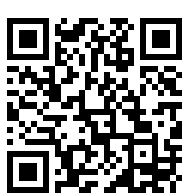
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A

TREATISE ON FRANCHISES

ESPECIALLY THOSE OF

PUBLIC SERVICE CORPORATIONS

CONTAINING ALSO IN AN

APPENDIX

THE PUBLIC SERVICE COMMISSIONS LAW
OF NEW YORK

AND

THE PUBLIC UTILITY LAW
OF WISCONSIN

BY

JOSEPH ASBURY JOYCE

OF THE NEW YORK, CALIFORNIA, AND CONNECTICUT BARS; AUTHOR OF "JOYCE ON INSURANCE," "JOYCE ON DAMAGES" AND JOINT AUTHOR OF "JOYCE ON ELECTRIC LAW."

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DEDICATED
TO THE MEMORY OF
MY FRIEND
AND
SOMETIME LAW PARTNER
THE LATE
JUDGE NOBLE HAMILTON
OF
SAN FRANCISCO, CALIFORNIA
WHO
RENDERED TO THE BENCH AND BAR
MANY YEARS OF
UPRIGHT AND ABLE SERVICE

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PREFACE

In preparing this treatise on the very important subject of franchises, especially those of public service corporations, the author has endeavored to logically arrange and make clearly apparent the essential governing principles and the law which is applicable, and to present them as concisely as is consistent with clearness and an exhaustive treatment thereof. Great care has been exercised in stating not only these essential principles and the law applicable, but they have been illustrated by decisions or statements of facts in the text, and elucidated by notes embodying numerous quotations from the courts. Especial attention has also been given to the enunciation of the doctrines set forth in the decisions of the United States Supreme Court. While the above states the author's general purpose, his specific plan has been to define and consider in logical sequence the nature, character, source and underlying principles of all franchises, and the distinctions between them, for the better ascertainment of what franchises of corporations comprise; to define and show the nature, character and source of power of all corporations, to classify and distinguish them, and so make clear what constitute public service corporations and their peculiar characteristics, especially in regard to those franchises possessed by them which are not common to other corporations. Inasmuch as franchises are derived from and owe their existence to the sovereign power or State, and the right to their exercise is dependent upon the extent to which the State or subordinate bodies may grant, regulate or control and forfeit such franchises, and the validity of legislative enactments, the author has also considered in their proper and logical order, certain subjects, such as Federal and state constitutional and legislative powers; the delegation of powers by Congress,

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by the State, and to subordinate bodies or agencies; the law of interpretation or construction of constitutions and statutes; the various constitutional provisions, including obligation of contracts, due process of law, and equal protection of the laws; and as dependent thereon the relative rights of the State and of all corporations in relation to franchises and governmental control and regulation, including rate regulation, taxation, alienation and forfeiture of franchises. The author trusts that the plan of this treatise is such as to commend itself to the Bench and the Bar, and that the work will be of some aid not only in saving time and labor, but also in ascertaining, determining and applying the principles and the law governing franchises.

JOSEPH ASBURY JOYCE.

NEW YORK CITY, NEW YORK, January, 1909.

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212 U. S. 19.

[January 4, 1909.]

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White v. State, 69 Ind. 273, § 64.
White v. State, 134 Ala. 197, § 270.
White v. United States, 191 U. S. 545, § 287.
Whitfield v. Ætna Life Ins. Co. of Hartford, 205 U. S. 489, §§ 352, 365.
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Whitman v. Mast, Buford & Burwell Co., 11 Wash. 318, § 271.

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Whitmyre v. Mast, Buford & Burwell Co., 84 App. Div. 91, § 33.
Wichita, City of, v. Missouri & K. Teleph. Co., 70 Kan. 441, § 379.
Wiggins Ferry Co. v. Ohio D. M. R. Co., 142 U. S. 396, § 478.
Wight v. Davidson, 181 U. S. 371, § 399.
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Wilcox v. McClellan, 185 N. Y. 9, §§ 148, 192.
Wild v. Boston & M. R. Co., 171 Mass. 245, § 287.
Wilkes-Barre Bank v. Wilkes-Barre, 148 Pa. 601, § 425.
Wilkes-Barre Elec. L. Co. v. Wilkes-Barre L., H. & M. Co. (C. P. Penn., 1886), 4 Kulp, 47, § 23.
Wilkes County v. Call, 123 N. Car. 308, § 316.
Wilkes County v. Coler, 180 U. S. 506, §§ 273, 275.
Wilkins v. State, 113 Ind. 514, § 234.
Wilkins County v. City of Baltimore, 103 Md. 293, §§ 453, 454.
Wilkinson v. Evans, 34 Pa. Super. Ct. 472, § 53.
Wilkinson v. Leland, 2 Pet. (27 U. S.) 627, § 239.
Willcox v. Consolidated Gas Co. See "Appendix C," herein.
Williamette Iron Bridge Co. v. Hatch, 125 U. S. 1, §§ 127, 152.
Williamette Mfg. Co. v. Bank of British Columbia, 119 U. S. 191, §§ 3, 10, 465, 471.
Williams v. Bank, 7 Wend. (N. Y.) 540, § 350.
Williams v. Brousard, 51 La. Ann. 335, § 423.
Williams v. City Electric Ry. Co., 41 Fed. 556, § 111.
Williams v. Cresswell, 51 Miss. 817, § 130.
Williams v. Gold Hill Min. Co., 96 Fed. 454, § 272.
Williams v. Mayor, etc., of New York, 110 N. Y. 569, § 33.
Williams v. Miles, 62 Neb. 566, § 264.
Williams v. Parker, 188 U. S. 491, § 399.
Williams v. Supervisors of Albany, 122 U. S. 154, § 182.
Williams v. Western Union Teleg. Co., 48 N. Y. Super. Ct. 349, §§ 425, 446.
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Williamson v. Liverpool & London & Globe Ins. Co., 141 Fed. 54, § 300.
Williamsport Passenger R. Co.'s Appeal, 120 Pa. 1, § 317.
Willis v. Eastern Trust & Banking Co., 169 U. S. 295, § 269.
Willoughby v. Horridge, 16 Eng. L. & Eq. 437, §§ 14, 97.
Wilmington v. Addicks (Del.), 47 Atl. 366, § 307.
Wilmington & Reading Ry. Co. v. Downward (Del.), 14 Atl. 720, §§ 1, 11, 26.
Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, §§ 412, 452, 455, 459, 479.
Wilmington City R. Co. v. Wilmington & Brandywine Springs R. Co. (Del. Ch.), 46 Atl. 12, §§ 12, 26, 307, 317.
Wilmington Ry. v. Reid, 13 Wall. (80 U. S.) 264, §§ 26, 34, 454, 459, 460.
Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, § 295.
Wilmington Water Power Co. v. Evans, 166 Ill. 548, §§ 3, 122, 132, 133, 463.
Wilson v. Blackbird Creek Marsh Co., 2 Pet. (27 U. S.) 245, § 152.
Wilson v. Briscoe, 6 Eng. (11 Ark.) 44, § 239.
Wilson v. Gabler, 11 S. Dak. 579, § 194.
Wilson v. Gaines, 9 Baxt. (68 Tenn.) 546, §§ 12, 20, 480.

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Wilson v. Kansas City, St. J. & C. B. R. Co., 60 Mo. 184, § 372.
Wilson v. Spaulding (C. C.), 19 Fed. 304, § 221.
Winchester & L. Turnpike Road Co. v. Croxton, 98 Ky. 739, § 397.
Winchester & Strasburg Rd. Co. v. Commonwealth, 106 Va. 264, §§ 170, 464.
Winn v. Wabash R. Co., 118 Fed. 55, §§ 67, 481.
Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.), 205 U. S. 354, § 229.
Winona & St. Peter Rd. Co. v. Blake, 94 U. S. 180, §§ 167, 381, 391, 400.
Winspear v. District Township of Halman, 37 Iowa, 542, § 56.
Winston, City of, v. Town of Salem, 131 N. Car. 404, § 440.
Winters v. City of Duluth, 82 Minn. 127, §§ 56, 118.
Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, §§ 458, 460.
Wisconsin Central R. Co. v. Forsythe, 159 U. S. 46, § 256.
Wisconsin Central R. Co. v. Taylor, 52 Wis. 57, §§ 216, 223.
Wisconsin Central R. Co. v. United States, 164 U. S. 190, §§ 254, 263.
Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, § 62.
Wisconsin, M. & P. R. Co. v. Jacobson, 379 U. S. 287, §§ 167, 381, 386.
Wiswall v. Hall, 3 Paige (N. Y.), 313, § 17.
Witbreck v. Holland, 45 N. Y. 13, § 79.
Withers v. Buckley, 20 How. (61 U. S.) 84, § 275.
Wolf v. Bauereis, 72 Md. 481, § 213.
Wood v. Brady, 150 U. S. 18, § 259.
Wood v. City of Seattle, 23 Wash. 1, § 347.
Wood v. Common Council of City of Binghamton, 56 N. Y. Supp. 105, § 24.
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Wood v. Truckee Turnpike Co., 24 Cal. 474, § 17.
Woodall v. Boston Elevated Ry. Co. (Mass., 1906), 78, § 283.
Woodfork v. Union Bank, 3 Coldw. (43 Tenn.) 488, § 311.
Woodruff v. New York & N. E. R. Co., 59 Conn. 63, § 366.
Woods v. Colfax County, 10 Neb. 552, § 56.
Woods v. Lawrence County, 1 Black (66 U. S.), 386, §§ 3, 236, 256.
Woodson v. Murdock, 22 Wall. (89 U. S.) 351, § 247.
Woodward v. Commonwealth, 9 Ky. L. Rep. 670, § 67.
Woodworth v. Bowles, 61 Kan. 569, § 227.
Woolsey v. Cade, 54 Ala. 378, § 270.
Worcester v. Worcester Consol. St. Ry. Co., 182 Mass. 49, § 337.
Worcester, City of, v. Worcester Con. St. Ry. Co., 196 U. S. 539, §§ 337, 343.
Workman v. Southern Pacific R. Co., 129 Cal. 536, §§ 47, 241.
Worth v. Wilmington & Weldon Rd. Co., 89 N. Car. 291, § 26.
Wortham v. Basket, 99 N. Car. 70, § 265.
Wright v. Adams, 45 Tex. 134, § 233.
Wright v. Baltimore & Ohio Rd. Co., 32 Pa. Super. Ct. 5, § 63.
Wright v. Cunningham, 115 Tenn. 445, § 137.
Wright v. Milwaukee Electric R. & L. Co., 95 Wis. 29, §§ 465, 488.
Wright v. Minnesota Life Ins. Co., 193 U. S. 657, § 339.
Wright v. Nagle, 101 U. S. 791, §§ 17, 23, 171, 145, 148, 254, 257, 313.
Wright v. Sill, 2 Black (67 U. S.), 544, § 334.
Wright v. Southern R. Co. (C. C.), 80 Fed. 260, § 287.
Wrought Iron Range Co. v. Carver, 118 N. Car. 328, § 288.

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Wulff v. Aldrich, 124 Ill. 591, § 216.
Wyandotte Elec. L. Co. v. City of Wyandotte, 124 Mich. 43, § 33.
Wynn Johnson, In re, 1 Alaska, 630, § 233.
Wyoming Agricultural College v. Irvine, 206 U. S. 278, § 69.

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Yankton Sav. Bank v. Gutterson, 15 S. Dak. 486, § 269.
Yarbrough, Ex parte, 110 U. S. 651, § 416.
Yard v. Ford, 2 Saund. 172, § 15.
Yarmouth v. North Yarmouth, 34 Me. 411, §§ 61, 115, 132, 311.
Yazoo v. Adams, 180 U. S. 1, §§ 479, 481, 483.
Yazoo & M. V. R. Co. v. Board of Levee Commrs., 37 Fed. 24, §§ 61, 412, 453, 459.
Yazoo & M. V. R. Co. v. Thomas, 132 U. S. 174, § 455.
Yick Wo v. Hopkins, 118 U. S. 356, §§ 136, 298.
Yonkers, City of, v. Yonkers R. Co., 64 N. Y. Supp. 955, § 387.
York v. Washburn, 129 Fed. 564, § 272.
Youghiogheny & Ohio Coal Co. v. Erie Ry. Co., 24 Ohio Cir. Ct. Rep. 289, § 103.
Young v. City of Kansas City, 152 Mo. 661, § 136.
Young v. Commonwealth, 101 Va. 853, § 231.
Young v. Harrison, 6 Ga. 130, §§ 17, 145.
Young v. Webster City & So. West. Ry. Co., 75 Iowa, 140, §§ 1, 5, 11.
Younger v. Webster City & So. West. R. Co., 75 Iowa, 140, § 491.
Youngerman v. Murphy, 107 Iowa, 686, § 245.
Young, Ex parte, 209 U. S. 123 (see "Appendix C," herein), § 416.
Young Men's Christian Assoc. of Omaha v. Douglass County, 60 Neb. 642, § 455.
Young's Case, 101 Va. 853, § 231.
Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, § 491.

Z.

Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. 178, § 311.
Zanesville, City of, v. Zanesville Teleg. & Teleph. Co., 64 Ohio St. 67, §§ 135, 179.
Zeiger v. Pennsylvania R. Co., 158 Fed. 809, § 272.
Zeigler v. South & N. A. R. Co., 58 Ala. 594, § 231.
Zeigler v. Thompson, 43 La. Ann. 1013, § 89.
Zimmer v. State, 30 Ark. 677, § 20.
Zirele v. Southern Ry. Co. (Va.), 45 S. E. 802, §§ 63, 136.

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JOYCE ON FRANCHISES,

ESPECIALLY THOSE OF

PUBLIC SERVICE CORPORATIONS.

CHAPTER I.

DEFINITIONS.

§ 1. Definition of Franchise by Finch, Blackstone, Chitty, Cruise and Kent.
2. Chief Justice Taney's Definition of a Franchise.
3. Other Definitions and Expressions Classified — Franchises.
4. "Franchise" as a Contract — As an Exclusive Right.
5. "Corporate Franchise" — Corporate Franchises.
§ 6. General Franchise of Corporation.
7. Special Franchise of Corporation.
8. Primary Franchise and Secondary Franchises of Corporation.
9. "Franchise" Under Constitutions and Statutes.

SECTION 1. **Definition of Franchise by Finch, Blackstone, Chitty, Cruise and Kent.**—Finch says "a franchise is a royal privilege in the hands of a subject." [1] This definition is one of those quoted by Kent,[2] and has not only been adopted and followed substantially by Blackstone,[3] Chitty,[4] and Cruise,[5] but it has also been accepted, either in the words of Finch or in those of Blackstone, as an authority and quoted by subse-

[1] Finch's Laws of Eng. 126 [38.]

[2] Kent's Comm. (14 ed.), bottom p. 723, *p. 458.

[3] "A royal privilege or branch of the king's prerogative, subsisting in the hands of a subject," 2 Blackstone's Comm. (Lewis's ed.), bottom p. 506, *37; (Hammond's ed.) 67 [37]; (Wendell's ed.) 37, side p. [38]; (Sharswood's ed.) 37; (Chase's ed.) 234, *37.

[4] Chitty on Prerogatives, p. 119.

[5] 3 Greenleaf's Cruise on Real Property (ed. 1850), 55, *260, giving same definition as Blackstone.

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quent writers and likewise by the courts in numerous opinions and cases.[6]

[6] **United States:** California v. Central Pacific Rd. Co., 127 U. S. 1, 40, 32 L. ed. 346, 9 Sup. Ct. 6 (taxation of franchises of railroad company amongst which were franchises conferred by the United States); Talcott v. Township of Pine Grove, 1 Flipp (U. S. C. C.), 120, 142, Fed. Cases No. 13,735, per Emmons, Cir. J.

Alabama: Horst, Mayor, etc., v. Moses, 48 Ala. 146, per Peters, J., in dissenting opinion; State v. Moore & Ligon, 19 Ala. 520, per Parsons, J.

California: Spring Valley Water Works v. Schottler, 62 Cal. 69, 106, per Thornton, J.

Connecticut: Norwich Gas Light Co. v. The Norwich City Gas Co., 25 Conn. 19, 36, per Hinman, J. (a case of right to lay gas-pipes in streets).

Illinois: Lasher v. People, 183 Ill. 226, 232, per Cartwright, C. J.; Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171, 185, 38 N. E. 584, 26 L. R. A. 681, per Baker, J. (a case holding that corporate property cannot be forfeited by ordinance); Fietsam v. Hay, 122 Ill. 293, 295, 13 N. E. 501, 11 West. Rep. 582, 3 Am. St. Rep. 492, per Mulkey, J. (a case of right to sell or transfer); Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 575, per Dickey, J. (a case of what is a franchise under a state constitution and also as to appellate jurisdiction); People v. Holtz, 92 Ill. 426, 428 (holding that an office is not a franchise); Board of Trade of Chicago v. The People, 91 Ill. 80, 83 (a question of appeal and the right of a member of a Board of Trade to be restored to membership); Chicago City Ry. v. People, 73 Ill. 541, 547 (a case of quo warranto against a street railway company); People ex rel. Koerner v. Ridgley, 21 Ill. 65, 69, per Breese, J.; Cain v. City of Wyoming, 104 Ill. App. 538, 540, per Brown, J. (a case of a grant for the use of streets made by city ordinance for a water works system, also of municipal indebtedness and powers).

Iowa: Prosser v. Wapello County, 18 Iowa, 327, 333, per Dillon, J.

Kansas: State v. City of Topeka, 30 Kan. 653, 657, 2 Pac. 587, per Horton, C. J. (holding that the right of licensing the sale of intoxicating liquors as a beverage and the exaction of tax or charge therefor was a franchise or privilege which no city in the State had the power to exercise and that quo warranto was the proper remedy in case of an unlawful assumption of such power.)

Kentucky: Louisville Tobacco Warehouse Co. v. Commonwealth, 20 Ky. L. Rep. 1047, 1050, 48 S. W. 420 ("a branch of the king's prerogative subsisting in the hands of a subject." A case of corporation failing to report for franchise tax); Commonwealth v. City of Frankfort, 13 Bush (76 Ky.), 185, 189, per Lindsey, C. J. (a lottery case).

Louisiana: Maestri v. Board of Assessors, 110 La. 517, 526, 34 So. 658, per Blanchard, J.

Michigan: Mayor v. Park Commissioners, 44 Mich. 602, 604, 7 N. W. 180, per Cooley, J. (a case of a public park as a public franchise).

Minnesota: State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 225, 3 L. R. A. 510, 41 N. W. 1020, per Mitchell, J. ("The definition of a 'franchise' given by Finch, adopted

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Another definition, given by Kent, is that franchises are "certain privileges conferred by a grant from government, and vested in individuals," [7] and this definition has

by Blackstone, and accepted by every authority since, is 'a royal privilege or branch of the King's prerogative, subsisting in the hands of a subject.'' A case involving the Constitution; quo warranto; corporations under Act 1873; Ultra Vires acts; forfeiture).

New York: People v. Utica Ins. Co., 15 Johns. (N. Y.) 357, 386, 387, 8 Am. Dec. 243, per Spencer, J. ("All the elementary writers agree in adopting Finch's definition." A case of usurpation of franchise by insurance company to carry on banking business as a corporation).

Ohio. State v. Pittsburgh, Youngstown & Ashtabula Rd., 50 Ohio St. 239, 251, 33 N. E. 1051, per Marshall, J. (a case of quo warranto); Knoup v. Piqua Bank, 1 Ohio St. 603, 613, per Corwin, J. ("A franchise is a royal privilege subsisting in a subject by a grant from the crown.")

Pennsylvania: Douglass's Appeal, 118 Pa. 65, 68, per Master's Report; Commonwealth v. Arrison, 15 Serg. & R. (Pa.) 127, 130, 16 Am. Dec. 531, per Tilghman, C. J. ("A franchise is a word of extensive signification. It is defined by Finch, whom all subsequent writers have followed, to be a 'royal privilege in the hands of a subject.'" A case of information in nature of quo warranto against persons acting as trustees of incorporated church.) See Twelfth St. Market Co. v. Philadelphia & Reading Term. Co., 142 Pa. 580, 590, 21 Atl. 989, per Thayer, P. J.; Shamokin Valley Rd. Co. v. Livermore, 47 Pa. 465, 468, 86 Am. Dec. 552, per Agnew, J.

South Dakota: State v. Scougal, 3 S. Dak. 55, 62, 15 L. R. A. 477, 44 Am. St. Rep. 756, per Corson, J. (a case of banking business).

West Virginia: State v. Peel Splint Coal Co., 36 W. Va. 802, 813, 17 L. R. A. 385, 15 S. E. 1000, per Lucas, Pres. (a case of constitutional law; "Scrip" act; laborers' wages; Screening act; weighing and measuring coal; construction of statutes and indictment).

England: Attorney General v. Trustees of British Museum, Law Rep. (1903), 2 Chan. Div. 598, 612, per Farwell, J. ("A franchise is a royal privilege or a branch of the king's prerogative subsisting in a subject by a grant from the king. Chitty on Prerogatives, 119. So long as it is attached to the Crown it is called a prerogative, but when it is granted to a subject it is called a franchise. Chitty on Prerogatives, 118." A case of treasure-trove held not to pass under a general grant of franchises, but must be expressly granted when it becomes a franchise in the grantee.)

See also Viner's Abridg., "Franchises," 508; Angell & Ames on Corp. (9th ed.), §§ 4, 737; Bouvier's L. Dict.; Brown's L. Dict.; Burn's L. Dict.; Burrill's L. Dict.; 3 Jacob's L. Dict., 122, title "Franchises;" Kinney's L. Dict. & Gloss.; Rapalje & Lawrence's L. Dict.; Shumaker & Longsdorf's Cyc. Dict.; Stroud's Judic. Dict.; Mozley & Whiteley's L. Dict.

[7] Kent's Comm. (14 ed.), bottom p. 723, *p. 458.

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also been adopted and relied upon by the courts to a great extent.[8] And with the exception that the words "particular privilege" are used instead of the words "certain privileges" this last definition by Kent has also been given in a number of opinions.[9] Other forms of this definition are as follows:

[8] **Alabama:** Horst, Mayor, etc., v. Moses, 48 Ala. 129, 146, per Saffold, J.

Arkansas: State v. Real Estate Bank, 5 Ark. (5 Pike) 595, 599, 41 Am. Dec. 109, per Lacy, J.

California: Henshaw ex parte, 73 Cal. 486, 493, 15 Pac. 110, per McKinstry, J.; Spring Valley Water Works v. Schottler, 62 Cal. 69, 106, per Thornton, J.

Colorado: Londoner v. People, 15 Colo. 246, 247, 25 Pac. 183, per Hayt, J.; Arapahoe County v. Rocky Mountain News Printing Co., 15 Colo. App. 189, 202, 61 Pac. 494, per Wilson, J.

Delaware: Wilmington & Reading Ry. Co. v. Downward (Del. Ct. Err. & App., 1888), 14 Atl. 720, 721, per Saulsbury, Ch. J.

Georgia: State ex rel. Waring v. Georgia Medical Society, 38 Ga. 608, 626, 95 Am. Dec. 408, citing Bouvier's L. Dict., but definition same as Kent's.

Illinois: Fietsam v. Hay, 122 Ill. 293, 295, 13 N. E. 501, 11 West. Rep. 582, 3 Am. St. Rep. 492, per Mulkey, J. (a case of right to sell or transfer), citing Bouvier's L. Dict., but definition same as Kent's.

Kentucky: Commonwealth v. Frankfort, 13 Bush (76 Ky.), 185, 189, per Lindsay, C. J.

Louisiana: Maestri v. Board of Assessors, 110 La. 517, 526, 34 So. 658, per Blanchard, J.; State v. Morgan, 28 La. Ann. 482, 493, per Ludeling, C. J., in dissenting opinion (a case of exemption from taxation, right of transfer and construction of charter), quoting Bouvier's L. Dict., but definition same as Kent's.

Maine: Kennebec & Portland Rd. Co. v. Portland & Kennebec Rd. Co., 59 Me. 9, 66, dissenting opinion of Tapley, J. (mortgage and foreclosure of railroad franchise and other property), citing Bouvier's L. Dict., but definition same as Kent's.

Minnesota: McRoberts v. Washburne, 10 Minn. 23, 27.

New York: Milhau v. Sharp, 27 N. Y. 611, 619, 84 Am. Dec. 314, per Selden, J., quoting Bouvier's L. Dict., but definition same as Kent's.

Ohio: State v. Pittsburgh, Youngstown & Ashtabula Rd. Co., 50 Ohio St. 239, 251, 33 N. E. 1051, per Minshall, J.

Oregon: Montgomery v. Multnomah Rd. Co., 11 Oreg. 344, 354, per Lord, J.

Wisconsin: Sellers v. Union Lumbering Co., 39 Wis. 525, 527, per Ryan, C. J.

[9] **California:** Ex parte Henshaw, 73 Cal. 486, 492, 15 Pac. 110, per McKinstry, J.

Colorado: Londoner v. People, 15 Colo. 247, per Hayt, J.; Arapahoe County v. Rocky Mountain News Printing Co., 15 Colo. App. 189, 202, 61 Pac. 494, per Wilson, J.

Connecticut: Crum v. Bliss, 47 Conn. 592, 602, per Park, C. J. (case of transfer of corporate franchise).

Iowa: Young v. Webster City & So. West Ry. Co., 75 Iowa, 140, 143, 39 N. W. 234, per Rothrock, J. (case of forfeiture of railroad fran-

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"A particular privilege conferred by grant from a sovereign or government and vested in individuals;" [10] "a particular privilege or right granted by a prince or sovereign to an individual, or to a number of persons;" [11] a certain privilege of a public nature, conferred by grant from the government, and vested in individuals.[12]

§ 2. **Chief Justice Taney's Definition of a Franchise.**—Under a definition which is generally accredited to Chief Justice Taney of the United States Supreme Court, franchises are special privileges conferred by the government on individuals, and which do not belong to the citizens of the country generally of common right.[13] This definition has been extensively quoted or adopted and relied upon as an authority by the courts in their opinions and decisions.[14]

chise and taxation), quoting from Bromin.

Kentucky: Miller v. Commonwealth, 112 Ky. 404, 65 S. W. 828, per Guffy, J. (Bouvier's L. Dict. is cited, however); Louisville Tobacco Warehouse Co. v. Commonwealth, 20 Ky. L. Rep. 1047, 1050, 48 S. W. 420 (a case of corporation failing to report for franchise tax); Commonwealth v. City of Frankfort, 13 Bush (76 Ky.), 185, 189, per Lindsay, C. J. (a lottery case).

Ohio: State v. Pittsburgh, Youngstown & Ashtabula Rd. Co., 50 Ohio St. 239, 251, 33 N. E. 1051, per Marshall, J. (a case of quo warranto to determine right to franchise).

Wisconsin: Sellers v. Union Lumbering Co., 39 Wis. 525, 527, per Ryan, C. J. (a case of right to take tolls).

See also Kinney's L. Dict. & Gloss.

[10] Crum v. Bliss, 47 Conn. 592, 602, per Park, C. J. (a case of transfer of corporate franchise), quoting Webster's Dict.; Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42, 53, 22 N. E. 616, per Baker, J. (a case of charter powers to, and use of streets by, a gas company, its rights under grant as a contract and specific performance); Louisville Tobacco Warehouse Co. v. Commonwealth, 20 Ky. L. Rep. 1047, 1050, 48 S. W. 420, per Paynter, J. (a case of corporation failing to report for franchise tax) quoting Webster's Dict.

[11] Central Railroad & Banking Co. v. State of Georgia, 54 Ga. 401, 409, per Warner, C. J. (a case of duration of charter and right of State to withdraw franchise), quoting Webster's Dict.

[12] Truckee & Tahoe Turnpike Road Co. v. Campbell, 44 Cal. 89, 91, applied by Rhodes, J., to a right to collect tolls on bridges, roads, etc.

[13] Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 595, 10 L. ed. 274.

[14] **United States:** People's Rd. v. Memphis Rd., 10 Wall. (77 U. S.) 38, 51, 20 L. ed. 844; Western Union Teleg. Co. v. Norman, 77 Fed. 13, 22, per Barr, Dist. J. (taxation of fran-

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§ 3. Other Definitions and Expressions Classified—Franchises.—The word "franchise" is frequently used to denote

chises); Jersey City Gas-Light Co. v. United Gas Improvement Co., 46 Fed. 264, 265, per Greene, J., case aff'd 58 Fed. 323.

Illinois: Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 576, 579, per Dickey, J.

Iowa: Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 238, 91 N. W. 1081, per Weaver, J. (the court also says: "The term 'franchise' is defined in various ways and the meaning depends more or less upon the connection in which the word is employed").

Kentucky: Miller v. Commonwealth, 112 Ky. 404, 65 S. W. 828, per Guffy, J. (gives same definition, but cites Bouvier's L. Dict.); Louisville Tobacco Warehouse Co. v. Commonwealth, 20 Ky. L. Rep. 1047, 1050, 48 S. W. 420, per Payntor, J. (a case of corporation failing to report for franchise tax. Gives same definition, but cites Angell & Ames on Corp. § 4).

Louisiana: Maestri v. Board of Assessors, 110 La. 517, 526, 34 So. 658, per Blanchard, J. (gives same definition, but cites Angell & Ames on Corp. § 4, and Bouvier's, also Blacks. L. Dicts.).

Maryland: Consolidated Gas Co. v. Baltimore City, 101 Md. 541, 545–548, per McSherry, C. J.; Purnell v. McLane, 98 Md. 589, 592, 56 Atl. 830, per Pearce, J.; Baltimore City v. Johnson, 96 Md. 737, 747, 61 L. R. A. 568, 54 Atl. 646, per Boyd, J. (a case where seat in stock exchange was held not liable to taxation); State v. Philadelphia, Wilmington & Balt. Rd. Co., 45 Md. 361, 379, 24 Am. Rep. 511, per Robinson, J. (a case of franchise tax and exemption from taxation.)

Minnesota: Green v. Knife Falls Boom Corp., 35 Minn. 155, 157, per Vanderburgh, J.

Nebraska: Abbott v. Omaha Smelting Co., 4 Neb. 416, 420 (citing also Angell & Ames on Corp. § 4).

New York: Smith v. Mayor, etc., of New York, 68 N. Y. 552, 555, per Earl, J. (taxation; pier as land); Curtiss v. Leavitt, 15 N. Y. 9, 170, per Shankland, J. (in connection with bank's capacity or liability to incur obligations). See Trustees of Southampton v. Jessup, 162 N. Y. 122, 56 N. E. 538, per Vann, J. (case reverses 42 N. Y. Supp. 4, 10 App. Div. 456), who applies the substance of the definition in the above text in determining that a right to make a roadway and to erect a bridge is a franchise and not a license.

South Dakota: State v. Scougal, 3 S. Dak. 55, 62, 15 L. R. A. 477, 11 Ry. & Corp. L. J. 254, 6 Bkg. L. J. 432, 51 N. W. 858, 44 Am. St. Rep. 756, per Corson, J.

Texas: State v. Austen & Northwestern Rd. Co., 94 Tex. 530, 532, 62 S. W. 1050, per Gaines, C. J. [a case of taxation franchises of railroad. Citing People's Rd. v. Memphis Rd., 10 Wall. (77 U. S.) 38, 51, 19 L. ed. 844].

Wisconsin: Sellers v. Union Lumbering Co., 39 Wis. 525, 527, per Ryan, C. J.

Which do not belong to the citizens of the country generally by common right: The qualification [by Chief Justice Taney, in Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 595, 10 L. ed. 274] "'which do not belong to citizens of the country generally by common right' is an important one and constitutes the distinguishing

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a right or privilege, and in a legal sense, franchise and liberty are said to be synonymous terms. "Franchise" is also said to be synonymous with rights, privileges and immunities. One of the legal meanings of the word, approaching very closely to its primary signification, is freedom, and exemption or immunity from a burden or duty to which others are subject. In its broad sense the word "franchise" is sometimes used to denote all the rights, powers and privileges of a cor-

feature of a franchise. What is meant by this qualification is made clear by Mr. Justice Bradley, in a recent case decided by the Supreme Court of the United States. * * * He says 'no private person can establish a public highway, public ferry or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No persons can make themselves a body politic without legislative authority. Corporate capacity is a franchise.' California v. Central Pacific Rd. Co., 127 U. S. 1, 40, 41, 32 L. ed. 346, 9 Sup. Ct. 6. Of course, as the learned judge says, this list might be continued indefinitely. But this quotation clearly illustrates the nature of a franchise. Over all public property, highways, navigable rivers and seas, over everything that belongs to the sovereign, the power of the government is absolute, whether that power is derived from the common law or from the State, or the National Constitution. When, therefore, the State grants the right thus belonging to the government, and not to the citizens generally, as a matter of right, it is the grant of a franchise." State v. Scougal, 3 S. Dak. 55, 62, 15 L. R. A. 477, 44 Am. St. Rep. 756, per Corson, J.

"In this country it is a special privilege granted by the State, which does not belong to citizens of the country generally by common right. This is the distinguishing feature of a franchise. A right which belongs to the government when conferred upon a citizen is a franchise." Lasher v. People, 183 Ill. 226, 233, per Cartwright, C. J.

"This ordinance then undertook to confer an especial privilege not enjoyed by the people of the Territory in common, and conferred such privilege in perpetuity, for there is no limitation to it in point of time, and no power of revocation reserved to the city council therein. Such a privilege is a franchise. In England the granting of a franchise was a royal prerogative, and could only be granted by the Crown, and in the Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 595, 10 L. ed. 274, Chief Justice Taney says: 'Franchises are special privileges, conferred by the government upon individuals, which do not belong to the citizens of the country generally of common right.' It is essential that a franchise should be created by a grant from the sovereign authority. It is doubtful whether the legislature can delegate the power to grant such a franchise at all." Denver & S. Ry. Co. v. Denver City Ry. Co., 2 Colo. 673, 682, per Brazee, J.

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poration, especially those which are essential to its operations and management and to make the grant of value.[15] Other definitions given or expressions used by the courts, in opinions or decisions, may be briefly stated as follows: Privileges or a privilege; [16] a privilege with conditions; [17] a privilege vested—

[15] Central Rd. & Banking Co. v. State of Georgia, 54 Ga. 401, 409, per Warner, C. J. (a case of duration of charter and right of State to withdraw franchise); Buchanan v. Knoxville & Ohio Rd. Co., 71 Fed. 324, 334, 18 C. C. A. 122, per Severens, Dist. J.; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; State v. Morgan, 28 La. Ann. 482, 493, per Ludeling, C. J., in dissenting opinion; Board of Trade v. People, 91 Ill. 82, per Scott, C. J.; Board of Water Commissioners of White Plains, Matter of, 76 N. Y. Supp. 11, 16, 71 App. Div. 541, rev'd 176 N. Y. 239, 68 N. E. 348, per Jenks, J.; Kinney's Law Dict. & Gloss.; Stroud's Judic. Dict.; Taylor's Law Gloss. (ed., 1858), 210. See Finch's Laws of Eng., 126 (38); 2 Black. Comm., *37.

[16] "If there is anything peculiar in the word franchise it must include, in any definition that can be given it, this word 'privilege,' especially where" a statute gives to a corporation "the exclusive right to the hydraulic powers and privileges." Williamette Mfg. Co. v. Bank of British Columbia, 119 U. S. 191, 198, 30 L. ed. 384, 7 Sup. Ct. 187, per Miller, J. (a case of foreclosure of mortgage, and right to sell or mortgage franchises).

"Franchises are privileges derived from the government, vested either in individuals or private or public corporations." California State Teleg. Co. v. Alta Teleg. Co., 22 Cal. 398, 422, per Crocker, J.

The term ("franchise") "may sometimes be used in a popular sense as a privilege." Lawrence v. Times Printing Co., 22 Wash. 482, 490, 61 Pac. 166, per Reavis, J.

"A privilege in the hands of a subject which the king alone can grant will be a franchise." State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 599, 41 Am. Dec. 509, per Lacy, J.

A privilege emanating from the sovereign power of the State, owing its existence to a grant on a prescription presupposing a grant. Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 137 Ill. 231, 28 N. E. 248, per Scholfield, J.

"It is a privilege which the sovereign power alone can grant, whether it be the king or the people assembled in legislative bodies." Kennebec & Portland Rd. Co. v. Portland & Kennebec Rd. Co., 59 Me. 9, 66, dissenting opinion of Tapley, J.

[17] "A franchise is a privilege conferred in the United States by the immediate or antecedent legislation, with conditions expressed, or necessarily inferential from its language, as to the manner of its exercise and for its enjoyment. To ascertain how it is to be brought into existence the whole charter must be consulted and compared." Woods v. Lawrence County, 1 Black (66 U. S.), 386, 409, 17 L. ed. 122, per Wayne, J. (a case of charter of railroad company, with authority in charter to subscribe to stock; question whether to be made *in præsenti* or held in abeyance.)

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a privilege or authority vested;[18] a liberty or privilege—powers and privileges;[19] a right or privilege;[20] a right, privilege or power of public concern which should be reserved for public control;[21] a special privilege;[22] a privilege granted, not a

[18] In this country a franchise "may be defined as a privilege vested," or "a privilege or authority vested in certain persons by grant from the sovereign authority in the State, to exercise powers or perform acts, which without such grant they could not do or perform. A franchise is *jus publicum* and necessarily exclusive in its nature." Twelfth St. Market Co. v. Philadelphia & Reading Term. R. Co., 142 Pa. 580, 590, 21 Atl. 989, per Thayer, P. J. (a case of public market house, and right of eminent domain over, or right of another corporation to appropriate); West Manayunk Gas Light Co. v. New Gas Light Co., 21 Pa. Co. Ct. Rep. 378; Watson v. Fairmont & Suburban Ry. Co., 49 W. Va. 528, 539, 39 S. E. 193, per Poffenbarger, J.

A franchise is "a privilege or authority vested in certain persons by grant of the sovereign (with us by special statute) to exercise powers or to do and perform acts which without such grant they could not do or perform." Consolidated Gas Co. v. Baltimore City, 101 Md. 541, 545–548, per McSherry, C. J.; Tuckahoe Canal Co. v. Tuckahoe Ry. Co., 11 Leigh (Va.), 42.

[19] "Franchise is a word of extensive signification; it is a liberty or privilege. In England, it was the powers and privileges inherent in the Crown which subsisted in the hands of a subject by grant from the Crown. It was therefore defined to be 'a royal privilege in the hands of a subject.' In this country the people have not only the rights and privileges of English subjects, but they have succeeded to all the rights and privileges of the Crown." State v. City of Topeka, 30 Kan. 653, 657, 2 Pac. 587, per Horton, C. J., (a case of liquor license, and exaction of a charge or tax therefor. See § 21, herein, as to liquor license).

"Franchise in its general sense is a liberty or privilege." Rapalej & Lawrence's L. Dict.

[20] "The word 'franchise' is generally used to designate a right, or privilege, conferred by law." State v. Western Irrigating Canal Co., 40 Kan. 96, 99, 19 Pac. 349, per Horton, C. J.

"A franchise is nothing more than the right or privilege of being a corporation, and of doing such things and such things only as are authorized by the corporation's charter." Fietsam v. Hay, 122 Ill. 293, 295, 13 N. E. 501, 11 West. Rep. 582, 3 Am. St. Rep. 492, per Mulkey, J. (a case of right to sell or transfer). See also Morgan v. State of Louisiana, 93 U. S. 217, 23 L. ed. 860, per Field, J.; Chesapeake & Ohio Ry. Co. v. Miller, 114 U. S. 176, 185, 29 L. ed. 121, 5 Sup. Ct. 813.

[21] "Generalized, and divested of the special form which it assumes under a monarchical government based

[22] "A franchise is generally understood to be a special privilege emanating from the sovereign power of the State, owing its existence to a grant or to prescription presupposing a grant." Wilmington Water Power

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right taken away;[23] certain immunities and privileges in which the public have an interest—a privilege or immunity of a public nature; [24] a certain privilege or exemption—immu-

on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority." California v. Central Pacific Rd. Co., 127 U. S. 1, 40, 32 L. ed. 150, 8 Sup. Ct. 1073, per Bradley, J.; Ashley v. Ryan, 153 U. S. 436, 441, 38 L. ed. 773, 14 Sup. Ct. 865.

Co. v. Evans, 166 Ill. 548, 556, 46 N. E. 1083, per Magruder, C. J.

In this country "a special privilege existing in an individual by grant of the sovereignty and not otherwise exercisable." Mayor v. Park Commissioners, 44 Mich. 602, 604, 7 N. W. 180, per Cooley, J. (a public park as public franchise).

A special privilege granted by sovereign authority, either to an individual or a corporation, is a franchise. State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

A special privilege emanating from the government by a legislative or royal grant and vested in an individual person or in a body politic and corporate. Standard Dict.

As all persons have the right of forming corporations upon complying with the formalities required by law (State v. Western Irrigating Canal Co., 40 Kan. 96, 99, 19 Pac. 349, per Horton, J., in case sustaining right of irrigation company to sell property) the above words "special privilege" might, perhaps, be open to construction. See subsequent sections herein covering exclusive franchises; see Chief Justice Taney's definition, § 2, herein, see also § 3, herein. Examine Bank of California v. San Francisco, 142 Cal. 276, 280, 75 Pac. 832, per Angellotti, J.

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[23] "The real meaning of 'franchise' is a privilege granted, not a right taken away." Fresno Canal, etc., Co. v. Park, 129 Cal. 437, 442, 62 Pac. 87, per McFarland, J. (where "franchise" is held an affirmative word denoting a grant, and that the right to collect certain rates is not taken away by the use of the word. See § 9 herein).

[24] "If there are certain immunities and privileges in which the public have an interest, as contradistinguished from private rights, and which cannot be exercised without authority derived from the sovereign power, it would seem to me that such immunities and privileges must be franchises. * * * If, in England, a privilege in the hands of a subject,

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nity; [25] an exemption from a burden or duty to which others are subject; [26] an exemption or immunity from ordinary jurisdiction; a constitutional or statutory right or privilege; [27] a right reserved to the people by the constitution; [28] a right belonging to the government; [29] a grant under authority of govern-

which the king alone can grant, would be a franchise, with us, a privilege, or immunity of a public nature, which cannot legally be exercised without legislative grant, would be a franchise." People v. Utica Ins. Co., 15 Johns. (N. Y.) 357, 387, 8 Am. Dec. 243 (a case of usurpation of franchise to carry on banking business as a corporation); State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 599, 41 Am. Dec. 509, per Lacy, J.; Crum v. Bliss, 47 Conn. 592, 602, per Park, C. J.; Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 576; People ex rel. Koerner v. Ridgley, 21 Ill. 65, 69, per Breese, J. (a case of an information in the nature of quo warranto in a criminal proceeding; held, not to be allowed against persons for assuming a franchise of a merely private nature, and that persons appointed by statute to close up affairs of a bank are not officers, but mere trustees, and do not exercise or enjoy a franchise); Commonwealth v. City of Frankfort, 13 Bush (76 Ky.), 185, 189 (a lottery case); Cumberland River Lumber Co. v. Commonwealth, 6 Ky. L. Rep. 295 (in abstract only, no opinion); Maestri v. Board of Assessors, 110 La. 517, 526, 34 So. 658, per Blanchard, J.; State, Clapp, v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; State v. Mayor, etc., of New York, 3 Duer (N. Y.), 119, 144.

Privileges and immunities of a public nature which cannot legally be exercised without a legislative grant, are franchises, although they never existed in the people, or could be exercised by them in their political capacity. People v. Utica Ins. Co., 15 Johns. (N. Y.) 357, 8 Am. Dec. 243.

[25] State v. Morgan, 28 La. Ann. 482, 493, per Ludeling, C. J., in dissenting opinion, in case of exemption from taxation and right of transfer.

The term "franchises" in a "legal sense, contains the element of a grant or immunity, privilege or exemption" by public or quasi-public authority. Lawrence v. Times Printing Co., 22 Wash. 482, 490, 61 Pac. 166, per Reavis, J.

[26] Central Rd. & Banking Co. v. State of Georgia, 54 Ga. 401, 409, per Warner, C. J. (a case of duration of charter and right of State to withdraw franchise).

[27] Louisville Tobacco Warehouse Co. v. Commonwealth, 20 Ky. L. Rep. 1047, 1050, 48 S. W. 420, per Paynter, J. (citing Webster's Dict.), (a case of corporation failing to report for franchise tax).

[28] People ex rel. Koerner v. Ridgeley, 21 Ill. 65, 69, per Breese, J. (as in case of the elective franchise).

[29] "A franchise is a right belonging to the government, as a sovereign, yet committed in trust to some officer, corporation or individual." Knoup v. Piqua Bank, 1 Ohio St. 603, 613, per Corwin, J.

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ment;[30] a grant of sovereign power;[31] a sovereign power;[32] a sovereign prerogative emanating from the sovereign authority of the State, either directly or through a delegated body.[33]

§ 4. **"Franchise"—As a Contract—As an Exclusive Right.**[34]—The definition given by Finch and substantially adopted and followed by Blackstone and other authorities,[35] has been criticised as not being strictly correct under our government and laws, since franchises are based in this country upon contracts between the sovereign power and a private citizen, made upon a valuable consideration for purposes of public benefit as well as for individual advantage; and it is said by Chancellor Kent that franchises "contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant. Some of these franchises are presumed to be founded on a valuable consideration, and to involve public duties, and to be made for public accommodation, and to be affected with *jus publicum*, and they are necessarily exclusive in their nature. The government cannot resume them at pleasure, or do any act to impair the grant, without a breach of contract."[36] Again, "Franchise" is

[30] "A franchise is a grant under authority of government, conferring a special and usually a permanent right to do an act, or a series of acts, of public concern." Trustees of Southampton v. Jessup, 162 N. Y. 122, 126, 56 N. E. 538, per Vann, J.; case reverses 10 App. Div. 456 (a case of a right "to make a roadway and erect a bridge").

[31] Pennsylvania Rd. Co. v. Philadelphia Belt Line Rd. Co., 10 Pa. Co. Ct. Rep. 625, 629.

[32] "It must needs be a sovereign power or something which no subject or citizen can of right use." Knoup v. Piqua Bank, 1 Ohio St. 603, 613, per Corwin, J. See Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 595, 10 L. ed. 274, per Taney, C. J.; State v. Scougal, 3 S. Dak. 55, 62, 44 Am. St. Rep. 756, 15 L. R. A. 477.

[33] Truckee & Tahoe Turnpike Road Co. v. Campbell, 44 Cal. 89, 91, per Rhodes, J.

[34] See §§ 22, 23 herein.

[35] See § 1 herein.

[36] Kent's Comm. (14 ed.), bottom p. 723, *p. 458; Horst, Mayor, etc., v. Moses, 48 Ala. 146, per Peters, J., dissenting in part; Maestri v. Board of Assessors, 110 La. 517, 526, 34 So. 658, per Blanchard, J.; State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 599, 41 Am. Dec. 509, per Lacy, J.

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sometimes used to mean an exclusive right held by grant from the sovereign power, such in its nature that the same right or privilege cannot be subsequently granted to another without the grant operating as an invasion of the franchise of the first grantee and of his property rights. The strictly legal signification of the term is not, however, always confined to exclusive right and the word is used in law to designate powers and privileges which are not exclusive in their nature.[37] It is also declared that every grant of a franchise is, so far as that grant extends, necessarily exclusive, and cannot be resumed or interferred with; it is a contract whose obligation cannot be constitutionally impaired.[38] In a recent case in the United States Supreme Court it is held that there are privileges which may exist in their full entirety in more than one person, and the privilege or franchise or right to supply the inhabitants of a city with light or water is of this kind; and that a grant of power conferring such a privilege is not necessarily a grant making that privilege exclusive.[39] So a franchise may consist solely in being a corporation and carrying on business solely in a corporate capacity and still be also a right which any person or persons may exercise without any grant from the State, and, therefore, such a right would not be an exclusive one, and the corporation would be a private one as distin-

[37] Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 576, per Dickey, J.

[38] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 604, 618, 637, 638, 643, 645, 9 L. ed. 773, per Story, J., in dissenting opinion.

Examine the following cases:

Illinois: Mills v. County of St. Clair, 7 Ill. 197.

New Jersey: Millville Gas Light Co. v. Vineland Light & Power Co. (N. J.), 65 Atl. 504; State v. Freeholders of Hudson, 23 N. J. L. 206, 209, per Carpenter, J.

New York: Staten Island Midland R. Co. v. Staten Island Electric R. Co., 54 N. Y. Supp. 598, 34 App. Div. 181.

North Dakota: Patterson v. Wollman, 5 N. Dak. 608, 33 L. R. A. 536, 67 N. W. 1040.

Ohio: Bank of Toledo v. City of Toledo (Toledo Bank v. Bond), 1 Ohio St. 622, 635, 636, per Bartley, C. J.

Pennsylvania: Rayburn Water Co. v. Armstrong Water Co., 9 Pa. Dist. R. 24, 30 Pittsb. Leg. J. (N. S.) 239.

[39] Water, Light and Gas Co. of Hutchinson v. City of Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, case affirms 144 Fed. 256.

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guished from a public one with no public functions which it would be under obligation to perform.[40] We shall, however, consider this entire matter exhaustively under other sections in this work.

§ 5. "Corporate Franchise" — Corporate Franchises.— Whenever a corporation is legally formed, the right to be and exist as such and as a corporation to do the business specified and authorized in the articles, constitutes a valuable right which has been called the "corporate franchise," as it is a grant from the sovereign power. And this applies, whether a banking or a grocery business, or the operation of a railroad, or in fact any other business, in which individuals may engage without a grant from the State, is specified and in which the right to engage in a corporate capacity is granted.[41] But it is decided that a franchise granted to an organized corporation, or to an individual or individuals, and thereafter transferred to a corporation, is not a corporate franchise strictly so called, or in any sense, except that of being the property of the corporation.[42] As to the term corporate franchises, it is declared that it covers all rights granted to a corporation.[43] The above statements, however, involve certain questions which have been

[40] Twelfth St. Market Co. v. Philadelphia & Reading Term. R. Co., 142 Pa. 580, 590, 21 Atl. 989.

[41] Bank of California v. San Francisco, 142 Cal. 276, 279, 64 L. R. A. 918, 75 Pac. 832, per Angellotti, J. (citing Central Pacific R. Co. v. California, 162 U. S. 91, 17 Sup. Ct. 35, 41 L. ed. 362; Horn Silver Mining Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 12 Sup. Ct. 403; Home Ins. Co. v. New York, 134 U. S. 594, 599, 33 L. ed. 1025, 10 Sup. Ct. 593; State Rd. Tax Cases, 92 U. S. 575, 23 L. ed. 663, Spring Valley Water Works v. Schottler, 62 Cal. 69, 106; Southern Gun Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564, 566; State v. Anderson, 90 Wis. 550, 63 N. W. 746; 2 Morawetz on Corp. § 922); Jersey City Gas-Light Co. v. Gas Improvement Co., 46 Fed. 264, 265, per Greene, J., case aff'd 58 Fed. 323.

See State v. Western Irrig. Canal Co., 40 Kan. 96, 99, 19 Pac. 349, per Horton, C. J.

Compare Meyer v. Johnson, 53 Ala. 237, 324, per Manning, J.; Young v. Webster City & So. West. Ry. Co., 75 Iowa, 140, 143, 39 N. W. 234, per Rothrock, J.; Knoup v. Piqua Bank, 1 Ohio St. 603, 613, per Corwin, J.

[42] State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

[43] Atlantic & Gulf R. Co. v. Georgia, 98 U. S. 359, 365, per Strong, J.

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the subject of considerable discussion by the courts, and which relate principally to the power of alienation, taxation and the nature of franchises, based upon such distinctions as exist between the franchise to be a corporation and other franchises or rights and privileges; but these questions will be fully considered elsewhere herein under their proper headings.[44]

§ 6. **General Franchise of Corporation.**— The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the State. Such a franchise, however, gives the corporation no right to do anything in the public highways without special authority from the State, or from some municipal officer or body acting under its authority. Thus the general franchise of a street railroad is the special privilege conferred by the State upon a certain number of persons known as the corporators to become a street railroad corporation and to construct and operate a street railroad upon certain conditions, but its privileges are within the above rule as to occupation of streets.[45]

§ 7. **Special Franchise of Corporation.**—A right granted to a corporation to construct, maintain or operate in a public highway some structure intended for public use, which except for the grant would be a trespass, is a special franchise, and when a right of way over a public street is granted to a corporation with leave to construct and operate a street railway thereon, the privilege is known as a special franchise.[46] In a

[44] See three last preceding sections herein, also sections as to transfer or alienation; taxation; nature of franchise; and distinctions.

[45] People ex rel. Metropolitan St. Ry. Co. v. Tax Commissioners, 174 N. Y. 417, 435, 67 N. E. 69 (a case of taxation, etc. In this case the court, per Vann, J., says: "The general franchise of a street railroad company * * * is the special privilege conferred by the State upon a certain number of persons known as the corporators to become a street railroad corporation and to construct and operate a street railroad upon certain conditions," but this differs from a special franchise); reargument denied, 175 U. S. 482 (Mem.), case affirmed, Metropolitan St. Ry. Co. v. New York, 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 705. See Chap. IV herein.

[46] People ex rel. Metropolitan St.

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case of taxation of a special franchise decided in New York the court, per Kenefick, J., says: "The plaintiff insists that the authority to cross highways sprang into being with the creation of the corporation, that it is a part of the franchise to be a corporation, and that, to constitute a special franchise, some particular railroad must be grantee of the right, or some particular highway or highways must be the subject of the grant. As I view it, this claim argues a misconception of the term 'special franchise.' As applied to railroads, this species of property is defined as the 'franchise' right or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways, or public places.[47] A special franchise thus derives its character from the nature of the grant, to wit, the right to occupy the public ways. This right does not lose its character as a special franchise because it emanates directly from the State, rather than indirectly through its political subdivisions, nor because it comes into being with the creation of a corporation, rather than by subsequent action of the legislature or its duly authorized municipal agents. The tax on its franchise to be a corporation is imposed irrespective of whether it crosses any highways, or of the number of highways crossed. Authority to run 'upon and along' highways is conferred by the same section of the general railroad law which confers the right to 'cross highways.' If the plaintiff's argument is sound, then a railroad might, under its general powers, run for some distance along a highway, without possessing a special franchise therein subject to taxation." [48]

Ry. Co. v. Tax Commissioners, 174 N. Y. 417, 435, 67 N. E. 69, per Vann, J., reargument denied, 175 N. Y. 482 (Mem.), case affirmed, 199 U. S. 1, 50 L. ed 65, 25 Sup. Ct. 705.

[47] Laws 1899, c. 712, § 1.

[48] New York, Lackawanna & Western Ry. Co. v. Roll, 66 N. Y. Supp. 748, 749, 750, 32 Misc. 321. See chapter herein on taxation.

Definition of special franchise and what the term includes, under tax laws of New York, see 3 Cumming & Gilbert's Annot. Genl. Laws & Statutes of N. Y. (ed. 1901), 3876, 3877, Laws 1896, ch. 908, § 2, subds. 3, 4, as amended by Laws 1899, ch. 712 and Laws 1901, ch. 490. See chap. IV, herein.

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§ 8. Primary Franchise, and Secondary Franchises of Corporation.—The right of an incorporated company to be a corporation, or the right conferred upon it by the State, to be an artificial body, has been called its primary franchise, and this has been distinguished from what is termed its secondary franchises, which include the right to carry on or transact a particular kind of business, as in case of the privileges granted to a water company with the right to take tolls, etc.; or the right of a railroad company to collect fares; or of a toll road company to exact toll for services performed. This distinction has been considered as important in connection with the power of alienation, since in certain corporations other than those subject to public service duties and obligations, secondary franchises may be said, generally, to be those which may be alienated, and even in connection with public utility corporations there are some decisions in which the same distinction is made apparent. So in certain tax cases the distinction between the franchise to be a corporation and other rights, privileges and franchises of the corporation, has been the subject of much discussion and many adjudications.[49]

[49] Virginia Cañon Toll Road Co. v. People, 22 Colo. 429, 432, 45 Pac. 398, 37 L. R. A. 711, per Campbell, J. See two last preceding sections, and next following section herein.

See also the following cases:

United States: Adams Express Co. v. Ohio State Auditor, 166 U. S. 185, 224, 41 L. ed. 965, 17 Sup. Ct. 604, per Brewer, J., rehearing denied, 165 U. S. 194, 255, 41 L. ed. 683, 707, 17 Sup. Ct. 305; Mercantile Bank v. Tennessee, 161 U. S. 160, 171, 40 L. ed. 656, 16 Sup. Ct. 466, per Peckham, J.; Home Ins. Co. v. New York, 134 U. S. 594, 599, 33 L. ed. 1025, 10 Sup. Ct. 593, per Field, J., case affirms People v. Home Ins. Co., 92 N. Y. 328, also aff'd by divided court 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. 1385, restored to calendar, 122 U. S. 636 (Mem.). (The principal case is cited in People v. Miller, 83 N. Y. Supp. 184, 187, 85 App. Div. 211, which case is reversed 177 N. Y. 51, 69 N. E. 124, which is cited in People v. Miller, 86 N. Y. Supp. 420, 422, 90 App. Div. 588. This last case is reversed 179 N. Y. 49, 71 N. E. 463); Memphis & Little Rock Rd. Co. v. Commissioners, 112 U. S. 609, 619, 28 L. ed. 837, 5 Sup. Ct. 299; Gordon v. Appeal Tax Court, 3 How. (44 U. S.) 133; Western Union Teleg. Co. v. Norman, 77 Fed. 13, 22.

California: San Joaquin & King's River Canal & Irrig. Co. v. Merced County, 2 Cal. App. 593, 595, 597, 599, 84 Pac. 285.

Connecticut: Bridgeport, City of,

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In a Kansas case, a corporation was organized under state laws for the purpose of supplying a municipality with water,

v. New York & New Haven Rd. Co., 36 Conn. 255, 266, 4 Am. Rep. 63.

Iowa: Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 239, 91 N. W. 1081, per Weaver, J., citing Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585.

Kentucky: Bailey v. Southern Ry. Co., 112 Ky. 424, 430, 61 S. W. 31, per O'Rear, J.; Board of Councilmen of City of Frankfort v. Stone, 108 Ky. 400, 22 Ky. L. Rep. 25, 56 S. W. 679.

Michigan: Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 405, 24 Am. Rep. 585; Joy v. Jackson & Michigan Plank Road Co., 11 Mich. 155, 164, 165, per Christiancy, J.

New Jersey: Lumberville Bridge Co. v. Assessors, 55 N. J. L. 529, 535, 537, 25 L. R. A. 134, 26 Atl. 711, per Garrison, J.; State Board of Assessors v. Central Rd. Co., 48 N. J. L. 146, 314, per Dixon, J.

New York: People v. Knight, 174 N. Y. 475, 67 N. E. 65 (case reverses 73 N. Y. Supp. 745, 67 App. Div. 333); Smith v. New York, 68 N. Y. 552, 555; Sandham v. Nye, 30 N. Y. Supp. 552, 555, 62 N. Y. St. Rep. 198, 9 Misc. 541, per Rumsey, J.

Ohio: Coe v. Columbus, Piqua & Indiana Rd. Co., 10 Ohio St. 372, 385, 75 Am. Dec. 518, per Gholson, J. [citing Thomas v. Dakin, 22 Wend. (N. Y.) 71]; Pierce v. Emery, 32 N. H. 484-507.

Pennsylvania: Monongahela Bridge Co. v. Pittsburg & Birmingham Traction Co., 196 Pa. 25, 46 Atl. 99; Shamokin Valley Rd. Co. v. Livermore, 47 Pa. 465, 468, 86 Am. Dec. 552, Agnew, J.

Texas: State v. Austin & Northwestern Rd. Co., 94 Tex. 530, 532, 62 S. W. 1050, per Gaines, C. J.

Vermont: Miller v. Rutland & Washington Rd. Co., 36 Vt. 452, 494, per Barrett, J., quoting from Bank of Middlebury v. Edgerton, 30 Vt. 182, 190.

Virginia: Tuckahoe Canal Co. v. Tuckahoe Ry. Co., 11 Leigh (Va.), 42.

Wisconsin: Linden Land Co. v. Milwaukee Elect. Ry. & Light Co., 107 Wis. 493, 513, 83 N. W. 858; Attorney General v. Chicago & Northwestern Rd. Co., 35 Wis. 425, 560, per Ryan, C. J., quoted in Brady v. Moulton, 61 Minn. 185, 186, per Mitchell, J.

Examine Baldwin's Amer. Rd. Law (ed. 1904), 26.

See Thompson's Comm. on Corp. § 257 (where the franchise to be a corporation is designated a *primary franchise*, and that of the right to carry on a certain business, as the right to maintain and operate a railway, a *secondary franchise*); *Id.* § 694 (where it is said that the primary franchise may be exercised only in State where created, while the secondary franchise may by comity, or unless by prohibited, be exercised in any State. See also *Id.* § 7884); *Id.* §§ 5336, 5341–5352, (where he says: "The *secondary franchises* of a corporation, that is, those peculiar and exclusive privileges which do not consist in the right of being a corporation, are property, and hence are alienable"); *Id.* § 5353 (where under the section heading "Franchise to be a corporation not alienable," the author makes the distinction "between what may be regarded as *primary*, and what as *secondary* franchises.

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and a municipality granted to it, by ordinance, the right to erect, construct and maintain waterworks in the city and to occupy its streets for the laying of pipes, erecting hydrants, and other privileges usually accorded to water companies, including the right to take tolls, etc., for a certain period, and it was declared by the court, and the decision was based thereon, that such rights to occupy the streets, erect hydrants, supply water, etc., were secondary franchises, differing and distinct from the franchise to be a corporation, received from the State which was essential to the creation and continued existence of the corporation, to its right to live, to exist as an artificial being. The court, per Smith, J., said: "The rule is that the primary franchise of being a corporation vests in the individuals who compose it and not in the corporation itself, while the secondary franchises, such as the right of a railway to construct and operate its road, or the right to operate a water plant and collect water-rents are vested in the corporation." [50]

§ 9. **"Franchise" under Constitutions and Statutes.**—As appears elsewhere, herein, the word "franchise" has various meanings, and it is difficult to define the term as used under constitutions and statutes, since, as a rule, it is a question of construction in each particular case precluding any definition applicable to all cases. Thus, although a state constitution declares that the right to collect rates or compensation for the use of water is a "franchise," still such word is an affirmative one denoting a grant, instead of a negative term signifying prohibition, and does not take away the right to collect water

The franchise of being a corporation —of having a corporate existence— is a franchise of the former character; and the franchise of carrying on a particular business or holding particular property is of the latter character"); *Id.* §§ 5356, 6140, 6747 (where secondary franchises, as considered in connection with the "effect of dissolution," as "the peculiar privileges or rights" of a corporation "which it may have received from the legislature under its charter or incorporating act, or from a municipal corporation under an ordinance by way of a license").

[50] State v. Topeka Water Co., 61 Kan. 547, 558–560, 60 Pac. 337.

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rates or compensation, fixed by contract between the parties for the irrigation of lands, where no special statute regulates such rates.[51] So the words "privileges, immunities or franchises," used in a constitution may be intended to refer to things of the same or similar general nature.[52] But it is declared that where the term "franchise" is used in a statute or elsewhere in the law, it is generally, if it is not always, understood as a special privilege conferred by grant from the State or sovereign power, as being something not belonging to the citizen of common right.[53] Again, "franchise"

[51] Fresno Canal & Irrigation Co. v. Park, 129 Cal. 437, 62 Pac. 87. In this case the court, per McFarland, J., said: "Section 2, of Art. XIV, Constitution of California, which is mainly relied on, is as follows: 'The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.' Appellants seem to lay great stress on the fact that the word 'franchise' is used in this section, as if 'franchise' were a negative word signifying prohibition instead of being, as it is, an affirmative word denoting a grant. Whatever right a ditch owner had to sell and distribute water at the time the Constitution was adopted, or afterward, was not destroyed because it was called in the Constitution a franchise. The real meaning of 'franchise' is a privilege granted—not a right taken away; but the word was evidently employed in section 2 mainly for the purpose of emphasizing the general declaration in section 1, that the use of water for sale, distribution, etc., is a public use, and with the notion no doubt, that calling it a franchise would make more clear and certain the intent to subject it to State regulation. In all other respects the meaning and effectiveness of section 2 would be the same if the words 'is a franchise, and' were not there."

[52] Dike v. State, 38 Minn. 366, 38 N. W. 95. The court, per Mitchell, J., says: "In construing the meaning of the word 'privilege,' as used in the constitution, the maxim *noscitur à sociis*, is applicable. The prohibition is against granting special or exclusive 'privileges, immunities, or franchises.' The three terms are evidently all intended to refer to things of the same or similar general nature. An 'immunity' has been defined as an exemption from any charge, duty, office, tax, or imposition; a 'franchise' has been defined to be a particular privilege conferred by the sovereign power of the State, and vested in individuals; and while it is not necessary, and would be perhaps unwise, to attempt to give a complete definition of any of these terms, yet it is evident that the word 'privilege,' as used in this connection, means, generally, a right or immunity granted to a person either against or beyond the course of the common or general law."

[53] City of Bridgeport v. New York & New Haven Rd. Co., 36 Conn. 255,

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under a statute is defined as a privilege emanating from the sovereign power of the State, owing its existence to a grant, or, as at common law, to prescription which presupposes a grant and invested in individuals or a body politic, something not belonging to the citizen as of common right.[54] So in another case the word "franchise" in a statute conferring a right of appeal is held not to include a liberty or privilege merely, but that the word is used in a restricted sense of a special privilege conferred by grant from the State or sovereign power, as being something not belonging to the citizen of common right.[55] The words "public * * * franchise," in a remedial statute as to usurping, etc., unlawfully holding or exercising any "public office or franchise," is construed as including the exercise of the right to use city streets for laying gas pipes.[56] And where a statute [57] provided for the bringing of an action by the attorney general in the name of the State, against the parties offending, "when any person shall usurp, intrude into, or unlawfully hold or exercise * * * any franchise within this State," etc., it was held, that the section contained no word of limitation as in the statute of Anne,[58] and was not an adoption therefrom with the English construction thereof, but was taken from the New York statute,[59] and that the word "franchise" was used in its general sense so as to include franchises, whether corporate or not.[60] Again, a street railway franchise may be such a "franchise" under a statute

quoted in Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 575.

[54] Hazelton Boiler Co. v. Tripod Boiler Co., 137 Ill. 231, 232, 28 N. E. 248, per Scholfield, C. J. (statute in this case created appellate court, and the question of right to appeal arose, also holding that a corporate name was, and a trade-mark was not, a franchise). Same definition in Board of Trade of Chicago v. The People, 91 Ill. 80, 82.

[55] Hesing v. Attorney General, 104 Ill. 292, 296 (holding that a franchise to be a relator cannot exist in behalf of anyone to cause a prosecution to be carried on in an information).

[56] State ex rel. Attorney General v. Seattle Gas & Electric Co., 28 Wash. 488, 68 Pac. 496, rehearing denied, 70 Pac. 114; Ballinger's Annot. Codes, § 5780, subd. 1.

[57] Wis. Stat., 1898, § 3466.

[58] Stat. 9 Anne, c. 20, § 4.

[59] 2 Rev. Stat. (N. Y., 1829), c. 9, art. 2, § 28.

[60] State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

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as may be annulled by quo warranto upon sufficient cause.[61] And where the word "franchise" is used in a statute providing for taxation [62] such word is held to be a generic term and to include all rights and privileges granted to or exercised by a person, association, copartnership, joint-stock company, or corporation engaged in the express, telegraph, or telephone business in the State.[63] So under the Kentucky statute [64] when an assessment is made of the "franchise" of a railroad company it is decided that it necessarily embraces all the intangible property of the company, as the word "franchise" is not used in its strict technical sense.[65] In New York "the statute, which is an amendment of the General Tax Law, declares in substance, that the right, authority or permission to construct, maintain or operate some structure intended for public use, 'in, under, above, on or through streets, highways or public places,' such as railroads, gas pipes, water mains, poles and wires for electric, telephone and telegraph lines, and the like, is a special franchise." [66]

[61] State ex rel. Vilter Mfg. Co. v. Milwaukee, Burlington & Lake Geneva Rd. Co., 116 Wis. 142, 92 N. W. 546.

[62] Sec. 78 of the new Revenue Law, § 10, 477, Cobbey's Ann. Stat., 1903.

[63] Western Union Teleg. Co. v. City of Omaha (Neb., 1905), 103 N. W. 84.

[64] Ky. Stat., 1903, §§ 4077–4080.

[65] Commonwealth v. Chesapeake & Ohio Ry. Co., 28 Ky. L. Rep. 1110, 91 S. W. 672. See also Adams Express Co. v. Kentucky (Weir v. Norman), 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. 527, under Ky. Stat., 1894, §§ 4077–4081.

[66] People ex rel. Metropolitan Street Ry. Co. v. Tax Commissioners, 174 N. Y. 417, 436, 67 N. E. 69, per Vann, J., reargument denied 175 N. Y. 482 (Mem.), case aff'd 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 705. See People v. Priest, 77 N. Y. Supp. 382, 75 App. Div. 131, under Tax Law § 2, subd. 3, as amended by Laws, 1899, c. 712. See also chapter herein on Taxation.

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CHAPTER II.

ENUMERATION OF FRANCHISES.

§ 10. Enumeration of Franchises Generally.
11. Corporations Generally—Members' Rights—Membership—Corporate Name — Municipal Corporations — "Public Franchise."
12. Corporations Continued—What Franchises are Embraced Generally.
13. Corporations Continued—Foreign Corporations Generally.
14. Common Carriers—Railroads —Street railroads.
15. Bridges— Roadways — Ferries —Canals.
16. Right to Supply Water, Gas or Electricity.
§ 17. Right to Tolls, Fares, Rates or Wharfage.
18. Banking—Insurance.
19. Eminent Domain.
20. Exemption or Immunity from Taxation, Jury Duty and Working on Public Roads.
21. Political Rights, "Elective Suffrage," "Elective Franchise" or Freedom—Public Office—Attorney or Counsellor—Right to Preside—Appointment of Professors —Liquor License—"Commodities"—Fishery—Public Market — Patent Right — Trade-mark—"News Contract."

§ 10. **Enumeration of Franchises Generally.**—Franchise is a word of extensive signification, and various kinds of franchises exist.[1] And it is said that whatever is of large public

[1] "The kinds of franchises are various and almost infinite." Spring Valley Water Works v. Schottler, 62 Cal. 69, 106, per Thornton, J., quoting 2 Black. Comm. 37; Central Railroad & Banking Co. v. State of Georgia, 54 Ga. 401, 409, per Warren, C. J.; Louisville Warehouse Co. v. Commonwealth, 20 Ky. L. Rep. 1047, 1051, 48 S. W. 420.

"Franchises are divers, says Finch, and almost infinite." Commonwealth v. Arrison, 15 Serg. & R. (Pa.) 127, 130, per Tilghman, C. J.

Franchises are extremely numerous and of various kinds. 3 Greenleaf's Cruise on Real Prop., *260. See also next following note.

"The word 'franchise' is used with various meanings. In its broad and popular sense it embraces the right of trial by jury, the right to *habeas corpus*, the right to vote at an election, the right to membership in voluntary associations or corporations, the right to hold an office, and perhaps other rights." Chicago & Western Indiana Rd. Co. v. Dunbar,

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concern, so that a want of regulation and control will injuriously affect the public in its general interests, may be the subject of a franchise.[2] There are, however, certain classes of franchises which have been enumerated as existing in England but which are unknown here and can have no application under the laws of this country.[3]

95 Ill. 571, 575, per Dickey, J. A case of what constitutes a franchise under a state constitution and also of appeal.

[2] People v. Loew, 44 N. Y. Supp. 43, 26 Civ. Proc. 132, 19 Misc. 248.

[3] "Franchises are of various kinds, such as the privilege of exercising the powers of a corporation, of having waifs, wrecks, estrays; the right to collect tolls on a road, bridge, ferry or wharf; the privilege of fishing, or taking game and numerous others which might be referred to. In England a large class of franchises exist which are unknown to our law, but some are of more extensive use than here, especially corporate franchises." California State Teleg. Co. v. Alta Teleg. Co., 22 Cal. 398, 422, per Crocker, J.

The word is "frequently used to denote the right of voting for a member to serve in Parliament, which is called the parliamentary franchise or the right of voting for an alderman or town councillor, which is called the municipal franchise." Mozley & Whiteley's Law Dict.

"The franchises of Forest, Chase, Park, Free Warren, Manor, Game, Court-leet, Waif, Wreck, Estray, Treasure-trove, Royal Fish, Goods of Felons, and Deodands, which form the body of this title in Mr. Cruise's work, have no existence in the United States, and afford but few and remote illustrations of any principles of our law of real property. Those subjects, therefore, are entirely omitted in this edition. The others are retained, for the sake of the doctrines involved in them, which are useful and interesting to the American lawyer." Note to 3 Greenleaf's Cruise on Real Prop., * 261.

None of the franchises enumerated by Blackstone "except corporations having the right to take tolls at bridges, wharfs, etc., have any application, under our laws. If, then, his enumeration is to be taken, the number of cases is small in which a franchise may be involved. If the Constitutional Convention and the General Assembly used the term according with its strict legal import, and we must presume they did, then in this country it can only embrace corporations, ferries, bridges, wharfs and the like, where tolls are authorized to be taken, and we may add the elective franchise as it is granted by the constitution to a portion of the people to elect their officers. If others exist they do not occur to us at this time." People v. Holtz, 92 Ill. 426, 429, per Curiam.

"The right to create a corporation, assuredly, is a franchise; so is the right to create an office, or to coin money, or to appropriate private property, or, in England, to take royal fish, to work mines of gold and silver, to take waifs, wrecks, estrays, and treasure-trove, to hold courts baron, or courts leet, to keep warrens, forests, parks and chases, and many

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§ 11. Corporations Generally—Members' Rights—Membership—Corporate Name—Municipal Corporations—"Public Franchise."—Under our laws corporations or bodies politic are the most usual franchises;[4] and the privilege or right to

privileges of the like description. A franchise is a right belonging to the government, as a sovereign, yet, committed, in trust, to some officer, corporation or individual. On page 279 of the third volume of Cruise's Digest, it is said: 'A franchise is a royal privilege, or branch of the King's prerogative, subsisting in a subject by a grant from the Crown.' It must needs be a sovereign power, or something which no subject or citizen can, of right, use. In England, as is well known, there were certain fish, as whale or sturgeon, to which, when thrown ashore or caught near the coast, the King is entitled. Mines of gold and silver, also, were the King's property and part of his revenue. All the game in the kingdom, belonged originally to him, as did all waifs, wrecks, estrays, treasure-trove, deodands, etc. None but the King, at first, could have a forest, a chase, a warren, or a park. 1 Black. Comm., chap. 8; 3 Cruise's Digest, title 28, chap. 1. In England, therefore, all such rights, when delegated to a subject, are franchises. * * * It is plain that many things are the subjects of a franchise, in England, which are not such in this country." Knoup v. Piqua Bank, 1 Ohio St. 603, 613, 614, per Corwin, J. See also Arnold v. Mundy, 6 N. J. L. 1, 87, 10 Am. Dec. 266, per Kirkpatrick, C. J.

"Franchises may be divided into two classes—those which the King has in his own hands as parcel of the flowers of his crown, and those which have no existence until created by the King. * * * This distinction is well settled and was recognized in the case of Duke of Northumberland v. Houghton, L. R. 5 Ex. 127. Franchises which belong to the King by right of his prerogative cannot pass under the general word 'franchise' in a grant from the Crown because they do not exist as such until, created by grant, they are part of the prerogative; if created and resumed they merge in the prerogative. But franchises which are no part of the flowers of the Crown have no existence until the Crown expressly creates them, and these if resumed do not merge." Attorney General v. Trustee of British Museum, Law Rep. (1903) 2 Ch. Div. 598, 612, 613, per Farwell, J. (holding that treasure-trove cannot be claimed under a general grant of franchises, but must itself be expressly granted and when so granted it becomes a franchise in the grantee).

[4] Spring Valley Water Works v. Schotler, 62 Cal. 69, 106, per Thornton, J., quoting 3 Kent's Comm. 459; State ex rel. Waring v. Georgia Medical Society, 38 Ga. 608, 626, 95 Am. Dec. 408, quoting Bouvier's L. Dict. 593; People ex rel. Koerner v. Ridgley, 21 Ill. 65, 69 (an information in nature of quo warranto in a criminal proceeding); Kennebec & Portland Rd. Co. v. Portland & Kennebec Rd. Co., 59 Me. 9, 66, dissenting opinion of Tapley, J. (a mortgage and foreclosure of a railroad franchise, etc.), quoting 3 Kent's Comm. 459.

"The word 'franchise' is often used in the sense of privileges generally, but in its more appropriate and legal sense the term is confined to such

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be or exist as a corporation is declared to be of itself a franchise [5] belonging to members of the corporation.[6] But it is

rights and privileges as are conferred upon corporate bodies by legislative grant." Fietsam v. Hay, 122 Ill. 293, 294, 13 N. E. 501, 11 West. Rep. 582, 3 Am. St. Rep. 492, per Mulkey, J. (a case of right to sell or transfer).

[5] People v. O'Hair, 128 Ill. 20, 21 N. E. 211, per Schofield, J. (a case of quo warranto and whether franchise involved on appeal); Louisville Tobacco Warehouse Co. v. Commonwealth, 20 Ky. L. Rep. 1047, 1050, 48 S. W. 420, quoting from People v. Utica Ins. Co., 15 Johns. (N. Y.) 357, 387; Pierce v. Emery, 32 N. H. 484, 507; State v. Austin & Northwestern Rd. Co., 94 Tex. 530, 532, 62 S. W. 1050, per Gaines, C. J. (a case of railway taxation.)

See also the following cases:

United States: Central Pacific Rd. Co. v. California, 162 U. S. 91, 125, 40 L. ed. 903, 16 Sup. Ct. 766, where it is said that "corporate capacity is a franchise" (a case of taxation); Mercantile Bank v. Tennessee, 161 U. S. 171, 40 L. ed. 656, 16 Sup. Ct. 466, per Peckham, J.; Memphis & Little Rock Ry. Co. v. Railroad Commissioners, 112 U. S. 609, 610, 5 Sup. Ct. 299, 28 L. ed. 837.

California: Spring Valley Water Works v. Schottler, 62 Cal. 69 (under state constitution).

Colorado: Iron Silver Mining Co. v. Cowie, 31 Colo. 450, 72 Pac. 1067 (upon the question of mandamus and the jurisdiction of the Supreme Court to review judgment, a franchise was held to be involved, where the legal existence of the corporation was treated by both parties as the sole issue).

Illinois: People ex rel. v. Cooper 139 Ill. 461, 29 N. E. 872 (franchise involved and appeal lies where legal existence of drainage district and of commissioner's powers the question in issue); Porter v. Rockford, Rock Island & St. Louis Rd. Co., 76 Ill. 561, 573, per Scholfield, J.

Iowa: Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 239, 91 N. W. 1081, per Weaver, J.

Kentucky: Board of Councilmen of City of Frankfort v. Stone, 108 Ky. 400, 22 Ky. L. Rep. 25, 56 S. W. 679 (a case of taxation and apportionment of tax. In this case a distinction was made between the franchise itself and the means of exercising the franchise, *Id.*, 407).

Michigan: See Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 405, 24 Am. Rep. 585.

Minnesota: State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 225, 226, 41 N. W. 1020, 3 L. R. A. 510, per Mitchell, J.

New York: People ex rel. Metropolitan Street Ry. Co. v. Tax Commissioners, 174 N. Y. 417, 435, 67 N. E. 69; State v. Mayor, etc., of New York, 3 Duer (N. Y.), 119, 144, per Bosworth, J.

Virginia: Tuckahoe Canal Co. v. Tuckahoe Rd. Co., 11 Leigh (Va.), 42, 76, 36 Am. Dec. 374 ("thus it is a franchise to be a corporation, with power to sue and be sued and to hold property as a corporate body," per Tucker, P.).

See State ex rel. Vilter Mfg. Co. v. Milwaukee, Burlington & Lake Ge-

[6] Memphis & Little Rock Rd. Co. v. Commissioners, 112 U. S. 609, 619, 28 L. ed. 837, 5 Sup. Ct. 299, per Matthews, J.; Fietsam v. Hay, 122

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said that the franchise to be a corporation belongs to the corporators in so far that it does not pass by mortgage and

neva Rd. Co., 116 Wis. 142, 92 N. W. 146, per Winslow, J.

"Corporations or bodies politic are the most usual franchise known to our law." Wilmington & Reading Ry. Co. v. Downward (Del. Ct. Err. & App., 1888), 14 Atl. 720, 721, per Salisbury, Ch.

"The creation of a corporation, the grant of power to exist and act as such is, in itself, a franchise." San Joaquin & King's River Canal Irrig. Co. v. Merced County, 2 Cal. App. 593, 84 Pac. 285.

Where the creation of a corporation was sought to be enjoined and the question was one of appeal and whether a franchise was involved, the court declared that to be a corporation was itself a franchise. Drummond Tobacco Co. v. Randle, 114 Ill. 412, 434, 2 N. E. 536, per Scholfield, J.

Franchises "are very generally granted to corporations. Indeed, the right of incorporation is said to be itself a franchise." Sellers v. Union Lumbering Co., 39 Wis. 525, 527, per Ryan, C. J., citing 2 Bl. Comm. 37; Angell & Ames on Corp. § 4.

"It is true, the right to be a corporation is itself a franchise, but all franchises granted to a corporation do not become corporate franchises." Green v. Knife Falls Boom Corp., 35 Minn. 155, 157, 158, per Vanderbergh, J.

"When the legislature grants a charter of incorporation, it confers upon the grantees of the charter the

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Ill. 293, 295, 3 Am. St. Rep. 492, 13 N. E. 501, per Mulkey, J. See criticism of this case by Judge Thompson in next following note. Driscoll v. Norwich & Worcester Rd. Co., 65 Conn. 230, 256, 32 Atl. 354, per Torrence, J., in dissenting opinion. See Medical & Surgical Soc. of Montgomery v. Weatherly, 75 Ala. 248, 253; Coe v. Columbus, Piqua & Indiana Rd. Co. 10 Ohio St. 372, 385, 75 Am. Dec. 518, per Gholson, J.

"A corporation is itself a franchise belonging to the members of the corporation." Spring Valley Water Works v. Schottler, 62 Cal. 69, 106, per Thornton, J.; Louisville Tobacco Warehouse Co. v. Commonwealth, 20 Ky. L. Rep. 1047, 1051, 48 S. W. 420. Both cases quoting from Pierce v. Emery, 32 N. H. 484, 507, per Perley, J.

"Franchise is the privilege held by the individual members to be a corporation and exercise corporate powers." Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 239, 91 N. W. 1081, per Weaver, J.

"The rule is that the primary franchise of being a corporation vests in the individuals who compose it, and not in the corporation itself." State v. Water Co., 61 Kan. 547, 560, 60 Pac. 337, per Smith, J.

"'The franchise to exist as a corporation' * * * is a franchise of the individual corporators, of the natural persons who are shareholders of the capital stock, and pertains to them as such corporators; whereby they are endowed with the privilege and capacity of being constituted into, and co-operating together as a body politic, with power of succession, and without individual liability." Meyer v. Johnson, 53 Ala. 237, 324, per Manning, J., case decided in 1875.

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sale thereunder.[7] And considered in connection with the right to assess for taxation, the assessment should not be

right or privilege of forming a corporate association, and of acting, within certain limits, in a corporate capacity, and this right or privilege is called the 'corporate franchise.'" Jersey City Gas-Light Co. v. Gas Improvement Co., 46 Fed. 264, 265, per Greene, J., case aff'd 58 Fed. 323.

"A corporation is defined by Mr. Justice Blackstone (2 Black. Comm. 37) to be a franchise. It is, says he, 'A franchise for a number of persons to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts.'" Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 657, 4 L. ed. 629, per Washington, J., See also *id.*, 700 per Story, J.

A corporation franchise to be and act as a corporation merely gives the corporation life as a person, bearing the same relation to the taxing powers borne by the natural person. San Joaquin & King's River Canal Irrig. Co. v. Merced County, 2 Cal. App. 593, 84 Pac. 285.

"A corporation is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual. The ordinary incidents to a corporation are to have perpetual succession, and the power of electing or otherwise providing members in the place of those removed by death or otherwise; to sue and be sued; to grant and receive and to purchase and hold lands and chattels by their corporate name; to have a common seal; to make by-laws for the government of the corporation; and sometimes the power of a motion or removal of members. * * * The right to be a corporation is itself a separate, distinct and independent franchise." Southern Pacific Rd. Co. v. Orton, 32 Fed. 457, 473, per Sawyer, J., citing 2 Kent's Comm. (9 ed.), 306, 325; Memphis & Little Rock Rd. Co. v. Commissioners, 112 U. S. 609, 5 Sup. Ct. 299. Above quotation is given in part in Porter v. Rockford, Rock Island & St. Louis Rd. Co., 76 Ill. 561, 573, per Scholfield, J.

"*What is called 'the franchise of*

[7] See New Orleans Debenture Redemption Co. v. Louisiana, 180 U. S. 320, 329, 45 L. ed. 551, 21 Sup. Ct. 378, per Peckham, J. (a case of action to enjoin use of charter; necessary parties, and power of States over corporations); Julian v. Central Trust Co., 193 U. S. 93, 106, 48 L. ed. 629, 24 Sup. Ct. 399, per Day, J. (a case of state laws as rules of decision; railroads, foreclosure of mortgages; purchase by foreign corporation, validity of; indebtedness; liability of purchaser; and conflicting jurisdiction); New Orleans, Spanish Fort & Lake Rd. Co. v. Delamore, 114 U. S. 501, 510, 5 Sup. Ct. 1009, 29 L. ed. 244 (a case of federal jurisdiction over state judgment as to sale; jurisdiction in bankruptcy; railroad franchise of right of way, title by foreclosure; right to mortgage; and of transfer to assignee in bankruptcy of franchises mortgaged). See subsequent sections herein as to this power to transfer or alienate.

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made against the stockholders or members as such, but against the corporation, for this franchise of a right to exist, while in a certain sense belonging to the members of the corporation, must be availed of through the corporation itself.[8] Again, it is declared that corporate rights are granted to the corporation and not to the individuals interested therein, as is instanced by a case where the stockholders may separately assign and transfer their stock, and, independently of their rights, the corporation itself may alienate its property and franchises, where the law permits such transfer, mortgage or conveyance.[9]

forming a corporation,' is really but an exemption from the general rule of the common law prohibiting the formation of corporations. All persons in this State have now the right of forming corporate associations upon complying with the simple formalities prescribed by the statute. The right of forming a corporation and of acting in a corporate capacity under the general incorporation laws, can be called a franchise only in the sense in which the right of forming a limited partnership, or of executing a conveyance of land by deed, is a franchise (2 Morawitz, Priv. Corp. § 923)." State v. Western Irrigating Canal Co., 40 Kan. 96, 99, 19 Pac. 349, per Horton, C. J.

"'*The corporation itself is not a franchise*, but it is the attributes of the corporation which comprise the franchises thereof,—its special powers and rights,' 1 Wood, Ry. Law, § 14, p. 27; now, it is perfectly apparent that any acts done to further the objects of the corporation are the exercise of its franchises." Young v. Webster City & So. West. Ry. Co., 75 Iowa, 140, 143, 39 N. W. 234, per Rothrock, J.

"Strictly 'the franchise to exist as a corporation' is not a corporate franchise 'or franchise of the corporation' at all." Meyer v. Johnson, 53 Ala. 237, 324, per Manning, J.

"The right to be a corporation has sometimes been called a franchise, but that is a misapplication of terms." Knoup v. Piqua Bank, 1 Ohio St. 603, 613, per Corwin, J.

[8] Bank of California v. San Francisco, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918.

[9] Detroit, City of, v. Mutual Gas Co. & Mutual Gas Light Co., 43 Mich. 594, 5 N. W. 1039.

Judge Thompson after quoting from an Illinois case to the point, "'that a franchise or right to be and act as an artificial body, is vested *in the individuals* who compose the corporation, and not in the corporation itself,'" Fietsam v. Hay, 122 Ill. 293, 3 Am. St. Rep. 492, 494, says: "But this is an imperfect statement of the true conclusion,—which is, that a *primary franchise*, that is to say, *the franchise of being a corporation*, vests in the individuals who compose the corporation; while those *secondary franchises* which, as we shall hereafter see, are *vendible* by the corporation, necessarily and for that reason alone must vest in the corporation." 4 Thompson's Comm. on Corp. § 5336. The author also adds

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It is also held that a corporation is an entity, irrespective of the persons who own all of its stock; that the fact that one person owns all the stock does not make such owner and the corporation one and the same person; and that there is not any identity between the individual or the corporation which owns such stock in another corporation, and that latter corporation.[10] And whenever a corporation makes a contract,

the following: "We shall, however, see hereafter that judicial theory is so confused on the subject, that proceedings in the nature of quo warranto, to vacate the franchises of corporations, are sometimes brought against the individuals who compose the corporation and sometimes against the corporation itself."

[10] Ulmer v. Lime Rock R. Co., 98 Me. 579, 594, 57 Atl. 1001.

Whether corporation is person or entity distinct from stockholders, see the following cases:

United States: Central Trust Co. of N. Y. v. Western North Carolina Rd. Co., 89 Fed. 31, per Simonton, Cir. J. ("this sovereign power made of several persons a single entity"); M'Cabe v. Illinois Central Rd. Co., 13 Fed. 827, 828 (is a legal entity, per Love, D. J.).

Alabama: State v. Stebbins, 1 Stew. (Ala.) 299, 306-308 [per Saffold, J., citing Bank of United States v. Dandridge, 12 Wheat. (25 U. S.) 91, per Marshall, C. J., to point that it is one entire impersonal entity].

Illinois: Ford v. Chicago Milk Shippers' Assoc., 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298 (while legal entity and distinct from persons composing it, it cannot act independently of natural persons constituting it, per Phillips, J.).

Kentucky: Lewis v. Maysville & Big Sandy Rd. Co., 25 Ky. L. Rep. 948, 76 S. W. 526 (when statute refers to entity and not to individual stockholder's right of removal to Federal court, cannot be defeated on ground that corporation not a legal entity).

Maryland: Folsom v. Detrick Fertilizer & Chemical Co., 85 Md. 52, 69, 36 Atl. 446 (corporation is person distinct from stockholders, per Bryan, J.).

Nebraska: Home Fire Insurance Co. v. Barber, 67 Neb. 644, 666, 93 N. W. 1024 (stating when separate and distinct in law and when not in equity, per Pound, C.).

New York: Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Elec. Light Co., 42 N. Y. Supp. 781, 788, 12 App. Div. 199 (word "entity" is merely descriptive; but cannot act independently of persons composing it, per Green, J.); People v. North River Sugar Refining Co., 3 N. Y. Supp. 401, 408, 16 Civ. Proc. R. 1, 2 L. R. A. 33 (is not in reality distinct, although in one point of view an entity, per Barrett, J.); Supervisors of Niagara v. People, 7 Hill (N. Y.), 504, 507 (individuality of natural persons is merged in entity, per Bockee, Senator).

Pennsylvania: Rhawn v. Edge Hill Furnace Co., 201 Pa. 637, 51 Atl. 360 (is an entity irrespective of persons owning stock); Monongahela Bridge Co. v. Pittsburg & Birmingham Traction Co., 196 Pa. 25, 46 Atl. 99 (same statement as last case).

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it is the contract of the legal entity, of the artificial being created by the charter—and not the contract of the individual

South Carolina: State v. Hood, 15 Rich. L. (S. C.) 177, 188 (corporation is wholly distinct from natural persons composing it, per Inglis, J.).

Tennessee: City of Nashville v. Ward, 16 Lea (84 Tenn.), 27, 30 (is not distinct, per Deaderick, C. J.).

Corporation is an entity irrespective of, and entirely distinct from, the persons who own its stock, and it is well settled that all the shares in a corporation may be held by a single person and yet the corporation continue to exist; nor does the fact that one person owns all of the stock, make him and the corporation one and the same person. The corporation does not lose its legally distinct and separate personality by reason of the ownership of the bulk or whole of its stock by another; nor does the fact that all the shares of a corporation pass into the ownership of one person, operate to dissolve the corporation. It is also immaterial whether the sole owner of stock is a man or another corporation, and the corporation owning such stock is as distinct from the corporation whose stock is owned as the man is from the corporation of which he is the sole member. Commonwealth v. Monongahela Bridge Co., 216 Pa. 108, 114, 115, 64 Atl. 909, per Potter, J., citing or quoting Exchange Bank of Macon v. Macon Construction Co., 97 Ga. 1, 6, 25 S. E. 326; Kendall v. Klapperthal Co., 202 Pa. 596, 607, 52 Atl. 92; Rhawn v. Edge Hill Furnace Co., 201 Pa. 637, 644, 51 Atl. 360; Monongahela Bridge Co. v. Pittsburg & Birmingham Traction Co., 196 Pa. 25, 46 Atl. 99; 10 Cyc. 1277.

"Franchises are usually conferred upon corporations for the purpose of enabling them to do certain things. The franchises are vested in the corporate entity rather than in the officers." Londoner v. People, 15 Colo. 246, 247, 25 Pac. 183, per Hayt, J.

"*The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not, in a proper case, ignore it* to preserve the rights of innocent parties or to circumvent fraud." Rieger, Kapner & Altmark, In re, 157 Fed. 609, 19 Am. B. Rep. 622, 628. The court, per Sater, Dist. J. (p. 629), cites First National Bank of Chicago v. Trebein Co., 59 Ohio St. 316, 52 N. E. 834, and the following is a part of the quotation in the said case, given by the court: "In contemplation of law, a corporation is a legal entity, an ideal person, separate from the real persons who compose it. This fiction, however, is limited to the uses and purposes for which it was adopted—convenience in the transaction of business, and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members. But the fiction cannot be abused. A corporation cannot be formed for the purpose of accomplishing a fraud or other illegal act under the disguise of the fiction." The court in the principal case cites also the following authorities: Cincinnati, Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 200, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707; State v. Standard Oil Co., 49 Ohio St. 137, 177–179, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; Brundred v. Rice, 49

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members; the only rights it can claim are given to it in that character, and not the rights which belong to its members as citizens of a State.[11] Even though the word "franchise" is sometimes used as synonymous with privileges and immunities of a personal character, it is nevertheless something which cannot be enjoyed by a citizen without a legislative grant; so that a membership in a religious, benevolent, literary and scientific corporation or association, incorporated under general or special laws, is not a franchise, and a member of a corporation or association without legislative grant, organized to transact commercial business, has not a franchise but a mere privilege. Therefore, the right of membership in a private corporation, such as a Board of Trade, is not a franchise.[12] So, in New York, a distinction is made between membership in a municipal, eleemosynary, or private corporation, where the member is declared to be in the enjoyment of a franchise, the right to which is not derived from the body, but is created by statute or exists by prescription, and membership in an unincorporated voluntary association, such as an association or exchange called an "Open Board of Brokers," where the privilege of membership is not given by statute or derived through prescription, as in a corporation, but is created and conferred by the organization itself and may be conferred or withheld at pleasure and therefore is not a franchise arising from a grant from a sovereign or government.[13] Again, it

Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; Thompson on Corp. § 1077; Cook on Corp. (4th ed.), 23; 7 Ency. Am. & Eng. Law, 633, 634. See also United States v. Milwaukee Refrigerator Co., 142 Fed. 247 (holding corporation a legal entity as a general rule, but will be regarded in law as an association of persons under certain circumstances.

[11] Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 10 L. ed. 274.

[12] Board of Trade of Chicago v. People ex rel. Sturgis, 91 Ill. 80, 83 (the question here was one of the right of a member of a board of trade to be restored to membership and whether such membership was a franchise within the meaning of a law giving the right to prosecute appeals and writs of error to the Supreme Court). See Chicago & Western Indiana Ry. Co. v. Dunbar, 95 Ill. 571, 575, per Dickey, J.

Disfranchisement of member of corporation, what is. See Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774; White v. Brownell, 4 Abb. Pr. (N. S.) (N. Y.) 162, 192.

[13] White v. Brownell, 4 Abb. Pr.

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is declared that the right to be a corporation by a particular name is a franchise, but that this is an entirely distinct and different right from the right to use a franchise in transacting business which can only exist by specific grant or prescription.[14] And it is further decided that where, under the law, a corporation may acquire a right to the exclusive use of another than its corporate name as a trade name, but not as a corporate name, and the object of the statute is not to prevent the fraudulent use of trade names but to prevent the identity of corporate names, the commissioner of corporations may properly approve a name as that of a corporation, notwithstanding that name is then in use as a trade name by a corporation with a different corporate name; and the corporate name inserted in the certificate of incorporation from the Secretary of State under authority of the statute is conclusive of the right to the corporate name and gives a franchise to bear the name which can no more be impeached by private persons than can the franchise to be a corporation, and in bearing such a name a franchise conferred by law is exercised precluding any right of the older corporation to have a petition granted for leave to file an information in the nature of a quo warranto to restrain the exercise of a franchise and the use of the corporate name.[15] As to municipal corporations, special franchises may be conferred upon a city in respect to its waterworks, sewers and public parks, to enable it to accomplish the purpose for which it was created. So the right of a city to take possession of, and improve as a public park, lands lying outside its limits, is derived only from a sovereign

N. S. (N. Y. Ct. Com. Pleas) 162, 191–193, 2 Daly (N. Y.), 329, 358, per Daly, F. J.

[14] Hazelton Boiler Co. v. Tripod Boiler Co., 137 Ill. 231, 233, 28 N. E. 248, per Schofield, C. J.

That equitable relief may be had to prevent use of corporate name, given by special charter, and exercise of a franchise and that complainant not restricted to quo warranto, See Union Water Co. v. Kean, 52 N. J. Eq. 111, 129–132, 27 Atl. 1015, citing numerous cases.

[15] Boston Rubber Shoe Co. v. Boston Rubber Co., 149 Mass. 436, 21 N. E. 875, cited in American Order Scottish Clans v. Merrill, 151 Mass. 558, 561, 8 L. R. A. 320, 24 N. E. 918. Compare Hazleton Boiler Co. v. Hazleton Tripod Boiler Co., 137 Ill. 231, 28 N. E. 248.

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grant, and so far as concerns the city is a "public franchise." [16] And, by way of further illustration, the franchise right to erect and maintain electric light and power plants may be conferred upon cities of a certain class.[17] And, generally, municipalities may, within constitutional limitations, be empowered, or granted the franchise, to own and operate electric lighting plants not only for use of the city but also for private use.[18] Again, where a city acts in the capacity of a private corporation, in exercising its powers or franchise, it is placed by the law upon the same plane, in the matter of its liability for damages, as would any person or collection of persons which is the grantee of a like special franchise.[19]

[16] Mayor of Detroit v. Park Commissioners, 44 Mich. 602, 7 N. W. 180. An information in nature of quo warranto to inquire by what authority the city usurped certain franchises. See People v. Spring Valley, 129 Ill. 169, 21 N. E. 843, where the information charged a city with exercising a franchise not authorized by its charter, and it was held proper to make the city a defendant by its corporate name, but the question of franchise as such was not discussed, being evidently conceded to exist.

"A municipal corporation, for instance, may have the franchise of a market, or of a local court." Pierce v. Emery, 32 N. H. 484, 507, per Perley, C. J.

Municipality may be authorized to erect and maintain a system of waterworks. See Keen v. Waycross, 101 Ga. 588, 29 S. E. 42.

City may be authorized to construct sewers. See Kennedy v. Bollmar, 61 N. J. L. 20, 38 Atl. 756.

[17] State v. City of Hiawatha & General Elec. Co., 53 Kan. 477; State v. Taylor, 36 Wash. 607, 79 Pac. 286.

[18] **United States:** Thompson-Houston Elec. Light Co. v. City of Newton, 42 Fed. 723, 3 Am. Elec. Cas. 507.

Florida: Jacksonville Elec. Light Co. v. Jacksonville, 36 Fla. 229, 18 So. 677, 30 L. R. A. 540, 12 Am. R. & Corp. Rep. 626, 51 Am. St. Rep. 24, 6 Am. Elec. Cas. 668.

Indiana: Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849.

Michigan: Mitchell v. Negaumee, 113 Mich. 359, 4 Det. L. N. 318, 38 L. R. A. 157, 71 N. W. 646.

New York: Potsdam Elec. Light & Power Co. v. Village of Potsdam, 97 N. Y. Supp. 199, 49 Misc. 18. See Tuttle v. Brush Elec. Illum. Co., 50 N. Y. Super. Ct. 464, 1 Am. Elec. Cas. 508, 514, 515.

Pennsylvania: Linn v. Chambersburgh Borough, 160 Pa. 511, 4 Am. Elec. Cas. 647, 28 Atl. 842. See also Black v. Chester, 175 Pa. 101, 34 Atl. 354.

Tennessee: Smith v. Nashville, 88 Tenn. (4 Pick.) 464, 12 S. W. 924.

See Opinion of Justices, 150 Mass. 593, 24 N. E. 1084.

[19] Chicago, City of, v. Selz, Schwab & Co., 104 Ill. App. 376, aff'd 202 Ill. 545, 67 N. E. 386; Dickinson v. City of Boston, 188 Mass. 595, 1 L. R. A.

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§ 12. Corporations Continued—What Franchises are Embraced Generally.—A corporation is not only itself a franchise, but it consists and is made up of its rights and franchises and it may hold other franchises as rights and franchises of the corporation.[20] So it is said, by the court, in a Connecticut

(N. S.) 664, 75 N. E. 68; Bullmaster v. St. Joseph, 70 Mo. App. 60.

[20] **United States:** See Memphis & Little Rock Rd. Co. v. Commissioners, 112 U. S. 609, 610, 619, 28 L. ed. 837, 5 Sup. Ct. 299; Buchanan v. Knoxville & Ohio Rd. Co., 71 Fed. 324, 334, 18 C. C. A. 122, per Severens, Dist. J.

California: Spring Water Works v. Schottler, 62 Cal. 69, 106, per Thornton, J., quoting from Pierce v. Emery, 32 N. H. 484, 507, per Perley, J.

Connecticut: Driscoll v. Norwich & Worcester Rd. Co., 65 Conn. 230, 256, 32 Atl. 354, per Torrance, J., in dissenting opinion.

Florida: Sullivan v. Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388. See quotation from this case in note to § 39, herein, as to distinction between franchise to be and to do.

Illinois: Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 576.

Iowa: Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 239, 91 N. W. 1081, per Weaver, J.

Kentucky: Louisville Tobacco Warehouse Co. v. Commonwealth, 20 Ky. L. Rep. 1047, 1051, 48 S. W. 420, quoting from Pierce v. Emery, 32 N. H. 484, 507, per Perley, J.

New Jersey: State Board of Assessors v. Central Rd. Co., 48 N. J. L. 146, 271, per Scudder, J.

New York: People ex rel. Metropolitan Street Ry. Co. v. Tax Commissioners, 174 N. Y. 417, 67 N. E. 69; State v. Mayor, etc., of New York, 3 Duer (N. Y.), 119, 144, per Bosworth, J.

Vermont: State v. Boston, Concord & Montreal Rd. Co., 25 Vt. 433, 442, per Redfield, Ch. J.

Examine the following cases:

United States: Mercantile Bank v. Tennessee, 161 U. S. 171, 40 L. ed. 656, 16 Sup. Ct. 466, per Peckham, J.; Home Ins. Co. v. New York, 134 U. S. 594, 599, 33 L. ed. 1025, 10 Sup. Ct. 593, per Field, J. [case affirms People v. Home Ins. Co., 92 N. Y. 328, also aff'd by divided court, 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. 1385, restored to calendar 122 U. S. 636 (Mem.). The principal case is cited in People v. Miller, 83 N. Y. Supp. 184, 187, 85 App. Div. 211, which case is reversed 177 N. Y. 51, 69 N. E. 124, which is cited in People v. Miller, 86 N. Y. Supp. 420, 422, 90 App. Div. 588, this last case is reversed 179 N. Y. 49, 71 N. E. 463. The principal case is also quoted from in Cobb v. Commissioners of Durham County, 122 N. Car. 307, 309, 30 S. E. 338, per Montgomery, J.]; Davis v. Gray, 16 Wall. (83 U. S.) 203, 228, 21 L. ed. 447, per Swayne, J.; Thompson v. Schenectady Ry. Co., 124 Fed. 274, 279, per Ray, Dist. J., see same case 131 Fed. 577; Central Trust Co. of New York v. Western North Carolina Rd. Co., 89 Fed. 24, 31, per Simonton, Cir. J.; Southern Pacific Rd. Co. v. Orton, 32 Fed. 457, 474, per Sawyer, J.

California: San Joaquin & King's River Canal Irrig. Co. v. Merced

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case, that: "The term 'franchise' has several significations and there is some confusion in its use. The better opinion, deduced from the authorities, seems to be that it consists of the entire privileges embraced in and constituting the grant. It does not then embrace the property acquired by the exercise of the franchise." [21] In case of a mortgage which "pur-

County, 2 Cal. App. 593, 84 Pac. 285.

Kentucky: Board of Councilmen of City of Frankfort v. Stone, 108 Ky. 400, 22 Ky. L. Rep. 25, 56 S. W. 679.

Maryland: Consolidated Gas Co. v. Baltimore City, 101 Md. 541, 545–548, 61 Atl. 532, per McSherry, C. J.

Minnesota: State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 225, 226, 41 N. W. 1020, 3 L. R. A. 510, per Mitchell, J.

New York: Sandham v. Nye, 30 N. Y. Supp. 552, 555, 62 N. Y. St. Rep. 198, 9 Misc. 541, per Rumsey, J.

Wisconsin: Linden Land Co. v. Milwaukee Elect. Ry. & Light Co., 107 Wis. 493, 513, 514, 83 N. W. 858.

[21] City of Bridgeport v. New York & New Haven Rd. Co., 36 Conn. 255, 266, 4 Am. Rep. 63, per Butler, J. (case of assessment for benefits), quoted in part in Spring Valley Water Works v. Schottler, 62 Cal. 69, 106, also quoted in Louisville Warehouse Co. v. Commonwealth, 20 Ky. L. Rep. 1047, 1051, 48 S. W. 420. See Gordon v. Appeal Tax Court, 3 How. (44 U. S.) 133, 150, 11 L. ed. 529, per Wayne, J.

"It is quite too narrow a definition of the word 'franchise' * * * to hold it as meaning only the right to be a corporation. The word is generic covering all the rights granted by the legislature." Atlantic & Gulf Rd. Co. v. Georgia, 98 U. S. 359, 365, 25 L. ed. 185, quoted in State Tide-Water Pipe Line Co. v. Berry, 52 N. J. L. 308, 311, 19 Atl. 665, per Van Syckel, J.; quoted in part in Wilmington City Ry. Co. v. Wilmington & Brandywine Springs Ry. Co. (Del. Ch., 1900), 46 Atl. 12.

The term "franchise" is "also to be regarded as a generic term covering all rights granted to a corporation by legislative act or statute." Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 238, 91 N. W. 1081, per Weaver, J., distinguishing also between the franchise to be a corporation and the privileges granted when organized.

Covers all rights granted to a corporation. Whence "corporate franchises." Atlantic & Gulf R. Co. v. Georgia, 98 U. S. 365, 25 L. ed. 185, per Strong, J.

"As applied to corporations" the word "franchise" "constitutes its right to do business, and, also, in so doing, to exercise certain special powers and privileges which do not belong to citizens of the country generally of common right, and is vested in the corporate entity." Arapahoe County v. Rocky Mountain News Printing Co., 15 Colo. App. 189, 203, 61 Pac. 494, per Wilson, J.

"*The franchise of the company is the right to hold property and exercise* its corporate privileges. * * * All the rights and privileges which the company is empowered to exer-

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ports to convey only the 'road and its franchises,'" these terms "embrace only such rights and privileges as are involved in the owning, maintaining and operating of the railroad, and in the receipt and enjoyment of the income and emoluments of so doing. The franchise conveyed is, by the language, restricted to the franchise that the corporation had in the road itself; and therefore cannot be regarded as touching other franchises, such as that of being a corporation, with the right of perpetual succession, of suing and being sued by corporate names, etc." [22] Again, those franchises are especially to be considered which are essential to corporate operation, and the exercise of corporate rights and necessary to make the grant of value.[23] And such privileges as are reasonably necessary to the discharge of the duty of a street-car company to the public in transporting persons from place to place on the street, in the way in which such business is ordinarily conducted, are incident to the franchise to maintain and operate the road, in the absence of municipal regulations or something in the franchise, or some state police

cise were granted to it by its charter upon the terms specified therein." Hancock, Comptroller, v. Singer Mfg. Co., 62 N. J. L. 289, 336, 42 L. R. A. 852, 41 Atl. 846, per Van Syckel, J.

"The franchise to be is only one of the franchises of a corporation." Adams Express Co. v. Ohio State Auditor, 166 U. S. 185, 224, 41 L. ed. 965, 17 Sup. Ct. 604, per Brewer, J. (a case of taxation and interstate commerce) denying rehearing, 165 U. S. 194, 41 L. ed. 683, 707, 17 Sup. Ct. 305. See further chap. IV, herein, as to distinctions.

What franchises a railroad company embraces. See Chesapeake & Ohio Ry. Co. v. Miller, 114 U. S. 176, 186, 29 L. ed. 121, 5 Sup. Ct. 813 (quoted in Baltimore, Chesapeake & Atlantic Ry. Co. v. Mayor, etc., of Ocean City, 89 Md. 89, 98, 42 Atl. 922); Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Chicago & Western Indiana Ry. Co. v. Dunbar, 95 Ill. 571, 576; Shamokin Valley Rd. Co. v. Livermore, 47 Pa. 465, 468, per Agnew, J., and examine generally cases throughout this work.

[22] Miller v. Rutland & Washington Rd. Co., 36 Vt. 452, 493, per Barrett, J.

[23] See the following cases:

United States: Chesapeake & Ohio Ry. Co. v. Miller, 114 U. S. 176, 186, 29 L. ed. 121, 5 Sup. Ct. 813; East Tennessee, Virginia & Georgia Rd. Co. v. Hamblen, 102 U. S. 275, 277, 26 L. ed. 121, 152; Morgan v. State of Louisiana, 93 U. S. 217, 23 L. ed. 860.

Illinois: Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 576.

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regulation to the contrary.[24] So it is declared that a franchise of itself is of no value when considered as the bare right to do a thing exclusive of its public utility; that its value depends upon the profit to be made out of it, having in view its practical uses in connection with the nature of the franchise and the skill, business judgment and management necessary to make it profitable.[25] But the privilege, right or power to exercise and acquire or own varied and distinct franchises may never be exercised by the corporation, and such franchises may never be acquired or owned, as in the case of the power to acquire realty.[26] This right to acquire and sell real estate, including particular real estate designated in the char-

Maine: State v. Maine Central Rd. Co., 66 Me. 488, 512, per Appleton, C. J.

Maryland: Baltimore, Chesapeake & Atlantic Ry. Co. v. Mayor, etc., of Ocean City, 89 Md. 89, 98, 42 Atl. 922.

Nebraska: Western Union Teleg. Co. v. City of Omaha (Neb., 1905), 103 N. W. 84, 86.

New Jersey: State Board of Assessors v. Central Rd. Co., 48 N. J. L. 146, 271, per Scudder, J.

Pennsylvania: Shamokin Valley Rd. Co. v. Livermore, 47 Pa. 465, 468, per Agnew, J.

Tennessee: Wilson v. Gaines, 9 Baxt. (68 Tenn.) 546, 552.

Texas: Denison & Sherman Ry. Co. v. St. Louis Southwestern Ry. Co., 30 Tex. Civ. App. 474, 481, 482, 72 S. W. 201, per Bookhout, Assoc. J.

"The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted," the legislature may impose conditions affecting the grant of the franchise. Home Insurance Co. v. New York, 134 U. S. 594, 599, 33 L. ed. 1025, 10 Sup. Ct. 593, per Field, J. Case affirms People v. Home Ins. Co., 92 N. Y. 328, which is also aff'd 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. 1385, restored to calendar, 122 U. S. 636 (Mem.).

[24] Tesch v. Milwaukee Elect. Ry. & Light Co., 108 Wis. 593, 608, 84 N. W. 823, per Marshall, J.

[25] Sullivan v. Lear, 23 Fla. 463, 11 Am. St. Rep. 388, 2 So. 846. See Medical & Surgical Soc. of Montgomery v. Weatherly, 75 Ala. 248, 253.

[26] San Joaquin & King's River Canal Irrig. Co. v. Merced, 2 Cal. App. 593, 84 Pac. 285. See chap. IV, herein, as to distinctions.

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ter, is declared to be a franchise;[27] as is also the right to consolidate.[28]

§ 13. **Corporations Continued—Foreign Corporations Generally.**—As to foreign corporations "the franchise of a cor-

[27] Davis v. Gray, 16 Wall. (83 U. S.) 203, 228, 21 L. ed. 447, per Swayne, J. See chap. IV, herein, as to distinctions.

The rule that the limitation of the power of a corporation in a State to receive and hold real estate concerns the State alone, does not apply when the corporation, as plaintiff, seeks to acquire real estate which it is not authorized by law to acquire. Case v. Kelly, 133 U. S. 21, 33 L. ed. 513, 10 Sup. Ct. 216.

Includes right to acquire land. Baltimore & Fredericktown Turnpike Road v. Baltimore, Catonsville & E. M. P. Rd. Co., 81 Md. 247, 255, 31 Atl. 854, per Bryan, J.

As to power to take and hold lands while empowered to receive grants of land; limitations as to purchase of real estate, see Southern Pacific Rd. Co. v. Orton, 32 Fed. 457, 470, 473.

"*This franchise, this corporate right, to select and acquire land, is property;* it is an incorporeal hereditament, not a legal title to the land itself, not a mere capacity or faculty to acquire and hold land, such as every individual possesses; but in addition to such capacity, it is a right or privilege, a portion of the eminent domain vested in the corporation, to acquire the legal title to land subjected by the grant to its will, and thus to convert the incorporeal into a corporeal hereditament, and after the franchise to choose and condemn land for any particular public purpose; that portion of the eminent domain granted and subsisting in one corporation, cannot be bestowed upon another, to the prejudice of the former grant; nor can any other legally acquire any such right of way or title to the land over which the franchise extends, as will hinder the former corporation in the exercise and enjoyment of its franchise." Canal Company v. Railroad Company, 4 Gill. & J. (Md.) 1, 144, 145, per Buchanan, Ch. J., quoted in Baltimore & Fredericktown Turnpike Road v. Baltimore, Catonsville & Ellicott Mills Pass. Rd. Co., 81 Md. 247, 255, 31 Atl. 854, per Bryan, J. See also § 19, herein, as to Eminent Domain.

The right of a city to take possession and improve lands lying outside the city limits as a public park is a franchise which the right to purchase, to create a debt therefor, and to extend over it the police power is expressly granted by a special act of the legislature. Mayor v. Park Commissioners, 44 Mich. 602, 605, 7 N. W. 180.

A corporation created for the purpose of dealing in lands, and to which the powers to purchase, to subdivide, to sell, and to make any contract essential to the transaction of its business are expressly granted, possesses, as fairly incidental, the power to incur liability in respect of securing

[28] Adams v. Yazoo & Miss. Valley Rd. Co., 77 Miss. 194, 1 Miss. Dec. (No. 30) 296, 24 So. 200, 317.

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poration is granted by the jurisdiction where the company is incorporated, and its situs is in the State or country of its origin." The certificate of authority issued to a foreign corporation "confers upon such company a privilege or right not possessed or enjoyed by citizens generally, and not conferred upon it by its original franchise. This right or privilege so conferred is in that sense a franchise." [29] So in Ohio, where a certificate of authority is required to enable a foreign corporation to carry on its business in a State, other than that of its incorporation, "the authority emanates from the State and the privilege granted is a franchise," and any company or association, carrying on its business in the domestic State without such authority, is unlawfully exercising a franchise.[30] It is also said that: "A State has the right to debar aliens * * * from holding shares in her corporations, or to admit them to that privilege only on such terms as she may prescribe. The right of an association under the protection of an artificial personality, and of doing business on its credit,

better facilities for transit to and from the lots of lands which it is its business to acquire and dispose of. Fort Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. 339.

Power to purchase and hold real estate indefinitely. In the absence of an enabling statute, either general or special, a railroad or other corporation cannot purchase and hold real estate indefinitely, without regard to the uses to be made of it. Case v. Kelly, 133 U. S. 21, 33 L. ed. 513, 10 Sup. Ct. 516.

Foreign corporations—Power to acquire lands. In harmony with the general law of comity among the States composing the Union, the presumption is to be indulged that a corporation, if not forbidden by its charter, may exercise the powers thereby granted within other States, including the power of acquiring lands, unless prohibited therefrom either in their direct enactments or by their public policy, to be deduced from their general course of legislation or the settled adjudications of their highest courts. Christian Union v. Yount, 101 U. S. 352, 25 L. ed. 888.

As to right of a corporation to hold lands in a State other than that of its incorporation, see State v. Boston, Concord & Montreal Rd. Co., 25 Vt. 433.

[29] Northwestern Mutual Life Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 491, 492, 72 Pac. 982, per Poorman, Comm'r.

[30] State ex rel. v. Ackerman, 51 Ohio St. 163, 194, 24 L. R. A. 298, 37 N. E. 828, per Williams, J., quoting also from Spelling on Extraordinary Relief, §§ 1807, 1808.

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whether it be obtained by a special charter or under a general incorporation law, is a franchise granted by the State to such, and such only, as she deems fit to be intrusted with its exercise." [31]

§ 14. Common Carriers—Railroads—Street Railroads.—Although the business of a common carrier is not of itself a franchise, but is general and has its foundation in the common law, needing in itself no legislative authority,[32] still a grant to a corporation of a right to lay out, construct and operate a railroad, is a franchise.[33] So a grant by a municipal corporation to a railway company of a right of way through certain streets of the municipality, with the right to construct its railroads thereon and occupy them for its use, constitutes a franchise.[34] It is also said that "the right of a railroad company to be, and to build a road is a franchise;" [35] it is a grant to the corporation of the capacity to exercise a portion of the powers of sovereignty for the purpose of making a pecuniary profit to itself.[36] So the

[31] State v. Travellers' Ins. Co., 70 Conn. 590, 600, 40 Atl. 465, 66 Am. St. Rep. 138, per Baldwin, J. (Taxation).

[32] McGregor v. Erie Ry. Co., 35 N. J. L. 89, 96, per Bedle, J.

[33] People's Railroad v. Memphis Railroad, 10 Wall. (77 U. S.) 38, 51, 19 L. ed. 844, per Clifford, J. [citing Beekman v. Saratoga & Schenectady Rd. Co., 3 Paige Ch. (N. Y.) 45; Willoughby v. Horridge, 16 Eng. L. & Eq. 437, 3 Kent's Comm. (11th ed.) 590]; Driscoll v. Norwich & Worcester Rd. Co., 65 Conn. 230, 254, 32 Atl. 354, per Andrews, C. J.; Milhau v. Sharp, 27 N. Y. 611, 619, per Selden, J.

See the following cases: Kennebec & Portland Rd. Co. v. Portland & Kennebec Rd. Co., 59 Me. 9, 66, dissenting opinion of Tapley, J.; New York, Lackawanna & Western Ry. Co. v. Roll, 66 N. Y. Supp. 748, 749, 750, 32 Misc. 321; Miller v. Rutland & Washington Rd. Co., 36 Vt. 452, 494, per Barrett, J., quoting from Bank of Middlebury v. Edgerton, 30 Vt. 190, per Bennett, J.; Camblos v. Philadelphia & Reading Rd. Co., 4 Brewster (Pa.), 563, 596, 597, per Cadwalader, Dist. J.; Thorpe v. Rutland & Burlington Rd. Co., 27 Vt. 140, 62 Am. Dec. 625; State v. Boston, Concord & Montreal Rd. Co., 25 Vt. 433, 442, per Redfield, Ch. J.

[34] New Orleans, Spanish Fort & Lake Rd. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244. See §§ 47, 48, herein.

[35] Consolidated Gas Co. v. Baltimore City, 101 Md. 541, 545–548, 61 Atl. 532, per McSherry, C. J.

[36] Driscoll v. Norwich & Worcester Rd. Co., 65 Conn. 230, 254, 32 Atl. 354, per Andrews, C. J.

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right to build in and upon a public road or river is a franchise. In this respect the owners of wharves and railroads stand upon the same plane and have similar rights.[37] Again, it is said that the right to carry passengers on a railway is a franchise requiring a specific grant from the legislature and that the right to run a railroad "is as much a part of the franchise as the right to build it." [38] It is declared, however, that the right to build, own, manage and run a railroad, or take the tolls thereon, is not, of necessity, of a corporate character, or dependent upon corporate rights, as it may belong to and be enjoyed by natural persons.[39] The right to construct and operate a street railway is also a franchise granted by the State upon considerations of public policy.[40] So in a New York case it is said that: "The right to construct and operate a street railway is a franchise which must have its source in the sovereign power, and the legislative power over the subject has this limitation, that the franchise must be granted for public and not for private purposes, or at least the grant must be based upon public considerations." [41] So a grant of a privilege by a city ordinance to a railroad company, of the use of certain streets, is a franchise.[42] And a grant of powers,

[37] Pennsylvania Rd. Co. v. Philadelphia Belt Line Rd. Co., 10 Pa. Co. Ct. Rep. 625, 629.

[38] McGregor v. Erie Ry. Co., 35 N. J. L. 89, 97, per Bedle, J.

[39] Miller v. Rutland & Washington Rd. Co., 36 Vt. 452, 494, per Barrett, J. (citing Bank of Middlebury v. Edgerton, 30 Vt. 182, 190); Joy v. Jackson & Michigan Plank Road Co., 11 Mich. 155, 164, 165, per Christiancy, J.

[40] Thompson v. Schenectady Ry. Co., 131 Fed. 577, 579, per Wallace, Cir. J. See §§ 47, 48, herein.

[41] Paige v. Schenectady Ry. Co. (Thompson v. Same), 178 N. Y. 102, 115, 70 N. E. 213, per Martin, J., case reverses 82 N. Y. Supp. 192, 84 App. Div. 91. Substantially same quotation in Hatfield v. Strauss, 189 N. Y. 208, 224, 226 (per Bartlett, J.) (dissenting opinion per Chase, J.), 82 N. E. 172; case affirms 102 N. Y. Supp. 934, 117 App. Div. 671.

The right to construct and operate a street railway in a city and to take tolls from persons traveling on the same is a franchise. Denver & S. Ry. Co. v. Denver City Ry. Co., 2 Colo. 673. See State v. Columbus Ry. Co., 24 Ohio Cir. Ct. 609, as to rights and franchise prior to act of May 14, 1878, 75 Ohio Laws, 359.

[42] Port of Mobile v. Louisville & Nashville Rd. Co., 84 Ala. 115, 4 So. 106 (the original charter here granted the right to use any street or highway and the amended charter authorized grants by cities, etc., of rights, privi-

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privileges and immunities conferred by a resolution of a municipality, to run a street railroad in the city, is the grant of a franchise which is void if made without the proper legislative authority.[43] But the right of a city railway company to use certain streets acquired by contract with the city and giving an exclusive right, constitutes no part of the franchise of the company and is not of itself a franchise, although it is in the nature of property and an incorporeal right.[44] In a Wisconsin case the court, in discussing the question of the proper remedy, under a statute, for usurping or unlawfully holding or exercising, etc., "any franchise," says that a street railway franchise is of the same nature as that of a franchise to operate a system of public waterworks in the streets of a city, and while not a corporate franchise necessary to corporate existence, it is still a franchise or "special privilege, within the statute, granted by sovereign authority and the State may always inquire into the title by which it is held, and render judgment of ouster if the party assuming to exercise it has not title thereto." [45]

§ 15. **Bridges—Roadways—Ferries—Canals.**—The right to construct and maintain a public bridge is a franchise.[46] So

leges and franchises within city limits).

[43] State v. Mayor, etc., of New York, 3 Duer (N. Y.), 119.

The right or privilege of constructing and operating railroads in the streets is called a "franchise" for convenience. Adee v. Nassau Electric Rd. Co., 72 N. Y. Supp. 992, 1000, 65 App. Div. 529, per Woodward, J., case aff'd (Mem.) 177 N. Y. 548, 69 N. E. 1120.

Railway in park. The commissioners of Fairmount Park in the city of Philadelphia have the power to grant to an individual or a foreign corporation the franchise or power to construct a passenger railway in Fairmount Park, and such franchise may be exercised without the consent of the city councils. Philadelphia, City of, v. McManes, 175 Pa. 28, 34 Atl. 331.

As to franchise to construct connecting switch from a street railway track to a warehouse, under ordinance, granting "permission to connect," see Dulaney v. United Rys. & Electric Co., 104 Md. 423, 65 Atl. 45.

[44] Metropolitan City Ry. Co. v. Chicago West. Division Ry. Co., 87 Ill. 317, 322.

[45] State ex rel. Vilter Mfg. Co. v. Milwaukee, Burlington & Lake Geneva Rd. Co., 116 Wis. 142, 92 N. W. 546, per Winslow, J.

[46] County Commissioners v. Chandler, 96 U. S. 205, 209, 24 L. ed. 625,

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it is said in a case in the Federal Supreme Court, that: "The corporation had conferred on it a public right of partially obstructing the river, which is a common highway, and which obstruction would have been a nuisance if done without public authority. This special privilege, conferred on the corporation by the sovereign power, of obstructing the navigation, did not belong to the country generally by common right and is therefore a franchise." [47] And the rule would apply to the right of a riparian proprietor to make a roadway, which includes a right of way, and to erect a bridge which is to be a drawbridge.[48] Bridges are of the same nature as

per Bradley, J.; Davis v. Mayor of New York, 14 N. Y. 506, 523, 67 Am. Dec. 186, per Denio, C. J. See Norris v. Farmers' & Teamsters' Co., 6 Cal. 590, 595, 65 Am. Dec. 535; Tuckahoe Canal Co. v. Tuckahoe Rd. Co., 11 Leigh (Va.), 42, 75, per Tucker, P.

The consideration for building the bridge for the political corporation was the franchise granted to the building corporation. Police Jury v. Bridge Co., 44 La. Ann. 137, 138, 10 So. 617.

As to bridge as a structure not being a franchise see Smith v. Mayor, etc., of New York, 68 N. Y. 552, 555, per Earl, J.; opinion given in § 34, herein, as to distinctions.

Public bridge defined and as part of road or highway see:

Alabama: State v. Street, 117 Ala. 203, 208, 23 So. 807, per Brickell, C. J. (defined and declared part of road or highway).

Montana: Cascade County v. City of Great Falls, 18 Mont. 537, 540, 46 Pac. 437 (is part of highway).

Nebraska: Union Pacific Rd. Co. v. Commissioners of Colfax County, 4 Neb. 450, 456, per Maxwell, J. (defined as part of common highway and considered as an internal improvement); People, Commissioners of, v. Buffalo County, 4 Neb. 150, 158, per Maxwell, J. (is part of a road).

Oregon: Bank of Idaho v. Malheur County, 30 Oreg. 420, 423, 45 Pac. 781, 35 L. R. A., 141 per Moore, J. (is part of highway; a case of mechanic's lien on public property).

Pennsylvania: Westfield Borough v. Tioga County, 150 Pa. 152, 153, 24 Atl. 700, per Mitchell, P. J. (defined as part of public highway); Commonwealth ex rel. Freeman v. Westfield Borough, 11 Pa. Co. Ct. R. 369, 372, per Mitchell, C. J. (defined; is part of public highway).

England: Rex v. Inhabitants of Bucks County, 12 East, 192, 203, 204, per Lord Ellenborough, C. J. (defined; is part of public highway); Rex v. Inhabitants of Yorkshire, 2 East, 342, 349, per Lord Ellenborough, C. J.

That "bridge" does not include approaches under statute relating to liabilities of cities and counties for construction and repairs, see Central City v. Morquis (Neb., 1905), 106 N. W. 221, under Cobbey's Ann. Stat., 1903, § 8756.

[47] Covington Drawbridge Co. v. Shepherd, 21 How. (62 U. S.) 112, 123, 16 L. ed. 38, per Catron, J.

[48] Trustees of Southampton v.

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ferries; a bridge franchise differs in no essential from a ferry franchise except in the mode or manner of transportation; both are for the same purpose, that is, to transfer men, cattle and vehicles across a stream for tolls.[49] So a right to establish and maintain a public ferry is a franchise,[50] and it is said

Jessup, 162 N. Y. 122, 56 N. E. 538, rev'g 42 N. Y. Supp. 4, 10 App. Div. 456 (a case as to construction and material of which roadway should be built. See this case under § 48, herein). See County Commissioners v. Chandler, 96 U. S. 205, 209, 24 L. ed. 625, per Bradley, J.; Davis v. Mayor of New York, 14 N. Y. 506, 523, 69 Am. Dec. 186, per Denio, C. J.

[49] Hunter v. Moore, 44 Ark. 184, 188, 51 Am. Rep. 589, per Eakin, J.; Gilman v. Philadelphia, 3 Wall. (70 U. S.) 713, 726, 18 L. ed. 96, per Swayne, J.

"It is a franchise to be empowered to build a bridge or to keep a ferry over a public stream, with a right to demand tolls or ferriage." Consolidated Gas Co. v. Baltimore City, 101 Md. 541, 545–548, 61 Atl. 532, per McSherry, C. J.

[50] See the following cases:

United States: County Commissioners v. Chandler, 96 U. S. 205, 209, 24 L. ed. 625, per Bradley, J.; People's Railroad v. Memphis Railroad, 10 Wall. (77 U. S.) 38, 51, 19 L. ed. 844, per Clifford, J.

Alabama: Tuscaloosa County v. Foster, 132 Ala. 392, 399, 31 So. 587; see Dyer v. Tuscaloosa Bridge Co., 2 Port. (Ala.) 296, 303, 304, 27 Am. Dec. 655, per Hitchcock, J.

Arkansas: Bell v. Clegg, 25 Ark. 26, 28, per Compton, J.

California: Norris v. Farmers' & Teamsters' Co., 6 Cal. 590, 595, 65 Am. Dec. 535.

Massachusetts: Fay, Petitioner, 15 Pick. (32 Mass.) 243, 249, per Shaw, C. J.; see Attorney General v. Boston, 123 Mass. 478.

Minnesota: McRoberts v. Washburne, 10 Minn. 23.

New York: Milhau v. Sharp, 27 N. Y. 611, 619, 84 Am. Dec. 314; Davis v. Mayor of New York, 14 N. Y. 506, 523, 67 Am. Dec. 186, per Denio, C. J.

North Dakota: Patterson v. Wollman, 5 N. Dak. 608, 617, 33 L. R. A. 536, 67 N. W. 1040, per Corliss, J.

Oregon: Montgomery v. Multnomah Ry. Co., 11 Oreg. 344, 347, 348, 3 Pac. 435 (quoting from Attorney General v. Boston, 123 Mass. 478).

South Dakota: Evans v. Hughes County, 3 S. Dak. 580, 581, 582, 54 N. W. 603, per Corson, J.

England: Blissett v. Hart, Willes, 508.

The right to establish and maintain a public ferry is a franchise. Hudspeth v. Hall, 111 Ga. 510, 36 S. E. 770.

"The right to establish and keep a public ferry is a franchise * * * 'a ferry is *publici juris*. It is a franchise which no one can erect without a license from the Crown.' * * * The franchise in England is in the Crown, and in this country in the State." Douglass's Appeal, 118 Pa. 65, 68–70, 12 Atl. 834, per Master's Report.

"The right to establish and keep a public ferry is, in law, termed a franchise * * * and it is perfectly clear that the franchise of a public ferry cannot be set up or exercised by any of the king's subjects without

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in a case in the United States Circuit Court that, "for all time the setting up of a highway or ferry for conveying persons and property has been deemed, in the common law a franchise, a part of the subjects in the immediate possession of the political power, and, to exercise which, demanded a release of this right by the sovereign by special grant or charter. It is not in its nature, or actual history, like those private avocations of milling, hotel keeping and traffic, which all may pursue at pleasure unless, in the exercise of police power, a restraining statute interferes and requires a license." [51] But it is declared that a ferry franchise is neither more or less than a right conferred to land at a particular point, and receive toll for the transportation of passengers and property from that point across a stream.[52] No franchise is required, how-

prescription, grant or license from the Crown. Thus says Chief Justice Willes (Willes' Rep. 512; Blissett v. Hart, note), 'a ferry is *publici juris*. It is a franchise which no one can erect without a license from the Crown.'" Prosser v. Wapello County, 18 Iowa, 327, 333, per Dillon, J.

"*A public ferry is a franchise, and consists not merely* in the building of the ferry and the furnishing of the boats, but in the running of them. The right of the public to use them is common, but the running of the ferry is a part of the franchise." McGregor v. Erie Ry. Co., 35 N. J. L. 89, 98, per Bedle, J.

"The right to establish a ferry was a franchise, and no man could set up a ferry, although he owned the soil and landing-places on both sides of the stream, without a charter from the king or a prescription time out of mind." People v. Budd, 117 N. Y. 1, 17, 18, 26 N. Y. St. R. 533, 22 N. E. 670, 682, per Andrews, J.

In an early case in Alabama it is held that under the statutes of that State, from the year 1820, the right to keep a public ferry for toll had been a franchise requiring a legislative grant. Milton v. Haden, 32 Ala. 30, 70 Am. Dec. 523.

Under the laws of Kentucky a ferry franchise on the Ohio river was held grantable to a citizen who was a riparian owner on the Kentucky side. Conway v. Taylor's Executor, 1 Black. (66 U. S.) 603, 17 L. ed. 191.

[51] Talcott v. Township of Pine Grove, 1 Flipp (U. S. C. C.), 120, 142, Fed. Cas. No. 13,733, per Emmons, Cir. J. [case aff'd Township of Pine Grove v. Talcott, 19 Wall. (86 U. S.) 666, 22 L. ed. 227].

[52] Mills v. County of St. Clair, 7 Ill. 197.

"A ferry, in its ordinary sense, is but a substitute for a bridge where a bridge is impracticable, and its end and use is the same. Like a toll-bridge, it is a franchise created for the use and convenience of the traveling public, as a link in the highway system of the country, and by no means includes the transportation of goods, wares, and merchandise by them-

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ever, to lawfully establish and maintain a private ferry as incident to ownership of lands on each side of the stream, and

selves, or, in other words, the carrying trade of modern commerce. Ferriage, literally speaking, is the price or fare fixed by law for the transportation of the traveling public, with such goods and chattels as they may have with them, across a river, bay, or lake." People v. San Francisco & Alameda Rd. Co., 35 Cal. 606, 619, per Sanderson, J.

"A ferry franchise is a privilege to take tolls for transporting men, horses, cattle and vehicles, with or without them loading, across a lake or stream, or some other body of water." Hunter v. Moore, 44 Ark. 184, 188, 51 Am. Rep. 589, per Eakin, J.

"A ferry franchise is neither more nor less than a right conferred to land at a particular point, and secure toll for the transportation of passengers and property from that point across a stream." Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508, 513, per Craig, C. J., quoting Mills v. County of St. Clair, 2 Gilm. (Ill.) 197.

A ferry "is a franchise granted by the State and regulated by statute. It may be defined to be a right to transport persons and property across a watercourse and land within the jurisdiction granting the franchise and receive tolls and pay therefor." Einstman v. Black, 14 Ill. App. 381, 383, 384, per Higbee, J. (also citing Bouvier's L. Dict.).

"The definition of a ferry in the early books is 'a liberty by prescription, or the King's grant, to have a boat for passage upon a great stream for carriage of horses and men for reasonable toll.' Termes de la Ley (1st Am. ed.), 223; Jacobs' Law Dict., 'Ferry.' And according to all authorities, English and American, the grant of a ferry, in its very nature, implies the taking of tolls by the grantee." Attorney General v. Boston, 123 Mass. 460, 468, per Gray, C. J.

"A ferry, when considered as a franchise, consists in the right, arising from grant or prescription, to have a boat or boats for carrying men and horses across a river for reasonable fare or toll (Burrill's Law Dict., 'Ferry'). Bouvier defines a ferry to be a place where persons and things are taken across a river or stream in boats or other vessels for hire. The franchise consists in the right to exact toll, and this right involves the corresponding obligation of maintaining the ferry and carrying such persons as apply and pay their fare." Akin (Aiken) v. Western Rd. Corp., 30 Barb. (N. Y.) 305, 310, per Harris, J. See also Alexandria, Warsaw & Keokuk Ferry Co. v. Wisch, 73 Mo. 655, 657, 39 Am. Rep. 535, per Norton, J.

The essential element of a ferry franchise, is the exclusive right to transport persons, with the horses and vehicles and such personal goods as accompany them from one shore to the other. Broadnax v. Baker, 94 N. Car. 675, 55 Am. Rep. 633.

"*A ferry is not a railroad, nor a railroad a ferry. Both franchises, i. e.,* the right to construct a railroad and to erect a ferry, may be granted to one corporation, where the grant conflicts with no other rights. But * * * the two things are in their nature distinct, and cannot be merged." Aiken (Akin) v. Western Rd. Corp., 20 N. Y. 370, 376, per Selden, J.

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the owner of such a ferry may charge and collect toll for its use, but he cannot maintain the ferry for use of the public at large or seek public patronage and maintain its character as a private ferry.[53] Again, the right to improve navigation by a canal is a franchise.[54]

§ 16. **Right to Supply Water, Gas or Electricity.**—The right to dig up the streets of a city or town and to supply water to the inhabitants is a franchise.[55] So the right of a waterworks company to exist as a corporation and to collect water rates for the use of water supplied to a city and its inhabitants are franchises.[56] And a grant made by the com-

"That the franchise of a ferry at common law, and in the State of Massachusetts *extends beyond the landing places*, is very clear from authority." Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 555, 9 L. ed. 773, per M'Lean, J., citing 10 Petersdorf, 53, 13 Vin. 513; Blissett v. Hart, Willes' Rep. 512, note; King v. Nicholson, 12 East, 330; Peter v. Kendal, 6 Barn. & Cress. 703; Year Book, Hen. 6, 22; Rolles' Ab. 140; Fitz., 428, note; Com. Dig., Market, c. 2; Piscary, B. Action on the case, A; 3 Blk. 219; Nott & M'Cord, 387; Yard v. Ford, 2 Saund. 172; 6 Mod. 229; 2 Vent. 344; 3 Levinz, 220; Com. Dig., Patent, F., 4, 5, 6, 7; 2 Saund. 72, note 4; 2 Inst. 406; Chit. Pre., 12 Chap. 3; 10 Chap. 2; 3 Salk. 198; Tripp v. Frank, 4 Term. 666; Saund. 114; Croke, E. 710.

[53] Hudspeth v. Hall, 111 Ga. 510, 36 S. E. 770.

[54] See Tuckahoe Canal Co. v. Tuckahoe Rd. Co., 11 Leigh (Va.), 42, 75, per Tucker, P.

"The right to improve and extend the navigation of the river, was a franchise granted; the manner of doing it a mode of exercising that franchise." Canal v. Railroad Co., 4 Gill & J. (Md.) 1, 107, per Buchanan, Ch. J.

[55] New Orleans Water Works Co. v. Rivers, 115 U. S. 674, 681, 29 L. ed. 525, 6 Sup. Ct. 273, case controlled by New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252. Principal case is cited in Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 9, 43 L. ed. 341, 19 Sup. Ct. 77; cited, Tillamook Water Co. v. Tillamook City, 139 Fed. 405, 406; cited, Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 Fed. 232, 235; aff'd in St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. 405. See New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; Andrews v. National Foundry & Pipe Works, Lim., 61 Fed. 782, 787–789, 10 C. C. A. 60, per Woods, Cir. J., s. c., 73 Fed. 516, 19 C. C. A. 548, 77 Fed. 774, 23 C. C. A. 454, 113 Fed. 793, 794, 183 U. S. 216, 225. Examine §§ 47, 48, herein.

[56] Spring Valley Water Works v. Schottler, 62 Cal. 69 (under constitution of State),

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mon council of a city, by authority of its charter, to construct, maintain and operate a system of waterworks in such city and to use the streets and alleys thereof for that purpose, is a legislative grant through the medium of an authorized legislative agency, and is a franchise.[57] So an ordinance granting to a corporation an exclusive right to supply a city with water is a franchise.[58] And under a statute providing for taxation the franchise primarily in view "is any special or exclusive privilege not allowed by law to natural persons." [59] It is also held that a private corporation is a "person" within the meaning of a statute providing a remedy for usurping or unlawfully holding or exercising, etc., "any franchise," and that a franchise to operate a system of public waterworks in a city, using the streets for that purpose, while not a corporate franchise in the sense that it is necessary to corporate existence, is still a franchise within the meaning of the enactment and may be annulled for cause by quo warranto proceedings.[60] Again, the right to dig up and to place pipes and mains in the public streets and ways of a city for the distribution of gas for public and private use is also a franchise.[61] So a legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the State,

[57] State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

[58] Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081. The question whether a grant by a municipality is a franchise or license is considered elsewhere herein.

[59] Board of Councilmen of City of Frankfort v. Stone, Auditor, 108 Ky. 400, 406, 22 Ky. L. Rep. 25, 56 S. W. 679, per Hobson, J. (a case of taxation of franchise of water company. See above case where the grant to a water company is considered throughout the opinion as a franchise).

[60] State ex rel. Attorney General v. Portage City W. Co., 107 Wis. 441, 83 N. W. 697, cited in State ex rel. Vilter Mfg. Co. v. Milwaukee, Burlington & Lake Geneva Rd. Co., 116 Wis. 142, 92 N. W. 546, per Winslow, J.

[61] Consolidated Gas Co. v. Baltimore City, 101 Md. 541, 545–548, 61 Atl. 532, per McSherry, C. J. (citing State v. Cinn. Gas Co., 18 Ohio St. 262; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; Purnell v. McLane, 98 Md. 589, 593, 56 Atl. 830, per Pearce, J., citing New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 659, 6 Sup. Ct. 252, 29 L. ed. 516.

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in consideration of the performance of a public service, and, after performance, by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it.[62] And a consent by town authorities, acting under a statute, giving a gas company power to lay conductors for conducting gas in and through the public streets and highways of a town, confers upon the company a franchise to carry on its business in the town and to lay conductors in the streets and highways for the purpose of delivering gas.[63] While the right to produce and sell electricity as a commercial product is open to all persons without legislative authority, still the right to use the streets of a city for the purpose of transmitting electricity with wires is not common to all citizens, but is a franchise which can only be granted by the State or a municipality acting under legislative authority.[64]

[62] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252 (cited, Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 9, 43 L. ed. 341, 19 Sup. Ct. 77; cited, Tillamook Water Co. v. Tillamook City, 139 Fed. 405, 406; cited Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 Fed. 232, 235). It is said in the principal case that: "The right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the State, or by the municipal government of that city acting under legislative authority. Dillon's Munic. Corp. (3d ed.) § 691; State v. Cincinnati Gas Co., 18 Ohio St. 262; see also Boston v. Richardson, 13 Allen (Mass.), 146. To the same effect is the decision of the Supreme Court of Louisiana in Crescent City Gas-Light Co., 27 La. Ann. 138, 147, in which it was said: 'The right to operate gas-works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets, and lay down gas pipes, erect lamp-posts, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the State, and, in the exercise of the police power, the State could carry on the business itself or select one of several agents to do so.' " New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 659, 660, 29 L. ed. 516, 6 Sup. Ct. 252. See State ex rel. Attorney General v. Seattle Gas & Electric Co., 28 Wash. 488, 68 Pac. 496; Bul. Code, § 5780, subd. 1, construed.

[63] People ex rel. Woodhaven Gas Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787, rev'g 11 App. Div. 175. See Ghee v. Northern Union Gas Co., 56 N. Y. Supp 450, 454, 34 App. Div. 551, per O'Brien, J ; rev'd 158 N. Y. 510, 53 N. E. 592.

[64] Purnell v. McLane, 98 Md. 589,

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But a city ordinance does not create a franchise, which can be taxed, by giving the right to the use of the city streets to a telegraph company for its poles and wires, where it has a franchise, under the Post Roads Act, to construct its lines along the post roads of the United States, and the state statutes also give authority to construct such lines upon any public road or highway and declare streets, alleys and roads laid out and dedicated to the public to be public highways, and a Federal statute provides that all public highways are post roads.[65]

§ 17. **Right to Tolls, Fares, Rates or Wharfage.**—The right to receive tolls for the use of roadways, turnpike roads, bridges and ferries is a franchise.[66] So a turnpike company which con-

56 Atl. 83. See Joyce on Electric Law (2d ed.), §§ 184*a*, 349, 430*a*.

"The right to manufacture and supply gas is not a special privilege which can only be exercised under authority from the sovereign. There is nothing in the law to prevent an individual from manufacturing and selling gas as a private manufacturing business." West Manayunk Gas Light Co. v. New Gas Light Co., 21 Pa. Co. Ct. Rep. 378.

[65] Western Union Teleg. Co. v. City of Visalia, 149 Cal. 744, 87 Pac. 1023.

As to Post Roads Acts and telegraph companies' rights thereunder, see Joyce on Electric Law (2d ed.), §§ 39 *et seq.*

Electricity—"Manufacturing" corporations, see Joyce on Electric Law (2d ed.), §§ 169, 932, 933.

[66] Truckee & Tahoe Turnpike Road Co. v. Campbell, 44 Cal. 89; McRoberts v. Washburne, 10 Minn. 23. See Virginia Cañon Toll Road Co. v. People, 22 Colo. 429, 432, 45 Pac. 398, 37 L. R. A. 711, per Campbell, J.; State v. Boston, Concord & Montreal Rd. Co., 25 Vt. 433, 442, per Redfield, Ch. J.

"The privilege of making a road or bridge, or of establishing a ferry, and of taking tolls from the citizens for the use of the same, are among the most common examples of a franchise [3 Kent's Comm., 458; 2 Black. Comm., 37; Charles River v. The Warren Bridge, 11 Pet. (36 U. S.) 420, 639, 9 L. ed. 773, per Story, J.]. Chancellor Walworth, in Beekman v. The Saratoga and Schenectady Railroad Company [3 Paige (N. Y.), 75], said: 'The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf, and taking tolls for the use of the same.'" Davis v. The Mayor of New York, 14 N. Y. 506, 523, 67 Am. Dec. 186, per Denio, C. J.

"Chancellor Kent says: 'The privilege of making a road or establishing a ferry, and taking tolls for the use of the same, is a franchise, and the public have an interest in the same; and the owners of the franchises are answerable in damages if they should

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structs a road has the franchise to collect the tolls authorized by law.[67] And it has been decided in Georgia that the right

refuse to transport an individual without any reasonable excuse, upon being paid or tendered the usual fare.' In the same connection, he enumerates in this class of franchises, ferries, bridges, turnpikes, and railroads. 3 Kent's Comm., 458, 459." County Commissioners v. Chandler, 96 U. S. 205, 209, 24 L. ed. 625, per Bradley, J.; People's Railroad v. Memphis Railroad, 10 Wall. (77 U. S.) 38, 51, 19 L. ed. 844, per Clifford, J.

"*No private person can establish* a public highway, or a public ferry or railroad or charge tolls for the use of the same without authority from the legislature, direct or derived. These are franchises." Central Pacific Rd. Co. v. California, 162 U. S. 91, 124, 40 L. ed. 903, 16 Sup. Ct. 766, per Fuller, C. J., quoting from California v. Central Pac. Rd., 127 U. S. 1, 38, 40, 32 L. ed. 150, 8 Sup. Ct. 1073.

The right to take tolls is apparently conceded to be a franchise in Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. 622; Detroit v. Detroit & Howell Plank Road Co., 43 Mich. 140, 5 N. W. 275; Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 405, 24 Am. Rep. 585.

To build a mill upon a public river and receive tolls for grinding, etc., is said to be a franchise. Tuckahoe Canal Co. v. Tuckahoe Rd. Co., 11 Leigh (Va.), 42, 75, per Tucker, P.

"The right of a corporation, or of an individual, to exact tolls is not of common right, and in this country, does not exist in the absence of a grant from the legislatures. This power of collecting tolls is a part of the sovereign power of the state, which the legislature may delegate in return for a supposed public good, and the grant of the power may be conferred with any restrictions which the legislature may see fit to impose, and the grantee takes subject to all such limitations, and the grant of the right is the equivalent of, or compensation for, the cost of building and maintaining the road. 2 Waterman on Corporations, sec. 419; Angell & Ames on Corps., sec. 4; Commonwealth v. Wilkinson, 16 Pick. 175; Wood et al. v. Truckee Turnpike Co., 24 Cal. 474; Craig v. The People, 47 Ill. 487." The Virginia Cañon Toll Road Co. v. People, 22 Colo. 424, 431, 45 Pac. 398, 37 L. R. A. 711, per Campbell, J.

"*Toll*" *defined and distinguished:* see the following cases:

United States: New York, Lake Erie & Western Rd. Co. v. Pennsylvania, 158 U. S. 431, 435, 15 Sup. Ct. 896, 39 L. ed. 1043, per Shiras, J.; St. Louis v. Western Union Teleg. Co., 148 U. S. 92, 97, 13 Sup. Ct. 485, 37 L. ed. 380, per Brewer, J. (toll and tax distinguished; a case of municipal charge for use of streets by telegraph company); Sands v. Manistee River Imp. Co., 123 U. S. 288, 294, 31 L. ed. 149, 8 Sup. Ct. 113, per Field, J. (toll defined and distinguished from taxes); Huse v. Glover, 119 U. S. 543, 548,

[67] Derry Township Road, 30 Pa. Super. Ct. 538.

Examine Coe v. Columbus, Piqua & Indiana Rd. Co., 10 Ohio St. 372.

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to receive tolls for the transportation of travelers and others across a river on a public highway is a franchise which belongs

7 Sup. Ct. 313, 30 L. ed. 487, per Field, J. (tolls for passage through locks are not impost on navigation, and tolls are like charges for wharves and docks); Lake Superior & Mississippi Rd. Co. v. United States, 93 U. S. 442, 454, 23 L. ed. 965, per Bradley, J. (toll and freight compared. See also *Id.*, 458, in dissenting opinion of justices); Reading Rd. Co. v. Pennsylvania (case of the state freight tax), 15 Wall. (82 U. S.) 232, 278, 21 L. ed. 14, per Strong, J. (tolls and freights defined; toll distinguished from tax); Kentucky & Indiana Bridge Co. v. Louisville & Nashville Rd. Co., 37 Fed. 567, 616, 2 L. R. A. 289, per Jackson, J.; Lake Superior & Mississippi Rd. Co. v. United States, 12 Ct. Cl. 35, 54, per Bradley, J. (toll and freight compared).

Maine: Wadsworth v. Smith, 11 Me. 278, 282, 26 Am. Dec. 525, per Paris, J. (toll is a common charge which it is the prerogative of the government alone to impose and regulate).

Michigan: McKee v. Grand Rapids & Reeds Lake St. Ry. Co., 41 Mich. 274, 279, 1 N. W. 873.

Missouri: St. Louis Brewing Assoc. v. City of St. Louis, 140 Mo. 419, 429, 37 S. W. 525, per Macfarlane, J. (charges and rates allowed to be made by a city for water are not in the nature of general taxation but in that of a toll); St. Louis, City of, v. Green, 7 Mo. App. 468, 476, per Bakewell.

New York: Pennsylvania Coal Co. v. Delaware & Hudson Canal Co., 3 Abb. Dec. (N. Y. Ct. App.) 470, 477, per Emott, J.

North Carolina: McNeal Pipe & Foundry Co. v. Howland, 111 N. C. 615, 624, 16 S. E. 857, 20 L. R. A. 743, per MacRae, J. (toll, fare and water rate defined).

Pennsylvania: Geiger v. Perkiomen & Reading Turnpike Road, 167 Pa. 582, 585, 31 Atl. 918, 28 L. R. A. 458, per Dean, J.; Commonwealth v. New York, Lake Erie & Western Rd. Co., 145 Pa. 200, 22 Atl. 212; Pennsylvania Rd. Co. v. Sly, 68 Pa. 205, 210, per Sharswood, J.; Boyle v. Philadelphia & Reading Rd. Co., 54 Pa. 310, 314,

England: South Yorkshire Ry. & River Dun Co. v. Great Northern Ry. Co., 22 Eng. L. & Eq. 531, 535, 22 L. J. Rep. (N. S.) Exch. 305, per Martin, B.

380, 75 Am. Dec. 518, per Gholson, J.

"A toll road is a public highway, differing from ordinary public highways chiefly in this, that the cost of its construction in the first instance is borne by individuals, or by a corporation, having authority from the State to build it, and further in the right of the public to use the road after its completion, subject only to the payment of toll. The acceptance by the corporation of the franchise to construct the road and the operation thereof constitute a dedication of the same as a public highway." The Virginia Cañon Toll Road Co. v. People, 22 Colo. 429, 431, 45 Pac. 398, 37 L. R. A. 711, per Campbell, J.

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to the people collectively.[68] This right to tolls also includes a bridge [69] and a ferry.[70] And this franchise or right to tolls or fares applies to railroads.[71] A distinction is said to exist,

[68] Wright v. Nagle, 101 U. S. 791, 794, 25 L. ed. 921, per Waite, C. J., citing, Young v. Harrison, 6 Ga. 130.

[69] "The authority of taking tolls from those who crossed the river on the bridge was also a franchise, a freedom to do that which could not lawfully be done without public authority." Covington Drawbridge Co. v. Shepherd, 21 How. (62 U. S.) 112, 123, 16 L. ed. 38, per Catron, J.

When bridge company cannot demand tolls for automobile, see Mallory v. Saratoga Lake Bridge Co., 104 N. Y. Supp. 1025, 53 Misc. 446.

[70] The right to set up a ferry or a road, and the taking of tolls is "a franchise," or the "right of taking toll for a bridge, way or wharf." Talcott v. Township of Pine Grove, 1 Flipp. (U. S. C. C.) 120, 142, Fed. Cas. No. 13,735, per Emmons, Cir. J.

Keeping a ferry over a public stream with the right to demand tolls and ferriage is a franchise. Tuckahoe Canal Co. v. Tuckahoe Rd. Co., 11 Leigh (Va.), 42, 75, per Tucker, P.

The right to maintain and operate a ferry and to collect tolls for transporting persons and property, is a franchise. Evans v. Hughes County, 3 S. Dak. 580, 581, 54 N. W. 603.

"The privilege of establishing a ferry and taking tolls for the use of the same, is a franchise." Rohn v. Harris, 130 Ill. 525, 530, 22 N. E. 587, per Craig, J.

The primary object of our statute conferring jurisdiction upon county courts to license ferries, is to secure the public accommodation; the right to take tolls is conferred as an equivalent for the obligation to accommodate the traveling public. Although the right to take tolls is *privati juris* and incident to the franchise, a ferry is *privati juris* and cannot be created without a license. Hackett v. Wilson, 12 Oreg. 25, 6 Pac. 652.

Right to take tolls is incident to ferry franchise. Montgomery v. Multnomah Ry. Co., 11 Oreg. 344, 347, 348, 3 Pac. 435, quoting from Attorney Genl. v. Boston, 123 Mass. 478.

[71] " 'The privilege of making a road, or establishing a ferry, and taking tolls for the use of the same, is a franchise.' Railroads certainly do not form an exception." Milhan v. Sharp, 27 N. Y. 611, 619, 84 Am. Dec. 314, per Selden, J., quoting 3 Kent's Comm. 458, citing Beekman v. Saratoga & Schenectady Rd. Co., 3 Paige Ch. (N. Y.) 45. See also Chesapeake & Ohio Ry. Co. v. Miller, 114 U. S. 176, 185, 29 L. ed. 121, 5 Sup. Ct. 813; East Tennessee, Virginia & Georgia Rd. Co. v. County of Hamblen, 102 U. S. 273, 275, 26 L. ed. 152; Morgan v. State of Louisiana, 93 U. S. 217, 23 L. ed. 860; State v. Maine Central Rd. Co., 66 Me. 488, 512, per Appleton, C. J.; Baltimore, Chesapeake & Atlantic Ry. Co. v. Mayor, etc., of Ocean City, 89 Md. 89, 98, 42 Atl. 922; Shamokin Valley Rd. Co. v. Livermore, 47 Pa. 465, 468, per Agnew, J.

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however, between tolls for the use of a turnpike and the compensation charged by railroads for transportation.[72] But rates chargeable for the use by others of a railroad track as a public highway are of themselves alone in a strictly proper sense called tolls, and a railroad company which is also a

Privilege of making railroad and taking tolls thereon is a franchise. See Beekman v. Saratoga & Schenectady Rd. Co., 3 Paige Ch. (N. Y.) 45.

The essential franchise of a railroad company is the right to operate their road, and receive fare and freight. Thorpe v. Rutland & Burlington Rd. Co., 27 Vt. 140, 62 Am. Dec. 625.

"Now what was the franchise in this case, specified in the mortgage as 'the franchise of said company?' A recurrence to the grant (its charter) will show substantially, it was the privilege of being a body politic and possessing the powers incident to such bodies; the privilege of taking lands of individuals *in invitum* for the purpose of constructing a railway; and the right to construct, maintain, and manage such railway, and in so doing levy and collect tolls upon and from travelers thereon." Kennebec & Portland Rd. Co. v. Portland & Kennebec Rd. Co., 59 Me. 9, 66, dissenting opinion of Tapley, J. (a case of mortgage and foreclosure of railroad franchise, etc.)

The word "toll" is properly used to express the charges made by railroad companies for transportation of persons and property in the manner which is now usual and universal. It is also "a sum demanded for a passage through a highway or for passage over a ferry. In the latter case it is not for the use of the river but is for the transportation. "A 'toll-thorough' then, as understood at the common law, did include compensation for something more than the use of a roadbed or a water-way, and did include, when applied to a proper case, compensation for the means of locomotion and transportation used by the party who claimed the right of toll * * * neither by the common law of England, by its statutes, nor by customary usage there or in the United States, is the word 'toll' limited to compensation for the use of a road, a way, a mill or a ferry, where the moving power comes from the party using it, but, on the contrary, that it is and always has been applied to compensation for such use when the thing used, and the motive power by which it was used, came from the party charging the toll, as well as when it came from the party paying it." Lake Superior & Mississippi Rd. Co. v. United States, 93 U. S. 442, 458, 459, 23 L. ed. 965, per Bradley, J.

[72] "The analogy is very imperfect between the tolls exacted for the use of a turnpike, and the compensation charged by a railroad company for the transportation of persons and property. The right to exact the one, and the earning of the other, involve very different duties and responsibilities." Coe v. Columbus, Piqua and Indiana Rd. Co., 10 Ohio St. 372, 380, 75 Am. Dec. 518, per Gholson, J.

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transportation company has the twofold franchise of taking tolls and also engaging in the business of carriers upon its own road.[73] The corporate right to build and run a railroad, and take tolls, or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the legislature.[74] The right, however, to build, own, manage and run a railroad, or take the tolls thereon, is not of necessity of a corporate character, or dependent upon corporate rights. It may belong to and be enjoyed by natural persons.[75] The constitution of California provides that the right to collect rates or compensation for the use of water by counties, etc., is a franchise.[76] And where a statute grants

[73] Camblos v. Philadelphia & Reading Rd. Co., 4 Brewster (Pa.), 563, 596, 597, per Cadwalader, Dist. J., who states the distinction between railroad and transportation companies after 1829 (case was decided in 1873), and also considers the distinction between tolls and charges for locomotive power and of both of these from charges of passenger money and freight money.

As to meaning of "rate" (in Interstate Commerce Act, Feb. 19th, 1903, c. 708, §1, 32 Stat. 847, U. S. Comp. Stat. Supp. 1905, p. 599) and also what constitutes giving a rebate, see United States v. Chicago & A. Ry. Co., 148 Fed. 646.

Where a statute provides that "rates of toll or fare" to be charged by street railway companies "shall be established by agreement between such company and the corporate authorities of the city," etc., the word "toll" so used, "is used in its established meaning. * * * The term applies at common law to a very large class of dues and exactions which are in the nature of fixed rights, and which cannot be lawfully exceeded. They are generally if not universally connected with some franchise which involves duties as well as privileges of a general or public nature. The right to receive fixed tolls is found in fairs, markets, mills, turnpikes, ferries, bridges and many other classes of interests where the owner of the franchise is obliged to accommodate the public, and the public in turn are protected from extortion by an obligation to pay only regular dues. The law has in this State always provided some means of fixing rates of ferriage, and passage over turnpikes and bridges. It has also done the same on street and other tramroads." McKee v. Grand Rapids & Reeds Lake St. Ry. Co., 41 Mich. 274, 279, 1 N. W. 873, per Campbell, C. J.

[74] State v. Boston, Concord & Montreal Rd. Co., 25 Vt. 433, 442, per Reffield, Ch. J.

[75] Miller v. Rutland & Washington Rd. Co., 36 Vt. 452, 494, per Barrett, J., quoting from Bank of Middlebury v. Edgerton, 30 Vt. 190, per Bennett, J., who cites Peter v. Kendall, 6 B. & C. 703; Comyn's Dig., Grant, C.

[76] Fresno Canal, etc., Co. v. Park, 129 Cal. 437, 442, 62 Pac. 87.

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a right to collect tolls upon logs put into a river, such a right is a franchise.[77] So the right of a turnpike company to require wheelmen to pay tolls, for using its road or sidepath, is a franchise;[78] as is also the right to construct and maintain a pier or wharf and take wharfage therefor.[79] But a pier as a structure is not a franchise. It is built under the franchise

[77] Sellers v. Union Lumbering Co., 32 N. H. 525.

[78] Rochester & Charlotte Turnpike Road Co. v. Joel, 58 N. Y. Supp. 346, 41 App. Div. 43. Adams, J., said: "The plaintiff when it perfected its organization under the provisions of the general turnpike law, acquired a valuable franchise, in virtue of which it was not only enabled to construct its road, but also to derive such profit and advantage therefrom as might be gained from the patronage of the traveling public."

[79] "The right to collect wharfage rests upon the statute; it is a franchise dependent upon a grant from the sovereign power. In Walsh v. New York Floating Dry Dock Co., 77 N. Y. 448, 452, this court said, Judge Andrews writing the opinion, 'The right to collect wharfage is a franchise and depends upon a grant by the sovereign power [Wiswall v. Hall, 3 Paige (N. Y.), 313; Houck on Rivers, §§ 283, 284]. It is given as a compensation to persons who, under authority of law, have constructed piers and wharfs, and to remunerate them for the outlay made for the convenience and safety of vessels and the benefit conferred thereby upon commerce and navigation." Flandreau v. Elsworth, 151 N. Y. 473, 477, 45 N. E. 853, per Bartlett, J. Case affirms 29 N. Y. Supp. 694, 60 N. Y. St. R. 609, 9 Misc. 340. See also to same point Town of Pelham v. The B. Y. Woolsey, 14 Fed. 418, 423, per Brown, J.

See Sullivan v. Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388. The case, however, is merely one as to assignment of franchise and evidence of value of franchise granted to build and operate a wharf, conceding, apparently, that such wharf is a franchise in connection with its use.

Wharfage defined and distinguished; see the following cases: Ouachita Packet Co. v. Aiken, 121 U. S. 444, 449, 7 Sup. Ct. 907, 30 L. ed. 976, per Bradley, J. (a charge for rent for temporary use of wharf); Transportation Company v. Parkersburg, 107 U. S. 691, 696-699, 27 L. ed. 584, 2 Sup. Ct. 732, per Bradley, J. (wharfage and tonnage defined and distinguished); The Idlewild, 64 Fed. 603, 605, 12 C. C. A. 198, per Shipman, Cir. J., (a pecuniary charge in the nature of rent to which vessels are liable for use of dock or wharf); People v. Roberts, 92 Cal. 659, 28 Pac. 689, (wharfage and dockage defined and distinguished); Sacramento v. The New World, 4 Cal. 41, 44, per Heydenfeldt, J.; Sweeney v. Otis, 37 La. Ann. 520, 521 (defined and distinguished from taxes, duty of tonnage, tolls, imposts, etc.); Kusenberg v. Browne, 42 Pa. 173, 179, per Read, J.

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which consists of the right to construct and maintain the pier and to take wharfage for its use.[80] Again, where a lock and dam of a navigation company are condemned under an act of Congress, the corporation is entitled to recover compensation from the United States for the taking of the franchise to exact tolls, and the assertion by Congress of its purpose to take the property does not destroy the state franchise.[81]

§ 18. **Banking—Insurance.**—The charter of a bank is declared to be a franchise.[82] So in an early case in Alabama it is said, that since the adoption of the constitution in that State, the right to exercise banking powers constitutes a franchise.[83]

[80] Smith v. Mayor, etc., of New York, 68 N. Y. 552, 555, per Earl, J.

[81] Monongahela Navigation Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. 622.

[82] Gordon v. Appeal Tax Court, 3 How. (44 U. S.) 133, 150, 11 L. ed. 529, per Wayne, J.

[83] State v. Stebbins, 1 Stew. (Ala.) 299. The court said in that case that: "The object and necessity at all times and in every country of incorporating companies has been to give them perpetuity and legal authority to exercise specific powers and privileges of a nature promising some degree of public utility, and to which individuals in their natural capacity, are supposed incompetent; or such as are of a nature so far involving the general interest of society, that public policy forbids the unrestrained pursuit of them by individuals. The doctrine has universally prevailed, that a corporation can only exercise such powers as are specially granted by the 'act of incorporation.' or are necessary to carry into effect the powers expressly granted. This principle is clearly maintained by Thompson, chief justice of the Supreme Court of New York, in the same opinion referred to by the defendant's counsel to maintain another principle, deemed material to the defense. The latter principle alluded to is, 'that the right of banking was a common law right, belonging to individuals, and to be exercised at their pleasure.' Such is the language of the chief justice, and is a doctrine which this court has no disposition to disturb or question, but the deductions proper to be drawn from it, are worthy of consideration. Does it follow that corporations can claim all rights, privileges and immunities, which the law has not denied to individuals? Or if they can, must they not derive such rights from the principles of the common law and general legislation? If the first branch of the proposition is assumed, the consequence would be, that corporations, instead of being limited to the powers granted them, can claim irrevocably, all powers not expressly denied them. If the latter, the necessary consequence must be that the rights and powers of corporations, like those of individuals,

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But at common law the business of banking, in all its branches, was open and free to all and belonged to the citizens of the country generally by common right. It did not constitute one of the prerogatives of the sovereign, or pertain to sovereignty. The only banking privilege in this country that is made a franchise is the privilege of issuing bank notes intended to circulate as money, which, since the adoption of the constitution of the United States, has existed in the National government, and, when not exercised by that government, could be exercised by the several States. The business of banking "by discounting and negotiating promissory notes, bills of exchange, drafts, and other evidences of debt, by re-

are general and insecure, dependent on such restraints and modifications as the legislature may think proper to prescribe. That corporations have only legal, invisible, intangible existence, with powers specially granted and circumscribed, within limits necessary to the objects of their creation, is one of the prominent principles of elementary law. In the case of the Bank of the United States against Dandridge, 12 Wheat. 91, Chief Justice Marshall, in a dissenting opinion, but on points on which he was not opposed, says 'a corporation being one entire impersonal entity, distinct from the individuals who compose it, must be endowed with a mode of action peculiar to itself, which will always distinguish its transactions from those of its members.' This faculty must be exercised according to its own nature. In the case of Head and Amory against the Providence Insurance Company, 2 Cranch, 127, the Supreme Court said,' an individual has an original capacity to contract and bind himself in such manner as he pleases. He who acts by another, acts by himself.' He who authorizes another to make a writing for him makes it himself; but with these bodies, which have only a legal existence, it is otherwise. The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated. In the case of the New York Firemen's Insurance Company against Sturgis, 2 Cowen's R. 664, it was ruled that 'a corporation, having no power by the act of incorporation to discount notes, but created for the purposes of insurance, has no right to carry on the business of discounting; that a corporation has no powers except such as are specially granted, and those that are necessary to carry into effect the powers so granted.' The authorities referred to, show conclusively to my mind, that no corporation can legally exercise banking privileges, unless the power be specially granted." State v. Stebbins, 1 Stew. (Ala.) 299, 306–308, per Saffold, J.

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ceiving deposits, by buying and selling exchange, coin and bullion, and by loaning money on personal security," was not a franchise at common law, and has not been made such by the state or National constitutions.[84] So it is said in a New York case that: "Banking is not in its nature a corporate franchise. In the absence of legislative restraints, it may be carried on by individuals and partnerships in all its departments of issuing, lending, receiving deposits, discounting, dealing in exchange, bullion, etc.[85] The State has, however, the power to regulate and restrain the right of conducting a banking business, even though it may, under the common law, be exercised at pleasure by a citizen.[86] It has also been held repeatedly that the State has the right to regard the business of insurance as one dependent upon the exercise of a franchise, which the State has the right to give and to withhold. This franchise right has grown up from a small beginning from necessity, but is not a departure from the general rule characterizing the meaning of the term "franchise." It is simply a modern application of the principle governing such privileges, applied to new emergencies.[87]

§ 19. **Eminent Domain.**—A railroad corporation under the constitution and laws of the State of Illinois possesses not only the franchise of the right to exist as a corporation, but the right to condemn private property for corporate use is also one of its most important franchises, since the right of eminent domain is a franchise.[88] In a Pennsylvania case it is

[84] State v. Scougal, 3 S. Dak. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756 (decided 1892).

[85] Curtis v. Leavitt, 15 N. Y. 9, 52, per Comstock, J.

[86] State v. Richcreek, 167 Ind. 217, 77 N. E. 1085.

[87] People v. Loew, 44 N. Y. Supp. 43, 26 Civ. Proc. 132, 19 Misc. 248.

[88] Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 576. See also Knoup v. Piqua Bank, 1 Ohio St. 603, 619, where Corwin, J., speaks of a railroad or a turnpike being made, "In virtue of a franchise of eminent domain." The same court (at pp. 615, 616) also says: "Any citizen may construct a railroad upon his own land, but no citizen can construct a railroad upon the land of another without that other's consent, unless authorized to do so by law. The right to construct a road over the lands

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said that the ordinary franchise of a railroad company is, by virtue of the sovereign power of eminent domain, to condemn, take and use lands for the purpose of a public highway, and to take tolls from those who use it as such.[89] So it is declared in a Texas decision that the ordinary franchises of a railroad corporation are the right to exist and to transact business as a corporation, and the right to condemn property for its use.[90] It is also said that exclusive grants for ferries, bridges and turnpikes are grants of franchises of a public character appertaining to the government, and that their use usually requires the exercise of the right of eminent domain.[91]

§ 20. **Exemption or Immunity from Taxation, Jury Duty, and Working on Public Roads.**—In a case in the United States Supreme Court, decided in 1876, it was held that immunity from taxation is not itself a franchise of a railroad corporation which passes as such without other description

of private citizens, without their consent, is a sovereign right; it is the right, so called, of eminent domain. Whenever that right is delegated to a corporation or an individual, by an act of the general assembly, the corporation or individual has *a franchise of eminent domain*. In England, also, a franchise may become the property of a corporation or an individual. * * * Whenever, therefore, a franchise is conferred, upon a corporation, or an individual, nothing but the public good is to be considered; the private advantage which may result to the corporation or individual, is but incidental to the chief object and cannot ripen into a right of property."

[89] Shamokin Valley Rd. Co. v. Livermore, 47 Pa. 465, 468, 68 Am. Dec. 552, per Agnew, J.

[90] State v. Austin & Northwestern Rd. Co., 94 Tex. 530, 532, 62 S. W. 1050, per Gaines, C. J. (a case of railway franchise taxation).

[91] Slaughter-House Cases, 16 Wall. (83 U. S.) 36, 88, 21 L. ed. 394, per Field, J., in dissenting opinion.

See the following cases as to the right of corporations to exercise the power of eminent domain:

United States: Miocene Ditch Co. v. Jacobsen, 146 Fed. 680, 77 C. C. A. 106.

California: Boca & Loyalton Rd. Co. v. Sierra Valleys Rd. Co., 2 Cal. Ct. App. 546, 84 Pac. 298.

Idaho: Potlach Lumber Co. v. Peterson, 12 Ida. 769, 88 Pac. 426.

Montana: State v. District Court of Tenth Jud. Dist. of Meagher County, 34 Mont. 535, 88 Pac. 44.

New York: Pocantico Waterworks Co. v. Bird, 130 N. Y. 249, 41 N. Y. St. R. 315, 29 N. E. 246; East Canada Creek Elect. Light & Power Co., In re, 99 N. Y. Supp. 109, 49 Misc. 565.

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to a purchaser of its property.[92] In this case the court, per Field, J., says: "Much confusion of thought has arisen in this case and in similar cases, from attaching a vague and undefined meaning to the term 'franchise.' It is often used as synonymous with rights, privileges and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchise of the company. But

Pennsylvania: Towanda Bridge Co., In re, 91 Pa. 216.

Washington: State ex rel. Harlan, Centralia-Chehalis Elect. Ry. & Power Co., 42 Wash. 633, 85 Pac. 344.

[92] Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860.

That exemption or immunity from taxation is not such a franchise as can be transferred, assigned, or will pass to a purchaser, see the following cases:

United States: Mercantile Bank v. Tennessee, 161 U. S. 161, 40 L. ed. 656, 16 Sup. Ct. 466; Pickard v. East Tennessee, Virginia & Georgia Rd. Co., 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. 640, 6 Rd. & Corp. L. J. 130; Memphis & Little Rock Rd. Co. v. Railroad Commissioners, 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. 899; Wilson v. Gaines, 103 U. S. 417, 421, 26 L. ed. 401; East Tennessee, Virginia & Georgia Rd. Co. v. County of Hamblen, 102 U. S. 273, 277, 26 L. ed. 121, 152. Examine Rochester Ry. Co. v. City of Rochester, 205 U. S. 236, 254, 255, per Moody, J.; Savannah v. Jesup, 106 U. S. 563, 565-570, 27 L. ed. 276, 1 Sup. Ct 512.

Kentucky: Evansville, Henderson & Nashville Rd. Co. v. Commonwealth, 9 Bush (Ky.), 438, 443.

Louisiana: State v. Morgan, 28 La. Ann. 482.

Maryland: Baltimore, Chesapeake & Atlantic Ry. Co. v. Ocean City, 89 Md. 89, 42 Atl. 922, 14 Am. & Eng. Rd. Cas. (N. S.) 195 (does not pass to purchaser without express statutory direction). But see Baltimore, Chesapeake & Atlantic Ry. Co. v. Wicomico County Commrs., 103 Md. 277, 63 Atl. 678.

Missouri: State ex rel. Crumpacker v. Chicago, Burlington & Kansas City Ry. Co., 89 Mo. 523, 14 S. W. 522 (not transferrable in absence of express statutory authority).

Tennessee: Wilson v. Gaines, 9 Baxt. (68 Tenn.) 546, 552.

Virginia: Examine Seaboard & R. R. Co. v. Norfolk County, 83 Va. 195, 2 S. E. 278. See also subsequent sections herein upon taxation.

That such exemption is not such a franchise as passes on consolidation see: Keokuk & Western Rd. Co. v. Missouri, 152 U. S. 301; Adams v. Yazoo & Mississippi Valley R. Co., 77 Miss. 194, 24 So. 200, 317, 1 Miss. Dec. (No. 30), 296. Examine Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. 645; State v. Maine Central Rd. Co., 66 Me. 488. Examine Rochester Ry. Co. v. Rochester, 205 U. S. 236, 247, 27 Sup. Ct. —, 51 L. ed. 784.

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the term must always be considered in connection with the corporation or property to which it is alleged to appertain." The court then specifies certain franchises which belong to a railroad company and concludes with the words: "Immunity from taxation is not one of them. The former may be conveyed as a part of the property of the company; the latter is personal and incapable of transfer without express statutory direction." The above quotation has been given and relied upon in several cases,[93] and in another Federal case which was decided in 1884, and which also gives the above quotation, it is declared, as affirming the 1876 case, that immunity from taxation conferred on a corporation by legislation was not a franchise, although in the 1884 case the principal point determined was that immunity from taxation did not pass by a transfer of the corporate property,[94] and it has, therefore, been frequently declared that immunity from taxation is not a franchise. But the same court decided in 1885, that an exemption from taxation granted by the government to an individual is a franchise, which can be lost by acquiescence under the imposition of taxes for a period long enough to raise a conclusive presumption of a surrender of the privilege; and that such acquiescence for a period of sixty years, or even for a much shorter period, raises such a presumption.[95] In another case the court in discussing the meaning of the word

[93] **United States:** East Tennessee, Virginia & Georgia Rd. Co. v. County of Hamblen, 102 U. S. 275, 277, 26 L. ed. 121, 152.

Maine: State v. Maine Central Rd. Co., 66 Me. 488. 512, per Appleton, C. J.

Maryland: Baltimore, Chesapeake & Atlantic Ry. Co. v. Mayor, etc., of Ocean City, 89 Md. 89, 98, 42 Atl. 922.

Nebraska: Western Union Tel. Co., v. City of Omaha (Neb., 1905), 103 N. W. 84, 86.

Texas: Denison & Sherman Ry. Co. v. St. Louis Southwestern Ry. Co., 30 Tex. Civ. App. 474, 481, 482, 72 S. W. 201, in dissenting opinion, Bookhout, Assoc. J.

[94] Chesapeake & Ohio Rd. Co. v. Miller, 114 U. S. 176, 185, 186, 29 L. ed. 121, 5 Sup. Ct. 813.

[95] Given v. Wright, 117 U. S. 648, 29 L. ed. 1021, 6 Sup. Ct. 907. Exemption from taxation is declared to be "a franchise property." State v. Morgan, 28 La. Ann. 482, 493, per Ludeling, C. J., in dissenting opinion (a case of exemption from taxation, right of transfer and construction of charter).

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"franchise" considers it in its broad sense and its legal meanings, and continuing says: "It is true that it is now generally used in more restricted senses, and for that reason the Supreme Court of the United States has held in a number of cases that, because of the reasons for adopting a strict construction of language claimed to create or transfer exemptions from taxation, and a presumption against an intent to do either, a reference to the 'franchises' of a corporation would not include its immunities, in the absence of other language or circumstances indicating that the term was used with a signification wide enough to include them." [96] An exemption from jury duty and from working on public roads granted in the charter of a railroad company to its officers, agents and servants, is not a grant of a mere personal privilege, but is a grant of a valuable right or privilege upon the company based upon considerations of public policy.[97]

§ 21. Political Rights, "Elective Suffrage," "Elective Franchise" or Freedom—Public Office—Attorney or Counsellor—Right to Preside—Appointment of Professors—Liquor License—"Commodities"—Fishery—Public Market—Patent Right—Trade-mark—"News Contract."—Various other franchises exist, such as the political rights of citizens and subjects, the "elective suffrage," or the "elective franchise," which is not a natural but a permissive right, dependent for its exercise upon the law conferring it.[98] It is also said that

[96] Buchanan v. Knoxville & Ohio Rd. Co., 71 Fed. 324, 334, 18 C. C. A. 122, per Severens, Dist. J.

[97] Johnson v. State, 88 Ala. 176, 7 So. 253 (followed in Zimmer v. State, 30 Ark. 677, which also holds that another company consolidated with it succeeds to such right, where the consolidation is authorized by the State). As to exemption being unconstitutional and class legislation, see Neely v. State, 4 Lea (72 Tenn.), 316.

[98] Pierce v. Emery, 32 N. H. 507, per Perley, C. J.; People ex rel. Koerner v. Ridgley, 21 Ill. 65, 69, per Breese, J.

See also the following cases:

United States: Corfield v. Coryell, 4 Wash. (U. S. C. C.) 371, Fed. Cas. No. 3,230, where Washington, Cir. J., in discussing the points as to "privileges and immunities of citizens of the several States" under the constitution mentions as fundamental, "the elective franchise, as regulated and established by the laws or constitution of the State in

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each individual of a corporation has "a franchise or freedom." [99] A public office is declared to be of the nature of a franchise in

which it is to be exercised." The case, however, was one as to regulation of fisheries and constitutional law.

Delaware: Frieszleben v. Shallcross, 9 Houst. (Del.) 1, 59, 8 L. R. A. 337, 19 Atl. 576 (a case where the constitution required every elector to pay a county tax before election; a statute requiring the payment of poll taxes and dropping delinquents from assessment list; said legislation being held not to disfranchise a voter). "It is conceded that the power to use the ballot, is one derived from the government, or the political society in which the elector resides."

District of Columbia: Spencer v. Board of Registration, 1 McArthur (D. C.), 169, 29 Am. Rep. 582. Holding that elective franchise uniformly rests upon the express authority of the political power and revolves within the limitations of express law and includes only male citizens in the district.

Indiana: Gougar v. Timberlake, 148 Ind. 38, 46 N. E. 339, 37 L. R. A. 644, 62 Am. St. Rep. 487 (where the nature of suffrage, considered as a political privilege and not a natural right, is discussed, as well as the question of woman suffrage and constitutional law); Morris v. Powell, 125 Ind. 281, 292, 9 L. R. A. 326, 25 N. E. 221 [where regulations of the elective franchise are

[99] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 657, 4 L. ed. 629. See also same case *Id.*, 700, where Story, J. (citing Ashby v. White, 2 Ld. Raym. 938, 1 Kyd. on Corp. 16), says: "The corporators are not mere agents, but have vested rights in their character as corporators. The right to be a freeman of a corporation is a valuable temporal right. It is a right of voting and acting in the corporate concerns, which the law recognizes and enforces, and for a violation of which it provides a remedy. It is founded on the same basis as the right of voting in public elections; it is as sacred a right; and whatever might have been the prevalence of former doubts since the time of Lord Holt, such a right has always been deemed a valuable franchise or privilege."

In the case of Ashby v. White, 2 Ld. Raymond, 938, 6 Mod. 45, above cited, it was declared by Chief Justice Holt (p. 951) that the right of sending members to Parliament must be granted to a corporation "*and when this right of election is granted within time of memory it is a franchise, that can be given only to a corporation.*" And it was held that a man who has the right to vote at an election for members of Parliament could maintain an action against the returning officer for refusing to admit his vote. See 3 Ld. Raymond, 320.

Franchise also means the locality subject to a franchise. Rapalje & Lawrence's L. Dict.

That the word "franchise" under the English Stat. 9 Anne, c. 20 refers only to the franchise of being a freeman of a municipality, see Union Water Co. v. Kean, 52 N. J. Eq. 111, 128, 27 Atl. 1015, per Pitney, V. C., citing High, Extr. Rem. § 602, Rex v. Williams, 1 Burr. 402.

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that it can only be derived from the sovereign.[1] And a board of inspectors being general officers of the State, the power to

considered, quoting Cooley's Const. Lim. (5th ed.) p. 758].

Maryland: Anderson v. Baker, 23 Md. 531. The regulation of the

[1] Ex parte Henshaw, 73 Cal. 486, 492, 15 Pac. 110, per McKinstry, J. (§ 802 of the Code of Civ. Proc. provides for an action against one who unlawfully exercises any public office "or any franchise").

A franchise "is said to be a privilege conferred by grant from the government and vested in individuals as a public office." People ex rel Koerner v. Ridgeley, 21 Ill. 65, 69, per Breese, J.

"Lexicographers generally define 'office' to mean 'public employment'; and I apprehend its legal meaning to be an employment on behalf of the government, in any station or public trust, not merely transient, occasional or incidental. In common parlance, the term 'office' has a more general signification. Thus we say the office of executor, or guardian, or the office of a friend." Matter of Oaths by Attorneys & Counsellors, 20 Johns. (N. Y.) 491, 493.

"An office like a franchise, is a royal gift, it is considered property in England. Some offices are estates in fee simple, or fee tail, some, estates for life, and some only estates at will. Cruise's Digest, volume 3, title 25. There are some offices, also, which are said to be estates for a term of years, or for one year. And ministerial offices may be granted in reversion, or to commence at a future period. Some offices are even assignable by deed. But in America, a public officer is only a public agent or trustee, and has no proprietorship, or right of property in his office. It is true that in The State v. McCollister, 11 Ohio Rep. 50, Judge Hitchcock said, that an officer, had 'a vested right' in his office, but that dictum is opposed to many and well-considered authorities. Butler v. The State of Pennsylvania, 10 Howard's Rep. 402; The State v. Dens, R. M. Charleton's R. (Ga.) 397; The Commonwealth v. Bacon, C. S. & Rawle, 322; The Commonwealth v. Mawe, 5 Watts & S. (Pa.) 418; The Commonwealth v. Clark, 7 Watts & S. (Pa.) 127; Barker v. The City of Pittsburg, 4 Penn. St. Rep. 51;" Knoup v. The Piqua Bank, 1 Ohio St. 603, 616, per Corwin, J.

A statute providing that "in case any person or persons shall usurp, intrude into or unlawfully hold or exercise any office or franchise within this State, it shall and may be lawful to and for the attorney general," etc., is substantially a copy of the English Act, 9 Anne, 20, and the word "franchise" in the latter statute "has always been construed in the English courts to refer to the franchise of being a freeman of a municipality and no more." High, Extr. Rem. § 602; Rex. v. Williams, 1 Burr. 402, and the remedy of quo warranto, under that act, is there confined to municipal or public or *quasi public* corporations. High, Extr. Rem. § 626, Short, Inf. 129. Its application to offices in private corporations had its origin in this country." Union Water Co. v. Kean, 52 N. J. Eq. 111, 128, 27 Atl. 1015, per Pitney, V. C.; the change being from "said" in the English act to "any" office or franchise.

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appoint them is a franchise.[2] But a franchise is not conferred upon the president of a county board by a constitutional

elective franchise is an unqualified right of the States; citizenship and right of suffrage are not inseparable, as latter is not one of the universal, inalienable rights; suffrage is not a right of property or absolute, unqualified personal right.

Missouri: Blair v. Ridgely, 41 Mo. 63, 174, 97 Am. Dec. 248. Holding that the elective franchise cannot be exercised as a natural right and is subject to such qualifications as may be prescribed by the State or body politic. It was argued by counsel in this case that: "The very term franchise excludes the idea of natural right; for a franchise is a privilege granted by the sovereign authority to an individual." *Id.*, 161.

New York: People v. Barber, 48 Hun (N. Y.), 198, 201, 15 N. Y. St. R. 601, 28 Wkly. D. 313. "The elective suffrage is not a natural right of the citizen. It is a franchise dependent upon law by which it must be conferred to permit its exercise." "It is a political right to be given or withheld at the pleasure of the lawmaking power of the sovereignty, and is not deemed within the privileges and immunities guaranteed to the citizen by the Constitution of the United States," per Bradley, J. Case reversed, 25 N. Y. St. R. 184 (case cited in Gage, Matter of, 141 N. Y. 112, 116, 56 N. Y. St. R. 662, 35 N. E. 1094, to point that constitutional definition of elector must be read into laws regulating election of county officers; cited also in Spitzer v. Village of Fulton, 68 N. Y. Supp. 660, 662, 33 Misc. 257, to point that right of suffrage is not a natural right, but a privilege to be granted or denied, regulated or modified. This last case is affirmed, 69 N. Y. Supp. 1146, 61 App. Div. 612, which is affirmed, 172 N. Y. 285, 64 N. E. 957); People ex rel. Frost v. Wilson, 3 Hun (10 N. Y. Supr. Ct.), 437, rev'd, 62 N. Y. 186. Right of suffrage—whence derived and power of legislature to regulate.

Pennsylvania: Huber v. Reily, 53 Pa. 112, 115, 23 Leg. Int. 228. "The right of suffrage at a state election is a state right, a franchise conferrable only by the State, which Congress can neither give or take away. * * * Congress may doubtless deprive an individual of * * * even the right of suffrage. But this is a different thing from taking away or impairing the right itself," per Strong, J.; Duffy, In re, 4 Brewst. (Pa.) 531. The exercise of the elective franchise, though a constitutional right, is not one of unrestrained license, and is to be enjoyed in subordination to law.

South Dakota: Chamberlain v. Wood, 15 S. Dak. 216, 221, 56 L. R. A. 187, 88 N. W. 109, 91 Am. St. Rep. 674. "The right of suffrage is not a natural or civil right, but a privilege conferred upon the person by the constitution and laws of the State. Judge Cooley, in his work on Constitutional Limitations, says, 'Participation in the elective fran-

[2] Lasher v. People, 183 Ill. 226, 236, 55 N. E. 663, 47 L. R. A. 802. The right to create an office is said to be a franchise. Knoup v. Piqua Bank, 1 Ohio St. 603, 613, per Corwin, J.

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statute empowering him to appoint a civil service commission.[3] Nor is an office a franchise within the meaning of a constitution and a statute prescribing the appellate jurisdiction of courts.[4] And a public office is not a franchise under a statute clearly distinguishing the two, and the right of appeal does not exist where the judgment relates to the former and not to the latter.[5] It is declared in a New York case that an attorney or counsellor does not hold an office, but exercises a

chise is a privilege, rather than a right, and it is granted or denied upon grounds of general policy.' Cooley Const. Lim. (6th ed.) 752," per Corson, J.

Tennessee: State v. Staten, 6 Coldw. (46 Tenn.) 233, 255. "The elective franchise is at once, a right and a trust, conferred by the people of a State, acting in their supreme and sovereign capacity, upon such members of the body politic as they, in their sovereign discretion, deem should hold and exercise it, having regard to the protection, both of private rights and of public interests. Once conferred upon the citizen, it is a franchise in which he has a right of property which the law protects," per Andrews, J. "The elective franchise is a right which the law protects and enforces as jealously as it does property in chattels or lands. * * * Persons invested with it, cannot be deprived of it, otherwise than by 'due process of law.'" *Id.*, p. 243, per Smith, J.; Ridley v. Sherbrook, 3 Coldw. (43 Tenn.) 569, 576. The elective franchise is not an inalienable right or privilege, conferred, limited or withheld, at the pleasure of the people, acting in their sovereign capacity.

Utah: Anderson v. Tyree, 12 Utah, 129, 149, 42 Pac. 201. "It is conceded that the elective franchise is permissive, and from its nature excludes all not within the classes pointed out, and that it requires a legislative enactment or authority to extend the privilege to classes not previously embraced." Women held not entitled to vote.

The "elective franchise" under a statute as to preventing "a fair, free and full exercise of the elective franchise" "is the right or privilege of a qualified elector or voter to cast his ballot freely in favor of the man of his choice, in an election authorized by law to be held." Parks v. State ex rel. Owens, 100 Ala. 634, 651, 13 So. 756, per Stone, C. J.; Acts Ala. 1893–94 p. 468 (Act Feb. 10, 1893, §1, subdv. 5).

[3] Morrison v. The People, 196 Ill. 454, 63 N. E. 989.

[4] Graham v. People, 104 Ill. 321; People v. Holz, 92 Ill. 426 (a case of quo warranto to try title to office of inspectors of schools).

An office of alderman is not a franchise within a statute giving the Supreme Court jurisdiction of appeals direct from the trial court in quo warranto to test the right to the office. McGrath v. People, 100 Ill. 464.

[5] Londoner v. Barton, 15 Colo. 246, 247, 25 Pac. 183, per Hayt, J.

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privilege or franchise; that as attorneys or counsellors, they perform no duties on behalf of the government; they execute no public trust, but they enjoy the exclusive privilege of prosecuting and defending suits for clients, who may choose to employ them.[6] Again, the right of a mayor of a city to preside over the meetings of a city council, is a franchise within the meaning of a statute, and quo warranto will lie to test such right even though such a case is not a contest for office.[7] And it is also declared that "if appointment of professors by an incorporated college is a franchise the assertion of such right, unless justified by authority from the legislature, is the usurpation of a franchise" for which an information in the nature of a quo warranto may be filed.[8] Under a Kansas decision the right of licensing the sale of intoxicating liquors as a beverage, and the exaction of a tax or charge therefor, is a franchise or privilege which no city has the power to execise, and, if unlawfully exercised, quo warranto is the proper remedy.[9] And in Alabama the right to operate a dispensary for the sale of liquors is held to be the exercise of a franchise.[10] So in Kentucky such a license is held to be a franchise.[11] But in

[6] Matter of Oaths by Attorneys & Counsellors, 20 Johns. (N. Y.) 491, 493. The court says also: "Various classes of persons are licensed in the city of New York, with an exclusive privilege in their employment; yet they are not public officers. Physicians are also licensed, pursuant to statute; yet they hold no office or public trust, in legal construction." The right to practice law is not a privilege or immunity of a citizen of the United States within the meaning of the first section of the Fourteenth Article of Amendment of the Constitution of the United States. Bardwell v. State, 16 Wall. (U. S.) 130.

[7] Cochran v. McCleary, 22 Iowa, 75, 89, per Dillon, J., who said: "A public corporation can only emanate from proper authority—in this country from the legislature. The right to preside therein is a legal right conferred by law. This right is a 'franchise' or privilege given by law, and therefore, if invaded, the law affords a means of redress, a remedy, and this remedy is by quo warranto, or information in that nature," citing Angell & Ames, Corp. § 737.

[8] People v. Trustees of Geneva College, 5 Wend. (N. Y.) 211, 220, per Savage, Ch. J.

[9] State v. City of Topeka, 30 Kan. 653, 661, 2 Pac. 587.

[10] City of Uniontown v. State, 145 Ala. 471, 39 So. 814; State v. Wilburn (Ala., 1905), 39 So. 816.

[11] Miller v. Commonwealth, 112

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an Illinois case a liquor license is not a franchise under statutory provision allowing appeals in certain cases.[12] As to "commodities" it is said that: "It has been repeatedly held that corporate franchises enjoyed by grant from the government are commodities and subject to an excise. So with corporate franchises granted by a foreign government." [13] It is said in a New Jersey case that: "A free fishery or exclusive right of fishing in a public river, is a royal franchise, which is now frequently vested in private persons, either by grant from the crown or by prescription.[14] But no exclusive right of fishing, or several fisheries, in the Hudson river, can be granted to any one person, where, under the constitution, no franchise which does not promote the public welfare may be granted.[15] An exclusive privilege to build and operate a public market

Ky. 404, 65 S. W. 828. Point arose upon question of right of appeal.

[12] Martins v. Rock Island County Atty., 186 Ill. 314, 318, 57 N. E. 871.

[13] Gleason v. McKay, 134 Mass. 419, 424, 425, per Morton, C. J. The defendant in this case was not a corporation but merely a partnership. See Finch's Law of Eng. 126 [38].

Where a state constitution empowers the legislature to impose and levy reasonable duties and excises upon "commodities," etc., an act of incorporation is declared to be a commodity or privilege. Commonwealth v. People's Five Cent Sav. Bank, 5 Allen (87 Mass.), 428, 435, per Bigelow, C. J., who says, "Certainly it is most just and reasonable that a privilege, or to use the words of the constitution, 'a commodity,' which an act of incorporation furnishes * * * should bear a portion of the public burdens, in the form of an excise."

[14] Arnold v. Mundy, 6 N. J. L. 1, 87, 10 Am. Dec. 366, per Kirkpatrick, C. J., citing 2 Cruise, 29 (73 Greenleaf's Cruise on Real Prop. 261).

[15] Slingerland v. International Contracting Co., 60 N. Y. Supp. 12, 17, 43 App. Div. 215, per Landon, J., who also says: "The plaintiffs' claim is not to the land, but to what may come because of the land,—an incorporeal hereditament, which Blackstone classifies as a franchise. 2 Bl. Comm. 39. It manifestly is a franchise if it is a private, exclusive monopoly of a public right. Under our constitution no franchise can be granted except to promote the public welfare. To grant to one person the exclusive right of fishing in any part of the Hudson river, would be to deprive every other person of his privilege of fishing there." Case aff'd, 169 N. Y. 60, 72, 61 N. E. 995. See this case also as to riparian owners "*right to ice.*" The court said: "As riparian owner he has no exclusive right of fishery or of taking ice." "*As to shell fish* private ownership in public waters may exist and the State may lease privileges."

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and rent stalls is also a franchise.[16] But a franchise is not involved in an action to set aside or redeem from conveyance of a patent right so as to authorize an appeal to the Supreme Court, where the existence or validity of the patent itself is not questioned.[17] Nor is a trade-mark a franchise.[18] Although the term "news contracts" may pass under the name of "franchises" in the newspaper trade, where the term is used, they are not "franchises" in a legal sense, but are confined to the trade meaning of the term and do not pass under a sale of franchises under a statute providing a method for such sale.[19]

[16] Maestri v. Board of Assessors, 110 La. 517, 34 So. 658. Holding that the exclusive privilege vested in a person, pursuant to a city ordinance and contract predicated thereon made by him with the city of New Orleans to furnish the ground, build thereon a structure suitable for a public market and then operate it as such for 25 years by renting stalls to those engaged in the market business, and collecting and appropriating to himself the revenues derived from the renting of the stalls—the ground and market house to be conveyed by formal title to the city at the beginning, and to accrue to the city in full ownership at the expiration of the period fixed for the duration of the privilege—is a franchise taxable under the revenue laws of the State.

[17] Maginn v. Bassford, 196 Ill. 266, 63 N. E. 668. The court said: "Admitting for the sake of argument, that a patent is a franchise, still it does not necessarily follow that this case is properly before this court."

[18] "A trade-mark is not a franchise. It is not a privilege emanating from the sovereign power of the State, owing its existence to a grant, or a prescription presupposing a grant, but it is on the contrary, the name, symbol, figure, letter, from a device adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, and distinguish them from those manufactured or sold by another. * * * There being no franchise involved the appeal must be dismissed." Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 137 Ill. 231, 28 N. E. 248, per Scholfield, J.

[19] Lawrence v. Times Printing Co., 22 Wash. 482, 61 Pac. 166.

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CHAPTER III.

NATURE OF FRANCHISE.

§ 22 Franchise as Monopoly or Exclusive in Nature.
23. Same Subject Continued.
24. Same Subject Continued.
25. Franchise as Property.
26. Same Subject Continued.
27. Same Subject Continued.
§ 28. Franchise of Members, Shareholders, or Corporators as Property.
29. Corporate Franchises are Legal Estates not Mere Naked Powers.

§ 22. **Franchise as Monopoly or Exclusive in Nature.**[1]— Monopoly is not an essential feature of a franchise; and it is declared in a New York case that a corporation with banking powers would be no less a franchise if there were no law restraining private banking, which alone gives to banking corporations the character of monopolies.[2] So a monopoly cannot be implied from the mere grant of a charter to a company to construct a work of public improvement, and to take the profits; there must be an express provision in the charter to give such a monopoly; the legislature must restrain itself therein from granting charters for rival and competing works. Therefore, where a company was granted a charter to construct a navigable canal along the valley of a stream, and to take the profits in consideration of the work, and there was no provision against the exercise of power to charter other and rival companies, it was determined that the legislature was not restrained from chartering a company to construct a railroad along the same valley, even though it might afford the same public accommodation as the canal and in effect

[1] See § 4, herein.

[2] Milhau v. Sharp, 27 N. Y. 611, 619, 84 Am. Dec. 314, per Selden, J., quoting Bouvier.

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might impair or annihilate its profits.[3] In an Ohio case the court, per Bartley, C. J., basing its conclusions upon the language of Mr. Burke, in a speech upon a bill to repeal the charter of the East India Company, said; "The true nature of the franchise of a private corporation, is here portrayed in clear and comprehensive language. We are here told that it is an institution to establish monopoly and to create power; that to speak of such charters and their effects in terms of the greatest possible moderation, they do at least suspend the natural rights of mankind at large; and in their very frame and constitution, are liable to fall into a direct violation of them; that all special privileges of this kind, claimed or exercised in exclusion of the greater part of the community, being wholly artificial, and for so much a derogation from the natural equality of mankind at large, ought to be some way or other exercised ultimately for their benefit; and that they are not original self-derived rights, or grants for the mere and sole private benefit of the holders, but rights and privileges, which in the strictest sense are derivative trusts, and from their very nature accountable to the power which created them." [4]

[3] Tuckahoe Canal Co. v. Tuckahoe & James River Ry. Co., 11 Leigh (Va.), 42, 36 Am. Dec. 374. See §§ 23, 24, herein.

[4] Bank of Toledo v. City of Toledo (Toledo Bank v. Bond), 1 Ohio St. 622, 635, 636.

Definitions or meaning of monopoly, see the following cases:

United States: Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 567, 9 L.ed. 773, per M'Lean, J.; City of Laredo v. International Bridge & Tramway Co., 66 Fed. 246, 248, 14 C. C. A. 1, per McCormick, Cir. J.; United States v. Trans-Missouri Freight Assn., 53 Fed. 440, 452, per Reiner, Dist. J.; *s. c.*, 58 Fed. 58, 92, 7 C. C. A. 15, 24 L. R. A. 73, per Sanborn, Cir. J.; s. c., 166 U. S. 290, 41 L. ed. 100, 17 Sup. Ct. 540; Camblos v. Philadelphia & R. R. Co., Fed. Cas. No. 2,331, per Cadwalader, Dist. J. See Slaughter House Cases, 16 Wall. (83 U. S.) 36, 65, 21 L. ed. 394.

Arkansas: Levy, Ex parte, 43 Ark. 42, 53, 51 Am. Rep. 550, per Eakin, J.

Connecticut: Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19, 38, per Hinman, J., quoting Bouvier.

Florida: Barbee v. Jacksonville & A. Plank Road Co., 6 Fla. 262, 268, 269, per DuPont, J., citing Walker's Amer. Law, p. 208.

Montana: Davenport v. Klein-

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§ 23. **Same Subject Continued.**—It is pertinent, in this connection,[5] to notice the rule that grants of franchises should, as to all rights claimed under them, be strictly construed against the grantee and most favorably to the sovereign power or State,—that is, strictly against the corporation and liberally in favor of the public.[6] Such grants of franchises should be in plain language, and certain and definite in their nature,[7] as only that passes which is granted in clear and explicit

schmitt, 6 Mont. 502, 529, 13 Pac. 249, per McLeary, J. (gives an exclusive right or sole power).

North Dakota: Patterson v. Wollmann, 5 N. Dak. 608, 615, 616, 67 N. W. 1040, 33 L. R. A. 536, per Corliss, J.

Tennessee: Leeper v. State, 103 Tenn. 500, 514, 53 S. W. 962, 48 L. R. A. 167, per Wilkes, J.; Memphis, City of, v. Memphis Water Co., 5 Heisk (52 Tenn.), 495, 529, per Nicholson, C. J.

Texas: Jones v. Carter (Tex. Civ. App. 1907), 101 S. W. 514, 515, 516, per Gill, C. J.

[5] See § 4, herein.

[6] **United States:** Water, Light & Gas Co. of Hutchinson v. Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, case affirms 144 Fed. 256; Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 130, citing Blair v. Chicago, 201 U. S. 400, 471, 50 L. ed. 801, 26 Sup. Ct. 427; Pearsall v. Great Northern Rd. Co., 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. 705, case reverses 73 Fed. 933; Hamilton Gas Light & C. Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. ed. 963; Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409; Hannibal & St. Joseph Rd. Co. v. Missouri River Packet Co., 125 U. S. 260, 31 L. ed. 731, 8 Sup. Ct. 874; Omaha Horse Rd. Co. v. Cable Tramway Co., 30 Fed. 324. Rule also applied to franchises giving monopolies. Georgia Macon & Western Rd. v. Davis, 13 Ga. 68.

Illinois: Blocki v. People, 220 Ill. 444, 77 N. E. 172; Mills v. County of St. Clair, 7 Ill. 197.

Maryland: Baltimore, City of, v. Chesapeake & Potomac Teleph. Co., 92 Md. 692, 48 Atl. 465.

Minnesota: State v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380, 108 N. W. 261.

Nebraska: Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 110, 84 N. W. 802.

New Jersey: Millville Gas Light Co. v. Vineland Light & Power Co. (N. J. Eq., 1906), 65 Atl. 504.

New York: Trustees of Southampton v. Jessup, 162 N. Y. 122, 127, 56 N. E. 538, per Vann, J.; case reverses 10 App. Div. 456.

Ohio: Bank of Toledo v. City of Toledo (Toledo Bank v. Bond), 1 Ohio St. 622, 636, per Bartley, J.

Pennsylvania: Emerson v. Commonwealth, 108 Pa. 111.

Tennessee: Citizens' St. Ry. Co. v. Africa, 100 Tenn. 26, 53, 42 S. W. 485, 878.

[7] Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 130, 51 L. ed. 399, 27 Sup. Ct. —, citing Blair v. Chicago, 201 U. S. 400, 471, 26 Sup. Ct. 427, 50 L. ed. 801.

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terms; whatever is not unequivocally granted is withheld, and nothing passes by implication except what is necessary to carry into effect the obvious intent of the grant.[8] The above rule as to strict construction is held to apply so that grants of a franchise or privilege are not ordinarily to be taken as grants of an exclusive privilege.[9] So it is declared that "Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed. Every statute which takes away from the legislature its power will always be construed most strongly in favor of the State. These are elementary principles." [10] It is also said that an exclusive privilege cannot legally exist where there is the slightest doubt as to its validity, and that a special franchise to be exclusive must be absolutely free from ambiguity.[11] And in a late case in the United States Supreme Court it is held that the power to grant an exclusive privilege must be expressly given, or, if inferred from other powers, must be indispensable, and not merely convenient to them.[12] So, under a New York decision, grants of franchises by the same State are to be so strictly construed as to operate as a surrender of the sovereignty no further than is expressly declared by the terms of the grant; the grantee takes nothing in that respect by inference, except so far, therefore, as, by the terms of the grant, the exercise of the franchise rights granted is made exclusive, the legislative power is reserved to grant

[8] Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. ed. 353; Stein v. Bienville Water Supply Co., 141 U. S. 67, 11 Sup. Ct. 892, 35 L. ed. 622; Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 9 L. ed. 773; City of Helena v. Helena Waterworks Co., 122 Fed. 1, 59 C. C. A. 159; People ex rel. Woodhaven Gas Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787, case reverses 11 App. Div. 175; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 26 N. Y. St. R. 364, 22 N. E. 381; Pennsylvania Ry. Co. v. Canal Commissioners, 21 Pa. 9, 22, per Black, C. J.

[9] Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 696, 41 L. ed. 1165, 17 Sup. Ct. 718, per Brewer, J.; McLeod v. Burroughs, 9 Ga. 213.

[10] Wright v. Nagle, 101 U. S. 791, 796, 25 L. ed. 921, per Waite, C. J.

[11] West Manayunk Gas Light Co. v. New Gas Light Co., 21 Pa. Co. Ct. Rep. 379 (a franchise under Pa. act 1874).

[12] Water, Light & Gas Co., of Hutchinson v. Hutchinson, 207 U.

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and permit the exercise of competing and rival powers and privileges, however injurious they may be to those previously granted.[13] And if a State grants no exclusive privileges to one company which it has incorporated, it impairs no contract by incorporating a second one which itself largely manages and profits by to the injury of the first.[14] Again, in the construction of charters and statutes granting exclusive privileges to street-railway, gas or water companies, authority therefor must be given explicitly by the legislature in clearly expressed terms—the right will not be implied from the use of general language; and, as a rule, municipalities have no power to grant such exclusive rights to said companies except upon legislative authorization subject to the same rules of construction as above stated.[15] Where a statute grants exclusive rights to supply light or heat, a corporation which comes within the terms of the statute may exercise such exclusive privilege. But where the statute provides for the incorporation of companies "for the supply of water to the public, or for the manufacture of gas, or the supply of light or heat to the public, by any other means," it does not include electric lighting, where such grant is relied on for the purpose of claiming an exclusive privilege, especially so where the act in question gives no power to enter upon the public streets for the erection of poles and placing of wires, the privilege of so entering being confined to the laying of pipes only and the process of lighting by electricity being unknown when the statute was

S. 385, 28 Sup. Ct. 135, case affirms 144 Fed. 256. See § 4, herein.

[13] Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 26 N. Y. St. R. 364, 22 N. E. 381.

[14] Turnpike Co. v. State, 3 Wall. (70 U. S.) 210, 18 L. ed. 180. See also Rockland Water Co. v. Camden & Rockland Water Co., 80 Me. 544, 1 L. R. A. 388, 15 Atl. 785. Examine Skaneateles Water Works Co. v. Skaneateles, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. 400, aff'g 161 N. Y. 154, 55 N. E. 562, aff'g 54 N. Y. Supp. 1115, 33 App. Div. 642.

[15] Detroit Citizens' St. R. Co. v. Detroit, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859, 28 Chic. L. News, 409, 3 Detroit L. News, 377, 5 Am. & Eng. R. Cas. (N. S.) 15, aff'd 171 U. S. 48, 18 Sup. Ct. 732. See Morawetz on Priv. Corp. (ed. 1882) § 431; Cooley on Const. Lim. (ed. 1890) pp. 231 *et. seq;* 4 Thomp. on Corp. (ed. 1895) §§ 5348, 5398–5403.

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enacted.[16] The rule was also relied upon in this case, that a legislative grant to a corporation of exclusive privileges is to be construed most strictly, that every intendment not obviously in favor of the grant must be construed against it, and that monopolies are not to be favored.[17]

§ 24. **Same Subject Continued.**—The term "franchise" [18] is, however, sometimes used to mean an exclusive right,[19] and

[16] Scranton Elect. Light & Heat Co. v. Scranton Illuminating, Heat & Power Co., 122 Pa. 154, 9 Am. St. Rep. 79, 15 Atl. 446, 3 Am. Elec. Cas. 499; Act of Pa. 1874, § 34, cl. 3, *contra*, except as to exclusive privilege; Wilkesbarre Elec. L. Co. v. Wilkesbarre L. H. & M. Co. (C. P. Penn. 1886), 4 Kulp, 47.

[17] Citing Emerson v. Commonwealth, 108 Pa. 111. The court in the principal case (122 Pa. 154, cited in last preceding note), per Gordon, C. J., said: "Monopolies are favorites neither with courts nor people. They operate in restraint of competition, and are hence, as a rule, detrimental to the public welfare; nor are they at all allowable except where the resultant advantage is in favor of the public, as, for instance, where a water or gas company could not exist except as a monopoly."

[18] See § 4, herein.

[19] Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 576, per Dickey, J. See § 4, herein.

"The word 'exclusive' is derived from '*ex*,' out, and '*claudere*,' to shut. An act does not grant an exclusive privilege or franchise unless it shuts out or excludes others from enjoying a similar privilege or franchise. The most familiar instances of grants of exclusive privileges or franchises are to be found in acts authorizing the establishment of ferries, toll bridges, turnpikes, telegraph companies and the like. * * * The delegation to a corporation of the power to acquire title to land for public purposes is not a grant of an 'exclusive' privilege, for the same delegated power may be conferred upon any corporation to whom the legislature may see fit to intrust it." Union Ferry Co., Matter of Application of, 98 N. Y. 139, 151, per Rapallo, J.; Davenport v. Kleinschmidt, 6 Mont. 502, 531, 13 Pac. 249, per McLeary, J., gives same definition.

The grant of every franchise or privilege is "an exclusive one, in the sense that all others are excluded from the enjoyment of that particular franchise or privilege. The true test is not, are all others excluded from the enjoyment of that particular grant? But are all others excluded from the enjoyment of a like grant? The fact that no others enjoy a like immunity does not render the immunity exclusive. It is not whether others enjoy a similar privilege, immunity or franchise, but are others prohibited from a similar enjoyment by reason of the enactment." Wood v. Common Council of City of Binghamton, 56 N. Y. Supp. 105, 111, 26 Misc. 208, per Mattice, J.

Meaning of exclusive franchise,

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it is expressly declared that every grant of a franchise is, so far as that grant extends, necessarily exclusive, and cannot be resumed or interfered with; that it is a contract whose obligation cannot be constitutionally impaired;[20] and that certain franchises are founded upon a valuable consideration and are necessarily exclusive in their nature and cannot be resumed at pleasure or the grant impaired by any act of the government without a breach of contract.[21] So in a California case it is said that franchises are necessarily exclusive in character, otherwise their value would be liable to be destroyed or seriously impaired; and that even though the grant does not declare the privilege to be exclusive, yet that is necessarily implied from its nature.[22] It is also declared that a franchise is *jus publicum* and necessarily exclusive in its nature.[23] So a grant of a ferry franchise by the legislature, unless limited by some general law, or some restrictive provision in the grant itself, is said to be necessarily exclusive to the extent

privilege or immunity, see the following cases:

Montana: Davenport v. Kleinschmidt, 6 Mont. 502, 529–531, 13 Pac. 249 (holding that a right to furnish all the water to a municipal corporation for twenty years, which right cannot be abridged, is an exclusive privilege).

New Jersey: State v. Post, 55 N. J. L. 264, 26 Atl. 683.

New York: Trustees of Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 328, 45 Am. Rep. 217 (a grant of a right to receive a certain proportion of public funds is not an exclusive privilege, franchise or immunity, under a constitutional provision prohibiting such grants by private or local bill).

Oregon: Hackett v. Wilson, 12 Oreg. 25, 31, 32, 6 Pac. 652 (exclusive privilege confined to ferry landings and such privilege can be implied beyond that); Montgomery v. Multnomah Ry. Co., 11 Oreg. 344, 3 Pac. 435 (ferry franchise gives exclusive privilege of transportation between certain points or ferry landings).

Pennsylvania: Lehigh Water Co.'s Appeal, 102 Pa. 515, 527.

[20] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 604, 618, 637, 638, 643, 645, 9 L. ed. 773, per Story, J., in dissenting opinion.

[21] Dyer v. Tuskaloosa Bridge Co., 2 Port. (Ala.) 296, 303, 304, 27 Am. Dec. 655, per Hitchcock, J.

[22] California State Teleg. Co. v. Alta Teleg. Co., 22 Cal. 398, 422, per Crocker, J.

[23] Twelfth St. Market Co. v. Philadelphia & Reading Term. R. Co., 142 Pa. 580, 590, 21 Atl. 989, per Thayer, P. J. (a case of a public market house and right of eminent domain). See also 3 Kent's Comm. (14th ed.) bottom p. 723, *p. 458.

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of the privilege conferred.[24] But it is also asserted that a grant of a public ferry franchise carries with it no exclusive privilege, and that such franchise is subject to the power of the proper authorities, under state laws, to establish such other public ferries over the same waters as public convenience demands, and that any injury thereby sustained by the first grantee is *damnum absque injuria*.[25] Legislative grants of franchises, however, whether granted by special charters or under general laws, confer privileges which are exclusive in their nature as against all persons upon whom similar rights have not been conferred, so that any attempted exercise of such rights, without legislative sanction, is not only an unwarranted usurpation of power, but operates as a direct invasion of the private property rights of those upon whom the franchises have been so conferred.[26]

§ 25. **Franchises as Property.**—A franchise has been declared to be a mere legal right or privilege;[27] only an intangible right or privilege not subject to assessment;[28] not property of any description except in the sense that it is valuable;[29] not property within the meaning of that term as

[24] Mills v. County of St. Clair, 7 Ill. 197. See also Patterson v. Wollmann, 5 N. Dak. 608, 67 N. W. 1040, 33 L. R. A. 536. Examine Mills v. County of St. Clair, 7 Ill. (2 Gilm.) 225; Phillips v. Bloomington, 1 G. Greene (Iowa), 498, 502; Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633.

"There can be no question as to the meaning of the word ferry, when used in the common-law sense of a franchise or right of ferry. The definition, given in *Termes de la Ley* is 'a liberty, by prescription or the king's grant, to have a boat for passage upon a great stream for carriage of horses and men for reasonable toll.' The term, according to the common law of England, implies an exclusive right of conveyance, and can only be set up by license from the crown. While it may be a right to convey one way only, there must, at least, be a right to land on the opposite shore, or the franchise cannot beneficially exist." State v. Freeholders of Hudson, 23 N. J. L. 206, 209, per Carpenter, J.

[25] Hudspeth v. Hall, 111 Ga. 510, 36 S. E. 770.

[26] Millville Gaslight Co v. Vineland Light & Power Co., (N. J. Eq. 1906), 65 Atl. 504.

[27] Pennsylvania Rd. Co. v. Bowers, 124 Pa. 183, 191, 2 L. R. A. 621, 23 Wkly. N. of Cas. 257, 16 Atl. 836.

[28] South Park Commissioners v. Chicago, 107 Ill. 105, 108.

[29] State v. Ferris, 53 Ohio St. 314.

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used in the Bill of Rights, even though in one sense property and valuable property;[30] not real estate;[31] and that a ferry is not land nor an incorporeal hereditament.[32] It has also been declared by an eminent writer, whose statements, generally, have been accepted as having almost the force of a judicial opinion, that franchises have with some impropriety been classed among hereditaments.[33] Again, in a New Jersey case the court says that: "Although, technically speaking, franchises are property, they are property of a peculiar character, arising only from legislative grant, and are not in ordinary cases, subject to execution or to sale and transfer, even in payment of the debts of the corporation without the assent or authority of the legislature.[34] And it is also held that an action at law cannot be maintained to recover possession of a franchise of a corporation because it is intangible and is incapable of physical identification or delivery.[35]

§ 26. **Same Subject Continued.**—Notwithstanding any assertion to the contrary, franchises are property, and are almost universally classed as real property or incorporeal hereditaments.[36] But, upon the point that the legislature

329, 41 N. E. 579, 30 L. R. A. 218.

[30] City of Baltimore v. Johnson, 96 Md. 737, 747, 61 L. R. A. 568, 54 Atl. 646, per Boyd, J.; State v. Philadelphia, Wilmington & Balt. Rd. Co., 45 Md. 361, 379, 24 Am. Rep. 511, per Robinson, J. (a case of taxation).

[31] Fidelity Title & Trust Co. v. Schenley Park & Highlands Rd. Co., 189 Pa. 363, 370, 42 Atl. 140, 69 Am. St. Rep. 815.

[32] Morse v. Garner, 1 Strobh. (S. C.) 514, 520, held not an incorporeal hereditament "in this State." See notes under next following section herein.

[33] "These incorporated franchises seem, indeed with some impropriety, to be classed by writers among hereditaments, since they have no inheritable quality, inasmuch as a corporation, in cases where there is no express limitation to its continuance by the charter, is supposed never to die, but to be clothed with a kind of legal immortality." 3 Kent's Comm. (14th ed.) bottom p. 727, *459; quoted in dissenting opinion of Tapley, J., in Kennebec & Portland Rd. Co. v. Portland & Kennebec Rd. Co., 59 Me. 966 (a case of mortgage and foreclosure of franchise, etc., of railroad).

[34] Randolph v. Larned, 27 N. J. Eq. 557, 561, per Green, J.

[35] Budd v. Multnomah St. Rd. Co., 15 Oreg. 404, 15 Pac. 654.

[36] **United States:** Louisville & Jeffersonville Ferry Co. v. Kentucky,

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had no power to authorize the construction of one railroad across another, the Supreme Court of the United States has

188 U. S. 385, 394, 23 Sup. Ct. 463, 47 L. ed. 513 (ferry franchise is incorporeal hereditament—taxation case); Central Pac. Rd. Co. v. California, 162 U. S. 91, 127, 16 Sup. Ct. 766, 40 L. ed. 903, per Fuller, C. J. (is property, etc., a case of taxation of franchise); Wilmington v. Reid, 13 Wall. (80 U. S.) 264, 268, 20 L. ed. 568, per Davis, J. (case of exemption from taxation); Veazie Bank v. Fenno, 8 Wall. (75 U. S.) 533, 547, 19 L. ed. 482 ("Franchises are property often very valuable and productive"), Conway v. Taylor, 1 Black (66 U. S.), 603, 17 L. ed. 191 (ferry franchise is property, and as sacred as other property); West River Bridge Co. v. Dix, 6 How. (47 U. S.) 12 L. ed. 535 (property held by an incorporated company stands upon the same footing with that held by an individual, and a franchise cannot be distinguished from other property); Bowman v. Wathen, 2 McLean (U. S. C. C.), 376, Fed. Cas. No. 1,740 (is an incorporeal hereditament).

Alabama: Medical & Surgical Soc. of Montgomery v. Weatherly, 75 Ala. 248, 253 (corporate franchise is property, incorporeal it is true, but nevertheless valuable in the eye of the law); Horst v. Moses, 48 Ala. 129, 146 (an incorporeal hereditament); Stewart v. Hargrove, 23 Ala. 429, 436 (franchise of a toll bridge is properly within the bankrupt law and passes to the assignee in bankruptcy).

California: City of South Passadena v. Passadena Land & Water Co., (Cal., 1908), 93 Pac. 490 (is a species of real property); Stockton Gas & Electric Co. v. San Joachin County, 148 Cal. 313, 83 Pac. 54 (is incorporeal hereditament; real estate in nature of an easement); Oakland R. Co. v. Oakland, Brooklyn & Fruit Vale Rd. Co., 45 Cal. 365, 373, 13 Am. Rep. 181 (has legal character of estate in property); People v. Duncan, 41 Cal. 507, 511 (franchise to construct turnpike road and collect tolls is personal trust reposed in grantee and is not assignable except with consent of granting party); California State Teleg. Co. v. Alta Teleg. Co., 22 Cal. 398, 422 (is in nature of vested right of property subject to conditions); San Joaquin & Kings River Canal Irr. Co. v. Merced County, 2 Cal. App. 593, 84 Pac. 285 (is property subject to taxation).

Delaware: Wilmington & Reading R. Co. v. Downward (Del., 1888), 4 Atl. 720, 723 (is property and cannot be wantonly or of whim be taken away by legislative act and transferred to another).

Florida: Gibbs v. Drew, 16 Fla. 147, 26 Am. Rep. 700 (are incorporeal hereditaments of intangible nature not embraced within terms, lands and tenements in act regulating unlawful detainer).

Georgia: Averett v. Brady, 20 Ga. 523, 529 (ferry right is incorporeal hereditament. It grows out of the soil and may be granted).

Idaho: Evans v. Kroutinger, 9 Ida. 153, 72 Pac. 882 (is an incorporeal hereditament which may be voluntarily transferred—question of right to transfer discussed, however).

Illinois: Dundy v. Chambers, 23 Ill. 369 (ferry franchise is real estate, transferrable only in accordance with statutory provisions).

Iowa: Lippincott v. Allander, 27

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declared that: "The grant of a franchise is of no higher order, and confers no more sacred title than a grant of land to an

Iowa, 460, 1 Am. Rep. 299 (ferry franchise is included in the general denomination of incorporeal hereditaments, a term used to distinguish one of the different kinds of things real).

Kentucky: Dufour v. Stacey, 90 Ky. 288, 296, 29 Am. St. Rep. 374, 14 S. W. 48 (ferry franchise is property alienable and descendable and a property right of which the legislature has no power to divest the owner); Frankfort, Lexington & Versailles Turnpike Co. v. Commonwealth, 82 Ky. 386, 388, 6 Ky. L. Rep. 391, 392 (the term "property" in its broad sense includes even a franchise).

Louisiana: Maestri v. Board of Assessors, 110 La. 157, 528, 529, 34 So. 658 (is taxable property); State v. Morgan, 28 La. Ann. 482, 493 (franchises are incorporeal hereditaments known as a species of property, as well as any estate in lands, per Ludeling, C. J., in dissenting opinion, a case of exemption from taxation and construction of charter and right to transfer).

Maryland: Jacob Tome Inst. of Port Deposit v. Crothers, 87 Md. 569, 585, 40 Atl. 261 (a vested right peculiar in its nature—a quasi property); Baltimore & Fredericktown Turnpike Road v. Baltimore, Catonsville & Ellicotts Mills Pass. Rd. Co., 81 Md. 247, 255, 31 Atl. 854 (franchise or corporate right to acquire land by right of eminent domain is an incorporeal hereditament, not a legal title to the land itself).

Michigan: Billings v. Breinig, 45 Mich. 65, 70, 7 N. W. 722 (franchise of keeping rope ferry is property possessing valuable incidents of other species of property and transferrable subject to conditions lawfully imposed).

Minnesota: McRoberts v. Washburne, 10 Minn. 23 (ferry is property entitled to protection same as other property).

Missouri: Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884 (ferry franchise is property right); Capital City Ferry Co. v. Cole, etc., Transp. Co., 51 Mo. App. 228, 234 (ferry franchise is property, just as real estate or ordinary chattels are property and is entitled to protection).

Nebraska: State v. Savage, 65 Neb. 714, 91 N. W. 716 ("property" includes all property tangible or intangible).

New Jersey: State Board of Assessors v. Central R. Co., 48 N. J. L. 146, 283, 4 Atl. 578 (franchises are undoubtedly property and as such are taxable).

New York: Hatfield v. Strauss, 189 N. Y. 208, 219, 82 N. E. 172, per O'Brien (a franchise is property assignable, taxable and transmissible); case affirms 102 N. Y. Supp. 934, 117 App. Div. 671; Mayor, etc., of New York v. Starin, 106 N. Y. 1, 8 N. Y. St. Rep. 655, 27 Wkly Dig. 124, 12 N. E. 631 (a ferry franchise is property, an incorporeal hereditament, as sacred as other property); People v. Utica Ins. Co., 15 Johns. (N. Y.) 357, 386, 8 Am. Dec. 243, per Spencer, J. (is a species of incorporeal hereditament). See People v. Roberts, 158 N. Y. 162, 167, 158, 52 N. E. 1102.

North Carolina: Worth v. Wilmington & Weldon Rd. Co., 89 N. C. 291, 301, 306, 45 Am. Rep. 679

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individual; and, when the public necessities require it, the one as well as the other, may be taken for public purposes

(is property—exemption from taxation).

Ohio: Turnpike Co. v. Parks, 50 Ohio St. 568, 576, 35 N. E. 304 (is property and nothing more—incorporeal—cannot be distinguished from other property).

Pennsylvania: Shamokin Valley Rd. Co. v. Livermore, 47 Pa. 465, 468, per Agnew, J. (land, in itself, is not a franchise; it is an absolute tenement; a corporeal thing. Franchise is an incorporeal hereditament).

West Virginia: Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396, 410, 417 (a ferry is an incorporeal hereditament—it is private property within a constitutional provision that private property shall not be taken or damaged for public use without just compensation).

Wisconsin: Sellers v. Union Lumbering Co., 39 Wis. 525, 527 (is property—an incorporeal hereditament).

Franchise is a seventh species of incorporeal hereditaments. 2 Blackstone's Comm. (Lewis's ed.) p. 506, *37; (Hammond's ed.) 67 [37]; (Wendell's ed.) 37 [38]; (Sharswood's ed.) 37; (Chase's ed.) 234 *37; Taylor's Law Gloss. (ed. 1858) p. 210.

"Besides the above hereditaments there are others * * * called Franchises. * * * Such are every Liberty or Commodity which having their Creation at first by Special Grant of the King, or of their nature appertaining to him, are given to a common Person to have in them some Estate of Inheritance or for life," etc. Finch's Laws of Eng. 125 [38]. See §§ 33–36, herein.

Property in its broadest and most comprehensive sense, includes all rights and interests in real and personal property and also in easements, *franchises* and incorporeal hereditaments. Metropolitan City Ry. Co. v. Chicago West Division Ry. Co., 87 Ill. 317, 324.

"It is clear upon authority that the franchise of a corporation is property, and as such, it may be a proper subject of taxation." Porter v. Rockford, Rock Island & St. Louis Rd. Co., 76 Ill. 561, 573, per Scholfield, J.

A franchise "is property which may be transferred by sale or otherwise, and it will descend to heirs like other property; and the owner has the same security for its protection under the constitution, as has the owner of any other property. * * * As this is a species of property derived by grant from the government, it follows, that if the government has no power to make the grant, either because it is contrary to public policy, or because the government had no title to the thing granted, no title will be conveyed to the grantee." Norwich Gas Light Co. v. The Norwich City Gas Co., 25 Conn. 19, 36, per Hinman, J.

"A franchise is an incorporeal hereditament known as a species of property, as well as any estate in lands. It is property which may be bought and sold, which will descend to heirs, and may be devised. Its value is greater or less according to the privilege granted to the proprietors. Enfield Toll Bridge Co. v. Hartford & New Haven Rd. Co., 17 Conn. 40, 59, per Williams, Ch. J.

Street railroads. "A franchise, both at common law and by New

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on making suitable compensation; nor does such an exercise of the right of eminent domain interfere with the inviolability

York statute, is real estate, being classified as an incorporeal hereditament," and thus applies to street railroads. Thompson v. Schenectady Ry. Co., 124 Fed. 274, 278, per Ray, Dist. J. [citing 2 Wash. R. P. C. I., p. 291, § 2, note I, et seq.; 3 Kent's Comm. (12th ed.), p. 458; Laws N. Y. 1899, p. 1589, c. 712]. See also same case, 131 Fed. 577, 579, per Wallace, Cir. J.

Exclusive right vested in street railroad to operate line in city is property right entitling company to raise question of forfeiture by injunction suit. Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co. (Del. Ch.), 46 Atl. 12.

Gas light company. A franchise to carry on its business in a town and to lay conductors in the streets and highways for the purpose of delivering gas is property of which the gas light company cannot be divested except for cause and by due legal process. People ex rel. Woodhaven Gas Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787, rev'g. 11 App. Div. 175.

In a strict sense a ferry franchise is not real estate, but it is held that it partakes so far of the nature of real estate that it may be partitioned in the same manner as real property, and a franchise to cross a river and receive tolls is so connected with the land on each side of the river as a part of the ferry that it may be regarded as a part of the land for the purpose of being partitioned. Bohn v. Harris, 130 Ill. 525, 22 N. E. 587.

A license to establish a ferry is the grant of an incorporeal hereditament subject to be revoked if a sufficient bond is not executed within ten days after such requisition is made. It is an interest which may be sold, and will descend to the heir as an incident of the fee. "At common law, a ferry was an incorporeal hereditament, and was consequently capable of alienation, and would pass to the heir by descent. In this State, the whole matter has been regulated by statute; so that we must therefore look thereto to ascertain what rights appertain to the grantee of a ferry." Lewis v. Intendant and Town Council of Gainesville, 7 Ala. 85, 87, per Ormond, J.

"There can be no doubt, at this day, that the right to enjoy a ferry franchise is property, the full use of which the court will protect by appropriate remedies, one of which is injunction, where a direct pecuniary loss ensues to plaintiff by the unauthorized and continuous operation of a rival ferry. Cauble v. Craig, 94 Mo. App. 675, 69 S. W. 49.

In the Charles River Bridge case the court, per Story, J., in dissenting opinion, said: "This franchise is property; is fixed, determinate property. * * * That franchise, so far as it reaches, is private property; and so far as it is injured, it is the taking away of private property." Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 604, 618, 637, 638, 643, 645, 9 L. ed. 773.

"*A franchise for banking* is in every State in the Union recognized as property." Gordon v. Appeal Tax Court, 3 How. (44 U. S.) 133, 150, 11 L. ed. 529, per Wayne, J. (a case of right to tax). See also Home Insurance Co. v. New York, 134 U. S. 594, 601, 33 L. ed. 1025, 10 Sup. Ct.

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of contracts." [37] So an estate in a franchise vests upon the same principle as estates in land, being equally a grant of a right or privilege for a valuable consideration.[38]

§ 27. **Same Subject Continued.**—In some States the franchises and privileges of a corporation are declared to be personal property, and it is said in a Federal case that: "According to the law of most States this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation." [39]

§ 28. **Franchise of Members, Shareholders or Corporators as Property.**—Each individual member is said to be the owner of a franchise, and his privilege of membership is, therefore, subject to protection as valuable.[40] And the corporators have a property in the franchise of a private civil corporation of which they cannot be deprived without due process of law.[41]

593, per Field, J., citing Monroe Sav. Bk. v. City of Rochester, 37 N. Y. 365, 369, 370.

[37] Richmond, Fredericksburg & Potomac Rd. Co., 13 How. (54 U. S.) 71, 83, 14 L. ed. 55, per Grier, J.

A franchise of a corporation is property and may be condemned for public use by virtue of the power of eminent domain, due compensation being made therefor. Porter v. Rockford, Rock Island & St. Louis Rd. Co., 76 Ill. 561, 575.

[38] State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 41 Am. Dec. 509.

"All the elementary writers treat of franchises as real property, though incorporeal in their nature. Chancellor Kent, in his commentaries, says that an estate in a franchise and an estate in land rest upon the same principles." Randolph v. Larned, 27 N. J. Eq. 557, 561, per Green, J.

[39] Horn Silver Mining Co. v. New York, 143 U. S. 305, 312, 36 L. ed. 164, 12 Sup. Ct. 403, per Field, J. (a case of taxation of corporate franchises). See also Home Insurance Co. v. New York, 134 U. S. 594, 601, 33 L. ed. 1025, 10 Sup. Ct. 593, per Field, J.; Bank of California v. San Francisco, 142 Cal. 276, 280, 75 Pac. 832; Monroe Sav. Bk. v. City of Rochester, 37 N. Y. 365, 367, per Fullerton J.; State v. Anderson, 90 Wis. 550, 561, 63 N. W. 746.

[40] Medical & Surgical Soc. of Montgomery v. Weatherly, 75 Ala. 248, 253.

[41] State ex rel. Waring v. Georgia Medical Soc., 38 Ga. 608, 626, 95 Am. Dec. 408. The court, per Brown, C. J., said: "When the voluntary society accepted the charter, it became a private, civil corporation, and the corporators then in being acquired a property in the franchise, and every person who has since become a corporator has acquired a

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In a Kentucky case the legislature by statute [42] incorporated a company to construct a railroad from Lexington to the Ohio River, giving to said corporation perpetual succession, and the power to raise funds by subscription in shares, to purchase ground for a railway, and for the erection of suitable buildings for the safe-keeping of articles received for transportation, and for shops for the accommodation of the company, cars, vehicles, etc., and to charge toll, and make a dividend of the profits among the shareholders according to the amount of stock held by each. It was determined that the right conferred on each shareholder was unquestionably an incorporeal hereditament. The court said: "It is a right of perpetual duration; and though it springs out of the use of personalty, as well as lands and houses, this matters not. It is a franchise which has ever been classed in that class of real estate denominated an incorporeal hereditament. An annuity, though only chargeable upon the person of the grantor is an incorporeal hereditament; and though the owner's security is merely personal, yet he may have a real estate in it.[43] Much less can it be doubted that a franchise created by act of in-

like property. The property which the corporator acquires is not visible, tangible property; but it is none the less property because it is invisible and intangible. It is not a corporeal hereditament; but it is incorporeal. Blackstone, in his commentaries, volume 2, page 21, says: That incorporeal hereditaments are divided into ten sorts; one of these consists of franchises. * * * The law books are full of the doctrine that persons may have a property in incorporeal hereditaments, franchises, etc. Property, says Bouvier, volume 2, page 381, is divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise and the like; the latter consists in legal rights, as choses in action, easement and the like. Blackstone says, volume 2, page 37, it is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession, and to do other corporate acts, and each individual member of such corporation is also said to have a franchise or freedom. We think it well settled by these and other authorities, that a corporator in a private civil corporation has a property in the franchise, of which he cannot be deprived without due process of law."

See Bank of California v. City & County of San Francisco, 142 Cal. 276, 64 L. R. A. 918, 75 Pac. 832.

[42] Approved Jan'y 27, 1830. Session Acts 1829, 126.

[43] Citing 2 Blackstone's Comm. 40.

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corporation, unlimited in duration, and springing out of the combined use of lands and personalty, should be denominated and classed as real estate." [44] So in the Dartmouth College case it is declared that the franchise of a corporation and that of its members, "like other franchises, is an incorporeal hereditament, issuing out of something real or personal, or concerning or annexed to, and exercisable within, a thing corporate. To this grant, or this franchise, the parties are the king and the persons for whose benefit it is created, or trustees for them. The assent of both is necessary." [45]

§ 29. Corporate Franchises are Legal Estates, not Mere Naked Powers.—In respect to corporate franchises, they are, properly speaking, legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest, which vest in the corporation by virtue of its charter. The property of the corporation vests upon the possession of its franchises; and whatever may be thought as to the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises. It may sue and be sued for them.[46]

[44] Price v. Price's Heirs, 6 Dana (36 Ky.), 107, citing 2 Blackstone's Comm, 20–22, 37–38; Co. Litt. 19, 20; Com. Dig., title "Franchise."

[45] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 657, 4 L. ed. 629, per Washington, J., *Id.*, 700, per Story, J.

[46] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 700, 4 L. ed. 629, per Story, J.; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. (73 U. S.) 632, 638, 18 L. ed. 904, per Clifford, J.; Society for Savings v. Corte, 6 Wall. (73 U. S.) 594, 606, 18 L. ed. 897, per Clifford, J. (a case of imposition of franchise tax); Bank of California v. San Francisco, 142 Cal. 276, 281, 75 Pac. 832, per Angellotti, J. See also Commonwealth v. Standard Oil Co., 101 Pa. 119, 127 (a case of taxation).

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CHAPTER IV.

NATURE OF FRANCHISE CONTINUED—DISTINCTIONS.

§ 30. Franchises Essential and not Essential to Corporate Existence—"Essentially Corporate Franchises."
31. "Corporate Powers or Privileges" not Franchises Essential to Corporate Existence.
32. Franchises and Powers—To What Extent Distinguished.
33. Franchise to Be Separate and Distinct from Property or Franchise Which Corporation May Acquire.
34. Same Subject Continued.
35. Same Subject — "Personal Franchise" Distinguished from Property Franchise.
36. Franchise Differs from Grant of Land—Easement—Freehold.
37. General Creative Franchise and Special Franchise Distinguished.
38. Franchises Belonging to Corporators and Those Belonging to Corporation Distinguished.
39. Franchise to Be and to Carry on Business Distinguished—"Corporate Franchise or Business."
§ 40. Franchise Distinguished from Means Employed in Exercising it.
41. Charter and Franchise—To What Extent Distinguished.
42. Charter and Franchise Continued—How Extent of Powers Is Ascertained.
43. Charter and Franchise Continued—Where Franchise Does Not Take Effect Before Actual Formation of Corporation.
44. Charter and Franchise Continued—Charter Rights and Privileges Derived Through Organization — "Additional Franchise or Privilege" Acquired after Incorporation.
45. Charter and Franchise Continued—Distinction Exists.
46. Charter and Franchise Continued—"Charter" as Synonymous with "Franchise."
47. Whether Certain Grants Constitute a License, Privilege, Permission, Gratuity or Contract; and not a Franchise —Distinction.
48. Same Subject Continued.

§ 30. **Franchises Essential and not Essential to Corporate Existence—"Essentially Corporate Franchises."**—It may be stated generally that a marked distinction exists between a

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franchise which is essential to the creation and continued existence of a corporation, to its right to exist as an artificial being, and inseparable from it, and other franchises, rights and privileges, subsidiary in their nature, which it possesses and may exercise under and by virtue of the franchise to be and to the enjoyment of which corporate existence is not a prerequisite.[1] So it is declared that: "The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise to be is distinct from a franchise as a corporation to maintain and operate a railway. The latter may be mortgaged without the former, and may pass to a pur-

[1] *As to primary and secondary franchises of corporations*, see § 8, herein.

"The Western North Carolina Railroad Company was created a corporation by the legislature of that State in the exercise of a sovereign power. This sovereign power made of several persons a single entity, and conferred on them the franchise of acting as one person. This new person, creature of the law, and existing through the grace and at the will of the sovereign, was then clothed with certain powers, and granted certain privileges. These are its franchises. First, the franchise of existence as a corporation,—its life and being. This is inseparable from it. When it parts with it,—with this franchise,—it parts with its life. But, with respect to the other franchises with which it has been clothed,—the right and privilege to act as a common carrier, to carry passengers and goods, to charge tolls, to operate a railroad,—these it enjoys as an individual could, and they are not inseparable from its existence. They are its property. A franchise to be a corporation is distinct from a franchise, as a corporation to maintain and operate a railroad." Central Trust Co. of N. Y. v. Western North Carolina Rd. Co., 89 Fed. 24, 31, per Simonton, Cir. J.

"The right to be a corporation is itself a separate, distinct and independent franchise, complete within itself, and a corporation having been created, enjoying this franchise, may receive a grant and enjoy other distinct and independent franchises, such as may be granted to and enjoyed by natural persons; but because it enjoys the latter franchises, they do not, therefore, constitute a part of the distinct and independent essential franchise,—the right to be a corporation. They are additional franchises given to the corporation, and not parts of the corporation itself,—not of the essence of the corporation." Southern Pacific Rd. Co. v. Orton, 32 Fed. 457, 474, per Sawyer, J.

"By the term 'corporate franchise a business' as here used * * * is meant * * * the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and *not* the privilege or franchise which, when incorporated, the company may exercise." Cobb v. Commissioners of Durham County, 122 N. C. 307, 309,

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chaser at a foreclosure sale.[2] And a franchise to take tolls, which comes into existence by grant, not directly from the State, but from a local board, is distinct from a corporate franchise. So a franchise to be a corporation may continue to exist, though any particular franchise annexed to it may have been surrendered or forfeited.[3] In a California case it is said: "This corporate franchise—viz., the franchise to be and exist as a corporation for the purposes specified in the articles of incorporation—appertains to every corporation, for whatever purpose it may be formed, and there is no distinction in this regard between the banking or grocery corporation, and the railroad, water or gas corporation. The right to engage in every such business is open to all citizens, independent of any grant from the sovereign, but it is available to no one to conduct any such business through the agency of a corporation without such grant. Certain occupations are, however, of such a nature that various privileges conferrable only by the sovereign power are convenient, and in most cases absolutely essential, to the successful maintenance of the business to be carried on, whether it be carried on by a corporation or by an individual—such, for instance, as the right to use public highways. Such rights and privileges are also known as franchises, but they constitute a class entirely distinct from and independent of the corporate franchise."[4] Again, what have been called "Essentially corporate franchises" are those without which the corporation could not exist, and which are, in their nature, incapable of being vested in, or enjoyed by, a natural person—such as the right or franchise of being a corporation, of having a corporate succession, etc. But the franchise of taking private property, or the right of eminent domain, is not perhaps necessarily a corporate right. So the franchises to

30 S. E. 338, per Montgomery, J., quoting Home Ins. Co. v. New York, 134 U. S. 594, 599, 33 L. ed. 1025, 10 Sup. Ct. 593, per Field, J.

[2] Memphis & Little Rock Rd. Co. v. Commissioners, 112 U. S. 609, 619, 28 L. ed. 837, 5 Sup. Ct. 299.

[3] Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 405, 24 Am. Rep. 585.

[4] Bank of California v. San Francisco, 142 Cal. 276, 280, 75 Pac. 832, per Angellotti, J.

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build, own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing and being enjoyed by natural persons. The franchise of maintaining a plank road and taking tolls, is not necessarily a corporate franchise, more than that of a ferry.[5]

§ 31. **"Corporate Powers or Privileges" not Franchises Essential to Corporate Existence.**—In granting franchises to street railway corporations to use and occupy city streets, a common council may exercise delegated legislative powers, but they are not grants of "corporate powers or privileges" under a constitution prohibiting the enactment of any special or private law granting corporate powers or privileges. They are not franchises essential to corporate existence, granted as part of the organic act of incorporation, but are such as may be sold and assigned, if assignable, or lost by forfeiture, and yet not affect the corporate existence of the street railway. It is said, however, that some confusion undoubtedly exists in the cases upon this subject and such franchises have been sometimes called "corporate franchises," but that this does not affect the true character of the franchises.[6]

§ 32. **Franchises and Powers—To What Extent Distinguished.**—A distinction is made in a Minnesota case between

[5] Joy v. Jackson & Michigan Plank Road Co., 11 Mich. 155, 164, 165, per Christiancy, J.

[6] Linden Land Co. v. Milwaukee Elect. Ry. & Light Co., 107 Wis. 493, 513, 514, 83 N. W. 858, per Winslow, J.

"We feel bound to hold, and find no difficulty in holding, the phrase in the amendment" (of a state constitution prohibiting the legislature from passing special laws, amongst other purposes, for corporate powers or privileges, except to cities) "to grant corporate powers or privileges, to mean *in principio donationis*, and equivalent to the phrase, to grant corporate charters. This is implied not only by the word grant, but also by the word corporate. A franchise is not essentially corporate; and it is not the grant of franchise which is prohibited, but of corporate franchise; that is, as we understand it, franchise by act of incorporation." Attorney Gen'l v. Chicago & Northwestern Rd. Co., 35 Wis. 425, 560, per Ryan, C. J., quoted in Brady v. Moulton, 61 Minn. 185, 186, per Mitchell, J. (holding that a special law authorizing a city to issue bonds for waterworks is not a grant of "corporate powers or privileges under the state constitutional pro-

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franchises and powers, and it is said that in order to constitute a franchise the right possessed, the privilege or immunity of a public nature must be such as to require the express permission of the sovereign power, through legislative authorization or grant, to warrant its exercise; that the right, whether existing in a natural or artificial person, to carry on any particular business is not necessarily a franchise; that a business which corporations are organized to carry on under a statute are powers and not franchises where such right is one possessed by all citizens who choose to engage in it without any legislative grant; and that the only franchise which corporations so organized possess is the general franchise to be or exist as a corporate entity so that if they engage in any business not authorized by the statute it is *ultra vires* or in excess of their powers, but not a usurpation of franchises not granted nor necessarily a misuser of those granted.[7] It is also declared, however, that the term power is in a sense synonymous with franchise. Thus, the capacity or liability to incur obligations in conducting the legitimate business of banking is said not to be a power in any just sense.[8] So it is asserted that: "The various powers conferred on corporations are franchises; the execution of a policy of insurance by an insurance company, and the issuing of a bank note by an incorporated banking company are the exercise of franchises; without legislative authority neither could be lawfully done by a corporation."[9] And in a case in the Federal Supreme Court it is said that: "The franchise to be a corporation is distinguished from the franchise to exercise as a corporation the banking powers named in this charter."[10] It may be stated, in this connec-

vision substantially the same as that last above considered).

[7] State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 225, 226, 41 N. W. 1020, 3 L. R. A. 510, per Mitchell, J.

Examine Wait on Operations Preliminary to Construction in Engineering & Architecture, § 862, as to distinction between franchises and powers, in substance same as the last above cited case, but citing no cases.

[8] Curtis v. Leavitt, 15 N. Y. 9, 170, per Shankland, J.

[9] State v. Mayor, etc., of New York, 3 Duer (N. Y.), 119, 144, per Bosworth, J.

[10] Mercantile Bank v. Tennessee,

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tion, that all the functions of a corporation are, in one sense franchises. Thus, the right to hold property in the corporate name, to sue and be sued in that capacity, to have and to use a corporate seal, and by that to contract, and some others, perhaps, are franchises, which constitute the very definition of a corporation. And whenever and wherever the corporation is recognized, for any purpose, the existence and exercise of these franchises must also be recognized.[11]

§ 33. **Franchise to Be Separate and Distinct from Property or Franchise Which Corporation May Acquire.**—Corporations may by virtue of a legislative grant of a franchise obtain or acquire certain property essential to their successful operations. Thus an electrical company which, in pursuance of a grant of a right by the proper authorities to enter upon and occupy streets or highways, proceeds to the construction and erection of its lines, obtains a right, partaking of the nature of an easement in property, of which it cannot be deprived, in the absence of a reservation of the right so to do.[12] Again, it is

161 U. S. 160, 171, 40 L. ed. 656, 16 Sup. Ct. 466, per Peckham, J. (a case of judicial sale of franchises of a corporation; of tax exemption, and purchasers' rights).

[11] State v. Boston, Concord & Montreal Rd. Co., 25 Vt. 433, 442, per Redfield, Ch. J.

[12] **United States:** City of Morristown v. East Tennessee Teleph. Co., 115 Fed. 304, 53 C. C. A. 132, 8 Am. Elec. Cas. 3. The court, per Lurton, C. J., said: that the consent of the municipal authorities "to the occupancy of the streets by poles and wires of the telephone company for the purpose of maintaining a telephone system was a grant of an easement in the streets and a conveyance of an estate or property interest, which, being in a large sense the exercise of a proprietory or contractual right rather than legislative, was irrevocable after acceptance, unless the power to alter or revoke was reserved." See Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed. 1, 44 C. C. A. 33.

Illinois: Village of London Mills v. White, 208 Ill. 289, 70 N. E. 313, aff'g 105 Ill. App. 146; People v. Central Illinois Tel. Co., 192 Ill. 307, 61 N. E. 428.

Kansas: City of Baxter Springs v. Baxter Springs L. & P. Co., 64 Kan. 591, 68 Pac. 63, 8 Am. Elec. Cas. 125.

Michigan: Mohan v. Michigan Teleph. Co.., 132 Mich. 242, 93 N. W. 629, 8 Am. Elec. Cas. 38; Michigan Teleph. Co. v. City of St. Joseph, 121 Mich. 502, 80 N. W. 383, 7 Am. Elec. Cas. 1.

Minnesota: City of Duluth v. Duluth Teleph. Co., 84 Minn. 486, 87 N. W. 1128, 8 Am. Elec. Cas. 136;

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declared to be settled law that when in pursuance of proper legislative authority a grant is made of a valid franchise, right or privilege to use or occupy a public street, common, or levee, or navigable waters adjacent thereon, for a public purpose, such as the construction and maintenance of wharves in aid of commerce, water tanks for use in sprinkling streets, telegraph and telephone poles, railway tracks and the like, and the grantee, relying upon such grant, expends money in prosecuting the enterprise he thereby acquires the property interest or right of which he cannot be deprived except under the power of eminent domain and upon compensation therefor. In such case the grantee acquires a right or easement different in kind from that enjoyed by the general public.[13] So where the consents of abutting owners is necessary to the use of streets and the construction of an electric street railway, property rights are created, by such valid consents, which cannot be abandoned except by action of all parties interested, including the consent of the State; nor can the rights acquired under such consents be destroyed by the action of a receiver of the company appointed in foreclosure proceedings, under

Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 7 Am. Elec. Cas. 168.

New Jersey: Inhabitants of East Orange v. Suburban Elec. L. & P. Co., 59 N. J. Eq. 563, 44 Atl. 628, 7 Am. Elec. Cas. 37.

See §§ 25–27, herein.

"*The right to use the public streets or highways is a property right* and has an assessable value. Western Union Teleg. Co. v. City of Omaha (Neb., 1905), 103 N. W. 84, 85, 86, per Letton, C., quoting from People ex rel. Retsof Min. Co. v. Priest, 77 N. Y. Supp. 382, 75 App. Div. 131, case aff'd (Mem.) 175 N. Y. 511, 67 N. E. 1088 (which determines what franchises are taxable under the statute).

[13] Mead v. Portland, 45 Oreg. 1, 9, 76 Pac. 347, per Bean, J., citing 1 Dillon, Munc. Corp. (4th ed.) §§ 110, 111, 29 Am. & Eng. Ency. of Law (1st ed.), 69; Portland & Willamette Valley Rd. Co. v. Portland, 14 Oreg. 188, 12 Pac. 265, 58 Am. Rep. 299; Savage v. Salem, 23 Oreg. 381, 31 Pac. 832, 24 L. R. A. 787, 37 Am. St. Rep. 688; City of Des Moines v. Chicago, R. I. &. P. R. Co., 41 Iowa, 569; Phillipsburg Elect. Lighting, Heating & Power Co. v. Phillipsburg, 66 N. J. L. 505, 49 Atl. 445; Langdon v. Mayor, etc., of New York, 93 N. Y. 129; Williams v. Mayor, etc., of New York, 110 N. Y. 569, 18 N. E. 435. See also Wyandotte Elec. L. Co. v. City of Wyandotte, 124 Mich. 43, 82 N. W. 821, 7 Am. Elec. Cas. 43.

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an order limiting his authority to the management, operation and protection of its property, in abandoning that portion of the road to which such consents attached; nor has the city any power to authorize such abandonment.[14] But where it is provided by ordinance that telegraph, telephone and electric light companies may lay wires under the streets of a city, and that such company shall remove its conduits whenever directed so to do by the city council, the company does not acquire a right of property in the street which cannot be discontinued and appropriated to another public use without compensation, but only a right to use the streets in the manner specified, which is subject to revocation, and a statute providing for the removal of electrical appliances from the streets and that the companies shall have the right either to remove the same or to put them in underground conduits which are to be constructed under regulations does not confer a franchise which includes an individual right of property in the public easement, and in such a case the right so reserved may be exercised either by the municipality or by the legislature.[15] And it is also decided that though the right of an electrical company to use the streets for its purposes, is recognized as within the public easement, which was paid for in assessing damages to the owner when the street was opened, such company acquires no property rights in the streets by reason of the fact that it is authorized to construct its conduits therein by statute or ordinances which clearly do not purport to convey private rights of property.[16]

[14] Paige v. Schenectady Ry. Co. (Thompson v. Same), 178 N. Y. 102, 70 N. E. 213, case reverses 82 N. Y. Supp. 192, 84 App. Div. 91, and Whitmyre v. Same, 84 App. Div. 91, but affirms Lansing v. Same, 84 App. Div. 91; Van Epps v. Same, 84 App. Div. 91; Beatty v. Same, 84 App. Div. 91, see 131 Fed. 577.

[15] Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N. E. 346, 8 Am. Elec. Cas. 50.

[16] New England Teleph. & Teleg. Co. v. Boston Terminal Co., 182 Mass. 397, 65 N. E. 835, 8 Am. Elec. Cas. 132. In this case the court, per Knowlton, J., said: "In this Commonwealth, on the laying out or construction of a highway or public street, the fee of the land remains in the landowner, and the public acquire an easement in the street for travel. * * * The rights, in the streets which are so exercised or

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§ 34. **Same Subject Continued.**—It is apparent, therefore, from what is above stated, that a corporation in the exercise of its franchise may or may not obtain certain property rights according to the nature of the franchise or character of the grant. It also appears, as we have stated elsewhere, that the right to acquire property is declared to be a franchise.[17] But the right and privilege, or what is termed the franchise of being a corporation, is of value to its members, and is considered as property separate and distinct from the property or franchises which the corporation may itself acquire subsequent to its incorporation by the use of its franchise.[18] So the corpo-

enjoyed are not private rights of property, but are part of the public rights which are shared in common."

Rails and other materials of a street railway company embedded in the surface of the public streets of a city remain personal property and may be disposed of as such. French v. Jones, 191 Mass. 522, 526, 78 N. E. 118.

[17] See § 12, herein.

[18] Central Pac. R. Co. v. California, 162 U. S. 91, 127, 16 Sup. Ct. 766, 40 L. ed. 903, per Fuller, C. J. (a case of taxation of franchise); Horn Silver Mining Co. v. New York, 143 U. S. 305, 312, 36 L. ed. 164, 12 Sup. Ct. 403, per Field, J. (a case of taxation of corporate franchises); Bank of California v. San Francisco, 142 Cal. 276, 280, 64 L. R. A. 918, 75 Pac. 832, per Angellotti, J.; Consolidated Gas Co. v. Baltimore City, 101 Md. 541, 545–548, per McSherry, C. J.; Lumberville Bridge Co. v. Assessors, 55 N. J. L. 529, 535, 26 Atl. 711, 25 L. R. A. 134, per Garrison, J. See Western Union Teleg. Co. v. Norman, 77 Fed. 13, 22; City of Bridgeport v. New York & New Haven Rd. Co., 36 Conn. 255, 266, 4 Am. Rep. 63; Bailey v. Southern Ry. Co., 112 Ky. 424, 61 S. W. 31; Smith v. Mayor, etc., of New York, 68 N. Y. 552, 555.

"The powers and privileges which constitute the franchises of a corporation were in a just sense property, quite distinct and separate from the property which by the use of such franchises the corporation might acquire." Home Insurance Co. v. New York, 134 U. S. 594, 601, 33 L. ed. 1025, 10 Sup. Ct. 593, per Field, J. (taxability of franchises considered).

See §§ 25–27, herein.

"Much confusion often happens from a failure to distinguish between those franchises that are corporate in a strict legal sense and not really property of the corporation, and franchises acquired by a corporation after corporate existence commenced, that it may part with if they be assignable, or deprived of without corporate existence being affected and which may survive the death of the corporation." State v. Portage City Water Co., 107 Wis. 441, 446, 83 N. W. 697, per Marshall, J. (a case of action to forfeit a waterworks franchise granted by a city to individuals and assigned to defendant).

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rate property of a bank is separable from the franchise, and the banking capital attached to the franchise is another property owned in its parts by persons, corporate or natural, and the corporate property may be taxed in the absence of a special contract otherwise.[19] And although the franchise or privilege of running a railroad and taking fares and freight is property which is valuable, still it is not the same sort of property as the rolling stock, roadbed, and depot grounds.[20] The roadbed, acquired by purchase or condemnation, is altogether distinct from the pre-existing franchise to exist and to build the road, even though it is obtained as a result of the exercise of such franchise to be. That franchise consists in the incorporeal right, the property acquired is not the franchise; this distinction is clear between a franchise, as such, and the property acquired by the exercise or use thereof, even though the property so acquired may be largely augmented by the use to which the franchise enables that property or easement to be put and although it may have no particular value independent of the use made as incidental to the franchise to be.[21] Again, the real estate of a corporation is a distinct thing from its franchises, even though the right to acquire and sell real estate is a franchise.[22] And a structure, such as a pier, or bridge, is

[19] Gordon v. Appeal Tax Court, 3 How. (44 U. S.) 133, 150, 11 L. ed. 529, per Wayne, J.

[20] Wilmington Railroad v. Reid, 13 Wall. (80 U. S.) 264, 268, 20 L. ed. 568, per Davis, J. (a case of exemption from taxation, including franchise of railroad company).

[21] Consolidated Gas Co. v. Baltimore City, 101 Md. 541, 545–548, 61 Atl. 532, per McSherry, C. J.

"A 'franchise', *i. e.*, the right to exist and perform certain acts, is a thing distinct from the property rights which the corporation when created may acquire from individuals. * * * The 'franchise,' the charter granted by the State is one thing; the property rights, including rights of way which the chartered body may acquire from private individuals, is quite another. These latter may be lost by acts of the corporation and the approval of the State is not necessary," although it may be true that a corporation cannot abandon its franchise without the consent of its creator, the State. Thompson v. Schenectady Ry. Co., 124 Fed. 274, 279, per Ray, Dist. J., see same case 131 Fed. 577.

[22] Davis v. Gray, 16 Wall. (83 U. S.) 203, 228, 21 L. ed. 447, per Swayne, J. (a suit by receiver of railroad, grantee of lands from State,

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not a franchise; it differs from the franchise right or privilege to construct and maintain the pier, etc., and take wharfage, tolls, rates or like charges for the use thereof.[23] It is also declared that: "In every instance of a private easement—that is, an easement not enjoyed by the public—there exists the characteristic feature of two distinct tenements—one dominant and the other servient. On the other hand, a franchise is a special privilege conferred by government on individuals, which does not belong to the citizens of the country generally by common right.[24] A franchise does not involve an interest in land—it is not real estate, but a privilege which may be owned without the acquisition of real property at all. The *use* of a franchise *may* require the occupancy, or even the ownership, of land, but that circumstance does not make the franchise itself an interest *in* land. To define the *nature* of a thing

to enjoin forfeiture and grant of same lands to another; was as preventing fulfillment of conditions of grant).

See § 12, herein.

[23] "The plaintiff has a franchise to construct and maintain this pier and take wharfage for its use. The pier itself is a structure built under his franchise. It is tangible, bulky property, and in no sense incorporeal. (2 Black. Comm. 191). It is not like a mere right or privilege which has no physical existence. A person may have a franchise to build and maintain a bridge and take toll for its use. The bridge as a structure is not a franchise. * * * A railroad company has a franchise to construct and maintain a railroad * * * its road and other structures may be taxed as real estate." Although under the laws of the State a mere franchise is not taxable except by special statute. Smith v. Mayor, etc., of New York, 68 N. Y. 552, 555, per Earl, J.

"The consideration for building the bridge was the franchise to collect tolls for a designated number of years. The plaintiffs needed the bridge for the convenience of the public. The defendants agreed to build it for the franchise granted. The bridge as soon as completed became the property of the plaintiffs, and at the termination of this franchise they are compelled to deliver the bridge to plaintiffs. They asserted their duty in their charter, when in the fifth section they agreed to abandon the bridge to the plaintiffs. The defendants owned the franchise and not the bridge. They had the use of the bridge during the existence of their franchise, and held it in trust for the public. The defendant corporation, under their charter, stood in the same relation to the public as the plaintiffs would have done had they built the bridge." Police Jury v. Bridge Co., 44 La. Ann. 137, 141, 10 So. 677, per McEnery, J.

[24] Citing 2 Wash. Real Prop. 303. See § 2, herein.

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by the *accidents* which are employed in its use, is to confound the thing itself with the agencies applied in its adaptation. Because land *may* be required in putting a franchise into effective operation, it does not follow that the franchise *is* land, or an interest *in* land. But an easement is quite a different thing. It is essentially and inherently an interest in land. It is an estate—a dominant estate imposed upon a servient tenement. * * * It will be found upon examining some of the cases that there is occasionally, in the arguments of counsel, a want of exactness in the use of terms, and now and then the *right* to do a particular thing is confused with the *results* achieved in the exercise of the right, and those *results* are inaccurately spoken of as the franchise. The *right* to occupy the streets with gas mains is a *franchise*—the actual occupation of them in that way pursuant to the franchises the acquisition of an *easement*. You must distinguish between the *right* to do the thing, and the *interest* acquired in the soil by the exercise of that right." [25]

§ 35. **Same Subject—"Personal Franchise" Distinguished from Property Franchise.**—A clear distinction is made between that franchise which creates a corporation that has the power to own property, and the franchise which authorizes the corporation thus organized to construct and operate a railroad. The first has been called the "personal franchise," so denominated, by virtue of which the corporation becomes a legal entity, and obtains the capacity to acquire property and other rights. The other franchise is declared to be purely and only a property franchise.[26]

§ 36. **Franchise Differs from Grant of Land—Easement—Freehold.**—The grant of franchises and privileges is unlike a grant of land, since, in the latter, the grantee is invested with

[25] Consolidated Gas Co. v. Baltimore City, 101 Md. 541, 61 Atl. 532, 545–548, per McSherry, C. J. See §§ 26, 36, herein.

[26] Sandham v. Nye, 30 N. Y. Supp. 552, 555, 62 N. Y. St. Rep. 198, 9 Misc. 541, per Rumsey, J. See §§ 25–27, herein.

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exclusive dominion. But there is, however, a certain resemblance to a grant to a telephone company of the use of a certain space on, above or beneath the earth's surface, since it cannot be excluded from the space which it is lawfully entitled to possess for its purposes, although this rule is subject to many qualifications dependent upon a lawful exercise of the public rights in, and public user of streets. Nor is the right existent in an electrical company to claim any exclusive right in the earth as an electrical field for the conduct of electricity.[27] Again, it is declared that, "The exercise of the power of using streets for laying gas pipes is rather an easement than a franchise." [28] In an Illinois case where it was sought to set aside or redeem from conveyance of a patent it was held that a franchise was not involved so that a direct appeal to the Supreme Court would lie, the existence or validity of the patent not being questioned, and the court in its argument upon the point of analogy of title to a freehold declared that franchises differ in their nature from freeholds; that the very essence of a freehold lies in the title to the land; that no question can arise as to the existence of the land, but only as to the title to it; that a franchise is something incorporeal and artificial, created by the will of the sovereign authority and its very essence lies in its existence, in the right to exercise it.[29]

§ 37. **General Creative Franchise and Special Franchise Distinguished.**[30]—Under the constitution of California, franchises must be classed as property, subject to taxation. The

[27] Hudson River Telephone Co. v. Watervliet Turnpike & Rd. Co., 56 Hun (N. Y.), 67, 3 Am. Elec. Cas. 387, 389, 9 N. Y. Supp. 177, per Landon, J. See §§ 25–27, 33, 34, herein.

[28] People ex rel. Kunze v. Fort Wayne & Elmwood Ry. Co., 92 Mich. 522, 525, 52 N. W. 1010, per Montgomery, J.; People ex rel. Maybury v. Mutual Gas Light Co., 38 Mich. 154, 155, per Campbell, C. J. See Trustees of Southampton v. Jessup, 162 N. Y. 122, 56 N. E. 538, where franchise is distinguished from easement. Case reverses 42 N. Y. Supp. 4, 10 App. Div. 456.

An indefeasible interest in land. See Ghee v. Northern Union Gas Co., 158 N. Y. 510, 513, 53 N. E. 692. Case reverses 56 N. Y. Supp. 450, 34 App. Div. 551.

[29] Maginn v. Bassford, 196 Ill. 266, 63 N. E. 668, per Carter, J.

[30] See §§ 6–8, herein.

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franchises so assessable, may be classified as creative and special. The creation of a corporation, the grant of power to exist and act as such is, in itself, a franchise distinctly held to be assessable as property. This creative franchise is, however, inseparable from the being or personality of the corporate body. But the right to collect water rates or compensation for water distributed or furnished is a franchise independent of the creative or corporate franchise; it is a separate entity or franchise, a special franchise distinct from the general franchise to be and act as a corporation. It is also a property right. So it is declared that a difference exists "between the general creative franchise to be, and the special franchises which, when accepted or purchased, vest privileges or franchises resting in special grant from governmental sources. * * * The mere fact that a corporation is organized for the specific purpose of acquiring, and is given power to acquire public uses or franchises, does not carry with it the idea that such franchises, when acquired, be they many or few, are merged in, and must be assessed as part and parcel of the general corporate franchise. * * * The distinction between the corporate or creative franchise, and other special franchises which the corporate entity may acquire and exercise, has long been recognized by our courts." [31]

§ 38. **Franchises Belonging to Corporators and Those Belonging to Corporation Distinguished.**—The franchise of being a corporation belongs to the corporators, while the powers, rights and privileges vested in and to be exercised by the corporate body as such constitute franchises of the corporation.[32] So it is declared by Judge Baldwin that: "In the common case of the incorporation of a domestic company to build and operate a domestic railroad, the franchises granted are also distinct, and are held by different persons. The fran-

[31] San Joaquin & King's River Canal & Irrig. Co. v. Merced County, 2 Cal. App. 593, 595, 597, 599, 84 Pac. 285, per McLaughlin, J. See §§ 5, 11, 12, herein.

[32] Memphis & Little Rock Rd. Co. v. Commissioners, 112 U. S. 609, 619, 28 L. ed. 837, 5 Sup. Ct. 299, per Matthews, J. See §§ 11, 28, herein.

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chise to become and exist as an artificial person vests in the corporators; that to act, when incorporated, in such a way as to accomplish certain purposes, vests in the corporation." [33] But, a franchise granted by a city to an electric light company is, under an Indiana case, the property of the corporation and not of the owner of stock therein.[34]

§ 39. Franchise to Be and to Carry on Business Distinguished—"Corporate Franchise or Business."—The franchise

[33] Baldwin's Amer. Rd. Law (ed. 1904), p. 26.

"Now it is clear from these definitions, and from the very nature of a corporation, that a franchise, or the right to be and act as an artificial body, vests in the individuals who compose the corporation and not in the corporation itself," although "It will be kept in mind that the corporate body, for most purposes, has a distinct identity from that of the individual corporators." Feitsam v. Hay, 122 Ill. 293, 295, 3 Am. St. Rep. 492, 13 N. E. 501, per Mulkey, J.

"It has been said, 'the essence of a corporation consists in the capacity (1) to have perpetual succession under a special name, and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued by its corporate name, as an individual; and (3) to receive and enjoy, in common, grants of privileges and immunities. * * * Under the two first is described what may be termed the franchise of the corporators, or individual members of the corporation, and under the last what may be termed the franchises of the corporation.'" Coe v. Columbus, Piqua & Indiana Rd. Co., 10 Ohio St. 372, 385, 75 Am. Dec. 518, per Gholson, J., citing Thomas v. Dakin, 22 Wend. (N. Y.) 71; Pierce v. Emery, 32 N. H. 484–507.

"The word 'franchise' is often used as a generic name, descriptive of all the rights, privileges and immunities contained in the charter, including the right of the corporation to become and continue to be a legal person; but in a narrower sense it includes only the rights, powers and privileges conferred by the legislature upon the corporation as such after it has come into existence as a legal person. The right to form a corporation is a franchise which may be said to belong to the corporators; while the right to take land for railroad purposes, to operate the railroad and to take tolls there, are properly called 'franchises' which belong to the corporation." Driscoll v. Norwich & Worcester Rd. Co., 65 Conn. 230, 256, 32 Atl. 354, per Torrance, J., in dissenting opinion.

Formation of corporation to accomplish fraud or other illegal act cannot be based upon distinction that corporation and corporators have independent existence. First Nat. Bank v. J. C. Trebein Co., 59 Ohio St. 316, 41 Ohio L. J. 142, 52 N. E. 834. See also Chesapeake & Ohio R. Co. v. Howard, 14 App. D. C. 262, 27 Wash. L. Rep. 146.

[34] Payne v. Goldbach, 14 Ind. App. 100, 42 N. E. 642.

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to be or exist is only one of the franchises of a corporation. The franchise to do, to carry on the business of the corporation, is an independent franchise, or rather, a combination of franchises, embracing all things which a corporation is given power to do, and this power, this authority, constitutes a thing of value and a part of the corporation's intangible property as much as does the franchise to be. Franchises to do, go wherever the work is done; for the transaction of its business the corporation may go into various States, and wherever it goes as a corporation it also carries with it the franchise to be, for although for the purposes of jurisdiction in the Federal courts, it is also true that a corporation is presumed to be a citizen of the State which created it, still it does not follow that its franchise to be is for all purposes to be regarded as confined to that State. Again, it would seem that these intangible properties, these franchises to do, exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every State in which that tangible property may be found.[35] So in a Nebraska case a distinction is made between a franchise to be and a franchise consisting of a right to do business in a State, where the latter franchise is sought to be reached for the purpose of taxation, whether such right is derived through an act of Congress, or of the legislature, or by an ordinance of a municipality; that is, the thing which is so sought to be reached for taxation is the intangible right to transact or carry on business by means of the usual, visible and tangible agencies with which the operations of such business are carried on independent of the

[35] Adams Express Co. v. Ohio State Auditor, 166 U. S. 185, 224, 41 L. ed. 965, 17 Sup. Ct. 604, per Brewer, J. Denying rehearing in 165 U. S. 194, 255, 17 Sup. Ct. 305, 41 L. ed. 683, 707.

"The franchise or bare right to do a thing considered with reference to itself alone is of no value. It is only when it is considered relatively and in connection with its *use* that it can be said to be valuable. The wharf without a right to use it would be of no appreciable value. It is the combination of the two—the wharf and the franchise—that mutually impart to each other, when combined, an estimable value. * * * No franchise is of any value when considered without reference to its utility." Sullivan v. Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

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instrumentalities themselves. It was also said in this case, that there was a clear distinction between "corporate franchise" and franchises or privileges which a corporation or individual might exercise.[36] The term "corporate franchise or business" as used in the tax law of New York[37] providing for the taxation of corporations, means (not referring to corporations sole which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise.[38]

§ 40. **Franchise Distinguished from Means Employed in Exercising It.**—A franchise is distinguished from the means employed in exercising it, as in case of a franchise of furnishing a city and its inhabitants water for public and private purposes and limited to the city. In such case, the fact that the water is pumped and stored without the city, constitutes only a means of exercising the franchise. The franchise does not consist in pumping the water or in maintaining the reservoirs.[39]

§ 41. **Charter and Franchise—To What Extent Distinguished.**—In determining to what extent, if any, a charter and franchise may be distinguished, we will first consider the meaning of the word "charter," where definitions of the word have a bearing upon the question. The definitions of a fran-

[36] Western Union Teleg. Co. v. City of Omaha (Neb., 1905), 103 N. W. 84–86, per Lurton, C.

[37] Act May 26, 1881, c. 361.

[38] Home Insurance Co. v. New York, 134 U. S. 594, 599, 33 L. ed. 1025, 10 Sup. Ct. 593, per Field, J. Case affirms People v. Home Insurance Co., 92 N. Y. 328, also affirmed by divided court, 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. 1385, restored to calendar, 122 U. S. 636 (Mem.). The principal case is cited to above point in People v. Miller, 83 N. Y. Supp. 184, 187, 85 App. Div. 211, which case is reversed, 177 N. Y. 51, 69 N. E. 124, which is cited in People v. Miller, 86 N. Y. Supp. 420, 422, 90 App. Div. 588. This last case is reversed, 179 N. Y. 49, 71 N. E. 463.

[39] Board of Councilmen of City of Frankfort v. Stone, 108 Ky. 400, 22 Ky. L. Rep. 25, 56 S. W. 679 (a case of taxation and apportionment of tax).

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chise have been fully given elsewhere.[40] A charter of incorporation is defined as the instrument evidencing the act of a legislature, governor, court, or other authorized department or person, by which a corporation is or was created.[41] The word "charter" is also used to signify the agreement between the shareholders of the corporation, whether this agreement be contained in a special act of the legislature, or in articles of association, or in either of these taken in connection with the general laws of the State.[42] So the general law under which corporations are formed, together with the articles of association adopted in pursuance thereof, sometimes called "constating instruments," constitute the charter of the corporation.[43]

§ 42. Charter and Franchise Continued—How Extent of Powers Is Ascertained.—It may be stated, as pertinent to the question as to the distinction between a charter and a franchise, that resort must be had to the charter in connection with the general law in order to ascertain the extent of the powers, rights and privileges conferred, and where a private corporation is organized under the general incorporation law, the franchises conferred by the State, when it was organized, are to be ascertained or determined from the objects of the incorporation as stated and set forth in the articles of incorpo-

[40] See Chap. I, herein.

[41] Anderson's L. Dict., "Charter." See State Bank of Chicago v. Carr, 130 N. C. 479, 41 S. E. 876. Examine State v. Pittman, 32 Wash. 137, 72 Pac. 142.

[42] Floyd v. National Loan & Investment Co., 49 W. Va. 327, 345, 87 Am. St. Rep. 805, 38 S. E. 653, 54 L. R. A. 536, per Poffenbarger, J., citing Morawetz on Corp. § 967.

[43] Attorney Genl. v. Perkins (Mason v. Perkins), 73 Mich. 303, 319, 320, 41 N. W. 426, per Champlin, J. See also to same point Bent v. Underdown, 156 Ind. 516, 519, 60 N. E. 307, per Monks, J., citing 1 Cook on Stock and Stockholders, §§ 2, 9; People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798; 1 Morawetz on Corp. (2d. ed.) § 318; and cited in State v. Anderson, 31 Ind. App. 34, 67 N. E. 207.

Examine Union Traction Co. v. Chicago, 199 Ill. 484, 59 L. R. A. 631, 65 N. E. 451; Bixler v. Summerfield, 195 Ill. 147, 62 N. E. 849; McLeod v. Lincoln Medical College, 69 Neb. 550, 96 N. W. 265.

For other definitions, see Merrick v. Santvoord, 34 N. Y. 208, 214, per Porter, J.; Lehigh Water Co.'s Appeal, 102 Pa. 515, 517.

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ration. And although the statute, under which it is organized, vests it with and authorizes it to exercise all the powers necessary and requisite to carry into effect the objects for which it was formed, nevertheless the general powers intended by the enactment are such powers only as are necessarily incident and supplemental to the special powers granted.[44]

§ 43. Charter and Franchise Continued—Where Franchise Does not Take Effect Before Actual Formation of Corporation.—It may be also stated, as a consideration having an important bearing upon the matter under discussion, that a corporation may be presently created by the terms of a statute, without condition precedent or preliminary. And

[44] Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42, 53, 22 N. E. 616; Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 635, 4 L. ed. 629, per Marshall, C. J.; Meyer v. Johnston, 53 Ala. 237, 324, per Manning, J.

See the following cases:

United States: Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950.

Illinois: People, Moloney, v. Pullman's Palace Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366.

Missouri: State, Crow, v. Lincoln Trust Co., 144 Mo. 562, 46 S. W. 593.

New York: McGraw, In re, v. Cornell University, 45 Hun (N. Y.), 354, 10 N. Y. Supp. 495 and cases cited.

Texas: Ft. Worth Street Rd. Co. v. Rosedale Street Rd. Co., 68 Tex. 169, 4 S. W. 434; Gulf, Colorado & Santa Fe R. Co. v. Morris, 67 Tex. 692, 4 S. W. 156.

Utah: Weyeth Hardware & M. Co. v. James-Spencer-Bateman Co., 15 Utah, 110, 47 Pac. 604.

"A corporation being the mere creature of the legislature, its rights, privileges and powers are dependent solely upon the terms of its charter." Horn Silver Mining Co. v. New York, 143 U. S. 305, 312, 36 L. ed. 164, 12 Sup. Ct. 403, per Field, J. (a case of taxation of corporate franchises).

Railroad corporations possess only those rights, powers or properties which the charters of their corporations confer upon them, either expressly or as incidental to their existence, and this applies to all other corporations. St. Louis, Iron Mountain & Southern Ry. Co. v. Paul, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154.

Articles of incorporation under general laws have the effect of a charter when necessary to ascertain the extent of the powers conferred upon the corporation so organized. North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co., 16 Utah, 246, 52 Pac. 168, 40 L. R. A. 851, 8 Am. and Eng. Corp. Cas. (N. S.) 98. See also Detroit Driving Club v. Fitzgerald, 109 Mich. 670, 67 N. W. 899, 4 Am. and Eng. Corp. Cas. (N. S.) 546, 3 Det. L. N. 232; International Boom Co. v. Rainy Lake River Boom Corp., 97 Minn. 513, 107 N. W. 735.

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very commonly charters are framed, not of themselves creating, but authorizing the formation of corporations upon preliminary conditions. Under the former class of charters, the corporation created is the grantee of the franchises conferred. Under the latter class, however, neither the franchise to be a corporation, nor the particular franchise conferred, takes effect before the actual formation of the corporation. When the corporation is formed, the franchises conferred vest in it as grantee. Franchises so conferred are like any other estate granted upon condition precedent, the estate vesting upon condition fulfilled. But like every other operative grant, franchises so conferred have a certain grantee.[45] Again, it is necessary to complete the corporate organization by the election of the proper and necessary officers before a corporation can exercise the power of condemnation of property.[46]

§ 44. **Charter and Franchise Continued—Charter Rights and Privileges Derived Through Organization—"Additional Franchise or Privilege" Acquired After Incorporation.**—Another point in the determination of the question as to the difference between a charter and a franchise may be stated as follows:—A privilege of supplying a city with water may be such that it cannot be said in the strict sense of the word, to be a "corporate franchise"; that is, not a privilege derived from or obtained by the act of incorporation, when charter rights and privileges are such only as come to a corporation through its organization under the general corporation law, and so not include the right to furnish water to a city. Such right may only be acquired after the incorporation is accomplished, and upon the agreement and consent of the city. Although the grant of corporate capacity is from the State, and the subsequent grant from the city may be said theoretically to have been also from the State, still such city

[45] Sellers v. Union Lumbering Co., 39 Wis. 525, 527, per Ryan, C. J., citing Att'y General v. Railway Companies, 35 Wis. 599.

[46] Consolidated St. Ry. Co. v. Toledo Elect. St. Ry. Co., 6 Ohio N. P. 537, 8 Ohio S. & C. P. Dec. 268.

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is under no legal obligation to make the grant, and may refuse it, without in any manner affecting the company's corporate rights, powers or franchises. If the city makes the grant it gives the corporation what may be called an "additional franchise or privilege." [47] A privilege granted by a municipality to a telephone company to erect its lines in the streets and alleys of the city is not a charter, where such city has no legislative power to authorize the use of its streets for the erection of telephone poles and wires and cannot grant to any person or corporation the use of the streets and alleys of a city or town for any other purpose than that for which they were dedicated; and where subsequently the state constitution prohibits the use of such streets, alleys or public grounds of a city or town, without the prior consent of the proper legislative authorities, such consent is a prerequisite and if it is not obtained, the company has no right to occupy such streets and alleys, unless the right so to do existed by virtue of a charter antecedently granted and work had in good faith been begun thereunder. Nor was it the purpose of the constitution to render valid a resolution or ordinance of a board of councilmen granting a franchise which, under the law at the time of its adoption, was invalid.[48]

§ 45. **Charter and Franchise Continued—Distinction Exists.**—It appears from the preceding statements that the charter is the instrument evidencing the act of the authority creating the corporation; that it is also the agreement between the shareholders of the corporation whether the agreement is contained in the statutes or in the articles of association, in either or both; that resort must be had to the charter, in connection with the general law, or to the articles of incorporation, to ascertain the extent of the powers, rights and privi-

[47] Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 239, 91 N. W. 1081, per Weaver, J., citing Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585.

[48] East Tennessee Teleph. Co. v. City of Russellsville, 106 Ky. 667, 21 Ky. L. Rep. 305, 51 S. W. 308; Ky. Const. § 163.

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leges conferred; that where a charter authorizes the formation of corporations upon conditions, neither the franchise to be a corporation nor the particular franchise conferred takes effect or vests in the grantee before the actual formation of the corporation; and that a "corporate franchise" may not be a privilege derived by the act of incorporation, but one which can only be acquired by subsequent grant, and so may never vest. It would seem, therefore, that to the extent set forth within this summary a distinction may reasonably be declared to exist between a charter and a franchise.[49]

§ 46. **Charter and Franchise Continued—"Charter" as Synonymous with "Franchise."**—Notwithstanding what is said in the preceding sections, it is declared that "a charter of incorporation is a franchise."[50] And that every grant of a franchise is a charter. It may be a grant of the mere franchise of being a corporation, or a grant of powers to a corporation already in existence. In either case, the grant is the company's charter to exercise the rights and privileges and enjoy the immunities granted.[51] Again, where a statute gives authority to mortgage its charter, the word "charter" is said to include at least its franchises in the sense of the right to own and

[49] See Chap. I, herein, as to definitions of franchise.

"A charter contains the grant of a franchise, but it is not the franchise itself. The charter is evidence that a franchise has been granted rather than the franchise, for that is the thing the charter grants. The constitutional inhibition against impairing the obligation of contract is not operative upon the charter but upon the contract which the charter contains, and protects franchises because they are valuable property or contract rights." Elliott on Rds. (2d ed.), § 64.

[50] State v. Peel Splint Coal Co., 36 W. Va. 802, 812, 15 S. E. 1000, 17 L. R. A. 385, per Lucas, Pres.

[51] State, Morris & Essex Rd. Co. Pros. v. Commissioner of Rd. Taxation, 37 N. J. L. 228, 237, per Depue, J., who adds: "Bouvier defines the word 'charter' to be, a grant made by the sovereign, either to the whole people, or to a portion of them, securing to them the enjoyment of certain rights. Bouvier's Law Dict., 'Charter.' 'All franchises,' says Chief Baron Comyn, 'are derived from the king, and ought to be claimed by charter.' Com. Dig., 'Franchises' A, 71. 'Besides the charter of incorporation, a body politic has granted to it other charters, by which the crown, from time to time, adds to or modifies the powers,' etc. Grant on Corp. 13."

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operate the road, take tolls and carry on its business, even though there may be a question whether more is intended to be embraced in the transfer.[52]

§ 47. Whether Certain Grants Constitute a License, Privilege, Permission, Gratuity or Contract, and not a Franchise—Distinction.—In Illinois a distinction exists between a franchise and a license, and where a street railway is incorporated under an act of the legislature, but the power to construct and operate is by its charter dependent upon the consent of the city, and such privilege is granted by ordinance, such grant by the city is held a mere license and not a franchise; such license may, however, become a contract.[53] So under another decision in the same State a distinction exists between a franchise granted by the sovereign power of a State and an authority given by ordinance of a city to construct a railway on the city streets, as the grant in the ordinance is not a franchise but a mere license. Such a privilege of the use of public streets in a city or town, when granted by ordinance, is not, however, always a mere license revocable at will of the municipality, but it may be a valid and binding contract, as where the grant is based upon an adequate consideration and is accepted by the grantee, or, even though considered as a mere license, it may have been acted upon in such a manner that it would be inequitable and unjust to revoke it.[54] It is

[52] Memphis & Little Rock Rd. Co. v. Berry, 37 N. J. L. 436, 443.

[53] Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171, 185, 38 N. E. 584, 26 L. R. A. 681.

"License to operate railroad"—License defined, see State ex rel. Chicago, Milwaukee & St. Paul Ry. Co. v. McFetridge, 56 Wis. 256, 259, 14 N. W. 185.

[54] Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616, citing City of Quincy v. Bull, 106 Ill. 337, 351; Chicago City Ry. Co. v. The People, 73 Ill. 541, where it is asserted that a grant or license given by an ordinance comes within no definition of a franchise. *Id.*, 547.

An authority given a street railway company to use city streets for the construction and operation of its road is a mere license or permission subject to conditions specified in the ordinance. Blocki v. People, 220 Ill. 444, 77 N. E. 172.

Ordinance granting such a right to railroad to use streets is not a mere

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also determined in that State that a municipal grant of a right to a company to use the streets for its poles, etc., is not a franchise but a license or contract; a binding contract, upon acceptance of the privilege by the company, which cannot be revoked except for cause shown.[55] So a municipal ordinance granting the use of streets for a system of waterworks is held not to confer a franchise but merely a license, as a municipal body cannot grant a franchise.[56] In Maine, permissive rights given by statute, 1885,[57] "regulating the erection of posts and lines for the purposes of electricity," granted no franchises. Prior to 1895 the legislature kept the granting of franchises in its own hands. Quasi-public corporations are, however, required to obtain authority, either general or special, from the legislature, besides, a permit is required from municipal officers, even though a general franchise is obtained, under the act of 1895.[58] It is declared in a Michigan case, that the exercise of the power of using streets for laying gas pipes is rather an easement than a franchise; that, it is not a state franchise but a mere grant of authority which, whether coming from private owners or public agents, vests in contract or license and nothing else.[59] In Nebraska, the right of a street car company to so occupy the streets of a city, when granted by a vote of the electors, is, if nothing more, a license coupled with an interest, and such licenses are assignable.[60] Again, it is held

revocable license. Workman v. Southern Pac. R. Co., 129 Cal. 536, 62 Pac. 185.

[55] People v. Union Tel. Co., 192 Ill. 307, 61 N. E. 428. See People v. Chicago Teleph. Co., 220 Ill. 238, 77 N. E. 245; Chicago Teleph. Co. v. Northwestern Teleph. Co., 199 Ill. 324, 65 N. E. 329, 8 Am. Elec. Cas. 81. See Baxter Springs, City of, v. Baxter Springs Light & Power Co., 64 Kan. 591, 68 Pac. 63, 8 Am. Elec. Cas. 125; Duluth, City of, v. Duluth Teleph. Co., 84 Minn. 486, 8 Am. Elec. Cas. 136, 87 N. W. 1128.

[56] Cain v. City of Wyoming, 104 Ill. App. 538.

[57] Chap. 378, Pub. Laws, 1885, p. 318.

[58] Twin Village Water Co. v. Damariscotta Gas Light Co., 98 Me. 325, 56 Atl. 1112.

[59] People ex rel. Kunze v. Fort Wayne & Elmwood Ry. Co., 92 Mich. 522, 525, 52 N. W. 1010, per Montgomery, J.; People ex rel. Maybury v. Mutual Gas Light Co., 38 Mich. 154, 155, per Campbell, J.

[60] State, Caldwell, v. Citizens' St. Ry. Co. (Neb., 1907), 141 N. W. 429. The charter rights are derived

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that a grant by private act of a right to maintain a ferry is a mere license or gratuity and not a contract.[61] A distinction also exists between a franchise as a special privilege conferred by the legislature, and not belonging of common right to the citizens of the country generally, and a mere license intended by the legislature as a means for the regulation of a business and which confers no special right or privilege upon the holder.[62] It is also declared that a consent, given to a department store by the proper municipal authorities, to construct a spur track connecting with a street railroad for the conveyance of goods confers no franchise, but is merely a license to private parties.[63] So a grant by the legislature may be a mere gratuity conferring only a privilege, as where it is not an act of incorporation and confers no chartered rights and does not amount to a contract.[64]

§ 48. **Same Subject Continued.**[65]—Under a Louisiana decision the authorities of a city are not invested with legal power to create corporations or to grant franchises; that can be done only by the State; a city can, however, concede a

from the State, and the provisions of the ordinance, under which the consent of a majority of the electors is secured, obligate the street railway company to construct its street railway within the time and in the manner stated, and make it subject to such regulations as might lawfully be established by ordinance; the corporation is thereby privileged or permitted to enter upon the streets of the city for the purpose of constructing its tracks and to carry out the purposes of its organization; and it thereby derives no other or greater right than a privilege, license, or permission to enter upon the streets for such purpose. Its grant of corporate franchises or privileges is not determined by such ordinance, but by general law. Lincoln St. Ry. Co. v. City of Lincoln, 61 Neb. 109, 110, 84 N. W. 802, cited in Western Union Telegraph Co. v. City of Omaha (Neb., 1905), 103 N. W. 84–86.

[61] Robinson v. Lamb, 126 N. C. 492, 36 S. E. 29. Examine Roy v. Henderson, 132 Ala. 175, 31 So. 457.

[62] Martens v. The People, 186 Ill. 314, 318, 57 N. E. 871 (holding that a license to keep a saloon is not a franchise). See § 21, herein.

[63] Hatfield v. Strauss, 189 N. Y. 208, 218, 224, 226, per O'Brien, J., Bartlett, J., and Chase, J., in dissenting opinion.

[64] Gregory v. Trustees of Shelby College, 2 Metc. (59 Ky.) 589 (a case of a lottery privilege). But compare Commonwealth v. City of Frankfort, 13 Bush (76 Ky.), 185, 189 (as to lottery privilege being in the nature of a franchise).

[65] See §§ 14–16, herein.

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right of way through its streets, but such right does not constitute a franchise in law. The privileges so conceded are held to be "secondary franchises," instrumentalities by means of which the corporate powers granted by the charter may be exercised.[66] Where the word "franchise" is not used in an ordinance and it does not purport to grant any franchise, and it is apparent that such ordinance is only intended to exercise the authority to regulate, such regulation is not the grant of a franchise and no effective municipal franchise is granted distinct from the Federal franchise which a telegraph company may hold under the post-roads act, even though the character of the ordinance, in view of its provisions, may have the character of an attempted grant of a franchise.[67] The right of a corporation to occupy city streets for railroad purposes is a franchise which primarily resides in the State and must proceed from that source whatever may be the agencies through which it is conferred;[68] and where a city has delegated powers it acts as agent for the State so that its grant by ordinance conferring such rights is a franchise.[69] So a grant by ordinance of an exclusive right to supply a city with water is a franchise,[70] as is also a grant by a common council to construct and operate a system of waterworks, where such city council is an authorized legislative agency of the State.[71] The same rule applies where consent by town authorities, acting under

[66] Shreveport Traction Co. v. Kansas City, Shreveport & Gulf Ry. Co., 119 La. 759, 44 So. 457.

[67] Western Union Teleg. Co. v. City of Visalia, 149 Cal. 744, 87 Pac. 1023.

[68] Adee v. Nassau Elec. Rd. Co., 72 N. Y. Supp. 992, 1000, 65 App. Div. 529, 106 N. Y. St. R. 992, per Woodward, J., citing Beekman v. Third Ave. Rd. Co., 153 N. Y. 144, 152, 47 N. E. 277. Principal case aff'd, 173 N. Y. 580 (Mem.), 65 N. E. 1113. See also Baltimore, City of, v. United Rys. & Elec. Co. (Md., 1908), 68 Atl. 557.

Grant to street railway company is franchise where city empowered by statute to make grants for use of streets. Linden Land Co. v. Milwaukee Elec. Ry. & Light Co., 107 Wis. 493, 83 N. W. 851.

[69] Port of Mobile v. Louisville & Nashville Rd. Co., 84 Ala. 115, 4 So. 106; Los Angeles Ry. Co. v. City of Los Angeles (Cal., 1907), 92 Pac. 490.

[70] Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081.

[71] State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

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a statute, is given to a gas company to occupy and use the public streets and highways for the purpose of conducting and delivering gas, as such grant constitutes a franchise.[72] Again, it is declared, in a Newark case, that the consent which the "municipal authorities," under a statute are required to give, operates to create a franchise by which is vested in the corporation receiving it an indefeasible interest in the land constituting the streets of a municipality. Although the franchise comes from the State, nevertheless, the act of the local authorities, who represent the State by its permission and for that purpose, constitutes the act upon which the law operates to create the franchise. The consent of local authorities is unnecessary as the State may grant the franchise directly, although the tendency is to delegate the power to municipal or local authorities. The legal effect of the consent is, however, the same as if the local authorities in form granted the franchise and the interest in the land.[73] In another case in the same State it is decided that the right, created by a resolution of the trustees of a town, vested by royal charters granted in colonial days, with title and sovereignty over the waters of a bay in that town and the lands thereunder, authorizing a riparian proprietor "to make a roadway and to erect a bridge" across the bay, the said bridge to be a drawbridge, and providing that there shall be no unnecessary delay to those navigating the waters of the bay, is a franchise as distinguished from a license or an easement.[74] In this case, the court, per Vann, J., said: "We think it is a franchise, because it was granted in the exercise of a govern-

[72] People ex rel. Woodhaven Gas Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787, rev'g 11 App. Div. 175.

[73] Ghee v. Northern Union Gas Co., 158 N. Y. 510, 513, 53 N. E. 692. This case reverses 56 N. Y. Supp. 450, 34 App. Div. 551. But it was said in the reversed case, that a municipality acting under a properly delegated legislative power or authority may grant a franchise, as the franchise proceeds from the State and the consent of the local authorities is merely to a form of street use, even though it has been asserted that a distinction exists between the grant of a franchise and the consent of a municipality.

[74] Trustees of Southampton v. Jessup, 162 N. Y. 122, 56 N. E. 538, rev'g 42 N. Y. Supp. 4, 10 App. Div. 456.

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mental power conferred by royal charter in colonial days.[75] It is a special privilege, because it is not of common right; is permanent, because there is no limitation as to time, and is of public concern, because it relates to the public domain. A roadway necessarily includes a right of way, which when granted by a legislative body is a franchise. The resolution has the same effect as if a like privilege had been granted by act of the legislature in relation to similar lands held by the State for public use. A grant by a resolution of a legislative body is as effective as a grant by deed of an executive body and is the usual form in which franchises are conferred." But, although a right to construct a railroad or a telephone system is conferred by the proper city authorities, still if the municipality has no power to make such a grant it is invalid.[76] In conclusion, it would seem to be immaterial whether the grant is made directly by the legislature or through the agency of a municipality or like body acting under delegated powers and exercising proper legislative authority, and, therefore, in so far as this question as to distinctions is concerned, such grant ought in the latter case to be considered as a franchise as well as in the former instance.

[75] Citing People ex rel. Howell v. Jessup, 160 N. Y. 249, 54 N. E. 682.

[76] State of New York v. Mayor, etc., of City of New York, 3 Duer (10 N. Y. Super. C.), 119; State v. Milwaukee Independent Teleph. Co. (Wis., 1907), 114 N. W. 108, 315.

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CHAPTER V.

DEFINITIONS, CLASSIFICATION, NATURE OF CORPORATION AND DISTINCTIONS.

§ 49. Change in Nature and Relations of Corporations—Effect upon Early Definitions.
50. Definitions of a Corporation.
51. Summary of Expressions Used in Defining a Corporation.
52. To What Extent Definition of Corporation Includes a Company, Association and Joint-Stock Association or Company—Partnership.
53. Same Subject—Continued.
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55. General Classification of Corporations—Public and Private.
56. General Classification of Corporations Continued—Quasi-Public Corporations—Quasi-Municipal Corporations.
57. Other Divisions or Kinds of Corporations.
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60. Corporation Considered as Civil or Political Institution—Distinctions Between Incorporation and Corporation—Distinction Between Public and Private Corporations.
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63. Duties, Obligations and Power as affecting Classification or Nature of Corporations—Public Service Corporations.
64. To what Extent Corporations are "Persons"—Generally.
65. To What Extent Corporations are "Persons" Under Statutes.
66. Corporations as "Persons" under Constitution of United States.
67. Corporations as "Citizens" for Federal Jurisdiction Purposes—Not "Citizens" Under Constitution of United States.

§ 49. **Change in Nature and Relations of Corporations—Effect upon Early Definitions.**—What is said by the court in a case in the United States Supreme Court, decided in 1870, is pertinent here; it is as follows: "The subject of the powers, duties, rights and liabilities of corporations, their essential

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nature and character, and their relations to the business transactions of the community, have undergone a change in this country within the last half century, the importance of which can hardly be overestimated. They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, telegraph companies, insurance companies, etc., and the demand for the use of corporate powers in combination with the capital and the energy required to conduct these operations is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time." [1]

§ 50. **Definitions of a Corporation.**—Under a definition given in a comparatively recent case in the Federal Supreme Court a corporation is but an association of individuals with a distinct name and legal entity.[2] The definition, however,

[1] Liverpool Ins. Co. v. Massachusetts, 10 Wall. (77 U. S.) 566, 574, 575, 19 L. ed. 1029, per Miller, J. See also Thomas v. Dakin, 22 Wend. (N. Y.) 1, 70.

[2] Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. 370. See also Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 189, 8 Sup. Ct. 737, 31 L. ed. 650. See § 51, herein.

"A corporation is a body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the individuals who compose it, and is for certain purposes, considered as a natural person. * * * It means an intellectual body, composed of individuals, and created by law; a body which is united under a common name, and the members of which are capable of succeeding each other, that the body (like a river), continues always the same, notwithstanding the change in the parts which compose it." Angell & Ames on Corp. (9th ed.) §§ 1, 30.

"A body politic or corporate, formed and authorized by law to act as a single person, and endowed by law with the capacity of perpetual

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which has been the most extensively quoted, adopted and relied upon, is that given by Chief Justice Marshall, as follows: "A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same and may act as a single individual." [3] It is said, however, that: 'It is not essential to the idea of a corporation that it shall have perpetual existence, for limited corporations are a matter of most common occurrence, whether organized under general or special laws. Neither is it essential that it shall have capacity to sue and be sued under its corporate name, for it may be authorized only to sue in the name of its officers, as was the case under the New York banking law. That it shall have capacity to sue and be sued under some name standing for the collective body is all that is necessary. In the last analysis, the only essential attribute of a corporation is the capacity to exist and act within the powers granted, as a legal entity, apart from the individual or individuals who constitute its members." [4]

§ 51. **Summary of Expressions Used in Defining a Corporation.**—The following summary of the expressions used by the courts in defining a corporation evidences a substantial agreement upon certain essential points irrespective of the form in which any particular court has given such definition.

succession; a society having the capacity of transacting business as a single individual." Webster's Dict.

[3] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 636, 4 L. ed. 629. See note to § 51, herein.

[4] Andrews Bros. v. Youngstown Coke Co., 86 Fed. 585, 589, 30 C. C. A. 293, 58 U. S. App. 444, per Lurton, Cir. J. That this case is overruled, see Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 457, 44 L. ed. 842, 20 Sup. Ct. 690, per Harlan, J.

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Thus a corporation is defined as: "An artificial being, invisible, intangible; an artificial body; an artificial legal person; an artificial person representing shareholders; an artificial person created to become the business representative, agent or trustee of those furnishing money for the business; an artificial person created by statute; an intelligent though artificial person; an intellectual body created by law; a legal person; a legal being, a legal institution; a fictitious person; an ideal body; in a certain sense legislative bodies; a creature of the law; a body created by the supreme power of the State; a creature existing by statute; created by the legislature; a franchise created by the king; an association of individuals; an association of persons; a collection or association of individuals united in one body; composed of persons made into one body; an aggregate body; an aggregation of individuals united by operation of law so as to form but one person; a collective unity; a body consisting of one or more persons; a body consisting of one or more natural persons; a collection of many individuals in one body; an assembly of many into one body; a body composed of persons which the law prescribes; a body united in its franchises and liberties; an artificial being existing only in contemplation of law; a body distinct in law from all its members, or existing independent of its members; a distinct entity; a legal entity; an entity distinct from its members; a body politic or corporate; a franchise for a number of persons to exist as a body politic; existing only in political capacity or in both a political and natural capacity; composed of individuals vested with a political character and personality distinct from their natural capacity; composed of individuals who subsist as a body politic; a body united for a lawful purpose; a mere creature of the law established for special purposes; a personification of certain legal rights; a body established by law with usually some specific purpose, or for certain specific purposes; a body with special privileges not possessed by individuals; a body composed for the purpose of obtaining franchises or privileges not allowed to corporators as individuals; composed of individuals united under a common name, or a special name;

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having a distinctive artificial name; subsisting under a special denomination; having common stock and common business; a person or legal being capable of transacting some kind of business as a natural person; a person with capacity to transact business as an individual; having power or capacity to act as an individual; having capacity to act as a single individual; a body acting in many respects as individuals; having certain powers and duties of natural persons; having like powers and liabilities as natural persons; an artificial being with capacity of acting within the scope of its charter as a natural person; a body which acts and speaks through its officers or agents; a legal institution conferring on its members powers, privileges and immunities which they would not otherwise possess; a personification of certain legal rights; a body possessed with power to do corporate acts, but with prescribed powers, or with powers prescribed by law, or with powers only of the kind and degree conferred by law; a body constituted by policy with capacity to take or do; being in its corporate capacity a mere creature of the act to which it owes its existence; receiving all its powers from the act creating it; a body with its existence, powers and liabilities fixed by the act of incorporation; a body limited to one peculiar mode of action; a body whose existence is evidenced by the exercise of certain franchises and functions; a person vested with power and capacity to make contracts within the scope of its powers; a person with capacity to take and grant property as an individual; a body with right to sue and be sued like natural persons; composed of constantly changing members, or with a right to change of members without dissolution; a succession of individuals; in law a single continuous person; a body with such a grant of privileges as secures a succession of members without changing the identity of the body, a body continued by a succession of members, as its members succeed each other so that the body is always the same notwithstanding change of individuals; a body with capacity of succession irrespective of change in membership; or with a capacity of succession in perpetuity, by transfer of shares; a body with capacity of

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succession, perpetual or limited; a permanent body or thing; a body which never dies.[5]

§ 52. To What Extent Definition of Corporation Includes a Company, Association and Joint-Stock Association or Company—Partnership.—The constitution of New York pro-

[5] See the following cases for definitions of a corporation. (Explanatory note. Cases preceded by a * give, in whole or in part, Chief Justice Marshall's definition, quoted in the preceding section; cases preceded by a * and also a † give same definition and also another or other definitions. Unmarked cases give still other and different definitions.)

United States: * Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44, 44 L. ed. 657, 20 Sup. Ct. 518, per McKenna, J.; Kansas Pac. Rd. Co. v. Atchison, Topeka & Santa Fe Rd. Co., 112 U. S. 414, 416, 5 Sup. Ct. 208, 28 L. ed. 794; Baltimore & Potomac Rd. Co. v. Fifth Baptist Church, 108 U. S. 317, 330, 27 L. ed. 739, per Field, J.; Ohio & Mississippi Rd. Co. v. Wheeler, 1 Black (66 U. S.), 286, 295, 17 L. ed. 130 ("a corporation exists only in contemplation of law and by force of law"); * Marshall v. Baltimore & Ohio Rd. Co., 16 How. (57 U. S.) 314, 327, 14 L. ed. 953, per Grier, J.; Louisville, Cincinnati & Charleston Rd. Co. v. Letson, 2 How. (43 U. S.) 497, 558, 11 L. ed. 553; * Runyan v. Lessee of Coster, 14 Pet. (39 U. S.) 122, 129, 10 L. ed. 382, per Thompson, J.; * Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 587, 10 L. ed. 274, per Taney, C. J.; Bank of United States v. Deveaux, 5 Cranch (9 U. S.), 61 88, per Marshall, C. J.; * Seattle Gas & Electric Co. v. Citizens' Light & Power Co., 123 Fed. 588, 592, per Hanford, Dist. J.; Andrews Bros. v. Youngstown Coke Co., 86 Fed. 585, 588, 589, 30 C. C. A. 293, 58 U. S. App. 444, per Lurton, Cir. J. [quoting Kyd; Thomas v. Dakin, 22 Wend. (N. Y.) 9, 70, 1 Dill. Munic. Corp. (3d. ed.) § 18; Angel & Ames on Corp. §§ 1–30]; Ames v. Union Pac. Rd. Co., 62 Fed. 7, 14 ("a corporation is organized capital; it is capital consisting of money and property," per Caldwell, Cir. J.); * Ross v. Chicago, M. & St. P. Ry. Co., 8 Fed. 544, per McCrary, J. (similar to first part of Chief Justice Marshall's definition); Santa Clara, County of, v. Southern Pac. Rd. Co., 18 Fed. 385, 402.

Alabama: * Dillard v. Webb, 55 Ala. 468, 474, per Stone, J.; Askew v. Hale County, 54 Ala. 639, 642, 25 Am. Rep. 730, per Brickell, C. J.

Arkansas: *† Conway, Ex parte, 4 Ark. (4 Pike) 302, 351, per Lacy, J.

California: * San Luis Water Co. v. Estrada, 117 Cal. 168, 177, 48 Pac. 1075, per Chipman, C.; Dean v. Davis, 51 Cal. 406, 410, per Crockett, J. (code definition).

Colorado: * Utley v. Clark-Guardian Lode Min. Co., 4 Colo. 369, 372, per Deady, J.

Connecticut: Barber v. International Co. of Mexico, 73 Conn. 587, 606, 48 Atl. 758, per Baldwin, J.; * Coite v. Society for Savings, 32 Conn. 173, 185, per McCurdy, J.; Hartford Fire Ins. Co. v. Hartford, 3 Conn. 15, 25, per Hosmer, Ch. J.

Delaware: * Higgins v. Downward, 8 Houst. (Del.) 227, 240, 40 Am. St. Rep. 141, 32 Atl. 133, per

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vides that: "The term corporations as used in this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corpora-

Saulsbury, Ch.; *† Coyle v. McIntire, 7 Houst. (Del.) 44, 88, 40 Am. St. Rep. 109, 30 Atl. 728, per Saulsbury, Ch.; * Deringer v. Deringer, 5 Houst. (Del.) 416, 429, 1 Am. St. Rep. 150, per Wales, J.

Georgia: *† Goldsmith v. Rome Rd. Co., 62 Ga. 473, 481, per Bleckley, J.; Central Rd. & Banking Co. v. State, 54 Ga. 401, 406, per Warner, C. J. (giving Code and Comyns, Dig. definitions); Hightower v. Thornton, 8 Ga. 486, 492, 52 Am. Dec. 412 ("corporations aggregate are but associations of individuals") per Lumpkin, J.; South Carolina Rd. Co. v. McDonald, 5 Ga. 531, 535, per Nisbet, J.

Illinois: Sellers v. Greer, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; Fietsam v. Hay, 122 Ill. 293, 295, 3 Am. St. Rep. 492, 13 N. E. 501, per Mulkey, J.; * Mather v. City of Ottawa, 114 Ill. 659, 664, 3 N. E. 216, per Craig, J.; Porter v. Rockford, Rock Island & St. Louis Rd. Co., 76 Ill. 561, 573, 574, per Scholfield, J.; People ex rel. Cairo & St. Louis Ry. Co. v. Dupuyt, 71 Ill. 651, 655, per Craig, J.

Indiana: Tippecanoe County, Board of Commissioners of, v. Lafayette, Muncie & Bloomington Rd. Co., 50 Ind. 85, 108, per Biddle, J.; * Cutshaw v. Fargo, 8 Ind. App. 691, 693, 36 N. E. 650, 34 N. E. 376, per Gavin, C. J.

Kansas: * Land Grant Ry. & Trust Co. v. Coffey County, Board of Commissioners of, 6 Kan. 245, 253, per Valentine, J.

Louisiana: State ex rel. Saunders v. Kohnke, 109 La. 838, 843, 33 So. 793 (Code definition), per Provosty, J.; State v. New Orleans Debenture Redemption Co., 51 La. Ann. 1827, 1834, 26 So. 586, per Breaux, J.

Maine: Goddard v. Grand Trunk Ry. Co., 57 Me. 202, 241, per Tapley, J.; * Miller v. Ewer, 27 Me. 509, 518, 46 Am. Dec. 619, per Shepley, J.

Massachusetts: Central Bridge Corp. v. Bailey, 8 Cush. (62 Mass.) 319, 322, per Fletcher, J.; Pratt v. Bacon, 10 Pick. (27 Mass.) 123, 125, 126; Phillips Academy v. King, 12 Mass. 546, 554, per Thatcher, J.

Michigan: Thompson v. Waters, 25 Mich. 214, 223, 224, per Christiancy, Ch. J.; * Swan v. Williams, 2 Mich. (1 Gibbs) 427, 433, per Martin, J.

Mississippi: * Bank of the United States v. State, 12 Smedes & Marsh (20 Miss.), 456, 459, per Clayton, J.

Missouri: State v. Turley, 142 Mo. 403, 410, 44 S. W. 267, 268, per Burgess, J.; Jones v. Williams, 139 Mo. 1, 25, 61 Am. St. Rep. 436, 37 L. R. A. 682, per Macfarlane, J.; State v. Payne, 129 Mo. 468, 478, 31 S. W. 797, 33 L. R. A. 576, per Macfarlane, J.

Nebraska: * Horbach v. Tyrell, 48 Neb. 514, 526, 37 L. R. A. 434, 67 N. W. 485, per Ryan, J., in dissenting opinion.

Nevada: *† Edwards v. Carson Water Co., 21 Nev. 469, 479, 34 Pac. 381, per Murphy, C. J.

New Jersey: North Hudson Co. Ry. Co. v. May, 48 N. J. L. 401, 5 Atl. 276.

New York: Anglo-American Provision Co. v. Davis Provision Co., 169 N. Y. 506, 511, 88 Am. St. Rep.

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tions not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons." [6]

608, per Gray, J.; * Codd v. Rathbone, 19 N. Y. 37, 40, per Grover, J.; * Curtis v. Leavitt, 15 N. Y. 9, 257, per Selden, J., in dissenting opinion; *† Warner v. Beers, 23 Wend. (N. Y.) 103, 123, 124; Thomas v. Dakin, 22 Wend. (N. Y.) 9, 70, 71, 104; Niagara County v. People, 7 Hill (N. Y.), 504, 507; Farmers' Loan & Trust Co. v. New York, 7 Hill (N. Y.), 261, 283, per Scott, Senator; Purdy v. People, 4 Hill (N. Y.), 384, 406, per Scott, Senator; People v. Assessors of Watertown, 1 Hill (N. Y.), 616, 620, per Bronson, J.; *† Gifford v. Livingston, 2 Denio (N. Y.), 380, 395, per Hand, Senator; Sandford v. New York, 15 How. Pr. (N. Y.) 172, 175, per Davies, J.; Bradley Fertilizer Co. v. South Pub. Co., 23 N. Y. Supp. 675, 678, 53 N. Y. St. Rep. 214, 4 Misc. 172, per Bookstaver, J.; People v. North River Sugar Refining Co., 3 N. Y. Supp. 401, 407, per Barrett, J.

Ohio: State v. Standard Oil Co., 49 Ohio St. 137, 178, 34 Am. St. Rep. 541, 15 L. R. A. 145, 30 N. E. 279, per Marshall, J.

Pennsylvania: Gibbs's Estate, Halstead's Appeal, 157 Pa. 59, 69, 33 Wkly. N. C. 120, 22 L. R. A. 276, 27 Atl. 383, per Williams, J.; Commonwealth v. Fall Brook Coal Co., 156 Pa. 488, 494, 26 Atl. 1071, per Williams, J.

South Carolina: * McCandless v. Richmond R. Co., 38 S. C. 103, 110, 18 L. R. A. 440, 16 S. E. 429, per Pope, J.; State ex rel. Copes v. Charleston, 10 Rich. Law (S. C.), 491, 503.

Texas: * Waterbury & Co. v. City of Laredo, 60 Tex. 519, 521.

Utah: Weyeth Hardware & Mfg. Co. v. James-Spencer-Bateman Co., 15 Utah, 110, 121, 47 Pac. 604, per Bartch, J.

Virginia: * Roanoke Gas Co. v. Roanoke, 88 Va. 810, 824, 14 S. E. 665, per Richardson, J.

West Virginia: * Roanoke Gas Co. v. Clarksburg, 30 W. Va. 491, 494, 4 S. E. 774, per Woods, J.; * Hope v. Valley City Salt Co., 25 W. Va. 789, 797, per Woods, J.

Wisconsin: State ex rel. Attorney Gen'l v. Milwaukee Lake Shore & Western Ry. Co., 45 Wis. 579, 592, 593, per Orton, J.

[6] Const. N. Y., art. 8, § 3.

See also the following state constitutions:

Alabama: Const., art. 12, par. 241.

California: Const., art. 12, § 4.

Idaho: Const., art. 11, § 16.

Kansas: Const., art. 12, § 6 (Dassler's Gen'l Stat. § 215).

Kentucky: Const., § 208.

Louisiana: Const., art. 268.

Michigan: Const., art. 15, § 11.

Minnesota: Const., art. 10, § 1.

Mississippi: Const., § 199, art. 7.

Missouri: Const., art. 12, § 11.

Montana: Const., art. 15, § 18.

North Carolina: Const., art. 8, § 3.

North Dakota: Const., art. 7, § 144.

Pennsylvania: Const., art. 16, § 13.

South Carolina: Const., art. 9, § 1.

South Dakota: Const., art. 17, § 19.

Utah: Const., art. 17.

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Under the Public Service Commissions Law of that State the term "corporation," when used in that act, includes a corporation, company, association and joint-stock association.[7] But under the Joint-Stock Association Law of the same State the term "joint-stock association" does not include a corporation.[8] In People ex rel. Winchester v. Coleman[9] it is held that notwithstanding the various legislative enactments extending the powers of joint-stock companies, and clothing them with many of the essential attributes possessed by and characteristic of corporations, the distinction between the two classes of organizations still exists, and a joint-stock company is not taxable upon its capital under statutes subjecting "all money or stock corporations deriving an income or profit from their capital or otherwise," to such a tax. In People ex rel. Platt v. Wemple[10] it is held that the words "incorporated or organized under any law of this State," as used in a statute providing for the taxation of certain corporations, joint-stock companies and associations,[11] are not to be taken in a technical or restricted sense and confined to associations brought into being according to the formality of a statute, but as including any combination of individuals upon terms which embody or adopt as rules or regulations of business the enabling provisions of the statutes, and, so far as possible for it, assume an independent personality, and claim

Virginia: Const., art. 12, § 153 (Pollard's Code, 1904).

Washington: Const., art. 12, § 5.

Power to sue under New York constitution includes power to maintain only actions relating to corporate rights. Board of Education v. Board of Education, 78 N. Y. Supp. 522, 76 App. Div. 355.

[7] Public Service Commissions of N. Y., Laws 1907, p. 891, ch. 429, art. 1, § 2.

[8] "As used in this chapter the term joint-stock association includes every unincorporated joint-stock association, company or enterprise having written articles of association and capital stock divided into shares, but does not include a corporation; and the term stockholder includes every member of such an association." Joint Stock Assn. Law, N. Y. Laws 1894, ch. 235, § 2.

[9] 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183, 45 N. Y. St. R. 217, 46 Alb. L. J. 50, 30 Am. & Eng. Corp. Cas. 1.

[10] 117 N. Y. 136, 6 L. R. A. 303, 22 N. E. 1046.

[11] Ch. 542, Laws N. Y. 1880, as am'd by § 3, ch. 361, Laws 1881; ch. 501, Laws 1885.

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privileges not possessed by individuals or copartnerships, and that an association described in the articles as a "joint-stock company" has the characteristics, in certain respects, of a corporation and not a mere partnership, in view of the capacities and attributes with which it was endowed, and in view also of the statutes which legalized its assumed capacities and made valid and effective its asserted right of succession, its distinctive name and the inalienability of its shares, even though the articles contained no reference to any statute of the State as one under or by which the company was organized.[12] In Fargo v. McVicker [13] it is held that in case of joint-stock associations the question of citizenship, in respect to the removal of causes to the Federal courts, should be governed by the same principles of law which determine the question of citizenship in the case of corporations authorized by the laws of a State. In Waterbury v. Merchants' Union Express Co.[14] the nature and legal character of joint-stock associations organized under the New York laws is considered, and it is declared that they have all the attributes of a corporation except the technical one of a common seal; and that in respect to the absence of a common seal they are like partnerships. In Supervisors of Niagara v. People [15] it is held that associations formed under the general banking law are corporations within the purview of the statute [16] and liable to taxation on their capital. In a case in the Supreme Court of the United States it appeared that a joint-stock association was, by a deed of settlement in England and certain acts of Parliament, endowed with certain faculties and powers, which were: a distinct artificial name by which it could make contracts; a statutory authority to sue and be sued in the name of its officers as representing the association; a statutory recognition of the association as an entity distinct from its

[12] *Shareholders of joint-stock company considered as partners*, liable for debts, etc., of company in Hibbs v. Brown, 98 N. Y. Supp. 353, 112 App. Div. 214.

[13] 55 Barb. (N. Y.) 437.

[14] 50 Barb. (N. Y.) 157.

[15] 7 Hill (N. Y.), 504.

[16] 1 Rev. Stat. 414, § 1.

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members by allowing them to sue and be sued by it; and a provision for its perpetuity by transfers of its shares, so as to secure succession of membership. It was decided that such foreign association was, in view of these like powers, a corporation in this country, notwithstanding the acts of Parliament in accordance with a local policy declared that it should not be so held. It was also determined that such corporations, whether organized under the laws of a State of the Union or a foreign government, could be taxed by another State for the privilege of conducting their corporate business within the latter; and that in this country the individual responsibility of the shareholder for the association's debts was not incompatible with the corporate idea.[17]

[17] Liverpool Insurance Co. v. Massachusetts, 10 Wall. (77 U. S.) 566, 574, 19 L. ed. 1029, aff'g Oliver v. Liverpool & London Life & Fire Ins. Co., 100 Mass. 531; Bradley, J., dissented.

This last cited case has been cited, explained, distinguished and criticised as appears from the following decisions:

Cited in Board of Levee Inspectors of Chicot County v. Crittenden, 94 Fed. 613, 616 (holding that a board of levee inspectors possessed of the powers usually incident to a corporation is a corporation even though the statute creating such board does not expressly declare them to be such). See also Dean v. Davis, 51 Cal. 406, 411; Elmore v. Commissioners, 135 Ill. 269, 25 N. W. 1010; Archer v. Board of Levee Inspectors of Chicot County, 128 Fed. 125, 127. *Cited* in American Steel & Wire Co. v. Wire Drawers & Die Makers' Unions, 90 Fed. 598, 600, per Hammond, J. (to point that "The right to sue and be sued is a corporate franchise, must be granted by legislation, and voluntary association only possess it under the circumstances mentioned" in the cited case). *Cited* in Edgeworth v. Wood, 58 N. J. L. 463, 467, 33 Atl. 942 (holding that a joint-stock company or association formed under New York laws and expressly authorized thereunder to sue and be sued is a corporate entity subject to action against it in New Jersey in the name of designated officers though not in its corporate name. And the court, per Magie, J., said, "Whether an aggregation of individuals united in an artificial body is a corporation or not is to be determined rather by the faculties and powers conferred upon the body than by the name or description given to it.) *Cited* in Tide Water Pipe Co., Lim., v. State Board of Assessors, 57 N. J. L. 516, 517, 27 L. R. A. 684, 31 Atl. 221 (holding that joint-stock companies or partnership associations organized in Pennsylvania even if not a corporation in the State of its creation, still it may be deemed a corporation within the Corporation Tax Act of New Jersey where such company is invested with the essential charac-

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§ 53. Same Subject Continued.—In a case in the Federal Circuit Court of Appeals it is held that an allegation in respect of the plaintiff, styled a "limited partnership association organized and existing under the laws of the State of Michi-

teristics of a corporation and assumes to exercise corporate powers and statutory privileges in the latter State. *Cited* in McGregor v. Erie Ry. Co., 35 N. J. L. 115, 118 (but only to the point that a foreign corporation might have the character of a corporation in New Jersey although it is not so expressly declared). *Distinguished* in Imperial Refining Co. v. Wyman, 38 Fed. 574, 575, 579, 3 L. R. A. 504 (holding that Pennsylvania limited partnerships are not "citizens" under the Constitution and laws of the United States defining the limited judicial powers of the United States. *Distinguished*—as to point that "if incorporated it seems that in this country it is to be regarded as at least a quasi-corporation," although otherwise where unincorporated,—in Allen v. Long, 80 Tex. 261, 266, 26 Am. St. Rep. 735, 739, 16 S. W. 45 (which holds that an unincorporated joint-stock company or association lacking the element of succession or perpetuity is not a corporation but a joint-stock association governed by general laws of partnership). *Distinguished* in Andrew Bros. v. Youngstown Coke Co., 86 Fed. 585, 587–589, 595, 30 C. C. A. 293, 58 U. S. App. 444 (upon point that statute in this case does not disclaim a purpose to create a corporation. This last case holds that a "limited partnership association" is a corporation and "citizen" so as to give Federal courts jurisdiction). But the court, per Harlan, J., in great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 457, 44 L. ed. 842, 20 Sup. Ct. 690, says of this case: "For the reasons stated we are unable to concur in the view taken by that court." *Explained and distinguished* in Gregg v. Sanford, 65 Fed. 151, 154, 12 C. C. A. 525 (holding that a joint-stock company or association formed in the State of New York was not subject to taxation under the Pennsylvania statutes taxing the capital stock of "incorporated" companies, as such joint-stock association was not a corporation but a partnership relying as to taxation upon People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; relying as to partnership upon Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426; Gleason v. McKay, 134 Mass. 419; Boston & Albany Rd. v. Pearson, 128 Mass. 445; Taft v. Ward, 106 Mass. 518; explaining and distinguishing Oak Ridge Coal Co. v. Rogers, 108 Pa. 147). *Criticised.* The dissenting opinion of Bradley, J., in the principal case, upon the question whether the company was a corporation, is said by the court, per Lathrop, J., in Edwards v. Warren Linoline & Gasoline Works, 168 Mass. 564, 567, 568, 38 L. R. A. 793, 47 N. E. 503 (to be "in accord with the view of this court and we are not aware that the view taken by the Supreme Court of the United States has been followed in this commonwealth. The decisions we have already cited show that a foreign joint-stock company is considered as an association or partnership and not a corporation").

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gan," is not, in the absence of some further averment as to citizenship of its members a "citizen" within the Federal jurisdictional rule, unless such organization is a corporation within such rule. And it was also decided that the association was not such a corporation as to become a citizen of the State of its domicile, independent of the members, either under the state constitution or under a statute which did not declare such associations to be corporations.[18] It is decided, however, in that court that, for the purpose of jurisdiction of the Federal court, such company or association may be considered as a corporation and not as a limited partnership.[19] It is also determined in an early case in the United States Circuit Court that a joint-stock company is a citizen of the State of organization in the same sense that corporations are citizens and that such company may sue and be sued, in the name of its proper officer, in the Federal courts as a citizen of such State. Gresham, J., said: "Corporations are artificial persons—ideal creatures of the State—and so are New York joint-stock companies. It is of no consequence that in the statutes under which these companies are organized they are called 'unincorporated associations.' In determining what such institutions really are, regard is to be had to their essential attributes rather than to any mere name by which they may be known. If the essential franchises of a corporation are conferred upon a joint-stock company, it is none the less a corporation for being called something else." The court also relies upon the New York constitution.[20] In a comparatively recent case in Idaho it is decided that an unincorporated association or joint-stock company, formed for the purpose of acquiring certain land, is a partnership, or governed by some of the principles of partnership, but is not a general partnership, and that its rights, powers and privileges are not those of a corpo-

[18] Fred Macey Co. v. Macey, 135 Fed. 725. See the first note under § 52, herein.

[19] Bushnell v. Park (U. S. C. C.), 46 Fed. 209.

[20] Fargo v. Louisville, New Albany & Chicago Ry. Co., 10 Biss. (U. S. C. C.) 273, 277. See § 52, herein, for provisions of New York constitution above relied on.

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ration as that word is defined under the constitution of that State. In its discussion of the questions involved the court says: "From a reading of said section 16, article 11 of the constitution of Idaho, it will be observed that the word 'corporation' does not include, as therein defined, all joint-stock companies and associations, but only such as 'have or exercise any of the powers or privileges of corporations not possessed by individuals or partnerships.' The provisions of that section expressly affirm that there are joint-stock companies or associations that do not have or exercise any such powers or privileges, and to which the term 'corporation' as used in section 16 does not apply. In said section 16 the term 'corporation' is there defined only with reference to its use in said section. The definition of the term 'corporation' as given in said section would not apply to the Denver Townsite Company unless it possessed or exercised some of the powers or privileges not possessed by an individual or partnership. The constitutional definition of the term 'corporation' has been held by some courts as not being a general definition, but only a definition of that term as it is used in that article of the constitution. The Supreme Court of the United States in the case of Great Southern Fireproof Hotel Co. v. Jones,[21] referring to the definition of the term 'corporation' as used in section 13, article 16 of the Pennsylvania state constitution, said 'the only effect of that clause is to place the joint-stock companies or associations referred to under the restrictions imposed by that article upon corporations, but not to invest them with all the attributes of corporations.' In People v. Coleman,[21a] it was held that this provision in the constitution of New York only applied to the term 'corporation' as used in the article referred to in that constitution, requiring that there should be entered after the word 'corporation' at every place in that article the following: 'All associations and joint-stock companies having or exercising any of the powers or privileges of

[21] 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. 693.

[21a] 5 N. Y. Supp. 394, aff'd in 133 N. Y. 279, 21 N. E. 96, 16 L. R. A. 183.

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corporations not possessed by individuals or partnerships.' " [22] In Kentucky it is held that a joint-stock association, created under the laws of the State of New York, is not a corporation under a statute requiring all corporations doing business in the State, except foreign insurance companies, to have an agent in the State to accept service, and also requiring a specified statement to be filed with the Secretary of State; nor is it a corporation within such a statute, even though the word "corporation" in the constitution embraces joint-stock companies, and under a statute the words "corporation" or "company" include joint-stock companies or associations.[23] In a case in Massachusetts, which was one of trustee process, the defendant was described in the writ as a "joint-stock company organized under the laws of Pennsylvania" and its decision rested upon the question whether an association formed under the laws of that State was a corporation or a partnership. It was determined that it was not a corporation and so could not be sued as such in Massachusetts, although the court, per Lathrop, J., said that if the question "were an open one in this commonwealth, it might well be held that such an association could be considered to have so many of the characteristics of a corporation that it might be treated as one." [24] But it is also declared in the same State that: "The words 'joint-stock company,' as used in the statutes of this commonwealth, refer to companies organized under general laws as corporations. * * * The phrases 'joint-stock company' and 'corporations organized under general laws,' as used in all the statutes above cited, are convertible terms, and

[22] Spotswood v. Morris, 12 Idaho, 360, 374, 375, 85 Pac. 1094, per Sullivan, J. See § 52, herein, for list of constitutions. That joint-stock company is a partnership, see Bradford v. National Ben. Assn., 26 App. D. C. 268.

[23] Commonwealth v. Adams Express Co., 29 Ky. L. Rep. 1280, 97 S. W. 386.

[24] Edwards v. Warren Linoline & Gasoline Works, 168 Mass. 564, 566, 38 L. R. A. 793, 47 N. E. 503.

When association is partnership and its rolling stock taxable as personal property, see Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284.

As to resemblance and difference between corporations and partnerships, see Pratt v. Bacon, 10 Pick. (27 Mass.) 123, 125–127.

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refer to the same class of corporations, as distinguished from those established under special charters. * * * The words 'joint-stock company' have never been used as descriptive of a corporation created by special act of the legislature, and authorized to issue certificates of stock to its shareholders. They describe a partnership made up of many persons acting under articles of association, for the purpose of carrying on a particular business, and having a capital stock, divided into shares transferable at the pleasure of the holder." [25] Under a Minnesota decision certain constitutional and statutory provisions are construed and it is held that an annuity, safe-deposit and trust company is not a corporation embracing banking privileges.[26] In a Missouri case it is decided that an express company, as a joint-stock association, cannot maintain an action at law in the name of the association, nor in the name of its officers as trustees.[27] In Ohio, however, express companies have been treated by the courts as corporations though organized as joint-stock companies but not designated as such in the statute of incorporation.[28] In Pennsylvania, a partnership association limited is a "person or corporation" within the meaning of those words in a statute authorizing an action of trespass for the recovery of damages for trespassing upon and mining coal from the lands of another. In this case the court, per Mercur, C. J., said: "Such an association is not technically a corporation. Yet it has many of the characteristics of one. * * * It may not be improper to call such an association a quasi-corporation. If not a corporation it is a person. It is either a natural or an artificial person. There is no intermediate place for it to occupy, no other name for it to bear." [29]

[25] Attorney General v. Mercantile Ins. Co., 121 Mass. 524–526, per Endicott, J.

[26] International Trust Co. v. American Loan & Trust Co., 62 Minn. 501, 65 N. W. 78.

[27] Weir v. Metropolitan St. Ry. Co., 126 Mo. App. 471, 103 N. W. 583. Examine Wilkinson v. Evans, 34 Pa. Super. Ct. 472.

[28] State v. Adams Express Co., 2 Ohio N. P. 98; State v. United States Express Co., 1 Ohio N. P. 259, 2 Ohio Leg. News, 257.

[29] Oak Ridge Coal Co., Lim., v. Rogers, 108 Pa. 147.

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§ 54. **Same Subject—Conclusion.**—As a summary of what is set forth under the two last preceding sections, it appears that it is conceded in a number of decisions and in the opinions of the courts, that joint-stock associations or companies have many of the characteristics, attributes, faculties, and powers of corporations, and in an early case in New York, it is declared that such companies have all the attributes of a corporation except a common seal. So in Massachusetts, the court's statements to the point that such an association has so many of the characteristics of a corporation that it might well be treated as one, and also that the phrases "joint-stock company" and "corporations organized under general aws" are convertible terms, are important. It also appears that a foreign association, having like powers, etc., with corporations is a corporation; that voluntary associations may under certain circumstances exercise certain corporate franchises; that the question is not one as to the name, but one as to essentials, faculties and powers possessed; that if a joint-stock company possesses the essential franchises of a corporation it is none the less a corporation by being called something else; that a distinction exists between these classes of organizations, even though joint-stock companies or associations possess many of the essential attributes of corporations and the former are not corporations; that in a Federal case and in New York they are not corporations taxable as such upon their capital stock; that in a Federal and a Massachusetts case they are so subject to taxation; also so in a New Jersey case if they are invested with the essentials of a corporation; and also so in a New York case as to associations formed under the General Banking Law; that under certain Federal decisions they are within the Federal jurisdictional rule, respectively a corporation, a citizen, and a limited partnership association is not a citizen unless it is a corporation within such rule; that under a New York case they are in respect to citizenship and such jurisdiction, governed by the same principles as govern corporations in determining the question of citizenship; that under another Federal case, a joint-stock company is a citizen

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in the same sense as a corporation, and may sue and be sued as a citizen in the name of its proper officer; that in Kentucky it is not a corporation so as to require an agent in the State for service of papers, and the same as to filing a certificate; that under a Massachusetts case it is not a corporation subject to suit; that under a Missouri case it cannot sue as a corporation or by officers as trustees; that in New Jersey it is a corporate entity subject to action in name of officers but not in a corporate name; that in the Federal and Ohio courts it has been considered a corporation, and in Pennsylvania a "person or corporation" and not a corporation in Minnesota; that in a number of jurisdictions such companies or associations are considered as an association or partners, or as partners, also so under a Texas decision if they lack the element of succession or perpetuity, also so in respect to the absence of a common seal, although it is declared in a New York case that such companies have not the characteristics of a mere partnership, and in a Federal case that they are not partnerships but corporations for the purposes of jurisdiction, and under a Pennsylvania decision it is said that it may not be improper to call them quasi-corporations. While, therefore, such joint-stock companies or associations have, under certain circumstances and for certain purposes, been considered as corporations, and although it is generally conceded that they possess the attributes, characteristics, faculties, and powers of corporations in a marked degree, nevertheless they are not technically corporations and the courts have more generally relied upon the technical distinctions that exist, and have held that they are not corporations and, as above stated, they have been held in a number of decisions to be partners. In so far, however, as the constitutional provisions, noted under a preceding section,[30] affect or control the determination of the question under consideration, it would seem that such provisions are limited in their operation to those cases which satisfy or come within the express conditions therein.

[30] See § 52, herein.

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§ 55. General Classification of Corporations—Public and Private.—In classifying corporations regard must be had to their mode of creation, to the objects and purposes for which they are created, to the degree of power conferred upon them, to their legal status, and to the relation sustained by them to the government and the public. While corporations are divided generally into public and private,[31] other divisions have been made. Thus it is declared that: "The division of corporations into public and private will be more simple and easily understood as political and private." [32] So, as to all their rights, powers and responsibilities, three classes of corporations are said to exist: (1) Political or municipal corporations, such as counties, towns, cities and viliages, which from their nature are subject to the unlimited control of the legislature; (2) those associations which are created for public benefit, and to which the government delegates a portion of its sovereign power, to be exercised for public utility, such as turnpike, bridge, canal and railroad companies; and (3) strictly private corporations where the private interest of the corporator is the primary object or purpose of the association, such as banking, insurance, manufacturing and trading companies; and in this class may be included eleemosynary corporations, generally.[33] Although a municipality or city is a

[31] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629; Murphy v. Board of Chosen Freeholders, 57 N. J. L. 245, 251, 31 Atl. 229.

As to distinction between public and private corporations, see §§ 60–62, herein.

[32] State v. Hayward, 3 Rich. Law (S. C.), 389, 408, per O'Neall, J. See § 60, herein.

[33] Swan v. Williams, 2 Mich. (1 Gibbs) 427, 434, per Mattin, J.

In McKim v. Odom, 3 Bland (Md.), 407, 417–419, decided in 1829, Bland, Chancellor, says: "The multitude of bodies politic, that have been created either by the government of the province or of the Republic, most of which still subsist, may be considered, in reference to their objects, as belonging to one or other of three distinct classes. The first kind are such as relate merely to the public police; which by assuming upon themselves some of the duties of the State, in a partial or detailed form, and having neither power nor property for the purposes of personal aggrandizement can be considered in no other light than as the auxiliaries of the government of the Republic; and consequently, as the secondary and deputy trustees and servants of the

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public corporation,[34] still municipal corporations may possess certain characteristics or powers in the nature of a private

people. The right to establish, alter or abolish such corporations, seems to be a principle evidently inherent in the very nature of the institutions themselves; since all mere municipal regulations must from the nature of things be subject to the absolute control of the government. These institutions being, in their nature, the auxiliaries of the government in the great business of municipal rule, cannot have the least pretension, to sustain their privileges, or their existence upon anything like a contract between them and the government; because there can be no reciprocity of stipulation; and because their objects and duties are incompatible with everything of the nature of such a compact. The power of acquiring and holding property, although almost always given, is by no means a necessary incident to corporations of this class; they may be established without any such capacity; as in the instance of the commissioners for emitting bills of credit The preservation of morals, and the administration of justice are the chief ends for which government has been instituted; and infancy, insanity, infirmity, and helpless poverty have an undoubted claim upon the protecting care of the Republic. Bodies politic of this class having these objects in view, are city corporations; levy courts; county schools of the provincial or state government; public colleges; hospitals; trustees of the poor of the several counties, etc. The second class of corporations are such as have no concern whatever with the duties of the Republic; nor are in any manner bound to perform any acts for its benefit; but whose only object is the personal emolument of its members. The corporators in such institutions may also, in some sense, be considered as trustees; but then, when in that character, they are the mere factors of individuals; and, therefore, their resignation or removal cannot divest or alter any of the rights of the individuals they represented. Each member of such an aggregation either was a proprietor at the commencement, or became so during the existence of its incorporation; and consequently, unless he has aliened his right, must continue to be so after its dissolution. A corporation not being, like a natural person, one of the elements of society, of which government is formed, can only be considered as a creature of the law. It is the law alone which gives to it a personality distinct from that of each of its members, and confers on it the right to act by its president, directors, or agents, in a manner analogous to that in which the government itself acts by its regularly constituted functionaries. This individuality of character, and the right so to act is, then, nothing more than a portion of the power of the government with

[34] Philadelphia v. Fox, 64 Pa. 180, 181; Ogden City v. Bear Lake & River Water Works & Irrig. Co., 16 Utah, 440, 451, 452, 52 Pac. 697, 41 L. R. A. 305, per Zane, C. J. (city declared to be a public corporation and the nature of such corporation and the extent of its powers considered). See §§ 60–62, herein.

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corporation.[35] A right may be private in respect that it belongs to the municipality for the exclusive benefit of its own corporators, and yet public in respect that there can be no property in it by individual citizens, and the right itself exists only by public and sovereign grant and as a franchise.[36]

which it has been invested. It is this power which is given by the creation of a body politic, and which, by its extinguishment, is resumed, and nothing more; the rights of property vested in its several members, in all other respects, remain unaffected by its dissolution. It is remarkable, that there is no instance of the creation of any body politic of this description under the provincial government; but since the establishment of the Republic they have increased and multiplied to a very large and still rapidly growing family. The examples of this class of corporations are the insurance companies; the Free Mason societies; the banks; the manufacturing companies; the library companies, etc. The third species of corporations partake, in many respects, of the nature of the two first classes; and are such as have a concern with some of the extensive duties of the State, the trouble and charge of which are undertaken and defrayed by them, in consideration of a certain emolument allowed and secured to their members. In cases of this kind there is certainly many of the material features of a contract between the government and the corporation; there is manifestly a *quid pro quo*. But this contract, if it be so, is, and of necessity must be, like all others to which a government or State is a party, one of imperfect obligation as regards the State; and, as such, subject to be dealt with by the government of the State as the public good may require, on making a just compensation for any private property which may be taken for a public use. No bodies politic of this description were ever created under the provincial government; but since our independence, a great number of them have been called into existence; such as canal companies; bridge companies; turnpike road companies, etc." See Tinsman v. Belvidere Delaware Rd. Co., 26 N. J. L. 148, 171, 69 Am. Dec. 195 (defining public corporations as created for political purposes, etc.).

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[35] Mount Pleasant v. Beckwith, 100 U. S. 514, 529, 25 L. ed. 699, per Clifford, J.

[36] Mayor v. Park Commissioners, 44 Mich. 602, 605, 7 N. W. 180, per Cooley, J., who adds: "Indeed in respect to its waterworks, sewers and public parks, a city would be without power to make them accomplish the purposes for which they are created, held and used, but for special franchises conferred upon them by the State for the purpose. The power to condemn lands, for example, is generally essential, but this is only given upon the ground that the end aimed at is public, though it is public only as concerns the particular city, borough, village, etc., to be benefited."

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§ 56. General Classification of Corporations Continued—Quasi-Public Corporations—Quasi-Municipal Corporations. —Another division is what has been termed quasi-public corporations, which is a term generally used to designate a subdivision of public corporations, as in the case of certain political divisions or subordinate agencies, such as counties, towns or townships, school districts, etc.[37] These latter are,

[37] **United States:** School District v. Insurance Co., 103 U. S. 707, 708, 26 L. ed., per Miller, J. (school district); Madden v. Lancaster County, 65 Fed. 188, 191, 27 U. S. App. 528 (counties). *Compare* Lincoln, County of, v. Luning, 133 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. 363; Tippecanoe County, Board of Commrs. of, v. Lucas, 93 U. S. 108, 23 L. ed. 882.

Alabama: Chambers County v. Lee County, 55 Ala. 534 (counties are public or quasi-corporations).

Arkansas: *Compare* Eagle v. Beard, 33 Ark. 497, 501 (counties are of a purely political character).

California: See County of San Bernadino v. Southern Pac. Rd. Co., 137 Cal. 659, 662, 70 Pac. 782, Cal. Polit. Code, § 1575 (school district is public corporation which may sue and be sued in own name).

Illinois: Bush v. Shipman, 4 Scam. (5 Ill.) 186 (incorporated township for common school purposes). Examine Board of Education v. Greenebaum & Sons, 39 Ill. 609, 618; Trustees of Schools v. Tatman, 13 Ill. 27, 30 (school trustees).

Indiana: See School Town of Montecello v. Kendall, 72 Ind. 91, 37 Am. Rep. 139 (school, town or township is purely public corporation).

Iowa: Soper v. Henry County, 26 Iowa, 264. *Compare* Curry v. District Township of Sioux City, 62 Iowa, 102, 104, 105, 17 N. W. 191, per Rothrock, J. (school district is municipal corporation; may issue bonds; municipal corporation defined); Winspear v. District Township of Holman, 37 Iowa, 542–544, per Day, J. (school district held a political or municipal corporation as to incurring indebtedness).

Kentucky: Lawrence County v. Chatteroi Rd. Co., 81 Ky. 225.

Massachusetts: Inhabitants of Fourth School Dist. in Rumford v. Wood, 13 Mass. 193 (towns; inhabitants of school districts); Riddle v. Proprietors of Locks & Canals, 7 Mass. 169, 186, 187, 5 Am. Dec. 35.

Minnesota: See Dowlan v. Sibley, County of, 36 Minn. 430, 432, 31 N. W. 517 (term "municipal corporations" includes such quasi-corporations as counties and towns).

Mississippi: Brabham v. Hinds County, Board of Supervisors of, 54 Miss. 363, 364, 28 Am. Rep. 352.

Missouri: Clark v. Adair County, 79 Mo. 536, 537; Ray County v. Bentley, 49 Mo. 236.

Nebraska: See Woods v. Colfax County, 10 Neb. 552, 554, 555, 7 N. W. 269.

New Hampshire: Wells v. Burbank, 17 N. H. 393 (township).

North Carolina: White v. Chowan, Commrs. of, 90 N. C. 437, 438, 47 Am. Rep. 534.

Ohio: Carder v. Fayette County, Board of Commrs. of, 16 Ohio St. 353, 367; Hopple v. Brown Town-

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however, sometimes called quasi-municipal corporations, as distinct from municipal corporations proper, such as cities and incorporated villages, and this distinction has been deemed important in a case in Minnesota which holds that no private action lies for the negligence of public governmental officers.[38]

ship, 13 Ohio St. 311, 324 (townships are often denominated quasi-corporations).

Pennsylvania: See Chester, County of, v. Brower, 117 Pa. 647, 655, 12 Atl. 577, 2 Am. St. Rep. 713 (not strictly municipal corporation; is public as distinguished from private; sometimes called a quasi-municipal corporation); Turnpike Co. v. Wallace, 8 Watts (Pa.), 316, 317, per Rogers, J. (the words "other corporate bodies," in a statute as to corporations exempted from execution, etc., means boroughs, cities, etc.).

Texas: Heigel v. Wichita County, 84 Tex. 392, 31 Am. St. Rep. 63, 19 S. W. 562.

Washington: State ex rel. Summerfield v. Tyler, 14 Wash. 495, 499, 45 Pac. 31.

Wisconsin: Norton v. Peck, 3 Wis. 714 (township). See Burhap v. City of Milwaukee, 21 Wis. 257, 260, per Downer, J. (counties, cities, villages, towns, etc., are public; private corporations distinguished).

See § 61, herein.

Counties, towns, school districts, etc., as *involuntary quasi-corporations*, see Dillon's Munic. Corp. (4th. ed.) §§ 22–25.

[38] Snider v. City of St. Paul, 51 Minn. 466, 471, 472, 18 L. R. A. 151, 53 N. W. 763. In this case the court, per Mitchell, J., said: "But respecting the principle upon which to rest this distinction, as to the nature of the duties to which it extends, the courts seem to be much perplexed, and their decisions, often in conflict with each other, leave the subject in some confusion. The ground for the distinction is not to be found in the mere fact that one is created by special charter, while the other is not, for both alike are subdivisions of the State, created for public, although local, governmental purposes. Nor is it to be found in the fact that one is given greater powers than the other, unless the power is, not for governmental purposes, but to engage in some enterprise of a *quasi*-private nature, from which the municipality will derive a pecuniary benefit in its corporate or proprietary capacity; as, for example, power to build gasworks or waterworks, to furnish gas or water to be sold to consumers, or to build a toll bridge, from each of which the city would derive a revenue. In this class of cases it is generally held that corporations are liable for wrongful or negligent acts, because done in what is termed their 'private' or 'corporate' character, and not in their public capacity as governing agencies, in the discharge of duties imposed for the public or general benefit. But it is also generally held that they are not liable for negligence in the performance of a public, governmental duty imposed upon them for public benefit, and from which the municipality in its corporate or proprietary capacity derives no pecuniary benefit. The liabilities of cities for negligence in not keeping streets in repair would seem to be an exception to this gen-

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The term "quasi-public corporation" has, however, also been used to denominate a certain class of private corporations of a quasi-public character in that they have conferred upon them certain governmental powers to enable them to carry out some enterprise of a public nature involving public interests, although the public may have no other concern therein than that it is or may be indirectly benefited.[39] The term has, however, been declared to be a misnomer where applied to private corporations such as a railroad.[40]

§ 57. Other Divisions or Kinds of Corporations.—Corporations have been also divided into aggregate and sole, ecclesiastical and lay, eleemosynary and civil.[41] Corporations are also domestic or foreign.[42]

eral rule * * * and, as already suggested, as to what are public governmental duties and what are private corporate duties the courts are not in entire harmony, and their decisions do not furnish a definite line of cleavage between the two."

See also upon the points in above quotation as to liability for negligence and distinctions, the following cases:

United States: Madden v. Lancaster County, 65 Fed. 188, 27 U. S. App. 528.

Illinois: Tollefson v. Ottawa, 228 Ill. 134, 81 N. E. 823, 11 L. R. A. (N. S). 990 (not liable for negligence of servants in conducting hospital).

Indiana: Aiken v. Columbus, 167 Ind. 139, 78 N. E. 657, 12 L. R. A. (N. S.) 416 (liable; case of maintaining electric light plant for lighting streets).

Michigan: Alberts v. City of Muskegan, 146 Mich. 210, 109 N. W. 262, 117 Am. St. Rep. 633 (when not liable for negligence of officers in using steam-roller on streets).

New York: Winters v. City of Duluth, 82 Minn. 127, 135, 84 N. W. 788; O'Donnell v. City of Syracuse, 184 N. Y. 1, 76 N. E. 738, 112 Am. St. Rep. 558 (not liable in exercise of discretionary powers of public or legislative character, but otherwise for nonperformance of corporate duties not discretionary relating to its special interests).

North Carolina: Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342, 111 Am. St. Rep. 857 (not liable for breach of duty while acting as agency of State, but liable for negligence in operating electric light plant).

See also note 30 Am. St. Rep. 376; Dillon's Munic. Corp. (4th. ed.) §§ 954, 980–984, 987; Thompson's Comm. on Law of Neg. §§ 5785 *et seq.*

[39] See Miners Ditch Co. v. Zellenbach, 37 Cal. 543, 577, per Sawyer, C. J. See Chap. VI.

[40] Pierce v. Commonwealth, 104 Pa. 150, 155, 13 Am. & Eng. Rd. Cas. 74, 79. Compare Chap. VI.

[41] See Penobscot Boom Corp. v. Lamson, 4 Shep. (16 Me. 224) 33 Am.

[42] See Chap. VI, herein, as to other particular kinds of corporations.

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§ 58. Classification as Affected by Constitutions and Statutes.—Another consideration of importance in this connection is that of the various constitutions and statutes, especially those which define and classify corporations either expressly or impliedly.[43] Although corporations are divided generally into those created by the State for purposes of government and management of public affairs, which are public or quasi-public corporations, and those formed by voluntary agreement for private advantage, which are technically private corporations;[44] still, in statutes relating to the creation of corporations and to the grant of the ordinary franchises to them, the term "corporation" may properly be limited by construction to private corporations, and in any remedial statute the term "corporations" includes all classes of cor-

Dec. 656; Day v. Stetson, 8 Greenl. (8 Me.) 365; Jansen v. Ostrander, 1 Cow. (N. Y.) 670; Thomas v. Dakin, 22 Wend. (N. Y.) 9; Angell & Ames on Corp. (9th ed.) §§ 26–30, 36–40; Anderson's Dict. of Law, title "Corporation."

Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms and bounty of the founder in such manner as he has directed, and in this case are ranked hospitals for the relief of the poor and impotent persons and colleges for the promotion of learning and piety and the support of persons engaged in literary pursuits. Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 668, 672–676, 4 L. ed. 629.

[43] See §§ 52–54, herein. The New York General Corporation Law (Laws 1890, ch. 563, § 2, 1 Cumming & Gilbert's Gen'l Laws & Gen'l Stat. N. Y., 812, 813) provides: "Classification of Corporations.—A corporation shall be either, (1) a municipal corporation; (2) a stock corporation; (3) a non-stock corporation, or (4) a mixed corporation. A stock, corporation shall be either, (1) a moneyed corporation; (2) a transportation corporation, or (3) a business corporation. A non-stock corporation shall be either, (1) a religious corporation, or (2) a membership corporation. A mixed corporation shall be either, (1) a cemetery corporation, (2) a library corporation, (3) a co-operative corporation, (4) a board of trade corporation, or (5) an agricultural and horticultural corporation. A transportation corporation shall be either, (1) a railroad corporation, or (2) A transportation corporation other than a railroad corporation. A membership corporation shall include benevolent orders and fire and soldiers' monument corporations. A reference in a general law to a class of corporations described in accordance with this classification shall include all corporations theretofore formed belonging to such class."

[44] See §§ 55, 56, 61, 62, herein.

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porations, and it may, upon applying the legal rules of construction, be reasonably concluded that the term should be extended to every character of corporations which can be created by legislative power, especially those which may have imposed upon them duties for the breach of which a liability in law arises.[45]

§ 59. **Classification as Affected by Public-Service Commissions Law, or Public Utilities Act.**[46]—Still another division of corporations, and one which is of constantly increasing importance, is that of public service or public utility corporations or companies. What are embraced within this denomination is evidenced, in some degree at least, by recent enactments of the Public Service Commissions Law in New York and the Public Utilities Act in Wisconsin. Under the former, the law applies to the public services described therein, and embraces common carriers, all railroad and street railroad corporations, by whatsoever power operated, above or below any street, etc., subways, tunnels, express companies, car, sleeping-car, freight and freight-line companies, gas and electric light, heat and power companies, doing business in the State.[47]

[45] Murphy v. Board of Chosen Freeholders, 57 N. J. L. 245, 251, 31 Atl. 229, per Lippincott, J. The term "corporation" as contained in the first section of the act entitled, "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default," approved March 3, 1848 (Rev. p. 294), includes within its meaning the boards of chosen freeholders of the respective counties of this State, as public corporations, having by the act of 1860 (Rev. p. 86, § 1) imposed upon them a liability for damages for personal injuries occasioned by their neglect to erect, rebuild or repair bridges in such manner as not to be dangerous to public travel over them, and that by reason of such neglect such boards become liable in damages whenever the death shall be caused by such neglect. The act of 1848, to which reference is made, called the Death Act, was intended to give a right of action thereunder, against persons or corporations upon whom a liability was imposed, if death had not ensued, and in the absence of any language in the act, which either expressly or impliedly excludes public corporations, it is upon principle clear that they are included within the provisions of the statute, which being remedial, must, in its nature, be liberally and beneficially interpreted.

[46] See § 104, herein.

[47] Public Service Commissions

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Under the latter statute [48] in 1907 were included telegraph companies, urban street railway companies, and all public utility companies, and under the act of 1905 [49] creating the commission, all common carriers, including steam railroads, interurban electric railroads; bridge and terminal companies, express companies, car and sleeping-car, freight and freight-line companies were included.[50]

Law, Laws N. Y., 1907, ch. 429. See §§ 52–54; and Chap. VI, herein.

"The provisions of this article shall apply to the transportation of passengers, freight or property, from one point to another within the State of New York, and to any common carrier performing such service." *Id.*, art. II, § 25.

"This article shall apply to the manufacture and furnishing of gas for light, heat or power, and the generation, furnishing and transmission of electricity for light, heat or power." *Id.*, art. IV, § 65.

The terms "Corporation," "Common Carrier," "Railroad," "Railroad Corporation," "Street Railroad," "Street Railroad Corporation," "Gas Corporation," "Electrical Corporation," "Transportation of Property or Freight" and "Municipality" are defined in said act, art. 1, § 2. See §§ 52–54, and Chap. IV, herein.

[48] Public Utilities Act, Laws Wis., 1907, p. 449, ch. 499, § 1797m–1, subdv. 1.

"The term 'public utility' as used in this act shall mean and embrace every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every town, village or city that now or hereafter may own, operate, manage or control any plant or equipment or any part of a plant or equipment within the State, for the conveyance of telephone messages or for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public." Public Utilities Act, Laws Wis., 1907, p. 449, ch. 499, § 1797m–1, subdv. 1.

"The term 'service' is used in this act in its broadest and most inclusive sense." Public Utilities Law, Laws Wis., 1907, p. 449, ch. 499, § 1797m–1, subdv. 4.

[49] "Railroad Act" of 1905.

[50] "The railroad commission of Wisconsin is vested with power and jurisdiction to supervise and regulate every public utility in the State and to do all things necessary and convenient in the exercise of such power and jurisdiction." Public Utilities Law; Laws Wis., 1907, p. 449, ch. 499, § 1797m–2.

The "Railroad Act" of 1905; Laws of Wis., 1905, p. 549, ch. 362, was entitled "An act, to regulate railroads and other common carriers in this State, create a board of railroad commissioners, fix their salaries, define their duties, prevent unjust discriminations, insure an adequate railway service, prescribe the mode of procedure and the rules of evidence in relation thereto, prescribe penalties for violations, and making an appropriation therefor."

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§ 60. Corporation Considered as Civil or Political Institution—Distinction Between Incorporation and Corporation—Distinction Between Public and Private Corporations. —It is declared in an Ohio case, decided in 1853, that: "A corporation is a civil institution. It is established by a law of the State from considerations of public policy. Its existence, its capacities and its powers are all conferred by law from some real or supposed public benefit to result from it. If this mere creature of the law thus instituted or established, be not a *political institution* of the State, it would be difficult to conceive under what other denomination it could be placed by any sensible distinction, which could be invented. Mr. Kyd, a reputable elementary author, has furnished the following comprehensive and descriptive definition: ' A corporation or body politic, or body incorporate, is a collection of many individuals, united in one body, under a *special denomination*, having perpetual succession under an artificial form, and vested by the policy of the law with a capacity of acting, in several respects, as an individual, particularly of taking and granting property, contracting obligations and of suing and being sued; of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence.'[51] In England a corporation is usually created by a charter granted by the king, but sometimes by an act of Parliament. But the Supreme Court of the United States say, in Bank of Augusta v. Earle,[52] 'In this country no franchise can be held, which is not derived from the law of the State.' In the latest edition of Angell & Ames on Corporations [53] the authors say: 'The words *incorporation* and *corporation* are frequently confounded, particularly in the old books. The distinction between them is, however, obvious; the one is a *political institution*, the other

[51] Kyd on Corp., 13.

[52] 13 Pet. (38 U. S.) 519, 10 L. ed. 274.

[53] Pages 3 and 4.

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only the *act* by which that institution is created. When a corporation is said to be a *person* it is understood to be so only in certain respects, and for certain purposes, for it is strictly a *political institution.*' [54] It matters not that private or individual interests may be invested in the corporation, or under authority of the charter, so far as this denomination of the institution is concerned. Individual interests or investments in private property exist under a great variety of the civil institutions of the State. Private institutions are those which are created or established by private individuals for their own private purposes. Public institutions are those which are created and exist by law or public authority. Some public benefits or rights may result from the institutions of private individuals or associations. So also some private or individual rights may arise from public institutions. The only sensible distinction between public and private institutions is to be found in the *authority* by which, and the *purpose* for which, they are created and exist. Because, therefore, a corporation may fall under the denomination of *private* corporations, in the artificial distinction between *public* and *private* corporations, it is none the less a public or political institution. The distinction between public and private corporations is somewhat arbitrary, and by no means determines whether the corporation is a public or private institution. If the stock in a banking, railroad, or insurance corporation, be exclusively owned by the government, the institution is denominated a public corporation; but if a private individual be allowed to own a single share of the stock, in common with the government, it is said that it becomes a private corporation. Eleemosynary corporations, established for the purpose of public charity or for the advancement of religion, education or literature, upon donations or bequests made exclusively for

[54] "A grant of incorporation is to bestow the character and properties of individuality on a collective and changing body of men." Kansas Pac. Rd. Co. v. Atchison, Topeka & Santa Fe Rd. Co., 112 U. S. 414, 416, 5 Sup. Ct. 208, 28 L. ed. 794, per Field, J., quoting from Providence Bank v. Billings, 4 Pet. (29 U. S.) 514, 562, 7 L. ed. 939, per Marshall, C. J.; adding: " This capacity is always given to such a body."

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these great and beneficial public purposes without right to or expectation of dividends, repayment or other individual or private interest therein in future, are denominated private corporations. But an incorporated village in the use and expenditure of whose property, the citizens of the village have individual and private interests, and receive daily individual and private benefits, is denominated a public corporation. To say that an incorporated bank, authorized and created from considerations of public policy, and endowed by law with extraordinary power and sovereign attribute of creating in fact, the circulating medium of the country, and regulating the standard of value, is not a public institution of the State adopted for the purposes of internal government, because it falls under the artificial denomination of private corporations, would be arrogant absurdity. And it would be equally as absurd to treat a railroad corporation as a private institution, which is endowed with extensive powers, and the extraordinary sovereign authority of exercising the right of eminent domain by taking private property for *public purposes*. In truth and in reality, whatever arbitrary or fictitious distinctions may be created by mere verbiage, these corporations are, in fact, public institutions, created by public authority, from considerations of public policy, and endowed with highly important civil power for the advancement of public welfare. It would be unreasonable at least (to speak with the greatest moderation) to say, that because some private interests are invested in these corporations, that, therefore, they must be denominated *private institutions*, and for that reason placed beyond the reach of responsibility to the law-making power of the State by which they are created. * * * It is admitted upon all hands, that the legislature has control over those corporations which are denominated public corporations, either to modify or to repeal their charters, as will best subserve the public interests. But it is claimed that the charters of those corporations, technically denominated *private corporations*, must be regarded as *contracts*, and therefore beyond the control and regulation of the law-making power of the State. And this,

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according to a late elementary work, is 'the main distinction between *public and private* corporations.' [55] This distinction is not founded on sound reason, but is based upon a fiction and has its origin in that short-sighted timidity of capitalists, which distrusts the integrity and stability of the government. * * * The right of Parliament to amend or repeal the charters of private corporations, has for many years been undisputed. * * * Whether regard be had to the franchise of the corporation alone, or to the investments of private property under the authority of the charter, in either instance, there exists no *good reason* for the distinction above mentioned, between *public and private* corporations. * * * It is apparent from a thorough examination of the subject, that the distinction between public and private corporations, as ordinarily recognized in the books, is a mere arbitrary distinction, without foundation in the nature, objects, incidents or property of this class of institutions." [56]

§ 61. **Public, Quasi-Public and Private Corporations Defined and Distinguished.**[57]—Public corporations are such as exist only and wholly for public political purposes, they are political corporations. Strictly speaking they are such only as are founded by the government for public purposes where the whole interest belongs also to the government. Therefore, if the foundation be private, though under charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution.[58] The

[55] Citing Angell and Ames on Corporations, §§ 27 and 28.

[56] Bank of Toledo v. City of Toledo (Toledo Bank v. Bond), 1 Ohio St. 622, 642–652, per Bartley, C. J.

[57] See § 56, herein.

[58] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629; Board of Directors for Leveeing Wabash River v. Houston, 71 Ill. 318, 322, per Scott, J., quoting from Ten Eyck v. Delaware & Raritan Canal Co., 18 N. J. L. 200, 203, per Nevins, J. See Yarmouth v. North Yarmouth, 34 Me. 411, 417, 56 Am. Dec. 666, per Howard, J. "The distinction between public and private corporations has reference to their powers, and the purposes of their creation. They are public, when created for public purposes only, connected with the administra-

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fact of the public having an interest, direct or incidental, in the works or the property or the objects of a corporation, unless it has the whole interest, does not make it a public corporation. All corporations whether public or private are founded, in the contemplation of the law, upon the principle, that they will promote the interest or convenience of the public.[59] In a California case it is said that: " 'Public corporations are generally esteemed such as exist for public purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interest.' * * * The difference between private and public corporations" is "radical, the former being associations formed by voluntary agreement of their members," while the latter " 'are not voluntary associations at all, and there is no contractual relation between the corporators who compose them; they are merely governmental institutions created by law for the administration of the affairs of the community.' * * * To corporations proper, authors and courts have added a species called quasi-corporations, or corporations *sub modo, i. e.*, associations and government institutions possessing only a portion of the attributes which distinguish ordinary public or private corporations. * * *

tion of the government, and where the 'whole interests and franchises are the exclusive property and domain of the government itself.' Over these the legislature has power, not limited by the constitution, to impose such modifications, extensions or restraints as the general interests and public exigencies may require without infringing private rights. All corporations invested with subordinate powers, for public purposes, fall within this class and are subject to legislative control. All other corporations are private. They exist by legislative grants conferring powers, rights and privileges, for special purposes. These grants are essentially contracts which the legislature cannot impair or change without the consent of the corporation." Citing Coke Lit. § 413; Vin. Abr. Corp. A. 2; Phillips v. Bury, 2 Term. Rep. 346; Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629; Allen v. McKeen, 1 Sumner, 276; People v. Morris, 13 Wend. (N. Y.) 325; Penobscot Boom Corp. v. Lamson, 16 Me. 224; Story's Com. on Const. §§ 1385–1388; Angell & Ames on Corp. §§ 9, 27, 28.

[59] Ten Eyck v. Delaware & Raritan Canal Co., 18 N. J. L. 200, 203, per Nevins, J.

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These quasi-corporations may be either public or private, and are to be distinguished upon the same principle as ordinary corporations." [60] Again, it is declared, in an early South Carolina decision, that whatever belongs to the public, or people composing a government, or is instituted for the good government of any part of the people, is a public or political corporation; and that private corporations are such as are instituted for the benefit of certain persons as individuals, or for the purpose of applying private funds or enterprise and skill to the public good.[61] A statute may define and limit the meaning of the term "public corporation" and it is asserted in such a case that before the enactment of such a statute a public corporation "was one which was created for public purposes and for those only; and all of whose franchises were exercised for public purposes and whose property belonged to the public; such as counties, towns, parishes and school districts. Individuals had no private interest in them, such as could be released or conveyed to another. Private corporations were those which were created for the immediate benefit and advantage of individuals. Each stockholder had an interest in them which could be bought and sold, and which could be seized on execution. Canals, turnpike roads and bridges, banks and manufacturing companies were of this character," and in such case railroad companies would have been private corporations.[62] So constitutional provisions,[63] under which discretionary power is vested in the legislature to tax property of corporations, do not apply, in the matter of a right to repeal a prior legislative exemption, to corporations which are of a quasi-public nature and necessary for

[60] Estate of Royer, Matter of, 123 Cal. 614, 620, 44 L. R. A. 364, 56 Pac. 461, per Chipman, C. Citing or quoting Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 563, 4 L. ed. 629, per Story, J.; Morawetz on Corp. (2d ed.) §§ 3, 6; 2 Kent's Comm. 274. See § 56, herein.

[61] State v. Heyward, 3 Rich. Law (S. C.), 389, 408, per O'Neall, J., citing Phillips v. Bury, 2 Term. R. 352, per Lord Holt; 2 Kent's Comm. 222, 223.

[62] Dearborn v. Boston, Concord & Montreal Rd., 24 N. H. (4 Fost.) 179, 189, 190, per Eastman, J. See § 56, herein.

[63] Mo. Const., art. 12, §§ 13, 20.

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public convenience as arteries of commerce, the development of the State's resources, and the increase in valuation of other properties, as in the case of railroads, but only apply to such corporations as are created solely for private gain and are those in which the public has no special interest, right or privilege.[64]

§ 62. **Same Subject Continued.**[65]—A corporation is not public merely because its object is of a public character, and this applies to a private corporation authorized to construct works of public improvement by private capital for private emolument.[66] So where a corporation is a private one conducted for private gain, the mere fact that it is subject to visitation and inspection by public officials does not make it a public institution.[67] And corporations in which the stock is owned by individuals are private even though the use may be public as in the case of banks, insurance companies, and corporations for building bridges, canals and railroads.[68] What is said by the court in a Minnesota case is important here. It is there stated that: "The State may and must commit the discharge of its sovereign political functions to agencies selected by it for that purpose. Such agencies, while engaged exclusively in the discharge of such public duties, do not act in any private capacity, but stand in the place of the State and exercise its political authority. Therefore, when the State creates public corporations solely for governmental purposes, such corporations, while engaged in the discharge of the duties imposed upon them for the sole benefit of the public, and from the performance of which they derive no compensation or benefit in their corporate capacity, are clothed with the immunities and privileges of the State; and no private action, in

[64] Yazoo & Mississippi Valley Rd. Co. v. Board of Levee Commissioners (C. C.), 37 Fed. 24, case aff'd 132 U. S. 190, 33 L. ed. 308, 10 Sup. Ct. 74.

[65] See § 56, herein.

[66] Tinsman v. Belvidere & Delaware Rd. Co., 26 N. J. L. 148, 69 Am. Dec. 595.

[67] Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 158, 70 N. W. 68, 36 L. R. A. 55.

[68] Burhop v. City of Milwaukee, 21 Wis. 257, 260, per Downer, J.

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the absence of an express statute to that effect, can be maintained against them for negligence in the discharge of such duties. The liability of cities and other municipal corporations created by special charters for negligence in the care of their streets is an illogical exception to this rule, but the rule itself is too well settled, by the almost unanimous agreement of all of the authorities, to be now questioned or discussed.[69] The rule, however, has no application to private corporations,—that is, to those which are organized by the voluntary act and agreement of their members for their own benefit,—although the creation of such corporations directly promotes the public interest and welfare. It is also subject to the qualification that public or quasi-public corporations are not exempt from liability, to which other corporations are subject, for negligence in managing or dealing with property or rights voluntarily held by them for their own profit and advantage, although inuring ultimately for the benefit of the public."[70] Under another definition, however, a public corporation is one which cannot carry out the purposes of its organization without chartered rights from the commonwealth. Railroads, canals and gas companies must have the right of eminent domain in order to perform their functions. A private corporation which needs no chartered rights in order to carry on its business, stands in no different position from an individual.[71]

[69] Citing Snider v. City of St. Paul, 51 Minn. 466, 53 N. W. 763.

[70] Lane v. Minnesota State Agricultural Soc., 62 Minn. 175, 176, 177, 29 L. R. A. 208, 64 N. W. 382, per Start, C. J., citing Dillon, Mun. Corp. §§ 980–984; Oliver v. Worcester, 102 Mass. 489; Mersey Docks v. Gibbs, 11 H. L. Cas. 686; Glavin v. Rhode Island Hospital, 12 R. I. 411; Moulton v. Scarborough, 71 Me. 267; Hannon v. St. Louis Co., 62 Mo. 313.

[71] Allegheny County v. McKeesport Diamond Market, 123 Pa. 164, 169, 16 Atl. 619, per Hand, J. See Pittsburgh, Appeal of City of, 123 Pa. 374, 379, 380, where it is said as to the power of local taxation that: "It may be somewhat difficult to define what is a public work or a public corporation in this sense, but it is clear that one of the characteristics is that it has the right of eminent domain, that it has franchises which justifies the legislature in defining or considering it public. A mere private corporation needs no franchise from the State in order to carry on its business. Men may manufacture shoes without corporate power but they cannot occupy streets or property of private individuals without corporate

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§ 63. Duties, Obligations and Powers as Affecting Classification or Nature of Corporations—Public Service Corporations.—There is a certain class of corporations which are private in so far as their grants relate to their private interests but which also sustain, as a distinct class, a certain relation to the public as to their duties, obligations and powers. Such corporations, even though technically private as distinguished from those which are technically public in their nature, are to some extent governmental agencies of the State, they are public agents or servants, or quasi-public servants; the duties which they perform are public in a certain degree or quasi-public; their special privileges or franchises are granted to enable them to carry out the objects of their creation, and the consideration therefor is the performance of a public service; their grant presupposes a benefit to the public, and has in view some general enterprise of public utility, involving public interests or evoked by public necessity; they are created or established in these respects for the benefit of the people and to subserve public ends, and the public has a direct and positive interest in their business, such that its rights will be protected by the courts. These corporations must also serve all alike and cannot discriminate; they may, when authorized, exercise the right of eminent domain; they are also subject to reasonable and just governmental control and regulation; and they cannot avoid the performance of the duties which they owe to the public by neglect or refusal, or by agreements with other persons or corporations, nor can they evade such obligations by the transfer of all their rights and powers, nor disable themselves by any contract which makes public accommodation or convenience subservient to their private interests, nor can they arbitrarily abandon their duties or discontinue their service to the public. It is also true, however,[72] that all corporations rest, in the contemplation of the law, upon the principle that the interest or convenience of the

power or warrant from the State. They need a delegation of sovereignty and in such cases their works may be properly called public works," per Hand, J.

[72] See §§ 61, 62, herein.

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public will be benefited, and that a corporation is not necessarily public in its nature because its object is of a public character; that a corporation may also be created to carry out some work of great public utility and still be one that is strictly private and not a public service corporation in any sense. Again, the power resides in the government to grant to individuals, acting as agents of the State and under legislative control, the right to exercise the power of eminent domain as well as to corporations, although such right cannot be exercised for a purely private enterprise or for private uses.[73]

[73] "It has been repeatedly held that railroad, telegraph, and telephone companies are quasi-public servants. The nature of their business makes them so, and they are, therefore, bound to serve the public on reasonable terms, with impartiality. They are almost always endowed with the right to appropriate private property, presumptively upon the theory that such corporations are quasi-public servants, as their business is one in which the public has a direct and positive interest. * * * It may be said that it has long been the policy of our States to encourage the formation of private companies for the construction and maintenance of highways, railroads, canals, bridges, telegraph lines, waterworks or gasworks, by granting valuable franchises or public bounties, or both, in their aid, and these grants have been of funds or property, the right to receive municipal aid, subscriptions for shares, a delegation of the power of eminent domain, an exemption from taxation or a monopoly, and in each instance the acceptance of the grant of the public aid implies an assumption by the grantee of an obligation in favor of the public; for instance, on the part of a railroad company 'an obligation to maintain its roads as a thoroughfare for the use of the public.' In fact, it may be laid down as a general rule that whenever the aid of the government is granted to a private company in the form of a monopoly, or a donation of public property or funds, or the delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made." Corrigan v. Coney Island Jockey Club, 22 N. Y. Supp. 394, 396, 397, 2 Misc. 512, 51 N. Y. St. R. 592, per Dugro, J.

"Turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*. The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used." Olcott v. Supervisors, 16 Wall. (83 U. S.) 678, 695, 696, 22 L. ed. 382, per Strong, J.

"Turnpikes are public highways notwithstanding the exaction of toll for passing on them. Railroads are

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§ 64. To What Extent Corporations Are "Persons"—Generally.—Although a corporation is not a natural person

public highways * * * yet no one can travel on them without paying toll. Railroads, turnpikes, bridges, ferries are all things of public concern and the right to erect them is a public right. If it be conceded to a private individual or corporation, it is conceded as a public franchise; and the right to take toll is granted as a compensation for erecting the work and relieving the public treasury from the burden thereof. Those who have such franchises are agents of the public. They have, it is true, a private interest in the tolls; but the works are public, and subject to public regulation, and the entire public has the right to use them. * * * All bridges intended and used as thoroughfares are public highways whether subject to toll or not." County Commissioners v. Chandler, 98 U. S. 205, 208, 24 L. ed. 625, per Bradley, J.

Exclusive grants for ferries, bridges and turnpikes are grants of franchises of a public character appertaining to the government. "Their use usually requires the exercise of the right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroachment upon the freedom or the just rights of others. The grant, with exclusive privileges, of a right thus appertaining to the government, is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual." Slaughter-House Cases, 16 Wall. (83 U. S.) 36, 88, 21 L. ed. 394, per Field, J., in dissenting opinion.

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant. Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629.

"Other companies, such as gas and electric light companies, turnpike roads and canal companies, harbors and ferry companies are similar to railways in this, that they receive their franchise as such upon the consideration that the public convenience will be served thereby." White on Canadian Company Law (ed. 1901), p. 368, § 21.

In this country, franchises spring from contracts between the sovereign power and the citizen, made upon a valuable consideration, for purposes of public benefit as well as individual advantage. State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 41 Am. Dec. 509.

"All corporations, whether public or private, are, in contemplation of law, founded upon the principle that they will promote the interest or convenience of the public." Board of

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but is a creature of the State possessing no powers except those conferred by the State,[74] still, in a certain sense, the word

Directors for Leveeing Wabash River v. Houston, 71 Ill. 318, 322, per Scott, J., quoting Ten Eyck v. Delaware & Raritan Canal Co., 18 N. J. L. 200, 203, per Nevins, J.

As to mutual obligations from franchise and obligations to serve public, see Kent's Comm. (14th ed.) bottom p. 724, *p. 458.

See also Chap. VI, herein.

As to discrimination see the following cases:

United States: Platt v. Lecocq, 150 Fed. 391; Little Rock & Memphis Rd. Co. v. St. Louis Iron Mountain & Southern Ry. Co., 59 Fed. 400, 402.

Florida: State v. Atlantic Coast Line R. Co. (Fla., 1906), 40 So. 875.

Kansas: Larrabee Flour Mills Co. v. Wisconsin Pac. Ry. Co., 74 Kan. 808, 88 Pac. 72.

Minnesota: Farwell Farmers' Warehouse Assoc. v. Minneapolis St. Paul & Sault Ste Marie Ry. Co., 55 Minn. 8, 12, 56 N. W. 248.

New York: Rhinehart v. Redfield, 179 N. Y. 569, 72 N. E. 1150, aff'g 87 N. Y. Supp. 789, 93 App. Div. 410.

North Carolina: Freight Discrimination Cases (Hines v. Wilmington & Wedon Rd. Co.), 95 N. C. 434, 446, 59 Am. Rep. 250.

Pennsylvania: Wright v. Baltimore & Ohio Rd. Co., 32 Pa. Super. Ct. 5; Hagan v. Fayette Gas Fuel Co., 21 Pa. Co. Ct. 503, 29 Pitts. L. J. (N. S.) 229.

Tennessee: Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060; Crumley v. Watauga Water Co., 99 Tenn. 420, 41 S. W. 1058.

Texas: Houston & Texas Central Ry. Co. v. Rust, 58 Tex. 98, 107; Gulf, Colorado & Santa Fe Ry. Co. v. Lone Star Salt Co., 26 Tex. Civ. App. 531, 63 S. W. 1025.

The corporation or person who exercises the right of eminent domain assumes certain obligations to the public, and the grant of that right carries with it the right of public supervision and reasonable control. Pottlach Lumber Co. v. Peterson, 12 Idaho, 769, 88 Pac. 426.

The power of eminent domain can only be granted for public use, and when it is conferred by law, as in the case of irrigation companies, upon a corporation, its status as quasi-public is fixed irrespective of the question whether it exercises such power or not. "It can no more escape its duty to the public, because it has not exercised such power, than can a railway company who has purchased its right of way instead of exercising its power to acquire it by condemnation proceedings." Colorado Canal Co. v. McFarland & Southwell (Tex. Civ. App., 1906), 94 S. W. 400, 404, per Neill, J.

The incorporation of a railroad company by a State, the granting to it of special privileges to carry out the object of its incorporation, particularly the authority to exercise the State's right of eminent domain to appropriate property to its uses, and the obligation, assumed by the acceptance of the charter, to transport all persons and merchandise upon like conditions and for reasonable rates, affect the property and employment with a public use, and thus subject the business of the company to a legislative control which may extend to

[74] Cassatt v. Mitchell Coal & Coke Co., 150 Fed. 32.

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"person" applies to bodies politic and corporate.[75] So it is declared in a case in the United States Supreme Court that,

the prevention of extortion by unreasonable charges, and favoritism by discriminations. Georgia Rd. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. 47.

Corporations subject to reasonable and just regulations and rules, see the following cases:

United States: Atlantic Coast Line Rd. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 19, 51 L. ed. 933, 27 Sup. Ct. 585, citing numerous cases; Chicago, Burlington & Quincy Rd. Co. v. Drainage Commrs., 200 U. S. 561, 584, 50 L. ed. 596, 26 Sup. Ct. 341, per Harlan, J.

Florida: State v. Atlantic Coast Line Rd. Co. (Fla.), 41 So. 705; State v. Atlantic Coast Line Rd. Co. (Fla.), 40 So. 875.

Idaho: Pottlach Lumber Co. v. Peterson, 12 Idaho, 769, 88 Pac. 426.

Illinois: Danville v. Danville Water Co., 180 Ill. 235, 54 N. E. 224.

Indiana: Central Union Teleph. Co. v. Bradbury, 106 Ind. 1, 9, 5 N. E. 721; Chicago I. & L. Ry. Co. v. Railroad Commission (Ind. App.), 78 N. E. 338.

Iowa: McGuire v. Chicago, Burlington & Quincy R. Co. (Iowa), 108 N. W. 902.

Montana: State v. City of Helena (Mont.), 85 Pac. 744.

New York: Beekman v. Saratoga & Schenectady Rd. Co., 3 Paige Ch. (N. Y.) 45.

Wisconsin: Madison, City of, v. Madison Gas & Elect. Co., 129 Wis. 249, 108 N. W. 65.

Eminent domain—Delegation to and exercise of right by individuals, see Moran v. Ross, 79 Cal. 159; Ortiz v. Hanson (Colo.), 83 Pac. 964, under Mills Ann. Stat., § 2257; Downing v. More, 12 Colo. 316, 2 Denver Leg. News, 114, 20 Pac. 766.

Eminent domain—Private enterprises—Private use, see the following cases:

United States: Miocene Ditch Co. v. Jacobson, 146 Fed. 680, 77 C. C. A. 106.

California: See Madera County v. Raymond Granite Co., 139 Cal. 128, 72 Pac. 915, 989.

Georgia: Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422.

Iowa: Fleming v. Hull, 73 Iowa, 598, 35 N. W. 673.

Minnesota: Minnesota Canal & Power Co. v. Kooching Co., 97 Minn. 429, 107 N. W. 405.

New York: East Canada Creek Electric Light & Power Co., In re, 99 N. Y. Supp. 109, 49 Misc. 565.

North Carolina: Leigh v. Garysburg Mfg. Co., 132 N. C. 167, 43 S. E. 632; Stratford v. Greensboro, 124 N. C. 127, 32 S. E. 394.

Oregon: Dalles Lumbering Co. v. Urquhart, 16 Oreg. 67, 19 Pac. 78.

Pennsylvania: Peifly v. Mountain Water Supply Co., 214 Pa. 340, 63 Atl. 751; Bordentown Banking Co. v. Sparhawk, 214 Pa. 334, 63 Atl. 752.

Texas: Kyle v. Texas & N. O. R. Co. (Tex.), 4 L. R. A. 275.

Washington: State v. Superior Court of Thurston County (Wash.), 85 Pac. 666; Healy Lumber Co. v. Morris, 33 Wash. 490, 63 L. R. A. 820, 74 Pac. 681.

West Virginia: Pittsburg, Wheel-

[75] Erwin v. State, Wolley, 150 Ind. 332, 48 N. E. 249.

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"It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes, in contemplation of law, and has been recognized as such by the decisions of this court." [76]

ing & Ky. Rd. Co. v. Benwood Iron Works, 31 W. Va. 710, 2 L. R. A. 680, 8 S. E. 453, 5 R. R. & Corp. L. J. 324.

As to right of corporations to exercise power of eminent domain, see the following cases:

United States: Postal Teleg. Cable Co. v. Southern R. Co., 89 Fed. 190.

Georgia: Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422; Gardner v. Georgia R. & Bkg. Co., 117 Ga. 522, 43 S. E. 863.

Kansas: Dillon v. Kansas City, Ft. S. & M. R. Co., 67 Kan. 687, 74 Pac. 251.

Illinois: Aurora & G. R. Co. v. Harvey, 178 Ill. 477, 53 N. E. 331.

Louisiana: Lawrence v. Morgan's Louisiana & Tex. R. & S. Co., 39 La. Ann. 427, 2 So. 69.

Montana: State v. District Court of Tenth Judicial Dist. of Meagher County, 34 Mont. 535, 88 Pac. 44.

Nebraska: State, Burlington & M. R. R. Co. v. Scott, 22 Neb. 628, 36 N. W. 121.

Ohio: Ohio State v. Toledo Ry. & Terminal Co., 28 Ohio Cir. Ct. R. 321.

Pennsylvania: See Philadelphia M. & S. St. Ry. Co., In re, 203 Pa. 354, 53 Atl. 191.

New York: East Canada Creek Elect. Light & Power Co., In re, 99 N. Y. S. Supp. 109, 49 Misc. 565.

Virginia: Zircle v. Southern Ry. Co. (Va.), 45 S. E. 802.

Washington: State v. Centralia-Chehalis Elect. Ry. & Power Co., 42 Wash. 632, 85 Pac. 344.

Corporation cannot disable itself from performance of its public duties or neglect or refuse to perform them, or arbitrarily discontinue operations as in case of a railroad or street railway or other quasi-public company.

United States: Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478, 45 Am. & Eng. R. Cas. 607, 9 Ry. & Corp. L. J. 342, 43 Alb. L. J. 328; Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 397, 32 L. ed. 788, 9 Sup. Ct. 389; Thomas v. West Jersey R. Co., 101 U. S. 71, 83, 84, per Miller, J.; M'Cutcheon v. Merx Capsule Co., 71 Fed. 787, 793, per Lurton, C. J.

Connecticut: Driscoll v. Norwich & Worcester Rd. Co., 65 Conn. 230, 32 Atl. 354.

Illinois: Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530, 13 N. E. 169, per Magruder, J.; Balsley v. St. Louis, Alton & Terre Haute Rd. Co., 119 Ill. 68, 72, 73, 8 N. E. 859; Peoria & Rock Island Ry. Co. v. Coal Valley Mining Co., 68 Ill. 489.

Nebraska: Chollette v. Omaha & Republican Valley Rd. Co., 26 Neb. 159, 4 L. R. A. 135, 41 N. W. 1106.

New Jersey: State, Bridgeton v. Bridgeton & M. Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837.

[76] Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 588, 10 L. ed. 274.

When corporations are and are not persons, see the following cases:

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§ 65. To What Extent Corporations Are "Persons" Under Statutes.—If it is within the intent and meaning of a statute that the word "person" should include corporations it will undoubtedly be so held, thus the term "any person or persons" in a crimes statute relating to the destruction of a vessel extends to corporations and bodies politic as well as to natural persons.[77] And unless excepted they are also included in the word "persons" in statutes as to grants and conveyances of property.[78] If a statute relating to priority of payment by any person insolvent specially designates the class intended, it does not include a trading corporation not so specified.[79] So corporations are to be deemed and considered persons within the act of Congress, 1797, giving a priority of debts to the United States.[80] They are also persons under

California: Douglas v. Pacific Mail S. S. Co., 4 Cal. 304.

Connecticut: Emerson v. Goodwin, 9 Conn. 422.

Georgia: London v. Coleman, 59 Ga. 653; Southwestern R. Co. v. Paulk, 24 Ga. 356.

Indiana: White v. State, 69 Ind. 273.

Kentucky: Louisville, City of, v. Commonwealth, 1 Duer (62 Ky.), 295, 85 Am. Dec. 624.

Louisiana: Factors & Traders Ins. Co. v. New Harbor Protection Co., 37 La. Ann. 233; Jeffries v. Belleville Iron Works Co., 15 La. Ann. 19.

Massachusetts: Proprietors of Jeffries Neck Pasture v. Ipswich, 153 Mass. 42, 26 N. E. 239.

Nebraska: Chapman v. Brewer, 43 Neb. 890.

New York: La Farge v. Exchange Ins. Co., 22 N. Y. 352; State v. Woram, 6 Hill (N. Y.), 33.

Ohio: Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291; State v. Cincinnati Fertilizer Co., 24 Ohio St. 611.

Pennsylvania: Lehigh Bridge v. Lehigh Coal & Nav. Co., 4 Rawle (Pa.), 8.

Virginia: Miller v. Commonwealth, 27 Gratt. (Va.) 110; Western Union Teleg. Co. v. Richmond, 26 Gratt. (Va.) 1.

Wisconsin: Fisher v. Horicon Iron & Mfg. Co., 10 Wis. 351.

[77] United States v. Amedy, 11 Wheat. (24 U. S.) 392, 6 L. ed. 502. See cases in note to § 64, herein.

"The word 'person' when used in this act, includes an individual and a firm or copartnership." Public Service Commissions Law of N. Y., Laws 1907, chap. 429, art. 1, § 2.

Commonwealth is not a person under a covenant by grantor to defend title in deed to shore and tideland bottom. Feurer v. Stewart, 83 Fed. 793.

[78] State v. Nashville University, 4 Humph. (Tenn.) 157.

[79] Commonwealth v. Phœnix Bank, 11 Met. 129.

[80] Beaston v. Farmers' Bank, 12 Pet. (37 U. S.) 102, 9 L. ed. 1017.

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taxation statutes;[81] and are also within a law providing for attachments.[82]

§ 66. **Corporations as "Persons" Under Constitution of United States.**—Again, corporations are persons within the meaning of the clauses in the Fourteenth Amendment to the Constitution of the United States concerning the deprivation of property and concerning the equal protection of the laws.[83] It is held, however, within this amendment of the Constitution, that "due process of law" protects natural and not artificial persons in their "liberty."[84]

§ 67. **Corporations as "Citizens" for Federal Jurisdic-**

[81] People v. Utica Ins. Co., 15 Johns. (N. Y.) 382, 8 Am. Dec. 243; International Life Ins. Co. v. Commr. of Taxes, 28 Barb. (N. Y.) 318. Is an individual under a tax law. Otis Co. v. Ware, 8 Gray (Mass.), 509.

[82] Planters' & M. Bank v. Andrews, 8 Port. (Ala.) 404; Mineral Point R. Co. v. Keep, 22 Ill. 9.

[83] **United States:** Smyth v. Eames, 169 U. S. 466, 522, 42 L. ed. 819, 18 Sup. Ct. 418; Covington & Lex. Turnpike R. Co. v. Sandford, 164 U. S. 578, 592, 41 L. ed. 560, 17 Sup. Ct. 198; Charlotte, Columbia & Augusta Rd. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051, 48 Am. & Eng. R. Cas. 595, aff'g s. c., 27 S. C. 385, 4 S. E. 49; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 17 Wash. L. Rep. 34, 39 Alb. L. J. 166, 5 R. R. & Corp. L. J. 315, 9 Sup. Ct. 207; Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109; Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 65; Northwestern Fertilizer Co. v. Hyde Park, Fed. Cas. No. 10,336.

California: Johnson v. Goodyear Min. Co., 127 Cal. 4, 59 Pac. 304.

Iowa: McGuire v. Chicago, Burlington & Quincy R. Co. (Iowa), 108 N. W. 902.

Maine: Hammond Beef & P. Co. v. Best, 91 Me. 431, 40 Atl. 338.

Ohio: Wheeling Bridge & Terminal Ry. Co. v. Gilmore, 8 Ohio Cir. Ct. R. 655, 658, 1 Ohio Dec. 390.

Tennessee: Knoxville & O. R. Co. v. Harris, 99 Tenn. 684, 43 S. W. 115.

See Lake Shore & Mich. Southern Ry. v. Smith, 173 U. S. 684, 690, 43 L. ed. 858, 19 Sup. Ct. 565; Blake v. McClung, 172 U. S. 239, 259, 19 Sup. Ct. 165, 43 L. ed. 432; Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150, 154, 17 Sup. Ct. 255, 41 L. ed. 666.

Compare State v. Brown & Sharpe Mfg. Co., 18 R. I. 16, 25 Atl. 49; Central Pac. R. Co. v. State Board of Equalization, 60 Cal. 35.

[84] Western Turf Assn. v. Greenburg, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. 384, aff'g 148 Cal. 126, 82 Pac. 684. See Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033.

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tional Purposes—Not "Citizens" Under Constitution of United States.—Corporations are for purposes of jurisdiction in the Federal courts conclusively presumed to be citizens of the State in which created.[85] And a national bank is held, in an early case in Nevada, to be for jurisdictional purposes, a citizen of the State wherein it is located.[86] Corporations are

[85] Adams Express Co. v. Ohio State Auditor, 166 U. S. 185, 224, 41 L. ed. 965, 17 Sup. Ct. 604, per Brewer, J. See St. Louis, City of, v. Ferry Co., 11 Wall. (78 U. S.) 423, 20 L. ed. 192; §§ 52, 53, herein.

[86] Davis v. Cooke, 9 Nev. 134. The court, per Belknap, J., said: "It is urged by respondent in justification of the ruling of the District Court upon defendant's motion for removal that as the First National Bank of Nevada was incorporated under an act of the Congress of the United States it is a citizen of the United States, and cannot be treated as a citizen of this State for jurisdictional purposes. This question was thoroughly investigated by Judge Blatchford in the case of the Manufacturers' National Bank v. Banck, 2 Abb. (U. S.) 232. The various provisions, in respect to the 'location' of banking associations incorporated under the act of Congress of June 3, 1864, entitled, 'An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' are there discussed. By the sixth section of the act it is provided that the persons uniting to form a banking association under the act shall specify in an organization certificate the place where its operations of discount and deposit are to be carried on, designating the State, territory or district, and also the particular county and city, town or village. And by the eighth section it is provided that its usual business shall be transacted at an office or banking house located at the place specified in its organization certificate. The ninth section provides that the affairs of such banking association shall be managed by a board of directors, at least three-fourths of whom shall have resided in the State, territory or district in which such association is located one year next preceding their election as directors, and be residents of the same during their continuance in office. Further sections speak of the place where the association is 'located' and 'established.' 'It is quite apparent from all of these statutory provisions,' says Judge Blatchford, 'that Congress regards a national banking association as being "located" at the place specified in its organization certificate. If such place is a place in a State, the association is located in the State. It is, indeed, located at but one place in the State; but when it is so located, it is regarded as located in the State. The requirement that at least three-fourths of the directors of the association shall be residents, during their continuance in office, in the State in which the association is located, especially indicates an intention on the part of Congress to regard the association as belonging to such State. Three-fourths of the legal representatives of the unknown associates forming the corporation, with which repre-

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not, however, citizens within the meaning of the Constitution of the United States, under that clause which provides that the

sentatives any person dealing with the corporation must deal, are required to reside in the State where the corporation is "located."' A corporation existing by virtue of an act of the Congress of the United States must be considered a citizen of the United States. But a citizen of the United States, resident in any State in the Union, is a citizen of that State, Gassies v. Ballou, 6 Pet. (31 U. S.) 761, 8 L. ed. 573. The residence of the National Bank being in Nevada, it follows that it is a citizen of Nevada."

See also Cooke v. State National Bank of Boston, 52 N. Y. 96, to the same point where the court, per Church, Ch. J., also says: "As an original question, it seems clear that the residence and citizenship of a corporation should be determined without regard to the residence of its corporators. No valid reason is perceived for applying the presumption, or, if applied, it furnishes no ground for the doctrine that the suit is by the corporators in their personal capacity. Although they have an interest in the suit, they are not parties in any legal sense, and their interests are merged in the corporate body. But I cannot agree with the counsel for the plaintiff, that if the doctrine of presumption is to be maintained it would not apply to these banking associations. Their location and place of business are fixed by the law of their creation. They are made inhabitants of States for the purposes of taxation, and a majority of their managing officers are required by law to reside in the States of their respective location. I see no reason why this artificial presumption should not as well apply to them as if incorporated by state authority, especially as in this case where a state bank by virtue of the statute was transmuted from a state to a national bank. The day before the change it is admitted that the presumption would apply, while the day after it is insisted that it would not, although the change was in form only, and not in substance. Independent of this presumption, these banks should be deemed citizens of the States where by law they are located, within this clause of the constitution, and this does not impair the decisions in this State, holding that they are foreign corporations under our attachments laws, although located here, because these decisions are based upon the statutory definition of foreign corporations." See in this connection, Blake v. McClung, at end of note to this section; Chatham National Bank of New York v. Merchants' National Bank of West Virginia, 4 Thomp. & Cook (N. Y.), 196.

At the present time under the Removal Statute (Acts of Congress, Aug. 13, 1888, c. 866, 25 Stat. 433, U. S. Comp. Stat. 1901, pp. 508, 509) a suit between citizens of different States may be removed to the Federal court though neither party is a resident of the State in which the suit is brought. Examine the following cases: Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. 817; Memphis & Charleston R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. ed. 518; Foulk v. Gray (U. S. C. C.), 120 Fed. 156;

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citizens of each State shall be entitled to all privileges and immunities of citizens of the several States,[87] nor do they come within the protection of that clause of the Fourteenth Amendment which prohibits the abridgment of such privileges and immunities.[88] When an existing railroad corporation,

Winn v. Wabash R. Co. (U. S. C. C.), 118 Fed. 55; First National Bank v. Bridgeport Trust Co. (U. S. C. C.). 117 Fed. 969; Illinois Cent. Ry. Co. v. Hibbs, 25 Ky. L. Rep. 1899, 78 S. W. 1116; Illinois Cent. Ry. Co. v. Whitworth, 24 Ky. L. Rep. 2044, 25 Ky. L. Rep. 439, 73 S. W. 766, 75 S. W. 849; Cincinnati, N. O. & T. P. Ry. Co. v. Cook, 23 Ky. L. Rep. 2410, 67 S. W. 383; Allison v. Southern Ry. Co., 129 N. C. 336, 40 S. E. 91; Calvert v. Southern Ry. Co., 64 S. C. 139, 41 S. E. 963, aff'g 36 S. E. 750.

[87] Art. IV, § 2.

[88] **United States:** Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. ed. 552; Norfolk & Western Rd. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. 958; Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 650; Philadelphia Fire Assn. v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. ed. 342; Liverpool Ins. Co. v. Massachusetts, 10 Wall. (77 U. S.) 566, 19 L. ed. 1029; Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357; Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 10 L. ed. 274; Bank of United States v. Deveaux, 5 Cranch (9 U. S.), 61, 3 L. ed. 38; Kirben v. Virginia-Carolina Chemical Co., 145 Fed. 288, 292, per Dayton, Dist. J.; Berry v. Mobile Life Ins. Co., Fed. Cas. No. 1,358; See Ohio & Mississippi Rd. Co. v. Wheeler, 1 Black. (66 U. S.) 286, 17 L. ed. 130. Compare Louisville, Cincinnati & Charleston Rd. Co. v. Letson, 2 How. (43 U. S.) 497, 11 L. ed. 553.

Alabama: American Union Teleg. Co. v. Western Union Teleg. Co., 67 Ala. 26, 42 Am. Rep. 90.

Delaware: State v. Delaware & Atl. Teleg. & Teleph. Co., 7 Houst. (Del.) 269, 31 Atl. 714.

Illinois: Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Ducat v. Chicago, 48 Ill. 172, 95 Am. Dec. 529.

Indiana: Schmidt v. Indianapolis (Ind., 1907), 80 N. E. 632; Farmers' & Merchants' Ins. Co. v. Narrah, 47 Ind. 236.

Kentucky: Merchants National Bank v. Ford, 30 Ky. L. Rep. 558, 99 S. W. 260; Commonwealth v. Milton, 12 B. Mon. (51 Ky.) 212, 54 Am. Dec. 331; Woodward v. Commonwealth, 9 Ky. L. Rep. 670, 7 S. W. 613.

New Jersey: Tatem v. Wright, 23 N. J. L. 429.

New York: People v. Imlay, 20 Barb. (N. Y.) 68.

Ohio: Western Union Teleg. Co. v. Mayer, 28 Ohio St. 521.

Rhode Island: State v. Brown & Sharpe Mfg. Co., 18 R. I. 16, 25 Atl. 246.

Virginia: Slaughter v. Commonwealth, 13 Gratt. (Va.) 767.

While the members of a corporation are, for purposes of suit by or against it in courts of the United States, to be conclusively presumed to be citizens of State creating it, the corporation itself is not a citizen within the meaning of the provisions of the Constitution that the citizens of each State shall be

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organized under the laws of one State, is authorized under the laws of another State, to extend its road into the latter, it does not become a citizen of the latter State by exercising this authority, unless the statute giving this permission must necessarily be construed as creating a new corporation of the State which grants this permission.[89]

entitled to all privileges and immunities of citizens in the United States. Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. ed. 432.

A corporation is not a citizen within the meaning of the Constitution of the United States, and cannot maintain a suit in a court of the United States against the citizens of a different State from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that State. Ohio & Miss. Ry. Co. v. Wheeler, 1 Bl. (66 U. S.) 286, 17 L. ed. 130.

[89] Pennsylvania R. R. Co. v. St. Louis, A. & T. H. R. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83.

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CHAPTER VI.

NATURE OF VARIOUS CORPORATIONS.

§ 68. Agricultural Societies—State Board of Agriculture—Agricultural College.
69. Banks.
70. Bridge Companies.
71. Building and Loan Associations.
72. Canal Companies.
73. Colleges—State University.
74. Common Carriers.
75. Drainage Companies—Drainage—Constitutional Law—Police Power.
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77. Electric Light, Heat and Power Companies—When a "Manufacturing" Company.
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81. Fire Engine Company.
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84. Gas Company—Natural Gas Company When "Manufacturing" Company.
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88. Irrigation Companies—Irrigation Districts.
89. Levee Districts—Levee Boards.
90. Log Driving or Boom Corporation.
91. Manufacturing Corporations.
92. Market Company.
93. Medical College.
94. Park Association.
95. Plank Roads.

§ 68. Agricultural Societies—State Board of Agriculture—Agricultural College.—Under an Alabama decision an agricultural society is a public corporation.[1] It is also so under an Illinois case.[2] Under an Iowa decision it is held to be in no sense a corporation for pecuniary profit, but an agency of the State which exists for the sole purpose of promoting the public interests in the business of agriculture.[3] But in another case in the same State it is declared that the objects of an agricultural society may be public and yet it is essentially a

[1] Dillard v. Webb, 55 Ala. 468.
[2] Livingston County Agricultural Society v. Hunter, 110 Ill. 155.
[3] Hern v. Iowa State Agricultural Soc., 91 Iowa, 97, 98, 58 N. W. 1092, 24 L. R. A. 655.

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private corporation even though it is not organized for pecuniary profit.[4] So in Kentucky such societies are private corporations.[5] In Michigan, they are said to be quasi-public in their nature.[6] In Maine such a society is an aggregate corporation as distinguished from quasi-corporations and may be liable in its corporate capacity for its negligent acts.[7] Under a Minnesota decision it appeared that a state agricultural society was not, under the complaint therein and the laws, shown to be a public corporation organized for the sole purpose of discharging a governmental function, and it was held that annual contributions by the State did not make it a public corporation for the sole purpose of discharging governmental functions so as to relieve it from its negligence.[8] In Nebraska these societies are declared not to be corporations within the ordinary meaning of the term, but are rather agencies adopted by the State for the purpose of promoting the interests of agriculture and manufacturing.[9] In a North Carolina case they seem to be considered as public corporations.[10] But under an Ohio decision they are not public agencies of the State. They are the result of the voluntary association of the persons composing them, and although their purposes are public in a certain sense as conducing to the public welfare yet all private corporations are for a public purpose in the sense that they accomplish some public good or are of some public benefit.[11] A state board of agriculture, created by statute as a body corporate with perpetual succession, is, in Indiana, a private

[4] Thompson v. Lambert, 44 Iowa, 239.

[5] Commonwealth v. Bacon, 1 Bush (Ky.), 210, 26 Am. Rep. 189.

[6] See Kent County Agricultural Soc. v. Housemary, 81 Mich. 609, 46 N. W. 15.

[7] Brown v. South Kennebec Agricultural Soc., 47 Me. 275, 74 Am. Dec. 484.

[8] Lane v. Minnesota State Agricultural Soc., 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 208.

[9] State v. Robinson, 35 Neb. 401, 53 N. W. 213, 17 L. R. A. 383.

[10] State v. Stovall, 103 N. C. 416, 8 S. E. 900.

[11] Dunn v. Agricultural Soc., 46 Ohio St. 93, 99, 18 N. E. 496, 15 Am. St. Rep. 556, 1 L. R. A. 754.

County Agricultural Societies are corporations for public purposes. Stewart v. Hardin County Agricultural Soc. Comm'rs (Dist. Ct.), 7 Am. Law Rec. 668, 6 Ohio Dec. 751.

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corporation although the public has an interest therein, and the State has voluntarily aided it by contributions and appropriations, and no shares of stock are issued and held by trustees or private individuals.[12] In Wyoming it is held that an agricultural college which is subject to state visitation under the statute of its creation and incorporation is a public corporation and that the State is not prohibited from repealing the creative act, even though property had been devised or bequeathed in trust for the benefit of such college.[13]

§ 69. **Banks.**—A bank is a public corporation where the stock is exclusively owned by the government.[14] It is also held in an Ohio case that a bank is a public institution, a public corporation created solely for public and not for private purposes, and is subject to public control to extend or revoke its privileges according to the emergencies of public necessity or policy.[15] In a New Jersey case it is declared that banks of

[12] Downing v. Indiana State Board of Agriculture, 129 Ind. 443, 28 N. E. 123, 12 L. R. A. 664. The loaning of money to such board by the State was held to amount to a legislative construction of its charter as being a private corporation.

[13] State ex. rel. Agricultural College v. Irvine, 14 Wyo. 318, 373–376, 84 Pac. 90, aff'd Wyoming Agricultural College v. Irvine, 206 U. S. 278.

[14] Tinsman v. Belvidere Delaware Rd. Co., 26 N. J. L. 148, 172, 69 Am. Dec. 595, quoting from 2 Kent's Comm. 305.

[15] Knoup v. Piqua Bank, 1 Ohio St. 613, 609, 619, 621, 622, per Corwin, J., who said: "But banking is no more a private business, certainly than making a railroad, or a turnpike, and yet, when they are made, in virtue of a franchise of eminent domain, the corporations are public corporations. For how otherwise, I repeat, could the legislature authorize them to appropriate private property without the consent of the owners?" and in conclusion the court also said: "It may, therefore, be declared, that the Piqua Branch (Bank) and all other companies organized under the act of February 24, 1845, are public corporations—created for public purposes, and subject to the emergencies of public necessity or policy, as declared, from time to time, by the legislature. That the charters of such corporations may be repealed or altered without the consent of the corporators was admitted by all the judges in the Dartmouth College case, and is established by many other authorities. Terrel v. Taylor, 9 Cranch (13 U. S.), 43, 3 L. ed. 650; Town of Marietta v. Fearing, 4 Ohio, 427; People v. Morris, 13 Wend. (N. Y) 325." The case of Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629, above referred to, held, however, that the charter granted to

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deposit and discount, as well as those that issue circulation, and also savings banks, are quasi-public institutions and properly subject to statutory regulations for the protection of those who deal with them as depositors.[16] But it is also asserted in the same State that a bank owned by private persons is a private corporation, even though its operations and object partake of a public nature and even though the government has shared with the corporators in the stock. "The same thing may be said of insurance, canal, bridge, turnpike and railroad companies. The uses may in a certain sense be called public, but the corporations are private." [17] So under an Indiana case banking is of a quasi-public nature.[18] And substantially the same statement is made in other jurisdictions.[19]

§ 70. **Bridge Companies.**—Although a bridge company is a private corporation, yet, as the bridge, when complete, is to be used by the public as a common highway for public convenience and forms a continuous line of travel, it is as much dedicated to public use as it could have been had it been in all respects public property erected at public expense, and the legislature may authorize it to take private property for its use. These same principles have been uniformly applied to railroads and turnpikes.[20] Where the statute provides for the

the trustees of that college was a contract within the Federal Constitution prohibiting any law impairing the obligation of contracts and therefore a state legislative act altering such charter without consent of the corporation was unconstitutional and void and that under its charter the college was a private and not a public corporation liable to legislative control.

[16] Campbell, Receiver, v. Watson, 62 N. J. Eq. 396, 406, 50 Atl. 120, per Pitney, V. C. (this case was one of an action by a bank receiver against directors for losses alleged to have been caused by their negligence.)

[17] Tinsman v. Belvidere Delaware Rd. Co., 26 N. J. L. 148, 172, 69 Am. Dec. 595.

[18] State v. Richcreek, 167 Ind. 217, 222, 77 N. E. 1085, per Montgomery, J.

[19] A bank is an institution of a quasi-public character. American Nat. Bk. v. Morey, 24 Ky. L. Rep. 658, 660, 69 S. W. 759, 58 L. R. A. 956, per Hobson, J.; Patterson v. Marine Nat. Bank, 130 Pa. 419, 433, 18 Atl. 632, 17 Am. St. Rep. 778, per Paxson, C. J.

[20] Arnold v. Covington & Cincinnati Bridge Co., 1 Div. (62 Ky.) 372.

A "bridge is a part of a road, and an easement, like the road; and the privilege of making the bridge, and

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construction of toll bridges for "public use" and railroad toll bridges are within the intent of the enactment, a railroad bridge is a bridge for public use.[21] But the right, privilege, or franchise of constructing and operating a bridge and approaches as terminal facilities is held not to confer an authority upon the company to act as common carriers of goods or passengers for compensation.[22]

§ 71. **Building and Loan Associations.**—Building and loan associations are private associations.[23] Although they have been considered "corporate partnerships or quasi-partnerships." [24]

§ 72. **Canal Companies.**—A canal company, with the power of eminent domain, occupying some of the bed of a public stream, and carrying on a transportation business, whether as an accommodation to one party or to others, is affected with a public interest or impressed with a public trust.[25] So a canal

taking tolls for the use of the same, is a franchise in which the public have an interest; the corporation, as owner of the franchise, is liable to answer in damages if it refuses to transport individuals on being paid or tendered the usual fare; the law secured the tolls as a recompense for the duty imposed to provide and maintain facilities for accommodating the public." Covington Drawbridge Co. v. Shepherd, 21 How. (62 U. S.) 112, 124, 16 L. ed. 38, per Catron, J.

[21] Southern Illinois & Missouri Bridge Co. v. Stone, 174 Mo. 1, 27, 63 L. R. A. 301, 73 S. W. 453.

[22] Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567, 2 L. R. A. 289, 2 Inters. Com. Rep. 35.

[23] Washington Investment Assoc. v. Stanley, 38 Oreg. 319, 331–333, 63 Pac. 489, 84 Am. St. Rep. 793, per Woolverton, J. [quoting Thompson on Bldg. Assoc. (2d ed.) § 3; Endlich on Bldg. Assoc. § 39]; Albany Mutual Bldg. Assoc. v. City of Laramie, 10 Wyo. 54, 65, 66, 65 Pac. 1011, per Potter, C. J. [quoting Thompson on Bldg. Assoc. (2d ed.) § 3; Endlich on Bldg. Assoc. (2d ed.) § 16]; Cook v. Equitable Bldg. & Loan Assoc., 104 Ga. 814, 821, 30 S. E. 911.

[24] See Towle v. American Bldg. Loan & Investment Soc., 61 Fed. 446, 447, per Grosscup, Dist. J.; Union Mut. Bldg. & Loan Assoc. v. Aichele, 28 Ind. App. 69, 73, 61 N. E. 11, per Comstock, J.

[25] New York Cement Co. v. Consolidated Rosendale Cement Co., 76 N. Y. Supp. 469, 37 Misc. 746 (case was reversed upon the ground that the purchaser of the canal and "franchises" need not maintain and operate it as a public way, the sale and conveyance having been made under authority of a statute which also recited that it was no longer useful for

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constructed by the State is a public use, and the power of eminent domain may be exercised in subjecting private property to its construction.[26] A canal company is also held to be a private corporation.[27] So a New Jersey case holds that the Delaware and Raritan Canal Company was not a public corporation and that it was not justified by its charter in injuring the property of individuals, by obstructions of the natural flow of streams of water, although such injuries may be remote or consequential. In the opinion of the court it is said: "In the present case whatever may have been the objects of the corporation, whether to erect a public navigable highway, or to improve the navigation of the Raritan river, or whether the public have a right to the use and enjoyment of these improvements when made or not, the company are essentially a private company and are not the agents of the State. Their works are not constructed by the requirement of the State, nor at the expense of the State, nor does the stock belong to the State, nor is the State answerable for the lands or materials used in the construction of these works, or responsible for the debts of the company, or for injuries committed by them in the execution of their work. The State could not compel the company to construct this canal or improve the navigation of the river; it has permitted them to do so at their own request. The company might have abandoned the work whenever they saw fit, they may now abandon it without responsibility to the State. In all they have done, they have sought their own interest and if thereby they have incidentally promoted that of the public, it cannot reasonably be supposed it was from a liberality beyond that of their fellow citizens or for the sake

the purpose originally intended, 78 N. Y. Supp. 531; but held in 178 N. Y. 167, that part thereof purchased and used by manufacturing corporation for transportation purposes was still a public highway and subject to restrictions imposed by canal company by its charter).

Distinction exists between railroads and canals, and plank road companies. Douglass v. Boonsborough Turnpike Road Co., 22 Md. 219, 85 Am. Dec. 647.

[26] Cooper v. Williams, 4 Ham. (4 Ohio) 253, 287, 22 Am. Dec. 745.

[27] Hooker v. New Haven & Northampton Co., 15 Conn. 313, 36 Am. Dec. 477.

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of the public. The corporation itself, the property of the corporation, the object of the corporation, are essentially private, subject only to public use, under their own restrictions, and from which use, the company are to derive their profits. The whole scope of their charter indicates clearly that the legislature did not intend to interfere with private and vested rights, without providing a recompense to be paid by the company and not by the State." [28]

§ 73. **Colleges—State University.**—Under its charter, Dartmouth College was a private and not a public corporation; that a corporation is established for purposes of general charity, or for education generally, does not, *per se*, make it a public corporation, liable to the control of the legislature.[29] A state university formed for educational purposes, founded by the State, endowed by the United States by a grant to the State; all its property being property of the State; subject to the laws of the State as a state institution; declared to be a public trust by the state constitution, which also provides for its perpetual continuance, is a public corporation.[30]

§ 74. **Common Carriers.**—Formerly anyone who chose to engage in the business of a common carrier might do so, and such employment was conducted almost exclusively by private individuals for private gain and no especial protection or benefit was given by the State, but it has become a public employment in the sense that it is affected with a public interest and is subject to public regulation because of the obligations resting upon it arising from the character of the business.[31] It not only exercises a public employment but it has been called a public institution. The duties and liabilities are those imposed

[28] Ten Eyck v. Delaware & Raritan Canal Co., 18 N. J. L. 200, 203, per Nevins, J.

[29] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629, rev'g Dartmouth College v. Woodward, 1 N. H. 111. See § 93, herein.

[30] Estate of Royer, Matter of, 123 Cal. 614, 621, 44 L. R. A. 364, 56 Pac. 461.

[31] People v. Budd, 117 N. Y. 1, 26 N. Y. St. R. 533, 22 N. E. 670, 682.

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by public law, and in this respect a common carrier differs from the private. The former owes an equal duty to all, and it cannot be discharged if allowed to make unequal preferences and thereby prevent or impair the enjoyment of the common right.[32] It is asserted, however, that the employment of common carriers is quasi-public, upon the ground that the public have an interest in the faithful performance of their duties and that this applies to common carriers classified as carriers of goods and carriers of passengers.[33] Under the Public Service Commissions Law of New York,[34] "The term 'common carrier,' when used in this act, includes all railroad corporations, street railroad corporations, express companies, car companies, sleeping-car companies, freight companies, freight-line companies and all persons and association of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this State." [35] And such carriers cannot unreasonably or unduly discriminate, and are subject to reasonable and just regulation as to rates and to prevent discrimination, and the power to so regulate may be exercised by the legislature itself or delegated to and vested in railroad commissioners.[36] The nature of common carriers will, however, more fully appear under those sections herein which treat of the different corporations whose business is that of common carriers.

[32] Messenger v. Pennsylvania Rd. Co., 37 N. J. L. 531, 533, 535, 18 Am. Rep. 754.

[33] Thompson-Houston Electric Co. v. Simon, 20 Oreg. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86 (an action to condemn a right of way for street and suburban railway for passengers).

[34] Laws 1907, p. 891, chap. 429, art. 1, § 2. See Public Utilities Act, Laws Wis., 1907, chap. 499.

[35] The term "transportation of property or freight," when used in this act, includes any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage and handling of the property or freight transported. Public Service Commission Law of N. Y., Laws 1907, p. 892, chap. 429, art. 1, § 2.

[36] Interstate Commerce Commission v. Chicago Great Western Ry. Co., 141 Fed. 1003; Southern Express Co. v. R. M. Rose Co., 124 Ga. 581, 53 S. E. 185; State v. Atlantic Coast Line R. Co. (Fla.), 40 So. 875; Chicago, I. & L. Ry. Co. v. Rd. Commission of Indiana (Ind. App.), 78 N. E. 338.

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§ 75. Drainage Companies — Drainage — Constitutional Law—Police Power.—A drainage company is a private corporation.[37] Under the laws of Illinois the draining of bodies of land so as to make them fit for human habitation and cultivation, is a public purpose, to accomplish which the State may by appropriate agencies exert the general powers it possesses for the common good, and § 40½ of the Farm Drainage Act of that State was a proper exercise of the police power of the State. The rights of a railroad company to a bridge over a natural water course crossing its right of way, acquired under its general corporate power of Illinois are not superior and paramount to the right of the public to use that water course for the purpose of draining lands in its vicinity in accordance with plans adopted by a drainage commission lawfully constituted under the Farm Drainage Act.[38]

§ 76. Electric Light, Heat and Power Companies.—An electric light company is a corporation or association organized and engaged in the business of supplying electricity for lighting purposes, and it may by statute include supplying electricity for heat and power purposes.[39] So under the Public Service Commissions Law of New York,[40] the term "electrical corporation," when used in that act, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street corporation generating electricity for its own use exclusively), owning, operating, managing or controlling any plant or property for generating and distributing, or generating or selling for distribution, or distributing of electric current for such purposes. In New Hampshire, under a statute providing that all electric light companies serving parties for hire

[37] Howard v. St. Clair & Monroe Levy & Drainage Co., 51 Ill. 130. See § 96, herein, "Reclamation Districts."

[38] Chicago, Burlington & Quincy Ry. Co. v. Drainage Com'rs, 200 U S. 561, 50 L. ed. 596, 26 Sup. Ct. 341, aff'g 212 Ill. 103, 72 N. E. 219.

[39] Joyce on Electric Law (2d ed.), § 7. See also *id.*, §§ 7a, 7b.

[40] Laws 1907, p. 892, chap. 429, art. 1, § 2.

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shall be deemed to be public and shall reasonably accommodate persons wishing to enjoy their facilities without discrimination and at reasonable rates, electric light companies are evidently deemed to stand on the basis of quasi-public corporations; although "a natural person may engage in the business of furnishing electric lights for hire, and acquire all the rights and privileges and be subject to all the duties and obligations pertaining to the business as provided in the statute." [41] An electric light is a thing of general utility and in its nature an article of commerce.[42] But an electric lighting system maintained for the purpose of lighting city streets, is held to be a public use.[43] And where a municipality prior to a certain date had no power to grant the use of its streets for electric light poles, companies erecting and owning such poles after that period devoted them to public uses.[44] Again, an electric light company, owning an electric plant and engaged in furnishing light for the streets and inhabitants of a city or village has so far devoted its property to a public use, a use in which the public has an interest, that it is bound to furnish light, within such city or village, impartially to all applicants at a reasonable price.[45] Where a dam is erected, and land is flooded thereby, in order to supply electric power to the public generally, and especially to mines and smelters, and for irrigation also, it constitutes a public use justifying the exercise of the right of eminent domain.[46] In a Wisconsin case

[41] American Loan & Trust Co. v. General Electric Co., 71 N. H. 192, 51 Atl. 660, 8 Am. Elec. Cas. 117, 118, 121, 122, 124 (a case or right to mortgage.

[42] Hull Electric Light Co. v. Ottawa Elect. Light Co., Rap. Jud. Quebec, 14 C. S. 124.

[43] Tuttle v. Brush Elec. Illum. Co., 50 N. Y. Super. Ct. 464. Compare Joyce on Electric Law (2d ed.), §§ 276–278c.

[44] Toledo Electric St. Ry. Co. v. Western Light & Power Co., 4 Ohio C. D. 43.

[45] Cincinnati, H. & D. R. Co. v. Bowling Green, 57 Ohio St. 336, 41 L. R. A. 422, 49 N. E. 121.

[46] Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 Pac. 773. See also Story v. Indiana Hydraulic Power Co. (Ind.), 76 N. E. 1057; East Canada Creek Electric Light & Power Co., In re, 99 N. Y. Supp. 109, 49 Misc. 565; Niagara, L. & O. Power Co., In re., 97 N. Y. Supp. 853, 858, 111 App. Div. 686, 112 App. Div. 901. Examine State v. Superior Court of Thurston County (Wash.), 85 Pac. 666. But see Joyce

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the business of supplying electricity is declared to be a public one in which the community has an interest different from what it has in private enterprises, such as manufacturing, etc.[47] And the enterprise is a public one where water power is used to generate electricity which is to be sold and distributed on equal terms to the public generally and is subject to control by the government. In such a case the property is also held to be devoted to a public use.[48]

§ 77. **Electric Light, Heat and Power Companies—When a "Manufacturing" Company.**—In Alabama an electric light company is a manufacturing corporation, within a statute authorizing consolidation.[49] In Colorado the operation of an electric light plant is manufacturing and gives a right to condemn lands for the purpose of carrying water for power to operate such plant.[50] In New York a corporation engaged in producing electricity and supplying the same to customers was a manufacturing corporation and exempt from taxation until the statute of 1889,[51] which took electric light companies out of the exemption clause.[52]

§ 78. **Electric Light, Heat and Power Companies—When not a "Manufacturing" Company.**—In Illinois an electric light company is not a corporation for "purely manufacturing

on Electric Law (2 ed.), §§ 278a, 278c, 278d.

[47] Madison, City of, v. Madison Gas & Elec. Co., 129 Wis. 249, 263, 108 N. W. 65, per Siebecker, J.

[48] Minnesota Canal & Power Co. v. Koochicing Co., 97 Minn. 429, 107 N. W. 405.

[49] Beggs v. Edison Electric Illuminating Co., 96 Ala. 295, 38 Am. St. Rep. 94, 11 So. 381.

[50] Lamborn v. Bell, 18 Colo. 346, 4 Am. Elec. Cas. 573, 32 Pac. 989.

[51] Chap. 353, Laws 1889. See Laws 1898, chap. 908, § 183; 4 Cumming & Gilbert's (Supplement) Gen'l Laws & Gen'l Stat. (N. Y.) p. 1526.

[52] People ex rel. Brush Electric Mfg. Co., 129 N. Y. 543, 551, 553, 14 L. R. A. 708, 29 N. E. 808, case reverses 15 N. Y. Supp. 711, 61 Hun, 53. See also People, Edison Elec. L. Co. v. Campbell, 88 Hun (N. Y.), 527, 68 N. Y. St. R. 746, 34 N. Y. Supp. 711, 6 Am. Elec. Cas. 653; People, Western Elec. Co. v. Campbell, 145 N. Y. 587, 65 N. Y. St. R. 526, 40 N. E. 239, aff'g 80 Hun, 466, 30 N. Y. Supp. 472; People, Edison Elec. Illum. Co. v. Wemple, 129 N. Y. 664, 42 N. Y. St. R. 280, 29 N. E. 812, 4 Am. Elec. Cas. 563, rev'g 61 Hun, 53, 39 N. Y. St. R. 605, 15 N. Y. Supp. 711.

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purposes." [53] In Maryland an electric light and power company is not a manufacturing industry.[54] In Pennsylvania a corporation engaged in producing electricity and selling it to customers for the generation of light, heat and power is also held not to be a manufacturing company in the sense that it is within a statutory exemption from taxation on its capital stock.[55]

§ 79. **Express Companies.**—An unincorporated express company is not a corporation over which the State may exercise visitatorial powers, but is only a partnership carrying on a common carrier business.[56] But an express company does not carry on a purely private business where it transports between a city and places nearby, all kinds of portable freight and express matter; and it may, under authority of the city, facilitate such business by the use of a connecting switch between its warehouse and the lines of a street railway, and such appropriation of the street constitutes a legitimate public use.[57] A state statute which defines an express company to be persons and corporations who carry on the business of transportation on contracts for hire with railroad or steamboat companies, does not invidiously discriminate against the express companies defined by it, and in favor of other companies or persons carrying express matter on other conditions, or under different circumstances.[58] The following is of importance here:—"An express company is a species of common carrier

[53] Evanston Elec. Illum. Co. v. Kochersperger, 175 Ill. 26, 51 N. E. 519.

[54] Frederick Elec. Light & Power Co. v. Frederick City, 84 Md. 599, 36 Atl. 362, 30 L. R. A. 130, 6 Am. Elec. Cas. 644.

[55] Commonwealth v. Northern Electric Light & Power Co., 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107. Examine Southern Elec. Light & Power Co. v. Philadelphia, 191 Pa. 170, 43 Atl. 123; Commonwealth v. Edison Elec. L. Co., 145 Pa. 131, 22 Atl. 841, 845. Compare Commonwealth v. Keystone Elec. Light, Heat & Power Co., 193 Pa. 245, 44 Atl. 326.

[56] State v. United States Express Co., 81 Minn. 87, 83 Am. St. Rep. 366, 50 L. R. A. 667.

[57] Dulaney v. United States Rys. & Electric Co., 104 Md. 423, 65 Atl. 45.

[58] Pacific Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. ed. 1035.

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to which have been accorded privileges, and which from the nature of its business incurs great responsibility. * * * They are essentially different from railroad companies, not only in the fact that the latter carry more bulky freight, but they collect money and do other things, that would be held *ultra vires* if attempted by a railroad company. It has been held that a railroad company could not refuse to carry for an express, according to the peculiar methods of their business. * * * If a railroad company engage in these branches of the express business, authorized by their charters, they must not deny to express companies equal privileges with themselves as to that business. * * * It is the duty of the express companies to receive all goods offered for transportation, upon the payment or tender of their charges, but prepayment will be considered waived if not demanded. They are required, too, to have adequate facilities within a reasonable time. * * * A high degree of care is required of an express company in the delivery of goods." [59]

§ 80. **Ferries—Ferry Company.**—A ferry franchise is declared to be partly of a public and partly of a private nature,[60] or a quasi-public use.[61] If statutory restrictions are imposed, a ferry must conform to such requirements, and the owner of the ferry privilege is obligated to serve the public at all reasonable times.[62] The primary object in establishing roads and

[59] Alsop v. Southern Express Co., 104 N. C. 278, 288, 289, 10 S. E. 297, 6 L. R. A. 271, per Avery, J., citing to first point Witbreck v. Holland, 45 N. Y. 13; Am. & Eng. Cyc. of Law, 781–784; 5 Myers Fed. Dec. Carriers, § 511; to second point, 5 Myers Fed. Dec. Carriers, § 1509; to third point, 5 Myers Fed. Dec. §§ 1508, 1519; to fourth point, 5 Myers Fed. Dec. Carriers, §§ 1508, 1515–1521; Gomblos v. Philadelphia, etc., 9 Phila. 411; Texas Express Co. v. Texas, 6 Fed. 426; Messenger v. Pennsylvania Rd. Co., 37 N. J. L. (8 Vroom.) 531, 18 Am. Rep. 754; Express Cos. v. Railroad Cos. (Adams Express Co. v. Railroad Cos.) (U. S. C. C. 8th Civ.), 3 Am. & Eng. Rd. Cas. 591; to fifth point, New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 344; to sixth point, Marshall v. American Express Co., 7 Wis. 1; Witbreck v. Holland, 45 N. Y. 13.

[60] Benson v. Mayor, etc., of N. Y., 10 Barb. (N. Y) 223.

[61] Los Angeles Terminal Land Co. v. Southern Pac. Rd. Co., 136 Cal. 36, 68 Pac. 308.

[62] Warner v. Ford Lumber & Mfg.

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licensing ferries for transportation of persons and property, is to secure the public accommodation. For the attainment of this end, but as subordinate to it, when a ferry franchise is granted, the right to take lawful tolls is conferred as an equivalent for the obligations to the public. Although the taking of such tolls is *privati juris* and incident to the franchise, a ferry is *publici juris,* and cannot be created without a franchise, and is a thing of public interest and use. A ferry also forms a part of a public highway, and as such it is a thing of public interest.[63]

Co., 29 Ky. L. Rep. 527, 93 S. W. 650.

[63] Montgomery v. Multnomah Ry. Co., 11 Oreg. 344, 347, 348, 3 Pac. 435, quoting Attorney General v. Boston, 123 Mass. 478.

"Therefore, although the public convenience is the occasion of granting franchises of this nature, and, for example, the ferry established on the road chartered is *publici juris*, yet the property is private, and consequently an injury to it may be the subject of an action, for no person could be expected to serve the public by bestowing his time, labor and money in establishing a ferry or erecting a bridge, if its value could be immediately destroyed by the caprice or malice of private persons, in adopting means of drawing away the custom to some establishment of their own. It is, then, truly the interest of the public, as well as an instance of the private justice due to an individual, that the public grant of franchises of this kind should be protected by being held to be exclusive in the grantee, unless legally and duly ordered otherwise by the public authorities." Norris v. Farmers' & Teamsters' Co., 6 Cal. 590, 595, 65 Am. Dec. 535.

"When we recur to the origin and purposes of this prerogative, it will be seen that it was vested in the king as a means by which a business, in which the whole community were interested, could be regulated. In other words, it was simply one mode of exercising a prerogative of government, that is to say, through the sovereign instead of through parliament, in a matter of public concern. These and similar prerogatives were vested in the king for public purposes, and not for his private advantage or emolument." People v. Budd, 117 N. Y. 1, 17, 18, 26 N. Y. St. R. 533, 22 N. E. 670, 682, per Andrews, J.

"A ferry is in some sense an extension of a public road." Burlington & Henderson County Ferry Co. v. Davis, 48 Iowa, 133, 137, 30 Am. Rep. 390, per Adams, J. (a case of power to grant ferry license).

"Though a ferry be in its nature part of a highway, yet it is in many respects distinguishable; and from the earliest times of the colonial government, in Massachusetts, the mode of establishing ferries, and that of laying out highways, have been kept distinct." Fay, Petitioner, 15 Pick. (32 Mass.) 243, 249, per Shaw, C. J.

A ferry forms part of, and can only exist in connection with, a public highway, or as a connecting link be-

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§ 81. **Fire Engine Company.**—A fire engine company is a quasi-municipal corporation.[64] And if a fire company is incorporated for the purpose of rendering public service, a member thereof, even though such company is not connected officially with the municipality, is held to be within the provisions of the Civil Service Law prohibiting removal, except for cause and upon hearing, of a person under municipal employment or holding a municipal position and who has served in the volunteer fire department for the specified period of time.[65]

§ 82. **Gas Companies—Public Service Corporation.**—The manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character.[66] "The manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which everyone may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms it pleases. It is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of public convenience and the public safety." [67] So, in a Wis-

tween places in which the public has rights, on paying the tolls prescribed by public authority. Hackett v. Wilson, 12 Oreg. 25, 6 Pac. 652.

[64] Cole v. Greenwich Fire Engine Co., 12 R. I. 202.

[65] People v. Folks, 85 N. Y. Supp. 1100, 89 App. Div. 171.

[66] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 658, 29 L. ed. 516, 6 Sup. Ct. 252, per Harlan, J.

Gas company is somewhat public in its nature. Hagan v. Fayette Gas Fuel Co., 21 Pa. Co. Ct. R. 503, 508.

Gas company as public corporation. See Sanderson v. Commissioners, 3 Pa. Com. Pl. 1, 6.

Gas company not a public corporation. See New York Central & Hudson River Rd. Co., In re, v. Metropolitan Gas Light Co., 63 N. Y. 326.

Gas and light companies perform quasi-public duties. Commonwealth v. Northern Light & Power Co., 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107.

[67] New Orleans Gas Co. v. Louisi-

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consin case, it is declared that the business of supplying gas and electricity, to meet the demands of the inhabitants of a community, under grant of the State or of a municipal corporation, is of a public nature. It is, in character, a public business and like that of common carriers, warehousemen and other enterprises in which the community has an interest different from what it has in private enterprises devoted to manufacturing and merchandising the common articles of trade.[68] So the legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, by means of pipes and mains laid through the public streets, and upon condition of the performance of the service by the grantee, is a grant of

ana Light Co., 115 U. S. 650, 669, 29 L. ed. 516, 6 Sup. Ct. 252, per Harlan, J.

[68] Madison, City of, v. Madison Gas & Electric Co., 129 Wis. 249, 263, 108 N. W. 65, per Siebecker, J., citing Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. 553; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. 265; Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530, 13 N. E. 169; St. Louis v. St. Louis Gas Co., 70 Mo. 69; Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, quoting also to same effect New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 265, 29 L. ed. 516.

"The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. 265; Shepard v. Milwaukee Gas Co., 6 Wisconsin, 539; Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Illinois, 530; St. Louis v. St. Louis Gas Light Co., 70 Missouri, 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, Printing, etc., Registering Co. v. Sampson, L. R. 19 Eq. 462, yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; Chicago, etc., Gas Co. v. People's Gas Co., 121 Illinois, 530; Western Union Telegraph Co. v. American Union Telegraph Co., 65 Georgia, 160." Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 408, 409, 32 L. ed. 979, 9 Sup. Ct. 553, per Mr. Chief Justice Fuller.

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a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it.[69] Again, a gas company as a public service corporation may fix a rate less than the maximum rate specified in a statute as that to be charged, and in such case the court will not, it is held, have power to determine that the company's charge is unreasonably high.[70] Under the Public Service Commissions Law of New York,[71] the term "gas corporation," when used in that act, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, managing or controlling any plant or property for manufacturing or distributing and selling for distribution or distributing illuminating gas (natural or manufactured) for light, heat or power.

§ 83. **Gas—Natural Gas Companies.**—A natural gas company is a public corporation when organized under a statute, providing for the incorporation and regulation of such companies, and also that the transportation and supply of natural gas for public consumption shall be a public use, and further granting the right of eminent domain and all other powers and privileges necessary for the prosecution of the business for which such companies are incorporated.[72] Such a company is also called a quasi-public corporation, which cannot discriminate by charging more for gas for lighting than for heating, where it is incorporated for the purpose of furnishing natural

[69] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. 265.

[70] Brooklyn Union Gas Co. v. City of New York, 100 N. Y. Supp. 625, 115 App. Div. 69, aff'd 81 N. E. 141. See also People's Gas Light & Coke Co. v. Hale, 94 Ill. App. 406.

Gas company considered as public service corporation, see Indianapolis, City of, v. Consumers' Gas Trust Co., 144 Fed. 640, 75 C. C. A. 442.

[71] Laws 1907, p. 892, chap. 429, art. 1, § 2.

[72] St. Mary's Gas Co. v. Elk County, 191 Pa. 458, 43 Atl. 421.

Is impressed with a public character. Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 561.

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gas for heat and light.[73] Where a municipality has granted a franchise to a gas company to occupy the streets with its pipes, compulsory service to all consumers along the line may be required of the company by ordinance of the city.[74] So a State may regulate the pressure of natural gas transported in pipes within its borders, and such a regulation is not an unlawful interference with interstate commerce.[75] And the furnishing of such gas to municipal corporations and their inhabitants constitutes a public use within the taxing power.[76]

§ 84. **Gas Company — Natural Gas Company — When "Manufacturing" Company.**—A gas company engaged in manufacturing and supplying illuminating gas is included in the term "manufacturing" company.[77] But while the production of illuminating gas is a manufacture, the liberation of natural gas from the earth is not.[78]

§ 85. **Heating Corporation.**—A heating corporation which is organized to supply heat by circulating hot water, through pipes in city streets to buildings, is not a public or quasi-public corporation.[79]

§ 86. **Hospital Corporation.**—Where a statute provides for

[73] Bailey v. Fayette Gas Fuel Co. (Pa.), 44 Wkly. N. C. 505, 44 Atl. 251. See People's Gaslight & Coke Co. v. Hale, 94 Ill. App. 406. Compare Philadelphia Co. v. Park, 138 Pa. 346, 22 Atl. 26.

Unlawful discrimination—regulation of charges—Federal Constitution—equal protection of laws, see Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 516, 57 L. R. A. 761, 63 N. E. 220.

[74] Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 353.

[75] Jamieson v. Indianapolis Nat. Gas Co., 128 Ind. 555, 10 Ry. & Corp. L. J. 163, 12 L. R. A. 652, 28 N. E. 76, 44 Alb. L. J. 145.

[76] State, Attorney General, v. Toledo, 48 Ohio St. 112, 25 Ohio L. J. 218, 34 Am. & Eng. Corp. Cas. 28, 26 N. E. 1061, 11 L. R. A. 729. See also as to public use Toledo v. Northwestern Ohio Natural Gas Co., 5 Ohio C. C. 557.

[77] Nassau Gaslight Co. v. City of Brooklyn, 89 N. Y. 409, 25 Hun (N. Y.), 567.

[78] Commonwealth v. Northern Electric Light & Power Co., 145 Pa. 105, 117, 22 Atl. 83, 14 L. R. A. 107, per Williams, J.

[79] Evans v. Boston Heating Co., 157 Mass. 37, 31 N. E. 698.

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trustees for the founding of a public hospital for the insane, and such trustees are created a corporation, it is a public corporation governed and controlled by the State, and it acts exclusively as agent of the State and exercises governmental functions, even though it may sue and be sued under its charter; such corporation having no stockholders or members, except directors who have no interest in its affairs and are appointed by the governor and senate and are public rather than corporate officers.[80] But a hospital may be one which is maintained as a private enterprise.[81]

§ 87. **Insurance Companies.**—The business of insurance is not commerce nor is the contract of insurance an instrumentality of commerce, so that a State may exclude a foreign insurance company from its territory or may impose conditions upon which entry shall be made and may enforce those conditions.[82] And statutes prohibiting the carrying on of business by them except on compliance with prescribed conditions, such as obtaining a license therefor, etc., do not conflict with the guarantee under the Federal Constitution of privileges and immunities to citizens in the several States as they are not "citizens" within the Constitution.[83] Insurance companies are also subject to control and regulation by the State, and its power to enact laws of such a character is inherent and these corporations like natural persons are subject to legislation of this character.[84] It is declared in a New York case that: "As the business of insuring lives, property, credits and fidelity of conduct has become of such large public concern, in connection with the business enterprises and activities of the people of the

[80] Maia's Adm'r v. Directors of Eastern State Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577.

[81] Vink v. Work, 158 Ind. 638, 64 N. E. 83 (exemption from taxation case).

[82] Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 40 Cent. L. J. 228, per White, J.

[83] Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357. See § 67, herein.

[84] Joyce on Ins. § 327. See also Rauen v. Prudential Life Ins. Co. (Iowa), 106 N. W. 198; Opinion of Justices, In re, 97 Me. 590, 55 Atl. 828. Examine Adler-Weinberger S. S. Co. v. Rothschild & Co., 123 Fed. 145; Melancon v. Phœnix Ins. Co., 116 La. 324.

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State generally, such business has essentially become one of a public character; and it has been found necessary by the legislature to guard and protect the people of the State in their dealings with the persons and corporations assuming to act as insurance companies, in the same manner that it has been found essential to deal with the business of banking. The State has now for many years had a governmental department devoted to that purpose, and has placed upon the superintendent or head of that department responsible duties in regard to the supervision of domestic and foreign companies doing business within the State."[85]

§ 88. **Irrigation Companies—Irrigation Districts.**—Under a Federal decision corporations engaged in the business of furnishing water for irrigation under the laws of California are private corporations and have the same rights to contract as have individuals, unless prohibited by statute, and may agree with a consumer as to rates or charges until they are regulated by the law, even though commissioners under the law may fix rates and the use of water for irrigation is a public use under the state constitution.[86] But under a California decision such companies are declared to be quasi-public corporations.[87] But irrigation districts organized in that State, under the statutes of 1887, are public corporations to the same extent as are reclamation districts, and they are compared as to their creation to municipal corporations.[88] In Washington such districts are not municipal corporations when formed under the act of March 20, 1890, so as to come within the meaning of the constitution of that State as to the latter's incurring indebtedness.[89] In Texas irrigation companies organized for the pur-

[85] People v. Loew, 44 N. Y. Supp. 43, 26 Civ. Proc. 132, 19 Misc. 248.

[86] San Diego Flume Co. v. Souther, 90 Fed. 164, 170, 32 C. C. A. 548, 61 U. S. App. 134, s. c., 104 Fed. 706; s. c., 112 Fed. 229. Examine San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 445, 47 L. ed. 892, 23 Sup. Ct. 571.

[87] People v. Linda Vista Irrig. Dist., 128 Cal. 477, 61 Pac. 86.

[88] Central Irrig. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825. Compare Turlock Irrig. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379 (are quasi-public corporations for general public benefit).

[89] Board of Directors of Middle

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pose of furnishing water for hire to those desiring its use, although technically private in their nature, are public or quasi-public corporations or carriers of water. As such quasi-public corporations or carriers of water, they cannot, whatever their liability may be to the public, limit it by contract, and such attempted limitation should be deemed unreasonable and held to be void. Corporations of this class must be held to the discharge of their public obligations and cannot avoid or escape the consequences of their failure to perform such duties by limiting their liability by contract. Otherwise, the public, whose servants they are, are at their mercy. Nor can they, in performing their public duty, discriminate in favor of or against any of its members entitled to their service. The obligation rests upon them to discharge their duty to all; they must act faithfully in the performance of such duty, in so far as they can by the exercise of ordinary care and diligence, nor is it any excuse that they treat alike wrongfully all the members of the public entitled to their service, as a multiplicity of wrongs does not justify a single one. If such a company contracts to furnish water to a consumer and negligently or willfully fails to comply with its contract in such respect it becomes liable to the consumer thus injured, for any damage suffered in the loss or injury to his crops by reason of such breach of contract.[90] In Arizona a public irrigation company is obligated, in the exercise of its franchise, to render its services to the public at reasonable rates.[91] In Nebraska a corporation formed for the purpose of owning, constructing and operating canals, reservoirs, dams and other works for irrigation and water power purposes, is a quasi-public corporation and governmental agency, but its main purpose is the administration of a public utility. To the extent of its capacity it is obligated to furnish water, to persons desiring to use it,

Kittitas Irrig. Dist. v. Peterson, 4 Wash. 147, 29 Pac. 195; Wash. Const. art. 8, § 6.

[90] Colorado Canal Co. v. McFarland & Southwell (Tex. Civ. App., 1906), 94 S. W. 400. See opinion of Neill, J., at pp. 403, 404.

[91] Salt River Valley Canal Co. v. Nellsen (Ariz., 1906), 85 Pac. 117.

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on equal terms and without discrimination. It has no right or power to bind itself by a contract which, if enforced, would prevent its serving the public on such terms.[92]

§ 89. **Levee Districts—Levee Boards.**—Levee districts are declared to be neither private nor public corporations;[93] and are also said to be public corporations.[94] And under a Federal decision, a levee district is a corporation and a public corporation with power to sue and be sued even though a statute creating a board of levee inspectors with the powers usually incident to such corporations does not expressly declare it to be a corporation.[95] But in Illinois a board of directors appointed by statute to locate and superintend the construction of a levee, with power to contract, sue and be sued under a specified name, is strictly a private corporation.[96] It is also held that a levee district board exercises only public duties and functions and cannot be sued outside of the State.[97] Again, it is decided that such a district is a state local tax or assessment district, whose powers may be enlarged by the legislature.[98] But it is also held that power cannot be delegated to a levee district to levy a tax under a state constitutional provision authorizing such legislative delegation of power to counties and incorporated towns.[99] Again, a levee board may be a corpora-

[92] Sammons v. Kearney Power & Irrigation Co. (Neb., 1906), 110 N. W. 308, 312, citing and considering State v. Hartford & New Haven Rd. Co., 29 Conn. 538; Chicago Gaslight Co. v. People's Gaslight Co., 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169; West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527.

[93] People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016.

[94] Dean v. Davis, 51 Cal. 406.

[95] Board of Levee Inspectors of Chicot County v. Crittenden, 94 Fed. 613.

[96] Board of Directors for Leveeing Wabash River v. Houston, 71 Ill. 318, 322.

[97] Board of Directors of St. Francis Levee Dist. v. Bodkin (Tenn.), 69 S. W. 270.

[98] Hughes v. Board of Commrs. of Caddo Levee Dist., 108 La. 146, 32 So. 218.

A police jury as a sublevee district cannot under the constitution levy a special tax for levee improvements. Zeigler v. Thompson, 43 La. Ann. 1013, 10 So. 197.

[99] Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725. Compare Carson v. St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590.

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tion vested with large discretionary powers as a fiduciary agent to carry out public purposes, such as power to aid in building levees, or other works of public improvement. It may also possess authority to sue.[1] And an act conferring corporate powers on a board of directors of a levee district created by statute does not violate a state constitutional provision against special acts conferring corporate powers, as private corporations only are within such provision.[2] It is held, however, that levee districts are not corporations, but state functionaries within the prohibition of a state constitution as to loaning funds, etc., of the State.[3] In Arkansas neither a levee district nor its board of directors, is a municipality within a constitutional prohibition as to issuance of interest-bearing evidences of debt.[4] In Missouri a levee district is a political subdivision of the State.[5] A levee constructed along a river is, however, such a public use that the power of eminent domain may be exercised.[6] The word "levee" is synonymous with the word "landing" when used in connection with levees bordering on navigable streams and sloughs.[7]

§ 90. Log Driving or Boom Corporation.—The character of a corporation, as one created for pecuniary profit or as a boom company to improve a river for log driving, may be affected

[1] Louisiana, A. & M. R. Co. v. Tensas Basin Levee Dist. Commr's, 87 Fed. 594, 31 C. C. A. 121, 58 U. S. App. 281.

[2] Carson v. St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590.

[3] Fisher v. Steele, 39 La. Ann. 447, 1 So. 882.

[4] Memphis Trust Co. v. Board of Directors of St. Francis Levee Dist., 69 Ark. 284, 62 S. W. 902 (applied to St. Francis Levee District).

[5] Morrison v. Morey, 146 Mo. 543, 48 S. W. 629.

Municipal corporation not liable in exercise of police powers for errors of judgment for damage to others' lands in constructing levee, see De Baker v. Southern Cal. R. Co., 106 Cal. 257, 39 Pac. 610.

[6] Missouri, K. & T. Ry. Co. v. Cambern, 66 Kan. 265, 71 Pac. 809, aff'g 63 Pac. 605.

As to exercise of power of eminent domain see Pontchartrain R. Co. v. Orleans Levee Dist. Comm'rs, 49 La. Ann. 570, 21 So. 765; Union Elevator Co. v. Kansas City Suburban B. R. Co. (Mo.), 33 S. W. 929, modified 135 Mo. 353, 36 S. W. 1071; Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332.

[7] Napa v. Howland, 87 Cal. 84, 25 Pac. 247.

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by the terms of the statute under which such corporation or company is incorporated.[8] The business of booming logs on the waters of streams running through the forests of the West, is a lawful business, and a boom company is a lawfully organized corporation for the purpose of doing such lawful business; and it is "chartered" by law, when the corporation owning it is incorporated under either a general or special law. And the improvement made in the Mississippi River by the construction of the boom and its works, and the exaction of reasonable charges for the use of such works, including fees of state officials for inspecting and scaling, if done under state authority, cannot be considered in any just sense a burden upon interstate commerce.[9] But a corporation having power under its charter to improve the navigation of a stream, cannot, as incidental thereto, exercise a claimed right to drive or handle logs.[10] A log driving or boom corporation, authorized by its articles of incorporation to use the waters of a navigable river for a purpose public in its nature, such as improving navigation, and facilitating its business, has the rights of the public in the stream within its well-defined banks, and in aid of navigation it can raise and permanently maintain the water up to ordinary high-water mark, without making any compensation to riparian owners and without incurring liability in case of injury to them.[11]. A boom company may exercise the power of eminent domain,[12] although the condemnation of land for log roads is a taking of private property for private use and violates the constitution.[13] Again, such boom companies are also subject to the right of the legislature to regulate the fees or tolls for booming, sorting and rafting logs or lumber.[14]

[8] See International Boom Co. v. Rainy Lake River Boom Corp., 97 Minn. 513, 107 N. W. 735.

[9] Lindsay & Phelps Co. v. Mullen, 176 U. S. 126, 20 Sup. Ct. 125, 44 L. ed. 400.

[10] Northwestern Improvement & B. Co. v. O'Brien, 75 Minn. 335, 75 N. W. 989.

[11] Gniadek v. Northwestern Improvement & B. Co., 73 Minn. 87, 89, 75 N. W. 894.

[12] Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670.

[13] Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820.

[14] Machias Boom v. Holway, 89 Me.

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§ 91. **Manufacturing Corporations.**—Manufacturing corporations are private corporations in the strictest sense, as they are created for the convenience of the corporation, and are charged with no public duties whatever.[15]

§ 92. **Market Company.**—A company incorporated to build and maintain a market house, on property to be acquired by purchase, and authorized to rent stalls therein, on such terms and to such persons as its managers may determine, with full power to lease or sell the property acquired for that purpose, and to quit the business at its own pleasure, is in every legal sense a mere private business corporation.[16] So where a building, which is a market house, is erected upon a public square in a borough, which the corporation, a private one, is permitted to occupy until the borough purchases and pays for the building, it differs in no respect from the business of an individual except that it is erected in such place, as the company needs no chartered rights to carry on its business and the building is not exempt from local taxation; and the principle that the works of a public corporation, as, for example, the case of a railroad company, may not be subjected to local taxation without express statutory mandate, does not apply to such private corporation.[17]

§ 93. **Medical College.**[18]—A medical college is a private, or part of a private corporation, and not a public or political corporation, and the creating act of such a society constitutes a contract with the State which cannot be impaired, under the

236; Underwood Lumber Co. v. Pelican Boom Co., 76 Wis. 76, 45 N. W. 18. Examine as to rights of boom companies The Navigation Law, Laws of New York 1897, chap. 592, art. V; Cumming & Gilbert's Gen. Laws & Gen'l Stat. of N. Y., pp. 2525 et seq.

[15] Hamilton Mfg. Co. v. Massachusetts, 6 Wall. (73 U. S.) 632, 638, 18 L. ed. 904, per Clifford, J.

See §§ 77, 84, herein.

[16] Twelfth St. Market Co. v. Philadelphia & Reading R. Co., 142 Pa. 580, 21 Atl. 989.

[17] Allegheny County v. McKeesport Diamond Market, 123 Pa. 164, 168, 16 Atl. 619.

Right of city to control public markets, see Swayze v. City of Monroe, 116 La. 643, 40 So. 926.

[18] See § 73, herein.

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Federal Constitution, by a subsequently enacted statute transferring all its powers to a new corporation without such society's consent.[19] But a medical college may by its consent become a public corporation.[20]

§ 94. **Park Association.**—A park association is a private corporation where its objects are especially private and it possesses a distinctive name.[21]

§ 95. **Plank Roads.**[22]—The nature of the right of a plank road company in a road constitutes rather an easement than an absolute title; it is a franchise impressed with a public duty to maintain a highway for public use.[23]

[19] State v. Heyward, 3 Rich. Law (S. C.), 389, 408.

[20] Lewis v. Whittle, 77 Va. 415.

[21] Commonwealth v. Hazen, 207 Pa. 52, 56 Atl. 263.

[22] See § 116, herein.

[23] Western Plank Road Co. v. Central Union Tel. Co., 116 Ind. 227, 18 N. E. 14.

When plank roads are highways, see Flint & Pere Marquette Ry. Co. v. Gord, 41 Mich. 420, 2 N. W. 648.

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CHAPTER VII.

NATURE OF VARIOUS CORPORATIONS CONTINUED.

§ 96. Race Track Association.
97. Railroad Companies—Nature of as Affected by Their Relation and Duty to the Public.
98. Railroad Companies as Public Corporations or "Public Companies"—Statute.
99. Railroad Companies as Private Corporations.
100. Railroad Companies as Quasi-public Corporations.
101. Railroad Companies as Forming Distinct Class by Themselves—Distinct from Public, Private, or Other Quasi-Public Corporations.
102. Railroad—Public Use.
103. Railroad—Machine for Unloading Coal—Branch Railroad Track—Public Use.
104. Railroads as Public Utilities—Public Service Commissions Law—Public Utilities Act.
105. Railroad Companies as Common Carriers.
§ 106. Railroad Carriers' Business as Part of Trade or Commerce — Interstate Commerce.
107. Railroads as Highways.
108. Reclamation Districts.
109. Sleeping-Car Companies—Palace Cars.
110. Stockyards Company.
111. Street Railways—Street Railway Companies.
112. Street Railroad—Street Railroad Corporation—Public Service Commissions Law.
113. Storage and Elevator Companies.
114. Telegraph and Telephone Companies.
115. Trustees—Company Incorporated as—Trustees of Poor.
116. Turnpike Companies—Toll Roads.
117. Turnpike Road as Highway.
118. Waterworks.
119. Wharf—"Public Wharf"—Wharfingers.

§ 96. Race Track Association.—Where a corporation is organized for a public purpose and enjoys a public franchise, the conditions upon which it shall exercise the privileges or right conferred may be determined and directed by the legislature;[1] and this rule has been applied to a racing association

[1] Grannan v. Westchester Racing Assoc., 153 N. Y. 449, 461, 47 N. E. 896, modifying 44 N. Y. Supp. 790, 16 App. Div. 8.

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as a public corporation.[2] But it is also held that a race track corporation which offers purses and stakes, is a private and not a quasi-public corporation where it exercises no franchises, which clothe it with any public duty, and it has never held itself out for public service; and there is no grant of state aid nor the possession of the power of eminent domain, nor any obligation to offer stakes or purses, but its business is transacted for its own private purposes.[3]

§ 97. Railroad Companies — Nature of as Affected by Their Relation and Duty to the Public.—Railroad corporations are invested with special privileges, and the consideration for the public grant is the performance of their duties to the public. The franchise granted to them is intended to be exercised for the public good; their business is a matter of public concern as the public have an interest therein; and such corporations exercise their franchises as a quasi-public trust for the benefit of the people. They are public agents and perform, to a certain extent, certain functions of the government with which they are intrusted in order to afford the public necessary means of transportation. As they are formed

See the following cases:

United States: Jersey City Gas Light Co. v. United Gas Improvement Co., 46 Fed. 264, 266, per Greene, J., case aff'd 58 Fed. 323.

Illinois: Chicago General R. Co. v. Chicago, 176 Ill. 253, 66 L. R. A. 959, 52 N. E. 880, 68 Am. St. Rep. 188; Byrne v. Chicago General R. Co., 169 Ill. 75, 7 Am. & Eng. Corp. Cas. (N. S.) 768, 48 N. E. 703, aff'g 63 Ill. App. 438.

Maine: Boston & M. R. Co. v. County Commrs., 79 Me. 386, 10 Atl. 113, 4 N. Eng. 657.

New Jersey: State, Hutchinson, v. Belmar, 61 N. J. L. 443, 39 Atl. 643, aff'd 62 N. J. L. 450.

Oklahoma: United States, Search, v. Choctaw, O. & G. R. Co., 3 Okla. 404, 41 Pac. 729.

Pennsylvania: Commonwealth, Bell Teleph. Co. v. Warwick, 185 Pa. 623, 40 Atl. 93; Perkiomen R. Co. v. Collegeville Electric St. R. Co. (Pa. C. P.), 14 Mont. Co. L. R. 13.

Texas: Galveston & Western R. Co. v. Galveston, 90 Tex. 398, 36 L. R. A. 33.

Virginia: Richmond R. & E. Co. v. Brown, 97 Va. 26, 32 S. E. 775, 1 Va. S. C. Rep. 213.

[2] Grannan v. Westchester Racing Assoc., 153 N. Y. 449, 461, 47 N. E. 896, modifying 44 N. Y. Supp. 790, 16 App. Div. 8.

[3] Corrigan v. Coney Island Jockey Club, 22 N. Y. Supp. 394, 2 Misc. 512, 51 N. Y. St. R. 592.

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for the convenience of the public in the transportation of persons and merchandise, they are empowered to charge and receive a reasonable compensation for such carriage. They are also subjected to burdens not imposed on the owners of mere private property used exclusively for private interests. As their franchises are granted on the ground of public good, or public service, which is common or equal in every citizen, unequal and unjust favors are precluded, they must exercise a perfect impartiality and cannot discriminate, and they assume the obligation to transport all persons and merchandise upon like conditions and at reasonable rates. They may be authorized to exercise the right of eminent domain, and are subject to reasonable and just legislative control for the common welfare;[4] nor can they by contract render themselves incapable

[4] United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 321, 332, 41 L. ed. 1007, 17 Sup. Ct. 540. See Chicago, Milwaukee & St. Paul Rd. Co. v. Minnesota, 134 U. S. 418, 461, 33 L. ed. 970, 10 Sup. Ct. 462, 702, per Bradley, J., in dissenting opinion. Barton v. Barbour, 104 U. S. 126, 135, per Woods, J.

"Though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise, and are invested for that purpose with special privileges. They are allowed to exercise the State's right of eminent domain that they may appropriate for their uses the necessary property of others upon paying just compensation therefor, a right which can only be exercised for public purposes. And they assume, by the acceptance of their charters, the obligation to transport all persons and merchandise upon like conditions and at reasonable rates; and they are authorized to charge reasonable compensation for the services they thus perform. Being the recipients of special privileges from the State, to be exercised in the interests of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use." Charlotte, Columbia & Augusta Rd. Co. v. Gibbes, 142 U. S. 386, 393, 35 L. ed. 1051, 12 Sup. Ct. 255, per Field, J.

The franchise of a railroad corporation is intended to be exercised for the public good, the consideration for this public grant being the performance of these functions. Thomas v. West Jersey Rd. Co., 101 U. S. 71, 83, 25 L. ed. 950, quoted in Chicago v. People's Gas Light & Coke Co., 121 Ill. 530, 13 N. E. 169, 173.

"It is clear that the privilege of making a railway or turnpike, * * * and taking tolls for the same, is a franchise, as the public have an interest in the same, and the owners of the privilege are liable to answer in damages if they refuse the use of the same, without any reason-

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of performing their duties to the public, which are imposed upon them, nor can they absolve themselves from their obli-

able excuse, upon being paid or tendered the usual fare." People's Railroad v. Memphis Railroad, 10 Wall. (77 U. S.) 38, 51, 20 L. ed. 844, per Clifford, J., citing Beekman v. Saratoga & Schenectady Rd. Co., 3 Paige Ch. (N. Y.) 45, so holding; Willoughby v. Horridge, 16 Eng. L. & Eq. 437; 3 Kent's Comm. (11th ed.) 590; County Commissioners v. Chandler, 96 U. S. 205, 209, 24 L. ed. 625, per Bradley, J.

Railroad companies are by their charters "empowered, besides building and maintaining their roads, to carry passengers and property for a compensation; and at the same time a correlative duty is imposed, that they shall receive and carry passengers and freights over their roads, as they may be offered for the purpose. And when they accept their charters, it is with the implied understanding that they will fairly perform these duties to the public, as common carriers of both persons and property, under the responsibility which that relation imposes.'" Peoria & Rock Island Ry. Co. v. Coal Valley Mining Co., 68 Ill. 489, 494.

"All property devoted to public use takes a nature or qualification quasi-public. * * * Where property belonging to a natural person or to a corporation becomes 'affected with a public interest, it ceases to be *juris privati* only.' Where a party devotes his property to a public use, the community at large acquires such a qualified interest as will subject it to legislative control for the common welfare. Accordingly, the property of railroads and other public corporations transacting business for and with the public has been subjected to burdens not imposed on the owners of mere private property, used exclusively for private interests. * * * Railroad companies are public corporations in a limited sense, although the right of way, roadbed, and the track thereon, are for the exclusive use of the owners, over which only their own conveyances are propelled. * * * The fact that railroad corporations are granted exclusive franchises to conduct a business in its nature public must subject them to all reasonable control to secure the public safety and welfare. It is now the settled law that railroad corporations are within the operation of all reasonable police regulations." Illinois Central Rd. Co. v. Copiah County, 81 Miss. 685, 694, 33 So. 502, per Whitfield, C. J., quoting from Illinois Central Rd. Co. v. Willenborg, 117 Ill. 203, 209, 57 Am. Rep. 862, 7 N. E. 698, per Scott, J.

"In the grant of a franchise of building and using a public railway, there is an implied condition that it is held as a quasi-public trust for the benefit of the public, and the corporation possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust." It is true "that these railroad corporations are private, and, in the nature of their business, are subject to, and bound by, the doctrine of common carriers, yet, beyond that in a peculiar sense, they are intrusted with certain functions of the government, in order to afford the public necessary means of transportation. The bestowment of these franchises is

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gations without consent of the State.[5] Although its functions are public, a railroad company holds the legal title to the property employed in the discharge of its duties, and while it must under all circumstances do everything reasonably necessary for the accommodation of passengers and shippers, it may use its property to the best advantage of the public and itself, and for that end may make reasonable rules and regulations for the use of its property consistent with the purposes for which it is created, and not inconsistent with legally established regulations. When not unnecessary, unreasonable or arbitrary, a railroad may make arrangements with, including the granting of special privileges to, a single concern to supply passengers arriving at its terminals with hacks, and cabs, and it is not bound, at least in the absence of valid state legislation requiring it to do so, to accord similar privileges to other persons, even though they be licensed hackmen. Such an exclusive arrangement is not a monopoly in the odious sense of the

justified only on the ground of public good, and they must be held and enjoyed for that end. This public good is common, and unequal and unjust favors are entirely inconsistent with the common right. So far as their duty to serve the public is concerned, they are not only common carriers, but public agents, and in their very constitution and relation to the public, there is necessarily an implied duty on their part, and a right in the public, to have fair treatment and immunity from unjust discrimination. The right of the public is equal in every citizen, and the trust must be performed so as to secure and protect it." Messenger v. Pennsylvania Rd. Co., 37 N. J. L. 531, 536, 537, 18 Am. Rep. 754. Examine note 3 Am. & Eng. Rd. Cas. 602, especially as to weight of English authority *contra*.

The rights of the public in respect to railroads should be fostered by the courts. Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 9, 34 L. ed. 604.

[5] "It is well settled on the soundest principles of public policy that a contract, by which a railroad company seeks to render itself incapable of performing its duties to the public, or attempts to absolve itself from its obligations without the consent of the State, is void and cannot be rendered enforceable by the doctrine of estoppel, and any contract which disables the corporation from performing its functions without the consent of the State, and to relieve the grantees from the burden it imposes, is in violation of the contract with the State, and is void as against public policy." Paige v. Schenectady Ry. Co. (Thompson v. Same), 178 N. Y. 102, 115, 70 N. E. 213, per Martin, J. (citing several cases), case reverses 82 N. Y. Supp. 192, 84 App. Div. 91.

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word, nor does it involve an improper use by a railroad company of its property.[6]

§ 98. **Railroad Companies as Public Corporations or "Public Companies"—Statute.**—Railroad companies "are public corporations in a limited sense."[7] And they are "public companies" when incorporated under the English companies' acts, so as to come within the terms of a direction to trustees, under a will, to invest in securities of any railway or other public company.[8] Where a statute provides that all railroad corporations, chartered by the State, which shall be unable to purchase lands for their roads, of the owners of the respective routes, at agreed upon rates, shall be public corporations, and an earlier statute provides that members of public corporations shall be competent witnesses in cases affecting the interests of such corporations, it is held that railroad corporations are not such public corporations, within the meaning of the earlier enacted statute, that the stockholders can be witnesses for the corporation.[9]

§ 99. **Railroad Companies as Private Corporations.**—Technically, railroad companies are private corporations, they are private as distinguished from those created for municipal and governmental purposes.[10] They are also private in the nature of their business,[11] and in the sense that, even though their

[6] Donovan v. Pennsylvania Co., 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. 91.

[7] Illinois Central Rd. Co. v. Copiah County, 81 Miss. 685, 694, 33 So. 502, per Whitfield, J.

"It is not seriously denied that railroad, though constructed and owned by a private corporation is a matter of public concern, and that its uses are so far public that the right of eminent domain of the State may be exerted to facilitate its construction." Olcott v. Supervisors, 16 Wall. (83 U. S.) 678, 695, 696, 22 L. ed. 382, per Strong, J. See note to § 99, herein.

[8] Sharp, In re (C. A.), L. R. 45 Ch. D. 286.

[9] Dearborn v. Boston, Concord & Montreal Rd., 24 N. H. (4 Fost.) 179, 189.

[10] Charlotte, Columbia & Augusta Rd. Co. v. Gibbes, 142 U. S. 386, 393, 12 Sup. Ct. 255, 35 L. ed. 1051; Burhop v. City of Milwaukee, 21 Wis. 257.

[11] Messenger v. Pennsylvania Rd. Co., 37 N. J. L. 531, 536, 537, 18 Am. Rep. 754.

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uses are public, the contract embodied by implication in their charters is within the constitutional provision which prohibits the impairment of obligations of contracts.[12] Although a railway company is technically a private corporation, yet it is designed to promote the general public good as well as advance private speculation. So, too, are turnpike and canal companies, and other like corporations, designed to enhance the public prosperity. The interest, therefore, which the public may have in a corporation, unless it has all the interest, does not necessarily make it a public corporation.[13] It is declared in a Pennsylvania case that: "A railroad company is not public, nor does it stand in the place of the public; it is but a private corporation over whose rails the public may travel if it choose to ride in its cars. Indeed, we regard it as a misnomer to attach even the name 'quasi-public corporation' to a railroad company, for it has none of the features of such corporations, if we except its qualified right of eminent domain, and this is because of the right reserved in the public to use its way for travel and transportation. Its officers are not public officers, and its business transactions are as private as those of a banking house. Its road may be called a quasi-public highway, but the company itself is a private corporation and nothing more." [14]

§ 100. Railroad Companies as Quasi-Public Corporations.—In the circumstances of their origin and in their powers, uses and duties, railroad corporations are clearly distinguishable from other merely private corporations. There is no analogy between railroad corporations, and manufacturing, mining and other like corporations, evoked by no public necessity, exercising no sovereign powers, subserving no public uses, and subject to no public duties. And these distin-

[12] Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377, 16 Wash. L. Rep. 749.

[13] Board of Directors for Leveeing Wabash River v. Houston, 71 Ill. 318, 322, per Scott, J.

[14] Pierce v. Commonwealth, 104 Pa. 150, 155, 13 Am. & Eng. Rd. Cas. 74, 79, per Gordon, J., citing Presbyterian Society v. Auburn & Rochester Rd. Co., 3 Hill (N. Y.), 567.

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guishing characteristics make railroad corporations quasi-public corporations. They are creatures of the law, intrusted with the exercise of sovereign powers to subserve public necessities and uses and are bound to conduct their affairs in furtherance of the objects of their creation.[15]

§ 101. **Railroad Companies as Forming Distinct Class by Themselves—Distinct from Public, Private, or Other Quasi-Public Corporations.**—"Railroad corporations have peculiar qualities which distinguish them from mere private corporations, or other public or quasi-public corporations, in the right of eminent domain to condemn lands, conferred on them by charter; in the uses to which their railroads may be applied by them as carriers of passengers and freight, receiving tolls or fares for the same; in the employment of steam power, a dangerous agency, in passing through the State, and their protection in the careful use of such agency; in the structure of the road, with its rails, cuts, embankments, often built and maintained at great detriment to other property; in the ex-

[15] Railroad Commissioners v. Portland & Oxford Central Rd. Co., 63 Me. 269, 277, 278, per Dickinson, J. (railroads as quasi-corporations); see also Eckington & Soldiers' Home Ry. Co. v. McDevitt, 191 U. S. 103, 114, 48 L. ed. 112, 24 Sup. Ct. ——, per Fuller, C. J.; Pueblo & Arkansas Valley Rd. Co. v. Taylor, 6 Colo. 1, 45 Am. Rep. 512; Kotz v. Illinois Cent. Ry. Co., 188 Ill. 578, 59 N. E. 240.

"A railroad company is a quasi-public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property and to charge only reasonable rates for such service." Chicago, Milwaukee & St. Paul Ry. Co. v. Wabash, St. Louis & Pac. Ry. Co., 61 Fed. 993, 997, 9 C. C. A. 659, per Caldwell, C. J. (a case of pooling business and contract against public policy).

A railroad corporation is created for public purposes, "performs public duties and exercises delegated sovereign rights for that purpose and is in its nature a public corporation even though its shares are owned by private individuals;" they are quasi-public and stand by themselves in a distinct class; "The entire duty they perform is a public one, and a charter from the lawmaking power is necessary to its exercise. * * * The road, once constructed, is, instanter, and by mere force of the grant and law, embodied in the governmental agencies of the State and dedicated to public use." Talcott v. Township of Pine Grove, 1 Flipp. (U. S. C. C.) 120, 143, 144, Fed. Cas. No. 13,735, per Emmons, Cir. J.

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tent of the road, often through several counties or across the State; in the depots, freight houses, wharves, and the great accumulation of property at the termini and other points on the line of the railway. Canals have some of the same peculiarities in the construction and maintenance of their waterways. These characteristics, which so clearly distinguish them from other corporations, make it almost a necessity that they should form a class by themselves." [16]

§ 102. **Railroad—Public Use.**—The business of a railroad company is affected with a public use, so that the power of taxation may be invoked to aid in the construction of the road.[17] And to the extent of such use the company's business is subject to legislative regulations.[18] "That a railroad is for public use, though granted to a private company, has been decided, so far as we are informed, by every tribunal where the question has been made, and recognized, by the silent acquiescence of all concerned, in this State." [19]

§ 103. **Railroad—Machine for Unloading Coal—Branch Railroad Track—Public Use.**—A machine used for unloading coal from cars into boats is devoted to a public use, where it is part of the terminal facilities and of the entire plant of the railroad company and necessary for the successful prosecution of its business, and that of a coal transfer company even though constructed, owned and maintained jointly by both companies, and the grant to one shipper of coal of the exclu-

[16] State Board of Assessors v. Central R. R. Co., 48 N. J. L. 146, 289, 4 Atl. 578, per Scudder, J. See note to § 99, herein.

[17] Northern Pac. R. Co. v. Roberts, 42 Fed. 734, 31 Am. & Eng. Corp. Cas. 642. See Estill County v. Embry, 144 Fed. 913; State ex rel. Arkansas Southern Rd. Co. v. Knowles (La.), 41 So. 439; State v. Board of Commrs. of Clinton County (Ind.), 76 N. E. 986

[18] Charlotte, Columbia & Augusta Rd. Co. v. Gibbes, 142 U. S. 386, 393, 35 L. ed. 1051, 12 Sup. Ct. 255, per Field, J.

"The building and running of a railroad for public use are of public right, and require legislative sanction." McGregor v. Erie Ry. Co., 35 N. J. L. 89, 97, per Bedle, J.

[19] Enfield Toll Bridge Co. v. Hartford & New Haven Rd. Co., 17 Conn. 40, 58, per Williams, Ch. J.

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sive use of such machine, constitutes an unlawful discrimination.[20] The decisive tests as to whether a branch railroad track is for public or private purposes are these: Is the track to be open to the public, on equal terms to all having occasion at any time to use it, so that all can demand that they be served without discrimination? If so, and the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is public, and the case a proper one for the exercise of the right of eminent domain.[21]

§ 104. **Railroads as Public Utilities—Public Service Commissions Law—Public Utilities Act.**[22]—Commercial railroads may be recognized as public utilities, as well as private enterprises. Extensive rights and franchises have been conferred upon them, including the right to invoke the power of eminent domain; they have also had imposed upon them duties they cannot avoid, one of which is that they shall serve the public without unjust discrimination, but, with the exception of those duties which such carrier owes to the public, it has complete dominion over its property as well as every other owner.[23] Under the Public Service Commissions Law of New York, the term "railroad when used in that act," includes every railroad, other than a street railroad, by whatsoever power operated for public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, switches, spurs, tracks, stations and terminal facilities of every kind used, operated, controlled or owned by or in connection with any such railroad." [24] The same law also provides that: "The term 'railroad corporation,' when used in this act, includes every corporation, company, association, joint-stock associa-

[20] Youghiogheny & Ohio Coal Co. v. Erie Ry. Co., 24 Ohio Cir. Ct. Rep. 289.

[21] Ulmer v. Lime Rock Rd. Co., 98 Me. 579, 587, 57 Atl. 1001. See Kansas City, S. & G. Ry. Co. v. Louisiana Western R. Co., 116 La. 178, 40 So. 627.

[22] See § 59, herein.

[23] Memphis News Pub. Co. v. Southern Ry. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150.

[24] Public Service Commissions Law of N. Y., Laws 1907, p. 891, chap. 429, art. I, § 2.

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tion, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, managing or controlling any railroad or any cars or other equipment used thereon or in connection therewith." [25] The Railroad Act of Wisconsin, as amended by the Public Utilities Act, provides that: "The term 'railroad' as used herein shall mean and embrace all corporations, companies, individuals, associations of individuals, their lessees, trustees or receivers (appointed by any court whatsoever) that now, or may hereafter, own, operate, manage or control any railroad or part of a railroad as a common carrier in this State, or cars, or other equipment used thereon, or bridges, terminals or side tracks, used in connection therewith, whether owned by such railroad or otherwise, *and also all streets and interurban railway companies.* (*a*) The term 'railroad' whenever used herein shall also mean and embrace express companies *and telegraph companies.* * * * a. (*b*) The provisions of this act shall apply to *the transmitting and delivering of messages by telegraph, and to all charges connected therewith, and to the* transportation of passengers and property between points within this State, and to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, and shall apply to all railroad corporations, express companies, *telegraph companies,* car companies, sleeping-car companies, freight and freight-line companies, and to all associations of persons, whether incorporated or otherwise, that shall do business as common carriers upon or over any line of railroad within this State, and to any common carrier engaged in the transportation of passengers and (*or*) property wholly by rail or partly by rail and partly by water. b. (*c*) This act shall not apply to * * * logging or other private railroads not doing business as common carriers." [26]

[25] Public Service Commissions Law of N. Y., Laws 1907, p. 891, chap. 429, art. I, § 2.

[26] "Railroad Act" of 1905; Laws Wis., 1905, p. 552, chap. 362, § 2. Italicised words and letters added. Laws Wis., 1907, pp. 433, 434, chap. 582, § 1797–2 *a. b.* The words "street and electric railroads engaged solely in the transportation of

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§ 105. **Railroad Companies as Common Carriers.**—Railroad corporations are common carriers and they occupy a peculiar relation to the public as invested with certain franchises for the public benefit, and they are bound to use them with fairness and for the common good.[27] They impliedly agree "that they will fairly perform their duties to the public as common carriers of both persons and property, under the responsibility which that relation imposes." [28] But a railroad is not a common carrier where its only duty is to haul a special train of cars under a special contract, wherein the shipper assumes all risks of accident and loads and unloads the cars and the train is run on a schedule of time to suit the shipper's convenience.[29]

§ 106. **Railroad Carrier's Business as Part of Trade or Commerce—Interstate Commerce.**—It is declared by the Supreme Court of the United States that: "The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires them to perform the service upon equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between States, such commerce becomes what is described as interstate, and comes to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several States. * * * Although the franchise when granted by the State becomes by the grant the property of the grantee, yet there are some regulations respecting the exercise of such

passengers within the limits of cities, nor to" preceded the word "logging" in the act of 1905.

[27] Messenger v. Pennsylvania Rd. Co., 37 N. J. L. 531.

[28] Peoria & Rock Island Ry. Co. v. Coal Valley Mining Co., 68 Ill. 489, 494.

They "are subject to and bound by the doctrine of common carriers." Messenger v. Pennsylvania Rd. Co., 37 N. J. L. 531, 536, 537, 18 Am. Rep. 754.

They are common carriers under Louisiana constitution 1898, art. 272. Kansas City, S. & G. Ry. Co. v. Louisiana Western R. Co., 116 La. 178, 40 So. 627.

[29] Chicago, M. & St. P. R. Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 28 U. S. App. 589, 30 L. R. A. 161.

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grants which Congress may make under its power to regulate commerce among the several States. This will be conceded by all, the only question being as to the extent of the power. * * * We think it extends at least to the prohibition of contracts relating to interstate commerce, which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce." [30]

§ 107. Railroads as Highways.—Railroads built under authority of the law are public highways,[31] established primarily for the convenience of the people, and to subserve public ends, and are subject to governmental control and regulation; and for these reasons the corporation owning it may, under legislative sanction, take private property for a right of way, upon making just compensation to the owner.[32] "It is said that railroads are not public highways *per se;* that they are only declared such by the decisions of the courts, and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such. True, they must be used in a peculiar manner, and under certain restrictions, but they are facilities for passage and transportation afforded to the public, of which the public has the right to avail itself." [33] There is, however, a clear distinction between the cases of railroads and canals, and plank and turnpike roads; the occupation of the highway by the former being permanent and exclusive, whereas the latter are considered public highways, over which every citizen has the right to travel in his own mode of conveyance,

[30] United States v. Joint Traffic Assoc., 171 U. S. 505, 570, 19 Sup. Ct. 25, 43 L. ed. 259, per Peckham, J.

[31] Talcott v. Township of Pine Grove, 1 Flipp. (U. S. C. C.) 120, 146, Fed. Cas. No. 13,735, per Emmons, Cir. J.

[32] Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. 965.

[33] Olcott v. The Supervisors, 16 Wall. (83 U. S.) 678, 695, 696, 22 L. ed. 382 (per Strong, J., holding that State may impose a tax for public use); Kansas City, S. & G. Ry. Co. v. Louisiana Western R. Co., 116

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the imposition of tolls being simply a means of keeping them in repair.[34] Where, throughout an act of Congress, a railroad is referred to, in its character as a road, as a permanent structure, and designated, and required to be, a public highway, the term "railroad" cannot, without doing violence to language, and disregarding long-established usage of legislative expressions, be extended to embrace the rolling stock or other personal property of the company.[35]

§ 108. **Reclamation Districts.**[36]—Reclamation districts are declared to be public corporations,[37] and are also said to be quasi-public corporations.[38]

§ 109. **Sleeping-Car Companies—Palace Cars.**—We have seen that sleeping-car companies are embraced within the provisions of the Public Service Commissions Law of New York,[39] and also the Public Utilities Act of Wisconsin.[40] But it is held, however, that such a company is not a common carrier, but that it rests under such obligations only as are based upon its contract to furnish the accommodations which it offers to the public and is liable only to the extent of its breach thereof.[41]

La. 178, 40 So. 627 (under const. 1898, art. 272.

[34] Douglass v. Boonsborough Turnpike Road Co., 22 Md. 219, 85 Am. Dec. 647. See also Oliff v. City of Shreveport, 52 La. Ann. 1203, 27 So. 688.

Railroads and highways and distinctions as to use of, see McGregor v. Erie Ry. Co., 35 N. J. L. 89, 97, per Bedle, J.

[35] Lake Superior & Miss. Rd. Co. v. United States, 93 U. S. 442, 23 L. ed. 965.

[36] See § 75, herein.

[37] People v. Williams, 56 Cal. 547.

[38] Reclamation Dist. v. Turner, 104 Cal. 334, 37 Pac. 1038.

[39] See § 74, herein.

[40] See § 104, herein.

[41] Calhoun v. Pullman Palace Car Co. (U. S. C. C.), 149 Fed. 546, 549. Examine Braun v. Webb, 65 N. Y. Supp. 668, 32 Misc. 243, aff'g 62 N. Y. Supp. 1037 (where the plaintiff obtained judgment in a case where he had purchased a ticket, been assigned a berth but it was occupied by another person and he was refused its occupancy by the conductor and was compelled to sit all night in a day coach); Pullman's Palace Car Co. v. King, 99 Fed. 380, 39 C. C. A. 573 (in this case plaintiff was sold accommodations in a particular car, virtually represented and warranted to pass over a particular line, but the car did not pass over the line specified in the ticket and upon refusal to pay extra fare plaintiff was ejected, and

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A sleeping-car company may make reasonable regulations respecting the right to a passage or a berth on its cars, as such right of a person is held to be limited, and it is a reasonable regulation which excludes those who have infectious or contagious diseases or are insane.[42]

§ 110. **Stockyards Company.**—A stockyard business is one affected with a public interest when it is carried on at a large railroad and commercial center, and affords the only available market within the city and for an extensive territory, for resting, feeding and shipping of live stock. Such a business is also subject to public control and regulation as to the rates charged.[43] But in Cotting v. Kansas City Stock Yards Company,[44] wherein a statute defining certain duties in relation to public stockyards and regulating all charges thereof, was held unconstitutional as denying a certain company the equal protection of the laws, in that such enactment applied only to that particular company and not to other companies or corporations engaged in like business in the State, the court reviews the several cases bearing upon the subject and says: "As to those individuals who have devoted their property to a use in which the public has an interest, although not engaged in a work of a confessedly public character, there has been no further ruling than that the State may prescribe and enforce reasonable charges." [45]

§ 111. **Street Railways—Street Railway Companies.**—A street railway is a public utility; it is an appropriate and necessary method of using the highway; and the municipalities may permit them to occupy and use portions of the street. Such occupancy is in common with that of the general public.[46]

defendant was held liable for breach of contract).

[42] Pullman Car Co. v. Kraus (Ala.), 40 So. 398.

[43] Ratcliff v. Wichita Union Stockyards Co., 74 Kan. 1, 86 Pac. 150.

[44] 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. 30.

[45] See § 113, herein.

[46] City of Detroit v. Detroit United Ry., 133 Mich. 608, 611, 95 N. W. 736, per Hooker, C. J.

Definitions of street railroad or railway and street railway companies:

United States: Williams v. City

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Street railway companies are public carriers of passengers, and are given corporate existence in order that they may be enabled

Electric Ry. Co., 41 Fed. 556, 557, per Caldwell, J. (definition also distinction between street railroad and railroad; additional servitude).

Alabama: Birmingham Mineral Rd. Co. v. Jacobs, 92 Ala. 187, 200, 9 So. 320, 12 L. R. A. 830, per Coleman, J. (what street railroads are intended under statute as to street railways, also statute as to "railroads" crossing each other; collision and injury causing death).

California: Montgomery v. Santa Ana Westminster Ry. Co., 104 Cal. 186, 189, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654 (a case as to abutting owner's rights and urban servitudes).

Florida: Bloxham v. Consumers' Electric Light & St. Ry. Co., 36 Fla. 519, 539, 51 Am. St. Rep. 44, 18 So. 444, 29 L. R. A. 507, per Liddon, J. ("railroads" in statute as including street railroads; street railroad means what).

Illinois: North Chicago Electric Ry. Co. v. Peuser, 190 Ill. 67, 70, 60 N. E. 78, per Boggs, C. J. (a case as to relative rights of such corporations and of travelers on the street).

Iowa: Freiday v. Sioux City Rapid Transit Co., 92 Iowa, 191, 60 N. W. 656, 26 L. R. A. 246 (street railway defined; does not include an elevated "railway" under statute as to "railroad" and compensation to abutting owners).

Maryland: Park Tax Case (Mayor & City Council of Baltimore v. Baltimore, Catonsville & Ellicott's Mills Passenger Ry. Co.), 84 Md. 1, 35 Atl. 17, 33 L. R. A. 503 (question whether certain company answered description of street railway within intent of laws imposing park tax).

Massachusetts: Holland v. Lynn & Boston Rd. Co., 144 Mass. 425, 427, 11 N. E. 674 ("street railway," "railroad corporation" and "railroad company" in statute means what; action of tort).

Michigan: City of Detroit v. Detroit United Ry., 133 Mich. 608, 611, 95 N. W. 736, per Hooker, C. J.

Minnesota: Frank v. St. Paul City Ry. Co., 61 Minn. 435, 20 L. R. A. 208, 63 N. W. 1099, 52 Am. St. Rep. 608 ("street railway," "railroad" and "railway," meaning of terms and distinctions); Carli v. Stillwater St. Ry. & Transfer Co., 28 Minn. 373, 378, 41 Am. St. Rep. 290, 10 N. W. 205, per Clark, J. (character, purpose and use of street railways and railways; distinctions; additional servitudes).

Missouri: Hannah v. Metropolitan St. Ry. Co., 81 Mo. App. 78, 82, per Gill, J. (street railway defined and "railroad" distinguished).

New York: New York Dist. Ry. Co., In re, 107 N. Y. 42, 14 N. E. 187 (underground street railroad is a street railway within state constitution, art. 3, § 18, and general railroad act does not apply).

Oregon: Thompson-Houston Electric Co. v. Simon, 20 Oreg. 60, 23 Am. St. Rep. 86, 25 Pac. 147, 10 L. R. A. 251 (distinction as to uses and purposes of railways and street railways and character of same).

Pennsylvania: Heilman v. Lebanon & Annville St. Ry. Co., 180 Pa. 627, 628, 37 Atl. 119 (character of street railway companies; rights of abutting landowners); Philadelphia, City of, v. McManes, 175 Pa. 28, 33, 34 Atl. 331, per Thayer, P. J. (holding that a passenger railway in a

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to provide, for convenience of the public, the means of rapid transportation and promote the public welfare.[47] And any contract which disables a street railway corporation from performing its functions, under its franchise, without the consent of the State, and made to relieve the corporation of the burden which it has assumed, is void as against public policy.[48] It is declared that street railway companies are not endowed with the right of eminent domain,[49] and that stat-

park is not a street passenger railway requiring consent of city council, cited in Massachusetts Loan & Trust Co. v. Hamilton, 88 Fed. 588, 591; Manhattan Trust Co. v. Sioux City Cable Ry. Co., 68 Fed. 82); Rahn Township v. Tamaqua & L. St. Ry. Co., 167 Pa. 84, 90, 31 Atl. 472 (necessity of consent of authorities).

Railway line operated in city streets for passenger service, held not a "commercial" railroad but a street railroad possessing some unexercised powers not ordinarily conferred on street railway companies. State v. Duluth Gas & Water Co. (State v. Duluth St. Ry. Co.), 76 Minn. 96, 57 L. R. A. 63, 78 N. W. 1032.

Railway is not a street railway when it does not limit its business to passengers with hand baggage, but engages in transportation of freight on its entire line from town to town. Spalding v. Macomb & W. I. Ry. Co., 225 Ill. 585, 80 N. E. 327.

Underground tunnel railroad with a large portion of it under navigable waters and also built mostly on private property is not a street railway or street surface railroad. New York & Long Isl. R. Co. v. O'Brien, 106 N. Y. Supp. 909.

[47] North Chicago Electric Ry. Co. v. Peuser, 190 Ill. 67, 70, 60 N. E. 78, per Boggs, C. J.

[48] Thompson v. Schenectady Ry. Co., 131 Fed. 577, 579, citing Thompson v. Schenectady Ry. Co. (Paige v. Same), 178 N. Y. 102, 70 N. E. 213. This case reverses 82 N. Y. Supp. 192, 84 App. Div. 91, but affirms other cases of other complainants against same defendant, 84 App. Div. 91.

[49] "Street railway companies are not endowed with the right of eminent domain because they do not need it. They are modern local conveniences, the location and construction of which are subject to the will of the public they are intended to serve. This will is expressed through the local authorities. Such companies cannot force themselves into neighborhoods where they are not wanted. When permission is given them to occupy a public street, they acquire thereby not an exclusive right upon its surface, but a right concurrent with that of the general public. Their cars are a substitute for the private carriage and the public omnibus. They must move them along their tracks upon the surface of the street to the grade of which they are required to conform. They have no right to grade or fill or in any manner interfere with the access to private property from the highway, or so to construct the road as to interfere with public travel, or disturb adjacent land owners." Heilman v. Lebanon & Annville St. Ry. Co., 180 Pa. 627, 628, 37 Atl. 119, per Williams, J.

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utory provisions for condemnation of a right of way have little or no reference to street railways using electricity or horse-power for local convenience and for transportation of passengers, and the condemnation of private property for a right of way is not authorized.[50]

§ 112. **Street Railroad—Street Railroad Corporation—Public Service Commissions Law.**—The Public Service Commissions Law of New York provides that: "The term 'street railroad,' when used in this act, includes every railroad by whatsoever power operated, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons or property for compensation, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city, village or town, and including all switches, spurs, tracks, right of trackage, subways, tunnels, stations, terminals and terminal facilities of every kind used, operated, controlled or owned by or in connection with any such street railroad; but the term 'street railroad,' when used in this act, shall not include a railroad constituting or used as part of a trunk line railroad system." [51] Said law also provides that: "The term 'street railroad corporation,' when used in this act, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, managing or controlling any street

Examine the following cases:

Illinois: Suburban R. Co. v. West Side El. R. Co., 193 Ill. 217, 61 N. E. 1090.

Indiana: Carrell v. Muncie, H. & Ft. W. Ry. Co. (Ind. App.), 78 N. E. 254.

New York: Adee v. Nassau Electric R. Co., 177 N. Y. 548, 69 N. E. 1120, aff'g 76 N. Y. Supp. 589, 72 App. Div. 404; Schenectady Ry. Co. v. Peck, 84 N. Y. Supp. 759, 88 App. Div. 201.

Pennsylvania: Hinnershitz v. United Traction Co., 206 Pa. 91, 55 Atl. 841.

Virginia: Newport News & O. P. Ry. & Electric Co. v. Lake (Va.), 54 S. E. 328.

[50] Thompson-Houston Electric Co. v. Simon, 20 Oreg. 60, 10 L. R. A. 251, 23 Am. St. Rep. 86, 25 Pac. 147. See citations under last preceding note.

[51] Public Service Commissions Law of N. Y., Laws 1907, p. 891, chap. 429, art. 1, § 2.

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railroad or any cars or other equipment used thereon or in connection therewith." [52]

§ 113. **Storage and Elevator Companies.**—It is decided, in a case in Pennsylvania, that a company incorporated to transact a general storage and elevator business, including the right to issue warehouse receipts, etc., is not a public but a private corporation and its real estate used in the exercise of its franchise is not exempt from mechanics' liens.[53] But un-

[52] Public Service Commissions Law of N. Y., Laws 1907, p. 891, chap. 429, art. 1, § 2.

[53] Girard Point Storage Co. v. Southwark Foundry Co., 105 Pa. 248. The court, per Gordon, J., said: "From the facts here stated it is argued that the Girard Point Storage Company is in the nature of a public corporation, and that the general public has such an interest in its works as to protect it from the incumbrance of a mechanic's lien. It cannot be denied but that if this corporation bears the character here claimed for it, it cannot be thus disturbed. The material question, then, is, what rights have the public in and upon this property other than what it would have did that property belong to a private individual or to an unincorporated partnership? We understand very clearly and distinctly the relation of a turnpike road, canal, and railroad to the public. The people of the commonwealth have the right of way over them, which right, when occasion requires, may be exercised regardless of the will of the corporations owning them. They are highways, and the companies operating them have the right of eminent domain conferred upon them only because of this direct interest which the public has in these methods of transit. But in the works of the corporation defendant the community at large has no other or further interest than it has in the storehouses of private individuals. It may receive the grain of one person and refuse that of another, or it may, at its own will, suspend operations and shut out the public altogether. Its organization is all that it has received from the public, beyond this the public has no special interest in it, and when this organization disappears there is nothing left of a public character, or anything over which the commonwealth has control. Very different is the case of a turnpike, a canal or railroad, which remains for the common use after the corporation which built it is dissolved, and which the State may take possession of for the public welfare. Mr. Chief Justice Thompson, in the case of Foster v. Fowler, 10 P. F. S. 27, has shown very clearly the distinction between those corporations in which the public is directly interested, and those in which it has only an indirect interest; among the latter he mentions manufacturing, coal and iron companies; and he adds, that as against such as these liens are enforceable. But we cannot understand why a company organized for the shifting and storage of grain should occupy, in this respect, a position superior to those thus mentioned. All are alike established

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der a New York decision, a statute fixing the maximum charge for elevating, receiving, weighting and discharging grain and making it a misdemeanor to violate the enactment, is not violative of the constitutional guaranty protecting private property, but is a legitimate exercise of the police power of the State over a business affected with a public interest and is, therefore, constitutional, and this applies to stationary elevators owned by individuals or corporations, who have appropriated their property to that use and are engaged in that business.[54] In the United States Supreme Court, this statute was held to be a legitimate exercise of the police power of the State over a business affected with a public interest, that did

for private purposes, and by them the public is at best but incidentally benefited. If, however, the property and buildings, of every person and association whose trade or business in any degree advanced the common welfare, were exempt from the ordinary forms of lien and execution, the collection of debts would soon become so tedious and expensive that, in most instances, their abandonment would be the better policy. Nor can we understand how the case of Munn v. Illinois, 94 U. S. (4 Otto) 113, 24 L. ed. 77, can affect the case in hand. The question there involved not the rights of a corporation, but those of a private person, and the principle involved in the ruling of the Supreme Court of the United States was that where the owner of such property as a warehouse, devotes it to a use in which the public has an interest he, in effect, grants to the public an interest in such use, and must, therefore, to the extent thereof, submit to be controlled by the public for the common good as long as he maintains that use, but he may, at any time, withdraw this implied grant by discontinuing the business from which it arises. But it certainly does not follow that because of this public interest, the property of a private person is made public property, or even quasi-public property, or that it is therefore exempted from ordinary execution process." Quoted in part in Twelfth St. Market Co. v. Philadelphia & Reading Term. Rd. Co., 142 Pa. 580, 588, 21 Atl. 902, 989, per Thayer, P. J.

[54] People v. Budd, 117 N. Y. 1, 26 N. Y. St. R. 533, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460, two judges dissenting. In the prevailing opinion of Andrews, J. (p. 15), it is said: "That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with the freedom of contract we cannot doubt;" also that, "we have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common law and the practice of free governments, justify legislative control and regulation in the particular case,

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not violate the Constitution of the United States and was valid.[55]

§ 114. **Telegraph and Telephone Companies.**—Both the telegraph and telephone have become not only necessary, but almost indispensable as a vehicle of public intelligence, and for the conduct of affairs, business and commerce. They are both instrumentalities of a public character, though they exist for private gain. Their operations in doing a general business is in the nature of a public employment, for they are public or quasi-public servants. They undertake for a consideration to transmit messages, intelligence or communications, not exclusively for particular persons, but for all, for their lines are open alike to everyone who pays their charges, subject to such contract limitations as may legally exist. These corporations have valuable franchises conferred upon them. They exercise the right of eminent domain by reason solely of the public nature of their business. They must have suitable and approved instruments and appliances, employ competent servants and agents and skilled operators, and are held to a high degree of care, diligence and skill, adequate to, or commensurate with, their employment or undertaking. They are also subject to constitutional and legislative control, and lawful police regulations. Telegraph companies are "created for public benefit, endowed with special privileges, such as the right of eminent domain, and perform the most important functions of commerce, supplanting, in cases where celerity and rapid transmission of intelligence is necessary, the postal service of the government. Their business intimately concerns the

the statute of 1888 cannot be sustained."

[55] Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247. The case of Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, was reviewed and adhered to, and its application in cases decided in the state courts considered. The decision in Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462, explained. See § 110, herein.

Public warehouses are what; as embracing "all warehouses, elevators and granaries," etc., under statute, see State ex rel. Wood v. Smith, 114 Mo. 180, 21 S. W. 493.

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public, and on this account the government assumes and has the right to regulate their business so as to insure impartiality of service, and prevent the exaction of unreasonable tolls. Many and varied interests are dependent upon them. From their exceptional position, it is in their power, by a corrupt use of their knowledge and information, to reap unconscionable advantage in the marts of trade, or by their negligence entail ruin and disaster upon individuals and communities. * * * Their duty springs not alone * * * from contract, but is the result of the character of their business, and the laws regulating them." Again, "A telegraph company is a quasi-public corporation—private in the ownership of its stock, but public in the nature of its duties. It has all the powers of a private corporation, such as a separate legal existence, perpetual succession and freedom from individual liability; and possesses also in addition thereto, the extraordinary privileges which under our constitution can be exercised only by such corporations as are organized for a public purpose, and then only when necessary for the proper fulfillment of such purpose. Among the extraordinary privileges enjoyed by such corporations is the condemnation of private property, which can never be taken for a private purpose. The acceptance of such privileges at once fixes upon the corporation the indelible impress of a public use. A telegraph company is essentially public in its duties. Without such public duties there would be neither reason for its creation nor excuse for its continued existence. In fact, being the complement of the postal service, it is one of those great public agencies so important in its nature and far-reaching in its application that some of our wisest statesmen have deemed its continued ownership in private hands a menace to public interests." That a telegraph company owes certain duties to the public which are not dependent upon personal contract but are imposed by operation of law, is illustrated by the case of receiving, transmitting and delivering telegrams where the company cannot insist upon a personal contract contrary to its usual custom or contrary to public policy, so the failure to promptly deliver a telegram is

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not only a breach of contract but a failure to perform a duty which the company as a servant of the people is under obligation to perform. A telephone company organized to establish and maintain a public telephone system for the purpose of furnishing telephone communication between its subscribers and which under the statute of its incorporation has the right of eminent domain is organized for a public purpose. Its business is of a public character and it is a quasi-public corporation. It depends upon the public for its support and the public depends upon it for its accommodations.[56]

§ 115. **Trustees—Company Incorporated as—Trustees of Poor.**—A company, incorporated as the trustees of a fund, with the power and duty of investing it and appropriating its income to the public schools of a town, is a private and not a public corporation. Such a corporation can hold and enjoy their rights and privileges under their charter independent of legislative control or interference within the constitutional provision against passing laws impairing the obligation of contracts.[57] Trustees of the poor are a public corporation.[58]

§ 116. **Turnpike Companies—Toll Roads.**—A turnpike company, in which the State holds stock, is not a public corporation, within a statute which exempts from executions "a county, township, or other public corporate body."[59] Under

[56] Joyce on Electric Law (2d ed.), § 14, and note.

To what extent telegraph and telephone companies are common carriers, see Joyce on Elect. Law (2d ed.), §§ 15, 16, 18–24*a*, 27, 37*c*.

Considered as instruments of interstate commerce, see Joyce on Electric Law (2d ed.), §§ 42*a*, 44.

[57] Yarmouth v. North Yarmouth, 34 Me. 411, 56 Am. Dec. 666.

[58] Governor to Use of Trustees v. Gridley, 1 Walk. (1 Miss.) 328.

[59] Turnpike Co. v. Wallace, 8 Watts (Pa.), 316. "It is very clear that the character of the corporation cannot depend upon the quantity of the stock held by the commonwealth, so that if this case comes within the exception, for the same reason every corporation in which the State reserves an interest, however trifling, must be held to be in the same class. But on this construction, the act which is remedial, would be merely a dead letter, as there are very few corporations, if any, in which the State does not hold some stock, or in which they have not some pecuniary interest. Besides, the act applies to

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a California decision no authority is vested in a board of county supervisors to grant a franchise to collect tolls upon a free public highway, but the power of such board is limited to regulating the collection of tolls upon toll roads only.[60] The payment of toll under a turnpike franchise cannot be evaded by constructing a road solely for that purpose.[61]

§ 117. **Turnpike Road as Highway.**—"A road constructed and supported by a turnpike corporation differs in no essential characteristic from a common highway, established and supported by a town, a borough, or a city. Their origin and objects are identical. Both emanate from the same supreme power, acting through the legislature, the courts, or other depositaries of authority designated by the laws. Both are called into existence, and supported, to subserve, in exactly the same way, the public necessities and convenience, and both alike are intended to endure for an indefinite period, and so long as that convenience requires or that necessity exists." [62] That a turnpike road is a public highway constructed by virtue of public authority and for public purposes, is definitely settled in Pennsylvania. Such a road is for the use of every person desiring to pass over it on payment of the toll established by law. If the charter of the company is forfeited, or the corporation abandons the road, such road continues to be a public highway. The corporation is the agent of the State for the purpose of constructing the road, which is a part of the system of public highways of the State.[63]

§ 118. **Waterworks.**—A franchise to construct waterworks can be conferred only through direct or delegated authority from the State, and it is quasi-public in its nature.[64] So a corporation

banks, as well as other corporate bodies. In all of these the State has a deep interest, and in many holds stocks to a large amount, with a power to appoint a portion of the directors." *Id.*, 317, per Rogers, J.

[60] Blood v. Woods, 95 Cal. 78, 30 Pac. 129.

[61] Hydes Ferry Turnpike Co. v. Davidson County, 91 Tenn. 291, 18 S. W. 626.

[62] State v. Maine, 27 Conn. 641, 71 Am. Dec. 89.

[63] Derry Township Road, In re, 30 Pa. Super. Ct. 538, 540, 541.

[64] Washburn Waterworks Co. v.

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organized under the general law of Illinois to supply a village with water is a corporation engaged in an enterprise, essentially public in its nature. Its property and its efforts are devoted to a use in which the public has an interest. Its corporate existence is granted to enable it to serve the public. It is not a private corporation, but it is quasi-public. The duty devolves upon it to furnish water for a reasonable compensation and without unjust discrimination, and the power resides in the State, acting in its sovereign capacity, to enforce the performance of such duty.[65]

§ 119. **Wharf — "Public Wharf" — Wharfingers.** — The words "public wharf" are not used in the Michigan statutes as a term to indicate anything anolagous to any public use, like that of highways, and the wharves in the city of Detroit are not highways and may be leased.[66] But a wharf may be so located, and so connected with public highways as to constitute the only means of access to navigable water for use of the mediums of commerce navigating such waters, that it becomes impressed with a public interest precluding its conversion by a lessee into private property to the exclusion of the public, or of other carriers desiring its use upon payment of reasonable wharfage.[67] Wharfingers are not common carriers where they carry goods from their wharf, for wharf customers only, except in special cases, and they act as lightermen or carmen.[68]

City of Washburn, 129 Wis. 73, 80, 108 N. W. 194, per Kerwin, J.

[65] Danville v. Danville Water Co., 180 Ill. 235, 241, 54 N. E. 224.

Whether such company is a public corporation, see Foster v. Fowler, 60 Pa. 27.

Whether public works include waterworks, see Opinion of Justices, 13 Fla. 699; Ellis v. Common Council of Grand Rapids, 123 Mich. 567, 82 N. W. 244; Winters v. City of Duluth, 82 Minn. 127, 135, 84 N. W. 788, per Collins, J., in dissenting opinion.

[66] Horn v. People, 26 Mich. 221, 224. See Kemp v. Stradley (Mich.), 10 Detroit Leg. N. 671, 97 N. W. 41.

[67] Weems Steamboat Co. v. People's Steamboat Co., 141 Fed. 454.

As to right of exclusive occupation of wharf, and public use thereof, see Thousand Islands Steamboat Co. v. Visgar, 83 N. Y. Supp. 325, 86 App. Div. 126; The Davidson (U. S. D. C.), 122 Fed. 1006.

[68] Chattock v. Bellamy, 64 L. J. Q. B. (N. S.) 250.

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CHAPTER VIII.

SOURCE OF FRANCHISE—FEDERAL, CONSTITUTIONAL AND LEGISLATIVE POWERS.

§ 120. National and State Powers—Generally.
121. Distinction Between Limitations on Powers of Federal and of State Governments.
122. Grant of Franchises—Governmental or Legislative Power—Generally.
123. Power of Congress to Establish Corporations—Generally.
124. Power of Congress to Grant Additional Franchises.
125. Power of Congress Over Franchises of State Corporation — Interstate Commerce — Generally.
126. Grants by Congress—Banks.
127. Power of Congress—Bridge Corporation — Bridges — Commerce.
§ 128. Power of Congress to Declare Bridge a Lawful Structure After Its Being Adjudged a Nuisance; or After Injunction Suit—Post Route.
129. Power of Congress to Grant Franchise to Railroads—Interstate Commerce—The Pacific Railroad Companies.
130. Power of Congress Over Territories—Telegraph and Telephone—Savings Institution — Territorial Powers Generally—Irrigation Companies.
131. Extent of Authority Granted by Post Roads Act—Telegraph Companies.

§ 120. **National and State Powers—Generally.**—In a comparatively recent case in the United States Supreme Court it is said: "In the Constitution are provisions in separate articles for the three great departments of government—legislative, executive and judicial. But there is a significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: 'Article I, section 1. All legislative powers herein granted shall be vested in a Congress,' etc.; and then in Article VIII mentions and defines the legislative powers that are granted. By reason of the fact that

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there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers. In McCulloch v. State of Maryland,[1] Chief Justice Marshall said: 'This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.' * * * When a legislative power is claimed for the National Government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication. * * * As heretofore stated, the constant declaration of this court from the beginning is that this Government is one of enumerated powers. 'The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. * * * The Government of the United States is one of delegated, limited and enumerated powers.' "[2] And one of the points determined in that case is that: In a qualified sense and to a limited extent the separate States are sovereign and independent, and the relations between them partake something of the nature of international law. The Federal Supreme Court in appropriate cases, enforces the principles of that law, and in addition by its decisions of controversies between two or more States is constructing what may not improperly be called a body of interstate law. It is also held in the same court that: The National Government is one of enumerated powers; that a power enumerated and delegated to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself; and that to preserve the even

[1] 4 Wheat. (17 U. S.) 316, 405, 4 L. ed. 579.

[2] Kansas v. Colorado, 206 U. S. 46, 81, 82, 84, 87, 51 L. ed. 956, 27 Sup. Ct. 655, per Brewer, J. See Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 44 L. ed. 1088.

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balance between the National and state governments and hold each in its separate sphere is the duty of all courts and pre-eminently of that court.[3] It is declared in an Iowa case that: "It is fundamental in our system of government that all powers not delegated to the United States by the terms of the Federal Constitution and its amendments, nor prohibited by it to the States are reserved to the States or to the people.[4] Subject to the authority thus expressly or by necessary inference delegated to the Federal government, the State has sovereign legislative power over all subjects, except such as are withheld from it by the constitution of the State itself." [5] The following principles have been enunciated by the Federal Supreme Court and they are important in this connection. Thus, it is asserted that: (*a*) The government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be directly exercised on them, and for their benefit; (*b*) the government of the Union, though limited in its powers, is supreme within its sphere of action, and its laws, when made in pursuance of the Constitution, form the supreme law of the land; (*c*) there is nothing in the Constitution of the United States, similar to the articles of confederation, which includes incidental or implied powers; (*d*) if the end be legitimate, and within the scope of the Constitution all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect; (*e*) if a certain means to carry into effect any of the powers, expressly given by the Constitution to the government of the Union, be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance; (*f*) it is a general rule, that in so far as

[3] South Carolina v. United States, 199 U. S. 437, 50 L. ed. ——, 26 Sup. Ct. —— (a case of internal revenue, liability of agents and of sale of liquors). See also Heff, Matter of, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. 506.

[4] Constitution United States, amendment 10.

[5] McGuire v. Chicago, Burlington & Quincy R. Co., 131 Iowa, 340, 349.

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laws passed by Congress are constitutional and are enacted to carry out the powers vested in the government of the United States, the States are not empowered to retard, burden or control the operations of such constitutional laws; [6] and (*g*) the prohibition in the Constitution of the United States against the passage of laws impairing the obligation of contracts applies to the constitution as well as to the laws of each State.[7] The people of the United States, and of the States, have agreed to constitutions as a basis of government, and for the security, amongst other essentials, of their rights, property and common welfare. The people have not, however, committed to the United States government "their own complete functions of legislation and administration," but have intrusted a portion to the separate States, "so that the rights of the individual shall be guarded from the encroachments of power." [8] The Constitution and laws of the United States, made in pursuance thereof, are, however, the supreme law of the land; [9] and every

[6] McCulloch v. State of Maryland, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579, cited and quoted from on this last point in United States v. Rickert, 188 U. S. 438, 439, 23 Sup. Ct. 480, 481, 47 L. ed. 536, 537; cited also in South Carolina v. United States, 199 U. S. 437, 452, 26 Sup. Ct. 110, 50 L. ed. 261, where Brewer, J., says: "The two governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers. This proposition, so far as the nation is concerned, was affirmed at an early date, in the great case of McCulloch v. Maryland, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579. * * * No answer has ever been made to the argument of Mr. Chief Justice Marshall, and the propositions there laid down have become fundamental in our constitutional jurisprudence."

[7] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 615, 6 Sup. Ct. 252. See § 304, herein.

[8] Pomeroy's Const. Law (3d ed.), p. 142, § 226; McRoan v. Devries, 3 Barb. (N. Y.) 198; State v. McCann, 4 Lea (72 Tenn.), 9. See Sage v. New York, 154 N. Y. 61, 47 N. E. 906, aff'g 41 N. Y. Supp. 938, 10 App. Div. 294.

[9] Const. U. S. art. 6, par. 2; Pensacola Teleg. Co. v. Western Union Teleg. Co., 96 U. S. 1, 18, 24 L. ed. 708, 1 Am. Elec. Cas. 253, per Waite, C. J. See Western Union Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. 934, 6 Am. Elec. Cas. 863; New Orleans Gas Light Co. v. Louisiana Light & H. P. & M. Co., 115 U. S. 672, 6 Sup. Ct. 252; Sinnot v. Davenport, 22 How. (63 U. S.) 227, 16 L. ed. 243; Dodge v. Woolsey, 18 How. (59 U. S.) 331, 50 L. ed. 401; Houston v. Moore, 5 Wheat. (18 U. S.) 49, 5 L. ed. 31.

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part of the territory under the jurisdiction of the government of the United States is, irrespective of state lines, subject to its operation and within its protection, provided its acts are within the scope of its powers, and, in so far as national rights are concerned, which belong to all, no part of the country can encroach upon another. Within this doctrine no State can, by legislation, exclude all commercial intercourse by telegraph between its citizens and those of other States, as the power to control and regulate interstate commerce is vested in Congress.[10] Again, it is declared that the Supreme Court are fully sensible, that it is their duty, in exercising the high powers conferred upon them by the Constitution of the United States, to deal with great and extensive interests, such as chartered property, with the utmost caution, guarding, so far as they have power to do so, the right of property, at the same time, carefully abstaining from any encroachment on the rights reserved to the States.[11]

§ 121. **Distinction Between Limitations on Powers of Federal and of State Governments.**[12]—The people, and through them the legislature, have supreme power in all matters of government where not prohibited by constitutional limitations, and, while the powers of the Federal government are restricted to those delegated, those of the state government embrace all that are not forbidden. And all acts of the legislature are presumed to be valid until it is clearly shown that they violate some constitutional restriction, and questions relating to the wisdom, policy and expediency of statutes are for the legislature and not for the courts to determine.[13] So the rule of construction of the Constitution of the United States and of state constitutions differs in this, that in the former, the question is one of enumerated powers granted to Congress;

[10] Pensacola Teleg. Co. v. Western Union Teleg. Co., 96 U. S. 1, 24 L. ed. 708, 1 Am. Elec. Cas. 253, per Waite, C. J. See Joyce on Electric Law (2d ed.), §§ 65–67.

[11] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 9 L. ed. 773.

[12] See § 137, herein.

[13] Boyce, Ex parte, 27 Nev. 299, 75 Pac. 1. See also Wallace v. City of Reno, 27 Nev. 71, 73 Pac. 528.

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in the latter, whether the law is legislative in its character and whether it is prohibited to the legislature.[14] Again, under a Virginia decision, the state constitution, unlike the Federal Constitution in this particular, is a restraining instrument, and in the matter of enacting laws, the legislature is omnipotent, except in so far as it is restrained by the state or Federal Constitution, either in express terms or by necessary implication. Its enactments, therefore, are always presumed to be constitutional, and can never be declared otherwise, except where they clearly and plainly violate the Constitution. All doubts are resolved in favor of their validity, and in resolving doubts, the legislative construction put upon the Constitution is entitled to great consideration though it will not be given a controlling effect.[15]

§ 122. **Grant of Franchises—Governmental or Legislative Power—Generally.**—As we have stated elsewhere, a franchise was early defined as a royal privilege in the hands of a subject; a branch of the royal prerogative subsisting in the hands of a subject.[16] Being such royal privilege or prerogative all franchises were derived from the crown and subsisted in a subject by grant from the king, which grant was a prerequisite to their existence, and, although it might in some cases be held by prescription, still such prescription presupposed a grant. So that in England, corporations are created and exist by royal charter, by act of Parliament and by prescription.[17] Where a

[14] State ex rel. Henson v. Sheppard, 192 Mo. 497, 507, 91 S. W. 477. See § 217, herein.

[15] Button v. State Corporation Commission, 105 Va. 634, 54 S. E. 769.

[16] See § 1, herein.

[17] **California:** Spring Valley Water Works v. Schottler, 62 Cal. 69, 106, per Thornton, J.

Georgia: Franklin Bridge Co. v. Young Wood, 14 Ga. 80, 84.

Illinois: Wilmington Water Power Co. v. Evans, 166 Ill. 548, 556, 46 N. E. 1083; People v. Haltz, 92 Ill. 426, 428.

New York: People v. Utica Ins. Co., 15 Johns. (N. Y.) 357, 386, 8 Am. Dec. 243, per Spencer, J. (a case of usurpation of franchise to carry on banking business as a corporation).

Pennsylvania: Twelfth St. Market Co. v. Philadelphia & Reading Term. Co., 142 Pa. 580, 590, 21 Atl. 989, per Thayer, J. (a case of a public market house and right of eminent

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charter is granted by the Crown under an act of Parliament and privileges are granted which could not be conferred by the Crown except by force of that enactment, it constitutes an incorporation of the company "by act of Parliament" within the terms of a will authorizing the investment of trust funds in stocks of companies incorporated as so directed.[18] The right to establish a ferry was a franchise, and no man could set up a ferry although he owned the soil and landing place on

domain over, or right of another corporation to appropriate).

Wisconsin: Sellers v. Union Lumbering Co., 39 Wis. 525, 527, per Ryan, C. J.

See also Finch's Laws of Eng. 126 [38].

See as to prescription, § 133, herein.

"By the Civil Law no corporation could be created without the express approbation of the *sovereign*, after a satisfactory representation of its usefulness and tendency to promote the public good. * * * In England, it is true, during the latter part of the Saxon period of its history, and for some time after the Conquest, the power of conferring corporate privileges was exercised by the nobles, within their respective demesnes. * * * In the time of Bracton, who lived in the reign of Henry III, and Edward I, the king's prerogative, as to the exclusive privilege of granting liberties and franchises in general, seems to have been fully established; and the absolute necessity of the king's assent to the institution of any corporation was held, in the reign of Edward III, to have been previously settled as clear law. The method by which the king's assent is expressly given, is either by *act of Parliament* (of which the royal assent is a necessary ingredient), or by *charter*. * * * The king or queen alone, when a corporation is intended with privileges, which by the principles of the English Law may be granted by the king, is qualified to create a corporation by his or her sole charter. * * * When, on the other hand, it is intended to establish a corporation vested with powers which the king cannot of himself grant, recourse must be had to an act of Parliament. * * * All the corporations which are said in the English books to have been created by the *common law* and by *prescription*, imply the sanction of the government." Angell & Ames on Corp. (9th ed.) §§ 66–69. See also Sellers v. Lumbering Co., 39 Wis. 525, 527, per Ryan, C. J.

Formerly grants of royal franchises were so common, that in the Parliament held in 21 Edw. 3, there is a petition from the Commons to the king, stating that franchises had been so largely granted in times past, that almost all the lands were enfranchised, to the great *averisement* and *estingsement* of the common law, and in great oppression of the people; praying the king to restrain such grants for the time to come. To which his majesty answered, that the franchises which should be granted in the future should be made with good advisement. 3 Greenleaf's Cruise on Real Prop. * 260.

[18] Elve v. Boyton (C. A.) [1891], 1 Ch. 501.

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both sides of the stream, without a charter from the king or a prescription time out of mind. The franchise to establish ferries was a royal prerogative, and the grant of the king was necessary to authorize a subject to establish a public ferry, even on his own premises.[19] Although the granting of franchises was a part of the prerogatives of the British Crown,[20] it is declared that on the severance of the colonies from Great Britian they became vested in the people; [21] and that the commonwealth stands in place of the king, and has succeeded to all the prerogatives and franchises proper to a republican government and those only, since many branches of the royal prerogative would be altogether improper in this country.[22] In McKim v. Odom,[23] decided in 1829, Bland, chancellor, says: "Under the provincial government, corporations were framed and called into existence, as in England, either directly by or with the immediate sanction of the lord proprietary or the monarch. But however they may have been originated formerly or elsewhere, it is certain that they can now only be established here by the authority of the legislature."

§ 123. **Power of Congress to Establish Corporations—Generally.**—The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the Constitution to the government of the Union, it may be exercised by that government.[24]

[19] People v. Budd, 117 N. Y. 1, 17, 18, 26 N. Y. St. R. 533, 22 N. E. 670, 682, per Andrews, J. See Milhau v. Sharp, 27 N. Y. 611, 619, 84 Am. Dec. 314, per Selden, J. See § 144, herein.

[20] Finch's Law of Eng. 164.

[21] Milhau v. Sharp, 27 N. Y. 611, 619, 84 Am. Dec. 314, per Selden, J.

[22] Commonwealth v. Arrison, 15 Serg. & R. (Pa.) 127, 130, per Tilghman, C. J. (a case of information in the nature of quo warranto).

[23] 3 Bland (Md.), 407, 417–419.

[24] McCulloch v. State of Maryland, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579. Examine United States v. Stanford, 70 Fed. 346, 361, 17 C. C. A. 143.

"The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power,

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§ 124. Power of Congress to Grant Additional Franchises.—It is well settled that Congress has power to grant,

which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means for which other objects are accomplished. * * * The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them. But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making 'all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department thereof.'" The court then considers the meaning of the words "necessary and proper" as used in this clause of the constitution and concludes that it was not intended to "abridge, and almost annihilate this useful and necessary right of the legislature to select its means * * * for the following reasons: 1st. The clause is placed among the powers of Congress, not among the limitations on those powers. 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. * * * Had the intention been to make this clause restrictive, it would undoubtedly have been so in form as well as in effect. The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist in the letter and spirit of the constitution, are constitutional. That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means have been sufficiently proved. * * * Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case, whatever, it would have found a place among the enumerated powers of the government. But be-

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to a corporation created by a State, additional franchises, at least of a similar nature.[25]

§ 125. **Power of Congress Over Franchises of State Corporation—Interstate Commerce—Generally.**—Franchises of a corporation chartered by a State are, so far as they involve questions of interstate commerce, exercised in subordination to the powers of Congress to regulate such commerce; and while Congress may not have general visitatorial power over state corporations, its powers in vindication of its own laws are the same as if the corporation had been created by an act of Congress.[26]

§ 126. **Grants by Congress—Banks.**—Congress has power to incorporate a bank, and the act of April 10, 1816, c. 44, to "incorporate the subscribers to the Bank of the United States," is a law in pursuance of the Constitution. The Bank of the United States has, also, constitutionally, a right to establish its branches or offices of discount and deposit within any State.[27] So in the Legal Tender Cases,[28] it is declared that:

ing considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it." McCulloch v. State of Maryland, 4 Wheat. (17 U. S.) 316, 411–421, 4 L. ed. 579, per Mr. Chief Justice Marshall.

[25] Southern Pac. R. Co. v. United States, 183 U. S. 519, 526, 527, 46 L. ed. 307, 22 Sup. Ct. 154, citing Sinking Fund Cases, 99 U. S. 700, 727, 25 L. ed. 496; Pacific Railroad Removal Cases, 115 U. S. 1, 15, 29 L. ed. 319, 5 Sup. Ct. 1157; California v. Central Pacific Rd., 127 U. S. 1, 32 L. ed. 150, 8 Sup. Ct. 1073; United States v. Stanford, 161 U. S. 412, 431, 16 Sup. Ct. —, 40 L. ed. 751; Central Pacific Rd. v. California, 162 U. S. 91, 118, 123, 16 Sup. Ct. 766, 40 L. ed. 903.

[26] Hale v. Henkel, 201 U. S. 43, 75, 50 L. ed. 652, 26 Sup. Ct. 370.

[27] McCulloch v. State of Maryland, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579, cited in Slaughter-House Cases, 16 Wall. (83 U. S.) 36, 64, 21 L. ed. 394. Decision discussed in Hepburn v. Griswold, 8 Wall. (75 U. S.) 603, 629, 19 L. ed. 650, in dissenting opinion of Miller, Swayne and Davis, JJ. That Congress has power to establish

[28] 110 U. S. 421, 438, 445, 28 L. ed. 204, 4 Sup. Ct. 122, per Gray, J., where McCulloch v. State of Maryland (cited at beginning of last preceding note), is considered.

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"It is equally well settled that Congress has the power to incorporate national banks, with the capacity, for their own profit as well as for the use of the government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of the tender." [29] National banks organized under the act of 1864 [30] are the instruments designed to be used to aid the government in the administration of an important branch of the public service; and Congress, which is the sole judge of the necessity for their creation, having brought them into existence, the States can exercise no control over them, nor in any wise affect their operation, except so far as it may see proper to permit.[31]

a national bank considered as settled in Veazie Bank v. Fenno, 8 Wall. (75 U. S.) 533, 551, 19 L. ed. 482, in dissenting opinion of Nelson & Davis, JJ. This case holds that Congress having undertaken, in the exercise of undisputed constitutional power, to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain by suitable enactments, the circulation of any notes, not issued under its own authority, and it may impose a tax on the notes of state banks. See also as to right to incorporate bank, Magill v. Parsons, 4 Conn. 321.

[29] "The bank is not considered as a private corporation, where the principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. * * * It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court in McCulloch v. State of Maryland, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.' It * * * was created in the form in which it now appears, for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. * * * Why is it that Congress can incorporate or create a bank? This question was answered in the case of McCulloch v. State of Maryland, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579. It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government." Osborn v. United States Bank, 9 Wheat. (22 U. S.) 738, 860, 861, 6 L. ed. 204, per Marshall, C. J.

[30] Act of June 13, 1864, 13 Stat. 99.

[31] Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196.

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§ 127. Power of Congress—Bridge Corporation—Bridges—Commerce.—Congress, under the power to regulate commerce among the States, may create a corporation to build a bridge across navigable water between two States, and to take private lands for the purpose, making just compensation therefor.[32] And it can exercise this power without the consent of any State.[33] So the act of July 11, 1890, c. 669, to incorporate the North River Bridge Company, and to authorize the construction of a bridge across the Hudson River between the States of New York and New Jersey, is constitutional.[34] And the act approved June 16, 1886, authorizing the construction of a bridge across Staten Island Sound, known as "Arthur Kill" is within the power of Congress to regulate commerce and is valid.[35] Congress has power also to determine the location, plan, and mode of construction of railroad bridges.[36]

[32] Luxton v. North River Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. ed. 808. See §§ 145, 152, herein.

[33] Decker v. Baltimore & N. Y. R. Co., 30 Fed. 723, 1 Inters. Comm. Rep. 434. See also Stockton v. Baltimore & N. Y. R. Co., 32 Fed. 9, 1 Inters. Comm. Rep. 411.

As to powers of Congress and of the States as to bridges, see the following cases:

United States: Montgomery v. Portland, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. 852; Lake Shore & Michigan Ry. v. Ohio, 165 U. S. 365, 366, 368, 41 L. ed. 747, 748, 17 Sup. Ct. 357; Williamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. 1; Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962; Hamilton v. Vicksburg, Shreveport & Pac. Rd., 119 U. S. 281, 30 L. ed. 393, 7 Sup. Ct. 206; Miller v. Mayor of New York, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. ed. 971; South Carolina v. Georgia, 93 U. S. 4, 13, 23 L. ed. 782; United States v. Cincinnati & Muskingum Valley Ry. Co., 134 Fed. 353, 67 C. C. A. 335. See Missouri v. Illinois (Chicago Drainage Case), 200 U. S. 496, 50 L. ed. 572, 26 Sup. Ct. 268, per Holmes, J., discussing the Wheeling Bridge Case.

Maine: State v. Leighton, 83 Me. 419, 22 Atl. 380.

Maryland: Baltimore v. Stole, 52 Md. 435.

Michigan: Dietrich v. Schreman, 117 Mich. 298, 75 N. W. 618.

New Hampshire: Dover v. Portsmouth Bridge, 17 N. H. 200.

New York: People v. Kelly, 76 N. Y. 475.

As to Post Roads Act; Commerce; Bridges; Submarine Cables, see Joyce on Electric Law (2d ed.), §§ 68–83.

[34] Luxton v. North River Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. ed. 808.

[35] Stockton v. Baltimore & N. Y. R. Co., 32 Fed. 9, 1 Inters. Comm. Rep. 411.

[36] Texarkana & Ft. Smith Ry. Co. v. Parsons, 74 Fed. 411.

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The act of congress of 1866,[37] which authorized a bridge to be constructed across the Missouri River at Kansas City, required that the distance of 160 feet between the piers of the bridge, which was called for by the act, should be obtained by the measuring along a line between said piers drawn perpendicularly to the faces of the piers and the current of the river; and as such a line drawn between the piers of the bridge of the plaintiff in error measured only 153 feet and a fraction of a foot, instead of the required 160 feet, it was held that it was not a lawful structure within the meaning of that act.[38] If Congress authorizes the construction of a railway bridge across a navigable river, and prescribes the location and mode of its construction, and the bridge is built in conformity therewith, it is then a legal structure; but if it is apparent upon its completion, owing to its location or mode of construction, or through some change in the channel of the river, that such bridge is in fact an unreasonable obstruction to navigation, Congress can require it to be remodeled or to be entirely removed if that is the only remedy. If when constructed it is a legal structure its *status* cannot be charged by judicial action, or by any power short of that which legalized it in the beginning. And Congress may legalize a bridge after its erection.[39]

§ 128. **Power of Congress to Declare Bridge a Lawful Structure After Its Being Adjudged a Nuisance; or After Injunction Suit—Post-Route.**[40]—Congress has power to provide by statute that a bridge is a lawful structure, and such act will be constitutional,[41] although that bridge has, by decision rendered before the said enactment, been held to be a nuisance.[42] The prior judgment, however, which related to

[37] Act July 25, 1866, 14 Stat. 244, § 10.

[38] Hannibal & St. Joseph Rd. Co. v. Missouri River Packet Co., 125 U. S. 260, 31 L. ed. 731, 8 Sup. Ct. 874.

[39] United States v. Keokuk & Hamilton Bridge Co. (Dist. Ct.), 45 Fed. 178, case is distinguished in E. A. Chatfield Co. v. City of New Haven, 110 Fed. 788, 792.

[40] See § 152, herein.

[41] Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. (59 U. S.) 421, 15 L. ed. 435.

[42] Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. (54 U. S.) 518, 14 L. ed. 249.

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the abatement of the bridge, proceeded upon the ground that the bridge was in conflict with the then existing regulations of commerce by Congress, and was executory, depending upon the bridge continuing to be an unlawful obstruction to the public right of free navigation, but that right having been so modified by the above-mentioned act of Congress that it no longer constituted an unlawful obstruction, the prior decree could not be enforced, and the authority to maintain the bridge existed from the moment of said enactment, for the authority then combined the concurrent powers of both governments, state and Federal, which are sufficient. The bridges concerning which this controversy arose were over the Ohio River, and the act of Congress declared them to be lawful structures at their then height and position, and required the officers and crews of vessels navigating the Ohio River to regulate their vessels so as not to interfere with the elevation and construction of said bridges.[43] An act of Congress is also constitutional which provides that a certain bridge, theretofore erected over a river which divides two States, "shall be a lawful structure, and shall be recognized and known as a post-route." Such an enactment means not only that the bridge shall be a post-route but also that as built, with its abutments, piers, superstructure, draw and height, it should have the sanction of law, and be maintained and used in that condition, and this is so, even though the statute is declared by its title to be an act declaring the bridge "a post-route." Such enactment also operates to abate an injunction suit, instituted prior to the passage of the act, to prevent erection of the bridge and to have it declared a nuisance, even though the case was ready for a hearing.[44]

See as to bridge as a nuisance Joyce on Law of Nuisances (ed. 1906), § 274.

[43] The act was passed Aug. 31, 1852, 10 Stat. at L. 112, §§ 6, 7. Decree in former case was at May term, 1852. Said act was also held not invalid by reason of the compact, as to free navigation of the Ohio River, made between Virginia and Kentucky with the sanction of Congress when the latter State was admitted into the Union.

[44] Clinton Bridge, The, 10 Wall. (77 U. S.) 454, 20 L. ed. 969.

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§ 129. Power of Congress to Grant Franchise to Railroads—Interstate Commerce—The Pacific Railroad Companies.—That Congress has power to construct, or to grant franchises to individuals or corporations to construct, railroads across the States and Territories of the United States is so held in relation to the statutes enacted by that body, conferring franchises of the most important character upon the Central Pacific Railroad Company; and the United States Supreme Court declares upon this subject as follows: "If, therefore, the Central Pacific Railroad Company is not a Federal corporation, its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden City, were conferred upon it by Congress. It cannot be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, National highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the more important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely

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exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of state as well as Federal corporations." [45] As to the Central Pacific Company, it is a corporation of California recognized as such by the acts of Congress granting it aid and conferring upon it Federal franchises, and it was not the object of those acts to sever its allegiance to the State or transfer the powers and privileges derived from it; nor did those consequences result from the acceptance of the grant by the corporation; nor is the state franchise destroyed by or merged in the right granted under the acts of Congress so that taxation by the State of the franchise granted by it is precluded. It was also held that the property of a corporation of the United States may be taxed by a State, but not through its franchise.[46] Again, the Union Pacific Railway Company is, as to its road, property and franchises in Kansas, a corporation *de facto* created and organized under acts of Congress; and as to the same in Nebraska, it is strictly and purely a corporation deriving all its corporate and other powers from acts of Congress. The Texas and Pacific Railway Company is also a corporation, deriving its corporate powers from acts of Con-

[45] California v. Pacific Rd. Co., 127 U. S. 1, 39, 40, 32 L. ed. 150, 8 Sup. Ct. 1073, per Bradley, J., citing Pacific Rd. Removal Cases, 115 U. S. 1, 14, 18, 29 L. ed. 319, 5 Sup. Ct. 1113.

[46] Central Pacific Rd. Co. v. California, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. 766, affirmed and followed in Southern Pacific Rd. Co. v. California, 162 U. S. 167, 16 Sup. Ct. 794, 40 L. ed. 929.

"*It may be said that the franchise which the State may sell is that which was granted by it. But is the state franchise so distinct and separate from the franchise granted by the United States* that it can be sold separately from the franchise granted by the United States? It seems to me that the franchise to build, operate and maintain a railroad from San Francisco to a point of junction with the Union Pacific Railroad is a unit, and that it is utterly impracticable to separate and sell so much of that franchise as originally came from the State, and leave intact that which was derived from the United States. The State cannot lawfully do anything to impair or cripple the franchises, rights and privileges derived from the United States." Central Pacific Rd. v. California, 162 U. S. 91, 165, 40 L. ed. 903, 16 Sup. Ct. 766, per Harlan, J., in dissenting opinion.

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gress.[47] The United States has also granted aid to the Pacific railroads as well as aid in developing the telegraph system.[48]

[47] Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. ed. 319.

[48] See Joyce on Electric Law (2d ed.), §§ 30–37*a*.

Lands which at the time a railroad grant attached by the filing and approval of the map of definite location, were within the claimed but undetermined limits of a Mexican grant, did not pass to the railroad company although within the place limits of its grant, and this notwithstanding the fact that by the final survey and patent they were excluded from the Mexican grant. A survey of the Mexican grant made by the proper officers at the instance of the applicant and before the railroad grant attached included the disputed lands. The applicant did not repudiate the survey, but sought a patent based upon it. It was in legal effect his claim to the lands. The government not questioning the right to have such a survey at the time it was applied for and made, ordered a resurvey on the ground that the boundaries shown in the first survey were incorrect. The second survey was made after the railroad grant attached and excluded the lands, and it was held that the lands were *sub judice* at the time the railroad grant attached and were not included within it. Southern Pacific Rd. Co. v. United States, 200 U. S. 354, 50 L. ed. 512, 26 Sup. Ct. 298.

The acts of March 3, 1887, 24 Stat. 556, of Feby. 12, 1896, 29 Stat. 6, and of March 2, 1896, 29 Stat. 42, do not, in providing for adjustment of railroad land grants, amount to a taking of the railroad companies' property without compensation because they confirm sales made to bona fide purchasers of lands erroneously patented to railroad companies and require such companies to account for and pay to the government the amounts received by them from such purchasers up to the regular government price. Southern Pacific Rd. Co. v. United States, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. ed. 507.

Under the act of March 3, 1871, c. 122, 16 Stat. 573, the rights of the Southern Pacific Railroad Company were subordinate to those of the Texas Pacific Railroad Company. When the Texas Pacific grant was declared forfeited by the act of February 28, 1885, the forfeiture did not vest the Southern Pacific with the lands forfeited, but the forfeiture inured to the benefit of the United States. Southern Pacific Rd. Co. v. United States, 189 U. S. 447, 23 Sup. Ct. 567, 47 L. ed. 896.

The title of the Southern Pacific Railroad Company to the lands in controversy in this suit was acquired by virtue of the act of July 27, 1866, 14 Stat. 292, and the construction of the road was made under such circumstances as entitle the company to the benefit of the grant made by the eighteenth section of that act. And the grant to the Southern Pacific and that to the Atlantic and Pacific both took effect, and both being *in præsenti*, when maps were filed and approved, they took effect by relation as of the date of the act. The United States having by the Forfeiture Act of July 6, 1866, became possessed of all the rights and interests of the Atlantic and Pacific company in this grant within the limits of California, had an equal undivided moiety in

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§ 130. Power of Congress over Territories—Telegraph and Telephone—Savings Institution—Territorial Powers Generally—Irrigation Companies.—While the United States holds country as a Territory it has all the powers both of national and municipal governments, Federal and state;[49] its legisla-

all the odd-numbered sections which lie within the conflicting place limits of the grant to the Atlantic and Pacific Company and of that made to the Southern Pacific Company by the act of July 27, 1866, and the Southern Pacific Company holds the other equal undivided moiety thereof. Southern Pacific Rd. Co. v. United States, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. 154.

The Atlantic and Pacific Railroad Company took no title to lands within the indemnity limits of its grant until the deficiency in the place limits had been ascertained and the company had exercised its right of selection. Southern Pacific Rd. Co. v. Bell, 183 U. S. 675, 46 L. ed. 383, 22 Sup. Ct. 232.

Examine further as to public lands and aid to railroads, Howard v. Perrin, 200 U. S. 1, 50 L. ed. 343, 26 Sup. Ct. 229; Northern Pacific Ry. Co. v. Ely, 197 N. S. 1, 49 L. ed. 639, 25 Sup. Ct. 302; Ramsey v. Tacoma Land Co., 196 U. S. 360, 49 L. ed. —, 25 Sup. Ct. —; Humbird v. Avery, 195 U. S. 480, 25 Sup. Ct. 123, 49 L. ed. 286; United States v. Northern Pacific Rd. Co., 193 U. S. 1, 24 Sup. Ct. 330, 48 L. ed. 593, 177 U. S. 435, 44 L. ed. 836, 20 Sup. Ct. 706; Northern Pacific Ry. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. 671; Oregon & California Rd. Co. v. United States (No. 3), 190 U. S. 186, 47 L. ed. 1012, 23 Sup. Ct. 673, (No. 2), 189 U. S. 116, 47 L. ed. 732, 23 Sup. Ct. 620 (No. 1), 189 U. S. 103, 47 L. ed. 726, 23 Sup. Ct. 615; Northern Pacific Ry. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. 365; Nelson v. Northern Pacific Ry. Co., 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. 302; United States v. Southern Pacific Rd. Co., 184 U. S. 49, 46 L. ed. 425, 22 Sup. Ct. 285; Powers v. Slaght, 180 U. S. 173, 45 L. ed. 479, 21 Sup. Ct. 319; Hewitt v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. 309; United States v. Tennessee & Coosa Rd. Co., 176 U. S. 242, 44 L. ed. 452, 20 Sup. Ct. —; United States v. Oregon & California Rd. Co., 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. 261.

[49] Shively v. Bowlby, 152 U. S. 1, 48, 38 L. ed. 331, 14 Sup. Ct. 548. See § 139, herein.

Power when ceded territory not made part of United States. In the case of Dorr v. United States, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. 808, it is held that Congress has the right to make laws for the government of Territories, without being subject to all the restrictions which are imposed upon it when passing laws for the United States considered as a political body of States, and, until territory ceded by treaty has been incorporated into the United States, it is to be governed under Congress subject only to such constitutional restrictions upon its powers as are applicable to the situation. See Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1048, 21 Sup. Ct. 770.

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tive powers over the Territories is plenary, subject to express or implied constitutional limitations,[50] and the combined powers of the general and state governments are exercised by Congress in its legislation for Alaska.[51] So Congress in the exercise of its powers to regulate commerce has full authority to grant rights of way through the land domiciled by Indian tribes in Indian Territory, and where it has exercised this power by authorizing the Secretary of the Interior to grant such rights of way for the construction, operation and maintenance of telephone and telegraph lines, it follows that none of the Indian tribes could grant an exclusive right to any one company, and that grants by such tribes were annulled by the statutory provisions.[52] An act of Congress,[53] which grants a right of way through the Indian Territory to the Southern Kansas Railway Company, for a railroad, telegraph and telephone line, is also a valid exercise of the power of Congress to regulate commerce among the several States and with the Indian tribes.[54] Congress has also power to grant, at its discretion,

[50] Allen v. Reed, 10 Okla. 105, 60 Pac. 782. Examine United States v. Binns, 1 Alaska, 553.

[51] Allen v. Myers, 1 Alaska, 114.

[52] Muskogee Nat. Teleph. Co. v. Hall, 118 Fed. 382, 385, 55 C. C. 208, rev'g decree of U. S. Ct. App. in Ind. Ty., 4 Ind. Ty. 18, and aff'g decree in United States court in Indian Ty. Northern Division, rendered April, 1900.

[53] Act July 4, 1884, 23 Stat. 73, c. 179.

[54] Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. 965.

Amongst the various statutes which have been enacted by Congress, in the exercise of its powers, are the following, which provide for a right of way through Indian Territory for railway, telegraph and telephone lines with the right to take and condemn lands for such purposes (U. S. Comp. Stat. Supp. 1905, p. 371, act Feb. 28, 1902, c. 134, §§ 13, 17, 32 Stat. at L. pp. 47, 49); for the regulation of charges on such telegraph and telephone lines (U. S. Comp. Stat. Supp. 1905, p. 373, act Feb. 28, 1902, c. 134, § 16, 32 Stat. at L. pp. 48, 49); and for dams across non-navigable streams in that Territory to be used by light and power companies, to generate electric power, light and heat. Act of April 26, 1906, c. 1876, § 25, Stat. 1905–1906, Part 1, pp. 146, 147. Congress also provides for a telephone system on the island of Oahu, Territory of Hawaii (act June 20, 1906, c. 3441, § 4184, Stat. 1905–1906, Part I, p. 309), and regulates telephone and other electric wires in the District of Columbia. Act March 3, 1905, c. 1415, 33 Stat. at L. pp. 984–986. See acts April 27.

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a charter to a savings institution with its location and domicile in Washington in the District of Columbia by virtue of the grant to it of "exclusive legislation in all cases whatsoever over the district." [55] Again, the statutes of a Territory may be approved or declared void irrespective of the organic territorial act.[56] So an act of Congress may require the submission, to that body, of territorial statutes, and its disapproval may render them void, although such statutes may be presumed valid where there is no disapproval thereof, by Congress.[57] A statute of a Territory which is approved by Congress "subject to future territorial legislation" cannot by virtue of such proviso be repealed by the legislature, but the latter is thereby authorized to enact such legislation as may be in furtherance of the main object of the confirming and approving act of Congress.[58] Territorial statutes, enacted within the power of a Territory, are not laws of the United States.[59] But the power of eminent domain may, it is held, be exercised by a Territory under its organic law, when not re-

1904, c. 1628, 33 Stat. at L. p. 374; Rev. Stat. § 5263, p. 1019; act June 20, 1902, c. 1136, 32 Stat. at L. pp. 393–395; act July 1, 1902, c. 1352, 32 Stat. at L. p. 619, par. 5. (Tax on Telephone Companies.) The right of way is also extended by statute to electric power companies, through the Secretary of the Interior, upon the necessary public lands and forests of the United States. Act May 14, 1896, c. 179, 29 Stat. at L. p. 120, U. S. Comp. Stat. 1901, p. 1573. And such statutes empower the Edison Electric Company to occupy certain lands in certain forest reserves in California for electric power plants. Act May 1, 1906, c. 2076, U. S. Stat. 1905–1906, Part I, p. 163. See act Jan. 18, 1897, c. 61, 29 Stat. at L. 489, U. S. Comp. Stat. 1901, p. 3029. The use of electricity is also allowed to private parties in Yellowstone National Park under certain conditions, such as permission and regulations prescribed by the Secretary of War. Act March 3, 1903, c. 1007, § 1, U. S. Comp. Stat. Supp. 1905, p. 365, 32 Stat. at L. p. 1130. See act Feb. 15, 1901, c. 372, 31 Stat. at L. 790, U. S. Comp. Stat. 1901, p. 1584, as to use of other public parks and reservations for electrical plants, telephone and telegraph companies.

[55] Williams v. Cresswell, 51 Miss. 817, 822.

[56] Allen v. Reed, 10 Okla. 105, 60 Pac. 782.

[57] Buttron v. El Paso Northeastern Ry. Co. (Tex. Civ. App.), 93 S. W. 676.

[58] Murphy v. Utter, 186 U. S. 95, 46 L. ed. 1070, 22 Sup. Ct. 776.

[59] Moran, Ex parte, 144 Fed. 594, 75 C. C. 396; s. c., 203 U. S. 103, 51 L. ed. —, 27 Sup. Ct. —.

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stricted by the Constitution and laws of the United States.[60] The provisions of the corporation laws of the Territory of New Mexico relating to the formation and rights of irrigation companies are not invalid because they assume to dispose of property of the United States without its consent. By the acts of 1866 and 1877,[61] Congress recognizes as respects the public domain, and so far as the United States is concerned, the validity of the local customs, laws and decisions in respect to the appropriation of water, and granted the right to appropriate such amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, and as to the surplus, the right of the public to use the same for irrigation, mining and manufacturing purposes subject to existing rights. The purpose of Congress to recognize the legislation of Territories as well as of States in respect to the regulation of the use of public water is evidenced by the act of March 3, 1891, 26 Stat. 1095. The statute of New Mexico is not inconsistent with the legislation of Congress on this subject.[62]

§ 131. **Extent of Authority Granted by Post Roads Act—Telegraph Companies.**—The right given by act of Congress[63] to telegraph companies to construct their lines over and along military and post roads of the United States upon compliance with certain conditions is permissive only and confers no right to use the streets and alleys of a city and to take municipal property without compensation. Such companies cannot use said streets without authority from the city; the Congress of the United States has no power to take private property without compensation.[64] The Post Roads Act confers

[60] Sanford v. City of Tucson (Ariz., 1903), 71 Pac. 903.

[61] Act July 26, 1866, 14 Stat. 253, Rev. Stat. § 2339; act March 3, 1877, 19 Stat. 377.

[62] Gutierres v. Albuquerque Land & Irrigation Co., 188 U. S. 545, 47 L. ed. 588, 23 Sup. Ct. 338.

[63] Act July 4, 1866.

[64] Postal Teleg. Cable Co. v. City of Newport, 25 Ky. L. Rep. 635, 74 S. W. 159, 8 Am. Elec. Cas. 25, 27, citing Postal Teleg. Co. v. Baltimore, 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. 356; St. Louis v. Western Union Teleg. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. ed. 380.

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a right and not a mere privilege to construct, maintain and operate telegraph lines in the manner provided, and upon, over and along the places specified. A plenary power is granted for the benefit of the public and of the government of the United States, having in view the growing necessity of commerce and the needs of the postal service.[65] But while the statute confers this right it may not be exercised absolutely and under all circumstances. It cannot be taken away by hostile state legislation, nor can such legislation operate to prevent placing telegraph lines upon, over, along or under, the places designated in said Post Roads Act. Nor after such lines are located there, may the use of them be stopped by state or municipal legislation. Nevertheless, the right conferred is limited or abridged to this extent, that the statute is permissive only in many respects.[66] The Post Roads Act being permissive only, it was never intended to interfere with the proper regulation and control of such highways by the States, counties or municipalities which had them in charge, and such statute also expressly provides that such telegraph lines shall be so maintained as not to "interfere with the ordinary travel on such military or post roads." [67] The authority conferred under the Post Roads Act is subordinated in its exercise to the rights of the public to a certain extent, and also to the exercise, within lawful limits, of the police power of the State or municipality which the telegraph company has entered for the purpose of constructing its lines. Such company must submit to the ordinary, reasonable and lawful regulations of the state

[65] Hewett v. Western Union Telegraph Co., 4 Mackey (D. C.), 424, 16 Am. & Eng. Corp. Cas. 276, 2 Cent. Rep. 694, 2 Am. Elec. Cas. 222, 225, 226, per Merrick, J.

[66] St. Louis v. Western Union Teleg. Co., 148 U. S. 92, 37 L. ed. 380, 39 Fed. 59, 4 Am. Elec. Cas. 102, 111, 13 Sup. Ct. 485, per Mr. Justice Brewer, citing with approval Western Union Teleg. Co. v. Attorney-General of Mass., 125 U. S. 530, 548, 31 L. ed. 790, 8 Sup. Ct. 961, 21 Am. & Eng. Corp. Cas. 13, 2 Am. Elec. Cas. 57, 61, per Mr. Justice Miller; Southern Bell Teleph. & Teleg. Co. v. Richmond (C. C. E. D. Va.), 78 Fed. 858, 6 Am. Elec. Cas. 1, 6, per Goff, Cir. J.

[67] Ganz v. Ohio Postal Teleg. Cable Co., 140 Fed. 692, rev'g Ohio Postal Teleg. Cable Co. v. Board of Commissioners, 137 Fed. 947.

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and local governmental authorities whose highways and streets are used, even though said roads and streets are post and military roads.[68] But, on the other side, although the State may, in the exercise of its police power, enact such laws relating to persons and property within its territorial limits as shall best promote general prosperity, and the public health, safety and morals, nevertheless, it cannot encroach upon the powers of the Federal government so as to materially impair or destroy rights granted or secured by constitutional acts of Congress, or granted under a constitutional exercise of power. Especially is this true of the constitutional right to regulate commerce.[69] It is held, however, in a case in the United States Circuit Court that the police power is inherent in the States, and is not affected by the United States interstate commerce provision, nor by the Post Roads Act.[70] These two propositions, although seemingly inconsistent, are perfectly reconcilable. It is well settled that the police power extends to the protection of life, health and property, and that no citizen should be permitted to exercise his rights so as to injuriously affect a community in these matters. A strictly legitimate exercise of the police power of a State does not, in a constitutional sense,

[68] Richmond v. Southern Bell Teleph. & Teleg. Co., 42 U. S. App. 686, 28 U. S. C. C. A. 659, 85 Fed. 19, 30 Chic. Leg. News, 271, 3 Va. La. Reg. 856; Southern Bell Teleph. & Teleg. Co. v. Richmond, 78 Fed. 858, 6 Am. Elec. Cas. 1, 6, per Goff, Cir. J.; Clausen & Sons Brewing Co. v. The Baltimore & Ohio Teleg. Co. (N. Y. Sup. Ct. Chambers, 1884), 2 Am. Elec. Cas. 210, 217, per Van Brunt, J.; Mutual Union Teleg. Co. v. Chicago, 16 Fed. 309, 1 Am. Elec. Cas. 506, 507, per Drummond, J.

[69] Western Union Teleg. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. ed. 1105, 6 Am. Elec. Cas. 858, 861, 16 Sup. Ct. 934, per Mr. Justice Peckham; People v. Hawkins, 20 N. Y. App. Div. 494, 47 N. Y. Supp. 56, citing Walling v. Michigan, 116 U. S. 446–460, 29 L. ed. 691, 696, 6 Sup. Ct. 454; People v. Gilson, 109 N. Y. 389–401, 4 Am. St. Rep. 465, 17 N. E. 343; New Orleans Gas Light Co. v. Louisiana L. & H. P. & Mfg. Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; Brennan v. Titusville, 153 U. S. 289–299, 4 Inter. Comm. Rep. 658, 38 L. ed. 719, 722, 14 Sup. Ct. 829; Jacobs, In re, 98 N. Y. 98–108, 50 Am. St. Rep. 636.

[70] Western Union Teleg. Co. v. Mayor of New York, 38 Fed. 552, 2 Inter. Comm. Rep. 533, 3 L. R. A. 449, 6 Ry. & Corp. L. Jour. 105, 2 Am. Elec. Cas. 195.

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necessarily encroach upon any authority confided expressly or by implication to the national government. In addition, the exercise of the police power in the last case above noted, related to the enforcement of the subway act[71] in the city of New York.[72] The franchise of a telegraph company is derived from the State, and it owes its existence to the state law of organization, even though its privilege of running lines over post and military roads is derived from Congress.[73] A telegraph company, therefore, within the limitations above specified, owes obedience to the state laws, notwithstanding it has accepted the provisions and benefits of the Post Roads Act.[74] It may be stated in this connection that it is a general principle that the State may legislate with binding effect within its territorial limits where such enactments relate to the rights, duties and liabilities of citizens, and are not directed against commerce nor any of its regulations.[75]

[71] Laws N. Y. 1884, c. 534; Laws 1885, c. 499, and Laws 1887, c. 716.

[72] The case last given is cited with approval in State ex rel. Wisconsin Teleph. Co. v. Janesville St. Ry. Co., 87 Wis. 72, 41 Am. St. Rep. 23, 4 Am. Elec. Cas. 289, 294, 57 N. W. 970, per Orton, C. J. See Western Union Teleg. Co. v. Mississippi R. Commission, 74 Miss. 80, 21 So. 15.

[73] Western Union Teleg. Co. v. Attorney-General of Mass., 125 U. S. 530, 548, 31 L. ed. 790, 8 Sup. Ct. 961, 21 Am. & Eng. Corp. Cas. 13, 2 Am. Elec. Cas. 57, 60, 61, per Mr. Justice Miller; Attorney-General of Mass. v. Western Union Teleg. Co., 141 U. S. 40, 3 Am. Elec. Cas. 20, 24, 25, 35 L. ed. 628, 11 Sup. Ct. 889, per Mr. Justice Gray.

[74] See Attorney-General of Mass. v. Western Union Teleg. Co., 141 U. S. 40, 3 Am. Elec. Cas. 20, 24, 11 Sup. Ct. 889, 35 L. ed. 628, per Mr. Justice Gray; St. Louis v. Western Union Teleg. Co., 148 U. S. 92, 37 L. ed. 380, 39 Fed. 59, 4 Am. Elec. Cas. 102, 111, 13 Sup. Ct. 485, per Mr. Justice Brewer, citing Western Union Teleg. Co. v. Massachusetts, 125 U. S. 530, 548, 21 Am. & Eng. Corp. Cas. 13, 31 L. ed. 790, 8 Sup. Ct. 961, per Mr. Justice Miller.

[75] Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819, cited with approval in Western Union Teleg. Co. v. Tyler, 90 Va. 297, 4 Am. Elec. Cas. 816, 819, 18 S. E. 280, per Lewis, P.

See Joyce on Electric Law (2d ed.), under the following sections: § 38. Acts aiding telegraph companies—Post Roads Act; § 39. Object of Post Roads Act; § 40. Powers of Congress—Commerce—Post-offices and post roads; § 41. Object of vesting power in Congress—Commerce; § 42. Legislative intent—New discoveries—Regulation of Commerce; § 42*a*. Interstate Commerce—Regulation of by common law and acts of Congress; § 43. Telegraph is instrument of commerce—Control of Congress;

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§ 44. Telephone is instrument of interstate commerce; § 45. Whether Post Roads Act includes telephone companies; § 45*a*. Post Roads Act—Messenger service—Call boxes; § 46. What are post and military roads; § 47. Post Roads Act not limited to public domain; § 48. Post Roads Act applies to District of Columbia; § 49. Post Roads Act applies to companies thereafter formed; § 50. Post Roads Act—Regulation of commerce—Foreign corporation; § 51. Acceptance necessary of Post Roads Act; § 51*a*. Certificate of postmaster general competent evidence of acceptance; § 52. Effect of acceptance of Post Roads Act; § 52*a*. Foreign corporations—Incorporation prerequisite to acceptance—Post Roads Act does not confer franchise; § 53. Post Roads Act does not authorize condemnation; § 54. Post Roads Act—Condemnation under state law—Telegraph companies; § 55. Commerce—Federal Constitution—Municipal powers; § 56. Commerce—Federal Constitution—Stipulations in telegraph blanks against negligence; § 57. Commerce—Federal constitution—Tariff or rates for telegraph or telephone; § 62. Post Roads Act—Authority conferred; § 63. Post Roads Act—Limitations upon authority or right conferred; § 64. Same subject—Public and private property—Streets and highways—Abutting owners; § 65. Post Roads Act exclusive—Hostile legislation; § 66. Post Roads Act exclusive—Hostile legislation continued—Modification of rule; § 67. Post Roads Act—Modification of the rule as to hostile legislation continued. See also *id.*, §§ 30–37*c*, 68–83, 130–140*a*.

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CHAPTER IX.

SOURCE OF FRANCHISE CONTINUED—STATE, CONSTITUTIONAL AND LEGISLATIVE POWERS.

§ 132. Legislative Power—Source of Franchise of Charter—Legislative Grant Necessary.
133. Same Subject—Prescription.
134. Test of Legislative Power to Grant Franchises.
135. Distribution or Division of Powers of State.
136. What Matters Exclusively Within Legislative Discretion—Power of Courts.
137. Limitations on Powers of State Legislature.
138. Abdication or Surrender of Essential or Distinctive Legislative Powers—Binding Future Legislatures—Waiver—Police Powers—Judicial Powers.
139. Legislative Powers of Territory—Corporations Created by Territory Follow It Into Union.
140. Legislative Power to Grant Implies Power to Refuse Franchise—Refusal by Subordinate Body.
§ 141. Consent of Subordinate Body Unnecessary to Exercise of Power by Legislature.
142. Corporations Created by Rebel State.
143. Legislative Power—Grant of Additional Franchises—Amendments.
144. Legislative Grant Necessary—Roads, Highways, Bridges and Ferries, Eminent Domain, Generally.
145. Bridge Corporation—Bridges — Commerce — Navigable Waters Wholly Within State—Power of State as to Toll Bridges — Railroad Toll Bridge.
146. Pier Erected Without Authority in Navigable Water—Unlawful Structure—Owner's Liability.

§ 132. Legislative Power—Source of Franchise or Charter—Legislative Grant Necessary.—A franchise must have its source in or emanate from the sovereign power wherein it primarily resides, and that power alone can grant it and make possible its lawful exercise, for such legislative grant or law is a prerequisite. The source of a franchise is the State, whatever the agency employed.[1]

[1] **United States**: Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 595, 10 L. ed. 274, per Taney, C. J., who says: "It is essential to the

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§ 133. Same Subject—Prescription.[2]—Although a corporation may exist by prescription, such prescription presupposes

character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State;" quoted in whole or in part in People's Rd. v. Memphis Rd., 10 Wall. (77 U. S.) 38, 51, 19 L. ed. 844; Western Union Teleg. Co. v. Norman, 77 Fed. 13, 22, per Barr, Dist. J.; Chicago & Western Indiana Rd. Co. v. Dunbar, 95 Ill. 571, 575; Purnell v. McLane, 98 Md. 589, 592, 56 Atl. 830, per Pearce, J.; State v. Scougal, 3 S. Dak. 55, 62, 44 Am. St. Rep. 756, 15 L. R. A. 477, per Corson, J.

Alabama: State v. Wilburn (Ala., 1905), 39 So. 816; Uniontown, City of, v. State (Ala., 1905), 39 So. 814; State v. Moore & Ligon, 19 Ala. 520, per Parsons, J., who says: "It is clear that the State is the source of all such franchises."

Colorado: Denver & Swansea Ry. Co. v. Denver City Ry. Co., 2 Colo. 673, 682, per Brazee, J., who says: "It is essential that a franchise should be created by a grant from the sovereign authority." It is a franchise which the sovereign authority alone can grant.

Idaho: Spotswood v. Morris, 12 Idaho, 360, 85 Pac. 1094 (sovereign power is necessary in order to possess or lawfully exercise the powers, privileges or franchises of a corporation).

Illinois: Wilmington Water Power Co. v. Evans, 166 Ill. 548, 556, 46 N. E. 1083, per Magruder, C. J.; Chicago City Ry. v. People, 73 Ill. 541, 547, per Story, J., who says: "Corporate franchises in the American States emanate from the government, or sovereign power, owe their existence to a grant," etc.; People ex rel. Koerner v. Ridgley, 21 Ill. 65, 69, per Breese, J., who says: "In this country, under our institutions, a privilege or immunity of a public nature, which could not be exercised without a legislative grant would also be a franchise. There must be some parting of prerogative belonging to a king, or to the people, under our system, that can constitute a franchise"; Cain v. City of Wyoming, 104 Ill. App. 538 (a franchise must be granted by the legislature).

Louisiana: Maestri v. Board of Assessors, 110 La. 517, 526, 34 So. 658, per Blanchard, J., who says: "To be a franchise the right possessed must be such as cannot be exercised without the express permission of the sovereign power—a privilege or immunity of a public nature which cannot be legally exercised without legislative grant."

Maine: Yarmouth v. North Yarmouth, 34 Me. 411, 56 Am. Dec. 666 (private corporations exist by legislative grants conferring rights and powers for special purposes).

Minnesota: State, Clapp, v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020 (same statement as Louisiana case); Blake v. Winona & St. Peter Ry. Co., 19 Minn. 418, 425.

Pennsylvania: Allegheny County v. McKeesport Diamond Market, 123 Pa. 164, 19 Pitts. L. J. (N. S.) 280, 46 Phila. Leg. Int. 211, 23 W. N. C. 89, 16 Atl. 619 (chartered rights from

[2] See § 122, herein.

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a grant.[3] So the presumption of a right to exercise a ferry franchise may arise from its continuous, uninterrupted use for twenty years even though no license or legislative grant exists.[4] But a gas and electric company's right to maintain poles in the identical spot of their location on streets of a city, cannot arise by prescriptive right based merely on lapse of time.[5] But it is declared that a franchise being derived from the government is always supposed to have been originally granted by the government.[6]

§ 134. Test of Legislative Power to Grant Franchises.— One of the tests of legislative power to grant franchises to particular individuals is whether such grant will promote the pub-

commonwealth necessary to effect purposes for which organized).

"It is universally recognized that the power of creating corporations is one appertaining to sovereignty, and can only be exercised by that branch of the government in which it is legally vested, and whatever method may be adopted for their formation, and with whatever liberality the privilege of forming them may be conferred, every corporation is dependent for its existence upon the permission of the State in which it is created." Bank of California v. San Francisco, 142 Cal. 276, 279, 75 Pac. 832, 64 L. R. A. 918, per Angellotti, J.

In the United States a corporation can only have an existence under the express law of the State by which it is created and can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other legislative act. Oregon Ry. & Navigation Co. v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837.

[3] Wilmington Water Power Co. v. Evans, 166 Ill. 548, 556, 46 N. E. 1083, per Magruder, J.; Chicago City Ry. v. People, 73 Ill. 541, 547, per Scott, J.

"There is no doubt," says Kent, "that corporations, as well as other private rights and franchises, may exist in this country by *prescription*, 2 Kent's Com. 277(*a*). * * * It may be considered well settled, that a corporation may exist in this country by *presumptive evidence*. * * * Although corporations may * * * exist in this country by common law, and by reputation. * * * Yet there are, comparatively, but few cases where a legislative act or charter cannot be shown." Angell & Ames on Corp. (9th ed.) § § 70, 71.

[4] Milton v. Haden, 32 Ala. 30, 70 Am. Dec. 523.

[5] Merced Falls Gas & Elect. Light Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239.

[6] Norwich Gas Light Co. v. The Norwich City Gas Co., 25 Conn. 19, 36, per Hinman, J. (right to lay gas pipes in streets).

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lic good, and is such that the rights or privileges granted must be committed to a few in order to be available.[7]

§ 135. Distribution or Division of Powers of State.—The distribution of the powers of the State, by the constitution, to the legislative, executive and judicial departments, operates, by implication, as an inhibition against the imposition on either, of those powers which distinctively belong to one of the other departments.[8] So the legislative and judicial functions of the State are entirely separate and vitally distinct;[9] and the fact that a power is conferred by statute on a court of justice, to be exercised by it in the first instance in a proceeding instituted therein, is, itself, of controlling importance, as fixing the judicial character of the power, and is decisive in that respect unless it is reasonably certain that the power belongs exclusively to the legislative or executive department.[10] The division of powers between the several branches of the state government made by the Nebraska constitution is comprehensive and final, and the legislature can neither add to nor subtract from the classes or character of questions with which the courts are entitled to deal.[11]

§ 136. What Matters Exclusively Within Legislative Discretion—Power of Courts.[12]—Certain matters rest exclusively within the discretion of the legislature to determine, such as whether the public interest will be served by a grant of a right or privilege, whether an act is expedient or wise,

[7] Horst, Mayor, etc., v. Moses, 48 Ala. 129, 143. See §§ 120–124, 136, 147, 148, herein.

[8] Zanesville, City of, v. Zanesville Teleg. & Teleph. Co., 64 Ohio St. 67. See also Western Union Teleg. Co. v. Myatt, 98 Fed. 335.

[9] Western Union Teleg. Co. v. Myatt, 98 Fed. 335.

[10] Zanesville, City of, v. Zanesville Teleg. & Teleph. Co., 64 Ohio St. 67. "On the first hearing the judgment of the Circuit Court was reversed. The report of the case on that hearing appears in 63 Ohio St. 442, 59 N. E. 109. On the rehearing the judgment of reversal was set aside and judgment rendered affirming the Circuit Court in accordance with the following report of the case —Reporter." *Id.*, 68.

[11] Tyson v. Washington County (Neb., 1907), 110 N. W. 634.

[12] See §§ 171, 184, 200, herein.

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adequate or necessary, and courts cannot inquire into the motives inducing legislation, nor as to the expediency of the enactment, nor as to the wisdom, necessity, policy or justice thereof, nor as to the reasons inducing legislators to act, but their power is limited to the determination only of the question of the constitutionality of a statute.[13] But it also held that the

[13] **United States:** California Reduction Co. v. Sanitary Reduction Co., 126 Fed. 29, 61 C. C. 91, s. c., 194 U. S. 635, case aff'd 199 U. S. 306.

California: Dobbins v. City of Los Angeles, 139 Cal. 179, 72 Pac. 970. See Odd Fellows Cemetery Assn. v. San Francisco, 140 Cal. 226, 73 Pac. 987.

Florida: Thomas v. Williamson (Fla., 1906), 40 So. 831.

Indiana: State v. Terre Haute & Indianapolis Rd. Co., 166 Ind. 580, 77 N. E. 1077.

Iowa: McGuire v. Chicago, Burlington & Quincy R. Co., 131 Iowa, 340, 108 N. W. 902.

Louisiana: St. Joseph Plank Road Co. v. Kline, 106 La. 325, 30 So. 854.

Missouri: Young v. City of Kansas City, 152 Mo. 661, 54 S. W. 535.

Nebraska: See Tyson v. Washington County (Neb., 1907), 110 N. W. 634.

New York: Kittinger v. Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081, aff'g 49 N. Y. Supp. 713, 25 App. Div. 329.

South Carolina: Brown v. Tharpe, 74 S. C. 207, 54 S. E. 363.

Virginia: Zircle v. Southern Ry. Co. (Va.), 45 S. E. 802; Danville v. Hatcher, 101 Va. 523, 44 S. E. 723.

See Joyce on Elect. Law (2d ed.), § 357.

When an act of the legislature is challenged in a court, the inquiry is limited to the question of power, and does not extend to the matter of expediency, to the motives of the legislators, or to the reasons which were spread before them to induce the passage of the act; and, on the other hand, the courts will not interfere with the action of the legislature, so it may be presumed that the legislature never intends to interfere with the action of the courts, or to assume judicial functions to itself. Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. 240.

The question of the public welfare or interest rests exclusively with the legislature. Revere Water Co. v. Town of Winthrop, 192 Mass. 455, 78 N. E. 497.

"*Whether the grant of a franchise is, or is not on the whole, promotive of the public interest*, is a question of fact and judgment, upon which different minds may entertain different opinions. It is not to be judically assumed to be injurious and then the grant to be reasoned down. It is a matter exclusively confided to the sober consideration of the legislature, which is invested with full discretion, and possesses ample means to decide it. For myself, meaning to speak with all due deference for others, I know of no power or authority confided to the judicial department, to rejudge the decisions of the legislature, upon such a

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court cannot inquire into the motives of legislators in enacting laws, except as they may be disclosed on the face of the acts, or be inferable from their operation, considered with reference to the condition of the country and existing legislation.[14] It is further determined that the policy, wisdom, justice and fairness of a state statute, and its conformity to the state constitution, are wholly for the legislature and the courts of the State to determine, and the Federal Supreme Court has nothing to do with those matters.[15] Again, courts always presume that a legislature in enacting statutes, acts advisedly and with full knowledge of the situation, and they must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action.[16] And in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is, or is not, repugnant to the Constitution of the United States.[17] So questions of relative benefit as between the public and a combination alleged to be in

subject. It has an exclusive right to make the grant, and to decide whether it be, or be not, for the public interests. It is to be presumed, if the grant is made, that it is made from a high sense of public duty, to promote the public welfare, and to establish the public prosperity. In this very case, the legislature has, upon the very face of the act made a solemn declaration as to the motive for passing it; that, 'The erecting of a bridge over the Charles River, etc., will be of great public utility.' What court of justice is invested with authority to gainsay this declaration? To strike it out of the act, and reason upon the other words, as if it were not there? To pronounce that a grant is against the interest of the people, which the legislature has declared to be of great utility to the people? It seems to me to be our duty to interpret laws, and not to wander into speculations upon their policy." Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 605, 9 L. ed. 773, per Story, J., in dissenting opinion.

[14] Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. 730.

[15] Hunter v. City of Pittsburg, 207 U. S. 161.

[16] Chesapeake & Potomac Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. 881, rev'g Manning v. Chesapeake & P. Teleph. Co., 18 App. D. C. 191.

[17] Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 Sup. Ct. 862. See Brimmer v. Redman, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. ed. 862.

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violation of the Anti-Trust Act of Congress, are those of public policy resting solely upon the determination of Congress, and not questions for the consideration of the court.[18] In cases where the validity of a legislative act is to be examined and the opinion of the highest law tribunal of the State to be revised, it is declared by the United States Supreme Court that that court will proceed with cautious circumspection, and in no doubtful case will it pronounce a legislative act to be contrary to the Constitution, but that upon that court is imposed the high and solemn duty of protecting from even legislative violation those contracts which the Constitution has placed beyond legislative control.[19] Legislative acts of a city's common council are, equally with those of a state legislature, within the rule which precludes inquiry by the courts into the motives which may have induced legislation.[20] But while the right to exercise the police power is a continuing one, and a business lawful to-day may in the future become a menace to the public welfare and be required to yield to the public good, the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment.[21] And although an ordinance may be lawful on its face and apparently fair in its terms, yet if it is enforced in such a manner as to work a discrimination against a part of a community for no lawful reason, such exercise of power will be invalidated by the courts.[22]

§ 137. **Limitations on Powers of State Legislature.**[23]—Subject to such limitations as are expressly or impliedly imposed

[18] United States v. Northern Securities Co., 120 Fed. 721, case aff'd 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436.

[19] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629.

[20] Kittenger v. Buffalo Traction Co., 49 N. Y. Supp. 713, 25 App. Div. 329, aff'd 160 N. Y. 377, 54 N. E. 1081.

[21] Dobbins v. City of Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. ed. 169.

[22] Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. 1064; Dobbins v. City of Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. ed. 169.

[23] See § 121, herein.

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by the Federal and state constitutions a State has plenary power to legislate upon all subjects.[24] And whatever the State may do, even with creations of its own will, it must do in subordination to the inhibitions of the Federal Constitution. It may confer, by its general laws, upon corporations, certain capacities of doing business, and of having perpetual succession in their members. It may make its grant in these respects

[24] **Colorado:** The constitution is not a grant of power to the legislature, it is but a limitation upon legislative authority, as it is invested with plenary power for all the purposes of civil government. People ex rel. Rhodes v. Fleming, 10 Colo. 553, 16 Pac. 298.

Florida: The state constitution is a limitation upon power; and unless legislation duly passed be clearly contrary to some express or implied prohibition contained in the constitution, the courts have no authority to pronounce it invalid. Thomas v. Williamson (Fla., 1906), 40 So. 831.

Iowa: Subject to the power expressly or by necessary inference delegated to the Federal government, the State has sovereign legislative power over all subjects except such as are reserved by the state constitution. McGuire v. Chicago, Burlington & Quincy Ry. Co., 131 Iowa, 340, 108 N. W. 902.

Missouri: A state legislature has power to pass any law not prohibited by the Constitution. State ex rel. Henson v. Sheppard, 192 Mo. 497, 507, 91 S. W. 477. The legislative power to enact laws is practically absolute except where limited or prohibited by the Constitution. Joseph Roberts, Ex parte, 166 Mo. 207, 65 S. W. 726.

Ohio: Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564.

South Dakota: The legislature does not look to the state constitution for power to act, but only looks to that instrument to see if the sovereign legislative power of the State is in or by such constitution in any way restricted or limited. Platt v. Le Cocq, 150 Fed. 391. No limitations on legislative power; so statute is constitutional unless palpably conflicts. Watson, In re, 17 S. Dak. 886, 97 N. W. 463.

Tennessee: Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293. As to all subjects of legislation the general assembly has full power to pass any law not in conflict with the delegated powers of the Federal government, or with the restrictions of the state constitution. Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 159, 34 L. R. A. 725, 36 S. W. 1041, per Caldwell, J.

Utah: State v. Lewis, 26 Utah, 120, 72 Pac. 388; State v. Cherry (Utah, 1900), 60 Pac. 1103.

Virginia: As to matters not ceded to the Federal government, the legislative powers of the general assembly are without limit, except so far as restrictions are imposed by the constitution of the State in express terms or by strong implication. The state constitution is a restraining instrument only, and every presumption is made in favor of the constitutionality of a state statute. Whitlock v. Hawkins, 105 Va. 242, 53 S. E. 401.

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revocable at pleasure. It may make the grant subject to modifications and impose conditions upon its use, and reserve the right to change these at will.[25] Again, until Congress acts upon the subject, a State may legislate in regard to the duties and liabilities of its citizens and corporations while on the high seas and not within the Territory of any other sovereign. So a statute giving damages for death caused by tort is a valid exercise of the legislative power of a State, and extends to a case of a citizen of the enacting State wrongfully killed while on the high seas, in a vessel belonging to a corporation of another State by the negligence of another vessel also belonging to a corporation of the latter State.[26] The power of legislation may be taken away from the lawmaking body by the Constitution as well by implication as by express prohibition, and prohibitions against legislation are equally as effectual as when they are express, and are to be regarded in the one case, no less than in the other.[27]

§ 138. Abdication or Surrender of Essential or Distinctive Legislative Powers—Binding Future Legislatures—Waiver—Police Powers—Judicial Powers.—No department of the government can abdicate or resign any of its essential and distinctive powers to another department, and much less so to a mere subdivision or inferior agency unless the organic law itself expressly so authorizes.[28] So a statute prohibiting

[25] Southern Pacific Co. v. Board of Railroad Commrs. (C. C.), 78 Fed. 236, 254, per McKenna, Cir. J., quoting from Railroad Tax Cases, 13 Fed. 722–789, per Field, J., sitting as circuit justice. The principal case concerned the powers of the California Railroad Commission; regulation of rates; leased lines; illegal combinations; amendment of charters, etc.

[26] Hamilton, The (Old Dominion Steamship Co. v. The Hamilton), 207 U. S. 398, 77 C. C. 150, 52 L. ed. —, 28 Sup. Ct. —, aff'g 146 Fed. 724. Examine also as to principle involved, Ozan Lumber Co. v. Union County National Bank, 207 U. S. 251, 52 L. ed. —, 28 Sup. Ct. —.

[27] Cain v. Smith, 117 Ga. 902, 44 S. E. 5. See City of Lexington v. Thompson, 24 Ky. L. Rep. 384, 68 S. W. 477, 57 L. R. A. 775.

[28] Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 174, 36 S. W. 1041, 34 L. R. A. 725, per Caldwell, J.

As to reserved powers of State being inalienable, see West Point Water Power & L. I. Co. v. State, 49 Neb. 223, 68 N. W. 507, 66 N. W. 6.

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the laying of any railroad or railway tracks on a certain city street may be repealed, and a statute which provides that, in consideration of the surrender by a certain street railway company of its claims on a city street, no franchise should be granted thereafter to any street railway company to lay tracks on certain other streets, may also be repealed, as the legislature cannot grant away the State's right of eminent domain so as to bind future legislatures, and such railway company, so abandoning its right, has no superior right to the street, and the privilege of using it may by such repealing statute become open to all on equal terms and prior action will secure prior right.[29] And even though it could be assumed that the sovereign might be barred from the assertion of sovereign rights by acquiescence in encroachments upon sovereign prerogatives such view could not be extended to new or additional encroachments by a public service corporation having no legislative authority to exercise franchise rights or corporate powers of the nature and character attempted to be exercised.[30]

[29] Commonwealth v. Broad St. Rapid Transit Co., 219 Pa. 11, 67 Atl. 958.

[30] McCarter, Atty. Genl., v. Vineland Light & Power Co. (N. J. Ch., 1907), 65 Atl. 1041.

The United States Supreme Court in the well-known case of Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 426, 9 L. ed. 773, asserts that the object and the end of all government is, to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intends to diminish its power of accomplishing the end for which it was created; and in a country like ours, free, active and enterprising; continually advancing in numbers and wealth; new channels of communication are daily found necessary both for travel and trade; and are essential to the comfort, convenience and prosperity of the people. A State ought never to be presumed to surrender this power; because, like the taxing power, the whole community have an interest in preserving it undiminished; and when a corporation alleges, that a State has surrendered, for seventy years, its powers of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court, "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." The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the func-

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Again, it is not within the power of the State to permanently divest itself, by action or inaction of its police powers, and this is also true as to any subordinate subdivision or agency of the State, acting under a delegation of authority from the State;[31] nor can a State by any contract divest itself of the power to make police regulations.[32] The right to exercise the police power is a continuing one that cannot be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise, as it is immaterial upon what consideration the attempted contract is based. The exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and uncompensated obedience to an ordinance passed in its exercise is not violative of property rights protected by the Federal Constitution; so an ordinance of a municipality, valid under the state law as construed by its highest court, which compels a railroad to repair a viaduct constructed, after the opening of the railroad, by a city in pursuance of a contract relieving the railroad, for a substantial consideration, from

tions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court, in the case of the Providence Bank v. Billings, 4 Pet. (29 U. S.) 514, 7 L. ed. 339, was not confined to the taxing power, nor is it so limited in the opinion delivered; on the contrary, it was distinctly placed on the ground, that the interests of the community were concerned in preserving undiminished the power in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power, or any other affecting the public interest, the same principle applies and the rule of construction must be the same. No one will question, that the interests of the great body of the people of the State, would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights; and that the happiness and well-being of every citizen depends on their faithful preservation.

[31] State v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380, 108 N. W. 261. See § 149, herein.

[32] Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989. See also St. Louis & San Francisco Ry. Co. v. Matthews, 165 U. S. 1, 23, 41 L. ed. 611, 17 Sup. Ct. 243, per Bradley, J.; State v. Northern Pacific Ry. Co., (Minn.), 108 N. W. 269.

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making any repairs thereon for a term of years is not void under the contract or the due process clause of the Constitution.[33] Again, the power of a State to regulate the forms of administering justice is an incident of sovereignty, and its surrender is never to be presumed.[34] It is held, in a comparatively late case in the United States Supreme Court, that the rule that every doubt is resolved in favor of the continuance of governmental power, and that clear and unmistakable evidence of the intent to part therewith is required, which applies in determining whether a legislative contract of exemption from such power was granted also applies in determining whether its transfer to another was authorized or directed.[35]

§ 139. **Legislative Powers of Territory—Corporations Created by Territory Follow It into Union.**—The power of territorial legislatures extends to all rightful objects of legislation subject to the restriction that laws enacted by them shall not be inconsistent with the laws and Constitution of the United States.[36] But it is held that by the admission of a Territory as a State, the territorial government ceases to exist and all authority under it.[37] On the admission, however, of a Territory into the Union corporations created under territorial laws become corporations of such State.[38] While a State upon its admission to the Union is on an equal footing with every other State and, except as restrained by the Constitution, has full and complete jurisdiction over all persons and things within its limits, still Congress has power to regulate commerce

[33] Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583.

[34] Railroad Co. v. Hecht, 95 U. S. 168, 24 L. ed. 423.

[35] Rochester Ry. Co. v. City of Rochester, 205 U. S. 236, 248, 51 L. ed. 784, 27 Sup. Ct. —.

[36] American Ins. Co. v. Canter, 1 Pet. (26 U. S.) 511, 7 L. ed. 242. See also Walker v. New Mexico & Southern Pacific Rd. Co., 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. 421; Ferris v. Higley, 20 Wall. (87 U. S.) 375, 22 L. ed. 383. See § 130, herein.

[37] McNulty v. Batty, 10 How. (51 U. S.) 72, 13 L. ed. 333. Compare Wastl v. Montana Union Ry. Co., 24 Mont. 159, 61 Pac. 9; Criswell v. Railway Co., 17 Mont. 189, 42 Pac. 767.

[38] Kansas Pacific R. Co. v. Atchison, Topeka & Sante Fe R. Co., 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. 208.

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with the Indian tribes, and such power is paramount and superior to the authority of the State within whose limits are the Indian tribes.[39]

§ 140. **Legislative Power to Grant Implies Power to Refuse Franchise—Refusal by Subordinate Body.**[40]—The legislative power to grant a franchise or privilege implies a power to withhold or refuse it.[41] And where the constitution of a State provides that any association or corporation, organized for that purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within the State, and declares all such companies to be common carriers and subject to legislative control, and further provides that railroad corporations organized and doing business in the State shall allow such telegraph and telephone companies certain rights and privileges, and also gives the latter the right of eminent domain, and authorizes the legislature, by general law of uniform operation, to provide reasonable regulations to give effect to these provisions, such provisions are not self-operative, and in the absence of the provided for regulations by the legislature no rights are conferred on the persons specified, but if the legislature does authorize the construction of such lines subject, as to rights of way within the corporate limits of a city, to the consent of the city council, and, by another statute, the authority to regulate and the complete control of such lines is given to cities of a certain class with power to authorize or prohibit the use of electricity at, in or upon any of their streets, the power to refuse is correlative with the power to consent and the city's authority is not limited to a reasonable regulation of the method of using its streets for the above purposes. In brief, this case decides

[39] Dick v. United States, 208 U. S. 340.

[40] See § 187, herein.

[41] Colegrave Water Supply Co. v. City of Hollywood (Cal., 1907), 90 Pac. 1053; Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N. E. 346.

"The State is the source of all such franchises, to be granted or withheld by the legislature at its discretion." State v. Moore & Ligon, 19 Ala. 520, per Parsons, J.

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that notwithstanding a constitutional provision authorizing the construction of telegraph and telephone lines within a State and giving such companies the power of eminent domain, the legislature, acting under an authority to provide reasonable regulations to give effect to such section, may delegate to a city the right to grant or refuse the use of its streets for the construction of such lines.[42] But the refusal of a commissioner to designate the location of poles cannot be arbitrary and unjustified, where such authority to designate is delegated to him, but in case of such refusal the legal course should be pursued to compel the commissioner to act, and the company will not be warranted in proceeding to erect its poles without thus securing the right to do so.[43] In this case the common council of a city granted permission to a telephone exchange company, in accordance with its request therefor, to extend its telephone poles and wires along certain streets, upon condition that the commissioner of public works should designate the location of the poles to be erected, and that the extension of the system should be acceptable to and approved by him,

[42] State ex rel. Spokane & British Columbia Teleph. & Teleg. Co. v. City of Spokane, 24 Wash. 53, 63 Pac. 1116, 7 Am. Elec. Cas. 96. *See* Michigan Teleph. Co. v. City of Benton Harbor, 121 Mich. 512, 80 N. W. 386, 7 Am. Elec. Cas. 9; State v. Frost (Neb., 1907), 110 N. W. 986; Nebraska Teleph. Co. v. Western Independent Long Distance Teleph. Co., 68 Neb. 772, 95 N. W. 18, 8 Am. Elec. Cas. 32; State ex rel. New York & New Jersey Teleph. Co. v. Mayor, etc., of Bound Brook, 66 N. J. L. 168, 48 Atl. 1022, 7 Am. Elec. Cas. 65; Utica, City of, v. Utica Teleph. Co., 24 N. Y. App. Div. 361, 7 Am. Elec. Cas. 67; State v. Taylor, 36 Wash. 607, 79 Pac. 286; Joyce on Electric Law (2d ed.), § 353. *Compare* Chamberlain v. Iowa Teleph. Co., 119 Iowa, 619, 93 N. W. 596, 8 Am. Elec. Cas. 11; Michigan Teleph. Co. v. City of St. Joseph, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87; Inhabitants of Township of Summit v. New York & New Jersey Teleph. Co., 57 N. J. Eq. 123, 41 Atl. 146, 7 Am. Elec. Cas. 58; Barhite v. Home Teleph. Co., 50 N. Y. App. Div. 25, 7 Am. Elec. Cas. 75; State ex rel. Wisconsin Teleph. Co. v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657, 7 Am. Elec. Cas. 109.

Similar constitutional provision is held not self-executing, but it is also decided that when the legislature acts it must do so under a general statute so as to give effect to the constitution. State v. City of Helena, 34 Mont. 67, 85 Pac. 744.

[43] St. Paul, City of, v. Freedy, 86 Minn. 350, 90 N. W. 781, 8 Am. Elec. Cas. 29.

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and it was held that the commissioner's action, as required by the permit, was a prerequisite to the exercise by the company of whatever authority the permit conferred upon the company, even conceding that the common council had power to designate the locality and the method of constructing such extension, without regard to the commissioner. But the manager of the telephone company having been arrested for violating an ordinance for excavating in the streets contrary to the prohibition thereof, it constituted no defense that the reasons assigned by the commissioner for his refusal were purely arbitrary and unjustified. Again, where the general law, under which the construction of street railroads is authorized, requires the consent of the railroad commissioners, and such board refuses its consent, the legislature has power by retrospective action to cure the defect existing because of such refusal.[44]

§ 141. **Consent of Subordinate Body Unnecessary to Exercise of Power by Legislature.**—The legislature may exercise its power to grant rights, privileges and franchises, or to incorporate a company, without obtaining the consent of a subordinate body to whom it has delegated certain authority. Thus it may authorize the construction of a street railroad without the consent of railroad commissioners,[45] or without consulting a municipality upon the streets of which the railroad tracks are to be laid,[46] and it has the same right which it has vested in county courts relative to the erection of toll bridges.[47]

§ 142. **Corporations Created by Rebel State.**—A corporation created by a rebel State during the war, if not for a hostile

[44] Kittinger v. Buffalo Traction Co., 49 N. Y. Supp. 713, 25 App. Div. 329, aff'd 160 N. Y. 377.

[45] Kittinger v. Buffalo Traction Co., 49 N. Y. Supp. 713, 25 App. Div. 329, aff'd 160 N. Y. 377, 54 N. E. 1081.

[46] Central R. & E. Co.'s Appeal, 67 Conn. 197, 35 Atl. 32.

[47] Dyer v. Tuscaloosa Bridge Co., 2 Port. (Ala.) 296, 27 Am. Dec. 665.

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purpose, has power since the war, to sue in the United States courts.[48]

§ 143. **Legislative Power—Grant of Additional Franchises —Amendments.**—The act of creating a corporation by conferring upon an association of individuals certain strictly corporate powers embracing only powers and privileges not possessed by individuals and partnerships, and then granting to it other privileges, enlarging or restricting its right to the enjoyment of other franchises that may be possessed in common with natural persons, and regulating its external relations, are distinct and independent, and there is nothing in the constitution of California prohibiting the latter power to the legislature.[49] So a corporation's powers may be enlarged in harmony with its corporate purposes, by amendment by the legislature under authority reserved in the grant.[50] The right to amend is, however, fully considered elsewhere herein.

§ 144. **Legislative Grant Necessary—Roads, Highways, Bridges and Ferries—Eminent Domain—Generally.**—The laying off, regulating and keeping in repair, roads, highways, bridges and ferries, for the public use and convenience of the citizens, is an exercise of the supreme authority of the State. No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same without authority from the legislature, direct or derived. The right of eminent domain cannot be exercised without a legislative grant, and no person, natural or artificial, can become a body politic or corporate and exercise these rights or privileges,

[48] United States v. Insurance Companies, 22 Wall. (89 U. S.) 99, 22 L. ed. 816. Examine Texas v. White, 7 Wall. (74 U. S.) 700, 19 L. ed. 227, as to suit by Texas during the rebellion, and necessity that the government and the people of the State should be restored to peaceful relations to the United States, under the Constitution, before such a suit could be prosecuted.

Effect of war on pre-existing valid contract, see Joyce on Ins. §§ 289–291.

[49] Southern Pac. R. Co. v. Orton, 32 Fed. 457. See § 124, herein.

[50] McKee v. Chautauqua Assembly, 124 Fed. 808, 130 Fed. 536, 65 C. C. 8.

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which inhere in the sovereign power, without legislative authority.[51] The state authorities have power to grant a ferry franchise to the middle of a river, which is a boundary line between it and another State or foreign country, the power to establish ferries being coextensive with the legislative jurisdiction of the State, and such exercise of power does not conflict with the Constitution of the United States, under which Congress has power to regulate commerce between the States and with foreign nations.[52]

[51] "Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. * * * The right of eminent domain can only be exercised by virtue of a legislative grant. * * * No persons can make themselves a body corporate or politic without legislative authority." California v. Pacific Rd. Co., 127 U. S. 1, 40, 32 L. ed. 150, 8 Sup. Ct. 1073, per Bradley, J.

"No one can exercise the right of eminent domain, or establish a highway or railway and charge tolls for the same within a grant from the legislature. Such rights as inhere in the sovereign power can only be exercised by the individual or corporation by virtue of a grant from such sovereign power, and when the State grants such a right it is a franchise." Lasher v. People, 183 Ill. 226, 233, per Cartwright, C. J.

The right to lay off, regulate and maintain roads, highways, bridges and ferries for public use "is an exercise of the supreme authority of the State coeval with the institution of civic society, and indispensable to the free exercise of social and commercial intercourse. * * * It is a part of the eminent domain, and as such is treated by all writers on public law. It is upon this principle that roads are laid out." Dyer v. Tuscaloosa Bridge Co., 2 Port. (Ala.) 296, 303, 304, 27 Am. Dec. 655.

Certain laws in New York embraced in one scheme. The general corporation law, the banking law relating to trust companies and the stock corporation laws were evidently intended to provide one consistent scheme of legislation. Gause v. Boldt, 99 N. Y. Supp. 442, 443, 444, 49 Misc. 340, case modified, 100 N. Y. Supp. 1117, 115 App. Div. 879, quoting Hirshfeld v. Bopp, 145 N. Y. 84, 93, 39 N. E. 817.

[52] Tugwell & Madison v. Eagle Pass Ferry Co., 74 Tex. 450, 490, 9 S. W. 120.

License or legislative grant is necessary to exercise right of keeping public ferry for toll. Milton v. Haden, 32 Ala. 30, 70 Am. Dec. 523 (so under statute from year 1820); Pat-

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§ 145. Bridge Corporation—Bridges—Commerce—Navigable Waters Wholly Within State—Power of State as to Toll Bridges—Railroad Toll Bridge.—Although navigable waters of the United States lie wholly within a State, Congress in the exercise of its power under the commerce clause of the Constitution may exercise control to the extent necessary to protect, preserve and improve their free navigation; but until that body acts, the State has plenary authority over bridges across them, and there is nothing in the ordinance of July 13, 1787, or in the subsequent legislation of Congress, that precludes the State from exercising that authority.[53] But the several States have the power to establish and regulate bridges, and the rates of toll thereon, whether within one State, or between two adjoining States, subject to the paramount authority of Congress over interstate commerce.[54] It is determined, however, that under existing legislation, the right to erect a structure in a navigable water of the United States, wholly within the limits of a State, depends upon the concurrent or joint assent of the state and national governments; and that neither the act of Congress of March 3, 1899, c. 425, nor any previous act relating to the erection of structures in the navigable waters of the United States, manifested any purpose on the part of Congress to assert the power to invest private persons with power to erect such structures within a

terson v. Wollmann, 5 N. Dak. 608, 67 N. W. 1040, 33 L. R. A. 536. Examine Conway v. Taylor, 1 Black. (66 U. S.) 603, 17 L. ed. 191; Mills v. St. Glair County, 8 How. (49 U. S.) 569, 12 L. ed. 1201; Carroll v. Campbell, 108 Mo. 550; Mayor of New York v. Starin, 106 N. Y. 1, 27 Wkly. Dig. 124, 8 N. Y. St. R. 655; Evans v. Hughes County, 3 S. Dak. 580.

"The ownership of the soil does not necessarily entitle the owner to a public ferry franchise. He can exercise no such privilege until the right to do so is conferred by the proper authority. This court said, in Murray v. Minefee, 20 Ark. 561, that 'a ferry franchise is the creature of sovereign power, and no one can exercise it without the consent of the State.' This is too well settled by the authorities to admit of discussion." Bell v. Clegg, 25 Ark. 26, 28, per Compton, J.

[53] Escanaba Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442. See cases cited in first note to § 127, herein.

[54] Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 14 Sup. Ct. 1087.

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navigable water of the United States, wholly within the territorial limits of a State, without regard to the wishes of the State upon the subject.[55] Again, the provision in the act admitting California, "that all the navigable waters within the said State shall be common highways and forever free, as well to the inhabitants to said State, as to the citizens of the United States, without any tax, impost, or duty therefor," does not deprive the State of the power possessed by other States, in the absence of legislation by Congress, to authorize the erection of bridges over navigable waters within the State.[56] In determining the question whether a bridge may be erected over one of its own tidal and navigable streams, it is for the municipal power to weigh and balance against each other the considerations which belong to the subject—the obstruction of navigation on the one hand, and the advantage to commerce on the other—and to decide which shall be preferred, and how far one shall be made subservient to the other. And if such erection shall be authorized in good faith, not covertly and for an unconstitutional purpose, the Federal courts are not bound to enjoin it. Congress may, however, interpose whenever it shall be deemed necessary by either general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority, both the legislative and judicial power of the nation are supreme. Annunciating these principles on the one hand and on the other, the court refused to enjoin, at the instance of a riparian owner, to whom the injury would be consequential only, a bridge about to be built, under the authority of the State of Pennsylvania, by the city of Philadelphia over the River Schuylkill, a small river—tidal and navigable, however, and on which a great commerce in coal was carried on by barges—which river was wholly within the State of Pennsylvania, and ran through the corporate limits of the city authorized to erect the bridge;

[55] Cummings v. Chicago, 188 U. 113 U. S. 205, 28 L. ed. 959, 5 Sup. S. 410, 23 Sup. Ct. 472, 47 L. ed. 525. Ct. 423.

[56] Cardwell v. American Bridge Co.,

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on both sides of which municipal authority was exercised on one as much as on the other; the bridge being a matter of great public convenience every way, and another bridge, just like it, having been erected and in use for many years, over the same stream, about 500 yards above.[57] Authority to grant the franchise for establishing and maintaining a toll bridge over a river where it crosses a public highway in a State, is vested solely in the legislature, and may be exercised by it or committed to such agencies as it may select.[58] The legislature has power to create a franchise to construct toll bridges in general for public use within the State, and this term may include railroad toll bridges where the term "bridge" has been for years construed by the courts to include railroad bridges.[59] It has been decided in Georgia that the right to receive tolls for the transportation of travelers and others across a river on a public highway is a franchise which belongs to the people collectively.[60] "A grant of this franchise from the public, in some form, is, therefore, necessary to enable an individual to establish and maintain a toll bridge for public travel. The legislature of the State alone has authority to make such a grant. It may exercise this authority by direct legislation, or through agencies duly established."[61] And where the constitution of a State authorizes the legislature to provide for the construction of a bridge over navigable water it is thereby empowered to regulate such construction and management and it may also delegate such authority.[62]

§ 146. **Pier Erected Without Authority in Navigable Water—Unlawful Structure—Owner's Liability.**—A pier erected in the navigable water of the Mississippi River for the sole use of the riparian owner, as part of a boom for saw-logs,

[57] Gilman v. Philadelphia, 3 Wall. (70 U. S.) 713, 18 L. ed. 96.

[58] Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921.

[59] Southern Illinois & Missouri Bridge Co. v. Stone, 174 Mo. 1, 63 L. R. A. 301, 73 S. W. 453.

[60] Young v. Harrison, 6 Ga. 130.

[61] Wright v. Nagle, 101 U. S. 791, 794, 25 L. ed. 921, per Waite, C. J.

[62] Schinzel v. Best, 92 N. Y. Supp. 754, 45 Misc. 455, aff'g 96 N. Y. Supp. 1145, 109 App. Div. 917.

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without license or authority of any kind, except such as may arise from his ownership of the adjacent shore, is an unlawful structure, and the owner is liable for the sinking of a barge run against it in the night. Such a structure differs very materially from wharves, piers, and others of like character, made to facilitate and aid navigation, and generally regulated by city or town ordinances, or by statutes of the State, or other competent authority. They also have a very different standing in the courts from piers built for railroad bridges across navigable streams, which are authorized by acts of Congress or statutes of the States.[63] But land under navigable waters may be granted, even against the owner of the upland, for the purpose of promoting the State's commerce.[64]

[63] Atlee v. Packet Co., 21 Wall. (88 U. S.) 389, 22 L. ed. 619, *cited* in Prosser v. Northern Pacific R. Co., 152 U. S. 59, 64, 38 L. ed. 353, 14 Sup. Ct. —, which holds that a railroad corporation, which has laid out, constructed and maintained its railroad for a distance along the shore of a harbor, below high water mark, claiming under its charter the right to do so, and the ownership of adjacent lands under tide waters of the harbor, cannot maintain a bill in equity to restrain a board of commissioners from establishing, pursuant to the statutes of the State, a general system of harbor lines in the harbor, and from filing a plan thereof. *Also cited* in Shively v. Bowlby, 152 U. S. 1, 41, 14 Sup. Ct. 548, 38 L. ed. 331, which case considers the question of title to tidal lands, distinguishes the common law and American rule, the status of territories in this connection, and asserts that no one can erect a building or a wharf upon such lands without license.

[64] De Lancey v. Hawkins, 49 N. Y. Supp. 469, 23 App. Div. 8, aff'g 163 N. Y. 587, 57 N. E. 1108.

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CHAPTER X.

DELEGATION OF POWER—GENERALLY.

§ 147. Delegation of Power—Distinction Between Power to Make Laws and Discretion as to Their Execution or Administration—Power to Regulate.
§ 148. Grant of Franchise May Be Made Through Lawful Delegated Agency.
149. Delegation of Power—Police Regulations—Generally.
150. Delegation of Power of Taxation.

§ 147. Delegation of Power—Distinction Between Power to Make Laws and Discretion as to Their Execution or Administration—Power to Regulate.—A distinction exists between a delegation of power to fix or make a law, which involves a discretion as to what the law shall be, and employing an agency which is empowered to exercise a discretion in determining when the law as enacted shall be enforced, or to determine questions of fact essential to the application of the law; the power to legislate which is vested in the State cannot be delegated; the administrative duties in carrying out legislative powers may be delegated.[1] The State has power to regulate public service corporations, or the conduct of a business affected with a public interest, and to fix and determine,

[1] United States v. Union Bridge Co., 143 Fed. 377; People v. Grand Trunk Ry. Co., 232 Ill. 292, 297, 83 N. E. 839, per Carter, J., quoting Sutherland on Stat. Construction, p. 611.

Authority which by the Constitution is vested in the legislature, is the power to make the law. It may be exercised, leaving in the particular instance to some agency the duty of determining questions of fact essential to the application thereof; the former involves legislative, the latter administrative discretion. The true distinction between delegation of power to make law and delegation of power to administer law, is this: the former contemplates exercise of discretion as to what the law shall be, the other, exercise of discretion in the administration of the law. State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 10 N. W. 500.

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as a rule for future observance, the rates and charges for services rendered. This power is wholly a legislative or administrative function. The legislature may itself prescribe such regulations or delegate the exercise of such powers in matters of detail to some administrative board or body of its own creation. To prescribe a tariff of rates and charges is a legislative function, but to determine whether existing or prescribed rates and charges are reasonable or unreasonable is a judicial function, so the use of property of such corporations may be controlled by the State by regulations providing for the safety and convenience of the public; restrictions may also be imposed prohibiting unjust discrimination and unreasonable rates or charges, but this limitation exists as to such power, that it cannot be exercised to deprive owners of their property without due process of law, or without compensation, nor can they be denied the equal protection of the laws.[2] The above-stated principle, as to non-delegation of legislative powers, is also one which does not operate to prevent the exercise of certain functions by certain subordinate bodies in relation to the creation of corporations and the grant of privileges or franchises, as will hereinafter appear.[3]

§ 148. **Grant of Franchise May Be Made Through Lawful Delegated Agency.**—In England, although the contrary doctrine was formerly asserted, it is now well settled that the power of establishing corporations may, in a certain sense, be delegated.[4] So, in this country it is not essential to a franchise that a grant be made direct; it is sufficient that it be made through a legitimate legislative agency;[5] or, to state the rule

[2] Western Union Teleg. Co. v. Myatt, 98 Fed. 335, considered and distinguished as having no application to the case before it in Western Union Teleg. Co. v. Andrews, 154 Fed. 95, 103; cited in Louisville & N. R. Co. v. Brown, 123 Fed. 946 (a case relating to the powers and nature of the functions of a state railroad commission).

[3] See §§ 47, 48, herein, also various sections throughout this treatise.

[4] Franklin Bridge Co. v. Young Wood, 14 Ga. 80. In this case it was a question whether the legislature could transfer the lawmaking power to any corporation.

[5] State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

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in another form, the legislature may exercise its authority by direct legislation, or through agencies duly established, having power for that purpose. The grant, when made, binds the public, and is directly or indirectly the act of the State. The easement is a legislative grant, whether made directly by the legislature itself, or by one of its properly constituted instrumentalities.[6] So it is declared in a New York case that: All franchises or privileges known by that term proceed from the State in the exercise of its sovereign powers. Through different mediums or agencies the State may act in granting franchises, but it is itself the source and depositary from which the right proceeds. Sometimes the franchise is conferred directly by the State through some grant or legislative enactment, but more generally the sovereign delegates its power to municipal or local authorities.[7] This rule applies to ferries;[8] to a franchise to build a bridge and take tolls;[9] to the right to make use of city streets for railroad purposes;[10] and the franchise or

[6] Wright v. Nagle, 101 U. S. 791, 794, 25 L. ed. 921, per Waite, C. J.

"It makes no difference whether the grant be made directly from the legislature, or by a subordinate body to whom the power is delegated; it is still a grant emanating from the sovereign authority of the State. Truckee & Tahoe Turnpike Road Co. v. Campbell, 44 Cal. 89, 91, per Rhodes, J.

[7] Wilcox v. McClellan, 185 N. Y. 9, 16, 77 N. E. 986, per O'Brien, J.

[8] The power to establish ferries is one of the attributes of sovereignty which is to be exercised by the legislature itself, or by any agent whom that body may authorize to act for it. Spease Ferry, In re, 138 N. C. 219, 50 S. E. 625.

The right to maintain and operate a ferry and to collect tolls is a franchise or "right only vested in individuals by grant from the government. It is a sovereign prerogative, and in this country vests in an individual only by a legislative grant, and it makes no difference whether the grant be made directly by the legislature, or by a subordinate body to whom the power is delegated; it is still a grant emanating from the authority of the State. * * * It was said in an early English case that 'a ferry is *publici juris*. It is a franchise that no one can erect without a license from the crown.' Blissett v. Hart, Willes, 508;" Evans v. Hughes County, 3 S. Dak. 580, 581, 582, 54 N. W. 603, per Corson, J.

[9] A franchise to build a bridge and take tolls can "only be conferred by the legislature, directly or indirectly through public agents and tribunals, in pursuance of a statute." Covington Drawbridge Co. v. Shepherd, 21 How. (62 U. S.) 112, 113, 16 L. ed. 38, per Catron, J. See also Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921.

[10] "The authority to make use of

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contract to construct waterworks can be conferred through authority delegated from the State.[11] And a corporation, public in its nature, such as an irrigation district, need not be created by the legislature itself, but its organization will be valid even though it exists only by or under the supervision of a local body.[12] Other instances of the delegation of power through lawful agencies will appear throughout this treatise.

§ 149. **Delegation of Power—Police Regulations—Generally.**—The police power may be asserted directly by the legislature, or may, in the absence of constitutional restrictions, be delegated to several municipal corporations or other agencies provided for its exercise.[13] The legislature may also properly designate any agency it deems proper within the State, reasonably calculated to act justly in the matter, to nominate persons for appointment to administer police regulations.[14] The general police power is reserved to the States subject to this limitation: that it may not trespass on the rights and powers vested in the national government,[15] and must be exercised in subordination to the Constitution.[16] That such power is restricted in its exercise to the national Constitution, is also shown by those cases in which grants of exclusive privileges respecting public highways and bridges

the public streets of a city for railroad purposes primarily resides in the State, and is part of the sovereign power; and the right or privilege of constructing and operating railroads in the streets, which for convenience is called a 'franchise' must always proceed from that source, whatever may be the agency through which it is conferred. Adee v. Nassau Electric R. Co., 72 N. Y. Supp. 992, 1000, 65 App. Div. 529, per Woodward, J., case affirmed (mem.), 177 N. Y. 548, 69 N. E. 1120. See also Beekman v. Third Ave. Rd. Co., 153 N. Y. 144, 152, 47 N. E. 277, per O'Brien, J.; Fanning v. Osborne, 102 N. Y. 441, 7 N. E. 305.

[11] Washburn Water Works Co. v. City of Washburn, 129 Wis. 73, 80, 108 N. W. 194, per Kerwin, J.

[12] Central Irrigation District v. De Lappe, 79 Cal. 351, 21 Pac. 825.

[13] Chicago, Burlington & Quincy Rd. Co. v. Nebraska, 47 Neb. 549, 3 Am. & Eng. R. Cas. (N. S.) 573, 41 L. R. A. 481, 66 N. W. 624.

Police power—Power of courts as to, see § 184, herein.

[14] State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 10 N. W. 500. See § 138, herein.

[15] Heff, Matter of, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. 506.

[16] Stehmeyer v. Charleston, 53 S. C. 259, 31 S. E. 322.

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over navigable waters have been sustained as contracts, the obligations of which are fully protected against impairment by state enactments.[17] But the Fourteenth Amendment to the Constitution does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens.[18] Nor is the power of the Federal government to regulate commerce in conflict with the reserved rights of the several States under the Constitution, nor does it deprive them of the power to pass laws in the nature of police regulations under what is known as "the police power," but on all matters that are the subjects of commerce within the meaning of the Federal Constitution, state regulations must be limited to subjects of police control and must not in themselves be regulations of commerce.[19] Nor is uncompensated obedience to a regulation enacted for the public safety under the police power of the State a taking of property without due compensation, and the constitutional prohibition against the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments.[20] There is also a difference between ordinary vehicles and electric cars which the State may, in the exercise of its police power, recognize without denying the company operating the electric cars the equal protection of the laws.[21] The essential quality of the police power as a governmental agency

[17] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 662, 29 L. ed. 516, 6 Sup. Ct. 252, per Harlan, J.

[18] Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. 207, considering and following Missouri Pacific Ry. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. 730; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. 357.

[19] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23.

[20] Chicago, Burlington & Quincy Ry. Co. v. Drainage Comrs., 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. 341, aff'g 212 Ill. 103, 72 N. E. 219.

[21] Detroit, Fort Wayne & Belle Isle Ry. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. —.

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is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large;[22] and the police power of a State embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public health, morals or safety; it is not confined to the suppression of what is offensive, disorderly or unsanitary, but extends to what is for the greatest welfare of the State.[23]

§ 150. Delegation of Power of Taxation.—The power of taxation is an incident of sovereignty, and essentially a legislative power, falling, under the general apportionment of governmental powers, to the legislative department, but this power can be delegated to the extent expressly permitted under the Constitution.[24]

[22] Chicago, Burlington & Quincy Rd. Co. v. Nebraska, 47 Neb. 549, 3 Am. & Eng. R. Cas. (N. S.) 573, 41 L. R. A. 481, 66 N. W. 624.

[23] Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499, case affirms Walker v. Bacon, 11 Idaho, 127, 81 Pac. 155.

The police power of a State embraces such reasonable regulations relating to matters completely within its territory and not affecting the people of other States, established directly by legislative enactment, as will protect the public health and safety. Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. 358. See also Stehmeyer v. Charleston, 53 S. C. 259, 31 S. E. 322; State, ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500.

It is at all times difficult to define any subject with precision and accuracy; if this be so, in general, it is emphatically so in relation to a subject so diversified and various as that under the consideration of the court in this case; if the court were to attempt it, they would say, that every law came within the description of a regulation of police which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights or their duties; whether it respected them as men, or as citizens of the State in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a State, or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction. An example of the application of these principles, is the right of a State to punish persons who commit offenses against its criminal laws within its territory. New York v. Miln, 11 Pet. (36 U. S.) 102, 9 L. ed. 648.

[24] Reelfoot Lake Levee Dist, Dawson, 97 Tenn. 151, 158, 159, 174, 36 S. W. 1041, 34 L. R. A. 725. See Chapter herein on Taxation and § 182, herein, Board of Equalization.

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CHAPTER XI.

DELEGATION OF POWER BY CONGRESS.

§ 151. Delegation to the President.
152. Delegation to Secretary of War—Bridges.
153. Delegation of Power to Interstate Commerce Commission.
154. Delegation to American Railway Association.
155. Delegation of Power to Determine Compensation Under Right of Eminent Domain Exercised by United States.

§ 151. Delegation to the President.—Congress cannot, under the Constitution delegate its legislative power to the President, although other powers not legislative in character may be conferred upon him.[1] So, it is declared that: "While it is undoubtedly true that legislative power cannot be delegated to the courts or to the executive, there are some exceptions to the rule under which it is held that Congress may leave to the President the power of determining the time when or exi-

[1] Field v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. 495. [In this case it is also held that the authority conferred upon the president by § 3 of the act of October 1, 1890, to reduce the revenue and equalize duties on imports, and for other purposes, 26 Stat., c. 1244, pp. 567, 612, to suspend by proclamation the free introduction of sugar, molasses, coffee, tea and hides, when he is satisfied that any country producing such articles imposes duties or other exactions upon the agricultural or other products of the United States, which he may deem to be reciprocally unequal or unreasonable, is not open to the objection that it unconstitutionally transfers legislative power to the president (Fuller, C. J., and Lamar, J., dissenting); but that even if it were it does not follow that other parts of the act imposing duties upon imported articles, are inoperative.] Cited and considered in Union Bridge Co. v. United States, 204 U. S. 365, 379, 385, 51 L. ed. 523, 27 Sup. Ct. —, aff'g 143 Fed. 377. Approved in Butterfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. ed. 252. Cited in Rider v. United States, 178 U. S. 250, 258, 44 L. ed. 1060, 20 Sup. Ct. 480. Cited and considered in United States v. Dastervignes, 118 Fed. 190, 201. Cited in United States v. Maid, 116 Fed. 650, 653.

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gency upon the happening of which a certain act shall take effect." [2]

§ 152. **Delegation to Secretary of War—Bridges.**[3]—Under its power to regulate commerce, and to make all laws which shall be necessary and proper for carrying into execution such power, Congress is authorized to determine what constitutes an unreasonable obstruction to navigation and to control and regulate navigation. Such power being constitutionally vested in Congress it is without limitation as to the means or manner in which it shall be done, and it would seem that it has the right to employ every agency necessary to the due exercise of such authority, so that, although the power to legislate is vested in Congress alone, the administrative duties in carrying out legislative powers may be delegated, and an act of Congress, which does not delegate to the Secretary of War any power to fix or make the law, but only confers on such secretary authority to determine when a law, enacted by Congress concerning obstructions by bridges to navigable waters, shall be enforced, does not unconstitutionally operate as taking property of a bridge company, whose bridge constitutes such an obstruction, for public use without due compensation, nor is it unconstitutional as being a delegation of legislative or judicial power, especially so where notice is required to be given to the parties interested, and a party who considers himself aggrieved has the right of appeal, or a writ of error, to the court of highest resort.[4] Under an early de-

[2] St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203, 210, 46 L. ed. 872, 22 Sup. Ct. 616, per Brown, J., in discussing question of delegation of power to mining inspector and exercise by him of discretion, citing The Aurora, 7 Cranch (11 U. S.), 382, 3 L. ed. 378; Field v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. 601.

[3] See § 127, herein.

[4] United States v. Union Bridge Co., 143 Fed. 377, citing, considering or quoting from State of Pennsylvania v. Wheeling & Belmont Bridge Co. (Wheeling Bridge Case), 18 How. (59 U. S.) 421, 425, 15 L. ed. 435; South Carolina v. Georgia, 93 U. S. 13, 23 L. ed. 969; Gray v. Chicago, 10 Wall. (77 U. S.) 454, 19 L. ed. 969; Miller v. New York, 109 U. S. 393, 3 Sup. Ct. 232, 27 L. ed. 971; Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23; Gilman v.

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cision it is held that an act of Congress delegating to the Secretary of War the power to declare a bridge an obstruction to navigation and to require it to be changed, remodeled or rebuilt, is unconstitutional.[5] But the later enactment of 1899 [6] giving similar powers is held not unconstitutional as delegating legislative or judicial power to the Secretary of War, as the power granted is administrative, to be enforced by a judicial proceeding in court where the legality of his action could be reviewed.[7] So in another case, in the Supreme Court, it is

Philadelphia, 3 Wall. (70 U. S.) 713, 18 L. ed. 96; United States v. Moline (D. C.), 82 Fed. 592; E. A. Chatfield Co. v. City of New Haven (C. C.), 110 Fed. 792; Fletcher v. Peck, 6 Cranch (10 U. S.), 126, 3 L. ed. 162; Willson v. Blackbird Creek Marsh Co., 2 Pet. (27 U. S.) 245, 7 L. ed. 412; Williamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. ed. 629; Escanaba Co. v. Chicago, 107 U. S. 683, 2 Sup. Ct. 185, 27 L. ed. 442; Pound v. Turck, 95 U. S. 459, 24 L. ed. 525; Cardwell v. American Bridge Co., 113 U. S. 205, 5 Sup. Ct. 423, 28 L. ed. 959; Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294; Cohn v. United States, 152 U. S. 212, 14 Sup. Ct. 513, 38 L. ed. 415; Bushnel v. Leland, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. ed. 598; Lake Shore & Michigan Southern Ry. Co. v. Ohio, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. ed. 747; United States v. Ormsbee (D. C.), 74 Fed. 207; Dastervignes v. United States, 122 Fed. 35, 58 C. C. A. 346, and distinguishing Monongahela Nav. Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463. Principal case is aff'd in Union Bridge v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. 367. In the "statement" of this case it is said: "Legislation similar in its general character can be found in River and Harbor Acts passed at previous sessions of Congress. Act 1884, 23 Stat. 123, 148, c. 229; act of April 11th, 1888, 25 Stat. 400, 424, 425, c. 860, §§ 9, 10; and act of September 19th, 1890, 26 Stat. 426, 453, c. 907, §§ 4, 5. Finally, we have the act of March 23d, 1906, 34 Stat. 84, c. 1130, §§ 4, 5, which covers the same ground as the act of 1899 under which the present information was filed."

[5] United States v. Keokuk & H. Bridge Co., 45 Fed. 178 (under act of Congress, August 11, 1888, 25 U. S. Stat. at L. p. 424, §§ 9, 10, River & Harbor Bill), followed in United States v. Rider (D. C.), 50 Fed. 406.

[6] Act 1899, § 18, 30 Stat. 1153.

[7] E. A. Chatfield Co. v. City of New Haven (C. C.), 110 Fed. 788, cited in United States v. Union Bridge Co., 143 Fed. 377, 387; United States v. Matthews (D. C.), 146 Fed. 306, 308. In this case the delegation to the Secretary of the Interior (transferred to Secretary of Agriculture) of certain powers for the protection of forest reservations was held void as an attempted delegation of legislative powers to an administrative officer, cited in United States v. Keitel (D. C.), 157 Fed. 396, 401; considered as expressing a contrary view

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determined that the provisions of the act of Congress of 1890,[8] conferring upon the Secretary of War authority concerning bridges over navigable water-ways, do not deprive the States of authority to bridge such streams, but simply create an additional cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce.[9] It is also decided by the same court that this enactment does not embrace officers of a municipal corporation, owning or controlling a bridge, who had not in their hands, and, under the laws of the State, could not obtain public moneys that could be applied in execution of the order of the Secretary of War, within the time fixed by that officer to complete the alteration of such bridge. The facts of this case appear in the appended note.[10]

in United States v. Bale, 156 Fed. 687, 688; cited but declared not in point in United States v. Shannon (C. C.), 151 Fed. 863, 865.

Not a delegation of legislative or judicial powers to Secretary of War. United States v. City of Moline (D. C.), 82 Fed. 592.

[8] Act September 19, 1890, c. 907, §§ 4, 5, 7.

[9] Lake Shore & Michigan Southern Ry. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. 357.

[10] The fourth and fifth sections of the River and Harbor Act approved September 19, 1890, provide: "§ 4. That § 9 of the River and Harbor Act of August 11th, 1888, be amended and re-enacted so as to read as follows: That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width, or span, or otherwise, or where there is difficulty in passing the draw-opening of the draw-span of such bridge by rafts, steamboats or other water crafts, it shall be the duty of said Secretary first giving the parties reasonable opportunities to be heard, to give notice to the persons or corporation owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes to be made and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the District in which such bridge is situated to the end that the criminal proceedings mentioned in the succeeding section may be taken. § 5. That § 10 of the River and Harbor Act of August 11th, 1888, be amended and re-enacted so as to read as follows: That if the persons, corporations or associations owning or

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§ 153. Delegation of Power to Interstate Commerce Commission.—The Interstate Commerce Commission is a body corporate, with legal capacity to be a party plaintiff or defendant in the Federal courts. In enacting the interstate commerce acts, Congress had in view and intended to make provision for commerce between States and Territories, commerce going to and coming from foreign countries, and the whole field of commerce except that wholly within a State; and it conferred upon the commission the power of determining whether, in given cases, the services rendered were like and contemporaneous, whether the respective traffic was of a like kind, and whether the transportation was under substantially similar circumstances and conditions. If the commission has power of its own motion, to promulgate general decrees or orders, which thereby become rules of action to common carriers, such exertion of power must be confined to the obvious purposes and directions of the statutes, since Congress has not granted to it legislative powers. It was not the pur-

controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such person, corporation or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, and every month such person, corporation or association shall remain in default as to the removal or alteration of such bridge, shall be deemed a new offense and subject the person, corporation or association so offending to the penalties above described." 26 Stat. 426, 453, c. 907. Proceeding under that act the Secretary of War gave notice to the county commissioners of Muskingum County, Ohio, to make on or before a named day certain alterations in a bridge over the Muskingum River, Ohio, at Taylorsville in that State. The commissioners, although having control of the bridge, did not make the alterations required and were indicted under the act of Congress. It was held that however broadly the act of Congress may be construed it ought not to be construed as embracing officers of a municipal corporation owning or controlling a bridge who had not in their hands, and under the laws of their State could not obtain, public moneys that could be applied in execution of the order of the Secretary of War within the time fixed by that officer to complete the alteration of such bridge. Rider v. United States, 178 U. S. 251, 44 L. ed. 1060, 20 Sup. Ct. 480.

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pose of the statute to reinforce the provisions of the tariff laws; it was the purpose of such enactment to promote and facilitate commerce by the adoption of regulations, to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations, and to abolish combinations.[11] Competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce, this is no longer an open question.[12] Congress has not conferred upon the commission the legislative power of prescribing rates, either maximum, or minimum, or absolute, and, as it has not given the express power to such commission, it did not intend to secure the same result indirectly by empowering that tribunal, after having determined what, in reference to the past, are reasonable and just rates, to obtain from the courts a peremptory order that, in the future, railroad companies should follow the rates thus determined to have been, in the past, reasonable and just.[13] In construing this act, it is to be presumed that Congress in so far as it adopted the language of the English Traffic Act, had in mind the construction given by the English courts to the adopted language, and intended to incorporate it into the statute.[14] And as the general purpose of the statute was to facilitate commerce and prevent discrimination, it will not be construed so as to make illegal

[11] Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 140, 16 Sup. Ct. 666. See Interstate Commerce Commission v. Chicago Great Western Ry. Co., 141 Fed. 1003.

[12] Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414. See Interstate Commerce Commission v. Chicago Great Western Ry. Co., 141 Fed. 1003.

[13] Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; Interstate Commerce Commission v. Cincinnati, New Orleans & Tex. Pacific Ry. Co., 167 U. S. 479, 17 Sup. Ct. 896, 42 L. ed. 243; Cincinnati, New Orleans & Tex. Pacific Ry. Co., 162 U. S. 184, 40 L ed. 935, 16 Sup. Ct. 700.

[14] Interstate Commerce Commission v. Baltimore & Ohio R. Co., 145 U. S. 263, 36 L. ed. 699, 12 Sup. Ct. 844.

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a salutary rule to prevent the violation of the act in regard to obtaining rebates.[15]

§ 154. **Delegation to American Railway Association.**—An act of Congress which vests the American Railway Association with authority to designate the standard height of drawbars, and the maximum variation from such height, and which provides that no freight cars shall be used in interstate traffic which do not comply with such standard, is not unconstitutional as vesting such association with legislative power. The enactment vested it with authority to designate, without the power to give the designation the force or effect of the law that was derived entirely from the statute. When the designation was made the authority was exhausted, and no power to change, amend, enforce or control, existed in the association.[16]

§ 155. **Delegation of Power to Determine Compensation Under Right of Eminent Domain Exercised by United States.**—The liability to make compensation for private property taken for public uses is a constitutional limitation of the right of eminent domain. As this limitation forms no part of the power to take private property for public uses, the government of the United States may delegate to a tribunal created under the laws of a State, the power to fix and determine the amount of compensation to be paid by the United States for private property taken by them in the exercise of their right of eminent domain; or it may, if it pleases, create a special tribunal for that purpose.[17]

[15] Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. 330, rev'g Interstate Commerce Commission v. Southern Pacific Ry., 132 Fed. 829.

[16] St. Louis, Iron Mountain & Southern Ry. Co. v. Neal, 83 Ark. 591, 98 S. W. 958.

[17] United States v. Jones, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. 346, citing Kohl v. United States, 91 U. S. 367, 23 L. ed. 449.

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CHAPTER XII.

DELEGATION OF POWER BY STATE—ENUMERATION OF SUBORDINATE BODIES.

§ 156. Delegation to Board of Agriculture.
157. Delegation to Commissioner of Banking and Insurance —Secretary of State.
158. Delegation to Commissioners of Bridges.
159. Delegation to Drainage Commissioners—Removal of Bridge by Railway Company.
160. Delegation to Commission of Gas and Electricity.
161. Delegation to Grain and Warehouse Commission.
162. Delegation to Inspectors of Coal Mines.
163. Delegation to Bureau of Insurance or to Superintendent or Commissioner of Insurance—Standard Policy.
§ 164. Delegation to Levee District.
165. Delegation to Board of Loan Commissioners—Territory.
166. Delegation to Public Service Commission of New York.
167. Delegation to Railroad Commissioners.
168. Delegation to Railroad Commission—Public Utility Law of Wisconsin.
169. Delegation to Railroad and Warehouse Commission—Railroad — Carriers — Increase of Capital.
170. Delegation to State Corporation Commission.

§ 156. Delegation of Power to Board of Agriculture.—A board of agriculture, which is a branch of the executive department, may be constitutionally empowered to regulate the transportation of cattle within state limits, and such authorization is not a delegation of legislative power.[1] And where the legislature gives a board of agriculture authority to grant or refuse a license to mine for phosphate rock on the State's property and to exercise its discretion for the State's best interest, such authority so vested is not a delegation of legislative power to that board nor does it constitute a violation of the fourteenth constitutional amendment.[2]

[1] State v. Southern Ry. Co., 141 N. C. 846, 54 S. E. 294, Laws 1901, p. 662, c. 479, § 4, sub. "b" construed.

[2] State ex rel. Port Royal Mining Co. v. Hagood, 30 S. C. 519, 3 L. R. A. 841, 9 S. E. 686.

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§ 157. **Delegation to Commissioner of Banking and Insurance—Secretary of State.**[3]—Duties in relation to insurance matters, which are administrative and neither legislative nor judicial, may be devolved upon the Secretary of State and subsequently transferred by statute to the commissioner of banking and insurance, the object being to regulate certain corporations which are subject, by the law of their creation, to regulation.[4] And it is not a delegation of legislative or judicial power for a statute to require the approval of the Secretary of State to a contract for reinsurance.[5]

§ 158. **Delegation to Commissioners of Bridges.**—Where the legislature has authority under the state constitution to provide for building bridges over navigable waters and the power to charter companies for that purpose, it may exercise such authority and regulate the construction and management of bridges, and it may delegate its authority to commissioners to be named, and such delegation of power vests the control in them; and where such commission is abolished and its duties and powers vested in the commissioner of bridges of a city, who had the power to authorize to be operated, a railroad or railroads over the bridge, and authority to contract for such operation and to fix the fares to be paid by the directors of the company or companies so contracting, such contract does not create a franchise, and if it did, it would be illegal and void and beyond the power of the municipal officer making it.[6]

§ 159. **Delegation to Drainage Commissioners—Removal of Bridge by Railway Company.**—Where the proper drainage of the land in a district is impossible without the removal of a railway bridge over the natural water course into which the

[3] See § 163, herein.

[4] Iowa Life Ins. Co. v. East Mut. Life Ins. Co., 64 N. J. L. 340, 45 Atl. 762.

[5] Iowa Life Ins. Co. v. Eastern Mut. Life Ins. Co., 64 N. J. L. 340, 45 Atl. 762.

[6] Schinzel v. Best, 92 N. Y. Supp. 754, 45 Misc. 455, 48 Misc. 234, aff'd 96 N. Y. Supp. 1145, 109 App. Div. 917 (this was the Williamsburg bridge over the East river, New York).

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lands drained and the construction of a bridge with a larger opening for the increased volume of water, it is the duty of the railway company, at its own expense, to remove the existing bridge, and also, unless it abandons or surrenders its right to cross the creek at or in that vicinity, to erect at its own expense and maintenance a new bridge in conformity with regulations established by the drainage commissioners under the authority of the State; and such a requirement, if enforced, will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws.[7]

§ 160. **Delegation to Commission of Gas and Electricity.**— A statute may authorize the appointment by the governor of a commission to fix the maximum price to be charged for service by gas and electric light corporations where such commission is only intrusted with the duty of investigating the facts, and, after a public hearing, of ascertaining and determining "within the limits prescribed by law" what is a reasonable maximum rate. Such a statute does not violate that provision of the Federal constitution which guarantees to every State a republican form of government, although such statute is violative of the Fourteenth Amendment of the Federal Constitution guaranteeing "equal protection of the laws" where it does not afford companies the right to petition for a new rate at the end of the term of three years or at any time thereafter.[8] Under the statute of 1905[9] entitled: "An act to establish a commission of gas and electricity with power to regulate the price of gas and electric light and certain other electric services, and to provide for the control and supervision of gas, electric light and other electric corporations and making an appropriation therefor," and providing for an ap-

[7] Chicago, Burlington & Quincy Ry. Co. v. Drainage Comrs., 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. 341, aff'g 212 Ill. 103, 72 N. E. 219. See § 152, herein.

[8] Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co., 191 N. Y. 123, 83 N. E. 693, rev'g 107 N. Y. Supp. 341.

Board of gas trustees, see § 198, herein.

[9] Laws N. Y. 1905, chap. 737. See

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proval of incorporation and franchises, and a certificate of authority signed and executed by the commission, and that no municipality shall build, maintain and operate for other than municipal purposes any works or systems for the manufacture and supplying of gas or electricity for lighting purposes without a certificate of authority granted by the commission, such certificate is a prerequisite to the establishment and maintenance by a village of a system which includes private lighting, even though prior to the adoption of the statute, such village had by virtue of the authority of a prior statute [10] voted for a lighting system, but no property had been acquired, no expenditures made in the construction of such system; and in such a case an action will lie by a taxpayer to restrain the trustees of the village from issuing bonds to establish such a system.[11]

§ 161. **Delegation to Grain and Warehouse Commission.**—The State may, it is held, create a grain and warehouse commission, and provide for the inspection and grading of grain in a certain city where such city stands in a distinct class by itself with reference to commerce and the grain trade, and, therefore, the law is not unconstitutional on the ground of denying equal protection of the laws.[12]

§ 162. **Delegation to Inspectors of Coal Mines.**—A state legislature may provide for the appointment of inspectors of mines and the payment of their fees by the owners of such mines, and a law providing for the inspection of coal mines is not unconstitutional because of its limitation to mines where more than five men are employed at any one time. Where the law provides for the inspection of coal mines at least four times a year, it is not objectionable by reason of the fact that a dis-

§ 166, herein, as to Public Service Commissions Law.

[10] Laws 1897, p. 438, c. 414.

[11] Potsdam Electric Light & Power Co. v. Village of Potsdam, 97 N. Y. Supp. 190, 49 Misc. 18, aff'd 98 N. Y. Supp. 1113, 113 App. Div. 894.

[12] Globe Elevator Co. v. Andrew (U. S. S. C.), 144 Fed. 871, s. c., 156 Fed. 664.

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cretion is vested in the inspectors to cause the mines to be inspected a greater number of times a year and as often as they may deem it necessary and proper, nor is such law rendered unconstitutional by a provision fixing the maximum and minimum fees within the limits of which a fee may be charged for each inspection.[13]

§ 163. **Delegation to Bureau of Insurance or to Superintendent or Commissioner of Insurance—Standard Policy.**[14]— Independently of the constitution the legislature in Virginia has power to establish and officer a bureau of insurance, and it may appoint a commissioner of insurance, although the constitution declares that the state corporation commission shall have certain officers to be appointed by and be subject to removal by the commission. Such provision of the constitution also declares that the legislature may establish within the department, and subject to the supervision and control of the commission, a subordinate division or bureau of insurance. But the enumeration of a lower class of officers to be appointed and removed by the commission does not take away from the legislature the power and right to select the head of the bureau, the commissioner of insurance. General words following a specific enumeration should be applied to other persons or things of the class enumerated.[15] But a statute under which the insurance commissioner, or superintendent of insurance, is directed to prescribe a standard policy of insurance, for use in the State, and forbidding the use of any other form, is held unconstitutional in that it involves an unauthorized delegation of legislative power, but it is also decided that the legislature may itself prescribe a form of contract of insurance.[16]

[13] St. Louis Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 877, 22 Sup. Ct. 619.

[14] See § 157, herein.

[15] Button v. State Corporation Commission, 105 Va. 634, 54 S. E. 769.

[16] O'Neill v. Insurance Co., 166 Pa. 72, 25 Pitts. L. J. (N. S.) 236, 35 W. N. C. 513, 26 L. R. A. 715, 30 Atl. 943. Examine Opinion of Justices, In re, 97 Me. 570, 55 Atl. 828; Business Men's League v. Waddill, 143 Mo. 495, 40 L. R. A. 501; Anderson v. Manchester Fire Assur. Co., 59 Minn. 182, 63 N. W. 222, 241, 60 N. W.

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§ 164. **Delegation to Levee District.**—Where the constitution of a State expressly specifies that the legislature may delegate the taxing power to counties and incorporated towns, delegation of such power to a levee district is impliedly excluded.[17]

§ 165. **Delegation to Board of Loan Commissioners—Territory.**—A Territory may pass an act establishing a board of loan commissioners for the purpose of refunding the territorial indebtedness. And such act may be confirmed and approved by Congress so as to be beyond the power of the legislature to repeal, even though the authority of said board is derived from the Territory and not from Congress.[18]

§ 166. **Delegation to Public Service Commission of New York.**—The New York laws [19] establish a public service commission, vesting in the governor the power of appointment, by and with the consent of the Senate, and also the power of removal for certain specified causes, and give to such commission the regulation and control of certain public service corporations enumerated therein.[20]

1025, 28 L. R. A. 609, rev'g 24 Ins. L. J.; Flatley v. Phœnix Ins. Co., 95 Wis. 618, 70 N. W. 828; Dowling v. Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112.

[17] Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

[18] Murphy v. Utter, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. ed. 1070.

[19] Laws 1907, chap. 429.

[20] See Appendix, herein.

In an article in vol. 19 of The Green Bag (1907), by Travis H. Whitney, it is said of the Public Service Commissions Law, that: "A careful examination of the measure discloses that it follows closely the Interstate Commerce Act and is founded upon principles of public control and supervision that have been sustained by Federal and state courts, and that as to many important subjects is either a reenactment of existing New York law or a reassignment of duties already imposed upon important state commissions. For example, the important functions as to new transit lines in New York City heretofore exercised by the Rapid Transit Commission are transferred to the Commission of the First District, and the Rapid Transit Act which defines these functions is not changed in the slightest extent. Furthermore, the provisions as to gas and electrical corporations are, with slight changes, those contained in the act of 1905, creating the State Gas and Electricity

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§ 167. Delegation to Railroad Commissioners.—Railroad companies, from the public nature of the business carried on by them and the interest which the public have in their operation, are subject as to their state business to state regulation, which may be exerted either directly by legislative authority or by administrative bodies endowed with power to that end.[21] So a railroad commission is an administrative

Commission with jurisdiction over corporations supplying those public services. * * * The commissions and offices abolished and superseded are the State Railroad Commission, the State Gas Commission, the State Inspector of Gas Meters, and the Rapid Transit Commission." The article then reviews the legislation establishing the different commissions from the establishment of the first Rapid Transit Commission in 1875 and its reorganization in 1891, the scope, jurisdiction and effect of the new act generally, also specifically upon the points as to the "Powers of the Commissions"; "Court Proceedings and Preferences"; "Immunity of Witnesses"; "Summary Proceedings"; "Power Over Rates, etc."; "Uniform Accounts"; "Control over Franchise"; Issue of Stocks, etc."; "Duties of Common Carriers"; "Actions for Penaltes"; "Gas and Electricity."

See §§ 167–170, herein.

Delegation to Board of Rapid Transit Railroad Commission, see § 190, herein.

[21] Atlantic Coast Line Rd. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19, 51 L. ed. 933, 27 Sup. Ct. 585. This "elementary proposition, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine," per White, J., citing Chicago, Burlington & Quincy R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94; Peck v. Chicago & North-western Ry. Co., 94 U. S. 164, 24 L. ed. 97; Chicago, Milwaukee & St. Paul Rd. Co. v. Ackley, 94 U. S. 179, 24 L. ed. 99; Winona & St. Peter Rd. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99; Stone v. Wisconsin, 94 U. S. 181, 24 L. ed. 102; Ruggles v. Illinois, 108 U. S. 536, 27 L. ed. 816, 2 Sup. Ct. —; Illinois Central R. Co. v. Illinois, 108 U. S. 541, 27 L. ed. 818, 2 Sup. Ct. 839; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334, 348, 349, 388, 1191; Stone v. Illinois Central Rd. Co., 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. 348, 1191; Stone v. New Orleans & Northeastern Rd. Co., 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. 349, 391; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 8 Sup. Ct. 1028; Charlotte, Columbia & Augusta Rd. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. 255; Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U. S. 339, 30 L. ed. 176, 12 Sup. Ct. 400; Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 665, 40 L. ed. 838, 16 Sup. Ct. 705; Louisville & Nashville Ry. Co. v. Kentucky, 161 U. S. 677, 695, 40 L. ed. 849, 16 Sup. Ct. 714; Wisconsin, Minnesota & Pacific Rd. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 1194, 21 Sup. Ct. 124; Minneapolis & St. Louis Rd. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. 900; Minnesota & St. Louis Rd. Co.

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body empowered to act to carry out the State's legislation in matter of public convenience, safety and health.[22] And a statute authorizing state railroad commissioners to regulate railroad corporations and other common carriers, fix rates, etc., is not unconstitutional as a delegation of legislative powers.[23] The board of railroad commissioners of New York, when exercising its authority, exercises a large discretion as to what evidence it will hear upon the question, whether public convenience and necessity require construction of a proposed railroad and the issuance of a certificate to that effect.[24] But the power conferred upon such board does not take away the power of New York City to enact ordinances regulating railways in its streets.[25] Nor does the grant to such commissioners of the power to consent to the construction of street railroads deprive the legislature of the power to grant a franchise to street railroads without the commissioners' consent, or to enact a statute which operates retrospectively to cure defects arising from the commissioners' refusal to consent.[26] In Florida the powers of railroad commissioners are limited by the express or implied provisions of the statute; it may make rates for transportation but not for particular persons, natural or artificial;[27] and their rules and regulations are *prima facie* reasonable and just so that they may be enforced without being unconstitutional as taking property without due process of law, unless such

v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. 396; Chicago, Burlington & Quincy Ry. Co. v. Illinois, 200 U. S. 561, 584, 50 L. ed. 596, 26 Sup. Ct. 341; Atlantic Coast Line Rd. Co. v. Florida, 203 U. S. 256, 27 Sup. Ct. 108; Seaboard Air Line Ry. v. Florida, 203 U. S. 261, 27 Sup. Ct. 109.

[22] Morgan's Louisiana & Texas Rd. & Steamship Co. v. Railroad Commissioners, 109 La. 247, 33 So. 214.

[23] Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 866, 4 R. R. & Corp. L. J. 465, 2 Interstate Comm. Rep. 325, 1 L. R. A. 744.

[24] People v. Board of Railroad Commrs., 81 N. Y. Supp. 26, 81 App. Div. 237.

Public Service Commission Law of New York, § 166, herein, and note.

Board of Rapid Transit Railroad Commissioners, see § 190, herein.

[25] New York City v. Interurban St. Ry. Co., 86 N. Y. Supp. 673, 43 Misc. 29.

[26] Kittinger v. Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081, aff'g 49 N. Y. Supp. 713, 25 App. Div. 329.

[27] State v. Atlantic Coast L. R. Co. (Fla., 1906), 40 So. 875.

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rules and regulations are proven unreasonable.[28] But whether a regulation of a state railroad commission, otherwise legal, is arbitrary and unreasonable because beyond the scope of the powers delegated to the commission, is not a Federal question.[29] The commission may, subject to review thereof, maintain actions for penalties in case its orders are violated, and may upon proper notice make its orders executory.[30] The act of the legislature of Minnesota, creating a railroad commission, is nct unconstitutional in assuming to establish joint through rates or tariffs, over the lines of independent connecting railroads, and apportioning and dividing the joint earnings. Such a commission has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road or for a joint action between railroads in the transportation of persons and property in which the public is indirectly concerned. And whether or not connecting roads may be compelled to enter into contracts as between themselves, and establish joint rates, it is none the less true that where a joint tariff between two or more roads has been agreed upon, such tariff is as much within the control of the legislature as if it related to transportation over a single line.[31] Again, as the creation of a board of railroad commissioners and the extent of its powers; what the route of railroad companies created by the State may be; and whether parallel on competing lines may consolidate, are all matters which a State may regulate by its statutes, and the state courts are the absolute interpretators of such statutes; a decree of a state court requiring a railroad company, which does an interstate business, to con-

[28] State v. Atlantic Coast Line Co. (Fla., 1906), 41 So. 705.

[29] Atlantic Coast Line Rd. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. 585.

[30] Railroad Commission v. Kansas City Southern Ry. Co., 111 La. 133, 35 So. 487.

As to appeal from "decision, denial, direction or order" of municipal authorities to railroad commissioners, see Joyce on Elec. Law (2d ed.), § 360*a*.

[31] Minneapolis & St. Louis Rd. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151.

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struct its lines within the State in accordance with provisions of its charter and the directions of the state railroad commission, is not an interference with interstate commerce because compliance therewith entails expense or requires the exercise of eminent domain.[32]

§ 168. **Delegation to Railroad Commission—Public Utility Law of Wisconsin.**—The Public Utility Law of Wisconsin of 1907, gives to the railroad commission of that State jurisdiction over public utilities and provides for the regulation thereof. Its specific provisions are given elsewhere herein,[33] and its general features are those set forth in the appended note.[34]

[32] Mobile, Jackson & Kansas City Rd. Co. v. Mississippi, 210 U. S. 187.

[33] See Appendix, herein.

[34] In an article, by Eugene A. Gilmore, upon "The Wisconsin Public Utilities Act," published in vol. 19, Green Bag (1907), p. 517, it is said: "By the legislation of 1905 and amendments thereto, and by the enactment of the 'Public Utilities Bill' at the recent session of the legislature, all forms of public business in Wisconsin are subject to the control and supervision of a commission of three men known as the 'Railroad Commission' appointed by the governor for six years, and confirmed by the Senate. The governor may at any time remove any commissioner for cause. By the 'Railroad Act' of 1905 this commission was first created, and all common carriers, including steam railroads, interurban electric railroads, bridge and terminal companies, express companies, car companies, sleeping-car companies and freight and freight-line companies were placed under its control. The recent legislation places under this same commission, telegraph companies, urban street railway companies, and all public utility companies. * * * The supervision and control extends to the investigation and fixing of rates, tolls, and charges; the securing of adequate and equal service; prescribing regulations as to the conditions, adequacy and standards of service; the prevention of unreasonable preferences and discriminations; providing for a uniform system of books and accounting; and prescribing conditions for the ownership and development of public utilities. The Public Utilities Act is the consummation of the movement towards a more effective control of public service companies, which began two years ago with the adoption of the Railroad Rate Law, and the success of this recent measure is due in large part to the confidence in commission control, which has been inspired by the efficient administration of the present railroad commission. * * * While municipal ownership and operation are contemplated and provided for, the tendency of the Act will be strongly towards private rather than towards municipal operation of public utilities. * * * The object of the

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§ 169. Delegation to Railroad and Warehouse Commission—Railroads—Carriers—Increase of Capital Stock.—The authority vested in a railroad and warehouse commission to determine, in the exercise of their discretion and judgment, what are equal and reasonable rates and fares for the transportation of persons and property by a railway company, is not a delegation of legislative power.[35] And as the regulation of the business conducted by common carriers is one over which the legislature has full power to act, ample authority can by law be conferred upon a railroad and warehouse commission to call for information on any carrier, whether a natural or artificial person, resident or non-resident, carrying on business within the State, where such information is absolutely essential for the proper conduct of the carrier and the protection of the public. And a statutory provision empowering the courts to direct the manner of service of notice upon such common carrier, when proceeded against, does not constitute a delegation of legislative power to the judiciary.[36] A state legislature may also pass a statute providing generally

law is to secure adequate service from all public utilities under conditions which are fair and reasonable, not only to the public, but also to the corporations concerned, and at the same time leave sufficient inducement for the improvement and extension of such utilities and the further installation and development of similar utilities throughout the State. * * * The law is not wholly an experiment, but is based upon and follows a long line of English legislation, dating as far back as 1855, which has dealt, apparently with great success, with the business of supplying gas for lighting and heating. Many of the provisions of the law have been suggested by the Sheffield Gas Acts of 1855 and 1866. The framers of the bill have also drawn from the information and experience of the Public Franchise League of Massachusetts and from the legislation in Massachusetts and New York dealing with the same problem." Mr. Gilmore also considers the following important and characteristic features of the act, under the headlines of "Valuation"; "Capitalization"; "Competition"; "Municipal Ownership"; "Common Use of Facilities"; "Accounting and Publicity"; "Depreciation"; "Control of Rates and Service"; "Sliding Scale and Division of Surplus Proceeds"; and "Municipal Control."

[35] State v. Chicago, Milwaukee & St. Paul Ry. Co., 38 Minn. 281, 37 N. W. 782.

[36] State ex rel. Railroad & Warehouse Commission v. Adams Exp. Co., 66 Minn. 271, 273, 38 L. R. A. 225, 68 N. W. 1085, per Collins, J.

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for what purposes and upon what terms, conditions and limitations an increase of capital stock may be made, and it may confer upon a commission (a railroad and warehouse commission) the administrative duty of supervising any proposed increase of stock. It may also delegate to the commission the duty of finding the facts in each particular case, and empower and require it to allow the proposed increase where the facts exist which bring the case within the statute. But the legislature cannot, by any statute, authorize such commission in its judgment to allow an increase of a corporation's capital stock for such purposes and on such conditions or terms as it shall or may deem advisable, or in its discretion to refuse it, as such an attempt to confer authority would be a delegation of legislative power. And where the statute does delegate to a commission such legislative power, it is unconstitutional and void; a distinction exists between the delegation of legislative powers and administrative duties; that between the delegation of power to make a law, which involves a discretion as to which it shall be, and the conferring an authority or discretion to be exercised under and in pursuance of the law.[37]

§ 170. **Delegation to State Corporation Commission.**—As a State has inherent power to regulate and control public service corporations, operating within its limits, and to prescribe within reasonable bounds the facilities and conveniences which shall be furnished by them, it may delegate to or confer this power upon a body, such as a state corporation commission, although it possesses, to some extent, legislative, executive and judicial powers. And where such commission is, by the constitution and laws of a State, given control over common carriers of persons and goods as to matters relating to their public duties and charges, and the latter are given full opportunity, upon notice, to be heard as to their defense and also a right of appeal to the state court, they are not, by such legislation, deprived of their property without due process

[37] State v. Great Northern Ry. Co., 100 Minn. 445, 10 L. R. A. (N. S.) 250, 111 N. W. 289.

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of law. But although this applies to the exercise of its judicial powers, still, in exercising its legislative powers the commission is not obligated to give notice to the parties to be affected thereby. Again, the subjection of common carriers to the control of such corporation commission by the state constitution and laws does not deny to them the equal protection of the laws within the meaning of that provision of the Federal Constitution. The state constitution and laws apply alike in such case to all persons and companies similarly situated, and the classification is a reasonable one. Nor is the commission an illegal and invalid tribunal, even though invested to a certain extent with legislative, executive and judicial powers; nor does such grant of powers conflict with the Bill of Rights, which expressly provides that, "except as hereinafter provided, the legislative, executive and judicial departments shall be kept separate and distinct." But where a choice of either of two methods of performing a charter duty is given a corporation, it should not be limited to one of them by the commission, nor should the latter make any order affecting the right of a connecting carrier who has had no notice and was not a party to the proceeding.[38] Again, while a State in the exercise of its police powers may confer authority on an administrative agency to make reasonable regulations as to the place, time and manner of delivery of merchandise, moving in channels of interstate commerce, such commerce cannot be directly burdened thereby, and any regulation which does so is repugnant to the Federal Constitution, and this applies to an order of a state corporation commission which requires a railway company to deliver cars from another State to a consignee on a private siding beyond its own right of way as it constitutes a burden on interstate commerce; but *quære* whether such an order applicable solely to state business would be repugnant to the due process clause of the Constitution.[39] The state corporation commission, in determining the

[38] Winchester & Strasburg Rd. Co. v. Commonwealth, 106 Va. 264, 55 S. E. 692.

[39] McNeill v. Southern Ry. Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. ed. 1142, aff'g but modifying Southern

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liability of a corporation for a fine or forfeiture imposed by a statute which it is required to enforce, acts judicially, and may declare the act imposing such fine or forfeiture unconstitutional.[40]

Ry. Co. v. Greensboro Ice & Coal Co., 134 Fed. 82.

[40] Commonwealth v. Atlantic Coast Line Ry. Co., 106 Va. 61, 55 S. E. 572, 7 L. R. A. (N. S.) 1086.

As to powers of railroad commissioners on appeal see Joyce on Elec. Law (2d ed.), § 360a.

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CHAPTER XIII.

DELEGATION OF POWER TO AND BY COURTS.

§ 171. Delegation to Courts—Generally.
172. Delegation to Courts of Equity—Railroad Bridges Crossing Highways.
173. Delegation to Supreme Judicial Court—Water Rates.
174. Delegation to Appellate Court—Reasonableness of Rates Fixed by Commission.
175. Delegation to Fiscal Court—Subdelegation to County Judge—Subscription to Stock of Railroad Company.
176. Delegation to Circuit Courts—Designation of Telephone Route—Charter to Obstruct Highway.
177. Delegation to Federal Circuit Courts—Power to Enforce Orders of Interstate Commerce Commission—Jurisdiction—Contract Rights of Railroad.
178. Delegation to County Commissioners' Court—County Courts—Ferry Franchise—Grant of Use of Streets by Railroad or Gas Company.
§ 179. Delegation to Probate Court—Use of Streets by Telephone Company.
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182. Delegation to Board of Equalization—Review of Action of—Federal Courts.
183. Delegation to Commissioners by Courts—Construction of Street Railroads—Appointment by Circuit Judge of Commissioners of Equalization.
184. Delegation of Powers—Power of Courts in Relation to—Power of Over Municipalities, Common Council, Commissioners of Waterworks, Railroad Commissioners, and Over Other Courts, etc.—Police Power.

§ 171. **Delegation to Courts—Generally.**—A duty which is not a judicial but a legislative or administrative one, such as fixing railroad transportation rates, cannot be forced upon the judiciary contrary to the state constitution.[1] So the estab-

[1] Steenerson v. Great Northern R. Co., 69 Minn. 353, 72 N. W. 713, 8 Am. & Eng. R. Cas. (N. S.) 559.

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lishment of regulations as to the use of streets is such a legislative function that it cannot be assumed by a court, although it may pass upon the validity or reasonableness of such regulations by municipal authorities and may order the adoption by them of reasonable regulations as to such street use.[2] It is held the power committed to the courts of Georgia to grant corporate powers to private companies, not being judicial, but altogether legislative, and there being no provision for the review of such action, a writ of error will not lie.[3] Although the authority to grant a franchise of establishing and maintaining a toll bridge over rivers crossing public highways in that State is vested solely in the legislature, yet it may be exercised by it or be committed to such agencies as it may choose. And the statutes therein confer upon certain courts the power to establish such bridges, but not to bind the public in respect to its future necessities.[4] Whether a drainage ditch proposed to be constructed pursuant to a statute [5] will be conducive to the public health, convenience or welfare, or whether the route is practicable, are questions of governmental or administrative policy and not of judicial cognizance, therefore jurisdiction over them by appeal or otherwise cannot be conferred by statute upon the courts.[6]

[2] Michigan Teleph. Co. v. City of St. Joseph, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 7 Am. Elec. Cas. 1, 4; Grant, J., said: "It is conceded * * * that that part of the decree by which the court assumed the right to establish reasonable rules and regulations is void. This is a legislative or administrative function and not a judicial one. The court has the power to put the proper authorities in the defendant city in motion to adopt reasonable rules and regulations, and to pass upon the validity of such action when taken. This is the extent of its authority. Houseman v. Kent, Circuit Judge, 58 Mich. 364, 25 N. W. 369; City of Manistee v. Harley, 79 Mich. 238, 44 N. W. 603. Other courts recognize the same rule. Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047; Norwalk St. Ry., Appeal of, 69 Conn. 576, 37 Atl. 1080; Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171. See Joyce on Electric Law (2d ed.), §§ 220, 357.

[3] Gas Light Co. of Augusta v. West, 78 Ga. 318.

[4] Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921.

[5] Neb. Comp. Stat., 1903, chap. 89, art. 1.

[6] Tyson v. Washington County (Neb., 1907), 110 N. W. 634. See §§ 136, 147, herein.

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§ 172. **Delegation to Courts of Equity—Railroad Bridges Crossing Highways.**—The legislature may confer upon a court of equity jurisdiction to prescribe the crossing to be constructed if any railroad company shall not properly construct bridges or other crossings of highways as required by law, and such legislation is within the constitutional power of the legislature.[7]

§ 173. **Delegation to Supreme Judicial Court—Water Rates.**—As the legislature has power to require water companies to supply water to consumers at reasonable rates, it may give, by statute, to persons who are actual water-takers and are aggrieved, or to the selectmen of a town, the right to apply to the supreme judicial court and have two or more judges of such court determine whether the rates charged are reasonable, and also the reasonableness of rates to the extent of the interests before the court, and such statutory provision, as so construed, is not unconstitutional nor does it require the court to exercise legislative functions.[8]

[7] Mayor, etc., of City of Newark v. Erie Rd. Co. (N. J. Ch., 1907), 68 Atl. 413, 415, 416. The court, per Magie, C., upon the point of constitutionality, said: "I think I am not at liberty to deal with these questions. The legislation contained in § 29 has been pronounced to be within the constitutional power of the legislature in this court and that decision is binding on me. * * * Other legislation of similar scope and effect has also been pronounced constitutional in this court and that decision has been approved by the Court of Errors." See § 200, herein, as to Court of Chancery and appeal from orders of highway or toll road commissioners.

[8] Janvrin, Petitioner (Janvrin v. Revere Water Co.), 174 Mass. 514, 55 N. E. 381; Stat. 1895, c. 488. This statute provided, in substance, for application, by the selectmen of a town or by any person deeming themselves aggrieved, to the Supreme Judicial Court to have a reasonable rate fixed and that two or more judges should establish such maximum rates as the court should deem proper as compared with charges for similar services in other cities and towns in the metropolitan district. The statute was, however, construed as above. The court cited, or considered, the following cases: Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 42; Reagan v. Trust Co., 154 U. S. 362, 397, 14 Sup. Ct. 1047, 1054, 38 L. ed. 1014, 1023; Budd v. New York, 143 U. S. 517, 537, 549, 552, 12 Sup. Ct. 468, 36 L. ed. 247; Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.

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§ 174. **Delegation to Appellate Court—Reasonableness of Rates Fixed by Commission.**—Under the Indiana constitution judicial power is vested in certain courts and also in such other courts as the general assembly may establish,[9] so that it is held to be within the power of the legislature of that State to confer upon the appellate court appellate jurisdiction, or such other jurisdiction as it deems necessary and requisite where the duty vested is judicial only, and such court acts within its judicial power in determining, on appeal, the reasonableness of a rate fixed by a commission, and whether such commission is a valid one duly established under a valid law, and also whether the rate in question has been fixed in due form of law.[10]

§ 175. **Delegation to Fiscal Court—Subdelegation to County Judge—Subscription to Stock of Railroad Company.**—Where the legislature has delegated to a fiscal court the authority to subscribe to the stock of a railroad company, and that court has authorized the subscription, it has power to delegate to the county judge, who presides over such court, certain ministerial duties involved in the exercise of the authority so conferred upon the court.[11]

§ 176. **Delegation to Circuit Courts—Designation of**

S. 339, 344, 12 Sup. Ct. 400, 36 L. ed. 176; Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 354, 28 L. ed. 173, 4 Sup. Ct. 48; Smith v. Strother, 68 Cal. 194, 8 Pac. 852; McMahon v. McHale, 174 Mass. 320, 54 N. E. 854; Veginan v. Morse, 160 Mass. 143, 148, 35 N. E. 451; Attorney Gen'l v. Old Colony R. Co., 160 Mass. 62, 86, 87, 35 N. E. 252, 22 L. R. A. 112.

[9] Const., art. 7, § 1.

As to jurisdiction of Supreme Court, appellate and other courts in Indiana, see 11 "Cyc." pp. 816-818. Article "Courts," by Joseph A. Joyce and Howard C. Joyce. See also article as to jurisdiction, etc., of the different Federal and state courts.

[10] Chicago, Indianapolis & Louisville Ry. Co. v. Railroad Commission, 38 Ind. App. 439, 78 N. E. 338; s. c., 39 Ind. App. 358; act Feb. 28, 1905, acts 1905, chap. 53, p. 83; act Feb. 1891, acts 1891, c. 37, p. 39. See § 200, herein, as to appeal to Chancery Court from order of highway or toll road commissioners.

[11] Estill County v. Embry, 144 Fed. 913; acts Ky. 1877-1878, vol. 1, pp. 913-919, 449.

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Telephone Route—Charter to Obstruct Highway.—A delegation of power by the legislature to the Circuit Court, to designate a route for a telephone line through a municipality, in case the municipal authorities do not, upon application, make the designation within a certain number of days, is improper and void.[12] Nor has the Circuit Court of the city of Richmond any power to grant a charter to a corporation authorizing it to obstruct a public highway.[13]

§ 177. Delegation to Federal Circuit Courts—Power to Enforce Orders of Interstate Commerce Commission—Jurisdiction—Contract Rights of Railroad.—The twelfth section of the Interstate Commerce Act, which authorizes the Circuit Courts of the United States to use their process in aid of inquiries before the commission, is not unconstitutional as imposing on judicial tribunals duties not judicial in their nature;[14] and said court, in proceedings to enforce an order of the commission, under section sixteen of the act, is only

[12] State, New York & New Jersey Teleph. Co. v. Mayor, etc., of Bound Brook, 66 N. J. L. 168, 48 Atl. 1022, 7 Am. Elec. Cas. 65. In this case the court, per Garretson, J., said: "It is admitted by the counsel of the complainant that the delegation of power to the Circuit Court, in the act of 1887, to designate a route, in case the common council does not make the designation within fifty days, is improper and void, and for that reason application for mandamus is made to this court. The counsel for the borough claim that this delegation of power to the Circuit Court is void, and renders the entire act unconstitutional. We think that the act of 1888," which is in terms an amendment of the act of 1887 and takes its place, "contains an improper delegation of power to the Circuit Court, and in that respect is void (Mayor, etc., v. Lord, 61 N. J. L. 136, 38 Atl. 752), but we do not think that this renders the rest of the act unconstitutional. In the case of Home Teleph. Co. v. City of New Brunswick, 62 N. J. L. 172, it is to be noticed that it did not appear to be claimed that the company's remedy for the city's failure to act was by application to the Circuit Court, but that requirement was disregarded, and application made to the Supreme Court for a mandamus." The application in the principal case was for a mandamus upon the mayor and council of Bound Brook to designate a route for a telephone line through the borough. Examine Beirs v. Vanceburg Teleph. Co., 28 Ky. L. Rep. 142, 89 S. W. 126.

[13] Richmond, City of, v. Smith, 101 Va. 161, 43 S. E. 345.

[14] Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 Sup. Ct. 1125.

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empowered to enforce it, if at all, in its entirety, and cannot amend or modify it.[15] In a case in the Federal Supreme Court where a railroad company claimed a contract with the State for the exclusive use of certain space, but it had not obtained the requisite consents nor acquired any property by condemnation, it was held, that where the sole ground on which the jurisdiction of the Circuit Court is invoked is that the case arises under the impairment of contract clause of the Constitution of the United States, and the facts set up by complainant are, as matter of law, wholly inadequate to establish any contract rights as between them and the State, no dispute or controversy arises in respect to an unwarranted invasion of such rights, and the bill should be dismissed for want of jurisdiction.[16] Where a statute delegates powers to a city, the ordinances of the municipality are the acts of the State, and their unconstitutionality is the unconstitutionality of a state law within the meaning of section five of the Circuit Court of Appeals Act.[17]

§ 178. **Delegation to County Commissioners' Court—County Courts—Ferry Franchise—Grant of Use of Street by Railroad or Gas Company.**—In Texas a statute may constitute the commissioners' court of the proper county as the authority from which a license must be obtained by a company desiring to operate a ferry. Such county commissioners' courts are empowered to establish public ferries whenever the

[15] Interstate Commerce Commission v. Lake Shore & Michigan Southern Ry. Co., 134 Fed. 942, aff'd 202 U. S. 613, 26 Sup. Ct. 766, 50 L. ed. 1171; act March 2, 1889, c. 382, 25 Stat. 859, U. S. Comp. Stat. 1901, p. 3165. See also as to power to enforce order of Commission: Interstate Commerce Commission v. Southern Pacific Co., 132 Fed. 829, rev'd on other grounds in Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S. 536, 26 Sup. Ct. 330, 50 L. ed. 585; act Feb. 4, 1887, c. 104, 24 Stat. 379, U. S. Comp. Stat., 1901, pp. 3154–3165.

[16] Underground Railroad of the City of New York v. The City of New York, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. 494. Cited in Newburyport Water Co. v. Newburyport, 193 U. S. 561, 576, 48 L. ed. 795, 24 Sup. Ct. 553.

[17] Davis & Farnum Manufg. Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 504, 47 L. ed. 854. See 11 "Cyc." pp. 941–944, article "Courts," by Joseph A. Joyce and Howard C. Joyce.

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public interest may require it, and no one is permitted to keep a public ferry and to charge fees without a license from the court.[18] The county court in Tennessee may grant a ferry franchise. It may also grant a second ferry franchise to another without being guilty of gross abuse of discretion, even though public exigency does not demand two ferries.[19] Under an Arkansas decision the judgment of the county court, in granting or refusing a ferry franchise or privilege, concludes those whose interest is merely a public one, as the court acts judicially in the matter; but one whose private interests are invaded is not bound thereby except he voluntarily appears and so makes himself a party to the proceeding before the court.[20] Where a river at the point at which it is sought to establish a ferry is the dividing line between two counties, the jurisdiction of their respective county courts is concurrent, and the county court of either county may grant a ferry license at the point in controversy, but if one of the courts assumes jurisdiction for that purpose it retains jurisdiction until final adjudication, and the other cannot, while such proceeding is pending, assume jurisdiction of an application of another person for a ferry at the same place.[21] In Texas the county commissioners' court may grant a franchise for a ferry privilege to the center of a river constituting the boundary line between that State and foreign territory.[22] A county court has authority within its administrative discretion to grant or refuse a railroad company's petition for the use of city streets.[23] So county court commissioners may be authorized by statute to grant to an individual the right or

[18] Tugwell & Madison v. Eagle Pass. Ferry Co., 74 Tex. 480, 9 S. W. 120.

[19] Guinn v. Eaves, 117 Tenn. 524, 101 S. W. 1154. See Malone v. Williams, 118 Tenn. 390, 103 S. W. 798.

[20] Murray v. Menefee, 20 Ark. 561. Compare as to notice to persons interested, Clark County Court v. Warner, 25 Ky. L. Rep. 857, 76 S. W. 828.

[21] Clark County Court v. Warner, 25 Ky. L. Rep. 857, 76 S. W. 828.

[22] Tugwell & Madison v. Eagle Pass. Ferry Co., 74 Tex. 480, 9 S. W. 120.

[23] St. Louis, Iron Mountain & Southern Ry. Co. v. St. Louis, 92 Mo. 160, 4 S. W. 664.

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franchise to lay gas pipes and mains in the highways and streets of a county or of certain villages therein.[24]

§ 179. **Delegation to Probate Courts—Use of Streets by Telephone Company.**—A probate court may be authorized, in case of failure of city authorities and a telephone company to agree as to the mode of construction of its lines and the use of streets, to direct such mode of construction, and such power is not inappropriately bestowed, and the statute conferring such authority imposes judicial functions upon the court and does not violate the Constitution on the ground that the power conferred is distinctly legislative.[25] But in a case where a telephone company obtains its right to occupy the streets with its poles, lines, etc., from the State, and the municipal authorities are vested with the power to agree upon, not the right to use, but the mode of use, and the submission to the probate court is consequent upon the failure to agree as above stated; that is, the municipal authorities may do only what the probate court can do and no different thing. One is a substitute in all respects for the other.[26] Again, the decree of that court upon the matter, must be something more than an ordinance or general grant of the use of the streets; it must be a judicial ruling or decision according to established rules and practice, based upon proper allegations and proof, and not constitute in effect a substitution of the court to obtain legislative action.[27]

[24] Consolidated Gas Co. v. County Commrs. of Baltimore County, 99 Md. 403, 58 Atl. 214. Act of 1902, ch. 368, empowered the county court commissioners of Baltimore county to grant franchises in and below the highways of the county upon certain terms. Acts of 1886, ch. 384, 395 prohibited the formation of new gas companies in certain counties, including Baltimore, and provided that no gas company chartered in other counties shall have the right to lay mains or sell gas in these counties and it was also held that the act of 1886, related only to incorporated gas companies and not to an individual manufacturing gas.

[25] Zanesville, City of, v. Zanesville Teleph. & Teleg. Co., 64 Ohio St. 67, 59 N. E. 781, 52 L. R. A. 150, rev'g 63 Ohio St. 442, 59 N. E. 109.

[26] Farmer & Getz v. Columbiana County Teleg. Co., 72 Ohio St. 526, 74 N. E. 1078; Bates Annot. Stat., §§ 3461, 3471-3478, 3558.

[27] Queen City Teleph. Co. v. Cincinnati, 27 Ohio Cir. Ct. R. 385.

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§ 180. **Delegation to Court of Visitation.**—A statute creating a court of visitation declaring its jurisdiction and powers, and providing for proceedings and procedure therein, is unconstitutional and void where in the powers conferred upon that tribunal, legislative, judicial and administrative functions are commingled and interwoven in a manner violative of the constitutional requirement that the three great departments of the government be kept separate, and the powers and duties of each exercised independently of the other.[28]

§ 181. **Delegation of Power—Authority of Dental Board over Colleges.**—The authority of a board, under a law regulating dentistry, to pass upon the reputability of colleges, is neither legislative, nor judicial, but is quasi-judicial; that species of authority is commonly intrusted to individuals, boards, or commissions to determine matters of fact when that is essential to the performance of administrative duties.[29]

§ 182. **Delegation to Board of Equalization—Review of Action of—Federal Courts.**—The power to equalize taxes may be delegated to a board of equalization commissioners without violating the constitutional provision against a delegation of legislative power, as it is a quasi-judicial power.[30] Proceedings before a board of equalization being quasi-judicial, if an order made by it is within its jurisdiction, it is not void and cannot be resisted in an action at law; nor can overvaluation be made a ground of defense at law. The action of the tax officers being in the nature of a judgment must be yielded to until set aside. And this can only be done in a direct proceeding.[31] A state board of equalization is one of the in-

[28] State v. Johnson, 61 Kan. 803, 49 L. R. A. 662, 60 Pac. 1068. See also Western Union Teleg. Co. v. Myatt, 98 Fed. 335.

[29] State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500.

[30] Foster v. Rowe, 128 Wis. 326, 107 N. W. 635, Rev. Stat., 1898, §§ 1077*a*, 1077*b*. See New Jersey Zinc Co. v. Sussex County Board of Equalization, 70 N. J. L. 186, 56 Atl. 138. See § 183, herein.

[31] Western Union Teleg. Co. v. Missouri ex rel. Gottlieb, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. 730.

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strumentalities provided by a State for the purpose of raising the public revenue by way of taxation, and it may be made the duty of such board to make an original assessment on corporations such as traction companies, and, where no appeal is provided, its decision is conclusive except as proceedings for relief may be taken in the courts, and, in so far as the board is one of review its decisions are equally conclusive as in case of original assessments. A board of equalization acting under the constitution and laws of a State represents the State, and its action is that of the State. But the provisions of the Fourteenth Amendment of the Federal Constitution are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions cover and relate to all the instrumentalities through which the State acts; therefore, whoever by virtue of public position under the government of a State deprives another of any right guaranteed by that amendment against deprivation by the State, violates such constitutional inhibition, so that, as he acts for the State and in the State's name and is clothed with the powers of the State, his act is that of the State. It follows, then, that when the action of taxing bodies is in effect the action of the State it is reviewable in the Federal courts at the instance of one who claims that he has been thereby deprived of his property without due process of law and has been denied the equal protection of the law. And it is held that the action of a board of equalization resulting in illegal discrimination, not being an action forbidden by the state legislature, is not beyond review by the Federal courts under the Fourteenth Amendment.[32]

See State of Missouri v. Dockery, 191 U. S. 165, 24 Sup. Ct. 53, 48 L. ed. 133 (judgment of board as to tax on corporation final); Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. ed. 1031; Whitbeck v. Mercantile Nat. Bank, 127 U. S. 193, 8 Sup. Ct. 1121, 32 L. ed. 118; Williams v. Supervisors of Albany, 122 U. S. 154, 30 L. ed. 1088, 7 Sup. Ct. 1244; Cummings v. Nat. Bank, 101 U. S. 153, 30 L. ed. 1088, 7 Sup. Ct. 1244; Cochise, County of, v. Copper Queen Consol. Min. Co. (Ariz., 1903), 71 Pac. 946; Foster v. Rowe, 128 Wis. 326, 107 N. W. 635.

[32] Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35, 36, 52 L. ed. 7, 28 Sup. Ct. 7, aff'g 114 Fed.

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§ 183. Delegation to Commissioners by Courts—Construction of Street Railroads—Appointment by Circuit Judge of Commissioners of Equalization.—The constitution of New York provides that no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.[33] This provision does not, however, apply to the streets of New York City, the titles to which are in the city.[34] If commissioners, acting under this provision, make a report adverse to the construction of the road, it is held that there is no power in the appellate division to set aside, conform or review their determination.[35] But if the commissioners are divided, the court may confirm the report of the majority.[36] The restriction also applies as well to a part of as to a complete road,[37] and additional but not inconsistent restrictions may be imposed.[38]

557, distinguishing Barney v. City of New York, 193 N. Y. 430. See citations under last preceding note herein.

[33] New York Const., art. III, § 18.

[34] Matter of Gilbert Elev. R. Co., 70 N. Y. 361, 30 Abb. N. C. 434, aff'g 9 Hun, 303.

[35] Nassau Elec. R. Co., In re, 40 N. Y. Supp. 334, 6 App. Div. 141.

[36] Port Chester St. Ry. Co., In re, 43 App. Div. 536, 60 N. Y. St. R. 160.

[37] Matter of Metropolitan Transit Co., 111 N. Y. 588, 20 N. Y. St. R. 516, 19 N. E. 645, aff'g 15 N. Y. St. R. 977, 1 N. Y. Supp. 114, 19 N. E. 645.

[38] Matter of Thirty-Fourth St. R. Co., 102 N. Y. 343, 7 N. E. 172, rev'g 37 Hun, 442.

Examine further as to the effect of these constitutional provisions on pre-existing corporations, Ingersoll v. Nassau Elec. R. Co., 17 N. Y. 453; Matter of Third Ave. R. Co., 121 N. Y. 536, 31 N. Y. St. R. 693, 24 N. E.

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In Wisconsin a statute is not unconstitutional as conferring on a circuit judge non-judicial duties where it empowers such judge, upon application made with proof of notice, to appoint commissioners of equalization to perform duties in cities and other political subdivisions within the county.[39]

§ 184. **Delegation of Powers—Power of Courts in Relation to—Power of Over Municipalities, Common Council Commissioners of Waterworks, Railroad Commissions, and Over Other Courts, etc.—Police Power.**[40]—In view of the three great and separate divisions, made by the Constitution, of the powers of a State into the legislative, judicial and executive, a city assembly cannot be restrained by a Circuit Court from enacting an ordinance granting to a street railroad company a right of way in the city's streets.[41] So a statute may confer upon a board of public officers, such as the commissioners of waterworks, a discretion to make a contract with the "lowest and best bidder," and this discretion cannot be controlled by mandamus.[42] Nor does the Supreme Court of Louisiana act as a supervisory or administrative board, but only as a judicial body in taking cognizance of and adjudicating disputed matters arising between the railroad commission and state railroads.[43] And the determination of the board of railroad commissioners of New York, whether or not a certificate shall be issued that public convenience and necessity require the construction of a proposed railroad, does not constitute a subject for judicial revision.[44] Again, few principles are better settled in the courts of this country than this, that where the legislative powers are delegated to a municipal corpo-

951, rev'g 56 Hun, 537, 9 N. Y. Supp. 833, 31 N. Y. St. R. 645.

[39] Foster v. Rowe, 128 Wis. 326, 107 N. W. 635.

[40] See §§ 136, 200, herein.

[41] Albright v. Fisher, 164 Mo. 56, 64 S. W. 106.

[42] State of Ohio ex rel. Walton v. Hermann, 63 Ohio St. 440.

[43] Morgan's Louisiana & Texas Rd. & Steamship Co. v. Railroad Commission, 109 La. 247, 33 So. 214. See Railroad Commission v. Weld (Tex. Civ. App.), 66 S. W. 122, 1095.

[44] People v. Board of Railroad Commissioners, 175 N. Y. 516, 67 N. E. 1088, aff'g 81 N. Y. Supp. 20, 81 App. Div. 242.

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ration, its discretion within the legitimate sphere of its authority is proportionately as wide as is the like discretion possessed by the legislature of the State, "and as free from outside interference, and that discretion is not subject to judicial revision or reversal." [45] Municipal corporations are not, however, completely beyond judicial review and control, and such corporations, even in the exercise of the discretion and jurisdiction delegated to them by the legislature, may be subject to judicial review and control, although such discretion must and will be accorded broad scope and great deference, and the honest judgment of the authorities of a municipality as to what is promotive of the public welfare must ordinarily control notwithstanding it may not accord with the views of the courts. The delegation of legislative power to subordinate political divisions of the State is solely for public purposes and must, therefore, be exercised solely with reference to them. If an act be so remote from every such purpose that no relation thereto can within reason be discovered, such act must be excluded from the delegation. To that extent, then, courts will inquire into the purpose and policy of municipal conduct, and will hold unauthorized, and invalid, acts which are wholly unreasonable. This rule applies to and makes invalid a village ordinance conferring franchises upon and making a contract with a corporation binding the village and its municipal successors for a term of thirty years, and practically for fifty years, to take all its lights from a corporation and pay for them during the entire period at rates definitely fixed therein considerably in excess of rates paid elsewhere, under similar circumstances, no reservation being made in favor of the power and control of the village except of "such rights as it cannot waive," and this is especially so where other provisions evidence an intent to benefit the corporation irrespective of the public welfare, and it also appears that the village has a population sufficient to make it a city and immediately adjoin a city, the gas electrical facilities of which will without

[45] Barber Asphalt Paving Co. v. French, 158 Mo. 534, 58 S. W. 934, per Gantt, C. J.

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reasonable doubt be speedily extended to such village.[46] So where a duty of promulgating reasonable rules and regulations as to the occupancy by a telephone company of city streets is devolved in the first instance upon the common council of a city, upon application made by the company, and the act of such council involves discretion, a court will not prescribe in advance what such action shall be, or how to act, but it may compel some action. And where the company possesses a legislative franchise to occupy such streets, subject only to the police power of the municipality, it has the right on proper application to have such police power exercised by the approval of its plans and the prescribing of reasonable regulations.[47] Again, it is held that the Circuit Court of Missouri cannot interfere with the exercise of the administrative discretion conferred upon a county court to allow or refuse a petition to grant to a railroad company the use of city streets.[48] Nor will the Supreme Court of Tennessee interfere with the grant by the county court of a second ferry franchise to another person than the grantee of the first franchise, even though public exigency does not demand two ferries.[49] And whether the statutes of a State authorize the incorporation of a bridge company to construct a bridge over a navigable river separating it from another State; whether such statutes confer the right of eminent domain on a corporation of another State, and whether such a corporation can exercise therein powers other than those conferred by the State of its creation, are all questions of state law, involving no Federal questions, and the rulings of the highest court of the State are conclusive upon the Federal Supreme Court.[50] Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and is within legislative control;

[46] Le Feber v. West Allis, 119 Wis. 608, 97 N. W. 203.

[47] State ex rel. Wisconsin Metropolis Telephone Co. v. City of Milwaukee (Wis., 1907), 113 N. W. 40, 41.

[48] St. Louis, Iron Mountain & Southern Ry. Co. v. St. Louis, 92 Mo. 160, 4 S. W. 664.

[49] Guinn v. Eaves, 117 Tenn. 524, 101 S. W. 1154.

[50] Stone v. Southern Illinois & Missouri Bridge Co., 206 U. S. 267, 51 L. ed. 1057, 27 Sup. Ct. —.

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and, in the exercise of such power, the legislature is vested with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry.[51] But while a local regulation, even if based upon the acknowledged police power of a State, must always yield in case of conflict with the exercise of the general government of any power it possesses under the Constitution, the mode or manner of exercising its police power is wholly within the discretion of the State so long as the Constitution of the United States is not contravened, or any right granted or secured thereby is not infringed, or not exercised in such an arbitrary and oppressive manner as to justify the interference of the courts to prevent wrong and oppression.[52] Again, while every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health, municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the court with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with constitutional rights to carry on a lawful business, make contracts, or use and enjoy property.[53]

[51] Louisville & N. R. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 358.

[52] Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. 849, 16 Sup. Ct. 714.

[53] Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. 18.

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CHAPTER XIV.

DELEGATION OF POWER—MUNICIPAL, QUASI-MUNICIPAL AND SUBORDINATE AGENCIES.

§ 185. Delegation to Municipalities —Generally.
186. Delegation to Municipality—Ferries — Bridges — Rates for Gas, Water, Street Railroads, etc.
187. To What Extent Franchise Granted by State Is Subject to Municipal Consent for Exercise—Power to "Prevent" Distinguished From Power to "Regulate" — Consent to Use of Streets, etc.
188. Delegation to Municipal or City Council—Street Railways—Extent of Power of City Council.
189. Right to Amend Municipal Charter, as to Grant of Franchise, Not a Delegation of Legislative Power to People.
190. Delegation to Board of Rapid Transit Railroad Commissioners — Subways — City Ownership and Obligations —Change of Construction Plans.
191. Power of Electrical Commission—Electrical Conduits —Board of Commissioners of Electrical Subways—Board of Electrical Control.
192. Delegation of Power—Grant of Franchises—Board of Estimate and Apportionment of New York—Transfer of Power from Another Board — Cumulative Voting.
§ 193. Dock Department no Power to Grant Franchises — Street Railway.
194. Delegation to County Commissioners — Ferries — Bridges—Use of Streets—Permits—Gas and Electricity—Street Railroads—Repaving — Removal of Poles, etc.
195. Delegation to Towns, Villages and Counties — Water Rates — Ferries — Heat, Light and Power Franchise and Contract, When Void—Waterworks — Hydrant Rentals.
196. Delegation to Town Council —Use of Streets.
197. Delegation to Selectmen, or to Board of Aldermen of City—Use of Streets—Location and Control of Electrical Appliances, etc. — Conditions as to Street Railway Fares.
198. Delegation to Trustees of Town — Drawbridge — Board of Gas Trustees—Gas Rates—Lighting Plant Ordinance Invalid.
199. Delegation to Board of Su-

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pervisors—Grant of Turnpike Franchise—Right to Collect Tolls.
§ 200. Delegation to Highway or Toll Road Commissioners—Public Lighting—Franchise—Bridges—When Order to Cease Taking Tolls Invalid — Delegation to City Officials, Subway Construction.
§ 201. Delegation to Police Juries—Ferries, Bridges and Roads.
202. Delegation of Power by Municipality.
203. Delegation by Ordinance to Street Commissioner.

§ 185. Delegation to Municipalities — Generally. — The State has power not only to grant a franchise directly by legislative enactment, but such enactment may specify the mode by which a municipality may, under the charter of the corporation which is in itself a legislative enactment, grant the franchise of privilege.[1] But such power in a municipality to

[1] Port of Mobile v. Louisiana & Nashville Rd. Co., 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106.

Examine the following cases:

United States: New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 659, 29 L. ed. 516, 6 Sup. Ct. 252 (franchise must be granted by State or municipality acting under legislative authority); Andrews v. National Foundry & Pipe Works, Lim., 61 Fed. 782, 787–789, 10 C. C. A. 60, per Woods, Cir. J. (legislature may delegate such power to municipal corporations).

Maryland: Purnell v. McLane, 98 Md. 589, 592, 593, 56 Atl. 830 (franchise must be granted by State or municipality acting under legislative authority).

New York: People ex rel. Woodhaven Gas Co. v. Deehan, 153 N. Y. 525, 47 N. E. 787, rev'g 11 App. Div. 175. See Ghee v. Northern Union Gas Co., 56 N. Y. Supp. 450, 454, 34 App. Div. 551, per O'Brien, J., case rev'd 158 N. Y. 510, 53 N. E. 592; Sauter v. Utica City Nat. Bank, 90 N. Y. Supp. 838, 45 Misc. 15.

Washington: State v. Taylor, 36 Wash. 607, 79 Pac. 286.

Wisconsin: Linden Land Co. v. Milwaukee Elec. Ry. & Light Co., 107 Wis. 493, 83 N. W. 851; State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

Legislatures may delegate to municipal assemblies the power of enacting ordinances relating to local matters, and such ordinances, when legally enacted, have the force of legislative acts. New Orleans Water Works Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. 161.

"While the lawmaking power of the State is vested in the legislature, yet it is competent for the legislature to delegate power to municipal corporations to pass ordinances which shall have the same force, within the municipality, as a statute, to control its municipal affairs." Eureka City v. Wilson, 15 Utah, 53, 58, 48 Pac. 41, per Bartch, J.

Whether certain grants constitute license, etc., or franchise, see §§ 47, 48, herein.

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grant a franchise to use city streets, as in case of a right to lay pipes for gas, must be either expressly granted, or arise from the terms of the statute by implication so direct and necessary as to be clearly conferred;[2] a governmental function in a statute granting powers to a municipal corporation cannot be held to have been granted away by statutory provisions which are doubtful or ambiguous.[3] So a municipal corporation cannot grant a franchise to a street railroad corporation to construct and maintain a railroad in its streets where neither its charter, nor any statute of the State, confers power in express terms, to make such a grant. The existence of such a power cannot be implied as being necessary to the exercise of any power expressly granted, or the performance of any duty enjoined by law.[4] In a case in Kansas, the construction of a certain section of the Bill of Rights was before the court, that section was as follows: "All political power is inherent in the people, and all free governments are founded upon their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency." It was held that this section was devoted to matters of a political nature, and did not inhibit the legislature from granting to municipal corporations the power to permit railway companies to construct and operate street railways therein. The court said: "We think the words 'no special privileges or immunities' refer to privileges or immunities of a political nature. The section obviously treats of political powers, privileges, and immunities. It commences: 'all political power is inherent in the people.' It thus affirms the sovereignty of the people, that all political power proceeds from them, and upon the exercise of that

[2] State v. Cincinnati Gas Co., 18 Ohio St. 262; Purnell v. McLane, 98 Md. 589, 592, 56 Atl. 830, per Pearce, J.

[3] Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. 490.

[4] State v. Mayor, etc., of New York, 3 Duer (N. Y.), 119.

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power they placed the limitations and restrictions contained in the other part of the section; so that the last sentence really means that no political privilege, no immunity from any political duty, any duty from the individual to the public, can be granted by the legislature which may not be altered or revoked by that body; and that no other tribunal or agency in the State shall have power to grant any such political privilege or freedom from public duty. These are such duties as those of serving in the militia, as jurors, filling offices, etc. A franchise involving solely matters of pecuniary interest or a privilege in respect to property, can in no just sense be called a political privilege. It touches no duty which the citizen as such owes to the State." [5] In an early case in the United States Supreme Court where the question arose as to the power of a municipality to make a contract giving to a street railroad company the right to use the streets, Clifford, J., in his opinion upon this question, and also whether or not such a contract existed, said: "Power to make laws is vested in the legislature, under the constitution of the State, and it is very doubtful whether the legislative department can delegate to any other body or authority the power to grant such a franchise, as the exercise of that power involves a high trust created and conferred for the benefit of those who granted it, and as the trust is confided to the legislature it must remain where it is vested until the constitution of the State is changed. Franchises, it is conceded, cannot as a general rule be granted by such a corporation. * * * Contracts undoubtedly may be made by such municipalities to the extent of the authority conferred for that purpose by the legislature, but the granting of a franchise is not the same thing as a contract, and the exercise of such a power cannot be upheld or vindicated as falling within the same rule as the power to make contracts. * * * Authority is also conferred on municipal corporations, by the code of that State, 'to grant privileges in the use and enjoyment of the streets' of the municipality; but it would be

[5] Atchison Street Ry. Co. v. Missouri Pacific Ry. Co., 31 Kan. 661, 666, 3 Pac. 284.

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a forced construction to hold that the power to grant such a franchise for twenty-five years is included in that provision. * * * Special powers are given to such corporations to lay out, open, and repair streets as a trust to be held and exercised for the benefit of the public from time to time, as occasion may require, and the general rule is, that those powers cannot be delegated to others, nor be effectually abridged by any act of the municipal corporation without the express authority of the legislature. Municipal corporations are doubtless invested with subordinate legislative powers to be exercised in the passage of ordinances for local purposes, connected with the public good, but they are merely derivative, and are subject at all times to the legislative control." [6]

§ 186. **Delegation to Municipality—Ferries—Bridges—Rates for Gas, Water, Street Railroads, etc.**—The want of a ferry license from a city authorized to license and regulate ferries is not cured by a license issued by a county court or by any other authority;[7] and where a city corporation has an exclusive right to grant such ferry franchise, an injunction lies to restrain persons operating a ferry under a coasting license, from interference and competition with such ferry franchise.[8] So a State may vest in a city jurisdiction over the construction, repair and use of bridges within that city, although over navigable waters, where such waters are wholly within the State and Congress has not exercised its control, which it has

[6] People's Railroad v. Memphis Railroad, 10 Wall. (77 U. S.) 38, 51, 20 L. ed. 844.

"It is doubtful whether the legislature can delegate the power to grant such a franchise at all." Denver & Swansea Ry. Co. v. Denver City Ry. Co., 2 Colo. 673, 682, per Brazee, J.

"A franchise must be granted by the legislature and a municipal body cannot confer such a franchise." Lasher v. People, 183 Ill. 226, 233, per Cartwright, C. J.; quoted in Cain v. City of Wyoming, 104 Ill. App. 538, 541.

"A municipal body, it is understood, possesses no power to confer a franchise." Chicago City Ry. v. People, 73 Ill. 541, 547, per Scott, J.

[7] Cauble v. Craig, 94 Mo. App. 675, 69 S. W. 49. Compare Malone v. Williams, 118 Tenn. 390, 103 S. W. 398, under § 178, herein; Guinn v. Eaves, 117 Tenn. 524, 101 S. W. 1154, under § 178, herein.

[8] Mayor, etc., of N. Y. v. Longstreet, 64 How. Pr. (N. Y.) 30.

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over navigable waters.[9] A city may also be authorized to construct a railroad at its expense and to issue bonds therefor, and such authorization is not unconstitutional.[10] Again, although the legislature has power to regulate rates for gas, water, etc., in cases not covered by previous contracts or vested rights, still it cannot constitutionally delegate such power, to authorities of a city which is itself a consumer, either in its municipal capacity or through its inhabitants, without any provision for a judicial investigation of the reasonableness of the rates fixed by such authorities, and an ordinance of the city council which attempts to fix rates, and to enforce their acceptance by penal ordinance is unauthorized and void, whether or not there exists a valid contract.[11]

§ 187. **To What Extent Franchise Granted by State Is Subject to Municipal Consent for Exercise—Power to "Prevent" Distinguished from Power to "Regulate"—Consent to Use of Streets, etc.**[12]—The right to use public streets or highways for the exercise of franchise rights granted by the Federal government or the State is generally dependent upon the consent of the municipality or other governmental agency or upon the consent of owners of abutting property. While, however, this subject will be considered here in connection with the delegation of power, it will be more fully treated elsewhere herein under other headings. Although a telegraph or telephone or long distance telephone line is an instrument of interstate commerce, it stands upon no higher ground in respect to a right of way than does a purely local company, and it must conform to the requirements of the state statutes in

[9] Escanaba Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. 185. See §§ 127, 128, 145, herein.

City authorities may order the construction of a bridge. Kundinger v. City of Saginaw, 132 Mich. 395, 8 Det. Leg. N. 650, 93 N. W. 914.

[10] Sun Printing & Publishing Assn. v. Mayor, etc., of New York, 152 N. Y. 257, 46 N. E. 499, aff'g 40 N. Y. Supp. 607, 75 N. Y. St. R. 1, 8 App. Div. 230.

[11] Agua Pura Co. of Las Vegas v. City of Las Vegas (Cal., 1900), 60 Pac. 208; act March 18, 1897, Laws 1897, c. 57, p. 124.

[12] See § 140, herein.

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relation to its occupancy of city streets. But authority may be granted to a city council to grant a franchise right to use a city's streets for the erection of the poles and wires of telephone or telegraph companies, even though they have the right by way of a license under a statute to occupy such streets. And where a statute gives a right to telegraph and telephone companies to use any highway or road in the State for its wires and poles, but requires that a franchise shall be obtained from a city or village before its streets or alleys can be so used, and the statute merely grants a revocable license or one which may be modified unless acted upon by some work of construction, a city may exclude a company from its streets when no rights have been acquired by such action of the company, and no authority has been granted for such occupancy by the city council.[13] Where the statute under which a telephone company is organized does not require the consent of the municipality to enable it to construct its lines, as in a case where the business carried on by such corporation is not purely local, but extends over and outside of the State, the municipal power to regulate and control the use of its streets is limited to a valid exercise of its police power inherent in it to protect the public from unnecessary obstructions, inconveniences and dangers, and to the determination of the manner in which such company may erect its poles and maintain its wires; and it cannot impose other conditions, as such power rests alone in the charter making power, which is the legislature.[14] So, where

[13] Northwestern Teleph. Exchange Co. v. City of St. Charles (C. C.), 154 Fed. 386.

[14] Michigan Telephone Co. v. City of Benton Harbor, 121 Mich. 512, 80 N. W. 386, 7 Am. Elec. Cas. 9. The statute providing for telephone and messenger-service companies was as follows: "Every such corporation shall have power to construct and maintain lines of wire or other material, for use in the transmission of telephonic messages along, over, across, or under any public places, streets, and highways, and across or under any of the waters of this State, with all necessary erections and fixtures therefor; provided, that the same shall not injuriously interfere with other public uses of the said places, streets and highways, and the navigation of said waters; to construct, provide and furnish instruments, devices and facilities for use in the transmission of such messages; and to construct, maintain and

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a telephone company has by grant of the legislature a franchise to lay or erect its wires in the streets of a municipality, such city has the power of reasonable police control and regulation over the exercise of such franchise. This power of regulation is, however, limited and includes the designation of streets upon which it is deemed consistent with the public good, that such wires should be placed or excluded, also the method of construction with reference to the public welfare. But a company with this franchise, so subject to police regulation only, has a right, and the municipality owes a duty, upon proper application to prescribe restrictions and regulations such as it deems necessary, although its discretion is legislative and limited to what is reasonably and consistent with the intent of the general law granting the franchise, and the city cannot practically exclude the company by its regulations.[15] Again, the specific duty of exercising the legislative discretion to the end of promoting reasonable regulations under the police power of a city for the use of the city streets, upon application made by a telephone company possessing a franchise from the legislature giving a right to lay or erect its wires in the city streets, is vested primarily in the city's common council, where no provision of law or charter gives to any other officer, board or commission of the city any power until after such council acts.[16] A street railway company derives no

operate telephone exchanges and stations, and generally to conduct and carry on the business of providing and supervising communication by telephone, and also the business of furnishing messenger service in cities and towns." The statute also required every such company to supply the public with telephones and telephonic service, and to operate a telephone exchange, and to receive and transmit messages without discrimination, upon payment or tender of the usual or customary charges. 3 How. Ann. Stat. §§ 3718*d*, 3718*i*; acts 1883, § 4, p. 131. The company was also engaged in interstate commerce.

Police power, see §§ 149, 184, herein, also other sections throughout this treatise.

[15] State ex rel. Wisconsin Metropolis Teleph. Co. v. City of Milwaukee (Wis., 1907), 113 N. W. 40, per Dodge, J.

As to Post Roads Act and hostile legislation, see Joyce on Electric Law (2d ed.), §§ 62–67.

[16] State ex rel. Wisconsin Metropolis Teleph. Co. v. City of Milwaukee (Wis., 1907), 113 N. W. 40.

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power to construct a railway from any ordinance of a city where all its power and authority is derived from the State and is conferred by its charter, and such city has delegated to it only the power to say in what manner and upon what conditions the company may exercise the franchises conferred by the State.[17] Under the New Jersey system of laws, corporate franchises are the subject of legislative grant exclusively, although the legislature may make the right to exercise them within the limits of a municipality dependent upon the consent of such municipality, and where a statute declares that its provisions shall not apply to corporations which do not and cannot exercise "municipal franchises" those corporations will be held to have been intended whose right to exercise their franchises depends upon municipal consent.[18] In New York all of the corporations for which the transportation corporations law provides, such as pipe line, gas and electric light companies, waterworks and roads and bridge corporations, except telegraph and telephone corporations, are required by the provisions of that law to obtain the consent of the local authorities to occupy the streets and highways, and this applies also to steam and street railroad corporations. But no such restriction or limitation appears in the transportation corporations law as regards the right of telegraph or telephone companies to use the public roads, streets, highways and waters of the State. Many, however, if not all, of the charters of cities and villages, as well as the general laws do to some extent regulate, restrict and limit the right of such corporations to use the public streets and carry on their business within the municipality; and in one instance, at least, it is provided that the common council of the city may prevent the stringing or setting of telegraph or telephone poles or wires

[17] Chicago City Ry. v. People, 73 Ill. 541, 549.

[18] State Board of Assessors v. Plainfield Water Supply Co., 67 N. J. L. 357, 52 Atl. 230; Laws 1900, chap. 195 (Pamph. L., p. 502), § 8, provides as to a franchise tax and declares that: "This act shall not be construed to apply to any corporation which has not hitherto, or may not hereafter, exercise any municipal franchise." The relators sought to compel a water company to furnish statements showing gross receipts.

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in the city, and that charter is not expressly or impliedly repealed by the transportation corporations law and under such power to "prevent" the city may bind a telephone company by exacting a compensation as a condition to granting a franchise even though the power alone "to regulate" will not authorize such exaction, and the acceptance of the franchise with the condition binds the accepting company.[19] But where a city has no power to "prevent" a telephone company organized under the transportation corporations law from using the city streets as provided by that law, still it may be empowered by statute to control the erection, construction, laying, stringing, maintaining and removing of all wires, cables, poles, conduits and subways therein. And, although a company's franchise to use the public highways of the State may come directly from the State under the transportation corporations law independent of any grant from the municipality, yet if the municipality has granted a franchise to use the streets of the city and also additional rights to use public property and places, such as parks, squares and aqueducts, such additional grant is a good consideration for an agreement with the city whereby maximum rates for services to citizens are fixed, and the grantee is estopped to repudiate the agreement on the ground of want of authority in the city to make it. And the company has no statutory authority to use such public places for its conduits and subways without the city's consent, without regard to whether or not it has a statutory right to use the public streets and highways.[20] Under the well-settled law of Tennessee the power to grant to a public corporation a right of way for the operation of public railroads, commercial or street, on or over a particular public highway or street, resides primarily in the state legislature, but it may be delegated to municipal governments. Restrictions, however, may be imposed by a constitutional provision, requiring the

[19] City of Jamestown v. Home Teleph. Co., 125 N. Y. App. Div. 1; Rochester Teleph. Co. v. Ross, 125 App. Div. 76, 80, per Kruse, J.

[20] Rochester Telephone Co. v. Ross, 125 App. Div. 1, Williams, J., dissenting.

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legislature to provide for the organization of corporations by general law only which might prevent the granting of a particular right of way to a particular corporation.[21] Under a Federal decision it is declared that: "While 'it is essential to the character of a franchise,' as was held in Bank of Augusta v. Earle,[22] 'that it should be a grant from the sovereign authority and in this country no franchise can be held which is not derived from a law of the State,' and while the right to the use of the public streets of a city by a gas company or water company, for the purpose of laying down its pipes, is generally considered to be such a franchise, it is well settled that the legislature of a State may confer the power to grant such franchises upon municipal corporations; though when so granted, they are, nevertheless, to be regarded as derived from the State. The question here, therefore, is not whether the franchises of the Oconto Water Company were obtained from the State; they necessarily came directly or indirectly from that source. It is whether or not the common council of Oconto had been given the power to grant such franchises, and in this instance, did grant those named in its ordinance. Without that ordinance, it is clear the water company could not lawfully have laid its pipes in the streets of the city, nor have put into practical effect its 'franchise to operate the plant,'—if it can be said to have had such franchise merely by act of incorporation, and before the ordinance was passed. The city of Oconto, by its own charter, had the power, and therefore, was under the duty of caring for the public health. That power it could employ in any reasonable way; if it chose, for instance, by contracting for a water supply through pipes laid in the streets. The making of such a contract would, of necessity, carry with it the right, on the part of the contractor, to lay the pipes and to operate the plant. Such a right is a franchise, and the making of the contract operating by necessary implication as a grant of the privilege or franchise, the power given to make

[21] Mayor, etc., of Knoxville v. Africa, 77 Fed. 501, 507, 23 C. C. A. 252, 47 U. S. App. 725.

[22] 13 Pet. (38 U. S.) 519, 595, 10 L. ed. 274, 311.

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the contract was power to grant the franchise. But, besides the power to provide for the health of its inhabitants, the city of Oconto had the express power * * * 'to provide for the erection of waterworks for the supply of water to the inhabitants of the city.' * * * The authority extended to any reasonable method; and it follows that, before the Oconto Water Company was incorporated, the city of Oconto, by its own charter, had power, from the State, to grant franchises like those in question to any person or body capable of receiving them. By its act of incorporation the Oconto Water Company came into being, endowed, not with the right to establish and operate waterworks in Oconto, but with capacity to receive and exercise that right or privilege upon such terms as the city should consent to grant. But, though capable of receiving, it could acquire no complete or effective right or franchise without the consent, and there is no impropriety, legal or verbal, without the grant of the city. The ultimate source of such franchises in all cases being the State, the difference between a municipal power to grant them and authority to contract for or to consent to the exercise of them is a difference of words rather than of substance. * * * So, here, not by reason of a constitutional provision, but by statute, the ultimate efficient right could be acquired only by act and consent of the city authorities, which they could grant or refuse at their pleasure." [23]

§ 188. **Delegation to Municipal or City Council—Street Railways—Ferries—Extent of Power of City Council.**—The legislature may by its act incorporating a city delegate to the city council authority to pass an ordinance granting to a corporation or to an individual a right to construct and operate a street railway in the streets of such city.[24] And it is held that

[23] Andrews v. National Foundry & Pipe Works, Lim., 61 Fed. 782, 787–789, 10 C. C. A. 60, per Woods, Cir. J.; s. c., 73 Fed. 516, 19 C. C. A. 548, 77 Fed. 774, 23 C. C. A. 454, 113 Fed. 793, 794, 183 U. S. 216, 225.

[24] Watson v. Fairmont & Suburban Ry. Co., 49 W. Va. 528, 39 S. E. 193. The legislative act incorporating the city provided that, "the council of said city shall have power to grant and regulate all franchises in, over

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authority is vested in a city council to grant the franchise to construct such railroad unless prohibited by statutory restrictions.[25] The action of the common council of Buffalo, New York, under its revised charter of 1891,[26] in consenting to the construction of a railroad in its streets is not an administrative but a legislative act.[27] So the city council, of a city of the fourth class in Missouri, is to all intents and purposes a legislative body, and when acting within the limits prescribed by its charter and the constitution and laws of the State, its acts are as valid and binding as an act of the legislature of the State.[28] Again, the provision of the Rochester city charter of 1894, which authorizes the common council to control and regulate the erection of poles, etc., in the streets and public places, does not infringe upon the legislative power of the State to grant a franchise in the first instance, for the use of the streets for such purpose, but operates merely as a grant of empowering such city to regulate the manner of exercise of the franchise.[29] Again, the city council of Montreal is held to have power to authorize a temporary electric railway to be constructed in the city's streets for the benefit of persons visiting an exhibition, and such authority may be granted by resolution at least when ratified by a subsequent by-law.[30] No authority is given in the constitution of Tennessee for the delegation to a municipal council of the exclusive power to license ferries and to regulate the same and to fix charges and fees therefor.

and under the alleys and public ways of said city under such restrictions as shall be provided by ordinance, but no exclusive franchise shall be granted to any individual or corporation."

[25] Electric City Ry. Co. v. City of Niagara Falls, 95 N. Y. Supp. 73, 48 Misc. 91.

[26] Laws 1891, c. 105, tit. 2, subc. 1, § 5.

[27] Kittinger v. Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081, aff'g 49 N. Y. Supp. 713, 25 App. Div. 329.

[28] Lebanon Light & Magnetic Water Co. v. City of Lebanon, 163 Mo. 254, 260, 63 S. W. 811, per Burgess, J. See also Barber Asphalt Paving Co. v. French, 158 Mo. 534, 58 S. W. 934.

[29] Barhite v. Home Telephone Co., 63 N. Y. Supp. 659, 50 App. Div. 417. See Joyce on Electric Law (2d ed.), §§ 186*a*, 355*a*, 474.

[30] Bell Teleph. Co. v. Montreal St. R. Co., Rap. Jud. Quebec, 6 B. R. 223.

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Such a delegation of power is unconstitutional and void, where the constitution provides that: "The legislature shall have the right to vest such powers in the courts of justice, with regard to private and local affairs as may be expedient." [31] Although a city council is authorized to grant franchises to railroad companies to construct and maintain tracks in the streets, yet, to be valid and effectual, the power or authority vested in the city must be exercised in accordance with the formalities prescribed by the statutes conferring such power upon the city.[32]

§ 189. **Right to Amend Municipal Charter, as to Grant of Franchises, not a Delegation of Legislative Power to People.**—Where the legislative powers of cities is vested by statute in the mayor and city council, a proposed charter amendment is not unconstitutional as a delegation of legislative power to the people; although such amendment provides that whenever any ordinance granting or amending any franchise for gas, electric light, water, telephone or telegraph purposes, shall have been introduced, then the council shall, upon presentation of a petition signed by the electors of the city equal in number to fifteen per cent of the entire vote cast at the last municipal election, submit to a vote of the people the question of the adoption of the franchise, and if a majority of the qualified voters voting thereon at the election shall approve the ordinance, it shall take effect, but otherwise it shall be defeated. In such case the powers of the mayor and council are only those provided by charter, and the people have a right to reserve to themselves by such proposed amendment a part of the powers so conferred.[33]

[31] Malone v. Williams, 118 Tenn. 390, 103 S. W. 798; the court, per Neil, J., said: "For the defendants it is insisted that it is customary everywhere to grant such rights to municipal corporations. Such seems to be the rule in England and in some of our States. 1 Dillon on Munic. Corp. (3d ed.) §§ 114, 115, 116. In this State, however, there is a different rule. No authority is given in the constitution for the delegation of such rights to municipal corporations."

[32] Cereghino v. Oregon Short Line Rd. Co., 26 Utah, 467, 99 Am. St. Rep. 843.

[33] Hindman v. Boyd, 42 Wash. 17, 84 Pac. 609.

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§ 190. **Delegation to Board of Rapid Transit Railroad Commissioners—Subways—City Ownership and Obligations—Change of Construction Plans.**—A rapid transit board may be authorized by statute to enter into contracts with any person, corporation or firm best qualified in the board's opinion to carry out and fulfill such contract, and such enactment is not unconstitutional as denying the equal protection of the laws to other persons intending to construct a road on the same line.[34] Where a city, by its board of rapid transit commissioners, acting in pursuance of the law conferred upon it, entered into a contract for the construction and operation of a rapid transit railroad; said road and tunnels, under the statutes and contract, were to be paid for by the city and be its property, and the equipment was to be paid for by the contractor and be his property; the board was also authorized to make such changes as were deemed necessary and determined that electricity should be the motive power used, thereby necessitating additional excavation; and it was held that the city should pay therefor, and that the property so changed should belong to it.[35]

§ 191. **Power of Electrical Commission—Electrical Conduits—Board of Commissioners of Electrical Subways—Board of Electrical Control.**—Where an electrical commission is established under an ordinance of a city, which has power under its charter to grant franchises or rights in the city streets, and such commission is vested with power to construct, regulate and maintain electrical conduits in such city, coupled with authority to rent space therein, under certain conditions, it may refuse a permit for the use of such conduits to a person who has not acquired a franchise to use the streets and may

[34] Underground Rd. of the City of New York v. New York City, 116 Fed. 952, aff'd 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. 494.
See §§ 167–170, herein.
Delegation to Public Service Commission of New York, see § 166, herein.

[35] McDonald, In re, 80 N. Y. Supp. 536, 80 App. Div. 210, aff'd 175 N. Y. 470 (mem.). See § 166, herein.

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require a compliance with the provisions of the law.[36] Another subordinate body was created in 1885, and was known as the board of commissioners of electrical subways in and for the city of New York,[37] and in 1887, the board of electrical control for said city was created and it was held to have full discretionary power in reference to when, where and in what manner wires should be placed underground;[38] and it is also declared that from the proper construction it would appear that a discretionary power was intended by the enactment to be vested in the board and that such power was to be legitimately and fairly exercised.[39]

[36] Purnell v. McLane, 98 Md. 589, 56 Atl. 830, 8 Am. Elec. Cas. 55.

Commission of gas and electricity, see § 160, herein.

Delegation to Public Service Commission of New York, see § 166, herein.

Delegation to Railroad Commission —Public Utility Law of Wisconsin, see § 168, herein.

[37] See People v. Ellison, 101 N. Y. Supp. 441, 51 Misc. 413, aff'd 101 N. Y. Supp. 55, 115 App. Div. 254; Laws N. Y., 1885, chap. 499; People ex rel. N. Y. Elect. Lines Co. v. Squire, 107 N. Y. 593.

[38] United States Illuminating Co. v. Hess, 3 N. Y. Supp. 777, 19 N. Y. St. R. 883, 2 Am. Elec. Cas. 187; Laws 1887, chap. 716, Am'd Laws 1890, chap. 550.

[39] Higgins v. Manhattan Elec. L. Co. (Sup. Ct. Chambers, March, 1889), 3 Am. Elec. Cas, note 167, per Lawrence, J. See American Rapid Transit Co. v. Hess, 125 N. Y. 641, 36 N. Y. St. R. 252, 21 Am. St. Rep. 764, 26 N. E. 919, 39 Am. & Eng. Corp. Cas. 526, 3 Am. Elec. Cas. 142, aff'g 58 Hun, 610, 35 N. Y. St. R. 606, 12 N. Y. Supp. 536; Joyce on Electric Law (2d ed.), §§ 424, 425.

Board of aldermen and not board of electrical control is proper authority to consent—Subways. *Compare* People v. Consolidated Teleg. & Electrical Subway Co. (West Side Electric Co. v. Consolidated Teleph. Co.), 96 N. Y. Supp. 609, 110 App. Div. 171, aff'd 187 N. Y. 58, 79 N. E. 892, where the Laws of 1848, p. 48, c. 37; Laws 1879, p. 562, c. 512, as to occupation of streets by gas and electrical companies with consent of municipal authorities; Laws of 1887, p. 928, ch. 716, transferring to board of electrical control the powers theretofore vested in commissioners of electrical subways under Laws of 1885, p. 852, c. 499; Laws of 1890, p. 1146, c. 566, subdv. 1. Transportation corporations Law, authorizing use of streets over and under the surface by electrical corporations with consent of city authorities, and the New York city charter prior to 1897 are all considered, and it is held that the right to lay such wires in conduits or a subway was dependant upon consent of board of aldermen and not upon that of the board of electrical control. See Laws 1902, c. 596, amending Laws 1890, c. 566, § 61, subdv. 1. See Laws 1905, c. 210, amending Laws 1890, c. 665, § 82, subdv. 2; Laws 1906, c. 455, amending Laws 1890, c. 566, § 82, subdv. 2.

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§ 192. Delegation of Power—Grant of Franchises—Board of Estimate and Apportionment of New York—Transfer of Power from Another Board—Cumulative Voting.—It is held in a New York case that there is no restriction upon the power of the legislature to take away from one body of local authorities the power to grant franchises and to transfer the same to some other city, board or department, such as the board of estimate and apportionment, as such authorities have no vested right to the continuance of any public powers or duties conferred upon them, and that what the legislature can grant it can transfer and such laws are not unconstitutional. It is held that the system of cumulative voting in the board of estimate and apportionment, authorized by the city charter, does not prevent the legislature from authorizing it to grant franchises because a minority of the individuals composing the board, by a combination of votes, may be able to determine a question before it; since there is no constitutional limitation upon providing for such a system of voting in the board, it being a question of policy and not one of power, and under the circumstances attendant upon creating Greater New York City, it would be neither fair nor just to permit each member to vote per capita.[40] This case is cited in a later case in the same State [41] upon the question

[40] Wilcox v. McClellan, 185 N. Y. 9, 10, 77 N. E. 986, aff'g 97 N. Y. Supp. 311, 110 App. Div. 378, aff'g 95 N. Y. Supp. 941, 47 Misc. 465; Pettit v. McClellan, 97 N. Y. Supp. 320, 110 App. Div. 390; Laws 1905, pp. 1533, 1548, cc. 629–631; Laws 1873, p. 517, c. 335, § 112; Greater New York Charter, §§ 48, 74; Laws 1901, pp. 26, 38, c. 466, construed with Const., art. 10, § 2, art. 8, § 1, which provide that (art. 10, § 2) "* * * All city * * * officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, * * * or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose. * * *" (art. 8, § 1.) "Corporations shall be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

[41] Reis v. City of New York, 188 N. Y. 58, 67, 80 N. E. 573, aff'g 99 N. Y. Supp. 291, 113 App. Div. 264.

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of the powers of the board of estimate and apportionment: "a body which has been deemed by the legislature sufficiently representative, responsible, and trustworthy to exercise the power of granting or withholding street railroad franchises within the limits of the municipality in place and instead of the board of aldermen." [42]

§ 193. **Dock Department no Power to Grant Franchises—Street Railway.**—A dock department of a city has no power to grant franchises, and its consent or resolution permitting the construction of a street railway is not the grant of a franchise.[43]

§ 194. **Delegation to County Commissioners—Ferries—Bridges—Use of Streets—Permits—Gas and Electricity—Street Railroads—Repaving—Removal of Poles, etc.**—A ferry may be established by county commissioners, and the petitioner is given a vested right subject only to reversal or modification by the Superior Court.[44] If a statute grants a ferry franchise and makes it unlawful to establish any other ferry within a specified distance, such enactment operates as a limitation upon the general power conferred upon the county commissioners by code to "appoint and settle ferries," and precludes them from authorizing a ferry within the prohibited distance. And a constitutional provision giving the supervision and control of roads, bridges, etc., to such commissioners, does not deprive the general assembly of the power to enact a statute authorizing the establishment of a public ferry at a certain point for a certain term of years and also providing that it shall be unlawful for any person to establish another ferry within a specified distance of said ferry.[45] So county

[42] Laws 1905, chaps. 629–631.

[43] Central Crosstown Ry. Co. v. Metropolitan St. Ry. Co., 44 N. Y. Supp. 752, 16 App. Div. 229. See also Hart v. Mayor, etc., of New York, 44 N. Y. Supp. 767, 16 App. Div. 227.

[44] Robinson v. Lamb, 129 N. C. 16, 39 S. E. 579. See Wilson v. Gabler, 11 S. Dak. 206, 76 N. W. 924.

[45] Spease Ferry, In re, 138 N. C. 219, 50 S. E. 625.

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commissioners have no power to grant a ferry franchise to establish a ferry between points located outside of the county even though one of said points is attached to the county for judicial purposes.[46] Such commissioners may also be authorized to appropriate money for the purpose of constructing bridges on public highways or town roads.[47] If a gas company is authorized by the law of its creation to lay pipes and mains under the streets and roads of any county, but it is subject to any law that may be passed by the county commissioners for the filling up and repaving of any street under which the pipes may be laid; still it is not bound by a regulation of the commissioners providing that no water pipes or mains shall be laid within the limits of any of the highways of the county, and prohibiting the digging up of any of said highways for said purpose, without a permit, and also includes electric light, telegraph and telephone poles and wires, electric, steam and other railway tracks within the requirement as to a permit, for such regulation does not include gas mains or pipes. And this is so even though such commissioners may make reasonable regulations before such gas pipes are laid, or might prevent gas companies from making improper use of its public highways.[48] Where county commissioners are given the custody and control of a pike or highway in the State, they may take steps to require the removal to the other side of the street of poles and wires when they, from their location and the existing conditions, seriously incommode the public.[49]

§ 195. **Delegation to Towns, Villages and Counties—Water Rates—Ferries—Heat, Light and Power Franchise and Contract, When Void—Waterworks—Hydrant Rentals.**—Where towns and villages have the right, under a

[46] Patterson v. Wollmann, 5 N. Dak. 608, 67 N. W. 1040, 33 L. R. A. 536. See Green v. Ivey (Fla., 1903), 33 So. 711.

[47] Bayne v. Board of Commrs. of Wright County, 90 Minn. 1, 95 S. W. 456.

[48] Consolidated Gas Co. v. County Commrs. of Baltimore County, 98 Md. 689, 57 Atl. 29.

[49] Gantz v. Ohio Postal Teleg. Cable Co., 140 Fed. 692, rev'g Ohio Postal Teleg Cable Co. v. Board of Commrs., 137 Fed. 947.

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statute, as agencies of the State to exercise by delegation the State's power to secure the observance and performance of the duty of incorporated water companies to furnish water for reasonable compensation and without unjust discrimination to such public bodies, or the inhabitants thereof, such municipal corporations may, in the exercise of the governmental power so conferred by the legislature, regulate the water rates, and that power is a continuing one and is not exhausted by the first exercise thereof.[50] If a town is so empowered under its charter it may, without an ordinance, grant an exclusive right or license for a ferry, and this is so held even though such ferry is across a navigable river without the territorial limits of the town.[51] But the fact that an ordinance has been submitted to and approved by vote of the electors of a village, so that it is the duty of the village board under the requirements of a statute to grant a franchise, will not aid its validity where it is void for unreasonableness in granting a franchise and making a contract with a heat, light and power company.[52] A public ferry franchise can, in Georgia, only be granted by the proper county authorities.[53] Where a village is empowered to and does by ordinance grant a franchise for the construction of waterworks in said village and contracts to pay certain hydrant rentals, etc., and the plant is constructed wholly within the village limits, which village was thereafter incorporated as a city, and the water company and the city continued to act under the ordinance and the contract upon the assumption that the city had succeeded to the rights and liabilities of the town, and thereafter, the latter exercised no rights and derived no benefit from the waterworks, it was held that the city was bound by the ordinance and contract as the successor of the town.[54]

[50] Danville v. Danville Water Co., 180 Ill. 235, 54 N. E. 224.

[51] Dinner v. Humberstone, 26 Can. Sup. Ct. 252.

[52] Le Feber v. West Allis, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917.

[53] Hudspeth v. Hall, 111 Ga. 510, 36 S. E. 770.

[54] Washburn Waterworks Co. v. City of Washburn, 129 Wis. 73, 108 N. W. 194.

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§ 196. **Delegation to Town Council—Use of Streets.**—The town council may, under New Jersey public laws, providing for the formation and government of towns, prescribe by general ordinance the manner of exercise by corporations or individuals of any privilege granted them in digging up any street, alley or highway, but every grant of such privilege need not necessarily be also by ordinance, and under a statute so empowering a town council to appoint such subordinate officers as may be deemed necessary, it is authorized to appoint a street commissioner and prescribe that the fees to be paid for permits in the opening of streets may be fixed by him.[55]

§ 197. **Delegation to Selectmen or to Board of Aldermen of City—Use of Streets—Location and Control of Electrical Appliances, etc.—Conditions as to Street Railway Fares.**—In Connecticut the selectmen in towns are, subject to the provisions of the statute, vested with the full direction and control of the location, relocation or removal of electrical fixtures of telephone and other electrical companies. So in Massachusetts and in Vermont certain powers have been conferred upon these subordinate bodies as to location, etc., of electrical appliances, and for the assessment of damages for injury by location, etc., of lines.[56] And where a statute authorizes the selectmen of a town, in case they are of opinion that public necessity and convenience require the granting of a location to a street railway company, to prescribe how the tracks shall be laid and the kind of rails, they may not only prescribe the original construction but may also prescribe that the company may at its election use a cheaper rail without granite paving within the rails and for a certain space outside on condition that if not satisfactory they shall be changed, and the determination of the selectmen as to the work being satis-

[55] Stowe v. Town of Kearney, 72 N. J. L. 106, 59 Atl. 1058. The case here showed, however, an abuse of discretion by the town council in awarding certain contracts. Pamph. Laws 1895, p. 218, § 47.

[56] See Joyce on Elec. Law (2d ed.), §§ 156, 226a.

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factory in accordance with the condition, and with the authority conferred by statute is final, at least where no fraud exists, and cannot be transferred to or controlled by the courts, and it is immaterial that the selectmen ought to have been satisfied.[57] Again, although a statute authorizes the board of aldermen of a city or the selectmen of a town, in granting a location to a street railway company, to prescribe the manner in which tracks shall be laid, and the kind of rails, poles, wires and other appliances which shall be used, and also to impose such other terms, conditions and obligations in addition to those applying to all street railways, under the general provisions of law, as the public interest may require, still, it is not within the power of such board of aldermen of a city or of selectmen of a town to impose a condition of location regulating and restricting the fares to be charged by a street railway company, where other statutes contain other provisions as to the right of the directors of such company, primarily to fix and regulate fares, subject to revision by the railroad commissioners under certain limitations on their powers; and in such case, as the condition of location is illegal and wrongfully imposed, the acceptance by the company of the grant of location so burdened does not constitute a contract with the granting board.[58]

§ 198. **Delegation to Trustees of Town—Drawbridge—Board of Gas Trustees—Gas Rates—Lighting Plant Ordinance Invalid.**—The trustees of a town may grant by resolution, to a riparian proprietor, a franchise to construct a drawbridge over waters of a bay, the title and sovereignty to which and of the lands thereunder in such town are vested in said town by royal charter granted in colonial days, as the grant of such franchise is the exercise of governmental power and a grant by resolution is as effective as a grant by deed.[59] But a board

[57] Selectmen of Gardner v. Templeton St. Ry., 184 Mass. 294, 68 N. E. 340.

[58] Keefe v. Lexington & Boston St. Ry. Co., 185 Mass. 183, 70 N. E. 37.

[59] Trustees of Southampton v. Jessup, 162 N. Y. 122, 56 N. E. 538, rev'g 42 N. Y. Supp. 4, 10 App. Div. 456.

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of gas trustees of a city, whose authority under a statute is limited to fixing the price of gas by such rules and regulations as a town council may prescribe, cannot exceed such authority by raising the rates without action by the council as provided by the statute.[60] Where a lighting plant ordinance of town trustees granting the franchise is invalid, a provision therein obligating the town to pay for a certain number of lights for the street, goes with the invalidity.[61]

§ 199. **Delegation to Board of Supervisors—Grant of Turnpike Franchise—Right to Collect Tolls.**—A grant of a turnpike franchise by a board of supervisors made under authority conferred by the legislature, has the same force and effect in respect to its validity, the presumptions in its favor, and the mode in which it may be attacked, as a grant of any other right, privilege or thing made by any department of the government under authority of the law.[62] So the board of supervisors may, where a statute so provides, confer a license or franchise upon anyone to collect tolls over a public highway where it complies with the prerequisites specified, such as the determination that, in its judgment, the necessary expense in operating such public highway is too great to justify the county in operating and maintaining it.[63]

§ 200. **Delegation to Highway or Toll Road Commis-**

[60] Foster v. Findlay, 5 Ohio C. C. 455.

Delegation to commission of gas and electricity, see § 160, herein.

[61] Meyer v. Town of Boonville, 162 Ind. 165, 70 N. E. 146.

Power of village trustees—Telephone companies, see People ex rel. Monticello Teleph. Co. v. Trustees, 72 N. Y. Supp. 350, 35 Misc. 675; New Union Teleph. Co. v. Marsh, 89 N. Y. Supp. 79, 96 App. Div. 122.

Power of village trustees—Underground conduits, see Village of Carthage v. Central New York Teleph. Co., 96 N. Y. Supp. 919, 110 App. Div. 625.

[62] Truckee & Tahoe Turnpike Road Co. v. Campbell, 44 Cal. 89.

Electric street railway—Delegation to supervisors, see Joyce on Elec. Law (2d ed.), § 155.

[63] Bedell v. Scott, 126 Cal. 675, 59 Pac. 210, under County Government Act, § 25, subdv. 41, Stat. 1893, p. 359. See Prosser v. County of Wapello, 18 Iowa, 327; Chapin v. Crasen, 31 Wis. 209.

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sioners—Public Lighting Franchise—Bridges—When Order to Cease Taking Tolls Invalid—Delegation to City Officials, Subway Construction.—The highway commissioners of a town which is a municipal corporation may grant a franchise to a public lighting company and may exercise their discretion, and the courts have no power to interfere with such municipal bodies when their discretion is to be exercised when no fraud or corruption or bad faith amounting to corruption is charged or proven. In such case the franchise may be given without a consideration therefor, even though a consideration is offered by another.[64] Commissioners of highways, may, under the highway laws, be the proper officers to jointly contract for building or repairing a bridge between two towns, or such power may devolve entirely upon the board of supervisors under the county laws.[65] The power to locate foundations and walls, in a case where a track elevation ordinance provides for the construction of a subway in a certain street, may be properly delegated by a city council to city officials.[66] Where a statute confers on a highway or toll road commissioner authority to examine toll roads and, if he has reason to believe that they are defective, to require the toll road company to repair the same within a certain time, or in default thereof, that the toll shall cease, and the statute also provides for a full and complete investigation and hearing and for an appeal to the Court of Chancery, such commissioners' powers are thereby limited and such requirement as to a hearing is a prerequisite to the validity of an order of the commissioners that such company shall cease taking tolls. Such statute is also unconstitutional in that it encroaches on the jurisdiction and powers of such chancery courts, which possessed no appellate jurisdiction, and so the statute provided for no appeal

[64] Craft v. Lent, 103 N. Y. Supp. 366, 53 Misc. 584. See §§ 136, 184, herein.

[65] Colby v. Town of Mt. Morris, 100 N. Y. Supp. 362. See Town of Palatine v. Canajoharie Water Supply Co., 86 N. Y. Supp. 412, 90 App. Div. 548; examine Croley v. California Pac. R. Co., 134 Cal. 557, 66 Pac. 860.

[66] People v. Grand Trunk Ry. Co., 232 Ill. 292, 83 N. E. 839.

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from the arbitrary decision of the commissioner who is not a judicial officer and is one upon whom judicial power cannot be conferred.[67]

§ 201. Delegation to Police Juries—Ferries, Bridges and Roads.—Police juries throughout the State of Louisiana have plenary powers with respect to the establishment of public ferries, bridges and roads, and with respect to their abandonment or discontinuance, and may, in their discretion, convert a free bridge or road into a toll bridge or road and vice versa, and may operate a toll bridge or road directly or through their lessees; it may also restrain by injunction the operation of a free ferry or bridge within the prohibited distance from a public toll bridge prescribed by statute or ordinance.[68] Such juries may also exercise their discretion to establish a toll road upon the site of a free road or elsewhere, and may build, maintain and operate such roads, or do so by contract with corporations or individuals, nor will the exercise of such discretion be interfered with by the courts except in case it has been grossly abused.[69] So a police jury has the power or right to offer a ferry privilege and to have it adjudicated at public auction, and irregularities or illegalities in the manner of

[67] Bridge Street & Allendale Gravel Road Co. v. Hogadone (Mich., 1908), 114 N. W. 917, 14 Det. Leg. N. 858; Besson v. Crapo Toll Road Co. (Mich., 1908), 114 N. W. 924, 14 Det. Leg. N. 858. See § 172, herein.

[68] Police Jury of Lafourche v. Robichaux, 116 La. 286, 40 So. 705, reaffirming St. Joseph Plank Co. v. Kline, 106 La. 325, 30 So. 854; Blanchard v. Abraham, 115 La. 989, 40 So. 379.

The police juries of the several parishes are vested by statute with the exclusive right to establish, lease, and regulate ferries and bridges within their respective limits; such juries have also the power to prohibit by ordinance the operation of unlicensed ferries and bridges within competitive distance; nor has any person the legal right to construct a pontoon ferry bridge across a navigable stream without special legislative authority, state or Federal. Blanchard v. Abraham, 115 La. 989, 40 So. 379, holding also that Act No. 202, p. 391 of 1902, relative to the powers of police juries throughout the State (the parish of Orleans excepted), is not a local or special law in the sense of article 48 of the state constitution.

[69] St. Joseph Plank Road Co v. Kline, 106 La. 325, 30 So. 854.

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exercising the right which that body has to confer, may be ratified, or may be cured by estoppel.[70]

§ 202. **Delegation of Power by Municipality.**—A state government may delegate to a municipal corporation part of its own powers. But such powers cannot be delegated or vicariously exercised unless the authority to delegate is specially granted by the legislature, nor can the municipal corporation divest itself of the discretion vested by the statute.[71]

§ 203. **Delegation by Ordinance to Street Commissioner.**—The requirement of a general ordinance requiring permission of the street commissioner for the opening of streets and public places is proper and not subject to the objection that it is a delegation of power to an officer not authorized, as it does not empower the street commissioner to grant the right to open the street, but merely requires a written permit from him, otherwise such opening is forbidden.[72]

[70] Prince v. Police Jury of Concordia Parish, 112 La. 257, 36 So. 342.

[71] State v. Garibaldi, 44 La. Ann. 809, 11 So. 36 (a case of police regulation of private markets).

[72] Stowe v. Kearny, 72 N. J. L. 106, 59 Atl. 1058.

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CHAPTER XV.

CONSTITUTIONAL LAW—INTERPRETATION OR CONSTRUCTION OF CONSTITUTIONS.

§ 204. Interpretation or Construction—Generally.
205. Construction—Intent—Effect Given to Every Part—Ordinary Signification of Words—Grammatical Construction.
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225. Whether Constitutional Provisions Self-Executing.
226. When Constitutional Provision is Self-Executing—Instances.
227. When Constitutional Provision is Not Self-Executing—Instances.

§ 204. **Interpretation or Construction—Generally.**—The courts of the United States are bound to take notice of the Constitution. It is paramount to the power of the legislature.

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Every act of Congress, and every statute repugnant thereto is void from the beginning and without life or operation; such act or statute cannot become a law.[1] The policy of constitutional provisions is not a guide to the determination of constitutional questions, for they must rest upon the provisions themselves of the Constitution, and the courts possess no control over matters of mere policy; the jurisdiction of the courts extends only to the construction and enforcement of the Constitution and laws as they exist.[2] Although the Federal Constitution embraces all new conditions within the scope of the powers conferred,[3] still it must be construed and administered now according to its true meaning and intention when it was formed and adopted.[4] It may be generally stated that such rules of construction as have been established in relation to statutes are also applicable to constitutions.[5] To this rule there are, however, certain exceptions or qualifications.

§ 205. Construction—Intent—Effect Given to Every Part —Ordinary Signification of Words—Grammatical Construction.—The purpose of interpretation or construction of a constitution is, if possible, to ascertain the intent, so that the instrument may effectuate such intent.[6] The only proper

[1] Marbury v. Madison, 1 Cranch (5 U. S.), 137, 2 L. ed. 60. See also Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. 1121; Vanhorne v. Dorrance, 2 Dall. [2 U. S. (C. C.)] 304, 320, 1 L. ed. 391, Fed. Cas. No. 16,857; Seneca Min. Co. v. Osman, 82 Mich. 573, 47 N. W. 25, 9 L. R. A. 770; Minnesota Sugar Co. v. Iverson, 90 Minn. 6, 97 N. W. 454; State, Smyth, v. Moores, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175; Heyman, Ex parte (Tex. Cr. App.), 78 S. W. 349.

[2] Grand Island & Northern Wyoming Rd. Co. v. Baker, 6 Wyo. 369, 378, 34 L. R. A. 835, 45 Pac. 494.

[3] South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. —. See Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. 655.

[4] Dred Scott v. Sandford, 19 How. (60 U. S.) 393, 15 L. ed. 691. See South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. —.

[5] Nicholson v. Thompson, 5 Rob. (La.) 367; People ex rel. Jackson v. Potter, 47 N. Y. 375, 42 How. 375.

[6] People v. Leonard, 73 Cal. 230, 14 Pac. 853; Bourland v. Heldreth, 26 Cal. 161; Hills v. City of Chicago, 60 Ill. 86; Minnesota & Pacific Rd. Co. v. Sibley, 2 Minn. 13.

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way to construe a constitution is to consider first, the language used as being the best evidence of the intention; and the interpretation should, if possible, be such that force and effect shall be given to every part or provision thereof, and to each word, unless it would lead to a conclusion absurd in itself, or to one necessarily repugnant to the plain meaning of the instrument; and such provisions and parts should be made to harmonize, if by any reasonable construction it can be done.[7] The evil intended to be remedied should also be considered.[8]

[7] Funkhouser v. Spahr, 102 Va. 306, 46 S. E. 378; State, Chamberlin, v. Daniel, 17 Wash. 111, 116, 49 Pac. 243.

See also the following cases:

Arkansas: Hawkins v. Filkins, 24 Ark. 286; State v. Ashley, 1 Pike (1 Ark.), 513.

California: Marye v. Hart, 76 Cal. 291, 293, 18 Pac. 325; Miller v. Dunne, 72 Cal. 462, 14 Pac. 27; Bourland v. Hildreth, 26 Cal. 161; Cohen v. Wright, 22 Cal. 293.

Colorado: People, Livesay, v. Wright, 6 Colo. 92. Examine Denver Circle R. Co. v. Nester, 10 Colo. 403, 15 Pac. 715.

Georgia: Examine Paddleford v. Savannah, 14 Ga. 438.

Illinois: Beardstown v. City of Virginia, 76 Ill. 34.

Kentucky: Louisville School Board v. King (Ky., 1908), 107 S. W. 247.

Louisiana: Western Union Teleg. Co. v. Railroad Commission (La., 1908), 45 So. 598; Decklar v. Frankenberger, 30 La. Ann. 410.

Maryland: Dyer v. Bayne, 54 Md. 87, 100; Picking v. State, 26 Md. 503; Manley v. State, 7 Md. 135.

Minnesota: Minnesota & Pacific Rd. Co. v. Sibley, 2 Minn. 13.

Mississippi: Examine Green v. Weller, 32 Miss. 652.

New York: People v. Fancher, 50 N. Y. 288.

Oregon: Acme Dairy Co. v. City of Astoria (Oreg., 1907), 90 Pac. 153.

South Carolina: Norton v. Bradham, 21 S. C. 375, 382.

Effect must be given to each word. Knowlton v. Moore, 178 U. S. 41, 87, 44 L. ed. 969, 20 Sup. Ct. 747, per White, J.; Holmes v. Jennison, 14 Pet. (39 U. S.) 540, 570, 10 L. ed. 579, per Taney, C. J.; Ogden v. Saunders, 12 Wheat. (25 U. S.) 213, 316, 6 L. ed. 606, per Trimble, J., in dissenting opinion. See Osborn v. United States Bank, 9 Wheat. (22 U. S.) 738, 851, 6 L. ed. 204, per Marshall, C. J.

All other provisions relating to subject are to be considered. Tazewell v. Herman (Va., 1908), 60 S. E. 767.

Provisions are not to be segregated and considered separately, but all provisions are to be brought together and so interpreted as to effectuate the great purposes of the instrument. South Dakota v. North Carolina, 192 U. S. 286, 328, 48 L. ed. 448, 24 Sup. Ct. 269, per White, J., in dissenting opinion; Downes v. Bidwell, 182 U. S. 244, 312, 45 L. ed. 1088, 21 Sup. Ct. 770, per White, J.

[8] Louisville School Board v. King (Ky., 1908), 107 S. W. 247.

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The plain ordinary signification and usual meaning in common parlance must be given to the words employed, when the language is clear and unambiguous, and the intent must be gathered therefrom.[9] But a judicial construction of words will prevail over the popular conception of their signification, and this applies as well to constitutions as to statutes.[10] The mere grammatical construction ought not, however, to control the interpretation, unless it is warranted by the general scope and object of the provision.[11] But no uniform rule of interpretation can be applied to the Federal Constitution, which may not allow, even if it does not positively demand, many

[9] **Colorado:** Alexander v. People, 7 Colo. 155, 2 Pac. 894.

Idaho: Powell v. Spackman, 7 Idaho, 692, 54 L. R. A. 378, 65 Pac. 503.

Illinois: Law v. People, 87 Ill. 385.

Nevada: State v. Doran, 5 Nev. 399.

Pennsylvania: Monongahela Nav. Co. v. Coons, 6 Watts. & S. (Pa.) 101.

South Carolina: Charleston, City of, v. Oliver, 16 S. C. 47.

See also the following cases: Dooley v. United States, 183 U. S. 151, 173, 46 L. ed. 128, 22 Sup. Ct. 62, per Fuller, C. J., in dissenting opinion (plain language not to be construed away); McPherson v. Blacker, 146 U. S. 1, 27, 13 Sup. Ct. 3, 36 L. ed. 869, per Fuller, C. J. (framers used words in natural sense); Tennessee v. Whitworth, 117 U. S. 129, 147, 29 L. ed. 830, 6 Sup. Ct. 645 (given meaning they have in common use); Passenger Cases, 7 How. (48 U. S.) 283, 477, 12 L. ed. 702, per Taney, C. J., in dissenting opinion (members of convention used words in same sense as in their debates; no presumption that they used ordinary words in unusual sense); Holmes v. Jennison, 14 Pet. (39 U. S.) 540, 571, 10 L. ed. 579, per Taney, C. J. (usual and fair import of words to be given); Craig v. Missouri, 4 Pet. (29 U. S.) 410, 454, 7 L. ed. 903, per M'Lean, J. (plain import of words to be given); Brown v. Maryland, 12 Wheat. (25 U. S.) 419, 437, 6 L. ed. 678, per Marshall, C. J. (literal meaning of words to be considered in connection with other words); Martin v. Hunter, 1 Wheat. (14 U. S.) 304, 326, 4 L. ed. 97, per Story, J. (to be given reasonable construction according to import of its terms, and words to be taken in their natural and obvious sense, which should not be unreasonably restricted or enlarged); Epping v. City of Columbus, 117 Ga. 263, 43 S. E. 803 (words should ordinarily be construed according to their popular sense and meaning).

If the words are clear, explicit, unambiguous and free from obscurity the courts are bound to expound the language according to the common sense and ordinary meaning of the words. Minnesota & Pacific Rd. Co. v. Sibley, 2 Minn. 13.

[10] Nephi Plaster & Mfg. Co. v. Juab County (Utah, 1907), 93 Pac 53, 56, per Frick, J.

[11] Groves v. Slaughter, 15 Pet. (40 U. S.) 449, 10 L. ed. 800.

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modifications in its actual application to particular clauses, although a safe rule is to consider the nature and objects of the particular powers, duties and rights, and to give to the words of each, just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.[12]

§ 206. **Context—Ordinary and Technical Meaning of Words—Phrase or Word in Different Parts of Instrument.**—Reference should be had to the context;[13] and the popular meaning will prevail over a technical one, unless it is apparent therefrom, or from the nature of the subject, that the technical meaning was intended;[14] and, generally, unless the context makes it clearly apparent that a phrase or word used in the instrument has a meaning different from the plain and manifest sense thereof, such word or phrase should be given the same construction if used in any other part.[15]

§ 207. **Plain Language of Constitution Cannot Be Ignored—Repugnant Provisions.**—A construction of a constitution should be such as to give it force and effect in every part rather than a construction by which any part shall be rendered meaningless or destroyed;[16] and a constitutional provision which is clear, unambiguous, and not duplicitous, cannot be construed away;[17] nor can the plain language of such a provision be ignored or altered even though by literal interpretation, an inconsistency with other parts of the instrument in relation to other subjects may arise;[18] and a construction which raises a conflict between different parts of a constitution is not admissible, where, by any reasonable con-

[12] Prigg v. Pennsylvania, 16 Pet. (41 U. S.) 539, 10 L. ed. 1060.

[13] Richardson v. Treasure Hill Min. Co., 23 Utah, 366, 65 Pac. 74.

[14] Epping v. City of Columbus, 117 Ga. 263, 43 S. E. 803; Hamilton Nat. Bank v. American Loan & Trust Co., 66 Neb. 67, 92 N. W. 189.

[15] Epping v. City of Columbus, 117 Ga. 263, 43 S. E. 803.

[16] State, Chamberlain, v. Daniel, 17 Wash. 111, 49 Pac. 243. See § 205, herein.

[17] State, Robertson, v. McGough, 118 Ala. 159, 24 So. 395.

[18] Jackson v. State, 87 Md. 191, 39 Atl. 504.

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struction, they may be made to harmonize.[19] If, however, repugnant provisions cannot be reconciled, the order of time and local position should be considered and preference given to that which is last.[20]

§ 208. **Meaning of Constitution as Understood by Its Framers—Construction.**—In interpreting the constitution recourse may be had to the position of the framers of the instrument, and what they must have understood to be the meaning and scope of the grants of power contained therein.[21] But it is presumed that the framers of, and the people who adopted the constitution employed words in their natural sense and expressed what they intended, so that the last stated rule would not apply so as to control unambiguous and clearly expressed constitutional provisions;[22] and, as stated in a prior section, the only proper way to construe a constitution is to consider the language used, and, if possible, to ascertain the intent therefrom, so that the instrument may effectuate that intent;[23] and it is not so much what was the framers intention as what is meant by the words they have used.[24] Again, although it may not be difficult to conceive of reasons which influenced the framers of constitutional amendments in incorporating therein certain provisions, such reasons, if true, will not control the court when called upon to construe the provisions of the constitution as they originally stood.[25]

[19] People, Livesay, v. Wright, 6 Colo. 92, 95. See § 233, herein.

[20] Quick v. White-Water Township, 7 Ind. 570. "If the different sections cannot be 'liquidated' and made to stand together, it is a 'rule of construction, not derived from positive law, but from the nature and reason of the thing,' 'as consonant to truth and propriety,' 'that the last in order of time shall be preferred to the first.' Federalist, No. 78.— Spencer v. The State, 5 Ind. 41." *Id.*, 578, per Perkins, J.

[21] South Carolina v. United States, 199 U. S. 437, 26 Sup. Ct. —, 50 L. ed. 261.

General intent of framers to be considered. Tazewell v. Herman (Va., 1908), 45 S. E. 598.

[22] See Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 188, 6 L. ed. 23, per Marshall, C. J.

[23] See § 205, herein.

[24] Beardstown v. City of Virginia, 76 Ill. 34; Smith v. Thursby, 28 Md. 244.

[25] Norton v. Bradham, 21 S. C. 375, 383.

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§ 209. **Strict Construction.**—Constitutions do not come within the rule of strict construction applicable to statutes.[26] So in the interpretation of the Federal Constitution the extremes of a strict and a liberal construction should be avoided;[27] and in constitutions generally a meaning or interpretation between a strict and liberal construction should be adopted, and technical rules avoided.[28]

§ 210. **Implied Matters a Part of Constitution.**—That which is implied is as much a part of the constitution as that which is expressed, and amongst the implied matters is that the nation may not prevent a State from discharging the ordinary functions of government, and no State can interfere with the National government in the free exercise of the powers conferred upon it.[29]

§ 211. **Punctuation.**—Punctuation is not, as a general rule, any part of an enactment or constitutional provision and cannot be permitted to control its evident meaning or intent.[30]

§ 212. **Interpretation in View of Common Law.**—A constitution must be interpreted in view of and with the assistance of the common law;[31] and recourse must be had thereto in

[26] State, Chamberlain, v. Daniel, 17 Wash. 111, 116, 49 Pac. 243. See Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 187, 6 L. ed. 23, per Marshall, C. J.

[27] North River Steamboat Co. v. Livingston, 3 Cow. (N. Y.) 713, aff'g Hopk. 149. Compare Southern Pac. R. Co. v. Orton (C. C.), 32 Fed. 457, 473. "The construction" of the Federal Constitution "is strict against those who claim under it," per Sawyer, J., quoting from Sharpless v. Mayor of Philadelphia, 21 Pa. 160, per Black, C. J.

Constitution not to be interpreted with strictness of private contract. Legal Tender Cases, 110 U. S. 4, 439, per Gray, J.

[28] Acme Dairy Co. v. City of Astoria (Oreg., 1907), 90 Pac. 153.

[29] South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. 123. See People v. Fleming, 10 Colo. 522, 16 Pac. 298.

Implied powers. See § 123, herein.

[30] Richardson v. Treasure Hill Min. Co., 23 Utah, 366, 388, 65 Pac. 74.

[31] Mobile, City of, v. Stonewall Ins. Co., 53 Ala. 570; English v. State, 31 Fla. 340, 12 So. 689; Durham v. State, 117 Ind. 477, 19 N. E. 327. See also Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 368, 394, 37 L. ed.

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interpreting the Federal Constitution.[32] In case of conflict with the common law, either as to a right or remedy, the constitution will prevail, and thus applies where it makes private property inviolate but subservient to the welfare of the public.[33]

§ 213. **Constitutional Prohibitions — Proviso — Exception from General Words.**—A constitutional prohibition should receive a rational and not a technical construction; and, looking to the evil intended to be remedied, it should be applied to such acts of the legislature alone as are obviously within its spirit and meaning.[34] There is a clear distinction between such prohibitions of the constitution as go to the very root of the power of Congress to act at all, irrespective of time and place, and such as are operated only throughout the United States, or among the several States.[35] And in construing clauses of the Federal Constitution which involve conflicting powers of the government of the Union and of the respective States it is proper to consider the literal meaning of the words to be expounded, their connection with other words and of the general objects to be accomplished by the prohibitory clause or by the grant of power, but the words of the prohibition ought not to be pressed to their utmost extent. In our complex system, the object of the powers conferred on the government of the Union and the nature of the often conflicting powers which remain in the States, must always be taken into view and may aid in expounding the words of any particular clause.[36] In the absence of a clearly apparent intention to the contrary a proviso should be confined to the antecedent next preceding

772, 13 Sup. Ct. 871, per Field, J., in dissenting opinion; Waring v. Clarke, 5 How. (46 U. S.) 441, 466, per Catron, J. Compare The Huntress, Fed. Cas. No. 6,914.

[32] South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. —; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. 456.

[33] Chicago & Erie Rd. Co. v. Keith, 67 Ohio St. 279, 65 N. E. 1020, 60 L. R. A. 1025.

[34] Phillips v. Covington & Cincinnati Bridge Co., 2 Metc. (59 Ky.) 219, 221, 222.

[35] Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 91 Sup. Ct. 770.

[36] Brown v. Maryland, 12 Wheat. (25 U. S.) 419, 6 L. ed. 478.

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it. This rule of statutory construction also applies to a constitution.[37] If it be a rule of interpretation to which all assent that the exception of the particular thing from general words proves that in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, there is no reason why this rule should not be as applicable to the constitution as to other instruments.[38] The rule, that as exceptions strengthen the force of a general law, so enumeration weakens as to things not enumerated, is applicable to constitutional as well as to statutory provisions.[39]

§ 214. **Partially Invalid Provisions.**—The authority given to a railroad commission to establish rates is not rendered invalid by other invalid but separable provisions of a constitution which make the rates so established conclusively reasonable and just in case of controversy, and, therefore, repugnant to the Fourteenth Amendment of the Federal Constitution.[40]

§ 215. **Construction—Prospective—Retrospective.**—In the absence of a contrary intention, clearly evidenced beyond reasonable question, constitutions will be construed so as to operate prospectively only.[41] So in order that a constitution should be held retrospective in its operation, such intention should unmistakably appear from the words used.[42] A con-

[37] State v. Quayle, 26 Utah, 26, 30, 71 Pac. 1060, citing Fowler v. Tuttle, 24 N. H. 9; Cushing v. Warwick, 9 Gray (75 Mass.), 382; Wolf v. Bauereis, 72 Md. 481–485, 19 Atl. 1045, 8 L. R. A. 680; Suth., Stat. Const. § 267; 23 Am. & Eng. Ency. of Law, 636.

[38] Brown v. Maryland, 12 Wheat. (25 U. S.) 419, 6 L. ed. 678.

[39] Western Union Teleg. Co. v. Railroad Commission (La., 1908), 45 So. 598.

[40] Southern Pac. R. Co. v. Railroad Commissioners (C. C.), 78 Fed. 236.

[41] **United States:** Shreveport v. Cole, 129 U. S. 36, 9 Sup. Ct. 210, 32 L. ed. 589.

Colorado: Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245.

Maryland: New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537.

Missouri: State v. Holliday, 66 Mo. 385.

Utah: Jungk v. Holbrook, 15 Utah, 198, 49 Pac. 305.

[42] Jungk v. Holbrook, 15 Utah, 198, 49 Pac. 305; Mercer v. Gold Min. & Mill. Co. v. Spry, 16 Utah, 222, 52

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stitution being prospective in operation does not affect statutes in force when the constitution was adopted.[43] And a constitutional provision has no retroactive operation as to actions pending at the time of the adoption thereof, even though such provision relates to the manner of bringing such actions.[44] So where an action is begun under a constitution, the rights of the parties are to be determined thereunder and not under a constitution which goes into effect thereafter.[45] A constitution prohibiting special charters or special laws does not repeal charters granted when the constitution took effect,[46] nor is past legislation affected thereby.[47] So where corporations are required, under a constitutional amendment, to be formed under general statutes such requirement does not affect charters theretofore granted, even though subsequently amended.[48] And although a constitution provides for the repeal of all laws inconsistent therewith, and prohibits the passage of special laws thereafter, still a special act whereby a taxing district is incorporated is not repealed thereby.[49] But a constitution prohibiting the passing of any local or special act may operate as a repeal to a certain extent of a bank charter granted by special act prior thereto.[50] Again, a law in force when a constitution is adopted, may, when not inconsistent therewith,

Pac. 382. See Lloyd v. Hamilton, 52 La. Ann. 861, 27 So. 275.

[43] Adams v. Dendy, 82 Miss. 135, 33 So. 843.

[44] Conyers v. Commission of Roads, 116 Ga. 101, 42 S. E. 419.

[45] McHugh v. Louisville Bridge Co., 23 Ky. L. Rep. 1546, 65 S. W. 456.

[46] Ulbrecht v. City of Keokuk, 124 Iowa, 1, 97 N. W. 1082.

[47] **California**: Nevada School Dist. v. Shoecraft, 88 Cal. 372, 26 Pac. 211; Meade v. Watson, 67 Cal. 591, 8 Pac. 311, 314.

Colorado: People, Dean, v. Board of County Commissioners of Grand County, 6 Colo. 202.

Illinois: Covington v. City of East St. Louis, 78 Ill. 548.

Indiana: Davidson v. Kœhler, 76 Ind. 398.

Louisiana: Pecot v. Police Jury, 41 La. Ann. 707, 6 So. 677.

Missouri: Atlantic & Pacific R. Co. v. City of St. Louis, 66 Mo. 228.

Ohio: Allbyer v. State, 10 Ohio St. 588.

[48] State v. City of Bangor, 98 Me. 114, 56 Atl. 589; Farnsworth v. Lime Rock Rd. Co., 83 Me. 440, 22 Atl. 373. See Atlantic & Pacific R. Co. v. City of St. Louis, 66 Mo. 228.

[49] Covington, City of, v. District of Highlands, 24 Ky. L. Rep. 433, 68 S. W. 669.

[50] Commonwealth v. Porter, 24 Ky. L. Rep. 364, 68 S. W. 621.

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be continued in force by an express provision continuing in force all laws until repealed or altered.[51] If the charter of a corporation exempts it from taxation such exemption includes assessments made before the taking effect of a constitution repealing the exemption, and also the right to exemption for taxes so assessed for the year during which the constitution took effect.[52]

§ 216. Contemporaneous Construction—Extrinsic Matters—History—Debates and Proceedings in Convention.—In cases of doubt as to the interpretation or construction of a provision of the constitution, its contemporaneous and practical construction may be considered in aid thereof.[53] So the contemporaneous interpretation in the "Federalist" and the original judiciary act is entitled to much weight;[54] and the nature and objects of the particular powers, duties and rights should be considered, with all the lights and aids of contemporary history,[55] or the history of its passage through the convention,[56] or of the times when it was passed or adopted,[57] and of well-known conditions then existing.[58] The views or debates of the framers of the constitution cannot be con-

[51] State v. O'Neil Lumber Co., 170 Mo. 7, 70 S. W. 121.

[52] Newport v. Masonic Temple Assoc., 20 Ky. L. Rep. 266, 269, 45 S. W. 881, 46 S. W. 697.

[53] Eastman v. Clackamas County (C. C.), 32 Fed. 24; Howell v. State, 71 Ga. 224, 51 Am. Rep. 259; Allen v. Clayton, 63 Iowa, 11, 18 N. W. 663; Chesapeake & Ohio R. Co. v. Miller, 19 W. Va. 408. See Cohen v. Virginia, 6 Wheat. (19 U. S.) 418, 420, per Marshall, C. J. Compare State ex rel. Chamberlain v. Daniel, 17 Wash. 111, 117, 49 Pac. 243.

[54] Cohens v. Virginia, 6 Wheat. (19 U. S.) 264, 5 L. ed. 257.

[55] Prigg v. Pennsylvania, 16 Pet. (41 U. S.) 539, 10 L. ed. 1060.

[56] Minnesota & Pacific Rd. Co. v. Sibley, 2 Minn. 13, 19.

[57] Toncray v. Budge (Idaho, 1908), 92 Pac. 26; Funkhouser v. Spahr, 102 Va. 306, 46 S. E. 378, quoting from United States v. Trans-Missouri Freight Assn., 166 U. S. 318, 17 Sup. Ct. 550, 41 L. ed. 1007; United States v. Union Pacif. Rd. Co., 91 U. S. 72, 23 L. ed. 224; Queen v. Hertford College, 3 Q. B. Div. 707, per Coleridge, Lord Chief Justice. See Maynard v. Board of Canvassers, 84 Mich. 228, 238, 47 N. W. 756, 43 Alb. L. J. 389, 11 L. R. A. 332; People v. Gies, 25 Mich. 83.

[58] Toncray v. Budge (Idaho, 1908), 92 Pac. 26.

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sidered;[59] nor can debates on the passage of an act be accepted as evidence of the meaning of a clause in the constitution.[60] It is held, however, that debates or proceedings of a constitutional convention may be considered in a limited degree, although they are unsafe as a guide.[61] It is also decided that such proceedings are valuable as an aid in ascertaining the intent of doubtful provisions, but that the terms of the constitution cannot be varied thereby;[62] nor can express constitutional provisions be construed away by resort to the convention proceedings.[63]

§ 217. **Contemporaneous Construction Continued—Legislative Construction.**—Although the legislature has the same right as have the courts to construe a constitutional provision,[64] yet it cannot bind the courts by its interpretation;[65] nor will a legislative construction control unambiguous and clearly expressed provisions of the constitution.[66] But in case of a doubtful constitutional provision a legislative interpretation will be considered or availed of as an aid to construction when contemporaneous with the adoption of the constitution,[67] and such contemporaneous interpretation is a strong pre-

[59] Funkhouser v. Spahr, 102 Va. 306, 46 S. E. 378, quoting from United States v. Union Pac. R. Co., 91 U. S. 72, 23 L. ed. 224; United States v. Trans-Missouri Freight Assn., 166 U. S. 318, 41 L. ed. 1007.

[60] District of Columbia v. Washington Market Co., 108 U. S. 243, 2 Sup. Ct. —, 27 L. ed. 714.

[61] Rasmusser v. Baker, 7 Wyo. 117, 38 L. R. A. 773, 50 Pac. 819.

[62] Epping v. City of Columbus, 117 Ga. 263, 43 S. E. 803. See Wisconsin Central R. Co. v. Taylor, 52 Wis. 37, 8 N. W. 833; Wulff v. Aldrich, 124 Ill. 591, 16 N. E. 886. Examine Richardson v. Treasure Hill Mining Co., 23 Utah, 367, 65 Pac. 74.

[63] Starne v. People, 222 Ill. 189, 78 N. E. 61.

[64] Selma & Gulf Rd. Co., Ex parte, 45 Ala. 696, 6 Am. Rep. 722.

[65] State, Kenner, v. Spears (Tenn. Ch. App., 1899), 53 S. W. 247. See State ex rel. Chamberlain v. Daniel, 17 Wash. 111, 117, 49 Pac. 243.

[66] State, Hibbard, v. Cornell, 60 Neb. 276, 83 N. W. 72. See Griffin v. Rhoton (Ark., 1907), 107 S. W. 380; State, Chamberlain, v. Daniel, 17 Wash. 111, 49 Pac. 243; Fairbanks v. United States, 181 U. S. 283, 21 Sup. Ct. 648, 45 L. ed. 862.

[67] Board of Railroad Commrs. v. Market St. Ry. Co., 132 Cal. 677, 64 Pac. 1065; People, Livesay, v. Wright, 6 Colo. 92, 97; State, Hib-

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sumption in favor of the constitution;[68] it is of great force;[69] and where the question is one in which a liberal construction may be made the legislative construction will not be condemned unless it very clearly appears that it is wrong;[70] it should also be followed so as to give effect to a constitutional provision if it can be done without violence to a fair interpretation of the words employed;[71] and an act, in execution of a constitutional power, passed by the first legislature after the adoption of the constitution, is a cotemporary interpretation of the latter entitled to much weight.[72]

§ 218. **Construction or Interpretation Long Continued and Acquiesced in by Legislative and Executive Departments.**—A contemporaneous construction of the constitution, practiced and acquiesced in, for a period of years, fixes the construction, and the courts will not shake or control it.[73] So practical construction for a long period of time is conclusive of the meaning of a constitution in cases otherwise doubtful.[74] Again, a long continued and uniform interpretation, put by the executive and legislative departments of the government, upon a clause of the constitution should be followed by the judicial department, unless such interpretation be manifestly contrary to its letter or spirit.[75] And where the

bard, v. Cornell, 60 Neb. 276, 83 N. W. 72. Compare State ex rel. Chamberlain, 17 Wash. 111, 117, 49 Pac. 243.

[68] State, Guerguin, v. McAllister, 88 Tex. 284, 28 L. R. A. 523, 31 S. W. 187. Compare Griffin v. Rhoton (Ark., 1907), 107 S. W. 380.

[69] People, Mooney, v. Hutchinson, 172 Ill. 486, 30 Chic. Leg. N. 303, 50 N. E. 599, 40 L. R. A. 770.

[70] Selma & Gulf Rd. Co., Ex parte, 45 Ala. 696, 6 Am. Rep. 722.

[71] State v. Tingey, 24 Utah, 225, 67 Pac. 33.

[72] Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. 739.

[73] Stuart v. Laird, 1 Cranch (5 U. S.), 299, 2 L. ed. 115.

[74] French v. State, Harley, 141 Ind. 618, 29 L. R. A. 113, 41 N. E. 2. See also Dred Scott v. Sandford, 19 How. (60 U. S.) 393, 616, 15 L. ed. 691 (practical construction through long years and in doubtful cases determines judicial mind); State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313 (legislative practice continued and acquiesced in for a long period of time controls the construction of a constitution in cases of doubt); Faribault, City of, v. Misener, 20 Minn. 396; Moers v. Reading, 21 Pa. 188.

[75] Downes v. Bidwell, 182 U. S.

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legislature or officers intrusted with the duty of carrying out the provisions of a paragraph, have given, unquestioned for a long time, a construction to such paragraph such interpretation so acquiesced in will be of great force.[76] But a practice of officials of a state penal institution is not such a contemporaneous and practical construction as to be obligatory upon the courts.[77] Where the constitution prohibits the creation of corporations by special acts the exercise of the power to regulate corporations by special acts, continued by the legislature and acquiesced in for a long period of time, is of force in construing such constitutional provision.[78] So great weight should be given to legislative construction, extending over a long period of time, of identical provisions in two state constitutions.[79] And a construction of identical clauses in two constitutions of exemption from license taxation by a legislative imposition of license taxes on the business of public service corporations for a number of years should be given great weight.[80]

§ 219. **Long and Continued Usage.**—Prior well-known usages and practices are to be considered in construing constitutions.[81] But the rule of construction by long and continued usage should be applied to a constitutional provision only in cases of doubt.[82]

244, 21 Sup. Ct. 770, 45 L. ed. 1088. See People, Mooney, v. Hutchinson, 172 Ill. 486, 30 Chic. Leg. N. 303, 50 N. E. 599, 40 L. R. A. 770.

[76] Epping v. City of Columbus, 117 Ga. 263, 43 S. E. 803.

[77] Manthey v. Vincent, 145 Mich. 327, 13 Det. L. N. 465, 108 N. W. 667.

[78] Indianapolis v. Navin, 151 Ind. 139, 41 L. R. A. 337, 14 Nat. Corp. Rep. 774, 47 N. E. 525, 151 Ind. 156, 30 Chic. Leg. N. 414, 5 Det. L. N. No. 19, 41 L. R. A. 344, 51 N. E. 80. Compare Bank of Commerce v. Wiltsie, 153 Ind. 460, 53 N. E. 950, 47 L. R. A. 489, 55 N. E. 224.

[79] Victoria Lumber Co. v. Rives, 115 La. 996, 40 So. 382.

[80] State v. New Orleans Ry. & Light Co., 116 La. 144, 40 So. 597.

[81] Johnston v. State, Sefton, 128 Ind. 16, 12 L. R. A. 235, 27 N. E. 422.

Usages of government to be considered. State v. Sorrells, 15 Ark. 664.

[82] Pingree v. Dix, Auditor Genl., 120 Mich. 95, 44 L. R. A. 679, 6 Det. L. N. 45, 78 N. W. 1025.

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§ 220. **Amendments to Constitution.**—An amended constitution should be interpreted in connection with what has preceded, and the necessity and object of the change will be considered. When new provisions are so inserted into a constitution regard should be had to their nature and purpose, and a fair and legitimate meaning should be given so that the objects intended may be accomplished.[83] In determining the intent of a constitutional amendment reference may be had to the surrounding conditions in respect to the matter to which the amendment relates, and also to the history of general legislation concerning the matter.[84] A constitutional amendment will also be construed so as to reconcile provisions of the amended constitution in conflict therewith.[85] Again, a repeal of one section of a constitution is effected by an amendment which is repugnant thereto.[86] But a distinction exists between embodying a statute in a constitution by an amendment thereto and an amendment which makes constitutional and validates a statute which still remains only ordinary legislation. And the conditions embodied in a petition for an election, a legislative act and constitutional amendment to carry out a tax scheme, such conditions being made a part of all the proceedings, and the enactment and amendment being drafted by the promoters of the scheme, become conditions of the amendment to which the tax adopted into the constitution is subject.[87] A title insurance company, organized under a special act prior to the adoption of a constitution but there-

[83] Steele v. County Commissioners, 83 Ala. 304, 3 So. 761; Minnesota & Pacific Rd. Co. v. Sibley, 2 Minn. 13.

[84] State, Getchell, v. O'Connor, 81 Minn. 79, 83, 83 N. W. 498, citing Church of Holy Trinity v. United States, 143 U. S. 457, 459, 12 Sup. Ct. 511, 36 L. ed. 226; United States v. Union Pacific R. Co., 91 U. S. 72, 79, 23 L. ed. 224; Croomers v. State, 40 Tex. Cr. App. 672, 51 S. W. 927.

[85] Chicago, City of, v. Reeves, 220 Ill. 274, 77 N. E. 237.

[86] Bray v. Florence City Council, 62 S. C. 17, 39 S. E. 810.

[87] State, Saunders, v. Kohnke, 109 La. 838, 33 So. 793.

The words "ratify" and "approve" are not, in their abstract meaning, the equivalent of such terms as "to adopt" or "to incorporate into." Hence a statute ratified and approved by a constitutional amendment is not necessarily embodied into the constitution, but may have been thereby simply validated, and made

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after repealed, does not, by failure to accept such later constitution, become estopped to deny that it continues to exercise the special privileges granted by its legislative charter and amendments thereto.[88]

§ 221. **Title of Legislative Enactment Proposing Constitutional Amendment.**—The title of a legislative enactment proposing an amendment of a constitution may be resorted to as an aid to the construction of that section of the constitution to which it relates.[89]

§ 222. **Revised Constitution—Re-enactment.**—If a constitution is revised, a re-enactment in the same language will be regarded as adopting a prior construction of the preceding constitution.[90]

§ 223. **Constitution Adopted from Another State—Construction.**—Where a constitution, or constitutional provision, has been adopted from another State it is presumed that the construction or judicial interpretation given and established there is the sense in which it was adopted, and such construc-

constitutional, remaining still nothing more than mere valid ordinary legislation. But where, in a constitutional amendment, a statute is ratified and approved, and a clause is added reserving to the legislature the right to amend the statute in certain specified respects, then the words become charged with a special meaning, and the statute does go into the constitution, except in so far as the right to amend is reserved to the legislature. State, Saunders, v. Kohnke, 109 La. 838, 33 So. 793.

[88] Hager v. Kentucky Title Co., 27 Ky. L. Rep. 346, 85 S. W. 183.

[89] State, Getchell, v. O'Connor, 81 Minn. 79, 83, 85, 83 N. W. 498. "It is true that no title is required to a proposed constitutional amendment. Such an amendment may be proposed to the people by joint resolution of the legislature. Julius v. Callahan, 63 Minn. 154, 65 N. W. 267. But such title may be looked to nevertheless for the purpose of ascertaining the intent of the law. This is a universal rule, and applies where no title is required. Wilson v. Spaulding (C. C.), 19 Fed. 304; United States v. Carbery, 2 Cranch (C. C.), 358; Fed. Cas. No. 14,720; Clark v. Mayor, 29 Md. 277, 285; United States v. Palmer, 3 Wheat. (16 U. S.) 610, 4 L. ed. 471; Page v. Young, 106 Mass. 313." *Id.*, 85, per Brown, J.

[90] **California:** Lord v. Dunster, 79 Cal. 477, 21 Pac. 865.

Indiana: McIntire v. State (Ind., 1908), 83 N. W. 1005.

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tion or interpretation should be followed.[91] It may also be assumed that the convention adopting a provision of a constitution from another State was conversant with a judicial construction placed thereon by the latter State previous to such adoption.[92]

§ 224. **Former Constitution Repealed by Implication.**—A former constitution is repealed by implication by a later one so far as inconsistent.[93]

§ 225. **Whether Constitutional Provisions Self-Executing.**—The determination of the question whether or not a constitutional provision is self-executing rests upon the inten-

Iowa: McGregor, Town of, v. Baylies, 19 Iowa, 43.

Louisiana: State v. Board of Assessors, 35 La. Ann. 651.

Missouri: Sanders v. St. Louis & New Orleans Anchor Line, 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390.

Wisconsin: Attorney Genl. v. Brunst, 3 Wis. 787.

If the language of a constitution is carried into a later one by re-enactment, the construction of such language as then adopted by the courts will control in the later constitution. Morton v. Broderick, 118 Cal. 474, 50 Pac. 644.

[91] **Colorado**: Lace v. People (Colo., 1908), 95 Pac. 302.

Idaho: Stein v. Morrison, 9 Idaho, 426, 75 Pac. 246.

Mississippi: Daily v. Swope, 47 Miss. 367.

Nevada: State v. Parkinson, 5 Nev. 15.

Wisconsin: Attorney Genl. v. Brunst, 3 Wis. 787. See Wisconsin Cent. R. Co. v. Taylor, 52 Wis. 37, 8 N. W. 833.

[92] State ex rel. State Board of Equalization v. Fortune (Mont., 1900), 60 Pac. 1086. See People v. Coleman, 4 Cal. 46, 60 Am. Dec. 581; Commonwealth v. Hartnett, 3 Gray (69 Mass.), 450.

[93] State, Childs, v. Board of County Commissioners of Crow Wing, 66 Minn. 519, 68 N. W. 767. "The later adopted constitutional provision will, so far as inconsistent with a former one, repeal it by implication, just as a later statute will repeal by implication a former one. Such repeals by implication are not favored." *Id.*, 525, per Canty, J.

See also the following cases:

United States: Sands v. Manistee River Imp. Co., 123 U. S. 288, 8 Sup. Ct. 113, 31 L. ed. 149; Escanaba & Lake Michigan Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. 185.

Arkansas: State v. Cox, 3 Eng. (8 Ark.) 436.

Louisiana: Sigur v. Crenshaw, 8 La. Ann. 401.

New York: People v. Angle, 109 N. Y. 564, 17 N. E. 413.

Oregon: Wood v. Fitzgerald, 3 Oregon, 568.

Texas: Cox v. State, 8 Tex. App. 254, 34 Am. Rep. 746.

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tion of the persons framing and adopting the constitution, and such intention is to be determined by the language used and the surrounding circumstances.[94] If, therefore, a constitutional provision is complete in itself, and evidences an intent to prescribe in itself a rule, the application of which will put into operation, it is self-executing;[95] and it would seem that if

[94] Illinois Central R. Co. v. Ihlenberg, 75 Fed. 873, 876, 877, 43 U. S. App. 726, 21 C. C. A. 546, 34 L. R. A. 393. In this case it is said by the court, per Taft, Cir. J., that: "In Groves v. Slaughter, 15 Pet. (40 U. S.) 449, 10 L. ed. 800, the question was whether the language of the constitution of Mississippi providing that the 'introduction of slaves into that State, as merchandise, or for sale, should be prohibited, from and after the first day of May, 1833,' was self-executing, or was directed to the legislature, and required legislative action before it should become operative upon contracts and persons. The question arose in the Supreme Court of the United States with reference to its effect upon contracts made in the State, and it was, therefore, determined by a divided court that the clause was not self-executing. Subsequently the court of errors of Mississippi in Green v. Robinson, 5 How. (Miss.) 80, in Glidewell v. Hite, *Id.*, 110, and Brien v. Williamson, 7 How. (Miss.) 14, refused to follow the decision of the Supreme Court of the United States held and that the clause was self-executing. Thereafter another case involving the effect of the clause upon contracts made before the decision of the Supreme Court in Mississippi was considered in Rowan v. Runnels, 5 How. (46 U. S.) 134, 12 L. ed. 85, and the Supreme Court of the United States refused to change its ruling with respect to those contracts entered into before the decisions of the Supreme Court of Mississippi. An examination of the case of Groves v. Slaughter and the reasoning of the court leaves no doubt that the question for consideration is one of the intention of the persons framing and adopting the constitution. There is nothing in Groves v. Slaughter, to justify the claim that a constitution may not contain self-executing provisions. It may be conceded that it is usually a declaration of fundamental law, and that many of its provisions are only commands to the legislature to enact laws to carry out the purposes of the framers of the constitution, and that many are mere restrictions upon the power of the legislature to pass laws; but that it is entirely within the power of those who confirm and adopt the constitution to make any of its provisions self-executing is too clear for argument. Hence it is a question always of intention to be determined by the language used and the surrounding circumstances."

[95] Acme Dairy Co. v. City of Astoria (Oreg., 1907), 90 Pac. 153. See Davis v. Burke, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. ed. 249.

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by

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the language of such provision obviously points to something more to be done, such as legislative action, and does not within itself contain a governing or controlling rule for its enforcement, it is not self-executing,[96] although it may be self-executing to a certain extent, even though it is expressly required that the legislature shall provide a penalty for a specified prohibited act.[97]

§ 226. When Constitutional Provision Is Self-Executing—Instances.—A constitutional provision is self-executing:[98] where it clearly fixes the individual responsibility of a bank officer or director, who assents to a receipt of deposits after knowledge of the bank's insolvent condition, and there is no necessity for legislation, especially where a sufficient remedy by civil action is provided under the general laws;[99] where it specifies the extent of the individual liability of stockholders of a banking corporation;[1] where the requirement is that certain books of a corporation shall be kept for public inspection, and that corporations shall keep an office in the State when they are engaged in business therein;[2] where a prohibition therein as to foreign corporations doing business in a State needs no legislative action to carry it into effect;[3] where certain requirements as to taxation are mandatory;[4] where it

means of which those principles may be given the force of law." Cooley's Const. Lim. (7th ed.) p. 121.

[96] Groves v. Slaughter, 15 Pet. (40 U. S.) 449, 10 L. ed. 800; Mercur Gold Min. & Mill. Co. v. Spry, 16 Utah, 222, 52 Pac. 382.

[97] Quinlan v. Smye, 21 Tex. Civ. App. 156, 50 S. W. 1068.

[98] Day v. Day (Idaho), 86 Pac. 531; Merchants' Police & Dist. Teleg. Co. v. Citizens' Telephone Co., 29 Ky. L. Rep. 512; Spratt v. Helena Power & Trans. Co. (Mont., 1908), 94 Pac. 631. Central Iron Works v. Pennsylvania R. Co., 2 Dauph. Co. Rep. (Pa.) 308.

[99] Mallon v. Hyde, 76 Fed. 388.

[1] Farmers' Loan & T. Co. v. Funk, 49 Neb. 353, 68 N. W. 520.

[2] State, Bourdette, v. New Orleans Gaslight Co., 49 La. Ann. 1556, 22 So. 815.

[3] American Union Teleg. Co. v. Western Union Teleg. Co., 67 Ala. 26, 42 Am. Rep. 90.

[4] Railroad & Teleph. Cos. v. Board of Equalization (C. C.), 85 Fed. 302, citing Hyatt v. Allen, 54 Cal. 353; St. Joseph Board of Pub. Schools, 62 Mo. 444; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 160, 34 L. R. A. 725.

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prohibits taking or damaging private property for public use without just compensation;[5] where discrimination as to receiving, handling and charging for freight, and as to the manner of payment is prohibited under penalty;[6] where it requires that a city shall receive bids before granting a franchise for the use of its streets;[7] and where street railway companies are required to pave their right of way, and in case of refusal the cost thereof is to be paid by levy of an assessment.[8]

§ 227. **When Constitutional Provision Is Not Self-Executing—Instances.**—A provision of the state constitution which declares the right of any corporation or individual to construct and maintain lines of telegraph and telephone upon the streets and highways within the State, that such lines shall be common carriers, and that the right of eminent domain is extended to them, is not self-operative, but by its own terms imposes the duty upon the legislature of providing by general law reasonable regulations to give effect to the section, and hence confers no power to use the streets and highways other than as the legislature may provide.[9] Nor is a constitutional provision self-executing, where its language is that laws shall be made to provide for the enforcement thereof;[10] nor where the legislature is directed to make provision for a specific purpose, or to carry out a designated matter;[11] nor where a provision amending a constitution requires that certain laws shall be enacted by the legislature and also a general election

[5] Searle v. Lead, 10 S. Dak. 312, 39 L. R. A. 345, 73 N. W. 101.

[6] Louisville & Nashville R. Co. v. Commonwealth (Ky.), 46 S. W. 702, modified, 105 Ky. 179, 20 Ky. L. Rep. 1099, 48 S. W. 416, 43 L. R. A. 550.

Regulation of rates, see City of Tampa v. Tampa Waterworks Co. (Fla., 1903), 34 So. 631.

[7] Merchants' Police & Dist. Teleg. Co. v. Citizens' Teleph. Co., 29 Ky. L. Rep. 512, 93 S. W. 642.

[8] Lincoln St. Ry. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802.

[9] State ex rel. Spokane & British Columbia Teleph. & Teleg. Co. v. City of Spokane, 24 Wash. 53, 63 Pac. 116, 7 Am. Elec. Cas. 96. See also State v. City of Helena (Mont., 1906), 85 Pac. 744.

[10] Chittenden v. Wurster, 152 N. Y. 345, 46 N. E. 857, 47 N. E. 273, 37 L. R. A. 809, 29 Chic. Leg. N. 298, 300, rev'g 43 N. Y. Supp. 1035, 77 N. Y. St. R. 1035. 14 App. Div. 483.

[11] Harris v. Kill, 108 Ill. App. 305.

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held before it can go into full force and effect;[12] nor where it relates to foreign corporations having a known place of business in the State and also an authorized agent;[13] nor where it requires that the legislature shall prescribe regulations and penalties;[14] nor where it gives a railroad company the right to intersect, connect with, or cross any other railroad, at least so in the sense that its charter powers cannot be ignored;[15] nor where it prohibits discrimination by railroads, also monopolies, and combinations, but provides that the legislature shall enforce such provisions by laws;[16] nor where in addition to a provision as to stockholder's individual liability as security for dues from a corporation, recourse is to be had to such other means as shall be provided by law;[17] nor where the express requirement is that the legislature shall provide by law and prescribe regulations as to taxation;[18] nor where the mode or manner of taxation is to be that provided by law;[19] nor where it specifies that the value of property for taxation is to be ascertained as provided by law;[20] nor where it requires that the legislature shall by general law exempt certain property from taxation;[21] nor where a provision only specifies that power "may" be vested to assess and collect taxes.[22]

[12] Blake v. Ada County Commrs. (Idaho), 47 Pac. 734.

[13] St. Louis A. R. Co. v. Fire Assoc., 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83.

[14] State v. Bradford (S. Dak.), 80 N. W. 143, aff'd 83 N. W. 47, citing numerous cases.

[15] Boca & L. R. Co. v. Sierra Valleys Ry. Co. (Cal. App.), 84 Pac. 298. See Denver & N. O. R. Co. v. Atchison, Topeka & Santa Fe R. Co., 15 Fed. 650, case is rev'd, Atchison, Topeka & Santa Fe R. Co. v. Denver & N. O. R. Co., 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. 185.

[16] Northwestern Warehouse Co. v. Oregon R. & Nav. Co., 32 Wash. 218, 73 Pac. 388.

[17] Bell v. Farwell, 176 Ill. 489, 31 Chic. Leg. N. 167, 42 L. R. A. 804, 52 N. E. 346, 17 Nat. Corp. Rep. 644, 10 Am. & Eng. Corp. Cas. (N. S.) 71, 68 Am. St. Rep. 194; Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331. See Eau Claire Nat. Bank v. Benson, 106 Wis. 624, 82 N. W. 604.

[18] State Board of Tax Commrs. v. Holliday, 150 Ind. 216, 27 Ins. L. J. 97, 49 N. E. 14, 42 L. R. A. 865.

[19] Mercur Gold Min. & Mill. Co. v. Spry, 16 Utah, 222, 52 Pac. 382.

[20] McHenry v. Downer, 116 Cal. 20, 47 Pac. 779, 6 Am. & Eng. Corp. Cas. (N. S.) 113, 45 L. R. A. 737.

[21] Engstad v. Grand Forks County, 10 N. Dak. 54, 84 N. W. 577.

[22] State, Ross, v. Kelly, 45 S. C. 457, 23 S. E. 281.

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CHAPTER XVI.

CONSTITUTIONAL LAW—INTERPRETATION OR CONSTRUCTION OF STATUTES.

§ 228. Constitutional Law—Interpretation or Construction of Statutes—Generally.
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243. Matters incorporated by Reference.
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248. Punctuation.
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§ 256. Same Subject — Instances Continued — Public Land Grants—Railroad Aid.

§ 228. **Constitutional Law—Interpretation or Construction of Statutes—Generally.**—The word "franchise" may be used in its general sense so as to include franchises whether corporate or not, and may cover any special privilege having its source in the sovereign power.[1] But corporate privileges can only be held to be granted as against public rights when conferred in plain and explicit terms.[2] When the good faith of all parties is unquestionable, the courts will lean to that construction of a statute which will uphold a transaction as consummated, and this applies to transactions with a county which have resulted in the delivery of bonds of the county to a railroad company, such bonds having been issued in aid of the company and placed in escrow in the hands of a trustee who had adjudged that the conditions of delivery had been complied with and had delivered them to the company. In such case the company was held to have taken such a title that when a bond was transferred to a *bona fide* holder a recovery could be had against the county even if the condition had, in fact, not been performed.[3]

§ 229. **Judicial Authority and Duty to Determine Constitutional Questions.**—Whenever there exists a fair antagonistic assertion of rights involving the validity of any legislative enactment, Federal or state, and the decision necessarily rests upon the power of the legislature to so enact, the court having jurisdiction in the matter must determine the

[1] State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697 (a case of construction of Wis. Stat., 1898, § 3466, action for usurping, etc., franchise). See § 9, herein.

[2] Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801. See § 254, herein, as to construction against grantee.

[3] Provident Life & Trust Co. v. Mercer County, 170 U. S. 593, 42 L. ed. 1156, 18 Sup. Ct. 788.

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constitutionality of the act.[4] But unless a clear or absolute necessity exists for determining the question of the constitutionality of a statute, or the determination of such question is essential in order to properly dispose of the case it will not be considered by the court if any other clear ground exists upon which to base a decision.[5] And the Supreme Court of the United States will not condemn state legislation as unconstitutional and void except at the suit of parties directly and certainly affected thereby.[6] Thus, a state law will not be held unconstitutional in a suit coming from a state court at the instance of one whose constitutional rights are not invaded,

[4] Chicago & Grand Trunk Ry. Co. v. Wellmann, 143 U. S. 339, 12 Sup. Ct. 400, 30 L. ed. 176. See Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. ed. 223; Dodge v. Woolsey, 18 How. (59 U. S.) 331, 15 L. ed. 401; Cohens v. Virginia, 6 Wheat. (19 U. S.) 264, 5 L. ed. 257; Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629.

Validity of statute is drawn in question when the power to enact it is fairly open to denial and is denied, but not otherwise. And on questions of appeal a distinction exists between the power to enact and the judicial construction which does not question that power. Baltimore & Potomac Rd. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 837.

[5] **Alabama**: Hill v. Tarver, 130 Ala. 592, 30 So. 499.

Arkansas: Sturdivant v. Tollette (Ark., 1907), 105 S. W. 1037.

Georgia: Herring v. State, 114 Ga. 96, 39 S. E. 866.

Idaho: Mills Novelty Co. v. Dunbar, 11 Idaho, 671, 83 Pac. 932; Jack v. Village of Grangeville, 9 Idaho, 291, 74 Pac. 969.

Illinois: Joliet, City of, v. Alexander, 194 Ill. 457, 62 N. E. 861.

Indiana: Weir v. State, 161 Ind. 435, 68 N. E. 1023; Hart v. Smith, 159 Ind. 182, 64 N. E. 661; First Nat. Bank v. Gregor, 157 Ind. 479, 62 N. E. 21.

Louisiana: Succession of Bienvenu, 106 La. 595, 31 So. 193.

Maine: See Weeks v. Smith, 81 Me. 538, 18 Atl. 325.

Mississippi: Flora, Town of, v. American Express Co. (Miss., 1908), 45 So. 149; Hendricks v. State, 79 Miss. 368, 30 So. 708.

Montana: State v. King, 28 Mont. 268, 72 Pac. 657.

Nebraska: Green v. Dœrwald, 69 Neb. 698, 96 N. W. 634; Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734.

Nevada: State v. Curler, 26 Nev. 347, 67 Pac. 1075.

Ohio: Collins v. Bingham, 22 Ohio Cir. Ct. R. 533.

South Carolina: State v. Jennings (S. C., 1908), 60 S. E. 967.

The judiciary is a co-ordinate branch of the government and may declare a statute to be void as repugnant to the Constitution. Calder v. Bull, 3 Dall. (3 U. S.) 386, 1 L. ed. 648.

[6] Chadwick v. Kelley, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. 175.

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because as against a class making no complaint it might be held unconstitutional.[7]

§ 230. Validity of Statutes—Generally.—A statute need not be contrary to an express constitutional provision in order to be held invalid; it is sufficient that the general purpose and scope of such provision inhibits it or renders it invalid.[8] So where there exists an irreconcilable repugnancy between the provisions of an enactment so that it cannot be enforced, it will be void.[9] A statute may also be invalid for indefiniteness and uncertainty, as where it makes it unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic in any respect whatever, in the transportation of a like kind of traffic, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or advantage.[10] So a distinction is made between the effect of an act and its purpose, the former and not the latter being held to determine its validity.[11] None of the provisions of a statute should, however, be regarded as unconstitutional where they all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title.[12] And a statute is not void for uncertainty where the powers granted thereunder

[7] The Winnebago (Iroquois Transp. Co. v. DeLaney Forge & Iron Co.), 205 U. S. 354, 51 L. ed. 27, 27 Sup. Ct. —.

[8] State, Smyth, v. Moores, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175, citing Maynard v. Board of Canvassers, 84 Mich. 228, 11 L. R. A. 332, 47 N. W. 756; State v. Constantine, 42 Ohio St. 437, 51 Am. Rep. 833; Cincinnati, Wilmington & Zanesville Rd. Co. v. Commissioners of Clinton County, 1 Ohio St. 77; Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; People, Bolton, v. Albertson, 55 N. Y. 50; People v. Morris, 13 Wend. (N. Y.) 325.

[9] Hendricks, In re, 60 Kan. 796, 57 Pac. 965.

[10] Commonwealth v. Louisville & Nashville R. Co., 20 Ky. L. Rep. 491, 46 S. W. 700.

[11] Commonwealth, Cambria County, v. Lloyd, 178 Pa. 308, 35 Atl. 816, aff'g 2 Pa. Super. Ct. 6, 38 W. N. C. 290.

[12] Phillips v. Covington & Cincinnati Bridge Co., 2 Metc. (59 Ky.) 219, 222.

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may be clearly defined by reference to other laws.[13] Statutes have frequently been passed directing suits for specific objects to be brought by an attorney general, and regulating the proceedings in them, such as quo warranto, or a bill in equity against a corporation to test its right to the exercise of its franchises, or to declare them forfeited, or, if insolvent, to wind up its business and distribute its assets; and the validity of such statutes has uniformly been recognized.[14]

§ 231. **Presumption That Legislative Enactment Constitutional—Repugnancy Must Clearly Appear.**—Every legislative enactment will be presumed to be constitutional and valid unless its repugnancy to the Constitution is so clearly apparent that it cannot stand. Every reasonable intendment is in favor of such validity,[15] and in certain cases the rule is

[13] Land, Log & Lumber Co. v. Brown, 73 Wis. 294, 40 N. W. 482, 3 L. R. A. 472.

[14] United States v. Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143.

[15] **United States:** Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 340, 48 L. ed. 252; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. 92, case affirms 29 Colo. 333, 68 Pac. 228; Fairbank v. United States, 181 U. S. 283, 21 Sup. Ct. 648, 45 L. ed. 862; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. 522; Brown v. Maryland, 12 Wheat. (25 U. S.) 419, 6 L. ed. 678; Fletcher v. Peck, 6 Cranch (10 U. S.), 87, 3 L. ed. 162; Logan & Bryan v. Postal Teleg. & Cable Co., 157 Fed. 570; Southern Pac. R. Co. v. Orton, 32 Fed. 457, 472, 473, per Sawyer, J.; Farmers' Loan & Trust Co. v. Stone (C. C.), 20 Fed. 270.

Alabama: State v. Skeggs (Ala., 1908), 46 So. 268; Jackson v. Birmingham Foundry & Mach. Co. (Ala., 1908), 45 So. 660; Mobile Dry Docks Co. v. City of Mobile, 146 Ala. 198, 40 So. 205; Zeigler v. South. & N. A. R. Co., 58 Ala. 594.

Arkansas: Stillwell v. Jackson, 77 Ark. 250, 93 S. W. 71.

California: Stockton & V. R. R. Co. v. City of Stockton, 41 Cal. 147.

Colorado: Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 Pac. 61.

Connecticut: State v. Carroll, 38 Conn. 449, 9 Am. Rep. 400; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210.

Delaware: Bailey v. Philadelphia, W. & B. R. Co., 4 Har. (Del.) 389, 44 Am. Dec. 593.

Florida: Holton v. State, 28 Fla. 303, 9 So. 716.

Georgia: Griggs v. State (Ga. App., 1908), 60 S. E. 364; Park v. Candler, 113 Ga. 647, 39 S. E. 89; Ivey v. State, 112 Ga. 175, 37 S. E. 398; Howell v. State, 71 Ga. 224, 51 Am. Rep. 259; Botson v. Cummins, 16 Ga. 102, 60 Am. Dec. 717; Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248.

Illinois: People v. Rose, 203 Ill. 46, 67 N. E. 746; Chicago Union Traction

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extended to the exclusion of reasonable doubt; [16] and the whole burden of proof lies on him who denies the constitutionality

Co. v. City of Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; Hawthorne v. People, 109 Ill. 302, 50 Am. Rep. 610.

Indiana: Kraus v. Lehman (Ind., 1908), 83 N. E. 714, aff'g 80 N. E. 550; State v. Denny, 118 Ind. 388, 21 N. E. 252; Robinson v. Schenck, 102 Ind. 307, 1 N. E. 698.

Iowa: McGuire v. Chicago, Burlington & Quincy Rd. Co., 131 Iowa, 340, 108 N. W. 902; McCormick v. Rush, 15 Iowa, 127, 83 Am. Dec. 401.

Kansas: State v. Barrett, 27 Kan. 213; Leavenworth v. Miller, 7 Kan. 298.

Kentucky: Commonwealth v. Barney, 24 Ky. L. Rep. 2352, 74 S. W. 181; Millay v. White, 86 Ky. 170, 5 S. W. 429; McReynolds v. Smallhouse, 8 Bush (71 Ky.), 447; Louisville, City of, v. Hyatt, 2 B. Mon. (41 Ky.) 77, 178, 36 Am. Dec. 594.

Louisiana: Grinage v. Times Democrat Pub. Co., 107 La. 121, 31 So. 682; Police Jury v. McDonough 8 La. Ann. 341; Hyde v. Planters' Bank, 8 Rob. (La.) 416.

Maine: Williamson v. Carlton, 51 Me. 449.

Maryland: Fell v. Maryland, 42 Md. 71, 20 Am. Rep. 83; Temmick v. Owings, 70 Md. 246, 19 Md. L. J. 981, 16 Atl. 719; Harrison v. State, 22 Md. 468, 85 Am. Dec. 658.

Massachusetts: Commonwealth v. People's Five Cent Sav. Bank, 5 Allen (87 Mass.), 432; Dearborn v. Ames, 8 Gray (74 Mass.), 1.

Michigan: Attorney General v. Preston, 56 Mich. 177, 22 N. W. 261; Inkster v. Carver, 16 Mich. 484.

Missouri: State, Judah, v. Fort (Mo., 1908), 109 S. W. 737; Wells v. Missouri Pac. R. Co., 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847; State v. Simmons Hardware Co., 109 Mo. 118, 18 S. W. 1125.

Montana: Spratt v. Helena Power Trans. Co. (Mont., 1908), 94 Pac. 63.

Nebraska: State v. Nolan, 71 Neb. 136, 98 N. W. 657; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922; State v. Standard Oil Co., 61 Neb. 28, 84 N. W. 413; Cumming v. Hyatt, 54 Neb. 635, 74 N. W. 411.

Nevada: Boyce, Ex parte, 27 Nev. 299, 75 Pac. 1; State v. Humboldt County Commissioners, 21 Nev. 235, 29 Pac. 974.

New Hampshire: Orr v. Quimby, 54 N. H. 590, 601; Rich v. Flanders, 39 N. H. 304.

New Jersey: Atlantic City Waterworks Co. v. Consumers' Water Co., 44 N. J. Eq. 427, 15 Atl. 581; Olden v. Hallet, 5 N. J. L. 466.

New York: Sugden v. Partridge, 174 N. Y. 87, 66 N. E. 655, rev'g 80 N. Y. Supp. 1149, 78 App. Div. 644; People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; People

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[16] **United States:** Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. 522 (applied to act of Congress).

Indiana: Kraus v. Lehman (Ind., 1908), 83 N. E. 714, aff'g 80 N. E. 550.

Missouri: State, Judah, v. Fort (Mo., 1908), 109 S. W. 737.

New York: People v. Reardon, 97 N. Y. Supp. 535, 110 App. Div. 821, aff'd 184 N. Y. 431, 77 N. E. 970.

South Dakota: Morrow v. Wipf (S. Dak., 1908), 115 N. W. 1121.

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of the law;[17] nor will it be declared void until it is clearly shown that under no state of facts can it be upheld,[18] or that there is a clear usurpation of power.[19] And where a statute

v. Reardon, 97 N. Y. Supp. 535, 110 App. Div. 821, aff'd 184 N. Y. 431, 77 N. E. 970; Lexington Ave., In re, 63 How. Prac. (N. Y.) 462; People v. New York Cent. R. Co., 34 Barb. (N. Y.) 123.

North Carolina: Malloy v. Fayettsville, 122 N. C. 480, 29 S. E. 880; McGwigan v. Wilmington & W. R. Co., 95 N. C. 428.

Ohio: State v. Jones, 51 Ohio St. 492, 37 N. E. 945; Bronson v. Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90.

Oregon: Crowley v. State, 11 Oreg. 512, 6 Pac. 70.

Pennsylvania: Commonwealth, Cambria County, v. Lloyd, 178 Pa. 308, 35 Atl. 816, aff'g 2 Pa. Super. Ct. 61, 38 W. N. C. 290; Pennsylvania R. Co. v. Riblet, 66 Pa. 164; Commonwealth v. Erie Ry. Co., 62 Pa. 286, 1 Am. Rep. 399; Erie & North-East Rd. v. Casey, 26 Pa. 287; Commonwealth v. Mentz, 19 Pa. Super. Ct. 283.

South Carolina: Feldman v. Charleston, 23 S. C. 57, 55 Am. Rep. 6; Lynch, Ex parte, 16 S. C. 32.

South Dakota: Fremont, Elkhorn & Missouri Valley Rd. Co. v. Pennington County (S. Dak., 1908), 116 N. W. 75; Morrow v. Wipf (S. Dak., 1908), 115 N. W. 1121; Bon Homme County v. Berndt, 15 S. Dak. 494, 90 N. W. 147.

Tennessee: Tate v. Bell, 4 Yerg. (12 Tenn.), 202, 26 Am. Dec. 221; State Bank v. Hooper, 2 Yerg. (10 Tenn.) 599.

Texas: Barker v. Torrey, 69 Tex. 7, 4 S. W. 646; Rosenberg v. Weekes, 67 Tex. 578, 4 S. W. 899; Missouri, Kansas & Texas Ry. Co. v. State (Tex. Civ. App., 1908), 109 S. W. 867.

Utah: State v. Edwards (Utah, 1908), 95 Pac. 367; State v. Lewis, 26 Utah, 120, 72 Pac. 288.

Vermont: Bennington v. Park, 50 Vt. 178.

Virginia: Young's Case (Young v. Commonwealth), 101 Va. 853, 45 S. E. 327; Commonwealth v. Moore, 25 Grat. (Va.) 951.

Washington: Townsend Gas & Elect. Co. v. Hill, 24 Wash. 469, 64 Pac. 778.

West Virginia: Bridges v. Shallcross, 6 W. Va. 562; Osburn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin: Chicago & N. W. Ry. Co. v. State, 128 Wis. 553, 108 N. W. 557.

"Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose." Employers' Liability Cases (Howard v. Illinois Cent. Rd. Co.), 207 U. S. 463, 501, per White, J.

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[17] Brown v. Maryland, 12 Wheat. (25 U. S.) 419, 6 L. ed. 678. Compare Weeks v. Smith, 81 Me. 538, 18 Atl. 328 (as to duty of court to determine question without pleading or proof.

[18] McGuire v. Chicago, Burlington & Quincy Rd. Co., 131 Iowa, 340, 108 N. W. 902.

[19] Commonwealth, Cambria County, v. Lloyd, 178 Pa. 308, 35 Atl. 816, aff'g 2 Pa. Super. Ct. 6, 38 W. N. C. 290.

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has stood for a long time and the court can, without a violent construction, read it so that it will not be declared unconstitutional, it will do so.[20]

§ 232. **Same Subject—Exception to or Qualification of Rule.**—The above presumption as to the constitutionality of a statute is held not to prevail where part of the enactment has been declared unconstitutional. In such case it must be clear that it was the legislative intent that the remainder should stand as law independent of and uncontrolled by the unconstitutional provisions. So a statute which provides a forfeiture for failure, neglect or refusal of a telegraph company to receive, transmit and deliver, without unnecessary delay, any telegraph message tendered under the provisions of an act otherwise invalid, is inoperative and void.[21]

§ 233. **Conflicting Provisions—Validating Interpretation or Construction—Two Constructions.**—A construction will be given which supports it in all its parts where a statute is conflicting and doubtful in its provisions; such provisions should be reconciled, if possible,[22] for the enactment should be so interpreted, if by any reasonable view it can be done, that it will be in harmony with the Constitution and not be eluded but upheld.[23] And of two constructions, one constitutional

[20] Martin v. District of Columbia, 205 U. S. 135, 51 L. ed. 473, 27 Sup. Ct. 440.

[21] Western Union Teleg. Co. v. Austin, 67 Kan. 208, 72 Pac. 850, citing or quoting Hall, Petitioner, In re, 38 Kan. 670, 17 Pac. 649; Central Branch Union Pacific Rd. Co. v. Atchison, Topeka & Santa Fe Rd. Co., 28 Kan. 453; State v. Stewart, 52 Neb. 243, 71 N. W. 998; Martin v. Tyler, 4 N. Dak. 278, 298, 60 N. W. 392, 25 L. R. A. 838; Skagit County v. Stiles, 10 Wash. 388, 39 Pac. 116; Cooley's Const. Lim. (5th ed.) 213. See Joyce on Electric Law (2d ed.), §§ 836*a et seq.*, as to penalty, statutes and discrimination. See §§ 234, 235, 265–267, herein, as to *pari materia* and partial invalidity.

[22] Boyer v. Onion, 108 Ill. App. 612; Burlington, C., R. & N. Ry. Co. v. Dey, 82 Iowa, 312, 12 L. R. A. 436, 48 N. W. 98, 9 Ry. & Corp. L. J. 282, 45 Am. & Eng. R. Cas. 391.

[23] **United States:** Grenada County Supervisors v. Brogden, 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. 125; Singer Mfg. Co. v. McCollock (C. C.), 24 Fed. 667.

Alabama: Noble v. Mitchell, 100 Ala. 519, 14 So. 581.

Alaska: Wynn Johnson, In re, 1 Alaska, 630.

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and the other unconstitutional, the former will prevail.[24] So if both interpretations are equally reasonable that in favor of validity of the act should be adopted;[25] or if one construction will lead to an absurdity, the other should be favored;[26] and one bringing the enactment within the legislative power is to be given, rather than one that presses it beyond constitutional authority;[27] this last also applies to a section of an act of Con-

Arkansas: Arkansas, L. & G. Ry. Co. v. Kennedy (Ark., 1907), 105 S. W. 885.

California: French v. Teschemaker, 24 Cal. 518; Goodrich's Est., In re (Cal. App., 1907), 93 Pac. 121.

Connecticut: Ferguson v. Stanford, 60 Conn. 432, 22 Atl. 782, 37 Am. & Eng. Corp. Cas. 321.

Illinois: People v. Rose, 203 Ill. 46, 67 N. E. 746; People v. Peacock, 98 Ill. 172; Newland v. Marsh, 19 Ill. 376.

Indiana: Hovey v. State, 119 Ind. 395, 21 N. E. 21; McComas v. Krug, 81 Ind. 327, 42 Am. Rep. 135.

Iowa: Duncombe v. Prindle, 12 Iowa, 1.

Kansas: Cherokee, County of, v. State, 36 Kan. 339, 13 Pac. 558.

Kentucky: Commonwealth v. Barney, 24 Ky. L. Rep. 2352, 74 S. W. 181; Conner v. Commonwealth, 13 Bush (76 Ky.), 714.

Massachusetts: Commonwealth v. Downes, 24 Pick. (41 Mass.) 227.

Michigan: Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

Mississippi: Marshall v. Grimes, 41 Miss. 27.

Missouri: Loving, Ex parte, 178 Mo. 194, 77 S. W. 508.

New Jersey: Colwell v. May's Landing Water Power Co., 19 N. J. Eq. 245.

New York: Sugden v. Partridge, 174 N. Y. 87, 66 N. E. 655, rev'g 80 N. Y. Supp. 1149, 78 App. Div. 644; New York & Oswego Mid. R. Co. v. Van Horne, 57 N. Y. 473; People v. Utica Ins. Co., 15 Johns. (N. Y.) 357, 8 Am. Dec. 243.

North Carolina: McGwigan v. Wilmington & W. R. Co., 95 N. C. 428.

Ohio: Senior v. Ratterman, 44 Ohio St. 661, 11 N. E. 321.

Oregon: Portland & W. V. R. Co. v. Portland, 14 Oreg. 188, 12 Pac. 26, 58 Am. Rep. 299.

South Carolina: Columbia & G. R. Co. v. Gibbes, 24 S. C. 60; Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705.

Tennessee: Cole Mfg. Co. v. Falls, 90 Tenn. 466, 16 S. W. 1045.

Texas: Wright v. Adams, 45 Tex. 134.

Utah: State v. Lewis, 26 Utah, 120, 72 Pac. 388.

Wisconsin: Chicago & N. W. Ry. Co. v. State, 128 Wis. 553, 108 N. W. 557.

[24] Wellmaker v. Terrell (Ga. App., 1908), 60 S. E. 464; Lears v. Seaboard Air Line Ry. Co. (Ga. App., 1908), 60 S. E. 343; Burnette, In re, 73 Kan. 609, 85 Pac. 575; State, Brown, v. Union, 62 N. J. L. 142, 40 Atl. 632.

[25] Rosin v. Lidgewood Mfg. Co., 86 N. Y. Supp. 49, 89 App. Div. 245.

[26] Harless v. United States, 88 Fed. 97, 57 U. S. App. 745, 31 C. C. A. 397.

[27] Martin v. South Salem Land Co., 94 Va. 28, 2 Va. Law Reg. 743, 26

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gress, because a presumption never ought to be indulged that that body meant to exercise or usurp any constitutional authority, unless the conclusion is forced on the court by language altogether unambiguous.[28] But if it is doubtful that a tax is authorized, such tax will not be upheld.[29] In case of two constitutional provisions and a statute passed in pursuance therewith, effect should be given to all and such a construction that all may operate harmoniously. In order to nullify the statute in such case it must be so repugnant to and in conflict with the constitution that the two enactments cannot stand or be reconciled in any reasonable way. If no conflict exists, the statute must be given full force and effect.[30]

§ 234. **Partial Invalidity.**—A statute may be valid in part and invalid in part, and where some of the provisions are constitutional and some are unconstitutional, effect may be given to the former, where they can be separated from the latter and sufficient is left to enable their intent or purpose to be accomplished after the invalid provisions are eliminated; but this rule has no application where the parts of the statute which are unconstitutional are so connected with its general scope or purpose that should they be stricken out, effect cannot be given to the legislative intent, or where the provisions of the act are dependent upon each other, intended as an entirety and are indivisible, or where it does not plainly appear that the constitutional legislation would have been enacted without the unconstitutional provisions, or that the invalid part induced the passage of the valid part, or where the invalid clause or provision cannot be rejected without causing the statute to enact what the legislature never intended.[31]

S. E. 591, 6 Am. & Eng. Corp. Cas. (N. S.) 312.

[28] United States v. Coombs, 12 Pet. (37 U. S.) 72, 9 L. ed. 1004.

[29] Morris v. Cummings, 91 Tex. 618, 45 S. W. 383.

[30] Seeley, Matter of, v. Stevens, 190 N. Y. 158, 166, 82 N. E. 1095, case reverses Seeley v. Franchot, 104 N. Y. Supp. 1145.

[31] **United States:** Employers' Liability Cases (Howard v. Illinois Cent. Rd. Co.), 207 U. S. 463, 28 Sup. Ct. 141, 52 L. ed. —; People's National Bank v. Maryé, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. 68

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§ 235. Same Subject—Instances.—A charter otherwise valid is not made void by the insertion therein of an invalid

(taxation; bank stock; deductions; state laws); Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047 (establishing state railroad commission); Spraigue v. Thompson, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. 988 (if a clause, in a statute which violates the constitution, cannot be rejected without causing the act to enact what the legislature never intended, the whole statute must fall); Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. 580; Allen v. Louisiana, 103 U. S. 90, 26 L. ed. 310 (if the provisions of a statute which are unconstitutional be so connected with its general scope that, should they be stricken out, effect cannot be given to the legislative intent, the other provisions must fall with them; a case of municipal subscription for stock of a railroad company); Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; Pacific Express Co. v. Seibert (C. C.), 44 Fed. 310.

Alabama: State, Sanche, v. Webb, 110 Ala. 214, 20 So. 462, 4 Am. Eng. Corp. Cas. (N. S.) 574 (special act amending charter of corporation); Ramagnano v. Cook, 85 Ala. 226, 3 So. 845.

Arkansas: St. Louis, I. M. & S. R. Co. v. State, 55 Ark. 200, 17 S. W. 806 (not void if void part can be eliminated).

California: Christensen, Ex parte, 85 Cal. 208, 24 Pac. 747.

Colorado: Callahan v. Jennings, 16 Colo. 471, 27 Pac. 1055; House Bill, In re, 15 Colo. 593, 595, 26 Pac. 141.

District of Columbia: District of Columbia v. Arms, 8 App. D. C. 393, 24 Wash. L. Rep. 278 (valid where the intent or purpose of the act may still be effectuated if the invalid part is eliminated or excised).

Illinois: People v. Olsen, 222 Ill. 117, 78 N. E. 23; People, Deneen, v. Simons, 176 Ill. 165, 31 Chic. Leg. N. 75, 3 Chic. L. J. Wkly. 506, 52 N. E. 910 (if possible to carry out the general purposes of the act it will stand though part invalid).

Indiana: State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; State, Holt, v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65 (invalid part mutually connected with valid part, and if legislature would not have passed valid part without the invalid all void); Wilkins v. State, 113 Ind. 514, 16 N. E. 192.

Kansas: Smith v. Haney, 73 Kan. 506, 85 Pac. 550 (if invalid part so connected that legislature would not have passed act without it, act is void). See Western Union Teleg. Co. v. Austin, 67 Kan. 208, 72 Pac. 850.

Kentucky: Norman v. Boaz, 85 Ky. 557, 4 S. W. 316.

Michigan: Mathias v. Cramer, 73 Mich. 5, 40 N. W. 926.

Minnesota: St. Paul v. Chicago, Milwaukee & St. Paul R. Co., 63 Minn. 330, 68 N. W. 458, 34 L. R. A. 189, modifying 34 L. R. A. 184, 65 N. W. 649, which aff'd 63 N. W. 267; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513, 1 L. R. A. 777, 39 Alb. L. J. 9; O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458 (if invalid and valid parts so mutually dependent that it is obvious that the legislature intended them as an entirety, both parts must fall).

Missouri: State, Crow, v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363 (remain-

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provision.[32] And omissions as to the amount of capital stock and the value of shares do not of themselves invalidate an act

ing provisions valid when separable and sufficient left to be operative); State v. Bockstruck, 136 Mo. 335, 38 S. W. 317; Grimes v. Eddy, 126 Mo. 168, 28 S. W. 756, 26 L. R. A. 638, 61 Am. & Eng. R. Cas. 343; State, Maggard, v. Pond, 93 Mo. 605, 6 S. W. 469. Compare State v. Walsh, 136 Mo. 400, 37 S. W. 1112; 35 L. R. A. 231.

Nebraska: State v. Poynter, 59 Neb. 417, 81 N. W. 431 (passage of remaining provisions induced by invalid part, whole act void); State, Wheeler, v. Stuht, 52 Neb. 209, 71 N. W. 941 (parts of statute or of section valid though other parts invalid where latter not the inducement to enactment of the former); Muldoon v. Levi, 25 Neb. 457, 41 N. W. 280.

New Jersey: State, McCullough, v. Franklin Township, 59 N. J. L. 106, 34 Atl. 1088.

New York: Skaneateles Waterworks Co. v. Village of Skaneateles, 54 N. Y. Supp. 1115, 33 App. Div. 642, aff'd 161 N. Y. 154, 55 N. E. 562 (not connected with purpose of act as entirety and remainder separable and capable of being carried out, is valid); People, Weaver, v. Van De Carr, 150 N. Y. 439, 44 N. E. 1040, aff'g 39 N. Y. Supp. 581, 44 N. E. 1040 (is valid where the valid part is not so connected, interwoven and dependent on the invalid part that it must fall with it); Gause v. Boldt, 99 N. Y. Supp. 442, 49 Misc. 340, 100 N. Y. Supp. 1117.

North Dakota: Martin v. Tyler, 4 N. Dak. 278, 25 L. R. A. 838, 60 N. W. 392 (void where remainder cannot be enforced).

Ohio: Fayette County v. People's & D. Bk., 47 Ohio St. 503, 24 Ohio L. J. 408, 10 L. R. A. 196, 25 N. E. 697.

Pennsylvania: East Grant Street, In re, 121 Pa. 596, 22 W. N. C. 333, 46 Phila. L. Int. 168, 16 Atl. 366; Titusville Iron Works v. Keystone Oil Co., 122 Pa. 627, 22 W. N. C. 435, 1 L. R. A. 361, 15 Atl. 917.

South Carolina: Utsy v. Hiott, 30 S. C. 360, 9 S. E. 338 (invalid where cannot be presumed that one part would have been passed without the other).

Tennessee: State National Bank v. City of Memphis, 116 Tenn. 641, 94 S. W. 606 (deduction of state bonds from shares of stock of corporations in assessment of latter).

Texas: St. Louis Southwestern Ry. Co. of Texas v. Gentry (Tex. Civ. App., 1906), 95 S. W. 74, 75; Galveston, Harrisburg & San Antonio Ry. Co. v. Davidson (Tex. Civ. App., 1906), 93 S. W. 436. Compare 97 N. W. 71.

Utah: Eureka v. Wilson, 15 Utah, 67, 48 Pac. 150 (does not invalidate whole where different parts separable and valid part complete in itself).

Washington: Pullman State Bank v. Manring, 18 Wash. 250, 51 Pac. 464 (exception of bank stock from credits); Skaget County v. Stiles, 10 Wash. 388, 39 Pac. 116 (remainder unenforceable if existed independently).

Wyoming: State, Cheyenne, v. Swan, 7 Wyo. 166, 51 Pac. 209, 40 L. R. A. 195 (if invalid part sustains

[32] Hanna v. International Petroleum Co., 23 Ohio St. 622.

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of incorporation.[33] So a statute giving a lien and providing for its enforcement against railroad companies which is unconstitutional in part may be valid as to the rest.[34] Nor will a statute imposing conditions upon foreign corporations doing business in a State be void as a whole even though it includes invalid provisions, where such invalid parts are separable.[35] So where statutes empower villages to supply water for use of the inhabitants and regulate water rates for fire protection in certain cases and provide for taxation to meet deficiencies from water receipts, such provisions as are not essential may be eliminated.[36] And although an attempt of a city to make exclusive a franchise for waterworks may be invalid, still the valid part of the grant may be enforced.[37] So where the manifestly clear intention of the legislature is to effect a change in a system of waterworks and the maintenance thereof, and by eliminating the unconstitutional provisions of a statute the old system must still be relied on, the whole enactment will be void.[38] Where a code provided that a city could not grant

a material relation to valid part which depends thereon, whole act invalid).

"An act will not necessarily be condemned as a whole because some separable part is vulnerable to constitutional objections. * * * But, there is authority for the proposition, that even though the provisions of an act are separable, and not dependent one upon the other, the rule that the unconstitutional provision may be discarded and the valid provision allowed to stand applies only where it is plain that the lawmaking body would have enacted the legislation with the provision eliminated. It was so said in the recent case of Howard v. Illinois Central Rd. Co (Employers' Liability Cases), 207 U. S. 463, 28 Sup. Ct. 141, 52 L. ed. —. Without stopping for a discussion of the proposition as announcing a rule of construction we may accept it as correct in principles." Eckerson v. City of Des Moines (Iowa, 1908), 115 N. W. 177, 188, per Bishop, J.

[33] Kirksey v. Florida & G. Plank Road Co., 7 Fla. 23, 68 Am. Dec. 426.

[34] New England Engineering Co. v. Oakwood St. Rd. Co. (C. C.), 75 Fed. 162.

[35] Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. 206.

[36] Skaneateles Water Co. v. Village of Skaneateles, 54 N. Y. Supp. 1115, 33 App. Div. 642, aff'd 161 N. Y. 154, 55 N. E. 562.

[37] City of Gadsden v. Mitchell, 145 Ala. 137, 40 So. 557.

[38] Blades v. Board of Water Commissioners of the City of Detroit, 122 Mich. 366, 81 N. W. 271.

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a right to operate a system of waterworks for a period longer than a certain number of years, and an ordinance in question granted such right for a longer term and an equal right thereafter with all others supplying such city with water, it was held that the grant, in so far as it was within the term allowed under the statute, was valid, but that it was void for the period in excess thereof, and also that an act of the General Assembly legalizing the void portion of such ordinance was invalid.[39] Again, where a statute, which directs a board of railroad commissioners not to include the embankments, tunnels, cuts, ties, trestles or bridges of railroads in the schedule of property of railroad companies, prepared by them for the purpose of assessment of taxes, is in conflict with the constitution relating to the assessment and taxation of property within a State, it does not render the remainder of the statute invalid where it is separable therefrom.[40] But while the act of Congress of 1906, known as the Employers' Liability Act, embraces subjects within the authority of Congress to regulate commerce, it also includes subjects not within its constitutional power, and the two are so interblended in the statute that they are incapable of separation, and the statute is therefore repugnant to the Constitution of the United States and non-enforcible.[41] So unreasonable features of an ordinance and the other portions thereof may be so interdependent that the whole will be void. This rule has been applied to an ordinance granting a franchise and making a contract with a heat, light and power company.[42]

§ 236. **Intent—Effect to Be Given to Every Part.**—The purpose of construction or interpretation is to ascertain and give effect to the intent.[43] The whole and every part of the

[39] Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa, 234, 91 N. W. 1031.

[40] Huntington v. Worthen, 120 U. S. 97, 7 Sup. Ct. 469, 30 L. ed. 588.

[41] Employers' Liability Cases (Howard v. Illinois Central Rd. Co.), 207 U. S. 463, 464, 28 Sup. Ct. 141, 52 L. ed. —.

[42] Le Feber v. West Allis, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917. See §§ 231, 232, herein, as to presumption and exception.

[43] **Colorado:** Murray v. Hobson, 10 Colo. 66, 13 Pac. 921.

Illinois: Andel v. People, 106 Ill. App. 558.

Indiana: Hunt v. Lake Shore & M.

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statute, each section, provision, clause and word should be examined, if necessary, to determine what was intended, and all should be made to harmonize and be given effect, if possible; the intention is to be ascertained from the language used, and the words should be applied to effectuate such intent.[44] So

S. R. Co., 112 Ind. 69, 13 N. E. 176.

Montana: Power v. Choteau County, 7 Mont. 82, 14 Pac. 658.

Nebraska: State v. Drexel (Neb., 1906), 106 N. W. 791; Little v. State, 60 Neb. 749, 84 N. W. 248, 51 L. R. A. 717.

New York: Manhattan Co. v. Laimbeer, 108 N. Y. 578, 15 N. E. 712, 21 Abb. N. C. 27, 13 N. Y. St. R. 869, 28 W. D. 352, case reverses 53 Supr. 22.

See also cases cited throughout this section.

[44] **United States:** United States v. Goldenberg, 168 U. S. 95, 18 Sup. Ct. 3, 42 L. ed. 394; McKee v. United States, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. 92; Atkins v. Disintegrating Co., 18 Wall. (85 U. S.) 272, 21 L. ed. 841; Woods v. Lawrence County, 1 Black (66 U. S.), 386, 409, 17 L. ed. 122; United States v. Fisher, 2 Cranch (6 U. S.), 358, 2 L. ed. 304; Jasper v. United States, 38 Ct. Cl. 202; Lowe v. United States, 38 Ct. Cl. 170, case aff'd 194 U. S. 193, 48 L. ed. 931, 24 Sup. Ct. 617.

Alabama: Hawkins v. Louisville & N. R. Co., 145 Ala. 385, 40 So. 293.

Alaska: Chambers v. Solner, 1 Alaska, 271.

Arkansas: Wheat v. Smith, 50 Ark. 266, 7 S. W. 161.

Colorado: Denver v. Campbell, 33 Colo. 162, 80 Pac. 142.

District of Columbia: Duehay v. District of Columbia, 25 App. D. C. 434.

Florida: Goode v. State (Fla., 1905), 39 So. 461.

Illinois: Chudnovski v. Eckels, 232 Ill. 312, 83 N. E. 846; Illinois Cent. R. Co. v. Chicago, B. & N. R. Co., 122 Ill. 473, 13 N. E. 140; Andel v. People, 106 Ill. App. 558; Gilbert v. Morgan, 98 Ill. App. 281.

Indiana: Johnson v. Schlosser, 146 Ind. 509, 45 N. E. 202, 36 L. R. A. 59.

Kansas: Noecker v. Noecker, 66 Kan. 347, 71 Pac. 815; Wenger v. Taylor, 39 Kan. 754, 18 Pac. 911.

Kentucky: Commonwealth v. Trent, 25 Ky. L. Rep. 1180, 77 S. W. 390.

Louisiana: See State v. Fontenot, 112 La. 628, 36 So. 630.

Massachusetts: Brown v. Turner, 174 Mass. 150, 54 N. E. 510.

Missouri: State, School Dist. of Sedalia, v. Harter, 188 Mo. 516, 87 S. W. 941.

Nebraska: State v. Fink (Neb., 1905), 104 N. W. 1059; McIntosh v. Johnson, 51 Neb. 33, 70 N. W. 522.

New York: School Board of Brooklyn v. Board of Education of N. Y., 157 N. Y. 566, 52 N. E. 583, aff'g 54 N. Y. Supp. 185, 34 App. Div. 49, which affirms 53 N. Y. Supp. 1000, 25 Misc. 40; Wehrenberg v. New York, New Haven & Hartford Rd. Co., 108 N. Y. Supp. 704; People, Terry, v. Keller, 54 N. Y. Supp. 1011, 35 App. Div. 493, case aff'd 158 N. Y. 187, 52 N. E. 1107.

North Carolina: Fortune v. Buncombe County Commrs., 140 N. C. 322, 52 S. E. 950; Propst v. Southern Ry. Co., 139 N. C. 397, 51 S. E. 920.

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words in different parts of a statute must be referred to their proper connections, giving each in its place its proper force.[45] In seeking the intent of the legislature, in case of ambiguity in the language used, regard must be had to the subject-matter of the statute, to what the legislature may be presumed to have known and anticipated; the difficulties, mischief or evil to be remedied, or the cause inducing the enactment and the general purpose and design indicated by the act.[46]

§ 237. **Plain and Manifest Intention.**—What is clearly and plainly expressed evidences the legislative intent,[47] and language which is clear and unambiguous must be construed as written;[48] nor is the manifest and plain intention to be defeated

Virginia: Smith v. Bryan, 100 Va. 199, 4 Va. Sup. Ct. R. 121, 40 S. E. 652.

West Virginia: Building & Loan Assoc. v. Sohn, 54 W. Va. 101, 46 S. E. 222; Jackson v. Kittle, 34 W. Va. 207, 12 S. E. 484.

[45] Building & Loan Assoc. v. Sohn, 54 W. Va. 101, 46 S. E. 222.

[46] **United States:** McKee v. United States, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. 92.

Louisiana: Richard v. Lazard, 108 La. 540, 32 So. 559.

Maine: Gray v. Cumberland County Commrs., 83 Me. 429, 22 Atl. 376.

Maryland: Maryland Agricultural College v. Atkinson, 102 Md. 557, 62 Atl. 1035.

West Virginia: Webb v. Ritter, 60 W. Va. 193, 206, 54 S. E. 484.

"It is a rule of interpretation, of universal application, that a law is to be so construed as to carry out the intention of the maker, and that to ascertain that intention, not merely is the language of the law to be looked to, but also the subject-matter to which it relates, the evil provided against, and the attending circumstances and understanding, at the time the law was framed." Bank of Toledo v. City of Toledo (Toledo Bank v. Bond), 1 Ohio St. 622, 637, per Bartley, C. J.

When there is an ambiguity in the language of a statute it may be necessary to inquire into the objects of the legislature in its enactment; or if it be a private act, the purpose of the beneficiaries in asking for it; but when the language is clear, and needs no interpretation, and leads to no absurd conclusion, this will not be done. Ruggles v. Illinois, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 812.

Where the words of a statute are obscure or doubtful, the intention of the legislature is to be resorted to in order to discover their meaning. People v. Utica Ins. Co., 15 Johns. (N. Y.) 357, 8 Am. Dec. 243.

[47] Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 106, 9 Sup. Ct. 651, 2 Denver Leg. N. 193, case reverses 34 Fed. 845; Barnard v. Gall, 43 La. Ann. 959, 10 So. 5; Maryland Agricultural College v. Atkinson, 102 Md. 557, 62 Atl. 1035.

[48] Walker v. Vicksburg, S. & P. Ry. Co., 110 La. 718, 34 So. 749.

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by construction;[49] and, generally, there is no room for construction or interpretation where the language is clear and unambiguous, its application plain, and its meaning certain.[50]

§ 238. **Natural and Reasonable Effect and Construction—Ordinary or Popular Meaning—Absurdity or Injustice.**—In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect;[51] and a fair, reasonable and natural construction is to be given if possible, unless it is evident that the language was used in a peculiar or restricted sense.[52] So the general terms of a statute are to be reasonably construed, leaving the provisions of the enactment practically operative.[53] And an ordinance which requires that the line of a railroad company shall be lighted, if sufficiently definite to inform the company of such requirement and the manner and time of carrying out its provisions, even though it does not specify a particular time, must be reasonably construed.[54] Words and phrases are presumed to be used in their natural and ordinary sense; the common, popular or received import of words furnishes the general rule of interpretation,[55] unless it is ap-

[49] State, Barton County, v. Kansas City, Ft. S. & G. R. Co. (C. C.), 32 Fed. 722.

[50] United States v. Colo. & N. W. R. Co., 157 Fed. 321, 324; Johnson v. Southern Pac. R. Co., 117 Fed. 462, 54 C. C. A. 508; Swarts v. Siegel, 117 Fed. 13, 54 C. C. A. 399; Chudnovski v. Eckels, 232 Ill. 312, 83 N. E. 846; McGowan v. Metropolitan Ins. Co., 60 N. J. L. 198, 38 Atl. 671; Choctaw, O. & G. R. Co. v. Alexander, 7 Okla. 591, 54 Pac. 42, aff'g 7 Okla. 579, 52 Pac. 944.

[51] Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. 768; Henderson v. New York, 92 U. S. 259, 23 L. ed. 543.

[52] Opinion of Justices, In re (N. H., 1907), 68 Atl. 873; Wehrenberg v. New York, New Haven & Hartford R. Co., 108 N. Y. Supp. 704.

Reasonable and not technical meaning should be given. Jasper v. United States, 38 Ct. Cl. 202.

Reasonable construction to be given statutes prescribing tax sales. Kane v. Garfield, 60 Vt. 79, 13 Atl. 800.

[53] Electro Magnetic M. & D. Co. v. Van Auken, 9 Colo. 204.

[54] St. Mary, Village of, v. Lake Erie & W. R. Co., 60 Ohio St. 136, 53 N. E. 795.

[55] **United States:** Maillard v. Lawrence, 16 How. (57 U. S.) 251, 14 L. ed. 925; United States v. Colo. & N. W. R. Co., 157 Fed. 321.

Alabama: Western Union Teleg. Co. v. State Board of Assessment,

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parent from the context or otherwise that a peculiar or different meaning was intended.[56] But a well-known commercial meaning will prevail over the ordinary meaning unless a clearly contrary intention is manifested.[57] If a legislative body in this country uses a term, without defining it, which is well known in the English law, it must be understood in the sense of that law.[58] In case of a statute or certificate of incorporation, words which define the powers of the corporation and are unambiguous and free from doubt as having a common and well-understood signification will be so construed.[59] So in a case relating to municipal bonds and aid to railroad corporations, that construction of a statute should be adopted which, without doing violence to the fair meaning of the words used, will bring it in harmony with the constitution.[60] An interpretation or construction should, however, be adopted which will avoid, if possible, an absurd or palpably unjust conclusion or consequences.[61]

80 Ala. 273, 1 Am. Elec. Cas. 844, per Clopton, J.; Wetumpka v. Winter, 29 Ala. 651.

California: People, Atty. Genl., v. Reis, 76 Cal. 269. Compare Oakland v. Oakland Water-Front Co., 118 Cal. 160, 50 Pac. 277.

Florida: See Southern Bell Teleph. & Teleg. Co. v. D'Alemberte, 39 Fla. 25, 21 So. 570.

Illinois: Chudnovski v. Eckels, 232 Ill. 312, 83 N. E. 846.

Kansas: Burlington, K. & S. W. R. Co. v. Johnson, 38 Kan. 142, 16 Pac. 125.

Louisiana: State v. Berard, 40 La. Ann. 172, 3 So. 463.

Maryland: Perkinson v. State, 14 Md. 184, 74 Am. Dec. 522.

Minnesota: See Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175, 17 Am. Elec. Cas. 179, 183, per Lovely, J.

Missouri: McFarland v. Missouri, K. & T. Ry. Co., 94 Mo. App. 336, 68 S. W. 105.

Texas: Murray v. State, 21 Tex. App. 620.

Virginia: Postal Teleg. Cable Co. v. Norfolk & Western R. Co., 88 Va. 920, 14 S. E. 803, 4 Am. Elec. Cas. 225, 230, per Lacy, J.

[56] People, Atty. Genl., v. Reis, 76 Cal. 269; Burlington, K. & S. W. R. Co. v. Johnson, 38 Kan. 142, 16 Pac. 125; State v. Berard, 40 La. Ann. 172, 3 So. 463.

[57] Cadwalader v. Zeh, 151 U. S. 171, 38 L. ed. 115, 14 Sup. Ct. 288.

[58] McCool v. Smith, 1 Black (66 U. S.), 459, 17 L. ed. 218.

[59] Riker v. Lee, 133 N. Y. 519, 44 N. Y. St. R. 63, 30 N. E. 598, aff'g 15 N. Y. Supp. 966.

[60] Grenada County Supervisors v. Brogden, 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. 125.

[61] **United States**: Chapman, In re, 166 U. S. 661, 17 Sup. Ct. 677, 41 L.

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§ 239. **Literal Meaning—Intention and Letter of Statute.**—A statute is to be interpreted not only by its exact words, but also by its apparent general purpose.[62] While the primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used,[63] and although the cases are few and exceptional in which the letter of the statute is not deemed controlling, and only arise when there are cogent reasons for believing that the letter does not fully justify and accurately disclose the intent,[64] still the court will restrain the meaning of an enactment within narrower limits than its words import if satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it;[65] and where it is perfectly evident by the whole tenor of a statute and other acts in *pari materia* that the legislature could not have intended the consequences of a literal construction of the language, such literal construction will not be followed.[66] Again, every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of

ed. 1154; Oates v. National Bank, 100 U. S. 239, 25 L. ed. 580.

Colorado: Murray v. Hobson, 10 Colo. 66, 13 Pac. 921.

Illinois: Chudnovski v. Eckels, 232 Ill. 312, 83 N. E. 846; People, Keeney, v. Chicago, 152 Ill. 546, 38 N. E. 744; Wabash, St. Louis & Pacific Ry. Co. v. Binkert, 106 Ill. 298, 306, per Shelden, J.; Union County Board v. Short, 77 Ill. App. 448.

Indiana: Haggerty v. Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384; Indianapolis v. Huegele, 115 Ind. 581, 18 N. E. 172; Hunt v. Lake Shore & M. S. R. Co., 112 Ind. 69, 13 N. E. 176.

Kentucky: Sams v. Sams, 85 Ky. 396, 3 S. W. 593; Bailey v. Commonwealth, 11 Bush (74 Ky.), 688.

Nebraska: Logan, County of, v. Carnahan (Neb., 1903), 95 N. W. 812.

West Virginia: Old Dominion Bldg. & Loan Assoc. v. Sohn, 54 W. Va. 101, 46 S. E. 222.

[62] United States v. Saunders, 22 Wall. (89 U. S.) 492, 22 L. ed. 736.

[63] United States v. Goldenberg, 168 U. S. 95, 18 Sup. Ct. 3, 42 L. ed. 394; Wilkinson v. Leland, 2 Pet. (27 U. S.) 627, 7 L. ed. 542. See § 236, herein.

[64] United States v. Goldenberg, 168 U. S. 95, 18 Sup. Ct. 3, 42 L. ed. 394.

[65] McKee v. United States, 164 U. S. 287, 17 Sup. Ct. 92, 41 L. ed. 437; Brewer v. Blougher, 14 Pet. (39 U. S.) 178, 10 L. ed. 408.

[66] Pool v. Simmons, 134 Cal. 621, 66 Pac. 872 (a case of construction of certain statutes as to ferry franchise and sale to highest bidder; river between two counties).

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the legislature;[67] and such legislative intent, when clearly expressed, should not be defeated by a too rigid adherence to the mere letter of the statute,[68] for the intention of the lawmaking power will prevail even against the letter of the statute; a thing may be within the letter of the statute and not within its meaning, and within its meaning though not within its letter.[69] So the letter of the statute is not to be

[67] Wilkinson v. Leland, 2 Pet. (27 U. S.) 627, 7 L. ed. 542.

[68] Oates v. National Bank, 100 U. S. 239, 25 L. ed. 580.

[69] **United States:** Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. 787.

Alabama: Napier v. Foster, 80 Ala. 379.

Arkansas: Wilson v. Briscoe, 6 Eng. (11 Ark.) 44.

Georgia: Erwin v. Moore, 15 Ga. 361.

Idaho: Chandler v. Lee, 1 Idaho, 349.

Illinois: Chudnovski v. Eckels, 232 Ill. 312, 83 N. E. 846 (different intent prevails over ordinary meaning); Springfield v. Greene, 120 Ill. 269, 11 N. E. 261 (intent in which word used controls its strict primary signification); Wabash, St. Louis & Pacific Ry. Co. v. Binkert, 106 Ill. 298.

Kentucky: Bailey v. Commonwealth, 11 Bush (74 Ky.), 688.

Louisiana: Ardry v. Ardry, 16 La. 264.

Maine: Gray v. Cumberland County Commrs., 83 Me. 429, 22 Atl. 376 (intent not to be defeated by adhering strictly to letter).

Maryland: Hooper v. Creager, 84 Md. 358, 36 Atl. 359, 35 L. R. A. 210, s. c., 84 Md. 195, 35 Atl. 967, 1103, 35 L. R. A. 202 (intention should govern though contrary to letter).

Massachusetts: Staniels v. Raymond, 4 Cush. (58 Mass.) 314, 316.

Mississippi: Ingraham v. Speed, 30 Miss. 410.

Missouri: Kane v. Kansas City, Ft. Smith & Memphis Ry. Co., 112 Mo. 34.

Nebraska: State v. Drexel (Neb., 1906), 106 N. W. 791 (intent controls literal sense of words).

New Jersey: Associates of The Jersey Co. v. Davison, 29 N. J. L. 415, 424.

New York: Salisbury, In re, 44 N. Y. Supp. 291, 19 Misc. 340.

A constitution is as effectually violated by an act contravening its spirit and intent as by an act contravening its letter. State, Saunders, v. Kohnke, 109 La. 838, 33 So. 793. But while the spirit is to be respected no less than the letter, the spirit is to be collected chiefly from the words used. Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. 358.

Language of statute controls intent. Richmond v. Henries County, 83 Va. 204, 2 S. E. 26.

Intent prevails over letter where latter would defeat former. Vermont Loan & Trust Co. v. Whithed, 2 N. D. 82, 49 N. W. 318.

Matters within words may be not within intent and so be without purview of statute. Condon v. Mutual Reserve Fund, 89 Md. 99, 31 Chic. Leg. N. 273, 42 Atl. 944, 44 L. R. A. 149.

A thing within the intention is as

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followed when it materially conflicts with or tends to defeat its general purpose and innovate upon the manifest policy of the law;[70] nor where it is clearly apparent that the application of the letter is so unreasonable that the result following could not have been intended;[71] and the intent prevails over the literal meaning of words and the strict letter of law where the ordinary signification would, if given by interpretation, lead to absurd consequences.[72]

§ 240. **General and Specific Words or Clauses—General Legislation.**—It is a well-settled principle of construction that specific terms covering a given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling.[73] And where the language of an enacting clause is general and followed by a provision by which it is restricted, such restriction will be strictly construed and limited in its application to objects reasonably within its terms.[74] When general words follow particular words the things mentioned generally must be confined to the matters incorporated in the particular words: that is, all things that may be contained in the general words must be *ejusdem gen-*

much within the statute as if it were within the letter; and a thing within the letter is not within the statute if contrary to the intention of it. People v. Utica Ins. Co., 15 Johns. (N. Y.) 357, 8 Am. Dec. 243.

Evident verbal inaccuracy raises no difficulty of interpretation. Each section means what the whole act taken together shows the legislature understood it meant. Sargent v. Union School District, 63 N. H. 528.

[70] Webb v. Ritter, 60 W. Va. 193, 207, 54 S. E. 484.

[71] Napier v. Foster, 80 Ala. 379.

[72] Wabash, St. Louis & Pacific Ry. Co. v. Binkert, 106 Ill. 298, 306, per Shelden, J.; Indianapolis v. Huegele, 115 Ind. 581, 18 N. E. 172; Sams v. Sams, 85 Ky. 396, 3 S. W. 593; Old Dominion Building & Loan Assoc. v. Sohn, 54 W. Va. 101, 46 S. E. 222. See § 238, herein.

[73] Kepner v. United States, 195 U. S. 100, 24 Sup. Ct. 797, 49 L. ed. 114; State v. Taylor, 7 S. Dak. 533, 64 N. W. 548. See Cantrell v. Seaverns, 168 Ill. 165, 30 Chic. Leg. N. 89, 48 N. E. 186, aff'g 64 Ill. App. 273; Commonwealth v. Connecticut Valley St. Rd. Co. (Mass., 1907), 82 N. E. 19.

Particular intention is exception and prevails over general intention when inconsistent. Jackson v. Kittle 34 W. Va. 207, 12 S. E. 484.

[74] Southern Bell Teleph. & Teleg. Co. v. D'Alemberte, 39 Fla. 25, 21 So. 570.

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eris—of the same kind or class of those particularly mentioned. In addition to this general rule there is also a further restriction upon general words which follow particulars by which general words will not be held to include anything which is of a class superior to the class mentioned in the particular words. This rule or principle of construction is well established. The doctrine of *ejusdem generis* is, however, only a rule of construction, and, like all rules, is resorted to only as an aid to the courts in ascertaining the true intent of the lawgiver, and cannot override the fundamental principle that all words contained in a statute must, if possible, be given their ordinary meaning, and that the intention must be gathered from the language employed in the light of the context and of the subject-matter to which it is applied, and when such intention is clear it must prevail, notwithstanding the operation of other rules which would lead to a different conclusion or one adverse to the intention, but the ordinary meaning of words should, however, be so restricted or expanded so as not to lead to an absurdity or inflict a great injustice.[75] Again, in cases of doubt, the general state legislation relating to the subject-matter is to control in preference to a particular expression, term or word used in a statute.[76] Where street railroad companies are obligated by statute to furnish pupils of "public schools" transportation at reduced rates, and the enactment is amended by the insertion of the words "or private" after the word "public," the word "private" is held to be limited to such institutions as were *ejusdem generis* with the public schools previously specified, and that a private business college did not come within the provision.[77] If water is supplied to a city under contract, a special statutory provision authorizing the levy of a tax to pay therefor, will be given precedence over a general provision for levying any other tax or special assess-

[75] Nephi Plaster & Mfg. Co. v. Juab County (Utah, 1907), 93 Pac. 53, 56, per Frick, J.

[76] Massachusetts Loan & T. Co. v. Hamilton, 88 Fed. 588, 59 U. S. App. 403, 11 Am. & Eng. R. Cas. (N. S.) 771.

[77] Commonwealth v. Connecticut Valley St. Ry. Co. (Mass., 1907), 82 N. E. 19.

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ment.[78] And a general clause inserted after a specific precise clause of authority to use city streets, confers no additional authority.[79]

§ 241. Construction of Special Words and Clauses in Grants of Franchises or Privileges to Street Railway, Railroad and Electric Light, etc., Companies.—The words "other street railways" in a statute concerning franchises and the designation of routes for "any elevated, underground or other street railway on, over or under any street" extends to surface street railways.[80] The word "track" does not operate to limit the right to lay one track only where the words "track or tracks" are used in other parts of the same ordinance.[81] The term "plant" in a charter of an electric light, heat and power company includes poles and wires.[82] "Railroad," in its ordinary acceptation and enlarged sense, includes all structures which are necessary and essential to its operation.[83] "Other appliances," in an ordinance authorizing the construction of a street railroad, will cover any existing or improved devices or appliances of a like kind with those mentioned and necessary or proper for the purpose of running, moving or turning cars, but will not include a mere transfer-house erected on the street surface for shelter and to facilitate transfers.[84] In the construction for land grant acts in aid to railroads, "granted lands" are those falling within the limits specially designated, the title to which attaches as of the date of the act of Congress, when the lands are located by an approved or accepted survey of the line of the road filed in the Land Department: but "indemnity lands" are lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, the

[78] State, City Water Co., v. Kearney, 49 Neb. 325, 68 N. W. 533, aff'g 49 Neb. 337, 70 N. W. 255.

[79] Chicago, D. & V. R. Co. v. Chicago, 121 Ill. 176, 11 N. E. 907.

[80] Ruckert v. Grand Ave. Ry. Co., 163 Mo. 260, 63 S. W. 814.

[81] Workman v. Southern Pac. R. Co., 129 Cal. 536, 62 Pac. 185.

[82] Brown v. Gerald, 100 Me. 351, 70 L. R. A. 472, 61 Atl. 785.

[83] United States v. Denver & Rio Grand R. Co., 150 U. S. 1, 37 L. ed. 975, 14 Sup. Ct. 11.

[84] Hamilton & L. E. T. Co. v. Hamilton, 1 Ohio N. P. 366.

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title to which accrues only from the time of their selection.[85] Where a statute provides that a railroad company shall "for its government be entitled to all the powers and privileges, and be subject to all the restrictions and liabilities imposed" upon another railroad company, the words "for its government" are held to imply for its regulation and control.[86] If a statute authorizes the construction of a telegraph line along "any railroad" in such a manner as not to incommode the public use thereof, such railroad right of way may be acquired by the telegraph company by condemnation.[87] But the right to condemn a railroad right of way is not conferred by a statute authorizing the construction and maintenance of telegraph lines "along and parallel" to railroads, and which provides for contracts for said right of way and for the mode of compensation in case of disagreement.[88] "Public use," in an eminent domain statute, includes the use of land for the purpose of a telegraph line.[89] Electric railways may be permitted to maintain their lines in highways under a statute authorizing a like permission to be granted by cities to "horse and steam railroads."[90] A franchise subject to the paramount control of the streets by a city, is only granted by a statute authorizing corporations to transact "any business in which electricity over or through wires may be applied to any useful purpose;" so that the municipality may refuse a permit to lay under-

[85] Barney v. Winona & St. Peter Rd. Co., 117 U. S. 228, 29 L. ed. 858, 6 Sup. Ct. 654, explaining Winona & St. Peter Rd. Co. v. Barney, 113 U. S. 618, 5 Sup. Ct. 606, 28 L. ed. 1109.

[86] Tennessee v. Whitworth, 117 U. S. 139, 6 Sup. Ct. 649, 29 L. ed. 833.

[87] St. Louis & C. R. Co. v. Postal Teleg. Co., 173 Ill. 508, 51 N. E. 382, distinguishing Postal Teleg. Cable Co. v. Norfolk & Western R. Co., 88 Va. 920, 14 S. E. 803.

[88] Postal Teleg. Cable Co. v. Norfolk & Western R. Co., 88 Va. 920, 14 N. E. 803, 4 Am. Elec. Cas. 225. See s. c. 87 Va. 349.

[89] New Orleans, Mobile & T. R. Co. v. Southern & Atl. Teleg. Co., 53 Atl. 211, 1 Am. Elec. Cas. 190.

As to construction of words "taking" and "taken" under act entitled: "An act to provide for the expropriation of lands for railroads and other works of public utility," see Amet v. Texas & Pacific Ry. Co., 117 La. 454, 41 So. 721.

[90] Buckner v. Hart, 52 Fed. 835, aff'd 54 Fed. 925. See Blair v. City of Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801.

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ground conduits.[91] An ordinance which imposes a charge upon telephone poles as a "consideration for the privilege" of using the streets, is not a tax either on property or as a license.[92] In the Chicago street railway cases the principle was applied that corporate privileges can only be held to be granted as against public rights, when conferred in plain and explicit terms, and an ambiguous phrase, "during the life hereof," in the statute there under consideration, was held not to operate to extend existing contracts for the term of ninety-nine years or to limit the right of the city to make future contracts with the companies covering shorter periods.[93]

§ 242. **Construction as to Conflicting Railroad Grants—Undivided Moiety.**—The settled rule of construction is that where by the same act, or by acts of the same date, grants of land are made to two separate companies, in so far as the limits of their grants conflict by crossing or lapping, each company takes an equal undivided moiety of the lands within the conflict, and neither acquires all by priority or location or construction.[94]

§ 243. **Matters Incorporated by Reference.**—Requirements contained in another statute or document may be incorporated in a charter by generic or specific reference and, if clearly identified, the charter has the same effect as if it itself contained the restrictive words, and the question of the constitutionality of the statute referred to is immaterial.[95] A code provision which is not a part of the public law of the State at the time a charter or franchise is granted does not enter into and constitute a part of the contract of the State with such corporation.[96]

[91] Edison Elect. Illum. Co. of B. v. Hooper, 85 Md. 110, 36 Atl. 113, 6 Am. Elec. Cas. 8.

[92] New Orleans v. Great Southern Teleph. & Teleg. Co., 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502, 2 Am. Elec. Cas. 122.

[93] Blair v. Chicago (1905), 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427.

[94] Southern Pac. R. Co. v. United States, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. 154.

[95] Interstate Consolidated Street Ry. Co. v. Commonwealth of Massachusetts, 207 U. S. 79, aff'g 187 Mass. 436.

[96] Central Rd. & Banking Co. v. State of Georgia, 54 Ga. 401.

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But a city ordinance becomes a part of a charter of a corporation where it is subject to such ordinance under the statute of incorporation.[97] And a reference to a plat will operate to embody it in a grant of a right to a railroad to construct its line in a certain street according to such plat.[98] So an ordinance will be construed in accordance with a plat filed, where such plat is referred to as the basis of construction of a switch from a street railway track to a warehouse under a grant of a franchise thereof.[99] If the time for the construction of a certain railroad is extended, a reference in the statute to its act of incorporation as of a certain date or year, though stated incorrectly, will refer to its original charter where there is but one act in that year which relates to such corporation.[1]

§ 244. **Title of Statute.**—The title is no part of a statute,[2] and it cannot be used to control, extend or restrain the positive provisions or plain and express words in the body of the act or the obvious meaning of the statute itself, for where the intent is plain nothing is left to construction. In cases, however, of doubt and ambiguity resort may be had to the title as an aid to construction.[3]

[97] Philadelphia v. Ridge Ave. Pass. R. Co., 143 Pa. 444, 48 Phila. Leg. Int. 414, 28 W. N. C. 388, 22 Atl. 695.

[98] Murray Hill Land Co. v. Milwaukee Light, Heat & Traction Co., 110 Wis. 555, 86 N. W. 199.

[99] Dulaney v. United Rys. & Electric Co., 104 Md. 423, 65 Atl. 45.

[1] Lowell v. Washington County Rd. Co., 90 Me. 80, 37 Atl. 869, 9 Am. & Eng. R. Cas. (N. S.) 115.

[2] Patterson v. Bark Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. 821.

[3] **United States**: Cornell v. Coyne, 192 U. S. 418, 24 Sup. Ct. 383, 48 L. ed. 504; Patterson v. Bark Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. 821; Hadden v. Collector, 5 Wall. (72 U. S.) 107, 18 L. ed. 518; Postmaster General v. Early, 12 Wheat. (25 U. S.) 136, 6 L. ed. 577; United States v. Union Pacific R. Co., 37 Fed. 551, 2 Denver Leg. N. 83.

Illinois: South Park Commissioners v. First Nat. Bank, 177 Ill. 234, 52 N. E. 365, 31 Chic. Leg. N. 166.

Indiana: Rushville v. Rushville National Gas Co., 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853.

Michigan: Stevens v. Lake George & M. R. Co., 82 Mich. 426, 46 N. W. 730.

Missouri: State, Judah, v. Fost (Mo., 1908), 109 S. W. 737 (title is valuable aid in determining scope, etc., of statute).

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§ 245. Same Subject Continued—Constitutional Requirements.—The object of a constitutional provision that no law shall embrace more than one subject, which shall be ex-

New Jersey: See O'Hara v. National Biscuit Co., 69 N. J. L. 198, 54 Atl. 241.

New York: Rosin v. Lidgerwood Mfg. Co., 86 N. Y. Supp. 49, 89 App. Div. 245.

Oklahoma: Choctaw, O. & G. R. Co. v. Alexander, 7 Okla. 579, 52 Pac. 944, aff'd 7 Okla. 591, 54 Pac. 421.

Pennsylvania: Commonwealth, Cambria County, v. Lloyd, 178 Pa. 308, 35 Atl. 816.

South Carolina: Garrick v. Florida, C. & P. R. Co., 53 S. C. 448, 31 S. E. 334, 13 Am. & Eng. R. Cas. (N. S.) 541.

"While express provisions in the body of an act cannot be controlled or restrained by the title or preamble, the latter may be referred to when ascertaining the meaning of a statute which is susceptible of different constructions. In United States v. Fisher, 2 Cranch (6 U. S.), 358, 386, 2 L. ed. 304, Chief Justice Marshall said: 'neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. When the mind labors to discover the design of the legislature it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.' United States v. Palmer, 3 Wheat. (16 U. S.) 610, 631, 4 L. ed. 471. This rule is especially applicable in States whose constitutions, * * * provide that 'every act or resolution, having the force of law, shall relate to but one subject, and that shall be expressed in the title.' Meyer v. Car Co., 102 U. S. 1, 11, 12, 26 L. ed. 59. So, in Beard v. Rowan, 9 Pet. (34 U. S.) 301, 317, 9 L. ed. 135. 'The preamble in the act may be resorted to, to aid in the construction of the enacting clause, when any ambiguity exists.' The ambiguity here referred to is not simply that arising from the meaning of particular words, but such as may arise, in respect to the general scope and meaning of a statute, when all its provisions are examined." Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 563, 36 L. ed. 537, 12 Sup. Ct. 689, per Harlan, J. (a case of construction of a grant conferring an exclusive mining right, franchise or privilege for a period of years).

"Title of an act, especially in congressional legislation, furnishes little aid in the construction of it, because the body of the act in so many cases, has no reference to the matter specified in the title." United States v. Union Pacific Rd. Co., 91 U. S. 72, 82, 23 L. ed. 224, per Davis, J. (in considering the "act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes").

"Act to incorporate"—Status of foreign railroad corporation. It is held that the Louisville and Nashville Railroad Company is a corporation of Kentucky, and not of

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pressed in its title, is to prevent matters which sustain no relation to each other, but are incongruous, from being united;[4] and the form in which the title of an act shall be expressed is a matter of legislative discretion, as such constitutional requirement is a matter merely of substance.[5] So a title which fairly expresses the scope and purpose of the enactment is sufficient to make a law constitutional.[6] The language of the title should also be liberally construed under the above constitutional provision;[7] and the subject to be considered is that expressed in the title, but if it does not embrace the subject of the provision or is not properly connected therewith such provision will not be sustained, although every reasonable doubt should be resolved in favor of validity.[8] A title to an enactment need not be and ought not to be a complete index to or an abstract of its contents;[9] nor is it necessary that the

Tennessee, having from the latter State only a license to construct a railroad within its limits, between certain points, and to exert there some of its corporate powers. "Some stress is laid upon the title of that act," namely "an act to incorporate the Louisville and Nashville Railroad Company," "as indicating a purpose to create a corporation, and not simply to recognize an existing one of another State, and invest it with authority to exert functions within the State of Tennessee. While the title of a statute should not be entirely ignored in determining the legislative intent, it cannot be used 'to extend or restrain any positive provisions contained in the body of the act,' and is of little weight even when the meaning of such provisions is doubtful. Hadden v. Collector, 5 Wall. (72 U. S.) 107, 110, 18 L. ed. 518. Looking, then, at the body of the Tennessee act * * * we find no language clearly evincing a purpose to create a new corporation, or to adopt one of another State, in such form as to establish the same relations in the law, between the latter corporation and the State of Tennessee, as would exist in the case of one created by that State." Goodlett v. Louisville Rd., 122 U. S. 391, 408, 409, 30 L. ed. 1230, 7 Sup. Ct. 1254, per Harlan, J.

[4] Baltimore & Ohio R. Co. v. Jefferson County (C. C.), 29 Fed. 305. Examine Knight, Ex parte (Fla. 1906), 41 So. 786.

[5] Union Pac. Co. v. Sprague, 69 Neb. 48, 95 N. W. 46.

[6] State, Wheeler, v. Stuht, 52 Neb. 209, 71 N. W. 941.

[7] State v. Coffin (Idaho, 1903), 74 Pac. 962.

[8] Knight, Ex parte (Fla., 1906), 41 So. 736.

[9] Commonwealth v. Broad St. Rapid Transit Co., 219 Pa. 11, 67 Atl. 958. See also Skinner v. Garnett Gold Mining Co., 96 Fed. 735.

Rule applies to title of municipal ordinance. Commonwealth v. La Bar (Pa.), 5 Lack. L. News, 229.

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title set forth every purpose where the several objects of the enactment are connected with the chief object expressed, or are merely subdivisions of and referable to such expressed purpose.[10] Again, the above constitutional provision is satisfied if the law has but one general object, and that is expressed in the title and the body of the act is germane to the title;[11] and when the title of a statute of a State clearly and distinctly expresses the whole object of the legislature in the enactment, and there is nothing in the body of the act which is not germane to what is there expressed, the act sufficiently complies with a requirement in the constitution of the State that no law "shall relate to more than one subject, and that shall be expressed in the title," although some details in the execution of the purpose of the legislature may not be expressed in the title.[12] The generality of the title of a state statute does not invalidate it under a provision of the constitution of the State that private and local laws shall only embrace one subject, which shall be expressed in the title, so long as the title is comprehensive enough to reasonably include within the general subject or the subordinate branches thereof, the several objects which the statute seeks to effect, and does not cover legislation incongruous in itself and which by no fair intendment can be included as having any necessary and proper connection.[13] If a statute contain two objects, only one of which is mentioned in the title, the entire act is not unconstitutional, but only that part not provided for in the title.[14]

Examine City of Topeka v. Raynor, 61 Kan. 10, 58 Pac. 557.

[10] Baltimore & Ohio Rd. Co. v. Jefferson County (C. C.), 29 Fed. 305; Excelsior Planting & Mfg. Co. v. Green, 39 La. Ann. 455, 1 So. 873.

[11] Mahomet v. Quackenbush, 117 U. S. 508, 29 L. ed. 982, 6 Sup. Ct. 858. See also Skinner v. Garnett Gold Mining Co., 96 Fed. 735.

If by reasonable construction the subject-matter of an act is fairly germane to the expressed title it is sufficient. Dallas v. Redman, 10 Colo. 297, 15 Pac. 397.

[12] Carter County v. Sinton, 120 U. S. 517, 30 L. ed. 701, 7 Sup. Ct. 650.

[13] Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801, rev'g 132 Fed. 848, citing Montclair v. Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. 311.

[14] State, Saunders, v. Kohnke, 109 La. 838, 33 So. 793. See Hickman v. State (N. J., 1899), 44 Atl. 1099, aff'g 62 N. J. L. 499, 41 Atl. 942;

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It is held that courts cannot ignore a plain mandatory provision of the constitution as to the titles of acts,[15] and that such

Golden Star Fraternity v. Martin, 59 N. J. L. 207, 35 Atl. 908; St. Louis Southwestern Ry. Co. v. Gentry (Tex. Civ. App., 1906), 95 S. W. 74.

As to sufficiency of title and constitutionality of statute thereunder, examine the following decisions:

United States: City of Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 46 L. ed. 392, 22 Sup. Ct. 410 (entitled: "An act to provide for the formation of street railways; embraces provisions of act, making it applicable to like corporations organized and in existence); United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 327, 41 L. ed. 1007, 17 Sup. Ct. 540 (resort to title in this case declared to create no doubt. A case of monopolies "pooling contracts," between corporations); Holy Trinity Church v. United States, 143 U. S. 451, 36 L. ed. 226, 12 Sup. Ct. 511, 45 Alb. L. J. 372; San Antonio v. Mehaffey, 96 U. S. 312, 24 L. ed. 816, 18 Sup. Ct. 423 (an act entitled: "An act to incorporate the San Antonio Railway Company," which authorizes the city of San Antonio to subscribe for the stock of said company, and issue bonds to pay for the same is not repugnant to state constitutional provision requiring that "every law enacted by the legislature shall contain but one object and that shall be expressed in the title"); Montgomery Amusement Co. v. Montgomery Traction Co. (C. C.), 139 Fed. 353, aff'd Montgomery Traction Co. v. Montgomery Amusement Co., 140 Fed. 988, 72 C. C. A. 682 (title to act amending code not defective as violating constitution, providing what the style of law of the State should be; such provision of the constitution is mandatory); Crowther v. Fidelity Ins. T. & S. D. Co. (C. C.), 85 Fed. 41, 29 C. C. A. 1, 42 U. S. App. 701, 3 Va. Law Reg. 867 (liens against mining and manufacturing companies not embraced in title and held unconstitutional); Brooks v. Roberts, 78 Fed. 411, 45 U. S. App. 395, 24 C. C. A. 158 (an act to authorize construction of dock and wharf embraces provisions granting right to individuals to erect and maintain a dock and collect wharfage with title to certain benefits); Tabor v. Commercial National Bank, 62 Fed. 383, 10 C. C. A. 429 (provisions as to liability of directors for debts on failure to file reports embraced in title of act for formation of corporations; act valid); State, Hunt, v. Illinois Cent. R. Co. (C. C.), 33 Fed. 721 (title "relating to a portion of" certain submerged lands and statute disposing of fee in part to city and in part to a railroad company with right to wharfs; title sufficiently expresses subject).

Alabama: Rayford v. Faulk (Ala., 1908), 45 So. 714 (act to regulate business of insurance, embraces as cognate, provision permitting person to insure own life for benefit of estate and exempting proceeds from creditors; and act is valid); Mobile Dry Docks Co. v. City of Mobile, 146 Ala. 198, 40 So. 205 (act unconstitutional as embracing more than the subject); Mobile, City of, v. Louisville & N. R. Co., 124 Ala. 132, 26 So. 902 (an act to amend certain

[15] Wade v. Atlantic Lumber Co. (Fla., 1906), 41 So. 72.

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constitutional provisions as those which are considered under this section are mandatory.[16] A statute which embraces more

sections of an act to incorporate a certain railroad and to "add additional sections thereto;" constitutional provision that act shall embrace but one subject to be expressed in title violated added section conferring rights and powers on a city or village to grant railroads certain rights); Birmingham N. R. Co. v. Elyton Land Co., 114 Ala. 70, 21 So. 314 (constitution providing that no law shall be revived, amended or provisions extended by reference to title only; right of railroad companies to acquire real estate by gift, purchase or conmendation); Montgomery v. National Bldg. & Loan Assoc., 108 Ala. 336, 18 So. 816 (an act to regulate the business of building and loan associations with subtitle as to state license fee; sufficiently expressed in title).

California: Francais v. Somps, 92 Cal. 503, 28 Pac. 592 (requirement of itemized balance sheet from directors covered by title of act to protect stockholders in corporations for mining business; act valid).

Colorado: Burton v. Snyder, 22 Colo. 173, 43 Pac. 1004 (an act relating to life and casualty insurance on the assessment plan; sufficiently expressed in title).

Florida: Wade v. Atlantic Lumber Co. (Fla. 1906), 41 So. 72 (act containing land grant held not within title to incorporate a railroad company).

Georgia: Central of Ga. R. Co. v. State, 104 G. 831, 31 S. E. 518, 42 L. R. A. 518 (constitutional provision limiting statute to one subject-matter expressed in title; not violated by statute approving an adopting code).

Illinois: People v. People's Gaslight & Coke Co., 205 Ill. 482, 68 N. E. 950 (title relating to gas companies; act not invalid which authorizes consolidation and merger, as such authority is germane to general subject); Hutchinson v. Self, 153 Ill. 542, 39 N. E. 27 (provisions as to municipal subscriptions to stock, the issue of bonds and modes of exercising such power embraced in title of act to incorporate railroad company; act valid).

Indiana: State v. Commercial Ins. Co., 158 Ind. 680, 64 N. E. 466 (entitled an act to require insurance companies organized by special act to file annual reports; does not embrace matters not properly connected therewith as required by the constitution where the act requires the state auditor to examine into details, etc., of business); Maule Coal Co. of Princeton v. Partenheimer (Ind., 1899), 55 N. E. 751 (held not unconstitutional, as title embraced only one general subject sufficiently expressed; title related to mines and regulation thereof, protection of employees and right of action for death. Act March 2, 1891, acts 1891, p. 57, Burns, Rev. St. 1894, §§ 7461 *et seg.*); Pittsburg, C. C. & St. Louis R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 9 Am. & Eng. R.

[16] Weaver v. Lapsley, 43 Ala. 224; State v. Miller, 45 Mo. 495; State v. McCann, 4 Lea (72 Tenn.), 1; State v. McCracken, 42 Tex. 383. But compare Boston Min. & Milling Co., In re, 51 Cal. 624; Weil v. State, 46 Ohio St. 450, 21 N. E. 643.

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than one subject which is enacted before a constitutional prohibition as to such acts is not within the prohibition.[17]

Cas. (N. S.) 792, 69 L. R. A. 875 (title as to regulating liability of railroads and other corporations to employees for injury; embraces prohibition of contracts releasing corporations from liability, also provisions creating new liability); Central Union Teleph. Co. v. Fehring, 146 Ind. 189, 45 N. E. 64 (act regulating and prescribing duties of telegraph and telephone companies and providing for penalties; not unconstitutional).

Iowa: Youngerman v. Murphy, 107 Iowa, 686, 76 N. W. 648 (constitutional requirement that tax and object be stated; not violated by act authorizing tax to be imposed for anticipated purchase or construction of waterworks).

Kansas: Manley v. Mayer, 68 Kan. 377, 75 Pac. 550 (relating to dissolution of corporations; act not unconstitutional as not within title).

Kentucky: Conly v. Commonwealth, 98 Ky. 125, 17 Ky. L. Rep. 678, 32 S. W. 285 (title was corporations—Private—and art. entitled railroads; statute constitutional; title not embracing more than one subject).

Louisiana: Standard Cotton Seed Oil Co. v. Matheson, 48 La. Ann. 1321, 20 So. 713 (authorizing certain companies to become surety on bonds required to be furnished by law; title sufficient).

Maryland: State v. Schultz Gas Fixture & A. M. Co., 83 Md. 58, 34 Atl. 243 (title relating to taxes on newly incorporated corporation; law unconstitutional).

Michigan: Bird v. Arnott (Mich., 1906), 108 N. W. 646, 13 Det. Leg. N. 531 (title held sufficiently broad to embrace a provision imposing tax on capital stock of corporations organized under act authorizing formation of corporations for water power purposes); Blades v. Board of Water Commrs. of City of Detroit, 122 Mich. 366, 81 N. W. 271 (act, including provision for changing system of supporting water works, held violative of constitutional provision that law shall not embrace more than one subject to be expressed in title); Burrows v. Delta Transp. Co., 106 Mich. 582, 29 L. R. A. 468, 2 Det. L. N. 503, 64 N. W. 501 (act to compel steam vessels to provide fire screens and to provide penalty for violation; subject sufficiently expressed in title); Ripley v. Evans, 87 Mich. 217, 49 N. W. 504, 10 Ry. & Corp. L. J. 250, 36 Am. & Eng. Corp. Cas. 188 (act not unconstitutional as embracing more than one object in title where it provides for stockholders' individual liability for corporate debts for materials, and title is an act for organization of telephone companies); Fort St. Union Depot Co. v. Morton, 83 Mich. 265, 47 N. W. 228, 47 Am. & Eng. R. Cas. 41 (title sufficient to justify authority granted to acquire land by condemnation).

Minnesota: First National Bank v. How, 65 Minn. 187, 47 N. W. 994 (exemption from execution of life insurance money paid by co-operative or assessment companies).

Missouri: State v. Murlin, 137 Mo. 297, 38 S. W. 923 (regulating

[17] Choctaw, O. & G. R. Co. v. Alexander, 7 Okla. 579, 52 Pac. 944, aff'd 7 Okla. 591, 54 Pac. 421.

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§ 246. Title of Acts Which Amend, Revive or Repeal.— The title to an amendatory act which contains provisions

blasting in mines and keeping of explosives; constitution not violated); Ward v. Gentry County Board of Equalization, 135 Mo. 309, 36 S. W. 648 (act entitled the assessment and collection of revenue; not unconstitutional as to requirement for officers of banks to list shares for taxation, etc.).

Montana: State v. Bernheim, 19 Mont. 512, 49 Pac. 441 (title of act to regulate sales and redemption of transportation tickets of carriers; embraces a provision for penalties.

Nebraska: West Point Water Power & L. I. Co. v. State, 49 Neb. 223, 68 N. W. 507, rev'g 49 Neb. 218, 66 N. W. 6 (subject not within title); State, Farmers' Mut. Ins. Co., v. Moore, 48 Neb. 870, 67 N. W. 876 (one subject only in an act to authorize the organization of mutual insurance companies; valid); Western Union Teleg. Co. v. Lowrey, 32 Neb. 732, 49 N. W. 707, 10 Ry. Corp. L. J. 377 (an act to prohibit extortion and discrimination in transmission of telegrams; statute not unconstitutional as not expressing in title subject-matter providing against relief from liability by reason of conditions in printed blanks).

New Jersey: Hickman v. State (N. J. 1899), 44 Atl. 1099, aff'g 62 N. J. L. 499, 41 Atl. 942 (act to provide for incorporation and regulation of insurance companies; separable provision as to insurance by individuals does not invalidate as to insurance by corporations; and regulation of foreign companies is embraced in scope of title); American Surety Co. v. The Great White Spirit Co., 58 N. J. Eq. 526, 43 Atl. 579 (act supplemental to act not unconstitutional under provision requiring object of law to be expressed in title, where the title of the act supplemented relating to the taxation of corporations is accurately set forth in the title, even though the date of approval is erroneously stated); Schenck v. State, 60 N. J. L. 381, 37 Atl. 724 (the business of individual insurers is not expressed as object of act to provide for a regulation and incorporation of insurance companies); Golden Star Fraternity v. Martin, 59 N. J. L. 207, 35 Atl. 908 (an act to incorporate benevolent and charitable institutions; held unconstitutional in certain respects and constitutional in other respects); Newark v. Mount Pleasant Cemetery Co., 58 N. J. L. 168, 33 Atl. 396 (authorizing incorporation of rural cemetery associations and to regulate cemeteries; constitution satisfied).

New York: Parfitt v. Furguson, 159 N. Y. 111, 53 N. E. 707, aff'g 38 N. Y. Supp. 466, 3 App. Div. 176, which affirms 33 N. Y. Supp. 1111, 12 Misc. 278 (act ratifying and confirming lighting contracts in a certain town; held not embraced in scope of title).

Pennsylvania: Rodenbaugh v. Philadelphia Traction Co., 190 Pa. 358, 42 Atl. 953, 44 W. N. C. 105, 30 Pitts. L. J. (N. S.) 24 (does not embrace two subjects in violation of constitution where provision is for survival of action for personal injuries and limiting time for bringing suit where injuries do not result in death).

South Carolina: Bacot, Ex parte, 36 S. C. 125, 15 S. E. 204, 50

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germane to the original statute, is sufficient if it designates itself as an amending act and refers to the section of the code to be amended without stating the substance of the proposed amendment.[18] A constitutional provision that all acts which repeal, revive or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended, does not apply to an act which does not expressly purport to repeal, revive or amend but only repeals or amends by necessary implication, and is a new and substantive act conferring additional powers on railroad companies incorporated under general laws.[19] The title of an enactment need not set forth the intention to repeal inconsistent laws.[20]

§ 247. Title to Statutes—Instances—Incorporation—Expropriation—Railroads—Street Railroads—Bonds in Aid of Railroads—Lien on and Sale of Railroad—Electrical Conductors—Fraudulent Elections in Corporations—Foreign Corporations.[21]—The title to an act of incorporation of a

Am. & Eng. R. Cas. 597, 16 L. R. A. 586 (powers given to corporations are within title of acts to promote certain corporations under general laws).

Tennessee: Samuelson v. State, 116 Tenn. 470, 95 S. W. 1012 (acts to prohibit traffic in non-transferable signature tickets issued by common carriers, and to require such carriers to redeem unused or partly used tickets, and to provide punishment for violation; is not unconstitutional as embracing more than one subject in title).

Texas: St. Louis Southwestern Ry. Co. v. Gentry (Tex. Civ. App., 1906) 95 S. W. 74 (constitutional provision that only so much of statute the subject of which is not expressed in title shall be void).

Virginia: Martin v. South Salem Land Co., 94 Va. 28, 2 Va. Law Reg. 743, 26 S. E. 941, 6 Am. & Eng. Corp. Cas. (N. S.) 312 (act to prescribe mode by which unpaid subscription to joint-stock companies may be recovered by said companies, their receivers or assignees, does not embrace mode for recovery; title insufficient); Powell v. Brunswick County Supervisors, 88 Va. 707, 16 Va. L. J. 129, 14 S. E. 543, 36 Am. & Eng. Corp. Cas. 625 (provisions for subscriptions and mode of taking same, germane to object expressed in title generally providing for incorporation of railroad companies, and not unconstitutional as embracing more than one object.

[18] McGuire v. Chicago, Burlington & Quincy Rd. Co., 131 Iowa, 340, 108 N. W. 902.

[19] Memphis & State Line Rd. Co. v. Union Ry. Co., 116 Tenn. 500, 95 S. W. 1019.

[20] Union Pac. Ry. Co. v. Sprague, 69 Neb. 48, 95 N. W. 46.

[21] See extended note under § 245, herein.

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private corporation need not enumerate the powers and privileges which it is intended by the charter to confer.[22] And the provisions of a general law may by reference in the title to a special act of incorporation of a railroad company be made applicable thereto where no constitutional provision to the contrary exists.[23] If the title of a charter expresses a purpose to expropriate property it will embrace the method of such expropriation set forth in the body of the instrument; and the purpose to incorporate a main line will include a right to construct a short branch line of railroad.[24] But where the title to an act of incorporation of a railroad company does not show that it includes a land grant it is void.[25] The title, however, embraces but one object and sufficiently indicates it when it shows that it was intended to apply to certain lands of a railroad company.[26] A declaration in the title of state statutes that they concern horse railways, where it is apparent that these terms were intended to indicate street railways as distinguished from steam railways, will not, because of a constitutional provision that the object of the statute must be expressed in the title, prevent the city from exercising its powers under the statute in such manner as to authorize the use of other power, such as cable or electricity.[27] And a statute legalizing elections held by the voters of a county on the question of issuing negotiable bonds of the county, in aid of certain railroad companies, and authorizing, on conditions named therein, all the townships in counties where the township organization had been adopted, lying on or near the line of a

[22] Crease v. Babcock, 23 Pick. (40 Mass.) 334, 34 Am. Dec. 61.

[23] Quinlan v. Houston & T. C. R. Co., 89 Tex. 356, 34 S. W. 738 (donations of land to railroad companies).

[24] Morgan's Louisiana & T. R. & S. S. Co. v. Barton, 51 La. Ann. 1338, 26 So. 271.

[25] Wade v. Atlantic Lumber Co. (Fla.), 41 So. 72.

[26] Hoboken v. Pennsylvania R. Co., 124 U. S. 656, 31 L. ed. 543, 8 Sup. Ct. — (title was "to enable the united companies to improve lands under water at Kill von Kull and other places." Supplemental to act entitled "to ascertain the rights of the State and of riparian owners in lands lying under waters of the Bay of New York, and elsewhere in this State").

[27] Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801, rev'g 132 Fed. 848.

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specified railroad, to subscribe to the stock of the railroad company, and issue negotiable bonds therefor, is a public act, and, as such act, it does not conflict with a constitutional provision that no private or local law, which may be passed by the General Assembly, shall embrace more than one subject, and that shall be expressed in the title.[28] But an act entitled an act to "Incorporate" a named railroad company cannot be held to authorize a county to make a subscription and issue bonds in payment thereof to the company.[29] A statute of Illinois, however, which was entitled: "An act to amend the articles of the association of the Danville, etc., Railroad Company, and to extend the powers of and confer a charter upon the same," and which, in the body of the act, authorized incorporated townships along the route to subscribe to its capital stock on an assenting vote of a majority of the legal voters, and further legalized assents of voters of certain townships given at meetings held previous to the passage of the act, complied with the requirement of the constitution of that State that, "no private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title." [30] Where an act was entitled: "An act for the sale of the Pacific railroad, and to foreclose the State's lien thereon, and to amend its charter," it was held that after certain sections providing for the sale, a section providing that in certain contingencies no sale should be made, was not a violation of a constitutional provision, "that no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in its title;" such provision is not violated by any act having various details, provided they all relate to one general subject.[31] A statute is also constitutionally entitled where the title is: "An act providing for placing electrical conductors under-

[28] Unity v. Burrage, 103 U. S. 447, 26 L. ed. 405.

[29] People, Standerfer, v. Hamill, 125 Ill. 600, 17 N. E. 799.

[30] Mahomet v. Quackenbush, 117 U. S. 508, 29 L. ed. 982, 6 Sup. Ct. 858.

[31] Woodson v. Murdock, 22 Wall. (89 U. S.) 351, 22 L. ed. 716.

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ground in cities, and for commissioners of electrical subways." [32] The title of a statute is, where the constitution so provides, not only an indication of the legislative intent, but is also a limitation upon the enacting part of the law. It can have no effect with respect to any object that is not expressed in the title. This applies to a statutory provision enacted under the title of "an act to prevent fraudulent elections in incorporated companies and to facilitate proceedings against them," notwithstanding its re-enactment in subsequent revisions of the law under the title of "an act concerning corporations," and so, irrespective of the generality of its language, does not extend to the right of a stockholder to examine corporate books beyond that accorded to him at common law, or entitle him to the remedy by mandamus, save as a discretionary writ.[33] If the title is of an act to regulate the business of foreign corporations it does not invalidate the enactment because it fails to set forth that its purpose is to punish those who violate the law.[34]

§ 248. **Punctuation.**—It is well settled that punctuation of a statute is not decisive of its meaning,[35] and so little is it a part of an enactment that it will be disregarded by the courts

[32] People, New York Elect. Lines Co., v. Squire, 107 N. Y. 593, 14 N. E. 820, 12 N. Y. St. R. 832, 28 Wkly. Dig. 175, rev'g 6 N. Y. St. R. 281. See Hanson v. Wm. A. Hunter Electric Light Co. (Iowa), 48 N. W. 1005, 10 R. & Corp. L. J. 103, 34 Am. & Eng. Corp. Cas. 83. Examine Morrow Title Illuminating Co. v. Village of Mt. Gilead, 10 Ohio S. & C. P. Dec. 235 (ordinance held to violate statute that contained only one subject, etc.).

[33] O'Hara v. National Biscuit Co., 69 N. J. L. 198, 54 Atl. 241. The rule established is "that a legislative enactment limited in its operation by force of the title under which it was originally passed will continue to be impressed with such limitation, notwithstanding its re-enactment in subsequent revisions of the law under a title which imports no such limitation." *Id.*, 202.

[34] Hartford Fire Ins. Co. v. Commissioner of Insurance, 70 Mich. 485, 38 N. W. 474.

[35] Ford v. Delta & Pine Land Co., 164 U. S. 662, 17 Sup. Ct. 230, 41 L. ed. 590 (a case of exemption of railroad company from taxation; assessments for local improvements; tax sales; recitals in deeds).

Punctuation will not affect or control legislative intent. Murray v. State, 21 Tex. App. 620.

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or changed and read with such stops as to give effect to the whole.[36]

§ 249. Order of Arrangement—Transposition—Alteration—Omissions—Rejections.—Ordinarily the order of arrangement is of itself entitled to no consideration,[37] and words may be transposed or inserted;[38] so clerical errors and omissions may be rectified in order to arrive at the intent or to supply the obvious sense.[39] But where the language, read in the order of clauses as passed, presents no ambiguity, courts will not attempt, by transposition of clauses, and from what it can be ingeniously argued was a general intent, to qualify by construction the meaning.[40] Nor will an ambiguous statute be rewritten to make it constitutional, and words will not be written into a statute where they would operate to destroy it in an important particular, or where the qualifying words would but add to its provisions in order to save it in one aspect and thereby destroy it in another.[41] But words may be re-

[36] **United States:** Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. 9; Hammock v. Loan & Trust Co., 105 U. S. 77, 26 L. ed. 1111; Gwathmay v. Clisby (C. C.), 31 Fed. 220, 24 Blatchf. 398.

Alabama: Cook v. State, 110 Ala. 40, 20 So. 360.

Maryland: Munger v. Board of State Medical Examiners, 90 Md. 659, 45 Atl. 891.

Ohio: Allbright v. Payne, 43 Ohio St. 8.

Oregon: State v. Banfield, 43 Oreg. 287, 72 Pac. 1093; State, Baker, v. Payne, 22 Oreg. 335, 29 Pac. 787.

South Carolina: Archer v. Ellison, 28 S. C. 238.

Texas: Murray v. State, 21 Tex. App. 620.

[37] National Bank of The Republic v. St. Joseph (C. C.), 31 Fed. 216, 24 Blatchf. 436.

[38] Slinguff v. Weaver, 66 Ohio St. 621, 64 N. E. 574. Examine Orvil Township v. Woodcliff, 61 N. J. L. 107, 38 Atl. 685, and cases cited below in this section.

[39] Western Invest. Bkg. Co. v. Murray (Ariz.), 56 Pac. 728, 16 Bkg. L. J. 349. See Landrum v. Flannigan, 60 Kan. 436, 56 Pac. 753; McKee Land & Improv. Co. v. Swikehard, 51 N. Y. Supp. 399, 23 Misc. 21, aff'd 71 N. Y. Supp. 1141, 63 App. Div. 553; Murray v. State, 21 Tex. App. 620.

[40] Doe v. Considine, 6 Wall. (73 U. S.) 458, 18 L. ed. 869.

[41] Employers' Liability Cases (Howard v. Illinois Cent. Rd. Co.), 207 U. S. 463, 501, 28 Sup. Ct. 141, 52 L. ed. — (an act addressed to common carriers engaged in interstate commerce imposing liability as to employees—regulation by Congress of relation of master and servant confined to interstate commerce).

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jected where they cannot be given any effect consistent with the plain intent.[42]

§ 250. **Construction of Proviso or Exception.**—The general purpose or office of a proviso in a statute is to carve exceptions out of the body of the act; to qualify the operation of the act or of some part of it; to except something from the enacting clause, or to qualify its generality, or to exclude some possible ground of misinterpretation of its extending to cases not intended by the legislature to be brought within its purview.[43] In the absence of an apparent intention to the contrary, a proviso or an exception has reference only to the immediately preceding paragraph or clause, or the section to which it is attached and is to be strictly construed. But these rules are not absolute and the proviso is often used in other senses than those above stated; it will not be used to defeat the grant or the obvious intent of the statute; the entire enactment may be considered, and if from the context and the subject-matter it is obvious that its meaning should be extended beyond what it technically imports it may be so construed.[44] So a proviso in

See Hilburn v. St. Paul, M. & M. Ry. Co., 23 Mont. 229, 58 Pac. 811, 551 (citing numerous cases); State v. Reneau (Neb., 1905), 106 N. W. 451.

Words cannot be inserted by court when not used by legislature. Steere v. Brownell, 124 Ill. 27, 15 N. E. 26.

Words cannot be imported into a statute. Baker v. Payne, 22 Oreg. 335, 29 Pac. 787.

Nothing should be added to extend the words beyond their plain import. McCarthy v. McCarthy, 20 App. D. C. 195.

[42] Leavitt v. Loverin, 64 N. H. 607, 1 L. R. A. 58, 15 Atl. 414. See Jackson, Ex parte, 140 Fed. 266, rev'd United States v. Jackson, 143 Fed. 783. See also cases cited under third preceding note herein.

[43] Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. 47, 16 Wash. L. Rep. 749; Ryan v. Carter, 93 U. S. 78, 83, 84, 23 L. ed. 807; Minis v. United States, 15 Pet. (40 U. S.) 423, 10 L. ed. 791; Deitch v. Staub, 115 Fed. 309; Wartensblen v. Haithcock, 80 Ala. 565; Chicago v. Phœnix Ins. Co., 126 Ill. 276, 18 N. E. 668; Traders' Nat. Bank v. Lawrence Mfg. Co., 96 N. C. 298.

[44] **United States:** Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. 47, 16 Wash. L. Rep. 749; Carter, Webster & Co. v. United States, 137 Fed. 978, aff'd 143 Fed. 256; Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 12 C. C. A. 365 26 L. R. A. 667, 1 Am. & Eng. R. Cas. (N. S.) 71.

Alabama: Wartensblen v. Haithcock, 80 Ala. 565.

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an act incorporating a railroad company may be used in other senses than that of its technical meaning, so that the statute will not exempt the corporation created by it, or its successors, from the duty of submitting to reasonable requirements concerning transportation rates made by a railroad commission created by the State.[45] Nor will a proviso be permitted technically to operate so as to defeat the grant of a franchise, the purpose of which is the performance of a public duty.[46] Again, although not in accord with its technical meaning, or its office when properly used, a frequent use of the proviso in Federal legislation is to introduce new matter extending, rather than limiting or explaining, that which has gone before.[47] Those who set up any such exception must establish it as being within the words as well as the reason thereof. No known rule of law, however, requires its interpretation according to its literal import, when its evident intent is different.[48] Mere convenience will not justify the introduction of exceptions not suggested by the language used.[49]

§ 251. Liberal Construction—Meaning Extended—Implication.—Although a liberal construction of a statute may be proper and desirable, yet the fair meaning of the language used must not be unduly stretched for the purpose of reaching any particular case which, while it might appeal to the court, would plainly be beyond the limitations contained in the statute.[50] An act to regulate commerce should receive a lib-

Illinois: Huddleston v. Francis, 124 Ill. 195, 16 N. E. 243.

North Carolina: Traders' Nat. Bank v. Lawrence Mfg. Co., 96 N. C. 298.

Oklahoma: Leader Printing Co. v. Nichols, 6 Okla. 302, 50 Pac. 1001.

See Southern Pacific Rd. Co. v. Orton, 32 Fed. 457, 472, 473, per Sawyer, J.

[45] Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. 47, 16 Wash. L. Rep. 749.

[46] West Branch Boom Co. v. Pennsylvania Joint Lumber & Land Co., 121 Pa. 143, 22 W. N. C. 303, 15 Atl. 509, 6 Am. St. Rep. 766.

[47] Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. ed. 860.

[48] Ryan v. Carter, 93 U. S. 78, 83, 84, 23 L. ed. 807, per Davis, J.

[49] Morris Coal Co. v. Donley, 73 Ohio St. 298, 76 N. E. 945.

[50] United States v. St. Anthony Rd. Co., 192 U. S. 524, 24 Sup. Ct. 333, 48 L. ed. 548 (grants in aid of railroads).

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eral construction in favor of its purpose, although where a common carrier seeks relief it must be clearly apparent that the claimed right has been conferred or forbidden, and equity will not by a strained construction extend the meaning in favor of a complaining carrier whose position is such as not to demand favorable consideration.[51] While a legislature may prescribe regulations for the management of business of a public nature, even though carried on by private corporations, with private capital, and for private benefit, the language of such regulations will not be broadened by implication.[52] But a statute restraining any person from doing certain acts, applies equally to corporations, or bodies politic, although not mentioned.[53] An implication created by construction from subsequent words will not, unless such implication is very necessary and clear, restrain prior explicit provisions embracing in terms an entire class of cases.[54] The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed; the limitation of the rule being that to extend the meaning to any case, not included within the words, the case must be shown to come within the same reason upon which the lawmaker proceeded, and not a like reason.[55]

§ 252. **Strict Construction.**—The rule of strict construction applies to statutes creating a new liability;[56] to a statute authorizing the levy of a tax by a municipality;[57] to statutes as to eminent domain which grant power to private corporations;[58]

[51] Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (C. C.), 37 Fed. 567, 2 L. R. A. 289, 2 Inters. Comm. Rep. 351.

[52] Chesapeake & P. Tel. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. 881.

[53] People v. Utica Ins. Co., 15 Johns. (N. Y.) 357, 8 Am. Dec. 243.

[54] National Bank of The Republic v. St. Joseph (C. C.), 31 Fed. 216, 24 Blatchf. 436.

[55] United States v. Freeman, 3 How. (44 U. S.) 556, 11 L. ed. 724.

[56] Hunt v. Burns, 95 N. W. 1110.

[57] Drummer v. Cox, 165 Ill. 648, 46 N. E. 716.

[58] Poughkeepsie Bridge Co., In re, 108 N. Y. 483, 15 N. E. 681. Compare Chesapeake & Ohio Canal Co.

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to enactments taking away or changing fundamental rights;[59] to every statute derogatory of rights of property or which takes away the rights of a citizen;[60] to enactments penal in character as in case of one making trustees of a corporation personally liable in certain cases;[61] or one prohibiting combinations and requiring reasonable transportation facilities;[62] or one allowing recovery for wrongful death caused by officers, etc., of a corporation;[63] or one relating to false representations as to capital stock and accumulation, made by insurance companies.[64]

§ 253. **Common Law—Statutes in Derogation of.**—Strict construction is to be given statutes;[65] or statutory authority in derogation of common law.[66] So the intent to change a rule of common law should be clearly shown in the statute;[67] for common law rights are not to be taken away by doubtful implications and affirmative words.[68] Again, where a well-established rule of that law is attempted to be modified or abrogated by statute the plain import of the words used should limit the interpretation if thereby they can give reasonable effect to the statute.[69] Statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used, according to its true and obvious mean-

v. Key, 3 Cranch (U. S. C. C.), 599, 603-609, Fed. Cas. No. 2,649.

[59] Crowder v. Fletcher, 80 Ala. 219.

[60] Vanhorne v. Dorrance, 2 Dall. 304.

[61] Park Bank v. Remsen, 158 U. S. 337, 29 L. ed. 1008, 15 Sup. Ct. 891; Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. —, 28 L. ed. 1038.

[62] Clark v. American Express Co., 130 Iowa, 254, 106 N. W. 642.

[63] Casey v. St. Louis Transit Co., 116 Mo. App. 235, 91 S. W. 419.

[64] Langworthy v. C. C. Washburn Flouring Mills Co., 77 Minn. 256, 79 N. W. 974.

[65] Butte Hardware Co. v. Sullivan, 7 Mont. 307, 16 Pac. 588.

[66] Ramsey v. Hommel, 68 Wis. 12, 31 N. W. 271.

[67] Rasin v. Lidgerwood Mfg. Co., 86 N. Y. Supp. 49, 89 App. Div. 245.

[68] Ryalls v. Mechanics Mills, 150 Mass. 190, 194, 5 L. R. A. 667, 22 N. E. 766.

[69] Felix v. Griffiths, 56 Ohio St. 39, 45 N. E. 1092, 37 Ohio L. J. 139. See McCarthy v. McCarthy, 20 App. D. C. 195.

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ing.[70] Where the charter of a state bank provides for additiona liability of the shareholders as sureties to the creditors of the bank for all contracts and debts to the extent of their stock therein, at the par value thereof, at the time the debt was created a shareholder is not liable for a debt created after he has actually parted with his stock and the transfer has been regularly entered on the books of the bank. The additional liability of shareholders of corporations depends on the terms of the statutes creating it, and as such a statute is in derogation of the common laws it cannot be extended beyond the words used.[71] In the Charles River Bridge case the following decision was rendered: The grant to the bridge company is of certain franchises, by the public, to a private corporation; in a matter where the public interest is concerned, there is nothing in the local situation of this country, or in the nature of our political institutions, which should lead this court to depart from the rules of construction of statutes, adopted under the system of jurisprudence which we have derived from the English law; no good reason can be assigned, for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law in every other case, without exception.[72]

§ 254. **Public Grants of Franchises, Privileges, etc.—Construction Against Grantee.**—Public grants of franchises, powers, rights, privileges or property in which the government

Common law changed by statute is modified only to extent clearly warranted by the language used. Johnson v. Southern Pacif. Co., 117 Fed. 462, 54 C. C. A. 508.

[70] Johnson v. Southern Pacific Co., 196 U. S. 1, 49 L. ed. 872, 25 Sup. Ct. 158.

Rule that statutes in derogation of common law are to be strictly construed is held not to apply to a revision which is to be liberally construed. Dillehay v. Hickey, 24 Ky. L. Rep. 1220, 71 S. W. 1, 69 S. W. 1095.

Statutes in derogation of common law to be liberally construed where statute so provides. Gans' Estate, In re (Utah, 1906), 86 Pac. 757.

[71] Brunswick Terminal Co. v. Nat. Bk. of Balt., 192 U. S. 386, 48 L. ed. 491, 24 Sup. Ct. —.

[72] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 9 L. ed. 773. See Rice v. Railroad Co., 1 Black (66 U. S.), 358, 17 L. ed. 147;

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or public has an interest must be construed in favor of the grantor and strictly against the grantee; whatever is not clearly, plainly and unequivocally granted is withheld; nothing passes by implication except it be necessary to carry into effect the obvious intent of the grant. This rule applies in cases of doubt or ambiguity in the meaning or interpretation of language used or where the grant is susceptible of two constructions, for if the meaning is plain and clear and the intention obvious there is no room for construction. Private corporations and individuals are within the above rule,[73] which also applies to arti-

Peterson v. Gittings, 107 Iowa, 306, 77 N. W. 1056, rev'g 72 N. W. 662.

[73] **United States:** Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 130, 51 L. ed. —, 27 Sup. Ct. —; Cornell v. Coyne, 192 U. S. 418, 24 Sup. Ct. 383, 48 L. ed. 504; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 696, 41 L. ed. 1165, 17 Sup. Ct. 718, per Brewer, J. (condemnation of water supply; water companies; exclusive privileges; statutes and contracts; legislative powers; municipal powers); Pearsall v. Great Northern R. Co., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. ed. 838, rev'g 73 Fed. 933 (consolidation of railroads; parallel and competing lines; statutes; powers not directly contemplated; subsequent legislative restriction); Hamilton Gas Light & Coke Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. ed. 963 (grant to corporation of special privileges; obligation of contract; municipal powers; contract for gas supply; exclusive privilege); Stein v. Bienville Water Supply Co., 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. 892 (grant of water franchise; exclusive right; obligation of contract); Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478, 45 Am. & Eng. R. Cas. 607, 9 Ry. & Corp. L. J. 342, 43 Alb. L. J. 328 (corporate contract; alienation of franchise; *ultra vires* agreement; breach of duty to public); Slidell v. Grandjean, 111 U. S. 412, 4 Sup. Ct. 475, 28 L. ed. 321; Turnpike Co. v. State, 3 Wall. (70 U. S.) 210, 18 L. ed. 180 (grant of franchise; exclusive privilege; unlawful charter to rival); Jefferson Bank v. Skelly, 1 Black (66 U. S.), 436, 17 L. ed. 173 (bank charters; exemption from taxation; franchise grant construed; waiver of sovereignty); Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (57 U. S.) 416, 14 L. ed. 997 (statutes as to insurance company; exemption from taxation; obligation of contract); Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 9 L. ed. 773; United States v. Arredondo, 6 Pet. (31 U. S.) 691, 736, 8 L. ed. 547, 564; Helena, City of, v. Helena Water Works Co., 122 Fed. 1; Omaha Horse R. Co. v. Cable Tramway Co. (C. C.), 30 Fed. 324.

Georgia: Macon & W. R. v. Davis, 13 Ga. 68.

Illinois: Mills v. County of St. Clair, 7 Ill. 197.

Louisiana: State of Louisiana v. Morgan, 28 La. Ann. 482.

Maine: Rockland Water Co. v.

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cles of association organizing a corporation under general laws which are a substitute for a charter from the legislative

Camden & R. Water Co., 80 Me. 544, 15 Atl. 785, 1 L. R. A. 388.

Minnesota: State v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380.

Nebraska: Lincoln St. Ry. Co. v. City of Lincoln, 61 Neb. 109, 110, 84 N. W. 802.

New Jersey: Millville Gaslight Co. v. Vineland Light & Power Co. (N. J., 1906), 65 Atl. 504; Jersey City v. North Jersey St. Ry. Co., 72 N. J. L. 383, 61 Atl. 95.

Texas: East Line & R. R. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834.

Grants of franchises should be in plain language, and certain and definite in their nature, and should be free from ambiguity in their terms. The legislative mind should be distinctly impressed with the unequivocal form of expression contained in the grant. They will also be strictly construed against the grantee. Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 130, 51 L. ed. —, 27 Sup. Ct. —.

One asserting private rights in public property under grants of franchises must show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. Legislative grants of franchises which are in any way ambiguous as to whether granted for a longer or a shorter period are to be construed strictly against the grantee. Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427 (street railroads).

Only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public; whatever is not unequivocally granted is withheld; and nothing passes by implication. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. 224 (contract to supply water; corporations; due process and obligation of contracts).

Statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee. Wisconsin Cent. R. Co. v. United States, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct 45 (public lands; subsidized railroad).

Legislative grants must be interpreted so as to effect the intention of the grantor; but if the words are ambiguous, the true rule is to construe them most strongly against the grantee. Wherever privileges are granted to a corporation and the grant comes under revision in the courts, it is to be construed strictly against the corporation and in favor of the public, and nothing passes except what is given in clear and explicit terms. Rice v. Railroad Co., 1 Black (66 U. S.), 358, 17 L. ed. 147 (railroad aid; land grants; vested rights; conditions as to construction of railroad).

When there is any doubt as to the proper construction of a statute granting a privilege, that construction should be adopted which is most advantageous to the interests of the government, the grantor. Hannibal & St. Joseph R. Co. v. Missouri River Packet Co., 125 U. S. 260, 31 L. ed. 731, 8 Sup. Ct. 874 (interstate bridge; unlawful structure; act of Congress).

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body.[74] Such rule also differs from that as to ordinary grants,[75] and one of the reasons for strict construction against the

When a statute makes a grant of property, powers or franchises to a private corporation or to a private individual, the construction of the grant in doubtful points should always be against the grantee, and in favor of the government. Oregon Railway & Navigation Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409, 5 R. R. & Corp. L. J. 364 (railroads; grants to; corporate charters and powers).

Every statute which takes away from a legislature its power will always be construed most strongly in favor of the State. This is an elementary principle. Wright v. Nagle, 101 U. S. 791, 796, 25 L. ed. 921, per Waite, C. J. (toll-bridge franchise; obligation of contract; legislative power).

In construing a franchise the principle should be applied that a grant from the public, so far as it is ambiguous, is to be construed in the interest of the public, that is, in favor of the grantor, and not, as in the ordinary sense, in favor of the grantee. This principle, however, is to be applied only when doubt arises, since if the meaning is clear there is no room for construction. Trustees of Southampton v. Jessup, 162 N. Y. 122, 127, 56 N. E. 538, per Vann, J., case reverses 10 App. Div. 456.

Grants of franchises by the same State are to be so strictly construed as to operate as a surrender of the sovereignty no further than is expressly declared by the terms of the grant. The grantee takes nothing in that respect by inference. Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 26 N. Y. St. R. 364, 22 N. E. 381.

The rule that public grants are to be construed strictly against the grantee means that nothing shall pass by implication except it be necessary to carry into effect the obvious intent of the grant. People ex rel. Woodhaven Gas Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787, rev'g 11 App. Div. 175.

"If there be anything well settled in the law relating to corporations, it is, that their charters, being grants of power or authority, in derogation of the natural rights and equality of men, must be construed favorable to the public, and strictly as against the corporation, in whose favor nothing can be claimed by implication." Bank of Toledo v. City of Toledo (Toledo Bank v. Bond), 1 Ohio St. 622, 636, per Bartley, C. J.

[74] Oregon Railway & Navigation Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409, 5 Rd. & Corp. L. J. 364. See also Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478, 9 Rd. & Corp. L. J. 342, 43 Alb. L. J. 328, 45 Am. & Eng. R. Cas. 607.

[75] The rule of construction of private grants, if the meaning of the words be doubtful, is, that they shall be taken most strongly against the grantor. An opposite rule prevails in cases of grants made by a sovereign power. Mills v. County of St. Clair, 7 Ill. 197.

Generally, dubious words ought to be taken most strongly against the lawmaker. United States v. Heth, 3 Cranch (7 U. S.), 399, 413, 2 L. ed. 479.

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grantee is that such grants are usually prepared by those interested in them and submitted to the legislatures with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give.[76] The rule or principle must, however, be applied with reference to the subject-matter as a whole, and not in such a manner as to defeat the general intent of the legislature,[77] as the obvious intention of the parties, when expressed in plain and unequivocal language, cannot be ignored in a public any more than in a private grant.[78]

§ 255. Same Subject Continued—Instances—Railroads—Street Railroads—Submarine Railway—Gas, Telephone,

Where there is a doubt as to the meaning of the terms of a grant of public interests or uncertainty as to its general purpose, that construction must be adopted which will support the claim of the State rather than that of the individual or corporation. Slidell v. Grandjean, 111 U. S. 412. Grants which confer exclusive privileges affecting great public interests must be construed strictly against the grantee. Emerson v. Commonwealth, 108 Pa. 111.

"Corporate powers can never be created by implication nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. When the State means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said; and words of equivocal import are so easily inserted by mistake or fraud, that every consideration of justice and policy requires that they should be treated as nugatory, when they do find their way into the enactments of the legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference. This court has asserted it times without number." Pennsylvania Ry. Co. v. Canal Commissioners, 21 Pa. 9, 22, per Black, C. J.

Acts of incorporation and other statutes granting special privileges are to be construed strictly, and whatever is not given in unequivocal terms is withheld. Moran v. Miami County, 2 Black (67 U. S.), 722, 17 L. ed. 342.

[76] Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 130, 51 L. ed. —, 27 Sup. Ct. —.

[77] Moran v. Miami County, 2 Black (67 U. S.), 722, 17 L. ed. 342.

[78] People, Woodhaven Gas Co., v. Deehan, 153 N. Y. 528, 47 N. E. 187, rev'g 42 N. Y. Supp. 1071, 17 App. Div. 175, 76 N. Y. St. R. 1071.

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Canal, Water and Turnpike Companies—Ferry—Eminent Domain.—The rule of liberal construction in favor of the public and strict construction against the grantee has been applied to legislative grants of franchises to railroads,[79] including the right of such companies to exercise the power of eminent domain,[80] and the privilege of occupying the public streets with its tracks;[81] to the charter and the right or privilege of a street railway to construct, maintain and operate its road in the public streets of a city;[82] to the grantee of land under water for a submarine railway;[83] and to the right to use the streets of a city for pipes to supply it and the inhabitants with gas.[84] So in case exceptional privileges and powers, which interfere to an important extent with a municipality's control over its streets, are conferred by ordinance upon a telephone company to its benefit and advantage, such contract should be strictly construed, and if it contains words susceptible of various meanings that interpretation should be given by which the public interests will be conserved.[85] But a charter of a corporation should be so construed as to carry into effect the will of the legislature, and a power given to a canal company to take private property for public use upon just compensation is not a power in derogation of common right, necessitating, as against the company, the strictest construction of particular words at variance with a reasonable construction drawn from the whole context of the instrument which will

[79] State v. St. Paul, M. & M. Ry. Co. (Minn., 1906), 108 N. W. 261; Norfolk & W. Ry. Co. v. Lynchburg Cotton Mill Co., 106 Va. 376, 56 S. E. 146; Norfolk & W. Ry. Co. v. Schein, 106 Va. 382, 56 S. E. 148.

[80] Norfolk & W. Ry. Co. v. Lynchburg Cotton Mill Co., 106 Va. 376, 56 S. E. 146; Norfolk & W. Ry. Co. v. Schein, 106 Va. 382, 56 S. E. 148.

[81] Chicago, D. & V. Ry. Co. v. Chicago, 121 Ill. 176, 11 N. E. 907.

[82] Blocki v. People, 220 Ill. 444, 77 N. E. 172; Citizens' Street R. Co. v. Africa, 100 Tenn. 26, 53, 42 S. W. 485, 878; Hamilton & L. E. T. Co. v. Hamilton, 1 Ohio N. P. 366.

[83] De Lancey v. Hawkins, 49 N. Y. Supp. 469, 23 App. Div. 8, aff'd 163 N. Y. 587, 53 N. E. 1108.

[84] Pensacola Gas Co. v. Pensacola, 33 Fla. 322, 14 So. 826. See also Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. 90.

[85] Baltimore City v. Chesapeake & Potomac Teleph. Co., 92 Md. 692, 48 Atl. 465.

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best carry out the legislative intent.[86] In a case where a contract was made with a municipality granting the right to supply a city with water for a certain number of years it was held that such contract being susceptible of two meanings, the one restricting and the other extending the powers of the municipal corporation, that construction was to be adopted which worked the least harm to the State.[87] This last rule has also been applied in the case of a contract by a turnpike company with a State concerning the exercise of franchises.[88] But in another case it appeared that in 1819, the legislature of Illinois authorized an individual, his heirs and assigns, to establish a ferry on the east bank of the River Mississippi, near the town of Illinois, and to run the same from lands "that they may belong to him," provided that the ferry should be put into actual operation within eighteen months. At this time he had no land, but within the eighteen months acquired an interest in a tract of one hundred acres. In 1821, another act was passed, authorizing him to remove the ferry "on any land may belong to him" on the said Mississippi River, under the same privileges as were prescribed by the former act. It was held that the words of this act, "on any land that may belong to him," must be construed to apply to the lands which then belonged to him, and not to such as he obtained after the passage of the act, viz., in 1822. The following rules for construing statutes were applied to the case, viz., First. That in a grant, designed by the sovereign power making it to be a general benefit and accommodation to the public, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government; and, therefore, should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed, it must

[86] Chesapeake & Ohio Canal Co. v. Key, 3 Cranch (U. S. C. C.), 599, 603–609, Fed. Cas. No. 2,649.

[87] Stein v. Bienville Water Supply Co., 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. 892.

[88] Covington & Lex. Turnp. Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560.

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fall. Secondly. If the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any apparent violation of the apparent objects of the grant, if in such case one interpretation could render the grant inoperative and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted.[89] Under still another decision it appeared that a water company was a corporation organized under the general statute of Illinois, as was also a municipality. In June 1882, the government of the city gave the water company an exclusive right to supply the city with water for thirty years, reserving the right of purchasing the works erected for that purpose, and if this right were not exercised, the rights of the company were to be extended for a further term. Provision was made for the erection of hydrants by the company for which fixed rentals were to be charged, and the city was given rights in a part of them. Further provisions were made for the payment of water rates by consumers. In 1896 an ordinance was passed by the city reducing the rentals of the hydrants and rates to consumers, to take effect from the date of its passage. At the time when the grant of 1882 was made, a statute passed in 1872 was in force in Illinois, authorizing cities and villages to contract with incorporated companies for a supply of water for a public use, for a period not exceeding thirty years. It was held that the power so conferred by the statute of 1872 in force in 1882 could, without straining, be construed as distributive; that the city council was authorized to contract with any person or corporation to construct and maintain waterworks at such rates as might be fixed by ordinance and for a period not exceeding thirty years; that the words "fixed by ordinance" might be construed to mean by ordinance once for all to endure during the whole period of thirty years, or by ordinance from time to time as might be

[89] Mills v. St. Clair Co., 8 How. (49 U. S.) 569, 12 L. ed. 1201, 7 Ill. 197.

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deemed necessary; and that of the two constructions, that must be adopted which was most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time.[90]

§ 256. **Same Subject—Instances Continued—Public Land Grants—Railroad Aid.**—Land grant statutes should receive a strict construction, and one which supports the construction of the government rather than that of the individual, the sovereign rather than the grantee; nothing passes by implication.[91] But while it is well settled that public grants are to be construed strictly against the grantees, they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given. General legislation, offering advantages in the public lands to individuals or corporations as the inducement to the accomplishment of enterprises of a quasi-public character through undeveloped public domain should receive a more liberal construction than is given to an ordinary private grant.[92] Every act of Congress making a grant of public land is to be treated both as a law and a grant, and the intent of Congress when ascertained is to control in the interpretation of the law; and when Congress makes a grant of a specific quantity of public land in aid of any internal improvement, it must be assumed that it intends the beneficiary to receive such amount of land, and when it designates what land shall be received it is equally clear that the intent is, if possible, that the exact land thus particularly designated shall be received.[93] Property rights of owners will, however, be favored by a construction of railroad aid laws.[94] Where the

[90] Freeport Water Co. v. Freeport City, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. 493.

[91] Northern Pacific Ry. Co. v. Soderberg, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. ed. 575 (public lands; grants in aid of railroads; reservations and exceptions; mineral lands).

[92] United States v. Denver & Rio Grande Ry. Co., 150 U. S. 1, 14 Sup. Ct. 11, 37 L. ed. 975.

[93] Wisconsin Cent. R. Co. v. Forsythe, 159 U. S. 46, 15 Sup. Ct. 1020, 40 L. ed. 71.

[94] Demaree v. Johnson, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376.

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charter of a railroad company authorizes the counties "through which it may pass" to subscribe to its stock, a county lying between the two termini of the road may subscribe without waiting until the route is actually located. "It is true, when a charter is given for franchises or property to a corporation, which is to be brought into existence by some future acts of the corporators, that such franchises or property are in abeyance until such acts shall have been done, and then they instantly attach. But not to distinguish the acts enjoined or permitted, to give to the corporation its intended purpose and object, is to confound the franchises with such acts, and would nullify the means by which the franchises are to be produced;" and if the evident intent, to be ascertained from the charter conditions, there being no express limitation as to the time of making such subscription, is that it is optional with those who could do so to make it when most convenient or advantageous to themselves, it may be made before actual location of the road.[95]

[95] Woods v. Lawrence County, 1 Black (66 U. S.) 386, 409, 17 L. ed. 122.

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CHAPTER XVII.

CONSTITUTIONAL LAW—INTERPRETATION OR CONSTRUCTION OF STATUTES CONTINUED.

§ 257. Grant of Exclusive Franchises, Rights or Privileges —Strict Construction.
258. Separate Grants of Franchises—Rule of Construction.
259. Settled Judicial Construction.
260. Practical Construction by Parties.
261. Effect of Interpretation—Beneficial Reasons—Natural Justice and Equity—Inconvenience—Injury or Hardship.
262. Contemporaneous Construction—Extraneous Matters —History—Debates, etc.
263. Policy of Government, of Legislative Body or of Law —Public Policy—General Principles of Law.
264. Remedial Statutes.
265. Statutes in *Pari Materia*.
266. Statutes in *Pari Materia* Continued.
267. Statutes in *Pari Materia* Continued—Exception to or Qualification of Rule.
268. Words or Provisions of Prior Statutes Adopted in Later Act.
269. Derivative Statutes — Construction of Statutes Adopted from Foreign State or Country.
270. Re-enactment—Consolidation —Revised Statutes — Codes.
§ 271. Construction by State of Its Statutes—How Far Respected in Courts of Other States.
272. Construction of State Constitutions and Statutes by State Courts—How Far Respected by Federal Courts.
273. Same Subject Continued.
274. Same Subject Continued — Exceptions to or Qualifications of Rule.
275. Same Subject Continued—Instances — Incorporation Acts—Eminent Domain—Corporate Powers.
276. Same Subject — Instances Continued—Common Carriers—Railroads.
277. Same Subject — Instances Continued — Revenue — Taxation.
278. Same Subject — Instances Continued — Exemptions from Taxation — Impairment of Obligation of Contract as to Taxation.
279. Same Subject — Instances Continued — Impairment of Obligation of Contract—Fourteenth Amendment.
280. Same Subject — Instances Continued—Statutes Penal

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in Nature — Trustees of Corporations — Anti-Trust Laws.
§ 281. Same Subject — Instances Continued—Foreign Corporations.
282. Repeal or Amendment of Statutes.
283. Same Subject Continued.
284. Same Subject Continued—Instances.
§ 285. Same Subject — Instances Continued—Taxation and Assessment.
286. Construction of Statutes, Charters and Ordinances—Miscellaneous Cases.
287. Prospective and Retrospective Operation.
288. Validating Statutes—Waiver or Correction of Defect or Irregularity.

§ 257. Grant of Exclusive Franchises, Rights or Privileges—Street Construction.—Grants of exclusive franchises, rights or privileges to corporations or individuals do not pass except by plain and express words or necessary implication, and are to be strictly construed. If the terms of such contract between the corporation or individual and the State are ambiguous such ambiguity must operate in favor of the public or State; exclusive rights or privileges under public franchises are not favored.[1] A special franchise to be exclusive ought to be

[1] **United States:** Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 696, 17 Sup. Ct. 718, 41 L. ed. 1165; Wright v. Nagle, 101 U. S. 791, 796, 25 L. ed. 921, per Waite, C. J.; Citizens' Street R. Co. v. Jones (C. C.), 34 Fed. 579.

District of Columbia: United States Elec. L. Co. v. Ross, 9 App. D. C. 558, 24 Wash. L. Rep. 775, appeal denied, 24 Wash. L. Rep. 838.

Georgia: McLeod v. Burroughs, 9 Ga. 213.

Maryland: North Baltimore Pass. Ry. Co. v. North Ave. Ry. Co., 75 Md. 233, 4 Am. Elec. Cas. 1, 9, 29 Atl. 466, per Alvey, C. J.

Pennsylvania: West Manayunk Gas Light Co. v. New Gas Light Co., 21 Pa. Co. Ct. Rep. 379.

Texas: Victoria County v. Victoria Bridge, 68 Tex. 62, 4 S. W. 140.

Examine Blair v. City of Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427, rev'g 132 Fed. 848; Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573; Hamilton & L. E. T. Co. v. Hamilton, 1 Ohio N. P. 366. See §§ 22–24, herein, also chapter herein as to exclusive franchises.

Charles River bridge; powers expressly granted; exclusive privileges not regarded; implications as to. The act of incorporation of the proprietors of the Charles River bridge, is in the usual form, and the privileges such as are commonly given to corporations of that kind; it confers on them the ordinary faculties of a corporation, for the purpose of building the bridge, and establishes certain rates of toll which the company are authorized to take. This is the whole grant; there is no exclusive privilege given to them over the waters of Charles River, above or below their bridge; no right to erect

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free from ambiguity, and the precise territorial limitations of a charter should not be uncertain and incapable of accurate determination so that the grantee may elect to exercise its rights in one district one year and abandon that locality the next.[2] So where an exclusive right is granted to a corporation for a period of years that interpretation will govern which is most favorable to the State, and the right will be held to expire at the termination of the period specified, even though under another statute such grant might be construed as for an unlimited period.[3] But it is held that the rule requiring all gratuitous grants by the sovereign of exclusive privileges and franchises to be construed strictly, and that any ambiguity therein must operate against the grantee, is not in its strictness fully applicable to the grant of a ferry franchise. Such a grant being never without a consideration, as it imposes upon the grantee the obligation of maintaining a ferry with suitable accommodations for the convenience of the public.[4]

§ 258. **Separate Grants of Franchises—Rule of Construction.**—If the franchise of a ferry and that of a bridge are different in their nature and are each established by separate grants which have no words to connect the privileges of the one with the privileges of the other, there is no rule of legal interpretation, which will authorize a court to associate such

another bridge themselves, nor to prevent other persons from erecting one; no engagement from the State, that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects, the charter is silent, and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges; no words are used, from which an intention to grant any of these rights can be inferred; if the plaintiffs are entitled to them, it must be implied simply from the nature of the grant, and cannot be inferred from the words by which the grant is made. Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 9 L. ed. 773.

[2] West Manayunk Gas Light Co. v. New Gas Light Co., 21 Pa. Co. Ct. Rep. 379.

[3] Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. 689.

[4] Mayor, etc., of New York v. Starin, 106 N. Y. 1, 8 N. Y. St. R. 655, 27 Wkly. Dig. 124, 12 N. E. 631.

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grants together, and to infer that any privilege was intended to be given to the bridge company merely because it had been conferred upon the other; the charter being a written instrument it must speak for itself and be interpreted by its own terms.[5]

§ 259. **Settled Judicial Construction.**—It is a well-settled principle of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body.[6] And if the courts of a State have, when an agreement is made, construed their constitution and laws so as to give the agreement force and vitality, the same courts cannot, by a subsequent and contrary construction, render it invalid,[7] for the settled judicial construction of a statute, so far as contract rights are acquired thereunder, is as much a part of the statute as the text itself, and a change of decision is the same in effect on pre-existing contracts as a repeal or amendment by legislative enactment.[8] But the construction placed by a state court upon one statute implies no obligation on its part to put the same construction upon a different statute though the language of the two may be similar.[9]

§ 260. **Practical Construction by Parties.**—The practical interpretation or construction of ambiguous language of a charter of a corporation or of a grant of a franchise or privilege, by the subsequent acts of the parties, and continued uniformly for a number of years and acquiesced in by the public or officials charged with the duty to object in the premises, is, in case where such construction is permissible, entitled to

[5] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 9 L. ed. 773.

[6] Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. 797.

[7] Thomson v. Lee County, 3 Wall. (70 U. S.) 327, 18 L. ed. 177.

[8] German Sav. Bank v. Franklin County, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. ed. 519 (a case of county bonds; railroad aid; conditions precedent; invalidity; innocent holders); Douglass v. County of Pike, 101 U. S. 677, 25 L. ed. 968.

[9] Wood v. Brady, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. —.

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great weight as evidencing the right interpretation, but if such acts, conduct or acquiescence have not been uniform, and indicate conflicting views, they furnish no aid in arriving at the meaning.[10] The omission, however, of a city to assert its rights, or its passive submission to the invasion thereof is held to have but little bearing in the construction of a grant, although the acts of a city in asserting and exercising its rights from time to time, claiming an exclusive franchise, conclusively shows its understanding under the charter.[11] Practical construction by a common carrier and officials to whom passes have been given cannot operate to modify a law clearly prohibiting transportation of favored passengers.[12]

§ 261. **Effect of Interpretation—Beneficial Reasons—Natural Justice and Equity—Inconvenience—Injury or Hardship.**—Effect of interpretation may be considered to ascertain intent.[13] If two laws interfere in their application to particular facts that interpretation should be followed which is recommended by the most beneficial reasons.[14] In case of ambiguity a statute should be so construed as to be consistent with natural justice if not contrary to settled legal principles,[15] and, keeping in view the object or purpose of the act, it may be construed according to its equity.[16] But if Congress, or a state legislature, pass a law within the general

[10] Port of Mobile v. Louisville & Nashville R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342; Clark's Run & S. R. Turnpike Road Co. v. Commonwealth, 16 Ky. L. Rep. 681, 29 S. W. 360; Mayor, etc., of New York v. Starin, 106 N. Y. 1, 8 N. Y. St. R. 655, 27 Wkly. Dig. 124, 12 N. E. 631; Jones v. Erie & W. V. R. Co., 169 Pa. 333, 32 Atl. 535, 36 W. N. C. 441 (construction of railroad and occupation of city streets as interpretation of grant).

[11] Mayor, etc., of New York v. Starin, 106 N. Y. 1, 8 N. Y. St. R. 655, 27 Wkly. Dig. 124, 12 N. E. 631.

[12] State v. Southern R. Co., 122 N. C., 1052, 30 S. E. 133, 41 L. R. A. 246, 11 Am. & Eng. R. Cas. (N. S.) 228.

[13] Bowers v. Smith, 111 Mo. 45, 16 L. R. A. 754, 35 Cent. L. J. 305, 46 Alb. L. J. 204.

[14] Kane v. Kansas City, Ft. Smith & Memphis Ry. Co., 112 Mo. 34, 39, citing Rutherforth's Inst. (2d Am. ed.), p. 432.

[15] Plum v. Kansas City, 101 Mo. 525, 14 S. W. 657, 10 L. R. A. 371.

[16] Harrison v. Commonwealth, 83 Ky. 162.

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scope of their constitutional power, the courts cannot pronounce it void, merely because, in their judgment, it is contrary to the principles of natural justice;[17] and natural equity will not control in case of uncertainty, although where there is ambiguity the presumption exists that the legislature intended to do equity.[18] So constitutional restrictions and not natural justice and equity are the test of the validity of statutes.[19] And where a particular construction of a statute will occasion great inconvenience, or produce inequality and injustice, that view is not to be favored if another and more reasonable interpretation is present in the statute.[20] So in case the legislature has the constitutional power to enact a given law, and it properly frames an act clearly expressing its legal intent, it is the duty of the court to construe that act so as to effectuate its terms. The argument based on the inconvenience which may result is out of place under such circumstances.[21] Again, that different sections of the statute may subject different classes of corporations to control and result in some inconvenience is not a sufficient reason for departure from the plain intent evidenced by the language used;[22] but there is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience.[23] An act of Congress otherwise valid is not unconstitutional because the motive in enacting it was to secure certain advantages for conditions of labor not

[17] Calder v. Bull, 3 Dall. (3 U. S.) 386, 1 L. ed. 648, per Irdell, J.

[18] Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co., 116 Ind. 578, 19 N. E. 440.

[19] Viemeister v. White, 84 N. Y. Supp. 712, 88 App. Div. 44.

[20] Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. ed. 969.

[21] State v. Rat Portage Lumber Co. (Minn., 1908), 115 N. W. 162.

[22] Home Building & Loan Assoc. v. Nolan, 21 Mont. 205, 53 Pac. 738.

Where the argument of impossibility of applying a law to a particular matter amounts to no more than that it would result in an inconvenience which may readily be avoided, and the intention of the legislature is reasonably clear under the statute, such argument is rather a matter for the legislative body than for the court. Ellis v. United States, 206 U. S. 246, 266, 267, per Moody, J., dissenting.

[23] Bird v. United States, 187 U. S. 118, 47 L. ed. 100, 23 Sup. Ct. 42.

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subject to the general control of Congress.[24] And in testing the constitutionality of an act of Congress the court will confine itself to the power of Congress to pass the act and may not consider any real or imaginary evils arising from its execution;[25] nor will additions be made by construction to prevent apparent hardships;[26] and although the state of the statute law may operate injuriously at times the situation cannot be changed by the courts, but only by legislation.[27] Again, the court will not limit the power of the State by declaring that because the judgment exercised by the legislature is unwise it amounts to a denial of the equal protection of the laws or deprivation of property or liberty without due process of law.[28]

§ 262. **Contemporaneous Construction—Extraneous Matters—History—Debates, etc.**—The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine the proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it.[29] Not only will the lawmaking body be presumed to know that which is commonly known

[24] Ellis v. United States, 206 U. S. 246, 51 L. ed. —, 27 Sup. Ct. —.

[25] Employers' Liability Cases, 207 U. S. 463.

Consequences should not be considered. State, Harris, v. Scarboro, 110 N. C. 232, 14 S. E. 737.

That a failure of corporations to make annual reports is made by statute is made evidence of non-user when otherwise it would have been inadmissible evidence, does not invalidate the enactment. People v. Rose, 207 Ill. 352, 69 N. E. 762.

[26] Cheyenne County v. Bent County, 15 Colo. 320, 25 Pac. 508.

[27] Caledonia Coal Co. v. Baker, 196 U. S. 432, 49 L. ed. 540, 25 Sup. Ct. 375.

[28] Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 338.

[29] Hamilton v. Rathbone, 175 U. S. 414, 419, 421, 44 L. ed. 219, 20 Sup. Ct. 155; Ruggles v. Illinois, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. 832; Platt v. Union Pac. R. Co., 99 U. S. 48, 25 L. ed. 424. See Siemens v. Sellers, 123 U. S. 276, 8 Sup. Ct. 117, 31 L. ed. 153.

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among men, but it will be presumed to have investigated and advised itself respecting the conditions made by it the subject of legislative enactment.[30] It is also a familiar rule of interpretation that in the case of a doubtful or ambiguous law the contemporaneous construction of those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, or unless it is clear that such construction is erroneous.[31] The doctrine of contemporaneous legislative construction will also be considered in cases of doubt.[32] And acquiescence by the people or governmental departments for a long period of time ought to settle the con-

[30] Eckerson v. City of Des Moines (Iowa, 1908), 115 N. W. 177, 187, per Bishop, J.

[31] **United States:** United States v. Finnell, 185 U. S. 236, 46 L. ed. 890, 22 Sup. Ct. 633; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. 699, aff'g 14 Sawy. 584, 595, 43 Fed. 196, 339; Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. ed. 1083; Meritt v. Cameron, 137 U. S. 42, 11 Sup. Ct. 174, 34 L. ed. 772; United States v. Johnston, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. 446; Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. 648; United States v. Pugh, 99 U. S. 265, 25 L. ed. 322; Smythe v. Fiske, 23 Wall. (90 U. S.) 374, 23 L. ed. 47; Northern Pac. R. Co. v. Sanders, 47 Fed. 604, aff'd 49 Fed. 129, 7 U. S. App. 47, 1 C. C. A. 192.

Arizona: See Copper Queen Consol. Min. Co. v. Board of Equalization (Ariz., 1906), 84 Pac. 511.

District of Columbia: United States v. Bliss, 12 App. D. C. 485, 26 Wash. L. Rep. 293.

Illinois: People, Neil, v. Knopf, 171 Ill. 191, 49 N. E. 424.

Kentucky: Harrison v. Commonwealth, 83 Ky. 162.

Minnesota: O'Connor v. Gertgens, 85 Minn. 481, 89 N. W. 866.

New York: People v. City of Buffalo, 84 N. Y. Supp. 434.

Washington: Mississippi Valley Trust Co. v. Hofins, 20 Wash. 272, 55 Pac. 54.

West Virginia: State v. Davis (W. Va., 1908), 60 S. E. 584.

Contemporaneous construction is a rule of interpretation, but it is not an absolute one and does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the government, however long continued by successive officers, must yield to the positive language of the statute. Houghton v. Payne, 194 U. S. 88, 48 L. ed. 888, 24 Sup. Ct. 590.

[32] **California:** Burgoyne v. Supervisors, 5 Cal. 23.

Kentucky: Collins v. Henderson, 11 Bush (74 Ky.), 74.

Nevada: State v. Parkinson, 5 Nev. 17.

Pennsylvania: Commonwealth v. Paine, 207 Pa. 45, 56 Atl. 317.

Wisconsin: Travelers' Ins. Co. v.

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stitutionality of an act.[33] But a construction by the legislative or executive departments will not be followed where it would override the obviously plain meaning of the enactment.[34] The history of the statute or of the times may be considered, if necessary,[35] but debates in Congress are not appropriate sources of information from which to discover the meaning of a congressional enactment,[36] although resort has been had to journals [37] and reports of committees in charge.[38] A legislative exposition of a doubtful law, is the exercise of a judicial power, and if it interferes with no vested rights, impairs the obligation of no contract, and is not in conflict with the primary principles of our social compact, it is in itself harmless, and may be admitted to retroactive efficiency; but if rights have grown up under a law of somewhat ambiguous meaning, then it cannot interfere with them. The construction of the law belongs to the courts.[39] When the executive department charged with the execution of a statute gives a construction

Fricke, 94 Wis. 258, 68 N. W. 958.

[33] People, Neil, v. Knopf, 171 Ill. 191, 49 N. E. 424; Wallace v. Board of Equalization (Oreg., 1906), 86 Pac. 365. See Warren v. Board of Registration, 72 Mich. 398, 2 L. R. A. 203, 40 N. W. 553.

[34] State, Pearson, v. Cornell, 54 Neb. 647, 75 N. W. 25. See Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. 770.

[35] **United States:** District of Columbia v. Washington Market Co., 108 U. S. 243, 27 L. ed. 714, 2 Sup. Ct. —; United States v. Union Pac. Rd. Co., 91 U. S. 72, 23 L. ed. 224; Aldridge v. Williams, 3 How. (44 U. S.) 9, 11 L. ed. 469; United States v. Colorado & N. W. R. Co., 157 Fed. 321.

Georgia: Western & A. R. Co. v. State (Ga.), 14 L. R. A. 438.

Missouri: Helton, Ex parte, 117 Mo. App. 609, 93 S. W. 913; Grimes v. Reynolds, 94 Mo. App. 578, 68 S. W. 588.

Ohio: Slinguff v. Weaver, 66 Ohio St. 621, 64 N. E. 574.

Washington: Scouten v. City of Whatcom, 33 Wash. 273, 74 Pac. 389.

Wisconsin: Brown v. Phillips, 71 Wis. 239, 36 N. W. 242.

[36] United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540 (a case of railroads and contracts in restraint of trade). See Aldridge v. Williams, 3 How. (44 U. S.) 9, 11 L. ed. 469; United States v. Oregon & C. R. Co., 57 Fed. 426.

[37] Blake v. National Banks, 23 Wall. (90 U. S.) 307, 32 L. ed. 119.

[38] United States v. Colorado & N. W. R. Co., 157 Fed. 321.

[39] McLeod v. Burroughs, 9 Ga. 213. See also Spokane Fall & Northern Ry. Co. v. Stevens (Wash., 1908), 93 Pac. 927; Northern Ry. Co. v.

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to it, and acts upon that construction for a series of years, the court looks with disfavor upon a change whereby parties who have contracted with the government on the faith of the old construction may be injured; especially when it is attempted to make the change retroactive, and to require from the contractor repayment of moneys paid to him under the former construction.[40] A construction placed by the Attorney General upon a prohibitory statute as to trusts and combinations, giving it an extraterritorial effect, will not be adopted merely because thereafter the legislature rejected a proposed amendment limiting the operation to combinations within the State.[41]

§ 263. Policy of Government, of Legislative Body or of Law—Public Policy—General Principles of Law.—What is termed the policy of the government with reference to any particular legislation is too unstable a ground upon which to rest the judgment of the court in the interpretation of statutes.[42] And where legislative grants of land for railroad aid are made and the statute is free from all ambiguity, the letter of it is not to be disregarded in favor of a presumption as to the policy of the government.[43] Nor will the policy of legislation be considered, as the question is one of the legislative power to enact.[44] But it is held that some weight may be given to general considerations of public policy supposed to have influenced the legislature where the meaning is uncertain from the language used.[45] And when the language of a statute is plain and unambiguous, a refusal to recognize its natural and obvious meaning may be justly regarded as indicating a purpose to change the law by judicial action, based upon some supposed policy

Snohomish County (Wash., 1908), 93 Pac. 924.

[40] United States v. Alabama Great Southern R. Co., 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. 306.

[41] State v. Lancashire F. Ins. Co., 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348, 28 Ins. L. J. 605

[42] Hadden v. Collector, 5 Wall. (72 U. S.) 107, 18 L. ed. 518.

[43] St. Paul, M. & M. Ry. Co. v. Phelps, 137 U. S. 528, 11 Sup. Ct. 168, 34 L. ed. 767.

[44] Eckerson v. City of Des Moines (Iowa, 1908), 115 N. W. 177.

[45] Glass v. Cedar Rapids, 68 Iowa, 207.

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of Congress.[46] Again, an intention to surrender the right to demand the carriage of mails over subsidized railroads at reasonable rates, assumed in construing a statute of the United States, is opposed to the established policy of Congress.[47] Courts will not impute to the legislature an intention to obstruct or impede the operation of constitutional provisions or to innovate upon the settled policy of the law.[48] And a construction should be given so as to be in harmony rather than in conflict with the general principles of law where the meaning of the statute is doubtful.[49]

§ 264. **Remedial Statutes.**—Remedial statutes should be liberally construed so as to effectuate the purpose intended, advance the remedy and prevent the mischief or evil,[50] and the precise words of a remedial statute will be extended to effect the purpose clearly manifested.[51] So a statute is a remedial one which provided for a state board of transportation with certain powers as to inspection and superintending railroads, and it should not be strictly construed.[52]

[46] Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. 508.

[47] Wisconsin Cent. R. Co. v. United States, 164 U. S. 190, 17 Sup. Ct. 45, 41 L. ed. 399.

[48] Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484.

[49] Building & Loan Assoc. v. Sohn, 54 W. Va. 101, 46 S. E. 222.

[50] **Illinois**: Harrison v. National Bank, 108 Ill. App. 493, case aff'd 207 Ill. 630, 69 N. E. 871.

Indiana: Connecticut Mut. Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N. E. 586.

Missouri: Easley v. Bone, 39 Mo. App. 388.

Nebraska: Williams v. Miles, 62 Neb 566, 87 N. W. 315; McIntosh v. Johnson, 51 Neb. 33, 70 N. W. 522.

New Jersey: Camden & A. R. Transp. Co. v. Briggs, 22 N. J. L. 623.

North Carolina: Morris v. Staton, 44 N. C. 464.

Oregon: Tucker v. Constable, 16 Oreg. 407, 19 Pac. 13.

West Virginia: Janesville Hay Tool Co. v. Boyd, 35 W. Va. 240, 13 S. E. 381.

Wisconsin: Kendall v. Hynes Lumber Co., 96 Wis. 659, 71 N. W. 1039.

See Rawson v. State, 19 Conn. 292; Trandt v. Hagerman, 27 Ind. App. 150, 60 N. E. 1011; Carey v. Giles, 9 Ga. 253.

[51] Gray v. Cumberland County Commrs., 83 Me. 429, 22 Atl. 376.

[52] State, Transportation Board, v. Fremont E. & M. V. R. Co., 22 Neb. 313, 35 N. W. 118.

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§ 265. **Statutes in Pari Materia.**—Statutes are in *pari materia* which relate to the same thing or general subject-matter whether passed by the same legislature, or about the same time, or whenever passed, and even though they do not refer to each other, are to be construed together as one system in order to determine the legislative purpose and arrive at the true intent.[53] If a thing contained in a subsequent statute be

[53] **United States:** Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137 (a case of state right to control foreign corporations; what is and is not doing business in State; interstate commerce); Ryan v. Carter, 93 U. S. 78, 84, 23 L. ed. 807; Harrington v. United States, 11 Wall. (78 U. S.) 356, 365, 20 L. ed. 167; United States v. Babbit, 1 Black (66 U. S.), 55, 60, 17 L. ed. 94; United States v. Walker, 22 How. (63 U. S.) 299, 312, 16 L. ed. —; Converse v. United States, 21 How. (62 U. S.) 463, 467, 16 L. ed. —; United States v. Freeman, 3 How. (44 U. S.) 556, 11 L. ed. 724; Patterson v. Winn, 11 Wheat. (24 U. S.) 380, 385, 386, 6 L. ed. 500; United States v. Trans-Missouri Freight Assoc., 58 Fed. 58, 67, 19 U. S. App. 36, 24 L. R. A. 73 (interstate commerce; monopolies; "pooling contracts" between competing corporations, see same case, 166 U. S. 290; United States v. Benson, 31 Fed. 896.

Alabama: State v. Sloss, 83 Ala. 93, 3 So. 745 (a case of taxation of gross receipts of business of corporation).

Colorado: People v. Raymond, 18 Colo. 242, 248, 19 L. R. A. 649, 32 Pac. 429.

District of Columbia: United States, Koechlin, v. Marble, 2 Mackey (D. C.), 12.

Florida: Ferrari v. Escambia County 24 Fla. 390, 5 So. 1; O'Donovan, Ex parte, 24 Fla. 281, 4 So. 789.

Illinois: Chudnovski v. Eckels, 232 Ill. 312, 83 N. E. 846; Hunt v. Chicago Horse & Dummy Co., 121 Ill. 638, 644, 13 N. E. 176 (right of street railway company to use city streets); Meyer v. Hazelwood, 116 Ill. 319, 323, 6 N. E. 480.

Indiana: Noerr v. Schmidt, 151 Ind. 579, 583, 51 N. E. 332; Conn v. Cass County Commrs., 151 Ind. 517, 51 N. E. 1062; State, Michener, v. Harrison, 116 Ind. 300, 19 N. E. 146.

Iowa: Eckerson v. City of Des Moines (Iowa, 1908), 115 N. W. 177.

Kansas: Hall, In re, 38 Kan. 670, 17 Pac. 649.

Louisiana: Richardson v. Richardson, 38 La. Ann. 641.

Maine: French v. Cowan, 79 Me. 426, 10 Atl. 335; Merrill v. Crossman, 68 Me. 412.

Michigan: Simpkins v. Ward, 45 Mich. 559, 8 N. W. 507.

Missouri: State, Brown, v. Klein, 116 Mo. 259, 22 S. W. 693; Stump v. Hornback, 94 Mo. 26, 6 S. W. 326; Gibbins v. Brittenum, 56 Mo. 251; Grimes v. Reynolds, 94 Mo. App. 578, 68 S. W. 588.

Nebraska: State v. Royse, 71 Neb. 1, 3, 97 N. W. 473, 98 N. W. 459; State, Berry, v. Babcock, 21 Neb. 599.

Nevada: State, Hallock, v. Donnelly, 20 Nev. 214, 19 Pac. 680.

New Jersey: Gartner v. Cohen, 51 N. J. L. 125, 16 Atl. 684.

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within the reason of a former statute, it shall be taken to be within the meaning of that statute. And if it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.[54] So a chapter of a certain enactment extending the power, jurisdiction and control of a court of visitation over telegraph companies and telegraphic service within a State will be held in *pari materia* with another chapter of the statutes passed the same year creating a court of visitation and attempting to extend its power, jurisdiction and control over the railways of the State, and it must be construed in connection with that statute the same as though both chapters constituted one enactment.[55]

New York: Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 179, 22 N. E. 381, 26 N. Y. St. R. 364, 5 L. R. A. 546; Kilbourne v. Supervisor of Sullivan F. St. R., 62 Hun (N. Y), 210, 217, 41 N. E. 838, aff'g 137 N. Y. 170, 50 N. Y. St. R. 376, 33 N. E. 159.

North Carolina: Wortham v. Basket, 99 N. C. 70, 5 S. E. 401.

Ohio: State, Attorney General, v. Cincinnati Central R. Co., 37 Ohio St. 157, 170.

Pennsylvania: White v. Meadville, 177 Pa. 643, 34 L. R. A. 567, 27 Pitts. L. J. (N. S.) 97, 39 N. F. 102, 35 Atl. 695.

Tennessee: Graham v. Dunn, 3 Pick. (87 Tenn.) 458, 462.

Texas: Garrison v. Richards (Tex. Civ. App., 1908), 107 S. W. 861.

Statutes are in *pari materia* which, whenever passed, relate to the same thing or general subject-matter, and are to be construed together. State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.

Laws enacted by the same legislature about the same time and concerning the same subject-matter, being in *pari materia*, are to be taken and considered together to determine the legislative purpose and arrive at the true intent. Western Union Teleg. Co. v. Austin, 67 Kan. 208, 212, 72 Pac. 850.

Laws passed at the same session of the legislature and relating to the same subject are in *pari materia* and are to be construed together as one. Blackwell v. First National Bank, 10 N. M. 555, 63 Pac. 43. See also Garrison v. Richardson (Tex. Civ. App., 1908), 107 S. W. 861.

Other statutes are to be considered even though not in force where meaning doubtful. State, Michener, v. Harrison, 116 Ind. 300, 19 N. E. 146; Stedman v. Merchants' & P. Bank, 69 Tex. 50, 6 S. W. 675.

Antecedent and subsequent legislation to be considered. Gray v. Cumberland County Commissioners, 83 Me. 429, 22 Atl. 370.

[54] United States v. Freeman, 3 How. (44 U. S.) 556, 11 L. ed. 724.

[55] Western Union Teleg. Co. v. Austin, 67 Kan. 208, 212, 72 Pac. 850.

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§ 266. Statutes in Pari Materia Continued.—The whole system of which a statute forms a part should be considered and construed as one system and be read in *pari materia*.[56] So a clause in controversy may be construed in connection with previous acts upon the same subject, with other provisions of the same act and with a provisions of a statute upon which the subject-matter is dependent for its enforcement and with which as a system the statute in question forms a part.[57] And where by the constitution of a State the subjects of land titles and taxation are, to some extent, united in one scheme or plan, all statutes relating to either and affecting the subject-matter of the provisions of the article of the constitution in which they are set forth must be construed and interpreted in the light thereof and made to harmonize with and conform to said constitutional plan.[58] The same principle has been applied in a Federal case where a statute and a clause of the constitution of a State imposing certain conditions upon foreign corporations as prerequisites to their transacting business there were construed together as relating to the same subject-matter.[59]

§ 267. Statutes in Pari Materia Continued—Exception to or Qualification of Rule.—The rule in *pari materia*, that the similar terms of like statutes should receive like interpretations, does not apply where the provisions of the statute relative to the question in controversy are plain and explicit, as the rule is applicable only in case of ambiguity or doubt and because the objects intended to be accomplished, the evils to be remedied, and the provisions necessary to attain them, are radically different. It is decided, therefore, that the rule in *pari materia* is inapplicable to the Interstate Commerce Act and the Safety Appliance Act where the provisions of the latter are plain and explicit in relation to the question before the court.[60]

[56] Brace v. Solner, 1 Alaska, 361.

[57] Wabash, St. Louis & Pacific Ry. Co. v. Binhert, 106 Ill. 298, 306.

[58] Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484.

[59] Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. 739.

[60] United States v. Colorado & Northwestern Rd. Co. (C. C. A.), 157

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In the case in which this decision was rendered the court, per Sanborn, Cir. J., said: "It is true that each act was a regulation of interstate commerce, but so are the Sherman Anti-Trust Act, the Employers' Liability Act, the various acts relating to the inspection of steamboats, and the navigation of the inland rivers, lakes and bays, and many other acts, too numerous to mention or review. It does not follow from the facts that the Interstate Commerce Act was first passed, and that it regulates commerce among the States, and declares that its provisions shall apply to the members of a certain class of carriers engaged therein, that the Sherman Anti-Trust Act, the Safety Appliance Acts, and other subsequent acts regulating commerce apply to the members of that class only, in the face of the positive declarations of the later acts that they shall govern other parties and other branches of commerce. The subject of the first act was the contracts, the rates of transportation of articles of interstate commerce; the subject of the Safety Appliance Acts was the construction of the vehicles, the cars and engines which carry that commerce. The evils the former was passed to remedy were discrimination and favoritism in contracts and rates of carriage; the evils the latter was enacted to diminish were injuries to employees of carriers by the use of dangerous cars and engines. The remedy for the mischiefs which induced the passage of the former act was equality of contracts and rates of transportation; the remedy for the evils at which the latter act was leveled was the equipment of cars and engines with automatic couplers. Neither in their subjects, in the mischiefs they were enacted to remove, in the remedies required, nor in the remedies provided, do these acts relate to similar matters, and the rule that the words or terms of acts in *pari materia* should have similar interpretations ought not to govern their construction." [61]

§ 268. Words or Provisions of Prior Statute Adopted in

Fed. 321, 330, citing Endlich on Interp. of Stat. § 53, p. 67.

[61] United States v. Colorado & Northwestern Rd. Co. (C. C. A.), 157 Fed. 321, 330.

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Later Act.—Words in a subsequent act are presumed to be used in the same sense as in a prior act under which they have acquired, through judicial interpretation, a definite meaning, unless a contrary intent appears.[62] So the construction of a subsequent statute will follow that of a previous one from which it is derived where the same words are employed in the same connection.[63] And where the Federal Supreme Court has given a construction to relative provisions in different parts of a statute, and Congress then makes a new enactment respecting the same subject-matter, with provisions in different sections bearing like relations to each other, and without indicating a purpose to vary from that construction, the court is bound to construe the two provisions in the different sections of the new statute in the same sense which, in previous statutes, had uniformly been given to them, and not invent a new application and relation of the two classes.[64]

§ 269. **Derivative Statutes—Construction of Statutes Adopted from Foreign State or Country.**—The known adjudged construction of a statute by the highest court of a foreign State or country where it was enacted is generally to be given to it when such enactment is thereafter adopted by another State or country, unless such interpretation is contrary to the spirit and policy of the adopting State, or country, or unless circumstances are so different as to necessitate a different rule.[65] So if Congress adopts a state statute it adopts

[62] The Abbotsford, 98 U. S. 440, 25 L. ed. 168.

[63] Guggenheim Smelting Co., In re, 121 Fed. 153; Cooper v. Yoakum, 91 Tex. 391, 43 S. W. 871 (words of later statute adopted from earlier one, adopts construction); Sanders v. Bridges, 67 Tex. 93, 2 S. W. 663 (statute adopting language of prior enactment adopts its construction by highest tribunal.

Prior acts may be cited to solve but not to create an ambiguity. Hamilton v. Rathbone, 175 U. S. 414, 20 Sup. Ct. 155, 44 L. ed. 219, case reverses 9 App. D. C. 48.

[64] Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. 507.

[65] **United States:** James v. Appel, 192 U. S. 129, 24 Sup. Ct. 224, 48 L. ed. 328 (a statute copied from a similar statute of a foreign State or country is generally presumed to be adopted with the construction which it already has received); Henrietta

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its construction.[66] But the rule that the known and settled construction of the statute of one State will be regarded as

Mining & Milling Co. v. Gardner, 173 U. S. 123, 43 L. ed. 637, 19 Sup. Ct. 327; Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 Fed. 232; Coulter v. Stafford (C. C.), 48 Fed. 266.

Arizona: Costello v. Muheim (Ariz., 1906), 84 Pac. 906. Compare Copper Queen Consol. Mining Co. v. Territorial Board of Equalization (Ariz., 1906), 84 Pac. 511.

Arkansas: McNutt v. McNutt (Ark., 1906), 95 S. W. 778.

Florida: Atlantic Coast Line Rd. Co. v. Beazley (Fla., 1908), 45 So. 761 (unless contrary to the spirit and policy of the laws of the adopting State; a case of liability of railroad company; fellow servant).

Colorado: Chilcott v. Hartm, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41; Omaha & G. Smelting & Refining Co. v. Tabor, 13 Colo. 41, 5 L. R. A. 226, 21 Pac. 925, 2 Denver Leg. N. 281.

Connecticut: See West Hartford v. Hartford Water Commrs., 68 Conn. 323, 36 Atl. 786.

Dakota: White v. Chicago, M. & St. Paul R. Co., 5 Dak. 508, 41 N. W. 730.

District of Columbia: Strasburger v. Dodge, 12 App. D. C. 37, 26 Wash. L. Rep. 8 (adopted without material change, carries construction).

Idaho: Stein v. Morrison, 9 Idaho, 426, 75 Pac. 246.

Indiana: Laporte, City of, v. Gamewell Fire Alarm Teleg. Co., 146 Ind. 466, 469, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359 (contract for fire alarm system made with the company by a city; limitation of indebtedness of municipality).

Kansas: Missouri Pac. Ry. Co. v. Haley, 25 Kan. 35, 53 (Comp. Laws, 1879, chap. 84, § 29, adopted from another State, making railroad companies liable for damages to employee by negligence of its agents, etc.). Compare State v. Campbell (Kansas, 1906), 85 Pac. 784.

Massachusetts: Ryalls v. Mechanics Mills, 150 Mass. 190, 191–193, 5 L. R. A. 667, 22 N. E. 766 (Employers' Liability Act, Stat. 1887, c. 270, copied verbatim with same variations of detail from the English Stat., 43 & 44 Vict., c. 42); Pratt v. American Bell Teleph. Co., 141 Mass. 225, 227, 5 N. E. 307, 55 Am. St. Rep. 465 (Stock Jobbing Act, Pub. Stat., c. 78, § 6).

Minnesota: Nicolet National Bank v. City Bank, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577.

Missouri: Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 35 Cent. L. J. 305, 46 Alb. L. Jour. 204, aff'g 17 S. W. 76 (statutes from other States construed in subordination to their constitution and laws).

Montana: Oleson v. Wilson, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639; First National Bank v. Bell Silver & Copper Mining Co., 8 Mont. 32, 19 Pac. 403. Compare Ancient Order of Hibernians v. Sparrow, 29 Mont. 132, 74 Pac. 197, 64 L. R. A. 128.

Nebraska: Forester v. Kearney National Bank, 49 Neb. 655, 68 N. W. 1059.

[66] Willis v. Eastern Trust & Banking Co., 169 U. S. 295, 18 Sup. Ct. 347, 42 L. ed. 752, 26 Wash. L. Rep. 166.

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accompanying its adoption by another is not applicable where that construction had not been announced when the statute was adopted; nor when the statute is changed in the adoption.[67] Nor is such construction absolutely binding where it is subsequently overruled in the State of original enactment.[68] And where a statute of one State has been substantially adopted in another and as enacted in the latter is adopted in still another State and the second adopting State had declined to follow the construction of the State of its original enactment, and a case arose in the third adopting State, the court was held at liberty to follow its own judgment in the interpretation of the statute and was not obliged to follow the construction given such enactment by the second adopting State.[69] Again, subsequent additions and modifications of adopted statutes are not adopted where there is not an expressed or strongly implied intent so to do.[70] Where English statutes have been

New Jersey: State, Anderson, v. Camden, 58 N. J. L. 515, 33 Atl. 846.

North Carolina: Bridgers v. Taylor, 102 N. C. 86, 8 S. E. 893, 3 L. R. A. 376.

Oklahoma: National Live Stock Commission Co. v. Taliaferro (Okla., 1908), 93 Pac. 983.

South Dakota: Yankton Sav. Bank v. Gutterson, 15 S. Dak. 486, 90 N. W. 144; Adams v. Grand Island & W. C. R. Co., 10 S. Dak. 239, 72 N. W. 577.

Tennessee: Compare Smith v. Dayton Coal & Iron Co., 115 Tenn. 543.

Utah: State v. Mortensen, 26 Utah, 312, 73 Pac. 562, 633; Dixon v. Ricketts, 26 Utah, 215, 72 Pac. 947; People v. Ritchie, 12 Utah, 180, 42 Pac. 209.

Wisconsin: State, Rogers, v. Wheeler, 97 Wis. 96, 72 N. W. 225; Milwaukee County v. Sheboygan, 94 Wis. 58, 68 N. W. 387; Pomeroy v. Pomeroy, 93 Wis. 262, 67 N. W. 430.

Such construction must have been by highest court and so long established as to raise presumption that legislature adopting it knew of such construction. Smith v. Baker, 5 Okla. 326, 49 Pac. 61.

[67] Stutsman County v. Wallace, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. 227 (taxation; sales for taxes; railroads; lands).

Statute adopted from another State; rule as to adoption of construction and presumption that legislature had such construction in mind does not apply to decisions rendered after such adoption. Olin v. Denver & Rio Grande R. Co., 25 Colo. 177, 53 Pac. 454, 30 Chic. Leg. N. 427, 10 Am. & Eng. R. Cas. (N. S.) 708.

[68] Oleson v. Wilson, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639.

[69] Coulam v. Doull, 133 U. S. 216, 33 L. ed. 596, 10 Sup. Ct. 253.

[70] Postal Teleg. Cable Co. v. Southern R. Co. (C. C.), 89 Fed. 190; Andrews v. People, 173 Ill. 123, 50

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adopted into our own legislation, the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority.[71] When a British statute is adopted by Congress by reference, such adoption always refers to the law existing at the time of adoption only and no subsequent British legislation affects it.[72]

§ 270. **Re-enactment — Consolidation — Revised Statutes —Codes.**—Where the language of a statute which has received a construction by the highest court is adopted by reenactment, or by a revision or consolidation of statutes or codes, it carries with it the construction given it before such adoption, unless it is clearly manifest that the legislature intended that it should, as adopted, receive a different interpretation.[73] The presumption is, in such case, that the legisla-

N. E. 335; Court of Insolvency v. Meldon, 69 Vt. 110, 38 Atl. 167.

[71] McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. 142.

The rule uniformly observed by the Federal Supreme Court, in construing statutes is to adopt the construction made by the courts of the country, by whose legislature the statute was enacted. This rule may be susceptible of some modification when applied to British statutes which are adopted in any of the States; by adopting them they become our own, as entirely as if they had been enacted by the legislature of the State. Cathcart v. Robinson, 5 Pet. (30 U. S.) 264, 8 L. ed. 120. See Brown v. Walker, 161 U. S. 591, 600, 40 L. ed. 819, 16 Sup. Ct. 644, per Brown, J.

Statutes adopted from England; construction there will be of force. Jarvis v. Hitch, 161 Ind. 217, 67 N. E. 1057, citing numerous cases.

[72] Kendall v. United States, 12 Pet. (37 U. S.) 524, 9 L. ed. 1181.

The construction which British statutes had received in England, at the time of their adoption in this country, indeed, to the time of the separation of this country from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them; but however subsequent decisions may be respected, and they are entitled to great respect, their absolute authority is not admitted; if the English courts vary their construction of a statute which is common to both countries, the Federal Supreme Court asserts that it does not hold itself bound to fluctuate with them. Cathcart v. Robinson, 5 Pet. (30 U. S.) 264, 8 L. ed. 120.

[73] **United States:** Sessions v. Romadka, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. 799 (where the Revised Statutes adopt language of a previous statute, Congress must be considered as adopting that construction).

Alabama: Potter v. State, 92

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ture had in mind a known judicial construction.[74] And where the language of the revision is fairly consistent with that of a prior statute it will be presumed that the revisers have not changed the law.[75] If the United States Supreme Court has construed relative provisions in different parts of a statute and Congress then makes a new enactment on the same subject-matter, with provisions bearing like relations, they must be construed in the same way.[76] But an act included in a code by the codifier is not a part of such code when the latter was adopted before the passage of the act, and the enactment should be construed in the form in which it was enacted, independently of the code;[77] and a statute is not given greater efficacy by embodying it in a statutory revision.[78] If the meaning is plain the courts cannot look to the statutes codified in the Revised Statutes, and repealed with their enactment, to see if Congress erred in that revision, but may do so when necessary to interpret obscure and ambiguous phrases in the revision or to construe doubtful language used in expressing the meaning of Congress.[79] Again, upon a revision of statutes

Ala. 37, 9 So. 402; Snider v. Barks, 84 Ala. 53, 4 So. 225; Woolsey v. Cade, 54 Ala. 378, 25 Am. Rep. 711.

Indiana: Hilliker v. Citizens' St. Ry. Co., 152 Ind. 86, 52 N. E. 607.

Nebraska: State, Pearson, v. Cornell, 54 Neb. 647, 75 N. W. 25.

Texas: Hussey v. Moser, 70 Tex. 42, 7 S. W. 606.

Wisconsin: State, Rochester, v. Racine County, 70 Wis. 543, 36 N. W. 399.

[74] Woolsey v. Cade, 54 Ala. 378, 25 Am. Rep. 711. See White v. State, 134 Ala. 197, 32 So. 320; Camp v. Wabash R. Co., 94 Mo. App. 272, 68 S. W. 96.

[75] Duffield v. Pike, 71 Conn. 521, 42 Atl. 641; Bartram v. Hopkins, 71 Conn. 505, 42 Atl. 645.

[76] Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. 507.

[77] Rayford v. Faulk (Ala., 1908), 45 So. 714 (an act to regulate insurance business).

[78] Knight v. Ocean County, 49 N. J. L. 485, 12 Atl. 625.

[79] Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. ed. 601; Dwight v. Merritt, 140 U. S. 213, 11 Sup. Ct. 568, 35 L. ed. 450.

The Revised Statutes of the United States must be accepted as law on the subjects they embrace, as it existed December 1, 1873. When their meaning is plain the court cannot recur to the original statutes to see if errors were committed in revising them, but may do so when necessary to interpret or construe doubtful language. United States v. Bowen,

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a different meaning is not to be given to them without some substantial change of phraseology other than what may have been necessary to abbreviate the form of law.[80] But a change in the phraseology creates a presumption of change of intent of the legislative body from that expressed in the former statute.[81] And when the purpose of a prior law is continued, its words usually are so that an omission of the words implies an omission of the purpose;[82] that is, if the same subject-matter is covered by the Revised Statutes of a State, the failure to include the provisions of an earlier statute on the subject operates as a repeal thereof.[83] So a code revision, repealing all acts relating to the subject codified, repeals provisions omitted therefrom under corresponding sections.[84] A statute revising the whole subject-matter of a prior one impliedly repeals it.[85] So a statutory revision of the entire law as to the fire insurance business, including the right of foreign insurance corporations to transact business in the State, repeals prior statutes relating to foreign insurance companies doing business

100 U. S. 508, 25 L. ed. 631, followed in Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. 508 (which is cited in Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. ed. 219, 20 Sup. Ct. 155, which cites United States v. Lacher, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. ed. 1080; United States v. Averill, 130 U. S. 335, 32 L. ed. 977, 9 Sup. Ct. —; Cambria Iron Co. v. Ashburn, 118 U. S. 54, 6 Sup. Ct. 929, 30 L. ed. 60; Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. ed. 423), approved in Arthur v. Dodge, 101 U. S. 34, 29 L. ed. 948.

Original statutes examined in construing code, to give effect originally intended. Gunter v. State, 83 Ala. 96, 3 So. 600.

In case of compiled codes resort may be had to original for construction. Runnels v. State (Tex. Civ. App., 1903), 77 S. W. 458.

Where statutes are consolidated reference may be had to the interpretation of original acts so consolidated. Hooper v. Creager, 84 Md. 358, 36 Atl. 359, 35 L. R. A. 210, denying rehearing of 84 Md. 195, 35 Atl. 967, 1103, 35 L. R. A. 202. Compare Gaines v. Marye, 94 Va. 225, 26 S. E. 511.

[80] McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 269, 4 Sup. Ct. 142.

[81] Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. ed. 147.

[82] Price v. Chicago Title & Trust Co., 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. 906.

[83] National Bank v. Williams, 38 Fla. 305, 20 So. 931.

[84] Packett v. Ducktown Sulphur C. & I. Co., 97 Tenn. 690, 37 S. W. 698.

[85] Keese v. Denver, 10 Colo. 112, 15 Pac. 825.

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in the State.[86] Substantial provisions of an old statute enacted into a new one with slight modifications make the new statute to operate as a continuation of the old one with the added modifications.[87] But the re-enactment continues the statute in force and does not repeal and re-enact.[88]

§ 271. Construction by a State of Its Statutes—How Far Respected in Courts of Other States.—The interpretation of the statutes of a State by its highest judicial tribunal will ordinarily be followed by the courts of other States as an authoritative exposition of the construction of the statute, even though a different construction might have been given to the same language by the court which follows such interpretation. But it is held that the rule does not apply to questions under general or common law.[89]

[86] Continental Ins. Co. v. Riggen, 31 Oreg. 336, 48 Pac. 476, 26 Ins. L. J. 590.

[87] Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. ed. 327. See Matter of Prime, 136 N. Y. 347, 49 N. Y. St. R. 658, 32 N. E. 1091, aff'g 64 Hun, 50, 18 N. Y. Supp. 603, 45 N. Y. St. R. 832; McAvoy v. City of New York, 52 N. Y. App. Div. 485, 488; Marsh v. Kaye, 44 N. Y. App. Div. 68, 74; Roddy v. Brooklyn Heights R. Co., 23 Misc. 373; Taylor v. Empire State Sav. Bank, 66 Hun, 540; N. Y. Stat. Const. Law (L. 1892, chap. 677), § 32.

[88] State v. Kibling, 63 Vt. 636, 22 Atl. 613.

[89] **United States:** Bate Refrigerating Co. v. Gillett (C. C.), 20 Fed. 192.

Alabama: Bloodgood v. Grasey, 31 Ala. 575. Compare Nelson v. Goree, 34 Ala. 565.

Georgia: Clark v. Turner, 73 Ga. 1 (judgment court of State where corporation chartered, construing charter will be followed).

Illinois: Van Matre v. Sankey, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. 628, 23 L. R. A. 665 (will ordinarily be accepted although different construction might have been given to same language by court construing same).

Iowa: Franklin v. Twogood, 25 Iowa, 520, 96 Am. Dec. 73 (will be followed, but rule does not apply to questions under general or common law).

Kansas: Hamilton v. Hannibal & St. Joseph Rd. Co., 39 Kan. 56, 18 Pac. 57 (action for damages for person killed brought in Kansas under Missouri statute).

New Jersey: Watson v. Lane, 52 N. J. L. 550, 10 L. R. A. 784, 20 Atl. 894 (will be accepted as conclusive).

New York: Leonard v. Columbia Steam Navigation Co., 84 N. Y. 48, 38 Am. Rep. 491 (will be controlling; action by personal representative for death from injury received in another State).

North Carolina: Watson v. Orr, 14 N. C. 161.

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§ 272. Construction of State Constitutions and Statutes by State Courts—How Far Respected by Federal Courts.—It is a well-recognized general rule that the construction or interpretation by the highest court of a State of its own constitution and statutes are binding upon and will be followed by the Federal courts,[90] however much they may doubt the

Pennsylvania: Grant v. Henry Clay Coal Co., 80 Pa. 208; Merrimac Mining Co. v. Levy, 54 Pa. 227, 93 Am. Dec. 697 (charter of another State; rights and duties of stockholders thereunder).

Texas: Powell v. De Blane, 23 Tex. 66 (binding as to rights of property and of action depending on these laws).

Vermont: Blaine v. Curtis, 59 Vt. 120, 59 Am. Rep. 702, 7 Atl. 708.

Washington: Whitman v. Mast, Buford & Burwell Co., 11 Wash. 318, 39 Pac. 649, 48 Am. St. Rep. 874 (assignment, and effect on property elsewhere).

West Virginia: Mimick v. Ming Iron Works Co., 25 W. Va. 184 (liability of stockholders).

[90] Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. 301 (following Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. ed. 1081); West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. 650; Carstairs v. Cochran, 193 U. S. 10, 24 Sup. Ct. 318, 48 L. ed. 596; American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. ed. 538; People's National Bk. v. Marye, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. 68; Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. 449; Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. ed. 204; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. 95; Covington v. Kentucky, 173 U. S. 231, 19 Sup. Ct. 383, 43 L. ed. 679; Backus v. Fort St. Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. 445; Stutsman County v. Wallace, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. 227; Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. ed. 178; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Nesmith v. Sheldon, 7 How. (48 U. S.) 812, 12 L. ed. 925.

If the state statute as construed by its highest court is valid under the Federal Constitution, the Federal Supreme Court is bound by that construction. New York Central & Hudson River Rd. Co. v. Miller, 202 U. S. 584, 50 L. ed. —, 26 Sup. Ct. —; Minnesota Iron Co. v. Kline, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. ed. 322.

In a matter of local and non-Federal concern where no Federal question is involved the Federal Supreme Court adopts and follows the construction uniformly given to the constitution and laws of a State by its highest court. Board of Liquidation of New Orleans v. Louisiana, 179 U. S. 622, 45 L. ed. 347, 21 Sup. Ct. —; Fairfield v. County of Gallatin, 100 U. S. 47, 25 L. ed. 544.

State court construction conclusive in a case not involving any question re-examinable in the Federal Supreme Court under the twenty-fifth section of the Judiciary Act. Provident Institution v. Massachusetts, 6

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soundness of the interpretation,[91] and even though the state Supreme Court may have determined the meaning and scope of the statute by pursuing a rule of construction different from that recognized by the Federal court.[92] The words of Chief Justice Marshall are pertinent, they are as follows: "This court has uniformly professed its disposition, in cases depending upon the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misundertanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given

Wall. (73 U. S.) 611, 18 L. ed. 907.

Federal Supreme Court bound by decision of highest state court that a state statute does not violate any provision of the state constitution and is valid so far as that instrument is concerned. Jack v. Kansas, 199 U. S. 372, 50 L. ed. 234, 26 Sup. Ct. 73; People's National Bank v. Marye, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. ed. 180; Carstairs v. Cochran, 193 U. S. 10, 24 Sup. Ct. 318, 48 L. ed. 596.

"As a general rule, to which there are rare exceptions, the United States courts will, in the construction of state statutes or constitutions, follow the decisions of the highest courts of the State, Leffingwell v. Warren, 2 Black (67 U. S.) 599, 17 L. ed. 261, and numerous other judgments so decided all concede this." Talcott v. Township of Pine Grove, 1 Flipp. (U. S. C. C.) 120, 123, Fed. Cas. No. 13,735, per Emmons, Cir. J., case aff'd Township of Pine Grove v. Talcott, 19 Wall. (86 U. S.) 666, 22 L. ed. 227. The decision in the Circuit Court in this case specifies when the decisions of the state court will not be followed and in the opinion cites a series of cases decided in twenty-six States.

[91] Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. 383.

[92] Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. 276.

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by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several States to the legislative acts of those States, is received as true, unless they come into conflict with the Constitution, laws or treaties of the United States." [93]

§ 273. Same Subject Continued.—A suggested construc-

[93] Elmendorf v. Taylor, 10 Wheat. (23 U. S.) 152, 159, 6 L. ed. 289, per Marshall, C. J., cited in Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 175 U. S. 91, 100, 44 L. ed. 84, 20 Sup. Ct. 33 (to point questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union—when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the State, as expressed in its own constitutions and statutes, or declared by its highest courts); quoted in Hilton v. Guyot, 159 U. S. 113, 194, 40 L. ed. 95, 16 Sup. Ct. 139; cited to same point in McArthur v. Scott, 113 U. S. 340, 391, 28 L. ed. 1015, 5 Sup. Ct. 652; cited and principle considered in Burgess v. Seligman, 107 U. S. 20, 32-34, 2 Sup. Ct. 10, 27 L. ed. 359 (but court said it did not consider itself bound to follow the decision of the state court in that case); cited in Fairfield v. County of Gallatin, 100 U. S. 47, 52, 25 L. ed. 544 (rule recognized but subject to "some exceptions"); cited in Gelpcke v. City of Dubuque, 1 Wall. (68 U. S.) 175, 210, 17 L. ed. 520, in dissenting opinion, per Miller, J. (principle well settled but applicability to that case considered); cited and explained in Luther v. Borden, 7 How. (48 U. S.) 1, 58, 12 L. ed. 581; cited in Foxcroft v. Mallett, 4 How. (45 U. S.) 353, 11 L. ed. 1008 (but held not applicable); cited in Beals v. Hale, 4 How. (45 U. S.) 37, 54, 11 L. ed. 865 (principle controlling, but judgment in this case not by highest state court); quoted in part and followed in Zeiger v. Pennsylvania R. Co., 158 Fed. 809, 811; quoted in part in Kessler v. Armstrong Cork Co., 158 Fed. 744, 753, per Noyes, Cir. J., in dissenting opinion; explained and followed, with qualifications, in same case, *Id.*, 750; quoted in part and followed in York v. Washburn, 129 Fed. 564, 567 ("it is a cardinal rule"); cited in Parker v. Moore, 115 Fed. 799, 802 (to point that contracts valid in State or country where made will be enforced in another State except where contrary to good morals, etc.); cited and followed in Thompson v. M'Connell, 107 Fed. 33, 36 (such decisions are binding); cited and followed in Louisville & Nashville Rd. Co. v. Lansford, 102 Fed. 62, 66 (binding on courts of United States, as a rule of decision); cited and followed in Williams v. Gold Hill Min. Co., 96 Fed. 454, 465.

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tion of a state statute which would lead to a manifest absurdity and which has not, and is not likely to receive judicial sanction, will not be accepted by the United States Supreme Court as the basis of declaring the statute unconstitutional when the courts of the State have given it a construction which is the only one consistent with its purposes and under which it is constitutional.[94] And in the case of an appeal from the judgment of the Supreme Court of a Territory, which was admitted as a State after the appeal was taken, a subsequent judgment of the highest court of the State upon the construction of a territorial law involved in the appeal is entitled to be followed by the Federal Supreme Court, in preference to its construction by the Supreme Court of the Territory.[95] While the Supreme Court of the United States does not take judicial notice of the decisions of the courts of one State in a case coming from the courts of another State, it may properly refer to the opinion of the highest court of a State as to the construction of a statute of that State, when such statute is involved in the case before the Federal court; and this applies to a decision rendered after the judgment appealed from was rendered.[96] If the courts of one State fully consider the statute of another State and the decisions of the courts of that State construing it, and the case turns upon the construction of the statute and not upon its validity, due faith and credit is not denied by one State to the statute of another State, and the manner in which the statute is construed is not necessarily a Federal question.[97] Again, although the state court may refer to and uphold a statute, the constitutionality of which is attacked, if it does so after stating the rule at common law and that the statute is merely declaratory thereof the judgment is based on the common-law rule and no Federal question exists that the

[94] Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. 372.

[95] Stutsman County v. Wallace, 142 U. S. 293.

[96] Eastern Bldg. & Loan Assn. v. Williamson, 189 U. S. 122, 47 L. ed. 735, 23 Sup. Ct. 527 (construction by the highest courts of two States of a statute of one of the States held to commend itself to the Federal court as a correct construction).

[97] Johnson v. New York Life Ins. Co., 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. 194.

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Federal court can review.[98] So the limit of interference by the Federal Supreme Court with the judgments of state courts is reached when it appears that no fundamental rights have been disregarded by the state tribunals.[99] And whether the proceedings in the enactment of a state statute conform with the state constitution is to be determined by the state court, and its judgment is final.[1]

§ 274. **Same Subject Continued—Exceptions to or Qualifications of Rule.**—The general rule that the construction or interpretation given by the highest state courts to state laws and constitutions is binding and conclusive on the Federal courts is not applicable where they conflict with or impair some principle of the Federal Constitution, or of a Federal statute, or a rule of commercial or general law, or the treaties of the United States.[2] Nor does the rule extend to cases in which the Federal Supreme Court is called on to interpret the contracts of States, though they have been made in the form of laws or by functionaries of the State in pursuance of state laws. Fidelity to the Constitution of the United States makes it necessary, that in such a matter that court should not follow the construction of a state court with whose opinion it cannot concur, and it makes no difference in the obligation whether the contract is in the shape of a law or a covenant by the State's agents.[3] So where the decisions of the highest court of a State show that it regarded the construction and application of a statute as open for review if another case arose, its prior determination of the questions does not necessarily

[98] Arkansas Southern Ry. Co. v. German National Bank, 207 U. S. 270, 271.

[99] Backus v. Fort St. Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. 445.

[1] Smith v. Jennings, 206 U. S. 276, 29 Sup. Ct. —, 51 L. ed. —. See also Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. ed. 642.

[2] Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. 1121; Elemendorf v. Taylor, 10 Wheat. (23 U. S.) 152, 159, 6 L. ed. 289.

[3] Jefferson Bank v. Skelly, 1 Black (66 U. S.), 436, 17 L. ed. 173 (franchise grants; construction; waiver of sovereignty; bank charters; tax exemption irrevocable; subsequent constitutional provision).

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have to be adopted and applied by the Federal courts in cases where the cause of action arose prior to any of the adjudications by the state court.[4] And where the law has not been definitely settled, it is the right and duty of the Federal courts to exercise their own judgments.[5]

§ 275. **Same Subject Continued—Instances—Incorporation Acts—Eminent Domain—Corporate Powers.**—Where the constitution of a State prohibits the legislature from "passing any act of incorporation unless with the assent of at least two-thirds of each house," the judgment of the legislature is required to be exercised upon the propriety of creating each particular corporation, and two-thirds of each house must sanction and approve each individual charter; and the Supreme Court of the State having so construed its constitution such construction will be adopted by the Federal Supreme Court.[6] And whether the statutes of a State authorize the incorporation of a bridge company to construct a bridge over a navigable river separating it from another State; whether such statutes confer the right of eminent domain on a corporation of another State, and whether such corporation can exercise therein powers other than those conferred by the State of its creation, are all questions of state law, involving no Federal questions, and the rulings of the highest court of the State are final and conclusive upon the Supreme Court of the United States.[7] So the Federal courts will follow the construction of the highest court of a State that its statute is constitutional; and there is nothing in the Fourteenth Amendment which prevents a State in carrying out its declared pub-

[4] Brunswick Terminal Co. v. National Bank of Baltimore, 192 U. S. 386, 48 L. ed. 491, 24 Sup. Ct. — (liability of stockholders; construction of statute; banks; transfer of stock).

[5] Stanley County v. Coler, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. ed. 1126 (counties; bonds in aid of railroads; validity).

[6] Nesmith v. Sheldon, 7 How. (48 U. S.) 812, 12 L. ed. 925. See Wilkes County v. Coler, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. 458.

[7] Stone v. Southern Illinois & Missouri Bridge Co., 206 U. S. 267, 27 Sup. Ct. —, 51 L. ed. —, aff'g 194 Mo. 175.

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lic policy from requiring individuals to make to each other, on due compensation, such concessions as the public welfare demands; and a state statute providing that eminent domain may be exercised for railways and other means to facilitate the working of mines is not unconstitutional.[8] And, generally, the settled rule of the Federal Supreme Court in cases for the determination of the amount of damages to be paid for private property condemned and taken for public use, is that it accepts the construction placed by the Supreme Court of the State upon its own constitution and statutes.[9] But the Federal Supreme Court has no jurisdiction under the twenty-fifth section of the Judiciary Act of 1789 whether or not a law of a State is in opposition to the constitution of that State. Therefore, where it is alleged that the constitution of a State declares that private property shall not be taken, and that the highest court of the State has sustained the validity of a law which violates this constitutional provision, that court has no power to review that decision.[10]

§ 276. **Same Subject — Instances Continued — Common Carriers — Railroads.** — When the highest court of a State holds that a statute fixing the liability of common carriers applies to shipments made to points without the State, the Federal Supreme Court must accept that construction of the statute.[11] So all questions arising under the constitution and laws of a State are foreclosed by the decisions of the state courts for the purposes of a cause concerning the duties of receivers of railroads, the right of a municipality to regulate the speed of railroad trains within its limits, and to make exceptions in relation thereto, even though such trains are interstate trains, in the absence of congressional action on

[8] Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. 301, following Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. ed. 1085.

[9] Backus v. Fort St. Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. 445.

[10] Withers v. Buckley, 20 How. (61 U. S.) 84, 15 L. ed. 816.

[11] Central of Georgia Ry. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. 218.

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the subject.[12] So a state statute,[13] providing that the liability of railroad companies for damages to employees shall not be diminished by reason of the accident occurring through the negligence of fellow servants, and excepting from its provisions damages sustained by employees engaged in construction of new and unopened railroads, does not, as interpreted by the highest court of the State enacting such law, discriminate against any class of railroads or deny to such class the equal protection of the laws; the exception merely marks the time when the statute takes effect. There is no objection under the Fourteenth Amendment to legislation confined to a peculiar and well-defined class of perils, and it is not necessary that they are shared by the public if they concern the body of citizens engaged in a particular work; and freedom of contract may be limited by a state statute where there are visible reasons of public policy for the limitation.[14] So the rule applies, and the United States Supreme Court must accept the meaning of state enactments to be that found in them by the state courts, and although the question of the validity of the constitution and laws of a State under which the proceedings were had is properly before the Federal court, still the consideration of that court must be restricted to its Federal aspect, as in the case of common carriers, and the regulation of rates where a railroad corporation voluntary formed but not protected by a valid contract, cannot successfully invoke the interposition of the Federal court in respect to long and short haul clauses in a state constitution, simply on the ground that the railroad is property.[15] But in case a railroad company has fulfilled certain conditions upon which a grant of unsettled public lands was agreed to be made, under a contract with a county, and has, therefore, become entitled to a conveyance of the lands, then, in so far as the state court may be regarded

[12] Erb v. Marsh, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. 819.

[13] Minn. G. S., 1894, § 2701.

[14] Minnesota Iron Co. v. Kline, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. ed. 322.

[15] Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. ed. 298.

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as having held to the contrary, the courts of the United States are not bound to follow its decision as applied to a corporation created by an act of Congress, for national purposes, and for interstate commerce.[16] And where the state court has sustained a result which cannot be reached except on what the Federal Supreme Court deems a wrong construction of the charter without relying on unconstitutional legislation, that court cannot decline jurisdiction on writ of error because the state court apparently relied more on the untenable construction than on the unconstitutional statute.[17] So the Federal Supreme Court has jurisdiction over a decision of a state court that a statute of the State, compelling the removal of grade crossings on a railroad, is constitutional, and a judgment in accordance therewith enforcing the provisions of the statute.[18] Again, under the exception, above noted, that where the law has not been definitely settled in a State it is the right and duty of Federal courts to exercise their own judgment, county bonds issued under state statutes and sections of its code which permit bonds to be issued to aid in the completion of any railroad in which citizens of the county have an interest, are valid notwithstanding the Supreme Court of the State had decided in another action that such bonds were invalid.[19] But in Fairfield v. County of Gallatin,[20] the court accepted as binding the decision of the Supreme Court of Illinois [21] and subsequent cases, construing a section of the constitution of that State,[22] which provided that "no county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make any donation to, or loan its credit in aid of,

[16] Roberts v. Northern Pacific R. Co., 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. 756.

[17] Terre Haute & Indianapolis R. Co. v. Ketcham, 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. 767 (a case of railroads; control and regulation by a State; new charter; operation and effect of).

[18] New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. 437.

[19] Stanley County v. Coler, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. ed. 1126.

[20] 100 U. S. 47, 25 L. ed. 544.

[21] Chicago & Iowa Rd. Co. v. Pinckney, 74 Ill. 277.

[22] In force July 2, 1870.

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such corporation: *Provided, however*, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption," and holding that such previous donations, if sanctioned by a popular vote, under pre-existing laws, were not forbidden, but were, in like manner as subscriptions, excepted by the proviso from the general prohibitory terms of the section.

§ 277. **Same Subject—Instances Continued—Revenue—Taxation.**—Whether a statute of a State is or is not a revenue measure and how rights thereunder are affected by a repealing statute depends upon the construction of the statutes, and where no Federal question exists the Federal Supreme Court will lean to an agreement with the state court.[23] Nor will that court interfere with the conclusion expressed by the highest court of a State that under the provision of the state constitution a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed; and the decision of the highest court of a State that a license tax imposed on certain corporations was exacted from a foreign corporation doing both interstate and domestic business only by virtue of the latter, will not be reviewed in the Federal Supreme Court.[24] Nor will that court review a judgment of the highest court of a State refusing to restrain the collection of a tax, the imposition of which is not authorized by any law of such State.[25] So the rule, that if the state statute as construed by its highest court is valid under the Federal Constitution the Federal courts are bound by that construction, has been applied in a case wherein the question of the taxation of cars under the New York franchise tax law, and the

[23] Flanigan v. Sierra County, 196 U. S. 553, 49 L. ed. 597, 25 Sup. Ct. 314.

[24] Armour Packing Co. v. Lacy, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. ed. 451.

[25] Savannah, T. & I. of H. Ry. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. 690.

[26] New York Central & Hudson River Rd. Co. v. Miller, 202 U. S. 584, 50 L. ed. —, 26 Sup. Ct. —.

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situs of personal property was passed upon.[26] And in the State Railroad Tax cases,[27] the Supreme Court of the United States adopted the decision of the Supreme Court of the State of Illinois which had construed her statute and had decided that the law complained of in those cases was valid under her constitution. So the decision of a state Supreme Court that a statute in respect to the taxation of national banks does not conflict with the constitution of such State is conclusive upon the Federal Supreme Court.[28] But where it appears from the agreed statement of facts in a case that, under the laws of a State, as construed by the highest court of such State, all the elements of value which are embraced in the assessment of shares of stock in national banks are not included in assessing the value of property of state banks and other moneyed corporations, there is discrimination against the shares of national banks, and the state law taxing such shares as so construed violates and is void under that provision of the Revised Statutes which authorizes the taxation by the States of shares of stock of national banks, but exacts that the tax when levied shall be at no greater rate than that imposed on other moneyed capital.[29]

§ 278. **Same Subject—Instances Continued—Exemptions from Taxation—Impairment of Obligation of Contract as to Taxation.**—The construction by the Supreme Court of a State of its constitution as authorizing exemptions from

[27] 92 U. S. 575, 23 L. ed. 663.

[28] Merchants' & Mfrs. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. 829. See citations in next following note.

[29] San Francisco Nat. Bank v. Dodge, 197 U. S. 70, 49 L. ed. —, 25 Sup. Ct. —. Examine People's Nat. Bank v. Marye, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. ed. 180 (a case of taxation; bank stock; deductions; state laws. In this case it was held that the Federal Supreme Court will follow the ruling of the highest court of a State when it was held that a state statute does not violate the constitution of that state); Jefferson Bank v. Skelly, 1 Black (66 U. S.), 436, 17 L. ed. 173 (franchise grants; construction; waiver of sovereignty; bank charters; tax exemption irrevocable; subsequent constitutional provision; rule as to following state construction not extended to cases where Federal courts called on to interpret contracts of States).

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taxation, but declaring that such exemptions are repealable, binds the Federal Supreme Court, and therefore a railroad company, incorporated after such decision of the state court, is precluded from claiming an irrepealable exemption in its charter, and being so repealable the question whether it had in fact been repealed is a local and not a Federal question.[30] So, following the decisions of the Supreme Court of North Dakota as to the tax laws of Dakota Territory the Supreme Court of the United States holds that an erroneous decision of an assessor of taxes under those laws in the matter of exemptions does not deprive the tax proceedings of jurisdiction, and, that until such erroneous decision is modified or set aside by the proper tribunal, all officers with subsequent functions may safely act thereon; and that the rule of *caveat emptor* applies to a purchaser at a tax sale thereunder. It was also held that the county treasurer in making a sale under those laws for the non-payment of taxes acted ministerially and was protected as long as he acted within the statute. It was further decided that, in the case of lands granted to the Northern Pacific Railroad Company, on which the costs of survey had not been paid and for which no patents had been issued, it was his duty to proceed to sell notwithstanding those facts; and that when the title of the purchaser at the tax sale failed, by reason of the lands not being subject to taxation, the county was not liable for the purchase money.[31] A State may, through its legislature, make a valid contract as to taxation with a corporation which the latter can enforce; and the Supreme Court of the

[30] Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 22 Sup. Ct. 26, 46 L. ed. 86.

The Supreme Court of the United States is bound by the construction put by the highest court of the State of Kentucky upon its statutes, relating to exemptions from taxation of property used for "public purposes," however much it may doubt the soundness of the interpretation. Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. 383 (a case of exemption of "the said reservoir or reservoirs, machinery, pipes, mains and appurtenances, with the land on which they were situated" which the city of Covington was by that act authorized to acquire and construct; also a question of repeal, of contract and charter rights).

[31] Stutsman County v. Wallace, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. ed. 1018.

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United States is not, under the rule generally applicable as to the binding effect of decisions of the Supreme Court of the State construing its statutes, concluded by the decisions of that court as to whether such a contract exists, the extent of its terms and whether any subsequent law has impaired its obligation. But where the Supreme Court of the State sustains the validity of the statute from which a contract is claimed, the Federal Supreme Court follows that decision and determines what the contract is.[32] When a contract is asserted and the Constitution of the United States is invoked to protect it, all of the elements which are claimed to constitute it are open to examination and review by the Federal Supreme Court; and also all that which is claimed to have taken it away, and the writ of error will not be dismissed.[33]

§ 279. **Same Subject—Instances Continued—Impairment of Obligation of Contract—Fourteenth Amendment.**—While the Federal Supreme Court is not bound by the construction placed by the state court upon statutes of that State when the impairment of the contract clause of the Constitution is invoked, yet when the true construction of a particular statute is not free from doubt considering former legislation of the State upon the same subject, the Federal court has determined that it will best perform its duty in such case by following the decisions of the state court upon the precise question, although doubts as to its correctness may have been uttered by the same court in some subsequent case.[34] It is also decided that although decisions of the highest court of a State are not binding on the Federal Supreme Court in determining whether a contract was made by legislative action of that State which is entitled to protection under the impairment of obligation clause of the Federal constitution, it

[32] Powers v. Detroit, Grand Haven & M. Ry. Co., 201 U. S. 543, 26 Sup. Ct. 556, 50 L. ed. 860.

[33] Citizens' Bank v. Parker, 192 U. S. 73, 48 L. ed. 346, 24 Sup. Ct. 181 (taxation; banks; exemption; construction; license taxes; obligation of contracts).

[34] Waggoner v. Flack, 188 U. S. 595, 47 L. ed. 609, 23 Sup. Ct. 345.

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will consider decisions of that court on the point in question.[35] Again, it is determined that the Federal court possesses paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Federal Constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment.[36] But no jurisdiction exists in the Federal Supreme Court, under the twenty-fifth section of the Judiciary Act, to review a decision of the highest court of a State, maintaining the validity of a law which it has been set up "impairs the obligation of a contract," when the law set up as having this effect was in existence when the alleged contract was made, and the highest state court has only decided that there was no contract in the case.[37] A state statute directing the state treasurer to write certain bonds off the books in his office and no longer to carry them as a debt of the State does not impair any existing obligation of the State to pay the bonds nor affect the remedy to recover upon them; and where the state court has so construed the act, in refusing to enjoin the treasurer from making the entries required thereby, at the suit of one claiming to own the bonds, no Federal right of the plaintiff is denied, obstructed, impaired or affected and the writ of error will be dismissed. This decision was rendered in a case wherein the State of South Carolina had issued bonds due in twenty years in aid of a railroad company. A state bank came to be the owner of some of these bonds. Subsequently the assets of the bank, including the bonds, were seized and carried away by soldiers of the Federal army. Some of the bonds were recovered from time to time by the bank and were paid or funded by the State, but some of them remained outstanding and

[35] Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427.

[36] New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. 741.

[37] Railroad Co. v. McClure, 10 Wall. (77 U. S.) 511, 19 L. ed. 997 (in this case a state constitution was admitted to be a "law" within the meaning of the obligation of contracts clause).

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nothing was known of them when a statute was enacted directing that no coupon bond of the State payable to bearer should be funded or paid by the state treasurer after the expiration of twenty years from the date of its maturity, and the receiver of the bank, which had been in liquidation for many years, brought in the state Supreme Court a petition for an injunction to restrain the treasurer from obeying the requirement of the statute.[38] Where the allowance of an attorney's fee to be taxed as costs in case of a judgment against an insurance company for a total loss under the provisions of a state statute is the basis of the Federal right asserted, and it appears that one of the assignments of error relied upon before, and considered and expressly decided by, the highest court of the State, was that the statute was unconstitutional and void and in conflict with the Fourteenth Amendment for the want of mutuality and deprived the plaintiff in error of the equal protection of the law, the motion to be dismissed will be denied.[39]

§ 280. **Same Subject — Instances Continued — Statutes Penal in Nature—Trustees of Corporations—Anti-Trust Laws.**—The rulings of the highest court of a State, unanimously made, upon a question dependent altogether upon a statute of that State, relating to acts of a trustee of a corporation and liability thereunder, penal in its character, ought to be recognized in every court as, at least, most persuasive, although the case in which the ruling was made has not yet gone to final judgment.[40] So the Federal Supreme Court will follow a state court in holding that under the laws of such State, as they exist, combinations described in the anti-trust laws are forbidden and penalized, whether by agriculturists, organized laborers or others, and, therefore, there is no dis-

[38] Smith v. Jennings, 206 U. S. 276, 51 L. ed. —, 27 Sup. Ct. —.

[39] Farmers' & Merchants' Ins. Co. v. Dobney, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. ed. 821, aff'g 62 Neb. 213, 86 N. W. 1070. See Cleveland C. C. & St. L. Ry. Co. v. Hamilton, 200 Ill. 633, 66 N. E. 389.

[40] Park Bank v. Remsen, 158 U. S. 337, 29 L. ed. 1008, 15 Sup. Ct. 891.

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crimination against oil companies, and the latter are not deprived of the equal protection of the laws.[41] Again, where the highest court of a State has held that the acts of a person convicted of violating a state statute defining and prohibiting trusts were clearly within both the statute and the police power of the State, and that the statute can be sustained as a prohibition of these acts irrespective of the question whether its language was broad enough to include acts beyond legislative control, the Federal Supreme Court will accept such construction although the state court may have ascertained the meaning, scope and validity of the statute by pursuing a rule of construction different from that recognized by the Federal Court.[42]

§ 281. **Same Subject — Instances Continued — Foreign Corporations.**—Where the Supreme Court of a State has construed its constitution and statutes to the effect that a foreign corporation had no existence as a corporation in the State, and could acquire, therefore, no rights as such, and that an individual connected with the corporation had no independent rights in the premises, these conclusions do not involve the decision of Federal questions, but only the meaning and effect of local statutes and a finding of fact, neither of which is reviewable in the Federal Supreme Court.[43]

§ 282. **Repeal or Amendment of Statutes.**—Repeals by implication are not favored and will not be admitted unless there is such a repugnancy as to preclude the statutes being reconciled.[44] Implied repeals are not limited to police regulations, but the rule has been applied to all classes of legisla-

[41] National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. ed. 689.

[42] Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. 276.

[43] Telluride Power Trans. Co. v. Rio Grande Western Ry. Co., 187 U. S. 569, 23 Sup. Ct. 178, 47 L. ed. 307. See Swing v. Western Lumber Co., 205 U. S. 275, 51 L. ed. —, 27 Sup. Ct. —, aff'g 140 Mich. 344, N. W.

[44] **United States:** Petri v. F. E. Creehman Lumber Co., 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. 133; Gibson v. United States, 194 U. S. 182, 48 L. ed. 926, 24 Sup. Ct. 613; Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; Chew

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tion.[45] And if laws are repealed by necessary implication they need not be referred to in a statute.[46] Nor is a recital in a statute, that a prior act is repealed or superseded, conclusive, as the question whether an act has been so repealed or superseded is a judicial and not a legislative one.[47] Statutes which impliedly repeal are not within a constitutional pro-

Heong v. United States, 112 U. S. 536, 5 Sup. Ct. 255, 28 L. ed. 770; Arthur v. Homer, 96 U. S. 137, 24 L. ed. 811; Furman v. Nichol, 8 Wall. (75 U. S.) 44, 19 L. ed. 370; Beals v. Hale, 4 How. (45 U. S.) 37, 11 L. ed. 865.

Arkansas: Chamberlain v. State, 50 Ark. 132, 6 S. W. 524.

California: Cerf v. Reichert, 73 Cal. 360, 15 Pac. 10. See Hellman v. Shoulters, 114 Cal. 136, 141, 44 Pac. 915, 1057.

Colorado: Saguache County v. Decker, 10 Colo. 149, 14 Pac. 123.

Georgia: First M. E. Church v. Atlanta, 76 Ga. 181.

Illinois: Kenaga v. Kerr, 123 Ill. 659, 14 N. E. 671; Hunt v. Chicago, H. & D. R. Co., 121 Ill. 638, 13 N. E. 176.

Indiana: Shea v. Muncie, 148 Ind. 14, 46 N. E. 138; Robinson v. Rippey, 111 Ind. 112, 12 N. E. 141; Collins Coal Co. v. Hadley (Ind. App., 1906), 78 N. E. 353, 75 N. E. 382.

Iowa: Eckerson v. City of Des Moines (Iowa, 1908), 115 N. W. 177, 191; Snell v. Dubuque & S. C. R. Co., 78 Iowa, 88, 42 N. W. 588.

Michigan: Michigan Teleph. Co. v. City of Benton Harbor, 121 Mich. 512, 80 N. W. 386; People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751, 6 Rd. & Corp. L. J. 192, 40 Alb. L. J. 246; People v. Grand Rapids & W. Pl. Road Co., 67 Mich. 5, 34 N. W. 250.

Mississippi: Owens v. Yazoo & Miss. Valley R. Co., 74 Miss. 821, 21 So. 244.

Missouri: Manker v. Faulhaber, 94 Mo. 430, 6 S. W. 372.

Nebraska: Dawson County v. Clark, 58 Neb. 756, 79 N. W. 822; See Omaha Real Estate & T. Co. v. Kragscow, 47 Neb. 592, 66 N. W. 658.

New Jersey: Hotel Registry Realty Corp. v. Stafford, 70 N. J. L. 528, 57 Atl. 145; Plum v. Lugar, 49 N. J. L. 557, 9 Atl. 779; Atlantic City Waterworks Co. v. Consumers' Water Co., 44 N. J. Eq. 427, 15 Atl. 581.

North Carolina: State v. Sutton, 100 N. C. 474, 6 S. E. 687.

South Carolina: State v. McCoomer (S. C., 1908), 60 S. E. 237.

Tennessee: Memphis & State Line Rd. Co. v. Union Ry. Co., 116 Tenn. 500, 95 S. W. 1019; McCampbell v. State, 116 Tenn. 98, 93 S. W. 100.

Vermont: State v. Martin, 68 Vt. 93, 34 Atl. 40.

Virginia: Justice v. Commonwealth, 81 Va. 209.

Wisconsin: Hay v. City of Baraboo, 127 Wis. 1, 105 N. W. 654.

[45] Memphis & State Line Rd. Co. v. Union Ry. Co., 116 Tenn. 500, 95 S. W. 1019.

[46] Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L. R. A. 126.

[47] United States v. Claflin, 97 U. S. 546, 24 L. ed. 1082.

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vision requiring amending or repealing acts to recite in their title the substance of the law repealed etc.[48] If it is intended to amend a certain section of a statute it should be repealed to validate the amendment.[49] And an unconstitutional repealing statute can have no effect.[50] That the intent to repeal by implication did not exist may be evidenced by a still later amendment to the first act.[51] If a later statute has reference to the building of branch lines and an earlier enactment provides for the changing of the terminus of a railroad which has not been finally located there exists no such repugnancy between the two enactments as to work an implied repeal.[52] So an enactment providing for the liability of directors for debts for failing to make annual reports as to financial condition of a corporation is not repealed by an amendment permitting reports to be filed at a time specified in the amended act or during the next month.[53] But a proviso to an existing act is held to have been repealed by an act which "amended" the former act, "by striking out all after the enacting clause and inserting in lieu thereof, the following:" this "following" being in part an iteration of the words of the section amended, and in part new enactments.[54] And a proviso repealed may still be considered in construing remaining sections.[55] Provisions of a

[48] Memphis & State Line Rd. Co. v. Union Ry. Co., 116 Tenn. 500, 95 S. W. 1019. Examine St. Louis, I. M. & S. R. Co. v. Paul, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 7 Am. & Eng. Corp. Cas. (N. S.) 772; Parker-Washington Co. v. Kansas City (Kan., 1906), 85 Pac. 781; Palatine Ins. Co., Ltd., v. Northern Pac. Ry. Co. (Mont., 1906), 85 Pac. 1032; State, City Water Co., v. Kearney, 49 Neb. 325, 68 N. W. 533, aff'd 49 Neb. 337, 70 N. W. 255.

[49] Grand Island & W. C. R. Co. v. Swinbank, 51 Neb. 521, 71 N. W. 48.

[50] Porter v. Kingfisher County, 6 Okla. 550, 51 Pac. 741.

[51] Lincoln School Township v. American School Furn. Co., 31 Ind. App. 405, 68 N. E. 301.

[52] Memphis & State Line Rd. Co. v. Union Ry. Co., 116 Tenn. 500, 95 S. W. 1019.

[53] Bank of Saginaw v. Peirson, 112 Mich. 410, 4 Det. Leg. N. 59, 70 N. W. 701. Examine Van Pelt v. Gardner, 54 Neb. 701, 75 N. W. 874, 74 N. W. 1083.

[54] Steamboat Co. v. Collector, 18 Wall. (85 U. S.) 478, 21 L. ed. 769 (a case of statute in relation to tax on steamboat receipts).

[55] Bank for Savings v. Collector, 3 Wall. (70 U. S.) 495, 18 L. ed. 207 (a case of taxation of banks).

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statute repealed and re-enacted continue in force without intermission.[56] The statutory construction law of New York limiting the effect of repealing statutes is not limited to acts reported by the statutory revision committee, but applies to all subsequent legislation.[57]

§ 283. **Same Subject Continued.**—If two acts cannot be harmonized the later act prevails to the extent of the repugnancy; they should, however, be reconciled if possible on any reasonable basis,[58] or effect be given to both.[59] Without express words of repeal a previous statute will also be held modified or repealed by a subsequent one if the later is plainly intended to supersede the earlier act and to cover the whole subject embraced by both, and to prescribe the only rules, in

[56] Gull River Lumber Co v. Lee, 7 N. Dak. 135, 73 N. W. 430. See also Steamship Co. v. Joliffe, 2 Wall. (69 U. S.) 450, 17 L. ed. 805.

[57] Village of Champlain v. McCrea, 165 N. Y. 264; People, City of Niagara Falls, v. New York Cent. & Hudson Riv. R. Co., 158 N. Y. 410; People, City of Buffalo, v. New York Cent. & Hudson Riv. R. Co., 156 N. Y. 570, 51 N. E. 312, rev'g 50 N. Y. Supp. 1132, 25 App. Div. 632.

[58] **United States:** Gibson v. United States, 194 U. S. 182, 48 L. ed. 926, 24 Sup. Ct. 613; United States v. Lee Yen Tai, 185 U. S. 213, 22 Sup. Ct. 629, 46 L. ed. 878; Chicago, M. & St. P. R. Co. v. United States, 127 U. S. 406, 8 Sup. Ct. 1194, 32 L. ed. 180; Beals v. Hale, 4 How. (45 U. S.) 37, 11 L. ed. 865.

Arkansas: Porter v. Waterman, 77 Ark. 383, 91 S. W. 574.

Illinois: Kenaga v. Kerr, 123 Ill. 659, 14 N. E. 671; Hunt v. Chicago, H. & D. R. Co., 121 Ill. 638, 13 N. E. 176. See Bastian v. Modern Woodmen of America, 166 Ill. 595, 46 N. E. 1090, rev'g 68 App. Ill. 378.

Indiana: State, Hudspeth, v. Cooper, 114 Ind. 1, 16 N. E. 518; Pennsylvania Co. v. Dunlap, 112 Ind. 93, 13 N. E. 403.

Iowa: Straight v. Crawford, 73 Iowa, 676, 35 N. W. 920.

Kentucky: Weddell v. Commonwealth, 84 Ky. 276, 1 S. W. 480.

New Jersey: Plum v. Lugar, 49 N. J. 557, 9 Atl. 779.

Tennessee: McCampbell v. State, 116 Tenn. 98, 93 S. W. 100.

[59] Where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, and no purpose to repeal the earlier is expressed or clearly indicated, the court will, if possible, give effect to both. Frost v. Wenie, 157 U. S. 46, 39 L. ed. 614, 15 Sup. Ct. 532.

In the absence of any repealing clause, it is necessary to the implication of a repeal that the objects of the two statutes are the same. If they are not, both statutes will stand, though they refer to the same subject. United States v. Claflin, 97 U. S. 546, 24 L. ed. 1082.

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respect to that subject, which are to govern.[60] But a statute will not operate to repeal a prior statute merely because it repeats some of the provisions of the prior act, and omits others, or adds new provisions; but in such cases the later enactment operates as a repeal of the former one only when it plainly appears that it was intended as a substitute for the first act.[61] If a state statute and a Federal statute operate upon the same subject-matter, and prescribe different rules concerning it, and the Federal statute is one within the competency of Congress to enact, the state statute must give away.[62] As a rule of construction a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended.[63] An amendatory or additional act which is germane to the original act is to be construed in conjunction with such original enactment unless an intent clearly appears to the contrary;[64] and this applies to an act of incorporation, being in *pari materia*.[65]

[60] **United States**: Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Supp. Ct. 527; Davies v. Fairbairn, 3 How. (44 U. S.) 636, 11 L. ed. 760.

California: Cerf v. Reichert, 73 Cal. 360, 15 Pac. 10.

Iowa: State v. Courtney, 73 Iowa, 619, 35 N. W. 685.

Kentucky: Millay v. White, 86 Ky. 170, 5 S. W. 429.

Nebraska: State v. Omaha Elevator Co. (Neb., 1906), 106 N. W. 979.

New Jersey: Hotel Registry Realty Corp. v. Stafford, 70 N. J. L. 528, 57 Atl. 145.

Tennessee: Terrell v. State, 86 Tenn. 523, 8 S. W. 212.

See last preceding note herein.

[61] Chicago, M. & St. P. Ry. Co. v. United States, 127 U. S. 406, 32 L. ed. 180, 8 Sup. Ct. 1194; Red Rock v. Henry, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. 434.

[62] Gulf, Colorado & Santa Fe Ry. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. 802.

[63] Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427; Peters v. Vawter, 10 Mont. 201, 25 Pac. 438. See also McGuire v. Chicago, Burlington & Quincy Rd. Co., 131 Iowa, 340, 108 N. W. 902. Examine Building & Loan Assoc. v. Sohn, 54 W. Va. 101, 46 S. E. 222.

[64] McGuire v. Chicago, Burlington & Quincy Rd. Co., 131 Iowa, 340, 108 N. W. 902; Woodall v. Boston Elevated Ry. Co. (Mass., 1906), 78 N. E. 446; People v. Michigan Cent. Rd. Co. (Mich., 1906), 108 N. W. 772, 13 Det. Leg. N. 552; Village of Portchester, In re Locust Ave., 97 N. Y. Supp. 508, 110 App. Div. 774, case aff'd and modified 185 N. Y. 115, 77 N. E. 1012.

[65] Meyer v. Johnston, 53 Ala. 237, 321.

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§ 284. **Same Subject Continued—Instances.**—Renewals of charters granted after an enactment providing for repeal or amendment of all charters are subject to the statute though it expressly provides that it shall only apply to charters to be subsequently granted.[66] And a statute which grants to all corporations the right to obtain amendments to their charters in a certain way does not conflict with a prior statute, granting to railroad companies the right to change their termini at any time before final location of the road, so as to repeal it by implication.[67] A constitutional requirement that an act or section amended shall be re-enacted and published at length does not apply to a special act of incorporation of a railroad company granting it all the privileges, immunities, etc., of a certain general railroad law, as such special act is neither a revision or amendment.[68] If an act authorizing the organization of mutual insurance companies is so complete in itself as to repeal even impliedly all prior inconsistent laws, a constitutional provision requiring the section or sections amended to be contained in the new enactment does not apply.[69] An act amending "an act to facilitate the construction of railroads" is not repealed by the failure of the legislature to incorporate it in a revision of the statutes.[70] Where a statute is a public act a subsequent act which is amendatory and supplementary is also a public one.[71] A statute which regulates passenger and freight rates does not impliedly repeal prior laws on the subject when not irreconcilably repugnant thereto or where it is not apparent that such later enactment was intended to comprehend the entire subject and so supersede the prior laws.[72] The liability of a railroad company for death

[66] Northern Bank v. Stone (C. C.), 88 Fed. 413.

[67] Memphis & State Line Rd. Co. v. Union Ry. Co., 116 Tenn. 500, 95 S. W. 1019.

[68] Quinlan v. Houston & T. C. R. Co., 89 Tex. 356, 34 S. W. 738.

[69] Farmers' Mut. Ins. Co. v. Moore, 48 Neb. 870, 67 N. W. 876.

[70] Cape Girardeau Co. Court v. Hill, 118 U. S. 68, 30 L. ed. 73, 6 Sup. Ct. —.

[71] Unity v. Burrage, 103 U. S. 447, 26 L. ed. 405 (railroad aid bonds of county).

[72] Southern Ry. Co. v. McNeill, 155 Fed. 756.

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by negligence arising before repeal of a statute providing therefor is not affected by such repeal.[73] The operation of a statute providing for an indictment for unlawful discrimination in transportation of passengers is merely suspended for one day where such enactment is repealed on a day certain and it is re-enacted verbatim to take effect on the next following day.[74]

§ 285. Same Subject — Instances Continued — Taxation and Assessment.—A statute covering the subject-matter of all acts as to assessment and taxation and containing a repealing clause and provisions inconsistent with a prior act as to the power of cities to tax and assess property, repeals such inconsistent statute.[75] But a special act as to the power to tax to pay bridge bonds of a county is not repealed by a general law limiting the power of counties as to taxation.[76] And a general statute taxing every railroad company will not operate to repeal a charter exemption of a corporation.[77] A statute, however, which provides a general scheme for assessing and taxing the property of railroad and telegraph companies as a whole, and for distributing it ratably among the different counties, and their several precincts, townships and districts, according to the number of miles of line in each, repeals, as to such property, a power conferred upon the authorities of a city to make provisions for the assessment of the taxes which they were authorized by other provisions of the city charter to assess and collect.[78] Again, a provision of an act relating to a situs of stock of foreign corporations for taxation is not repealed by implication by omission of such provision from a compiled code.[79]

[73] Culpepper v. International & G. N. R. Co., 90 Tex. 627, 40 S. W. 386, aff'g 38 S. W. 818; Albrecht v. Milwaukee & S. R. Co., 94 Wis. 397, 69 N. W. 63. See State v. Maine C. R. Co., 90 Me. 267, 38 Atl. 158 (repeal; remedy by indictment for death caused by negligence superseded by civil remedy).

[74] State v. Southern Ry. Co. (N. C., 1899), 34 S. E. 527.

[75] State, Ross, v. Kelly, 45 S. C. 457, 23 S. E. 281.

[76] Burnett v. Maloney, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541.

[77] Commonwealth v. Richmond & P. R. Co., 81 Va. 355.

[78] Union Pacific Ry. Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. ed. 1098.

[79] Georgia Railroad & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251,

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§ 286. Construction of Statutes, Charters and Ordinances —Miscellaneous Cases.—Where the legislature has classified suburban and interurban railroads with street railroads, the laws governing the latter will govern as to the former.[80] If a corporation chartered prior to the existing constitution of a State is wound up and all of its property, contracts and obligations transferred by ordinance to a new corporation, the ordinance must be construed in connection with the constitution and such provisions for further control as are therein contained.[81] Although the language of a statute provides for the renewal of a street railway franchise upon the expiration thereof, such grants may be extended before their expiration, and in construing municipal ordinances relating to such extensions it may be reasonably presumed that no provision escaped attention or was misunderstood.[82] The generally inclusive terms of the Bush Act are to be interpreted with reference to the State's plenary power over its purely internal commerce, and over foreign corporations seeking to engage in such commerce; and, so interpreted, the law applies to all foreign corporations not engaged in interstate commerce, or business for the Federal government, and to all foreign corporations engaged in interstate commerce or business for the Federal government to the extent that they must comply with its requirements in order to engage in non-governmental interstate business.[83] A provision in an act of Congress incorporating a bank which requires that the capital stock shall consist of a certain number of shares of a certain amount each is not a condition precedent.[84] A clause in a charter that it

case reversed in Central of Georgia Ry. Co. v. Wright, 207 U. S. 127, upon the point that due process of law requires an opportunity to be heard, as to the validity of a tax and the amount of assessment, to be given a taxpayer.

[80] Cincinnati & H. E. St. Ry. Co. v. Cincinnati, H. & I. R. Co., 12 Ohio C. D. 113.

[81] San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. ed. 491.

[82] Cleveland Electric Ry. Co. v. City of Cleveland, 135 Fed. 368, aff'd Cleveland v. Cleveland Electric Ry. Co., 201 U. S. 529, 50 L. ed. 854.

[83] State v. Western Union Teleg. Co. (Kan., 1907), 90 Pac. 299.

[84] Minor v. Mechanics' Bank, 1 Pet. (26 U. S.) 46, 7 L. ed. 47.

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shall not be lawful for any person or persons to erect a bridge within a certain distance of the bridge in question means, not only that no person or association of persons shall erect such a bridge without legislative authority, but that the legislature itself will not make it lawful for any person or association of persons to do so by giving them authority.[85] A clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. A legislature can impose it as a punishment, but individuals can only make it a matter of contract. Being a penalty imposed by law the legislature has the right to remit it.[86] Where under an ordinance a street railway company has the right by a written acceptance thereof to designate the streets on which its railway will be constructed and operated, and has also the right to occupy such other streets as may be thereafter designated by resolution of the city council, a permission so granted to occupy another street does not operate as a new franchise, and the designation by the company of streets relates only to the minimum of mileage.[87] A corporate charter by which a corporation, with a grant from another State, obtains all the rights and privileges possessed under the foreign grant, does not confer privileges which conflict with the constitution of the foreign State where such original charter was granted, even though such privileges do not violate the constitution of the other State.[88]

§ 287. **Prospective and Retrospective Operation.**—A statute operates prospectively only unless a contrary intent very clearly appears.[89] There is a presumption against retrospec-

[85] The Binghamton Bridge, 3 Wall. (70 U. S.) 51, 18 L. ed. 137.

[86] Maryland v. Baltimore & O. R. Co., 3 How. (44 U. S.) 534, 11 L. ed. 714.

[87] Thurston v. Huston, 123 Iowa, 157, 98 N. W. 637.

[88] Johnston v. State, 91 Ala. 70, 9 So. 71.

[89] **United States**: City R. Co. v. Citizens' St. Ry. Co., 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. 653; United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. 540, 14 Nat. Corp. Rep. 116, 148; Chicago & N. W. R. Co. v. United States, 104 U. S. 680, 26 L. ed. 891; Harvey v.

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tive legislation; it is not favored; and words in a statute will not be construed as retroactive unless they clearly can be given no other effect and the legislative intent cannot be otherwise satisfied; in this respect the use in the statute of the future tense must be given weight.[90] The Fourteenth Amend-

Tyler, 2 Wall. (69 U. S.) 328, 17 L. ed. 871; United Mines Co. v. Hatcher (C. C.), 79 Fed. 517, 49 U. S. App. 139, aff'g and partly rev'g 75 Fed. 368. See Wright v. Southern R. Co. (C. C.), 80 Fed. 260.

Illinois: Voigt v. Kersten, 164 Ill. 314, 45 N. E. 543. See Halpin v. Prosperity Loan & Bldg. Assoc., 108 Ill. App. 316.

Maine: Knight v. Burnham, 90 Me. 294, 38 Atl. 168.

Massachusetts: Wild v. Boston & M. R. Co., 171 Mass. 245, 50 N. E. 533.

Minnesota: Powers v. St. Paul, 36 Minn. 87, 30 N. W. 433.

Mississippi: Capital State Bank v. Lewis, 64 Miss. 727, 2 So. 243.

Nebraska: McIntosh v. Johnson, 51 Neb. 33, 70 N. W. 522; State, City Water Co., v. Kearney, 49 Neb. 325, 68 N. W. 533.

South Carolina: Turner v. Interstate Bldg. & Loan Assoc., 51 S. C. 33, 27 S. E. 947, 7 Am. & Eng. Corp. Cas. (N. S.) 228.

Utah: Mercur Gold Min. & Mill. Co. v. Spry, 16 Utah, 222, 52 Pac. 382.

West Virginia: Stewart v. Vandervort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50.

See Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801 (rev'g 132 Fed. 848, where certain statutes were held not unconstitutional under the constitution in force when they were passed); Fowler v. Lewis, 36 W. Va. 112, 14 S. E. 447.

Compare State, Jones, v. Landis, 50 N. J. L. 374, 13 Atl. 251; State, Essex Public Road Board, v. Skinkle, 49 N. J. L. 641, 10 Atl. 379; Fitzgerald v. Phelps & B. Windmill Co., 42 W. Va. 570, 26 S. E. 315.

Only laws in existence or prospective laws, and not those then repealed, are within the terms of the statutory construction law of New York. People v. Potter, 82 N. Y. Supp. 649, 40 Misc. 485.

A statute operates prospectively so that it does not cure prior misuser of franchise as a ground of forfeiture of a charter. State, Walker, v. Equitable Loan & I. Assoc., 142 Mo. 325, 41 S. W. 916.

Unless on its face the contrary intention is manifest beyond reasonable question a statute is construed to operate prospectively only. Shotwell v. Moore, 129 U. S. 590, 32 L. ed. 827, 9 Sup. Ct. —.

[90] **United States:** United States v. American Sugar Ref. Co., 202 U. S. 563, 50 L. ed. 1149, 26 Sup. Ct. 717; White v. United States, 191 U. S. 545, 24 Sup. Ct. 171, 48 L. ed. 301; Chew Heong v. United States, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. 255; United States v. Heth, 3 Cranch (7 U. S.), 399, 2 L. ed. 479; United States v. Atchison, Topeka & Santa Fe Ry. Co., 142 Fed. 176.

Alabama: State v. Gloss, 83 Ala. 93, 3 So. 745.

Arkansas: St. Louis, A. & T. R. Co. v. Phila. F. Assoc., 55 Ark. 163, 18 S. W. 43.

California: Webber v. Clarke, 74 Cal. 11, 15 Pac. 431.

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ment, however, contains no prohibition of retrospective legislation as such, and, therefore, the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution.[91] Where the measure of damages under a statute for destruction of property for fire negligently caused by railroad companies is limited by a deduction of the amount of insurance received for such loss, the enactment does not operate retrospectively as to loss of property occasioned before passage of the statute.[92] And a statute which limits the liability of a railroad company for fires applies to an insurance policy taken out prior thereto, where the loss is occasioned subsequent to such enactment, and the difference between the amount of the insurance and of the loss is the measure of liability fixed by such statute.[93]

§ 288. **Validating Statutes—Waiver or Correction of Defect or Irregularity.**—An unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no

Colorado: City of Colorado Springs v. Weirlle (Colo., 1908), 93 Pac. 1096.

Illinois: Cleary v. Hoobler, 207 Ill. 97, 69 N. E. 967.

Indiana: Nicklaus v. Conkling, 118 Ind. 289, 20 N. E. 797.

Montana: State v. Northern Pac. Ry. Co. (Mont., 1908), 93 Pac. 945; Chicago Title & Trust Co. v. O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4.

Nebraska: Commercial Bk. v. Eastern Bkg. Co., 51 Neb. 766, 71 N. W. 1024.

New Jersey: Roxbury Lodge v. Hocking, 60 N. J. L. 439, 38 Atl. 693, 64 Am. St. Rep. 596.

New York: Union College, In re, 129 N. Y. 308, 4 N. Y. St. R. 640, 29 N. E. 460; People v. O'Brien, 111 N. Y. 1, 19 N. Y. St. R. 173, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255.

Oregon: State, German Sav. & Loan Soc., v. Sears, 29 Oreg. 580, 46 Pac. 785, rev'g 43 Pac. 482.

Pennsylvania: Horn & Brannan Mfg. Co. v. Steelman, 215 Pa. 187, 64 Atl. 409.

Texas: Rockwell County v. Kaufman County, 69 Tex. 172, 6 S. W. 431.

Virginia: Crabtree v. Old Dominion Bldg. & Loan Assoc., 95 Va. 670, 4 Va. Law Reg. 12, 64 Am. St. Rep. 818, 29 S. E. 741; Richmond v. Henrico County, 83 Va. 204, 2 S. E. 26.

Wisconsin: Strike v. Wisconsin Odd Fellows Mut. L. Ins. Co., 95 Wis. 583, 70 N. W. 819.

[91] League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. 475. See Watson v. Mercer, 8 Pet. (33 U. S.) 88, 8 L. ed. 876.

[92] Wild v. Boston & M. R. Co., 171 Mass. 245, 50 N. E. 533.

[93] Leavitt v. Canadian Pacific R. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152.

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protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed;[94] and it cannot be validated by the legislature,[95] nor under an amended constitution.[96] If, however, an act might have been legally authorized in the first instance it may thereafter be confirmed when not prohibited by the constitution.[97] And if a statute would be otherwise invalid as for want of the proper signatures it may be ratified by express reference thereto in an accompanying chapter containing supplemental provisions in relation to the same subject-matter.[98] So the legislature may waive and correct any want of regularity in the proceedings of a county in a contract between it and a railroad company for the construction of its road therein on a designated line with a terminus, and upon the fulfillment of those conditions to convey to it certain of its unsettled public lands, such power to contract having been conferred by statute.[99] Again, although certain rights, such as the authority of a street car company to become a carrier of freight, have been conferred without legislative power or in violation of law, still such powers as have been lawfully granted will not be affected, and the legislature may by general law affirm and validate such void grants so that the acceptance by such company of the provisions of the validating act makes it a *de jure* corporation possessed with all the authority and powers vested under the charter.[1] If the legislature possesses the power to authorize

[94] Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. 1121; Minnesota Sugar Co. v. Iverson, 90 Minn. 6, 97 N. W. 454.

[95] State, Charleston, Cincinnati, & Chicago Rd. Co., v. Whitesides, 30 S. C. 579, 3 L. R. A. 777, 9 S. E. 661. See Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa, 234, 91 N. W. 1031. Compare Sweet v. Syracuse, 129 N. Y. 337, 41 N. Y. St. R. 649, 29 N. E. 289.

[96] Seneca Min. Co. v. Osman, 82 Mich. 573, 47 N. W. 25, 9 L. R. A. 770. Compare Sweet v. Syracuse, 129 N. Y. 337, 41 N. Y. St. Rep. 649, 29 N. E. 289.

[97] Steele County v. Erskine, 98 Fed. 215.

[98] Wrought-Iron Range Co. v. Carver, 118 N. C. 328, 24 S. E. 352.

[99] Roberts v. Northern Pacific R. Co., 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. 756. See also Steele v. County of Erskine, 98 Fed. 215.

[1] Brown v. Atlanta R. & Power Co., 113 Ga. 462, 39 S. E. 462, 39 S. E. 71.

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an act to be done, it can by retrospective act cure the evils which existed, because the power thus conferred has been irregularly executed.[2] A municipal subscription to the stock of a railroad company, or in aid of the construction of a railroad, made without authority previously conferred, may be confirmed and legalized by subsequent legislative enactment, when legislation of that character is not prohibited by the constitution, and when that which was done would have been legal had it been done under legislative sanction previously given.[3] If the power of the legislature to legalize, by curative enactments, matters or proceedings which are defective under a former statute, is taken away by a constitutional amendment before passing such curative act, such remedial act is void.[4]

[2] Thomas v. Lee County, 3 Wall. (70 U. S.) 327, 18 L. ed. 177.

Amendment may cure a defective statute. State, McLorinan, v. Ryno, 49 N. J. L. 603, 10 Atl. 189.

[3] Grenada County Supervisors v. Brogden, 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. 125.

[4] Kimball v. Town of Rosendale, 42 Wis. 407, 24 Am. Rep. 421 (act confirming irregular assessment of taxes; constitutional amendment prohibited enactment of special laws for assessment or collection of taxes).

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CHAPTER XVIII.

CONSTITUTIONAL LAW—FEDERAL CONSTITUTION.

§ 289. Constitution—Grant and Limitation on Powers of Governments — Express and Implied Powers—Construction.
290. Same Subject Continued.
291. Privileges and Immunities of Citizens in the Several States.
292. Same Subject Continued—Discrimination—Tax Law—Deduction of Debts—Creditors in Different States.
§ 293. Same Subject — Actions — Statute of Limitations.
294. The Fourteenth Amendment—Generally.
295. Same Subject—Police Power.
296. Privileges and Immunities of Citizens of the United States.
297. Due Process of Law.
298. Same Subject Continued.
299. Same Subject Continued.
300. Equal Protection of the Laws.

§ 289. Constitution—Grant and Limitation on Powers of Governments—Express and Implied Powers—Construction.—We have considered the question of national and state powers generally,[1] and also the distinction between the grant, by the constitution, of powers to the Federal [2] and limitations on the state governments; [3] and it may also be stated

[1] See § 120, herein.

[2] See § 121, herein.

See the following cases:

United States: Spooner v. McConnell, 1 McLean (C. C.), 337, Fed. Cas. No. 13,245.

Arkansas: Hawkins v. Filkins, 24 Ark. 286; State v. Ashley, 1 Pike (Ark.), 513.

Connecticut: Pratt v. Allen, 13 Conn. 119.

Florida: Cotten v. County Commissioners, 6 Fla. 610.

Iowa: Purczell v. Smidt, 21 Iowa, 540.

Louisiana: State v. Nathan, 121 Rob. (La.) 332.

Nebraska: State v. Moore, 40 Neb. 854, 59 N. W. 755.

Pennsylvania: Page v. Allen, 58. Pa. 338, 98 Am. Dec. 272.

Utah: State v. Holden, 14 Utah, 71, 37 L. R. A. 103, 46 Pac. 756.

[3] See §§ 121, 137, herein.

See the following cases:

United States: Trezza v. Brush, 142 U. S. 160, 12 Sup. Ct. 158, 35 L. ed. 974; McElvaine v. Brush, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. 156.

Alabama: State v. Skeggs (Ala.,

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here that the settled rule of construction of state constitutions is that they are not special grants of power to legislative bodies, like the Constitution of the United States, but general grants of all the usually recognized powers of legislation not actually prohibited or expressly excepted. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears either by express terms or by necessary implication. The Federal Constitution confers powers expressly enumerated; that of the State confers

1908), 46 So. 268; Dorsey, In re, 7 Port. (Ala.) 293.

Arkansas: State v. Sorrels, 15 Ark. 664.

California: Beals v. Amador County, 35 Cal. 624; Hobart v. Butte County, 17 Cal. 23; Ross v. Whitman, 6 Cal. 361.

Colorado: People v. Fleming, 10 Colo. 552, 16 Pac. 298.

Connecticut: Booth v. Town of Woodbury, 32 Conn. 118; Lowrey v. Gridley, 30 Conn. 450.

Florida: Cotter v. Ponder, 6 Fla. 610.

Illinois: Hawthorne v. People, 109 Ill. 302, 50 Am. Rep. 610.

Indiana: Hovey v. State, 119 Ind. 395, 21 N. E. 21.

Iowa: Eckerson v. City of Des Moines (Iowa, 1908), 115 N.W. 177; McMillen v. County Judge & Treas. of Lee County, 6 Iowa, 391.

Kansas: Ratcliff v. Wichita Union Stockyards Co., 74 Kan. 1, 86 Pac. 150.

Kentucky: Griswold v. Hepburn, 2 Div. (63 Ky.) 20.

Louisiana: Hughes v. Murdock, 45 La. Ann. 935, 13 So. 182.

Michigan: Attorney Genl. v. Preston, 56 Mich. 177, 22 N. W. 261.

Missouri: State ex rel. Henson v. Sheppard, 192 Mo. 497, 91 S. W. 477.

Nebraska: State v. Moore, 40 Neb. 854, 59 N. W. 755. See State, Smyth, v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624.

New York: People v. Flagg, 46 N. Y. 401; Bank of Chenango v. Brown, 26 N. Y. 467. See Sage v. New York, 154 N. Y. 61, 38 L. R. A. 603, 47 N. E. 1096, 30 Chic. Leg. N. 1089, aff'g 41 N. Y. Supp. 938, 10 App. Div. 294.

Ohio: Bonebrake v. Wall (Ohio C. P.) 24 Ohio L. J. 175.

Pennsylvania: Lewis' Appeal, 67 Pa. 153; Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; Philadelphia, City of, v. Field, 58 Pa. 320.

Tennessee: Stratton v. Morris, 5 Pick. (89 Tenn.) 497, 15 S. W. 87, 12 L. R. A. 70.

Utah: State v. Holden, 14 Utah, 71, 46 Pac. 756, 37 L. R. A. 103.

Vermont: Thorpe v. Rutland, & Burlington Rd. Co., 27 Vt. 140, 62 Am. Dec. 625.

Virginia: Whitlock v. Hawkins, 105 Va. 242, 53 S. E. 401.

Washington: State v. Clark, 30 Wash. 439, 71 Pac. 20.

West Virginia: Bridges v. Shellcross, 6 W. Va. 562.

Wisconsin: Bushnell v. Beloit, 10 Wis. 195.

Enumeration of powers—Bill of Rights of Nebraska constitution.

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a general grant of all powers not excepted.[4] So the constitution itself and not the general body of the law must be resorted to in order to determine the limitations on the powers of the legislature.[5] That the government of the United States is one of enumerated powers is constantly asserted; it has no inherent powers of sovereignty; the enumeration of the powers granted is to be found in the Constitution of the United States and in that alone; the manifest purpose of the Tenth Amendment to the Constitution is to put beyond dispute the proposition that all powers not granted are reserved to the people, and if in the future further powers ought to be possessed by Congress they must be obtained by a new grant from the people.[6] The Federal Constitution is, however, a written instrument, and, as such, its meaning does not alter. Its language, as a grant of power to the national government, is general, and as changes come in social and political life, it embraces all new conditions within scope of the powers conferred.[7] Again, the Constitution was ordained and established by the people of the United States for themselves: for their own government; and not for the government of individual States. Each State established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests; the powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in

See State, Smyth, v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624.

[4] Southern Pacific Rd. Co. v. Orton, 32 Fed. 457, 472, 473, per Sawyer, J., citing or quoting Bourland v. Hildreth, 26 Cal. 183, 215, 225; People v. Sasswitch, 29 Cal. 482; Stockton & Visalia Rd. Co. v. Stockton, 41 Cal. 147, 161, 162; Sharpless v. Mayor of Philadelphia, 21 Pa. 160.

[5] Erie & North-East Rd. v. Casey, 26 Pa. 287.

[6] Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. 655. See citations in second preceding note to this section.

[7] South Carolina v. United States, 199 U. S. 437, 50 L. ed. —, 26 Sup. Ct. —. See Dred Scott v. Sandford, 19 How. (60 U. S.) 393, 15 L. ed. 191.

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general terms, are naturally and necessarily applicable to the government created by the instrument; they are limitations of power granted in the instrument itself; not of distinct governments framed by different persons and for different purposes.[8] And although the government of the United States is, within the scope of its powers, supreme and beyond the States, it can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the States.[9] But it is held that the reservation to the States does not limit the power of Congress to legislate for the Territories.[10]

§ 290. **Same Subject Continued.**—The Federal government is not restricted to the powers expressly granted in the Constitution; it has all the powers necessarily implied from the powers granted.[11] The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument. Even then, when an act of any department is challenged, because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication, to be drawn from the express authority conferred or deduced as an attribute which legitimately inheres in the nature of the powers given, and which flows from the character of the government established by the Constitution. In other words, whilst confined to its constitutional orbit the government of the United States is supreme within its lawful sphere. Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and

[8] Barron v. Baltimore, 7 Pet. (32 U. S.) 243, 8 L. ed. 672.

[9] United States v. Cruikshanks, 92 U. S. 542, 23 L. ed. 548, 190 Sup. Ct. 136.

[10] Downes v. Parshall, 3 Wyo. 425, 26 Pac. 994.

[11] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23.

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at all times potential in so far as its provisions are applicable. Hence it is that wherever a power is given by the Constitution and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits. Consequently, it is impossible to conceive that where conditions are brought about to which any particular provisions of the Constitution applies, its controlling influence may be frustrated by the action of any or all the departments of the government. Those departments, when discharging, within the limits of their constitutional power, the duties which rest on them, may of course deal with the subjects committed to them in such a way as to cause the matter dealt with to come under the control of provisions of the Constitution which may not have been previously applicable. But this does not conflict with the doctrine just stated, or presuppose that the Constitution may or may not be applicable at the election of any agency of the government.[12] If the Constitution in its grant of powers is to be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the powers of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety.[13]

§ 291. **Privileges and Immunities of Citizens in the Several States.**—Corporations are not citizens within the meaning of that clause of the Constitution of the United States which provides that citizens of each State shall be entitled to privileges and immunities of citizens in the several States.[14] Corpo-

[12] Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. 770.

[13] Fairbank v. United States, 181. U. S. 283, 45 L. ed. 862, 21 Sup. Ct. 648.

[14] Const. U. S., Art. IV, § 2, subdv. 1; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. 165, 9 Am. & Eng. Corp. Cas. (N. S.) 385; Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357. See § 67, herein. Compare Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 9 Am. & Eng. R. Cas. (N. S.) 792, 69 L. R. A. 875.

Corporation aggregate cannot be a citizen; and can only litigate in Federal courts in consequence of the character of the individuals who compose the body politic; which character

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rations are creatures of local law; and the privileges and immunities secured to citizens of each State in the several States by this clause, are those privileges and immunities which are common to the citizens of the latter States under their constitutions and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured by it in other States.[15] A state statute is not inconsistent with this provision where its purpose is to protect the State's industries and the property of its people, and the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of constitutional privileges, even though the subject of legislative action is a branch of interstate commerce; provided that Congress has not acted in the matter as involved in such commerce.[16] So a specific tax may, under a general tax law, be imposed upon a foreign corporation or manufacturing company, doing business by itself or its agents in a State, where such statute embraces all like corporations, associations, companies, etc., in such State, even though no domestic corporation with a like business exists in that State.[17] And a statute which provides for the assessment of capital stock of a corporation of another State may, in so far as it operates as a discrimination against such corporation, constitute merely an incident to the acceptance of the franchises of such corporation, and come within

must appear by the proper averments upon the record. Hope Insurance Co. v. Boardman, 5 Cranch (9 U. S.), 57, 3 L. ed. 36.

The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal courts in such other State as a citizen of the State of its original creation. That presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. And railroad corporations may be treated by each of the States whose legislative grants they accept as domestic corporations. St. Louis & San Francisco Ry. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. 621. See § 67, herein.

[15] Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357.

[16] Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. ed. 108, aff'g 29 Colo. 333, 68 Pac. 228 (a case of transportation of cattle—diseased live stock, Col. Sess. Laws 1885, p. 335, § 2).

[17] Singer Manufacturing Co. v. Wright, 33 Fed. 121.

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the power of the State to prescribe the conditions of the enjoyment of its corporate privileges and so not conflict with the above constitutional provision.[18] Again, a State cannot impose upon a foreign insurance company as a property condition, a requirement that it shall be possessed of a certain amount of capital stock invested in a specified manner where no such condition is imposed upon domestic unincorporated associations, firms or individuals.[19]

§ 292. **Same Subject Continued—Discrimination—Tax Law—Deduction of Debts—Creditors in Different States.**—A tax law of a State may operate as a denial of constitutional rights under this clause as to privileges and immunities where it discriminates between residents and non-residents in allowing a deduction of debts to the former.[20] And when the general property and assets of a private corporation, lawfully doing business in a State, are in the course of administration in its courts, creditors, who are citizens of other States, are entitled, under the Federal Constitution, to stand in all respects upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality of right merely because they do not reside in that State, but are citizens residing in other States.[21] In another case in the Federal

[18] State v. Travelers' Ins. Co., 73 Conn. 255, 47 Atl. 299.

[19] State, Hoadley, v. Florida Ins. Commrs., 37 Fla. 564, 20 So. 772, 33 L. R. A. 288.

[20] Sprague v. Fletcher, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840.

[21] Blake v. McClung, 176 U. S. 59, 20 Sup. Ct. 307, 44 L. ed. 371; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. 165, 9 Am. & Eng. Corp. Cas. (N. S.) 385. This case was as follows: Chapter 31, acts Tennessee 1877, entitled: "An act to declare the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business, and purchase, hold and convey real and personal property in this State," provided that corporations organized under the laws of other States and countries, for purposes named in the act, might carry on within that State the business authorized by their respective charters, but that "creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all

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Supreme Court bills were filed in Tennessee by the American National Bank and others against the Carnegie Land Company, a Virginia corporation, doing business in Tennessee under the provisions of the enactment upon which the above ruling was made; [22] and also against various creditors of that company. The prayer of the bill was that it might be taken as a general creditors' bill; and it was alleged that the company was insolvent, having a large amount of property in the State, which it had assigned for the benefit of its creditors, without preferences, which was in disregard of the statute of the State, that a receiver should be appointed, the assets marshaled and the creditors paid according to law. The company answered denying that it was insolvent and claimed that the assignment should be held valid, and the trust administered by the assignees. During the pendency of the suit, S. and C., New York creditors, filed a bill, setting up that nearly all the as-

debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments." It was held, in addition to the point above stated in the text, that as the litigation proceeded on the theory that plaintiffs in error were citizens of Ohio, where they resided, did business and had offices, that question could not now be considered; and as the manifest purpose of the act was to give to all Tennessee creditors priority over all creditors residing out of that State, without reference to the question whether they were citizens or only residents of some other State or country, the act must be held to infringe rights secured to the plaintiffs in error, citizens of Ohio, by the provisions of the Constitution stated in the text in this section, although, generally speaking, the State has power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. It was also held that there was no denial of equal protection of the laws.

"A local rule of law, which has been maintained by the courts of a State, to the effect that a foreign assignment by an insolvent will not operate on property in the State, so as to defeat an attachment made by a resident, is expressly annulled by Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. ed. 432, 9 Am. & Eng. Corp. Cas. (N. S.) 385, in so far as it discriminates against citizens of other States, and it cannot be presumed that the rule, as necessarily limited by Blake v. McClung, would be reaffirmed by local courts. Therefore it is held that it can no longer be accepted in any part." Syllabus to Belfast Savings Bk. v. Stowe, 92 Fed. 102, 103, 104.

[22] See last preceding note herein.

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sets, if not all of them in the hands of the assignees of the company, and sought to be impounded by the bill filed by the bank, were covered and conveyed to S., as trustee, and that C. was entitled to priority over all other creditors of the defendant in the appropriation of the assets covered by the deed of trust to S. They asked for leave to file that bill as a general bill against the land company, or, if that could not be done, that they might file it in the case of the bank against the land company, as a petition in the nature of a cross bill against that company. Other proceedings took place which are set forth in detail in the statement of the case. They ended in the consolidation of the various proceedings into one action and a reference to a master to take proof of all the facts. The master made his report, upon which a final decree was entered. It was decreed that the land company, by its deed of general assignment, of June 3, 1893, in making disposition therein for the payment of its creditors, without any preferences, attempted to defeat the preferences given by law to creditors residents of Tennessee, over non-resident creditors and mortgagees, whose mortgages were made subsequent to the creation of the debts due resident creditors, and that such deed was fraudulent in law, and void; that the making of the deed was an act of insolvency by the land company, and that the bill filed by the bank was properly filed, and should be sustained as a general creditors' bill, and that the assets of the company under the jurisdiction of the court were subject to distribution under the law relating to foreign corporations doing business in Tennessee, and as such should be decreed in the action then pending. The decree further adjudged that C. was a bona fide holder of the bonds mentioned in his bill and that he was entitled to recover thereon as provided for in the decree, but subject to the payment of debts due residents of Tennessee prior to the registration of such mortgage. It was also decreed that the Travelers' Insurance Company by its mortgage acquired a valid lien upon the property covered by it, subordinate, however, to debts due residents of Tennessee contracted prior to the registration thereof, and also subject to some other liabilities

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of the land company. The case was taken to the Court of Chancery Appeals, which modified in some particulars the decree of the chancellor, and after such modification it was affirmed. Upon writ of error from the Supreme Court the case was there heard, and that court held that the statute in question, providing for the distribution of assets of foreign corporations doing business in that State, was constitutional, and was not in contravention of any provision of the Constitution of the United States. The decree of the Court of Appeals was, after modifying it in some respects, affirmed. The case was then brought up on writ of error. It was held, that on an appeal from a state court the plaintiff in error in the Federal court must show that he himself raised the question in the state court which he argues there, and it would not aid him to show that someone else had raised it in the state court, while he failed to do so; but if he raised it in the Supreme Court of the State, it was sufficient. It was also decided that the allegation, in the case of C., that he was a resident of New York was a sufficient allegation of citizenship, no question having been made on that point in the courts below. It was further determined that a Tennessee general creditor had the same right of preference as against a resident mortgagee that he had against a non-resident, and the same burden that was placed upon non-resident mortgagees and judgment creditors was by the statute placed upon resident mortgagees and judgment creditors; and that there was no foundation for the claim made, on behalf of C., that section five of the Tennessee act of 1877, violated section one of the Fourteenth Amendment of the Constitution of the United States in that it deprived the non-resident mortgagee of his property.[23]

§ 293. Same Subject—Actions—Statute of Limitations.—The right to sue and defend in the courts of the States is one of the privileges and immunities comprehended by section 2

[23] Sully v. American Nat. Bk., 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. 935, cited in Rothschild v. Knight, 184 U. S. 334, 339, 46 L. ed. 573, Sup. Ct. 391.

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of article IV of the Constitution of the United States, and equality of treatment in regard thereto does not depend upon comity between the States, but is granted and protected by that provision in the Constitution; subject, however, to the restrictions of that instrument that the limitations imposed by a State must operate in the same way on its own citizens and on those of other States. The State's own policy may determine the jurisdiction of its courts and the character of its controversies which shall be heard therein. A statute, therefore, providing that no action can be maintained in the courts of a State for wrongful death occurring in another State except where the deceased was a citizen of the former State, the restriction operating equally upon representatives of the deceased whether they are citizens of the State where the statute was enacted or of other States, does not violate the privilege and immunity provision of the Federal Constitution.[24] A statute has also been held constitutional even though it prohibits certain actions between foreign corporations;[25] although a non-resident's right to maintain an action in a state court is not one of the privileges guaranteed by this provision of the Federal Constitution.[26] But a provision in a statute to the effect that when the defendant is out of the State, the statute of limitations shall not run against the plaintiff, if the latter resides in the State, but shall if he resides out of the State, is not repugnant to this constitutional provision as to privileges and immunities of citizens in the several States.[27]

§ 294. The Fourteenth Amendment — Generally.—The Fourteenth Amendment is prohibitory upon the States only, and the legislation authorized to be adopted by Congress for

[24] Chambers v. Baltimore & Ohio Ry. Co., 207 U. S. 142, aff'g 73 Ohio, 1.

[25] Anglo-American Provision Co. v. Davis Provision Co., 63 N. Y. Supp. 987, 50 App. Div. 273.

[26] Robinson v. Oceanic Steam Nav. Co., 112 N. Y. 315, 20 N. Y. St. R. 741, 16 C. P. 225, 19 N. E. 625, 2 L. R. A. 636, aff'g 1 N. Y. Supp. 418, 15 C. P. 88, 56 Sup. Ct. 108, 16 N. Y. St. R. 583, which reverses 16 N. Y. St. R. 871. See §§ 66, 67, herein.

[27] Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. ed. 806.

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enforcing it is not direct legislation on the matter respecting which the States are prohibited from making or enforcing certain laws, or doing certain acts, but is corrective legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts.[28] The prohibitions of this amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and whoever, by virtue of a public position under a state government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the State's name and is clothed with the State's power, his act is that of the State.[29] The mere

[28] Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. 18.

"It is well settled that the provisions of the Fourteenth Amendment which prohibit a State from depriving any person of life, liberty or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the laws, add nothing to the rights of one citizen as against another, but are limitations upon the powers of the State, and guaranty immunity from state law and state acts invading the privileges and rights stated in the amendment; that while the government of the United States is, within the scope of its powers, supreme, it can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction by the Constitution of the United States; and that rights and privileges not so placed within its jurisdiction are left to the exclusive protection of the States." Green v. Elbert, 63 Fed. 309.

The cases arising under the Fourteenth Amendment are examined in detail, and are held to demonstrate that, in passing upon the validity of state legislation under it, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some States methods of procedure which, at the time the Constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizens have been found to be no longer necessary; that restrictions which had, formerly been laid upon the conduct of individuals or classes had proved detrimental to their interests; and other classes of persons, particularly those engaged in dangerous or unhealthy employments, have been found to be in need of additional protection; but this power of change is limited by the fundamental principles laid down in the Constitution, to which each member of the Union is bound to accede as a condition of its admission as a State. Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. 383.

[29] Chicago, Burlington & Quincy Rd. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. 581.

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fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must not only appear that a classification has been made, but also that it is based upon some reasonable ground, something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.[30] Again, due process of law and the equal protection of the laws are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government;[31] nor is there any unjust discrimination, or any denial of the equal protection of the laws, in regulations regarding railroads, which are applicable to all alike.[32] And requiring the burden of a public service by a corporation, in consequence of its existence and of the exercise of privileges obtained at its request, to be borne by it, is neither denying to it the equal protection of the laws, nor making any unjust discrimination against it.[33] Corporations are persons within the meaning of the clauses in the Fourteenth Amendment to the constitution concerning the deprivation of property, and concerning the equal protection of the laws, and are not to be denied any of the rights therein guaranteed.[34]

§ 295. Same Subject—Police Power.—It is elementary that the Fourteenth Amendment does not deprive the States of their police power over subjects within their jurisdiction.[35]

[30] Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. 255.

[31] Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. 570.

[32] New York & New England Rd. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269.

[33] Charlotte, Columbia & Augusta Rd. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051. See New York v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. 880.

[34] Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. 207; McGuire v. Chicago, Burlington & Quincy R. Co., 131 Iowa, 340, 350, 108 N. W. 902. See § 66, herein.

[35] Cummings v. Reading School District, 198 U. S. 458, 49 L. ed. 1125, 25 Sup. Ct. 721; New Orleans Gas Light Co. v. Drainage Commissioners, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. ed. 831; Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. ed. 1018; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. 992; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct.

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So a State has power to regulate grain warehouses;[36] grain elevators;[37] the consolidation of common carrier corporations;[38] the recovery of damages against a railroad for killing live stock;[39] to provide for the extinction of grade crossings as a menace to public safety;[40] for the regulation of carriers of electricity, or electrical conductors;[41] for the regulation of slaughter houses of a corporation;[42] and in general a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, when that jurisdiction is not surrendered, or restrained by the Constitution of the United States; and all those powers which relate to merely municipal legislation, or which may more properly be called internal police, are not restrained, so that in relation to these the authority of a State is complete, unqualified and exclusive.[43] Again, it is an appropriate exercise of the police power of the State to regulate the use and enjoyment of mining properties, and mine owners are not deprived of their property, privileges or immunities without due process of law or denied the equal protection of the laws by the Illinois mining statute of 1899, which requires the employment of only licensed mine managers and mine examiners, and imposes upon the mine owners liability for the willful failure of the manager and examiner to furnish a reasonably safe place for the workmen. It is also within the power of the State to change or modify, in accord with its conceptions of public policy, the principles of the common law in regard to the relation of master and servant; and, in cases within the

357. See Sprigg v. Garrett Park, 89 Md. 406, 43 Atl. 813; State v. Jackman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438, 3 Chic. L. J. Wkly. 551. See § 149, herein.

[36] Brass v. Stoeser, 153 U. S. 391, 38 L. ed. —, 14 Sup. Ct. —.

[37] Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 Sup. Ct. 468.

[38] Louisville & Nashville Rd. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714.

[39] Minneapolis & St. Louis R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. 207.

[40] New York & New England Rd. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269.

[41] New York v. Squire, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. ed. 666.

[42] Slaughter-House Cases, 16 Wall. (83 U. S.) 36, 21 L. ed. 394.

[43] New York v. Milne, 11 Pet. (36 U. S.) 102, 9 L. ed. 648.

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proper scope of the police power, to impose upon the master liability for the willful act of his employee.[44] But none of the large police powers of a State can be exercised to such an extent as to work a practical assumption of the powers conferred by the Constitution on Congress, and since the range of the State's police power comes very near to the field committed by the Constitution to Congress, the courts should guard vigilantly against any needless intrusion.[45]

§ 296. **Privileges and Immunities of Citizens of the United States.**—The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution or its laws and treaties made in pursuance thereof and it is these which are placed under the protection of Congress by this amendment.[46] These privileges or immunities are not abridged by a state enactment prohibiting monopolies, etc., for certain purposes upon penalty of a revocation of a foreign corporation's certificate of authority in case of a violation of the statute.[47] Nor does a statute violate this clause as to privileges and immunities where it imposes a liability upon railroad companies for injuries by fire communicated from its right of way.[48] A corporation is not a citizen within the meaning of this clause and has not the privileges and immunities secured to citizens against state legislation.[49]

§ 297. **Due Process of Law.**—Due process of law within the meaning of the Constitution, is secured when the laws operate

[44] Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 51 L. ed. —, 27 Sup. Ct. —.

[45] Railroad Co. v. Husen, 95 U. S. 465, 24 L. ed. 527.

[46] Slaughter-House Cases, 10 Wall. (77 U. S.) 273, 19 L. ed. 915; Duncan v. Missouri, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. ed. 485.

[47] Attorney General v. A. Booth & Co., 143 Mich. 89, 12 Det. Leg. N. 991, 106 N. W. 868. But compare Gage v. State, 24 Ohio Cir. Ct. R. 724.

[48] Brown v. Carolina Midland Ry. Co., 67 S. C. 481, 46 S. E. 283; Code Laws 1902, § 2135.

[49] Western Turf Association v. Greenberg, 204 U. S. 359, 51 L. ed. —, 27 Sup. Ct. —; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. ed. 552, 28 Ins. L. J. 97, aff'g 136 Mo. 382, 35 L. R. A. 227,

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upon all alike, and no one is subject to partial or arbitrary exercise of powers of government.[50] Rights of property, and to a reasonable compensation for its use, created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may, unless constitutional limitations forbid, be changed at the will of the legislature. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. But down to the time of the adoption of the Fourteenth Amendment it was not supposed that statutes regulating the use of, or even the price of the use, of private property necessarily deprived the owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such deprivation.[51] In a Federal case, the court suggests the difficulty and danger of attempting an authoritative definition of what it is for a State to deprive a person of life, liberty or property without due process of law, within the meaning of the Fourteenth Amendment; and holds that the annunciation of the principles which govern each case as it arises is the better mode of arriving at a sound definition. In this case, the court holds that it is due process of law, within the meaning of the Constitution, when the statute requires that such a burden as the fixing of a tax or assessment before it becomes effectual, must be submitted to a court of justice, with notice to the owners of the property, all of whom have the right to appear and contest the assessment. But by prior decisions due process of law does not in all cases

38 S. W. 85, 26 Ins. L. J. 67. See § 67, herein.

[50] Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. 224. Examine Bartlett v. Wilson, 59 Vt. 23, 8 Atl. 321, 4 N. Eng. Rep. 119. See Marchant v. Pennsylvania R. Co., 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. 894 (for review of leading cases upon the construction of the due process of law phrase). See also Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616, as to the origin and history of this provision.

[51] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77. Examine State v. Sponangle, 45 W. Va. 415, 43 L. R. A. 727, 32 S. E. 283.

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require a resort to a court of justice to assert the rights of the public against the individual, or to impose burdens upon his property for the public use.[52] And neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution.[53] In order, however, to constitute a violation of the constitutional provision against depriving a person of his own property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived.[54] Again, restraints upon the proper exercise of the police power of the States are not imposed by this clause of the Federal Constitution.[55]

§ 298. **Same Subject Continued.**—Regulations of public stockyards and their charges, when not unreasonable and unjust as depriving their owners of a reasonable return on the money invested, do not constitute a taking of private property without due process of law or just compensation.[56] So gas rates may be regulated without infringing upon the due process of law provision of the Constitution where such rates, so fixed, allow a reasonable profit on the actual value of the investment.[57]

[52] Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616, citing Murray's Lessee et al. v. Hoboken Land & Improvement Co., 18 How. (59 U. S.) 272, 15 L. ed. 372; McMillan v. Anderson, 95 U. S. 37, 24 L. ed. 335.

[53] Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

[54] New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. 142.

[55] Sprigg v. Garrett Park, 89 Md. 406, 411, 43 Atl. 813. See § 138, herein.

[56] Ratcliff v. Wichita Union Stockyards Co., 74 Kan. 1, 86 Pac. 150; Laws 1903, p. 735, c. 487.

[57] Richman v. Consolidated Gas Co. of N. Y., 100 N. Y. Supp. 81, 114 App. Div. 216, 78 N. E. 871, aff'd 186 N. Y. 209; Grossman v. Same, 100 N. Y. Supp. 100, 114 App. Div. 242, aff'd 186 N. Y. 541 (mem.).

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Nor is a person deprived of property without due process of law by a statute which makes water rates a charge upon lands in a municipality prior to the lien of all incumbrances.[58] Nor is the exaction of tolls for the use of an improved waterway within such prohibition of the Constitution.[59] The repeal of a statute providing that a municipal government may set off the taxes of a water company against the company's rates for water, and the substitution of a different scheme of payment in its place, does not deprive the municipality of its property without due process of law, in the sense in which the word "property" is used in the Constitution of the United States.[60] Nor does a state statute, reducing the rate of interest upon all judgments obtained within the courts of the State, when applied to one obtained previous to its passage, deprive the judgment creditor of his property without due process of law, in violation of the provisions of section one of the Fourteenth Amendment.[61] Again, the right of a railroad company to maintain a tunnel under a navigable river is subject to the paramount public right of navigation, and where it has been constructed under municipal ordinance and a state law that it shall not interrupt navigation, the duty of not obstructing navigation is a continuing one; and, if the increased demands of navigation at any time require a deeper channel than when the tunnel was originally constructed, it is within the power of the municipality to compel the railroad company, at the latter's own expense, to either remove the tunnel or lower it to conform with the necessities of commerce and to a rule established by act of Congress; and such action of the municipality is not unconstitutional, and does not amount either to taking the property for public use without compensation, or depriving the company of its property without due

[58] Provident Inst. for Savings v. Jersey City, 113 U. S. 506, 28 L. ed. —, 5 Sup. Ct. —.

[59] Sands v. Manistee River Imp. Co., 123 U. S. 288, 8 Sup. Ct. 113, 31 L. ed. 149.

[60] New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 12 Sup. Ct. 142, 35 L. ed. 943.

[61] Morley v. Lake Shore & M. S. Ry. Co., 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. 54.

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process of law.[62] Nor does such a deprivation of property arise under a statute empowering a city to require the removal of telephone wires to underground conduits, as the enactment is within the police power of the State.[63] But a municipal corporation with charter authority to permit the use of its streets, to control them, and to regulate the construction of railroad tracks thereon acts, in resuming control of such streets, as agent of the State within the above constitutional provision that no State shall deprive any person of property without due process of law.[64] The construction, however, and maintenance by a city of its own waterworks plant does not

[62] West Chicago Street Railroad Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. 518, aff'g 214 Ill. 9, 73 N. E. 393, following Chicago, Burlington & Quincy Ry. Co. v. Drainage Commrs., 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596. In this case a railroad company was required to remove a bridge, unless it abandoned or surrendered its right to a crossing at that point, and to erect at its own expense and maintain a new bridge in conformity with regulations established by drainage commissioners under authority of the State, and it was held that such requirement, if enforced, would not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws. See Bristol County, In re, 193 Mass. 257, 79 N. E. 339; Stat. 1900, p. 411, c. 439, § 6.

[63] City of Geneva v. Geneva Teleph. Co., 62 N. Y. Supp. 172, 30 Misc. 236 (Laws 1897, c. 360, § 58, as am'd by Laws 1899, c. 405), citing Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Western Union Teleg. Co. v. City of New York, 38 Fed. 552; American Rapid Teleg. Co. v. Hess, 125 N. Y. 641, 36 N. Y. St. R. 252, 21 Am. St. Rep. 764, 26 N. E. 919, 39 Am. & Eng. Corp. Cas. 526, 3 Am. Elec. Cas. 142, aff'g 58 Hun, 610, 35 N. Y. St. R. 606, 12 N. Y. Supp. 536; People v. King, 110 N. Y. 418, 423, 18 N. E. 245, 1 L. R. A. 293, 18 N. Y. St. R. 353, aff'g 42 Hun, 186, 5 N. Y. St. R. 138, 25 Wkly. D. 212; People v. Squire, 107 N. Y. 593, 12 N. Y. St. R. 832, 28 Wkly. D. 175, 14 N. E. 823, 2 Am. Elec. Cas. 176, aff'd 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. 880, 4 Am. Elec. Cas. 122. See Joyce on Electric Law (2d ed.), §§ 420 *et seq.*

[64] Iron Mountain R. Co. v. Memphis, 96 Fed. 113, 37 C. C. A. 410, citing Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418; Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979; Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. 130; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014, 4 Inters. Comm. Rep. 575; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. 1108; Yick Wo v. Hopkins, 118 U. S. 356, — Sup. Ct. —, 30 L. ed. 220; Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. ed. 835; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567. See Joyce on Electric Law (2d ed.), § 229.

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constitute such a taking of the property of a corporation operating its works under a franchise granted by that city.[65] Nor is a railroad deprived of its property without due process of law or denied the equal protection of the laws by a statute which provides that every railroad company organized and doing business in the State of the statutory enactment shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employees, to any person sustaining such damage.[66] Again, due process of law is

[65] Mayor, etc., of City of Meridian v. Farmers' Loan & Trust Co., 143 Fed 67, rev'g Farmers' Loan & Trust Co. v. City of Meridian, 139 Fed. 673; Revere Water Co. v. Town of Winthrop, 192 Mass. 455, 78 N. E. 497; Stat. 1905, p. 488, c. 477.

[66] Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. 1161. See also Tullis v. Lake Erie & Western R. Co., 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. 136; Chicago, Kansas & Western Rd. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. ed. 675.

Eight-hour law regulating period of employment by corporations of workingmen in mines, smelters and other institutions for the reduction or refining of ores or metals, except in certain cases of emergency, is valid exercise of police power of State and does not violate the provisions of the Fourteenth Amendment by abridging the privileges or immunities of citizens of the United States, or by depriving them of their property, or by denying them the equal protection of the laws. Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. 383. *See* Atkin v. State of Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. 124, aff'g State v. Atkin, 64 Kan. 174, 67 Pac. 519; Boyce, Ex parte, 27 Nev. 299, 75 Pac. 1; People v. Orange County Road Const. Co., 175 N. Y. 84, 67 N. E. 129, rev'g 77 N. Y. Supp. 16, 73 App. Div. 580, citing Connolly & Dee v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. 431; Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 22 Sup. Ct. 30, 46 L. ed. 92; Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666; Pell's Estate, Matter of, 171 N. Y. 48, 63 N. E. 789, 89 Am. St. Rep. 791, 57 L. R. A. 540; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763; Colon v. Link, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302. *Examine* Ellis v. United States, 206 U. S. 246, 51 L. ed. —, 27 Sup. Ct. —.

Statute providing for payment monthly of employees of corporations and giving lien for wages with preference over other liens, with certain exceptions, and allowing a reasonable attorney's fee in case of action brought does not violate a state constitutional provision as to deprivation of property without due process of law, nor interfere with the liberty to contract. Skinner v. Garnett Gold Min. Co., 96 Fed. 735; Stat. Cal. 1897, p. 231, §§ 1, 2.

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not denied by the imposition of a tax on transfers of stock in domestic and foreign corporations.[67] Nor is this provision as to due process of law violated by a mechanic's lien law which specifies the form of contract requisite to obtain a lien but which does not preclude any other form of contract.[68] And this clause of the Constitution is held to be sufficiently satisfied by the provisions of the Massachusetts Mill Act which gives damages or compensation within a certain period for the harm actually done to lands overflowed or otherwise injured, the right of the lower owner only becoming complete when the land is flowed, and then being only a right to maintain a dam, subject to payment to the upper owners, as above stated, for the injury sustained.[69]

§ 299. **Same Subject Continued.**—A statute prohibiting effecting insurance on property in the State, by any person therein, in any marine insurance company which has not complied in all respects with the laws of the State of enactment, and providing a fine for noncompliance with such act, violates the due process clause of the Constitution when applied to a contract of insurance made in another State with an insurance company there, where the premiums and losses were to be paid there.[70] So compelling the acceptance of the arbitrary

[67] People v. Reardon, 184 N. Y. 431, 77 N. E. 970, aff'g 97 N. Y. Supp. 535, 110 App. Div. 821; Laws 1905, pp. 474, 477, c. 241, §§ 315, 324.

[68] Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. 786.

[69] Otis Co. v. Ludlow Mfg. Co., 186 Mass. 89, 70 N. E. 1009, 104 Am. St. Rep. 563. Modified as follows: In a suit at equity brought by the upper owner to restrain the lower owner from building a dam, the state court having decided generally that the Mill Act is valid, but not having definitely expressed itself as to its constitutionality, and as the opinion of the Federal Supreme Court might depend upon the interpretation of the act by the state court, it was held that the bill should be dismissed without prejudice, or retained until plaintiff's rights should be determined in an action for damages under the statute pending in the state courts. Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140, 26 Sup. Ct. 353, 50 L. ed. 696.

[70] Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. 427. Distinguishing Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. 207.

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decision of a statutory umpire as to the weight of grain and precluding the showing of any error by him violates the due process of law clause.[71] Property is also taken without due process of law by the requirement of an ordinance that street railroads accept transfers from other companies with which it has no connection and which thereby necessitates carrying passengers without charge, and this is so even though a reciprocal obligation is imposed upon such other companies and an increase of business results therefrom.[72] And a statute which attempts to change the ownership of private property without due process of law is unconstitutional.[73] Again, a law operates to deprive railroad companies of property without due process of law, and denies to them the equal protection of the law, where it singles them out of all citizens and corporations and requires them to pay, in certain cases, attorneys' fees to the parties successfully suing them, while it gives to them no like or corresponding benefit.[74] But the Nebraska statute of 1899,[75] by which the court upon rendering judgment for a total loss sued for against an insurance company upon any policy of insurance against loss on real property by fire, tornado or lightning shall allow the plaintiff a reasonable attorney's fee to be taxed as costs, is not repugnant to the equality clause of the Fourteenth Amendment either because it arbitrarily subjects insurance companies to a liability for such fees when other defendants in other cases are not subjected to such burden, or because the fee is to be

[71] Vega Steamship Co. v. Consolidated Elevator Co., 75 Minn. 308, 77 N. W. 973, 43 L. R. A. 843.

[72] Chicago City Ry. Co. v. Chicago, 142 Fed. 844.

[73] People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. R. 173, rev'g 45 Hun, 519, 10 N. Y. St. R. 596, 27 Wkly. D. 365, Laws N. Y. 1886, c. 271.

[74] Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 650, 41 L. ed. —, 17 Sup. Ct. —, act of Texas, April 5, 1889. The claims under this statute were those for "personal services rendered or for labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent," etc. See Joliffe v. Brown, 14 Wash. 155, 44 Pac. 149, 3 Am. & Eng. R. Cas. (N. S.) 254.

[75] Laws 1899, chap. 48, §§ 43–45.

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imposed on the insurance companies but not on the insured when the suit is successfully defended, or because the statute arbitrarily distinguished between different classes of policies allowing the fee in certain cases and not in others.[76]

§ 300. **Equal Protection of the Laws.**—There cannot be an exact exclusion or inclusion of persons and things in a classification for governmental purposes, and a general classification, otherwise proper, will not be rendered invalid because certain imaginary and unforeseen cases have been overlooked. In such a case there is no substantial denial of the equal protection of the laws within the meaning of the Fourteenth Amendment;[77] and a state constitutional provision declaring that protection to persons and property shall be impartial and complete is the equivalent to a declaration that the equal protection of the laws shall not be denied to any person.[78] So it is not in the power of one State, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges, connected with that business, which it denies to citizens of other States.[79] A state statute may, however, without violating the equal protection clause of the Fourteenth Amendment, put into one class all engaged in business of a special and public character, and require them to perform a duty which they can do better and more quickly than others and impose a not exorbitant penalty for the non-performance thereof.[80] And the peculiar

[76] Farmers' & Merchants' Ins. Co. v. Dobney, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. ed. 821, aff'g 62 Neb. 213, 86 N. W. 1070. See Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. ed. —.

[77] Oxan Lumber Co. v. Union County National Bank of Liberty, 207 U. S. 251.

[78] Georgia R. & Banking Co. v. Wright, 125 Ga. 589, 54 S. E. 52; Central of Georgia Ry. Co. v. Same, 125 Ga. 617, 54 S. E. 64, both rev'd, upon point that due process of law acquires opportunity to be heard as to validity of tax and amount of assessment, in 207 U. S. 127. See Walston v. Nevins, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. 192.

[79] Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. 165.

[80] Seaboard Air Line Ry. v. Seegaers, 207 U. S. 73, aff'g 73 S. C. 71. Examine Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 27 Chic. Leg. N. 270, 29 L. R. A. 79.

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character of the business in which a class of corporations is engaged may warrant the imposition upon that class of certain duties and liabilities without infringing upon this clause as to the equal protection of the laws.[81] So legislation imposing upon railway companies special restrictions, obligations, and liabilities not generally applicable to other persons or corporations is not a denial of the equal protection of the laws;[82] nor does the enforcement against railroad companies of reasonable rules and regulations deny such protection;[83] nor is it denied by a statute which imposes a liability upon railroad companies for injuries by fire communicated by its right of way;[84] nor is such protection of the law denied by a judgment in favor of an abutting owner of land against a railroad company for damages arising from the temporary construction and use of tracks in a street while reconstructing a crossing under authority of a state statute;[85] nor does a statute providing for the taxation of national banks deny to the banks as taxpayers the equal protection of the laws.[86] Such equal protection of the laws is not denied under a state constitution avoiding sales on margin of corporate shares of stock, or on future delivery.[87] And the courts requiring a bond of a party before issuing an injunction in condemnation proceeding, does not deny such protection of the laws, even though no bond is required of the opposing party;[88] nor is it denied by a statute which allows damages not exceeding a certain per

[81] St. Louis, Iron Mountain & Southern Ry. Co. v. Paul, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 7 Am. & Eng. Corp. Cas. (N. S.) 772.

[82] McGuire v. Chicago, Burlington & Quincy R. Co., 131 Iowa, 340, 352, 108 N. W. 902.

[83] State v. Atlantic Coast Line R. Co. (Fla.), 41 So. 705.

[84] Brown v. Carolina Midland Ry. Co., 67 S. C. 481, 46 S. C. 283; Code, Laws 1902, § 2135. See also St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. ed. 611.

[85] Knapp & Cowles Mfg. Co. v. New York, New Haven & Hartford Ry. Co., 76 Conn. 311, 56 Atl. 512.

[86] Bank of Redemption v. Boston, 125 U. S. 60, 31 L. ed. —, 8 Sup. Ct. —; Mass. Pub. Stats., chap. 13, §§ 8, 9, 10.

[87] Otis v. Parker, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. ed. —, aff'g Parker v. Otis, 130 Cal. 322, 62 Pac. 571, 927.

[88] Columbia Water Power Co. v. Nunamaker, 73 S. C. 550, 53 S. E. 996.

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cent and a reasonable attorney's fee to plaintiff in an action to recover for a loss against an insurance company which has vexatiously refused to pay such loss.[89] But a statute cannot constitutionally discriminate against corporations and so deny them the equal protection of the law by imposing upon them restrictions as to liability of damages to employees without regard to differences consequent upon the nature of the business not imposed on natural persons.[90] A statute does not, however, deny the equal protection of the laws where it makes all railroad companies liable for injuries to an employee although caused by a fellow servant's negligence irrespective of insurance or other benefits or other contracts of indemnity.[91]

[89] Williamson v. Liverpool & London & Globe Ins. Co., 141 Fed. 54, 72 C. C. A. 542; Rev. Stat. Mo., 1899, § 8012.

See also the following cases:

United States: Merchants' Life Assn. of United States v. Yoakum, 98 Fed. 251.

Florida: Tillis v. Liverpool & London & Globe Ins. Co. (Fla., 1903), 35 So. 171.

Missouri: Keller v. Home Life Ins. Co., 198 Mo. 440, 95 S. W. 903.

Tennessee: Continental Fire Ins. Co. v. Whitaker & Dillard, 112 Tenn. 151, 79 S. W. 119.

Texas: Sun Life Ins. Co. v. Phillips (Tex. Civ. App.), 70 S. W. 603.

Washington: Joliffe v. Brown, 14 Wash. 155, 44 Pac. 149, 3 Am. & Eng. R. Cas. (N. S.) 254.

[90] Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 34 So. 533; Acts 1898, § 1, Laws 1898, p. 85, c. 66. Compare Callahan v. St. Louis Merchants' Bridge Terminal Co., 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249; Froelich v. Toledo & Ohio Central Ry. Co., 24 Ohio Cir. Ct. R. 359.

[91] McGuire v. Chicago, Burlington & Quincy Rd. Co., 131 Iowa, 340, 108 N. W. 902. See also Vindicator Consol. Gold Mining Co. v. Firstbrook, 36 Colo. 498, 86 Pac. 313.

The following provisions in the first section of the act of the legislature of Indiana approved by the governor of that State on the fourth day of March, 1893, viz.: "That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases: *First.* When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with, or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition; *Second.* Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform, and did conform: *Third.* Where such injury resulted from the act or

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But this constitutional provision is violated by a stock-killing act against railroads which ignores the fencing of railways and the question of negligence.[92] A statute prohibiting agreements among insurance companies regulating agent's commissions, and also the manner of transacting the fire insurance intrastate business, violates this clause as to equal protection of the laws.[93] A private corporation is a person within this clause.[94]

omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf; *Fourth.* Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine or train upon a railway or where such injury was caused by the negligence of any person, coemployee or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployee or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; that nothing herein shall be construed to abridge the liability of the corporation under existing laws," as they are construed and applied by the Supreme Court of that State, are not invalid, and do not violate the Fourteenth Amendment to the Constitution of the United States. Tullis v. Lake Erie & Western R. Co., 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. 136.

[92] Sweetland v. Atchison, Topeka & Santa Fe R. Co., 22 Colo. 220, 43 Pac. 1006.

Payment of employees—Lien for wages on corporate property—Reasonable attorneys' fees to enforce lien. Statute as to does not deny equal protection of the laws. Skinner v. Garnett Gold Mining Co., 96 Fed. 735.

[93] Greenwich Ins. Co. v. Carroll, 125 Fed. 121.

[94] Johnson v. Goodyear Min. Co., 127 Cal. 4, 59 Pac. 304. See §§ 64–66, herein.

Although corporations are entitled to the equal protection of the laws, still "this does not mean that corporations and natural persons stand in the same relation to the power which inheres in the State to regulate their conduct or methods of business. The distinction between them is fundamental and ineradicable. The natural person has certain inalienable rights, for which he is not indebted to organized society. * * * The corporate person has no rights except those with which it is endowed by the lawmaking power, and the power of creation necessarily implies the power of regulation * * * 'the police power of the State may, within well defined limitations, extend over corporations outside and regardless of the power to amend charters.'" McGuire v. Chicago, Burlington & Quincy R. Co., 131 Iowa, 340, 367, 368, 108 N. W. 902, per Weaver, J.

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CHAPTER XIX.

OBLIGATION OF CONTRACTS.

§ 301. Impairment of Obligation of Contract—Generally.
302. States—Civil Institutions of —Constitutional Restraints —Obligation of Contracts.
303. Obligation of Contract—Existence of Legal Contract —Impairment— State Statutes.
304. Obligation of Contracts—Federal Question—Status of Party Plaintiff.
305. Impairment of Obligation of Contracts—What Are "Laws"—Application.
306. Same Subject—Judicial Acts —Vested Rights.
307. Vested Rights—Amendment to Effect Purposes of Charter—Modifying or Enlarging Powers.
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314. Same Subject.
315. What Is not a Contract—Obligation of Contract—When not Impaired—Instances.
316. Same Subject — Instances Continued—Railroad Charter—Subscriptions in Aid of Railroad.
317. Reservation of Power to Alter, Amend or Repeal Grant of Franchise or Charter.
318. Reservation of Power to Alter, etc., Is Part of Charter or Contract.
319. Reservation of Power to Alter, etc., and Limitations Thereon.
320. Reservation of Power to Alter, etc. — Fourteenth Amendment—Equal Protection of the Law—Deprivation of Property—Railroad Employees.

§ 301. **Impairment of Obligation of Contract—Generally.**—The provision in the Constitution of the United States that no State shall pass any law impairing the obligation of contracts [1] does not extend to any state law enacted before

[1] Art. 1, § 10, cl. 1.

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the first Wednesday in March, 1789, and operating upon rights of property vested before that time which was the date when the Constitution of the United States commenced its operation.[2] Said provision also necessarily refers to the law made after the particular contract in suit,[3] and applies as well to implied as to express contracts.[4] But a statute does not necessarily impair the obligation of a contract because it may affect it restrospectively, or because it enhances the difficulty of performance to one party or diminishes the value of the performance to the other, provided that it leaves the obligation of the performance in full force.[5]

§ 302. **States—Civil Institutions of—Constitutional Restraints—Obligation of Contracts.**—The Federal Constitution is not to be construed as intended to restrict the States in the regulation of their civil institutions adopted for internal government, and the constitutional provision forbidding the States from impairing the obligation of contracts is not to be understood to embrace other contracts than those which respect property or some other object of value and confer rights which may be asserted in a court of justice.[6]

§ 303. **Obligation of Contract—Existence of Legal Contract—Impairment—State Statutes.**—Before the Federal Supreme Court can be asked to determine whether a statute has impaired the obligation of a contract, it must be made to appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired.[7] And whether an alleged contract arises from state legislation, or by

[2] Owings v. Speed, 5 Wheat. (18 U. S.) 420, 5 L. ed. 124.

[3] Oshkosh Water Works Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. —; Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. 916.

[4] Fisk v. Jefferson Police Jury, 116 U. S. 131, 29 L. ed. 587.

[5] Curtis v. Whitney, 13 Wall. (80 U. S.) 68, 20 L. ed. 513.

[6] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629, per the court.

[7] New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. 142.

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agreement with the agents of a State, by its authority, or by stipulation between individuals exclusively, the Federal Supreme Court will upon its own judgment and independently of the adjudication of the state court, decide whether there exists a contract within the protection of the Constitution of the United States.[8]

§ 304. **Obligation of Contracts—Federal Question—Status of Party Plaintiff.**—One who has contracted to deliver gas machinery to a gas and fuel company has no standing in a court of equity to restrain a city from enforcing an ordinance prohibiting the erection of gas works within a portion of the city in which the erection of gas works was not prohibited when the contract was made, on the ground that such ordinances are repugnant to the Federal Constitution as impairing the obligation of a contract, it not appearing that the plaintiff has any contract with the city or that the gas and fuel company would not, or could not, by reason of insolvency, respond to its claim under the contract.[9]

§ 305. **Impairment of Obligation of Contracts—What Are "Laws"—Application.**—The prohibition in the Constitution of the United States against the passage of laws impairing the obligation of contracts applies only to legislative enactments of the States;[10] although it is also held to apply to the constitution as well as to the laws of each State.[11] And an ordinance

[8] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. 265.

"The doctrine that this court possesses paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases." Douglass v. Kentucky, 168 U. S. 488, 502, 42 L. ed. 553, 18 Sup. Ct. 199.

[9] Davis & Farnum Manufg. Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 538, 47 L. ed. 858.

[10] Weber v. Rogan, 188 U. S. 10, 47 L. ed. 363, 23 Sup. Ct. 263.

[11] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252. See also Hanford v. Davies, 163 U. S. 273, 41

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adopted as part of a state constitution levying a tax on the gross receipts of a railroad company, within two years after it was completed and put in operation, in order to pay debts of the State, in order to help build the road, and which as between itself and the State the railroad company was primarily bound to pay, impaired the obligation of contract and was void.[12] But it is also determined that if the decision of a state court is based upon a constitutional or legislative enactment, passed after the contract in question was made, the Federal Supreme Court has jurisdiction to inquire whether such legislation does not impair the obligation of the contract, and thereby violate the Federal Constitution.[13] A municipal ordinance, however, not passed under legislative authority, is not a law of the State within the meaning of this constitutional prohibition against state laws impairing the obligation of contracts.[14]

§ 306. **Same Subject—Judicial Acts—Vested Rights.**—This constitutional inhibition against the impairment of contracts does not apply to the judicial decisions or acts of the state tribunals or officers, under statutes in force at the time of the making of the contract the obligation of which is alleged to have been impaired.[15] So this clause of the constitution cannot be invoked against what is merely a change of decision in the state court, but only by reason of a statute enacted subsequent to the alleged contract and which has been upheld or

L. ed. 157, 16 Sup. Ct. 1051; Railroad Co. v. McClure, 10 Wall. (77 U. S.) 511, 19 L. ed. 997 (a constitution of a State is in this case admitted to be a "law" within the inhibition).

A state constitution is not a contract within the inhibition. Church v. Kelsey, 121 U. S. 282, 30 L. ed. 960.

[12] Pacific Rd. Co. v. Maguire, 20 Wall. (87 U. S.) 36, 22 L. ed. 282. Examine Oakland Paving Co. v. Barstow, 79 Cal. 45, 21 Pac. 544; Nelson v. Haywood County, 87 Tenn. 781, 11 S. W. 885.

[13] Delmas v. Insurance Co., 14 Wall. (81 U. S.) 661, 20 L. ed. 757.

[14] Hamilton Gas Light & C. Co. v. Hamilton City, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. 90.

[15] Weber v. Rogan, 188 U. S. 10, 47 L. ed. 363, 23 Sup. Ct. 263; Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. 1051. See last preceding section herein.

The provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, is aimed at the legislative power of the

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effect given to it by the state court.[16] But it is also held that where the highest court of a State has upheld the power of a railroad company to lease its road, and such decision stands unquestioned, when a lease is entered into it becomes embodied in the contract the obligation of which cannot be subsequently impaired.[17] And the doctrine has been asserted and reasserted by the United States Supreme Court that if a contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts altering the construction of the law.[18] So a railroad company may, under the Rapid Transit Act of New York, acquire upon organization such a vested franchise and right to use land upon prescribed routes, that, even though it has not undertaken to acquire ownership, a subsequent statute giving the lands to a public park will not operate to divest the company's rights.[19] And statutes regulating irrigation and water rights do not affect pre-existing rights.[20] If a legislative grant is only a mere gratuity, is not an act of incorporation,

State, and not at decisions of its courts, or acts of executive or administrative boards or officers, or doings of corporations or individuals. New Orleans Water Works Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. 741.

[16] National Mut. B. & L. Assn. v. Brahan, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. 532.

[17] Southern R. Co. v. North Carolina R. Co. (C. C.), 81 Fed. 595.

[18] Olcott v. Supervisors, 16 Wall. (83 U. S.) 678, 21 L. ed. 382; Havemeyer v. Iowa County, 3 Wall. (70 U. S.) 294, 18 L. ed. 38; Ohio Life, etc., Co. v. Debolt, 16 How. (57 U. S.) 416, 14 L. ed. 997, per the court. See Memphis v. United States, 97 U. S. 293, 24 L. ed. 920; Steamship Co. v. Joliffe, 2 Wall. (69 U. S.) 450; Coffin v. Rich, 45 Me. 507, 71 Am. Dec. 559; Bronson v. City of New York, 10 Barb. (N. Y.) 223; Morris v. State, 62 Tex. 728. See also §§ 282–285, herein.

A state law is not in violation of any part of the Federal Constitution because it divests rights vested by law in an individual if not impairing the obligation of a contract. Satterlee v. Matthewson, 2 Pet. (27 U. S.) 380, 7 L. ed. 458, distinguishing Fletcher v. Peck, 6 Cranch (10 U. S.), 87, 3 L. ed. 162.

[19] Suburban Rapid Transit Co. v. New York, 128 N. Y. 510, 40 N. Y. St. R. 498, 28 N. E. 525, 10 Ry. & Corp. L. J. 494.

[20] Benton v. Johncox, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912.

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confers no chartered rights and does not amount to a contract, the legislature has power to repeal the grant where no rights have been acquired under the statutory grant nor any liability incurred in consequence of its passage. But where vested rights have been acquired under the grant before the passage of the repealing law, then, to the extent of such rights, such repealing law is unconstitutional and inoperative.[21] Again, a statute annulling conveyances is unconstitutional as impairing the obligation of contracts.[22] The repeal of a state statute authorizing every street railway to be operated by such animal, electric or other power as the municipal authorities may have granted will not destroy its effect to ratify contracts in existence when it was passed.[23] Nor are franchises of existing corporations destroyed or materially impaired by an authority under a statute to empower street railway companies, by contract, to use city streets.[24] And where a statute is held constitutional, but that decision is overruled by the highest state court, the obligation of a contract entered into in the period between the two decisions is not thereby impaired.[25] An amendment to the general corporation law whereby a foreign corporation is prohibited from suing on a claim to the assignee, where it has not complied with the statute, does not apply to a suit on a prior contract where by such application there would be an impairment of the obligation of contract.[26]

§ 307. Vested Rights—Amendment to Effect Purposes of Charter—Modifying or Enlarging Powers.—The charter of a private corporation may vest rights in the corporators and stockholders which no subsequent legislation can impair or diminish. But a charter may be amended in so far as it is

[21] Gregory v. Trustees of Shelby College, 2 Metc. (59 Ky.) 589 (a case of a lottery privilege).

[22] Fletcher v. Peck, 6 Cranch (10 U. S.), 87, 3 L. ed. 162.

[23] Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801, rev'g Govin v. City of Chicago, 132 Fed. 848.

[24] Citizens' St. Ry. Co. v. City R. Co. (C. C.), 64 Fed. 647.

[25] Storrie v. Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666.

[26] McNamara v. Keene, 98 N. Y. Supp. 860, 49 Misc. 452.

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necessary to carry into effect or accomplish the purposes for which it was obtained.[27] So the provision of a constitution, which declares that, "the General Assembly shall have no power to grant corporate powers and privileges to private companies" (with certain exceptions), "but it shall prescribe by law the manner in which such powers shall be exercised by the courts," does not take away from the General Assembly the power to amend the charters of existing corporations by modifying or enlarging their powers,[28] especially so where the modification of the charter is consented to by the corporation;[29] and the whole charter is not necessarily revoked by the withdrawal of a single right or privilege where the legislature is authorized to incorporate with a reserved power of revocation.[30]

§ 308. **Charter Powers not Contemplated and Unexecuted —Treated as License and Revocable.**—Where a charter authorizes a company in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public.[31]

§ 309. **Obligation of Contracts—Change of Remedy.**—The remedy subsisting in a State when and where a contract is made, and is to be performed, is a part of its obligation; and any subsequent law of the State, which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the Constitution of the United States, and,

[27] City of Covington v. Covington & Cincinnati Bridge Co., 10 Bush (73 Ky.), 69.

[28] Jones v. Habersham, 107 U. S. 174, 27 L. ed. 401; Const. Ga., 1868.

[29] O'Phinney v. Sheppard & Enoch Pratt Hospital, 88 Md. 633, 42 Atl. 58.

[30] Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co. (Del. Ch., 1900), 46 Atl. 12, citing numerous cases. See also City of Wilmington v. Addicks (Del., 1901), 47 Atl. 366.

[31] Pearsall v. Great Northern R. Co., 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. 705. See §§ 7, 48, herein.

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therefore, is void.[32] So "it is well settled by the adjudications of this court, that the obligation of a contract is impaired, in the sense of the Constitution, by any act which prevents its enforcement, or materially abridges the remedy for enforcing it, which existed at the time it was contracted, and does not apply an alternative remedy equally adequate and efficacious." [33] If a statute provides that existing remedies for previously incurred liabilities against a corporation, its directors or officers, shall not be impaired by repealing the charter, it constitutes a contract within the protection of the Constitution of the United States.[34]

§ 310. **Obligation of Contracts—Municipal Corporations.** —There are many ways in which the legislature has absolute power to make and change subordinate municipalities.[35] Municipal corporations are political subdivisions of the State, created by it and at all times wholly under its legislative control; their charters, and the laws conferring powers on them, do not constitute contracts within the contract clause of the Federal Constitution.[36] But the power of the State to alter or

[32] Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793. See Memphis v. United States, 97 U. S. 293, 24 L. ed. 920.

[33] McGahey v. Virginia, 135 U. S. 662, 694, 34 L. ed. 304, 10 Sup. Ct. 972, per Bradley, J.

[34] People v. O'Brien, 111 N. Y. 1, 19 N. Y. St. R. 173, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

[35] Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552; Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. 27.

[36] Hunter v. City of Pittsburg, 207 U. S. 161.

Corporations for mere public government, such as towns, cities and counties, are subject to legislative control and their charters are not contracts within the meaning of the Federal Constitution, but the private contracts and property rights of such corporations are protected. Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629.

A municipal corporation is a public instrumentality, established to aid in the administration of affairs of the State, and neither its charters, nor any legislative act regulating the use of property held by it for governmental or public purposes, is a contract within the meaning of the Constitution of the United States. Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. 383.

A municipal corporation, being a mere agent of the State, stands in its governmental or public character, in no contract relation with its sovereign, at whose pleasure its charter

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destroy its municipal corporations is not, so far as the impairment of the obligation clause of the Federal Constitution is concerned, greater than the power to repeal its legislation; and the alteration or destruction of subordinate governmental divisions is not the proper exercise of legislative power when it impairs the obligations of contracts previously entered into. Courts cannot permit themselves to be deceived; and while they will not inquire too closely into the motives of the State they will not ignore the effect of its action; and will not permit the obligation of a contract to be impaired by the abolition or change of the boundaries of a municipality. Where a tax has been provided for and there are officers to collect it the court will direct those officers to lay the tax and collect it from the property within the boundaries of the territory that constituted the municipality.[37] The fact that the council of a city has passed a resolution providing for payment of a pending bill of a water company claiming a franchise, with a saving clause against the city, being estopped from denying the existence of contract right, does not give the Circuit Court jurisdiction to maintain an action in equity to enjoin the city from appropriating money in the water fund to the payment of any indebtedness other than the complainant on the ground that such resolution is a law impairing the obligation of a contract within the purview of the Federal Constitution.[38]

§ 311. **Charter or Franchise as a Contract—Impairment of Obligation of Contract.**—We have considered under preceding sections the nature of franchises and the question whether a distinction exists between a charter and a franchise, as well as other distinctions,[39] and it may be stated here that

may be amended, changed or revoked, without the impairment of any constitutional obligation; but such a corporation in respect of its private or constitutional rights and interests, may be entitled to constitutional protection. New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. 142.

[37] Graham v. Folsom, 200 U. S. 248, 50 L. ed. —, 26 Sup. Ct. —.

[38] Defiance Water Co. v. Defiance, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. 63.

[39] See §§ 22–48, herein.

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an accepted act of incorporation of a private corporation constitutes such a contract between the State and the corporation that the latter cannot, by a subsequent act of the legislature or of a subordinate legislative body, be deprived of vested rights, privileges and franchises acquired under that charter. That grant cannot, against the consent of the corporation, be destroyed or the obligation of contract be impaired by legislative amendments or repeal, or changed in any respect material to corporate rights, in the absence of a power reserved to alter, amend or repeal such charter or franchise rights, and even the extent to which this reserved power may be exercised remains a question not fully settled.[40] A corporation although organ-

[40] **United States:** Georgia Rd. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. 47, 16 Wash. L. Rep. 749; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. 265; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 615, 6 Sup. Ct. 252; Binghamton Bridge, The, 3 Wall. (70 U. S.) 51, 18 L. ed. 137; Providence Bank v. Billings, 4 Pet. (29 U. S.) 514, 7 L. ed. 939; Fletcher v. Peck, 6 Cranch (10 U. S.), 87, 3 L. ed. 162; Old Colony Trust Co. v. City of Wichita, 123 Fed. 762; City of Morristown v. East Tennessee Teleph. Co., 115 Fed. 304; Abbott v. City of Duluth, 104 Fed. 833; Central Trust Co. v. Citizens' St. R. Co. (C. C.), 82 Fed. 1, 83 Fed. 529, 29 Chic. Leg. News, 417, 14 Nat. Corp. R. 770, 15 Nat. Corp. R. 529; Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 22 C. C. A. 334, 47 U. S. App. 36.

Alabama: State v. Alabama Bible Soc., 134 Ala. 632, 32 So. 1011; Birmingham & P. M. S. R. Co. v. Birmingham S. R. Co., 79 Ala. 465; Alabama & F. R. Co. v. Burkett, 46 Ala. 569; Aldridge v. Tuscumbia P. & D. R. Co., 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307.

Arkansas: State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 599, 41 Am. Dec. 509.

California: Billings v. Hall, 7 Cal. 1.

Connecticut: Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210; Derby Turnpike Co. v. Parks, 10 Conn. 522, 27 Am. Dec. 700.

Delaware: Philadelphia, W. & B. Co. v. Bowers, 4 Houst. (Del.) 506.

Georgia: Goldsmith v. Augusta & S. R. Co., 62 Ga. 468; Branch v. Baker, 53 Ga. 502.

Illinois: Dobbins v. First Nat. Bank, 112 Ill. 553; Ruggles v. People, 91 Ill. 256; Bruffett v. Great Western R. Co., 25 Ill. 353. See People v. Central Union Tel. Co., 192 Ill. 307, 61 N. E. 428; People's Gaslight & Coke Co. v. Hale, 94 Ill. App. 406.

Indiana: Smead v. Indianapolis P. & C. R. Co., 11 Ind. 104.

Kansas: Baxter Springs, City of, v. Baxter Springs Light & Power Co., 64 Kan. 591, 68 Pac. 63, 8 Am. Elec. Cas. 125.

Kentucky: Hamilton v. Keith, 5 Bush (68 Ky.), 458; Griffin v. Kentucky Ins. Co., 3 Bush (66 Ky.), 592, 96 Am. Dec. 259. See Gregory v.

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ized under a general statute may nevertheless thereby enter into and obtain a contract from the State which may be of such a

Trustees of Shelby College, 2 Metc. (59 Ky.) 589.

Louisiana: New Orleans v. Great Southern Teleph. & Teleg. Co., 40 La. Ann. 41, 3 So. 533; Montpelier Academy v. George, 14 La. 395, 33 Am. Dec. 585.

Maine: State v. Noyes, 47 Me. 189; Coffin v. Rich, 45 Me. 507, 71 Am. Dec. 559; Yarmouth v. North Yarmouth, 34 Me. 411, 56 Am. Dec. 666.

Maryland: State v. Northern Cent. R. Co., 44 Md. 162; Chesapeake & O. Canal Co. v. Baltimore & Ohio R. Co., 4 Gill & J. (Md.) 1.

Michigan: Mahan v. Michigan Teleph. Co., 132 Mich. 242, 93 N. W. 639, 8 Am. Elec. Cas. 38, 9 Det. Leg. News, 597.

Minnesota: Duluth, City of, v. Duluth Teleph. Co., 84 Minn. 486, 87 N. W. 1128, 8 Am. Elec. Cas. 136.

Mississippi: New Orleans, J. & G. N. R. Co. v. Harris, 5 Cushm. (27 Miss.) 517; Payne v. Baldwin, 3 Smedes & M. (11 Miss.) 661.

Missouri: State, Morris, v. Board of Trustees of Westminister College, 175 Mo. 52, 74 S. W. 990.

Nebraska: State, City Water Co., v. Kearney, 49 Neb. 325, 68 N. W. 533, aff'd 49 Neb. 337, 70 N. W. 255.

New Hampshire: Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35, 68.

New Jersey: Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

New York: Trustees of Freeholders, etc., of Southport v. Jessup, 162 N. Y. 122, 126, 56 N. E. 538; Thompson v. People, 23 Wend. (N. Y.) 537, 578; People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 387, 8 Am. Dec. 243; People v. Albany & V. R. Co., 37 Barb. (N. Y.) 216.

North Carolina: Attorney Genl. v. Bank of Charlotte, 57 N. C. 287; Houston v. Bogle, 32 N. C. 496.

Ohio: See City of Toledo v. Northwestern Ohio Natural Gas Co., 6 Ohio N. P. 531, 8 Ohio S. & C. P. Dec. 277.

Pennsylvania: Pennsylvania R. Co. v. Duncan, 111 Pa. 352, 5 Atl. 742; Chincleclamouche Lumber, etc., Co. v. Commonwealth, 100 Pa. 444; Dillon v. Dougherty, 2 Grant's Cas. 99. See Pennsylvania R. Co. v. Bowers, 124 Pa. 183, 2 L. R. A. 621, 16 Atl. 836, 23 Wkly. N. of Cas. 257.

Tennessee: Woodfork v. Union Bank, 3 Cold. (43 Tenn.) 488.

Texas: Houston & T. Cent. R. Co. v. Texas & Pac. R. Co., 70 Tex. 649, 8 S. W. 498; State v. Southern Pac. R. Co., 24 Tex. 80.

Wisconsin: State v. Chicago & N. W. Ry. Co., 128 Wis. 449, 108 N. W. 594; State v. Atwood, 11 Wis. 422. See Pratt v. Brown, 3 Wis. 603.

Examine the following cases:

United States: Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. ed. 1165; Pearsall v. Great Northern Ry. Co., 161 U. S. 648, 40 L. ed. 838, 16 Sup. Ct. 705; Rundle v. Delaware & R. Canal Co., 14 How. (55 U. S.) 80, 14 L. ed. 335; Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 9 L. ed. 773.

Georgia: Central R. Co. v. Collins, 40 Ga. 582.

Maine: Farrington v. Putnam, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339.

Massachusetts: Boston Glass

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nature that it can only be altered in case the power to alter was, prior thereto, provided for in the constitution or legisla-

Manufactory v. Langdon, 24 Pick. (41 Mass.) 49, 53, 35 Am. Dec. 292.

North Carolina: Trustees of Davidson College v. Chambers, 56 N. C. 253.

Ohio: Exchange Bank of Columbus v. Hines, 3 Ohio St. 1; Bank of Toledo v. City of Toledo (Toledo Bank v. Bond), 1 Ohio St. 622, 642–652; Mechanics' & Traders' Bank v. Debolt, 1 Ohio St. 591, rev'd in 18 How. (59 U. S.) 380.

"Every grant of a franchise is, so far as that grant extends, necessarily exclusive; and cannot be resumed, or interfered with. All the learned judges in the state court admitted, that the Charles River bridge, whatever it be, could not be resumed or interfered with. The legislature could not recall its grant, or destroy it. It is a contract, whose obligation cannot be constitutionally impaired. In this respect it does not differ from a grant of lands. In each case, the particular land, or the particular franchise, is withdrawn from the legislative operation. The identical land, or the identical franchise, cannot be regranted, or avoided by a new grant. But the legislative power remains unrestricted. The subject-matter only (I repeat it) has passed from the hands of the government. * * * The authorities are abundant to establish, that the king cannot make any second grant which shall prejudice the profits of the first grant. And why not? Because the grant imposes public burdens on the grantee, and subjects him to public charges, and the profits constitute his only means of remuneration; and the crown shall not be at liberty to impair, much less to destroy the whole value and objects of its grant. * * * If the public exigencies and interests require that the franchise of Charles River bridge should be taken away, or impaired, it may lawfully be done upon making due compensation to the proprietors. 'Whenever,' says the constitution of Massachusetts, 'the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor:' and this franchise is property; is fixed, determinate property. * * * That franchise, so far as it reaches, is private property; and so far as it is injured, it is the taking away of private property. * * * If the sovereign power grants any franchise, it is good and irrevocable within the limits granted, whatever they may be; or else, in every case, the grant will be held only during pleasure; and the identical franchise may be granted to any other person or may be revoked at the will of the sovereign. This latter doctrine is not pretended; and, indeed, is unmaintainable in our systems of free government. * * * By the grant of a particular franchise the legislature does not surrender its power to grant franchises, but merely parts with its power to grant the same franchise; for it cannot grant that which it has already parted with. Its power remains the same; but the thing on which it can alone operate, is disposed of. It may, indeed, take it again for public uses, upon paying a compensation. But it cannot resume it, or grant it to another

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tion of the State.[41] And a grant in the constitution of a State of a privilege to a corporation is not subject to a repeal or change by the legislature of the State.[42] But a limitation in a charter of the time for bringing suits against a railroad corporation may be repealed by the legislature.[43]

§ 312. **Same Subject—The Dartmouth College Case.**—In this well-known case it was decided that the charter granted by the British Crown to the trustees of Dartmouth College in New Hampshire, in the year 1769, was a contract within the meaning of art. 1, sec. 10, of the Constitution of the United States, which declares that no State shall make any law impairing the obligation of contracts; that the charter was not dissolved by the Revolution; and that an act of the state legislature of New Hampshire, altering the charter, without the consent of the corporation, in a material respect, was an act impairing the obligation of the charter and was unconstitutional and void. It was also declared that a charter of incorporation is a contract. A contract is a compact between two or more persons and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of the contract is performed, and this differs in

person; under any other circumstances, or for any other purposes." Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 604, 618, 637, 638, 643, 645, 9 L. ed. 773, per Story, J., in dissenting opinion.

Franchises spring from contracts with the sovereign power. Some of them are presumed to be founded on a valuable consideration and to be exclusive. The government cannot resume them at pleasure or do any act to impair the grant without a breach of contract. Kent's Com. (14th ed.) bottom p. 723, *p. 458, quoted from in Horst, Mayor, etc., v. Moses, 48 Ala. 146, per Peters, J., dissenting in part; State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 599, 41 Am. Dec., per Lacy, J.

[41] Stanislaus Co. v. San Joaquin & King's River Canal & Irrig. Co., 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. 234.

[42] New Orleans v. Houston, 119 U. S. 265, 30 L. ed. 411.

[43] Louisville & N. R. Co. v. Williams, 20 Ky. L. Rep. 77, 45 S. W. 229, 11 Am. & Eng. R. Cas. (N. S.) 338, rev'g 41 S. W. 287, 7 Am. & Eng. Corp. Cas. (N. S.) 774. See Chicago Life Ins. Co. v. Needles, 113 U. S. 580, 28 L. ed. 1087.

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nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor and implies a contract not to reassert that right. A party is always estopped by his own grant. The grant of a State is a contract, within the above constitutional clause, and implies a contract not to reassume the rights granted. *A fortiori*, the doctrine applies to a charter or grant from the king. A grant of corporate franchises, although voluntary and without a valuable consideration, is irrevocable and constitutes such a contract as is within the protection of the Federal Constitution. It was further asserted that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or which restrains or controls their legitimate exercise, or transfers them to other persons without corporate assent, is a violation of the obligations of the corporate charter, and if the legislature means to retain such authority it must be reserved in the grant. The charter of Dartmouth College contained no such reservation therefore; the acts of the legislature of New Hampshire in question were held as above stated to impair the obligations of the charter and to be unconstitutional and void. It was also said that by the Revolution, the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of Parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts and rights, respecting property, remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present Constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the State. But the Constitution of the

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United States has imposed this additional limitation, that the legislature of a State shall pass no act "impairing the obligation of contracts." It was further declared that the Federal Constitution provides that no State shall by legislation impair the obligation of contracts. It is more than possible that the preservation of rights, such as those contended for in this case, was not particularly in the view of the framers of the Constitution when the clause under consideration was introduced into that instrument, but a case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous or repugnant to the general spirit of the instrument as to justify those who expound the Constitution in making it an exception.[44]

§ 313. **Obligation of Contract—Statutes—Ordinances—Delegated Authority—Easements in Streets.**—The rule that the accepted grant of a corporation or franchise constitutes a contract is peculiarly and emphatically applicable in the case of railroad corporations which are created upon public considerations and clothed with extensive and extraordinary powers and are bound to the discharge of public duties.[45] So a contract exists between the State and a railroad corporation organized under a general incorporation law;[46] and an exercise by a city, through the proper authority, of its power to grant franchises becomes a law of the State so as to prohibit it from passing any law impairing the obligation of the contract.[47] A railroad

[44] Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629, commented on and explained in Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079, distinguished in Watson Seminary v. Pike County, 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 675.

[45] Pierce v. Emery, 32 N. H. 484, 508, per Perley, C. J. See also State of Minnesota v. Duluth & I. R. Co., 97 Fed. 353; Smead v. Indianapolis, P. & C. R. Co., 11 Ind. 104; State v. Noyes, 47 Me. 189; Houston & T. Cent. R. Co. v. Texas & Pac. R. Co., 70 Tex. 649, 8 S. W. 498; Attorney Genl. v. Chicago & Northwestern Rd. Co., 35 Wis. 425.

[46] Central Trust Co. v. Citizens' St. Rd. Co. (C. C.) 82 Fed. 1, 83 Fed. 529, 14 Nat. Corp. Rep. 770, 15 Nat. Corp. Rep. 529. See §§ 147 *et seq.*, herein.

[47] Citizens' St. Ry. Co. v. City Ry. Co., 56 Fed. 746. See §§ 185 *et seq.*, herein.

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company's right to use city streets may also rest upon statute or indirectly upon legislative grant through delegated power and constitute an unimpairable contract.[48] So the right to supply gas or water through pipes and mains laid in city streets is, after acceptance of the grant, a contract which is protected by the Constitution of the United States.[49] And where a telephone company accepts and acts upon a grant, under an ordinance permitting it to place its lines and poles in the streets, and complies with all the conditions specified and constructs an expensive plant, such rights so granted and acted upon constitute a contract which cannot be impaired by subsequent legislation or unless the grantee consents; especially where the grant is without limitation as to time, nor can the city impose new and

[48] Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Birmingham & P. M. S. R. Co. v. Birmingham, S. R. Co., 79 Ala. 465. See Mercantile Trust & Deposit Co. of Balt. v. Collins Park & B. R. Co., 99 Fed. 812. See §§ 147 *et seq.*, herein.

[49] "This court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service, by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee is a contract protected by the Constitution of the United States against state legislation to impair it. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 615, 6 Sup. Ct. 252; New Orleans Water Works v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. 273; St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64, 7 Sup. Ct. 405, 30 L. ed. 563; Crescent City Gas Light Co. v. New Orleans Gas-Light Co., 27 La. Ann. 138, 147. It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the Supreme Court of Ohio in State v. Cincinnati Gas Light and Coke Co., 18 Ohio St. 262, 293: 'And assuming that such a power' (granting franchises to establish gas works) ' may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority.' This case is directly in line with those above cited. See also Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921;

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burdensome conditions.[50] If no term is specified, but the laws of the State place a limitation upon the duration of the grant, then during such period there can be no impairment of the contract obligation unless the right is reserved to the city to nullify the grant.[51] Again, the right to erect poles and lines in the streets may be derived directly from the legislature and the city's powers be limited, being such only as are delegated and subject to such direct control as the legislature may deem proper to exercise. And the acceptance of a special act giving a telephone company the exclusive right to the use of the streets for its purposes for a term of years does not operate to divest the company of its vested rights under a general statute to exercise its franchises after its exclusive grant has terminated, nor can it be deprived thereof by legislative action of the State or city.[52] Unless a municipality is expressly authorized to grant a permanent easement in its streets a license or grant by it to a railroad company to use such streets for tracks and the operation of its road will not constitute a permanent easement.[53] Nor does a gas and electric company obtain an irrevocable and indefeasible right to a particular location for each pole because of the original location by the permission of a municipality under a grant of franchise to use the city streets.[54]

§ 314. **Same Subject.**—It may be further stated generally, that where a city, vested with the proper authority, grants by a valid legislative enactment authority to a railroad, telephone, electric light or other private corporation to use its streets, and

Hamilton Gas Light and Coke Co. v. Hamilton, 146 U. S. 258, 266, 36 L. ed. 963, 13 Sup. Ct. 90; Bacon v. Texas, 163 U. S. 207, 216, 41 L. ed. 132, 16 Sup. Ct. 1023; New Orleans, etc., Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. 161." Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 9; 43 L. ed. 341, 19 Sup. Ct. 77, per Brown, J. See §§ 147 *et seq.*, herein.

[50] New Orleans v. Great Southern Teleph. & Teleg. Co., 40 La. Ann. 41, 3 So. 533.

[51] Old Colony Trust Co. v. City of Wichita, 123 Fed. 762, 132 Fed. 641.

[52] Abbott v. City of Duluth, 104 Fed. 833, aff'd 117 Fed. 137. See §§ 185 *et seq.*, herein.

[53] State v. Atlantic & N. C. R. Co. (N. C., 1906), 53 S. E. 290.

[54] Merced Falls Gas & Electric Co. v. Turner, 2 Cal. App. 720, 84 Pac. 238. See Joyce on Electric Law (2d ed.), §§ 229*a*–229*d*.

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such grant or franchise is accepted and the company proceeds thereunder and obtains vested rights, and there exists no questions of police power or regulation, or of reservations in the grant, the city cannot arbitrarily repeal or change materially such ordinance in any material matter so as to impair the obligation of the contract.[55] So in a case of a telegraph company, which occupies an independent post road of the United States, its franchise cannot be destroyed by state legislation.[56] If the exclusive right of occupation of city streets is granted, on certain conditions, to an electric light plant, by a city ordinance, as where it is not obligated to furnish light until it can make a certain per cent profit, the grantee must begin preparations for erecting such plant before it can avail itself of the protection against the impairment of obligation of contract provision of the Constitution.[57] But there may be a valid grant by a city or town to an intended corporation, of a franchise to use its streets for the public use of electricity, though at its date the corporation is not chartered, but is later chartered and accepts the grant.[58] If a town council has no power, either under its

[55] **United States:** Levis v. Newton (C. C.), 75 Fed. 884.

Alabama: Port of Mobile v. Louisville & Nashville R. Co., 84 Ala. 116, 4 So. 106, 5 Am. St. Rep. 342.

Illinois: Village of London Mills v. Fairview-London Teleph. Circuit, 105 Ill. App. 146, aff'd in Village of London Mills v. White, 208 Ill. 289, 70 N. E. 289.

Michigan: Mahan v. Michigan Teleph. Co., 132 Mich. 242, 93 N. W. 629, 8 Am. Elec. Cas. 38.

Minnesota: Northwestern Teleph. Exch. Co. v. City of Minneapolis, 81 Minn. 140, 83 N. W. 527, 7 Am. Elec. Cas. 168, 86 N. W. 69, 53 L. R. A. 175; Duluth, City of, v. Duluth Teleph. Co., 84 Minn. 486, 87 N. W. 1128, 8 Am. Elec. Cas. 136.

New Jersey: Phillipsburg Electric Lighting, Heating & Power Co. v. Phillipsburgh, 66 N. J. L. 505, 49 Atl. 445, 8 Am. Elec. Cas. 449.

Texas: Houston v. Houston City St. R. Co. (Tex.), 19 S. W. 127.

Washington: Commercial Electric Light & P. Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592.

West Virginia: Clarksburg Electric Light Co. v. City of Clarksburg, 47 W. Va. 739, 50 L. R. A. 142, 35 S. E. 994, 7 Am. Elec. Cas. 25.

[56] Western Union Teleg. Co. v. New York (C. C.), 38 Fed. 552, 3 L. R. A. 449, 2 Inters. Comm. Rep. 533, 6 Rd. & Corp. L. J. 105. See Joyce on Electric Law (2d ed.), §§ 62–67.

[57] Capital City Light & Fuel Co. v. City of Tallahassee, 42 Fla. 462, 28 So. 810.

[58] Clarksburg Electric Light Co. v. City of Clarksburg, 47 W. Va. 739, 50

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charter or under the general statute law governing towns and cities, to grant an exclusive franchise for a term of years to a private corporation to use its streets for the conveyance of electricity for public use in the city, such exclusive grant is void and not a valid contract protected by the provisions of the Constitution forbidding the passage of any law impairing the obligation of contracts; and such exclusive grant does not prevent the town from granting to another corporation within the term the privilege to occupy its streets for the same purpose.[59] The mayor and city council may be vested exclusively with the power over franchises, and still another statute may vest the right to amend charters in the people through their votes thereon, and such authorization may embrace an amendment to empower the people to grant franchises in the city.[60]

§ 315. **What Is not a Contract—Obligation of Contract—When not Impaired—Instances.**—An executive agency, created by the statute of a State for the purpose of improving public highways, and empowered to assess the cost of its improvements upon adjoining lands, and to put up for sale and buy in for a term of years for its own use any such lands delinquent in the payment of the assessment, does not, by such a purchase, acquire a contract right in the land so bought which the State cannot modify without violating the provisions of the Constitution of the United States. Such a transaction is matter of law and not of contract, and as such is not open to constitutional objections. Even as to third parties an assessment is not a contract in the sense in which that word is used in the Federal Constitution.[61] A contract between a city and a waterworks company which is void as being *ultra vires*, and which the city has repudiated, cannot be set up by it as impaired by subsequent

[59] Clarksburg Electric Light Co. v. City of Clarksburg, 47 W. Va. 739, 50 L. R. A. 142, 35 S. E. 994, 7 Am. Elec. Cas. 25.

[60] Hindman v. Boyd (Wash., 1906), 84 Pac. 609.

[61] Essex Public Road Board v. Skinkle, 140 U. S. 334, 11 Sup. Ct. 790, 35 L. ed. 446.

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state legislation, as such contract cannot be protected against state legislation by the Constitution of the United States.[62] If there is a defective acknowledgment of a corporate charter a curative statute affecting the personal liability of the incorporators on the company's contract does not operate so as to impair the contract obligation of the other party to the contract.[63] So a charter may be amended although it contains a grant of perpetual succession where rights of property have not vested, as such grant is held not to be a contract.[64] Nor is the obligation of contract impaired by a statute amending the Indian law in relation to the erection of poles and wires on the Tonawanda reservation.[65] Nor are contract rights, arising from an exclusive right to supply gas to a city and its inhabitants, impaired by charges against the gas company occasioned by a necessary public improvement, such as a drainage system undertaken by a municipality under statutory authority.[66] And a general statute which empowers a telegraph company to construct, operate and maintain its lines along and over the public highways and streets of the cities and towns of the State, or across and under the waters and over any public works belonging to the State, does not create such a contract between the State and the company as to create an immunity from rental charges imposed by a city for the use and occupation of its streets under a prior statute giving control of such streets, especially so where by the later enactment the State does not resume the control of the streets given by the earlier statute.[67] If gas street lamp-posts are directed by ordinance to be removed, because of the use of electricity to light the streets and

[62] New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. 142.

[63] Shields v. Clifton Hill Land Co., 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509.

[64] So held in Cumberland & O. R. Co. v. Barren County Court, 10 Bush (73 Ky.), 604, 613.

[65] Jennison v. Bell Telephone Co., 95 N. Y. Supp. 1137, 109 App. Div. 911, aff'd 186 N. Y. 493, 79 N. E. 728.

[66] New Orleans Gas Light Co. v. Drainage Commission, 111 La. 838, 35 So. 929, case aff'd 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. 471.

[67] City of Memphis v. Postal Teleg.-Cable Co., 145 Fed. 602, rev'g in part 139 Fed. 707.

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consequent uselessness of such posts, and the city refuses to pay interest for the use thereof, there is no impairment of the obligation of contract under which the posts were erected and interest was agreed to be paid by the city; and in such case where no legislative act is shown to exist, from the enforcement of which an impairment of the obligation of such a contract did or could result, it follows that solely an interpretation of the contract is involved and upon this ground no controversy being presented within the jurisdiction of the Federal Supreme Court the writ of error was dismissed.[68] Again, a statute, which authorizes a mode by ordinance and application to a Court of Chancery to compel railroad companies to erect gates at crossings, will not impair the obligation of contract based on charter rights, under which the company is operating by lease granting the right of grade crossings upon constructing passages so as not to prevent the passage of vehicles.[69]

§ 316. **Same Subject—Instances Continued—Railroad Charter—Subscriptions in Aid of Railroad.**—None of the essential elements of a contract exists merely because a railroad company is authorized by its charter to receive subscriptions from municipalities, no consideration being given and there being no attempted exercise of power.[70] So in a case in the Federal Supreme Court it appeared that the charter of the Ohio and Mississippi Railroad company, passed by the legislature of Indiana in 1848, and a supplement in 1849, authorized the county commissioners of a county through which the road passed to subscribe for stock and issue bonds, provided a majority of the qualified voters of the county voted, on the first of March, 1849, that this should be done. The election was held on the appointed day, and a majority of the voters voted that the subscription should be made. But before the subscription

[68] St. Paul Gas Light Co. v. City of St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. 575, writ of error dismissed 78 Minn. 39, 80 N. W. 877.

[69] Palmyra Township, Inhabitants of, v. Pennsylvania R. Co. (N. J. Ch.), 50 Atl. 369. See Pittsburg, Ft. W. & C. R. Co. v. Chicago (Cook County Super. Ct.), 27 Chicago Leg. News, 242.

[70] Wilkes County v. Call, 123 N. C. 308, 31 S. E. 481, 44 L. R. A. 252.

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was made the State adopted a new constitution, which went into effect the first day of November, 1851. One of the articles prohibited such subscriptions, unless paid for in cash, and prohibited also a county from loaning its credit or borrowing money to pay such subscriptions. In 1852 the county commissioners of Daviess county subscribed for stock in the railroad company and issued their bonds for the amount. It was held that the provisions of the railroad charter, authorizing the commissioners to subscribe, conferred a power upon a public corporation or civil institution of government, which could be modified, changed, enlarged or restrained, by the legislative authority, the charter not importing a contract, within the meaning of the clause of the Constitution prohibiting a State from passing a law impairing the obligation of contracts. It was also held that the mere vote to subscribe did not, of itself, form such a contract with the railroad company, as could be protected by the tenth section of the first article of the Constitution of the United States, for until the subscription was actually made the contract was unexecuted; and the bonds, having been issued in violation of the constitution of Indiana, were void.[71]

§ 317. **Reservation of Power to Alter, Amend or Repeal Grant of Franchise or Charter.**—Although a grant of a franchise is in the nature of a contract, yet if the right to amend, alter or repeal the grant be reserved to the sovereign it may be exercised;[72] and the legislative power to alter, amend and repeal charters is equally effectual whether it be reserved in the original act of incorporation, the articles of association under a general law, or in the constitution of the State in force when the incorporation under a general law is made.[73] Where a pri-

[71] Aspinwall v. County of Daviess, 22 How. (63 U. S.) 364, 16 L. ed. 296, ruling reaffirmed and applied in Wadsworth v. Eau Claire County Supervisors, 102 U. S. 534, 26 L. ed. 221.

[72] Jersey City Gas Light Co. v. United Gas Improvement Co., 46 Fed. 264, 266, case aff'd 58 Fed. 323.

[73] Polk v. Mutual Reserve Fund Life Assoc. of New York, 207 U. S. 310, 52 L. ed. —, 28 Sup. Ct. —.

Power to alter, amend or repeal exists when reserved by state constitution. Attorney Genl. v. Chicago & Northwestern Rd. Co., 35 Wis. 425.

If the constitution of the State provides that the legislature may alter,

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vate corporation was chartered under an act of incorporation which was by its terms subject to the provisions of the Revised Statutes, one section of which provided that "all acts of incorporation hereafter granted may be amended or repealed at the will of the General Assembly, unless express provision be made therein to the contrary," it was held that a legislative enactment which operated as an amendment of the company's charter was not unconstitutional.[74] Some constitutional provisions authorize a repeal only when the charter is injurious to the citizens of the commonwealth,[75] and then only in such manner that no injustice shall be done to the incorporators;[76] and in the latter case the provision is not a restriction upon the power but only upon the manner of its application.[77] Where a constitution provides that no special privileges shall be granted that may not be altered or revoked, the General Assembly will be thereby authorized to determine a privilege or franchise, even though perpetual as to duration, granted to a street railway company to construct and operate its line.[78]

revoke or amend the charter of any incorporation an amendment of a charter may be made by the legislature in accordance with the terms of the constitutional provision. St. Louis, Iron Mountain & Southern Ry. Co. v. Paul, 64 Ark. 83, 37 L. R. A. 504, 40 S. W. 705, 62 Am. St. Rep. 154.

"It is elementary that where the constitution of a State reserves the right to repeal, alter or amend, all charters granted by the legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential to bring them within the intendment of the clause of the Constitution of the United States protecting contracts from impairment. The cases supporting this doctrine are so numerous that they need not be cited. We content ourselves, therefore, by referring to one of them: Citizens' Savings Bank v. Owensboro, 173 U. S. 636, 641, 43 L. ed. 840, 19 Sup. Ct. 530." Northern Central Ry. Co. v. Maryland, 187 U. S. 258, 267, 268, 47 L. ed. 167, 23 Sup. Ct. 60, per White, J.

[74] State v. Brown & Sharpe Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856.

[75] Williamsport Passenger R. Co.'s Appeal, 120 Pa. 1, 13 Atl. 496, 21 W. N. C. 309. See Platte & D. Canal & M. Co. v. Dowell, 17 Colo. 376, 30 Pac. 68; Northern Central R. Co. v. Holland, 117 Pa. 613, 20 W. N. C. 428, 12 Atl. 575.

[76] Platte & D. Canal & M. Co. v. Dowell, 17 Colo. 376, 30 Pac. 68.

[77] Consolidated Gas Co. v. Mitchell (Pa. C. P.), 1 Dauph. Co. Rep. 71.

[78] State v. Columbus Ry. Co., 24 Ohio Cir. Ct. R. 609.

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Again, a grant by the legislature or by a municipality, when authorized by legislative enactment, may be such a special privilege as to become a contract between the State and the corporators, vested and irrevocable in its nature, and one which is protected from impairment. The state constitution may, however, prohibit the grant of special, irrevocable privileges or franchises.[79]

§ 318. **Reservation of Power to Alter, etc., is Part of Charter or Contract.**—A right reserved by a constitution or statute or by the charter itself, to alter or amend a charter or grant of a franchise, enters, as a term, stipulation or condition, into and becomes a part of the contract between the State or grantor and the corporation or grantee.[80] So Code provisions that a franchise is held subject to the power in a State to withdraw it, and subject to be changed, modified or destroyed at the will of its grantor or creator become in substance a part of the charter. "It is quite too narrow a definition of the word 'franchise,' as used in this statute, to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of any right or privilege which is a part of the franchise." [81] In other words, if a company accepts the grant of a right, privilege or franchise upon condition that the State may withdraw it whenever the public interest may so require, the reservation of such right is a part of the contract with the State, and its

[79] Port of Mobile v. Louisiana & Nashville R. Co., 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106.

[80] St. Louis, Iron Mountain, etc., Ry. Co. v. Paul, 173 U. S. 404, 408, 19 Sup. Ct. 419, 43 L. ed. 746, per Fuller, C. J. (noted under § 320, herein); Greenwood v. Freight Co., 105 U. S. 13, 26 L. ed. 961; Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co. (Del. Ch., 1900), 46 Atl. 12 (citing numerous cases); O'Phinney v. Sheppard & Enoch Pratt Hospital, 88 Md. 633, 42 Atl. 58; State v. Chicago & N. W. Ry. Co., 128 Wis. 449, 108 N. W. 504.

[81] Railroad Co. v. Georgia, 98 U. S. 359, 365, 25 L. ed. 185.

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exercise by the State does not impair the obligation of the contract as prohibited by the constitution, but if such right is not reserved the franchise cannot be withdrawn without impairing the obligation of contract.[82] So although a legislative grant to a corporation of special privileges may be a contract, when the language of the statute is so explicit as to require such a construction, yet if one of the conditions of the grant be that the legislature may alter or revoke it, a law altering or revoking the exclusive character of the granted privileges cannot be regarded as one impairing the obligation of the contract.[83] Where, by a state statute, the charter of a street railroad company was repealed, and its franchises and tracks were transferred to another, and the company refused to seek a remedy, a stockholder who asked an injunction on the ground that the statute impaired the obligation of a contract was given a standing in a court of equity. Such a statute impairs the obligation of a contract, unless the legislature reserved the right to repeal the statute conferring the charter. In Massachusetts such a reservation becomes a part of every act of incorporation, by virtue of the General Statutes,[84] which declare, "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration or repeal, at the pleasure of the legislature." Similar clauses of reservation exist in the statutes of various States. By the exercise of the repealing power reserved by such a clause the charter no longer exists, and whatever validity transactions entered into and authorized by it while it was in force may possess, there can be no new transactions dependent on the special power conferred by the charter. Such power is abrogated when the law granting it is repealed. Neither the rights of the shareholders to the real and personal property of the corporation, nor rights of contract, or choses in action, are destroyed by such repeal; and if the legislature has

[82] Central Rd. & Banking Co. v. State of Georgia, 54 Ga. 401, 409.

[83] Hamilton Gas Light & C. Co. v. Hamilton, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. 90.

[84] Sec. 41, chap. 68.

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provided no specific mode of enforcing and protecting such rights, the courts will do so by the means within their power.[85]

§ 319. **Reservation of Power to Alter, etc., and Limitations Thereon.**—Even though the power to amend or repeal may be properly exercised, yet such power is not without limit; the alterations must be reasonably made, in good faith, and consistent with the scope and object of the act of incorporation so that under the guise of amendment and alteration sheer oppression and wrong cannot be inflicted; and beyond the sphere of the reserved powers the vested rights of property in corporations in such cases is surrounded by the same sanction and are as unvoidable as in other cases.[86] So a power reserved by a statute of a State to its legislature, to alter, amend or repeal a charter of a railroad corporation, authorizes the legislature to make any alteration or amendment of a charter granted subject to that power, which will not defeat or substantially impair the object of the grant or any rights vested under it,[87] and which the legislature may deem necessary

[85] Greenwood v. Freight Co., 105 U. S. 13, 26 L. ed. 961.

[86] Stanislaus County v. San Joaquin & Kings River Canal & Irrigation Co., 192 U. S. 201, 213, 24 Sup. Ct. 241, 48 L. ed. 406, per Peckham, J. (after reviewing a number of cases).

[87] New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269; Holyoke Co. v. Lyman, 15 Wall. (82 U. S.) 500, 21 L. ed. 133. See also McKee v. Chautauqua Assembly, 130 Fed. 536, 124 Fed. 808; Smith v. Atchison, Topeka & Santa Fe R. Co. (C. C.), 64 Fed. 272; People v. O'Brien, 111 N. Y. 1, 19 N. Y. St. R. 173, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684. See next following section herein.

The reservation in a charter "of a power to add to, alter, amend or repeal a charter authorizes the proper legislative body to make any addition, alteration or amendment which does not substantially impair vested rights or directly impede the accomplishment of the purposes of the grant, and which the legislative body deems proper to secure the best interests of the public." Union Pac. Rd. Co. v. Mason City & Ft. Dodge R. Co., 128 Fed. 230, 238, 64 C. C. A. 348 (case affirms 124 Fed. 409), citing New York & N. E. Rd. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269; Sinking Fund Cases (Union Pac. R. Co. v. United States and Central Pac. R. Co. v. Gallatin), 99 U. S. 700, 720, 721, 25 L. ed. 496. Principal case is aff'd 199 U. S. 160, 50 L. ed. 134, 26 Sup. Ct. 19.

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to secure either that object or other public or private rights.[88] So the reservation, in a charter of a railroad company, of the power to add to, alter, amend or repeal includes the reservation of power to condition the title to a bridge and to terminal facilities with the provision that the joint use of them shall be allowed to other railroad companies for reasonable compensation, provided that this use does not deprive the holder of the property of the use of it requisite to the handling of its own engines and trains, to the conduct of its own business, and to the discharge of its corporate duty to the government and to the public.[89] If the constitution of a State forbids the passage of any law impairing the obligation of contracts such provision is held to limit the power reserved in the same constitution to alter or repeal general laws for the organization of corporations, so that the legislature cannot impair or destroy contract obligations of third parties with a corporation.[90]

§ 320. **Reservation of Power to Alter, etc.—Fourteenth Amendment—Equal Protection of the Law—Deprivation of Property—Railroad Employees.**—An act of a state legislature entitled "An act to provide for the protection of servants and employees of railroads," is not in conflict with the provisions of the Constitution of the United States. "The contention is that as to railroad corporations organized prior to its passage, the act was void because in violation of the Fourteenth Amendment. Corporations are the creations of the State, endowed with such faculties as the State bestows and subject to such conditions as the State imposes, and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligations; and as this amendment rested on reasons deduced from the peculiar character of the business of the corporations affected and the public nature of

[88] Holyoke Co. v. Lyman, 15 Wall. (82 U. S.) 500, 21 L. ed. 133.

[89] Union Pac. Rd. Co. v. Mason City & Fort Dodge R. Co., 128 Fed. 230, 64 C. C. A. 348, aff'g 124 Fed. 409, and aff'd in 199 U. S. 160, 50 L. ed. 134, 26 Sup. Ct. 19.

[90] Omaha Water Co. v. City of Omaha, 147 Fed. 1, 77 C. C. A. 267.

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their functions, and applied to all alike, the equal protection of the law was not denied.[91] The question, then, is whether the amendment should have been held unauthorized because amounting to a deprivation of property forbidden by the Federal Constitution. The power to amend 'cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made,'[92] but any alteration or amendment may be made 'that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights.'[93] This act was purely prospective in its operation. It did not interfere with vested rights or existing contracts, or destroy or sensibly encroach upon, the right to contract, although it did impose a duty in reference to the payment of wages actually earned, which restricted future contracts in the particular named. In view of the fact that these corporations were clothed with a public trust, and discharged duties of public consequence, affecting the community at large, the Supreme Court held the regulation, as promoting the public interest in the protection of employees to the limited extent stated, to be properly within the power to amend reserved under the state constitution. Inasmuch as the right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the State, we do not think that conclusion in its application to the power to amend can be disputed on the ground of infraction of the Fourteenth Amendment."[94]

[91] Citing Missouri Pacific Ry. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. 1161.

[92] Citing Sinking Fund Cases (Union Pacific R. Co. v. United States), 99 U. S. 700, 25 L. ed. 496, per Waite, C. J.

[93] Citing Commissioners v. Holyoke Water Power Co., 104 Mass. 446, 451, per Gray, J.; Greenwood v. Freight Co., 105 U. S. 13, 26 L. ed. 961; Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48.

[94] St. Louis, Iron Mountain, etc., Ry. Co. v. Paul, 173 U. S. 404, 408, 19 Sup. Ct. 419, 43 L. ed. 746, per Fuller, C. J.

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CHAPTER XX.

OBLIGATION OF CONTRACTS CONTINUED.

§ 321. Reserved Powers of Congress —Amendment of Charter of Subsidized Railroad—Railroad and Telegraph Company—Cemetery Company.
322. Obligation of Contract—Vested Rights—Conditions as Affecting — Reserved Power of Congress—Railroad Grants.
323. Implied Reservation in Favor of Sovereign Power.
324. Obligation of Contract — General and Special Laws —Reservation of Power to Alter or Repeal—Quo Warranto.
325. Reservation of Right to Repeal — Exemption from Legislative Repeal — Impairment of Obligation of Contracts.
326. Exemption from Execution—Corporation Grantee of Municipal Waterworks — Obligation of Contract.
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337. Obligation of Contracts—Street Paving by Street Railways—Conditions and Regulations.
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340. Impairment of Obligation of Contracts—Illustrative Decisions Continued—Tunnel —Ferries—Bridges—Canal.

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§ 321. **Reserved Powers of Congress—Amendment of Charter of Subsidized Railroad—Railroad and Telegraph Company—Cemetery Company.**—The objects which Congress sought to accomplish by the act of July 1, 1862,[1] granting a subsidy to aid in the construction of both a railroad and a telegraph line from the Missouri River to the Pacific Ocean, and by the act of July 2, 1864,[2] amendatory thereof, were the construction, the maintenance and the operation of both a railroad and a telegraph line between those two points; the governmental aid was extended for the purpose of accomplishing all these important results, nor is there anything in subsequent legislation to indicate a change of this purpose. The provisions in those acts permitting the railroad company to arrange with certain telegraph companies for placing their lines upon and along the route of the railroad and its branches, did not affect the authority of Congress, under its reserved power, to require the maintenance and operation by the railroad company itself, through its own officers and employees, of a telegraph line over and along its main line and branches. An arrangement between the railroad company and the telegraph company, such as was permitted under the acts of 1862 and 1864,[3] could have no other effect than to relieve the railroad company from any present duty itself to construct a telegraph line to be used under the franchises granted and for the purposes indicated by Congress. No arrangement of the character indicated by Congress could have been made except in view of the possibility of the exercise by Congress of the power reserved to add to, alter or amend the act that permitted such arrangement. It was not competent for Congress under its reserved power to add to, alter or amend these acts, to impose upon the railroad companies duties wholly foreign to the objects for which it was created or for which governmental aid was given, nor, by alteration or amendment of those acts, destroy rights actually vested, nor disturb transactions fully

[1] Chap. 120, 12 Stat. 489.
[2] Chap. 216, 13 Stat. 356.
[3] Sec. 19, act July 118, 62, and § 4, act July 2, 1864, chap. 220, known as the Idaho Act.

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consummated. The provisions of the act of 1888,[4] requiring all railroad and telegraph companies to which the United States have granted subsidies, to "forthwith and henceforward, by and through their own respective corporate officers and employees, maintain and operate, for railroad, governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants," is a valid exercise of the power reserved by Congress.[5] In the Sinking-Fund Cases the legislation of Congress in relation to the Central Pacific Railroad Company and the Western Pacific Railroad Company—the latter being by consolidation a part of the former—was considered, and it was held, 1. That, to the extent of the powers, rights, privileges and immunities thereby granted, Congress retained the right of amendment, and by exercising it could, in a manner not inconsistent with the original charter granted by California, as modified by the act of that State passed in 1864, accepting what had been done by Congress, regulate the administration of the affairs of the company in reference to the debts created by it under authority of such legislation. 2. That the establishment of the sinking-fund by the act of May 7, 1878, did not conflict with anything in said charter. It was also decided that the establishment of the fund was a reasonable regulation of the administration of the affairs of the companies, promotive alike of the interests of the public and of the corporators, and was warranted under the authority which Congress had, by way of amendment, to change or modify the rights, privileges and immunities granted by it. The right of amendment, alteration or repeal reserved by Congress in said acts of 1862 and 1864 was also considered.[6] In another case it appeared that a cemetery

[4] Act Aug. 7, 1888, chap. 772, 25 Stat. 382.

[5] United States v. Union Pacific Ry. Co. & Western Un. Teleg. Co., 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. 190. See United States v. Western Union Teleg. Co., 50 Fed. 28.

[6] Sinking Fund Cases (Union Pac. R. Co. v. United States), 99 U. S. 700, 25 L. ed. 496.

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company was incorporated in 1854 by an act of Congress which authorized it to purchase and hold ninety acres of land in the District of Columbia, and to receive gifts and bequests for the purpose of ornamenting and improving the cemetery; enacted that its affairs should be conducted by a president and three other managers, to be elected annually by the votes of the proprietors, and to have power to lay out and ornament the grounds, to sell or dispose of burial lots, and to make by-laws for the conduct of its affairs and the government of lot-holders and visitors; fixed the amount of capital stock to be divided among the proprietors according to their respective interests; and provided that the land dedicated to the purposes of a cemetery should not be subject to taxation of any kind, and no highways should be opened through it, and that it should be lawful for Congress thereafter to alter, amend, modify or repeal the act. Presently afterward thirty of the ninety acres were laid out as a cemetery, the cemetery was dedicated by public religious services, and a pamphlet was published, containing a copy of the charter, a list of the officers, an account of the proceedings at the dedication, describing the cemetery as "altogether comprising ninety acres, thirty of which are now fully prepared for interments," and the by-laws of the corporation, which declared that all lots should be held in pursuance of the charter. No stock was ever issued, but the owner of the whole tract, named in the charter as one of the original associates, and in the list published in the pamphlet as the president and manager of the corporation, knowing all the above facts, and never objecting to the appropriation of the property as appearing thereby, for more than twenty years managed the cemetery, sold about two thousand burial lots, and gave to each purchaser a copy of the pamphlet, and a deed of the lot, signed by himself as president, bearing the seal of the corporation, and having the by-laws printed thereon. In 1877 Congress passed an act, amending the charter of the corporation providing that its property and affairs should be managed, so as to secure the equitable rights of all persons having any vested interest in the cemetery by a board of five

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trustees to be elected annually, three by the proprietors of lots owned in good faith upon which a burial had been made, and two by the original proprietors; and that of the gross receipts arising from the future sale of lots one-fourth should be annually paid by the trustees to the original proprietors and the rest be devoted to the improvement and maintenance of the cemetery. It was held that the act of 1877 was a constitutional exercise of the power of amendment reserved in the act of 1854; that the owner of the land was estopped to deny the existence of the corporation, the setting apart of the whole ninety acres as a cemetery, the right of the lot-holders to elect a majority of the trustees; and that he was in equity bound to convey the whole tract to the corporation in fee, and to account to the corporation for three-fourths of the sums received by him from sales of lots since the act of 1877; and the corporation to pay him one-fourth of the gross receipts from future sales of lots.[7]

§ 322. **Obligation of Contract—Vested Rights—Conditions as Affecting—Reserved Power of Congress—Railroad Grants.**—Where a statute authorizes railway companies to build across and upon city streets but makes the city's assent a prerequisite, if such consent in due form is secured the company's right, in so far as the designated streets are concerned, to build its tracks, is complete. If the company accepts the privilege the right becomes vested, fixed and certain, the city's consent cannot be recalled, and the right so vested can only be revoked in an action, brought under the State's authority, to forfeit it.[8] And when an act granting public lands to aid

[7] Close v. Glenwood Cemetery, 107 U. S. 466, 27 L. ed. 789, 3 Sup. Ct. 10, cited in Citizens' Savings Bank v. Owensboro, 173 U. S. 636, 647, 43 L. ed. 840, 19 Sup. Ct. 530; Covington v. Kentucky, 173 U. S. 231, 239, 19 Sup. Ct. 383, 43 L. ed. 679; United States v. Union Pacific Ry. Co., 160 U. S. 1, 37, 40 L. ed. 319, 16 Sup. Ct. 190; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 14 Sup. Ct. 437; Louisville Water Co. v. Clark, 143 U. S. 1, 14, 12 Sup. Ct. 346, 36 L. ed. 55; Gibbs v. Consol. Gas Co. of Baltimore, 130 U. S. 396, 408, 32 L. ed. 979, 9 Sup. Ct. 553.

[8] Denniston & Sherman Ry. Co. v. St. Louis Southwestern Ry. Co., 30 Tex. Civ. App. 474, 476, 72 S. W. 201.

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in the construction of a railroad provides that patents shall issue from time to time, as sections of the road are completed, but reserves to Congress the right at any time "to add to, alter, amend, or repeal this act," Congress may, without violating the Constitution of the United States, by subsequent act passed before any of the road is constructed, or any of the land earned, require the cost of surveying, selecting and conveying the land to be paid into the treasury of the United States before the conveyance of the granted lands to any party entitled thereto.[9]

§ 323. **Implied Reservation in Favor of Sovereign Power.** —When a grant has once been made by legislative authority, to the extent of the rights conferred the power which made it is expended, and it cannot be taken back or transferred to another, until the public interests and welfare shall demand its resumption, and provision shall have been made for just compensation to the owner in the manner required by law. This rests upon an implied reservation to that effect or extent in favor of the sovereign power.[10] So the right to lay tracks in city streets is held to be taken subject to the implied power of the State to modify ordinances of the city so that the latter may be empowered to forbid construction of tracks, etc., without compensation to owners of abutting property, and such enactment will not be unconstitutional.[11] There may also be an implied reservation of power, in a charter to a railroad company, to incorporate companies to transport other than passengers.[12]

§ 324. **Obligation of Contract—General and Special Laws —Reservation of Power to Alter or Repeal—Quo Warranto.** —Where a state constitution provides that corporations may

[9] Northern Pac. R. R. Co. v. Traill County, 115 U. S. 600, 29 L. ed. 477, 6 Sup. Ct. 201.

[10] Mills v. County of St. Clair, 7 Ill. 197, 227.

[11] Drady v. Des Moines & Ft. D. R. Co., 57 Iowa, 393, 10 N. W. 754.

[12] Richmond, F. & P. R. Co. v. Louisa. R. Co., 13 How. (54 U. S.) 71, 14 L. ed. 55, considered more fully under § 333, herein.

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be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws, and reserves the power to alter or repeal from time to time all general laws and special acts passed in pursuance of such provision; a special act may be passed taxing the receipts of a corporation.[13] The legislature may also by special act impose restrictions or other burdens upon a railroad;[14] but it cannot deprive a corporation of its property or annul or interfere with its contracts with third persons;[15] and it is also held that the charter of a corporation cannot be amended thereunder.[16] In a case in the Federal Supreme Court it appeared that the constitution of New York, made in 1826, ordained that "corporations may be formed under general laws, but shall not be created by special act except in certain cases;" and also "that all general laws and special acts, passed pursuant to this section, may be altered from time to time or repealed." A statute of New York, passed in 1828, enacted, "that the charter of every corporation that shall be thereafter granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature." In this state of things, a general railroad law was passed in 1850, authorizing the formation of railroad corporations with thirteen directors. The formation of a company under this general law being subsequently contemplated, with a capital of $800,000, to build a road fifty miles long, the legislature authorized the city of Rochester to subscribe $300,000 to it, and enacted that if the company accepted the

[13] Mayor v. Twenty-Third St. R. Co., 113 N. Y. 311, 22 N. Y. St. R. 958, 21 N. E. 60, aff'g 48 Hun, 552, 16 N. Y. St. R. 137, 1 N. Y. Supp. 295.

[14] People, Kimball, v. Boston & Albany R. Co., 70 N. Y. 569. Examine Barnes v. Arnold, 45 N. Y. App. Div. 314.

[15] Mayor v. Twenty-Third St. R. Co., 113 N. Y. 311, 22 N. Y. St. R. 958, 21 N. E. 60, aff'g 48 Hun, 552, 16 N. Y. St. R. 137, 1 N. Y. Supp. 295; People v. O'Brien, 111 N. Y. 1, 19 N. Y. St. R. 173, 18 N. E. 692, rev'g 45 Hun, 519, 10 N. Y. St. R. 596, 27 W. D. 365; People, Gage, v. Lohnas, 54 Hun, 604.

[16] Lord v. Equitable Life Assur. Soc., 94 N. Y. Supp. 65, 47 Misc. 187.

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subscription, the city should appoint one director for every $75,000 subscribed by it, that is to say, should appoint four directors out of the thirteen contemplated; the other stockholders, of course, appointing the remaining nine. The company did accept the subscription, and the stockholders other than the city subscribed $677,500, but paid up only, $255,000. Then the enterprise for all but eighteen miles of the road was abandoned. The city had paid its $300,000 subscribed. In 1867 the legislature passed another act giving the city power to appoint one director for every $42,855.57 of stock owned by the city; in other words, establishing the same ratio that existed among the subscribers for the stock at the time the original subscription was made. The effect was to give the city seven directors and to leave the other stockholders but six. These last stockholders regarding the act of 1850 as making a contract that they should have nine directors and the city but four, and that the act of 1867 violated that contract, elected their old nine. It was held, on a quo warranto, that the act of 1867 did not, in view of the state constitution and the act of 1828 making charters subject to alteration, suspension and repeal, make such a contract, and that the act of 1867 was constitutional.[17] If the life of a corporation is by special charter to continue for sixty years and is not subject to alteration or amendment until after the period of thirty years except in case of a violation of the charter, the expiration of the period of thirty years limits the time before which any amendment or alteration of the charter can be made, even though a general law adopted by the special charter would have permitted an alteration before that period had elapsed; this especially applies where the legislature had not attempted to forfeit or alter said charter within the thirty years.[18] If the constitution provides for the alteration or repeal of all general laws and special acts, a railroad corporation whether incorporated under either law is subject to the constitutional provision and cannot claim an impairment of the obli-

[17] Miller v. State, 15 Wall. (82 U. S.) 478, 21 L. ed. 98.

[18] Tripp v. Pontiac & L. Plank Road Co., 66 Mich. 1, 32 N. W. 907.

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gation of contract in case of an alteration or repeal of its charter.[19]

§ 325. Reservation of Right to Repeal—Exemption from Legislative Repeal—Impairment of Obligation of Contracts.—Statutory reservations of the right to repeal, unlike similar constitutional provisions, are only binding on a succeeding legislature so far as it chooses to conform to them; and, if it so intends, an irrepealable legislative contract may be made. It is, therefore, in every case a question whether the legislature making the contract intended that the former provision for repeal or amendment should by implication become a part of the new contract.[20] In a Federal case it appeared that on February 14, 1856, the legislature of Kentucky enacted: "That all charters and grants of and to corporations or amendments thereof, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein expressed." By an act passed January 22, 1869, amending the charter of a gas company which was subject to that provision in the act of 1856, it was enacted: "That said gas company shall have the exclusive privilege of erecting and establishing gas works in the city of Louisville during the continuance of this charter, and of vending coal gas lights, and supplying the city and citizens with gas by means of public works," etc.; it was held that the latter act contained a clear expression of the legislative intent, that the company should continue to enjoy the franchise then possessed by it for the term named in that act without being subject to have its charter in that respect amended or repealed at the will of the legislature.[21] The rule, that a special statutory exemption does not pass to a new corporation succeeding others by consolidation or purchase in the absence of express direction to that effect in the statute, is applicable where the constituent companies are

[19] Matthews v. Board of Corporation Commrs. of N. C., 97 Fed. 400.

[20] New Jersey v. Yard, 95 U. S. 6 Sup. Ct. 265.

[21] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, 29 L. ed. 510, 104, 24 L. ed. 352.

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held and operated by one of them, under authority of the legislature. And where a contract which is claimed to have been impaired was made with one of several corporations merged into the complainant, and concededly affects only the property and franchises originally belonging to such constituent company, divisional relief cannot be granted affecting only such property, when the bill is not framed in that aspect but prays for a suspension of the impairing ordinance as to all of complainant's property.[22]

326. **Exemption from Execution—Corporation Grantee of Municipal Waterworks—Obligation of Contract.**[23]—Where a municipality which owned waterworks conveyed them to a corporation, formed for the purpose of maintaining and enlarging them, and received therefor shares of stock, which the statute authorizing the conveyance declared should not be liable for the debts of the city, but should be reserved for the benefit of the holders of the bonds that had been issued by the city to raise the means wherewith to construct the works, such statute does not, by thus exempting those shares from seizure, impair the obligation of any contract, as they merely represent the city's ownership in the waterworks which was, before the enactment of the statute, exempt from seizure and sale under execution.[24]

§ 327. **Exemption—Eminent Domain—Future Legislation—Obligation of Contract.**[25]—There exists no such contract between the State and a railroad company as exempts the latter from the operation of a state constitutional provision, requiring that corporations invested with the privilege of taking private property for public use shall make compensation for property injured or destroyed by the construction or en-

[22] People's Gas Light & Coke Co. v. Chicago, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. 520.

[23] See § 20, herein as to an exemption being a franchise.

[24] New Orleans v. Morris, 105 U. S. 600, 26 L. ed. 1184. See Myers v. Moran, 99 N. Y. Supp. 269, 113 App. Div. 427.

[25] See § 20, herein, as to an exemption being a franchise.

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largement of their works, highways or improvements, where neither the charter of the company nor supplementary acts of the legislature contain such a contract; nor does the constitutional provision, as applied to the company, in respect to cases afterward arising, impair the obligation of any contract between it and the State. Since there was in such case no prior contract with the company exempting it from liability from future legislation in respect to the subject-matter involved, the company took its original charter subject to the general law of the State, and to such changes as might be made in that general law, and subject to future constitutional provisions and future general legislation. Exemption from future general legislation either by a constitutional provision or by an act of the legislature, cannot be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words.[26]

§ 328. **Reservation of Power to Amend Charters—Supplementary Charter.**—A statute of a State, which declares that all charters of corporations granted after its passage may be altered, amended or repealed by the legislature, does not necessarily apply to supplements to an existing charter which were enacted subsequently to the statute. Nor does a provision which declares that "this supplement, and the charter to which it is a supplement, may be altered or amended by the legislature," apply to a contract with the corporation made in a supplement thereafter passed.[27]

§ 329. **Obligation of Contract—Mortgaged Franchise or Property — Purchaser — Reorganization of Corporation.** — Where a new corporation is organized to operate a road, by a mortgagee, who has purchased the franchise to take tolls, the legislature has no power over the franchise so purchased

[26] Pennsylvania R. R. Co. v. Miller, 132 U. S. 75, 10 Sup. Ct. 34, 33 L. ed. 267, cited on the last point in Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. 705.

[27] New Jersey v. Yard, 95 U. S. 104, 24 L. ed. 352. Examine Phœnix v. Trustees of Columbia College, 84 N. Y. Supp. 897, 87 App. Div. 438.

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even though the new corporation's charter is made subject to legislative changes.[28] But provisions in the railway law of Michigan of 1873, for the creation of a new corporation upon the reorganization of a railroad by the purchaser at a foreclosure sale, are held not to constitute a contract within the impairment clause of the Constitution of the United States.[29] So the authority conferred by acts of the legislature of New York [30] upon purchasers at a foreclosure sale of a railroad, to organize a corporation to receive and hold the purchased property, creates no contract with the State. The imposition under the provisions of the act of the legislature of New York of 1886,[31] of a tax upon a corporation so organized after the passage of that act by purchasers who purchased at a foreclosure sale made before its passage, for the privilege of becoming a corporation, violates no contract of the State and is no violation of the Constitution of the United States.[32] A provision in an act for the reorganization of an embarrassed corporation, which provides that all holders of its mortgage bonds who do not, within a given time named in the act, expressly dissent from the plan of reorganization, shall be deemed to have assented to it, and which provides for reasonable notice to all bondholders, does not impair the obligation of a contract, and is valid.[33]

§ 330. **Obligation of Contract—Franchises Expiring at Different Times—Extension of Franchise—Reservation of Power to Amend or Repeal.**—Ordinances granting an extension to a consolidated street railway corporation, possessing franchises expiring at different times, on conditions involving great expense to the corporation and resulting in substantial benefits to the public as to transfers for single fares and re-

[28] Ball v. Rutland R. Co. (C. C.), 93 Fed. 513.

[29] Grand Rapids & Ind. Ry. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. 310.

[30] Act May 11, 1874, chap. 430, p. 547, as amended by act June 2, 1876, chap. 446, p. 480.

[31] Act April 16, 1886, chap. 143.

[32] Schurz v. Cook, 148 U. S. 397, 13 Sup. Ct. 645, 37 L. ed. 498.

[33] Gilfillan v. Union Canal Co., 109 U. S. 401, 27 L. ed. 977.

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lating to the entire system as well as the extensions granted, and provided that the right granted terminate with the then existing grants of the main line at a specified date later than that of termination of some of the franchises, amount, on the acceptance by the company and compliance with the conditions, to a contract within the protection of the impairment clause of the constitution extending the various franchises to that date; the period, in this case of four years, not being an unreasonable one in view of the substantial benefits accruing to the public.[34] Under another decision it appeared that the Citizens' Street Railway Company of Indianapolis was organized in 1864 under an act of the legislature of Indiana of 1861, authorizing such a company to be "a body politic and corporation in perpetuity." January 18, 1864, the common council of that city passed an ordinance authorizing the company to lay tracks upon designated streets, and providing that "the right to operate said railways shall extend to the full time of thirty years," during which time the city authorities were not to extend to other companies privileges which would impair or destroy the rights so granted. In April, 1880, the common council amended the original grant "so as to read thirty-seven years where the same now reads thirty years." The company, desiring to issue bonds to run for a longer period than the thirty years, had, for that purpose, petitioned the common council for an extension to forty-five years. The city government was willing to extend to thirty-seven years, and this was accepted by the company as a compromise. On the 23d of April, 1888, the road and franchises were sold and conveyed to the Citizens' Street Railroad Company, which sale and transfer were duly approved by the city government. December 18, 1889, a further ordinance authorized the use of electric power by the company, and provided how it should be applied. In accordance with its provisions the company, at great expense, built a power house, and changed its plant to an electric system. In April, 1893, the city council, claim-

[34] Cleveland v. Cleveland Electric Ry. Co., 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. 513, aff'g 135 Fed. 368.

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ing that the rights of the company would expire in thirty years from January 18, 1864, granted to another corporation called the City Railway Company the right to lay tracks to be operated by electricity in a large number of streets then occupied by the tracks of the Citizens' Street Railroad Company, whereupon a bill was filed in the Circuit Court of the United States by the street railway company, to enjoin it from interrupting or disturbing the railroad company in the maintenance and operation of its car system, alleging that the action of the city council sought to impair, annul and destroy the obligation of the city's contract with the plaintiff. It was held that the Circuit Court had jurisdiction, although both parties were corporations and citizens of Indiana; that the right of repeal reserved to the legislature in the act of 1861 was not delegated to the city government; that the circumstances connected with the passage of the amended ordinance of April 7, 1880, operated to estop the city from denying that the charter was extended to thirty-seven years; that the continued operation of the road was a sufficient consideration for the extension of the franchise; that the citizens' company had a valid contract with the city which would not expire until January 18, 1901, and that the contract of April 24, 1893, with the City Railway Company was invalid. But no opinion was expressed whether complainant was entitled to a perpetual franchise from the city.[35] In another case, however, it is determined that where the legislature grants to a city comprehensive power to contract with street railroad companies with regard to the use of its streets and length of time, not exceeding twenty-five years, for which such franchise may be granted, the action of the city council of such city, and the acceptance by a street railway company of various ordinances adopted by the council do not amount to a contract between the city and the company extending the time of the franchise, and a

[35] City Ry. Co. v. Citizens' Street R. R. Co., 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. 653. Examine Blair v. City of Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427, rev'g Govin v. City of Chicago, 132 Fed. 848.

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later ordinance affecting that franchise after its expiration as originally granted is not void under the impairment clause of the Federal Constitution.[36] But even though an ordinance extending a franchise may be construed as a contract it is still subject to the control of the legislature if the constitution of the State then in force provides that no irrevocable or uncontrollable grant of privileges shall be made and that all privileges granted by the legislature, or under its authority, shall be subject to its control; nor is the legislature deprived of this control because the contract was not made by it but by a municipal corporation, as the latter is for such purpose merely an agency of the State.[37] If a statute reserves the power to amend or repeal charters or grants, unless a contrary intent therein is plainly expressed such provision embraces extensions of original charters or grants as well as those granted after such enactment.[38]

§ 331. Obligation of Contract not Impaired—Consolidation of Corporations—Reservation of Power to Alter or Repeal.—In the Pennsylvania College Cases [39] it appeared that the legislature of Pennsylvania chartered a college "at Cannonsburg," by name of the Jefferson College, "in Cannonsburg," giving to it a constitution and declaring that the same should "be and remain the inviolable constitution of the said college forever" and should not be "altered or alterable by an

[36] Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 51 L. ed. —, 27 Sup. Ct. —.

[37] San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. 261.

[38] Northern Bank of Kentucky v. Stone, 88 Fed. 413, aff'd Stone v. Bank of Kentucky, 174 U. S. 799, 43 L. ed. 1187, 19 Sup. Ct. 881, by a divided court, and cited in Bank of Kentucky v. Kentucky, 207 U. S. 258, 266, 267, which holds that a judgment against a county of Kentucky and the members of the state board of valuation restraining the collection of taxes of that county as impairing the obligation of a contract created by a law of the State and within the protection of the Federal Constitution is not, because such state officers were parties, *res judicata* to the validity of taxes imposed by another county, nor is such other county privy to the judgment.

[39] 13 Wall. (80 U. S.) 190, 20 L. ed. 550.

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ordinance or law of the said trustees or in any other manner than by an act of the legislature" of Pennsylvania. The college becoming in need of funds put into operation a plan of endowment whereby in virtue of different specific sums named, different sorts of scholarships were created; one, *ex. gr.*, by which on paying $400 a subscriber became entitled to a perpetual scholarship, capable of being sold or bequeathed; and another by which on payment of $1,200 he became entitled to a perpetual scholarship, entitling a student to tuition, room rent and boarding; this sort of scholarship being capable, by the terms of the subscription, of being disposed of as other property. But nothing was specified in this plan as to where this education, under the scholarships, was to be. On payment of the different subscriptions, certificates were issued by the college, certifying that A. B. had paid $———, which entitled him "to a scholarship as specified in plan of endowment adopted by the trustees of Jefferson College, Cannonsburg," etc. An act of the legislature, in 1865, by consent of the trustees of the college at Cannonsburg and of the trustees of another college at Washington, Pennsylvania, seven miles from Cannonsburg, created a new corporation, consolidating the two corporations, vesting the funds of each in the new one, and in their separate form making them to cease, but providing that all the several liabilities of each, including the scholarships, should be assumed and discharged without diminution or abatement by the new corporation. Notwithstanding the act of assembly, the collegiate buildings, etc., of Jefferson College were left at Cannonsburg, and certain parts of the collegiate course were still pursued there; the residue being pursued at Washington College, Washington. Subsequently, in 1869—the then existing constitution of Pennsylvania (one adopted in 1857, allowing the legislature of the State "to alter, revoke, or annul any charter of incorporation thereafter granted, whenever in their opinion it may be injurious to the citizens * * * in such manner, however, that no injustice shall be done to the corporators") being in force—a supplement to this act of 1865 was passed, "closely uniting" the

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several departments of the new college created by the act of 1865, and authorizing the trustees of it to locate them either at Cannonsburg, Washington, or some other suitable place within the commonwealth; they giving to whichever of the two towns named had the college taken away from it, or to both if it was taken away from both, an academy, normal school, or other institution of a grade lower than a college, with some property of the college for its use. It was held that the legislature of Pennsylvania, by its act of 1869, had not passed any law violating the obligation of a contract.[40] This decision was followed in another case under the following circumstances, viz.: The citizens of Millersburg, Kentucky, raised a fund for the purpose of establishing a collegiate institute in that place or its vicinity, and invited the Kentucky Annual Conference of the Methodist Episcopal Church, South, to take charge of it when established. The invitation was accepted, and the legislature of the State incorporated the Institute by an act, one provision in which was a reservation to the legislature of the right to amend or repeal it. Large additions were then made to the fund from other sources, and in 1860 another act was passed incorporating the Board of Education of that Conference of the Methodist Church. In this act, after reciting the raising of the money, and the establishment of the institution at Millersburg, the control of the college and the disposition of the sums raised were placed in the hands of the Conference. This act, also, was passed subject to the right of the legislature to amend or repeal. In 1861, the legislature passed another act, in which, as construed by the courts, power was conferred upon the Conference to remove the college from Millersburg to any other place within the bounds of Kentucky Annual Conference. It was decided that the latter act did not

[40] This case is cited in New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 14 Sup. Ct. 437; Greenwood v. Freight Co., 105 U. S. 13, 18, 26 L. ed. 961; Railway Co. v. Philadelphia, 101 U. S. 528, 540, 25 L. ed. 912; Railroad Co. v. Georgia, 98 U. S. 359, 366, 25 L. ed. 185; Holyoke Co. v. Lyman, 15 Wall. (82 U. S.) 500, 511, 522, 21 L. ed. 133; Miller v. State, 15 Wall. (82 U. S.) 478, 488, 495, 497, 21 L. ed. 98.

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impair any contract created by the former statutes and proceedings.[41]

§ 332. **Eminent Domain—Obligation of Contracts.**—The Constitution of the United States cannot be so construed as to take away the right of eminent domain from the States. Nor does the exercise of this right interfere with the inviolability of contracts. All property is held by tenure from the State, and all contracts are made subject to the right of eminent domain. No contract is, therefore, violated by the exercise of the right. The Constitution of the United States intended to prohibit all such laws impairing the obligation of contracts as interpolate some new term or condition, foreign to the original agreement.[42] Nor in the proceeding to condemn property for public use, is there anything in the nature of a contract between the owner and the State, or the corporation which the State in virtue of her right of eminent domain authorizes to take the property; all that the constitution of the State or of the United States or justice require in such cases is that a just compensation shall be made to the owner, his property can then be taken without his consent.[43] Again, while the legislative power to amend or repeal a statute cannot be availed of to take away property already acquired, or to deprive a corporation of fruits of contracts lawfully made, already reduced to possession, the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and, when unexecuted, cannot be held to be in itself a vested right surviving the existence of the franchise, or an authorized circumscription of its scope.[44] Nor is the right to proceed in a certain prescribed

[41] Bryan v. Board of Education, Kentucky Conference, 151 U. S. 639, 38 L. ed. 297, 14 Sup. Ct. —, cited in Mobile & Ohio Rd. v. Tennessee, 153 U. S. 486, 495, 14 Sup. Ct. 968, 38 L. ed. 793.

[42] West River Bridge Co. *v.* Dix, 6 How. (47 U. S.) 507, 12 L. ed. 535. See Baltimore & F. Turnpike Road v. Baltimore, C. & E. M. P. R. Co., 81 Md. 247, 31 Atl. 854.

[43] Garrison v. New York, 21 Wall. (88 U. S.) 196, 22 L. ed. 612.

[44] Adirondack Ry. Co. v. New York, 176 U. S. 335, 20 Sup. Ct. 460, 44 L. ed. —, 20 Sup. Ct. 460, aff'g

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manner a vested right, under a charter authorizing a corporation to acquire real estate under the exercise of the power of eminent domain, and such right may be repealed by the legislature notwithstanding there is no reservation of power to alter or repeal.[45] It is also within the power of a State to provide for condemnation of minority shares of stock in railroad and other corporations where the majority of the shares are held by another railroad corporation, if public interest demands; and the improvement of the railroad owning the majority of stock of another corporation may be a public use if the state court so declare, and the condemnation under the Public Laws of Connecticut [46] of such minority shares of a corporation is not void under the impairment clause of the constitution either because it impairs the obligation of a lease made by the corporation to the corporation obtaining the shares by condemnation, or because it impairs the contract rights of the stockholder.[47] Where the highest court of a State held that there was no property in a naked railroad route in such State which the State was obliged to pay for when it needed the land covered by that route for a great public use, and its officers were by appropriate legislation authorized to act, the Federal Supreme Court accepted the views of the state court, and accordingly held that the proceedings on the part of the State which were complained of in the case, impaired the obligation of no contract between it and the railroad company.[48]

§ 333. **Same Subject—Instances.**—The use of a team track and delivery space of a railroad company is not so essential as

People v. Adirondack Ry. Co., 160 N. Y. 225, 54 N. E. 689, cited in Underground Rd. v. City of New York, 193 U. S. 416, 428, 48 L. ed. 733, 24 Sup. Ct. 494.

[45] Chattaroi R. Co. v. Kinner, 81 Ky. 281, 5 Ky. Law Rep. 33.

[46] Secs. 3694, 3695.

[47] Offield v. New York, N. H. & H. Ry. Co., 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. 72, aff'g 78 Conn. 1, 60 Atl. 740.

[48] Adirondack Ry. Co. v. New York, 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. 460, aff'g People v. Adirondack Ry. Co., 160 N. Y. 225, 54 N. E. 689.

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to result in impairing the franchise and use of a railroad company in case another railroad is permitted to use three feet for clearance space, which clearance does not interfere with the running of defendant's trains, nor to an irremediable extent with the use of defendant's team track and delivery space. A railroad corporation having secured a franchise and right of way for the purpose of constructing its tracks upon a *locus publicus* of a city has the right to expropriate from another railroad corporation sufficient clearance space to enable it to pass its trains free of obstructions and hindrances from the latter, if the use thereof be not of such a character as to be indispensable to the movement of its own trains or its other business.[49] In another case it appeared that the legislature of Virginia incorporated the stockholders of the Richmond, Fredericksburg and Potomac railroad company, and in the charter pledged itself not to allow any other railroad to be constructed between those places, or any portion of that distance; the probable effect would be to diminish the number of passengers travelling between the one city and the other upon the railroad authorized by that act, or to compel the said company, in order to retain such passengers, to reduce the passage money. Afterwards the legislature incorporated the Louisa Railroad Company, whose road came from the West and struck the first named company's track nearly at right angles, at some distance from Richmond; and the legislature authorized the Louisa Railroad Company to cross the track of the other, and continue their road to Richmond. In this latter grant, the obligation of the contract with the first company was held not to be impaired within the meaning of the Constitution of the United States. It was also decided that in the first charter there was an implied reservation of the power to incorporate companies to transport other than passengers; and if the Louisa Railroad Company should infringe upon the rights of the Richmond Company, there would be a remedy at law, but that the apprehension of it would not justify an

[49] Shreveport & R. R. V. R. Co. v. St. Louis S. W. R. Co., 51 La. Ann. 814, 25 So. 424.

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injunction to prevent them from building their road; and that the obligation of the contract was not impaired by crossing the road, since a franchise may be condemned in the same manner as individual property.[50] In Baltimore & Susquehanna R. Co. v. Nesbit,[51] the State of Maryland granted a charter to a railroad company, in which provision was made for the condemnation of land to the following effect: namely, that a jury should be summoned to assess the damages, which award should be confirmed by the county court, unless cause to the contrary was shown. The charter further provided, that the payment, or tender of payment, of such valuation should entitle the company to the estate as fully as if it had been conveyed. In 1836 there was an inquisition by a jury, condemning certain lands, which was ratified and confirmed by the county court. In 1841, the legislature passed an act directing the county court to set aside the inquisition and order a new one. On the 18th of April, 1844, the railroad company tendered the amount of the damages, with interest, to the owner of the land, which offer was refused; and on the 26th of April, 1844, the owner applied to the county court to set aside the inquisition, and order a new one, which the court directed to be done. It was decided that the law of 1841 was not a law impairing the obligation of a contract; it neither changed the contract between the company and the State, nor did it divest the company of a vested title to the land. The charter provided that, upon tendering the damages to the owner, the title to the land should become vested in the company. There having been no such tender when the act of 1841 was passed, five years after the inquisition, that act only left the parties in the situation where the charter placed them, and no title was divested out of the company, because they had none. It was further held that the States have a right to direct a rehearing of cases decided in their own courts. The only limit upon the power to pass retrospective laws is,

[50] Richmond, F. & P. R. Co. v. Louisa. R. R. Co., 13 How. (54 U. S.) 469.

[51] 10 How. (51 U. S.) 395, 13 L. ed. 71, 14 L. ed. 55.

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that the Constitution of the United States forbids their passing *ex post facto* laws, which are retrospective penal laws. But a law merely divesting antecedent vested rights of property, where there is no contract, is not inconsistent with the Federal Constitution.

§ 334. **Constitution Subsequently Adopted—Obligation of Contract.**—If a charter from the legislature is amended so as to confer upon a city or village the power to grant and it does grant a franchise to a railroad company of certain rights or privileges in a business street, such franchise is irrevocable to the extent that it is protected from impairment by the constitution and it is not affected by the terms of a new constitution prohibiting grants of special privileges of such a nature.[52] So a distinction is made between grants of land, repealed by the operation of a state constitution prohibiting grants, where the grants were made to aid in the construction of lines of railway not authorized until after such provision of the constitution took effect,[53] and a case where the grants which were claimed to be affected by it were made prior to the adoption of that constitution, for the purpose of aiding in the construction of the road, since in the latter case the enforcement of that constitution against the accepted grant and vested rights will impair the obligation of the contract between the State and the railway company and cannot be sustained.[54] Where the State of Ohio chartered a bank in 1845, in which

[52] Port of Mobile v. Louisville & Nashville R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342.

[53] Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 170 U. S. 226, 18 Sup. Ct. 603, 42 L. ed. 1017 (provision in the constitution of Texas of 1869, that the legislature should not thereafter grant lands to any person or persons, as enforced against the Galveston, Harrisburg and San Antonio Railway Company, the successor of the Buffalo, Bayou Brazos and Colorado Railway Company, which had received grants of land under previous legislation to encourage the construction of railroads in that State, was held to involve no infraction of the Federal Constitution).

[54] Houston-Texas Central Ry. Co. v. Texas, 170 U. S. 243, 42 L. ed. 1023, 18 Sup. Ct. 610.

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charter was stipulated the amount of the tax which the bank should pay, in lieu of all taxes to which said company or the stockholders thereof, on account of stock owned therein would otherwise be subject, and in 1852, the legislature passed an act levying taxes upon the bank to a greater amount and founded upon a different principle, said act was held to be in conflict with the Constitution of the United States, as impairing the obligation of a contract, and therefore void. The fact that the people of the State had, in 1851, adopted a new constitution, in which it was declared that taxes should be imposed upon banks in the mode which the act of 1852 purported to carry out, could not, it was decided, release the State from the obligations and duties imposed upon it by the Constitution of the United States.[55] Where the constitution of a State makes each stockholder in a corporation "individually liable for its debts, over and above the stock owned by him," in a further sum at least equal in amount to such stock, and the corporation incurs debts and is then authorized to obtain subscriptions for new stock, but does not then obtain them, and the constitution of the State is afterwards amended and declares that, "in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him," and the corporation then, for the first time, issues the new stock, the holders of such new stock are not personally liable under the first constitution. The amended constitution does not impair the obligation of the contract between the

[55] Dodge v. Woolsey, 18 How. (59 U. S.) 331, 15 L. ed. 401, cited in Grand Lodge, F. & A. Masons, Louisiana, v. New Orleans, 166 U. S. 143, 146, 41 L. ed. 951, 17 Sup. Ct. 523; Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 662, 16 Sup. Ct. 705, 40 L. ed. 838; Shelby County v. Union & P. Bank, 161 U. S. 149, 156, 40 L. ed. 650, 16 Sup. Ct. 558; Louisiana v. Jumel, 107 U. S. 711, 760, 27 L. ed. 448, 2 Sup. Ct. 128, in dissenting opinion; Farrington v. Tennessee, 95 U. S. 679, 690, 24 L. ed. 558; Erie Ry. Co. v. Pennsylvania, 21 Wall. (88 U. S.) 492, 498, 22 L. ed. 595; Salt Co. v. East Saginaw, 13 Wall. (80 U. S.) 373, 376, 20 L. ed. 611; Home of The Friendless v. Rouse, 8 Wall. (75 U. S.) 430, 19 L. ed. 495; Von Hoffman v. City of Quincy, 4 Wall. (71 U. S.) 535, 554, 18 L. ed. 403; Wright v. Sill, 2 Black (67 U. S.), 544, 545, 17 L. ed. 333; Franklin Bank v. Ohio, 1 Black (66 U. S.), 474, 475, 17 L. ed. 180.

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corporation and its debtor made under the first constitution.[56]

§ 335. **Obligation of Contracts—Police Powers—Regulations.**—Legislative power to create corporations implies power to thereafter prescribe reasonable regulations even though the right to repeal or amend the charter is not reserved by the State.[57] So the exemption of a company from requirements inconsistent with its charter cannot operate to relieve it from submitting itself to such police regulations as the city may lawfully impose; and until it has complied, or offered to comply, to regulations to which it is bound to conform, it is not in a position to assert that its charter rights are invaded because of other regulations, which, though applicable to other companies, it contends will be invalid if applied to it.[58] Again, in granting the exclusive franchise to supply gas to a municipality and its inhabitants, a state legislature does not part with the police power and duty of protecting the public health, the public morals and the public safety, as one or the other may be affected by the exercise of that franchise by the grantee.[59] The railroad law of New York of 1850 [60] required the consent of a municipality to the construction of a surface railroad through its streets. Whatever may have been the effect of conditions attached to such consent by the municipality it had no power to contract away or limit the taxing or police powers of the legislature. A consent, however, notwithstanding unauthorized conditions, became effective and

[56] Ochiltree v. Railroad Co., 21 Wall. (88 U. S.) 249, 22 L. ed. 546.

[57] McGuire v. Chicago, Burlington & Quincy Rd. Co., 131 Iowa, 340, 108 N. W. 902. See Platte & D. Canal & M. Co. v. Dowell, 17 Colo. 376, 30 Pac. 68; Westport, City of, v. Mulholland, 159 Mo. 86, 60 S. W. 77; Martin v. Remington-Martin Co., 88 N. Y. Supp. 573, 95 App. Div. 18; New York Sanitary Utilization Co. v. Department of Public Health of N. Y., 67 N. Y. Supp. 324, 32 Misc. 377, 70 N. Y. Supp. 510, 61 App. Div. 106.

[58] Laclede Gas Light Co. v. Murphy, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. 505.

[59] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 615, 6 Sup. Ct. 252.

[60] Laws 1850, chap. 140.

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conferred a valid franchise.[61] The law of New York of 1885 transferred the reserved police power of the State from one set of functionaries to another and required companies intending to operate electrical conductors to submit their plans and specifications to the commissioners of electrical subways, who would determine whether they were in accordance with the terms of the ordinance giving to them the right to enter and dig up the streets of the city; and, being so construed, it violated no contract rights of companies which might grow out of the permission granted by the municipality.[62]

§ 336. **Obligation of Contracts—Conditions—Regulations—Reserved Power to Alter, etc.**—Laws requiring gas companies, water companies, and other corporations of like character to supply their customers at prices fixed by the municipal authorities of the locality, are within the scope of legislative power unless prohibited by constitutional limitation or valid contract obligation. Where the constitution of a State provided that corporations might be formed under general laws, and should not be created by special act, except for municipal purposes, and that all laws, general and special, passed pursuant to that provision might be from time to time altered and repealed, and a general law was enacted by the legislature for the formation of corporations for supplying cities, counties and towns with water, which provided that the rates to be charged for water should be fixed by a board of commissioners to be appointed in part by the corporations and in part by municipal authorities; and the constitution and laws of the State were subsequently changed so as to take away from corporations, which had been organized and put into operation under the old constitution and laws, the power to name members of the boards of commissioners, so as to place in municipal authorities the sole power of fixing rates

[61] City of Rochester v. Rochester Ry. Co., 182 N. Y. 99, case aff'd 175, 12 Sup. Ct. 880, 36 L. ed. Rochester Railway Co. v. Rochester, 666.

[62] New York v. Squire, 145 U. S. 205 U. S. 236, 27 Sup. Ct. 469.

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for water. It was held, that these changes violated no provision of the Constitution of the United States.[63] If requirements are exacted or duties imposed by ordinances, which, if enforced, would impair the obligation of a gas and electric light company's contract, nevertheless the company is not thereby relieved from offering to do those things which it is lawfully bound to do.[64] And a license of a street railway company may be revoked because of non-compliance with conditions to which the franchise was made subject, especially where such right to revoke is reserved.[65] And where a statute authorizes any city to grant by resolution or ordinance, under such restrictions as the common council may deem proper, to any person or corporation, the right to erect and maintain, in the streets, alleys and other public places of such city, poles, wires and other necessary appliances for the purpose of supplying electric or other light, the discretion of the common council is not confined to the mere restriction of methods of use, but extends to restriction of time and the statutory authority conferred carries with it an unreserved discretion and the right to impose any terms on the grant not forbidden by law, and a statutory authority to revoke such license may be given to such city and it may be exercised by it.[66] But, contract rights may be given by an act of incorporation to a navigation company, in consideration of the performance of certain conditions, which obligation cannot be impaired by a subsequent attempt to repeal in part such prior statute of incorporation.[67]

§ 337. Obligation of Contracts—Street Paving by Street Railways—Conditions and Regulations.—A subsequent ordi-

[63] Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48.

[64] Laclede Gas Light Co. v. Murphy, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. 505.

[65] Belleville v. Citizens' Horse R. Co., 152 Ill. 171, 26 L. R. A. 681, 38 N. E. 584.

[66] Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495, 7 Am. Elect. Cas. 15.

[67] Commissioners' Sinking Fund v. Green & Barren River Nav. Co., 79 Ky. 73.

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nance requiring additional paving impairs the obligation of the contract and is not such an exercise of the police power as will be upheld.[68] So a city ordinance which contains by agreement as to its stipulations a contract by the city with a street railway company to pave certain portions of the street cannot be thereafter so altered by the legislature as to impose additional obligations upon the company in the matter of paving, even though the Code of the State reserves to it the power to control the company's rights, privileges and immunities and to withdraw the franchise.[69] If, however, a power be

[68] State ex rel. City of Kansas City v. Corrigan Consol. St. Ry. Co., 85 Mo. 263, 55 Am. Rep. 361.

[69] Coast-Line R. Co. v. Savannah, 30 Fed. 646.

Examine the following cases as to street paving and repairing by street railroad companies:

Alabama: Montgomery St. Ry. Co. v. Smith (Ala.), 39 So. 757; Mobile v. Mobile Light & Ry. Co., 141 Ala. 442, 38 So. 127.

Connecticut: Hartford v. Hartford St. Ry. Co., 75 Conn. 471, 53 Atl. 1010; Fair Haven & W. R. Co. v. City of New Haven, 75 Conn. 442, 53 Atl. 960, aff'd in 203 U. S. 379, 27 Sup. Ct. 74, 51 L. ed. 239.

Illinois: Chicago v. Chicago Union Traction Co., 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666; Danville St. Ry. & Light Co. v. Mater, 116 Ill. App. 519.

Iowa: Marshalltown Light, P. & Ry. Co. v. Marshalltown, 127 Iowa, 637, 103 N. W. 1005.

Louisiana: Shreveport v. Shreveport Belt Ry. Co., 107 La. 785, 32 So. 189; State, New Orleans, v. New Orleans Tract. Co., 48 La. Ann. 567, 19 So. 565.

Massachusetts: Dunbar v. Old Colony St. Ry. Co., 188 Mass. 180, 74 N. E. 352; Hyde v. City of Boston, 186 Mass. 115, 71 N. E. 118; Worcester v. Worcester Consol. St. Ry. Co., 182 Mass. 49, 64 N. E. 581; Springfield v. Springfield St. Ry. Co., 182 Mass. 41, 64 N. E. 577; Boston v. Union Freight R. Co., 181 Mass. 205, 63 N. E. 412.

Michigan: Detroit v. Detroit Ry., 134 Mich. 11, 11 Det. Leg. N. 86, 99 N. W. 411; Detroit v. Detroit United Ry., 133 Mich. 608, 10 Det. Leg. N. 320, 95 N. W. 736; Lansing v. Lansing City Elec. R. Co., 109 Mich. 123, 66 N. W. 949, 3 Det. L. News, 41.

Nebraska: Lincoln, City of, v. Lincoln St. Ry. Co., 67 Neb. 469, 93 N. W. 766, 84 N. W. 802.

New Jersey: Cook v. North Bergen Township (N. J.), 59 Atl. 1035; Fielders v. North Jersey St. Ry. Co., 68 N. J. L. 434, 54 Atl. 822, 53 Atl. 404, rev'g 67 N. J. L. 76, 50 Atl. 533; Fielders v. North Jersey St. Ry. Co., 68 N. J. L. 343, 53 Atl. 404, 13 Am. Neg. Rep. 156.

New York: People v. Geneva, W. S. F. & C. L. Traction Co., 98 N. Y. Supp. 719, 112 App. Div. 581; New York City v. Harlem Bridge, M. & F. Ry. Co., 91 N. Y. Supp. 557, 100 App. Div. 257; Mechanicville v. Stillwater & M. St. Ry. Co., 71 N. Y. Supp. 1102, 35 Misc. 513; Binghamton v. Binghamton & P. D.

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reserved to the city so to do it may impose additional requirements as to street paving upon street railroad companies as where there is reserved the power of legislative control and the right to alter when deemed necessary.[70] So a right may exist to declare void a street railway's franchises or privileges in streets of a municipality in case of failure to accept in writing the conditions on which it is permitted to use said streets, a right to revoke such franchise having been reserved, one of such conditions being the payment of street paving improvements.[71] On December 12, 1883, the city of Sioux City, in Iowa, by ordinance, conferred on a street railway company, incorporated December 6, 1883, under the general laws of Iowa, the right of operating a street railway, with the requirement that it should pave the street between the rails. Subsequently, under an act of 1884, the city, by ordinance, required the company also to pave the street for one foot outside of the rails, and assessed a special tax against it for the cost of the paving outside of the rails. It was held, that there was no contract between the company and the State or the city, the obligation of which was impaired by the laying of the tax. But it appeared that under section 1090 of the Code of Iowa, which was in force when the company was incorporated, its franchise was subject to such conditions as the legislature should thereafter impose as necessary for the public good.[72]

Ry. Co., 16 N. Y. Supp. 225, 61 Hun, 479.

Ohio: Cleveland v. Cleveland Electric R. Co., 3 Ohio Dec. 92, 1 Ohio N. P. 413.

Pennsylvania: West Chester Borough v. West Chester St. Ry. Co., 203 Pa. 201, 52 Atl. 252; Philadelphia v. Hestonville, M. & F. Pass. Ry. Co., 203 Pa. 38, 52 Atl. 184; Reading, City of, v. United Traction Co., 202 Pa. 571, 52 Atl. 106; Reeves v. Philadelphia Traction Co., 152 Pa. 153, 4 Am. Elec. Cas. 27, 25 Atl. 516; Philadelphia v. Ridge Ave. Pass. Ry. Co., 143 Pa. St. 444, 22 Atl. 695.

Texas: Kettle v. City of Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874; Laredo Elect. & Ry. Co. v. Hamilton, 23 Tex. Civ. App. 480, 56 S. W. 998.

Wisconsin: Milwaukee Elec. Ry. & L. Co. v. Milwaukee, 95 Wis. 39, 69 N. W. 794, 36 L. R. A. 45.

[70] Sioux City St. Ry. Co. v. Sioux City, 78 Iowa, 367, 43 N. W. 224, 39 N. W. 498.

[71] Union St. Rd. Co. v. Snow, 113 Mich. 694, 4 Det. L. N. 455, 71 N. W. 1073.

[72] Sioux City R. Co. v. Sioux City, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. 226, 9 Ry. & Corp. L. J. 251, 46 Am.

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Again, the act of the legislature of Louisiana[73] authorizing the enforcement by mandamus without a jury of contracts by corporations with municipal corporations in that State with reference to the paving, grading, repairing, etc., of streets, highways, bridges, etc., simply gives an additional remedy to the party entitled to the performance, without impairing any substantial right of the other party, and does not impair the obligation of the contract sought to be enforced, and is not in conflict with the Constitution of the United States.[74] The statute of Massachusetts of 1898[75] providing for taxation of street railway companies is held not void, as violating the impairment of obligation clause of the Federal Constitution, because it relieved a railroad company from the obligation to pave and repair streets under the terms and conditions of certain municipal ordinances which the company had duly accepted.[76]

§ 338. **Same Subject—Exemption from Assessment for Street Paving—Consolidation.**[77]—Although the obligations of a legislative contract granting immunity from the exercise of governmental authority are protected by the Federal Constitution from immunity by the State, the contract itself is not property which can be transferred by the owner to another, but is personal to him with whom it is made and incapable of assignment, unless by the same or a subsequent law the State authorizes or directs such transfer; and this applies to a contract of exemption with a street railway company from assessments for paving between its tracks. A legislative authority to transfer the estate, property, rights, privileges and franchises of a corporation to another corporation does not authorize the transfer of a legislative contract of immunity from assessment. And where a corporation incorporates under a

& Eng. R. Cas. 169, aff'g 78 Iowa, 367, 43 N. W. 224.

[73] Act July 12, 1888, No. 133.

[74] New Orleans, C. & L. R. Co. v. New Orleans, 157 U. S. 219, 39 L. ed. 679, 15 Sup. Ct. 581.

[75] Laws 1898, chap. 578.

[76] City of Worcester v. Worcester Con. St. Ry. Co., 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. 327.

[77] See § 20, herein.

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general act which creates certain obligations and regulations, it cannot receive by transfer from another corporation an exemption which is inconsistent with its own charter or with the constitution or laws of the State then applicable, even though under legislative authority the exemption is transferred by words which clearly include it. Again, although two corporations may be so united by one of them holding the stock and franchises of the other, that the latter may continue to exist and also to hold an exemption under legislative contract, that is not the case where its stock is exchanged for that of the former and by operation of law it is left without stock, officers, property or franchises, but under such circumstances it is dissolved by operation of the law which brings this condition into existence.[78] In the state court in this case the following decision was rendered: the immunity from contribution to the expense of new pavements in the city of Rochester, conferred by chapter 34 of the Laws of 1869 upon the Rochester City and Brighton Railroad Company, a street surface railroad incorporated in 1868 under the Railroad Law of 1850, which, by purchase at foreclosure sale, had acquired the franchises of a prior company organized under the same act, and which had constructed the road, was not a contract right of which the company could not be deprived by subsequent legislation. The fact that the conditions attached to the original consent were modified by the city, they being deemed too onerous for the company, by an ordinance passed prior to the act, which exempted it from the expense of new pavements for five years, and also provided that the fare for children between twelve and five years should be reduced, and that both parties united in submitting it to the legislature which enacted the law in question, except as to the five year limitation, and that after its passage the company extended its lines into other streets, as permitted by the statute, does not render it an irrevocable agreement by the State to exempt the company from such expense as to those streets. The statute did not recite that

[78] Rochester Railway Co. v. Rochester, 205 U. S. 236, 51 L. ed. —, 27 Sup. Ct. 469, aff'g 182 N. Y. 99, 116.

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application was made to the legislature by either party for the adoption of any contract between the city and the company. It did not ratify or assume to ratify any contract. It did not grant a franchise, since that had already been acquired. It did not amend or assume to amend the charter of the company, and if it had, the charter would have been subject to repeal. No acceptance by the railroad company was requisite, and, therefore, the fact that it continued to operate its road and to construct lines in other streets, in alleged reliance upon perpetual exemption as to such streets, cannot be regarded as furnishing a consideration therefor. The statute did give an exemption, but being without a consideration, a mere gratuity or privilege was conferred which was revocable at the pleasure of the legislature. When, therefore, by section 9 of chapter 250 of the Laws of 1884, the provisions of which were re-enacted in the General Railroad Law,[79] the cost of repavement as specified was imposed upon all street surface railroads operating in cities, a contention by the lessee of such railroad company that it did not apply to streets in which the lessor had constructed and operated its lines before its enactment, and that as to these a contract of exemption existed, the obligation of which could not be impaired by subsequent legislation, is untenable. Assuming, however, that the statute constituted a contract, exemptions from taxation or from the exercise of the police power are to be construed *strictissimi juris;* they are against common right and must be held to be personal and limited to the grantee unless a contrary intention clearly appears. The right to exemption, therefore, did not pass to the lessee, the language being personal and not attached to the property, the statute enacting that "said company," not "said company, its successors and assigns," shall not be required to bear any part of the expense of repaving the streets.[80]

§ 339. Impairment of Obligation of Contracts—Illus-

[79] L. 1890, chap. 565, § 98.

[80] City of Rochester v. Rochester Ry. Co., 182 N. Y. 99, aff'd Rochester Ry. Co. v. Rochester, 205 U. S. 236, 27 Sup. Ct. 469.

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trative Decisions—Insurance—Banks—Rate of Interest—Pullman Cars.—Where there is a reserved power in the legislature to alter, amend or repeal charters, a law permitting mutual life associations to reincorporate as regular life insurance companies is not unconstitutional as impairing the obligation of the contracts existing between such associations and their policy holders, or as depriving such policy holders of their property without due process of law. Under the power to alter, amend and repeal charters reserved in the constitution of 1846 of New York, chapter 722 of the Laws of 1901 does not impair the obligation of contracts existing between mutual life associations and their policy holders, nor in this case did the reincorporation of such an association as a regular life insurance company deprive its policy holders of their property without due process of law.[81] The act of the legislature of Kentucky of February 14, 1856, and the act of May 12, 1884, c. 1412, incorporating the Citizens' Savings Bank of Owensboro, and the act of May 17, 1886, commonly known as the Hewitt Act, and other acts referred to, did not create an irrevocable contract on the part of the State, protecting the bank from other taxation, and therefore the taxing law of Kentucky of November 11, 1892, c. 108, did not violate the contract clause of the Constitution of the United States.[82] The provision in section 10 of article 1, of the Con-

[81] Polk v. Mutual Reserve Fund Life Association of New York, 207 U. S. 310; Wright v. Minnesota Life Ins. Co., 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. 549.

[82] Citizens' Savings Bank of Owensboro v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. 530.

"The so-called Hewitt law, * * * has given rise to much litigation in the courts of Kentucky, as well as in those of the United States. At one time it was held by the Court of Appeals of Kentucky that its provisions, when complied with by the bank seeking to avail itself of its privileges, constituted a valid and binding contract. Commonwealth to use of Franklin Co. v. Farmers' Bank of Kentucky et al., 97 Kentucky, 590. In a later case the Court of Appeals of Kentucky held the law not to constitute an inviolable contract. Deposit Bank of Owensboro v. Daviess Co., 102 Kentucky, 174. When the law was before this court, the same conclusion was reached. Citizens' Savings Bank of Owensboro v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. 530. It may be now regarded as the settled law that this enactment did not constitute a

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stitution of the United States that "no State shall 'pass any' law impairing the obligation of contracts," does not forbid a State from legislating, within its discretion, to reduce the rate of interest upon judgments previously obtained in its courts; as the judgment creditor has no contract whatever in that respect with the judgment debtor, and as the former's right to receive, and the latter's obligation to pay exists only as to such an amount of interest as the State chooses to prescribe as a penalty or liquidated damages for the nonpayment of the judgment.[83] The Pullman company, a corporation of the State of Illinois, contracted with the railway companies operating lines of interstate railroads in Kansas to furnish them a sufficient number of Pullman cars to meet the demands of the travelling public for that kind of service, to equip such cars for use, to provide conductors and porters for them, and to supply Pullman accommodations to railway passengers holding proper tickets without discrimination between such passengers, reserving the right to charge and collect from passengers demanding the service compensation therefor. Subsequently the legislature enacted a law requiring foreign corporations to comply with certain conditions, including the payment of charter fees for the privilege of transacting interstate business, to which law the Pullman company refused to submit. It was held, that a judgment ousting it from the franchise of charging and collecting compensation for Pullman accommodations furnished to passengers taken up and set down within the limits of the State did not violate the obligation of its contracts with the railway companies.[84]

contract between the State and the banks as to taxation, but is subject to modification and repeal by subsequent laws of the State undertaking to tax bank property." Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 229, 24 Sup. Ct. 107, per Day, J.

As to corporations for banking purposes not being a contract and criticism of the Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629, see Knoup v. Piqua Bank, 1 Ohio St. 603, 608, 609, per Corwin, J.

[83] Morley v. Lake Shore & M. S. Ry. Co., 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. 47.

[84] State v. Pullman Co. (Kan., 1907), 90 Pac. 319.

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§ 340. **Impairment of Obligation of Contracts—Illustrative Decisions Continued—Tunnel—Ferries—Bridges—Canal.**—A municipal ordinance giving permission to a street railroad company to construct a tunnel under a navigable stream, the law of the State providing that railways shall not be constructed so as to interrupt the navigation of any water in the State, does not amount to a contract under the contract clause of the constitution, so that the city could not subsequently require the company to lower the tunnel so as not to interfere with the increased demands of navigation; nor, in the absence of any provision to that effect, would it be construed as containing an implied covenant that the municipality would bear the expense of such alterations required by subsequent ordinances. In a navigable stream the public right is paramount, and the owner of the soil under the bed can only use it so far as consistent with the public right; and a municipality, through which a navigable stream flows, cannot grant a right to obstruct the navigation thereof nor bind itself to permit the continuance of an obstruction; and the rule is not affected by the fact that the person claiming a right to continue such an obstruction is the owner in fee of the bed of the stream.[85] A ferry connecting Wheeling with Wheeling Island was licensed at an early day in Virginia. Subsequently a general law of that State prohibited the courts of the different counties from licensing a ferry within a half a mile in a direct line from an established ferry. In 1847 the defendant purchased the ferry and its rights. It was held (1) that the general law of Virginia had in it nothing in the nature of a contract; (2) that the transfer of the existing rights from the vendor to the vendee added nothing to them.[86] From the year 1681 to 1783, a franchise on the ferry over the Connecticut River belonged to the town of Hartford, situated on the west bank of the river. In 1783, the legislature incorporated the town of East Hartford, and granted to it one-half

[85] West Chicago Street Railroad Co. v. Chicago, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. 518.

[86] Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 11 Sup. Ct. 301, 34 L. ed. 967.

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of the ferry during the pleasure of the General Assembly. In 1808 a company was incorporated to build a bridge across the river, which, being erected, was injured and rebuilt in 1818, when the legislature resolved that the ferry should be discontinued. This act, discontinuing the ferry, was held not inconsistent with that part of the Constitution of the United States which forbids the States from passing any law impairing the obligation of contracts. It was also decided that there was no contract between the State and the town of East Hartford, by which the latter could claim a permanent right to the ferry. The nature of the subject-matter of the grant, and the character of the parties to it, both show that it is not such a contract as is beyond the interference of the legislature. Besides, the town of East Hartford only held the ferry right during the pleasure of the General Assembly, and in 1818 the latter expressed its pleasure that the ferry should cease. After the year 1818, the legislature passed several acts contradictory to each other, alternately restoring and discontinuing the ferry. Those which restored the ferry were declared to be unconstitutional by the state courts, upon the ground that the act of 1818 had been passed to encourage the bridge company to rebuild their bridge, which had been washed away. But these decisions were not properly before the Federal Supreme Court in this case for revision. The town of East Hartford, having no right to exercise the ferry privilege, may have been correctly restrained, by injunction, from doing so, by the state court.[87] But a grant of a ferry franchise by the legislature is held a contract within the meaning of that provision of the Constitution prohibiting the passage of laws impairing the obligation of contracts.[88] An enactment by a State, in incorporating a company to build a toll bridge and take tolls fixed by the act, that it should not be lawful for any person or persons to erect any bridge within two miles either above or below the

[87] East Hartford v. Hartford Bridge Co., 10 How. (51 U. S.) 511, 13 L. ed. 518, aff'd 10 How. (51 U. S.) 541, 13 L. ed. 531.

[88] McRoberts v. Washburne, 10 Minn. 23.

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bridge authorized, was held to be a contract inviolable even though the charter of the company was without limit as to the duration of its existence.[89] The statute of the legislature of New Jersey, passed A. D. 1790, by which that State gave power to certain commissioners to contract with any persons for the building of a bridge over the Hackensack River; and by the same statute enacted that the "said contract should be valid on the parties contracting as well as on the State of New Jersey;" and that it should not be "lawful" for any person or persons whatsover to erect "any other bridge over or across the said river for ninety-nine years,"—is a contract, whose obligation the State can pass no law to impair.[90] A railway viaduct, if nothing but a structure made so as to lay iron rails thereon, upon which engines and cars may be moved and propelled by steam, not to be connected with the shore on either side of said river except by a piece of timber under each rail, and in such a manner, as near as may be, so as to make it impossible for man or beast to cross said river upon said structure, except in railway cars (the only roadway between said shores and said structure being two or more iron rails, two and a quarter inches wide, four and a half inches high, laid and fastened upon said timber four feet ten inches asunder), is not a "bridge" within the meaning of the said act of New Jersey, of 1790; and the Act of Assembly of that same State, passed A. D. 1860, authorizing a company to build a railway, with the necessary viaduct, over the Hackensack, does not impair the obligation of the contract made by the aforesaid act of 1790.[91] Congress cannot abolish or so limit tolls as to impair vested rights of bondholders of a canal company.[92]

[89] Binghamton Bridge, The, 3 Wall. (70 U. S.) 51, 18 L. ed. 137, following Dartmouth College v. Woodward, 4 Wheat. (17 U. S.) 518, 625, 4 L. ed. 629.

[90] Bridge Proprietors v. Hoboken Company, 1 Wall. (68 U. S.) 116, 17 L. ed. 571.

[91] Bridge Proprietors v. Hoboken Company, 1 Wall. (68 U. S.) 116, 17 L. ed. 571, Catron, J., dissenting.

[92] United States v. Louisville & Portland Canal Co., 1 Flipp. (U. S. C. C.) 260, Fed. Cas. No. 15,633, 1 Cent. L. J. 101.

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CHAPTER XXI.

CONDITIONS IMPOSED—GRANT OF FRANCHISE.

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362. Imposing New Conditions—Police Power.
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§ 341. **Conditions Imposed by Congress.**—In a railroad land grant Congress may impose conditions, such as for the transportation of property or troops of the United States and that the land shall remain and be a public highway for the use of the government, although this does not entitle it to free transportation of such property or troops.[1] So conditions for forfeiture of a railroad land grant to aid in construction of the road may be imposed by an act of Congress if the road is not completed within a certain number of years, but such condition subsequent can only be enforced by the United States.[2] But where an act of Congress appropriates money to be paid to railroad companies to carry out a scheme of public improvements in the District of Columbia and such enactment also requires those companies to eliminate grade crossings and erect a union station, and recognizes and provides for the surrender of existing rights, it is an act appropriating money for governmental purposes, and not for the private use of those companies, and the statutes[3] for thus eliminating grade crossings, etc., are not unconstitutional on the ground that they appropriate moneys to be paid railway companies for their exclusive use, nor is the property of a taxpayer taken without due process of law by reason of the taxes imposed under such statutes.[4] If special conditions are imposed by Congress under a special act of Congress incorporating a railroad company, and such conditions are a prerequisite to the acceptance of certain benefits, and particular interests are also protected under such grant, if the conditions are accepted and the special interests have determined, the

[1] Lake Superior & Miss. R. Co. v. United States, 93 U. S. 442, 23 L. ed. 965. See Joyce on Electric Law (2d ed.), §§ 31, 37*a*, 38.

[2] Lake Superior S. C. Iron Co. v. Cunningham, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. ed. 183. Compare United States v. Northern Pac. R. Co., 177 U. S. 435, 44 L. ed. 836, 20 Sup. Ct. 706 (where under the act of July 2, 1864, non-completion of the railroad within the time limited did not operate as a forfeiture); United States v. Tenn. & C. R. Co., 176 U. S. 242, 44 L. ed. 452, 20 Sup. Ct.—.

[3] Acts Cong. Feb. 12, 1901, 31 Stat. 767, 774, and of Feb. 28, 1903, 32 Stat. 909.

[4] Millard v. Roberts, 202 U. S. 429, 50 L. ed. 1090, 26 Sup. Ct. 674.

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corporation is not precluded from availing itself of the general railway law.[5]

§ 342. **Conditions Imposed by Legislature.**—As we have stated substantially elsewhere, the legislature has authority to determine and direct the conditions upon which a corporation organized for a public purpose and enjoying a public franchise shall exercise the right conferred upon it;[6] that is, the State may prescribe upon what conditions the rights and privileges granted by it shall be held and enjoyed.[7] So it is declared that it has never been doubted that the legislative authority, in making a grant of a corporate franchise, can prescribe such terms and such conditions for its acceptance and for its enjoyment as it shall deem best, not inconsistent with constitutional limitations. The manner of enjoying the franchise, its life, its scope, are all subject to legislative control.[8] It is also asserted that: "There is no doubt, that among the powers so delegated to the legislature, is the power to grant the franchises of bridges and ferries, and others of a like nature. The power to grant is not limited by any restrictive terms in the Constitution, and it is of course general and unlimited as to the terms, the manner, and the extent of granting franchises. These are matters resting in its sound discretion; and having the right to grant, its grantees have the right to hold, according to the terms of their grant, and to the extent of the exclusive privileges conferred thereby."[9]

§ 343. **Municipal Powers—Generally.**—Municipal corporations, in the exercise of their duties, are a department of the State; they are in every essential only auxiliaries of the State

[5] United States, Search, v. Choctaw, O. & G. R. Co., 3 Okla. 404, 41 Pac. 729.

[6] See § 96, herein, and cases cited at pp. 189, 190.

[7] Delaware, L. & W. R. Co. v. Central Stock Yard & T. Co., 43 N. J. Eq. 71, 10 Atl. 490.

[8] Jersey City Gas Light Co. v. United Gas Improvement Co., 46 Fed. 264, 266, per Greene, J., case aff'd 58 Fed. 323.

[9] Charles River Bridge v. Warren Bridge, 11 Pet. (36 U. S.) 420, 644, 645, 9 L. ed. 773, per Story, J., in dissenting opinion.

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for the purposes of local government; they are simply political subdivisions of the State existing by virtue of the exercise of the power of the State through its legislative department; they may be created, or, having been created, may be destroyed, or their powers may be restricted, enlarged or withdrawn at the will of the legislature, subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed.[10] These corporations, being created only to aid the state government in the legislation and administration of local affairs, possess only such powers as are expressly granted, or as may be implied because essential to carry into effect those which are expressly granted.[11] If a municipality is not authorized by its charter or other act of the legislature so to do it has no power

[10] Worcester, City of, v. Worcester Con. St. Ry. Co., 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. 327; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. 124.

A municipal corporation, in the exercise of its duties, is a department of the State. Its powers may be large or small; they may be increased or diminished from time to time at the pleasure of the State, or the State may itself directly exercise in any locality all the powers usually conferred upon such a corporation. Such changes do not alter its fundamental character. Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440.

"The term 'municipality,' when used in this act, includes a city, village, town or lighting district, organized as provided by general or special act." Public Service Commissions Law of N. Y., Laws 1907, p. 892, chap. 429, art. 1, § 2.

[11] **United States:** Ottawa v. Carey, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. —.

Alaska: Ketchikan Co. v. Citizens' Co., 2 Alaska, 120.

Iowa: Borough v. City of Cherokee (Iowa, 1906), 109 N. W. 876.

Missouri: Joplin, City of, v. Leckie, 78 Mo. App. 8, 2 Mo. App. Repr. 123.

South Carolina: Germania Sav. Bank v. Darlington, 50 S. C. 337, 27 S. C. 846.

Texas: Waters-Pierce Oil Co. v. McElroy (Tex. Civ. App.), 47 S. W. 272.

Municipal corporations must act within the scope of their powers expressly conferred or within such as are necessary to the exercise thereof. Ogden v. Bear Lake & River Water Works & Irrig. Co., 16 Utah, 440, 41 L. R. A. 305, 52 Pac. 697.

No corporation, municipal or otherwise, possesses any powers, except such as have been granted to it. State v. Mayor, etc., of New York, 3 Duer (N. Y.), 119.

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or authority to enter upon or take the land of a citizen for the purpose of digging or laying a sewer thereon; especially so where no mode is prescribed for the condemnation of such property for public use, for without a grant of such power no municipal corporation can exercise it. To justify such an authority claimed by a city there would have to be a necessity for the taking and the payment of just and adequate compensation before taking.[12] Again, in the absence of any provision to that effect in the original franchise, the city granting a franchise to a street railway company, cannot on the expiration of the franchise, take possession of the rails, poles and operating appliances; they are property belonging to the original owner, and an ordinance granting that property to another company on payment to the owner of a sum to be adjudicated as its value is void as depriving the owner of its property without due process of law.[13] Municipal corporations, as in case of county boards of police, when authorized by statute to do acts which otherwise they would have no power to do, such as subscribe to a railroad incorporated and beginning in another State and passing through their own State, cannot modify or alter the subscription as authorized by the statute, and a compromise by such board with a railroad company which does so alter or modify the subscription is accordingly void.[14]

[12] Butler v. Mayor, etc., of Thomasville, 74 Ga. 570.

[13] Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 51 L. ed. —, 27 Sup. Ct. —.

[14] Bell v. Railroad Co., 4 Wall. (71 U. S.) 598, 18 L. ed. 338. Examine Hedges v. Dixon County, 150 U. S. 182, 191, 37 L. ed. 1044, 14 Sup. Ct. 71; Brennan v. German-American Bank, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. 559; Doon Township v. Commins, 142 U. S. 366, 374, 35 L. ed. 1044, 12 Sup. Ct. 220; Litchfield v. Ballou, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. 820; Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. 369; Otoe County v. Baldwin, 111 U. S. 1, 28 L. ed. 331, 4 Sup. Ct. 265; Hoff v. Jasper County, 110 U. S. 53, 28 L. ed. 68, 3 Sup. Ct. —; Lewis v. Shreveport, 108 U. S. 282, 27 L. ed. 728, 2 Sup. Ct. 634; Jarrolt v. Moberly, 103 U. S. 580, 26 L. ed. 492; Buchanan v. Litchfield, 102 U. S. 278, 26 L. ed. 138; Chicago, City of, v. Galpin, 183 Ill. 399, 55 N. E. 731. Compare Board of Liquidation v. Louisville & Nashville R. Co., 109 U. S. 221, 27 L. ed. 916, 3 Sup. Ct. 144.

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§ 344. **Municipal Control Over Streets—Franchise Rights of Corporations.**—Public sidewalks and streets are for use by all on equal terms for proper purposes, subject to valid regulations prescribed by the constituted authorities.[15] Under a Virginia decision, public highways, whether in the country or a city, belong entirely to the public at large, and the supreme control over them is vested in the legislature. The power and authority of a city is contained in its charter and limited thereby and it has no other or different control of its streets than is prescribed in its charter or the general statutes of the State.[16] Under the law of Illinois municipal corporations have a fee simple in, and exclusive control over, the streets, and the municipal authorities may do anything with, or allow any use of, the streets not incompatible with the ends for which streets are established, and it is a legitimate use of a street to allow a street railroad track to be laid down in it.[17] Under a New York decision the authority to use the public streets of a municipality for railroad purposes is a franchise which proceeds from the State and a municipality has no power in respect thereto, except such as is expressly given by statute, and then only upon the conditions prescribed.[18] In a Maryland

[15] Donovan v. Pennsylvania Co., 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. 91. See Scovel v. City of Detroit, 146 Mich. 93, 13 Det. Leg. N. 681, 109 N. W. 20.

[16] Richmond, City of, v. Smith, 101 Va. 161, 165, 43 S. E. 345.

[17] Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427.

[18] Village of Phœnix v. Gannon, 108 N. Y. Supp. 255, 123 App. Div. 93 (case reverses 106 N. Y. Supp. 927, 55 Misc. 606, Spring and Robinson, JJ., dissenting), citing and quoting from Beekman v. Third Ave. R. R. Co., 153 N. Y. 144, 152, 47 N. E. 277, 278; Potter v. Collis, 156 N. Y. 16, 30, 50 N. E. 413, 415. See Rhinehart v. Redfield, 87 N. Y. Supp. 789, 93 App. Div. 310, aff'd in 179 N. Y. 569, 72 N. E. 1150.

"The power of the legislature to authorize the construction of a street railroad upon the streets of a city is plenary except as * * * limited by the constitution." Adee v. Nassau Elec. Rd. Co., 76 N. Y. Supp. 589, 72 App. Div. 404, 407, per Goodrich, P. J., case aff'd in 177 N. Y. 548.

Franchise in streets to railroad company. See the following cases:

United States: Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 22 C. C. A. 334, 47 U. S. App. 36.

California: Arcata & M. R. Co., 92 Cal. 639, 28 Pac. 676.

Florida: State, Jacksonville, v.

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case it is said that: "The rule must be considered settled, that no person can acquire the right to make especial or exceptional use of the public highway, not common to all the citizens of the State, except by grant from the sovereign power. The right to use the public streets of a city for the purpose of laying gas pipes therein, is a privilege which the State alone can confer." [19] It is declared in a case in Utah that: "The public streets of a city are dedicated and held in trust for the use of the public, and, * * * is well settled by the great weight of authority that a city council has no power to grant a franchise or a permit to an individual or corporation authorizing such person or corporation to make a permanent use of a public street for exclusively private purposes, to the detriment of the public and damage to private property abutting upon such street," and such council cannot authorize a railroad company to construct a permanent switch track, for the company's sole and exclusive use, from its main line along a street and across a sidewalk to a warehouse of another corporation for the accommodation of the business transacted at the warehouse.[20]

§ 345. **Same Subject.**—It is a proper exercise of the city's authority to permit an electric light company to use the streets for lighting purposes, but the public cannot be deprived of its right to have the streets free from material obstructions to

Jacksonville St. R. Co. (Fla.), 10 So. 590, 50 Am. & Eng. R. Cas. 179.

Illinois: Chester, City of, v. Wabash, C. & W. R. Co., 182 Ill. 382, 55 N. E. 524.

Missouri: Westport, City of, v. Mulholland, 84 Mo. App. 319.

New York: Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277, aff'g 14 App. Div. 629, 43 N. Y. Supp. 1150.

Pennsylvania: Philadelphia v. Empire Pass. R. Co., 177 Pa. 382, 35 Atl. 721; McHale v. Easton & B. Transit Co., 169 Pa. 416, 37 W. N. C. 14, 32 Atl. 461.

Texas: Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co. (Tex. Civ. App.), 67 S. W. 525.

Wisconsin: Allen v. Clausen, 114 Wis. 244, 90 N. W. 181.

See §§ 48, 132 *et seq.*, 185 *et seq.*, herein.

[19] Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242, quoted in Purnell v. McLane, 98 Md. 589, 593, 56 Atl. 830, per Pearce, J.

[20] Cereghino v. Oregon Short Line Rd. Co., 26 Utah, 467, 99 Am. St. Rep. 843. Examine Schwede v. Hemrich Bros. Brewing Co. (Wash.), 69 Pac. 362.

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their necessary use.[21] Though a city may grant a right of way over a batture it has no power to cut the public off entirely from all communication with a navigable stream, but it can so control and administer the batture as to enable the public to go to and return from the navigable stream, and at the same time so regulate things as to enable the grantee of the right of way to use and enjoy the way granted.[22] Where a public service corporation obtains its grant to construct a steam conduit in a city street, subject to the right of the municipal authorities to place other local improvements in the street, even though the construction thereof should require it to take additional precautions for the protection of its property in the street, or subject to greater expense in the maintenance of its property in changing the location thereof, its rights are not, by reason of its public service nature and its prior license, superior to those acquired by the owner of adjacent property to whom vault permits are granted.[23] But while a city, so authorized by its act of incorporation, has jurisdiction over a turnpike road, constructed within the limits of the city, for the purpose of regulating, grading and paving it; still it has no right to regu-

[21] Aurora Electric Light & Power Co. v. McWethy, 104 Ill. App. 479, aff'd in McWethy v. Aurora Electric Light & Power Co., 202 Ill. 218, 67 N. E. 9. See also, as to last point in text, the following cases:

United States: Baltimore v. Baltimore Trust & Guar. Co., 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. 696; Railroad Co. v. Richmond, 96 U. S. 521, 24 L. ed. 734.

Illinois: People v. Harris, 203 Ill. 272, 67 N. E. 785.

Indiana: Town of Newcastle v. Lake Erie & W. R. Co., 155 Ind. 18, 57 N. E. 516.

Iowa: Bennett v. Town of Mt. Vernon (Iowa), 100 N. W. 349.

Maryland: Brauer v. Baltimore Refrigerating Co. (Md.), 58 Atl. 21.

Missouri: Morie v. St. Louis Transit Co., 116 Mo. App. 12, 91 S. W. 962; Burnes v. City of St. Joseph, 91 Mo. App. 489.

New York: Interborough Rapid Transit Co. v. Gallagher, 90 N. Y. Supp. 104, 44 Misc. 536.

Texas: Houston v. Houston City St. Rd. Co., 83 Tex. 548, 19 S. W. 127, 50 Am. & Eng. R. Cas. 380.

Virginia: Richmond, City of, v. Smith (Va.), 43 S. E. 345.

See §§ 48, 132 *et seq.*, 185 *et seq.*, herein.

[22] City of Shreveport v. St. Louis Southwestern R. Co., 115 La. 885, 40 So. 298.

[23] New York Steam Co. v. Foundation Co., 108 N. Y. Supp. 84, 123 App. Div. 254, McLaughlin and Houghton, JJ., dissenting.

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late and grade the street so as to injure the turnpike company or interfere with their chartered rights; for police purposes, however, it has authority to make such municipal regulations as it may deem expedient.[24]

§ 346. **Implied Conditions — Railroad Company — City Streets—New Streets and Crossings—Police Power.**—Where a railroad has laid its tracks within the limits of a city it is held that it must be deemed to have done so and to have received its franchise subject to the conditions, not expressed but necessarily implied, that new streets of the city might be established, opened and extended from time to time across its tracks and right of way as the public convenience and necessity required and under such restrictions as might be prescribed by statute.[25] When a city seeks by condemnation proceedings to open a street across the tracks of a railroad within its corporate limits, it is not bound to obtain and pay for the fee in the land over which the street is opened, leaving untouched the right of the company to cross the street with its tracks, nor is it bound to pay the expenses that will be incurred by the railroad company in the way of constructing gates, placing flagmen, etc., caused by the opening of the street across its tracks. The railroad company must be held, as a matter of law, to have had in contemplation when its charter was granted, and is also bound to assume all burdens incident to new as well as existing crossings, and is obligated to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by common law at streets and highways when the railroad was constructed.[26] It is also decided that the expenses that will be incurred by such company in erecting gates, planking the crossing and maintaining flagmen, in order that its road may

[24] State v. City of New Brunswick, 30 N. J. L. 395.

[25] Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. 581; State v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380, 398, 108 N. W. 261.

[26] State v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380, 398, 108 N. W. 261.

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be safely operated, if all that should be required, necessarily result from the maintenance of a public highway, under legislative sanction. Such expenses must be regarded as incidental to the exercise of the police powers of the State and must be borne by the company.[27] But it is declared that "The authorities are not fully agreed upon the question whether the State may, in the exercise of the police power, compel a railroad company without compensation, to construct and maintain suitable crossings at streets extended over the right of way subsequent to the construction of the railroad. Our examination of the books, however, leads to the conclusion that the great weight of authority sustains the affirmative of that proposition. The right of the State so to act is maintained in the States of Maine, Connecticut, Illinois, New York, Tennessee, Indiana, Texas, Mississippi, Ohio, Nebraska, New Jersey, Vermont, Wisconsin, and by the Supreme Court of the United States. * * * A contrary doctrine may be said to be the law in the States of Kansas, Louisiana and Michigan." [28]

§ 347. Conditions—Payment of Expenses or Percentage—Arbitration—Submission to Electors.—Conditions may be imposed requiring a railroad company, to which a right of location in a borough has been granted, to pay certain incidental expenses of the ordinance conferring the privilege and also a reasonable sum for counsel fees.[29] A certain percentage of receipts or earnings may also be required to be paid to a municipality for the privilege or franchise right to use the public streets by telephone, street railroad or other corporations.[30] And if an electric company accepts a franchise sub-

[27] Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. 581.

[28] State v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380, 398, 108 N. W. 261, per Brown, J., citing and considering numerous decisions.

[29] State, Hutchinson, v. Belmar Borough, 61 N. J. L. 443, 39 Atl. 643, aff'g 62 N. J. L. 450, 45 Atl. 1092.

[30] Lancaster, City of, v. Briggs (Mo., 1906), 96 S. W. 314; California, City of, v. Bunceton Teleph. Co., 112 Mo. App. 722, 87 S. W. 604; Carlisle v. Cumberland Valley Elect. Pass. R. Co., 22 Pa. Co. Ct. 221. See Kuhn v. Knight, 101 N. Y. Supp. 1, 115 App. Div. 837.

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ject to an agreement for the use of its poles by other corporations upon a consideration of payment therefor, coupled with a condition for arbitration, and, in case of failure to agree, the amount of compensation to be determined by the city electrician, such company is obligated thereby.[31] So a street railway franchise may be made subject to a condition that efficient provisions for the compulsory arbitration of all disputes concerning any matter of employment or wages between the company and its employees shall be embodied in a grant of a franchise.[32] And the legislature may require that the grant of a franchise for the use of streets shall depend upon the consent of a majority of the voters at a general or special election.[33] And a city may reserve a right to purchase the privileges, property or works of a corporation upon conditions or at the termination of a certain period of time.[34]

§ 348. **Conditions—Acceptance.**—It requires the acceptance of the charter to create a corporate body, for the government cannot compel persons to become an incorporated body without their consent;[35] and such acceptance is necessary to bind the stockholders.[36] But in case of a grant by a city or

Percentage, how graduated. Payment by railroad company to State has reference to time of completion of certain number of miles of own line. State v. Northern Pac. R. Co., 36 Minn. 207, 30 N. W. 663.

[31] Montgomery Light & Water Co. v. Citizens' Light, Heat & Power Co. (Ala., 1906), 40 So. 981. See Kuhn v. Knight, 101 N. Y. Supp. 1, 115 App. Div. 837.

[32] Wood v. City of Seattle, 23 Wash 1, 62 Pac. 135, 52 L. R. A. 369.

[33] Hanson v. Wm. A. Hunter Electric Light Co. (Iowa), 48 N. W. 1005, 34 Am. & Eng. Corp. Cas. 83, 10 Ry. & Corp. L. J. 103. Question also whether city ordinance was within the statute.

[34] See Indianapolis, City of, v. Consumers' Gas Trust Co., 144 Fed. 640; Stein v. McGrath, 128 Ala. 175, 30 So. 792. Examine Blair v. City of Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. 427.

[35] Franklin Bridge Co. v. Young Wood, 14 Ga. 80, 86, per Lumpkin, J.; Chicago Teleph. Co. v. Northwestern Teleph. Co., 199 Ill. 324, 65 N. E. 329, 8 Am. Elec. Cas. 81, aff'g 100 Ill. App. 57; Quinlan v. Houston & T. C. R. Co., 89 Tex. 356, 34 S. 738.

[36] **Maine:** Lincoln & Kennebec Bank v. Richardson, 1 Greenlf. (1 Me.) 81, 10 Am. Dec. 34.

Massachusetts: Ellis v. Marshall, 2 Mass. 269, 3 Am. Dec. 49.

Kentucky: Atkinson v. Tennill, 14 Ky. L. Rep. 922.

Maryland: State v. Baltimore &

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town to a corporation to use its streets the company need not be necessarily incorporated and fully organized when the ordinance is originally presented for passage as it may become chartered at a later date and accept the ordinance at the time of its passage, and being then accepted and acted upon it becomes a contract between the city and the corporation.[37] As was said by the court in an early case in Georgia this acceptance or "consent, either express or implied, is generally subsequent in point of time to the creation of the charter. And yet, no charter, that we are aware of, has been adjudged invalid, because the law creating it and previously defining its powers, rights, capacities and liabilities, did not take effect until the acceptance of the corporate body, or at least a majority of them, was signified." [38] If a city grants a franchise to a corporation for a term authorized by law, and the conditions thereof are accepted, the same constitutes a contract between the parties, the violation of which is the subject of litigation in an ordinary proceeding.[39] And where, by the terms of a resolution of a township board, a franchise is to be absolutely void unless the company accepts the same, such acceptance of the resolution constitutes an irrevocable franchise.[40] Conditions precedent must be strictly complied with before there can be an acceptance; or, in other words, acceptance must be strictly in conformity with conditions precedent.[41] So an acceptance of a condition obligates the grantee to perform it, as in the case of the maintenance of a passageway in connection with a bridge franchise.[42] Where a corporation accepts the benefits of a franchise, with knowledge of its termination, it cannot com-

Ohio R. Co., 12 Gill & J. (Md.) 399, 38 Am. Dec. 319.

New York: Thomas v. Dakin, 20 Wend. (N. Y.) 9.

[37] Chicago Teleph. Co. v. Northwestern Teleph. Co., 199 Ill. 324, 65 N. E. 329, 8 Am. Elec. Cas. 81; Clarksburg Electric Light Co. v. City of Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 147.

[38] Franklin Bridge Co. v. Young Wood, 14 Ga. 80, 86, per Lumpkin, J.

[39] Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa, 234, 91 N. W. 1031.

[40] Hamtramck, Township of, v. Rapid Ry. Co. (Mich.), 81 N. W. 337.

[41] Lyons v. Orange, A. & M. R. Co., 32 Md. 98. See also Atkinson v. Tennill, 14 Ky. L. Rep. 922.

[42] Boston v. Crowley, 38 Fed. 602.

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plain, when the grantor insists that the termination of the franchise be observed, that such termination may affect the value of its property.[43]

§ 349. **Same Subject.**—A modification of an exemption in a charter should be accepted to be effectual;[44] but a consent to an ordinance modifying certain provisions may make a subsequent acceptance unnecessary.[45] If additional powers are conferred, to take effect from the passage of a statute granting them they should be duly accepted and conditions necessary to give the statute effect should be complied with.[46] Grants of new franchises should be accepted to be operative.[47] But, although, in case of a statute authorizing consolidation of certain companies, there has been no acceptance in the form or manner required, still a corporation cannot for that reason be held a trespasser on public lands under a land grant.[48] If a county subscription is granted on terms and conditions and it is accepted, such acceptance is burdened with such terms and conditions and the company will be estopped from asserting that they are unreasonable or void.[49] Nor can a street railroad company accept a franchise and thereafter set up formalities as to the publication of the ordinance in order to relieve itself of its obligations.[50] A charter created by special act, but not accepted before a new constitution prohibiting creation of corporations by special act, confers no rights as against the prohibition.[51] Again, where a city attempts by ordinance to

[43] Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa, 234, 91 N. W. 1031.

[44] Stevens County v. St. Paul, M. & M. R. Co., 36 Minn. 467, 31 N. W. 942.

[45] City R. Co. v. Citizens' St. R. Co., 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. 653.

[46] Hartford & C. W. R. Co. v. Wagner, 73 Conn. 506, 48 Atl. 218.

[47] Lyons v. Orange, A. & M. R. Co., 32 Md. 98.

[48] State v. New Orleans, C. & L. R. Co., 104 La. 685, 29 So. 312.

[49] West Virginia & P. R. Co. v. Harrison County Court (W. Va.), 34 S. E. 786. See also Topping Avenue, In re, 187 Mo. 146, 86 S. W. 190.

[50] Hattersley v. Village of Waterville, 26 Ohio Cir. Ct. R. 226.

[51] State v. Dawson, 16 Ind. 40; Gillespie v. Fort Wayne & S. R. Co., 17 Ind. 443. Compare Atlanta, City of, v. Gate City Gaslight Co., 71 Ga. 106.

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confer upon a corporation a right which it has no power to grant, the acceptance and use by the corporation of the privileges attempted to be conferred will not constitute a color of right which the city may not deny in an ordinary action; nor will the acceptance by the corporation of such privileges so illegally granted constitute a waiver by the city of its rights.[52] Corporations may by an express or implied acceptance of curative statutes become *de jure* corporations possessed of all the powers granted under their charters.[53] Formal acceptance may not be necessary under an offer, by statute, to any person to organize a railroad company under the authority of named commissioners; there must, however, in such case be an organization.[54]

§ 350. Same Subject—Implied Acceptance—Presumption—Evidence.—Where express acceptance is not required it may be implied from acts showing the intent to accept, as in case of organizing and exercising the franchise,[55] or corporate rights, development of the corporate property, election annually of directors, issuing stock, etc.,[56] and, generally, acceptance may be evidenced by acts of the stockholders or officers.[57] While formal acceptance need not appear from the records of

[52] Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa, 234, 91 N. W. 1031.

[53] Brown v. Atlanta Ry. & Power Co., 113 Ga. 462, 39 S. E. 71.

[54] Quinlan v. Houston & T. C. C. R. Co., 89 Tex. 356, 34 S. W. 738.

[55] Logan v. McAllister, 2 Del. Ch. 176; Middlesex Husbandmen v. Davis, 3 Metc. (44 Mass.) 133.

[56] Glymont Improv. & Excursion Co., 80 Md. 278, 30 Atl. 651.

[57] **Connecticut**: Danbury & Norwalk R. Co. v. Wilson, 22 Conn. 435.

Indiana: State v. Dawson, 22 Ind. 272.

Massachusetts: Blandford Third School Dist. v. Gibbs, 2 Cush. (56 Mass.) 39.

New York: Williams v. Bank, 7 Wend. (N. Y.) 540.

North Carolina: Benbow v. Cook, 115 N. C. 324, 22 S. E. 453, 44 Am. St. Rep. 454.

Texas: Quinlan v. Houston & T. C. R. Co., 89 Tex. 356, 34 S. W. 758.

Vermont: Scarsburgh Turnpike Co. v. Cutler, 6 Vt. 315.

Wisconsin: Heath v. Silverthorn Lead Min. & Smelting Co., 39 Wis. 146.

See United States Bank v. Danbridge, 12 Wheat. (25 U. S.) 64, 6 L. ed. 552.

Acceptance when presumed. See Attorney Genl. v. Chicago & Northwestern Rd. Co., 35 Wis. 425.

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the corporation,[58] still where a corporation is organized under a general law providing for signing, acknowledging and recording a certificate the acceptance is proved by the recording thereof.[59] But an agreement by a street railway company to hold a city harmless from damages occasioned from noncompliance with the terms of an ordinance requiring vigilance from conductors and motormen and the stopping of cars quickly to avoid injury to pedestrians does not evidence an acceptance of the terms and conditions of such ordinance, as the city would not be responsible for the company's neglect to comply with the ordinance.[60] Nor is a toll road franchise between certain points accepted by entering upon and into the possession of a highway between such points which the taxpayers have constructed.[61] In an early case in Alabama the court says: "It is pressed upon the court, that to constitute a corporation, under said acts, it was necessary that the identical persons named in said acts, or a majority of them, should have accepted the provisions of said acts; opened books for subscription to the capital stock of said companies; obtained the subscriptions of stock required and organized, by electing directors and a president, as required by said acts. But, we hold that these acts, by their own vigor, made the persons named in each a body politic and corporate. After naming the persons, each act declares that they, 'and such others as may hereafter become associated with them for that purpose and their successors, are hereby declared and created a body politic and corporate.' They therefore become corporations immediately on the passage of said acts; but to exercise the privileges, it was necessary for them to organize by obtaining stock, etc., and electing a board of directors and a president. These acts are altogether unlike acts that authorize persons to become a corporation, by doing certain things; in such cases, the things to be done are conditions that must be complied with before they

[58] Trott v. Warren, 2 Fairf. (11 Me.) 227.

[59] Glymont Improv. & Excursion Co. v. Toller, 80 Md. 278, 30 Atl. 651.

[60] Murphy v. Lindell Ry. Co. (Mo.), 54 S. W. 442.

[61] Welsh v. Plumas County, 94 Cal. 368, 29 Pac. 720.

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can become a body corporate. As a general proposition, it is true that the charter of a corporation must be accepted, but in cases of private corporations, like these under consideration, created for individual benefit, the presumption is, that they are created at the instance and on the request of the parties to be benefited thereby, and, consequently, are accepted by them. If, therefore, they are found exercising the privileges granted it will be almost conclusive evidence of the fact of acceptance. This view disposes of the fifth and sixth charges asked by the defendant and denied by the court." [62]

§ 351. **Foreign Corporation—Situs of—Interstate Comity.** —A corporation can have no legal existence out of the sovereignty by which it is created, as it exists only in contemplation of law, and by force of the law, and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation,[63] and cannot migrate to another sovereignty; but although it must live and have its being in that State only, yet it does not follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. The corporation must show that the law of its creation gave it authority to make such contracts; yet as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made; it is sufficient, that its existence as an artificial person, in the State of its creation, is acknowledged and recognized by the State or Nation where the dealing takes place, and that it is permitted by the laws of that place to exercise the powers with which it is endowed. Every power, however, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; a corporation can make no valid contract, without the sanction, express or implied, of

[62] Talladega Ins. Co. v. Landers, 43 Ala. 115, 136, per Peck, C. J.

[63] Ohio & Miss. Rd. Co. v. Wheeler, 1 Black (66 U. S.), 286, 17 L. ed. 130; Runyan v. Coster, 14 Pet. (39 U. S.) 122, 10 L. ed. 382.

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such sovereignty unless a case should be presented in which the right claimed by the corporation appears to be secured by the Constitution of the United States.[64] By the general comity, however, which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, corporations created in one State or Territory are permitted to carry on lawful business in another, and to acquire, hold, and transfer property there equally as individuals.[65] If foreign corporations have, as a matter of comity, been permitted to enter a State, or a Territory which afterwards becomes a State, without restriction, they have no vested right to remain there unlicensed, and must secure an express exemption, or exemption by implication equally clear with express words, or they will be subject to all subsequent regulations which the State may see fit to adopt in the exercise of its police power.[66]

§ 352. **Power of State to Impose Conditions Upon Foreign Corporations.**—Since a corporation created by one State can transact business in another State only with the consent of the latter, such latter State may accompany its consent with such conditions as it thinks proper to impose, provided that they are not repugnant to the Constitution and laws of the United States, or inconsistent either with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or those principles of natural justice which forbid condemnation without opportunity for defense.[67] These limitations upon the power of the State to

[64] Runyan v. Coster, 14 Pet. (39 U. S.) 122, 10 L. ed. 382. See also Christian Union v. Yount, 101 U. S. 352, 25 L. ed. 888; State v. Topeka Water Co., 61 Kan. 547, 60 Pac. 337.

[65] Cowell v. Springs Co., 100 U. S. 55, 25 L. ed. 547.

[66] State v. Western Union Teleg. Co. (Kan., 1907), 90 Pac. 299.

[67] Cable v. United States Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. ed. 188; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. ed. 657; New York v. Roberts, 171 U. S. 658, 43 L. ed. 345, 19 Sup. Ct. 235; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 12 Sup. Ct. 403, 11 Ry. & Corp. L. J. 182; Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148; State, Hadley, v. Standard Oil Co.,

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impose conditions also prohibit an interference with interstate or foreign commerce or other governmental functions of the Federal government.[68] But it is held that the only limitation upon the power of a State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign.[69] The State may, however, within the above limitations, not only prescribe the terms and conditions upon which foreign corporations may enter its limits, but may also prohibit them from doing business therein.[70] Again, the provisions in the Fourteenth Amendment to the Federal Constitution, that no State shall deny to any person within its jurisdiction the equal protection of the laws, do not prohibit a State from requiring, for the admission within its limits of a corporation of another State, such conditions as it chooses.[71] But while a State may impose these terms there should not be an unjust discrimination against

194 Mo. 124, 91 S. W. 1062. See § 13, herein.

If a corporation does business in a State it must do so subject to such valid regulations as the State may adopt, and it may adopt such policy as it thinks best, provided it does not in so doing come into conflict with the Federal Constitution, and, if constitutional, the legislative will must be respected even though the courts be of opinion that the statute is unwise. Whitfield v. Ætna Life Ins. Co. of Hartford, 205 U. S. 489, applied to an insurance company.

It is well settled that a State has the power to impose such conditions as it pleases upon foreign corporations seeking to do business within it. Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup.Ct. 518, aff'g 19 Tex. Civ. App, 1, 44 S.W. 936.

[68] New York v. Roberts, 171 U. S. 658, 19 Sup. Ct. 235, 43 L. ed. 345; State, Hadley, v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062.

[69] Pembina, C. S. M. & M. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 650.

[70] Swing v. Western Lumber Co., 205 U. S. 275, 51 L. ed. —, 27 Sup. Ct. —, aff'g 140 Mich. 344; Security Mutual Life Ins. Co. v. Prewitt, Ins. Comr., 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. 619; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. ed. 657, aff'g 19 Tex. Civ. App. 1, 44 S. W. 936; Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148.

[71] Pembina, C. S. M. & M. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 8 Sup. Ct. 737.

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foreign corporations;[72] and the validity of the contracts of such a corporation, made with its citizens, must be governed by like rules with those which apply to the same contracts between domestic corporations and the citizens of such State.[73] And foreign corporations who have accepted or complied with the prescribed conditions under the statutes are within the same rules as apply to domestic corporations under other sections of the code relating to the occupancy of the public roads by telephone companies.[74]

§ 353. **Same Subject—Instances—Certificate — Designation of Corporate Agent, etc.—Service of Process.**—Foreign corporations may, as conditions to doing business in a State, be required to file certificates;[75] instruments designating an agent and place of business;[76] stipulations for the service

[72] Mutual Fire Ins. Co. v. Hammond (Ky.), 51 S. W. 151.

[73] Security Savings & Loan Assoc. v. Elbert (Ind., 1899), 54 N. E. 753.

[74] State v. City of Red Lodge, 30 Mont. 388, 76 Pac. 758.

[75] Goodwin v. Colorado Mortgage Co., 110 U. S. 1, 28 L. ed. 47; Keystone Driller Co. v. Superior Court, 138 Cal. 738, 72 Pac. 198.

Railroad corporation—Filing certificate — Citizenship — Jurisdiction. The provision in the Arkansas statutes of March 13, 1889, that a railroad corporation of another State which had leased or purchased a railroad in Arkansas and filed with the Secretary of State of that State, as provided by the act, a certified copy of the articles of incorporation, should become a corporation of Arkansas, does not avail to create an Arkansas corporation out of a foreign corporation complying with those provisions in such a sense as to make it a citizen of Arkansas within the meaning of the Federal Constitution, and subject it to a suit in the Federal courts sitting in the State of Arkansas, brought by a citizen of the State of its origin. St. Louis & S. F. Ry. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. 621, cited in Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 576, 43 L. ed. 1081, 19 Sup. Ct. —; St. Joseph & Grand Island Rd. Co. v. Steele, 167 U. S. 659, 664, 42 L. ed. 315, 17 Sup. Ct. 925; Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 75 Fed. 440.

[76] Chattanooga Nat. B. & L. Assn. v. Denson, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. 630. In this case it appeared that the highest court of Alabama had decided that under the constitutional and statutory provisions of that State any act in the exercise of its corporate functions was forbidden to a foreign corporation which had not complied with the constitution and statute in regard to filing an instrument designating agent and place of business, and that contracts resulting from such acts were illegal and could not be enforced

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of process;[77] and to comply with a condition that service of process upon the agent of such corporation shall be considered as service upon the corporation itself; and, it is held, that when the company sends its agent into the State it must be presumed to have assented to the condition.[78] But it is pertinent in this connection to state that foreign corporations can be served with process in a State only when doing business therein, and such service must be upon an agent who represents the corporation in such business.[79] And while in case of diverse citizenship a suit may be brought in the Circuit Court for the district of the residence of either party, there must be service within the district; and if the defendant is a non-resident corporation, service can only be made upon it if it is doing business in that district in such a manner, and to such an extent, as to warrant the inference that it is present there through its agent; and a railroad company which has no tracks within the district is not doing business therein in the sense that liability

in the courts. It was held that this applied to a building and loan association of Tennessee making a loan in Tennessee secured by certain shares of its own stock and also by mortgage on certain real estate in Alabama, and that although the association had complied with certain provisions of the law, the fact that it had not designated an agent as required by the constitution and statutes was a bar to the foreclosure of the mortgage in the courts of Alabama, cited in National Mut. B. & L. Assn. v. Brahan, 193 U. S. 635, 650, 48 L. ed. 823, 24 Sup. Ct. 532.

What is sufficient compliance as to certificate. A certificate signed and acknowledged by the president and secretary of a foreign corporation, and filed with the Secretary of State and in the office of the recorder of deeds for the county in which it is proposed to carry on business, stating that, "the principal place where the business shall be carried on in the State of Colorado shall be at Denver, in the county of Arapahoe, in said State, and that the general manager of said corporation, residing at the said principal place of business, is the agent upon whom process may be served in all suits that may be commenced against said corporation," is a sufficient compliance with the requirements of the constitution and laws of Colorado in that respect. Goodwin v. Colorado Mortgage Co., 110 U. S. 1, 28 L. ed. 47.

[77] St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. 554.

[78] Lafayette Ins. Co. v. French, 18 How. (59 U. S.) 404, 15 L. ed. 451.

[79] Peterson v. Chicago, Rock Island & Pacific Ry. Co., 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. 513. See next following citation of this case under this section.

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for service is incurred because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger traffic.[80] Nor is a railroad company doing business in a State simply because another railroad company, of which it owns practically the entire capital stock, does do business therein, nor is the latter company or its officers and employees agents of the former company for the purpose of service of process even though such agents may at times also represent that company as to business done in other States. There is no partnership liability under such circumstances by which the company owning or controlling the capital stock of the other can be brought into court to respond for a tort by serving the latter company with process.[81]

§ 354. **Same Subject—Instances Continued—Interstate Commerce—Insurance, Railroad and Other Corporations.**—If a corporation of one State enters into a contract with a citizen of another State concerning a transaction which is interstate commerce, such act does not constitute a carrying on of business in the State where the contract work is to be completed so as to necessitate the performance by the foreign corporation of conditions precedent, such as registering its charter before doing business in the State.[82] But that section of the penal code of California [83] which makes it a misdemeanor for a person in that

[80] Green v. Chicago, Burlington & Quincy Ry. Co., 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. 594, aff'g 147 Fed. 767. See next following note herein.

[81] Peterson v. Chicago, Rock Island & Pac. Ry. Co., 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. 513. Neither in this case nor in the Green case cited under the last preceding note, was the question of the right to impose conditions before the court. In the Peterson case the question of jurisdiction rested upon fact, divided into two propositions viz.: 1. Was the railroad company doing business in the State of Texas? 2. Were the alleged agents served with process in that State duly authorized as such and competent to be thus served? The point as to partnership as noted in the text was also decided. Sayles, Civ. Stat., art. 1194, § 25, and art. 1223, also the act of March 13, 1905, Gen. Laws Tex., 1905, p. 30, §§ 2, 5, were the statutes considered. In the Green case the question was whether the service upon the agent was sufficient, as set forth in the above text.

[82] Davis v. Rankin Bldg. & Mfg. Co. v. Caigle (Tenn. Ch. App., 1899), 53 S. W. 240.

[83] § 439.

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State to procure insurance for a resident in the State from an insurance company not incorporated under its laws and which had not filed the bond required by the laws of the State relative to insurance, is not a regulation of commerce, and does not conflict with the Constitution of the United States, when enforced against the agent of a New York firm in California who, through his principals, procured for a resident in California applying for it there, marine insurance on an ocean steamer, from an insurance company incorporated under the laws of Massachusetts, and which had not filed the bond required by the laws of California.[84] The State may require that life insurance companies shall pay losses within a certain time, and the requirement may be validly applied to foreign corporations under the legislative power to prescribe conditions upon which such foreign companies may transact business wthin the State.[85] Where a state Supreme Court held that a foreign mutual insurance company, which had not been authorized to carry on business in such State as provided by its statutes, could not maintain a suit to collect assessments due on a policy issued by one of its agents in another State on request of an insurance broker of the State rendering the decision, who was unable to place the whole line in his own authorized companies, it was held that such State could prohibit foreign insurance companies from doing business within its limits or allow them to carry on business under such conditions as it might choose to prescribe; and that the state court having decided, as above stated, no Federal question was involved, and a request to find that the state statute could not prevent the insured from going without the State and obtaining insurance on property within the State did not raise a Federal question where the fact was otherwise; and the writ of error was dismissed.[86] If a state statute requires insurance com-

[84] Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. 207, cited in Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 46, 44 L. ed. 657, 20 Sup. Ct. 518; Hopkins v. United States, 171 U. S. 578, 602, 19 Sup. Ct. 40, 43 L. ed. 290; Allgeyer v. Louisiana, 165 U. S. 578, 583, 17 Sup. Ct. 427, 41 L. ed. 832; Noble v. Mitchell, 164 U. S. 367, 370, 17 Sup. Ct. 110, 41 L. ed. 472.

[85] Merchants' Life Assoc. of U. S. v. Yoakum (C. C. A.), 98 Fed. 251.

[86] Swing v. Weston Lumber Co.,

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panies to make full and specified returns to the proper state officers of their business condition, liabilities, losses, premiums, taxes, dividends, expenses, etc., such enactment is an exercise of the police power of the State, and may be enforced against a company organized under a special charter from the state legislature, which does not in terms require it to make such return, without thereby depriving it of any of its rights under the Federal Constitution.[87] Foreign railroad corporations may be required by statute to become resident corporations as a condition to the operation of a part of its road within a State, and such requirement does not deny the equal protection of the laws.[88] A foreign railroad, insurance or other corporation cannot be unjustly discriminated against as to the right of appeal, as where a certain per cent damages are by statute to be added to money judgments against corporations created in other States whether the appeal be affirmed or dismissed.[89]

§ 355. **Power of State to Impose Conditions Upon Foreign Corporations—Agreement not to Remove Suit to Federal Court—Waiver of Right.**—A statute is repugnant to the Federal Constitution and the laws in pursuance thereof and is illegal and void where it provides: "That any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, desiring to transact any such business as aforesaid by any agent or agents, in this State, shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the

205 U. S. 275, 51 L. ed. —, 27 Sup. Ct. —, aff'g 140 Mich. 344, citing Chicago, Indianapolis & Louisville Ry. Co. v. McGuire, 196 U. S. 128, 132, 49 L. ed. 413, 25 Sup. Ct. 200; Allen v. Allegheny County, 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. 311, to last point.

[87] Eagle Ins. Co. v. Ohio, 153 U. S. 446, 38 L. ed. 773, 14 Sup. Ct. —.

[88] Commonwealth v. Mobile & O. R. Co., 23 Ky. L. Rep. 784, 64 S. W. 451, 54 L. R. A. 916.

[89] Mutual Fire Ins. Co. v. Hammond (Ky.), 51 S. W. 151. See also Blake v. McClung, 172 U. S. 239, 43 L. ed. 486, 19 Sup. Ct. 226. Examine §§ 299, 300, herein.

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suit for trial into the United States Circuit Court, or Federal courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted." The agreement filed by the insurance company in pursuance of such enactment derives no support from a statute thus unconstitutional and is as void as it would be had the statute not been passed. The statute obstructs the absolute right, which the Constitution of the United States secures to citizens of another State than that in which the suit is brought, to remove their cases into the Federal court under the provisions of the Judiciary Act.[90] The doctrine of this case was reaffirmed under a decision holding that an agreement to abstain in all cases from resorting to the Federal courts was void as against public policy, and a statute requiring such an agreement was unconstitutional; but this same case also holds that as the State has the right to exclude a foreign corporation, the means by which she causes such exclusion or the motives of her action are not the subject of judicial inquiry. Thus, where a state legislature enacted that if any foreign insurance company transferred a suit brought against it from the state courts to the Federal courts, the Secretary of State should revoke and cancel its license to do business within the State, it was held that an injunction to restrain him from so doing, because such a transfer was made, could not be sustained; that the suggestion that the intent of the legislature was to accomplish an illegal purpose, by preventing a resort to the Federal court, was not accurate, therefore, the company must forego such resort or cease its business in the State.[91] This decision is, however,

[90] Insurance Co. v. Morse, 20 Wall. (87 U. S.) 445, 22 L. ed. 365, cited in Blake v. McClung, 172 U. S. 239, 256, 43 L. ed. 432, 19 Sup. Ct. 165; Barrow Steamship Co. v. Kane, 170 U. S. 100, 111, 42 L. ed. 964, 18 Sup. Ct. 526; Goldey v. Morning News, 156 U. S. 518, 523, 15 Sup. Ct. 559, 39 L. ed. 517; Martin v. Baltimore & Ohio Rd. Co., 151 U. S. 673, 684, 14 Sup. Ct. 533, 38 L. ed. 311; Southern Pacific Co. v. Denton, 146 U. S. 202, 207, 13 Sup. Ct. 44, 36 L. ed. 942; United States Life Ins. Co. v. Cable, 98 Fed. 767; Reimers v. Seatco Mfg. Co., 70 Fed. 575.

[91] Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148.

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explained in another case in the same court, which also approves the doctrine of the principal case.[92] But under a still later decision it is held that since a State has power to prevent a foreign corporation from doing business at all within its borders, unless such prohibition is so conditioned as to violate the Federal Constitution, a state statute which, without requiring a foreign insurance company to enter into any agreement not to remove into the Federal courts cases commenced against it in the state court, provides that if the company does so remove such a case its license to do business within the State shall thereupon be revoked, is not unconstitutional.[93]

§ 356. **Condition as to License, Privilege, Business or Occupation Charge, Rental, Fee or Tax—Interstate Commerce —Equal Protection of Law.**—Various names have been given to the charges imposed upon the franchise right of corporations to carry on their business within a State. Some of the cases variously hold that such charges are a license, not a license, a rental, a tax, not a tax, taxes for the privilege of exercising corporate franchises, a privilege tax, occupation tax, taxes on corporate franchises, tax on business, or merely a charge on business; other decisions avoid a discussion as to the nature or character of the charges imposed, but sustain the enactment or ordinance. By whatever name called, however, the validity of such legislative act of the State or a municipality is as a rule sustained in favor of the municipality or State, and the exceptions to the rule will be found to rest upon some special conditions or facts in the case, or upon the fact that the license, privilege, business or occupation tax, rental, or license fee is so excessive as to be prohibitive or grossly unjust or unreasonable.[94] So it must be regarded as finally settled in the Federal Supreme Court by frequent decisions that, subject to

[92] Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. ed. 915.

[93] Security Mutual Life Ins. Co. v. Prewitt, Ins. Commr., 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. 619; Doyle v. Continental Ins. Co., 94 U. S. 535 (above cited), followed, and held not to be overruled by Barron v. Burnside, 121 U. S. 186 (above cited), or by any other decision.

[94] See Joyce on Electric Law (2d ed.), §§ 97-113*a*, 186*b*, 937-939.

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certain limitations as respects interstate or foreign commerce, a State may, under the rule which permits it to impose conditions upon foreign corporations desiring to carry on business within its limits, make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the State.[95] And while a State may not impose a tax which is in any way a burden upon interstate commerce, it may impose a privilege tax upon corporations engaged in interstate commerce for carrying on that part of their business which is wholly within the taxing State and which tax does not affect their interstate business or their right to carry it on in that State;[96] nor does the exaction of a license fee deny the equal protection of the laws to a foreign corporation.[97] The legislature may also impose a privilege tax upon foreign or domestic corporations.[98] So a license fee or tax may be exacted as a franchise tax from domestic corporations transacting foreign business.[99] While, however, a corporation may be engaged in interstate commerce, a distinction is made between taxation of its property and taxation of interstate commerce;[1] but an annual license fee, or a tax in the nature of a license fee, is not a tax on property, and such a tax is not unconstitutional.[2] And in determining the amount

[95] New York v. Roberts, 171 U. S. 658, 43 L. ed. 345, 19 Sup. Ct. 235.

[96] Allen v. Pullman's Palace Car Co., 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. 39.

[97] State v. Hammond Packing Co. (La.), 34 Pac. 368.

[98] Clarkesdale Ins. Agency v. Cole, 87 Miss. 637, 40 So. 228.

[99] Honduras Commercial Co. v. State Bd. of Assessors (N. J. Sup.), 23 Atl. 668.

[1] Indianapolis & V. R. Co. v. Backus, 133 Ind. 609, 33 N. E. 443; Cleveland, C. C. & St. L. Ry. Co. v. Backus, 133 Ind. 513. See citations under next following note herein.

[2] Western Union Teleg. Co. v. Borough of New Hope, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. 204 (cited in Atlantic & Pacific Teleg. Co. v. Philadelphia, 190 U. S. 160, 164, 47 L. ed. 995, 23 Sup. Ct. 817, which is cited in Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 37, 49 L. ed. 925, 25 Sup. Ct. 552 in dissenting opinion; Postal Telegraph Cable Co. v. Taylor, 192 U. S. 64, 69, 70, 24 Sup. Ct. 208, 48 L. ed. 342; Postal Telegraph Cable Co. v. New Hope, 192 U. S. 55, 60, 63, 24 Sup. Ct. 204, 48 L. ed. 338); St. Louis v. Western Union Teleg. Co., 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. 485, 4 Am. Elec. Cas. 102 [s. c. 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. 990, 4 Am. Elec. Cas. 115;

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of a license fee or tax such amount should not be based upon the corporate stock.[3] In a Kansas case it is held that the act of the legislature of 1898, commonly known as the "Bush Act,"[4] requiring foreign corporations to comply with certain conditions, including the payment of charter fees computed upon the amount of their authorized capital stock for the privilege of exercising their franchises within the State, was enacted primarily to protect the people of the State from imposition, deception, fraud, and wrong arising from the abuse of corporate privileges and the mismanagement of corporate affairs, and is a measure which the State had authority to adopt under the police power reserved to it. It is also held that it was the intention of the legislature that the law should apply to foreign corporations transacting business in the State at the time such enactment took effect. It is further decided that the requirement of that law that a charter fee be paid fixes one of the conditions precedent to the granting of permission to a foreign corporation to transact its business within the State: that it levies no tax upon property or franchises, is not an attempt to extend the taxing power of the State to subjects outside of its jurisdiction, and does not affect the character of the enactment as a police regulation, although some revenue may be produced therefrom.[5]

§ 357. Condition as to License, etc., Fee or Tax Continued—Constitutional Law—Insurance Companies—Decisions.[6]—In a case where a foreign joint-stock association was held to be a corporation it was held that such corporation

s. c. (C. C.), 63 Fed. 68, 5 Am. Elec. Cas. 43]; North Jersey St. Ry. Co. v. Jersey City (N. J., 1906), 63 Atl. 833. See Newport Illum. Co. v. Tax Assessors, Newport, 19 R. I. 632, 36 Atl. 426, 36 L. R. A. 266, 6 Am. Elec. Cas. 659, 666, 667, per Tillinghast, J.; Postal Telegraph Cable Co. v. City of Norfolk, 101 Va. 125, 43 S. E. 207. Examine New Orleans, City of, v. Great Southern Teleph. & Teleg. Co., 40 La. Ann. 41, 3 So. 533, 2 Am. Elec. Cas. 122, 8 Am. St. Rep. 502.

[3] Knickerbocker Importation Co. v. State Board of Assessors (N. J., 1905), 62 Atl. 266.

[4] Laws 1898, p. 27, chap. 10.

[5] State v. Western Union Teleg. Co. (Kan., 1907), 90 Pac. 299.

[6] See § 87, herein.

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might be taxed in another State than that of its incorporation for the privilege or right of conducting its corporate business within the latter State.[7] Such imposition of taxes as a condition precedent to transacting business in a State is not within a constitutional prohibition against the passage of local or special laws for the collection of taxes; and although, in requiring the tax as such condition, the statute discriminates against foreign corporations, by exacting higher taxes from them than from domestic corporations, it is not unconstitutional as granting to any citizen or class of citizens privileges which, upon the same terms, shall not be open to all.[8] Where an insurance company conformed to the requirements of the act of the legislature of Georgia, and received from the comptroller general a certificate authorizing it to transact business in that State for one year from January 1, 1874, such act does not, expressly or by implication, limit or restrain the exercise of the taxing power of the State, or of any municipality; and where an ordinance of the city council of Augusta, passed January 5, 1874, imposed from that date an annual license tax "on each and every fire, marine, or accident insurance company located, having an office or doing business within' that city, it was held, that the ordinance was not in violation of that clause of the Constitution of the United States which declares "that no State shall pass any law impairing the obligation of contracts."[9] In another case a State by certain statutes authorized the state officers to grant to foreign insurance companies, upon complying with certain terms, a license to transact its business within the State, and then, by other statutes incorporating cities, made it obligatory on such foreign companies transacting business within those cities to pay them a *pro rata* on all their premiums, and, declaring it unlawful in the companies to otherwise do business in them, authorized

[7] Liverpool Ins. Co. v. Massachusetts, 10 Wall. (77 U. S.) 566, 19 L. ed. 1029, aff'g Oliver v. Liverpool & London Life & Fire Ins. Co., 100 Mass. 531.

[8] Scottish Union & National Ins. Co. of Edinburg v. Herriott (Iowa), 80 N. W. 665.

[9] Home Ins. Co. v. Augusta, 93 U. S. 116, 23 L. ed. 825.

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such cities to sue and recover it for the use of the city, the court followed a prior decision holding that the statutory requirement was not unconstitutional.[10] A Pennsylvania fire insurance corporation began doing business in New York in 1872, and continued it afterwards till 1882, receiving from year to year certificates of authority from the proper officer, under a statute of New York passed in 1883. A statute of New York [11] provided that whenever the laws of any other State should require from a New York fire insurance company a greater license fee than the laws of New York should then require from the fire insurance companies of such other State, all such companies of such other State should pay in New York a license fee equal to that imposed by such other State on New York companies. In 1873, Pennsylvania passed a law requiring from every insurance company of another State, as a prerequisite to a certificate of authority, a yearly tax of three per cent on the premiums received by it in Pennsylvania during the preceding year. In 1882, the insurance officer of New York required the Pennsylvania corporation to pay, as a license fee, a tax of three per cent on the premiums received by it in New York in 1881. In a suit against such corporation, in a court of New York, to recover such tax, it was set up as a defense, that the tax was unlawful, because the corporation was a "person" within the "jurisdiction" of New York and "the equal protection of the laws" had been denied to it, in violation of a clause in the Fourteenth Amendment to the Constitution of the United States. On a writ of error to review the judgment of the highest court of New York, overruling such defense, it was held, that such clause had no application, because, the defendant being a foreign corporation, was not within the jurisdiction of New York, until admitted by the State on compliance with the condition of admission imposed, namely, the payment of the tax required as a license fee; and that the business carried on by

[10] Ducat v. Chicago, 10 Wall. (77 U. S.) 410, 19 L. ed. 972, following Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357.

[11] Chap. 694, Laws N. Y. 1865, as am'd by chap. 60, Laws 1875.

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the corporation in New York was not a transaction of commerce.[12]

§ 358. **Condition as to License, etc., Fee or Tax Continued—Interstate Commerce—Express Companies—Decisions.**[13]—The license tax imposed upon express companies doing business in Florida by the statute of that State,[14] as construed by the Supreme Court of that State, applies solely to business of the company within the States, and does not apply to or affect its business which is interstate in its character; and, being so construed, the statute does not, in any manner, violate the Federal Constitution.[15] In another case the State of Georgia chartered a company to transact a general forwarding and express business. The company had a business office at Mobile, in Alabama, and there did an express business which extended within and beyond the limits of Alabama; or, rather, there made contracts for transportation of that sort. An ordinance of the city of Mobile was then in force requiring that every express company or railroad company doing business in that city, and having a business extending beyond the limits of the State, should pay an annual license of $500, which should he deemed a first-grade license; that every express or railroad company doing business within the limits of the State should take out a license called a second-grade license, and pay therefor $100; and that every such company doing business within the city should take out a third-grade license, paying therefor $50. And it subjected any person or incorporated company who should violate any of its provisions to a fine not exceeding $50 for each day of such violation. It was held that the ordinance, in requiring payment for a license to transact in Mobile a business extending beyond the limits of the State of Alabama, was not repugnant to the provision of the Constitution, vesting in

[12] Philadelphia Fire Association v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. 108.

[13] See § 79, herein.

[14] Sec. 9 of act approved June 2, 1893, chap. 4115.

[15] Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. 214. Examine Adams Express Co. v. Ohio, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. 604, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. 305.

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the Congress of the United States the power "to regulate commerce among the several States." [16] But it is also decided that the requirement that agents of foreign express companies shall obtain a license as a condition precedent to doing business in a State, or, in case of failure so to do, be subject to a fine, is unconstitutional in so far as it constitutes an interference with interstate commerce.[17]

§ 359. **Condition as to License, etc., Fee or Tax Continued — Constitutional Law — Railroads — Consolidated Railroads—Street Railroads—Decisions.**[18]—Foreign corporations running freight cars from places within to places outside of a State may be taxed.[19] In a Federal case it appeared that a company incorporated by the Pennsylvania statute of 1864, was authorized to construct a railroad on certain streets of Philadelphia, subject to the ordinances of the city regulating the running of passenger railway cars. The charter required, among other things, that the "company shall also pay such license for each car run by said company as is now paid by other passenger railway companies" in said city. That license was $30 for each car. An ordinance passed in 1867 increased the license charge to $50, and in 1868, by a general statute, the legislature provided that the passenger railway corporations of Philadelphia should pay annually to the city $50 as required by their charters for each car intended to run on their roads during the year, and that the city should have no power to regulate such corporations unless authorized by the laws of the

[16] Osborne v. Mobile, 16 Wall. (83 U. S.) 479, 21 L. ed. 470. Examine Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 14 Sup. Ct. 1094. Compare Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. 498; Western Union Teleg. Co. v. Alabama, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. ed. 409; Leloup v. Port of Mobile, 127 U. S. 640, 644, 647, 32 L. ed. 311, 8 Sup. Ct. 1380.

[17] Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. ed. 649, rev'g 89 Ky. 6, 12 S. W. 141.

[18] See §§ 97–107, 111, 112, herein.

[19] Fargo v. Auditor General, 57 Mich. 598, 24 N. W. 538. Examine Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. 498; Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 12 Sup. Ct. 121, 35 L. ed. 994.

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State expressly in terms relating to those corporations. The company paid the increased charge until 1875. On its refusing to pay it thereafter a suit was brought. It was held that the charter did not amount to a contract that the company should never be required to pay a license fee greater than that required of such companies at the date when the company was incorporated; and in their widest sense, the words employed in the charter meant that the company should not then be required by the city to pay any greater charge as license than that paid by other companies possessing the same privilege. *Quære*, without further legislation, could a greater sum have been exacted from the company? *Semble* that even if the charter were sufficient to import a contract, the legislature, under the constitutional provision then in force touching the alteration, revocation, or annulment of any charter in such manner that no injustice be done to the corporators, had ample power to pass the act raising the license fee from $30 to $50.[20] If a railroad is a link in a through line of road by which passengers and freight are carried into a State from other States and from that State to other States, it is engaged in the business of interstate commerce; and a tax imposed by such State upon the corporation owning such road for the privilege of keeping an office in the State, for the use of its officers, stockholders, agents and employees, it being a corporation created by another State, is a tax upon commerce among the States, and as such is repugnant to the Constitution of the United States.[21] So an agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, is an agency engaged in interstate commerce; and a license tax imposed upon the agent for the privilege of doing business in San Francisco is a tax upon interstate commerce, and is unconstitu-

[20] Railway Company v. Philadelphia, 101 U. S. 528, 25 L. ed. 912.

[21] Norfolk & W. R. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. 958.

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tional.[22] If several railroad corporations each existing under the laws of separate States consolidate into one corporation, a statute of one of the States, imposing a charge upon the new consolidated company of a percentage on its entire authorized stock as the fee to the State for the filing of the articles of consolidation in the office of Secretary of State, without which filing it could not possess the powers, immunities and privileges which pertain to a corporation in that State, is not a tax on interstate commerce, or the right to carry on the same, or the instruments thereof; and its enforcement involves no attempt on the part of the State to extend its taxing power beyond its territorial limits.[23] In case a statute so authorizes a city may impose a mileage tax as a condition to the privilege granted a street railway to use city streets.[24] An ordinance of a city, imposing, pursuant to a statute of the State, a license tax, for the business of running any horse or steam railroad for the transportation of passengers, does not impair the obligation of a contract, made before the passage of a statute, by which the city sold to a railroad company for a large price the right of way and franchise for twenty-five years to run a railroad

[22] McCall v. California, 136 U. S. 104, 34 L. ed. 391, 10 Sup. Ct. 881. Distinguished in Hopkins v. United States, 171 U. S. 578, 600, 43 L. ed. 290, 19 Sup. Ct. 40. Cited in Adams Express Co. v. Ohio, 165 U. S. 194, 235, 41 L. ed. 683, 17 Sup. Ct. 235 (in dissenting opinion); Hooper v. California, 155 U. S. 648, 653, 15 Sup. Ct. 207, 39 L. ed. 297; Brennan v. Titusville, 153 U. S. 289, 305, 14 Sup. Ct. 829, 38 L. ed. 719; Ficklen v. Shelby County, 145 U. S. 1, 22 (also at p. 27 in dissenting opinion), 12 Sup. Ct. 810, 36 L. ed. 801; Pacific Express Co. v. Seibert, 142 U. S. 339, 349, 35 L. ed. 1035, 12 Sup. Ct. 250; Crutcher v. Kentucky, 141 U. S. 47, 58, 11 Sup. Ct. 851, 35 L. ed. 649 (this case reverses 89 Ky. 6, 12 S. W. 141); Norfolk & W. R. R. Co. v. Pennsylvania, 136 U. S. 114, 118, 34 L. ed. 394, 10 Sup. Ct. 958.

[23] Ashley v. Ryan, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. ed. 773.

[24] Chicago General R. Co. v. Chicago, 176 Ill. 253, 52 N. E. 880, 66 L. R. A. 959, 68 Am. St. Rep. 188.

Examine further as to right to impose license or privilege fee or tax upon street railway companies the following cases: Byrne v. Chicago G. R. Co., 169 Ill. 75, 48 N. E. 703, 7 Am. & Eng. Corp. Cas. (N. S.) 768, Aff'g 63 Ill. App. 438; Cape May, City of, v. Cape May Transp. Co. (N. J. Sup.), 44 Atl. 948; McKeesport v. McKeesport & R. Pass. Co., 2 Pa. Super. Ct. 242; Newport News & O. P. Ry. & Electric Co. v. City of Newport News (Va.), 4 Va. Sup. Ct. Rep. 31, 40 S. E. 645.

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over certain streets and according to certain regulations, and the company agreed to pay to the city annually a real estate tax, and the city bound itself not to grant during the same period, a right of way to any other railroad company over the same streets.[25]

§ 360. **Condition as to License, etc., Fee or Tax Continued—Telegraph Companies.**—In a case in the Federal Supreme Court it appeared that the Western Union Telegraph Company established an office in the city of Mobile, Alabama, and was required to pay a license tax under a city ordinance, which imposed an annual license tax of $225, on all telegraph companies, and the agent of the company was fined for the nonpayment of this tax; in an action to recover the fine, he pleaded the charter and nature of occupation of the company, and its acceptance of the act of Congress of July 24, 1866, and the fact that its business consisted in transmitting messages to all parts of the United States, as well as in Alabama: it was held a good defense. It was also decided that 1. A general license tax on a telegraph company affects its entire business, interstate as well as domestic or internal, and is unconstitutional. The property of a telegraph company, situated within a State, may be taxed by the State as all other property is taxed; but its business of an interstate character cannot be thus taxed. 2. Where a telegraph company is doing the business of transmitting messages between different States, and has accepted and is acting under the telegraph law passed by Congress July 24, 1866, no State within which it sees fit to establish an office can impose upon it a license tax, or require it to take out a license for the transaction of such business. 3. Telegraphic communications are commerce, as well as in the nature of postal service, and if carried on between different States, they are interstate commerce, and within the power of regulation conferred upon Congress, free from the control of the state regulations, except such as are strictly of a police character; and

[25] New Orleans City & L. R. R. 192, 36 L. ed. 121, 12 Sup. Ct. Co. v. New Orleans, 143 U. S. 406.

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any state regulations by way of tax on the occupation or business, or requiring a license to transact such business, are unconstitutional and void.[26] In another case in the same court it is determined that a municipal charge for the use of the streets of the municipality by a telegraph company, erecting its poles therein, is not a privilege or license tax; and that a telegraph company has no right, under the act of July 24, 1865, c. 230, 14 Stat. 221, to occupy the public streets of a city without compensation. Whether such tax is reasonable is a question for the court.[27] And where telegraph companies, engaged in interstate commerce, carry on their business so as to justify police supervision, the municipality is not obliged to furnish such supervision for nothing, but it may, in addition to ordinary property taxation, subject the corporation to reasonable charges for the expense thereof. The reasonableness of such charges will depend upon all the circumstances involved in the particular case, and, if in a case tried before a jury the evidence in regard thereto is not such as to exclude every conclusion except one, the question of reasonableness should be submitted to the jury.[28] The city of St. Louis is authorized by the constitution and laws of Missouri, to impose upon a telegraph company putting its poles in the streets of the city, a charge in the nature of rental for the exclusive use of the parts so used.[29]

§ 361. Condition as to License, etc., Fee or Tax Continued — Constitutional Law — Gas Franchise — Brewing Company—Packing Houses—Decisions.—A legislative grant

[26] Leloup v. Port of Mobile, 127 U. S. 640, 32 L. ed. 311, 8 Sup. Ct. 1380, aff'd in Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 9 Sup. Ct. 1.

[27] St. Louis v. Western Union Teleg. Co., 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. 485.

[28] Atlantic and Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. 817.

[29] St. Louis v. Western Union Teleg. Co., 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. 990. Examine Western Union Teleg. Co. v. City of Fremont, 43 Neb. 499, 61 N. W. 724, 26 L. R. A. 706, aff'g 39 Neb. 692, 58 N. W. 415; Philadelphia, City of, v. Postal Telegraph Cable Co., 21 N. Y. Supp. 556, 67 Hun, 21, 66 Hun, 633; Kittanning Electric Light, H. & P. Co. v. Kittanning, 11 Pa. Super. Ct. 31; Western Union Teleg. Co. v. Harris (Tenn. Ch. App.), 52 S. W. 748; Joyce on Electric Law (2d ed.), §§ 97-113*a*.

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of a privilege to erect, establish and construct gas works, and make and vend gas in a municipality for a term of years does not exempt the grantees from the imposition of a license tax for the use of the privilege conferred.[30] And a brewing company may be liable to a corporation privilege tax notwithstanding it is liable for a brewer's license tax.[31] Nor was the Fourteenth Amendment to the Constitution of the United States intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways, or through its undoubted power to impose different taxes upon different trades and professions; and imposing a license tax upon meat packing houses is not an arbitrary and unreasonable classification invalidating the tax as denying the equal protection of the law; nor is it such a denial because the tax is not imposed on persons not doing a meat packing house business but selling products thereof, or because it is not imposed on persons engaged in packing articles of food other than meat.[32]

§ 362. **Imposing New Conditions—Police Power.**—Where the grant of a franchise to an electric railway company authorizes its construction, subject to the consent of certain city councils and of the judges of certain county courts and of counties, with the power delegated to such bodies to subsequently impose conditions and limitations concerning the exercise of the privileges conferred, the company will be bound by subsequent conditions to the same extent as if they had been originally a part of the grant.[33] And where a city grants consent to the use of its streets by a telephone company and reserves the right to regulate the manner of occupation, there is included in such reservation the power to compel the adoption of such reasonable and accepted improvements as may tend to increase the public safety or convenience, or which will decrease the

[30] Memphis Gas Co. v. Shelby County, 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. 205.

[31] Spira v. State (Ala., 1906), 41 So. 465.

[32] Armour Packing Co. v. Lacy, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. ed. 451.

[33] Richmond, R. & E. Co. v. Brown, 97 Va. 26, 32 S. E. 775, 1 Va. S. C. Rep. 213.

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obstruction to the city streets incident to the telephone corporation's use thereof; but the city cannot, after acceptance of the franchise and the erection of works, ordinarily impose new conditions.[34] So where the sole authority of a municipality is by the proper exercise of its police power, inherent in it, to protect the public from unnecessary obstructions, inconveniences, and dangers, and to determine where and in what manner a telephone company may erect its poles and stretch its wires so as to accomplish that result it cannot impose other or new conditions.[35]

§ 363. **Conditions Subsequent — Construction of — Performance.**—Conditions subsequent which work a forfeiture are to be construed liberally, but still the grantee is bound to a substantial performance. If the estate has once vested, it is sufficient if the substance of the condition be performed, and if the condition subsequent be impossible to be performed, or performance be prevented by the act of God, the grantee is excused.[36] Where the consent of a city is one of the conditions precedent upon which the State grants a franchise for the use of the streets of a municipality to a railroad company and such consent is obtained, the city cannot impose a condition subsequent which will bind the company to the extent of forfeiting its right in case of non-compliance therewith.[37]

[34] Commercial Bell Teleph. Co. v. Warwick, 185 Pa. 623, 40 Atl. 93.

As to use of safety appliances and improvements, see Joyce on Electric Law (2d ed.), §§ 460, 476, 477.

[35] Michigan Teleph. Co. v. City of Benton Harbor, 121 Mich. 512, 80 N. W. 386, 7 Am. Elec. Cas. 9, 14, per Grant, C. J.

[36] State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 41 Am. Dec. 509.

[37] Galveston & W. R. Co. v. Galveston, 91 Tex. 17, 39 S. W. 920, 36 L. R. A. 44, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33, 7 Am. & Eng. R. Cas. (N. S.) 72, which reverses 73 S. W. 27.

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CHAPTER XXII.

REGULATION AND CONTROL.

§ 364. Regulation and Control—General Statement.
365. Regulation and Control—Generally.
366. Regulation and Control—Police Power—Generally.
367. Foreign and Interstate Commerce Defined—Power to Regulate.
368. Same Subject.
369. Regulation of Commerce—State Control of Business Within Jurisdiction.
370. Regulation of Commerce—Transportation of Persons or Property—Generally.
371. Regulation of Commerce—Transportation of Railroad Cars—Transportation Over River—Distinction as to Ferries—Police Power.
372. Regulation of Commerce—Transportation of Cattle—Inspection Law—Police Power.
373. Same Subject.
374. Regulation of Commerce—Transportation of Natural Gas.
375. Regulation of Commerce—Stopping Interstate Trains.
376. Regulation of Commerce—Telegraph Messages—Police Power.
377. Regulation of Commerce—Examination and License of Locomotive Engineers—Color Blindness—Due Process of Law.
§ 378. Regulation of Commerce—Tracing Lost Freight.
379. Regulation and Control—Requiring Governmental Consent.
380. Same Subject.
381. Regulation of Railroads—Delegation to Commissioners—Constitutional Law—Discrimination—Generally.
382. Regulation of Railroads—Protection Against Injury to Persons and Property.
383. Regulation of Railroads—Providing Stations or Waiting Rooms—Police Power.
384. Regulation of Railroads—Sunday Trains—Interstate Commerce—Police Power.
385. Regulation of Railroads—Safety Appliances and Devices—Heating Cars.
386. Regulation of Railroads—General Decisions—Extra Trains for Connections—Removal of Tracks—Keeping Open Ticket Offices—Limitation of Liability—Adjusting Damage Claims—Separate Cars.
387. Regulation of Street Railroad Companies—Police Power.

§ 364. Regulation and Control—General Statement.—The right of a corporation to exercise its lawful franchises

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or privileges is essential to its very existence, and courts will protect such franchises or privileges and prevent their being unlawfully or unconstitutionally impaired or destroyed, and this protection will be extended to prevent the enforcement against corporations of unlawful and unconstitutional governmental regulations and rules which would, if not thus subject to lawful restriction and supervision, deprive corporations of their franchises and property rights either in part or wholly. But the courts will also exercise equal vigilance to enforce all lawful and constitutional regulations and rules intended, without injury or loss to franchise rights or privileges, to safeguard the public by the proper control of corporations. These principles are sustained throughout all the decisions. The following words of the court in a Federal case are pertinent here; they are: "It must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as in substance and effect to exceed regulation, and be equivalent to a taking of property without due process of law, or a denial of the equal protection of the laws." [1]

§ 365. **Regulation and Control—Generally.**—While we have considered this subject elsewhere we may substantially restate here the following propositions: A State may adopt such public policy as it deems best, provided that it does not in so doing come into conflict with the Federal Constitution; and if constitutional the legislative will must be respected, even though the courts be of opinion that the statute is un-

[1] Atlantic Coast Line Rd. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 20, 51 L. ed. 933, 27 Sup. Ct. 585, per White, J.

Obligation of contracts—Police powers—Regulations. See § 335, herein.

Obligation of contracts—Conditions—Regulations—Reserved power to alter etc. See § 336, herein.

Obligation of contracts—Street paving by street railways—Conditions and regulations. See §§ 337, 338, herein.

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wise.[2] So a corporation is subject to such reasonable regulations as the legislature may from time to time prescribe, as to the general conduct of its affairs, serving only to secure the ends for which it was created and not materially interfering with the privileges granted to it.[3] And state legislation which regulates business may well make distinctions depend upon the degrees of evil without being arbitrary and unreasonable.[4] It is declared in a case in the Federal Circuit Court that the right of a State to regulate by law the business of common carriers, so far as that business is impressed with a public use, does not depend upon the fact as to whether the company received its charter or right to do business from that State, or whether it is incorporated or not; nor does it depend upon the state constitution; but that such right to regulate, in so far as that business affects the public, has its foundation and source in the right of the State to protect its commerce, and that laws which regulate the relation of the carrier to the public, and provide against discriminations and abuses, do not interfere with the private business of the common carrier.[5] Again, in another Federal case where the power of the State to control public service corporations was before the court, it is said that: "There are certain principles involved in the consideration of the questions arising in this case which have been so clearly and definitely settled that it is unnecessary to review the various decisions of the courts supporting

[2] Whitfield v. Ætna Life Ins. Co., 205 U. S. 489, 51 L. ed. — 27 Sup. Ct. —, rev'g 144 Fed. 356. See Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Western Union Teleg. Co. v. Myatt, 98 Fed. 335; McGuire v. Chicago, B. & Q. R. Co., 131 Iowa, 340, 108 N. W. 902.

[3] Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. ed. 1084.

[4] Ozan Lumber Co. v. Union County National Bank of Liberty, 207 U. S. 251, followed in Heath v. Milligan Mfg. Co. v. Worst, 207 U. S. 338, 356. The first of these cases, however, relates only to the power of the States to legislate; classification for governmental purposes; equal protection of the laws; notes for patented articles; and the point stated in the text. The second case relates principally to the adulteration of articles and is important here only as stating the point set forth in the above text.

[5] Platt v. LeCocq, 150 Fed. 391.

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them. They relate to the nature and extent of public control over property affected with a public interest, and the character and limitations of the functions employed in and about the exercise of such control. Whenever special privileges, not generally possessed by private persons, are conferred by law upon corporations to enable them to carry out the objects of their organization, and their business and source of profit consists wholly or partly in the service and patronage of the public, their property dedicated to such employment becomes clothed with a public interest, and, to the extent of such interest, is subject to public control. The doctrine of governmental control of property and employments devoted to public use is particularly applicable to what are commonly termed 'public service corporations,'—such as railway and telegraph companies,—although it is also applied, though probably in a much more modified degree, to the property of private persons, which by reason of its use, has ceased to be *jus privati*. So long as property is so employed, the power of control by the public through their proper representatives exists; and such control may embrace not only provisions for the safety, security and convenience of the public, but also restrictions against unreasonable or extortionate charges and unjust discriminations. This power of control, however, is not absolute, but is subject to certain constitutional limitations, designed for the protection of the owner against oppressive action on the part of the State amounting to a deprivation of his property without compensation, or without due process of law, or amounting to a denial of the equal protection of the law." [6]

§ 366. **Control and Regulation—Police Power—Generally.**[7] —Each State has the power, never surrendered to the government of the Union, to guard and promote the public interests by reasonable police regulations that do not violate the Con-

[6] Western Union Teleg. Co. v. Myatt, 98 Fed. 335, 341, per Hook, Dist. J.

[7] See §§ 149, 295, herein.

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stitution of the United States or the constitution of the State.[8] The police power is not above the express or necessarily im-

[8] Chicago, Burlington & Quincy Ry. Co. v. Drainage Commrs., 200 U. S. 561, 584, 50 L. ed. 596, 26 Sup. Ct. 341 (case affirms 212 Ill. 103, 72 N. E. 219), per Harlan, J., citing New York, New Haven & Hfd. Rd. Co. v. New York, 165 U. S. 628, 631, 41 L. ed. 853, 17 Sup. Ct. 418; Hennington v. Georgia, 163 U. S. 299, 308, 309, 16 Sup. Ct. 1086, 41 L. ed. 166; Morgan v. Louisiana, 118 U. S. 455, 464, 6 Sup. Ct. 1114, 30 L. ed. 237; Patterson v. Kentucky, 97 U. S. 501, 503, 24 L. ed. 1115; Railroad Co. v. Husen, 95 U. S. 465, 472, 24 L. ed. 527; Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23.

Extent, nature, and definition of police power. See the following cases:

United States: Houston & Texas Central R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. 491 (regulation of railroads; commerce); Chicago, Burlington & Quincy Ry. Co. v. Drainage Commrs., 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596, aff'g 212 Ill. 103, 72 N. E. 219 (removal of bridge); Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. 127 (navigable rivers; dams); Cunnius v. Reading School District, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. ed. 1125 (Fourteenth Amendment does not deprive); Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. ed. 643 (scope and extent of power; reasonable regulation); Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. 276 (freedom to contract; trusts; monopolies); Gladson v. Minnesota, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. ed. 1064 (stopping of passenger trains; commerce); Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. ed. 832 (foreign insurance; extent to which power may be exercised to be determined in each case); Western Union Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. 934 (telegraph companies); Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714 (legislative discretion as to exercise of such power); Eagle Insurance Co. v. Ohio, 153 U. S. 446, 38 L. ed. 778, 14 Sup. Ct. —(returns by insurance companies); Brass v. Stoeser, 153 U. S. 391, 38 L. ed. 757, 14 Sup. Ct. — (grain warehouse act); New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. 437 (railroad grade crossings); New York v. Squires, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. 880 (regulation of carriers of electricity); Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247 (grain elevator acts; state legislation); Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. 207 (Fourteenth Amendment does not limit); Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 8 Sup. Ct. 564 (reserved powers of States in connection with); Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. 273 (legislation as to use of private property as affecting; eminent domain); Western Union Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 7 Sup. Ct. 1126 (telegraph companies); Robbins v. Shelby Tax District, 120 U. S. 489, 30 L. ed. 694, 7 Sup. Ct. 592 (inspection laws; commerce); Railroad Company v.

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plied constitutional prohibitions;[9] and all rights are held subject to the police power of a State, and, if the public safety

Fuller, 17 Wall. (84 U. S.) 560, 21 L. ed. 710 (regulation of rates; commerce); New York v. Miln, 11 Pet. (36 U. S.) 102, 9 L. ed. 648 (internal police powers of States unrestrained and exclusive); Brown v. Maryland, 12 Wheat. (25 U. S.) 419, 6 L. ed. 678 (reservation by States).

Alabama: Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 46 Am. St. Rep. 92; Van Hook v. City of Selma, 70 Ala. 361, 45 Am. Rep. 85; American Union Teleg. Co. v. Western Union Teleg. Co., 67 Ala. 26, 42 Am. Rep. 90.

Arkansas: Dabbs v. State, 39 Ark. 353, 43 Am. Rep. 275.

Connecticut: Clark, In re, 65 Conn. 17, 40, 31 Atl. 522, 28 L. R. A. 242, per Hammersley, J.; Woodruff v. New York & N. E. R. Co., 59 Conn. 63, 20 Atl. 17.

Illinois: Price v. People, 193 Ill. 114, 117, 118, 86 Am. St. Rep. 306, 61 N. E. 844, per Boggs, J.; Harmon v. City of Chicago, 110 Ill. 400, 51 Am. Rep. 698; Toledo, W. & W. Ry. Co. v. City of Jacksonville, 67 Ill. 37, 16 Am. Rep. 611.

Indiana: State v. Richcreek (Ind., 1906), 77 N. E. 1085 (banks and banking); Champer v. City of Greencastle, 138 Ind. 339, 351, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390, per McCabe, C. J.

Kansas: Ratcliff v. Wichita Union Stockyards Co. (Kan., 1906), 86 Pac. 150 (stockyards; regulation of rates); Meffert v. State Board of Medical Reg. & Exam., 66 Kan. 710, 72 Pac. 247, per Greene, J.

Louisiana: New Orleans Gas Light Co. v. Hart, 40 La. Ann. 474, 4 So. 215, 8 Am. St. Rep. 544, per Bermudez, C. J.

Maryland: Deems v. Mayor & City Council of Baltimore, 80 Md. 173, 45 Am. St. Rep. 339, 30 Atl. 648, 26 L. R. A. 541, per Robinson, C. J.

Massachusetts: Commonwealth v. Alger, 7 Cush. (Mass.) 53, 84, per Shaw, C. J.

Minnesota: State v. St. Paul, M. & M. Ry. Co. (Minn., 1906), 108 N. W. 261 (safety devices at railway crossings).

Mississippi: Macon, Town of, v. Patty, 57 Miss. 378, 407, 34 Am. Rep. 451, per George, C. J.

Missouri: State, Star Pub. Co., v. Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151, per Sherwood, J.; State v. Searey, 20 Mo. 489.

New Hampshire: State v. Griffin, 69 N. H. 1, 76 Am. St. Rep. 139, 39 Atl. 260, 41 L. R. A. 177, per Carpenter, C. J.

New York: People v. King, 110 N. Y. 418, 423, 18 N. E. 245, 6 Am. St. Rep. 389, 1 L. R. A. 293, per Andrews, J.

North Carolina: State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696, per Avery, J.

Pennsylvania: Northumberland County v. Zimmerman, 75 Pa. 26.

Rhode Island: State v. Dalton, 22 R. I. 77, 80, 84 Am. St. Rep. 818, 48 L. R. A. 775, 46 Atl. 234, per Tillinghast, J.; State v. Fitzpatrick, 16 R. I. 1, 54, 11 Atl. 767, per Durfee, J.

Washington: Seattle, City of, v. Clark, 28 Wash. 717, 69 Pac. 407,

[9] State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

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or the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience.[10] As we have stated elsewhere, the police power cannot be exercised over interstate transportation of subjects of commerce,[11] and it is limited to the extent that the exercise thereof must be reasonable both as to the regulation itself and the subjects to be regulated;[12] nor should there be an arbitrary invasion of personal rights or of private property; nor should such burdens be imposed upon property rights that the owner will thereby be unlawfully deprived of the same;[13] nor can a State contract away its police power.[14] "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any mere contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." [15]

per White, J.; Karasek v. Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345, per Anders, J.

Wisconsin: Madison, City of, v. Madison Gas & Electric Co. (Wis., 1906), 108 N. W. 65 (gas rates); Huber v. Merkel, 117 Wis. 355, 366, 94 N. W. 354, 62 L. R. A. 589, per Winslow, J.; State v. Krentzberg, 114 Wis. 530, 537, 91 Am. St. Rep. 934, 58 L. R. A. 748, 90 N. W. 1098, per Dodge, J.

[10] Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989.

[11] Railroad Company v. Husen, 95 U. S. 465, 24 L. ed. 527.

[12] State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

[13] Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624.

[14] Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; State v. St. Paul, M. & M. Ry. Co. (Minn., 1906), 108 N. W. 261.

[15] St. Louis & S. F. Ry. Co. v. Matthews, 165 U. S. 1, 123, 41 L. ed. 611, 17 Sup. Ct. 243. A case of constitutional law and liability of

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§ 367. **Foreign and Interstate Commerce Defined—Power to Regulate.**—Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. To regulate it as thus defined there must be only one system of rules applicable alike to the whole country, which Congress alone can prescribe.[16] As to such commerce the following doctrines have been asserted in the Federal courts. Thus in Gilman v. Philadelphia [17] it is held that the power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those on which they lie; and includes, necessarily, the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; that it is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided; that some of the subjects of this power, however, covering as it does a wide field, and embracing a great variety of subjects, will call for uniform rules and national legislation; while others can be best regulated by rules and provisions suggested by the varying circumstances of differing places, and limited in their operation to such places respectively; and to the extent required by these last cases, the power to regulate commerce may be exercised by the States. In another case it is held that the power conferred upon Congress by the commerce clause of the Constitution is exclusive, so far as it relates to matters within its purview which are national in their char-

railroads under state statutes for fire communicated by locomotives.

[16] Mobile, County of, v. Kimball, 102 U. S. 691, 26 L. ed. 238. See also Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 5 Sup. Ct. 826; United States v. Cassidy (D. C.), 67 Fed. 698; Charge to Grand Jury, In re (D. C.), 62 Fed. 840, 4 Inters. Comm. Rep. 784.

[17] 3 Wall. (70 U. S.) 713, 18 L. ed. 96.

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acter, and admit or require uniformity of regulation affecting all the States; and that that clause was adopted in order to secure such uniformity against discriminating state legislation.[18] It is also decided that (1) The power to regulate commerce, interstate and foreign, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. (2) Such commerce is a subject of national character and requires uniformity of regulation. (3) Interstate commerce by corporations is entitled to the same protection against state exactions which is given in such commerce when carried on by individuals. (4) As to those subjects of commerce which are local or limited in their nature or sphere of operation, the State may prescribe regulations until Congress assumes control of them. And (5) As to such as are national in their character, and require uniformity of regulation, the power of Congress is exclusive; and until Congress acts, such commerce is entitled to be free from state exaction and burdens.[19]

§ 368. **Same Subject.**—The question whether, when Congress fails to provide a regulation by law as to any particular subject of commerce among the States, it is conclusive of its intention that that subject shall be free from positive regulation, or that, until Congress intervenes, it shall be left to be dealt with by the States, is one to be determined by the circumstances of each case as it arises.[20] Again, a state act which imposes limitations upon the power of a corporation, created under the laws of another State, to make contracts within the State for carrying on commerce between the States, violates that clause of the Federal Constitution which confers upon Congress the exclusive right to regulate that commerce.[21]

[18] Mobile, County of, v. Kimball, 102 U. S. 691, 26 L. ed. 238.

[19] Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 5 Sup. Ct. 826.

[20] Bowman v. Chicago & N. W. Ry. Co., 125 U. S. 465, 31 L. ed. 700, 8 Sup. Ct. 689, 1062.

[21] Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. 739.

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But, under its power to regulate commerce, Congress may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract shall be, when carried out, to directly and not as a mere incident to other and innocent purposes, regulate to any extent interstate or foreign commerce; that the provision in the Constitution regarding the liberty of the citizen is to some extent limited by this commerce clause, and the power of Congress comprises the right to enact a law under this clause prohibiting a citizen from entering into those private contracts which directly and substantially and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree, commerce among the States.[22] So parties subject themselves to the power of Congress to enact subsequent laws where they engage in interstate commerce.[23] Again, the power of Congress to regulate foreign commerce, being an enumerated power, is complete in itself, acknowledging no limitations other than those prescribed in the Constitution.[24] The government of the United States may, in the exercise of its powers, remove everything put upon the highways, natural or artificial, to obstruct the passage of interstate commerce, or it may invoke the jurisdiction of the civil courts in this respect.[25]

§ 369. **Regulation of Commerce—State Control of Business Within Jurisdiction.**[26]—While one engaging in interstate commerce does not thereby submit all his business to the regulating power of Congress,[27] still the fact that a corporation is engaged in interstate commerce does not deprive the

[22] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. ed. 136, modifying 85 Fed. 271, 29 C. C. A. 141, a case as to combinations in restraint of trade and enhancement of prices.

[23] Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76.

[24] Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. ed. 252.

[25] Debs, In re, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. 900.

[26] See § 365, herein.

[27] Employers' Liability Cases (Howard v. Illinois Central Rd. Co. and Brooks v. Southern Pacific Co.), 207 U. S. 463.

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State of power to exercise reasonable control over its business done wholly within the State.[28] So it is said in a case in the Federal Supreme Court: "In our opinion the power, whether called police, governmental or legislative, exists in each State, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power of the States is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended. When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the general government." [29]

[28] McGuire v. Chicago, Burlington & Quincy Rd. Co., 131 Iowa, 340, 369, 108 N. W. 902.

[29] Lake Shore & Michigan Southern Ry. Co. v. Ohio, 173 U. S. 285, 298, 43 L. ed. 702, 19 Sup. Ct. 451, per Harlan, J.

"Where, as in the case of our dual government, the same territories and the same individuals are subject to two governments, each supreme within its sphere, both governments by virtue of distinct powers may legislate for the same ends. The exercise of the rightful authority of the Nation and the State, though it proceeds from different governmental powers, may reach and control the same subject. This result arises from the different relations to the community the subject may sustain: a drove of cattle may be at once interstate freight and the vehicle by which infectious disease may be brought within the borders of a State; a bridge may at the same time interrupt the navigation of the river and serve as a continuation of the highways of the State; a man, while the agent through which the transaction of interstate commerce is conducted, is at the same time one of the population, permanent or transient, of a State, and subject to its general laws. There is no conflict in powers, though there may be conflict in legislation, referable to different powers. In such a case under our system the law of the State enacted by virtue of its undoubted powers must yield to the national law enacted in pursuance of the powers conferred by the Constitution. There is no necessity in this case to disturb the troublesome question when, if ever, even when Congress is silent, the States may exercise any direct power over interstate

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§ 370. **Regulation of Commerce—Transportation of Persons or Property—Generally.**—While a State cannot regulate foreign commerce, still it may do many things which more or less affect it. But, on the other hand, it is not left to the discretion of each State in the Union either to refuse a right of passage to persons or property through her territory or to exact a duty for permission to exercise it, for Congress has willed that intercourse between the several States shall be free and has so regulated such commerce that this result shall be accomplished.[30] And a shipment which is received for the

and foreign commerce. * * * 'If a State,' said Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 204, 6 L. ed. 23, 72, 'in passing laws on subjects acknowledged to be within its control, and, with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State and may be executed by the same means. All experience shows that the same measure or measures, scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical.' That the States may by their laws fix the relative rights, duties, obligations and liabilities of all persons or corporations within their territorial jurisdictions, and thus control in that respect those who are engaged in interstate and foreign commerce; that such laws do not proceed from any power to regulate such commerce, though incidentally and indirectly they do regulate it, but are to be referred to their general power over persons and things within their territories, and that all such laws, so far as they affect such commerce, must yield to the superior authority of the laws of Congress, is, I think, conclusively shown by the following cases: Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. ed. 508; Nashville, C. & St. L. Ry. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 9 Sup. Ct. 28; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. 1086; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. ed. 453; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. 340; Pennsylvania Railroad v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. ed. 268; Martin v. Pittsburg, etc., Railroad, 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. 100; Peirce v. Van Dusen, 78 Fed. 693." Employers' Liability Cases (Howard v. Illinois Central Rd. Co. and Brooks v. Southern Pacific Co.), 207 U. S. 463, 534, 535, per Moody, J., in dissenting opinion.

[30] Passenger Cases, 7 How. (48 U. S.) 283, 12 L. ed. 702. See Employers' Liability Cases (Howard v. Illinois Central R. Co. and Brooks v. Southern Pacific Co.), 207 U. S. 463, 535, dissenting opinion of Moody, J.

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purpose of transportation between different States is not governed by state enactments, as it constitutes an interstate shipment.[31] But where a state statute applies to both intrastate and interstate shipments, but the shipment involved is wholly intrastate, the Federal Supreme Court will not consider the validity of the statute when applied to interstate shipments.[32] It was decided by the Federal Supreme Court, in 1887, that so far as the will of Congress respecting commerce among the States by means of railroads can be determined from its enactment of the provisions of the law found in the Revised Statutes,[33] they are an indication that the transportation of such commodities between the States shall be free except when restricted by Congress, or by a State with the express permission of Congress; and that a State cannot for the purpose of protecting its people against the evils of intemperance, enact laws which regulate commerce between its people and those of other States of the Union unless the consent of Congress, express or implied, be first obtained.[34] An absolute requirement that a railroad engaged in interstate commerce shall furnish a certain number of cars on a specified day, to transport merchandise to another State, regardless of every other consideration except strikes and other public calamities, transcends the police power of the States and amounts to a burden upon interstate commerce; and articles of the Revised Statutes of a State which exact such a service, are, when

[31] Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co., 116 Mo. App. 214, 92 S. W. 714.

[32] Seaboard Airline Ry. v. Seegers, 207 U. S. 73, aff'g 73 S. C. 71.

[33] Rev. Stat. § 5258, chap. 6, tit. 48; §§ 4252–4289.

[34] Bowman v. Chicago & N. W. Ry. Co., 125 U. S. 465, 31 L. ed. 700, 8 Sup. Ct. 689, 1062. Cited on first point in Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 231, 44 L. ed. 136, 20 Sup. Ct. 96; Minor, In re, 69 Fed. 235. Cited on second point in Vance v. W. A. Vandercook Co., 170 U. S. 438, 457, 18 Sup. Ct. 674, 42 L. ed. 1100; Rhodes v. Iowa, 170 U. S. 412, 414, 429, 42 L. ed. 1088, 18 Sup. Ct. 664; O'Neil v. Vermont, 144 U. S. 323, 335, 355, 36 L. ed. 450, 12 Sup. Ct. 693; Rahrer, In re, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. 865; Lyng v. Michigan, 135 U. S. 161, 166, 34 L. ed. 130, 10 Sup. Ct. 725; Leisy v. Hardin, 135 U. S. 100, 111, 124, 155, 34 L. ed. 128, 10 Sup. Ct. 681.

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applied to interstate commerce shipments, void as a violation of the commerce clause of the Federal Constitution. Such a regulation cannot be sustained as to interstate commerce shipments as an exercise of the police power of the State.[35]

§ 371. **Regulation of Commerce—Transportation of Railroad Cars—Transportation Over River—Distinction as to Ferries—Police Power.**—The interstate transportation of cars from another State which have not been delivered to the consignee, but remain on the track of a railway company in the condition in which they were originally brought into the State, is not completed and they are still within the protection of the commerce clause of the Constitution and are not subject to an order of a State Corporation Commission requiring a railway company to deliver cars from another State to the consignee on a private siding beyond its own right of way, and therefore such an order is a burden on interstate commerce and is void. *Quære*, whether such an order applicable solely to state business would be repugnant to the due process clause of the Constitution. The principle was applied in this case that while a State in the exercise of its police power may confer power on an administrative agency to make reasonable regulations as to the place, time and manner of delivery of merchandise moving in channels of interstate commerce, any regulation which directly burdens interstate commerce is a regulation thereof and repugnant to the Federal Constitution.[36] There is an essential distinction between a ferry in the restricted and legal signification of the term, and the transportation of railroad cars across a boundary river between two States, constituting interstate commerce, and such transportation cannot be subjected to conditions imposed by a State which are direct burdens upon interstate commerce. And it is held that conceding, *arguendo*, that the police power of a State extends to the establishment, regulation or licensing

[35] Houston & Texas Central R. Co. v. Mayes, 201 U. S. 321. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. 717.

[36] McNeill v. Southern Ry. Co.,

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of ferries on navigable streams which are boundaries between it and another State, there are no decisions of the Federal Supreme Court importing power in a State to directly control interstate commerce or any transportation by water across such a river which does not constitute a ferry in the strict technical sense of that term.[37]

§ 372. **Regulation of Commerce—Transportation of Cattle—Inspection Law—Police Power.**—While a State may enact sanitary laws, and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations and prevent persons and animals having contagious or infectious diseases from entering the State, it cannot, beyond what is absolutely necessary for self-protection, interfere with transportation of subjects of commerce into or through its territory; and a statute which is intended to prevent the importation of all cattle into a State is such an interference with interstate commerce as to be unconstitutional where such statute is more than a quarantine regulation and not a legitimate exercise of the police power of the State.[38] The transportation of live stock from State to State being a branch of interstate commerce, any specified rule or regulation in respect to such transportation which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. And when the entire subject of transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect to such matters and covering the same ground will cease to have any force, whether formally abrogated or not;

[37] St. Clair Co. v. Interstate Sand & Car Trans. Co., 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. —.

[38] Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527. See Chicago & A. R. Co. v. Erickson, 91 Ill. 613, 33 Am. Rep. 70; Salzenstein v. Mavis, 91 Ill. 391; Selvage v. St. Louis & S. F. Ry. Co., 135 Mo. 163, 36 S. W. 652; Grimes v. Eddy, 126 Mo. 168, 47 Am. St. Rep. 653, 28 S. W. 756, 26 L. R. A. 638; Gilmore v. Hannibal & St. J. R. Co., 67 Mo. 323.

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and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the power of the States. But where a state statute, relating to the introduction into the State of cattle with infectious or contagious diseases, relates to matters not covered by an act of Congress which legislates in respect to animal industry, such statute is not unconstitutional.[39]

§ 373. **Same Subject.**—In a case where a statute of Kansas related to the bringing into that State certain cattle which might communicate disease to domestic cattle and also provided for the trial of civil actions to recover damages therefor, it was held that such enactment was not overridden by the Animal Industry Act of Congress,[40] nor by the subsequent appropriation act therefor,[41] nor by the statute [42] authorizing every railroad company in the United States, operated by steam, its successors and assigns, "to carry upon and over its roads, boats, bridges and ferries, passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination;" as Congress has not assumed to give to any corporation, company or person the affirmative right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communicable diseases. The court considered in its decision the various points involved and also held as follows:

[39] Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. 92, aff'g 29 Colo. 333, 68 Pac. 228. Examine Kimmish v. Ball, 129 U. S. 217, 9 Sup. Ct. 277, 32 L. ed. 695; Missouri Pacif. Ry. Co. v. Finley, 38 Kan. 550, 16 Pac. 951; Kenney v. Hannibal & St. J. R. Co., 62 Mo. 476; Wilson v. Kansas City, St. J. & C. B. R. Co., 60 Mo. 184.

[40] Act March 29, 1884, 23 Stat. 31, c. 60.

[41] Act March 3, 1891, 26 Stat. 1044, 1049, c. 544.

[42] Rev. Stat. U. S. § 5258.

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(1) Whether a corporation transporting, or the person causing to be transported from one State to another, cattle of the class specified in the Kansas statute should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle, is a subject about which the act of Congress,[43] known as the Animal Industry Act, did not make any provision. (2) The provision in the Kansas act imposing such civil liability is in aid of the objects which Congress had in view when it passed the Animal Industry Act, and it was passed in execution of a power with which the State did not part when entering the Union, namely, the power to protect the people in the enjoyment of their rights of property, and to provide for the redress of wrongs within its limits, and is not, within the meaning of the Constitution, nor in any just sense, a regulation of commerce among the States. (3) A state statute, although enacted in pursuance of a power not surrendered to the general government, must in the execution of its provisions, yield in case of conflict to a statute constitutionally enacted under authority conferred upon Congress; and this, without regard to the source of power whence the state legislature derived its enactment. (4) Neither corporations nor individuals are entitled by force alone of the Constitution of the United States, and without liability for injuries resulting therefrom to others, to bring into one State from another State cattle liable to impart or capable of communicating disease to domestic cattle. Although the powers of a State must in their exercise give way to a power exerted by Congress under the Constitution, it has never been adjudged that that instrument by its own force gives anyone the right to introduce into a State, against its will, cattle so affected with disease that their presence in the State will be dangerous to domestic cattle. (5) Prior cases upon this matter proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within

[43] Act March 29, 1884, c. 60, 23 Stat. 31.

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the jurisdiction of a State, belongs primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes. (6) An act of Congress that does no more than give authority to railroad companies to carry "freight and property" over their respective roads from one State to another State, will not authorize a railroad company to carry into a State cattle known, or which by due diligence may be known, to be in such a condition as to impart or communicate disease to the domestic cattle of such State. (7) If the carrier takes diseased cattle into a State, it does so subject for any injury thereby done to domestic cattle to such liability as may arise under any law of the State that does not go beyond the necessities of the case and burden or prohibit interstate commerce; and a statute prescribing as a rule of civil conduct that a person or corporation shall not bring into the State cattle that are known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, cannot be regarded as beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by section 5258 of the Revised Statutes. (8) Congress could authorize the carrying of such cattle from one State into another State, and by legislation protect the carrier against all suits for damages arising therefrom; but it has not done so, nor has it enacted any statute that prevents a State from prescribing such a rule of civil conduct as that found in the statute of Kansas.[44] Again, in a late case the power of the State of Kansas to pass the cattle inspection law of 1905, prohibiting the transportation of cattle into that State subject to certain

[44] Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. 488.

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conditions, was held not unconstitutional as a direct regulation of interstate commerce and not in conflict with certain acts of Congress. The court reasserted certain propositions as follows: (1) While the State may not legislate for the direct control of interstate commerce, a proper police regulation which does not conflict with congressional legislation on the subject involved is not necessarily unconstitutional because it may have an indirect effect upon interstate commerce. (2) Until Congress acts on the subject a State may, in the exercise of its police power, enact laws for the inspection of cattle coming from other States. (3) Congress has not enacted any legislation destroying the right of a State to provide for the inspection of cattle and prohibiting the bringing within its borders of diseased cattle not inspected and passed as healthy either by the proper state or national officials. (4) A State may not, under the pretense of protecting the public health, exclude the products or merchandise of other States, and this court will determine for itself whether it is a genuine exercise of the police power or really and substantially a regulation of interstate commerce.[45]

[45] Asbell v. Kansas, 209 U. S. 251, aff'g 60 Kan. 51. The opinion of the court is important, was delivered per Moody, J., and is as follows: "A statute of the State of Kansas makes it a misdemeanor, punishable by fine or imprisonment, or both, for any person to transport into the State cattle from any point south of the south line of the State, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials or by the Bureau of Animal Industry of the Interior Department of the United States. Sec. 27, chap. 495, Session Laws of 1905. The plaintiff in error was duly charged by information in the state court with a violation of this statute, and found guilty by the verdict of a jury. The conviction was affirmed by the Supreme Court of the State, and the case is now here on a writ of error, allowed by the chief justice of that court. The only Federal question insisted upon in argument is whether the statute was a restriction of interstate commerce which was not within the power of a State to impose. The obvious purpose of the law was to guard against the introduction into the State of cattle infected with a communicable disease. It undoubtedly restricts the absolute freedom of interstate commerce in cattle, but only to the extent that all cattle coming to cross the guarded boundary are subjected to inspection to ascertain whether or not they are diseased. If healthy they are

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§ 374. Regulation of Commerce—Transportation of Natural Gas.—State laws prohibiting the transportation of natural

admitted, if diseased they are excluded. The validity of such a restriction for such purposes has been frequently considered by this court, and the principles applicable to the settlement of the question have been clearly defined. The governmental power over the commerce which is interstate is vested exclusively in the Congress by the commerce clause of the Constitution, and therefore is withdrawn from the States. It is not now necessary to cite the many cases supporting this proposition, or to consider some expressions in the books somewhat qualifying its generality, because in carefully chosen words it has recently been affirmed by us. At this term, Mr. Justice Peckham, speaking for the court, said: 'That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution is obvious.' Atlantic Coast Line v. Wharton, 207 U. S. 328, 334. But though it may not legislate for the direct control of interstate commerce, the State may exercise any part of the legislative power which was not withdrawn from it expressly or by implication by the scheme of government put into operation by the Federal Constitution. It may sometimes happen that a law passed in pursuance of the acknowledged power of the State will have an indirect effect upon interstate commerce. Such a law, though it is essential to its validity that authority be found in a governmental power entirely distinct from the power to regulate interstate commerce, may reach and indirectly control that subject. It was at an early day observed by Chief Justice Marshall that legislation referable to entirely different legislative powers might affect the same subject. He said in Gibbons v. Ogden, 9 Wheat. (22 U. S.) 194, 204, 6 L. ed. 23: 'So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality. In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right

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gas from the State are invalid where they interfere with interstate commerce;[46] otherwise such enactments may be valid.[47]

to exercise, the powers of the other.' Foreseeing cases where national and state legislation based upon different powers might, in their application, be brought into conflict, he, in the same case (p. 211), declared that then 'the law of the State, though enacted in the exercise of powers not controverted, must yield,' a rule which has constantly been applied by this court. These general principles control the decision of the case at bar. Cattle, while in the course of transportation from one State to another, and in that respect under the exclusive control of the law of the National Government, may at the same time be the conveyance by which disease is brought within the State to which they are destined, and in that respect subject to the power of the State exercised in good faith to protect the health of its own animals and its own people. In the execution of that power the State may enact laws for the inspection of animals coming from other States with the purpose of excluding those which are diseased and admitting those which are healthy. Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. 92. The State may not, however, for this purpose exclude all animals, whether diseased or not, coming from other States, Railroad v. Husen, 95 U. S. 465, 24 L. ed. 527, nor under the pretense of protecting the public health, employ inspection laws to exclude from its borders the products or merchandise of other States; and this court will assume the duty of determining for itself whether the statute before it is a genuine exercise of an acknowledged state power, or whether, on the other hand, under the guise of an inspection law it is really and substantially a regulation of foreign or interstate commerce which the Constitution has conferred exclusively upon the Congress. Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 Sup. Ct. 862; Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. ed. 862; Patapsco Guano Co. v. North Carolina, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. 862. Tested by these principles, the statute before us is an inspection law and nothing else; it excludes only cattle found to be diseased, and in the absence of controlling legislation by Congress it is clearly within the authority of the State, even though it may have an incidental and indirect effect upon commerce between the States. The cause, however, cannot be disposed of without inquiring whether there was at the time of the offense any legislation of Congress conflicting with the state law. If such legislation were in ex-

[46] State v. Indiana & O. Oil, Gas & Mining Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; Avery v. Indiana & O. Oil, Gas & Mining Co., 120 Ind. 600, 22 N. E. 781. See also Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 545, 58 N. E. 706. Examine Benedict v. Columbus Const. Co., 49 N. J. Eq. 23, 23 Atl. 485.

[47] Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind. 555, 12 L. R. A. 652, 28 N. E. 76. Examine, as to principle, Leisy v. Harding, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128.

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§ 375. Regulation of Commerce—Stopping Interstate Trains.—The rule that any exercise of state authority, whether

istence the state law, so far as it affected interstate commerce, would be compelled to yield to its superior authority. This question was considered and the national legislation carefully examined in Reid v. Colorado, *supra*, and the conclusion reached that Congress had not then taken any action which had the effect of destroying the right of the State to act on the subject. It was there said, p. 148: 'It did not undertake to invest any officer or agent of the Department with authority to go into a State, and, without its assent, take charge of the work of suppressing or extirpating contagious, infectious or communicable diseases there prevailing, and which endangered the health of domestic animals. Nor did Congress give the Department authority, by its officers or agents, to inspect cattle within the limits of a State and give a certificate that should be of superior authority in that or other States, or which should entitle the owner to carry his cattle into or through another State without reference to the reasonable and valid regulations which the latter State may have adopted for the protection of its own domestic animals. It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested.' There has, however, been later national legislation which needs to be noticed. Large powers to control the interstate movement of cattle liable to be afflicted with a communicable disease have been conferred upon the Secretary of Agriculture by the act of February 2, 1903, 32 Stat. 791, and the act of March 3, 1905, 33 Stat. 1204. The provisions of these acts need not be fully stated. The only part of them which seems relevant to this case and the question under consideration which arises in it is contained in the law of 1903. In that law it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or live stock and found them free from infectious, contagious or communicable disease, 'such animals so inspected and certified may be shipped, driven, or transported * * * into * * * any State or Territory * * * without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture.' There can be no doubt that this is the supreme law, and if the state law conflicts with it the state law must yield. But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it. The state law admits cattle inspected and certified by an inspector of the Bureau of Animal Industry of the United States, thus avoiding a conflict with the national law. Rule 13, issued by the Secretary of Agriculture under the authority of the statute, is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transportation of cattle from quarantined States, which is not this case, and that in terms it recognizes restrictions imposed by the State of destination. Our attention is called to no other

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made directly or through the instrumentality of a commission, which directly regulates interstate commerce is repugnant to the commerce clause of the Federal Constitution, applies to the stopping of interstate trains at stations within the State already adequately supplied with transportation facilities. But whether an order stopping interstate trains at specified stations is a direct regulation of interstate commerce depends on the local facilities at those stations, and while the sufficiency of such facilities is not in itself a Federal question, it may be considered by the Supreme Court for the purpose of determining whether the order does or does not regulate interstate commerce, and if it appears that the local facilities are adequate, the order is void. And inability of fast interstate trains to make schedule, their loss of patronage and compensation for carrying the mails, and the inability of such trains to pay expenses if additional trips are required are all matters to be considered in determining whether adequate facilities have been furnished to the stations at which the company is ordered by state authority to stop such trains.[48] So where a state statute required all regular passenger trains to stop a sufficient length of time at county seats to receive and let off passengers with safety, and it appeared that the defendant company furnished four regular passenger trains a day each way, which were sufficient to accommodate all the local and through business, and that all such trains stopped at county seats, the act was held to be invalid as applied to an express train intended only for through passengers from St. Louis to New York. It was also decided that while railways are bound

provision of national law which conflicts with the state law before us, and we have discovered none. Judgment affirmed."

[48] Atlantic Coast Line Ry. Co. v. Wharton, 207 U. S. 328, rev'g Railroad Commrs. v. Atlantic Coast Line R. Co., 74 S. C. 80, 53 S. E. 290.

"The want of power in a State to interfere with an interstate commerce train, if thereby a burden is imposed upon interstate commerce is settled beyond question." Employers' Liability Cases (Howard v. Illinois Central Rd. Co. and Brooks v. Southern Pacific Co.), 207 U. S. 463, 496, per White, J., citing principal case and also Mississippi R. Co. v. Illinois Cent. R. Co., 203 U. S. 335, 343, 51 L. ed. 209, 27 Sup. Ct. 90.

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to provide primarily and adequately for the accommodation of those to whom they are directly tributary, they have the legal right, after all these local conditions have been met, to adopt special provisions for through traffic, and legislative interference therewith is an infringement upon the clause of the Constitution which requires that commerce between the States shall be free and unobstructed.[49] In another case it appeared that an act of Congress [50] granted a right of way, and sections of the public lands, to the State of Illinois, and to States south of the Ohio River, to aid in the construction of a railroad connecting the waters of the Great Lakes with those of the Gulf of Mexico, and over which the mails of the United States should be carried. The State of Illinois accepted the act, and incorporated the Illinois Central Railroad Company, for the purpose of constructing a railroad with a southern terminus described as "a point at the city of Cairo." The company accordingly constructed and maintained its railroad to a station in Cairo, very near the junction of the Ohio and Mississippi Rivers; but afterwards, in accordance with statutes of the United States and of the State of Illinois, connected its railroad with a railroad bridge built across the Ohio River opposite a part of Cairo farther from the mouth of that river; and put on a fast mail train carrying interstate passengers and the United States mail from Chicago to New Orleans, which train ran through the city of Cairo, but did not go to the station in that city, and could not have done so without leaving the through route at a point three and a half miles from the station and coming back to the same point; but the company made adequate accommodations by other trains for interstate passengers to and from Cairo. Cairo was the county seat. It was held that a statute of Illinois, requiring railroad companies to stop their trains at county seats long enough to receive and let off passengers with safety, which was construed by the Supreme Court of the State to

[49] Cleveland, C. C. & St. L. Ry. Co. v. Illinois, 177 U. S. 514, 20 Sup. Ct. 122, 44 L. ed. 868

[50] Act of September 20, 1850, c.

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require the fast mail train of this company to be run to and stopped at the station at Cairo, was, to that extent, an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States.[51] But it is also held that a statute of a State requiring every railroad corporation to stop all regular passenger trains, running wholly within the State, at its stations at all county seats long enough to take on and discharge passengers with safety, is a reasonable exercise of the police power of the State, and does not take property of the company without due process of law; nor does it, as applied to a train connecting with a train of the same company running into another State, and carrying some interstate passengers and the United States mail, unconstitutionally interfere with interstate commerce, or with the transportation of the mails of the United States.[52] Again, where the statute of Ohio relating to railroad companies, in that State, provided that, "Each company shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village, containing over three thousand inhabitants, for a time sufficient to receive and let off passengers; if a company, or any agent or employee thereof, violate, or cause or permit to be violated, this provision, such company, agent or employee shall be liable to a forfeiture of not more than one hundred nor less than twenty-five dollars, to be recovered in an action in the name of the State, upon the complaint of any person, before a justice of the peace of the county in which the violation occurs, for the benefit of the general fund

[51] Illinois Cent. R. Co. v. Illinois, 173 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. 1096. Cited in Cleveland, C. C. & St. L. Ry. Co. v. Illinois, 177 U. S. 514, 518, 519, 20 Sup. Ct. 722, 44 L. ed. 868; Lake Shore & M. S. Ry. Co. v. Smith, 173 U. S. 684, 688, 19 Sup. Ct. 565, 43 L. ed. 858 [which reverses Smith v. Lake Shore & M. S. R. Co., 114 Mich. 460, 72 N. W. 328, 4 Det. L. N. 662, 8 Am. & Eng. R. Cas. (N. S.) 496]; Lake Shore & M. S. Ry. Co. v. Ohio, 173 U. S. 285, 303, 306 (and at p. 321, in dissenting opinion), 43 L. ed. 702, 19 Sup. Ct. 465. Distinguished in Gladson v. Minnesota, 166 U. S. 427, 431, 41 L. ed. 1064, 17 Sup. Ct. 627.

[52] Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. 627.

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of the county; and in all cases in which a forfeiture occurs under the provisions of this section, the company whose agent or employee caused or permitted such violation shall be liable for the amount of the forfeiture, and the conductor in charge of such train shall be held, *prima facie*, to have caused the violation," it was decided that such statute was not, in the absence of legislation by Congress on the subject, repugnant to the Constitution of the United States, when applied to interstate trains, carrying interstate commerce through the State of Ohio on the Lake Shore and Michigan Southern Railway.[53]

§ 376. **Regulation of Commerce—Telegraph Messages—Police Power.**—A state statute, requiring every telegraph company with a line of wires wholly or partly within that State to receive dispatches and, on payment of the usual charges, to transmit and deliver them with due diligence, under a certain penalty, is a valid exercise of the power of the State in relation to messages by telegraph from points outside of and directed to some point within the State.[54] But where a statute requires telegraph companies to deliver dispatches by messenger to the persons to whom the same are addressed or to their agents, provided they reside within one mile of the telegraph station, or within the city or town in which such station is, such enactment is in conflict with the commerce

[53] Lake Shore & M. S. Ry. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. 465.

[54] Western Union Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. 934, 6 Am. Elec. Cas. 858, Shiras, J., and White, J., dissenting.

Examine the following cases:

Georgia: Western Union Teleg. Co. v. Lark, 95 Ga. 806, 23 S. E. 118.

Iowa: Taylor v. Western Union Teleg. Co., 95 Iowa, 740, 64 N. W. 660.

Mississippi: Marshall v. Western Union Teleg. Co., 79 Miss. 154, 161, 162, 27 So. 614, 89 Am. St. Rep. 585.

Missouri: Connell v. Western Union Teleg. Co., 108 Mo. 459, 18 S. W. 883, 39 Am. & Eng. Corp. Cas. 594, 4 Am. Elec. Cas. 743.

Tennessee: Western Union Teleg. Co. v. Mellon, 100 Tenn. 429, 45 S. W. 443.

Virginia: Western Union Teleg. Co. v. Tyler, 90 Va. 297, 18 S. E. 280, 4 Am. Elec. Cas. 816. See Western Union Teleg. Co. v. Tyler, 94 Va. 268, 26 S. E. 828, 6 Am. Elec. Cas. 853, where the court relied upon the principal case although the message was a domestic one.

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clause of the Federal Constitution in so far as it attempts to regulate the delivery of such dispatches at places situated in other States. The authority of Congress over the subject of commerce by telegraph with foreign countries or among the States being supreme, no State can impose an impediment to its freedom by attempting to regulate the delivery in other States of messages received within its own borders. The reserved police power of a State under the Constitution, although difficult to define, does not extend to the regulation of the delivery at points without the State of telegraphic messages received within the State; but the State may, within the reservation that it does not encroach upon the free exercise of the powers vested in Congress, make all necessary provisions in respect of the buildings, poles and wires of telegraph companies within its jurisdiction which the comfort and convenience of the community may require.[55]

§ 377. **Regulation of Commerce—Examination and License of Locomotive Engineers—Color Blindness—Due Process of Law.**—The legislature of Alabama enacted a law entitled: "An act to require locomotive engineers in this State to be examined and licensed by a board to be appointed for that purpose," in which it was provided that it should be "unlawful for the engineer of any railroad train in this State to drive or operate or engineer any train of cars or engine upon the main line or roadbed of any railroad in this State which is used for the transportation of persons, passengers or freight, without first undergoing an examination and obtaining a license as hereinafter provided." The statute then provided for the creation of a board of examiners and prescribed their duties, and authorized them to issue licenses and imposed a license fee, and then enacted, "that any engineer violating the provisions of this act shall be guilty of a misdemeanor, and,

[55] Western Union Teleg. Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. ed. 1187, 18 Am. & Eng. Corp. Cas. 18, 2 Am. Elec. Cas. 49, rev'g 95 Ind. 12, 8 Am. & Eng. Corp. Cas. 56, 48 Am. Rep. 692, 1 Am. Elec. Cas. 632. See Joyce on Electric Law (2d ed.), §§ 125–128.

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upon conviction, shall be fined not less than fifty nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not more than six months." Plaintiff in error was an engineer in the service of the Mobile and Ohio Railroad Company. His duty was to "drive, operate and engineer" a locomotive engine drawing a passenger train on that road, regularly plying in one continuous trip between Mobile and Alabama and Corinth in Mississippi, and *vice versa*, sixty miles of which trip was in Alabama, and two hundred and sixty-five in Mississippi. He never "drove, operated or engineered" a locomotive engine hauling cars from one point to another point exclusively within the State of Alabama. After the statute of Alabama took effect, he continued to perform such regular duties without taking out the license required by that act. He was proceeded against for a violation of the statute, and was committed to jail to answer the charge. He petitioned the state court for a writ of *habeas corpus* upon the ground that he was employed in interstate commerce, and that the statute, so far as it applied to him, was a regulation of commerce among the States, and repugnant to the Constitution of the United States. The writ was refused, and the Supreme Court of the State of Alabama on appeal affirmed that judgment. It was held, (1) that the statute of Alabama was not, in its nature, a regulation of commerce, even when applied to such a case as this; (2) that it was an act of legislation within the scope of the powers reserved for the States, to regulate the relative rights and duties of persons within their respective territorial jurisdictions, being intended to operate so as to secure safety of persons and property for the public; (3) that so far as it affected transactions of commerce among the States, it did so only indirectly, incidentally and remotely, and not so as to burden or impede them, and that, in the particulars in which it touched those transactions at all, it was not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence; (4) that so far as it was alleged to contravene the Constitution of the United States the statute

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was a valid law.[56] So a state statute which requires locomotive engineers and other persons, employed by a railroad company in a capacity which calls for the ability to distinguish and discriminate between color signals, to be examined in this respect from time to time by a tribunal established for the purpose, and which exacts a fee from the company for the service of examination, does not deprive the company of its property without due process of law, and, so far as it affects interstate commerce, is within the competency of the State to enact, until Congress legislates on the subject.[57]

§ 378. **Regulation of Commerce—Tracing Lost Freight.** —The imposition, by a state statute, upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where, how and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution; and a code which imposes such a duty on common carriers is void as to shipments made from points in the State enacting such statutory provision to other States.[58] The court in giving this decision distinguishes it from an earlier case, wherein it was held that a state statute enacting that: "When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent; and although there be such contract in writing,

[56] Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 8 Sup. Ct. 564.

[57] Nashville, C. & St. L. Ry. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 9 Sup. Ct. 28.

[58] Central of Georgia Ry. Co. v. Murphy, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. 218.

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if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge," does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence, ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line; and it does not conflict with the provisions of the Constitution of the United States, touching interstate commerce.[59]

§ 379. **Regulation and Control—Requiring Governmental Consent.**—Within its power to control and regulate the exercise by a corporation of its franchises or privileges, a State or other governmental agency generally requires its consent as a prerequisite or condition precedent to the use of the public streets or highways, or to the valid exercise of a franchise. We have, however, treated this subject throughout this work and it will be only briefly considered here.[60] Con-

[59] Richmond & Alleghany R. Co. v. R. A. Patterson Tobacco Co., 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. 335. Cited in Cleveland, C. C. & St. L. Ry. Co. v. Illinois, 177 U. S. 514, 517, 20 Sup. Ct. 722, 44 L. ed. 868; Missouri, K. & T. Ry. Co. v. McCann, 174 U. S. 580, 587, 588, 590, 43 L. ed. 1093, 19 Sup. Ct. 755; Lake Shore & M. S. Ry. Co. v. Ohio, 173 U. S. 285, 324, 19 Sup. Ct. 465, 43 L. ed. 702, in dissenting opinion; Missouri, K. & T. Ry. Co. v. Haber, 169 U. S. 613, 627, 42 L. ed. 878, 18 Sup. Ct. 488.

[60] Philadelphia v. Lombard & S. St. Pass. R. Co., 4 Brewst. (Pa.) 14.

See the following cases:

United States: Ganz v. Ohio Postal Teleg. Cable Co., 140 Fed. 692, 72 C. C. A. 186, rev'g Ohio Postal Teleg. Cable Co. v. Board of Commissioners, 137 Fed. 947 (control by States, counties, etc., notwithstanding right under Post Roads Act); Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667, 1 Am. & Eng. R. Cas. (N. S.) 71 (express power given city to grant irrevocable consent; street railways); Baltimore Trust & G. Co. v. Baltimore (C. C.), 64 Fed. 153 (right to withdraw consent; laying of double tracks).

California: Western Union Teleg. Co. v. City of Visalia, 149 Cal. 744, 87 Pac. 1023 (effect of attempted grant by ordinance; telegraph company); Eisenhuth v. Ackerson, 105

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sent may be evidenced by the act of a city's common council in passing a resolution whereby the lighting of certain parts

Cal. 87, 38 Pac. 530 (code requiring vote of city or town for use of streets; veto power of mayor).

Florida: Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 So. 692, 7 Am. & Eng. R. Cas. (N. S.) 696 (statute conferring upon cities control over streets; no power to consent to exclusive use of all streets by street railway company).

Georgia: Almand v. Atlanta Consol. St. Ry. Co., 108 Ga. 417, 34 S. E. 6; Augusta & S. R. Co. v. City Council of Augusta, 100 Ga. 701, 28 S. E. 126.

Illinois: Independent Teleph. & Teleg. Co. v. Town of Towanda, 221 Ill. 299, 77 N. E. 456 (statute requires notice to highway commissioners, who shall specify what part of highway may be used, and where they fail to so specify company locates them at its peril); Chicago Teleph. Co. v. Northwestern Teleph. Co., 100 Ill. App. 57, aff'd 65 N. E. 329 (requirement that permit in writing be obtained; failure to obtain concerns city only).

Indiana: City R. Co. v. Citizens' St. Ry. Co. (Ind.), 52 N. E. 157, 1 Repr. 376 (consent necessary); Eichels v. Ry. Co., 78 Ind. 261.

Kansas: Wichita, City of, v. Missouri & K. Teleph. Co., 70 Kan. 441, 78 Pac. 886 (cities of first class may determine and designate streets and alleys which may be occupied and used by telegraph and telephone companies); La Harpe, City of, v. Elm Township Gaslight, Fuel & Power Co., 69 Kan. 97, 76 Pac. 448 (consent to lay pipes to distribute natural gas not required in cities of second or third class; right of eminent domain may be exercised therefor).

Kentucky: East Tennessee Teleph. Co. v. Russellville, 106 Ky. 667, 21 Ky. L. Rep. 305, 51 S. W. 308 (privilege to erect telephone line not a charter requiring consent under the constitution. See § 44, herein); Louisville v. Louisville Water Co., 20 Ky. L. Rep. 1529, 49 S. W. 766 (water company using streets for thirty years unquestioned and without consent; consent unnecessary).

Massachusetts: Blodgett v. Worcester Consol. St. Ry. Co. (Mass., 1906), 78 N. E. 222 (statute authorizing board of aldermen to grant locations subject to "restrictions" means "conditions").

Michigan: Monroe, City of, v. Detroit, M. & T. Short Line R. Co., 143 Mich. 315, 106 N. W. 704 (when statute does not authorize making connections with other roads organized under general statute requiring city's consent with right to impose conditions).

Missouri: Lawrence v. Hennessy, 165 Mo. 659, 65 S. W. 717 (city empowered by statute to give consent for exclusive privilege; erection, etc., of gas works; consent of people unnecessary); State, Crow, v. Lindell R. Co., 151 Mo. 162, 52 S. W. 248 (power over St. Louis' streets is in city and its consent necessary to enable State to authorize construction, etc., of street railway).

Nebraska: Lincoln St. Ry. Co. v. City of Lincoln (Neb.), 84 N. W. 802 (ordinance giving consent does not determine street railway company's rights; they are based upon the general law).

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of a city, under contract with a gas lighting corporation, is intended and provided for.[61] The term "municipal author-

New Jersey: Suburban Electric Light & Power Co. v. Inhabitants of East Orange, 59 N. J. Eq. 563, 44 Atl. 628, 7 Am. Elec. Cas. 37 (permission to erect poles for electric light wires required in incorporated cities and towns; permission may be given by resolution as well as by ordinance; permission for poles given, whether further permission for wires required); Consolidated Traction Co. v. East Orange Township, 63 N. J. L. 669, 44 Atl. 1099, aff'g 61 N. J. L. 202, 38 Atl. 803 (ordinance regulating the running of electric light wires and requiring permission to trim, cut, etc., trees on public street or highway and penalty for violation of same); State, Hutchinson, v. Belmar, 61 N. J. L. 443, 39 Atl. 643, aff'd 62 N. J. L. 450 (consent valid, though proviso attached that street railroad be constructed to certain point at specified time); Saddle River Township v. Garfield Water Co. (N. J. Ch.), 32 Atl. 978 (laying waterpipes in unincorporated village; consent of proper authorities necessary); Bergen Traction Co. v. Ridgefield Township Committee (N. J. Ch.), 32 Atl. 754 (consent of body governing township or of township committee and of road board exclusively controlling highways, necessary to enable street car company to construct road; under P. L. 1893, p. 302, § 1; Act May 16, 1894 (P. L. 374); Avon-by-the-Sea Land & I. Co. v. Neptune City (N. J.), 32 Atl. 220 (notice and consent to locate street railway under P. L. 1890, p. 113; P. L. 1886, p. 185, § 8); State, Kennelly, v. Jersey City, 57 N. J. L. 293, 26 L. R. A. 281, 30 Atl. 531 (knowledge by municipal board of particular tracks intended to be laid is necessary before giving consent); State, Theberath, v. Newark (N. J.), 30 Atl. 528 (municipality and not company to determine location, etc., of tracks in granting consent; under Act March 14, 1893, P. L. 1893, p. 302).

New York: Kittinger v. Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081, aff'g 49 N. Y. Supp. 713, 25 App. Div. 329 (consent of board of railroad commissioners required under general railroad law for construction of street railways; legislature has power in first instance to authorize without consent and may pass curative act where defect from non-consent of commissioners exists); Colonial City Traction Co. v. Kingston City R. Co., 153 N. Y. 540, 47 N. E. 810, 4 Det. L. N., No. 31, 30 Chicago Leg. News 73, aff'g 44 N. Y. Supp. 732, 15 App. Div. 195, rehearing denied in 154 N. Y. 493, 48 N. E. 900 (consent of local authorities and of one-half in value of property of abutting owners to entitle street railroad company to use another company's line; under N. Y. Const., art. 3, § 18; N. Y. Railroad Law, § 91; this section and § 102 construed); New York & L. I. R. Co. v. O'Brien, 100 N. Y. Supp. 316, 50 Misc. 13 (consent obtained for building railroad and tunnel under streets of New York, and confirmed Laws N. Y., 1892, p. 1450, c. 702, amending Laws 1890, p. 1089, c. 565, § 16; not

[61] People v. Littleton, 96 N. Y. Supp. 444, 110 App. Div. 728, aff'd 185 N. Y. 605, 78 N. E. 1109.

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ities," in a statute providing for the consent of such authorities for the laying of gas mains in a street, is held to mean, in New

necessary to sell franchises at public auction as Railroad Law, Laws 1890, p. 1082, c. 565, repealed Laws 1886, p. 919, c. 642); Carthage, Village of, v. Central New York Teleph. & Teleg. Co., 96 N. Y. Supp. 917, 48 Misc. 423, rev'd 96 N. Y. Supp. 919, 110 App. Div. 625, rev'd 185 N. Y. 448, 78 N. E. 165 (requiring wires to be placed underground; authority of village trustees); Transportation Corp. Law, Laws 1890, p. 1152, c. 566, § 102; Village Law, Laws 1897, p. 455, c. 414, § 340, § 89, subdiv. 9, p. 394, § 141, p. 414; West Side Electric Co. v. Consolidated Teleg. & Elec. Subway Co., 96 N. Y. Supp. 609, 110 App. Div. 171 (consent of board of aldermen of city of New York necessary prior to charter of 1897, to laying of electric wires in subway; Laws 1879, p. 562, c. 512, § 2; Laws 1887, c. 716, p. 929; Laws 1885, p. 852, c. 499; Transportation Corp. Law, Laws 1890, p. 1146, c. 566, art. 6, § 61, subd. 2); People v. Littleton, 96 N. Y. Supp. 444, 110 App. Div. 728 (requisite consent to gas lighting corporation given by common council of city); Beekman v. Third Ave. R. Co., 43 N. Y. Supp. 174, 13 App. Div. 279 (consent of common council to construction or extension of street railway company regulated by railroad law); Case v. Cayuga County, 34 N. Y. Supp. 595, 68 N. Y. St. Rep. 632, 88 Hun, 59 (board of county supervisors may give consent directly where county property abuts on street on which street railroad is to be laid); McDermott v. Nassau Elec. R. Co., 32 N. Y. Supp. 884, 66 N. Y. St. Rep. 202, 85 Hun, 422 (consent of property owners where street railroad bounded on one side by public park; Laws 1890, chap. 565, § 91, repealed Laws 1894, chap. 723, § 91).

Ohio: Cincinnati Inclined Plane R. Co. v. Cincinnati, 52 Ohio St. 609, 44 N. E. 327 (consent of one of two city boards; concurrent action; no implied renewal, Stats. 1885, 1888); Reynolds v. City of Cleveland, 24 Ohio Cir. Ct. R. 609 (statute must expressly confer power on municipal corporations to control and regulate construction, etc., of street railways); State v. Columbus Ry. Co., 24 Ohio Cir. Ct. R. 609 (city's consent necessary to construct, etc., street railway; so prior to act May 14, 1878, 75 Ohio Laws, p. 359); State v. Dayton Traction Co., 18 Ohio Cir. Ct. R. 490, 10 Ohio C. D. 212 (city may not impose as condition to its consent which prevents the corporation from exercising one of its corporate powers); Morrow County Illuminating Co. v. Village of Mt. Gilead, 10 Ohio S. & C. P. Dec. 235 (council's consent necessary to grant by city of electric light franchise).

Pennsylvania: Coatesville & D. St. Ry. Co. v. West Chester St. Ry. Co., 206 Pa. 40, 55 Atl. 844 [consent of local authorities required to be obtained in two years under statute (act June 7, 1901, P. L. 516); company organized thereunder has rights in streets in which it cannot be disturbed for two years]; Plymouth Township v. Chestnut Hill & N. R. Co., 168 Pa. 181, 36 W. N. C. 317, 32 Atl. 19, rev'g 4 Pa. Dist. R. 8, 15 Pa. Co. Ct. 442, 12 Lanc. L. Rev. 36 (consent may be burdened with such condition that non-compliance

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York City, the municipal assembly; but a subsequent permit from the commissioner of public buildings, lighting and the department of highways, is required to allow the corporation to exercise such rights in order that the public convenience may be subserved.[62] The Electrical Subway Company has no power to refuse an application for space in its conduits merely because the commissioner of water supply, gas and electricity of the city of New York has not first given his consent, although under the rules of said commissioner such consent is required before electric conductors can be placed in the space assigned after application made therefor.[63] The individual right of an electrical corporation, organized before

therewith will authorize forfeiture); Tamaqua & L. St. R. Co. v. Inter-County St. R. Co., 167 Pa. 91, 36 W. N. C. 166, 31 Atl. 473, aff'g 4 Pa. Dist. R. 20 (formalities in granting consent to street railway; when township not bound); Rahn Township v. Tamaqua & L. St. R. Co., 167 Pa. 84, 36 W. N. C. 165, 31 Atl. 472, aff'g 4 Pa. Dist. R. 29 (line in several boroughs, consent of all necessary to building line in any one); Lehigh Coal & Nav. Co. v. Inter-County St. R. Co., 167 Pa. 75, 36 W. N. C. 160, 31 Atl. 471, rev'g 15 Pa. Co. Ct. 293, 12 Lanc. L. Rev. 181 (consent to street railway by supervisors void where consideration is a condition benefiting the township officer).

Virginia: Petersburg, City of, v. Petersburg Aqueduct Co., 102 Va. 654, 47 S. E. 848 (insolvent water company cannot dig up city's streets without latter's consent, even though it be conceded that such consent is unnecessary under its charter if it were solvent).

Washington: State v. Taylor, 36 Wash. 607, 79 Pac. 286 (franchises may be granted by cities of the fourth class to construct electric light and power plants).

Wisconsin: Malone v. Waukesha Electric Light Co., 120 Wis. 485, 98 N. W. 247 (use of streets was granted electric light company by ordinance, subject to direction, etc., of board of public works, which failed to designate the particular places for the poles; abutting owner's consent necessary, especially where trimming of shade trees necessitated to place poles.

See §§ 44, 48, 187, herein; also Joyce on Electric Law (2d ed.), §§ 155, 186*a*, 353–376.

[62] Ghee v. Northern Union Gas Co., 158 N. Y. 510, 53 N. E. 692, rev'g 56 N. Y. Supp. 450, 34 App. Div. 551, Transp. Corp. Act., Laws 1890, c. 566, § 61, Greater New York Charter, Laws 1897, c. 378, §§ 49 (subdiv. 4), 416, 525, 573. See § 191, herein.

[63] Long Acre Electric & Power Co., In re, 101 N. Y. Supp. 460, 51 Misc. 407, aff'd in 102 N. Y. Supp. 242, 117 App. Div. 80, aff'd in 188 N. Y. 361, 80 N. E. 1101. See § 191, herein.

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the enactment of the laws of New York of 1885, creating a board of commissioners of electrical subways, to the use of the streets to enable them to lay in their own conduits their electrical conductors, was lost by said statute as all operators of such conductors were obligated to use the subways devised by said board, where plans submitted to the board should fail; and mandamus in this case, to compel the commissioner of water supply, gas and electricity to grant the electrical corporation permission to construct their subway, was denied.[64]

§ 380. **Same Subject.**—In New Jersey a township may properly, in the exercise of its powers to regulate and keep in repair streets and highways, require persons desiring to excavate the streets to obtain a permit from the township committee and a deposit for security for the restoration of the street to its natural condition; and an ordinance requiring such a permit and security is applicable to and binding upon an electric lighting company previously authorized by statute and ordinance to erect poles in the highways and streets.[65] While it is true, in a strict sense, that, under the system of laws in New Jersey, no corporations of that State can exercise any municipal franchise, still, many franchises are granted by the legislature upon the condition that they shall not be exercised without the consent of the authorities of a city within whose limits such franchise is intended to be exercised; so that, under a statute exempting from taxation "any corporation" which had not or might not "exercise any municipal franchise," those corporations were intended whose right to exercise their franchises were dependent upon municipal

[64] People v. Ellison, 101 N. Y. Supp. 441, 51 Misc. 413, aff'd in 101 N. Y. Supp. 55, 115 App. Div. 254. See § 191, herein.

[65] Cook v. Township of North Bergen, 72 N. J. L. 119, 59 Atl. 1035. There was also in this case a contract between the township and the lighting company for lighting the streets, and the statute giving the right to use the highways for the company's purposes required the consent, in writing, of the owners of the soil, which was obtained. Such power to regulate streets was also declared to be a branch of the police power and that the requirement of a permit was reasonable.

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consent.[66] Where there is no restriction on the legislative control of streets and highways contained in a state constitution which declares the right of individuals and corporations to maintain lines of telegraph and telephone within the State, a provision in a statute passed pursuant to such constitutional declaration "that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone line can be erected thereon" is valid, and amounts to an authorization to the council to refuse, as well as consent, to such use of the streets, and is not intended as an authorization of power merely to prescribe reasonable and proper regulations for the construction and operation of such lines, the power of regulation and control being amply conferred by other statutory provisions.[67] But a city cannot, by withholding its consent, defeat the exercise of the right of eminent domain possessed by a railroad company in locating its line of road through a city, but at the most the only power of the municipality would be to regulate the location and construction of the road; nor is the objection available, by a landowner in proceedings for condemnation, that no city franchise has been granted for the operation of such road in the city or to cross the streets and alleys thereof.[68] Provisions for obtaining the consent of a majority of the electors of a city before a street railway company is authorized to construct and operate a street railway over the streets of such city do not empower the city to grant a charter to, or enter into a contract in respect thereto with, such street railway company.[69] An ordinance which prohibits the laying

[66] Board of Assessors v. Plainfield Water Supply Co., 67 N. J. L. 357, 52 Atl. 230.

[67] State (ex rel. Spokane & British Columbia Teleph. & Teleg. Co.) v. City of Spokane, 24 Wash. 53, 63 Pac. 1116, 7 Am. Elec. Cas. 96. See State v. Frost (Neb., 1907), 110 N. W. 986, as to validity of ordinance giving city power to grant or refuse consent.

[68] Memphis & State Line Rd. Co. v. Union Ry. Co., 116 Tenn. 500, 95 S. W. 1019.

[69] Lincoln St. Ry. Co. v. City of Lincoln, 61 Neb. 109, 110, 84 N. W. 808.

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of any pipe in a public street "without having first obtained from the board of trustees of said city the franchise or privilege of using such public street * * * for that purpose," does not import to be a regulation of the manner of doing work. It assumes to require a franchise or privilege as a condition precedent to the occupation of the soil at all.[70]

§ 381. **Regulation of Railroads—Delegation to Commissioners—Constitutional Law—Discrimination—Generally.**[71] —Railroad corporations are subject to such legislative control as may be necessary to protect the public against danger, injustice or oppression, and this control may be exercised through a board of commissioners.[72] "The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine." [73] The public power to regulate railroads and the private right of ownership of such property coexist and do

[70] Colegrove Water Supply Co. v. City of Hollywood (Cal., 1907), 90 Pac. 1053, 1056, per Sloss, J. (a case where a water company sought to enjoin the city from interfering with the company's rights to lay pipes across city streets. Judgment for plaintiff was affirmed; the case turned, however, upon plaintiff's right as owner or licensee of owner of fee).

[71] See §§ 166–170, herein.

[72] New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269.

[73] Atlantic Coast Line Rd. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 19, 51 L. ed. 933, 27 Sup. Ct. 585, per White, J. Citing Seaboard Air Line v. Florida, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. 109; Atlantic Coast Line v. Florida, 203 U. S. 256, 27 Sup. Ct. 108, 51 L. ed. 174; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 584, 26 Sup. Ct. 341, 50 L. ed. 596; Minnesota & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. 396; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 1194, 21 Sup. Ct. 124; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 695, 40 L. ed. 849, 16 Sup. Ct. 714; Pearsall v. Great Northern R. Co., 161 U. S. 646, 665, 40 L. ed. 838, 16 Sup. Ct.

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not the one destroy the other; and where the power to regulate is so arbitrarily and unreasonably exerted as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such exertion is void because repugnant to the due process and equal protection clause of the Fourteenth Amendment.[74] A regulation may impose no greater obligation upon a railroad company than the common law would have imposed upon it. This is illustrated by a state constitutional provision that: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager,

705; Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400, 30 L. ed. 176; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. 255; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 8 Sup. Ct. 1028; Stone v. New Orleans & Northeastern R. Co., 116 U. S. 352, 6 Sup. Ct. 349, 29 L. ed. 651; Stone v. Illinois Central R. Co., 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. 348, 1191; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334; Illinois Central Rd. Co. v. Illinois, 108 U. S. 541, 27 L. ed. 818, 2 Sup. Ct. 839; Ruggles v. Illinois, 108 U. S. 526, 536, 2 Sup. Ct. 832, 27 L. ed. 812; Stone v. Wisconsin, 94 U. S. 181, 24 L. ed. 102; Winona & St. Peter R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. ed. 99; Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. ed. 97; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94.

[74] Atlantic Coast Line Rd. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. 585. Citing Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 26 Sup. Ct. 341; Minneapolis & St. Louis R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 20 Sup. Ct. 336, 44 L. ed. 417; Smyth v. Ames, 169 U. S. 466, 512, 42 L. ed. 819, 18 Sup. Ct. 418; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 241, 41 L. ed. 979, 17 Sup. Ct. 581; St. Louis & San Francisco R. Co. v. Gill, 156 U. S. 649, 657, 39 L. ed. 567, 15 Sup. Ct. 484; Reagan v. Farmers' Loan & Trust Co. (No. 1), 154 U. S. 362, 399, 38 L. ed. 1014, 14 Sup. Ct. 1047; Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400, 30 L. ed. 176; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 455, 10 Sup. Ct. 462, 33 L. ed. 970; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 331, 6 Sup. Ct. 334, 29 L. ed. 636.

See §§ 166–170, herein.

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or employee thereof, shall give any preference to individuals, associations or corporations in furnishing cars or motive power." [75] An order of the Interstate Commerce Commission is not a lawful order and enforceable where its enforcement will deprive a carrier of its business at a particular place, as in case of an order to discontinue a custom of furnishing cartage.[76]

§ 382. **Regulation of Railroads—Protection Against Injury to Persons and Property.**—A statute authorizing a municipal corporation to require railroad companies to provide protection against injury to persons and property confers plenary power in those respects over the railroads within the corporate limits.[77] So a city, when authorized by the legislature, may regulate the speed of trains within its limits, and this extends to interstate trains in the absence of congressional action on the subject. The Interstate Transit Railway is a railway connecting Kansas City, Missouri, with Kansas City, Kansas, and the exception of its trains from the general provision in the city ordinance respecting the speed of trains in the city was an exception entirely within the power of the legislature to make.[78] And it is not an unreasonable requirement that a railroad company light its line

[75] Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. 185 (case reverses 15 Fed. 650), cited in Express Cases, 117 U. S. 1, 29, 6 Sup. Ct. 542, 628, 29 L. ed. 791, which holds that railroad companies are not required by usage, or by the common law, to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled. Railroad companies are not obliged either by the common law or by usage to do more as express carriers than to provide the public at large with reasonable express accommodation; and they need not, in the absence of a statute, furnish to all independent express companies equal facilities for doing an express business upon their passenger trains.

Examine Nelson's Interstate Commerce Commission, pp. 48 *et seq.*

[76] Detroit, G. H. & M. Ry. Co. v. Interstate Commerce Commission, 7 Fed. 803, 21 C. C. A. 103, 43 U. S. App. 308.

[77] Hayes v. Michigan Central R. R. Co., 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. 369.

[78] Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. 788.

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by electricity within a certain time after notice of the passage of the ordinance so providing.[79] Again, a state statute directed to the extinction of railway grade crossings as a menace to public safety, is a proper exercise of the police power of the State.[80] So a statute is constitutional which places a part of the burden of expense necessary to improve a bridge, upon a railroad company benefited thereby, as where the bridge, instead of crossing at grade, spans the railroad, and two abutments on the old way are provided for, although there is no technical abandonment of such way.[81] A grant of a right of way over a tract of land to a railroad company by a municipal corporation, by an ordinance which provides that the company shall erect suitable fences on the line of the road and maintain gates at street crossings, is not a mere contract, but is an exercise of the right of municipal legislation, and has the force of law within the corporate limits.[82] So a State may constitutionally provide by statute, by a general law of uniform operation for the indictment of railroad companies for neglect or failure to furnish pure drinking water for passengers.[83] If railroad commissioners have authority under a state statute to investigate the cause of railroad accidents upon notice, and the enactment empowers them to order, after notice and an investigation and hearing,

[79] St. Mary v. Lake Erie & W. R. Co. (Ohio), 53 N. E. 595.

[80] New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. 437. Cited in Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 74, 42 L. ed. 948, 18 Sup. Ct. 513; Wabash R. Co. v. Defiance, 167 U. S. 88, 99, 17 Sup. Ct. 748, 42 L. ed. 87; Louisville & Nashville Rd. v. Kentucky, 161 U. S. 677, 696, 40 L. ed. 849, 16 Sup. Ct. 714. See New York, N. H. & H. R. Co. v. Wheeler (Conn.), 45 Atl. 14; New Haven Steam Sawmill Co. v. City of New Haven, 72 Conn. 276, 44 Atl. 229. See Blake v. Concord & M. R. Co., 73 N. H. 597, 64 Atl. 202.

[81] Bristol County, In re, 193 Mass. 257, 79 N. E. 339. See Charlotte, Columbia & Atlanta Rd. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. 255, 45 Am. & Eng. R. Cas. 595; Nashville, C. & St. L. Ry. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 9 Sup. Ct. 28.

[82] Hayes v. Michigan Central R. R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410. See Chicago, I. & L. Ry. Co. v. Irons (Ind. App., 1906), 78 N. E. 207.

[83] Southern Ry. Co. v. State, 125 Ga. 287, 54 S. E. 160.

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such change in the manner of operation of the road as shall be reasonable and expedient to facilitate public safety, an order made, requiring a change in the mode of operation, is void and without jurisdiction where proper notice of the statutory proceeding required is not given.[84] The power of a State to create railway corporations, and such creation being for public purposes, embodies the right of the legislature to enact statutes regulating the increase of their capital stock. In the exercise of this right the legislature may enact a statute providing generally for what purposes and upon what terms, conditions and limitations an increase of capital stock may be made. Such regulations tend to prevent secrecy of operation and accounts by such public agencies, and the issue and sale of fictitious or watered stock.[85]

§ 383. **Regulation of Railroads—Providing Stations or Waiting Rooms—Police Power.**—It is the proper duty of a railroad company to establish stations at proper places, and it is within the power of the States to make it *prima facie* a duty of the companies to establish them at all villages and boroughs on their respective lines. And a general law of State, requiring the erection and maintenance of depots by railroad companies on the order of the Railroad and Warehouse Commission under certain conditions specified in the statute, does not deny the railroad company the right to reasonably manage or control property or arbitrarily take its property without its consent, or without compensation or due process of law, and is not repugnant to the Constitution of the United States.[86] It is a proper exercise of the police power to require waiting rooms and stations to be erected at railroad crossings;[87] and also suitable and convenient waiting rooms kept and maintained in decent order and repair and fit for the accommodation of the public and subject in these

[84] Rutland R. Co., In re (Vt., 1906), 64 Atl. 233.

[85] State v. Great Northern Ry. Co., 100 Minn. 445, 10 L. R. A. (N. S.) 250, 111 N. W. 289.

[86] Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. ed. 614.

[87] State v. Kansas City, Ft. S. & G. R. Co. (C. C.), 32 Fed. 722.

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respects to a certain degree of supervision or regulation by the Railroad Commission.[88] But a railroad company cannot be required to provide two detached depots, one for passengers and another for freight, in one town, even though a Railroad Commission is empowered by statute to provide sufficient station facilities and to locate new depots where the railroad company has selected an inconvenient site.[89]

§ 384. **Regulation of Railroads—Sunday Trains—Interstate Commerce—Police Power.**—A statute forbidding the running of freight trains on any railroad in the State on Sunday, and providing for the trial and punishment on conviction of the superintendent of a railroad company violating that provision, although it affects interstate commerce in a limited degree, is not, for that reason, a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the State, and is not invalid by force alone of the Constitution of the United States; but is to be respected in the courts of the Union until superseded and displaced by some act of Congress, passed in execution of the power granted it by the Constitution. This is especially so where there is nothing in such state legislation that suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who on the Sabbath day, are within the territorial jurisdiction of the State.[90]

[88] Illinois Cent. R. Co. v. Commonwealth (Ky.), 52 S. W. 818. As to abandonment of stations, authority of railroad commissioners to consent or refuse to consent thereto in regard to existing stations, and their inability to contract so as to bind the State concerning the establishment of stations, see Railroad Company v. Hammersley, 104 U. S. 1, 26 L. ed. 629.

[89] State v. Yazoo & M. V. R. Co., 87 Miss. 679, 40 So. 263.

[90] Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. 1086. Cited in Employers' Liability Cases (Howard v. Illinois Central Rd. Co. and Brooks v. Southern Pacific Co.), 207 U. S. 463, 535 (in dissenting opinion of Moody, J.); Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 517, 20 Sup. Ct. 722, 44

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§ 385. **Regulation of Railroads—Safety Appliances and Devices—Heating Cars.**—The object of the provisions of the Safety Appliance Acts of 1893 and 1896,[91] declaring it to be unlawful for any common carrier engaged in interstate commerce to haul or permit to be hauled or used on its line any car used in moving interstate commerce not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, was to protect the lives and limbs of railroad employees by rendering it unnecessary for men operating the couplers to go between the ends of the cars, and the words "used in moving interstate traffic" occurring therein are not to be taken in a narrow sense.[92] The statute also includes a car of another company hauled over the lines of a railroad and employed in moving interstate traffic; so a car is used in such traffic where, although belonging to another company, it is received by a railroad from the latter and taken from its yards with the intention of making part of a train and moving it to its destination in another State, and if it is not equipped as provided for by the statute as to safety appliances the railroad company so employing the car in transportation is liable for the penalty imposed by the enactment.[93] The statute also relates to all kinds of cars running on the rails, including locomotives and steam shovel cars.[94] And in holding that locomotive engines are included

L. ed. 868; Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. 666; Lake Shore & Mich. South. Ry. Co. v. Ohio, 173 U. S. 285, 289, 43 L. ed. 702, 19 Sup. Ct. 465 (in dissenting opinion); Missouri, K. & T. Ry. Co. v. Haber, 169 U. S. 613, 627, 18 Sup. Ct. 488, 42 L. ed. 878; Gladson v. Missouri, 166 U. S. 427, 430, 41 L. ed. 1064, 17 Sup. Ct. 627; Pierce v. Van Dusen, 78 Fed. 699.

[91] Act of Cong. March 2, 1893, § 2, as am'd April 1, 1896.

[92] Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co., 205 U. S. 1, 57 L. ed. 681, 27 Sup. Ct. 407, rev'g 207 Pa. 198.

[93] United States v. Chicago, P. & St. L. Ry. Co., 143 Fed. 353. See United States v. Great Northern Ry. Co., 145 Fed. 438; United States v. Northern Pacific Terminal Co., 144 Fed. 861.

[94] Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co., 205 U. S. 1, 57 L. ed. 681, 27 Sup. Ct. 407, rev'g 207 Pa. 198.

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by the words "any car" contained in the second section of the act of 1893[95] requiring cars engaged in interstate commerce to be equipped with automatic couplers, it is further decided that although they were also required by the first section of the act to be equipped with power driving-wheel brakes, the rule that the expression of one thing excludes others does not apply, inasmuch as there was a special reason for that requirement and in addition the same necessity for automatic couplers existed as to them as in respect to other cars. A dining car regularly engaged in interstate traffic does not cease to be so when waiting for the train to make the next trip. The equipment of cars with automatic couplers which will not automatically couple with each other so as to render it unnecessary for men to go between the cars to couple and uncouple is not a compliance with the law.[96] Under the laws of the State of Michigan the commissioner of railroads has power to compel a street railroad to install safety appliances in accordance with law, the cost to be shared between it and a steam railroad occupying the same street, notwithstanding that the steam road is the junior occupier of the street.[97] And a statute does not unconstitutionally take private prop-

The Safety Appliance Acts are, according to the title, intended to promote the safety of employees and travellers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes: for this act, see Nelson's Interstate Commerce Commission, pp. 125 *et seq.*

Pleading and proof. In a suit based upon the Safety Appliance Act of March 2, 1893, as amended April 1, 1896, the plaintiff is not called upon to negative the proviso of § 6 of said act, either in his pleadings or proofs. Such proviso merely creates an exception, and if the defendant wishes to rely thereon, the burden is upon it to bring itself within the terms of the exception; those who set up such an exception must establish it. Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co., 205 U. S. 1, 57 L. ed. 681, 27 Sup. Ct. 407, rev'g 207 Pa. 198.

[95] Act of Cong. March 2, 1893, 27 Stat. 531, c. 196.

[96] Johnson v. Southern Pac. Co., 196 U. S. 1, 49 L. ed. 872, 25 Sup. Ct. 158. The act of March 2, 1903, 32 Stat. 943, c. 976, was held to reiterate the view above expressed and to be declaratory thereof.

[97] Detroit, Fort Wayne, Belle Isle Ry. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. —, aff'g 127 Mich. 219, 86 N. W. 842.

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erty for public use without compensation by requiring railroad companies to maintain such safety devices at crossings as shall be reasonably necessary for public protection.[98] The statutes of New York regulating the heating of steam passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto[99] were passed in the exercise of powers resting in the State in the absence of action by Congress, and, when applied to interstate commerce, do not violate the Constitution of the United States.[1]

§ 386. **Regulation of Railroads—General Decisions—Extra Trains for Connections—Removal of Tracks—Keeping Open Ticket Offices—Limitation of Liability—Adjusting Damage Claims—Separate Cars.**—It is within the power of a State Railroad Commission to compel a railroad company to make reasonable connections with other roads so as to promote the convenience of the travelling public, and an order requiring the running of an additional train for that purpose, if otherwise just and reasonable, is not inherently unjust and unreasonable because the running of such train will impose some pecuniary loss on the company.[2] A city, having authority under its charter to change its streets by widening or straightening them, etc., and also being empowered to enact governmental regulations and ordinances under a general welfare clause, may, when the act is not unreasonable or arbitrary, compel a railroad company to remove its tracks to another street than the one on which they are laid.[3] And the removal of a spur which has been constructed may be pre-

[98] State v. St. Paul, M. & M. Ry. Co. (Minn., 1906), 108 N. W. 261.

[99] Laws N. Y. 1887, c. 616, Laws 1888, c. 189.

[1] New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. ed. 853.

[2] Atlantic Coast Line Ry. Co. v. North Carolina Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. 585. See Jacobson v. Wisconsin, M. & P. R. Co., 71 Minn. 519, 40 L. R. A. 389, 74 N. W. 893, aff'd Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. 115.

[3] Atlantic & B. Ry. Co. v. City of Cordele, 125 Ga. 373, 54 S. E. 155.

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vented by a Railroad Commission.[4] The requirement that ticket offices shall be kept open for half an hour prior to the departure of each train should also be complied with.[5] While Congress under its power may provide for contracts for interstate commerce permitting the carrier to limit its liability to a stipulated valuation, it does not appear that Congress has, up to the present time, sanctioned contracts of this nature; and, in the absence of Congressional legislation on the subject, a State may require common carriers, although in the execution of interstate business, to be liable for the whole loss resulting from their own negligence, a contract to the contrary notwithstanding. There is no difference in the application of a principle based on the manner in which a State requires a degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in its courts.[6] The statute of South Carolina of 1903, imposing a penalty of fifty dollars on all common carriers for failure to adjust damage claims within forty days is not, as to interstate shipments, unconstitutional as violative of the Fourteenth Amendment, neither the classification, the amount of the penalty or the time of adjustment being beyond the power of the State to determine. And this applies in the matter of a small claim, as small shipments are the ones which especially need the protection of penal statutes of this nature.[7] The statute of the State of Mississippi of 1888, requiring all railroads carrying passengers in that State (other than street railroads) to provide equal, but separate, accommodations for the white and colored races, having been construed by the Supreme Court of the State to apply solely to commerce within the State, does no violation to the commerce clause of the Constitution of the United States.[8] And in another case

[4] Railroad Commission of La. v. Kansas City Southern Ry. Co., 111 La. 133, 35 So. 487.

[5] Gulf, C. & S. F. Ry. Co. v. Dyer (Tex. Civ. App.), 95 S. W. 12.

[6] Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. ed. 268, aff'g 202 Pa. 222, 51 Atl. 990. Decided in 1903.

[7] Seaboard Airline Ry. v. Seegers, 207 U. S. 73, aff'g 73 S. C. 71.

[8] Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 730, 10 Sup. Ct. 365.

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it is held that the provisions of the statute of Louisiana are not in conflict with either the Thirteenth or the Fourteenth Amendment of the Federal Constitution. Said enactment required railway companies carrying passengers in their coaches in that State, to provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; and providing that no person shall be permitted to occupy seats in coaches other than the ones assigned to them, on account of the race they belong to; and requiring the officers of the passenger trains to assign each passenger to the coach or compartment assigned for the race to which he or she belongs; and imposing fines or imprisonment upon passengers insisting upon going into a coach or compartment other than the one set aside for the race to which he or she belongs; and conferring upon officers of the trains power to refuse to carry on the train passengers refusing to occupy the coach or compartment assigned to them, and exempting the railway company from liability for such refusal.[9]

§ 387. **Regulation of Street Railroad Companies—Police Power.**—A municipality under its right to make reasonable regulations concerning the use of its streets by a street railroad company [10] may limit the speed of its cars,[11] or the length

[9] Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. ed. 256.

[10] Baltimore v. Baltimore Trust & Guar. Co., 166 U. S. 673, 17 Sup. Ct. 696, 41 L. ed. 1160, 3 Va. Law Reg. 189; Joyce on Electric Law (2d ed.), § 147. See People v. Geneva, W. S. F. & C. L. Traction Co., 98 N. Y. Supp. 719, 112 App. Div. 581, aff'd 186 N. Y. 516, 78 N. E. 1109; City of New York v. Interurban Street Railway Co., 86 N. Y. Supp. 673, 43 Misc. 29; also § 63 (and note at p. 155), herein.

[11] State, Cape May, D. B. & S. P. R. Co. v. Cape May, 59 N. J. L. 393, 36 Atl. 679, 36 L. R. A. 656, 9 Am. & Eng. R. Cas. (N. S.) 507, 6 Am. Elec. Cas. 42; Choquette v. Southern Elec. R. Co. (Mo.), 53 S. W. 897; Joyce on Electric Law (2d ed.), §§ 463, 464.

Examine the following cases:

Alabama: Montgomery St. Ry. Co. v. Lewis (Ala., 1906), 41 So. 736.

Delaware: Licznerski v. Wilmington City Ry. Co. (Del. Super.), 62 Atl. 1057.

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of time of service or of running cars on certain streets;[12] require the tracks to be watered so as to effectually lay the dust;[13] provide for the equipment of cars;[14] require the employment of a conductor as well as a motorman;[15] prohibit the use of salt on the tracks, except at certain places;[16] and make other lawful regulations in the exercise of the police power. The right of the legislature to require street railway companies in cities of a certain class to pave the part of the streets occupied by their tracks so as to conform with the improvements made in the remainder of the streets, or, in case they fail or neglect to perform such duty, to authorize the municipal authorities to make such improvements, and by the levy of a special assessment, charge the cost and expense thereof against such street railway company, which shall be a lien on its property, is a reasonable exercise of the reserve power vested in the legislature and in no wise violates or impairs the obligation of a contract with respect to the charter of such street railway company.[17] But it is held that a city

Georgia: Hill v. Rome St. R. Co., 99 Ga. 103, 24 S. E. 866, 3 Am. Neg. Rep. 353.

Missouri: Campbell v. St. Louis & S. Ry. Co., 175 Mo. 161, 75 S. W. 86.

New Hampshire: Bly v. Nassau St. R. Co., 67 N. H. 474, 30 L. R. A. 303, 32 Atl. 764.

New York: Union Traction Co. v. City of Watervliet, 71 N. Y. Supp. 977, 35 Misc. 392.

Ohio: Lewis v. Cincinnati St. Ry. Co., 10 Ohio S. & C. P. Dec. 53.

[12] People v. Detroit Citizens' Ry. Co., 116 Mich. 132, 74 N. W. 520, 4 Det. L. N. 1198, 16 Nat. Corp. Rep. 436, 11 Am. & Eng. R. Cas. (N. S.) 798.

[13] State v. Canal & C. R. Co., 50 La. Ann. 1189, 24 So. 265.

[14] People v. Detroit United Railway (Mich.), 10 Det. L. News, 648, 97 N. W. 36; State of Minnesota v. Smith, 58 Minn. 35, 5 Am. Elec. Cas. 614, 59 N. W. 545. Examine State v. Whitaker, 160 Mo. 59, 60 S. W. 1068; Brooklyn v. Nassau Elec. R. Co., 56 N. Y. Supp. 609, 38 App. Div. 365; Yonkers, City of, v. Yonkers' R. Co., 64 N. Y. Supp. 955, 51 App. Div. 271; Henderson v. Durham Traction Co., 132 N. C. 779, 44 S. E. 598. Compare Buente v. Pittsburg, A. & M. Tract. Co., 2 Pa. Super. Ct. 185.

[15] Danville St. Car Co. v. Wooding (Danville, Va., C. C.), 2 Va. L. Reg. 244.

[16] State, Consol. Tract. Co., v. Elizabeth, 58 N. J. L. 619, 32 L. R. A. 170, 34 Atl. 146, 3 Am. & Eng. R. Cas. (N. S.) 614.

[17] Lincoln St. Ry. Co. v. City of Lincoln, 61 Neb. 109, 110, 84 N. W. 808. See Amsterdam, City of, v.

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has no right under its police powers to adopt an ordinance requiring a motorman to "keep a vigilant watch for all vehicles on the track or moving towards it, and on the first appearance of danger to such vehicle, to stop the car in the shortest time and space possible." To make such an ordinance binding it should appear that the railroad company on accepting its franchise from the city and in consideration thereof undertook and agreed to obey the provisions of such ordinance. Such an agreement would create a contractual liability on its part, which did not exist at common law, but which was necessary to bind it. Laws controlling the liability of citizens *inter se*, must emanate from the legislature, in whom alone such power is vested by the Constitution.[18] Again a municipal

Fonda, J. & Y. R. Co., 101 N. Y. Supp. 694, 51 Misc. 438, aff'd 104 N. Y. Supp. 411; Weed v. City of Binghamton, 71 N. Y. Supp. 282, 62 App. Div. 525; also §§ 337 (and note 69), 338, herein.

[18] Sanders v. Southern Elec. Ry. Co., 147 Mo. 411, 48 S. W. 855. The court (at pp. 425–427), per Marshall, J., said: "This precise ordinance regulation underwent adjudication by this court in Fath v. Tower Grove & Lafayette Ry. Co., 105 Mo. 537, and Sherwood, J., said: 'Proceeding then to inquire into the validity of the ordinance, it may be admitted at the outset, that it is beyond the power of a municipal corporation by its legislative action directly to create a "civil duty, enforcible at common law;" for this is an exercise of power of sovereignty belonging to the State.' * * * The legislature may delegate a part of the police power of the State to a municipality, but it cannot delegate the legislative functions of making laws that will be binding upon citizens between themselves in civil proceedings. The police regulations control the citizen in respect to his relations to the city, representing the public at large, and for this reason are enforcible by fine and imprisonment, but laws controlling the liability of the citizens *inter esse*, must emanate from the legislature in whom alone such power is vested by the constitution [Norton v. City of St. Louis, 97 Mo. 537, 11 S. W. 242; City of St. Louis v. Connecticut Mut. Life Ins. Co., 107 Mo. 92, 17 S. W. 637; Heeney v. Sprague, 11 R. I. 456; Railroad Co. v. Ervin, 89 Pa. 71; Vandyke v. City of Cincinnati, 1 Disn. 532; Flynn v. Canton Co., 40 Md. 312; Jenks v. Williams, 115 Mass. 217; Kirby v. Association, 14 Gray (Mass.), 249.] A provision of the charter of a city, whether the charter be granted by an act of the legislature, or be adopted by the people of the city pursuant to the power conferred by art. 9 of the constitution which takes the place and has the force of a legislative act, stands on a totally different plane from an ordinance of a city passed under its police power. The latter creates no new right or

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ordinance regulating the speed of cars used upon a street railroad is within the city's police power and applies not only to all territory within the corporate limits but also to subsequently acquired territory and affords a sufficient basis for an action for a personal injury due to its breach.[19]

remedy between citizens; is enforcible only by *quasi* civil-criminal proceedings, and creates a municipal misdemeanor. The former is as much a law of the State as if it had been enacted by the legislature. The legislature under its reserve powers in the constitution may repeal or amend it, but until it does so, the provision of the organic law is a valid regulation and is binding upon citizens, both in their relation to the city and among themselves. The reason is that the people—the source of all power—conferred the right, by the constitution, upon the city to so legislate by its organic law, just as they granted the legislative power generally to the General Assembly, or the judicial power to the courts."

But compare Gray v. St. Paul City Ry. Co., 87 Minn. 280, 91 N. W. 1106, 12 Am. Neg. Rep. 604; Meyers v. St. Louis Transit Co. (Mo. App.), 73 S. W. 379; Gebhart v. St. Louis Transit Co. (Mo. App.), 71 S. W. 448; J. F. Conrad Grocer Co. v. St. Louis & M. R. R. Co., 89 Mo. App. 391.

[19] Deneen v. Houghton County St. Ry. Co., 150 Mich. 235, 14 Det. Leg. News, 670, 113 N. W. 1126.

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CHAPTER XXIII.

REGULATION AND CONTROL CONTINUED—RATES AND CHARGES.

§ 388. Regulation of Gas and Natural Gas Companies—Police Power.
389. Regulation of National Banks.
390. Regulation of Rates—General Rules.
391. Regulation of Public Warehouses and Their Charges—Munn v. Illinois.
392. Regulation of Gas Rates—Method of Valuation—Penalty—Equity—Injunction.
393. Regulation of Water Rates—Obligation of Contracts—Due Process of Law—Equal Protection of Laws—Reservation of Power to Amend.
394. Regulation of Water Rates Continued—Obligation of Contracts—Defense That Franchise Has Expired.
395. Regulation of Water Rates Continued—Illustrative Decisions.
396. Regulation of Ferry Fares and Tolls.
397. Regulation of Rates or Tolls of Turnpike Companies—Due Process of Law—Power of Courts.
398. Regulation of Fares—Street Railways—Obligation of Contract.
§ 399. Regulation of Fares—Street Railways Continued—Constitutional Law—Contract with Company—Alteration.
400. Regulation of Rates—Railroads.
401. Regulation of Rates—Railroads—Power of Railroad and Like Commissioners.
402. Railroads—Regulation of Rates by Congress—Reservation of Right to Alter or Amend.
403. Object of Interstate Commerce Act—Powers and Jurisdiction of Interstate Commerce Commission.
404. Regulation of Rates—Railroads—Interstate Commerce—Taxation of Freight or Passengers.
405. Regulation of Rates—Railroads—Non-user of Legislative Power—Lessee.
406. Regulation of Rates—Railroads—Reasonableness of Rates—Confiscatory Rates—Due Process of Law—Equal Protection of Laws.
407. Railroads—Unreasonable Rate Regulation—Judicial Inquiry—Due Process of Law—Equal Protection of the Laws.

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§ 408. Railroad—Rates Fixed by Legislative Action Presumed Reasonable—Railroad Commission — Due Process of Law.
409. Railroads—Test of Reasonableness of Rates Prescribed by State—Practice —Findings.
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411. Railroad—Arbitrary Regulation of Rates—Mileage Tickets—Discrimination — Due Process of Law—Equal Protection of the Laws.
412. Right of Carrier to Fix Rates —To What Extent Legislative Power Affected Thereby — Exemptions — Right to Create Railroad Commission — Power to Amend, etc., Successor Company—Obligation of Contracts.
§ 413. Right of Carrier to Fix Rates —Basis Upon Which Fixed.
414. Right of Carrier to Fix Rates in Competition—Long and Short Hauls—Discrimination.
415. Right of Carrier to Fix Rates in Competition Continued —Interstate Commerce—Presumption of Good Faith —Discrimination.
416. Railroad Rates — Excessive Penalties—Equal Protection of Law.

§ 388. Regulation of Gas and Water Companies—Police Power.[1]—In granting the exclusive franchise to supply gas to a municipality and its inhabitants, a state legislature does not part with the police power and duty of protecting the public health, the public morals and the public safety, as one or the other may be affected by the exercise of that franchise by the grantee.[2] And it constitutes a proper exercise by the legislature of the police power to regulate the pressure of natural gas in pipes although such exercise of power should not amount to oppression.[3] So where a court has jurisdiction over such matters it may direct a company to lay its pipes for natural gas below the surface of the ground.[4] Where a state statute pro-

[1] See §§ 16, 82-84, 160, 186, 194, 198, 374, herein, as to franchises, etc., of gas and natural gas companies.

[2] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252.

[3] Jamieson v. Indiana Nat. Gas. & O. Co., 128 Ind. 555, 12 L. R. A. 652, 28 N. E. 76, 10 Ry. & Corp. L. J. 163, 44 Alb. L. J. 145. Examine as to principle involved Consolidated Gas Co. v. City of New York (C. C.), 157 Fed. 849, considered under § 392, herein, and note as to regulation of pressure of gas.

[4] Kiskiminetas Township v. Cone-

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vided: "That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well; and thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles," it was held that such enactment did not violate the Federal Constitution; and its enforcement as to persons whose obedience to its commands were coerced by injunction, did not constitute a taking of private property without adequate compensation, and did not amount to a denial of due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution, but was only a regulation by the State of a subject especially within its lawful authority.[5] A State may also limit the right of eminent domain to such gas and oil corporations as are doing business with and furnishing supplies to customers within that State, and such exercise of power does not constitute an interference with interstate commerce.[6] But a State may not interfere with interstate commerce by enactments which substantially prevent the transportation of natural gas beyond the state limits where such legislation is not a police regulation.[7]

§ 389. **Regulation of National Banks.**[8]—Congress having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the ex-

maugh Gas Co., 14 Pa. Super. Ct. 67. See §§ 171 *et seq.*, herein.

[5] Ohio Oil Co. v. Indiana (No. 1), 177 U. S. 190, 44 L. ed. 429, 20 Sup. Ct. 576; Ind. Act, March 4, 1893.

[6] Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505.

[7] Benedict v. Columbus Construction Co. (N. J. Ch.), 23 Atl. 485, 35 Am. & Eng. Corp. Cas. 637.

[8] See §§ 18, 69, 126, herein, as to franchises, etc., of banks.

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ercise of their operations.[9] States have no power to enact legislation contravening Federal laws for the control of national banks, but such banks are, for actions against them in law or in equity, deemed citizens of the State in which they are located, and the Federal courts have such jurisdiction only as they have in cases between individual citizens of the same States.[10] Again, while a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction, and it may declare, by special laws, certain acts to be criminal offenses when committed by officers and agents of its own banks and institutions, it is without lawful power to make such special laws applicable to banks organized and operated under the laws of the United States. So Congress having dealt directly with the insolvency of national banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital, and full and adequate provision having been made for the protection of creditors of national banks by requiring frequent reports to be made of their condition, and by the power of visitation of Federal officers, it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government.[11] The doctrine, however, which exempts the instrumentalities of the Federal government from the influence of state legislation, is not founded on any express provision of the Constitution, but in the implied necessity for the use of such instruments by the Federal government. It is, therefore, limited by the principle that state legislation, which does not impair the usefulness or capability

[9] Easton v. Iowa, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. ed. 452.

[10] Guthrie v. Harkness, 199 U. S. 148, 50 L. ed. —, 26 Sup. Ct. —.

As to "citizens" see § 67, herein.

[11] Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. 288. Examine Farmers' Deposit Nat. Bank v. Western Pennsylvania Fuel Co., 215 Pa. 115, 64 Atl. 374.

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of such instruments to serve that government, is not within the rule of prohibition. And a state law requiring the national banks to pay a tax which is rightfully laid on the shares of its stock is valid under this limitation of the doctrine.[12] But the proposition that it is only when a state law incapacitates a national bank from discharging its duties to the government that it becomes unconstitutional, and the other proposition that national banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States, although distinct propositions, are nevertheless harmonious.[13]

§ 390. **Regulation of Rates—General Rules.**[14]—We have seen that the state legislature has power to regulate public service corporations within constitutional limitations, and it may be stated here that the rates to be charged by such corporations may, within such limitations, be prescribed by the legislature either directly or by delegation of the power to proper subordinate bodies or appropriate agencies, provided that the rates so fixed are such as to afford a reasonable compensation for the service rendered; property must not be confiscated by an unreasonable rate regulation; what constitutes a reasonable compensation or rate is, however, a question which must be decided in each particular case as no rule can be stated as a basis applicable to all cases; although the courts may determine whether the rate fixed by legislative authority is a reasonable one, still they have no power to fix rates for the future.[15] These rules will be more fully considered and illustrated under the sections next following in this chapter.

[12] National Bank v. Commonwealth, 9 Wall. (76 U. S.) 353, 19 L. ed. 701.

[13] McClellan v. Chipman, 164 U. S. 347, 41 L. ed. 461, 17 Sup. Ct. —, aff'g, on the first point, National Bank v. Commonwealth, 9 Wall. (76 U. S.) 353, 19 L. ed. 701, and, on the second point, Davis v. Elmira Savings Bank, 161 U. S. 275, 40 L. ed. 777, 16 Sup. Ct. 641.

[14] See § 369, herein.

[15] **United States:** Milwaukee R. & L. Co. v. Milwaukee, 87 Fed. 577; Old Colony Trust Co. v. Atlanta, 83 Fed. 39; New Memphis Gas Light Co. v. City of Memphis, 72 Fed. 952; Ames v. Union Pacific Ry. Co., 64

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§ 391. Regulation of Public Warehouses and Their Charges—Munn v. Illinois.[16]—The State has power to fix the maximum charges for receiving, elevating, storing and discharging grain and to regulate warehouses, and such enactments are not unconstitutional as an interference with interstate commerce. In the well-known case of Munn v. Illinois,[17]

Fed. 165; Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679. (Other United States cases are specially considered throughout this chapter.)

California: Redlands L. & C. Domestic Water Co. v. Redlands, 121 Cal. 312.

Colorado: Leadville Water Co. v. City of Leadville, 22 Colo. 297.

Illinois: Chicago, Burlington & Quincy Ry. Co. v. Jones, 149 Ill. 361, 24 L. R. A. 141; Clinton Electric Light, H. & P. Co. v. Snell, 95 Ill. App. 552; People's Gas Light & Coke Co. v. Hale, 94 Ill. App. 406.

Iowa: Des Moines v. Des Moines Waterworks Co., 95 Iowa, 348; Burlington, C. R. & N. R. Co. v. Day, 82 Iowa, 312, 12 L. R. A. 436.

Kentucky: Louisville & N. R. Co. v. Comm., 99 Ky. 132, 33 L. R. A. 20.

Massachusetts: Turner v. Revere Water Co., 171 Mass. 329; Opinion of Justices, 150 Mass. 592.

Michigan: Alpena Electric Co. v. City of Alpena, 130 Mich. 413; Mitchell v. City of Negaunee, 113 Mich. 359; Pingree v. Mutual Gas Co., 107 Mich. 156.

Minnesota: St. Paul Gas Light Co. v. City of St. Paul, 91 Minn. 521.

Mississippi: Gould v. Edison Electric Illum. Co., 29 Miss. 242.

Missouri: State v. Allen, 178 Mo. 555; State v. Laclede Gas Light Co., 102 Mo. App. 472.

Nebraska: Wabaska Electric Co. v. City of Wymore, 60 Neb. 199.

North Carolina: Leavell v. Western Union Teleg. Co., 116 N. C. 211, 5 Am. Elec. Cases, 689, 21 S. E. 391; State, Railroad Commission, v. Western Union Teleg. Co., 113 N. C. 213, 4 Am. Elec. Cases, 586, 18 S. E. 389.

Ohio: Hamilton & Dayton R. Co. v. Bowling Green, 57 Ohio St. 336; Cincinnati Gas Light & Coke Co. v. Avondale, 43 Ohio St. 257.

Pennsylvania: Brymer v. Butler Water Co., 179 Pa. 231.

Wisconsin: Shepard v. Milwaukee Gas Light Co., 6 Wis. 539.

As to rates and charges in the case of telegraph and telephone, etc., companies using electricity, see Joyce on Electric Law (2d ed.), §§ 57, 518–527*b*, 783*d*.

Power of municipality to regulate and fix charges for telephone companies—Police power—Validity of ordinance—Obligation of contract—Equal protection of laws—Unlawful discrimination, see Home Telep. & Teleg. Co. v. City of Los Angeles (C. C.), 155 Fed. 554.

Franchise as property, see §§ 25–29, 35, 36, herein.

As to obligation of contracts and reservation of power to alter or amend, see §§ 317 *et seq.*, herein.

[16] See §§ 113, 161, herein, as to storage and elevator companies and grain and warehouse commission. See also §§ 369, 390, herein.

[17] 94 U. S. 113, 24 L. ed. 77.

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which has been extensively cited, quoted from, and relied upon, a statute of Illinois prescribed charges for warehouses and the validity of the statute was in question. The following points were decided: (1) Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property. (2) In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold. (3) Down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property, necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation. (4) When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use. He may withdraw his grant by discontinuing the use. (5) The limitation by legislative enactment of the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle in the law but only gives a new effect to an old one. (6) Where warehouses are situated and their business is carried on exclusively within a State, she may, as a matter of domestic concern, prescribe regulations for them, notwithstanding they are used as instruments by those engaged in interstate, as well as in state, commerce; and, until Congress acts in reference to their interstate relations, such regulations can be enforced, even though they may indirectly operate upon commerce be-

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yond her immediate jurisdiction. (7) The court does not hold that a case may not arise in which it may be found that a State has, under the form of regulating her own affairs, encroached upon the exclusive domain of Congress in respect to interstate commerce. (8) The ninth section of the first article of the Constitution of the United States operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs. (9) The act of the General Assembly of Illinois, entitled: "An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the constitution of this State," [18] is not repugnant to the Constitution of the United States.[19] In another case an act of the legislature of

[18] Approved April 25, 1871.

[19] Another point was decided in this case and is stated in § 297, herein.

This case is explained on *first point* in Dobbins v. Los Angeles, 195 U. S. 223, 235, 25 Sup. Ct. 18, 49 L. ed. 169, cited to same point in Minneapolis & St. Louis Rd. Co. v. Minnesota, 186 U. S. 257, 261, 46 L. ed. 1151, 22 Sup. Ct. 900; Mugler v. Kansas, 123 U. S. 623, 660, 31 L. ed. 205, 8 Sup. Ct. 273; Home Teleph. & Teleg. Co. v. City of Los Angeles (C. C.), 155 Fed. 554, 561; Perkins v. Northern Pac. Ry. Co. (C. C.), 155 Fed. 445, 453; Muskogee Nat. Teleph. Co. v. Hall, 118 Fed. 382, 386. Cited to *second point* in Minneapolis & St. Louis Rd. Co. v. Minnesota, 186 U. S. 257, 261, 22 Sup. Ct. 900, 46 L. Ed. 1151; Lake Shore & M. S. Ry. Co. v. Smith, 173 U. S. 684, 696, 19 Sup. Ct. 565, 43 L. ed. 858; Interstate Commerce Comm. v. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479, 500, 42 L. ed. 243, 17 Sup. Ct. 896; Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, 213, 38 L. ed. 962, 14 Sup. Ct. 1087; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 461, 33 L. ed. 970, 10 Sup. Ct. 462 (in dissenting opinion); Georgia R. R. & Banking Co. v. Smith, 128 U. S. 174, 180, 9 Sup. Ct. 47, 32 L. ed. 377; Dow v. Beidelman, 125 U. S. 680, 686, 8 Sup. Ct. 1028, 31 L. ed. 861; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 564, 30 L. ed. 244, 7 Sup. Ct. 4. Distinguished in Railroad Commission Cases (Stone v. Farmers' Loan & Tr. Co.), 116 U. S. 307, 330, 29 L. ed. 636, 6 Sup. Ct. —. Cited in Spring Valley Waterworks v. Schottler, 110 U. S. 347, 354, 28 L. ed. 173, 4 Sup. Ct. 48; Ruggles v. Illinois, 108 U. S. 526, 531, 535, 536, 2 Sup. Ct. 832, 27 L. ed. 812; Sinking Fund Cases (Union Pacific R. Co. v. United States and Central Pacific R. Co. v. Gallatin), 99 U. S. 700, 747, 25 L. ed. 496 (in dissenting opinion); Burlington v. Beasley, 94 U. S. 310, 314, 24 L. ed. 161; Stone v. Wisconsin, 94 U. S. 181, 185, 24 L. ed. 102 (in dissenting opinion); Winona & St. Peter R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99; Peik v. Chicago & N. W. Ry. Co., 94 U. S. 164, 176, 178, 24

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New York [20] provided that the maximum charge for elevating, receiving, weighing and discharging grain should not exceed five-eighths of one cent a bushel; and that, in the process of handling grain by means of floating and stationary elevators,

L. ed. 97; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 161, 24 L. ed. 94; Home Teleph. & Teleg. Co. v. City of Los Angeles (C. C.), 155 Fed. 554, 569; Perkins v. Northern Pac. Ry. Co. (C. C.), 155 Fed. 445, 453. Cited to *third point* in Railroad Commission Cases (Stone v. Farmers' Loan & Tr. Co.), 116 U. S. 307, 335, 29 L. ed. 636, 6 Sup. Ct. —; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 354, 28 L. ed. 173, 4 Sup. Ct. 48. Cited to *fourth point* in Louisville & Nashville Rd. Co. v. West Coast Naval Stores Co., 198 U. S. 483, 500, 25 Sup. Ct. 745, 49 L. ed. 1135; Louisville & Nashville R. Co. v. Kentucky, 161 U. S. 677, 696, 16 Sup. Ct. 714, 40 L. ed. 849; Budd v. New York, 143 U. S. 517, 548, 12 Sup. Ct. 468, 36 L. ed. 247 (in dissenting opinion); Civil Rights Cases, 109 U. S. 3, 41, 27 L. ed. 835, 3 Sup. Ct. 18 (in dissenting opinion); Weems Steamboat Co. v. People's Steamboat Co., 141 Fed. 454, 456; West Coast Naval Stores Co. v. Louisville & N. R. Co. (C. C. A.), 121 Fed. 645, 650. Cited to *fifth point* in Dow v. Beidelman, 125 U. S. 680, 686, 8 Sup. Ct. 1028, 31 L. ed. 841; Home Teleph. & Teleg. Co. v. City of Los Angeles (C. C.), 155 Fed. 554, 569. Cited to *sixth point* in Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, 213, 38 L. ed. 962, 14 Sup. Ct. 1087; Brass v. Stoeser, 153 U. S. 391, 399, 38 L. ed. 757, 14 Sup. Ct. 857; Hall v. De Cuir, 95 U. S. 485, 487, 24 L. ed. 547; Globe Elevator Co. v. Andrew (C. C.), 144 Fed. 871, 879. Cited to *seventh point* in Kidd v. Pearson, 128 U. S. 1, 23, 32 L. ed. 346, 9 Sup. Ct. 6. Cited to *eighth point* in Johnson v. Chicago & Pac. Elevator Co., 119 U. S. 388, 400, 7 Sup. Ct. 254, 30 L. ed. 447; Morgan's Steamship Co. v. Louisiana Board of Health, 118 U. S. 455, 467, 6 Sup. Ct. 1114, 30 L. ed. 237.

The principal case (Munn v. Illinois) is also cited in Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. 30. While we have considered this case in § 110, herein, the following is pertinent here in connection with the principal case, since the court, per Brewer, J., basing its language upon the rule laid down in that case, says: "It may be conceded that the State has the power to make reasonable regulation of the charges for services rendered by the stock yards company. Its stock yards are situated at one of the gateways of commerce, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and therefore must be considered as subject to governmental regulation. But to what extent may this regulation go? Is there no limit beyond which the State may not interfere with the charges for services either of those who are engaged in performing some public

[20] Laws 1888, chap. 581.

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the lake vessels or propellers, the ocean vessels or steamships, and canal-boats, should only be required to pay the actual cost of trimming or shovelling to the leg of the elevator when unloading, and trimming cargo when unloading. It was held

service, or of those who, while not engaged in such service have yet devoted their property to a use in which the public has an interest? And is the extent of governmental regulation the same in both of these classes?" *Id.*, 85. The court then states the second point in the above text and reviews other cases at some length.

"To this day statutes are to be found in many of the States upon some or all these subjects [those in point 2 in above text] and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington 'to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread,' 3 Stat. 587, sec. 7; and, in 1848, 'to make all necessary regulations respecting hackney carriages, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers,' 9 *id.* 224, § 2. * * * This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise, *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. * * * And the same has been held as to warehouses and warehousemen. In Aldnutt v. Inglis, 12 East, 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing act, to receive wines from importers before the duties upon the importations were paid; and the question was, whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. Upon this point Lord Ellenborough said (p. 537):

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in the United States Supreme Court that the act was a legitimate exercise of the police power of the State over a business affected with a public interest, and did not violate the Constitution of the United States, and was valid.[21]

'There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them, for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is, by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the old wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf.' * * * Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney coachman, pursues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very 'gateway of commerce,' and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use.' Every bushel of grain for its passage 'pays a toll, which is a common charge,' and, therefore, according to Lord Hale, every such warehouseman 'ought to be under public regulation, viz., that he * * * take but reasonable toll.' Certainly, if any business can be clothed 'with a public interest, and cease to be *juris privati* only,' this has been. It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts. * * * Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no

[21] Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247. See § 113, herein.

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§ 392. Regulation of Gas Rates—Method of Valuation—Penalty—Equity—Injunction.[22]—The rules above stated [23] apply to gas rates, or charges for furnishing gas.[24] But a municipal corporation has no power to fix the price or regulate the rates for gas to be supplied to consumers unless such power is expressly delegated to it by the State or it can be implied necessarily from the powers expressly granted.[25] In an important case in the Federal court certain points in relation

attempt to compel these owners to grant the public an interest in their property, but to declare their obligations if they use it in this particular manner. * * * It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use. * * * We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts." Munn v. Illinois, 94 U. S. 113, 125, 127, 131, 133, 134, 24 L. ed. 77, 84, 86, per Waite, C. J.

[22] See §§ 16, 17, 82–84, 186, 198, herein, as to franchises, rates, etc., of gas companies.

[23] See § 390, herein.

[24] Madison, City of, v. Madison Gas & Electric Co., 129 Wis. 249, 108 N. W. 65. See Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48, also citations under note to § 390, herein.

Maximum rate fixed so low as to destroy property rights constitutes taking property without due process of law. Brooklyn Union Gas Co. v. City of New York, 100 N. Y. Supp. 570, 50 Misc. 450.

[25] Mills v. City of Chicago, 127 Fed. 731; Richmond, City of, v. Richmond Natural Gas Co. (Ind., 1907), 79 N. E. 1031. See Pryor, In re, 55 Kan. 724, 49 Am. St. Rep. 280, 41

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to franchises and equity jurisdiction are decided as follows: (1) In a suit by a gas company to enjoin the enforcement of a statute or regulation fixing the rate to be charged by such company for gas as unreasonable and confiscatory, where the company operates under a franchise, is required by law to furnish gas to all who demand it, and enjoys a practical monopoly in the territory in which it serves, it has no good will in a property sense, aside from its franchise, which can be considered as property invested in its business. (2) Under the settled rule of decision, however, that if property protected by a franchise is condemned and wholly taken from its owner the franchise must be paid for, such a state regulation reducing the earning power of property so protected reduces the value of the franchise *pro tanto*, and the complainant is entitled to add the value of its franchises, if ascertainable, to its capital account before declaring the rate of return permitted by the statute. (3) Complainant having followed the universal custom of American corporations, sanctioned by law, of capitalizing its franchises on its organization by issuing stock in excess of its actual investment in tangible property, and having since then earned fair dividends on all its stock, the amount of such excess stock may fairly be taken as the value of its franchises at the time of issuance, and where its business has largely increased such value may be assumed to have increased since that time in proportion to the increase of its tangible property. (4) Where the complainant on its organization pur-

Pac. 958, 29 L. R. A. 398, 12 Am. R. & Corp. Rep. 364.

Right exists in city to fix maximum rates for natural gas when statute in effect so authorizes. Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853.

Effect of acceptance of ordinance fixing rate (see Noblesville, City of, v. Noblesville Gas & Improvement Co., 157 Ind. 162, 60 N. E. 1032) for certain period of time. See Logan Natural Gas Co v. City of Chillicothe, 65 Ohio St. 186, 62 N. E. 122.

Presumed that rates charged are reasonable and need not be alleged that they are so. Noblesville, City of, v. Noblesville Gas & Improvement Co., 157 Ind. 162, 60 N. E. 1032. See § 405, herein.

Exemption from change of rates and loss of rights by consolidation. See People's Gas Light & Coke Co. v. Chicago, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. 520. See § 412, herein.

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chased the property and franchises of existing gas companies, and has since enjoyed and operated under such franchises, it acquired the legal ownership thereof under the decisions of the Court of Appeals of New York, and notwithstanding the fact that the original grantees have ceased to exist, it is, for the purpose of an inquiry into the legality of a state statute regulating its rates of charge, entitled to capitalize their value, especially where the State has during such time compelled it to pay a franchise tax based thereon. (5) The provisions of the New York statutes subjecting any gas company furnishing or selling gas in the city of New York to a penalty of one thousand dollars for every violation of their provisions respecting equipment, pressure, or rates of charge therein fixed is extravagant and unreasonable in its severity, and renders such statutes unconstitutional and void as a denial to such companies of the equal protection of the laws. (6) The fact that the regulation of rates to be charged by a public service corporation is made by a direct legislative act of a State, and not by a subordinate body, does not affect the jurisdiction or power of a court of the United States or of a State to inquire into its constitutionality. (7) A suit in equity may be maintained to enjoin the enforcement of an unconstitutional legislative act, the failure to comply with which would subject complainant to innumerable suits for penalties.[26] In addition to the points as to the valuation of franchises above stated, concerning which the court said: "The most important and novel question is whether a public service corporation is entitled to add the value of its franchise to the assets from which a fair return may be lawfully demanded," [27] it was held: (a) In a suit by a gas company to restrain the enforcement of a state statute regulating the price of gas as confiscatory and

[26] Syllabus in Consolidated Gas Co. v. City of New York (C. C.), 157 Fed. 849. Case was argued in Supreme Court of United States on November 10, 1908, and points therein will be inserted as "Appendix C," herein, if decision is rendered in time therefor. Compare as to point three in text Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418, considered under § 409, herein.

[27] *Id.*, p. 872, per Hough, Dist. J.

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unconstitutional, in placing a *valuation on* complainant's *tangible property* employed in the business, on which it is entitled to earn a fair return, *the actual or reproductive value at the time of the inquiry is the true measure, without regard to the original cost.* (*b*) *Real estate owned* by the complainant, *but not used* in the business, should not be included as part of the capital invested, unless it is shown that its use will necessarily be required in the near future; nor should the *income derived from such land* be included in the earnings, nor the *taxes paid thereon* in the expenses, of the business. (*c*) The complainant is entitled to have included in its capital the *value of land* of which it claims to be the *owner*, and actually *in its possession* and used by it in the business, although its *title* may be defective or subject to defeasance; but *land in a river bed*, over which boats approach the company's works, is of no greater value to the business, because owned by the company, than if owned by the public, and cannot properly be considered as employed in the business. (*d*) The complainant is entitled to include in its capital account as *working capital* in addition to the amount of its average bills payable outstanding, only so much cash as will enable it to safely and conveniently transact its business, having regard to its average losses and its standing as to credit. (*e*) The complainant cannot legally include as a part of its capital devoted to the business of manufacturing gas, and affected by the statute regulating rates, the *value of the property or stock of a coal and coke company of which it owns the entire stock*, and which was organized by it to purchase and dispose of its by-products, nor of *another gas company* organized by it to manufacture and sell gas to it to supplement its own production; *both such companies being separate and distinct corporations*, in which its legal interest is as stockholder only. (*f*) When the *capital stock* of such complainant was issued many years prior to the time of inquiry, and *its capital is invested*, not only in its business of manufacturing and selling gas, but *also largely in the stock of other corporations*, the amount of its share capital and its value in the market are of little or no value in determining its investment in the business on

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which it is entitled to earn a reasonable return; but such investment can only be reached by a valuation of the property employed in the business. (*g*) In determining the *cost* to complainant *of the production and distribution of gas*, the cost of gas purchased by it from other companies and distributed through its pipes to supplement its own production is not a part of the expense of operation; but such purchase and distribution is a business to be separately considered. (*h*) *Amounts paid out* by complainant *as interest and penalty on taxes*, the validity of which is contested in the courts, and the *expenses of such litigation and of legislative investigation*, are extraordinary expenses, and cannot be treated as part of the permanent and average expense of the manufacture and distribution of gas, to be deducted from earnings to ascertain the net profits of the business. (*i*) In such a suit complainant is not entitled, in addition to treating the amount actually expended during the time covered by the inquiry for repairs and renewals of plant as a permanent expense, to an allowance of a percentage of the gross income to be set aside as a *reserve or contingent fund to cover depreciation of plant*, which, together with the amount so actually expended, is largely in excess of the average expenditures for such purpose during a series of years, and which have maintained the plant in as good a condition as in the beginning; but the total allowance should be based on such average. (*j*) Where complainant, having insufficient gas of its own manufacture to supply its demand, *purchased additional gas* by contract from other companies, *which it distributed through its pipes*, and it appeared from the evidence that such purchases would probably continue, the *net profits realized therefrom* should be added to its income from its own production. (*k*) In ascertaining *whether a statute or an order of a state commission* fixing the maximum rate to be charged for gas by a gas company *is unjust and unreasonable*, and such as to work a practical destruction of the rights of property, which would render it unconstitutional, *the return which the company is entitled to earn on the capital employed* in the business is not determined by the legal *rate of interest* in the State, but

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by the local rate of return ordinarily sought and obtained on investments of the same degree of safety. A company having a long-established business and practical monopoly in supplying gas in the most populous portion of New York City held, entitled, as against such a statute, to a return of six per cent.[28] A United States Circuit Court injunction restraining the enforcement of a statute fixing the maximum price of gas at a less rate than that charged by the company constitutes no bar to an action in the state court, by a consumer, to restrain the gas company from cutting off his gas supply to enforce payment, and there is nothing in the principle of comity prohibiting a state court from entertaining jurisdiction to the extent of granting such relief.[29]

§ 393. **Regulation of Water Rates—Obligation of Contracts—Due Process of Law—Equal Protection of Laws—Reservation of Power to Amend.**[30]—Statutes of a State providing that the use of all water appropriated for sale, rental or distribution shall be a public use and subject to public regulation and control, are valid. To regulate or establish rates for which water will be supplied, is, in its nature, the execution of one of the powers of the State,[31] but this power cannot be exercised arbitrarily and without reference to what is just and reasonable between the public and those who appropriate water and supply it for general use. This applies to a statute [32] making it the official duty of the board of supervisors, town

[28] Syllabus in Consolidated Gas Co. v. City of New York (C. C.), 157 Fed. 849. The italicization in the text is that of the writer. Another point was decided in the case as to the constitutionality of a statute regulating the pressure of gas, which was held a commercially impossible requirement. See § 388, herein.

[29] Richman v. Consolidated Gas Co. of New York, 186 N. Y. 209, 78 N. E. 871, aff'g 100 N. Y. Supp. 81, 114 App. Div. 216. See Grossman v. Consolidated Gas Co. of New York, 100 N. Y. Supp. 100, 114 App. Div. 242, 78 N. E. 871.

[30] See §§ 16, 17, 88, 118, 130, 173, 186, 195, 255, herein, as to franchises, rates, etc., of water companies and irrigation companies.

[31] Stanislaus Co. v. San Joaquin & King's River Canal & Irrig. Co., 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. 241; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804. See §§ 369, 390, herein.

[32] Cal. Act of March 7, 1881, c. 52.

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council, or other legislative body of any city and county, city or town, in the State, to annually fix the rates that shall be charged or collected for water furnished, and also providing for a hearing, in an appropriate way, for fixing such rates. And the judiciary ought not to interfere with the collection of such rates, so established under legislative sanction, unless they are so plainly and palpably unreasonable, as to make their enforcement equivalent to the taking of property for public use without such compensation as, under the circumstances, is just both to the owner and the public.[33] It is also held in another case that the appropriation and distribution of water is a public use, and the right to collect tolls or compensation for it is a franchise, subject to regulation and control in the manner prescribed by law, and such tolls cannot be fixed by contract of the parties.[34] The provision in the California Water Act of 1862, that county boards of supervisors should regulate water rates but could not reduce them below a certain point, does not amount to a contract with water companies which would be impaired within the meaning of the Federal Constitution by a subsequent act either reducing the rates below such point or authorizing boards of supervisors to do so; and the right of the State to regulate or establish water rates should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of the alleged contract should in both cases be equally plain;[35] or, to state this last proposition in another form, the power to regulate water rates is a governmental power continuing in its nature which, if it can be bargained away at all, can only be so done by words of positive grant, and if any reasonable doubt exists in regard thereto it must

[33] San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804. See also Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48; Salt River Canal Co. v. Nelssen (Ariz., 1906), 85 Pac. 117.

[34] Osborne v. San Diego Land & Town Co., 178 U. S. 22, 44 L. ed. 961, 20 Sup. Ct. 860. But compare San Diego Flume Co. v. Souther, 90 Fed. 164, 32 C. C. A. 548, 61 U. S. App. 134.

[35] Stanislaus Co. v. San Joaquin & King's River Canal & Irrig. Co., 192 U. S. 201, 24 Sup. Ct. 241, 48 L. ed. 406.

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be resolved in favor of the existence of the power.[36] Again, although there is a limitation to the power of amendment when reserved in the constitution or statute of a State, it is not confiscation nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of six per cent upon the then value of the property actually used, even though the company had prior thereto been allowed to fix rates securing one and a half per cent per month, and if not hampered by an unalterable contract a law reducing the compensation as above is not unconstitutional.[37]

§ 394. **Regulation of Water Rates Continued—Obligation of Contracts—Defense That Franchise Has Expired.**—Corporations organized for the purpose of supplying cities and towns and the inhabitants thereof with water are none the less subject to legislative regulation and control because they are denominated private corporations.[38] Water rates cannot be reduced by a city or its water board where such act will impair the obligation of contracts, as where a city ordinance, which is accepted by the company, authorizes agreements with consumers for rates not in excess of those specified, the municipality cannot reduce the rates to less than those so specified while such contract exists.[39] So statutes impair the obligation of contracts where they enable a city, by establishing an independent system of waterworks, fixing a scale of prices, and making certain assessments, to destroy the value of the property of a waterworks company and procure its customers through its water commissioners by other than competitive means.[40] In a suit by a corporation against a city,

[36] Owensboro v. Owensboro Waterworks Co., 191 U. S. 358, 24 Sup. Ct. 82, 48 L. ed. 217.

[37] Stanislaus Co. v. San Joaquin & King's River Canal & Irrig. Co., 192 U. S. 201, 24 Sup. Ct. 241, 48 L. ed. 406.

[38] Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 Fed. 232, 59 C. C. 236.

[39] Omaha Water Co. v. City of Omaha, 147 Fed. 1, 77 C. C. A. 267.

[40] Warsaw Waterworks Co. v. Village of Warsaw, 44 N. Y. Supp. 876,

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brought after the expiration of its franchise rights, to restrain the enforcement of an ordinance limiting the water rates to be thereafter charged, the city may show in defense that the franchise has expired, and the corporation's rights thereunder have ceased to exist.[41]

§ 395. **Regulation of Water Rates Continued—Illustrative Decisions.**—The constitution of Florida has a clause to the effect that the legislature is invested with full powers to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers and performing other public services of a public nature, and that it shall provide for enforcing such laws. In pursuance of this clause a law was passed empowering cities to prescribe by ordinance maximum reasonable charges for water, provided that the act should not impair the validity of any valid contract, or be held to validate any contract theretofore made. After the constitution, but before the act, the city of Tampa had made a contract with a water company, giving the water company the right to charge certain rates. After the act it passed an ordinance fixing lower rates, not, however, alleged to be unreasonable. The Supreme Court of Florida sustained the ordinance, reading the statute as giving the power to fix reasonable rates, when it was possible, without impairing the obligation of contracts, and the constitution as meaning that the legislature was to have an inalienable power to make such laws. It was held that this interpretation was sufficiently plausible to be followed.[42] An ordinance of a city of Kentucky before it became a city of the third class, giving a water company a right to make and enforce, as part of the conditions upon which it would supply customers, all needful rules and regulations not inconsistent with the law, must be construed as to

16 App. Div. 502, mod. and aff'd in 161 N. Y. 176, 55 N. E. 486; Skaneateles Waterworks Co. v. Village of Skaneateles, 54 N. Y. Supp. 1115, 33 App. Div. 642, aff'd in 161 N. Y. 154, 55 N. E. 562.

[41] Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa, 234, 91 N. W. 1031.

[42] Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 178, 26 Sup. Ct. 55.

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the law, as it might be altered, and when the city becomes a city of the third class and thus has power under the general law to provide the city with water by contract or by works of its own and to make regulations for the management thereof and to fix prices to consumers, an ordinance subsequently enacted during the life of the franchise, fixing the price of water, is not void as against the water company under the impairment of contract clause of the Constitution of the United States, and in the absence of other grounds the Circuit Court of the United States has no jurisdiction of a suit in equity to restrain the enforcement of such last enacted ordinance, no question of unreasonableness of the rates being involved.[43] In another case it appeared that the Knoxville Water Company was incorporated to construct waterworks near Knoxville, with power to contract with the city and inhabitants for a supply of water and "to charge such price for the same as may be agreed upon between said company and said parties;" the general act under which the company was incorporated provided that it should not interfere with or impair the police powers of the municipal authorities, and they should have power by ordinance to regulate the price of water supplied by such company. The company in 1882 contracted for an exclusive privilege for thirty years to construct works, and after fifteen years to convey to the city at a price to be agreed upon or fixed by appraisal, and to "supply private consumers at not exceeding five cents per hundred gallons." Subsequently the city passed an ordinance reducing the price of water to private consumers below that rate. In an action to enforce penalties for overcharging the later rate, it was decided that there was no contract on the part of the city to permit the charge named therein; and that the charter having been accepted subject to the provision of the general act reserving the power in the municipal authorities to regulate the price of water the subsequent ordinance was not void either as impairing the obligation of a contract, or as depriving the company of its prop-

[43] Owensboro v. Owensboro Waterworks Co., 191 U. S. 358, 24 Sup. Ct. 82, 48 L. ed. 217.

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erty without due process of law.[44] Again, the facts under still another decision were as follows: On July 22, 1868, Los Angeles City leased to Griffin and others for a named sum its waterworks for a term of thirty years and granted them the right to lay pipes in the street, and to take the water from the Los Angeles River at a point above the dam then existing, and to sell and distribute it to the inhabitants of the city, reserving the right to regulate the water rates, provided that they should not be reduced to less than those then charged by the lessees. The lessees agreed to pay a fixed rental, to erect hydrants and furnish water for public uses without charge, and at the expiration of the term to return the works to the city in good order and condition, reasonable wear and damage excepted. This contract was procured for the purpose of transferring it to a corporation to be formed, which was done. Subsequently the limits of the city were extended, and the expenses of the corporation were increased accordingly. The city subsequently established water rates below those named in the contract, and the company collected the new rates, without in any other way acquiescing in the change. This suit was brought by the company to enforce the original contract. It was held that the power to regulate rates was an existent power, not granted by the contract, but reserved from it with a single limitation, the limitation that it should not be exercised to reduce rates below what was then charged, and that undoubtedly there was a contractual element, but that it was not in granting the power of regulation, but in the limitation upon it. It was also decided that the city of Los Angeles, by its solemn contract, and for various considerations therein stated, gave to the party under whom defendant claimed the privilege of introducing, distributing and selling water to the inhabitants of that city, on certain terms and conditions, which defendant had complied with, and it was not within the power of the city authorities, by ordinance or otherwise, afterward to impose additional burdens as a condition to the exercise of

[44] Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. 537.

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the rights and privilege granted. It was further held that by acquiescing in the regulations of rates ever since 1880 the company was not estopped from claiming equitable relief, and was guilty of no laches.[45]

§ 396. **Regulation of Ferry Fares and Tolls.**[46]—The regulation of fares and tolls at a ferry between two States is not exclusively within the power of Congress to regulate commerce.[47] But it is held by the Federal Supreme Court that the transportation of passengers and freight for hire by a steam ferry across the Delaware River from New Jersey to Philadelphia by a corporation of New Jersey is interstate commerce, which is not subject to exactions by the State of Pennsylvania.[48]

§ 397. **Regulation of Rates or Tolls of Turnpike Companies—Due Process of Law—Power of Courts.**[49]—A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair and from earning any dividends whatever for stockholders, is as obnoxious to the Federal Constitution as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight. And a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the

[45] Los Angeles, City of, v. Los Angeles City Water Co., 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. 736, aff'g Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720.

[46] See §§ 15, 80, 186, 194, 201, herein, as to franchises, rates, etc., of ferries. See also §§ 369, 390, herein.

[47] Freeholders of Hudson County v. State, 24 N. J. L. 718; State v. Hudson County Freeholders, 23 N. J. L. 206. See Newport v. Taylor, 16 B. Mon. (55 Ky.) 699; Marshall v. Grimes, 41 Miss. 27; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884, 110 Mo. 557, 19 S. W. 809. Examine § 145, herein.

[48] Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. ed. 158.

[49] See §§ 17, 19, 116, 117, 199–201, herein, as to franchises, rates or tolls, etc., of turnpikes, toll roads and plank roads. See also §§ 369, 390, herein.

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State or under its direction, for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in that due process of law required by the Fourteenth Amendment.[50] There is, however, no taking of property without due process of law where it does not appear that by such reduction of rates there will be any reduction of dividends or if so, the extent thereof, and rates may be subsequently changed notwithstanding a turnpike company's charter specifies what charges may lawfully be made, with the right to increase or decrease the same as the dividends may necessitate, such specification of certain rates in the charter raising merely an inference or presumption that they are reasonable.[51] The principle may, as to this class of corporations, be reaffirmed that courts have the power to inquire whether a body of rates prescribed by a legislature is unjust and unreasonable and such as to work a practical destruction of rights of property, and if found so to be, to restrain its operation, because such legislation is not due process of law. And when a question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered; and if the establishment of new lines of transportation should cause a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation operating the road should be allowed to maintain rates that would be unjust to those who must or do use its property, but that the public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends again; the constitutional provision forbidding a denial of the equal protection of the laws, in its application to corporations

[50] Smyth v. Ames, 169 U. S. 466, 525, 42 L. ed. 819, 18 Sup. Ct. 418, per Harlan, J. (a case of regulation of railroad rates and powers of State), relying in part upon Chicago, Burlington & Quincy Rd. Co. v. Chicago, 166 U. S. 226, 241, 41 L. ed. 979, 17 Sup. Ct. 581.

[51] Winchester & L. Turnpike Road Co. v. Croxton, 98 Ky. 739, 17 Ky. L. Rep. 1299, 33 L. R. A. 177, 34 S. W. 518.

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operating public highways, does not require that all corporations exacting tolls should be placed upon the same footing as to rates; but that justice to the public and to stockholders may require in respect to one road rates different from those prescribed by other roads; and that rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road.[52]

§ 398. **Regulation of Fares—Street Railways—Obligation of Contract.**[53]—The legislative power to regulate the exercise of the franchises or the fares of a street railway company does not empower a municipality to make such a reduction of fares that the company cannot obtain a reasonable return on its investment, and if property rights are invaded to that extent such reduction constitutes a violation of the Federal Constitution.[54] Nor can the company be required to carry passengers without reward, or at such a reduced rate of fare as will substantially confiscate or take away property without compensation or due process of law.[55] It is held that conditions may be imposed by a commissioner of highways, in granting consent to lay tracks on town highways, for transportation between certain points at a specified fare and also for transfers to connecting lines;[56] and a company is obligated by such conditions

[52] Covington & Lexington Turnpike R. Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 510.

[53] See §§ 14, 17, 111, 112, 188, 197, 337, 338, 387, herein, as to franchises, fares, etc., of street railways.

[54] Milwaukee R. & L. Co. v. Milwaukee (C. C.), 87 Fed. 577. See §§ 369, 390, 400, herein.

[55] Indianapolis v. Navin, 151 Ind. 139, 41 L. R. A. 337, 14 Nat. Corp. Rep. 774, 47 N. E. 525, rehearing denied in 151 Ind. 156, 30 Chic. Leg. N. 414, 51 N. E. 80, 41 L. R. A. 344, 5 Det. L. N., No. 19.

Municipality may regulate rates of fare on electric railways. See Joyce on Electric Law (2d ed.), § 518.

When city may not reduce fares. See Joyce on Electric Law (2d ed.), § 519.

Ordinance as to "labor tickets" at reduced rate and transfers—When a contract. See Joyce on Electric Law (2d ed.), § 519a.

Federal Constitution—Street railroad—Rates of fare. See Joyce on Electric Law (2d ed.), § 519b.

Power of legislature to reduce rates of fare, on street railroad, for students during summer months. See Joyce on Electric Law (2d ed.), § 519c.

[56] Gaedeke v. Staten Island M. R. Co., 60 N. Y. Supp. 598, 43 App. Div. 514, rehearing denied in 61 N. Y. Supp. 290, 46 App. Div. 219.

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or regulations, so imposed in granting a franchise, where its line is operated in compliance therewith.[57] So a contractual relation exists, based upon a sufficient consideration, and the company is bound to carry passengers free of charge within certain limits, where that condition is imposed in the grant of a franchise by a municipality through which it was interested in getting its line of street railway and had deposited checks to evidence its good faith in constructing such line in pursuance of the grant.[58] If the franchise granted by a township provides for the sale of trip tickets at a reduced rate between a city without and a village within the township, such sale of tickets may be made at any point on the line within or outside of the township granting the franchise.[59] Where a statute authorizes a street railroad company to charge as much as five cents fare, even though it reserves the right to amend or repeal the enactment, still it cannot, as to a company organized thereunder, be altered by provisions which would make the statute unconstitutional in its entirety.[60] In a case in the Federal Supreme Court it is held that a consolidated ordinance of the city of Cleveland, and ordinances thereafter passed by the municipality and accepted by certain street railway companies, constituted such binding contracts in respect to the rate of fare to be exacted upon the consolidated and extended lines of the railway companies as to deprive the city of its rights to exercise the reservations in the original ordinances as to changing the rates of fare; and a subsequent ordinance reducing the rate of fare to be charged was declared to be void and unconstitutional within the impairment clause of the Constitution of the United States. It was also decided in the same case that the passage by the municipality of an ordinance affecting franchises, already granted by prior ordinances

[57] Virginia Passenger & Power Co. v. Commonwealth, 103 Va. 644, 49 S. E. 995.

[58] Hattersley v. Village of Waterville, 26 Ohio Cir. Ct. R. 226.

[59] Rice v. Detroit, Y. & A. Ry. Co., 122 Mich. 677, 48 L. R. A. 84, 81 N. W. 927.

[60] Central Trust Co. v. Citizens' St. R. Co. (C. C.), 82 Fed. 1, 29 Chicago Leg. N. 417, 14 Nat. Corp. Rep. 770, dismissed in 83 Fed. 529, 15 Nat. Corp. Rep. 529.

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amounted to an assertion that the legislative authority vested in it to pass the original ordinance gave it the continued power to pass subsequent ordinances, and it could not assail the jurisdiction of the Circuit Court on the ground that its action in impairing the contracts which resulted from prior ordinances was not an action by authority of the State.[61]

§ 399. **Regulation of Fares—Street Railways Continued —Constitutional Law—Contract with Company—Alteration.**[62]—There can be no question as to the competency of a state legislature, unless prohibited by constitutional provisions, to authorize a municipal corporation to contract with a street railway company as to the rate of fares, and so to bind, during the specified period, any future common council from altering or in any way interfering with such contract. Such a contract having once been made, the power of the city over the subject, so far as altering the rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract. So where binding agreements have been made and entered into, between a city on the one side and certain street railway companies on the other, relating to rates of fare, such agreements cannot be altered without the consent of both sides; those binding agreements constitute a contract as to the rates, equally binding with that in regard to taxes. The rate of fare in such case having been fixed by positive agreement, under express legislative authority, the subject is not open to alteration thereafter by the common council alone, under the right to prescribe from time to time the rules and regulations for the running and operation of the road; especially so where the

[61] Cleveland, City of, v. Cleveland Ry. Co., 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. 756. Followed in Cleveland v. Cleveland Electric Ry. Co., 201 U. S. 529, 26 Sup. Ct. 513, 50 L. ed. 854. As to the power of the city council of Cleveland to pass ordinances diminishing the rate of fare on street railroads in view of the contracts contained in prior ordinances passed in regard to street railways, compare Railroad Commission Cases (Stone v. New Orleans & Northwestern Rd. Co., 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. 334, considered in § 412, herein.

[62] See § 390, herein.

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language of an ordinance, which provides that the rate of fare for one passenger shall not be more than five cents, does not give any right to the city to reduce it below the rate of five cents established by the company. And where the fixing of rates was among the vital portions of such agreement between the parties, it cannot be supposed that there was any intention to permit the common council, in its discretion, to make an alteration which might be fatal to the pecuniary success of the company.[63] If a street railway corporation takes a legislative charter subject to all duties and restrictions set forth in all general laws relating to corporations of that class, it cannot complain of the unconstitutionality of a prior enacted statute compelling it to transport children attending public schools at half price.[64]

[63] Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. 410. See § 412, herein.

[64] Interstate Consolidated Street Ry. Co. v. Commonwealth of Massachusetts, 207 U. S. 79, 28 Sup. Ct. 26, aff'g 187 Mass. 436. As appears from the headnotes to the official report, only two points were decided in this case, one of which is stated in the above text and the other in § 243, herein, but the court also discussed another point, viz., that of discrimination, and evidently there was some question as to the sufficiency of the proof. Both of these factors will appear from the following quotation from the opinion of the court, delivered by Holmes, J., as follows: "This was a complaint against the plaintiff in error for refusing to sell tickets for the transportation of pupils to and from the public schools at one-half the regular fare charged by it, as required by Mass. Rev. Laws, c. 112, § 72. At the trial the railway company admitted the fact, but set up that the statute was unconstitutional, in that it denied to the company the equal protection of the laws and deprived it of its property without just compensation and without due process of law. In support of this defense it made an offer of proof which may be abridged into the propositions that the regular fare was five cents; that during the last fiscal year the actual and reasonable cost of transportation per passenger was 3.86 cents, or, including taxes, 4.10 cents; that pupils of the public schools formed a considerable part of the passengers carried by it, and that the one street railway expressly exempted by the law transported nearly one-half the passengers transported on street railways and received nearly one-half the revenue received for such transportation in the commonwealth. The offer was stated to be made for the purpose of showing that the plaintiff in error could not comply with the statute without carrying passengers for less than a reasonable compensation and for less than cost. The offer of proof was rejected, and a ruling that the statute was repugnant to the

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§ 400. **Regulation of Rates—Railroads.**[65]—The rules given under a preceding section as to regulation of rates [66] apply in the case of railroads as to business wholly intrastate;[67] but it may also be stated here that where property has been clothed

Fourteenth Amendment was refused. The plaintiff in error excepted and, after a verdict of guilty and sentence, took the case to the Supreme Judicial Court. 187 Massachusetts, 436. That court overruled the exceptions, whereupon the plaintiff in error brought the case here. * * * The section of the revised laws (c. 112, § 72) was a continuation of St. 1900, c. 197, Rev. Laws, c. 226, § 2. Commonwealth v. Auselvich, 186 Massachusetts, 376, 379, 380. The act of incorporation went into effect March 15, 1901, St. 1901, c. 159. * * * The discrimination alleged is the express exception from the act of 1900 of the Boston Elevated Railway Company and the railways then owned, leased or operated by it. But, in the first place, this was a legislative adjudication concerning a specific road, as in Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. 616, not a general prospective classification as in Martin v. District of Columbia, 205 U. S. 135, 138, 51 L. ed. 743, 27 Sup. Ct. 440. A general law must be judged by public facts, but a specific adjudication may depend upon many things not judicially known. Therefore the law must be sustained on this point unless the facts offered in evidence clearly show that the exception cannot be upheld. But the local facts are not before us, and it follows that we cannot say that the legislature could not have been justified in thus limiting its action. Covington v. Lexington Turnpike Road Co. v. Sandford, 164 U. S. 578, 579, 598, 41 L. ed. 560, 17 Sup. Ct. 198. In the next place, if the only ground were that the charter of the Elevated Railway contained a contract against the imposition of such requirement, it would be attributing to the Fourteenth Amendment an excessively nice operation to say that the immunity of a single corporation prevented the passage of an otherwise desirable and wholesome law. It is unnecessary to consider what would be the effect on the statute by construction in Massachusetts if the exception could not be upheld. For, if in order to avoid the Scylla of unjustifiable class legislation, the law were read as universal (see Dunbar v. Boston & Providence R. R. Co., 181 Massachusetts, 383, 386), it might be

[65] See §§ 14, 17, 97–107, 129, 166–170, 184, 247, 255, 256, 322, 381–386, herein, as to franchises, fares, regulation, etc., of railroads.

[66] See § 390, herein. See also §§ 369, 398, herein.

[67] That State has right to fix rates for railroad companies, see also Lake Shore & M. S. Ry. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858 [rev'g Smith v. Lake Shore & M. S. Ry. Co., 114 Mich. 460, 72 N. W. 328, 4 Det. L. N. 662, 8 Am. & Eng. R. Cas. (N. S.) 496], per Peckham, J.; Perkins v. Northern Pac. Ry. Co. (C. C.), 155 Fed. 445, 453.

As to interstate commerce limitations upon state regulations, see § 402, herein.

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with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use.[68] Railroad companies are carriers for hire. Engaged in a public employment affecting the public interest, they are, unless protected by their

thought by this court to fall into the Charybdis of impairing the obligation of a contract with the elevated road, although that objection might perhaps be held not to be open to the plaintiff in error here. Hatch v. Reardon, 204 U. S. 152, 160, 27 Sup. Ct. 188, 51 L. ed. 415. The objection that seems to me, as it seemed to the court below, most serious is that the statute unjustifiably appropriates the property of the plaintiff in error. It is hard to say that street railway companies are not subjected to a loss. The conventional fare of five cents presumably is not more than a reasonable fare, and it is at least questionable whether street railway companies would be permitted to increase it on the ground of this burden. It is assumed by the statute in question that the ordinary fare may be charged for these children or some of them when not going to or from school. Whatever the fare, the statute fairly construed means that children going to or from school must be carried for half the sum that would be reasonable compensation for their carriage, if we looked only to the business aspect of the question. Moreover, while it may be true that in some cases rates or fares may be reduced to an unprofitable point in view of the business as a whole or upon special considerations, Minneapolis & St. Louis R. R. Co. v. Minnesota, 186 U. S. 256, 267, 46 L. ed. 1151, 22 Sup. Ct. 900, it is not enough to justify a general law like this, that the companies concerned still may be able to make a profit from other sources, for all that appears. Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 24, 25, 51 L. ed. 933, 27 Sup. Ct. 585. Notwithstanding the foregoing considerations I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power. The obverse way of stating this power in the sense in which I am using the phrase would be that constitutional rights like others are matters of degree and that the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some at least of the purposes of wholesome legislation. Martin v. District of Columbia, 205 U. S. 135, 139, 51 L. ed. 743, 27 Sup. Ct. 450; Camfield v. United States, 167 U. S. 518, 524, 42 L. ed. 260, 17 Sup. Ct. 864. If the Fourteenth Amendment is not to be a greater hamper upon the established practices of the States in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amend-

[68] Peik v. Chicago & Northwestern, etc., Ry. Co., 94 U. S. 164, 24 L. ed. 97.

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charters, subject to legislative control as to their rates of fare and freight;[69] a legislature has power to fix rates for the trans-

ment was passed. Education is one of the purposes for which what is called the police power may be exercised. Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 5 Sup. Ct. 507. Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or workingmen, or people who could afford to buy 1000-mile tickets. Structural habits count for as much as logic in drawing the line. And, to return to the taking of property, the aspect in which I am considering the case, general taxation to maintain public schools is an appropriation of property to a use in which the taxpayer may have no private interest, and, it may be, against his will. It has been condemned by some theorists on that ground. Yet no one denies its constitutionality. People are accustomed to it and accept it without doubt. The present requirement is not different in fundamental principle, although the tax is paid in kind and falls only on the class capable of paying that kind of tax—a class of *quasi* public corporations specially subject to legislative control. Thus the question narrows itself to the magnitude of the burden imposed—to whether the tax is so great as to exceed the limits of the police power. Looking at the law without regard to its special operation I should hesitate to assume that its total effect, direct and indirect, upon the roads outside of Boston amounted to a more serious burden than a change in the law of nuisance, for example, might be. See, further, Williams v. Parker, 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. 440. Turning to the specific effect, the offer of proof was cautious. It was simply that a 'considerable percentage' of the passengers carried by the company consisted of pupils of the public schools. This might be true without the burden becoming serious. I am not prepared to overrule the decision of the legislature and of the highest court of Massachusetts that the requirement is reasonable under the conditions existing there, upon evidence that goes no higher than this. It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained. Mr. Justice Harlan is of opinion that the constitutionality of the act of 1900 is necessarily involved in the determination of this case. He thinks the act is not liable to the objection that it denies to the railroad company the equal protection of the laws. Nor does he think that it can be held, upon any showing made by this record, to be unconstitutional as depriving the plaintiff in error of its property without due process of law. Upon these grounds alone, and independent of any other question discussed, he joins in a judgment of affirmance. *Judgment affirmed.*"

[69] Chicago, Burlington & Quincy R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94, cited in Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 397, 38 L. ed. 1014, 14 Sup. Ct. 1047; Wabash, St. L. & Pacif. R. Co. v. Illinois,

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portation of passengers by railways, and the extent of judicial interference is protection against unreasonable rates.[70] Again, a railroad is a public highway and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation is created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls is given primarily for the benefit of the public. It is, therefore, under governmental control, subject, of course, to the constitutional guarantees for the protection of its property.[71] A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges and franchises, subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against the exaction of unreasonable charges for the services rendered by it; but it is equally true that the corporation performing such public services, and the people financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disre-

118 U. S. 557, 564, 30 L. ed. 244, 7 Sup. Ct. 4; Railroad Commission Cases (Stone v. Farmers' Loan & Tr. Co.), 116 U. S. 307, 325, 29 L. ed. 636, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191; Ruggles v. Illinois, 108 U. S. 526, 531, 27 L. ed. 812, 2 Sup. Ct. 832; Sinking Fund Cases (Union Pacific R. Co. v. United States and Central Pacific R. Co. v. Gallatin), 99 U. S. 700, 719, 25 L. ed. 496; Winona & St. Peter R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99; Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. ed. 97. See also Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841.

The legislature may regulate the use of a franchise, which consists of the privilege of making a railroad and taking tolls thereon, and it may limit the amount of the tolls, unless they have deprived themselves of that power by a legislative contract with the owners of the land. Beekman v. Saratoga & Schenectady Rd. Co., 3 Paige Ch. (N. Y.) 45.

As to statute fixing maximum tolls to be charged by railroad company and remedy to persons injured for violation of act, see Attorney General v. Chicago & Northwestern Rd. Co., 35 Wis. 425.

When legislature cannot regulate tolls, see Attorney General v. Chicago & Northwestern Rd. Co., 35 Wis. 425.

[70] Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 30 L. ed. 176, 12 Sup. Ct. 400. See § 407, herein.

[71] See §§ 97–107, herein.

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gard of the fundamental guarantees for the protection of property.[72]

§ 401. Regulation of Rates—Powers of Railroad and Like Commissioners.—We have seen that a State may lawfully

[72] Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418. See § 364, herein.

"The control which, by common law and by statute, is exercised over common carriers is conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property, does not in every case depend upon the question of legal monopoly. From the earliest period of the common law it has been held that common carriers were bound to carry for a reasonable compensation. They were not at liberty to charge whatever sum they pleased, and even where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforceable beyond the point of reasonable compensation. From time to time statutes have been enacted in England and in this country, fixing the sum which should be charged by carriers for the transportation of passengers and property, and the validity of such legislation has not been questioned. But the business of common carriers, until recent times, was conducted almost exclusively by individuals for private emolument, and was open to every one who chose to engage in it. The State conferred no franchise and extended to common carriers no benefit or protection, except that general protection which the law affords to all persons and property within its jurisdiction. The extraordinary obligations imposed upon carriers and the subjection of the business to public regulation were based on the character of the business, or, in the language of Sir William Jones, upon the consideration 'that the calling is a public employment' (Jones on Bailments, Appendix). It is only a public employment in the sense of the language of Lord Hale, that it was 'affected with a public interest,' and the imposition of the character of a public business upon the business of a common carrier was made because public policy was deemed to require that it should be under public regulation. The principle of the common law that common carriers must serve the public for a reasonable compensation became a part of the law of this State, and from the adoption of the constitution has been part of our municipal law. It is competent for the legislature to change the rule of reasonable compensation, as the matter was left by the common law, and prescribe a fixed and definite compensation for the services of common carriers. This principle was declared in the Munn Case [Munn v. Illinois, 94 U. S. (4 Otto), 113, 24 L. ed. 77], which was cited with approval on this point in Sawyer v. Davis (136 Mass. 239). It accords with the language of Chief Justice Shaw in Commonwealth v. Alger (7 Cush. 53): 'Whenever there is a general right on the part of the public, and a general duty of the landowner, or any other person to respect such right, we think it is competent for the legislature by a specific

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create bodies designated as railroad commissioners, railroad and warehouse commissioners, state corporation commissioners, etc., and delegate to them the authority to exercise certain powers.[73] So a statute may constitutionally create a commission and charge it with the duty of supervising railroads,[74] and making rates;[75] and under the statutes of a

enactment to prescribe a precise, practical rule for declaring, establishing and securing such right and enforcing respect for it.' The practice of the legislature in this and other States to prescribe a maximum rate for the transportation of persons or property on railroads is justified upon this principle. Where the right of the legislature to regulate the fares or charges on railroads is reserved by the charter of incorporation, or the charter was granted subject to the general right of alteration or repeal by the legislature, the power of the legislature in such cases to prescribe the rate of compensation is a part of the contract, and the exercise of the power does not depend upon any general legislative authority to regulate the charges of common carriers. But the cases are uniform that where there is no reservation in the charter the legislature may, nevertheless, interfere or prescribe or limit the charges of railroad corporations. (Granger Cases [Munn v. Illinois, 94 U. S. (4 Otto) 113, 24 L. ed. 77]; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 8 Sup. Ct. 1028; Earl, J., in People ex rel. Kimball v. Boston & Albany Rd. Co., 70 N. Y. 569; Ruger, Ch. J., in Buffalo East Side Rd. Co. v. Buffalo Street Rd. Co., 111 N. Y. 132, 19 N. Y. St. R. 574, 19 N. E. 63.) The power of regulation in these cases does not turn upon the fact that the entities affected by the legislation are corporations deriving their existence from the State, but upon the fact that the corporations are common carriers, and therefore subject to legislative control. The State in constituting a corporation may prescribe or limit its powers and reserve such control as it sees fit, and the body accepting the charter takes it subject to such limitations and reservations, and is bound by them. The considerations upon which a corporation holds its franchises are the duties and obligations imposed by the act of incorporation. But when a corporation is created it has the same rights and the same duties, within the scope marked out for its action, that a natural person has. Its property is secured to it by the same constitutional guaranties, and in the management of its property and business is subject to regulation by the legislature to the same extent only as natural persons, except as the power may be extended by its charter. The mere fact of a corporate character does not extend the power of legislative regulation." People v. Budd, 117 N. Y. 1, 26 N. Y. St. R. 533, 22 N. E. 670, 680, 7 N. Y. Cr. R. 189, per Andrews, J.

[73] See §§ 167–170, herein.

[74] Railroad Commission Cases (Stone v. Farmers' Loan & Trust Co.), 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334.

[75] State v. Atlantic Coast Line R. Co. (Fla., 1906), 40 So. 875.

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State the duty of enforcing such rates as it may fix can be vested in a railroad commission.[76] Again, the creation of a railroad or corporation commission by a state statute may operate as a repeal of a statute empowering railroads to fix passenger rates, or a statute giving such authority to railroads may repeal an enactment creating such commission or extending and enlarging its powers.[77] But a statute creating a railroad and warehouse commission is unconstitutional where it makes the rates as fixed by such commission final and conclusive and deprives a railroad company of its right to judicial investigation by due process of law.[78] Again, when railroad commissioners are authorized to investigate and report to the legislature they have no implied authority to adjust, and cannot require the company to refund excess charges to the shipper.[79]

§ 402. **Railroads—Regulation of Rates by Congress—Reservation of Right to Alter or Amend.**—Congress has power to require a uniform freight rate, and the rate with which

That statute creating grain and warehouse commission is not unconstitutional as denying equal protection of the laws, see Globe Elevator Co. v. Andrew (C. C.), 144 Fed. 871.

[76] McChord v. Louisville & N. R. Co., 183 U. S. 483, 46 L. ed. 289, 22 Sup. Ct. 165.

[77] Southern Ry. Co. v. McNeill, 155 Fed. 756. See Matthews v. Board of Corporation Commrs. of N. C., 97 Fed. 400; Pacific Express Co. v. Cornell (Neb.), 81 N. W. 377.

[78] Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462, 702. The court (at p. 456), per Blatchford, J., said: "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." See § 407, herein.

[79] Oregon Railroad Commrs. v. Oregon R. & Nav. Co., 17 Oreg. 65, 2 L. R. A. 195, 19 Pac. 702. See this case also upon point as to when no authority exists to enter complaint in Circuit Court for refusal to obey orders.

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constitutions and statutes are concerned is the net cost to the shipper of the transportation of his property. As uniformity is the very essence of regulation and Congress has plenary power to regulate interstate commerce, the true rule must be that as a logical and necessary incident of the power to regulate, Congress may prohibit the doing, by any person whatsoever, of any act or thing the effect of which is to prevent or disturb uniformity.[80] Again, Congress has undoubted power to subject to regulations adopted by it every carrier engaged in interstate commerce.[81] "I have no doubt that Congress might very properly, under the constitutional provision giving it the entire power of control over interstate commerce, assume control of the avenues of interstate commerce, of the railroads which are engaged in interstate commerce, and of all rates which are collected by those railroads, whether within the States or without the States, because the matter of those rates would affect these avenues of interstate commerce, and might affect their ability to continue as avenues of interstate commerce. The rates, if they were fixed by the States, might be fixed so low in one State, and another, and all of them, that the railroads could not exist and could not perform their functions as carriers of interstate commerce, and for the purpose of securing these railroads as carriers of interstate commerce, Congress would have the power, under that provision, to take the entire control of the regulation and the rates which the carriers of interstate commerce, upon the avenues of interstate commerce, would have the right to charge, the same as Congress has assumed the right, under the very same clause, to control the navigation of the coastwise waters, bays and lakes; and the rivers running through the country, even if the rivers are entirely within a particular State. * * * But, as has been held by the Supreme Court in many cases, where Congress has the power to exercise con-

[80] **Interstate Commerce Commission v. Reichmann** (C. C.), 145 Fed. 235, 238.

[81] ***New York, New Haven & H. R.*** Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. 272.

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trol and fails to exercise it, the State may exercise control in all matters that are proper—police regulations at any rate. And until Congress does exercise that control, and certainly while the Supreme Court continues to hold, as it has, that the States may regulate the local commerce that is entirely within the State, I do not think that it would be proper to hold that these acts are void as invasions of the right of Congress to control exclusively the avenues of interstate commerce."[82] In the case of the Union Pacific Railroad Company, incorporated by the act of 1862,[83] it is held that until Congress, in the exercise of the power specially reserved in that enactment, or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by that company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits.[84]

§ 403. **Object of Interstate Commerce Act—Powers and Jurisdiction of Interstate Commerce Commission.**—The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preference to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freight. It was not designed to prevent competition between different roads, but rather to encourage competition. The statute does not define undue or unreasonable preference or advantage. That must be left to the circum-

[82] Perkins v. Northern Pac. Ry. Co. (C. C.), 155 Fed. 445, per Lochran, Dist. J. (a case of state regulation of rates to be charged by railroads on intrastate business). Examine State Freight Tax Case, 15 Wall. (82 U. S.) 232, 21 L. ed. 146; United States v. Colorado & N. W. Ry. Co., 157 Fed. 321, 342; United States v. Great Northern Ry. Co., 145 Fed. 438. See §§ 125, 365–369, herein.

[83] Act July 1, 1862, § 18.

[84] Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418. See § 402, herein.

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stances of each case.[85] Again, the Interstate Commerce Act was enacted to secure equality of rates and to destroy favoritism, and for those purposes is a remedial statute, to be interpreted so as to reasonably accomplish them; its prohibitions against directly or indirectly charging less than published rates are all embracing and applicable to every method by which the forbidden results could be brought about.[86] The purpose of the second section of said act is to enforce equality between shippers over the same line, and prohibit any rebate or other device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage are compelled to pay different prices therefor.[87] When a state railroad company whose road lies within the limits of a State enters into the carriage of foreign freight by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by consolidation with foreign companies, but by an arrangement for the continuous carriage or shipment from one State to another; and thus becomes amenable to the Federal act in respect to such interstate commerce; and having thus subjected itself to the control of the Interstate Commerce Commission, it cannot limit that control in respect to foreign traffic to certain points on its road to the exclusion of other points. Such commission is not, however, empowered, either expressly or by implication, to fix rates in advance; but, subject to the prohibition that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue pref-

[85] Interstate Commerce Commission v. Chicago Great Western Ry. Co. (C. C.), 141 Fed. 1003, 1014, per Bethea, Dist. J.

[86] New York, New Haven & H. Rd. Co. v. Interstate Commerce Commission, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. ed. 515. See Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. 666. See also § 153, herein.

[87] Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414.

The phrase "under substantially similar circumstances and conditions," as used in the second section of the Interstate Commerce Act, refers to the matter of carriage, and does not

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erence or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.[88] Rates fixed by the commission, in so far as it is empowered to fix them, should be regulated to each point independently and not be made to one point dependent upon the rise or fall of those to another point.[89] The Interstate Commerce Commission, in making an investigation on the complaint of a shipper has, in the public interest, the power, disembarrassed by any supposed admissions contained in the statement of the complaint, to consider the whole subject and the operation of the new classification complained of in the entire territory; also how far its going into effect would be just and reasonable and would create preferences or engender discriminations and whether it is in conformity with the requirements of the act to regulate commerce. And if it finds that the new classification disturbs the rate relations thereupon existing in the official classification territory and creates preferences and engenders discriminations it may, in order to prevent such result, prohibit the further enforcement of the changed classification, and an order to that

include competition among rival routes. Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. 822. As to competition, see §§ 413–415, herein.

[88] Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184. See the following cases: Interstate Commerce Commission v. Chicago Great Western Ry. Co., 209 U. S. 108, 119 (considered and quoted from under § 415, herein); Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 663, 672, 44 L. ed. 309, 20 Sup. Ct. 209; Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 162, 18 Sup. Ct. 45, 42 L. ed. 414; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479, 493, 508, 42 L. ed. 243, 17 Sup. Ct. 896; United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 373, 17 Sup. Ct. 540, 41 L. ed. 1007.

[89] Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409.

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effect is within the power conferred by Congress on the commission; and so held as to an order of the commission directing carriers from further enforcing throughout official classification territory a changed classification in regard to common soap in less than carload lots.[90]

§ 404. **Regulation of Rates—Railroads—Interstate Commerce—Taxation of Freight or Passengers.**—A state statute which relates to discrimination in transportation charges of goods and which includes the transportation under one contract and under one voyage of goods from within one State to another States violates the Federal Constitution. Such a transportation is "commerce among the States," even as to that part of the voyage which lies within the State where the statute was enacted. There may, however, be transportation of goods which is begun and ended within the limits of a State, and disconnected with any carriage outside of the State which is not commerce among the States. The latter is subject to regulation by the State; but the former is national in its character, and its regulation is confided to Congress exclusively, by that clause of the Constitution which empowers it to regulate commerce among the States. This principle or doctrine is asserted in a Federal case where certain cases [91] are examined and held, in view of other cases decided near the same time, not to establish a contrary doctrine. And the Supreme Court declares that, notwithstanding what is said in those cases, it still holds, and has never consciously held otherwise, that a statute of a State, intended to regulate or to tax or to impose any other restriction upon the transmission of persons or property or telegraphic messages from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress; and that such stat-

[90] Cincinnati, Hamilton & Dayton Ry. Co. v. Interstate Commerce Commission, 206 U. S. 142, 51 L. ed. 995, 27 Sup. Ct. 648, aff'g 146 Fed. 559.

[91] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Chicago, Burlington & Quincy Rd. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94; Peik v. Chicago & Northwestern Ry., 94 U. S. 164, 24 L. ed. 97.

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utes are void even as to that part of such transmission which may be within the State.[92] The transportation of freight, or of the subjects of commerce, is a constituent part of commerce itself. A tax upon freight, transported from State to State, is a regulation of commerce among the States. Whenever the subjects in regard to which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of Congress. Transportation of passengers or merchandise through a State, or from one State to another, is of this nature. A statute, therefore, of a State imposing a tax upon freight, taken up within the State and carried out of it, or taken up without the State and brought within it, is repugnant to that provision of the Constitution of the United States which ordains that "Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes." [93] Again, a railroad corporation cannot be compelled to pay a tax on each passenger

[92] Wabash, St. L. P. Ry. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 7 Sup. Ct. 4. This decision has been cited in numerous cases.

[93] State Freight Tax Case, 15 Wall. (82 U. S.) 232, 21 L. ed. 146. See, as to principle involved, Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 227, 44 L. ed. 136, 20 Sup. Ct. 96; Scott v. Donald, 165 U. S. 58, 98, 17 Sup. Ct. 265, 41 L. ed. 632; Leisey v. Hardin, 135 U. S. 100, 119, 10 Sup. Ct. 681, 34 L. ed. 128; Leloup v. Port of Mobile, 127 U. S. 640, 648, 32 L. ed. 311, 8 Sup. Ct. 1380; Ratterman v. Western Union Teleg. Co., 127 U. S. 411, 424, 32 L. ed. 229, 8 Sup. Ct. 1127; Bowman v. Chicago & N. W. Ry. Co., 125 U. S. 465, 483, 8 Sup. Ct. 689, 1062, 31 L. ed. 700; Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326, 338, 340, 345, 30 L. ed. 1200, 7 Sup. Ct. 1118; Fargo v. Michigan, 121 U. S. 230, 238, 240, 7 Sup. Ct. 857, 30 L. ed. 888; Robbins v. Shelby Co. Taxing Dist., 120 U. S. 489, 492, 493, 497, 30 L. ed. 694, 7 Sup. Ct. 592; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 564, 30 L. ed. 244, 7 Sup. Ct. 4; Pickard v. Pullman Southern Car Co., 117 U. S. 34, 48, 6 Sup. Ct. 635, 29 L. ed. 785; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 212, 29 L. ed. 158, 5 Sup. Ct. 826; Telegraph Co. v. Texas, 105 U. S. 460, 465, 26 L. ed. 1067; Cook v. Pennsylvania, 97 U. S. 566, 572, 24 L. ed. 1015; Railroad Co. v. Husen, 95 U. S. 465, 470, 24 L. ed. 527; Welton v. Missouri, 91 U. S. 275, 282, 23 L. ed. 347; Railroad Co. v. Maryland, 21 Wall. (88 U. S.) 456, 472, 22 L. ed. 678; Osborne v. Mobile, 16 Wall. (83 U. S.) 479, 481, 21 L. ed. 470.

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entering, passing through, or departing from a State, and a statute imposing such tax on a carrier is void as against the constitutional power of the United States to regulate commerce.[94] In a Federal Supreme Court case it is held that the transportation of goods on a through bill of lading from Fort Smith, Arkansas, to Grannis, Arkansas, over a railroad by way of Spiro in the Indian Territory, a total distance of one hundred and sixteen miles, of which fifty-two miles is in Arkansas and sixty-four in the Indian Territory, is interstate commerce, and is under the regulation of Congress, free from interference by the State of Arkansas, and a railway company operating such a line can maintain an action for equitable relief restraining the state railroad commission from fixing and enforcing rates between points within the State, when the transportation is partly without the State and under the conditions above stated.[95] Merchandise may, however, cease to be interstate commerce at an intermediate point between the place of shipment and ultimate destination; and if kept at such point for the use and profit of the owners and under the protection of the laws of the State it becomes subject to the taxing and police power of the State. It is held, therefore, in a late case that the statute of Tennessee providing for the inspection of oil is not an unconstitutional burden on interstate commerce as applied to oil coming from other States, but meanwhile stored in Tennessee for convenience of distribution and for reshipping from tank cars and barreling.[96] Again, a state legislature

[94] Clarke v. Philadelphia W. & B. B. Co., 4 Houst. (Del.) 158. Compare People v. Brooks, 4 Denio (N. Y.), 469; People v. Commissioners, 48 Barb. (N. Y.) 157.

[95] Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. 214. Lehigh Valley Rd. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. ed. 672, distinguished as applying to *taxation* on freight received on merchandise transported from one point to another within the same State by a route partly through another State, and not to a *regulation* of such transportation.

[96] General Oil Co. v. Crane, 209 U. S. 211. In this case the court, per McKenna, J., says (*id.*, 228): "We are brought, then, to consider whether the law would, if administered against the oils in controversy, violate any constitutional right of plaintiff in error. As determining an affirmative answer to this question, it is con-

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passed in 1862 an act "in relation to the duties of railroad companies," enacting: (1) that each railroad company should annually, in a month named by the act, fix its rates for the transportation of passengers and freight of different kinds;

tended that the oil in both tanks was in transit from the place of manufacture, Pennsylvania, to the place of sale, Arkansas. The delay at Memphis, it is urged, was merely for the purpose of separation, distribution and reshipment, and was no longer than required by the nature of the business and the exigencies of transportation. The difference in the oil in tank No. 1 and that in tank No. 2, it is further said, is that the former was sold before shipment, and the latter was to be held in Tennessee for sale, but in neither case was the oil to be sold in Tennessee, and it is hence insisted that the interstate transit of the oil was never finally ended in Memphis, but was only temporarily interrupted there. The beginning and the ending of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. 475, to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage. The latter is defined to be in Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. 1091, the point of time at which it arrives at its destination. But intermediate between these points questions may arise. State v. Engel, 5 Vroom (N. J.), 435; State v. Corrigan, 10 Vroom (N. J.), 35; The Daniel Ball, 10 Wall. (77 U. S.) 557, 19 L. ed. 999. In Pittsburg Coal Company v. Bates, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. ed. 538, coal in barges shipped from Pittsburg, Pennsylvania, to Baton Rouge, Louisiana, was stopped about nine miles above destination. It was held that it had ceased to be interstate commerce, and was subject to taxation by the State of Louisiana. In Diamond Match Company v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. 266, logs in transit to a point without the State were held subject to taxation under a statute of the State where they would 'naturally leave the State in the ordinary course of transit.' In Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. 259, a flock of sheep driven from a point in Utah across Wyoming to a point in Nebraska for the purpose of shipment by rail from the latter point was held to be property engaged in interstate commerce and exempt from taxation by Wyoming under the statute taxing all live stock brought into the State 'for the purpose of being grazed.' There was no difficulty in the case except that which arose from the contention that the manner of transit was adopted as an evasion of the statute. Otherwise the grazing of the sheep was as incidental as feeding them would be if transported by rail. The pertinence of the case to the present controversy is in its summary of the principles of prior cases expressed in the following passage: 'The substances of these cases is that, while property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit

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(2) that it should, on the first day of the next month, cause a printed copy of such rates to be put at all its stations and depots, and cause a copy to remain posted during the year; (3) that a failure to fulfill these requirements, or the charging

to another State, it becomes the subject of interstate commerce and is exempt from local assessment.' Property, therefore, at an intermediate point between the place of shipment and ultimate destination may cease to be a subject of interstate commerce. Necessarily, however, the length and purpose of the interruption of transit must be considered. In State v. Engle, Receiver, etc., 5 Vroom (N. J.), 425, 435, coal mined in Pennsylvania and sent by rail to Elizabethport, in New Jersey, where it was deposited on the wharf for separation and assortment for the purpose of being shipped by water to other markets for the purpose of sale, it was held that the property was not subject to taxation in New Jersey. The court said: 'Delay within the State, which is no longer than is necessary for the convenience of transshipment for its transportation to its destination, will not make it property within the State for the purpose of taxation.' See also in State v. Carrigan, 10 Vroom (N. J.), 36, where coal also shipped from Pennsylvania to a port in New Jersey and remained there no longer than was necessary to obtain vessels to transport it to other places was held to be in course of transportation and not subject to the taxing power of the State. In Burlington Lumber Co. v. Willetts, 118 Ill. 559, the principle was recognized that property *in transitu* was not subject to the taxing power of a State, but it was held that logs in rafts sent from Wisconsin to Burlington, Iowa, by the Mississippi River, a part of which were stopped at a place in Illinois called Boston Harbor, to be there kept until needed at Burlington for mill purposes, were subject to taxation. The court said that the property was 'kept at New Boston on account of the profit of the owners to keep it there;' and further, that the company was engaged in business in the State beneficial to itself, and its property was so located as to claim the protection of the laws of the State and hence was liable to taxation. Like comment is applicable to plaintiff in error and its oil. The company was doing business in the State, and its property was receiving the protection of the State. Its oil was not in movement through the State. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State v. Engle, etc., *supra*, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage, of putting it in and taking it from storage. The bill takes pains to allege this. 'Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of

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of a higher rate than was posted, should subject the offending company to the payment of certain penalties prescribed. Congress afterwards (in 1866), by an act whose title was "An act to *facilitate* commercial, postal and military communication between the several States," and which recited that "the Constitution of the United States confers upon Congress in express terms, the power to regulate commerce among the several States," and goes on "*Therefore*, be it enacted," etc., enacted, "That every railroad company in the United States, whose road is operated by steam * * * be, and hereby is, authorized to carry upon and over its road, boats, bridges, ferries, all passengers, troops, government supplies, mails, freights, and other property on their way from any State to another State, and to *receive compensation therefor*." And enacted further, "That *Congress* may, at any time, alter, amend, or repeal this act." It was held, in the case of a railroad running through several States, including that where the state enactment had been made, that the state enactment was but a police law, and therefore constitutional.[97]

freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary, in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil.' This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the State and for which the protection of the State is necessary, a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. 365. We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 356, 18 Sup. Ct. 862, 43 L. ed. 191. The difference, if any exists, is not necessary to observe. The cases based on the taxing power show the contentions of plaintiff in error are without merit; in other words, show that its oil was not property in interstate commerce. As our conclusion is that no constitutional right of the oil company was violated by the enforcement of the law of 1899, it follows that no error prejudicial to the company was committed by the Supreme Court of Tennessee, and, for the reasons stated, its judgment is affirmed."

[97] Railroad Co. v. Fuller, 17 Wall. (84 U. S.) 560, 21 L. ed. 710.

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§ 405. **Regulation of Rates—Railroads—Non-user of Legislative Power—Lessee.**—A power of government which actually exists is not lost by non-user. The fact, therefore, that the power of regulating the maximum rates of fare and freight was not exercised for more than twenty years after the incorporation of a company is unimportant. Nor does it affect the case that, before the power was exercised, such company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the carriage for the means of paying the stipulated rent. It could neither grant nor pledge more than it had, and its pledgee or tenant took the property subject to the exercise by the State of the same powers of regulation which might have been exercised over the company itself.[98]

§ 406. **Regulation of Rates—Railroads—Reasonableness of Rates—Confiscatory Rates—Due Process of Law—Equal Protection of Laws.**—The legislative power of limitation or regulation of rates is restricted. "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and rates, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."[99] So a state enactment, or regulations made under authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation, as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would,

[98] **Chicago, Burlington & Quincy Rd. Co. v. Iowa,** 94 U. S. 155, 24 L. ed. 94.

[99] **Railroad Commission Cases (Stone v. Farmers' Loan & Tr. Co.),** 116 U. S. 307, 331, 29 L. ed. 636, 6 Sup. Ct. 334, quoted in Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 396, 38 L. ed. 1014, 14 Sup. Ct. 1047.

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therefore, be repugnant to the Fourteenth Amendment.[1] Again, "The State is under an obligation to act justly, and without arbitrary discrimination, between corporations of the State, just as it is between citizens of the State enjoying equal rights. The State cannot under the guise of a regulation bring about a destruction and a confiscation of a company's property; and the State's power to absolutely abolish a corporation must be distinguished from its power to destroy its business and confiscate its property, so long as it chooses to permit its existence and to authorize its business by a valid charter." [2] So the grant to the legislature in a state constitution of the power to establish maximum rates for the transportation of passengers and freight on railroads in the State has reference to "reasonable" maximum rates, especially where the words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness, as the power granted cannot be exerted in derogation of rights secured by the Constitution of the United States, and of the right to be protected by the judiciary, when its jurisdiction is properly invoked.[3] But while the enforcement by a State of a general scheme of maximum rates so unreasonably low as to be unjust and unreasonable may be confiscation and amount to taking property without due process of law, still the State has power to compel a railroad company to perform a particular and

[1] Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418. See Stanislaus County v. San Joaquin & King's River Canal & Irrig. Co., 192 U. S. 201, 213, 48 L. ed. 406, 24 Sup. Ct. 241, per Peckham, J., case reverses 113 Fed. 930; San Diego Land & Town Co. v. National City, 174 U. S. 739, 753, 764, 43 L. ed. 1154, 19 Sup. Ct. 804, per Harlan, J.; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 399, 412, 14 Sup. Ct. 1047, 38 L. ed. 1014; Chicago, Milwaukee & St. Paul R. Co. v. Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 10 Sup. Ct. 462, 702; Ball v. Rutland R. Co. (C. C.), 93 Fed. 513; Chicago, Milwaukee & St. P. R. Co. v. Tompkins (C. C.), 90 Fed. 363, 12 Am. & Eng. R. Cas. (N. S.) 70, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; Metropolitan Trust Co. v. Houston & T. C. R. Co. (C. C.), 90 Fed. 683, 13 Am. & Eng. R. Cas. (N. S.) 149.

[2] New Memphis Gas Light Co. v. City of Memphis, 72 Fed. 952, 955. See cases cited under last preceding note herein.

[3] Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819.

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specified duty necessary for the convenience of the public even though it may entail some pecuniary loss.[4]

§ 407. **Railroads—Unreasonable Rate Regulations—Judicial Inquiry—Due Process of Law—Equal Protection of the Laws.**—While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and, therefore, without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become a subject of judicial inquiry. The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions; as the duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation.[5] And when a state legislature establishes a tariff of railroad rates so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, courts of the United States may treat it as a judicial question, and hold such legislation to be in conflict with the Federal Constitution, as depriving the company of its property without due process of law, and as depriving it of the equal protection of the laws.[6] So it is within the power of a court of

[4] Atlantic Coast Line Ry. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. 585; distinguishing Smyth v. Ames, 169 U. S. 526, 42 ed. —, 18 Sup. Ct. —.

[5] Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418.

[6] St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567.

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial

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equity to decree that rates established by a railroad commission are unreasonable and unjust, and to restrain their enforcement; but it is not within its power to establish rates itself, or to restrain the commission from again establishing rates.[7]

investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 10 Sup. Ct. 462, 702, per Blatchford, J.

"In the case of State v. Railroad Commissioners, 23 Neb. 117, 36 N. W. 305, and *Id.*, 38 Minn. 281, 37 N. W. 782, the Supreme Court of Minnesota held that the rates fixed by the state commission could not be inquired into by the courts. But on writs of error the Supreme Court of the United States reversed the decision of the Minnesota court. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970, and Minneapolis E. R. Co. v. Minnesota, 134 U. S. 475, 10 Sup. Ct. 473, 33 L. ed. 985. From that time until the present, all the courts and the profession have understood that the legislature, acting directly by statute or through a commission duly authorized, can fix maximum freight and passenger rates, subject to the right and power of the court by appropriate judicial proceedings to declare such statutes or orders void, if such rates are either confiscatory or unremunerative, for the reason that such proceedings are not due process of law, and are the taking of property without compensation, and therefore in violation of the United States Constitution." Poor v. Iowa Central Ry. Co. (C. C.), 155 Fed. 226, 227, per McPherson, Dist. J.

[7] Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047. The court said in this case:

"It appears from the bill that in pursuance of the powers given to it by this act, the state commission has made a body of rates for fares and freights. This body of rates as a whole is challenged by the plaintiff as unreasonable, unjust and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the courts. It is doubtless true as a general proposition that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum, the courts had juris-

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§ 408. Railroad—Rates Fixed by Legislative Action Presumed Reasonable—Railroad Commission—Due Process of Law.—The presumption is that the rates fixed by a railroad commission are reasonable, and the burden of proof is upon

diction to inquire into the matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed nor the limits of judicial inquiry altered because the legislature, instead of the carrier, prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by legislature or a commission; they do not determine whether one rate is preferable to another or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by legislature or a commission is unjust and unreasonable and such as to work a practical destruction to rights of property and, if found so to be, to restrain its operation. * * * The question of the reasonableness of a rate of charge for transportation by a railroad company involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation requiring the process of law for its determination. * * * These cases all support the proposition that, while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which in the form of a regulation of rates operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual, without compensation, wrested from him for the benefit of another or of the public. This, as has been often observed, is a government of law and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government with all their reach and power must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held. It was therefore within the

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the railroad company to show the contrary.[8] It will also be presumed that such a commission acts, in fixing an intrastate railroad rate, with full knowledge of the situation, and where the record does not disclose all the evidence, a rate sustained by the highest court of the State will not be held by the Federal Supreme Court to be confiscatory and to deprive a railroad company of its property without due process of law, where it appears by the report of the company that the rate exceeds the average rate received by the company during the previous year. And where the record does not disclose why an order of a state railroad commission was made applicable only to certain local and intrastate rates, but the state law provides that rates so fixed are to be considered in all courts as *prima facie* just and reasonable, and the effect of the order was to equalize rates, the Federal Supreme Court will not hold that the judgment of the highest court of the State, sustaining the rate, was erroneous. A State may insist upon equality of intrastate railroad rates, the conditions being the same, without depriving the railroad company of its property without due process of law.[9] If a state law provides that rates established by a railroad commission are to be taken in all courts as *prima facie* just and reasonable, and there is nothing in the record from which a reasonable deduction can be made as to the cost of transportation, or the amount transported, of the single article in regard to which an intrastate rate has been

competency of the Circuit Court of the United States for the western district of Texas, at the instance of the plaintiff, a citizen of another State, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission." Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 396, 398, 399, 38 L. ed. 1014, 14 Sup. Ct. 1047.

[8] Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151.

"It has been decided that such rates thus fixed are presumably fair and remunerative, and therefore valid, and that the company, stockholder, bondholder, or mortgagee challenging such rates has the burden of proof." Poor v. Iowa Central Ry. Co. (C. C.), 155 Fed. 226, 227, per McPherson, Dist. J.

[9] Seaboard Air Line Ry. Co. v. Florida, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175, aff'g 48 Fla. 129, 150.

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established and complained of, or how that rate will affect the income of the railroad company, the Federal Supreme Court will not disturb the finding of the highest court of the State that the rate was reasonable, and hold that it amounted to a deprivation of property without due process of law.[10] Where a state statute,[11] establishing a railroad and warehouse commission, has been interpreted by the Supreme Court of such State as providing that the rates of charges for transportation of property, recommended and published by the commission, shall be final and conclusive as to what are equal and reasonable charges, and that there can be no judicial inquiry as to the reasonableness of such rates, and a railroad company, in answer to an application for a mandamus, contended that such rates, in regard to it, were unreasonable, and it was not allowed by the state court to put in testimony on the question of the reasonableness of such rates, it was held, that the act was in conflict with the Constitution of the United States, as depriving the company of its property without due process of law, and as depriving it of the equal protection of the laws.[12]

§ 409. **Railroads—Test of Reasonableness of Rates Prescribed by State—Practice—Findings.**—Necessarily it is a difficult and perplexing question to determine whether or not a rate fixed by legislative authority for the transportation of passengers and freight is unreasonable. No rule can be stated, as the facts must vary in the different cases wherein this issue is raised. In a much cited and relied upon case the following rules have been stated: 1. A railroad company may not fix its rates with a view solely to its own interests and ignore the rights of the public; but the rights of the public would be ignored if rates for the transportation of persons or property on a railroad were exacted without reference to the fair value of

[10] Atlantic Coast Line Rd. Co. v. Florida, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. 108, aff'g 48 Fla. 146.

[11] Minn. Act March 7, 1887, Gen. Laws, 1887, c. 10.

[12] Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462, 702. See note to § 407, herein.

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the property used for the public or of the services rendered, and in order simply that the corporation may meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders. If a railroad company has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious,[13] it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation as represented by its stock, bonds and obligations is not alone to be considered when determining the rates that may be reasonably charged. 2. The reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from that business. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control; nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. 3. The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public; and in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present value as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters

[13] Compare as to overcapitalization or fictitious capitalization, Consolidated Gas Co. v. City of New York (C. C.), 157 Fed. 849, considered under § 392, herein (point 3 in case).

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for consideration, and are to be given such weight as may be just and right in each case. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience; and, on the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.[14] In another case it is held that a state statute, fixing at three cents a mile the maximum fare that any railroad corporation may take for carrying a passenger within the State, is not, as applied to a corporation reorganized by the purchasers at the sale of a railroad under a decree of foreclosure, shown to be a taking of property without due process of law, in contravention of the Fourteenth Amendment, by evidence that under that restriction, and with its existing traffic, its net yearly income will pay less than one and a half per cent on the original cost of the road, and only a little more than two per cent on the amount of the bonded debt, without any proof of the cost of the bonded debt, or the amount of the capital stock of the reorganized corporation, or the price paid by the corporation for the road; and it was also decided that a statute, classifying the railroad corporations in the State by the length of their lines, and fixing a different limit of the rate of passenger fares in each class, does not deny to any corporation the equal protection of the laws.[15] Again, a tariff fixed by a commission for coal in carload lots is not proved to be unreasonable, by showing that if such tariff were

[14] Smyth v. Ames, 169 U. S. 819, 18 Sup. Ct. 418. Examine Stanislaus County v. San Joaquin Canal & Irrig. Co., 192 U. S. 201, 213, 48 L. ed. 406, 24 Sup. Ct. 241, per Peckham, J.; San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 757, 43 L. ed. 1154, 19 Sup. Ct. 804, per Harlan, J.; Covington & Lex. Turnpike Co. v. Sandford, 164 U. S. 578, 596, 597, 17 Sup. Ct. 198, 41 L. ed. 560; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 412, 14 Sup. Ct. 1047, 38 L. ed. 1014; New Memphis Gas Light Co. v. City of Memphis, 72 Fed. 952, 955. See, upon point 2 in the above text, Seaboard Air Line Ry. Co. v. Railroad Commissioners of Ala., 155 Fed. 192.

Method of valuation—Rates—Gas companies. See § 392, herein.

Rates fixed by company—Reasonableness of—Basis of computation. See §§ 412, 413, herein.

[15] Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841.

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applied to all freight the road would not pay its operating expenses, since it might well be that the existing rates upon other merchandise, which were not disturbed by the commission, might be sufficient to earn a large profit to the company, though it might earn little or nothing upon coal in carload lots.[16] In still another case the facts were as follows: The State of South Dakota having passed an act providing for the appointment of a board of railroad commissioners, and authorizing that board to make a schedule of reasonable maximum fares and charges for the transportation of passengers, freight and cars on the railroads within the State, provided that the maximum charge for the carriage of passengers on roads of the standard gauge should not be greater than three cents per mile; and that board having acted in accordance with the statute, and having published its schedule of maximum charges, the Chicago, St. Paul and Milwaukee Railway company filed the bill in this case in the Circuit Court of the United States for the District of South Dakota, seeking to restrain the enforcement of the schedule. The railroad commissioners answered fully, and testimony was taken before an examiner upon the issues made by the pleadings. This testimony was reported without findings of fact or conclusions of law. The case went to hearing, the judge, without the aid of a master, examined the pleadings and the mass of proof. He made findings of fact and conclusions of law; delivered an opinion; and rendered a decree dismissing the bill. The Federal Supreme Court was of opinion that neither the findings made by the court, nor such facts as were stated in its opinion, were sufficient to warrant a conclusion upon the question whether the rates prescribed by the defendants were unreasonable or not, and that the process by which the court came to its conclusion was not one which could be relied upon; that there was error in the failure to find the cost of doing the local business, and that only by a comparison between the gross receipts and the cost of doing the business, ascertaining

[16] Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151.

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thus the net earnings, could the true effect of the reduction of rates be determined; that the better practice would be to refer the testimony, when taken, to the most competent and reliable master, general or special, that could be found, to make all needed computations, and find fully the facts; so that the Federal Supreme Court, if it should be called upon to examine the testimony, might have the benefit of the services of such master.[17]

§ 410. **Regulation of Rates—Railroad in Two or More States—Continuous Line—Consolidation—Test of Reasonableness of Rate—Penalties—Defense.**—A railroad forming a continuous line in two or more States, and owned and managed by a corporation whose corporate powers are derived from the legislature of each State in which the road is situated, is, as to domestic traffic in each State, a corporation of that State, subject to state laws not in conflict with the Constitution of the United States.[18] And when, by legislation and consolidation, a railroad which was originally all in one State becomes consolidated with other roads in other States, and the State originally incorporating it enacts laws to regulate the rates of the consolidated road within its borders, the proper test as to the reasonableness of these rates is as to their effect upon the consolidated line as a whole. And when a State prescribes rates for a railroad only a part of which is within its borders, the company may raise the question of their reasonableness by way of defense to an action for the recovery of penalties for violating the directions.[19]

§ 411. **Railroad—Arbitrary Regulation of Rates—Mileage Tickets—Discrimination—Due Process of Law—Equal Protection of the Laws.**—While a State may make reasonable regulations for the government of public service corporations, and

[17] Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417.

[18] Railroad Commission Cases (Stone v. Farmers' Loan & Tr. Co.), 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334.

[19] St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567.

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to that end may fix a reasonable maximum rate for the transportation of passengers, it cannot arbitrarily fix a maximum passenger rate of two cents a mile on mileage books of five hundred miles or over and require the carrier always to keep the same on sale to all who apply therefor, and to redeem them at a later period than they have theretofore redeemed mileage books. Such legislation is class legislation, and it is not for the protection of all the people, but of the favored few. It discriminates in favor of the wholesale buyer, and also invades the right of the carrier to conduct and manage its own affairs. It denies to the carrier the equal protection of the laws, and deprives him of his property without due process of law, and is, therefore, unconstitutional.[20] So the provision in the act of the legislature of Michigan,[21] amending the general railroad law, that one thousand mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in that State or carrying on business partly within and partly without the limits of the State, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula; that such one thousand mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such tickets, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand mile ticket shall be forfeited to the railroad company; that each one thousand mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used, is a violation of that part of the Constitution of the Uni-

[20] Commonwealth v. Atlantic Coast Line Ry. Co., 106 Va. 61, 55 S. E. 572, 7 L. R. A. (N. S.) 1086.

[21] Act 1891, No. 90.

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ted States which forbids the taking of property without due process of law, and requires the equal protection of the laws. In so holding the court is not thereby interfering with the power of the legislature over railroads, as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience or proper protection of the public; but it only holds that the particular legislation in review in this case does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects and that it does violate the Federal Constitution as above stated.[22]

§ 412. Right of Carrier to Fix Rates—To What Extent Legislative Power Affected Thereby—Exemptions—Right to Create Railroad Commission—Power to Amend, etc., Successor Company—Obligation of Contracts.[23]—The right of a State to reasonably limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction, cannot be granted away by the legislature unless by words of positive grant, or words equivalent in law.[24] And an exemption of a common carrier from legislative control in respect to its rates of fare must clearly appear from the language used, which must plainly and unmistakably evidence an intent inconsistent with the exercise of such control.[25] If a statute grants to a railroad company the right

[22] Lake Shore & M. S. Ry. Co. v. Smith, 173 U. S. 486, 19 Sup. Ct. 565, 43 L. ed. 858, rev'g Smith v. Lake Shore & M. S. Ry. Co., 114 Mich. 460, 72 N. W. 328, 4 Det. L. N. 662, 8 Am. & Eng. R. Cas. (N. S.) 496.

[23] See § 409, herein, as to test of reasonableness of rates in connection with right of company to fix rates.

[24] Railroad Commission Cases (Stone v. New Orleans & Northeastern Rd. Co.), 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. 349, 391. Compare Cleveland, City of, v. Cleveland Ry. Co., 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. 756, considered in § 398, herein. See also § 399, herein.

[25] Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 41 L. R. A. 337, 14 Nat. Corp. Rep. 774. Rehearing denied in 151 Ind. 156, 41 L. R. A. 344, 5 Det. Leg. N., No. 19, 30 Chic. Leg. N. 414, 51 N. E. 80. See § 327, herein.

Examine also the following cases:

United States: Metropolitan St. Ry. Co. v. New York Board of Tax Commissioners, 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 705; Citizens' Bank v. Parker, 192 U. S. 73, 48 L. ed. 346, 24

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"from time to time to fix, regulate and receive, the tolls and charges by them to be received for transportation," it does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. So an act of incorporation which confers upon the directors of a railroad company the power to make by-laws, rules and regulations touching the disposition and management of the company's property and all matters appertaining to its concerns, confers no right which is violated by the creation of a state railroad commission, charged with the general duty of preventing the exaction of unreasonable or discriminating rates upon transportation done within the limits of the State, and with the enforcement of reasonable police regulations for the comfort, convenience and safety of travellers and persons doing business with the company within

Sup. Ct. 181; Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. 301; Chicago, B. & K. C. R. Co. v. Guffey, 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. 693; Memphis Gas Co. v. Shelby County, 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. 205; Ruggles v. Illinois, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 872; Hoge v. Railroad Co., 99 U. S. 348, 25 L. ed. 303; North Missouri R. Co. v. Maguire, 20 Wall. (87 U. S.) 46, 22 L. ed. 287; Delaware Railroad Tax, 18 Wall. (85 U. S.) 206, 21 L. ed. 888; Gilman v. Sheboygan, 2 Black (67 U. S.), 510, 17 L. ed. 305; Jefferson Branch Bank v. Skelly, 1 Black (66 U. S.), 436, 17 L. ed. 173; Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (57 U. S.) 416, 14 L. ed. 997.

Illinois: People, Koehersperger, v. Chicago Theological Seminary, 174 Ill. 177, 51 N. E. 198.

Louisiana: State of Louisiana v. Morgan, 28 La. Ann. 482.

Nebraska: Lincoln St. Ry. Co. v. City of Lincoln, 61 Neb. 109, 110, 84 N. W. 802.

New Jersey: Sisters of Charity of St. Elizabeth v. Corey, 73 N. J. L. 699, 65 Atl. 500.

Ohio: Knoup v. Piqua Bank, 1 Ohio St. 603.

Washington: Thurston County v. Sisters of Charity, 14 Wash. 264, 44 Pac. 252.

See §§ 254, 255, herein.

In order to exempt a railroad corporation from legislative interference with its rates of charges within a designated limit, it must appear that the exemption was made in its charter by clear and unmistakable language, inconsistent with any reservation of power by the State to that effect. Georgia Rd. & Bkg. Co. v. Smith, 128 U. S. 174, 33 L. ed. 377, 9 Sup. Ct. 47, 16 Wash. L. Rep. 749.

A contract of exemption from future general legislation, unless it is given expressly or follows by impli-

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the State.[26] So where an amendment was made to the charter of a railroad company in Illinois providing that "the said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and securing the affairs, business and interest of the company: Provided, that the same be not repugnant to the Constitution and laws of the United States, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same as they shall from time to time by their by-laws determine, and to levy and collect the same for the use of such company;" it was held that inasmuch as the power to establish rates was to be exercised through by-laws, and the power to make by-laws was restricted to such as should not be repugnant, among other things, to the laws of the State, the amendment did not release the company from restrictions upon the amount of rates contained in general and special statutes of the State.[27] In another case the facts were as follows: the Chicago and Northwestern Railway Company was, by its charter, and the charters of other companies consolidated with it, authorized "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it should deem reasonable." The constitution of Wisconsin, in force when the charters were granted, provided that all acts for the creation of corporations within the State "may be altered or repealed by the legislature at any time after their passage." It was decided, that the legislature had power to prescribe a maximum of charges to be made by said company for transporting persons or property within the State, or taken up outside the

cation equally clear with express words, cannot be deemed to exist. Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. 95 (carriers; long and short hauls).

[26] Railroad Commission Cases (Stone v. New Orleans & Northeastern Rd. Co.), 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. 349, 391.

[27] Ruggles v. Illinois, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 812.

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State and brought within it, or taken up inside and carried without.[28] Again, where a charter to a railroad company vests it "with all the rights and privileges conferred by the laws of this commonwealth, and subject to such as apply to railroads generally," the corporation is thereby subjected to state laws regulating rates, notwithstanding provisions of exemption in statutes organizing other previous companies to whose rights it succeeded; and the successor who becomes possessed of the rights and property of the company so chartered takes them subject in like manner to such laws.[29] So a state railroad corporation, voluntarily formed, cannot exempt itself from the control reserved to the State by its constitution, and, if not protected by a valid contract, cannot successfully invoke the interposition of Federal courts, in respect to long and short haul clauses in a state constitution, simply on the ground that a railroad is property.[30] Where a railroad company's charter is granted after a constitutional provision is adopted authorizing a limitation of maximum rates, the objection cannot successfully be urged that such a limitation violates its charter contract.[31] But it is also held that the act of a legislature in attempting to fix a rate impairs the obligation of contracts as to a railroad company holding, by a prior grant, an exclusive power to fix rates, within certain limits, for transportation.[32]

[28] Peik v. Chicago & Northwestern Ry. Co., 94 U. S. 164, 24 L. ed. 97. See §§ 317 *et seq.*, herein.

[29] Norfolk & Western R. Co. v. Pendleton, 156 U. S. 667, 15 Sup. Ct. 413, 39 L. ed. 574.

[30] Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. 95.

[31] Wellman v. Chicago & G. T. R. Co., 83 Mich. 592, 47 N. W. 489, 45 Am. & Eng. Ry. Cas. 249, 9 Ry. & Corp. L. J. 102.

[32] Pingree v. Michigan Cent. R. Co., 118 Mich. 314, 5 Det. L. N., No. 31, 53 L. R. A. 274, citing Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047, 4 Inters. Comm. Rep. 560; Georgia Rd. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. 47; New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; Ruggles v. Illinois, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 812; Chicago, Burlington & Quincy R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94; The Binghamton Bridge, 3 Wall. (70 U. S.) 51, 18 L. ed. 137; Bridge Proprietors v. Hoboken Land & Improv. Co., 1 Wall. (68 U. S.) 116, 17 L. ed. 571; West River Bridge v. Dix, 6 How.

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It seems, therefore, that even though a statute may authorize a railroad company to fix reasonable charges for the transportation of persons or property within a State, still, as a general rule, such authorization does not constitute an irrepealable contract under which the company shall have the right for all future time to prescribe its rates of fare or toll free from all control by the legislature in intrastate matters. This conclusion is, however, subject to the exceptions that an exemption from legislative control in the matter of rates may have been granted in clear and unmistakable terms, or there may exist such a contract with the company that future legislative action in fixing rates may operate as an impairment of the obligation of contracts; but the question of police powers is entitled to weight in this connection.[33]

(47 U. S.) 507, 12 L. ed. 535; Stone v. Yazoo & M. V. R. Co., 62 Miss. 607, 52 Am. Rep. 193.

[33] See Minneapolis E. Ry. Co. v. Minnesota, 134 U. S. 467, 33 L. ed. 985, 10 Sup. Ct. 473; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462, 702; Chicago, I. & L. Ry. Co. v. Railroad Commission of Indiana (Ind. App., 1906), 78 N. E. 338. Examine Beardsley v. New York, L. E. & W. R. Co., 44 N. Y. Supp. 175, 15 App. Div. 251; Dillon v. Erie R. Co., 43 N. Y. Supp. 320, 19 Misc. 116. See §§ 311 *et seq.*, 399, herein.

As to exemptions and obligations of contracts, examine the following cases for principle involved:

United States: Rochester Railway Co. v. City of Rochester, 205 U. S. 236, 51 L. ed. —, 27 Sup. Ct. —; Powers v. Detroit, G., H. & M. Ry. Co., 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. 556; Grand Rapids & I. Ry. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598 (aff'g Commissioners of Railroads v. Grand Rapids & I. Ry. Co., 130 Mich. 248, 89 N. W. 967); Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. 26; Citizens' Savings Bank of Owensboro v. Owensboro, 173 U. S. 630, 43 L. ed. 840, 19 Sup. Ct. 530; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. ed. 972; Jefferson Bank v. Skelly, 1 Black (66 U. S.), 436, 17 L. ed. 173; Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (57 U. S.) 416, 14 L. ed. 230; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; New Jersey v. Yard, 95 U. S. 104, 24 L. ed. 352; Houston & T. C. R. Co. v. Storey, 149 Fed. 499; Yazoo & M. V. R. Co. v. Board of Levee Commrs. (C. C.), 37 Fed. 24.

Maryland: State v. Northern Central Ry. Co., 90 Md. 447, 45 Atl. 465.

New Jersey: Board of Assessors v. Plainfield Water Supply Co., 67 N. J. L. 357, 52 Atl. 230; Hancock, Comptroller, v. Singer Mfg. Co., 62 N. J. L. 289, 328, 42 L. R. A. 852, 41 Atl. 846, per Van Syckel, J.; State, Singer Mfg. Co., v. Heppenheimer, 58 N. J. L. 633, 34 Atl. 103.

Pennsylvania: Commonwealth v.

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§ 413. Right of Carrier to Fix Rates—Basis Upon Which Fixed.[34]—The approval of a board of railroad and warehouse commissioners does not justify a common carrier in imposing an unlawful freight rate.[35] If a railroad company has the franchise right to charge one fare from a certain village, through which it operates its road, to another village, and it charges a fare through to a point within the first village, it does not incur a statutory penalty for charging excessive fares if it requires another fare from that point out toward such other village.[36] Railroad companies have the right to sell nontransferable reduced rate excursion tickets,[37] and the nontransferability and forfeiture embodied in such tickets is not only binding upon the original purchaser and anyone subsequently acquiring them but, under the provisions of the act to regulate commerce,[38] it is the duty of the railroad company to prevent the wrongful use of such tickets and the obtaining of a preference thereby by anyone other than the original purchaser.[39] There are a great many factors and circumstances to be considered in fixing a rate,[40] among other things: 1. The value of the service to the shipper, including the value of the goods and the profit he could make out of them by shipment. This is considered an ideal method, when not interfered with by competition or other factors. This method is considered practical, and is based on an idea similar to taxation.

Philadelphia & E. R. Co., 164 Pa. 252, 35 W. N. C. 217, 30 Atl. 145.

South Carolina: Columbia Water Power Co. v. Campbell, 75 S. C. 34, 54 S. E. 833.

Tennessee: State, Memphis, v. Butler, 86 Tenn. 614, 8 S. W. 586.

[34] See § 409, herein, as to test of reasonableness of rates in connection with right of company to fix rates.

[35] McGrew v. Missouri Pac. Ry. Co. (Mo. App., 1906), 94 S. W. 719.

[36] Byars v. Bennington & H. V. Ry. Co., 90 N. Y. Supp. 736, 99 App. Div. 34, aff'd in 184 N. Y. 554, 76 N. E. 1090; Railroad Law, § 39, Laws 1890, p. 1096, c. 565.

[37] Bitterman v. Louisville & Nashville Ry. Co., 207 U. S. 205, aff'g 144 Fed. 34; Mosher v. St. Louis, I. M. & S. R. Co., 127 U. S. 249, 8 Sup. Ct. 324.

[38] See § 22, 24 Stat. 387, 25 Stat. 862.

[39] Bitterman v. Louisville & Nashville Ry. Co., 207 U. S. 205, aff'g 144 Fed. 34.

[40] Interstate Commerce Commission v. Chicago Great W. Ry. C., 141 Fed. 1003, 1015, citing Noyes, Am. R. R. Rates, pp. 61 *et seq.*, 85–109.

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2. The cost of service to the carrier would be an ideal theory, but it is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is worthy of consideration, however. 3. Weight, bulk and convenience of transportation. 4. The amount of the product or commodity in the hands of a few persons to ship or compete for, recognizing the principle of selling cheaper at wholesale than at retail. 5. General public good, including good to the shipper, the railroad company and the different localities. 6. Competition, which the authorities and experts recognize as a very important factor. None of the above factors alone are considered necessarily controlling by the authorities. Neither are they all controlling as a matter of law. It is a question of fact to be decided by the proper tribunal in each case as to what is controlling. In every case the Supreme Court has held that competition may be controlling. In only one case has it, as a matter of fact, been held not to be a defense.[41]

[41] Interstate Commerce Commission v. Chicago Great Western Ry. Co. (C. C.), 141 Fed. 1003, 1015, per Bethea, Dist. J. (case is affirmed in 209 U. S. 108, considered in § 415, herein). Citing to *first point*, Interstate Commerce Commission v. Baltimore & O. Ry. Co. (C. C.), 43 Fed. 37, 53; Noyes Am. R. R. Rates, 53. Citing to *second point*, Interstate Commerce Commission v. Baltimore & O. R. Co. (C. C.), 43 Fed. 37; Ransome v. Eastern Ry. Co. (1857), 1 C. B. 437, 26 L. J. C. P. 91; Judson on Interstate Commerce, §§ 148, 149; Western Union Telegraph Co. v. Call, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. ed. 765; Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee Rd. Co., 167 U. S. 633, 17 Sup. Ct. 986, 42 L. ed. 306. Citing to *fourth point*, Interstate Commerce Commission v. Baltimore & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699. Citing to *fifth point*, Interstate Commerce Commission v. Baltimore & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699. Citing to *sixth point* Pickering Phipps v. London & Northwestern Ry. Co., 2 Q. B. D. (1892) 229 (which construes § 2 of the English Act of 1854, which is almost like § 3 of our Interstate Commerce Act); Interstate Commerce Commission v. Baltimore & O. Ry. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699; Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct 700, 40 L. ed. 935; Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; Louisville & Nashville Rd. Co. v. Behlmer, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. ed. 309; East Tennessee, Virginia & Georgia Ry. Co. v. Interstate Commerce Commis-

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§ 414. Right of Carrier to Fix Rates in Competition—Long and Short Hauls—Discrimination.—When competition which controls rates prevails at a given point a dissimilarity of circumstances and conditions is created justifying a carrier in charging a lesser rate at such point, it being the longer distance, than it exacts to a shorter distance and non-competitive point on the same line. A nearer and non-competitive point on the same line is not entitled to lower rates prevailing at a longer distance and competitive place on the theory that it could also be made a competitive point if designated lines of railway carriers by combinations between themselves agreed to that end. The competition necessary to produce a dissimilarity of conditions must be real and controlling and not merely conjectural or possible. Where a charge of a higher rate for a shorter than a longer haul over the same line is lawful because of the existence of controlling competition at the longer distance place, the mere fact that the less charge is made for the longer distance does not alone suffice to cause the lesser rate for the longer distance to be unduly discriminatory. And where the commission has found a rate to be unreasonable solely because it was violative of the act which forbids a greater charge for a lesser than for a longer distance under stated conditions and which prohibits undue discrimination, it is held that as the grounds upon which such holding is based resulted from an error of law, it is proper not to conclude the question of the inherent unreasonableness of the rates, but to leave it open for further action by the commission to be considered free from the errors of law which had previously influenced that body. A carrier in order to give particular places the benefit of their proximity to a competitive point and thereby afford them a lower rate than they would otherwise enjoy, may take into consideration the rate to the point of competition and make it the basis of rates to

sion, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. ed. 940; Interstate Commerce
L. ed. 719; Texas & Pacific Ry. Co. Commission v. Louisville & Nashville
v. Interstate Commerce Commission, Rd. Co., 190 U. S. 273, 23 Sup. Ct.
162 U. S. 197, 16 Sup. Ct. 666, 40 687, 47 L. ed. 1047.

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the points in question. To give a lower rate as the result of competition does not violate the provisions of the act to regulate commerce.[42] So it has been settled by the Supreme Court of the United States that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstances and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point.[43] The only principle by which it is possible to enforce the whole statute of 1887,[44] is this construction: that is, that a competition which is real and substantial and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally, the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it.[45] Where

[42] Interstate Commerce Commission v. Louisville & N. R. Co., 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. 687.

[43] East Tennessee, etc., Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 516. In this case the Interstate Commerce Commission found as a fact that the competition at Nashville, which formed the basis of the contention in this case, was of such a preponderating nature that the carriers must either continue to charge a lesser rate for a longer haul to Nashville than was asked for the shorter haul to Chattanooga, or to abandon all Nashville traffic, nevertheless they were forbidden by the act of February 4, 1887, c. 104, 24 Stat. 379, to make the lesser charge for the longer haul; but since that ruling of the commission was made the rule stated in the text has been settled by the Federal Supreme Court in Louisville & Nashville Railroad Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. 209, and other cases cited; and the construction affixed by the commission to the statute upon which its entire action in this case was predicated was held to be wrong.

As to competition, see cases cited under §§ 413–415, herein.

[44] Act February 4, 1887, c. 104, 24 Stat. 379.

[45] East Tennessee, etc., Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 516.

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a state constitution provided that: "It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, That, upon application, such common carrier, or person or corporation, owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of persons or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from operation of this section," it was held that as construed by the courts of the State, and so far as it was made applicable to or affected interstate commerce, it was invalid.[46]

§ 415. **Right of Carrier to Fix Rates in Competition Continued—Interstate Commerce—Presumption of Good Faith —Discrimination.**—Railroads are the private property of their owners, and while the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, the public is in no proper sense a general manager. The companies may, subject to change of rates provided for in the Interstate Commerce Act, contract with shippers for single and successive transportations and in fixing their own rates may take into account competition, provided it is genuine and not a mere pretense. There is no presumption of wrong arising from a change of rate made by a

[46] Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. ed. 416.

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carrier. The presumption of good faith and integrity attends the action of carriers as it does the action of other corporations and individuals, as those presumptions have not been overthrown by any legislation in respect to carriers. A rate on the manufactured article resulting from genuine competition and natural conditions is not necessarily an undue and unreasonable discrimination against a manufacturing community because it is lower than the rate on the raw material.[47]

[47] Interstate Commerce Commission v. Chicago Great Western Ry. Co., 209 U. S. 108 (aff'g 141 Fed. 1003, considered in § 410, herein). It was held that under the circumstances of this case there was no undue and unreasonable discrimination against the Chicago packing-house industries on the part of the railroads in making, as the result of actual competition and conditions, a lower rate for manufactured packing-house products than for live stock from Missouri River points to Chicago. The opinion of the court, per Brewer, J., is as follows: "It is unnecessary to define the full scope and meaning of the prohibition found in § 3 of the Interstate Commerce Act—or even to determine whether the language is sufficiently definite to make the duties cast on the Interstate Commerce Commission ministerial, and therefore such as may legally be imposed upon a ministerial body, or legislative, and therefore, under the Federal Constitution, a matter for Congressional action—for within any fair construction of the terms 'undue or unreasonable' the findings of the Circuit Court place the action of the railroads outside the reach of condemnation. The complainant, before the Interstate Commerce action, was an incorporated association. The purposes for which it was organized were, as stated in its charter, 'to establish and maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to provide for the speedy adjustment of all business disputes between its members; to facilitate the receiving and distributing of live stock, as well as to provide for and maintain a rigid inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits.' Its members were, as found by the Commerce Commission, 'engaged in the purchase, shipment and sale of live stock for themselves and upon commission.' It was such an association, with members engaged in the business named, that initiated these proceedings and in whose behalf they were primarily prosecuted. While it may be that the proceedings are not to be narrowly limited to an inquiry whether this particular complainant has been in any way injured by the action of the railroad companies, yet that question must be regarded as the one which was the special object of inquiry and consideration. It is true that the Commission subsequently commenced under the Elkins Act an independent suit in its own name, but it was practically to enforce the award made by the Com-

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§ 416. Railroad Rates—Excessive Penalties—Equal Protection of Law.—A state railroad rate statute which imposes such excessive penalties that parties affected are deterred from

mission after its inquiry into the controversy between the live stock exchange and the railroad companies. It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. As said in Int. Com. Com. v. Ala. Mid. R. R. Co., 168 U. S. 144, 172, 42 L. ed. 414, 18 Sup. Ct. 45, quoting from the opinion of Circuit Judge Jackson, afterwards Mr. Justice Jackson of this court, in Int. Com. Com. v. B. & O. R. R. Co., 43 Fed. Rep. 37, 50: 'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.' It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the Interstate Commerce Act—Armour Packing Co. v. The United States, 209 U. S. 56, and also that in fixing their own rates they may take into account competition with other carriers, provided only that the competition is genuine and not a pretense. Int. Com. Com. v. B. & O. R. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. ed. 699; T. & P. Ry. Co. v. Int. Com. Com., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940; Int. Com. Com. v. Ala. Mid. Ry. Co., *supra;* Louisville & N. R. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. 209; East Tenn., Virginia & Georgia Ry. Co. v. Int. Com. Com., 181 U. S. 1, 21 Sup. Ct. 516, 45 L. ed. 719; Int. Com. Com. v. Louisville & N. R. R. Co., 190 U. S. 273, 47 L. ed. 1047, 32 Sup. Ct. 687. It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly when rates are changed the carrier making the change must, when properly called upon, be able to give a good reason therefor, but the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done. Those presumptions of good faith and integrity which have been recognized for ages as attending human action have not been overthrown by any legislation in respect to common carriers. The Commerce Commission did not find whether the rates were reasonable

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testing its validity in the courts denies the carrier the equal protection of the law without regard to the question of the insufficiency of the rates prescribed.[48]

or unreasonable *per se*. Its omission may have been owing, partly at least, to the decision in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Company, 167 U. S. 479, 506, 42 L. ed. 243, 17 Sup. Ct. 896, for this controversy arose before the amendment of June 29, 1906, 34 Stat. 584. On the other hand, the Circuit Court found specifically that the live-stock rates were reasonable, and also that the rates for carrying packers' products and dressed meats were remunerative. See Findings 1 and 7. Obviously shippers had in the rates considered separately no ground of challenge. But the burden of complaint is not that any rates taken by themselves were too high, but that the difference between those on live stock and those on dressed meats and packers' products worked an unjust discrimination. It is insisted that 'the making of the live-stock rate higher than the product rate is violative of the almost universal rule that the rates on raw material shall not be higher than on the manufactured product.' This may be conceded, but that the rule is not universal the proposition itself recognizes, and the findings of the court give satisfactory reasons for the exception here shown. See Findings 2, 3 and 9. The cost of carriage, the risk of injury, the larger amount which the companies are called upon to pay out in damages make sufficient explanation. They do away with the idea that in the relation established between the two kinds of charges any undue or unreasonable preference was intended or secured. Finding No. 6 is very persuasive. It reads: 'Sixth. That the present rates on live stock have not materially affected any of the markets, prices, or shipments; that they are reasonably fair to Chicago and to the shippers; that the shipments of live stock from points between Chicago and the Missouri River and St. Paul are as great in proportion to the volume of business as before the present rates were made; that the majority of the live stock comes to Chicago from points as near as 150 miles this side of the Missouri River and St. Paul, and that the lower rate given to the packers does not seem to directly influence or injure the shippers of live stock.' If the rates complained of have not materially affected any of the markets, prices or shipments; if they are reasonably fair to Chicago and the shippers; if the shipments of live stock from the west to Chicago are as great in proportion to the bulk of the business as before the present rates were made, and the lower rate given to the packers does not directly influence or injure the shippers of live stock; it is difficult to see what foundation there can be for the claim of an undue and unreasonable preference. It would seem a fair inference from the findings that the real complaint was that the railroad companies did not so fix their rates as to help the Chicago packing in-

[48] Young, Ex parte, 209 U. S. 123. Other points are decided in this case and owing to its very great importance we insert it here.

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dustry; that they recognized the fact that along the Missouri River had been put up large packing-houses, and, without any intent to injure Chicago, had fixed reasonable rates for the carrying of live stock to such packing-houses and also to Chicago; that those packing-houses being nearer to the cattle fields were able to engage in the packing industry as conveniently and successfully as the packing-houses in Chicago. If we were at liberty to consider the mere question of sentiment, certainly to place packing-houses close to the cattle fields, thus avoiding the necessity of long transportation of the living animals—a transportation which cannot be accomplished without more or less suffering to them—and to induce transportation to those nearer packing-houses would deserve to be commended rather than condemned. With reference to competition we have referred to the cases in this court in which that matter has been considered. According to the fourth finding the rates in question given to the packers at the Missouri River and St. Paul were the result of competition. Without recapitulating all the facts disclosed in that finding it is enough to say that the Chicago Great Western Railway Company, which had the longest line from Chicago to Missouri River points, made a reduction in the rates, and did this, as its president testified, 'for the purpose of securing a greater proportion of the traffic in the products of live stock than it had been previously able to obtain.' That is one of the facts inducing competition, and one of the results expected to flow from a reduction of rates. It certainly of itself deserves no condemnation. In order to secure to themselves what was likely to be transferred to the Great Western by virtue of its reduction of rates, the other companies also made a reduction and, as shown by the fifth finding, the competition was not the result of agreement, but was an 'actual, genuine, competition.' It may be true, as contended by counsel for the appellant, that even a genuine competition which results in a change of rates does not necessarily determine the question whether the rates as fixed work an undue preference or create an unlawful discrimination. Those rates fixed may make a preference or discrimination irrespective of the motives which caused the railway companies to adopt them, and yet the fact of a genuine competition does make against the contention that the rates were intended to work injustice. An honest and fair motive was the cause of the change in rates; honest and fair on the part of the Great Western in its effort to secure more business, and equally honest and fair on the part of the other railway companies in the effort to retain as much of the business as was possible. In other words, this competition eliminates from the case an intent to do an unlawful act, and leaves for consideration only the question whether the rates as established do work an undue preference or discrimination; and as the findings of the court show that the result of the new rates has not been to change the volume of traffic going to Chicago, or materially affect the business of the original com-

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Ex parte YOUNG.

HEADNOTES.

While this court will not take jurisdiction if it should not, it must take jurisdiction if it should. It cannot, as the legislature may, avoid

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plaint, it would seem necessarily to result that the charge of an unlawful discrimination is not proved. In short, there was no intent on the part of the railway company to do a wrongful act, and the act itself did not work any substantial injury to the rights of the complainant. We have not attempted to review in detail the great mass of testimony, amounting to two enormous printed volumes. It is enough to say that an examination of it clearly shows sufficient reasons for the findings of fact made by the Circuit Court. In short, the findings of the Circuit Court were warranted by the testimony, and those findings make it clear that there was no unlawful discrimination. The decree of the Circuit Court is *Affirmed.*"

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meeting a measure because it desires so to do.

In this case a suit by a stockholder against a corporation to enjoin the directors and officers from complying with the provisions of a state statute, alleged to be unconstitutional, was properly brought within Equity Rule 94 of this court.

An order of the Circuit Court committing one for contempt for violation of a decree entered in a suit of which it did not have jurisdiction is unlawful; and, in such case, upon proper application, this court will discharge the person so held.

Although the determination of whether a railway rate prescribed by a state statute is so low as to be confiscatory involves a question of fact, its solution raises a Federal question, and the sufficiency of rates is a judicial question over which the proper Circuit Court has jurisdiction, as one arising under the Constitution of the United States.

Whether a state statute is unconstitutional because the penalties for its violation are so enormous that persons affected thereby are prevented from resorting to the courts for the purpose of determining the validity of the statute and are thereby denied the equal protection of the law and their property rendered liable to be taken without due process of law, is a Federal question and gives the Circuit Court jurisdiction.

Whether the state railroad rate statute involved in this case, although on its face relating only to intrastate rates, was an interference with interstate commerce *held* to raise a Federal question which could not be considered frivolous.

A state railroad rate statute which imposes such excessive penalties that parties affected are deterred from testing its validity in the courts denies the carrier the equal protection of the law without regard to the question of insufficiency of the rates prescribed; it is within the jurisdiction, and is the duty, of the Circuit Court to inquire whether such rates are so low as to be confiscatory, and if so to permanently enjoin the railroad company, at the suit of one of its stockholders, from putting them in force, and it has power pending such inquiry to grant a temporary injunction to the same effect.

While there is no rule permitting a person to disobey a statute with impunity at least once for the purpose of testing its validity, where such validity can only be determined by judicial investigation and construction, a provision in the statute which imposes such severe penalties for disobedience of its provisions as to intimidate the parties affected thereby

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from resorting to the courts to test its validity practically prohibits those parties from seeking such judicial construction and denies them the equal protection of the law.

The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States.

When the question of the validity of a state statute with reference to the Federal Constitution has been first raised in a Federal Court that court has the right to decide it to the exclusion of all other courts.

It is not necessary that the duty of a state officer to enforce a statute be declared in that statute itself in order to permit his being joined as a party defendant from enforcing it; if by virtue of his office he has some connection with the enforcement of the act it is immaterial whether it arises by common general law or by statute.

While the courts cannot control the exercise of the discretion of an executive officer, an injunction preventing such officer from enforcing an unconstitutional statute is not an interference with his discretion.

The Attorney General of the State of Minnesota, under his common-law power and the state statutes, has the general authority imposed upon him of enforcing constitutional statutes of the State and is a proper party defendant to a suit brought to prevent the enforcement of a state statute on the ground of its unconstitutionality.

While a Federal court cannot interfere in a criminal case already pending in a state court, and while, as a general rule, a court of equity cannot enjoin criminal proceedings, those rules do not apply when such proceedings are brought to enforce an alleged unconstitutional state statute, after the unconstitutionality thereof has become the subject of inquiry in a suit pending in a Federal court which has first obtained jurisdiction thereover; and under such circumstances the Federal court has the right in both civil and criminal cases to hold and maintain such jurisdiction to the exclusion of all other courts.

While making a state officer who has no connection with the enforcement of an act alleged to be unconstitutional a party defendant is merely making him a party as a representative of the State, and thereby amounts to making the State a party within the prohibition of the Eleventh Amendment, individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence an action, either civil or criminal, to enforce an unconstitutional state statute may be enjoined from so doing by a Federal court.

Under such conditions as are involved in this case the Federal court may enjoin an individual or a state officer from enforcing a state statute on account of its unconstitutionality, but it may not restrain the state court from acting in any case brought before it either of a civil or criminal nature, or prevent any investigation or action by a grand jury.

An injunction by a Federal court against a state court would violate

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the whole scheme of this Government, and it does not follow that because an individual may be enjoined from doing certain things a court may be similarly enjoined.

No adequate remedy at law, sufficient to prevent a court of equity from acting, exists in a case where the enforcement of an unconstitutional state rate statute would require the complainant to carry merchandise at confiscatory rates if it complied with the statute and subject it to excessive penalties in case it did not comply therewith and its validity was finally sustained.

While a common carrier sued at common law for penalties under, or on indictment for violation of, a state rate statute might interpose as a defense the unconstitutionality of the statute on account of the confiscatory character of the rates prescribed, a jury cannot intelligently pass upon such a matter; the proper method is to determine the constitutionality of the statute in a court of equity in which the opinions of experts may be taken and the matter referred to a master to make the needed computations and to find the necessary facts on which the court may act.

A state rate statute is to be regarded as *prima facie* valid, and the *onus* rests on the carrier to prove the contrary.

The railroad interests of this country are of great magnitude, and the thousands of persons interested therein are entitled to protection from the laws and from the courts equally with the owners of all other kinds of property, and the courts having jurisdiction, whether Federal or state, should at all times be open to them, and where there is no adequate remedy at law the proper course to protect their rights is by suit in equity in which all interested parties are made defendants.

While injunctions against the enforcement of a state rate statute should not be granted by a Federal court except in a case reasonably free from doubt, the equity jurisdiction of the Federal court has been constantly exercised for such purpose.

The Circuit Court of the United States having, in an action brought by a stockholder of the Northern Pacific Railway Company against the officers of the road, certain shippers and the Attorney General certain other officials of the State of Minnesota, held that a railroad rate statute of Minnesota was unconstitutional and enjoined all the defendants from enforcing such statute, and the Attorney General having refused to comply with such order, the Circuit Court fined and committed him for contempt, and this court refused to discharge him on *habeas corpus*.

STATEMENT OF THE CASE.

"An original application was made to this court for leave to file a petition for writs of *habeas corpus* and certiorari in behalf of Edward T. Young, petitioner, as attorney general of the State of Minnesota.

"Leave was granted and a rule entered directing the United States marshal for the District of Minnesota, Third Division, who held the petitioner in his custody, to show cause why such petition should not be granted.

"The marshal, upon the return of the order to show cause, justified his detention of the petitioner by virtue of an order of the Circuit Court of the United States for the District of Minnesota, which adjudged the peti-

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tioner guilty of contempt of that court and directed that he be fined the sum of $100, and that he should dismiss the mandamus proceedings brought by him in the name and behalf of the State in the Circuit Court of the State, and that he should stand committed to the custody of the marshal until that order was obeyed. The case involves the validity of the order of the Circuit Court committing him for contempt.

"The facts are these: The legislature of the State of Minnesota duly created a railroad and warehouse commission, and that commission on the sixth of September, 1906, made an order fixing the rates for the various railroad companies for the carriage of merchandise between stations in that State of the kind and classes specified in what is known as the 'Western Classification.' These rates materially reduced those then existing, and were by the order to take effect November 15, 1906. In obedience to the order the railroads filed and published the schedules of rates, which have ever since that time been carried out by the companies.

"At the time of the making of the above order it was provided by the Revised Laws of Minnesota, 1905 (§ 1987), that any common carrier who violated the provisions of that section or willfully suffered any such unlawful act or omission, when no specific penalty is imposed therefor, 'if a natural person, shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five hundred dollars, nor more than five thousand dollars for the first offense, and not less than five thousand dollars nor more than ten thousand dollars for each subsequent offense; and, if such carrier or warehouseman be a corporation, it shall forfeit to the State for the first offense not less than twenty-five hundred dollars nor more than five thousand dollars, and for each subsequent offense not less than five thousand dollars nor more than ten thousand dollars, to be recovered in a civil action.'

"This provision covered disobedience to the orders of the Commission.

"On the fourth of April, 1907, the legislature of the State of Minnesota passed an act fixing two cents a mile as the maximum passenger rate to be charged by railroads in Minnesota. (The rate had been theretofore three cents per mile.) The act was to take effect on the first of May, 1907, and was put into effect on that day by the railroad companies, and the same has been observed by them up to the present time. It was provided in the act that 'Any railroad company, or any officer, agent or representative thereof, who shall violate any provision of this act shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding five thousand (5,000) dollars, or by imprisonment in the State prison for a period not exceeding five (5) years, or both such fine and imprisonment.'

"On the eighteenth of April, 1907, the legislature passed an act (chapter 232 of the laws of that year), which established rates for the transportation of certain commodities (not included in the Western Classification) between stations in that State. The act divided the commodities to which it referred into seven classes, and set forth a schedule of maximum rates for each class when transported in carload lots and established the minimum weight

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which constituted a carload of each class.

"Section 5 provided that it should not affect the power or authority of the Railroad and Warehouse Commission, except that no duty should rest upon that commission to enforce any rates specifically fixed by the act or any other statute of the State. The section further provided generally that the orders made by the Railroad and Warehouse Commission prescribing rates should be the exclusive legal maximum rates for the transportation of the commodities enumerated in the act between points within that State.

"Section 6 directed that every railroad company in the State should adopt and publish and put into effect the rates specified in the statute, and that every officer, director, traffic manager or agent or employé of such railroad company should cause the adoption, publication and use by such railroad company of rates not exceeding those specified in the act; 'and any officer, director or such agent or employé of any such railroad company who violates any of the provisions of this section, or who causes or counsels, advises or assists any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its railroad extends, and in which it has a station, and upon a conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days.' The act was to take effect June 1, 1907.

"The railroad companies did not obey the provisions of this act so far as concerned the adoption and publication of rates as specified therein.

"On the thirty-first of May, 1907, the day before the act was to take effect, nine suits in equity were commenced in the Circuit Court of the United States for the District of Minnesota, Third Division, each suit being brought by stockholders of the particular railroad mentioned in the bill, and in each case the defendants named were the railroad company of which the complainants were, respectively, stockholders, and the members of the Railroad and Warehouse Commission, and the attorney general of the State, Edward T. Young, and individual defendants representing the shippers of freight upon the railroad.

"The order punishing Mr. Young for contempt was made in the suit in which Charles E. Perkins, a citizen of the State of Iowa, and David C. Shepard, a citizen of the State of Minnesota, were complainants, and the Northern Pacific Railway Company, a corporation organized under the laws of the State of Wisconsin, Edward T. Young, petitioner herein, and others, were parties defendant. All of the defendants, except the railway company, are citizens and residents of the State of Minnesota.

"It was averred in the bill that the suit was not a collusive one to confer on the court jurisdiction of a case of which it could not otherwise have cognizance, but that the objects and purposes of the suit were to enjoin the railway company from publishing or adopting (or continuing to observe, if already adopted) the rates and tariffs prescribed and set forth in the two acts of the legislature above mentioned and in the orders of the Railroad and Warehouse Commission, and also to enjoin the other defendants from attempting to enforce such provisions, or from instituting

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any action or proceeding against the defendant railway company, its officers, etc., on account of any violation thereof, for the reason that the said acts and orders were and each of them was violative of the Constitution of the United States.

"The bill also alleged that the orders of the Railroad Commission of September 6, 1906, May 3, 1907, the passenger rate act of April 4, 1907, and the act of April 18, 1907, reducing the tariffs and charges which the railway company had theretofore been permitted to make, were each and all of them unjust, unreasonable and confiscatory, in that they each of them would, and will if enforced, deprive complainants and the railway company of their property without due process of law, and deprive them and it of the equal protection of the laws, contrary to and in violation of the Constitution of the United States and the amendments thereof. It was also averred that the complainants had demanded of the president and managing directors of the railway company that they should cease obedience to the orders of the Commission dated September 6, 1906, and May 3, 1907, and to the acts already mentioned, and that the rates prescribed in such orders and acts should not be put into effect, and that the said corporation, its officers and directors, should institute proper suit or suits to prevent said rates (named in the orders and in the acts of the legislature) from continuing or becoming effective, as the case might be, and to have the same declared illegal; but the said corporation, its president and directors, had positively declined and refused to do so, not because they considered the rates a fair and just return upon the capital invested or that they would not be confiscatory, but because of the severity of the penalties provided for the violation of such acts and orders, and therefore they could not subject themselves to the ruinous consequences which would inevitably result from failure on their part to obey the said laws and orders, a result which no action by themselves, their stockholders or directors, could possibly prevent.

"The bill further alleged that the orders of the Commission of September, 1906, and May, 1907, and the acts of April 4, 1907, and April 18, 1907, were, in the penalties prescribed for their violation, so drastic that no owner or operator of a railway property could invoke the jurisdiction of any court to test the validity thereof, except at the risk of confiscation of its property, and the imprisonment for long terms in jails and penitentiaries of its officers, agents and employés. For this reason the complainants alleged that the above-mentioned orders and acts, and each of them, denied to the defendant railway company and its stockholders, including the complainants, the equal protection of the laws, and deprived it and them of their property without due process of law, and that each of them was, for that reason, unconstitutional and void.

"The bill also contained an averment that if the railway company should fail to continue to observe and keep in force or to observe and put in force the orders of the Commission and the acts of April 4, 1907, and April 18, 1907, such failure might result in an action against the company or criminal proceedings against its officers, directors, agents or employés, subjecting the company

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and such officers to an endless number of actions at law and criminal proceedings; that if the company should fail to obey the order of the Commission or the acts of April 4, 1907, and April 18, 1907, the said Edward T. Young, as Attorney General of the State of Minnesota, would, as complainants were advised, and believed, institute proceedings by mandamus or otherwise against the railway company, its officers, directors, agents, or employés to enforce said orders and all the provisions thereof, and that he threatened and would take other proceedings against the company, its officers, etc., to the same end and for the same purpose, and that he would on such failure institute mandamus or other proceedings for the purpose of enforcing said acts and each thereof, and the provisions and penalties thereof. Appropriate relief by injunction against the action of the defendant Young and the railroad commission was asked for.

"A temporary restraining order was made by the Circuit Court, which only restrained the railway company from publishing the rates as provided for in the act of April 18, 1907, and from reducing its tariffs to the figures set forth in that act; the court refusing for the present to interfere by injunction with regard to the orders of the Commission and the act of April 4, 1907, as the railroads had already put them in operation, but it restrained Edward T. Young, Attorney General, from taking any steps against the railroads to enforce the remedies or penalties specified in the act of April 18, 1907.

"Copies of the bill and the restraining order were served, among others, upon the defendant Mr. Edward T. Young, Attorney General, who appeared specially and only for the purpose of moving to dismiss the bill as to him, on the ground that the court had no jurisdiction over him as Attorney General; and he averred that the State of Minnesota had not consented, and did not consent, to the commencement of this suit against him as Attorney General of the State, which suit was in truth and effect a suit against the said State of Minnesota, contrary to the Eleventh Amendment of the Constitution of the United States.

"The Attorney General also filed a demurrer to the bill, on the same grounds stated in the motion to dismiss. The motion was denied and the demurrer overruled.

"Thereupon, on the twenty-third of September, 1907, the court, after a hearing of all parties and taking proofs in regard to the issues involved, ordered a temporary injunction to issue against the railway company, restraining it, pending the final hearing of the cause, from putting into effect the tariffs, rates or charges set forth in the act approved April 18, 1907. The court also enjoined the defendant Young, as Attorney General of the State of Minnesota, pending the final hearing of the cause, from taking or instituting any action or proceeding to enforce the penalties and remedies specified in the act above mentioned, or to compel obedience to that act, or compliance therewith, or any part thereof.

"As the court refused to grant any preliminary injunction restraining the enforcement of the rates fixed by the Railroad and Warehouse Commission, or the passenger rates under the act of April 4, 1907, because the same had been accepted by the railroads and were in operation, the court

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stated that in omitting the granting of such preliminary injunction the necessity was obviated upon that hearing of determining whether the rates fixed by the Commission, or the passenger rates together or singly, were confiscatory and did not afford reasonable compensation for the service rendered and a proper allowance for the property employed, and for those reasons that question had not been considered, but inasmuch as the rates fixed by the act of April 18, 1907, had not gone into force, the court observed: 'It seems to me, upon this evidence of the conditions before either of those new rates were put into effect (that is, the order of the Commission of September, 1906, or the act of April 4, 1907), and the reductions made by those rates, that if there is added the reduction which is attempted to be made by the commodity act (April 18, 1907) it will reduce the compensation received by the companies below what would be a fair compensation for the services performed, including an adequate return upon the property invested. And I think, on the whole, that a preliminary injunction should issue, in respect to the rates fixed by chapter 232 (act of April 18), talked of as the commodity rates, and that there should be no preliminary injunction as to the other rates, *although the matter as to whether they are compensatory or not is a matter which may be determined in the final determination of the action.*'

"The day after the granting of this preliminary injunction the Attorney General, in violation of such injunction, filed a petition for an alternative writ of mandamus in one of the courts of the State, and obtained an order from that court, September 24, 1907, directing the alternative writ to issue as prayed for in the petition. The writ was thereafter issued and served upon the Northern Pacific Railway Company, commanding the company, immediately after its receipt, 'to adopt and publish and keep for public inspection, as provided by law, as the rates and charges to be made, demanded and maintained by you for the transportation of freight between stations in the State of Minnesota of the kind, character and class named and specified in chapter 232 of the Session Laws of the State of Minnesota for the year 1907, rates and charges which do not exceed those declared to be just and reasonable in and by the terms and provisions of said chapter 232. * * *'

"Upon an affidavit showing these facts the United States Circuit Court ordered Mr. Young to show cause why he should not be punished as for a contempt for his misconduct in violating the temporary injunction issued by that court in the case therein pending.

"Upon the return of this order the Attorney General filed his answer, in which he set up the same objections which he had made to the jurisdiction of the court in his motion to dismiss the bill, and in his demurrer; he disclaimed any intention to treat the court with disrespect in the commencement of the proceedings referred to, but believing that the decision of the court in the action, holding that it had jurisdiction to enjoin him as Attorney General from performing his discretionary official duties, was in conflict with the Eleventh Amendment of the Constitution of the United States, as the same has been interpreted and applied by the United States Supreme Court, he believed it to be his duty as such Attorney General to com-

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mence the mandamus proceedings for and in behalf of the State, and it was in this belief that the proceedings were commenced solely for the purpose of enforcing the law of the State of Minnesota. The order adjudging him in contempt was then made."

Mr. Justice Peckham, after making the foregoing statement, delivered the

OPINION OF THE COURT

"We recognize and appreciate to the fullest extent the very great importance of this case, not only to the parties now before the court, but also to the great mass of the citizens of this country, all of whom are interested in the practical working of the courts of justice throughout the land, both Federal and state, and in the proper exercise of the jurisdiction of the Federal courts, as limited and controlled by the Federal Constitution and the laws of Congress.

"That there has been room for difference of opinion with regard to such limitations the reported cases in this court bear conclusive testimony. It cannot be stated that the case before us is entirely free from any possible doubt nor that intelligent men may not differ as to the correct answer to the question we are called upon to decide.

"The question of jurisdiction, whether of the Circuit Court or of this court, is frequently a delicate matter to deal with, and it is especially so in this case, where the material and most important objection to the jurisdiction of the Circuit Court is the assertion that the suit is in effect against one of the States of the Union. It is a question, however, which we are called upon, and which it is our duty, to decide. Under these circumstances, the language of Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. (19 U. S.) 264, 404, 5 L. ed. 257, is most apposite. In that case he said:

"'It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty.'

"Coming to a consideration of the case, we find that the complainants in the suit commenced in the Circuit Court were stockholders in the Northern Pacific Railway Company, and the reason for commencing it and making the railroad company one of the parties defendant is sufficiently set forth in the bill. Davis, etc., Co. v. Los Angeles, 189 U. S. 207, 220, 47 L. ed. 778, 23 Sup. Ct. 498; Equity Rule 94, Supreme Court.

"It is primarily asserted on the part of the petitioner that jurisdiction did not exist in the Circuit Court because there was not the requisite diversity of citizenship, and there was no question arising under the Constitution or laws of the United States to otherwise give jurisdiction to that court. There is no claim made

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here of jurisdiction on the ground of diversity of citizenship, and the claim, if made, would be unfounded in fact. If no other ground exists, then the order of the Circuit Court, assuming to punish petitioner for contempt, was an unlawful order, made by a court without jurisdiction. In such case this court, upon proper application, will discharge the person from imprisonment. Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. ed. 274; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. 724; In re Ayers, 123 U. S. 443, 485, 31 L. ed. 216, 8 Sup. Ct. 164. But an examination of the record before us shows that there are Federal questions in this case.

"It is insisted by the petitioner that there is no Federal question presented under the Fourteenth Amendment, because there is no dispute as to the meaning of the Constitution, where it provides that no State shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws, and whatever dispute there may be in this case is one of fact simply, whether the freight or passenger rates as fixed by the legislature or by the railroad commission are so low as to be confiscatory, and that is not a Federal question.

"Jurisdiction is given to the Circuit Court in suits involving the requisite amount, arising under the Constitution or laws of the United States (1 U. S. Comp. Stat. p. 508), and the question really to be determined under this objection is whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law, and although that question might incidentally involve a question of fact, its solution nevertheless is one which raises a Federal question. See Hastings v. Ames (C. C. A. 8th Circuit), 68 Fed. Rep. 726. The sufficiency of rates with reference to the Federal Constitution is a judicial question, and one over which Federal courts have jurisdiction by reason of its Federal nature. Chicago, etc., R. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462, 702; Reagan v. Farmers', etc., Co., 154 U. S. 369, 399, 38 L. ed. 1014, 14 Sup. Ct. 1047; St. Louis, etc., Co. v. Gill, 156 U. S. 649, 39 L. ed. 567; Covington, etc., Turnpike Road Company v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198; Smyth v. Ames, 169 U. S. 466, 522; Chicago, etc., Railway Co. v. Tompkins, 176 U. S. 167, 172, 44 L. ed. 417, 20 Sup. Ct. 336.

"Another Federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employés, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though

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by a slower process) in such confiscation.

"Still another Federal question is urged, growing out of the assertion that the laws are, by their necessary effect, an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not, at any rate, frivolous.

"We conclude that the Circuit Court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States.

"Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties. For disobedience to the freight act the officers, directors, agents and employés of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents or employés willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. The company, in order to test the validity of the acts, must find some agent or employé to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employés could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. The observations upon a similar question made by Mr. Justice Brewer in Cotting v. Kansas City Stock Yards Company, 183 U. S. 79, 99, 100, 102, are very apt. At page 100 he stated: 'Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss?' Again, at page 102, he says: 'It is doubtless true that the State may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any chal-

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lenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.' The question was not decided in that case, as it went off on another ground. We have the same question now before us, only the penalties are more severe in the way of fines, to which is added, in the case of officers, agents or employés of the company, the risk of imprisonment for years as a common felon. See also Mercantile Trust Co. v. Texas, etc., Ry. Co., 51 Fed. Rep. 529, 543; Louisville, etc., R. R. Co. v. McChord, 103 Fed. Rep. 216, 223; Consolidated Gas Co. v. Mayer, 146 Fed. Rep. 150, 153. In McGahey v. Virginia, 135 U. S. 662, 694, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy, and when the remedy is so onerous and impracticable as to substantially give none at all the law is invalid, although what is termed a remedy is in fact given. See also Bronson v. Kinzie, 1 How. (42 U. S.) 311, 317, 11 L. ed. 143; Seibert v. Lewis, 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. 1190. If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. Chicago, etc., Railway Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462, 702. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

"It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any

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hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event.

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates. We also hold that the Circuit Court had jurisdiction under the cases already cited (and it was therefore its duty) to inquire whether the rates permitted by these acts or orders were too low and therefore confiscatory, and if so held, that the court then had jurisdiction to permanently enjoin the railroad company from putting them in force, and that it also had power, while the inquiry was pending, to grant a temporary injunction to the same effect.

"Various affidavits were received upon the hearing before the court prior to the granting of the temporary injunction, and the hearing itself was, as appears from the opinion, full and deliberate, and the fact was found that the rates fixed by the commodity act, under the circumstances existing with reference to the passenger rate act and the orders of the Commission, were not sufficient to be compensatory, and were in fact confiscatory, and the act was therefore unconstitutional. The injunction was thereupon granted with reference to the enforcement of the commodity act.

"We have, therefore, upon this record the case of an unconstitutional act of the state legislature and an intention by the Attorney General of the State to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character, and involving questions of vast importance to all employés and officers of the company, as well as to the company itself. The question that arises is whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem, and pending its solution obtain freedom from suits, civil or criminal, by a temporary injunction, and if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings.

"This inquiry necessitates an examination of the most material and important objection made to the jurisdiction of the Circuit Court, the objection being that the suit is, in effect, one against the State of Minnesota, and that the injunction issued against the Attorney General illegally prohibits state action, either criminal or civil, to enforce obedience to the statutes of the State. This objection is to be considered with reference to the Eleventh and Fourteenth Amendments to the Federal Constitution. The Eleventh Amendment prohibits the commencement or prosecution of

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any suit against one of the United States by citizens of another State or citizens or subjects of any foreign State. The Fourteenth Amendment provides that no State shall deprive any person of life, liberty or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws.

"The case before the Circuit Court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter Amendment. We think that whatever the rights of complainants may be, they are largely founded upon that Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier Amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant. It applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. 504. It was adopted after the decision of this court in Chisholm v. Georgia (1793), 2 Dall. 419, where it was held that a State might be sued by a citizen of another State. Since that time there have been many cases decided in this court involving the Eleventh Amendment, among them being Osborn v. United States Bank (1824), 9 Wheat. (22 U. S.) 738, 846, 857, 6 L. ed. 204, which held that the Amendment applied only to those suits in which the State was a party on the record. In the subsequent case of Governor of Georgia v. Madrazo (1828), 1 Pet. (26 U. S.) 110, 122, 123, 7 L. ed. 73, that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing Osborn v. United States Bank, *supra*, said that where the claim was made, as in the case then before the court, against the Governor of Georgia as governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the State and for slaves in possession of the state government), the State might be considered as the party on the record (page 123), and therefore the suit could not be maintained.

"Davis v. Gray, 16 Wall. (83 U. S.) 203, 220, 21 L. ed. 447, reiterates the rule of Osborn v. United States Bank, so far as concerns the right to enjoin a state officer from executing a state law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

"In Virginia Coupon Cases, 114 U. S. 270, 296, 29 L. ed. 185, 5 Sup. Ct. 903, 962 (Poindexter v. Greenhow), it was adjudged that a suit against a tax collector who had refused coupons in payment of taxes, and, under color of a void law, was about to seize and sell the property of a taxpayer for non-payment of his taxes, was a suit against him personally as a wrongdoer and not against the State.

"Hagood v. Southern, 117 U. S. 52, 67, decided that the bill was in substance a bill for the specific performance of a contract between the complainants and the State of South

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Carolina, and, although the State was not in name made a party defendant, yet being the actual party to the alleged contract the performance of which was sought and the only party by whom it could be performed, the State was, in effect, a party to the suit, and it could not be maintained for that reason. The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State.

"The cases upon the subject were reviewed, and it was held, in In re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. 164, that a bill in equity brought against officers of a State, who, as individuals, have no personal interest in the subject-matter of the suit, and defend only as representing the State, where the relief prayed for, if done, would constitute a performance by the State of the alleged contract of the State, was a suit against the State (page 504), following in this respect Hagood v. Southern, *supra*.

"A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State.

"On the other hand, United States v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. ed. 171, determined that an individual in possession of real estate under the Government of the United States, which claimed to be its owner, was, nevertheless, properly sued by the plaintiff, as owner, to recover possession, and such suit was not one against the United States, although the individual in possession justified such possession under its authority. See also Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. 770, to the same effect.

"In Pennoyer v. McConnaughy, 140 U. S. 1, 9, 11 Sup. Ct. 840, 35 L. ed. 631, a suit against land commissioners of the State was said not to be against the State, although the complainants sought to restrain the defendants, officials of the State, from violating, under an unconstitutional act, the complainants' contract with the State, and thereby working irreparable damage to the property rights of the complainants. Osborn v. United States Bank, *supra*, was cited, and it was stated: 'But the general doctrine of Osborn v. Bank of the United States, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from.' The same principle is decided in Scott v. Donald, 165 U. S. 58, 67, 41 L. ed. 632, 17 Sup. Ct. 265. And see Missouri, etc., v. Missouri Railroad Commissioners, 183 U. S. 53, 46 L. ed. 78.

"The cases above cited do not include one exactly like this under discussion. They serve to illustrate the principles upon which many cases have been decided. We have not cited all the cases, as we have not thought it necessary. But the injunction asked for in the Ayres Case, 123 U. S. (*supra*), was to restrain the state officers from commencing suits under the act of May 12, 1887 (alleged to be unconstitutional), in the

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name of the State and brought to *recover taxes for its use*, on the ground that if such suits were commenced they would be a breach of a contract with the State. The injunction was declared illegal because the suit itself could not be entertained as it was one against the State to enforce its alleged contract. It was said, however, that if the court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits. (Page 487.) It was not stated that the suit of the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property.

"Whether the commencement of a suit could ever be regarded as an actionable injury to another, equivalent in some cases to a trespass such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014 (a rate case), was a suit against the members of a railroad commission (created under an act of the State of Texas) and the Attorney General, all of whom were held suable, and that such suit was not one against the State. The Commission was enjoined from enforcing the rates it had established under the act, and the Attorney General was enjoined from instituting suits to recover penalties for failing to conform to the rates fixed by the Commission under such act. It is true the statute in that case creating the board provided that suit might be maintained by any dissatisfied railroad company, or other party in interest, in a court of competent jurisdiction in Travis County, Texas, against the Commission as defendant. This court held that such language permitted a suit in the United States Circuit Court for the Western District of Texas, which embraced Travis County, but it also held that, irrespective of that consent, the suit was not in effect a suit against the State (although the Attorney General was enjoined), and therefore not prohibited under the Amendment. It was said in the opinion, which was delivered by Mr. Justice Brewer, that the suit could not in any fair sense be considered a suit against the State (page 392), and the conclusion of the court was that the objection to the jurisdiction of the Circuit Court was not tenable, whether that jurisdiction was rested (page 393), 'upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress and the sanction of the Constitution of the United States.' Each of these grounds is effective and both are of equal force. Union Pacific, etc., v. Mason City Company, 199 U. S. 160, 166, 26 Sup. Ct. 19, 50 L. ed. 134.

"In Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819 (another rate case), it was again held that a suit against individuals, for the purpose of preventing them, as officers of the State, from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment to the injury of the rights of the plaintiff, was not a suit against a State within the meaning of the Amendment. At page 518, in answer to the objection that the suit was really against the State, it was said: 'It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the

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plaintiff, is not a suit against the State within the meaning of that Amendment.' The suit was to enjoin the enforcement of a statute of Nebraska because it was alleged to be unconstitutional, on account of the rates being too low to afford some compensation to the company, and contrary, therefore, to the Fourteenth Amendment.

"There was no special provision in the statute as to rates, making it the duty of the Attorney General to enforce it, but under his general powers he had authority to ask for a mandamus to enforce such or any other law. State of Nebraska ex rel., etc., v. The Fremont, etc., Railroad Co., 22 Nebraska, 313.

"The final decree enjoined the Attorney General from bringing any suit (page 477) by way of injunction, mandamus, civil action or indictment, for the purpose of enforcing the provisions of the act. The fifth section of the act provided that an action might be brought by a railroad company in the Supreme Court of the State of Nebraska; but this court did not base its decision on that section when it held that a suit of the nature of that before it was not a suit against a State, although brought against individual state officers for the purpose of enjoining them from enforcing, either by civil proceeding or indictment, an unconstitutional enactment to the injury of the plaintiff's right. (Page 518.)

"This decision was reaffirmed in Prout v. Starr, 188 U. S. 537, 542, 47 L. ed. 584, 23 Sup. Ct. 398.

"Attention is also directed to the case of Missouri, etc., Ry. Co. v. Missouri R. R., etc., Commissioners, 183 U. S. 53, 46 L. ed. 78. That was a suit brought in a state court of Missouri by the railroad commissioners of the State, who had the powers granted them by the statutes set forth in the report. Their suit was against the railway company to compel it to discontinue certain charges it was making for crossing the Boonville bridge over the Missouri River. The defendant sought to remove the case to the Federal court, which the plaintiffs resisted, and the state court refused to remove on the ground that the real plaintiff was the State of Missouri, and it was proper to go behind the face of the record to determine that fact. In regular manner the case came here, and this court held that the State was not the real party plaintiff, and the case had therefore been properly removed from the state court, whose judgment was thereupon reversed.

"Applying the same principles of construction to the removal act which had been applied to the Eleventh Amendment, it was said by this court that the State might be the real party plaintiff when the relief sought enures to it alone, and in whose favor the judgment or decree, if for the plaintiff, will effectively operate.

"Although the case is one arising under the removal act and does not involve the Eleventh Amendment, it nevertheless illustrates the question now before us, and reiterates the doctrine that the State is not a party to a suit simply because the State Railroad Commission is such party.

"The doctrine of Smyth v. Ames is also referred to and reiterated in Gunter, Attorney General, v. Atlantic, etc., Railroad Co., 200 U. S. 273, 283, 26 Sup. Ct. 252, 50 L. ed. 477. See also McNeill v. Southern Railway, 202 U. S. 543–559, 50 L. ed. 1142, 26 Sup. Ct. 722; Mississippi

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Railroad Commission v. Illinois, etc., Railroad Co., 203 U. S. 335, 340, 27 Sup. Ct. 90, 51 L. ed. 209.

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

"It is objected, however, that Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. ed. 535, has somewhat limited this principle, and, that upon the authority of that case, it must be held that the State was a party to the suit in the United States Circuit Court, and the bill should have been dismissed as to the Attorney General on that ground.

"We do not think such contention is well founded. The doctrine of Smyth v. Ames was neither overruled nor doubted in the Fitts case. In that case the Alabama legislature, by the act of 1895, fixed the tolls to be charged for crossing the bridge. The penalties for disobeying that act, by demanding and receiving higher tolls, were to be collected by the persons paying them. No officer of the State had any official connection with the recovery of such penalties. The indictments mentioned were found under another state statute, set forth at page 520 of the report of the case, which provided a fine against an officer of a company for taking any greater rate of toll than was authorized by its charter, or, if the charter did not specify the amount, then the fine was imposed for charging any unreasonable toll, to be determined by a jury. This act was not claimed to be unconstitutional, and the indictments found under it were not necessarily connected with the alleged unconstitutional act fixing the tolls. As no state officer who was made a party bore any close official connection with the act fixing the tolls, the making of such officer a party defendant was a simple effort to test the constitutionality of such act in that way, and there is no principle upon which it could be done. A state superintendent of schools might as well have been made a party. In the light of this fact it was said in the opinion (page 530):

"'In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the State, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the

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fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons.'

"In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

"It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (154 U. S. 362, 366, 38 L. ed. 1014, 14 Sup. Ct. 1047, § 19 of the act), but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

"In the course of the opinion in the Fitts case the Reagan and Smyth cases were referred to (with others) as instances of state officers specially charged with the execution of a state enactment alleged to be unconstitutional, and who commit under its authority some specific wrong or trespass to the injury of plaintiff's rights. In those cases the only wrong or injury or trespass involved was the threatened commencement of suits to enforce the statutes as to rates, and the threat of such commencement was in each case regarded as sufficient to authorize the issuing of an injunction to prevent the same. The threat to commence those suits under such circumstances was therefore necessarily held to be equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer. The being specially charged with the duty to enforce the statute is sufficiently apparent when such duty exists under the general authority of some law, even though such authority is not to be found in the particular act. It might exist by reason of the general duties of the officer to enforce it as a law of the State.

"The officers in the Fitts case occupied the position of having no duty at all with regard to the act, and could not be properly made parties to the suit for the reason stated.

"It is also objected that as the statute does not specifically make it the duty of the Attorney General (assuming he has that general right) to enforce it, he has under such circumstances a full general discretion whether to attempt its enforcement or not, and the court cannot interfere to control him as Attorney General in the exercise of his discretion.

"In our view there is no interference with his discretion under the facts herein. There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty. Board of Liquidation v. McComb, 92 U. S. 531, 541, 23 L. ed. 623.

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"The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.

"It is also argued that the only proceeding which the Attorney General could take to enforce the statute, so far as his office is concerned, was one by mandamus, which would be commenced by the State in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the State of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.

"The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See In re Ayers, *supra*, page 507. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the Federal Constitution be first raised in a Federal court that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts.

"The question remains whether the Attorney General had, by the law of the State, so far as concerns these rate acts, any duty with regard to the enforcement of the same. By his official conduct it seems that he regarded it as a duty connected with his office to compel the company to obey the commodity act, for he commenced proceedings to enforce such obedience immediately after the in-

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junction issued, at the risk of being found guilty of contempt by so doing.

"The duties of the Attorney General, as decided by the Supreme Court of the State of Minnesota, are created partly by statute and exist partly as at common law. State ex rel. Young, Attorney General, v. Robinson (decided June 7, 1907), 112 N. W. Rep. 269. In the above-cited case it was held that the Attorney General might institute, conduct and maintain all suits and proceedings he might deem necessary for the enforcement of the laws of the State, the preservation of order and the protection of public rights, and that there were no statutory restrictions in that State limiting the duties of the Attorney General in such case.

"Section 3 of chapter 227 of the General Laws of Minnesota, 1905 (same law, § 58, Revised Laws of Minnesota, 1905), imposes the duty upon the Attorney General to cause proceedings to be instituted against any corporation whenever it shall have offended against the laws of the State. By § 1960 of the Revised Laws of 1905 it is also provided that the Attorney General shall be *ex officio* attorney for the railroad commission and it is made his duty to institute and prosecute all actions which the Commission shall order brought, and shall render the commissioners all counsel and advice necessary for the proper performance of their duties.

"It is said that the Attorney General is only bound to act when the Commission orders action to be brought, and that § 5 of the commodity act (April 18, 1907), expressly provides that no duty shall rest upon the Commission to enforce the act, and hence no duty other than that which is discretionary rests upon the Attorney General in that matter. The provision is somewhat unusual, but the reasons for its insertion in that act are not material, and neither require nor justify comment by this court.

"It would seem to be clear that the Attorney General, under his power existing at common law and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the State, including, of course, the act in question, if it were constitutional. His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States Circuit Court.

"It is further objected (and the objection really forms part of the contention that the State cannot be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. Prout v. Starr, 188 U. S. 537, 544, 47 L. ed. 584, 23 Sup. Ct. 398. But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. Taylor v. Taintor, 16 Wall. (83 U. S.)

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366, 370, 21 L. ed. 287; Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. 119.

"Where one commences a criminal proceeding who is already party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings. Davis, etc., Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. 498. In Dobbins v. Los Angeles, 195 U. S. 223–241, 49 L. ed. 169, 25 Sup. Ct. 18, it is remarked by Mr. Justice Day, in delivering the opinion of the court, that 'it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity.' Smyth v. Ames (*supra*) distinctly enjoined the proceedings by indictment to compel obedience to the rate act.

"These cases show that a court of equity is not always precluded from granting an injunction to stay proceedings in criminal cases, and we have no doubt the principle applies in a case such as the present. In re Sawyer, 124 U. S. 200, 211, 8 Sup. Ct. 482, 31 L. ed. 402, is not to the contrary. That case holds that in general a court of equity has no jurisdiction of a bill to stay criminal proceedings, but it expressly states an exception, 'unless they are instituted by a party to the suit already pending before it and to try the same right that is in issue there.' Various authorities are cited to sustain the exception. The criminal proceedings here that could be commenced by the state authorities would be under the statutes relating to passenger or freight rates, and their validity is the very question involved in the suit in the United States Circuit Court. The right to restrain proceedings by mandamus is based upon the same foundation and governed by the same principles.

"It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our Government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.

"The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, and no power to do the latter exists because of a power to do the former.

"It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the op-

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portunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.

"Another obstacle to making the test on the part of the company might be to find an agent or employé who would disobey the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. Take the passenger rate act, for instance: A sale of a single ticket above the price mentioned in that act might subject the ticket agent to a charge of felony, and upon conviction to a fine of five thousand dollars and imprisonment for five years. It is true the company might pay the fine, but the imprisonment the agent would have to suffer personally. It would not be wonderful, if under such circumstances, there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk.

"If, however, one should be found and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. Questions of the cost of transportation of passengers and freight, the net earnings of the road, the separation of the cost and earnings, within the State from those arising beyond its boundaries, all depending upon the testimony of experts and the examination of figures relating to these subjects, as well, possibly, as the expenses attending the building and proper cost of the road, would necessarily form the chief matter of inquiry, and intelligent answers could only be given after a careful and prolonged examination of the whole evidence, and the making of calculations based thereon. All material evidence having been taken upon these issues, it has been held that it ought to be referred to the most competent and reliable master to make all needed computations and to find therefrom the necessary facts upon which a judgment might be rendered that might be reviewed by this court. Chicago, etc., Railway Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. 336. From all these considerations it is plain that this is not a proper suit for investigation by a jury. Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid.

"We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (St. Louis, etc., Ry. Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567), but the facility of proving it in either case falls so far below that which would obtain in a

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court of equity that comparison is scarcely possible.

"To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take. Over eleven thousand millions of dollars, it is estimated, are invested in railroad property, owned by many thousands of people who are scattered over the whole country from ocean to ocean, and they are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property, no more, no less. The courts having jurisdiction, Federal or state, should at all times be open to them as well as to others, for the purpose of protecting their property and their legal rights.

"All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, and enjoining the enforcement of the act until the decision of the court upon the legal question.

"An act of the legislature fixing rates, either for passengers or freight, is to be regarded as *prima facie* valid, and the onus rests upon the company to prove its assertion to the contrary. Under such circumstances it was stated by Mr. Justice Miller, in his concurring opinion in Chicago, etc., Co. v. Minnesota, 134 U. S. 418, 460, 33 L. ed. 970, 10 Sup. Ct. 462, 702, that the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its Commission is by a bill in chancery, asserting its unreasonable character, and that until the decree of the court in such equity suit was obtained it was not competent for each individual having dealings with a carrier, or for the carrier in regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive manner. This remedy by bill in equity is referred to and approved by Mr. Justice Shiras, in delivering the opinion of the court in St. Louis, etc., Co. v. Gill, 156 U. S. 649, 659, 666, 15 Sup. Ct. 484, 39 L. ed. 567, although that question was not then directly before the court. Such remedy is undoubtedly the most convenient, the most comprehensive and the most orderly way in which the rights of all parties can be properly, fairly and adequately passed upon. It cannot be to the real interest of anyone to injure or cripple the resources of the railroad companies of the country, because the prosperity of both the railroads and the country is most intimately connected. The question of sufficiency of rates is important and controlling, and being of a judicial nature it ought to be settled at the earliest moment by some court, and when a Federal court first obtains jurisdiction it ought, on general principles of jurisprudence, to be permitted to finish the inquiry and make a conclusive judgment to the exclusion of all other courts. This is all that is claimed, and this, we think, must be admitted.

"Finally it is objected that the necessary result of upholding this suit in the Circuit Court will be to draw to the lower Federal courts a great flood of litigation of this char-

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acter, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the State, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts.

"And, again, it must be remembered that jurisdiction of this general character has, in fact, been exercised by Federal courts from the time of Osborn v. United States Bank up to the present; the only difference in regard to the case of Osborn and the case in hand being that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the Osborn case, an actual and direct trespass upon or interference with tangible property. A bill filed to prevent the commencement of suits to enforce an unconstitutional act, under the circumstances already mentioned, is no new invention, as we have already seen. The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject-matter. In the case of the interference with property the person enjoined is assuming to act in his capacity as an official of the State, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, where the state official, instead of directly interfering with tangible property, is about to commence suits, which have for their object the enforcement of an act which violates the Federal Constitution, to the great and irreparable injury of the complainants, he is seeking the same justification from the authority of the State as in other cases. The sovereignty of the State is, in reality, no more involved in one case than in the other. The State cannot in either case impart to the official immunity from responsibility to the supreme authority of the United States. See In re Ayers, 123 U. S. 507, 31 L. ed. 216, 8 Sup. Ct. 164.

"This supreme authority, which arises from the specific provisions of the Constitution itself, is nowhere more fully illustrated than in the series of decisions under the Federal *habeas corpus* statute (§ 753, Rev. Stat.), in some of which cases persons in the custody of state officers for alleged crimes against the State have been taken from that custody and discharged by a Federal court or judge, because the imprisonment was adjudged to be in violation of the Federal Constitution. The right to so discharge has not been doubted by this court, and it has never been supposed there was any suit against the State by reason of serving the writ upon one of the officers of the State in whose custody the person was found. In some of the cases the writ has been refused as matter of discretion, but in others it has been granted, while the power has been fully recognized in all. Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. 734; In re Loney, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. ed. 949; In re Neagle, 135 U. S. 1, 19 Sup. Ct. 335, 43 L. ed. 591; Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. 323; Ohio v. Thomas, 173 U. S. 276;

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Minnesota v. Brundage, 180 U. S. 499, 502, 45 L. ed. 639, 21 Sup. Ct. 455; Reid v. Jones, 187 U. S. 153, 23 Sup. Ct. 89, 47 L. ed. 116; United States v. Lewis, 200 U. S. 1, 50 L. ed. 343, 26 Sup. Ct. 229; In re Lincoln, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. ed. 984; Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. 459.

"It is somewhat difficult to appreciate the distinction which, while admitting that the taking of such a person from the custody of the State by virtue of service of the writ on the state officer in whose custody he is found, is not a suit against the State, and yet service of a writ on the Attorney General to prevent his enforcing an unconstitutional enactment of a state legislature is a suit against the State.

"There is nothing in the case before us that ought properly to breed hostility to the customary operation of Federal courts of justice in cases of this character.

"The rule to show cause is discharged and the petition for writs of *habeas corpus* and certiorari is dismissed. *So ordered.*"

Mr. Justice Harlan, dissenting.

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CHAPTER XXIV.

TAXATION OF FRANCHISES.

§ 417. Taxation—Power of State—Limitations Thereon—Constitutional Law — General Principles.
418. Federal Franchises—Agencies of the Federal Government —State Taxation of.
419. Power of States to Tax Corporations—Agencies of Federal Government — Interstate Commerce.
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421. Diversity, Uniformity and Equality of Taxation.
422. Uniformity and Equality of Taxation — Constitutional Law—Board of Equalization—Illegal Discrimination—Jurisdiction in Equity.
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430. Taxation of Intangible Property of Interstate Bridge—Constitutional Law.
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433. Franchise Tax—Tax on Gross Receipts—Street Railroads.
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§ 417. Taxation—Power of State—Limitations Thereon—Constitutional Law—General Principles.—The power to levy and collect taxes is a legislative function in this country [1] and cannot be exercised otherwise than under the authority of the legislature.[2] But state governments have no right to

[1] Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; Heine v. Levee Commissioners, 19 Wall. (86 U. S.) 655, 22 L. ed. 223.

[2] Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197.

Delegation of power to tax—Extent of. See Michigan Railroad Tax Cases (C. C.), 138 Fed. 223 (held not unlawfully delegated—average rate to be ascertained by state board of assessors), case affirmed, Michigan Central Rd. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. 459; Southern Ry. Co. v. North Carolina Corp. Commission (C. C.), 97 Fed. 513 (North Carolina Corporation Commission no power to appraise and

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tax any of the constitutional means employed by the government of the Union to execute its constitutional powers; nor have the States any power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the national government.[3] The exercise, however, of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate their tax upon a corporation according to its business or income, or the value of its property, when this is not done by discriminating against rights held in other States, and the tax is not on imports or tonnage, or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress.[4]

assess railroad property); School City of Marion v. Forrest, 168 Ind. 94, 78 N. E. 187 (extent of delegation of power to municipal body or department thereof); People ex rel. Metropolitan St. Ry. Co. v. Tax Commissioners, 174 N. Y. 417, 67 N. E. 67 (special franchise; tax statute not unconstitutional as conferring upon state officers the right to assess franchises and tangible property connected therewith and included therein though formerly assessed by a local board of assessors); Missouri, K. & T. Ry. Co. v. Shannon (Tex. Civ. App., 1906), 97 S. W. 527, aff'd 100 Tex. 379, 100 S. W. 138 (state tax board; statute making Secretary of State and State Comptroller members not invalid as vesting judicial power in such officers).

Delegation to board of equalization. See § 182, herein.

The power to levy and collect taxes does not belong to a court of equity, and can only be enforced by a court of law, through the officers authorized by the legislature to levy the tax, if a writ of mandamus is appropriate to that purpose. Heine v. Levee Commissioners, 19 Wall. (86 U. S.) 655, 22 L. ed. 223.

Nature of tax—Not a debt or contractual obligation. State v. Chicago & N. W. Ry. Co., 128 Wis. 449, 108 N. W. 594.

[3] McCulloch v. Maryland, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579. In this case it was held that this principle did not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular State, nor to a tax imposed on the proprietary interest which the citizens of that State might hold in that institution, in common with other property of the same description throughout the State. See in this connection Home Savings Bank v. City of Des Moines, 205 U. S. 503, 509, 51 L. ed. —, 27 Sup. Ct. —.

As to implied constitutional limitations, see Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564.

[4] Delaware Railroad Tax, 18 Wall. (85 U. S.) 206, 21 L. ed. 888.

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If a State has not the power to levy a tax it will not be sustained merely because another tax which it might lawfully impose would have the same ultimate incidence.[5] The omission of the legislature for one year, or for a series of years, to tax certain classes of property, otherwise taxable, does not destroy the power of the State to subject them to taxation when it sees fit to do so.[6] The fact that taxation increases the expenses attendant upon the use or possession of the thing taxed, of itself constitutes no objection to its constitutionality.[7]

§ 418. **Federal Franchises—Agencies of the Federal Government—State Taxation of.**—The States may tax every subject of value, within the sovereignty of the State, belonging to the citizens as mere private property, but the power of taxation does not extend to the instruments of the Federal government, nor to the constitutional means employed by Congress to carry into execution the powers conferred in the Federal Constitution.[8] And although the property of a corporation of the United States may be taxed by a State, still this cannot be done through the company's franchises,[9] for franchises conferred by Congress cannot, without its permission, be taxed by the States. Thus the State Board of Equalization of California, having included in their assessment all the franchises of a railroad company, amongst which were franchises conferred by the United States, of constructing a railroad from the Pacific Ocean across the State as well as across the Territories of the United States, and of taking toll thereon, it was held that the assessment of these franchises was repugnant to the Constitution and laws of the United States and the power given to Congress to regulate commerce

[5] Home Savings Bank v. City of Des Moines, 205 U. S. 503, 504, 51 L. ed. —, 27 Sup. Ct. —.

[6] Metropolitan St. Ry. Co. v. New York State Board of Tax Commrs., 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 705.

[7] Delaware Railroad Tax, 18 Wall. (85 U. S.) 206, 21 L. ed. 888.

[8] McCulloch v. Maryland, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579.

[9] Central Pacific R. Co. v. California, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. ed. 903. See § 129, herein.

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among the several States.[10] But the decision of the Supreme Court of a State that the findings of the trial court on the question of whether the franchises taxed covered franchises derived from the United States was conclusive, is binding upon the Federal Supreme Court.[11] In the case of an interstate bridge the tax on the capital stock has been held not a tax on franchises conferred by the Federal government, but on those conferred by the State, and as such not open to objection in the Federal Supreme Court. Such tax was also held in the same case not to be a tax on interstate commerce.[12] The exemption of agencies of the Federal government from taxation by the States is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power. A tax upon their property merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the States. A tax upon their operations being a direct obstruction to the exercise of Federal powers may not be. This doctrine was applied to the case of a tax by a State upon the real and personal property, as distinguished from its franchises, of the Union Pacific Railroad Company, a corporation chartered by Congress for private gain, and all of whose stock was owned by individuals, but which Congress assisted by donations and loans, of whose board of directors the government appointed two, which makes annual reports to the government, whose operations in laying, constructing and working its railroad and telegraph lines, as well as its rates of toll,

[10] California v. Central Pacific R. Co., 127 U. S. 1, 32 L. ed. 150, 8 Sup. Ct. 1052, 2 Inters. Comm. Rep. 153. Examine Atlantic & Pacific R. Co. v. Lesner (Ariz.), 19 Pac. 157, 2 Inters. Comm. Rep. 189, 1 L. R. A. 244, 38 Alb. L. J. 328. See § 129, herein.

[11] Central Pac. R. Co. v. California, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. ed. 903.

[12] Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. 205.

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are subject to regulations imposed by its charter, and to such further regulations as Congress might thereafter make; on whose failure to comply with the terms and conditions of its charter, or to keep the road in repair and use, Congress might assume the control and management thereof, and devote the income to the use of the United States; the loan of the United States to which, amounting to many millions, constituted a lien on all the property, and on failure to redeem which loan, the Secretary of the Treasury was authorized to take possession of the road with all its rights, functions, immunities and appurtenances, for the use and benefit of the United States, and, finally, where all the grants made to the company were declared to be upon the condition that, besides paying the government bond advances, the company should keep the railroad and telegraph lines in repair and use, and should at all times transmit dispatches and transport mails, troops and munitions of war, supplies and public stores for the government, whenever required to do so by any department thereof; and that the government should have the preference of rates not to exceed those charged to private parties, and payable by being applied to the payment of the bonds aforesaid; and in addition to which control, and the obligations and liabilities of the company, Congress, not forbidding a state tax, reserved the right to add to, alter, amend or repeal the charter.[13]

§ 419. **Power of States to Tax Corporations—Agencies of Federal Government—Interstate Commerce.**—Although we have considered elsewhere in this treatise the relative powers of the States and the Federal government and also the question of interstate commerce in that connection, we will also consider here, more specifically, the application of governing principles to the questions of the power of the States as to taxation and interstate commerce in connection therewith. The following propositions as to the taxation by States and their municipalities of corporations engaged in carrying on inter-

[13] Railroad Co. v. Peniston, 18 Wall. (85 U. S.) 5, 21 L. ed. 787.

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state commerce have been settled; the Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects are national in their character, or admit only of one uniform system or plan of regulation. No State can compel a party, individual or corporation, to pay for the privilege of engaging in interstate commerce. This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce. The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, providing at least the franchise is not derived from the United States. No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to a charge therefor.[14] In Fargo v. Hart [15] it is held that while a State can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce between the States, it cannot tax the privilege of carrying on such commerce, nor can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. In Adams Express Co. v. Ohio [16] it is decided that it is well settled that no State can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is, in effect, a tax for the privilege of transacting such commerce; and also that such restriction upon the power of a State does not in the least degree abridge its right to tax at their full value all the instrumentalities used for such commerce. In the same case, determined at an earlier date,[17] the rule is stated as follows: Although the

[14] Atlantic and Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. 817; Robbins v. Shelby Taxing District, 120 U. S. 489, 492, 7 Sup. Ct. 592, 30 L. ed. 694.

[15] 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. 498.

[16] 166 U. S. 185, 218, 41 L. ed. 965, 17 Sup. Ct. 604.

[17] Adams Express Co. v. Ohio, 165 U. S. 194, 255, 41 L. ed. 683, 707, 17 Sup. Ct. 305.

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transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. In Postal Telegraph Co. v. Adams [18] the court holds that while a State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government, by the imposition of unreasonable conditions, it may subject it to a property taxation incidentally affecting its occupation in the same way that business of individuals or other corporations is affected by common governmental burdens. In Ficklen v. Shelby County [19] it is held that although a tax may affect interstate commerce it may do it so incidentally and so remotely as not to amount to a regulation of such commerce. In Robbins v. Shelby County Taxing District [20] it is decided that interstate commerce cannot be taxed at all by a State even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. That the power granted to Congress, to regulate commerce among the States, being exclusive when the subjects are national in their character, or admit only of one uniform system of regulation, the failure of Congress to exercise that power in any case, is an expression of its will that the subject shall be left free from restrictions or impositions upon it by the several States. The court also holds that a State may enact laws which in practice operate to affect commerce among the States, as by providing in the legitimate exercise of its police power and general jurisdiction, for the security and comfort of persons and the protection of prop-

[18] 155 U. S. 688, 39 L. ed. 311, 15 Sup. Ct. 360.

[19] 145 U. S. 1, 36 L. ed. 601, 12 Sup. Ct. 810.

[20] 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694.

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erty; by establishing and regulating channels for commercial facilities; by the passage of inspection laws and laws to restrict the sale of articles injurious to health and morals; by the imposition of taxes upon avocations within its borders nor interfering with foreign or interstate commerce; and in other ways indicated by the court in its opinion, subject in all cases to certain limitations. In Pickard v. Pullman Southern Car Co.[21] it is decided that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. In the Delaware Railroad Tax case[22] it is held that the State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. And in Western Union Teleg. Co. v. Norman[23] the court, per Barr, Dist. J., declares that: "A State cannot tax foreign or interstate commerce as such, nor can it tax its agencies or instrumentalities in such a manner as to interfere with the regulation of this commerce, which belongs exclusively to Congress. The State may tax property within the State, though it be employed in whole or in part in foreign or domestic commerce, as that use does not, of itself, exempt it from liability to taxation as is all other property within the jurisdiction of the State."

§ 420. **Same Subject—Application of Principles—Illustrative Decisions.**—Interstate commerce is not interfered with by the imposition upon a domestic railroad of a franchise tax,

[21] 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. 635.

[22] 18 Wall. (85 U. S.) 206, 21 L. ed. 888.

[23] 77 Fed. 13, 21.

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even though no deduction is allowed from the capital by reason of the fact that a part of the rolling stock of the company is constantly outside of the State.[24] A statute of Pennsylvania imposing a tax upon the tolls received by the New York, Lake Erie and Western Railroad Company from other railroad companies, for the use by them respectively of so much of its railroad and tracks as lies in the State of Pennsylvania for the passage over them of trains owned and hauled by such companies, respectively, is a valid tax, and is not in conflict with the interstate commerce clause of the Constitution when applied to goods so transported from without the State of Pennsylvania.[25] In the Delaware Railroad Tax case[26] the consolidated company therein mentioned was, in 1838, united with two other railroad companies, one called the Baltimore and Port Deposit Railroad Company, chartered by the legislature of Maryland in 1831, with authority to construct and maintain a railroad from Baltimore to Fort Deposit, on the Susquehanna River; and the other called the Philadelphia, Wilmington and Baltimore Railroad Company, chartered by the legislature of Pennsylvania in the same year, with authority to construct and maintain a railroad from Philadelphia to the Delaware state line. These three companies were, under acts of the legislatures of these States, Delaware, Maryland and Pennsylvania, consolidated into one company with a common stock, retaining as its corporate name the name of the company chartered by Pennsylvania. The act of the legislature of Delaware, under which the consolidation was effected, declared that the respective companies should "constitute one company, and be entitled to all the rights, privileges, and immunities which each and all of them possess, have, and enjoy, under and by virtue of their respective charters." It was held that this latter provision in no respect

[24] New York v. Miller, 202 U. S. 584, 26 Sup. Ct. 714, 50 L. ed. 1155, aff'g 177 N. Y. 584, 69 N. E. 1129, 76 N. E. 1104; N. Y. Tax Law; Laws 1890, chap. 908, § 182.

[25] New York, L. E. & W. R. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. 896.

[26] 18 Wall. (85 U. S.) 206.

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changed the position with reference to taxation of the new company, in one of the States, from that of the old company in such State. It was also decided that the tax did not conflict with the power of Congress to regulate commerce among the several States, nor interfere with the right of transit of persons and property from one State into or through another. In the case of Henderson Bridge Co. v. Kentucky [27] the court holds that the acts of Congress conferred no right or franchise on the company to erect the bridge or collect tolls for its use; that they merely regulated the height of bridges over the river and the width of their spans, in order that they might not interfere with its navigation; and that the declaration that such bridges should be regarded as post roads did not interfere with the right of the State to impose taxes; and that the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business; that business being carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. In another case the facts were as follows: Section 4077 of the compilation of the Kentucky statutes of 1894 provides that each of the enumerated companies or corporations; "every other like company, corporation or association;" and also "every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised;" and in the succeeding section the words "franchise," "franchises" and "corporate franchise" are used. It was held, that, taking the whole act together, and in view of the provisions of §§ 4078, 4079, 4080 and 4081, it was evident that the word "franchise" was not employed in a technical sense, and that the legislative inten-

[27] 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. 532.

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tion was plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad, telegraph, telephone, express, sleeping car, etc., companies, whose lines extend beyond the limits of the State, that their intangible property should be assessed on the basis of the mileage of their lines within and without the State; but that from the valuation on the mileage basis the value of all tangible property should be deducted before the taxation was applied.[28] In still another case it appeared that the statute of Ohio of 1893 [29] created a board of appraisers and assessors, and required each telegraph, telephone and express company doing business within the State to make returns of the number of shares of its capital, the par value and market value thereof, its entire real and personal property, and where located and the value thereof as assessed for taxation, its gross receipts for the year of business wherever done and of the business done in the State of Ohio, giving the receipts of each office in the State, and the whole length of the line of rail and water routes over which it did business within and without the State. It required the board of assessors to "proceed to ascertain and assess the value of the property of said express, telegraph and telephone companies in Ohio, and in determining the value of the property of said companies in this State to be taxed within the State and assessed as herein provided said board shall be guided by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of

[28] Adams Express Co. v. Kentucky, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. 527.

[29] Act April 27, 1893, Laws Ohio, 330, and May 10, 1894, Laws Ohio, 220.

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the capital stock thereof, and the other evidence and rule as aforesaid." It was held, (1) that, assuming that the proportion of capital employed in each of the several States through which such a company conducts its operation has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it does so only indirectly; and that the taxation is essentially a property tax, and as such, not an interference with interstate commerce; (2) that the property so taxed has its actual situs in the State and is, therefore, subject to its jurisdiction; and that the distribution among several counties is a matter of regulation by the state legislature; (3) that this was not taking of property without due process of law, either by reason of its assessment as within the jurisdiction of the taxing authorities, or of its classification as subject to the unit rule; (4) that the valuation by the assessors cannot be overthrown simply by showing that it was otherwise than as determined by them.[30] Again, the tax imposed by the laws of Mississippi,[31] when enforced against a telegraph company organized under the laws of another State, and engaged in interstate commerce in Mississippi, being graduated according to the amount and value of the company's property measured by miles, and being in lieu of taxes directly levied upon the property, is a tax which it is within the power of the State to impose; and the exercise of that power, as expounded by the highest judicial tribunal of the State, does not amount to a regulation of interstate commerce, or put an unconstitutional restraint thereon.[32] The business of receiving and landing of passengers and freight is incident to their transportation, and a tax upon such receiving and landing is a tax upon transportation and upon commerce, interstate or foreign, involved in such transportation.[33] A

[30] Adams Express Co. v. Ohio, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. 305.

[31] Code of 1880, c. 10, § 585; Sess. Laws, 1888, c. 3.

[32] Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 15 Sup. Ct. 360.

[33] Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 5 Sup. Ct. 826.

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state tax upon the gross receipts of a steamship company incorporated under its laws, which are derived from the transportation of persons and property by sea, between different States, and to and from foreign countries, is a regulation of interstate commerce, in conflict with the exclusive powers of Congress under the Constitution.[34] Under a state statute providing that certain corporations and companies "shall, in addition to the other taxes imposed by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised," and other subsequent sections provide the method of ascertaining the value of the "franchise" or "corporate franchise," the statute is not limited to the technical meaning of the term franchise; and the property to be taxed is all the intangible property of the corporation. If the corporation is a foreign one, engaged in interstate commerce, then the taxation is upon such proportion of such property as the length of lines situate in the State sustains to their entire length of lines. Such statute is not unconstitutional as violating the interstate commerce clause or Fourteenth Amendment.[35]

§ 421. **Diversity, Uniformity and Equality of Taxation.**— Diversity of taxation, both with respect to the amount imposed, and the various species of property selected, either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality in taxation, and of a just adaptation of property to its burdens. A system of taxation which imposes the same tax upon every species of property, irrespective of its nature, or condition, or class, will be destructive of the principle of uniformity and equality in taxation, and of a just adaptation of property to its burdens.[36] While a state constitution requires taxation, in general, to be uniform and equal, but declares in express

[34] Philadelphia & South. Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. ed. 1200.

[35] Western Union Teleg. Co. v. Norman (U. S. C. C.), 77 Fed. 13.

[36] Pacific Express Co. v. Seibert,

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terms that a large class of persons engaged in special pursuits, among whom are persons or corporations owning franchises

142 U. S. 339, 35 L. ed. 1035, 12 Sup. Ct. 250.

As to uniformity and equality of taxation, see the following cases:

United States: Merchants & Mfrs. Bank v. Pennsylvania, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. ed. 236 (uniformity of taxation—state statute not obnoxious to Fourteenth Amendment; national banks); Western Union Teleg. Co. v. Indiana, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. 345 (uniformity of taxation; telegraph companies); Charlotte, Columbia & Augusta Rd. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. 255, 48 Am. & Eng. R. Cas. 595 (constitutional law; equal and uniform taxation; railroads); Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. 57 (classification of assessed property; equal protection of law); Commonwealth v. National Bank, 101 U. S. 153, 25 L. ed. 903 (uniformity of taxation; state constitution; equalization board; bank shares); Railroad Companies v. Gaines, 97 U. S. 697, 24 L. ed. 1091 (uniformity of taxation; railroads; constitutional law; obligation of contract); Gilman v. Sheboygan, 2 Black (67 U. S.), 510, 17 L. ed. 305 (uniformity of taxation; Wisconsin constitution); W. C. Peabody & Co. v. Pratt, 121 Fed. 772, 58 C. C. A. 48 (effect of art. 8, § 1 of Federal Constitution); Western Union Teleg. Co. v. Norman (C. C.), 77 Fed. 13; San Mateo County v. Railroad Co., 7 Sawy. 517.

Alabama: Phœnix Carpet Co. v. State, 118 Ala. 143, 151, 152, 22 So. 627 (tax on privileges or franchises; equality and uniformity explained).

Arizona: Consolidated Nat. Bank v. Pima County, 5 Ariz. 142, 145, 146, 48 Pac. 291 (shares of national banks; equality of assessment with other moneyed capital).

Connecticut: State v. Travelers' Ins. Co., 73 Conn. 255, 47 Atl. 299 (neither the constitution of this State nor that of the United States contains any provision, express or implied, requiring equality or uniformity of taxation; taxation of local corporations).

Florida: Hayes v. Walker, 54 Fla. 163, 44 So. 747 (constitutional provision for uniformity does not prevent legislature making proper classifications of property).

Georgia: Central of Georgia Ry. Co. v. Wright, 125 Ga. 617, 54 S. E. 64; case controlled by Georgia R. & Banking Co. v. Wright, 125 Ga. 589, 54 S. E. 52 (shares of stock; constitutional requirement that all taxation shall be uniform, etc.); Sparks v. Macon, 98 Ga. 301, 25 S. E. 459; case is controlled by principles of Columbus Railway Co. v. Wright, 89 Ga. 574, 15 S. E. 293 (taxation of railroad company for county purposes; tax held equal, uniform and just).

Illinois: Crozer v. People, 206 Ill. 464, 473, 69 N. E. 489 ("only method by which taxation could be made exactly and absolutely uniform, and in proportion to the value of the property, would be by ascertaining its value throughout the entire year and fixing its assessed value accordingly"); Raymond, County Treasurer, v. Hartford Fire Ins. Co., 196 Ill. 329.

Iowa: Judy v. Beckwith (Iowa, 1908), 114 N. W. 565 (shares of foreign corporation; statute not violative

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and privileges, may be taxed as the legislature shall determine, by a general law, uniform as to the class upon which it operates;

of constitutional requirement of uniformity).

Kansas: Missouri, K. & T. Ry. Co. v. Miami County Commrs., 67 Kan. 434, 73 Pac. 103 (classification and common-law distinctions); Atchison, Topeka & S. F. Ry. Co. v. Clark, 60 Kan. 831, 832, 58 Pac. 561, modifying 54 Pac. 930 ("nor do we find a lack of equality and uniformity in this tax of which the railroad company has cause to complain").

Kentucky: Commonwealth v. Walsh's Trustee, 32 Ky. L. Rep. 460, 106 S. W. 240 (stockholders; corporate franchise; statute partly void); Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co., 25 Ky. L. Rep. 1404, 1409, 77 S. W. 1118 (statute provided that same rate of taxation which was levied on other real estate in any year, should also be levied on railroad property); Devou v. Boske, 23 Ky. L. Rep. 364, 63 S. W. 44 (taxation of turnpike company; statute held not to violate constitution requiring all taxation to be equal and uniform).

Louisiana: St. Anna's Asylum v. Parker, 109 La. 592, 33 So. 613 (property not exempt; if taxed should be taxed equally or in a uniform ratio according to assessment legally made on all property of same description upon which a tax is levied).

Michigan: Pingree v. Dix, 120 Mich. 95, 44 L. R. A. 679, 6 Det. L. N. 45, 78 N. W. 1025 (telegraph and telephone lines; statute held to violate constitutional requirement as to uniformity).

Minnesota: State ex rel. Marr v. Stearns, 72 Minn. 200, 222, 223, 75 N. W. 210 (system of commuted taxation on property of railroad companies; equality and uniformity).

Mississippi: Gulf & S. I. R. Co. v. Adams, 90 Miss. 559, 45 So. 91 (privilege tax law; additional tax on railroads; discriminatory and void as *ad valorem* tax); Adams v. Bank of Oxford, 78 Miss. 532, 29 So. 402 (*ad valorem* taxes on banks; not violative of constitutional requirement of uniformity).

Missouri: State, Johnson, v. Chicago, B. & Q. R. Co., 195 Mo. 228, 238, 93 S. W. 784 (general rule of law is that taxes must be uniform and equal, coextensive with the territory to which the tax applies; case of special road tax); Ward v. Gentry County Board of Equalization, 135 Mo. 309, 322, 323, 36 S. W. 648 (assessment of banking property; equality of taxation).

New Jersey: Central R. Co. of New Jersey v. State Board of Assessors, 74 N. J. L. 1, 67 Atl. 672 (statute for taxation of railroad and canal company does not violate constitutional provision as to uniformity). See United New Jersey R. & Canal Co. v. Parker (Err. & App., 1908), 69 Atl. 239; Bergen & Dundee R. Co. v. State Board of Assessors, 74 N. J. L. 742, 67 Atl. 668.

North Dakota: Minneapolis & Northern Elevator Co. v. Traill County, 9 N. D. 213, 50 L. R. A. 266, 82 N. W. 727 (assessments and taxation of grain in elevators, warehouses and grain houses; statute not violative of constitutional requirement of uniformity).

Tennessee: State v. Taylor, 119 Tenn. 229, 104 S. W. 242 (street railroads; not improper classification of property).

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a statute under such provision is not unconstitutional which prescribes a different rule of taxation for railroad companies from that of individuals. Nor does it violate any provision of the Constitution of the United States.[37] Again, in a case concerning want of uniformity in taxation, it is decided that while it was quite competent for the State of Virginia to impose upon the movable personal property of the Baltimore and Ohio Railroad Company (a corporation organized under the laws of Maryland), which was brought within its territory and there habitually used and employed, the same rate of taxation which was imposed upon similar property used in like way by its own citizens, it had not done so in the taxing laws of the State which were in force when the tax in controversy was imposed.[38]

§ 422. **Uniformity and Equality of Taxation—Constitutional Law—Board of Equalization—Illegal Discrimination—Jurisdiction in Equity.**—There is no general supervision by the nation over state taxation, in regard to which the State has, generally speaking, the freedom of a sovereign both as to

Virginia: Day v. Roberts, 101 Va. 248, 251, 43 S. E. 362 (settled construction is that uniform taxation requires uniformity not only in the rate of taxation, and in the mode of assessment upon the taxable valuation, but that uniformity must be coextensive with the territory to which it applies).

Washington: Pacific Nat. Bank v. Pierce County, 20 Wash. 675, 56 Pac. 936, 16 Bkg. L. J. 346 (shares of capital stock of banking institutions, also of real and personal property; constitution does not prescribe uniform methods of assessment for all classes of property but is a requirement that the rate of assessment and the method of valuation shall be uniform as to property sought to be taxed).

Wisconsin: Chicago & Northwestern Ry. Co. v. State, 128 Wis. 553, 108 N. W. 557 (uniformity required only as to property taxed directly; uniformity of burden, not of methods; public service corporations; franchises; valuation of property as a unit and as personality; *ad valorem* taxation of railroad property); State v. Railway Companies, 128 Wis. 449, 108 N. W. 594 (license fees in lieu of taxes; constitutional rule of uniformity not applicable; return of gross earnings; privilege taxes not taxes in constitutional sense).

[37] State Railroad Tax Case, 92 U. S. 575, 23 L. ed. 663.

[38] Marye v. Baltimore & Ohio R. R. Co., 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. 1037.

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objects and methods. Nothing in the Federal Constitution prevents a State from separating a particular class of property and subjecting it to assessment and taxation in a mode and by a rate different from that imposed on other property and applying the proceeds to state rather than local purposes. Nor is the legislature bound to impose the same rate of tax upon one class of property that it does upon another; it is sufficient if all of the same class are subjected to the same rate and the tax is administered impartially among them.[39] Again, it is not beyond the power of a State, so far as the Federal Constitution is concerned, to tax the franchise of a corporation at a different rate from the tangible property in the State.[40] This doctrine has been restated in a comparatively recent case although not the contention in the case, as it was asserted that the board of equalization assessed the franchises and other property of certain companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class for that year. The result was an enormous disparity and discrimination between the various assessments upon the corporations; and action of such board, resulting in illegal discrimination, was held in this case not to be action forbidden by the state legislature and therefore beyond review by the Federal courts under the Fourteenth Amendment. It was also decided in the same case that where a corporation has paid the full amount of its tax as based upon the same rate as that levied upon other property of the same class, equity will restrain the collection of the excess illegally assessed, there being no adequate remedy at law, when it appears that it would require a multiplicity of suits against the various taxing authorities to recover the tax and that a portion of it

[39] Michigan Central R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. 259, aff'g Michigan Railroad Tax Cases, 138 Fed. 223.

[40] Coulter v. Louisville & N. R. Co., 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. 342. Examine Fond du Lac Water Co. v. Fond du Lac, 82 Wis. 322, 16 L. R. A. 581, 52 N. W. 439; Galveston, H. & S. A. Ry. Co. v. State (Tex. Civ. App.), 93 S. W. 464, reversed in State v. Galveston, H. & S. A. Ry. Co. (Tex., 1906), 97 S. W. 71.

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would go to the State against which no action would lie, and where the amount is so great that its payment would cause insolvency, and a levy upon the property—in this case a street car system—would embarrass and injure the public.[41]

[41] Raymond v. Chicago Traction Co., 207 U. S. 20, 37 L. ed. 7, 28 Sup. Ct. 7, aff'g 114 Fed. 557, two justices dissenting. The court in its opinion, per Peckham, J., said: "The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the State through the board. * * * The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the constitution of the State in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her or its property,' was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the State. This action resulted in illegal discrimination, which under these facts was the action of the State through the board. Barney v. City of New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. 502, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the State. Such is not the case here. We are also of opinion that the case is one over which equity has jurisdiction. In Cummings v. National Bank, 101 U. S. 153, 25 L. ed. 903, this court held that the case was one properly brought in equity. It was to restrain the collection of a tax. While the court held that the position of the bank as trustee entitled it to maintain an action in equity and also under the statute of Ohio, it was further held (page 157): 'Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power.' We have in the case at bar similar facts. A system of valuation was adopted and applied to a large class of corporations, differing wholly from that applied to other corporations of the same class, and resulting in a discrimination against the appellee of the most serious and material nature. It is not a question of mere difference of opinion as to the valuation of property, but it is a question of difference of method in the manner of assessing property of the same kind. Although the law itself may be valid and provide for a proper valuation, yet if, through mistake on the part of the State, through its board of equalization and while act-

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§ 423. To What Extent Franchises Taxable—Generally.—We have seen that franchises are property almost universally

ing as a *quasi*-judicial body, the board erred in the method to be pursued in relation to the corporations now before us, the mistake is one which may be corrected in equity. In all these cases, however, where there is jurisdiction to tax at all, equity will not grant an injunction to restrain the collection, even of an illegal tax, without the payment on the part of the taxpayer of the amount of a tax fairly and equitably due. Bank v. Marye, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. ed. 180, and cases cited. Acting upon this principle, the Circuit Court refused to issue the injunction until the appellee paid the amount which the court found to be a fair and just amount due from the appellee for the tax of the year 1900, based upon a tax at the same rate as that levied upon other property and on corporations of the same class within the State. The sum to be paid by the appellee herein, as decided by the circuit judge, was $134,350.03. That sum was paid instead of $1,019,211.78, called for by the warrant in the hands of the collector. Finally it is objected that the appellee had a complete and adequate remedy at law by paying the amount of the warrant, and then suing the collector to recover the same back as money paid under duress, although upon a void warrant. Undoubtedly if there be a complete and adequate remedy at law in such a case as this, the remedy in equity will not be recognized. Assuming the tax to be void, equity will not restrain by injunction its collection, unless there be some other ground for equitable interposition. Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. 646; Allen v. Palace Car Co., 139 U. S. 658, 11 Sup. Ct. 682, 35 L. ed. 303; Express Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 12 Sup. Ct. 250. In the cases in 139 U. S., *supra*, it was recognized that no ground appeared for the interposition of a court of equity, because of the existence of a statute in the State of Tennessee providing for paying the amount of the alleged illegal tax to the officer holding the warrant, and granting to the taxpayer a right to commence an action to recover back the tax thus paid, the statute providing that the officer should pay the amount received into the state treasury, where it was to remain until the question was decided, and, if it was decided in favor of the taxpayer, provision was made for the repayment of the amount by the State. The other averments, beside that of the illegality of the tax, made in these two cases, were held not to constitute a ground for the interposition of a court of equity by restraining the collection of the tax. In the case in 142 U. S., *supra*, the court held that there was no ground to warrant the interposition of a court of equity. The case was decided upon the ground that the averment of illegality of the tax was not sustained. There is no statute of a similar kind in Illinois which has been called to our attention, but some of the cases in that State hold that such a suit may be maintained against the collector when the money was paid under protest. In the case at bar it is averred that it is the duty of the collector, having received the money on his warrant, to pay the sum so received in the proportions

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classed as real property or incorporeal hereditaments,[42] and this constitutes an important factor in determining to what

designated in his tax books to the city treasurer of the city of Chicago, the county treasurer of the county of Cook, the treasurer of the sanitary district, and other officers and authorities entitled to receive the same, and if the plaintiff instituted suit to recover back the taxes so paid to the town or county collector he would be obliged to bring separate suits against each one of the several taxing bodies receiving its proportionate share of the tax, thereby necessitating a multiplicity of suits, and the proportion of the tax which would go to the State of Illinois, could not be collected back by any legal proceeding whatsoever; and if repayment could be compelled from the city of Chicago and other taxing bodies, such repayment would not cover the cost, including commissions deducted for the collection of the tax, and in that way it was averred that the appellee would be subjected to a great and irreparable injury, for which there was not a complete and adequate remedy at law. There was also the allegation * * * that if compelled to pay this enormous tax it would be rendered insolvent. We think all these allegations combined take the case out of the class where relief is prayed for, founded simply upon the unconstitutionality of the law under which the tax is levied, or upon the illegality for any other reason, of the tax itself, and bring the case within the jurisdiction of a court of equity. And, in addition, there is the allegation that a levy upon the property of the appellee would interfere with the operation of the street car system in the city of Chicago, operated by the appellee, and would greatly embarrass and injure the public who have to use the cars. Upon the whole, we think it is apparent that no adequate remedy at law exists in this case, and that the judgment enjoining the collection of the balance of the tax levied against the appellee, above that which has been paid under the direction of the Circuit Court, must be *Affirmed.*"

In the above case of Raymond v. Chicago Traction Co., the material part of art. 9, § 1, of the constitution of Illinois, 1870, is as follows: "The general assembly shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct and not otherwise; but the general assembly shall have power to tax * * * insurance, telegraph and express interests or business, vendors of patents and persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates." The fol-

[42] See §§ 25–27, herein. Examine Southwestern Teleg. & Teleph. Co. v. City of San Antonio (Tex. Civ. App., 1903), 73 S. W. 859.

Tax on capital stock, franchises, etc., is tax on property and its assets. Commonwealth v. New York, P. & O. R. Co., 188 Pa. 169, 41 Atl. 594;

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extent franchises are taxable or to what extent the power to tax such property may be exercised. In the complex civiliza-

lowing are the statutes in question in the above case: "Real property shall be valued as follows: First, each tract or lot of real property shall be valued at its fair cash value estimated at the price it would bring at a fair voluntary sale." Hurd's Rev. Stat., 1899, c. 120, par. 4. "Personal property shall be valued as follows: First, all personal property, except as herein otherwise directed, shall be valued at its fair cash value. * * * Fourth, the capital stock of all companies and associations now or hereafter created under the laws of this State, except those required to be assessed by the local assessors and hereinafter provided, shall be so valued by the state board of equalization as to ascertain and determine respectively the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association; such board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just, and such rules and principles when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act, subject, however, to such change, alteration or amendment as may be found from time to time to be necessary by said board." Hurd's Rev. Stat., 1899, c. 120, § 3.

Raymond v. Chicago Edison Co., 207 U. S. 42, was decided upon the authority of the above principal case.

See § 182, herein.

Remedies for assessment by board of equalization in excess of authority. Compare Central Pac. R. Co. v. California, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. ed. 909.

Commonwealth v. Beach Creek Rd. Co., 188 Pa. 203, 41 Atl. 605; Commonwealth v. Fall Brook Rd. Co., 188 Pa. 199, 41 Atl. 606; Pa. Act June 8, 1891, P. L. 229.

Tax on franchises, rails, rolling stock, etc., under const. § 179, is tax on personal property. Minneapolis, St. Paul & S. M. Ry. Co. v. Dickey County, 11 N. Dak. 107, 90 N. W. 260.

"In some States the franchises and privileges of a corporation are declared to be personal property. Such was the case in New York with reference to the privileges and franchises of savings banks. They were so declared by a law passed in 1866, and made liable to taxation to an amount not exceeding the gross sum of the surplus earned and in the possession of the banks. The law was sustained by the Court of Appeals of the State in Monroe Savings Bank v. City of Rochester, 37 N. Y. 365, 369, 370, although the bank had a portion of its property invested in United States bonds. In its opinion the court observed that in declaring the privileges and franchises of a bank to be personal property the legislature adopted no novel principle of taxation; that the powers and privileges which constitute the franchises of a corporation were in a just sense property, quite distinct and separate from the property which, by the use of such franchises, the corporation might acquire; that they might be subjected to taxation if the legislature saw fit so to enact; that such taxation being within the power of the legislature,

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tion of to-day a large portion of the wealth of a community consists of intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from taxing such intangible property at its real value.[43] In California franchises are, under its constitution, classed as property and are subject to taxation.[44] In Illinois they are also declared to be taxable property.[45] In Kentucky the constitution does not prevent intangible property from being taxed, and a statute of that State providing for the taxation of franchises of every "corporation, company, or association having or exercising any special or exclusive privilege or franchise, not allowed to natural persons, or performing any public service," covers tangible and

it might prescribe a rule or test of their value; that all franchises were not of equal value, their value depending, in some instances, upon the nature of the business authorized, and the extent to which permission was given to multiply capital for its prosecution; and that the tax being upon the franchises and privileges it was unimportant in what manner the property of the corporation was invested. And the court added: 'It is true that where a state tax is laid upon the property of an individual or a corporation, so much of their property as is invested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed.' And again: 'It must be regarded as a sound doctrine to hold that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon it must bear the burden.' This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in Society for Savings v. Coite, 6 Wall. (73 U. S.) 594, 18 L. ed. 897, and Provident Institution v. Massachusetts, 6 Wall. (73 U. S.) 611, 18 L. ed. 907." Home Insurance Co. v. New York, 134 U. S. 594, 601, 33 L. ed. 1025, 10 Sup. Ct. 593, per Field, J.

[43] Adams Express Co. v. Ohio, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. 604, denying rehearing in 165 U. S. 194, 255, 41 L. ed. 683, 17 Sup. Ct. 305. See this case under § 39, herein.

[44] Bank of California v. City & County of San Francisco, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918; San Joaquin & Kings River Canal & Irrig. Co. v. Merced County, 2 Cal. App. 593, 84 Pac. 285.

[45] Porter v. Rockford, Rock Island & St. Louis Rd. Co., 76 Ill. 561, 573, per Scholfield, J.

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intangible property; and the statute does not provide for an additional tax upon the same property, but upon intangible property which has not been taxed as tangible property.[46] In Louisiana charters and franchises are specifically mentioned in the taxing statute, and franchises are taxable property and no kind of property is exempt from taxation in that State.[47] It is held in Maine that no legislation of that State

[46] Adams Express Co. v. Kentucky (Weir v. Norman), 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. 527; const. Ky., §§ 172, 174; Ky. Stat., 1894, §§ 4077–4081. See Louisville Tank Line v. Commonwealth, 29 Ky. L. Rep. 257, 93 S. W. 635 (Ky. St., 1903, § 4077, covers what corporations); Commonwealth v. Cheasapeake & O. Ry. Co., 28 Ky. L. Rep. 1110, 91 S. W. 672 (see this case under § 9, herein); Hager v. Louisville Title Co., 27 Ky. L. Rep. 345, 85 S. W. 182 (title and guaranty company not taxable under Ky. Stat., 1903, § 4077); Standard Oil Co. v. Commonwealth, 26 Ky. L. Rep. 985, 82 S. W. 1020 (mere trading corporations not included under § 4077); Henderson Bridge Co. v. Negley, 23 Ky. L. Rep. 746, 63 S. W. 989 (taxation of franchises authorized by Ky. const., § 174); Louisville Tobacco Warehouse Co. v. Commonwealth, 20 Ky. L. Rep. 1747, 49 S. W. 1069, reversing 20 Ky. L. Rep. 1047, 48 S. W. 420 (public service required by § 4077, not performed by tobacco warehouseman, or ordinary business corporation created under the general law).

[47] Maestri v. Board of Assessors (1903), 110 La. 517, the court, per Blanchard, J. (at p. 528), says: "Franchises are taxable property. New Orleans City Gas Light Co. v. Board of Assessors, 31 La. Ann. 476; Williams v. Bronsard, 51 La. Ann. 335, 24 So. 808. No kind of property is exempt from taxation in Louisiana, save that precisely enumerated in the fundamental law itself. The accepted rule everywhere is that grantees of franchises receive the same from the sovereign subject to the State's power of taxation, unless otherwise specially provided. As well said by counsel representing the city of New Orleans: 'Whenever a man accumulates property in open competition with his fellow man, the sovereign subjects the result of his toil, his property, to taxation. Why should it exempt property acquired by another individual as the result of his ownership (or administration) of an attribute of sovereignty—an attribute which he, and he alone, has the right to exercise?' The contrary theory, that the purchase of a franchise from the sovereign exempts the franchise from taxation, has been exploded. The subject came up in this State in the railroad cases reported in 40 La. Ann. 587, 4 So. 512, in 42 La. Ann. 4, 7 So. 59, 21 Am. St. Rep. 365, and in 44 La. Ann. 1055, 11 So. 820, where the right to tax was maintained, one of the cases, to wit: that in 40 La. Ann. and 4 So., going by writ of error to the Supreme Court of the United States, where the judgment of this court was affirmed. New Orleans City & L. R. Co. v. New Orleans, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. ed. 121. The Revenue law of 1898 (acts 1898, p. 347,

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has authorized municipal assessors to assess any tax upon a corporation on account of its franchise, the powers and privileges granted to it by the sovereign power of the State. "The State may impose such a tax as has been frequently done and upheld; or assessors in placing the valuation upon the shares of a corporation, should take into account the value of the franchise, because the value of the franchise necessarily affects the value of the shares, which by statute, are taxable to the owners thereof." In this case a water company had made a contract with a municipality whereby it had agreed to furnish water to the city for various purposes "for such sums annually as said city should assess upon the franchise and works," and the fact that the word "franchise" was used in the contract was held not to affect the value of the shares of stock except in so far as its value might be enhanced or depreciated by reason of the contract, according to whether it was beneficial to the company or otherwise.[48] But in the Opinions of the Justices [49] a tax can be lawfully assessed upon the franchise of a railroad and also a separate tax upon the roadbed, rolling stock and fixtures at their cash value.[50] In a Maryland case the court declares that the distinction is clear between a franchise, as such, and the property acquired for the use of the franchise; and that the naked, unused franchise is property concerning the assessment of which in that condition for purposes of taxation, the statutes of that State do not make provision, otherwise than by including it as an element which enhances the value of the shares of the capital stock. But that when the franchise is brought into activity and is availed of to accomplish the ends it was designed to effect, the property acquired under it becomes amenable to

No. 170) is the taxing statute now in force in the State of Louisiana. Under the term 'property' as therein used, subject to taxation, it gives a long list, and as coming within the definition of 'property,' as objects of taxation, it specifically mentions 'charters and franchises.'"

[48] Wheeler v. County Commissioners, 88 Me. 174, 33 Atl. 983.

[49] 102 Me. 52.

[50] See State v. Canadian Pacific Ry. Co., 100 Me. 202, 60 Atl. 901, where in the fourth point in the case the computation of a franchise was in question.

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the tax laws apart from the tax on the stock, and its value, as an easement, if an easement it be, may be largely augmented by the use to which the franchise enables that property or easement to be put. It is also asserted in the same case that it is a self-evident proposition that the use to which a franchise permits an easement to be put, is an essential element to be considered in placing a valuation on that easement for purposes of taxation.[51] In Michigan a statute is held not to disclose an intent to impose a franchise tax but only a tax upon property where it provides that the remainder, after deduction from the net assets above liabilities of the value of an insurance company's real estate, shall represent the amount of personalty liable for the tax.[52]

§ 424. **Same Subject.**—In Nebraska, under a statute providing for assessment on tangible property and in addition thereto on gross receipts, and that "such gross receipts shall represent the franchise valuation which shall not be other-

[51] Consolidated Gas Co. v. Baltimore City, 101 Md. 541, 545-548, per McSherry, C. J., who also says: " 'They,' said the Court of Appeals of New York in People v. Tax Commissioners, 174 N. Y. 441 '(tangible chattels in the public highway), have no assessable value worthy of notice except through the actual and constant use made of them as incidental to the special franchises. The value of either resides in the union of both and can be practically ascertained only by treating them as a unit. Unless assessed together both cannot be adequately assessed. A man of judgment in valuing a wagon, and especially in estimating its earning capacity, does not pass upon the body, wheels, top and tongue separately. We regard the tangible property as an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which as a going concern can neither be assessed nor sold to advantage, except as one thing, single and entire.' * * * What then is the thing assessed and taxed in this case? Is it the mere right to occupy the streets below the surface with mains and pipes—which is the franchise—or, is it the easement acquired, through the franchise, by the actual occupancy of the highways in that manner? Ostensibly it is the latter; and the right to include the value of that easement as an element in fixing an assessment on the tangible property employed in availing of that easement is, we think, no longer an open question in this State since the decision in The Appeal Tax Court v. Union R. Co., 50 Md. 274."

[52] Detroit Fire & Marine Ins. Co. v. Hartz (Mich.), 10 Det. Leg. N. 23, 94 N. W. 7.

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wise assessed," the term "franchise" was held to be a generic term and to include all rights and privileges granted to or exercised by an individual or public service corporation.[53] In a New Jersey case it is asserted that the franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the State, and a distinction is made between such a franchise and that which consists in the right to exist in corporate form without reference to the powers that under such form the company may exercise.[54] In New York it is declared in a comparatively early case that under the laws of that State a mere franchise or incorporeal hereditament of any kind is not taxable except by special statute; that a person may not be taxed on his franchise but he can be taxed upon a structure or real estate, as in case of a railroad or bridge the property itself can be taxed but not the company's franchise. "The bridge and railroad may not be of any use to their owners without the franchise pertaining or incident to them, and yet they may be taxed, and for the purpose of fixing their value, the uses to which they must be subjected must be considered." [55] In a later case it is asserted that the franchise made taxable by the tax law [56] does not mean the right to exercise corporate func-

[53] Western Union Teleg. Co. v. City of Omaha (Neb., 1905), 103 N. W. 84-86, under § 78, New Revenue Law, §§ 10, 477, Cobbey's Ann. Stat., 1903. See this case also under § 39, herein.

[54] Lumberville Bridge Co. v. Assessors, 55 N. J. L. 529, 537, 25 L. R. A. 134, 26 Atl. 711, per Garrison, J., who says: "This distinction, although formulated by Mr. Justice Field in Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. 593, was not strictly adhered to in his subsequent expressions because there was nothing in that case to call for a nice use of terms."

Distinction exists between property tax and franchise tax. North Jersey St. Ry. Co. v. Jersey City, 73 N. J. L. 481, 483, 63 Atl. 833; Tax Act 1903, Pamph. L. p. 394; Act 1900, Pamph. L. p. 502.

"This act imposes no tax upon franchises but merely requires that they shall be considered in ascertaining the value of the property assessed. The franchises intended are but the legal privileges which the company enjoys in the use of its property, and of course, therefore, should not be disregarded." State Board of Assessors v. Central Rd. Co., 48 N. J. L. 146, 314, per Dixon, J.

[55] Smith v. Mayor, etc., of New York, 68 N. Y. 552, 555, per Earl, J., citing People v. Barker, 48 N. Y. 70.

[56] § 2, subd. 3, Laws 1896, p. 796,

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tions, but the right to use the public streets, highways or public places for the purpose of laying pipes or mains, either as an individual or a corporation; that the right to use the public streets or highways is a property right, and it is because such property has a value that the right exists to assess it. The franchise thus made taxable must mean some special privilege derived from some governmental body or some political body having authority to grant the property right sought to be taxed; and that it is this species of property, intangible in its nature, which the law is enacted to reach.[57] In another case in the same State a distinction is made between the taxation of corporate franchises and a tax upon property of the corporation for the privilege of carrying on business.[58] In a Pennsylvania case it is said that: "The power to tax corporate franchises is undoubtedly recognized and acted upon in this State. The test, whether the tax in any given case is a franchise as distinguished from a property tax, would seem, from the authorities, to be that a tax according to a valuation is a tax upon property, whereas a tax imposed according to nominal value, or measured by some fixed standard of mere calculation—as contrasted with valuation—fixed by the law itself, may be a franchise tax;" thus, to illustrate, a tax on capital stock cannot be a franchise tax as tested by the above criterion.[59] In Washington corporate franchises are held to be taxable.[60]

c. 908, as amended by Laws 1899, p. 1589, c. 712.

[57] People ex rel. Retsof Min. Co. v. Priest, 77 N. Y. Supp. 382, 75 App. Div. 131, aff'd (mem.) 175 N. Y. 511, per the court. Quoted in Western Union Teleg. Co. v. City of Omaha (Neb., 1905), 103 N. W. 84, 85, 86.

[58] People v. Knight, 174 N. Y. 475, 67 N. E. 65, case reverses 73 N. Y. Supp. 745, 67 App. Div. 333.

That franchise tax is a tax on corporate functions, rather than on property, see Security Trust Co. v. Liberty Bldg. Co., 89 N. Y. Supp. 340, 96 App. Div. 436; Laws 1901, p. 316, c. 132.

That franchise is taxable property, see Hatfield v. Strauss, 189 N. Y. 208, 219, 82 N. E. 172, per O'Brien, J.

[59] Commonwealth v. Standard Oil Co., 101 Pa. 119, 127, citing as to

[60] Edison Electric Illuminating Co. v. Spokane City, 22 Wash. 168, 60 Pac. 132. See Commercial Electric Light & Power Co. v. Judson, 21 Wash. 49.

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§ 425. Franchise Tax—Capital Stock—Meaning of Terms—Nature of Tax—Construction of Statute.[61]—The words "capital stock," as used in the Tax Law of New York imposing a franchise tax on corporations for the privilege of doing business or exercising its corporate franchises in the State, refer to the capital or property of the corporation; and the words "employed within this State," as used in the statute, do not mean simply the legal situs of the property of the corporation.[62] It is also held in the same State that the term "capital stock," as used in its franchise tax law, means not the share stock held by individuals, but the actual capital which it represents, employed in that State; when considered as a basis for a franchise tax, it is the equivalent of the term "capital" and it is the amount of capital so employed upon which the tax is to be computed.[63] This tax is imposed for the

above criterion Kittanning Coal Co. v. Commonwealth, 29 P. F. S. 104; Bank of Commerce v. New York City, 2 Black (67 U. S.), 620, 17 L. ed. 451; Bank Tax Case, 2 Wall. (69 U. S.) 200, 17 L. ed. 793; Society for Savings v. Coite, 6 Wall. (73 U. S.) 594, 18 L. ed. 897; Providence Institution v. Massachusetts, 6 Wall. (73 U. S.) 611, 18 L. ed. 907.

[61] See §§ 439, 440, herein.

[62] People ex rel. Lackawanna Transp. Co. v. Knight, 77 N. Y. Supp. 398, 75 App. Div. 164; N. Y. Tax Law, Laws 1896, chap. 908, § 182, am'd by Laws 1901, chap. 558; by Laws 1906, p. 1195, chap. 474; by Laws 1907, p. 1726, chap. 734,

[63] People ex rel. Commercial Cable Co. v. Morgan, 178 N. Y. 433, rev'g 86 App. Div. 577, 83 N. Y. Supp. 998. The court, per Werner, J., said: "'Capital stock' and 'capital' are practically the equivalent of each other when considered as the basis of a franchise tax." *Id.*, 440.

Whether "franchise" or "franchises" included in "capital stock," see the following cases:

United States: New York Central & Hudson River Rd. Co. v. Miller, 202 U. S. 584, 596, 50 L. ed. —, 26 Sup. Ct. —; Western Union Teleg. Co. v. Norman, 77 Fed. 13, 22.

Illinois: State Board of Equalization v. People, 191 Ill. 528, 547–549, 68 L. R. A. 513, 61 N. E. 339.

Kentucky: Henderson Bridge Co. v. Commonwealth, 99 Ky. 623, 17 Ky. L. Rep. 389, 29 L. R. A. 73, 31 S. W. 486, aff'd 166 U. S. 150, 17 Sup. Ct. 532, 41 L. ed. 953; Henderson Bridge Co. v. Negley, Sheriff, 23 Ky. L. Rep. 746.

Minnesota: State v. Duluth Gas & Water Co., 76 Minn. 96, 102–104, 78 N. W. 1032, 57 L. R. A. 63.

New York: People ex rel. Rochester Ry. Co. v. Pond, 57 N. Y. Supp. 490, 493, 37 App. Div. 330; Williams v. Western Union Teleg. Co., 48 N. Y. Super. Ct. (16 Jones & S.) 349, 368, case rev'd 93 N. Y. 162.

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privilege of doing business or exercising corporate franchises within the State.[64] But under a Federal Supreme Court de-

Ohio: Hubbard v. Brush, 61 Ohio St. 252, 261, 262, 55 N. E. 829.

Tennessee: Tradesman Publishing Co. v. Knoxville Car Wheel Co., 11 Pick. (95 Tenn.) 634, 654-656, 49 Am. St. Rep. 943, 32 S. W. 1097, 31 L. R. A. 593.

Compare People ex rel. Manhattan Ry. Co. v. Barker, 146 N. Y. 304, 40 N. E. 996, s. c., 165 N. Y. 305, 310, 317, 324, 340, 59 N. E. 151, cited in People ex rel. Metropolitan St. Ry. Co. v. Tax Commissioners, 174 N. Y. 417, 436, 67 N. E. 169; People ex rel. Manhattan Ry. Co. v. Barker, 152 N. Y. 417, 439, 452, 46 N. E. 875.

Whether tax imposed on gross receipts is franchise tax, see Stephens v. Texas & Pac. Ry. Co. (Tex. Sup.), 97 S. W. 309; Galveston, H. & S. Ry. Co. v. State (Tex. Sup.), 97 S. W. 71, rev'g 93 S. W. 464.

Tax on value of capital stock is tax on property in which capital invested. Delaware, Lackawanna & Western Rd. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. 669.

Tax on cash value of shares of capital stock not tax upon shares of individual stockholders or upon property of corporation, but tax upon corporation itself measured by percentage upon cash value of certain proportional part of shares of capital stock. Delaware Railroad Tax, 18 Wall. (85 U. S.) 206, 21 L. ed. 888.

Capital stock and shares in joint-stock company represents tangible and intangible property, including all corporate franchises. Adams Express Co. v. Ohio, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. 604.

Capital stock and corporate property distinguished. The shares of the capital stock of a corporation are essentially different and distinct from the corporate property, and the owner of all the corporation's stock does not own or become entitled to control the property; such owner and the corporation do not thereby become one person. Monongahela Bridge Co. v. Pittsburg & Birmingham Traction Co., 196 Pa. 25, 46 Atl. 99. See § 11, herein.

That capital stock is distinguished from corporate property examine also the following cases:

United States: Van Allen v. Assessors, 3 Wall. (70 U. S.) 573, 18 L. ed. 229; Sturges v. Stetson, 1 Biss. (C. C.) 246, Fed. Cas. No. 13,568.

Connecticut: Security Co. v. Hartford, 61 Conn. 89.

Illinois: Ohio R. v. Weber, 96 Ill. 443.

Kentucky: Henderson Bridge Co. v. Commonwealth, 99 Ky. 623.

Missouri: Brent v. Hart, 10 Mo. App. 143.

New Jersey: State v. Morristown F. Assoc., 23 N. J. L. 195.

New York: People ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46, 50, 44 N. E. 787, case affirms 78 Hun, 63, 60 N. Y. St. Rep. 662, 29 N. Y. Supp. 92; People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433, 38 N. Y. St. Rep. 237, 27 N. E. 818, case reverses 36 N. Y. St. Rep. 221, 13 N. Y. Supp. 67; Pratt v. Munson, 17 Hun (N. Y.), 475.

Pennsylvania: Wilkes-Barre Bank

[64] People ex rel. United States Aluminum P. P. Co v. Knight, 174 N. Y. 475, 67 N. E. 65, rev'g 67 App. Div. 333, 73 N. Y. Supp. 745.

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cision where the state statute imposed a tax upon "the corporate franchise or business" it is held that the tax was upon the right or privilege to be a corporation and to do business within the State in a corporate capacity, and that it was not a tax upon the privilege or franchise which, when incorporated, the company might exercise.[65] And the same rule applies to the statute in the same State imposing a franchise tax on trust companies;[66] the tax imposed by the statute is a tax upon a privilege and not upon property. It is not imposed upon the privilege of becoming a corporation, for that would be an organization tax payable but once for the entire period of corporate existence. It is imposed "for the privilege of exercising" the corporate franchise, and is measured by the value of the investments made and used in carrying on the corporate business. It is an annual tax imposed for the purpose of exercising, not of possessing, a corporate franchise. It is the implied intent of the statute that the tax should be apportioned according to the period during which the company exercised such franchise.[67] The question whether a corporation does business so as to bring it within the operation of the statute is to be determined by the character of the business, and it is not a question of the right to carry it on.[68] Unless the goods are brought into the State before sale,[69]

v. Wilkes-Barre, 148 Pa. 601; Commonwealth v. Lehigh Ave. Rd. Co., 129 Pa. 405, 18 Atl. 414, 498, 24 Wkly N. of Cas. 530, 5 L. R. A. 367; Philadelphia & Ridge Ave. Rd. Co., 102 Pa. 109; Lycoming Co. v. Gamble, 47 Pa. 106, 110.

Tennessee: Brightwell v. Mallory, 10 Yerg. (Tenn.) 196; Union Bank v. State, 9 Yerg. (Tenn.) 489.

Amended statute expressly so provides.

[65] Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. 593, aff'g 92 N. Y. 328, which is also affirmed by divided court, 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. 1385, restored to calendar, 122 U. S. 636 (mem.).

[66] N. Y. Tax Laws; Laws 1896, chap. 908, § 187*a*. See § 434, herein.

[67] People ex rel. Mutual Trust Co. v. Miller, 177 N. Y. 51, 69 N. E. 124, rev'g 85 App. Div. 211, 83 N. Y. Supp. 185.

[68] People v. American Bell Teleph. Co., 117 N. Y. 241, 22 N. E. 1057.

[69] People ex rel. Southern Cotton Oil Co. v. Wemple, 131 N. Y. 64, 42 N. Y. St. Rep. 632, 29 N. E. 1002, aff'g 61 Hun, 83, 39 N. Y. St. Rep. 738, 15 N. Y. Supp. 446; People ex rel. Parke, Davis & Co. v. Roberts, 91 Hun, 158, 71 N. Y. St. Rep. 138,

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sales by sample do not constitute doing business;[70] and the fact that a portion of a corporation's business is the importation and sale of articles in original packages does not invalidate the tax.[71] In Vermont the franchise tax is imposed upon banks for the privilege of carrying on their business as a corporation.[72] A tax on the nominal capital of a bank, without regard to the nature or value of the property composing it, is annexed to the franchise as a royalty for the grant, and not a burden imposed on the property itself.[73] In an Alabama case the court says: "The tax imposed by the subdivision has the properties and qualities of a franchise tax—it is measured by the amount of paid-up capital stock of the corporation—and this distinguishes it from a tax on property. Speaking in reference to this inquiry it was said by Clopton, J., in State v. Stonewall Ins. Co.,[74] 'The usual and most certain test is, whether the tax is upon the capital stock, *eo nomine*, without regard to its value, or at its assessed valuation in whatever it may be invested; if the former, it is a franchise tax, if the latter, a tax upon property.' "[75] A statute of Massachusetts which requires corporations having a capital stock divided into shares, to pay a tax of a certain percentage (one-sixth of one per cent) upon "the excess of the market value" of all such stock over the value of its real estate and machinery, is, under the settled course of decision in the State of Massachusetts,

36 N. Y. Supp. 368, aff'd 149 N. Y. 608, 44 N. E. 1127, which is aff'd, New York v. Roberts, 171 U. S. 658, 43 L. ed. 345, 19 Sup. Ct. 235; People v. Horn Silver Mining Co., 105 N. Y. 76, 6 N. Y. St. Rep. 495, 26 Wkly. Dig. 158, 11 N. E. 155, aff'g 38 Hun, 276.

[70] People ex rel. Seth Thomas Clock Co. v. Wemple, 133 N. Y. 323, 45 N. Y. St. Rep. 234, 31 N. E. 238, rev'g 42 N. Y. St. Rep. 60, 16 N. Y. Supp. 602. See also People ex rel. Washington Mills Co. v. Roberts, 40 N. Y. Supp. 417, 8 App. Div. 201, aff'd 151 N. Y. 619, 45 N. E. 1134.

[71] New York v. Roberts, 171 U. S. 658, 43 L. ed. 345, 19 Sup. Ct. 235, 31 Chic. Leg. News, 111, 119, 129, 17 Nat. Corp. Rep. 677, 5 Det. L. N., No. 41.

[72] State v. Franklin County Sav. Bank & Trust Co., 74 Vt. 246, 52 Atl. 1069; Vt. St. 583, 584, as am'd by Laws 1896, No. 18, § 2.

[73] Bank of Commerce v. New York, 2 Black (67 U. S.), 620, 17 L. ed. 451.

[74] 89 Ala. 338.

[75] Phœnix Carpet Co. v. State, 118 Ala. 143, 151, 32 So. 627, per Brickell, C. J.

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on its constitution and laws, a statute which imposes a franchise tax; and the tax is lawful.[76] So the tax imposed by the statutes of Massachusetts,[77] requiring every telegraph company owning a line of telegraph within the State to pay to the state treasurer "a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock," deducting such portion of that valuation as is proportional to the length of its lines without the State, and deducting also an amount equal to the value of its real estate and machinery subject to local taxation within the State, is in effect a tax upon the corporation on account of property owned and used by it within the State; and is constitutional and valid, as applied to a telegraph company incorporated by another State, and which has accepted the rights conferred by Congress by § 5263 of the Revised Statutes.[78] Again, an act of the legislature of Delaware, taxing railroad and canal companies, was passed on the 8th of April, 1869. The fourth section of the act provided that every company of the class designated should, in addition to other taxes, also pay to the treasurer of the State for its use, on the first day of July of each year thereafter, or within thirty days from such period, a tax of one-fourth of one per cent upon the actual cash value of every share of its capital stock; with a proviso that when the line of the railroad or canal belonging to a company liable to the tax lay partly in the State and partly in an adjoining State or States, the company should only be required to pay the tax on such number of the shares of its capital stock as would be in that proportion to the whole number of shares, which the length of the road or canal within the limits of the State should bear to the whole length of such road or canal. It was held, that the tax was not imposed upon the shares of the individual stockholders, or upon the property of the

[76] Hamilton Co. v. Massachusetts, 6 Wall. (73 U. S.) 632, 18 L. ed. 904.

[77] Pub. Stat., c. 13, §§ 40, 42.

[78] Massachusetts v. Western Union Telegraph Co., 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. 889; Western Union Telegraph Company v. Attorney General of Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. ed. 790, followed.

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corporation, but was a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock,—a rule which, though an arbitrary one, was declared approximately just in the case.[79] Where a gross earnings tax is imposed upon a railroad company in lieu of all other taxes except certain real estate, such tax includes a stock of groceries kept by the company to furnish supplies for a steamboat line operated by it.[80]

§ 426. State Taxation—Franchise Assessments—Capital Stock—Constitutional Law—Remedy.—In order to bring taxation imposed by a State within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation, by its necessary operation, is really spoliation under the guise of exerting the power to tax.[81] And the validity of a state tax upon corporations created under its laws or doing business within its territory, can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise.[82] The statute of New York of 1881,[83] imposing a tax upon the corporate franchise or business of every corporation, joint-stock company or association incorporated or organized under any law of the State or of any other State or country, to be computed by a percentage upon its whole capital stock, and to be ascertained in the manner provided by the act, when applied to a manufacturing corporation organized under the

[79] Delaware Railroad Tax, 18 Wall. (85 U. S.) 206, 21 L. ed. 888.

[80] Pere Marquette R. Co. v. City of Ludington (Mich.), 10 Det. Leg. N. 231, 95 N. W. 417; Comp. Laws 1897, § 6277.

[81] Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. 553.

[82] Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. 593, aff'g 92 N. Y. 328, which is also aff'd by divided court in 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. 1385, restored to calendar 122 U. S. 636 (mem.).

[83] Act of May 26, 1881, c. 361.

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laws of Utah, and doing the greater part of its business out of the State of New York, and paying taxes in Illinois and Utah, but doing a small part of its business in the State of New York, does not tax persons or property not within the State; nor regulate interstate commerce; nor take private property without just compensation; nor deny to the corporation the equal protection of the laws; nor impose a tax beyond the constitutional power of the State; and the remedy of the corporation against hardship and injustice, if any has been suffered, must be sought in the legislature of the State.[84] So the tax law of that State of 1899,[85] imposing taxes on certain public franchises, is not repugnant to the equal protection, due process or impairment of obligation clauses of the Federal Constitution and of the Fourteenth Amendment thereto.[86] Again, the statutes of the same State providing that "Every corporation, joint-stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or country and doing business in that State, except only savings banks and institutions for savings, life insurance companies, banks, foreign insurance companies, manufacturing or mining corporations or companies, wholly engaged in carrying on manufacture or mining ores within this State, and agricultural and horticultural societies or associations, which exception, however, shall not include gas companies, trust companies, electric or steam heating, lighting and power companies, shall be liable to and shall pay a tax as a tax upon its franchise or business, into the state treasury annually, to be computed as follows:" and that "The amount of capital stock which shall be the basis for tax * * * in the case of every corporation,

[84] Horn Silver Mining Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 12 Sup. Ct. 403.

[85] As amended May 26, 1899, c. 712, p. 1589.

[86] Metropolitan St. Ry. Co. v. New York State Board of Tax Commissioners, 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 705. Proposition may, however, be deemed limited in this decision to the franchises involved in this case. As to Tax Law, see Cumming & Gilbert's Gen'l Laws & Statutes of N. Y., Title "Taxation," for various amendments.

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joint-stock company and association liable to taxation thereunder shall be the amount of capital stock employed within this State," as construed by the highest court of that State, are not repugnant to the Constitution of the United States.[87] And as the tax law of 1899 of that State[88] contains proper provisions for certiorari and review of the assessments, it does not deny to the holders of the franchises due process of law in the valuation and assessment of the franchises, because the tangible and intangible property of the corporation is valued as a totality or because it does not give sufficient notice.[89] The taxation of cars under the New York franchise tax law, belonging to a New York corporation, is not unconstitutional as depriving the owner of its property without due process of law because the cars are at times temporarily absent from the State—it appearing that no cars permanently without the State are taxed.[90] If a state statute requires every corporation, person or association operating a railroad within the State to pay an annual tax for the privilege of exercising its franchises therein, to be determined by the amount of its gross transportation receipts, and further provides that, when applied to a railroad lying partly within and partly without the State, or to one operated as a part of a line or system extending beyond the State, the tax shall be equal to the proportion of the gross receipts in the State, to be ascertained in the manner provided by the statute, it does not conflict with the Constitution of the United States; and the tax thereby imposed upon a foreign corporation, operating a line of railway, partly within and partly without the State, is one within the power of the State to levy.[91] As, however, a State cannot

[87] New York v. Roberts, 171 U. S. 658, 19 Sup. Ct. 235, 43 L. ed. 345, 5 Det. L. N., No. 41, 31 Chic. Leg. News, 111, 119, 129, 17 Nat. Corp. Rep. 677.

[88] As amended May 26, 1899, c. 712, p. 1589.

[89] Brooklyn City Rd. Co. v. New York State Board of Tax Commrs., 199 U. S. 48, 50 L. ed. 79, 25 Sup. Ct. 713.

[90] New York Central & H. R. Rd. Co. v. Miller, 202 U. S. 584, 50 L. ed. —, 26 Sup. Ct. —.

[91] Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 35 L. ed. 994, 12 Sup. Ct. 121, 163, 48 Am. & Eng. R. Cas. 602, 11 Ry. & Corp. L. J. 52.

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directly tax tangible property permanently outside the State and having no situs within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of a corporation which arises from the value of the property beyond its jurisdiction. And the collection of a tax on a corporation on its capital stock based on a valuation which includes property situated out of the State would amount to the taking of property without due process of law and can be restrained by the Federal courts.[92]

§ 427. **Franchise Tax—Capital Stock—Gross Receipts—Additional Franchise—Interstate Commerce.**—The statute of New York [93] imposes a tax upon corporations for the privilege of exercising their corporate franchises or carrying on their corporate business within the State, and it is based upon the amount of capital stock which is employed within the State, and it is held to apply notwithstanding the capital stock is used in a business which is in the nature of commerce between States. Thus it is held that a foreign corporation doing business in New York, from which it negotiates sales of the products of mines situated in other States and collects the proceeds of the sales, is doing business in that State so as to subject it to a franchise tax within the intent of the statute; nor can it, in order to avoid taxation, successfully contend that it is wholly engaged in interstate commerce because the products sold by it must all be transported from a foreign State into the taxing State and other States where purchasers are found.[94] Another sec-

Cited in McHenry v. Alford, 168 U. S. 651, 670, 42 L. ed. 614, 18 Sup. Ct. 242; Adams Express Co. v. Ohio, 165 U. S. 194, 220, 17 Sup. Ct. 305, 41 L. ed. 683; Western Union Teleg. Co. v. Taggart, 163 U. S. 1, 21, 16 Sup. Ct. 1054, 41 L. ed. 49; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 440, 39 L. ed. 1043, 15 Sup. Ct. 896; Pittsburg, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 431, 14 Sup. Ct. 1114, 38 L. ed. 1031; Ashley v. Ryan, 153 U. S. 436, 446, 38 L. ed. 773, 14 Sup. Ct. 865; Ficklen v. Shelby County, 145 U. S. 1, 23, 36 L. ed. 601, 12 Sup. Ct. 810.

[92] Delaware & L. W. Rd. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. 669.

[93] Laws 1896, chap. 908, §§ 181, 182, as amended by Laws 1901, chap. 558; since amended by Laws 1906, p. 1195, chap. 474, and Laws 1907, p. 1726, chap. 734.

[94] People ex rel. Union Sulphur Co. v. Glynn, 125 App. Div. 328. See

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tion of the tax law in the same State provides for an additional franchise tax on transportation and transmission corporations and associations, requiring every corporation and joint-stock association formed for steam surface railroad, canal steamboat, ferry, express, navigation, pipe-line, transfer, baggage express, telegraph, telephone, palace car or sleeping car purposes, to pay, for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in the State, an annual excise tax or license fee equal to a certain proportionate part of a specified per centum upon its gross earnings within the State, which shall include its gross earnings from its transportation or transmission business originating and terminating within the State, but not including earnings derived from business of an interstate character.[95] Under this section a terminal railroad company operating a grain elevator and a freight warehouse, and a number of railroad tracks, which tracks were used to afford access to such elevator and warehouse by cars owned by other corporations, and whose business was entirely transacted within the State, is not subject to the additional franchise tax so imposed. As the business of the corporation is connected with interstate commerce, its earnings are "earnings derived from business which is of an interstate character," within the meaning of the statutes which forbid the imposition of any tax upon the business of interstate commerce.[96] So earnings de-

Pennsylvania Rd. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. 202; People ex rel. Burke v. Wells, 95 N. Y. Supp. 100, 107 App. Div. 15, aff'd 184 N. Y. 275, 77 N. E. 19.

[95] N. Y. Tax Law; Laws 1896, chap. 908, § 184 (since amended by Laws 1907, p. 1726, chap. 734). This statute includes also all other corporations not liable to taxes under § 185, which provides for a franchise tax on elevated or surface railroads not operated by steam (as amended by Laws 1906, chap. 474); and § 186, which provides for a franchise tax on waterworks companies, gas companies, electric or steam heating, lighting and power companies (since amended by Laws 1907, p. 1726, chap. 734).

[96] People ex rel. Connecting Terminal R. Co. v. Miller, 178 N. Y. 194, 70 N. E. 472, rev'g 82 N. Y. Supp. 582, 84 App. Div. 174. As to franchise tax case is under Laws 1880, chap. 542, § 6; Laws 1881, chap. 361, Laws 1896, chap. 908, § 184; as to interstate commerce, see Laws 1894, chap. 562, § 11, Laws 1896, chap. 908, § 184.

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rived by a railroad company for the transportation of express freights, either shipped from counties in the State for delivery out of the State, or from counties out of the State for delivery within the State, are "earnings derived from business of an interstate character," and are therefore not taxable under this section.[97] Under the same section of the New York statute a foreign corporation engaged in the business of a common carrier outside of the State of New York, in carrying passengers to and from New York City, whose terminus in New Jersey is Jersey City, from which it conveys its New York passengers by ferry boats to various stations in New York City, and which maintains a cab service at one of its ferry stations, is taxable upon the capital employed in the maintenance of such cab service, since such service is not a part of or an incident to the interstate commerce of the railroad.[98] Again, where a state franchise tax is imposed on the gross receipts of fidelity and guaranty companies incorporated in the State and doing business therein, and also upon all corporations of like kind doing business in the State, it is held that interstate business is not included and the tax is limited to gross receipts on intrastate business.[99] A state tax may be imposed upon receipts for the mileage within the State, of a railroad corporation, incorporated under the state laws, on account of transportation done by it from one point within the State to another point within it, but passing during the transportation without the State and through part of another State and such tax is not a tax upon interstate commerce, and does not infringe the provisions of the Federal Constitution.[1]

[97] People ex rel. New York Central & H. R. Rd. Co. v. Miller, 88 N. Y. Supp. 373, 94 App. Div. 587.

[98] People ex rel. Pennsylvania Ry. Co. v. Knight, 73 N. Y. Supp. 790, 67 App. Div. 398, aff'd 171 N. Y. 354, 64 N. E. 152, and in Pennsylvania Rd. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. 202; under N. Y. Tax Law; Laws 1896, chap. 908, § 184.

[99] State v. United States Fidelity & Guaranty Co. of Balt. City, 93 Md. 314, 48 Atl. 918; Code, art. 81, § 146, as am'd by Act 1896, c. 120.

[1] Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. Rep. 806, 809, 36 L. ed. 672, 676, 45 Alb. L. J. 511, 11 Ry. & Corp. L. J. 302. See Galveston, H. & S. A. Ry. Co. v. State (Tex. Civ. App.), 93 S. W. 464, reversed in State v. Gal-

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§ 428. **Franchise Tax—Capital Stock—Who Liable—Generally.**—The New York statute imposing a franchise tax for the privilege of doing business or exercising a corporate franchise in the State [2] must be confined in its operation to domestic corporations. As to foreign corporations the tax is imposed solely on business, and two conditions are necessary: First, that the corporation shall be doing business within the State; and, second, employing capital within the State.[3] It is also held in Kansas that the power to levy a tax on the capital stock of a corporation is limited to the State of its domicile even though it conducts its principal business in another State.[4] Where the purpose of incorporation of a company includes a general business in the purchase, sale and exchange of real estate, with power to erect and manage buildings, and to purchase and sell mortgages and the stocks and bonds of other corporations, such company is subject to a franchise tax in New York.[5] So a domestic corporation which owns and operates an apartment house, situated in that State, is employing its capital stock within the State so as to be taxable on its franchise.[6] A foreign corporation doing business in the

veston, H. & S. A. Ry. Co. (Tex., 1906), 97 S. W. 71, under Laws 1905, p. 336, c. 141.

[2] Tax Law; Laws 1896, chap. 908, § 182, as am'd by Laws 1901, chap. 558, and Laws 1906, p. 1195, chap. 474, and since by Laws 1907, p. 1726, chap. 734.

[3] People ex rel. Chicago Junction Rys. & Union Stockyards Co. v. Roberts, 154 N. Y. 1, 47 N. E. 974, rev'g 90 Hun, 474, 70 N. Y. St. Rep. 640, 35 N. Y. Supp. 968; People ex rel. Harlin & Hollingsworth Co. v. Campbell, 139 N. Y. 68, 54 N. Y. St. Rep. 451, 34 N. E. 753, rev'g 49 N. Y. St. Rep. 917, 22 N. Y. Supp. 1111; People ex rel. American Contracting & D. Co. v. Wemple, 129 N. Y. 558, 42 N. Y. St. Rep. 400, 29 N. E. 812, aff'g 60 Hun, 225, 38 N. Y. St. Rep. 859; People v. Equitable Trust Co. of New London, 96 N. Y. 387.

[4] Foster-Cherry Commission Co. v. Caskey, 66 Kan. 600, 72 Pac. 268.

[5] People ex rel. Fourteenth St. Realty Co. v. Kelsey, 97 N. Y. Supp. 197, 110 App. Div. 797, aff'd (mem.) 184 N. Y. 572, 77 N. E. 1194, under N. Y. Tax Law; Laws 1896, p. 908, § 182. Examine People ex rel. Wall & Hanover St. Realty Co. v. Miller, 181 N. Y. 328, 73 N. E. 1102, aff'g 98 App. Div. 584, 90 N. Y. Supp. 755. Compare People ex rel. Ft. George Realty Co. v. Miller, 179 N. Y. 49, 71 N. E. 463, rev'g 90 App. Div. 588, 86 N. Y. Supp. 420.

[6] People ex rel. Hubert Apartment Assoc. v. Kelsey, 96 N. Y. Supp. 745, 110 App. Div. 617, aff'd (mem.) 184

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State of New York and acting as a holding corporation of the capital stock of constituent companies is subject to a franchise tax on money so invested, that being the purpose of the corporation. And although such corporation acts as the buying agent of constituent companies without charge, it cannot avoid taxation upon the theory that it is not doing business for a profit and that its capital is not employed in New York, for its profit consists in dividends on the stock held by it.[7] A foreign corporation by becoming a special partner in New York also employs capital there.[8] Again, a race-track association may be liable to a franchise tax where it exercises a special or exclusive privilege or franchise not allowed by law to natural persons.[9] If a non-resident enters into the business of loaning money within a State and employs a local agent to conduct the business, the State may tax the capital employed precisely as it taxes the capital of its own citizens, in like situation, and may assess the credits arising out of the business, and the foreigner cannot escape taxation upon his capital by temporarily removing from the State the evidences of credits which, under such circumstances, have a taxable situs in the State of their origin. Loans made by a New York life insurance company on its own policies in Louisiana are taxable in that State although the notes may be temporarily sent to the home office.[10]

§ 429. **Franchise Tax—Capital Stock—Who not Liable—Generally.**—Under the New York statute [11] a corporation

N. Y. 573, 77 N. E. 1194; under § 182 of N. Y. Tax Law, cited in last note.

[7] People ex rel. Manhattan Silk Co. v. Miller, 125 App. Div. 296, citing People ex rel. North American Co. v. Miller, 90 App. Div. 560, aff'd 182 N. Y. 521; under § 181 of N. Y. Tax Law; Laws 1896, chap. 908, as amended by Laws 1901, chap. 558. Also under § 182, of N. Y. Tax Law, as amended by Laws 1901, chap. 558. See Laws 1907, p. 1726, chap. 734; Laws 1906, p. 1195, chap. 474.

[8] People ex rel. Badische Anilin & Soda Fabrik v. Roberts, 152 N. Y. 59, 46 N. E. 161, aff'g 11 App. Div. 310, 76 N.Y. St. Rep. 502, 42 N.Y. Supp. 502.

[9] Latonia Agricultural & S. Assoc. v. Donnelly, 20 Ky. L. Rep. 1891, 50 S. W. 251.

[10] Metropolitan Life Ins. Co. of New York v. City of New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. 499, aff'g 115 La. 698.

[11] Tax Law; Laws 1896, chap. 908, § 182.

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composed only of tenants in common of unimproved city real estate and organized solely for the purpose of taking title to the property so as to raise funds by mortgage thereon to pay past due mortgages, taxes and assessments on the property and hold the same until it can be sold for such a price that the owners thereof may obtain something for their interest therein, is not liable to the franchise tax imposed by the statute, since the stock of such corporation is not capital "employed within this State" within the meaning of the statute.[12] When corporate real estate has been condemned and the receipts of the award distributed, after payment of the debts of the corporation, in a sum which exceeds the par value of the capital stock, and the surplus arises from the increment in the value of such real estate increased by interest upon the award, a franchise tax cannot be assessed upon such excess as a dividend.[13]

§ 430. **Taxation of Intangible Property of Interstate Bridge—Constitutional Law.**—A railroad bridge across a navigable river forming the boundary line between two States is not, by reason of being an instrument of interstate commerce, exempt from taxation by either State upon the part within it.[14] And the power of a State to tax an interstate bridge is not affected by the fact that it was erected under the authority or with the consent of Congress. So a municipality, which has authority from the legislature so to do, may tax so much of the property of a bridge company owning such a bridge as is permanently between low-water mark on the shore of a State on the other side of a river and low-water mark on the shore of its own State, where it is settled that the boundary of its own State extends to low-water mark on

[12] People ex rel. Ft. George Realty Co. v. Miller, 179 N. Y. 49, 71 N. E. 463, rev'g 90 App. Div. 588, 86 N. Y. Supp. 420, Distgd. in People ex rel. Wall & Hanover St. Realty Co. v. Miller, 181 N. Y. 328, 73 N. E. 1102.

[13] People ex rel. Jerome Park Villa Site & S. I. Co. v. Roberts, 58 N. Y. Supp. 254, 41 App. Div. 21.

[14] Pittsburg, C. C. & St. L. Ry. Co. v. Board of Public Works, West Virginia, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. 90.

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the other shore of the river on the line of the other State. And the taxation by the city as property of the bridge company, of the bridge and its appurtenances within the fixed boundary of the city, between low-water mark on the two sides of a river, is not a taking of private property for public use without just compensation, in violation of the Federal Constitution.[15]

§ 431. **Taxation of Ferry Franchise—Legal Situs of Property—Constitutional Law.**—A franchise granted by the proper authorities of Indiana, for maintaining a ferry across the Ohio River from the Indiana shore to the Kentucky shore, is an incorporeal hereditament derived from, and having its legal situs for purposes of taxation in Indiana. The fact that such franchise was granted to a Kentucky corporation, which held a Kentucky franchise to carry on the ferry business from the Kentucky shore to the Indiana shore (the jurisdiction of Kentucky extending only to low-water mark on the northern and western side of the Ohio River), does not bring the Indiana franchise within the jurisdiction of Kentucky for purposes of taxation. The taxation of the Indiana franchise by Kentucky would amount to a deprivation of property without due process of law, in violation of the provisions of the Fourteenth Amendment. *Quære*, whether such taxation would be such a burden on interstate commerce as to make it inconsistent with the power of Congress to regulate commerce among the several States, was not decided.[16]

§ 432. **Franchise Tax—Telegraph Companies—Constitutional Law.**[17]—A tax may be levied in the form of a franchise

[15] Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. 553; 173 U. S. 624, 43 L. ed. 835, 19 Sup. Ct. 545, 877; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. 532. Examine Chicago, B. & Q. R. Co. v. Nebraska City, 53 Neb. 453, 73 N. W. 952; Chicago, B. & Q. R. Co. v. Cass County, 51 Neb. 369, 70 N. W. 955. See § 429, herein.

[16] Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. ed. 513. See § 428, herein. See also as to situs § 438, herein.

[17] See § 425, herein, as to additional

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tax, though a privilege tax imposed in lieu of all other taxes.[18] But a state tax upon the franchise of a telegraph company covers all its intangible property, rather than its corporate franchises as technically defined.[19] A state statute, requiring a telegraph company to pay a tax upon its property within the State, valued at such a proportion of the whole value of its capital stock as the length of its lines within the State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State, is constitutional and valid, notwithstanding that nothing is in its terms directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other States; unless there is something more showing that the system of taxation adopted is oppressive and unconstitutional.[20]

§ 433. **Franchise Tax—Tax on Gross Receipts—Street Railroads.**—Under the Kentucky constitution an *ad valorem* tax may be imposed upon a street railway company's franchise.[21] So, a tax, for maintenance of parks, imposed upon

franchise tax on transportation and transmission companies.

[18] Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 15 Sup. Ct. 268, 360, 5 Am. Elec. Cas. 636, 645.

[19] Western Union Teleg. Co. v. Norman (C. C.), 77 Fed. 13.

As to taxation of telegraph, etc., companies and their franchises, see Joyce on Electric Law (2d ed.), §§ 85 *et seq.*, 911 *et seq.*

[20] Western Union Teleg. Co. v. Taggart, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. ed. 49. Cited in Adams Express Co. v. Ohio, 166 U. S. 185, 223, 17 Sup. Ct. 604, 41 L. ed. 965; s. c., 165 U. S. 194, 220, 248 (in dissenting opinion), 41 L. ed. 683, 17 Sup. Ct. 305. See Western Union Teleg. Co. v. Missouri ex rel. Gottlieb, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. ed. 1116; Western Union Teleg. Co. v. Massachusetts, 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. 961.

Tax on gross amount of the receipts of telegraph company derived from business done by it within the State, when a regulation of commerce and unconstitutional, see Western Union Teleg. Co. v. Alabama, 132 U. S. 472, 10 Sup. Ct. 161, 33 L. ed. 409. See State v. Fleming (Neb., 1903), 97 N. W. 1063; Neb. Sess. Laws, c. 73, § 78.

[21] South Covington & C. St. R. Co. v. Bellevue, 20 Ky. L. Rep. 1184, 49 S. W. 23; Ky. Const., § 174.

As to franchises appurtenant to use of street railway property being

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the gross receipts of a street railway company, is a franchise tax in consideration of the privilege granted to run cars upon the city streets subject to the control of the city. In case, however, of a railway not occupying any street within the city's control, but operating within extended limits of the city, and acquiring its right by purchase to use a turnpike upon which it operated a suburban railway, it is not liable to such tax.[22] Street railways are not included in the term "railroads" under a constitutional requirement for the taxation of the franchises, etc., of railroads, since there exists a difference in the nature of their franchises, especially where the value of the different portions of a street railway line varies in consequence of the varying density of population of the localities through which the line runs, and the constitutional requirement also makes the assessment at the actual value in proportion to the number of miles of railroad laid in the different counties, etc.[23] The difference between surface street railroads and subsurface street railroads is sufficient to justify classification in the mode and extent of taxation, and a tax otherwise legal on surface street railroad franchises does not deprive the owners thereof of the equal protection of the laws because subsurface street railroad franchises are not subjected to a similar tax.[24]

§ 434. **Franchise Tax—Water Companies.**—Where a statute requires all property in the State to be taxed unless

subject to separate tax, see Dallas Consol. Electric Ry. Co. v. City of Dallas (Tex. Civ. App.), 65 S. W. 201, reversed in Dallas, City of, v. Dallas Consol. Electric Ry. Co. (Tex. Sup.), 66 S. W. 835.

[22] Park Tax Case (Mayor & City Council of Baltimore v. Baltimore, Catonsville & Ellicotts Mills Passgr. Rd. Co.), 84 Md. 1, 35 Atl. 17, 33 L. R. A. 503.

[23] San Francisco & S. M. Electric Ry. Co. v. Scott, 142 Cal. 222, 75 Pac. 575. See Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 106 Iowa, 476, 76 N. W. 728. Compare Bloxham v. Consumers' E. L. & St. R. Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Philadelphia, City of, v. Philadelphia Traction Co., 206 Pa. 35, 55 Atl. 762.

[24] Metropolitan St. Ry. Co. v. New York State Board of Commrs., 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 705.

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exempt from taxation the franchises of a water company may be included.[25] So tangible and intangible property combined create a value constituting a basis for the taxation of a waterworks company, and the franchise of such company is personal property and embraces all things of a proprietary nature connected therewith.[26] Where a city is so authorized by its charter it may levy a franchise tax on a waterworks company, the legislature having also required that such corporations should pay a local franchise tax to the municipality wherein a corporation exercised its franchise.[27] Under the Kentucky statutes [28] a part of the charter of cities of the third class, providing that "all real and personal estate within the city on the tenth day of January in the year in which the assessment shall be made, and of all corporations having their chief office or place of business in the city on said date, and the franchises of the same shall be subject to assessment and taxation for all local and municipal purposes," the franchises of a water company, which has its chief office and place of business in the city of Frankfort, and which, while furnishing water to some persons outside the city, has no exclusive privilege except as to persons within the city, is taxable by the city, although the pumping station, reservoirs, and a part of the mains are outside the city; and the State Board of Valuation has no power [29] to apportion the valuation of the franchise between the city and the taxing districts outside the city, as the power of apportionment conferred by the statute [30] applies only to the carriers named under another section thereof,[31] which fixes the basis of apportionment.[32]

§ 435. Franchise Tax—Gross Receipts—Dividends—Gas and Electric Light and Power Companies.—In New Jersey

[25] Fond du Lac Water Co. v. Fond du Lac, 82 Wis. 322, 52 N. W. 439, 16 L. R. A. 581.

[26] Washburn, Town of, v. Washburn Waterworks Co. (Wis.), 98 N. W. 539; Rev. Stat., 1898, § 1037*a*.

[27] Owensboro Waterworks Co. v. City of Owensboro, 24 Ky. L. Rep. 2530, 74 S. W. 685, rehearing denied in 25 Ky. L. Rep. 434, 75 S. W. 268.

[28] § 3374.

[29] Under Ky. Stat., § 4077.

[30] Ky. Stat., § 4077.

[31] Ky. Stat., § 4081.

[32] Board of Councilmen of City of

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the franchise tax required to be paid by a gas and electric company, which exercises a municipal franchise, is based not merely upon the receipts from exercising such municipal franchise, but upon the actual gross receipts of its entire business.[33] But "dividends earned and declared" do not include profits or earnings used for betterment of a gas company's plant, although the percentage required to be paid for a franchise tax is based upon gross receipts and upon such dividends.[34] In Pennsylvania gross receipts for the purpose of taxation includes receipts derived by an electric light company from furnishing power to other companies and from sales of electric supplies.[35] A franchise tax may be levied upon an electric light and power company, which exercises its privilege to use city streets, even though the state constitution only authorizes the taxation of real and personal property and no statutory provision exists for ascertaining the value of franchises.[36] It is also held, however, that where a statute only provides for a tax on the value of a gas company's property its franchise is not taxable.[37] A gas and electric company formed by consolidation and merger is liable to a state franchise tax in New Jersey even though some of the original companies had never exercised their corporate franchises.[38]

§ 436. **Franchise Tax—Insurance Companies.**—Where the obvious intent of a statute is to impose a tax upon corporations, a large class of which it enumerates, exercising some special or exclusive privilege or franchise not allowed by law

Frankfort v. Stone, 108 Ky. 400, 22 Ky. L. Rep. 25, 56 S. W. 679.

[33] Paterson & P. Gas & Electric Co. v. State Board of Assessors (N. J. Sup.), 54 Atl. 246, aff'd 70 N. J. L. 825, 59 Atl. 1118; Act of March 23, 1900.

[34] State, Camden Gas Light Co. v. State Comptroller, 54 N. J. L. 135, 23 Atl. 122; N. J. Act of April 18, 1884.

[35] Commonwealth v. Brush Electric Light Co., 204 Pa. 249, 53 Atl. 1096; Act of June 1, 1889, § 23.

[36] Commercial Electric Light & P. Co. v. Judson, 21 Wash. 49, 56 Pac. 829, 57 L. R. A. 78; Wash. Const., art. 7, § 1; Laws 1897, p. 136.

[37] Covington Gas Light Co. v. Covington, 13 Ky. L. Rep. 577, 17 S. W. 808.

[38] Paterson & P. Gas & Electric Co. v. State Board of Assessors (N. J. Sup.), 54 Atl. 246, aff'd 70 N. J.

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to natural persons, an insurance company which exercises no such special or exclusive franchise is not within the statute even though in addition to the enumerated class, "every other like company" is specified as included.[39] Foreign mutual life insurance companies are within a statute which requires that each and every insurance company doing business in the State be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the State during the year.[40] In New York the statute requires an annual state tax, for the privilege of exercising corporate franchises or for carrying on business in their organized capacity within that State, to be paid by insurance companies, said tax being fixed at a certain per centum on the gross amount of premiums received during the preceding year for business done at any time within the State.[41] Under this section unearned premiums paid in advance but refunded upon the cancellation of policies are not to be included in the "gross amount of premiums received * * * for business done." The sum paid out by an insurance company to other companies for reinsuring its own risks cannot be deducted from the gross amount of premiums received, since such sum is an expense of the business.[42] The provisions of this statute authorizing an annual tax upon the gross amount of premiums received by a domestic insurance company are not retroactive, and do not impose a tax upon premiums derived from contracts made prior to the time the statute took effect, but upon future business only.[43] A foreign marine insurance company doing

L. 825, 59 Atl. 1118; Act of March 23, 1900, § 4.

[39] Ætna Life Ins. Co. v. Coulter, 25 Ky. L. Rep. 193, 74 S. W. 1050; Ky. Stat., 1899, § 4077.

[40] Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 Pac. 982; Civ. Code, §§ 650–681.

[41] N. Y. Tax Law; Laws 1896, chap. 908 § 187, as am'd by Laws 1897, chap. 494; Laws 1901, chap. 118; Laws 1905, chap. 94, since am'd by Laws 1907, p. 1726, chap. 734.

[42] People ex rel. Continental Ins. Co. v. Miller, 177 N. Y. 515, 70 N. E. 10, modifying 85 N. Y. Supp. 1142, 90 App. Div. 618.

[43] People ex rel. Provident Savings Life Assurance Soc. v. Miller, 179 N. Y. 227, 71 N. E. 930, reviewing 85 N. Y. Supp. 468, 88 App. Div. 218. Compare amendment of 1905.

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business in that State must pay the annual tax of five-tenths of one per cent on the gross amount of premiums received for business generally within this State during each calendar year.[44] Such a company is not entitled to a deduction from the amount required to be paid by it to the superintendent of insurance under § 34 of the Insurance Law. This is so because the amendment of 1901 provided that "the taxes imposed by this section shall be in addition to all other fees, licenses or taxes imposed by this or any other law.[45] Where a policy is cancelled and unearned premiums are returned to the insured the company is not required to include them in its return of gross receipts; the tax on such receipts is not in lieu of all other taxes.[46]

§ 437. **Franchise Tax—Guaranty or Security Company—Trust Company.**—A franchise tax imposed upon a "guaranty or security" company, does not include an insurance company.[47] If, however, such corporation does a guaranty or security business it is liable to a franchise tax even though it is an insurance company in name.[48] Under the New York statute every trust company incorporated, organized or founded under, by or pursuant to a law of that State, and any company organized to do a trust company's business solely or in connection with any other business, under a general or special law of that State, is required to pay to the State annually for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity, an annual tax equal to a certain specified per centum on the amount of its capital stock, surplus, and undivided profits.[49]

[44] Imposed by the amendment of 1901 to the above section of the Tax Law.

[45] People v. Thames & Mersey Marine Ins. Co., 176 N. Y. 531, 68 N. E. 888, aff'g 85 App. Div. 623, 83 N. Y. Supp. 1113.

[46] State v. Fleming (Neb., 1903), 97 N. W. 1063; Neb. Sess. Laws, 1903, c. 73, § 58.

[47] Ætna Life Ins. Co. v. Coulter, 25 Ky. L. Rep. 193, 74 S. W. 1050; Ky. Stat., 1899, § 4077, construed in connection with § 723.

[48] Fidelity & Casualty Co. of N. Y. v. Coulter, 25 Ky. L. Rep. 200, 74 S. W. 1053.

[49] N. Y. Tax Law; Laws 1896, chap. 908, § 187*a*; added by Laws 1901, chaps. 132, 535.

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The tax imposed by this act upon trust companies was intended as a substitution as of the day of its passage, for all other taxes upon trust companies. The act operated to relieve a trust company of a tax levied upon it, under a city charter for the year 1901.[50] So it is held that trust companies paying the tax required by this section are entitled to an exemption from local assessment and taxation of their personal property.[51] And when a trust company has carried on business for less than the fiscal year or tax year, or for a fraction of a year, the tax imposed for the said privilege of exercising its corporate franchises in the State must be apportioned accordingly.[52] Where a trust company leased, with an option to purchase, certain property owned by it, and agreed to pay all taxes upon the premises during the continuance of the lease, it was held that the provisions of this section requiring a payment of a tax of one per cent upon the capital stock, surplus and undivided profits of a trust company, and exempting it from all other taxation, did not operate to relieve such company from the obligation of paying the taxes on the leased premises.[53]

§ 438. **Franchise Tax; Savings Banks.**—The charter of a bank is a franchise, which is not taxable, as such, if a price has been paid for it, which the legislature has accepted with a declaration that it is to be in lieu of all other taxation.[54]

Nature of tax so imposed, see § 423, herein.

[50] Binghamton Trust Co. v. City of Binghamton, 76 N. Y. Supp. 517, 72 App. Div. 341.

[51] People ex rel. Poughkeepsie Trust Co. v. Lane, 83 N. Y. Supp. 606, 41 Misc. 1.

[52] People ex rel. Mutual Trust Co. of Westchester County v. Miller, 177 N. Y. 51, 69 N. E. 124, rev'g 83 N. Y. Supp. 185, 85 App. Div. 211. Compare, however, People ex rel. Hans Rees' Sons v. Miller, 86 N. Y. Supp. 193, 90 App. Div. 591.

[53] Security Trust Co. v. Liberty Building Co., 89 N. Y. Supp. 340, 96 App. Div. 436.

[54] Jefferson Bank v. Shelby, 1 Black (66 U. S.), 436, 17 L. ed. 173. See Gordon v. Appeal Tax Court, 3 How. (44 U. S.) 133, 11 L. ed. 529. Cited in State Bank of Ohio v. Knoop (Piqua, Branch of the State, v. Knoop), 16 How. (57 U. S.) 369, 386, 14 L. ed. 977.

Charter and franchise; to what extent distinguished. See §§ 41–46, herein.

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In a Federal case it appeared that the legislature of Maryland, in 1821, continued the charters of several banks to 1845, upon condition that they would make a road and pay a school tax. This would have exempted their franchise but not their property from taxation. But another clause in the law provided that upon any of the aforesaid banks accepting of, and complying with, the terms and conditions of the act, the faith of the State was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act. This was held to be a contract relating to something beyond the franchise, and exempted the stockholders from a tax levied upon them as individuals, according to the amount of their stock; but that the corporate property of the bank was separable from the franchise and could be taxed, unless there was a special agreement to the contrary.[55] Under the constitution and laws of Massachusetts, as interpreted by its highest court, in two cases not involving any question under the Judiciary Act, and by long usage, a statute which enacts that every institution for saving incorporated under the laws of that commonwealth, shall pay to the commonwealth "a tax on account of its depositors" of a certain percentage "on the amount of its deposits, to be assessed, one-half of said annual tax on the average amount of its deposits for the six months preceding the first of May, and the average amount of its deposits for the six months preceding the first of November," is to be regarded as a franchise tax, not as a tax on property, and is valid. Nor is there anything inconsistent with this view in the decisions of the Federal Supreme Court.[56] Under a Maryland decision savings banks with capital stock subject to taxation, equally with those without capital stock, are within the intent of a statute imposing a franchise tax on savings banks, institutions or corporations organized for the purpose of receiving deposits and

[55] Gordon v. Appeal Tax Court, 3 How. (44 U. S.) 133, 11 L. ed. 529. See as to last proposition in the text §§ 30 *et seq.*, herein.

[56] Provident Institution v. Massachusetts, 6 Wall. (73 U. S.) 611, 18 L. ed. 907.

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paying interest on the same.[57] The New York statute provides for a franchise tax on savings banks for the privilege of exercising their corporate franchises or carrying on their business in their corporate or organized capacity. Such tax being an annual one equal to a certain per centum on the par value of the surplus or undivided earnings.[58]

§ 439. **Franchise Tax—National Banks.**[59]—A State is wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets or franchises, except when permitted so to do by the legislation of Congress. Section 5219 of the Revised Statutes is the measure of the power of States to tax national banks, their property or their franchises, that power being confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank. So where the tax complained of had been assessed on the franchise or intangible property of a corporation, it was not within the purview of the authority conferred by the act of Congress, and was, therefore, illegal. And the taxing law of a State, under the provisions of which the above tax had been imposed, was, therefore, held to be beyond the authority conferred by Congress on the States, and to be void for repugnancy to that act.[60] Nor can taxes be lawfully imposed upon the franchises or intangible property of a national bank upon the ground that they may be regarded as the equivalent of a tax on the shares of stock in the names of the stockholders, and, therefore, such imposition of taxes does not violate the act

[57] Fidelity Savings Bank v. State, 103 Md. 206, 63 Atl. 484; Code Pub. Gen. Laws, 1888, art. 81, § 86.

[58] N. Y. Tax Law; Laws 1896, chap. 908, § 187*b*; added by Laws 1901, chap. 117, § 188, provides for a tax upon foreign bankers.

How tax is to be determined, see People ex rel. Bank of Savings v. Miller, 177 N. Y. 461, aff'g 82 N. Y. Supp. 621, 84 App. Div. 168, considered under the section herein, as to basis of computation.

[59] See § 443; also § 389, herein, as to regulation of national banks.

[60] Owensboro National Bank v. Owensboro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. ed. 850.

Application of § 5219, noted in text. See Consolidated Nat. Bank v. Pima County, 5 Ariz. 142, 48 Pac. 291.

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of Congress in that respect; such contention is erroneous and will not be sustained.[61] In the case of the Bank of the United States it was held that it could not be taxed by a State, and that any attempt on the part of its agents and officers, to enforce the collection of such tax against the property of the bank, could be restrained by injunction from the Circuit Court.[62] Nor can a State, within which a branch of such bank may be established, tax that branch without violating the Constitution.[63] The right, however, of the States to tax the shares of the national banks has been reaffirmed by the Federal Supreme Court;[64] and a bill to restrain the collection of a state tax upon the shares of a national bank is bad on demurrer, where it does not appear that there is any statutory discrimination against them, or that they, under any rule established by the assessing officers, are rated higher in proportion to their actual value than other moneyed capital.[65] A statute does not violate a state constitution where it does not impose a disproportionate and unequal tax upon national banks.[66]

§ 440. **Capital Stock—Tangible and Intangible Property—Franchises—Situs of, for Taxation.**—The capital stock of a corporation and the shares in a joint-stock company represent not only its tangible property but also its intangible property, including therein all corporate franchises and all contracts, privileges and good will of the concern; and when,

[61] First National Bank, Louisville, v. Louisvillė, 174 U. S. 438, 43 L. ed. 1038, 19 Sup. Ct. 875. See also Third National Bank, Louisville, v. Stone, 174 U. S. 432, 43 L. ed. 1035, 19 Sup. Ct. 759.

[62] Osborn v. United States Bank, 9 Wheat. (22 U. S.) 738, 6 L. ed. 204.

[63] McCulloch v. Maryland, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579.

[64] National Bank v. Commonwealth, 9 Wall. (76 U. S.) 353, 19 L. ed. 701. Cited in Van Slyke v. Wisconsin, 154 U. S. 581, 20 L. ed. 240, 14 Sup. Ct. 1168 (which is cited in Aberdeen Bank v. Chehalis County, 166 U. S. 440, 446, 41 L. ed. 1069, 17 Sup. Ct. 629); Delaware Railroad Tax, 18 Wall. (85 U. S.) 206, 230, 21 L. ed. 888. See Merchants & Mfrs'. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. 829.

[65] National Bank v. Kimball, 103 U. S. 732, 26 L. ed. 469.

[66] Bank of Redemption v. Boston, 125 U. S. 60, 31 L. ed. 689, 8 Sup. Ct. —; Mass. Pub. Stats., chap. 13, §§ 8, 9, 10.

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as in the case of an express company, the tangible property of the corporation is scattered through different States by means of which its business is transacted in each, the situs of this intangible property is not simply where its home office is, but is distributed wherever its tangible property is located and its work is done; and it is held that no fine-spun theories about situs should interfere to enable these large corporations, whose business is of necessity carried on through many States, from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires.[67] If a state constitution provides that all property except that of railroads operated in more than one county shall be assessed in the county or district where located [68] a gas and electric company's franchise to lay pipes or conduits, etc., for the purpose of supplying artificial light to the inhabitants of a city, must be assessed in the county wherein the municipality is located.[69] It is held in Wisconsin that the legislature cannot arbitrarily and capriciously give property a situs for taxation. Tax burdens must be imposed on the State at large, the county at large, and on the smaller taxing districts at large, according as the purpose thereof is purely general or purely local to the particular taxing district. The scope of the power of the legislature to fix the situs of railway property for taxation has regard to the nature of property as personalty. The doctrine that the situs of personal property for taxation is the home of the corporation is the law only in the absence of a law fixing some situs within constitutional limitations. The limit of legislative power as to territory in fixing the situs of personal property for taxation is not the taxing districts in which the visible part of the railroad and its office or offices are located. The peculiar nature of railway corporations as to

[67] Adams Express Co. v. Ohio, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. 604.

[68] Cal. Const., art. 13, § 10.

[69] Stockton Gas & Electric Co. v. San Joachin County, 148 Cal. 313, 83 Pac. 54. Examine San Joachin & K. R. Canal & Irrig. Co. v. Merced County (Cal. App., 1906), 84 Pac. 285; City & County of San Francisco v. Oakland Water Co. (Cal., 1906), 83 Pac. 61, under Pol. Code, § 3628.

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their commanding position, the universality and closeness of their touch with the everyday life of the people, the mutual relations of dependence for well-being both as to persons and property, reaching the State at large, the needs of such corporations as to support and protection, the significant degree in which the administrative energy of all departments of the State is devoted to affairs concerning their regulation and well-being, and their public privileges springing from the whole people, warrant the exercise of legislative power, giving to their property for the purposes of taxation a general situs, and applying thereto the average rate of taxation, whether regarded as having a situs throughout the State or one limited to the taxing districts touched by their tracks.[70] It may also be stated in this connection that the Federal Supreme Court holds that the State of origin remains the permanent situs of personal property notwithstanding its occasional excursions to foreign parts, and a State may tax its own corporations for all their property in the State during the year even if every item should be taken into another State for a period and then brought back.[71] The same court also holds that neither the fiction that personal property follows the domicile of the owner, nor the doctrine that credits evidenced by notes have the situs of the latter, can be allowed to obscure the truth; and personal property may be taxed at its permanent abiding place although the domicile of the owner is elsewhere.[72] The sover-

[70] Syllabus by Marshall, J., in Chicago & Northwestern Ry. Co. v. State, 128 Wis. 553, 108 N. W. 557.

[71] New York Central & H. R. Rd. Co. v. Miller, 202 U. S. 584, 50 L. ed. 1155, 26 Sup. Ct. —.

[72] Metropolitan Life Ins. Co. of New York v. City of New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. 499, aff'g 115 La. 698.

As to situs for taxation of personal property and franchises, see generally the following cases:

United States: Pyle v. Brenneman (C. C. A.), 122 Fed. 787 (bank deposits).

Arkansas: Harris Lumber Co. v. Grandstaff (Ark., 1906), 95 S. W. 772 (personal property of company manufacturing, selling, etc., lumber).

California: Mackay v. City & County of San Francisco, 128 Cal. 678, 61 Pac. 382 (bonds of foreign railroad company on deposit and payable outside of State); Fair's Estate, In re, 128 Cal. 607, 61 Pac. 184 (bonds of foreign railroad company operating entirely outside of State).

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eign that creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock

Colorado: Hall v. American Refrigerator Transit Co., 24 Colo. 291, 51 Pac. 421 (refrigerator cars).

Connecticut: East Granby, Town of, v. Hartford Electric Light Co., 76 Conn. 169, 56 Atl. 514 (water power); State v. Travellers' Ins. Co., 70 Conn. 590, 40 Atl. 465 (power of legislature to give shares of corporation a situs).

Georgia: Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. 251 (rule, as to situs of stock in foreign railroad corporation, changed).

Illinois: Scripps v. Board of Review of Fulton County, 183 Ill. 278, 55 N. E. 700 (credits).

Indiana: Buck v. Miller, 147 Ind. 586, 47 N. E. 8, 37 L. R. A. 387, 45 N. E. 647, 37 L. R. A. 384 (personal property used in business in State; owner domiciled elsewhere; test of situs).

Kansas: Board of Commrs. of Johnson County v. Hewitt, 76 Kan. 816, 93 Pac. 181 (notes of resident left for safekeeping in another State).

Kentucky: Ayer & Lord Tie Co. v. Keown, 122 Ky. 580 (personal property of residents and non-residents); Ayer & Lord Tie Co. v. Keown, 29 Ky. L. Rep. 110, 400, 93 S. W. 588 (same point as last case); Ayer & Lord Tie Co. v. Keown, 27 Ky. L. Rep. 541, 85 S. W. 726; Ayer & Lord Tie Co. v. Keown, 26 Ky. L. Rep. 585, 85 S. W. 1096, rev'd in 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. 679 (vessels owned by corporation domiciled in Illinois, having acquired a permanent situs for taxation in another State, not subject to taxation in Kentucky even though enrolled in a port in that State); Commonwealth v. Northwestern Mut. Life Ins. Co., 32 Ky. L. Rep. 796, 107 N. W. 232 (choses in action); Langdon & Creasy Co. v. Trustees of Owenton Common School Dist., 25 Ky. L. Rep. 823, 76 S. W. 381 (franchise tax); Board Councilmen of City of Frankfort v. Stone, 22 Ky. L. Rep. 502, 58 S. W. 373, denying rehearing, 22 Ky. L. Rep. 25, 56 S. W. 679 (franchise of corporation).

Louisiana: Liverpool & L. & G. Ins. Co. v. Board of Assessors, 51 La. Ann. 1028, 25 So. 970, 45 L. R. A. 524 (debt).

Maine: Inhabitants of Farmingdale v. Berlin Mills Co., 93 Me. 333, 45 Atl. 39 (personal property employed in trade; logs); Union Water Power Co. v. Auburn, 90 Me. 71, 37 Atl. 331, 37 L. R. A. 651 (water power).

Maryland: Baltimore, City of, v. Safe Deposit & Trust Co. of Balt. (Md.), 55 Atl. 316 (personal property, bonds, etc.; validity of statute); Baldwin v. State, Hull, 89 Md. 587, 43 Atl. 857 (personal property; non-residents).

Massachusetts: Lamson Consol. Store-Service Co. v. Boston, 170 Mass. 354, 49 N. E. 630 (personal property leased for profit by foreign corporation).

Michigan: Portsmouth Township v. Cranage S. S. Co., 148 Mich. 230, 14 Det. Leg. N. 101, 111 N. W. 749 (navigation company located in place other than that specified in articles of incorporation); Detroit, City of, v. Donovan (Mich.), 8 Det. Leg. N. 465, 86 N. W. 1032 (franchise of street railway).

Minnesota: State v. Iverson, 97 Minn. 286, 106 N. W. 309 (personal

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therein, and it is not an unreasonable regulation to establish the situs of stock, for purposes of taxation, at the principal

property of logging railroad companies); State v. Red River Valley Elevator Co., 69 Minn. 131, 72 N. W. 60 (situs of personal property of corporation after appointment of receiver).

Missouri: State, Hopkins, v. Brown Tobacco Co., 140 Mo. 218, 41 S. W. 776 (personalty; removal of corporation from county).

New Jersey: American Mail Steamship Co. v. Crowell (N. J., 1908), 68 Atl. 752 (vessels owned by corporation); Crossley v. East Orange Township Committee, 62 N. J. L. 583, 41 Atl. 712, 16 Bkg. L. J. 34 (shares of capital stock of bank).

New York: People ex rel. Edison Electric Light Co. v. Campbell, 138 N. Y. 543, 43 N. E. 177 (situs of bonds of foreign corporations issued in payment of patent rights; franchise tax); Heerwagen v. Crosstown St. Ry. Co., 86 N. Y. Supp. 218, 90 App. Div. 275 (street railway company's franchise); People ex rel. Hans Rees' Sons v. Miller, 86 N. Y. Supp. 193, 90 App. Div. 591 (franchise taxes); People ex rel. v. Barker, 83 N. Y. Supp. 33, 84 App. Div. 469 (taxation on capital; personalty; corporate indebtedness).

North Carolina: Winston, City of, v. Town of Salem, 131 N. C. 404, 42 S. E. 889 (personal property; legislative power as to situs).

Ohio: Cleveland Trust Co. v. Lander, 62 Ohio St. 266, 56 N. E. 1036 (shares of national banks; nonresidents).

Oklahoma: Prairie Cattle Co. v. Williamson, 5 Okla. 488, 49 Pac. 937 (personal property).

Pennsylvania: Commonwealth v. Pennsylvania Coal Co., 197 Pa. 551, 47 Atl. 740 (personalty); Commonwealth v. Fall Brook R. Co., 188 Pa. 199, 41 Atl. 606 (capital stock of railroad company partly in other States); Commonwealth v. Pennsylvania Coal Co., 3 Dauph. Co. Rep. 142, 9 Pa. Dist. Rep. 486 (coal mined or purchased).

Texas: Missouri, K. & T. Ry. Co. of Texas v. Shannon (Tex. Civ. App., 1906), 97 S. W. 527, aff'd 100 Tex. 379, 100 S. W. 138, 10 L. R. A. (N. S.) 681 (intangible assets of railroads); State v. Austin & N. W. R. Co. (Tex. Civ. App.), 60 S. W. 886, 62 S. W. 1050 (tangible and intangible property, franchises, etc., of railway company).

Utah: Eureka Hill Mining Co. v. City of Eureka, 22 Utah, 447, 63 Pac. 654 (personalty; net proceeds of mine); Union Refrigerator Transit Co. v. Lynch, 18 Utah, 378, 55 Pac. 639, 13 Am. & Eng. R. Cas. (N. S.) 868, 48 L. R. A. 790 (railway cars); Salt Lake County v. State Board of Equalization, 18 Utah, 172, 55 Pac. 378 (rolling stock of railroad).

Virginia: Board of Supervisors of Elizabeth City County v. City of Newport News, 106 Va. 764, 56 S. E. 80 (rolling stock of electric railway taxed, where principal place of business located); Norfolk & W. R. Co. v. Board of Public Works, 97 Va. 23, 1 Va. Sup. Ct. Rep. 203, 32 S. E. 779 (tugs and barges engaged in interstate commerce); Union Bank v. Richmond, 94 Va. 316, 26 S. E. 821, 6 Am. & Eng. Corp. Cas. (N. S.) 581 (bank stock).

Wisconsin: Chicago & N. W. Ry. Co. v. State, 128 Wis. 553, 108 N. W. 557 (personal property; limitation on legislative power to fix situs).

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office of the corporation whether owned by residents or non-residents, and to compel the corporation to pay the tax for the stockholders, giving it a right of recovery therefor against the stockholders and a lien on the stock. If valid according to the laws of the State, such a regulation does not deprive the stockholder of his property without due process of law either because it is an exercise of the taxing power of the State over persons and things not within its jurisdiction, or because notice of the assessment is not given to each stockholder, provided that notice is given to the corporation, and the statute, either in terms or as construed by the state court, constituted the corporation the agent of the stockholders to receive notice and to represent them in proceedings for the correction of the assessment.[73]

§ 441. **Franchise Tax—What Is Included as Capital Stock—Exempt Property.**[74]—It is decided in New York that United States and other bonds, in the absence of proof that they were bought by a corporation with its surplus, should be treated as capital employed within the State, and as part of the basis upon which the franchise tax is to be computed. Stocks of other corporations held by a corporation sought to be taxed upon its franchise fall within the same rule as bonds. The fact that it not only owns the entire stock of another corporation, but also acquired all its assets, property and privileges, except its corporate franchise and some non-assignable contracts, does not exempt such stock from the operation of the rule, upon the ground that the ownership of stock is merged in the ownership of the assets and privileges represented by it, and is, therefore, of no value, where the corporation has never been dissolved, retains its corporate franchise, and therefore remains a going concern.[75] It is also held in the

[73] Corry v. Mayor and Council of Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. 297.

[74] See § 423, herein. Also §§ 446–451 as to basis of computation.

[75] People ex rel. Commercial Cable Co. v. Morgan, 178 N. Y. 433, rev'g 86 App. 577, 83 N. Y. Supp. 998. Compare § 441, herein.

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Federal Supreme Court that a tax which is imposed by a state statute upon "the corporate franchise or business" of all corporations incorporated under any law of the State or of any other State or country, and doing business within the State, and which is measured by the extent of the dividends of the corporation in the current year, is a tax upon the right or privilege to be a corporation and to do business within the State within a corporate capacity, and is not a tax upon the privilege or franchise which, when incorporated, the company may exercise, and, being thus construed, its imposition upon the dividends of the company does not violate the provisions of the statute exempting bonds of the United States from taxation, 12 Stat. 346, c. 33, § 2, although a portion of the dividends may be derived from interest on capital invested in such bonds.[76] So the entire rolling stock of a domestic railroad corporation is capital employed within the State, where the company has not shown that any portion thereof is used exclusively outside of the State.[77] Land partly improved, which is owned by a manufacturing corporation, but not purchased with its surplus, and a part of which produces an annual revenue, and a part no revenue and is held for sale as village lots, is not employed in manufacturing and must be considered as capital in fixing the amount of franchise tax payable by the corporation, even though assets are possessed by it in excess of its capital stock, and in an amount exceeding the value of such land.[78] Good will is also taxable as capital; and copyrights granted by the United States are subject to the taxing power of the State.[79] The fact that the capital of a domestic corporation is substantially all invested in letters

[76] Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. 593, decided in 1889. See § 423, herein. Compare § 441, herein.

[77] People ex rel. New York Cent. & H. R. R. Co. v. Miller, 84 N. Y. Supp. 1088, 89 App. Div. 127, aff'd (mem.) 177 N. Y. 584, 69 N. E. 1129. See also People ex rel. New York Cent. & H. R. R. Co. v. Knight, 77 N. Y. Supp. 401, 75 App. Div. 169, modified in 173 N. Y. 255, 65 N. E. 1102.

[78] People ex rel. Steinway & Sons v. Kelsey, 96 N. Y. Supp. 42, 108 App. Div. 138.

[79] People, A. J. Johnson Co., v. Roberts, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126, rev'g 54 N. Y. Supp. 1112, 35 App. Div. 624.

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patent issued by the United States, which, under the Federal law, is exempt from taxation, does not prevent the imposition of a franchise tax thereon, for the reason that, although measured by the value of the property, it is imposed upon the corporation for the privilege of carrying on business in the State. The same rule would apply if its capital were invested in United States bonds or copyrights, which are also exempt from taxation.[80] So a patent may be considered as part of the capital and exempt where manufacturing is done in the State under letters patent.[81] Capital invested in New York by a foreign corporation maintaining an office there for the sale of products of mines from other States, the proceeds being collected there, is deemed capital stock for the purposes of taxation, although not part of the original capital stock, and it may be made the basis for determining the percentage of taxation.[82] Where a franchise tax or annual license fee is imposed upon a corporation and graduated according to the amount of outstanding stock, such tax is held not to be a property tax, and that shares of a corporation organized in another State but located in the State imposing such tax were liable.[83]

§ 442. **Franchise Tax—What Is not Included as Capital Stock.**[84]—Under the New York statute[85] bills receivable are not capital employed within the State.[86] Nor is surplus of a foreign corporation which is merely invested in real estate in

[80] People ex rel. United States Aluminum Printing Plate Co. v. Knight, 174 N. Y. 474, 67 N. E. 65, rev'g 67 App. Div. 333, 73 N. Y. Supp. 745. See also Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. 593; People v. Home Ins. Co., 92 N. Y. 328; People ex rel. Electric Light Co. v. Campbell, 138 N. Y. 543, 43 N. E. 177, rev'g 88 Hun, 530, 68 N. Y. St. Rep. 747, 34 N. Y. Supp. 713.

[81] American Mutoscope Co. v. State Board of Assessors (N. J. Sup.), 56 Atl. 369.

[82] People ex rel. Union Sulphur Co. v. Glynn, 125 App. Div. 328.

[83] Rhode Island Hospital Trust Co. v. Tax Assessors of Providence, 25 R. I. 355, 55 Atl. 877; Genl. Stat., p. 3337, § 4; Genl. Laws, 1896, c. 45, § 10.

[84] See § 423, herein. Also §§ 446–451 as to basis of computation.

[85] Tax Law; Laws 1896, chap. 908, § 182.

[86] People ex rel. Rees' Sons v. Miller, 86 N. Y. Supp. 193, 90 App. Div. 591.

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New York taxable.[87] Nor are surplus earnings or stocks and bonds purchased with surplus by a domestic corporation taxable.[88] Again, money invested by a domestic corporation in real estate not used by the corporation in its business or in any connected therewith, and upon which it pays a tax for general and local purposes, and money invested in it by non-negotiable municipal bonds, the rentals of the real estate and the interest on the bonds being used to increase the corporation's annual income, are not part of the capital of the corporation "employed within" a State under a statute providing for taxation on capital so employed. The capital intended by the enactment is that actually employed in the State and does not apply to that merely invested.[89] So stock of a foreign corporation, acquired by a domestic corporation in exchange for patent rights, is not taxable to the domestic corporation.[90] Nor does stock of a foreign corporation held by a domestic railroad corporation constitute a part of its capital employed within the State; nor are the amount of anticipated dividends, bills receivable for expenditures on leased lines, and the value of coal and supplies owned by the corporation without the State to be included.[91] And where a domestic corporation owns vessels plying between the port of Buffalo and other ports on the Great Lakes, all of which are without the State, they do not constitute capital employed within the State within the statutory intent.[92]

§ 443. Exemptions—Tax Upon Banks in Which United

[87] People ex rel. Singer Mfg. Co. v. Wemple, 150 N. Y. 46, 44 N. E. 787, *aff'g* 78 Hun, 63, 60 N. Y. St. Rep. 662, 29 N. Y. Supp. 92.

[88] People ex rel. United Verdi Copper Co. v. Roberts, 156 N. Y. 585, rev'g 25 App. Div. 89.

[89] People ex rel. Union Ferry Co. v. Roberts, 72 N. Y. Supp. 950, 66 App. Div. 157.

[90] People ex rel. Edison Electric Light Co. v. Wemple, 148 N. Y. 690, rev'g 63 Hun, 44, 44 N. Y. St. Rep. 702, 18 N. Y. Supp. 511; People ex rel. Edison Electric Light Co. v. Wemple, 138 N. Y. 543.

[91] People ex rel. New York Central & H. R. Rd. Co. v. Knight, 173 N. Y. 255, 65 N. E. 1102, modifying 77 N. Y. Supp. 401, 75 App. Div. 169.

[92] People ex rel. Lackawanna Transp. Co. v. Knight, 77 N. Y. Supp. 398, 75 App. Div. 164.

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States Securities Are Included.[93]—In a comparatively late decision in the Federal Supreme Court certain banking institutions were incorporated under the state laws and upon each of them a tax was levied under the state law, which provided that "shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to individual stockholders." These banks being corporations of the State imposing the tax, the State did not, as in the case of national banks, require any authority from the United States. Its own governmental power was sufficient for the imposition of such taxes, assessed by such methods, and under such standards of valuation as it might choose, provided the Federal Constitution should not be violated, or some Federal law which by that Constitution is made supreme. The following were the points decided: (1) The Constitution has conferred upon the government power to borrow money on the credit of the United States, and that power cannot be burdened, impeded, or in any way affected by the action of any State. (2) The tax upon the property of a bank in which United States securities are included is beyond the power of the State, and is also within the prohibition of § 3701, Rev. Stat., and other acts of Congress. (3) While a tax on an individual in respect to his shares in a corporation is not a tax on the corporation, and the value of the shares may be assessed without regard to the fact that the assets of the corporation include government securities, if the tax is actually on the corporation although nominally on the shares such securities may not be included in assessing the value of the shares for taxation. (4) The substantial effect of the statute, providing as above stated, and providing that in fixing the value of the shares capital, surplus and undivided earnings shall be taken into account, as the law has been construed by the highest court of the State, is to tax the property of the bank and not the shares of stock, and an assessment which includes govern-

[93] See § 439, herein.

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ment bonds owned by the bank in fixing the valuation of its shares is illegal and beyond the power of the State.[94]

§ 444. **Special Franchises—Taxation.**—The right to exist as a railroad company, and to maintain and operate a railroad, is a general franchise. A special franchise of a railroad is its right to construct, maintain and operate a railroad in public streets, highways or public places, and under the New York Tax Law [95] it covers railroads over, upon or under such streets, etc., including the tangible property in use over, upon or under the highway. If the railway is located entirely in or under the streets, highways or public places, the special franchise consists of the physical property itself, including the right to use it; and a special franchise is only taxable as real estate.[96] Whatever doubt there may be as to the classification of special franchises to operate mains, etc., under public waters as real property the statute clearly includes under the term "special franchise" [97] such tangible property under public waters as is used in connection with the special franchise; and tangible property situated under public waters as a part or continuation of the system in the public streets operated by an electric light company under its special franchise and in connection therewith, there being no suggestion that the property under water is the subject of a separate and distinct franchise, cannot be validly assessed for taxation by the commissioners of taxes of the city wherein such plant is located, but can only be taxed as a part of the special franchise upon an assessment made by the state board of tax commissioners as provided by the Tax Law.[98] The Interborough Rapid Transit

[94] Home Savings Bank v. Des Moines, 205 U. S. 503, 51 L. ed. —, 27 Sup. Ct. — (another point was decided in this case and is given under § 417, herein), under § 1322 of the Iowa code.

[95] Tax Law; Laws 1896, chap. 908, § 2, subd. 3, as amended by laws of 1899, chap. 712.

[96] People ex rel. Interborough Rapid Transit Co. v. Tax Commrs., 126 App. Div. 610, 611–613, from opinion of Kellogg, J.

[97] Subdv. 3, § 2, of the Tax Law of N. Y., Laws 1896, chap. 908, as amended by Laws 1899, chap. 712.

[98] People ex rel. Edison Illuminating Co. v. Commissioner of Taxes, 58 Misc. 249.

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Company, as lessee or operator of subway railroads owned by the city of New York, is not subject to a special franchise tax on account of the rights which it exercises under its contract with the city. If the city had been given power to operate the road no franchise tax could be charged against it, and the legislature has by express provision extended the exemption to the operator or lessee of the city. This express exemption from taxation of such operator or lessee of said subway railroad on property, other than real property owned or employed by it in the construction or operation of the road, was not impaired by the subsequent enactment of that provision of the Tax Law declaring a special franchise to be real estate for the purposes of taxation, and it may well be questioned whether the legislature could destroy the exemption after a contract is made relying upon it. The courts, by a doubtful construction, will not impute to that body an intent to violate a promise by which the city was aided in obtaining a contractor on favorable terms. Where two acts are passed at the same session it is presumed that the legislature did not intend to repeal by implication the earlier act. And this applies to a claim that the Tax Law [99] repeals by implication that section of the Rapid Transit Law which contains the exemption from taxation.[1]

§ 445. **Franchises—Exemption From Tax on Capital Stock.**—The New York Tax Law exempts certain corporations from the payment of taxes on their capital stock.[2] Under

[99] Genl. Laws N. Y., chap. 24, Laws 1896, chap. 908.

[1] People ex rel. Interborough Rapid Transit Co. v. Tax Commrs., 126 App. Div. 610. Sec. 35 of Rapid Transit Law was amended May 19, by chap. 729, Laws N. Y., 1896, and the Tax Law was enacted May 27, at same session.

[2] N. Y. Tax Law; Laws 1896, chap. 908, § 183, as am'd by Laws 1897, chap. 785, by Laws 1901, chap. 558, and by Laws 1906, p. 1195, chap. 474. Includes banks, savings banks, institutions for savings, title guaranty, insurance or surety corporations, trust companies organized under the laws of the State, companies authorized to do a trust company's business, solely or in connection with any other business, laundry corporations, manufacturing corporations, to the extent only of the capital actually employed in the State in

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this statute manufacturing companies have been held to include electricity,[3] gas,[4] and putting together parts of a fountain pen by experts.[5] So a corporation whose sole business is that of manufacturing, under a patent process, linings composed of lead, brick and cement for use in wood-pulp digesters is a manufacturing corporation within the intent of a statute exempting manufacturing corporations from a tax on capital stock to the extent only of the capital actually employed in the State in manufacturing and in the sale of the product of manufacturing, with the condition that such corporation shall not be exempted unless at least a specified certain per centum of its capital stock is invested in property in the State and used by it in its manufacturing business in the State.[6] Again, the making of a paving compound is the production of a new and distinct substance which constitutes manufacturing within the intent of the statute, but the preparation of a street for the laying of the paving compound and the placing of the compound thereon, is not in any sense a process of manufacture.[7] Nor is collecting and preparing ice,[8] publishing a

manufacturing, and in the sale of the product of such manufacturing, mining corporations wholly engaged in mining ores within the State, agricultural or horticultural societies or associations, and corporations, joint-stock companies or associations, owning or operating elevated railroads or surface railroads not operated by steam, or formed for supplying water or gas for electric or steam heating, lighting or power purposes and liable to a tax under certain other specified sections of the tax law. Laundrying, manufacturing or mining corporations are not exempted from the tax unless at least forty per centum of the capital stock of such corporation is invested in property in the State and used by it in laundrying, manufacturing or mining business in the State.

[3] People ex rel. Edison Illuminating Co. v. Wemple, 129 N. Y. 664, 42 N. Y. St. Rep. 280, 3 Silv. C. A. 653, 29 N. E. 812, rev'g 61 Hun, 53, 39 N. Y. St. Rep. 605, 15 N. Y. Supp. 711; People ex rel. Brush Electric Mfg. Co. v. Wemple, 129 N. Y. 543, 42 N. Y. St. Rep. 272, 29 N. E. 808, rev'g 39 N. Y. St. Rep. 614, 15 N. Y. Supp. 718.

[4] Nassau Gas Light Co. v. City of Brooklyn, 89 N. Y. 409.

[5] People ex rel. Waterman Co. v. Morgan, 48 App. Div. 395.

[6] People ex rel. Digester Co. v. Knight, 73 N. Y. Supp. 743, 67 App. Div. 365.

[7] People ex rel. Paving Co. v. Knight, 90 N. Y. Supp. 537, 99 App. Div. 62.

[8] People v. Knickerbocker Ice Co., 99 N. Y. 181.

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newspaper,[9] or doing merely an incidental business in connection with selling manufactured goods, included as manufacturing.[10]

§ 446. **Franchise Tax—Capital Stock, etc.—Valuation—Basis of Computation.**—The legislature has power to determine upon what basis the amount of a franchise tax upon banks may be ascertained.[11] Under the New York statute the basis of the franchise tax imposed upon corporations is the actual value of the capital employed "within" the State,[12] and an assessment based upon the par value of the stock is erroneous.[13] That section of the statute of that State [14] relating to the imposition of a franchise tax on corporations, and providing that when a dividend of less than six per centum has been declared during the tax year, the tax shall be at the rate of one and one-half mills upon such portion of the capital stock, at par, as the amount of capital employed within the

[9] People ex rel. Jewelers' Pub. Co. v. Roberts, 155 N. Y. 1.

[10] People ex rel. Roebling's Sons Co. v. Wemple, 138 N. Y. 582, 53 N. Y. St. Rep. 297, 34 N. E. 386, aff'g 63 Hun, 452, 44 N. Y. St. Rep. 708, 18 N. Y. Supp. 504.

[11] State v. Franklin County Sav. Bank & Trust Co., 74 Vt. 246, 52 Atl. 1069.

[12] People ex rel. New York Cent. & H. R. R. Co. v. Knight, 77 N. Y. Supp. 401, 75 App. Div. 169, modified 173 N. Y. 255, 65 N. E. 1102; People ex rel. Wiebush & Hilger Co. v. Roberts, 154 N. Y. 101, 47 N. E. 980, aff'g 19 App. Div. 574, 46 N. Y. Supp. 570; People ex rel. Chicago Junction Rys. & Union Stock Yards Co. v. Roberts, 154 N. Y. 1, 47 N. E. 974, rev'g 90 Hun, 474, 70 N. Y. St. Rep. 640, 35 N. Y. Supp. 968; People ex rel. Edison Electric Light Co. v. Wemple, 148 N. Y. 690, rev'g 63 Hun, 444, 44 N. Y. St. Rep. 702, 18 N. Y. Supp. 511; People ex rel. Seth Thomas Clock Co. v. Wemple, 133 N. Y. 323, 31 N. E. 238, 45 N. Y. St. Rep. 234, rev'g 42 N. Y. St. Rep. 60, 16 N. Y. Supp. 602; People ex rel. American Contracting & D. Co. v. Wemple, 129 N. Y. 558, 42 N. Y. St. Rep. 400, 29 N. E. 812, aff'g 60 Hun, 225, 38 N. Y. St. Rep. 17, 14 N. Y. Supp. 859; People v. Horn Silver Mining Co., 105 N. Y. 76, 6 N. Y. St. Rep. 495, 26 Wkly. Dig. 158, 11 N. E. 155, aff'g 38 Hun, 276; People v. Equitable Trust Co. of New London, 96 N. Y. 387.

[13] People ex rel. New York Central & H. R. R. Co. v. Knight, 173 N. Y. 255, 65 N. E. 1102, modifying 77 N. Y. Supp. 401, 75 App. Div. 169. See Bells Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892, noted under § 446, herein.

[14] Tax Law; Laws 1896, chap. 908, § 182.

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State bears to the entire capital of the corporation, must be read in connection with the subsequent section,[15] providing for the assessment at its actual cash value, and when so read establishes a rule for the computation of the amount of capital stock on which the assessment is to be made, but not for its valuation, that being determined by the provisions of the latter section, and, therefore, in such case an assessment upon its par value is erroneous.[16] In determining the tax under the statute of that State as to savings banks, the comptroller must appraise the bonds and securities in which the surplus is invested at their market value, whenever such value is less than the face or par value thereof. This is in accordance with the provisions of the banking law,[17] authorizing a savings bank to accumulate a surplus not to exceed fifteen per cent of its deposits, and providing that "in determining the per cent of surplus held by any savings bank its interest paying stocks and bonds shall not be estimated above their par value, or above their market value if below par." It was held that in imposing a tax upon the surplus of a savings bank the legislature must have intended the surplus provided for in these sections of the banking law.[18] Where the comptroller is dissatisfied with the appraisal of the value of the capital stock of a corporation, and elects to reject such appraisal and make one of his own, he is not limited by the average market price for which the stock sold during the year, except that he is required to appraise it at not less than such average market price.[19] The franchise right of a corporation to conduct its business under its franchise is to be considered in determining

[15] See § 190.

[16] People ex rel. New York & East River Ferry Co. v. Roberts, 168 N. Y. 14, 60 N. E. 1043, rev'g 35 App. Div. 625, 54 N. Y. Supp. 1112.

[17] See §§ 123, 124.

[18] People ex rel. Bank of Savings v. Miller, 177 N. Y. 461, modifying 82 N. Y. Supp. 621, 84 App. Div. 168; N. Y. Tax Law; Laws 1896, chap. 908, § 187*b*, as am'd by Laws 1901, chap. 117, imposing franchise tax on savings banks.

[19] People ex rel. Metropolitan Security Co. v. Kelsey, 91 N. Y. Supp. 711, 101 App. Div. 248; N. Y. Tax Laws; Laws 1896, chap. 908, § 190, as am'd by Laws 1906, chap. 474, since am'd by Laws 1907, p. 1726, chap. 734, providing that value of stock be appraised.

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the actual value of its "capital stock" for taxation.[20] Surplus earnings are not within the statute of New York.[21] The tax is computed on the basis of dividends made upon the capital stock of the corporation, and not upon dividends earned within the State.[22] If more than six per cent dividends are paid by a corporation the tax is to be assessed upon the basis of the capital employed within the State.[23] It is not necessary in valuing a property as a totality for taxation to disintegrate the various elements which enter into it and ascribe to each its separate fraction of value.[24] An imposition of a tax upon the capital of a foreign investment corporation employed within the State, computed upon the monthly bank balance

[20] People ex rel. Wiebusch & Hilger Co. v. Roberts, 154 N. Y. 101, 107, 108, 47 N. E. 480. See also New York Central & Hudson R. Rd. Co. v. Miller, 202 U. S. 584, 596, 50 L. ed. —, 26 Sup. Ct. —; Henderson Bridge Co. v. Commonwealth, 99 Ky. 623, 17 Ky. L. Rep. 389, 29 L. R. A. 73, 31 S. W. 486, aff'd in 166 U. S. 150, 17 Sup. Ct. 532, 41 L. ed. 953; Henderson Bridge Co. v. Negley, Sheriff, 23 Ky. L. Rep. 746; People ex rel. Commercial Cable Co. v. Morgan, 178 N. Y. 433, 70 N. E. 967, rev'g 83 N. Y. Supp. 998, 86 App. Div. 577; Williams v. Western Union Teleg. Co., 48 N. Y. Super. Ct. (16 Jones & S.) 349, 368, rev'd 93 N. Y. 162; People ex rel. Rochester Ry. Co. v. Pond, 57 N. Y. Supp. 490, 493, 37 App. Div. 330. Compare People ex rel. Manhattan Ry. Co. v. Barker, 146 N. Y. 304, 40 N. E. 996, 165 N. Y. 305, 310, 317, 324, 340, 59 N. E. 137, 151, cited in People ex rel. Metropolitan St. Ry. Co. v. Tax Commissioners, 174 N. Y. 417, 436, 67 N. E. 169; People ex rel. Manhattan Ry. Co. v. Barker, 152 N. Y. 417, 439, 452, 46 N. E. 875.

Value of franchise should be considered in determining the actual value of the capital stock. Commonwealth v. Ontario, C. & S. R. Co., 188 Pa. 205, 41 Atl. 607; Pa. Act June 8, 1891, P. L. 229.

Earning capacity of franchise. See Rocheblave Market Co. v. City of New Orleans (La.), 34 So. 665, considered under § 447, herein.

[21] People ex rel. Steinway & Sons v. Kelsey, 96 N. Y. Supp. 42, 108 App. Div. 138; Tax Laws; Laws 1896, chap. 908, § 182.

[22] Home Ins. Co. v. People, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. 593; People ex rel. New England Dressed Meat & Wool Co. v. Roberts, 155 N. Y. 408, 415; People v. Horn Silver Mining Co., 105 N. Y. 76, 6 N. Y. St. Rep. 495, 26 Wkly. Dig. 158, 11 N. E. 155, aff'g 38 Hun, 276; People v. Equitable Trust Co., 96 N. Y. 387.

[23] People ex rel. Commercial Cable Co. v. Morgan, 178 N. Y. 433, rev'g 83 N. Y. Supp. 998, 86 App. Div. 577.

[24] Brooklyn City Rd. Co. v. New York State Board of Tax Commrs., 199 U. S. 48, 50 L. ed. 79, 25 Sup. Ct. 713.

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carried in the State, and the amount of stocks, bonds and other securities held in the State, and the average amount of bills and accounts receivable within the State has been sustained.[25] Where a real estate corporation is liable upon its capital stock employed within the State but had only exercised its corporate franchises five and one-half months of the year for which it was taxed, the tax should be apportioned for such time, and should not be levied for the whole year.[26] If the amount varies throughout the year the average of capital should be taken.[27] The good will of a corporation engaged in importing the products of foreign manufacturers is an asset to be considered in fixing the amount of the capital employed by the corporation within the State. In fixing the amount of such capital the same proportion of the value of the entire good will of the corporation should be taken as the amount of the tangible capital employed within the State bears to the entire amount of tangible capital employed both without and within the State.[28] In determining the value of the stock of an apartment house corporation, taxable on its franchise, the real rental value of the apartment may be considered, although such apartments are leased to stockholders in the company at a rate below the rental value, in lieu of dividends.[29] The value of a trade-mark may also be taken into consideration in estimating the value of capital stock.[30]

[25] People ex rel. North American Co. v. Miller, 86 N. Y. Supp. 286, 90 App. Div. 560, aff'd (mem.) 182 N. Y. 521.

[26] People ex rel. Ft. George Realty Co. v. Miller, 179 N. Y. 526, 71 N. E. 463, rev'g 86 N. Y. Supp. 420, 90 App. Div. 588.

[27] People ex rel. Brooklyn Rapid Transit Co. v. Morgan, 57 App. Div. 335, 68 N. Y. Supp. 21, aff'd (mem.) 168 N. Y. 672.

[28] People ex rel. Koechl & Co. v. Morgan, 88 N. Y. Supp. 1066, 96 App. Div. 110, aff'd (mem.) 183 N. Y. 574, 76 N. E. 1105. See People ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70, rev'g 35 App. Div. 624; People ex rel. Hans Rees' Sons v. Miller, 86 N. Y. Supp. 193, 90 App. Div. 591.

[29] People ex rel. Hubert Apartment Assoc. v. Kelsey, 96 N. Y. Supp. 745, 110 App. Div. 617, aff'd (mem.) 184 N. Y. 573, 77 N. E. 1194.

[30] People ex rel. Spencerian Pen Co. v. Kelsey, 93 N. Y. Supp. 971, 105 App. Div. 132, aff'd (mem.) 185 N. Y. 546.

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§ 447. **Franchise Tax—Capital Stock, etc.—Valuation—Basis of Computation Continued.**—In a case in the Federal Supreme Court where a statute of Illinois was before the court it was held that the capital stock, franchise, and all the real and personal property of corporations, are justly liable to taxation; and a rule which ascertains the value of all this, by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment, is probably as fair as any other. Deducting from this the assessed value of all the tangible, real and personal property, which is also taxed, leaves the real value of the capital stock and franchise subject to taxation as justly as any other mode, all modes being more or less imperfect.[31] In another case in the same court where a section of the Iowa Code was under consideration [32] it was decided that while the tax on an individual in respect to his shares in a corporation is not a tax on the corporation, and the value of the shares may be assessed without regard to the fact that the assets of the corporation include government securities, if the tax is actually on the corporation although nominally on the shares such securities may not be included in assessing the value of the shares for taxation.[33] In Kentucky, in order to ascertain the value of the franchise of a foreign corporation for taxation, it is held that the value of the capital stock being arrived at and the assessed value of tangible property deducted, the remainder constitutes the value of the franchise tax subject to taxation; three things are to be done under the statute,[34] as follows: First. The value of the entire capital stock is to be fixed by the board of valuation and assessment. Second. The board must then ascertain the gross receipts of the corporation in that State and the entire gross receipts from every source including that State. Third. The board should calculate the proportion which the gross receipts in that State bear to the

[31] State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663.

[32] Code Iowa, § 1322.

[33] Home Savings Bank v. Des Moines, 205 U. S. 503, 51 L. ed. —, 27 Sup. Ct. —.

[34] Ky. Stat., § 4080.

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entire gross receipts of the taxed corporation, and that proportion of the value of the entire capital stock, less the assessed value of the tangible property in that State, will constitute the correct value of the corporate franchise subject to taxation there for state, county and municipal purposes.[35] The value of a franchise is not dependent in any sense upon the amount which is expended in creating it. The payment of any sum of money for the purpose of perfecting its organization or putting the company into legal shape to do business cannot be regarded as a taxable asset in the hands of the company, or as giving to the company so organized any greater value than if its organization had been perfected without incurring any expense; nor is the value of a franchise enhanced because the company is required to pay annually a license to the State or to a foreign State to continue its corporate existence.[36] In the case of an interstate bridge the franchise valuation for taxation in that State may be ascertained by determining what per cent of the length of such bridge is within the taxing State, and then taking the same per cent of the total value of stock and bonded indebtedness, the assessed valuation of the tangible property in that State should be deducted therefrom.[37] In a case in the United States Supreme Court it appeared that the Henderson Bridge Company was a corporation created by the commonwealth of Kentucky for the purpose of erecting and operating a railroad bridge, with its approaches, over the Ohio River between the city of Henderson, in Kentucky, and the Indiana shore. It owned 9.46 miles of railroad connections in Indiana, which property was assessed for taxation in that State, at $627,660. The length of the bridge in the two States, measured by feet, was one-third in Indiana and two-thirds in Kentucky. The tangible property of the company was assessed

[35] Hager, etc., v. American Surety Co., 28 Ky. L. Rep. 782, 90 S. W. 550.

[36] Commonwealth, By, etc., v. Ledman, 32 Ky. L. Rep. 452, 455, 106 S. W. 247. But the court, per Lassing, J., says: "On the other hand, we can readily see how the value of a franchise might be materially lessened because of the expenditure of a large sum of money in creating it or in perfecting its organization."

[37] Commonwealth v. Covington & C. Bridge Co., 24 Ky. L. Rep. 1177, 70 S. W. 849.

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in Henderson County, Kentucky, at $649,735.54. From the evidence before them the Board of Valuation and Assessment placed the value of the company's entire property at $2,900,000, and deducted therefor $627,660 for the tangible property assessed in Indiana, which left $2,272,340, of which two-thirds, or $1,514,893, was held to be the entire value of the property in Kentucky. From this, $649,735.54, the value of the tangible property in Henderson County, was deducted, and the remainder, $865,157.46, was fixed by the board as the value of the company's franchise. From the total value, $1,385,107 was deducted for the tangible and intangible property in Indiana, and the taxes in Kentucky were levied on $1,514,893 of tangible and intangible property in that State. The company paid the tax on the tangible property ($2,762.08) and refused to pay the tax on the intangible property ($3,675.91). This action was brought to recover it. The Court of Appeals held that the commonwealth was entitled to recover it. It was held by the Supreme Court that the company was chartered by the State of Kentucky to build and operate a bridge and the State could properly include the franchises it had granted in the valuation of the company's property for taxation.[38] In Louisiana, in determining the value of street railway franchises for the purposes of taxation, reference should be had to elements bearing directly upon said value other than the earning capacity as a basis.[39] But it is also held in that State that the earning capacity of a franchise should be taken into consideration in determining its value.[40]

§ 448. **Franchise Tax—Capital Stock, etc.—Valuation—Basis of Computation Continued.**—In a case in Maine, where the statute [41] provided for an excise tax upon a railroad based upon the average gross transportation receipts per mile

[38] Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. 305.

[39] St. Charles St. R. Co. v. Board of Assessors, 51 La. Ann. 458, 25 So. 90; La. Const., art. 203; Acts 1890, §§ 1, 28.

[40] Rocheblave Market Co. v. City of New Orleans, 34 So. 665.

[41] § 42, chap. 6, Rev. Stat., as am'd by chap. 145, Pub. Laws 1901.

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of the railroad operated, it is held that the mileage basis of apportionment in taxing railroads and other public service corporations is eminently just, but that there are exceptional cases where deductions should be made to prevent manifest inequality or value per mile; also, that a railroad may be in a legal sense considered a unit capable of proportionate subdivisions by miles, but where it is especially chartered to own and operate, in connection with its transportation business, lines of steamboats across navigable rivers beyond its termini, the length of such lines should be excluded from the computation in determining the franchise tax.[42] Under a Nebraska decision the value of the tangible property of an express, telephone or telegraph company, apart from its gross receipts for the year prior to the time of the assessment and its franchise or right to carry on its business, does not furnish the true value of its property for taxation. Such value should be ascertained from a consideration of all of the aforesaid items taken together and by treating the corporation as a growing concern.[43] So in assessing the value of railroad and telegraph property all the elements which enhance its value should be considered, whether such elements consist of tangible or intangible property, and the valuation should be so made as to comply with the constitutional rule of uniformity.[44] Under a New Jersey statute the amount of a tax to be levied is two per centum of the company's gross annual receipts from all business, and not merely two per centum of its receipts from the exercise of municipal franchises; and a company which constitutes a consolidation and merger of several corporations and continues to exercise their franchises is subject to the taxation of its franchises.[45] In assessing the value of the capital stock of a corporation of Pennsylvania under the statute of that State,[46] coal which is owned by the corpora-

[42] State v. Canadian Pacific Ry. Co., 100 Me. 202, 60 Atl. 901.

[43] Nebraska Teleg. Co. v. Hall County (Neb., 1906), 106 N. W. 471.

[44] State v. Savage (Neb.), 91 N. W. 716.

[45] Peterson & Passaic Gas & Elec. Co. v. State Board of Assessors, 69 N. J. L. 116, 54 Atl. 246, 8 Am. Elec. Cas. 403, aff'd 70 N. J. L. 825, 59 Atl. 1118.

[46] Act June 8, 1891.

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tion, but at the time of the assessment is situated in another State and is not to be returned to Pennsylvania, should not be included. The same rule that requires the exclusion from the assessment of valuation of capital stock of tangible personal property permanently situated outside of the State applies to property sent outside of the State to be sold and which is actually out of the State when the assessment is made. And while an appraisement of value is in general a decision on a question of fact and final, where it is arrived at by including property not within the jurisdiction of the State, it is absolutely illegal as made without jurisdiction.[47] Again, a provision in a statute of that State for an assessment upon the nominal or face value of bonds, instead of upon their actual value, was held to be a part of the state system of taxation, authorized by its constitution and laws, and, therefore, not a violation of any provision of the Federal Constitution.[48] In Wisconsin the property of a public service corporation is to be valued for taxation as a unit, the franchise element and tangible elements, whether in land or movables, being regarded as inseparable parts of one thing in which the former so far predominates as to stamp all with the impress of personal property. In assessing railway property for taxation, the assessing agency is not concerned with physical value except as evidence of physical conditions; nor specially concerned with franchise value. All is to be valued as a unit, inseparable for the purpose of valuing any one element or determining the value, in the whole, by adding together the separate values of elements. The rule that property of a railway corporation, for the purposes of direct taxation, must be valued as a unit, reasonably demands that such value be treated as a unit, and, to the end that the rule of taxation may be uniform, that the average rate of taxation on general property throughout the taxing districts which, in any reasonable view, are entitled to participate in taxing such property, be applied thereto, and

[47] Delaware, L. & W. Rd. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. 679.

[48] Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892. See § 444, herein.

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the avails be treated as belonging to the State for public purposes, on the theory of a constructive accounting between it and such taxing districts.[49] So under a Federal decision the property of corporations engaged in interstate commerce, situated in the several States through which their lines or business extends, may be valued as a unit for the purposes of taxation, taking into consideration the uses to which it is put and all the elements making up aggregate value; and a proportion of the whole fairly and properly ascertained may be taxed by the particular State, without violating any Federal restriction.[50] Again, in estimating, for purposes of taxation, the value of the property of a telegraph company situate within a State, it may be regarded not abstractly or strictly locally, but as a part of a system operated in other States; and the taxing State is not precluded from taxing the property because it did not create the company or confer a franchise upon it, or because the company derived rights or privileges under the act of Congress of 1866, or because it is engaged in interstate commerce.[51]

[49] Chicago & Northwestern Ry. Co. v. State, 128 Wis. 553, 108 N. W. 557, citing to the point that the property of a railway corporation "be assessed as a unit; the physical things being regarded as merged in that produced by union with the franchise element: the one of primary importance" (*Id.* p. 663) the following cases:

United States: Columbus Southern Ry. Co. v. Wright, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. ed. 238; State Railroad Tax Cases, 92 U. S. 575, 607, 23 L. ed. 663.

Colorado: Ames v. People, 26 Colo. 83, 56 Pac. 656; People ex rel. Iron M. Co. v. Henderson, 12 Colo. 369, 21 Pac. 144; Carlisle v. Pullman P. C. Co., 8 Colo. 320, 7 Pac. 164, 54 Am. Rep. 553.

Illinois: Chicago & A. R. Co. v. People, 129 Ill. 571, 22 N. E. 864, 25 N. E. 5.

Iowa: Dubuque v. Illinois Cent. R. Co., 39 Iowa, 56.

Kansas: Missouri River, Ft. S. & G. R. Co. v. Morris, 7 Kan. 210; Missouri, K. & T. R. Co. v. Board of Commrs., 9 Kan. App. 545, 59 Pac. 383.

Missouri: State ex rel. K. C., St. J. & C. B. R. Co. v. Severance, 55 Mo. 378.

Tennessee: Franklin County v. Nashville, C. & St. L. R. Co., 12 Lea (80 Tenn.), 521.

Virginia: Shenandoah Valley R. Co. v. Clarke County, 78 Va. 269.

See Union Pacific Ry. Co. v. Cheyenne, 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. 601.

[50] Adams Express Co. v. Ohio, 65 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. 305.

[51] Western Union Tel. Co. v. Missouri ex rel. Gottlieb, 190 U. S.

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§ 449. **Franchise Tax—Capital Stock, etc.—Valuation—Basis of Computation—Deductions.**—A deduction from the capital stock should be made of the amount of corporate funds invested in shares of other corporations which pay taxes on their capital stock.[52] Capital stock should be assessed at its market value subject to a deduction of such amount of the capital as is invested in realty. Such amount to bear the same proportion to the market value as the entire investment sustains to the net assets.[53] Where a foreign corporation doing business in New York is acting as a holding corporation of the capital stock of constituent companies and its indebtedness is incurred generally in its business and not in respect to any particular asset which is within the State, it is not entitled, on the assessment of a franchise tax, to have its indebtedness within the State deducted from the capital which is held to be employed within the State, but the indebtedness should be deducted from the sum of the assets of the corporation wherever found, and such amount offset against the value of the assets within the State as will be proportionate.[54] A railroad company is not entitled to be credited with the average amount of its rolling stock employed during the year outside of the State, but only with such amount of its rolling stock as was exclusively and continuously used outside of the State during that period.[55] A domestic corporation is not entitled

412, 23 Sup. Ct. 730, 47 L. ed. 1116.

[52] Commonwealth v. People's Traction Co., 183 Pa. 405, 39 Atl. 42.

[53] Batterson, In re, 72 Conn. 374, 44 Atl. 546.

[54] People ex rel. Manhattan Silk Co. v. Miller, 125 App. Div. 296. "It may be that there are cases where the indebtedness within the State should be offset against capital employed within that State. Those are cases, however, where the indebtedness was in respect of the specific assets which are found within the State. Where the indebtedness is general, that is, is incurred generally in the business, and was not incurred in respect of any particular asset which is within the State, there is no reason why it should not be deducted from the sum of the assets of the company wheresoever they may be found, and an amount offset against the value of the assets within this State as will be proportionate. Such seems to have been the rule of this department in People ex rel. Rees' Sons v. Miller (90 App. Div. 591)." *Id.*, 298, per Smith, P. J.

[55] People ex rel. New York Central & Hudson R. Rd. Co. v. Miller,

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to have deducted from its gross assets the assets employed without the State and together therewith its total liabilities, leaving the balance as the amount upon which the franchise tax is to be computed. A reduction should only be made of the value of the assets employed in the State of such proportionate amount of the liabilities of the corporation as is represented by the ratio of the assets employed within the State to the total assets of the corporation.[56] The aggregate and fairly appraised value of corporate property is not subject to a deduction of the amount of corporate indebtedness, although such amount should be taken into consideration in arriving at the actual value of capital stock where the purpose of the statute is to include the corporation's property consisting of bonds, mortgages, franchises, etc.[57] Where a corporation issues stock certificates representing a part of the capital stock of the corporation, such certificates cannot be deemed debts and deducted from an assessment made by the comptroller for the purpose of imposing a franchise tax.[58]

§ 450. **Value of Special Franchise.**—In assessing a special franchise tax, the value of the franchise should, so far as its nature permits, be ascertained in the same manner as the value of any other property. Where such tax is assessed against a water supply company which owns three distinct classes of property, the use of which produces the net earnings; and such property consists of tangible property outside of the street; tangible property in the street and intangible property in the street, each of these three classes should be considered as contributing *pro rata* to the net earnings of the company according to its respective value. On determining the value

85 N. Y. Supp. 998, aff'd (mem.) 177 N. Y. 584.

[56] People ex rel. Hyde & Sons v. Miller, 85 N. Y. Supp. 522, 90 App. Div. 599, aff'd (mem.) 179 N. Y. 564.

[57] Commonwealth v. Beech Creek R. Co., 188 Pa. 203, 41 Atl. 605; Commonwealth v. Manor Gas Coal Co., 188 Pa. 195, 41 Atl. 605; Commonwealth v. New York, P. & O. R. Co., 188 Pa. 169, 41 Atl. 594.

[58] People ex rel. Cohn & Co. v. Miller, 180 N. Y. 16, aff'g 88 N. Y. Supp. 197, 94 App. Div. 564.

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of tangible and intangible property, actual value, not the cost, is the true basis for taxation; and hence intangible property in a public street, consisting of a mere right to lay water mains, must be determined by treating it as a part of the plant and basing its value upon the net earnings and then capitalizing such earnings. Such intangible property has a taxable value on the theory that it is earning an income for the company, and if with good management there is no adequate return, such intangible property has little value. The value of the property of a water company for the purpose of taxation, and especially its franchise and good will, cannot be ascertained until the franchise tax and all other taxes and a proper replacement or upkeep fund have been deducted from the current earnings. In determining the value of the property of such a corporation based principally upon its earnings, the earnings and expense for one year alone should not be considered, but the average earnings and expense for a series of years, or for such time as is reasonably available, should be taken. The correct method of arriving at the value of the intangible property of a water supply company in a public street is as follows: From the earnings should be deducted salaries and other expenses of maintenance, all taxes, including the approximate amount of the special franchise tax to be assessed, such percentage of the earnings as is shown to be a reasonable and proper fund for replacements and upkeep not ordinarily covered by the current maintenance account, and the balance of the earnings remaining should be treated as the actual net earnings of the company; six per cent should then be deducted as a fair return upon the value of the real estate and other tangible property, and the surplus earnings should then be capitalized at six per cent, which result represents the fair value of the intangible rights in the street. To this should be added the value of the tangible property in the street, the result representing the value of the special franchise.[59]

[59] People ex rel. Jamaica Water Supply Co. v. Tax Commrs., 128 App. Div. 13, 112 N. Y. Supp. 392.

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§ 451. **Deduction from Special Franchise Tax.**—The New York statute provides that if, when the tax assessed on any special franchise tax is due and payable the corporation has paid to the city, etc., for its exclusive use under any agreement therefor, or under any statute requiring the same any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise granted to or possessed by such person, copartnership, association or corporation, which payment was in the nature of a tax, all amounts so paid, except money paid or expended for paving or repairing of pavement of any street, etc., shall be deducted from any tax based on the assessment made by the State Board of Tax Commissioners for city, etc., purposes, and the remainder shall be the tax on such special franchise. This section of the Tax Law does not authorize a deduction from the amount assessed against the franchise of a street surface railroad of the amount of the lamp tax levied against the property of the street railroad company under the provisions of a city charter. The payment made by the street railway company which is to be deducted must be in the nature of a tax. So where under an agreement between a street railway company and the city, subsequently ratified by statute, the street railroad company agreed to pay to the city certain percentages of its gross receipts, such payment should be deducted from the amount payable under the special franchise tax law.[60]

§ 452. **Exemption or Immunity from Taxation—Whether a Franchise or Privilege.**—We have considered elsewhere the question whether exemption or immunity from taxation is a franchise;[61] but exemption from taxation may or may not be a "privilege" within the sense in which that word is used in a statute, and in the act of North Carolina, incorporating a

[60] Heerwagen v. Crosstown St. Ry. Co., 86 N. Y. Supp. 219, 90 App. Div. 275, modified 179 N Y. 99, 71 N. E. 729.

[61] See § 20, herein.

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railroad company,[62] the word "privileges" does not include such exemption.[63]

§ 453. **Power to Exempt from Taxation—State, Municipality and Board of Assessment—Local Taxation.**—Unless prohibited by the constitution a State has undoubted power to exempt through its legislature or by contract certain property, by reasonable provisions, from taxation;[64] and the power to tax includes the power to exempt within constitutional limitations.[65] If the constitution requires a tax upon property, the legislature has no power to exempt it therefrom.[66] In the case of a municipality the power to exempt property within its limits from taxation must be conferred by legislative act.[67] And a state board of valuation and assessment cannot validly agree to release a corporation from the payment of local taxes upon its franchise.[68] But a telephone company may be made exempt from local taxation under an incorporation statute imposing certain taxes in lieu of all other taxes.[69] A clause, however, in a statute exempting property from taxation does not release it from liability for assessments for local improvements. It has been held in Mississippi not only that special assessments for local improvements do not come within the constitutional limitation as to taxation, but also that the construction and repair of levees are to be regarded as local improvements for which the property specially benefited may be

[62] Act January 3, 1834.

[63] Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. ed. 972.

[64] Tomlinson v. Branch, 15 Wall. (82 U. S.) 460, 21 L. ed. 189; Jefferson Bank v. Skelly, 1 Black (66 U. S.), 436, 17 L. ed. 173; Ohio Life Ins. Co. v. Debolt, 16 How. (57 U. S.) 416, 14 L. ed. 997; William S. Wilkins Co. v. City of Baltimore, 103 Md. 293, 63 Atl. 562; Wallace v. Board of Equalization (Oreg., 1906), 86 Pac. 365.

[65] Colton v. City of Montpelier, 71 Vt. 413, 45 Atl. 1039.

[66] Crocker v. Scott, 149 Cal. 575, 87 Pac. 102; Mackay v. San Francisco, 113 Cal. 392, 45 Pac. 696.

[67] Tampa v. Kannitz, 39 Fla. 687, 23 So. 416, 63 Am. St. Rep. 202.

[68] Southern Ry. Co. v. Coulter, 24 Ky. L. Rep. 203, 68 S. W. 873.

[69] Attorney Genl. v. Detroit, 113 Mich. 388, 71 N. W. 632, 4 Det. L. N. 326; Mich. Pub. Acts, 1883, Act No. 129, § 8, 3 How. Ann. Stat., § 3718*h*; Mich. Sess. Laws, 1881, Act No. 168.

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assessed; and this rule is in harmony with that recognized generally elsewhere, to the effect that special assessments for local improvements are not within the purview of either constitutional limitations in respect of taxation, or general exemptions from taxation.[70]

§ 454. **Duration and Extent of Exemption from Taxation.**—A tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and therefore no tax can be levied upon the corporation issuing the stock which includes property that is otherwise exempt.[71] If the charter of a railroad company contains a provision that "The capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, machinery, and vehicles of transportation, shall be exempt from taxation for a period of twenty years from the completion of the road and no longer," such provision does not, after the expiration of that period, exempt from taxation the road with its fixtures, etc., although the same were purchased with or represented by capital.[72] Where the legislature of Tennessee had, under the Constitution of the State, power to and did grant to a railroad company an exemption from taxation, under an act incorporating it, in the following terms: "That the capital stock of said company shall be forever exempt from taxation and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent," it was held that under such provisions the capital stock of the company was forever exempt from taxation during the existence of

[70] Ford v. Delta & Pine Land Co., 164 U. S. 662, 17 Sup. Ct. 230, 41 L. ed. 390. Examine Yazoo & M. V. R. Co. v. Board of Levee Commrs. (C. C.), 37 Fed. 24.

[71] Delaware, L. & W. Rd. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. 669.

[72] Railroad Companies v. Gaines, 97 U. S. 697, 24 L. ed. 1091. See also Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. 845.

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the corporation; and the road, fixtures, etc., were exempt for twenty-five years after the completion of the road, and said term having expired, it was also held that the corporation could be taxed only when the net earnings of the road were more than sufficient to pay to the stockholders, on the then existing basis of its capital, a dividend of eight per cent a year.[73] If a statute exempts all the property of a railroad corporation from taxation, it exempts not only the rolling stock and real estate owned by it and required by the company for the successful prosecution of its business, but its franchise also.[74] In the case of a foreign corporation, whose principal place of business is within the taxing State, and a very large proportion of whose preferred stock is held by residents thereof, it is not entitled to an exemption from taxation of its tangible property within the State, under an exemption in a statute of the personal property of corporations incorporated by the State, when the laws of the State subject the corporation's shares to taxation.[75] An exemption from taxation is to be taken as an exemption from the burden of ordinary taxes, and does not relieve from the obligation special assessments, imposed to pay the cost of local improvements, and charged upon contiguous property upon the theory that it is benefited thereby. So provisions in an act of Illinois, incorporating a railroad company,[76] and exempting it from taxation, do not exempt it from the payment of a municipal assessment upon its land within a municipality in the State, laid for the purpose of grading and paving a street therein.[77] Again, a statutory exemption from taxation, conferred upon a railroad company by its charter,[78] is held not to extend to

[73] Mobile & O. R. R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. ed. 785.

[74] Wilmington Railroad v. Reid, 13 Wall. (80 U. S.) 264, 20 L. ed. 568. See also Ford v. Delta & Pine Land Co., 164 U. S. 662, 17 Sup. Ct. 230, 41 L. ed. 390.

[75] William S. Wilkins Co. v. City of Baltimore, 103 Md. 293, 63 Atl. 562; Gen. L. 1904, art. 81, § 2.

[76] Private Laws Ill., 1851, 61, 72, § 22, incorporating The Illinois Central Railroad Company.

[77] Illinois Central R. Co. v. Decatur, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. ed. 132.

[78] Miss. Act, November 23, 1859, c. 14, § 19.

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property other than that used in the business of the company, acquired under the authority of a subsequent act of the legislature in which there was no exemption clause.[79] The provision in the act of Congress of 1866,[80] which exempts from taxation within the Territories of the United States, the right of way granted by the act to the Atlantic & Pacific Railroad Company, operates to exempt from such taxation the land itself to the extent to which it is made by the act subject to such right of way and all structures erected thereon.[81] Where a limitation is placed upon the amount up to which property shall be exempt, such exemption extends to property in excess of such limited and specified sum, even though such excess arises from the fact that there has been an increase in value since the property was acquired.[82] If the exemption is subject to conditions as to completion of a railroad and declaring dividends within a certain period of time a contract is created that the railroad company, subject to such conditions, shall not be taxed.[83] In case a constitutional provision exempts railroads, thereafter constructed and completed before a certain date, from taxation, but excludes railroads substantially completed at the time of the adoption of the constitution, it embraces, as within the meaning of those words, a railroad which lacks only a small per cent of being completed.[84] Again, where a charge upon the gross revenues of a street railroad company is imposed in lieu of all other taxes and upon the payment of such license fee the company is exempt by statute from taxation on all real estate which it owns and actually and necessarily uses in its business, such exemption will include leased property which is so used and upon which the required license fee has

[79] Ford v. Delta & Pine Land Co., 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. 230. See also St. Paul, etc., R. Co. v. St. Paul, 39 Minn. 112, 38 N. W. 925.

[80] Act July 27, 1866, c. 328, § 2, 14 Stat. 292, 294.

[81] New Mexico v. United States Trust Co., 172 U. S. 171, 19 Sup. Ct. 128, 43 L. ed. 407.

[82] Evangelical Baptist Missionary Society v. City of Boston (Mass., 1906), 78 N. E. 407.

[83] Pacific Railroad v. Maguire, 20 Wall. (87 U. S.) 36, 22 L. ed. 282.

[84] Louisiana & N. W. R. Co. v. State Board of Appraisers, 108 La. 14, 32 So. 184.

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been paid for a number of years.[85] An authority to exempt from taxation property devoted to religious, charitable and educational purposes, conferred by a constitution upon the legislature, includes the proceeds of such property.[86]

§ 455. **Surrender of Power of Taxation—Presumptions—Exemption from Taxation—Statutory Construction.**—The surrender of the power of taxation by a State cannot be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power.[87] So an alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibition upon particular officers, or special tribunals, or from any doubtful or uncertain expression.[88] Presumptively all property within the territorial limits of a State is subject to its taxing power, and the burden of proof is on one claiming that any particular property is by contract or otherwise beyond the reach thereof; and growing out of the conditions of modern business, a large proportion of valuable property is now to be found in intangible things such as franchises, which are, like other property, subject to taxation;[89] and grants of immunity

[85] Merrill Ry. & Lighting Co. v. City of Merrill, 119 Wis. 249, 96 N. W. 686; Rev. Stat., 1898, § 1038, subd. 14.

[86] Staunton, City of, v. Mary Baldwin Seminary, 99 Va. 653, 3 V. Sup. Ct. Rep. 468, 39 S. E. 596; Const., art. 10, § 3.

[87] Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. ed. 972, applied to an exemption from taxation conferred upon the Wilmington and Raleigh Railroad Company by the Act of January 3, 1834, incorporating it, and it was held that such exemption was not conferred by that act upon the branch roads which the company was authorized to construct. See § 138 herein.

[88] Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. 301; Jefferson Bank v. Skelly, 1 Black (66 U. S.), 436, 17 L. ed. 173; Ohio Life Ins. Co. v. Debolt, 16 How. (57 U. S.) 416, 14 L. ed. 997; Knoup v. Piqua Bank, 1 Ohio St. 603. See also New Orleans City & L. R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. 406.

[89] Metropolitan St. Ry. Co. v. New York State Board of Tax Commrs., 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 713.

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from legitimate governmental control are never to be presumed; unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction, as the public interest may require.[90] Although it has been repeatedly held by the Federal Supreme Court that the legislature of a State may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected, and that when such immunity is conferred, or such limitation is prescribed by the charter of a corporation it becomes a part of the contract, and is equally inviolate with its other stipulations; yet before any such exemption or limitation can be admitted, the intent of the legislature to confer the immunity or prescribe the limitation must be clear beyond a reasonable doubt. All public grants are strictly construed, and nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges and immunities not expressly granted are reserved;[91] and no claims for exemptions from taxation can be sustained unless within the express letter or the necessary scope of the exempting clause.[92] It is held, however, that

[90] Ruggles v. Illinois, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 812. See Gilman v. Sheboygan, 2 Black (67 U. S.), 510, 17 L. ed. 305.

No presumption exists in favor of a contract by a State to exempt lands from taxation. Every reasonable doubt should be resolved against it. When such a contract exists it must be rigidly scrutinized and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. Tucker v. Ferguson, 22 Wall. (89 U. S.) 527, 22 L. ed. 805.

[91] Delaware Railroad Tax, 18 Wall. (85 U. S.) 206, 21 L. ed. 888.

[92] **United States:** Ford v. Delta & Pine Grove Land Co., 164 U. S. 662, 17 Sup. Ct. 230, 41 L. ed. 390; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. 47, 16 Wash. L. Rep. 749; Chicago, B. & K. C. R. Co. v. Guffey, 120 U. S. 569, 7 Sup. Ct. 693, 30 L. ed. 732; Memphis Gas Co. v. Shelby County, 109 U. S. 398, 27 L. ed. 1006, 3 Sup. Ct. 327; Hoge v. Railroad Co., 99 U. S. 348, 25 L. ed. 303; North Missouri R. Co. v. Maguire, 20 Wall. (87 U. S.) 46, 22 L. ed. 287.

Illinois: People, Kochersperger, v. Chicago Theological Seminary, 174 Ill. 177, 51 N. E. 198; Bloomington Cemetery Assoc. v. People, 170 Ill. 377, 30 Chic. Leg. News, 187, 48 N. E. 905; People, Davis, v. Chicago, 124 Ill. 636, 17 N. E. 56.

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while the rule requiring a strict construction of statutes exempting property from taxation should not be infringed, still it is the duty of the court to determine whether doubt exists and to solve it and not to immediately surrender to it.[93] It is also decided that where a certain class of property has by settled custom and policy been entitled for a long period of time to be exempt from taxation, as in case of property held for religious and charitable purposes, a statute taxing such property must show the intent so to do by language clearly expressing such intent, as a presumption in favor of such taxation will not exist.[94] In connection with this last decision the following case in the Federal courts is pertinent. The facts were these: Section 5 of the act of 1855 of the General Assembly of Illinois, incorporating the plaintiff, provided: "That the property of whatever kind or description belonging or appertaining to said seminary shall be forever free and exempt from all taxation for all purposes whatever." Section 2 provided: "That the seminary shall be located in or near the city of Chicago." Property of the incorporation other than the seminary buildings was

Louisiana: State v. New Orleans Ry. & Light Co., 116 La. 144, 40 So. 597; Louisiana & N. W. R. Co. v. State Board of Appraisers, 108 La. 14, 32 So. 184; Penrose v. Chaffraix, 106 La. 250, 30 So. 718; State of Louisiana v. Morgan, 28 La. Ann. 482.

Nebraska: Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 110, 84 N. W. 802; Young Men's Christian Assoc. of Omaha v. Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123.

New Jersey: Sisters of Charity of St. Elizabeth v. Corey, 73 N. J. L. 699, 65 Atl. 500; Cooper Hospital v. City of Camden (N. J. L.), 57 Atl. 260.

Oregon: Wallace v. Board of Equalization (Oreg., 1906), 86 Pac. 365.

Tennessee: Knoxville & O. R. Co. v. Harris, 99 Tenn. 684, 43 S. W. 115.

Utah: Judge v. Spencer, 15 Utah, 242, 48 Pac. 1097.

Washington: Thurston County v. Sisters of Charity, 14 Wash. 264, 44 Pac. 252.

Examine Brown University v. Granger, 19 R. I. 705, 36 L. R. A. 847.

See §§ 23, 209, 252, 254–257, herein.

Exemptions from taxation, being in derogation of the sovereign authority and of common right, are not to be extended beyond the express requirements of the language used, when most rigidly construed. Yazoo & M. V. R. Co. v. Thomas, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. 68.

[93] Citizens' Bank v. Parker, 192 U. S. 73, 48 L. ed. 346, 24 Sup. Ct. 181.

[94] Mattern v. Canevin, 213 Pa. 588, 63 Atl. 131.

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taxed under the general taxing law of 1872. The Supreme Court of Illinois construed the statute of 1855 as meaning that the exemption was limited to property used in immediate connection with the seminary and did not refer to other property held by the institution for investment, although the income was used solely for school purposes. It was held that as the rule of the Supreme Court of Illinois in construing an act exempting property from taxation under legislative authority, was that the exemption must be plainly and unmistakably granted and could not exist by implication only, a doubt being fatal to the claim, and as the construction placed on the act was not such an unnatural, strained or unreasonable construction as showed it to be erroneous, the judgment would be affirmed even though the statute might be otherwise construed so as to effect a total exemption. The act incorporating the seminary also provided that: "It shall be deemed a public act and be construed liberally in all courts for the purposes therein expressed." It was decided that such provision should not be construed as a complete overthrow of the canon of construction adopted by the Supreme Court of Illinois in regard to exemption of property from taxation.[95] Again, the rule of strict construction of exemptions from taxation is held not applicable when the statute simply changes the method of taxation.[96] Where a statute, imposing taxes upon corporate franchises, provided that: "This act shall not be construed to apply to" certain corporations, it was decided that the purpose of the legislature was not to curtail to any extent the judicial power of interpretation but to limit the scope of the act itself; that it was a legislative declaration that the designated corporations should be exempted from the operation of the statute.[97] A constitutional limitation upon the legislature as to exemptions from taxation is prospective and not retroactive as to charter exemptions.[98]

[95] Chicago Theological Seminary v. Illinois, 188 U. S. 662, 47 L. ed. 641, 23 Sup. Ct. 386.

[96] Binghamton Trust Co. v. City of Binghamton, 76 N. Y. Supp. 517, 72 App. Div. 341.

[97] Board of Assessors v. Plainfield Water Supply Co., 67 N. J. L. 357, 52 Atl. 230.

[98] State ex rel. Morris v. Board of Trustees of Westminster College, 175 Mo. 52, 74 S. W. 990; Const'ns

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§ 456. **Constitutional Law—Validity of Exemption from Taxation.**—Nothing in the Federal Constitution prevents a State from granting exemptions from taxation; and the reduction, upon equitable considerations of payments made in the nature of taxes of certain corporations on their franchises from the amount to which they are subjected by a general law does not entitle every franchise owner to a similar reduction and render the tax invalid because it denies the holders of some franchises the equal protection of the law or deprives them of their property without due process of law.[99] So the rights of an individual under the Fourteenth Amendment turn on the power of the State. A State does not infringe such rights under that amendment by exempting a corporation from a tax, either in whole or in part, whether such exemption results from the plain language of a statute or from the conduct of a state official under it.[1] There may also be an exemption of one class of corporations from taxation without the statute being invalid as to other corporations.[2] And a statute which provides for a deduction of shares of stock of a national bank invested in real estate, and on which such bank pays a tax, from the market value of the shares, is not unconstitutional.[3] Legislation, however, which is in effect an attempt to create an express exemption from taxation of corporation property contrary to the constitutional provisions of a State is void, even though the kind of property attempted to be so made exempt is not mentioned in the constitution which provides for equal and uniform taxation and permits the exemption of certain kinds of property.[4] So a statute which does not properly classify property for exemption violates a constitutional provision which requires uniform taxation.[5] But an exemption of a water company

of 1865, 1875. See §§ 215, 287, herein.

[99] Metropolitan St. Ry. Co. v. New York State Board of Commrs., 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 705.

[1] Missouri v. Dockery, 191 U. S. 165, 24 Sup. Ct. 53, 48 L. ed. 33.

[2] W. C. Peacock & Co. v. Pratt, 121 Fed. 772, 58 C. C. A. 48.

[3] Middletown Nat. Bank v. Town of Middletown, 74 Conn. 449, 51 Atl. 138.

[4] State Nat. Bank v. City of Memphis, 116 Tenn. 641, 94 S. W. 603.

[5] Adams v. Kuykendall (Miss.), 35

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from municipal taxation based upon a consideration that the company give the city the use of water for certain purposes free of charge is not illegal, as it constitutes merely an offset against taxes of the value of the water used by the city.[6]

§ 457. **Obligation of Contracts—Exemption from Taxation—Preliminary Statement.**—We have considered under prior sections the principles governing cases as to obligation of contracts, the impairment thereof and also the right to alter, amend or repeal reserved to the legislative body, and the application of these doctrines in matters relating to corporations and their franchises,[7] and shall, therefore, only consider here certain questions as to exemptions from taxation in connection with the obligation of contracts.

§ 458. **Obligation of Contracts—Reservation of Power to Alter, Amend or Repeal—Exemption from Taxation.**—The object of a reservation of the right of the legislature to repeal, alter or amend a charter is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interests should at any time require such interference, and to preserve the state control over its contract with the corporators, which would otherwise be irrepealable and protected from any measure affecting its obligation. Immunity, therefore, from taxation, constituting a part of a contract between the government and a corporator or stockholder, is, by the reservation of power contained in a general law enacted prior to the grant of the charter, subject to be revoked equally with any other provision of the charter, whenever the legislature may deem it expedient for the public interest that the revocation should be made. The reservation affects the entire relation between the State

So. 830; Const., art. 12, § 20; Municipal Charter, Acts 1884, p. 445, c. 391, § 31.

[6] Bartholomew v. Austin, 85 Fed. 359, 52 U. S. App. 512, 29 C. C. A. 568. Distinguishing Illinois Cent. R. Co. v. McLean County, 17 Ill. 291; Grant v. Davenport, 36 Iowa, 405; Portland v. Portland Water Co., 67 Me. 135.

[7] See §§ 301-340, 482, herein.

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and the corporation, and places under legislative control all rights, privileges and immunities derived by the charter directly from the State.[8] So where at the time a charter is granted to a railroad corporation a general law of the State was in existence which provided that the charter of every corporation subsequently granted, and any renewal, amendment or modification thereof, should be subject to amendment, alteration or repeal by legislative authority, unless the act granting the charter or the renewal, amendment or modification, in express terms excepted it from the operation of that law, and thereafter the charter of the corporation was amended and its property exempted from taxation, but the amending act contained no clause excepting the amendment from the provisions of the general law, and, subsequently, the state constitution was adopted requiring the property of corporations then existing or thereafter chartered to be taxed except in certain cases, not affecting this case, and the legislature in pursuance of such requirement then provided for the taxation of property of railroad companies and under it the property of such corporation, it was held that the taxation was legal and constitutional; that the power reserved to the State by the general law, in force when the charter was granted, authorized any change in the contract created by the charter between the corporators and the State, as it originally existed, or as subsequently modified, or

[8] Tomlinson v. Jessup, 15 Wall. (82 U. S.) 454, 21 L. ed. 204. Cited on *first point* in Louisville Water Co. v. Clark, 143 U. S. 1, 12, 36 L. ed. 55, 12 Sup. Ct. —; Spring Valley Water Works v. Schottler, 110 U. S. 347, 370, 4 Sup. Ct. 48, 28 L. ed. 173 (in dissenting opinion); Sinking Fund Cases (Union Pacific Rd. Co. v. United States and Central Pacific Rd. Co. v. Gallatin), 99 U. S. 700, 758, 25 L. ed. 496 (in dissenting opinion); Railroad Co. v. Maine, 96 U. S. 499, 511, 24 L. ed. 836. Cited on *second point* in Stanislaus County v. San Joaquin & Kings River Canal & Irrig. Co., 192 U. S. 201, 211, 30 L. ed. 406, 26 Sup. Ct. —; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 386, 387, 48 L. ed. 229, 24 Sup. Ct. 107. Distinguished in Citizens' Savings Bank v. Owensboro, 173 U. S. 636, 658, 43 L. ed. 840, 19 Sup. Ct. 530, 571 (in dissenting opinion), cited in same case at p. 645; Pearsall v. Great Northern Ry., 161 U. S. 646, 663, 16 Sup. Ct. 705, 40 L. ed. 838; Louisville Water Co. v. Clark, 143 U. S. 1, 12, 12 Sup. Ct. —, 36 L. ed. 55; Sinking Fund Cases (Union Pacific Rd. Co. v. United States and Central Pacific Rd. Co. v. Gallatin), 99

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its entire revocation.[9] Again, the mere grant for a designated time of an immunity from taxation does not take it out of the rule subjecting such grant to the general law retaining the power to amend or repeal, unless the grant contain an express provision to that effect. And the act of the legislature of Kentucky of 1856,[10] and the act of 1884,[11] incorporating the Citizens' Savings Bank of Owensboro, and the act of 1886,[12] commonly known as the Hewitt Act, did not create an irrevocable contract on the part of the State protecting the bank from other taxation, therefore, the taxing law of Kentucky of 1892 [13] did not violate the contract clause of the Federal Constitution.[14] In another Kentucky case it is held that the immunity from taxation conferred upon the Louisville Water Company by the legislature of that State by the statute of 1882 [15] was withdrawn by the general revenue act of 1886; [16] and the immunity from taxation granted to the company by the said act of 1882 was accompanied by the condition expressed in the act of 1856,[17] and made part of every subsequent statute, when not otherwise expressly declared, that by amendment or repeal of the former act such immunity could be withdrawn. It was also held that the withdrawal of the exemption from taxation conferred upon the company by the act of 1882, put an end to the obligation, imposed upon the company by that act, to furnish water free of charge to the city for the extinguishment of fires, cleaning of streets, etc.[18] If a charter is granted exempting the

U. S. 700, 720, 25 L. ed. 496. Qualified in Hoge v. Railroad Co., 99 U. S. 348, 353, 25 L. ed. 303.

[9] Tomlinson v. Jessup, 15 Wall. (82 U. S.) 454, 21 L. ed. 204. See Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. 383.

[10] Act February 14, 1856.

[11] Act May 12, 1884, c. 1412.

[12] Act May 17, 1886.

[13] Act November 11, 1892, c. 108.

[14] Citizens' Savings Bank v. Owensboro, 173 U. S. 636, 19 Sup. Ct. 530, 43 L. ed. 840.

[15] Act April 22, 1882, 1 Sess. Acts, 1886, Gen. Stat. 1888, c. 92.

[16] Act May 17, 1886, Gen. Stat. 1888, c. 92.

[17] Act February 14, 1856, 2 Rev. Stat. 121.

[18] Louisville Water Co. v. Clark, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. —. See also Louisville Water Co. v. Kentucky, 170 U. S. 127, 42 L. ed. 975, 18 Sup. Ct. —. This case was decided upon the authority of the last above-cited case, which it also affirmed.

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property of a corporation from taxation, providing that an existing statute reserving the right to alter, amend or repeal corporate charters shall not apply to it, and the State thereafter passes a law taxing the property of the corporation, such statute violates the obligation of a contract and is unconstitutional.[19]

§ 459. **Obligation of Contracts—What Is a Contract—Exemption from Taxation.**—It is a general rule that a valid grant to a corporation, by a statute of a State, of the right of exemption from taxation, given without reservation of the right to amend, alter or repeal, is a contract between the State and the corporation, protected by the Constitution of the United States against state legislative impairment.[20] So a charter provision exempting a corporation's property not actually and in fact within the State and the stock held or owned by any of its stockholders, is violated by the imposition

[19] Home of The Friendless v. Rouse, 8 Wall. (75 U. S.) 430, 19 L. ed. 495.

[20] Wilmington & W. Rd. Co. v. Alsbrook, 146 U. S. 279, 13 Sup. Ct. 92, 36 L. ed. 972 (Laws Mich., 1855, p. 305, § 9). Holding also that this rule is not qualified by St. Paul, Minneapolis & M. R. Co. v. Todd County, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. —, nor by Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. —; Wilmington Railroad v. Reid, 13 Wall. (80 U. S.) 264, 20 L. ed. 568; Barnes v. Kornegay (C. C.), 62 Fed. 671; Yazoo & M. V. R. Co. v. Board of Levee Commrs., 37 Fed. 24; Commonwealth v. Philadelphia & E. R. Co., 164 Pa. 252, 35 W. N. C. 217, 30 Atl. 145; State, Memphis, v. Butler, 86 Tenn. 614, 8 S. W. 586. See Powers v. Detroit, Grand Haven & M. Ry. Co., 201 U. S. 543, 26 Sup. Ct. 556, 50 L. ed. 860, aff'g Detroit, Grand Huron & M. Ry. Co. v. Powers (C. C.), 138 Fed. 264; New Jersey v. Yard, 95 U. S. 104, 25 L. ed. 352; Columbia Water Power Co. v. Campbell, 75 S. C. 34, 54 S. E. 833.

Such a contract once made cannot be rescinded by a subsequent legislative act. Jefferson Bank v. Skelly, 1 Black (66 U. S.), 436, 17 L. ed. 173.

Statute repealing all former laws exempting from taxation held void. See Duluth & I. R. Co. v. St. Louis County, 179 U. S. 302, 45 L. ed. 201, 21 Sup. Ct. 124, rev'g St. Louis County v. Duluth & I. R. Co., 77 Minn. 433, 80 N. W. 626; Stearns v. Minnesota, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. ed. 162, rev'g State v. Stearns, 72 Minn. 200, 75 N. W. 210.

An exemption from taxation in a charter of a company constitutes a contract, as is illustrated by a case where there are present a subject-matter, parties and consideration and on the one side a complete performance, and on the other, acceptance. Hancock, Comptroller, v. Singer Mfg. Co., 62 N. J. L. 289, 328, 42 L. R. A. 852, 41 Atl. 846, per Van Syckel, J.

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upon such corporation of a franchise tax upon its capital less the value of its real and personal property within the State.[21] A provision in the charter of a bank that "Said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the State, for taxes, and shall pay to the State an annual tax of one-half of one per cent on each share of capital stock, which shall be in lieu of all other taxes," limits the amount of tax on each share of stock in the hands of the shareholders, and any subsequent revenue law of the State which imposes an additional tax on such shares in the hands of shareholders, impairs the obligation of the contract, and is void; such exemption applies to new stock in the bank, created and issued after the adoption of a new constitution. But when not otherwise exempted the capital stock of a corporation and its shares in the hands of shareholders may both be taxed. And the surplus accumulated is not exempted from taxation by such provision of exemption in the charter.[22] Although a statutory exemption from taxation may be repealable, still the exemption remains in force until the repealing goes in effect.[23]

§ 460. **Obligation of Contracts—What Is not a Contract —Exemption from Taxation.**—An act of the legislature exempting property of the railroad from taxation is not a "contract" to exempt it unless there be a consideration for the act. An agreement where there is no consideration is a nude pact; a promise of a gratuity spontaneously made, which may be kept, changed, or recalled at pleasure; and this rule of law applies to the agreements of States made without consideration as well as to those of persons.[24] So where none of the expressions in a

[21] State, Singer Mfg. Co., v. Heppenheimer, 58 N. J. L. 633, 34 Atl. 1061, 32 L. R. A. 643.

[22] Bank of Commerce v. Tennessee, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. 456, aff'g, on the first point, Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558.

[23] Manistee & N. E. R. Co. v. Commissioner of Railroads, 118 Mich. 349, 5 Det. L. N. 507, 76 N. W. 633; Mich. Pub. Acts 1897, Act No. 228; Laws 1891, Act, No. 174; Laws 1893, Act No. 129.

[24] Tucker v. Ferguson, 22 Wall. (89 U. S.) 527, 22 L. ed. 805, reaffirmed in West Wisconsin Ry. Co. v. Trempealeau County, 93 U. S. 595, 23

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contract between a street railway company and a municipality in regard to the extension of the company's tracks for the better advantage of, and furnishing more facilities to, the public, import any exemption from taxation, the subsequent imposition of a tax, otherwise valid, is not invalid under the impairment of obligation clause of the Constitution.[25] In grants from the public nothing passes by implication, and, in the absence of direct stipulations relinquishing the right of taxation, a provision in grants of privileges or franchises, that the grantee shall pay something therefor, is not to be construed as an equivalent or substitute for taxes amounting to a contract of exemption from future taxation within the impairment clause of the Federal Constitution.[26] So a provision in a general tax law that railroads thereafter building and operating a road north of a certain parallel shall be exempted from the tax for ten years, unless the gross earnings shall exceed a certain sum, is not addressed as a covenant to such railroads and does not constitute a contract with them, the obligations of which cannot be impaired consistently with the Constitution of the United States.[27] In another case a charter of a railroad company, incorporated by an act of the legislature of Mississippi, passed in 1882, contained an exemption from all taxation for twenty years. The state constitution adopted in 1869 provided that the property of all corporations for pecuniary profit should be subject to taxation, the same as that of indi-

L. ed. 814. See also Manistee & N. E. R. Co. v. Commissioners of Railroads, 118 Mich. 349, 5 Det. L. N. 507, 76 N. W. 633. Citing Grand Lodge F. & A. M. v. New Orleans, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. 523; Welch v. Cook, 97 U. S. 541, 24 L. ed. 1112; West Wisconsin Ry. Co. v. Trempealeau County, 93 U. S. 595, 23 L. ed. 814; Tucker v. Ferguson, 22 Wall. (89 U. S.) 527, 22 L. ed. 805. Distinguishing University v. People, 99 U. S. 309, 25 L. ed. 387; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Wilmington R. Co. v. Reid, 13 Wall. (80 U. S.) 264, 20 L. ed. 568; Home of The Friendless v. Rouse, 8 Wall. (75 U. S.) 438, 19 L. ed. 498; Piqua Branch of the State v. Knoop, 16 How. (57 U. S.) 369, 14 L. ed. 977.

[25] Savannah, T. & I. of H. Ry. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. 690.

[26] Metropolitan St. Ry. Co. v. New York State Board of Tax Commrs., 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 205.

[27] Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. ed. 229.

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viduals, and that taxation should be equal and uniform throughout the State. Prior to the incorporation of the railroad company, the Supreme Court of the State had construed this provision of the constitution as authorizing exemptions from taxation, but had declared that such exemptions were repealable. It was held that the Federal Supreme Court was bound by such construction of the constitution, and, therefore, that the railroad company could not claim an irrepealable exemption in its charter. It was also decided that the exemption being repealable, the question whether it had in fact been repealed was a local and not a Federal question.[28] An irrevocable contract is not created by the acceptance by a national bank of the Hewitt Act [29] so as to exempt its shares from taxation as required by a state statute which is valid as to taxes for subsequent years.[30] Again, a corporation organized for the purpose of doing an insurance business, under an act of the legislature of the State of Tennessee passed before the adoption by that State of its constitution of 1870, with a provision in the charter limiting the rate and extent of taxation by the State, does not continue to enjoy the exemption if its corporate objects and business are changed to those of a bank by legislation enacted subsequent to the adoption of that constitution.[31] If a statute, supplemental to a corporation's charter, is enacted after a state constitution is adopted which makes all laws subject to alteration and repeal, it is repealable.[32]

§ 461. Obligation of Contracts—Reservation of Power to Alter, etc.—Exemption from Taxation—Res Adjudicata.—Where it is *res judicata* that the original charter of a bank by

[28] Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. 26.

[29] Act 1886, Acts 1885–1886, p. 140, c. 1233.

[30] First National Bank of Covington v. City of Covington, 129 Fed. 772, case aff'd in Covington v. First National Bank of Covington, 198 U. S. 100, 49 L. ed. —, 25 Sup. Ct. —; Ky. Act March 21, 1900, Acts 1900, p. 65, c. 23. See State Board of Assessors v. Patterson (N. J.), 14 Atl. 610.

[31] Memphis City Bank v. Tennessee, 161 U. S. 186, 40 L. ed. 664, 16 Sup. Ct. —.

[32] State v. Northern Cent. Ry. Co., 90 Md. 447, 45 Atl. 465; Const. 1851, art. 3, § 47.

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which its capital is exempt from any tax constituted a contract within the impairment clause of the Constitution, and that such exemption is not affected by subsequent charters and constitutions, and there is no doubt that the State intended to offer inducements to enlist capital in the early development of the State, and no license tax was demanded for fifty-eight years although that method of taxation was in force during the whole period, the exemption from any tax may be construed as including a license tax on occupation as well as taxes on property.[33] Again, where it has been litigated and determined in a Federal court that the state law under which the taxes were levied is unconstitutional within the impairment clause of the Constitution because of a contract which exempted from all taxation, including particular years then in controversy, the question is *res judicata* as to the right to levy the tax under such law in any other year although it may have been established by the highest court of that State that an adjudication concerning taxes for one year cannot be pleaded as estoppel in suits involving taxes of other years. And the adjudication of a Federal court establishing a contract exempting from taxation, although based upon the judgment of a state court given as a reason therefor, is equally effectual as *res judicata* between the parties as though the Federal court had reached its conclusion as upon an original question; and under the doctrine of *res judicata* such adjudication will estop either party in subsequent litigation between themselves from again litigating the question of contract determined in the former action, even though the judgment of the state court upon which the Federal court based its decision has meanwhile been reversed by the highest court of that State.[34] Where it has been adjudged by the Supreme Court of New Jersey that a franchise tax imposed upon a manufacturing company is illegal by reason of the contract of exemption in its charter, the question of its liability for a like tax in a subsequent year is *res*

[33] Citizens' Bank v. Parker, 192 U. S. 73, 24 Sup. Ct. 181, 48 L. ed. 346.

[34] Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 Sup. Ct. 154.

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adjudicata; and even though prior to such decision a statute of earlier date reserved to the legislature the power to alter, suspend or repeal subsequent charters, and although under subsequent state decisions this statute was held to be read into every subsequent charter, nevertheless a legislature cannot bind its successors and prohibit its granting an irrepealable contract if it should so elect; and unless an intention can fairly be drawn from the terms of a contract of exemption from taxation to reserve to the State a right to repeal such contract at will without the consent of the company, there can be no departure from it.[35]

[35] Hancock, Comptroller, v. Singer Mfg. Co., 62 N. J. L. 289, 328, 329, 42 L. R. A. 852, 41 Atl. 846.

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CHAPTER XXV.

ALIENATION AND FORFEITURE.

§ 462. Power to Alienate Franchises —Nature of Franchise as Affecting.
463. Power to Alienate Franchises —General Rule.
464. Same Subject—Basis of Rule.
465. Power to Alienate Franchises —Legislative Authorization.
466. Power to Alienate Franchises —Legislative Authorization Continued.
467. Power to Alienate Franchises —Implied Legislative Authorization— Presumptions —Construction of Statutes.
468. Power to Alienate Franchises —Railroad Companies.
469. Power to Alienate Franchises —Banks—Street Railway Companies—Telegraph Lines.
470. Power to Alienate Franchises —Water and Irrigation Companies.
471. Power to Mortgage.
472. Power to Make and Take a Lease—Railroad Companies—Natural Gas, Gas and Electric Companies.
473. Illegal or Ultra Vires Lease —Ratification—Estoppel—Equity—Validating Statutes.
474. Power to Assign Franchises.
475. Assignment of Franchises of Insolvent or Bankrupt Corporation—What Passes.
§ 476. Power to Purchase.
477. Judicial Sales—Decree—Generally.
478. Judicial Sales—What Does and Does not Pass—Purchasers' Rights and Obligations.
479. Exemption or Immunity from Taxation or Governmental Regulation—Not Transferable Unless Expressly Authorized by State.
480. Exemption or Immunity from Taxation, etc., Continued —Judicial Sale—Sale Under Mortgage or Statutory Lien.
481. Exemption or Immunity from Taxation, etc., Continued —Whether Passes on Consolidation of Corporations.
482. Same Subject—When Exemption Does and Does not Pass—Illustrative Decisions.
483. Exemption or Immunity from Taxation, etc.,—Rule as to Effect of Reservation of Power to Alter, Amend or Repeal.
484. Same Subject—Illustrative Decisions.
485. Forfeiture of Franchise—Legislative Power as to.

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§ 486. Forfeiture of Franchise—Judicial Determination of—Quo Warranto—State Officials—Ipso Facto Forfeiture.
487. Courts Reluctant to Adjudge Forfeitures and Will Proceed with Caution.
488. Forfeiture of Franchise—Abuse, Misuser or Nonuser of Corporate Powers.
§ 489. Nature and Extent of Misuser or Nonuser Justifying Forfeiture.
490. When Franchise Will Be Forfeiture—Instances.
491. When Franchise Will not Be Forfeited—Instances.

§ 462. **Power to Alienate Franchises—Nature of Franchise as Affecting.**—We have elsewhere considered such distinction as exists between what are designated as primary and secondary franchises, and have also seen that a marked distinction exists between franchises which are essential to the creation and continued existence of a corporation, to its right to exist as an artificial being and which are inseparable from it, and other franchises and privileges subsidiary in their nature which it possesses and may exercise under and by virtue of the franchise to be and to the enjoyment of which, corporate existence is not a prerequisite. We have further specially considered: "essentially corporate franchises;" the non-inclusion in that term of "corporate powers or privileges;" the sale and assignability of the latter and their liability to loss or forfeiture; the distinction between franchises and powers and of franchises to be and property or franchises which a corporation may acquire; the distinction between the general creative franchise and a special franchise; also other distinctions of importance, with those above mentioned; these distinctions are pertinent to the question of the power to alienate franchises.[1]

§ 463. **Power to Alienate Franchises—General Rule.**—It is a general rule, in the case of public service corporations, that the franchise to be a corporation is not a subject of sale and transfer unless made so by a statute which provides a mode of exercising it.[2] So a corporation, in the absence of

[1] See §§ 8, 30 *et seq.*, herein.

[2] Memphis & L. R. Ry. Co. v. Railroad Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; Branch v. Jesup, 106 U. S. 468, 27 L. ed. 279, 1 Sup. Ct. 495. Other authori-

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statutory authority, has no right to sell or transfer its franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain.[3] Nor can a corporation sell or transfer franchises from which it has been forever ousted by quo warranto proceedings.[4] A strictly private corporation, however, may alienate its property or part with it in its entirety with the consent of its stockholders, where it is under no obligation to render public services or to perform public duties.[5] And it is held that a corporation's power to alienate its property exists in the absence of a statutory restriction;[6] that the power to convey is limited to the accomplishment of the objects for which the corporation was created;[7] that all of a corporation's property may be sold to another corporation;[8] that franchise interests which are independent are transferable,[9] as is also an easement or right of way upon a public street;[10] and a ferry franchise is held to be transferable the same as other property.[11] Nor does the rule apply to a sale or transfer to the public, as where a municipality, under a contract condition upon acceptance of a franchise by a gas company, has the right reserved to purchase its property.[12]

ties supporting this rule appear under subsequent sections in this chapter.

Insurance company doing losing business, but still solvent; right of to alienate. See Raymond v. Security Trust & Life Ins. Co., 89 N. Y. Supp. 753, 44 Misc. 31, rev'd 111 App. Div. 191, 97 N. Y. Supp. 557.

[3] Fietsam v. Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492. Citing Freeman on Executions, §§ 179, 180; Pierce on Railroads, §§ 196–201; Jones on Mortgages, § 161; Rorer on Judicial Sales (2d ed.), 222.

[4] Wilmington Water Power Co. v. Evans, 166 Ill. 548, 46 N. E. 1083.

[5] Morrisette v. Howard (Kan.), 63 Pac. 756.

[6] Fitch v. Lewiston Steam Mill Co., 80 Me. 34, 12 Atl. 732.

[7] Kit Carter Cattle Co. v. McGillin, 10 Ohio S. & C. P. Dec. 146, 7 Ohio N. P. 575.

[8] Warfield v. Marshall County Canning Co., 72 Iowa, 666, 34 N. W. 467. See Marvin v. Anderson, 111 Wis. 387, 87 N. W. 226.

[9] Long Acre Electric Light & Power Co., In re, 101 N. Y. Supp. 460, 51 Misc. 407, aff'd 102 N. Y. Supp. 242, 117 App. Div. 80, aff'd 188 N. Y. 361, 80 N. E. 1101.

[10] Knoxville v. Africa, 77 Fed. 501, 47 U. S. App. 74, 246, 23 C. C. A. 252.

[11] Evans v. Kroutinger (Idaho), 72 Pac. 882.

[12] Indianapolis, City of, v. Consumers' Gas Trust Co., 144 Fed. 640. See s. c., 206 U. S. 592. Examine Joyce on Electric Law (2d ed.), § 244.

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§ 464. **Same Subject—Basis of Rule.**—The franchises and powers of a public service corporation are in a large measure designed to be exercised for the public good, and this exercise of them is the consideration for granting them; and any transfer or contract by which the company renders itself incapable of performing its duties to the public or attempts to absolve itself from its obligations without the consent of the State is forbidden by public policy, violates its charter, and is, therefore, void.[13] So a railroad company cannot, by a lease of

[13] **United States:** Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55, 45 Am. & Eng. R. Cas. 607, 9 Ry. & Corp. L. J. 342, 43 Alb. L. J. 328; Thomas v. Railroad Co., 101 U. S. 71, 83, 84, 25 L. ed. 950; New York, etc., Rd. Co. v. Winans, 17 How. (58 U. S.) 30, 15 L. ed. 27.

Illinois: Balsley v. St. Louis, Alton & Terre Haute Rd. Co., 119 Ill. 68, 72, 73, 8 N. E. 859.

Kentucky: Anderson v. Cincinnati S. R. Co., 86 Ky. 44, 5 S. W. 49.

New Jersey: State, Bridgeton, v. Bridgeton & M. Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837.

Texas: International & G. N. R. Co. v. Eckford, 71 Tex. 274, 8 S. W. 679; International & G. N. R. Co. v. Kuehn, 70 Tex. 582, 8 S. W. 484; East Line & R. R. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834.

Virginia: Acker v. Alexandria & F. R. Co., 84 Va. 648, 5 S. E. 688; Naglee v. Alexandria & F. R. Co., 83 Va. 707, 3 S. E. 369.

Examine State, Grinsfelder, v. Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 11 Am. & Eng. R. Cas. (N. S.) 62; Connor v. City of Marshfield (Wis., 1906), 107 N. W. 639, under Rev. Stat. 1898, § 959–51.

A corporation cannot disable itself by contract from the performance of public duties which it has undertaken, and thereby make public accommodation or convenience subservient to its private interests. Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 397, 32 L. ed. 788, 9 Sup. Ct. 389, 6 R. R. & Corp. L. J. 22.

Courts will not allow corporations to escape from their proper responsibility, by means of any disguise. New York, etc., Rd. Co. v. Winans, 17 How. (58 U. S.) 30, 15 L. ed. 27.

"The State is presumed to grant corporate franchises in the public interest, and to intend that they shall be exercised through the proper officers and agencies of the corporation, and does not contemplate that corporate powers will be delegated to others. Any conduct which destroys their functions, or maims or cripples their separate activity, by taking away the right to freely and independently exercise the functions of their franchise, is contrary to a sound public policy. Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950; People v. North River Sugar Refining Co., 121 N. Y. 582–625, 24 N. E. 834; Mallory v. Oil Works, 86 Tenn. 598, 8 S. W. 396." McCutcheon v. Merz Capsule Co., 71 Fed. 787, 793, per Lurton, C. J.

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its property, absolve itself from liability for an injury to a stranger, caused by the negligence of the lessee in the operation of its road, unless such exemption is provided for in the lease and is also expressly sanctioned by legislative authority. Where, however, one railroad company has, with express legislative authority, transferred the full legal ownership of its franchise, as well as its property, to another railroad corporation, the former is then exempt from liability for the negligence of the latter in the management and operation of the road.[14] Again, the original obligation of a railroad company to the public cannot be discharged by a transfer of its franchises to another company except by legislative enactment consenting to and authorizing such transfer, with an exemption granted to such company relieving it from liability. Mere legislative consent to the transfer is not sufficient; there must be a release from the obligations of the company to the public.[15] A cor-

"The duties which railroad corporations owe to the public and which are the consideration upon which their privileges were conferred, cannot be avoided by neglect or refusal, or by agreement with other persons or corporations. Therefore, any contract to prevent the faithful discharge of any such duties will be against public policy and void." Peoria & Rock Island Ry. Co. v. Coal Valley Mining Co., 68 Ill. 489, quoted in Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530, 13 N. E. 169, 172, per Magruder, J.

[14] Driscoll v. Norwich & Worcester Rd. Co., 65 Conn. 230, 32 Atl. 354.

[15] Chollette v. Omaha & Republican Valley Rd. Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135. It is also held in this case that a railroad company organized and incorporated under the laws of that State cannot absolve itself from the performance of duties imposed upon it by law, nor relieve itself from liability for the wrongful acts or omissions of duty of persons operating its road, by transferring its corporate powers, or permitting others to operate its road as owners of its capital stock. To allow it to do so would be contrary to the public policy of the State as expressed in its constitution and laws with reference to railroad companies.

When purchaser or transferee is and is not liable for torts and debts, see the following cases:

United States: Guardian Trust & Deposit Co. v. Fisher, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. 180 (statute to be liberally construed to give effect to intent of legislature and make corporate property security against torts, and imposes upon plant of corporation responsibility for torts which cannot be avoided by conveyance to new corporation).

Illinois: Chicago, M. & St. P. Ry. Co. v. City of Chicago, 83 Ill. App.

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poration in debt cannot transfer its entire property by lease, so as to prevent the application of it, at its full value, to the

233 (purchaser of franchises is not freed from public duty imposed by grant).

Indiana: Graham v. Chicago, I. & L. Ry. Co. (Ind. App., 1906), 77 N. E. 57, 1055 (railroad company cannot by transfer relieve grantee from statutory obligations as to public security); United States Capsule Co. v. Isaacs, 23 Ind. App. 533, 55 N. E. 832 (transferee liable for debts of consolidating companies, but limited by amount of property transferred).

Michigan: Chase v. Michigan Tel. Co., 121 Mich. 631, 80 N. W. 717 (not liable in absence of statute or agreement for seller's obligations, and in case of tort only liable after judgment against seller); Wallace v. Ann Arbor & Y. Electric Ry. Co., 121 Mich. 588, 80 N. W. 572 (transferee prima facie bound to honor passes issued by transferring company); Grenell v. Detroit Gas Co., 112 Mich. 70, 70 N. W. 413, 3 Det. L. N. 858, 6 Am. & Eng. R. Cas. (N. S.) 420 (purchaser assumes creditors' claims in respect to property transferred).

Minnesota: Heron v. St. Paul, M. & M. R. Co., 68 Minn. 542, 71 N. W. 706 (old company liable for negligence of transferee of right to run trains over former road when it retains control).

Missouri: Lawson v. Illinois Southern Ry. Co., 116 Mo. App. 690, 94 S. W. 807 (purchaser not liable for destruction of crops); Porter v. Illinois Southern Rd. Co., 116 Mo. App. 526, 92 S. W. 744 (purchaser not liable for torts of seller). See Hagermann v. Southern Electric Co. (Mo.), 100 S. W. 1081.

New Jersey: State, Bridgeton, v. Bridgeton & M. Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837 (transferee obligated to maintain and operate street railroad).

Texas: Dallas Consolidated Traction Co. v. Maddox (Tex. Civ. App.), 31 S. W. 702 (purchaser not bound by contract obligations of selling company).

Purchasers obligated by burdens and conditions. Purchasers of a railroad, not having any right to demand to be incorporated under the laws of a State, but voluntarily accepting the privileges and benefits of an incorporation law, are bound by the provisions of existing laws regulating rates of fare and are, as well as the corporation formed, estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporation. Grand Rapids & Ind. Ry. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. 310. See Metropolitan Trust Co. v. Columbus, S. & H. R. Co. (C. C.), 95 Fed. 18. So where conditions are attached to the right of a corporation and its successors to operate a railroad on a street, such conditions bind the transferee. Chicago, M. & St. P. Ry. Co. v. City of Chicago, 183 Ill. 341, 55 N. E. 648, aff'g 83 Ill. App. 233.

A business or manufacturing corporation does not become the owner of a railroad company's road, franchises, or other property, by owning nearly all the stock of the latter. A railroad company, whoever may be the owner of its stock, still owns its property. Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001.

Whether lessor or lessee liable for torts and debts, see the following cases:

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satisfaction of the debts of the company; and when such transfer is made under circumstances which warrant such remedy,

United States: Chesapeake & O. Ry. Co. v. Howard, 178 U. S. 153, 44 L. ed. 1015, 20 Sup. Ct. 880 (railroads; lessor through agents and servants managed and conducted train; no defense for negligence causing injury that road was leased); Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank, Chicago, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. ed. 900 (a lessee of a railroad, receiving money to be expended on the leased property, and misappropriating it by spending it on another property, cannot, by afterwards spending an equal amount of its own money on the leased property, deprive a creditor of the lessor of an equitable right growing out of the misappropriation); Chicago & N. W. Ry. Co. v. Crane, 113 U. S. 424, 28 L. ed. 1064, 5 Sup. Ct. 578 (statute, authorizing company to lease railroad to another corporation and requiring lessee to be liable in same manner as though railroad belonged to it, imposes liability as to leased property upon lessee while operating it; but does not discharge lessor from its corporate liabilities); Hukill v. Maysville & B. S. R. Co. (C. C.), 72 Fed. 745 (lessor empowered to lease not liable for all lessee's torts; nor liable for lessee's torts as to employees; is liable for injuries to public).

California: Lee v. Southern Pacific R. Co., 116 Cal. 97, 47 Pac. 932, 7 Am. & Eng. R. Cas. (N. S.) 656, 38 L. R. A. 71 [constitutional provision against leasing so as to release lessor from liability (Cal. Const., art. 12, § 10), injured employee of lessee; no action against lessor but may enforce judgment against property].

Connecticut: Driscoll v. Norwich & W. R. Co., 65 Conn. 230, 32 Atl. 354 (lease ratified by State; managing agent of lessee to be person satisfactory to lessor; lessor not released from liability for negligence of lessee).

Georgia: Pickens v. Georgia Rd. Co., 126 Ga. 517, 55 S. E. 171 (railroad company; lessor liable for injury to passenger for breach of public duty where road is operated by lessee). See Nashville, C. & St. L. R. Co. v. Edwards, 91 Ga. 24.

Illinois: People, Cantrell, v. St. Louis, A. & T. H. R. Co., 176 Ill. 512, 52 N. E. 292, 12 Am. & Eng. R. Cas. (N. S.) 227, aff'g 45 N. E. 824, 35 L. R. A. 656, 6 Am. & Eng. R. Cas. (N. S.) 241 (lessee of railroad bound by requirements of lessor's charter).

Kansas: Carruthers v. Kansas City, Ft. S. & M. R. Co., 59 Kan. 629, 54 Pac. 673, 44 L. R. A. 737 (lease authorized; lessor no control over railroad; general lease; lessor not liable for results of lessee's negligence).

Kentucky: Schmidt v. Louisville & N. R. Co., 101 Ky. 441, 19 Ky. L. Rep. 666, 38 L. R. A. 809 (lessee held not a mere tenant by sufferance, but bound by terms of lease where it assumes control of and operates road); Brooker v. Maysville & B. S. R. Co., 26 Ky. L. Rep. 1022, 83 S. W. 117 (railroad making *ultra vires* lease to foreign corporation of ferry franchise acquired by lessor, is liable for negligent injury to passenger on ferryboat).

Michigan: Ackerman v. Cincinnati, S. & M. R. Co. (Mich., 1906), 12 Det. L. N. 908, 106 N. W. 558 [lessor not liable for acts of lessee of railroad; statute (Comp. Laws,

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a court of equity will decree the payment of a judgment debt of the lessor by the lessee.[16] In a Federal case it appeared that a corporation, formed by articles of association, called a certificate or charter, under the general laws of Pennsylvania concerning manufacturing companies, with a certain capital stock, for twenty years, for "the transportation of passengers in railroad cars constructed and owned by the said company," under certain patents, carried on the business of manufacturing sleeping cars under its patents, and of hiring and letting the cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers. Seven years afterwards, by special act of the legislature of Pennsylvania, the charter was extended for ninety-nine years, and the corporation was empowered to double its capital stock, and "to enter into contracts with corporations of this or any other State for the leasing or hiring and transfer to them, or any of them, of its railway cars and other personal

§ 6369) authorized lease and made lessee liable].

Minnesota: Heron v. St. Paul, M. & M. R. Co., 68 Minn. 542, 71 N. W. 706 (lease authorized by legislature; lessee had exclusive control; lessor not liable for negligence of lessee or sublessee).

Ohio: Beckett Paper Co. v. Hamilton & R. H. Co., 18 Ohio C. C. 200 (lessees of water power liable after assignment of lease).

Virginia: Ft. Winchester & Strasburg Rd. Co. v. Commonwealth, 106 Va. 264, 55 S. E. 692 (the lessee of a railroad who had contracted to perform all the public legal obligations of the lessor, and who is of financial ability to do so, will be compelled to discharge such obligations, although the lessor may be of financial ability to do so, and although it may entail a loss upon the lessee, evidence upon the latter subject is, therefore, inadmissible. A lessor and a lessee who have sought and obtained a charter imposing obligations cannot repudiate them simply because they are onerous and unprofitable).

West Virginia: Guinn v. Ohio River R. Co. (W. Va.), 33 S. E. 87 (lessee of constructed railroad not liable for damages to property occasioned by construction and operation).

Canada: Michigan C. R. Co. v. Wealleans, 24 Can. S. C. 309 (foreign lessee, under authorized lease; no greater liability than that of lessor where property injured without negligence).

Examine Miller v. New York, L. & W. R. Co., 125 N. Y. 118, 34 N. Y. St. R. 607, 26 N. E. 35, rev'g 20 N. Y. St. R. 157, 3 N. Y. Supp. 245; Logan v. North Carolina R. Co., 116 N. C. 940.

[16] Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank, Chicago, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. 550.

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property." The corporation forthwith entered into an indenture with a corporation of another State engaged in a similar business, by which it leased and transferred to that corporation all its cars, railroad contracts, patent rights and other personal property, moneys, credits and rights of action, for the term of ninety-nine years, except so far as the contracts and patents should expire sooner; and covenanted not to "engage in the business of manufacturing, using or hiring sleeping cars" while the indenture should remain in force; and the lessee covenanted to pay all existing debts of the lessor, and to pay to the lessor annually the sum of $264,000, during the entire term of ninety-nine years, unless the indenture should be sooner terminated as therein provided. It was held that this contract was unlawful and void, because beyond the corporate power of the lessor, and involving an abandonment of its duty to the public; and therefore no action could be maintained by the lessor upon the contract, or to recover the sums thereby payable, even while the lessee had enjoyed the benefits of the contract.[17] In another Federal case the facts were as follows: A lease to a commercial partnership from a railroad corporation of a strip of its land by the side of its track in the State of Iowa, for the purpose of erecting and maintaining a cold storage warehouse thereon, contained an agreement that the corporation should not be liable to the partnership for any damage to the building or contents, by fire from the locomotive engines of the corporation, although owing to its negligence. At a trial of an action brought in the Circuit Court of the United States by the partnership against the corporation to recover for damage to the building and contents by fire from its locomotive engines, owing to its negligence, under a statute of the State making any railroad corporation liable for damages to property of others by fire from its locomotive engines, the plaintiff contended that the agreement was void as against public policy. It appeared that, since this lease, the highest court of the State, in an action between other parties, had at first

[17] Central Trans. Co. v. Pullman's Pal. Car. Co., 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478.

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held a like agreement to be void as against public policy, but, upon a rehearing, had reversed its opinion, and entered final judgment affirming the validity of the agreement; and it also appeared that its final decision was not inconsistent with its decision or opinion in any other case. It was held, that the question of the validity of the agreement was one of statutory and local law, or of general jurisprudence; and that the final decision of the state court thereon was rightly followed by the Circuit Court of the United States.[18]

§ 465. **Power to Alienate Franchises—Legislative Authorization.**—It is within the power of a legislature which creates a corporation and grants to it its franchise, to empower it to sell, lease or otherwise transfer those franchises.[19] And where a statutory authorization exists to alienate, a city's consent thereto is unnecessary although the franchise right to use its streets was granted by the city.[20] The power granted to

[18] Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 175 U. S. 91, 99, 20 Sup. Ct. 33, 44 L. ed. 84. "A railroad corporation holds its station grounds, railroad tracks and right of way for the public use for which it is incorporated, yet as its private property, and to be occupied by itself or by others, in the manner which it may consider best fitted to promote, or not to interfere with, the public use. It may, in its discretion, permit them to be occupied by others with structures convenient for the receiving and delivering of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. Grand Trunk Railroad v. Richardson, 91 U. S. 454, 23 L. ed. 356. And it must provide reasonable means and facilities for receiving goods offered by the public to be transported over its road. Covington Stockyards v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. 416. But it is not obliged, and cannot even be compelled by statute, against its will, to permit private persons or partnerships to erect or maintain elevators, warehouses or similar structures, for their own benefit, upon the land of the railroad company. Missouri Pacific Railroad Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. 130." *Id.*, per Gray, J.

[19] Williamette Mfg. Co. v. Bank of British Columbia, 119 U. S. 191, 30 L. ed. 384, 7 Sup. Ct. 187; St. Louis & C. R. Co. v. East St. Louis & C. R. Co., 39 Ill. App. 354, case aff'd 139 Ill. 401, 28 N. E. 1088; State, Badger Illum. Co., v. Anderson, 97 Wis. 114, 72 N. W. 386.

[20] Michigan Teleph. Co. v. City of St. Joseph, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 7 Am. Elec. Cas. 1. See Moorshead v. United Rys. Co., 119 Mo. App. 541, 96 S. W. 261.

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make or take a lease of a railroad may be limited to connecting or continuous lines.[21] So the act of the legislature of Kentucky of January 22, 1858, authorizing any railroad company to lease its road to another railroad company, provided its road so leased should be so connected as to form a continuous line, permits the lessee company to take leases of branches by means of which it established continuous lines from their several termini to each of its own.[22] Under the laws of North Carolina a corporation can sell, transfer or mortgage its franchises, other than its franchise of existence, and the franchise so far as it relates to receiving fare or tolls, may be sold without the other property of the corporation.[23] In a Federal decision, rendered in 1888, it is held that the constitution and general laws of Oregon do not authorize a railroad corporation, organized under the laws of the State, to take a lease of a railroad and franchise; nor do the general laws of that State confer upon a foreign corporation a right to make a lease of a railroad within the State, but only the right to construct or acquire and operate one there.[24] Under the Pennsylvania act of 1870,[25] authorizing leases to or by "railroad companies," steam, passenger and all railroads are included;[26] and under the statute of 1876 of that State [27] water companies are empowered to alienate their franchises and property and another water company may become the purchaser and owner of such property.[28] In West Virginia the act of 1901 [29] vests corporations with the power to sell all

[21] Chesapeake & O. R. Co. v. Howard, 14 App. D. C. 262, 27 Wash. L. Rep. 146; W. Va. Code, chap. 54, § 53; State, Leese, v. Atchinson & N. R. Co., 24 Neb. 143, 38 N. W. 43; Neb. Comp. Stat., chap. 16, § 94.

[22] Hancock v. Louisville & N. R. R. Co., 145 U. S. 409, 36 L. ed. 755, 12 Sup. Ct. 969.

[23] Central Trust Co. of N. Y. v. Western North Carolina Rd. Co., 89 Fed. 24, 31; Code N. C., §§ 671, 673–675.

[24] Oregon R. & N. Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409 (decided in 1888).

[25] Act February 13, 1870, P. L. 31.

[26] Rafferty v. Central Traction Co., 1 Pa. Adv. R. 419, 29 W. N. C. 542, 2 Pitts. L. J. (N. S.) 319, 50 Am. & Eng. R. Cas. 239, 23 Atl. 884.

[27] Act April 17, 1876, P. L. 33, amending Act April 29, 1874, § 23, P. L. 83.

[28] Hey v. Springfield Water Co., 207 Pa. 38, 56 Atl. 265.

[29] Acts 1901, p. 93, c. 35; Code 1899, C. C. 52, 53, 54.

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their property, where they act in good faith and are authorized so to do by the vote of a certain per cent of outstanding stock, and the fact that the company was incorporated before the act does not prevent its application.[30] Street and passenger railways and traction companies are also authorized under state and municipal legislative enactments to alienate their property.[31]

§ 466. **Power to Alienate Franchises—Legislative Authorization Continued.**—It is held that a transfer of the privileges or franchise of an elevated street railroad company is not precluded by a prohibition, in the ordinance conferring such franchise, against its use by any other company; the municipality alone has the right to enforce such prohibition as it alone is benefited thereby.[32] Nor does a statutory prohibition against a transfer or lease by a corporation of its franchise prevent such alienation by an individual.[33] In Kentucky the word "franchise" in a statute providing that "no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges," is the corporate existence or charter privileges

[30] Germer v. Triple State Natural Gas & Oil Co. (W. Va., 1906), 54 S. E. 509.

[31] Moorshead v. United Rys. Co., 119 Mo. App. 541, 96 S. W. 261 (municipal ordinance); Hampe v. Pittsburg & B. Traction Co., 165 Pa. 468, 25 Pitts. L. J. (N. S.) 413, 30 Atl. 931, under Pa. Act April 23, 1861, P. L. 410, and Pa. Act February 17, 1870, P. L. 31 (the possession of franchises of an inclined railroad does not preclude this right); Philadelphia & W. C. Turnp. Co. v. Philadelphia & D. C. R. Co. (C. P.), 5 Pa. Dist. R. 305, under Act March 22, 1887; Wright v. Milwaukee Electric R. & L. Co., 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47, under Wis. Laws 1883, chap. 221, as am'd by Laws 1891, chap. 127.

[32] Chicago & S. S. R. T. R. Co. v. Northern Trust Co., 90 Ill. App. 460. See Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837, noted under § 467, herein.

[33] Long Acre Electric Light & Power Co., In re, 101 N. Y. Supp. 400, 51 Misc. 407, aff'd 102 N. Y. Supp. 242, 117 App. Div. 80, also aff'd 188 N. Y. 361, 80 N. E. 1101; Laws N. Y. 1905, p. 2097, c. 737, § 13.

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as distinguished from the corporeal property of the corporation.[34] In that State the statute of 1903 [35] provides for consent of court as a condition to making a sale of a ferry right and imposes certain limitations as to the time within which a non-resident owner shall make a sale to a resident citizen of the State, with other conditions, the non-compliance with which authorizes a revocation of the grant; but in applying this statute it was held that such non-compliance did not *per se* operate to revoke a lease, but that this must be done by a direct proceeding for that purpose instituted by the State or county authorities, or by the lessor.[36] In New York a lease made at public auction may include two ferries, in the discretion of the commissioners of the sinking fund of New York City.[37] In a Connecticut case a bequest was made to a charitable corporation located in the State of Pennsylvania. After the will was made, and before the death of the testator, the legislature of the latter State authorized the corporation to transfer its entire property and franchises to a corporation established in the State of New York for the same charitable purpose, which corporation was to become its legal successor and hold and enjoy all its corporate franchises and powers. The legislature of New York authorized the New York corporation to receive the property and franchise of the Pennsylvania corporation. The transfer was effected, and the New York corporation thereafter carried on, and at the time of the testator's death was carrying on, the same charitable work that had been carried on by the Pennsylvania corporation, using the same means and employing the same agencies. The legacy was a general one with no directions as to the objects for which, or the class of persons for

[34] Bailey v. Southern Ry. Co., 112 Ky. 424, 430, 61 S. W. 31, per O'Kear, J.

[35] Ky. Stat. 1903, § 1808, subd. 3.

[36] Paynter v. Miller, 25 Ky. L. Rep. 2222, 80 S. W. 469.

[37] Starin v. Staten Island R. T. R. Co., 112 N. Y. 206, 20 N. Y. St. Rep. 898, 19 N. E. 670, rev'g 4 N. Y. St. R. 588; New York City Consol. Act 1882, chap. 410, § 716.

As to powers to take or make grant or assignment of ferry franchise, subject to the rights of New York City or other municipal corporation, etc., see Transp. Corp. Law of N. Y., Laws 1890, chap. 566, § 4.

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whose benefit the money was to be applied. It was decided that the legacy lapsed. The court, per Park, C. J., gave as one of the reasons for the above decision the following: "A franchise of a corporation is its life—its being. * * * Manifestly there was nothing whatever left of this corporation after the transfer was made." [38]

§ 467. **Power to Alienate Franchises—Implied Legislative Authorization—Presumptions—Construction of Statutes.**—A statute [39] empowering all railroad companies incorporated under the laws of the State to make "contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads," authorizes a railroad company of the State to make a lease of its road to a railroad corporation of another State, but confers no power on a railroad company of the other State to take such a lease, if not authorized to do so by the laws of its own State.[40] But it is also held that the ordinary clause in a railroad company's charter, authorizing it to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads, confers no authority to lease its road and franchises.[41] And it is further decided: That the power to lease a railroad, its appurtenances and franchises, is not to be presumed from the usual grant of powers in a railroad charter; and, unless authorized by legislative action so to do, one company cannot transfer them to another company by lease, nor can the other company receive and operate them under such a

[38] Cram v. Bliss, 47 Conn. 592, 593.

[39] Ill. Stat. February 12, 1855.

[40] St. Louis & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 748. See Union Pacific R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. 1173; Beveridge v. New York Elev. R. Co., 112 N. Y. 1, 20 N. Y. St. R. 962, 19 N. E. 489, 2 L. R. A. 648, aff'g 5 N. Y. St. R. 59, under N. Y. Act 1839; O'Neill v. Hestonville, M. & F. Pass. Ry. Co., 9 Pa. Dist. R. 2, under Act May 15, 1895, P. L. pp. 63, 64; Michigan C. C. R. Co. v. Weallens, 24 Can. S. C. 309.

[41] Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950. See Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478, 9 Ry. & Corp. L. J. 342, 45 Am. & Eng. R. Cas. 607, 43 Alb. L. J. 328.

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lease; that the use of the words "successors or assigns" in a proviso attached to a statute making specific grants to a corporation does not necessarily imply that the corporation can transfer all its property and its franchises to another corporation, to be exercised by the latter; that a provision in a general act for the organization of corporations that a corporation organized under it may authorize its own dissolution and the disposition of its property thereafter, does not authorize such a corporation, not dissolving but continuing in existence, to dispose of all its corporate franchises and powers by lease; and that a provision in a general act for organization of corporations for the purpose of navigating streams, with power to construct railroads where portage is necessary, and that a corporation organized under it shall not lease such a railroad, does not imply that without such a restraint the corporation could make such a lease.[42] Where the charter of a railroad company confers the right to transport passengers and freight, and gives the power to "farm out" the right of transportation, the company is thereby authorized to execute a valid lease of its property and franchises to another railroad company.[43] Again, if a statute empowers ferries to be maintained and operated across certain streams a lease may be made, by virtue thereof, by a county to private individuals.[44]

§ 468. **Power to Alienate Franchises—Railroad Companies.**—The franchises of a railroad company cannot be alienated without the consent of the State which granted them. It is a state prerogative to put the administration of its franchises into such hands as it may choose and, therefore, the State must confer the right upon such a corporation to make a transfer of them.[45]

[42] Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409. See § 466, herein.

[43] Hill v. Atlantic & North Carolina Rd. Co., 143 N. C. 539, 570.

[44] State v. King County (Wash.), 69 Pac. 1106, under Sess. Laws 1899, p. 39.

[45] State v. Morgan, 28 La. Ann. 482. See also Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed.

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§ 469. Power to Alienate Franchises—Banks—Street Railway Companies—Telegraph Lines.—A bank holding its franchise under a special act is held to be within the rule prohibiting alienation of franchises without authority from the legislature.[46] The rule also applies to a street railway company's franchises;[47] and to a right to construct and operate a telephone or telegraph line.[48]

§ 470. Power to Alienate Franchises—Water and Irrigation Companies.—In Kansas, corporations cannot transfer

849, 16 Sup. Ct. 714, 3 Am. & Eng. R. Cas. (N. S.) 525; Branch v. Jesup, 106 U. S. 468, 27 L. ed. 279, 1 Sup. Ct. 495; Southern Pac. R. Co. v. Esquibel (N. M.), 20 Pac. 109, 5 R. R. & Corp. L. J. 256. Examine Canada S. R. Co. v. Niagara Falls (Ch.), 22 Ont. Rep. 41.

[46] Fietsam v. Hay, 122 Ill. 293, 13 N. E. 501. Compare New Hampshire Savings Bk. v. Rickey, 121 Fed. 956, 58 C. C. A. 194.

[47] French v. Jones, 191 Mass. 522, 78 N. E. 118. Examine Prospect Park & Coney Island R. Co. v. Coney Island & B. R. Co., 144 N. Y. 152, 63 N. Y. St. Rep. 48, 39 N. E. 17, 1 Am. & Eng. R. Cas. (N. S.) 222, 26 L. R. A. 610, case reverses 66 Hun, 366, 50 N. Y. St. Rep. 862, 21 N. Y. Supp. 1046, holding that franchise may be sold to rival company to one with which it is under contract to allow cars to run over its tracks.

[48] Cumberland Teleph. & Teleg. Co. v. City of Evansville, 127 Fed. 187; United States v. Western Union Teleg. Co. (C. C.), 50 Fed. 28. See Joyce on Electric Law (2d ed.), §§ 203 *et seq.*

Grant of exclusive franchises or privileges by railroad company to telegraph company; extent of power. See United States v. Union Pacific R. Co. (and Western Union Teleg. Co.), 160 U. S. 1, 16 Sup. Ct. 190, 40 L. ed. 319, 6 Am. Elec. Cas. 697, rev'g 59 Fed. 813, 19 U. S. App. 531, aff'g 50 Fed. 28; Western Union Teleg. Co. v. Western & Atlantic Teleg. Co., 91 U. S. 283, 23 L. ed. 350, 1 Am. Elec. Cas. 194; Mercantile Trust Co. v. Atlantic & Pacific R. Co., 63 Fed. 910; Pacific Postal Teleg. Cable Co. v. Western Union Teleg. Co., 50 Fed. 493; Western Union Teleg. Co. v. American Union Teleg. Co., 9 Biss. (C. C.) 72; Western Union Teleg. Co. v. Atlantic & Pacific Teleg. Co., 7 Biss. (C. C.) 367; Western Union Teleg. Co. v. National Teleg. Co., 22 Blachf. (C. C.) 108; Western Union Teleg. Co. v. American Union Teleg. Co., 65 Ga. 160, 38 Am. Rep. 781; St. Louis & C. R. Co. v. Central Teleg. Co., 173 Ill. 508, 51 N. E. 382; Union Trust Co. v. Atchison, Topeka & S. F. R. Co., 8 N. M. 327, 43 Pac. 701. Examine also Joyce on Electric Law (2d ed.), §§ 35, 191–193.

Special franchise; electrical conductors on streets assigned to individual and by him to corporation; title not defective for that reason. Long Acre Electric Light & Power Co., In re, 101 N. Y. Supp. 450, 51 Misc. 407, aff'd 102 N. Y. Supp. 242, 117 App. Div. 80, also aff'd 188 N. Y. 361, 80 N. Y. Supp. 101.

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those franchises received from the State which confer power upon them to exist as artificial bodies, but those franchises denominated as secondary, which include the privileges granted to a water company, with the right to take tolls, etc., may by statute be lawfully alienated and encumbered.[49] But where a water company does not derive power from the legislature to transfer its franchises and other property, it does not obtain such power merely from a city's consent to alienate.[50] An irrigating company, incorporated under the laws of a State, to construct and operate a canal for irrigation, waterworks and manufacturing purposes, has the power, with the assent of its stockholders, to sell and convey to another irrigating corporation its right of way, canal, personal and real property, if the same is done in good faith, and not for the purpose of defrauding or delaying creditors.[51]

§ 471. **Power to Mortgage.**—A corporation which is authorized to sell its franchises is empowered to mortgage them. Thus a statute which confers upon a corporation the right to take water from a river and to conduct it through canals, and the exclusive right to the hydraulic power and privileges created by the water and the right to use, rent or sell the same or any portion thereof, authorizes the corporation to mortgage such powers and privileges.[52] So a grant by a municipal corporation to a railway company of a right of way through certain streets of a municipality, with the right to construct its railroad thereon and occupy them, in itself is a franchise which may be mortgaged and pass to the purchaser at a sale under foreclosure of the mortgage; and there is nothing in the laws of Louisiana which forbids such transfer of a franchise to use and occupy the streets of a municipality by a railroad corporation.[53] In 1856 that State passed a general law authoriz-

[49] State v. Water Co., 61 Kan. 547, 60 Pac. 337.

[50] New Albany Waterworks v. Louisville Banking Co., 122 Fed. 776, 58 C. C. A. 576.

[51] State v. Western Irrigating Canal Co., 40 Kan. 96, 19 Pac. 349.

[52] Williamette Mfg. Co. v. Bank of British Columbia, 119 U. S. 191, 30 L. ed. 384, 7 Sup. Ct. 187.

[53] New Orleans, S. P. & L. R. R.

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ing railroad companies to mortgage their property and franchises. But until the passage of such act such franchises in that State could not be mortgaged. Otherwise that act would have been unnecessary.[54] Again, it is "well settled that a mortgage of a railroad to be constructed and of its appurtenances to be acquired by the company chartered to build and operate such road, is valid." [55] Such a mortgage, as against the company and its privies, although given before the road is built, attaches itself thereto as fast as it is built, and to all property covered by its terms as fast as it comes into existence as property.[56]

§ 472. Power to Make and Take a Lease—Railroad Companies—Natural Gas, Gas and Electric Companies.—A lease by a railroad company of all its road, rolling stock and franchises for which no authority is given in its charter is *ultra vires* and void.[57] And it is held that clear and specific authority is necessary to enable a railroad company to lease its property; otherwise such lease is void.[58] Again, unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot by lease or other contract turn over to another company for a long period of time its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company, without similar authority, make a contract to run and operate such road, property, and franchises of the first corporation. Such a contract is not among the ordinary powers of a railroad company, and is not to be inferred from the usual grant of powers in a railroad charter.[59] So it is held in a case decided in

Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244.

[54] State v. Morgan, 28 La. Ann. 482.

[55] Meyer v. Johnston, 53 Ala. 324, per Manning, J.

[56] Galveston Railroad v. Cowdrey, 11 Wall. (78 U. S.) 459, 20 L. ed. 199.

[57] Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950.

[58] Van Steuben v. Central R. Co., 178 Pa. 367, 39 W. N. C. 217, 35 Atl. 992, 34 L. R. A. 577. See §§ 465–467, herein.

[59] Pennsylvania R. R. Co. v. St. Louis, A. & T. H. R. R. Co., 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. 1094. See upon last point in text § 467, herein.

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1886 that no authority is found in the statutes of Indiana for the lease of an entire railroad property and franchise for the period of ninety-nine years.[60] It is also decided in Michigan that a part of a railroad company's right of way may be leased to a manufacturing concern where it expects to obtain business therefrom.[61] And, under a Massachusetts decision, real property which a corporation is, under its charter, entitled to hold, may be leased for purposes of a business which the lessor could not legally enter into.[62] Again, a railroad company has the right to rely upon decisions that authority to lease its road exists, as such decisions when made by the highest courts of the State constitute a part of the contract which cannot be impaired under the Constitution.[63] The rule that precludes a railroad company without legislative authorization, by charter or other enactment, from leasing its entire plant for a long period of time, applies to a natural gas company;[64] and a lease cannot validly be made by a corporation of its franchise to furnish a city with gas and electricity.[65]

§ 473. Illegal or Ultra Vires Lease—Ratification—Estoppel—Equity—Validating Statutes.—The fact that the legislature, after an *ultra vires* lease is made, passes a statute

[60] Pennsylvania R. R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 630, 30 L. ed. 284, 7 Sup. Ct. 24, 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. 1094. Compare Chicago, R. I. & P. R. Co. v. Union Pacific R. Co. (C. C.), 47 Fed. 15, 10 Ry. & Corp. L. J. 283, 47 Am. & Eng. R. Cas. 340.

[61] Michigan C. R. v. Bulard, 120 Mich. 416, 6 Det. L. N. 193, 79 N. W. 635. Citing Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356 (this case holds that the erection of buildings by the permission of a railroad company within the line of its roadway by other parties, for convenience in delivering and receiving freight, is not inconsistent with the purpose for which the charter was granted); Illinois Cent. R. Co. v. Wathen, 17 Ill. App. 582; Gurney v. Minneapolis Union Elevator Co., 63 Minn. 70, 30 L. R. A. 546; Roby v. New York C. & H. R. R. Co., 142 N. Y. 176, 58 N. Y. St. Rep. 642, case reverses 65 Hun, 532, 48 N. Y. St. Rep. 201, 20 N. Y. Supp. 551.

[62] Nye v. Storer, 168 Mass. 53, 6 Am. & Eng. Corp. Cas. (N. S.) 247, 46 N. E. 402.

[63] Southern R. Co. v. North Carolina R. Co. (C. C.), 81 Fed. 595.

[64] Stowe v. Citizens' Natural Gas Co., 23 Pa. Co. Ct. R. 273.

[65] Visalia Gas & E. L. Co. v. Sims, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105.

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forbidding the directors of the company, its lessees or agents, from collecting more than a fixed amount of compensation for carrying passengers and freight, is not a ratification of the lease or an acknowledgment of its validity.[66] And the operation of a railroad and payment of rent for three years by a lessee under a lease of it for ninety-six years, which was executed in violation of the corporate powers both of the lessor and of the lessee, does not so far execute the contract of lease by part performance, as to estop the lessee from setting up its illegality in an action at law to recover after accruing rent.[67] But while a lease for nine hundred and ninety-nine years of a railroad and its franchise to another railroad corporation may be *ultra vires* of one or both, still it will not be set aside by a court of equity at the suit of the lessor, when the lessee has been in possession, paying the stipulated rent for seventeen years, and has taken no steps to rescind the contract.[68] The legislature may validate as to the future an unauthorized railroad lease of a line of road in another State, where the road is operated thereafter for years and the contract thus impliedly readopted.[69]

§ 474. **Power to Assign Franchises.**—A franchise of an illuminating company may be assigned under a statutory authorization,[70] as may also a water company's exclusive franchise.[71] And the rule prohibiting the sale of the franchise of a public or quasi-public corporation is held not applicable to a franchise, derived from a municipality, to erect poles and string electric wires in city streets, granted to a company and its assigns.[72] A constitutional provision that "corporations

[66] Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950.

[67] Oregon R. & N. Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409. See Visalia Gas & E. L. Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042, as to non-recovery from lessee under guaranty of certain profits, where lease is void.

[68] St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. 953, 12 Ry. & Corp. L. J. 63, 46 Alb. L. J. 84.

[69] Terre Haute & I. R. Co. v. Cox, 102 Fed. 825, 42 C. C. A. 654.

[70] State Badger Illum. Co. v. Anderson, 97 Wis. 114, 72 N. W. 386.

[71] San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075.

[72] Commercial Electric Light & P.

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may be found under general laws, but shall not be created by special act," is held to apply to the formation or creation of corporations and to the powers directly conferred upon them by legislative enactment, and cannot be construed as prohibiting the assignment of a franchise to a legally organized corporation by persons having the lawful right to exercise and transfer the same, and a corporation may acquire a franchise granted to individuals.[73]

§ 475. **Assignment of Franchises of Insolvent or Bankrupt Corporation—What Passes.**—A statute authorizing the sale, through receivers, of franchises of insolvent public service corporations and conferring them for the unexpired term of the grant upon the person or persons purchasing them, will not receive that strict construction which is applied to legislative grants, where such enactment grants no new rights but simply makes provision for the transmission of title by sale or lease of the rights theretofore granted.[74] All franchises of a railroad company which can be parted with by mortgage pass to the assignee of the company in bankruptcy, and may be transferred to a purchaser at a bankruptcy sale.[75] In New Jersey under the act of 1842[76] the legislature authorized the sale, through the medium of public receiverships, of the franchises of public utility corporations. This legislation has, with few minor changes, been preserved since that date.[77] The sale of franchises of insolvent public corporations was thereby authorized to be made for the unexpired term of such franchises

Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592.

[73] People v. Stanford, 77 Cal. 360, 371, 2 L. R. A. 92, 18 Pac. 85.

[74] McCarter, Atty. Genl., v. Vineland Light & Power Co. (N. J. Ch., 1907), 65 Atl. 1041.

[75] "It follows that if the franchises of a railroad corporation essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold and passed to the purchaser at a bankruptcy sale." New Orleans, Spanish Fort & Lake Rd. Co. v. Delamore, 114 U. S. 501, 510, 29 L. ed. 244, 5 Sup. Ct. 1009, per Woods, J.

[76] P. L. 1842, p. 164.

[77] Rev. Stat. 1846, p. 136, tit. 5, c. 3, § 20; Revision, p. 192, § 85; P. L. 1896, p. 303, § 82.

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to any person or persons and so sanctioned the use thereof for the specified term by an individual purchaser, and also bestowed upon him the use and enjoyment of the franchises so obtained to the same extent that the stockholders of the corporation to which the franchises theretofore granted could have used and enjoyed the same. These franchises are such parts of the sovereign power as had been granted to the corporation, being rights and privileges only held and enjoyed through legislative grant. The law of 1881 [78] was, however, in its general scope and purpose the same as that of 1875,[79] and clearly withdrew whatever legislative sanction might theretofore have existed for the use by an individual, of the sovereign prerogatives purchased under decrees of courts, and required their use by corporations created by the act *ex proprio vigore*.[80]

§ 476. **Power to Purchase.**—Under a California decision corporations formed under the general law have the power to purchase and hold an exclusive franchise or privilege granted by the legislature to an individual and his assigns.[81] A railroad company having the right of constructing a particular line of railroad, with general power to purchase all kinds of property of whatever nature or kind, may purchase from another company a road constructed upon that line, if the latter company had power to sell and dispose of the same.[82] A power, however, given in a charter of a railroad company to connect or unite with other roads refers merely to a physical connection of the tracks, and does not authorize the purchase or even the lease of such roads or road, or any union of franchises. So where, from reasons of public policy, a legislature declares that a railway company shall not become the purchaser of a parallel or competing line, the purchase is not the less unlawful, because the parties choose to let it take the form of a

[78] Act February 17, 1881, P. L. p. 33; Gen. Stat., p. 3694, §§ 34, 35.

[79] P. L. 1875, p. 41. The year that the constitutional amendments took effect.

[80] McCarter, Atty. Genl., v. Vineland Light & Power Co. (N. J. Ch., 1907), 65 Atl. 1041.

[81] California State Teleg. Co. v. Alta Teleg. Co., 22 Cal. 398.

[82] Branch v. Jesup, 106 U. S. 468, 27 L. ed. 279, 1 Sup. Ct. 495.

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judicial sale. And where a statute[83] provides that a certain company may "from time to time extend any branch road and may purchase and hold any road constructed by another company," it does not confer a general power to purchase roads constructed by other companies regardless of their relations or connections with such specified company.[84] If franchises and property are acquired by a railroad corporation from another company, subsequent conveyances of land made to the latter pass to the former.[85] A charter authorization to supply light and motive power, or heat, generated by electricity or other artificial means, does not enable a corporation to purchase a gas plant and operate the same.[86] Nor does a statutory authority to sell franchises and property to corporations organized under similar, or the same state laws, empower the purchase of a foreign corporation's franchises and privileges.[87] But if a statute empowers railroad corporations, who, acting in good faith, are unable to complete their roads, to sell their franchise rights and property to any other company without the same terminal points, the stock of such company may be purchased by another railroad company in order to accomplish the statutory purpose.[88] It is held, however, in the Federal Supreme Court, that unless express permission be given to do so, it is not within the general powers of a corporation to purchase stock of other corporations for the purpose of controlling their management.[89]

§ 477. **Judicial Sales—Decree—Generally.**—Franchise interests may be transferred as property under judicial proceedings.[90] The power given under the state law to a corporation

[83] Ky. Act of 1856, re-enacting the Tenn. Act of 1855.

[84] Louisville & N. R. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714.

[85] Smith v. Frankfort & C. Ry. Co., 24 Ky. L. Rep. 2040, 72 S. W. 1088.

[86] Covington Gas Light Co. v. City of Covington, 22 Ky. L. Rep. 796, 58 S. W. 805.

[87] Dieterle v. Ann Harbor Paint & Enamel Co. (Mich., 1906), 107 N. W. 79.

[88] Dewey v. Toledo, A. A. & N. M. Co., 91 Mich. 351, 51 N. W. 1063.

[89] De la Vergne Refrigerating Co. v. German Savings Institution, 175 U. S. 40, 44 L. ed. 65, 20 Sup. Ct. 20.

[90] Long Acre Electric Light & Power Co., In re, 101 N. Y. Supp.

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to mortgage its franchises and privileges necessarily includes the power to bring them to sale and make the mortgage effectual, and the purchaser acquires title thereto although the corporate right to exist may not be sold.[91] A sale under a junior security must be subordinate to one that is prior and paramount. Successive sales of the same franchises can no more be deemed incompatible than successive sales of the same property. "We all know that a sale of land under a judgment does not, in the slightest manner, affect a prior mortgage. A subsequent sale of the same land may be made by virtue of the latter."[92] In case of a judicial sale to pay debts the court may, it is held, administer the assets upon such a basis as it might have done in case of a dissolution, notwithstanding no dissolution is effected.[93] If a branch road owned by a lessee is essential to a leased road which a decree has required to be operated, it may properly be included in the terms thereof.[94]

§ 478. **Judicial Sales—What Does and Does not Pass—Purchasers' Rights and Obligations.**—A grant by a municipal corporation to a railway company of a right of way through the city streets with the right to construct a railroad thereon and occupy them is a franchise which passes to a purchaser upon a sale under foreclosure of a mortgage thereof.[95]

460, 51 Misc. 407, aff'd 102 N. Y. Supp. 242, 117 App. Div. 80, also aff'd 188 N. Y. 361, 80 N. E. 1101.

[91] Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. 660.

[92] Galveston, etc., R. Co. v. Cowdrey, 11 Wall. (78 U. S.) 459, 476, 20 L. ed. 199, per Bradley, J. Sale made under Tex. Act of Dec. 19, 1857, Paschal's Dig., arts. 4912–4914.

[93] Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155, 96 Fed. 784, 37 C. C. A. 587, modifying 82 Fed. 642 and 86 Fed. 929.

[94] Southern R. Co. v. Franklin & P. R. Co., 96 Va. 693, 1 Va. S. C. Rep. 113, 32 S. E. 485, 44 L. R. A. 297.

[95] New Orleans, Spanish Fort & Lake Rd. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244. The court said: "When there has been a judicial sale of railroad property under a mortgage authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passed to the purchasers." The court also said: "This was assumed to be the law by the opinion of this court pronounced

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But it is also held that when a State covenants and agrees that a certain corporation shall administer certain franchises, the ordinary judgment creditors of that corporation may seize and sell its property, but not its franchises.[96] And a franchise cannot be sold under execution in the absence of statute giving authority therefor.[97] A mortgage of the charter of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation; if it confers any right of corporate existence upon them, it is only a right to reorganize as a corporation subject to laws, constitutional and otherwise, existing at the time of the reorganization.[98] But where a statute provides for the sale, under foreclosure, of the entire roadbed, track, franchises and chartered rights of a railroad company and prescribes the rights of purchasers, they become vested with all the rights, privileges and franchises of the foreclosed company; and they may continue the business under the old corporate name or organize a new corporation therefor.[99] So where by statute the purchaser, in case of a sale, under process, of the property or franchises of any manufacturing or other corporation, becomes a body corporate with all the rights of such corporation, all the gas company's rights pass by judicial sale to a pur-

by Mr. Justice Matthews in the case of Memphis Rd. Co. v. Commissioners, 112 U. S. 609, 619, 28 L. ed. 837, 5 Sup. Ct. 299, where it was said: 'The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it and the franchise of maintaining and operating it as such.' See also Hall v. Sullivan Rd. Co., 21 Law Repr. 138; Galveston Rd. v. Cowdrey, 11 Wall. (78 U. S.) 459, 20 L. ed. 199," *Id.*, 510, per Woods, J.; Julian v. Central Trust Co., 193 U. S. 93, 106, 24 Sup. Ct. 399, 48 L. ed. 629, per Day, J.; New Orleans Debenture Redemption Co. v. Louisiana, 180 U. S. 320, 329, 45 L. ed. 550, 21 Sup. Ct. —, per Peckham, J.

[96] State v. Morgan, 28 La. Ann. 482.

[97] Gregory v. Blanchard, 98 Cal. 311, 33 Pac. 199.

[98] Memphis & R. R. Co. v. Railroad Commissioners, 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. 299.

[99] Denniston & Sherman Ry. Co. v. St. Louis & Southwestern Ry. Co., 30 Tex. Civ. App. 474, 476, 72 S. W. 201.

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chaser.[1] But where after purchase under a foreclosure sale a company reorganizes, the corporation whose property has been so sold being dissolved, such new company holds title only to such property as was decreed to it by the court.[2] In a great public enterprise such as the Union Pacific Railroad, under a congressional charter reserving the right to alter, amend or repeal, public interests, and not simply private purposes are to be regarded, and the purchaser at judicial foreclosure sale takes the property subject to the proper regulations and use established by Congress, notwithstanding the mortgage foreclosed may have antedated the legislation.[3] Under the laws of North Carolina, and the decisions of the highest court of that State rendered prior to 1894, there was nothing to prevent property of a railroad company sold under foreclosure passing to the purchaser free from any obligation for debts of the former owner arising thereafter, notwithstanding the purchaser was not a domestic railroad corporation.[4]

§ 479. Exemption or Immunity from Taxation or Governmental Regulation—Not Transferable Unless Expressly

[1] Gas & Water Co. of Downington v. Corporation of Borough of Downington, 193 Pa. 255, 44 Atl. 282; Act May 25, 1878.

[2] Frank v. New York, L. E. & W. R. Co., 122 N. Y. 197, 33 N. Y. St. R. 235, 25 N. E. 332, 8 Ry. & Corp. L. J. 470, 46 Am. & Eng. R. Cas. 356, aff'g 7 N. Y. St. Rep. 814, 26 Wkly. D. 414. See National Foundry & Pipe Works v. Oconto City Water Supply Co., 105 Wis. 48, 81 N. W. 125.

[3] Union Pacific Rd. Co. v. Mason City & Fort Dodge Rd. Co., 199 U. S. 160, 50 L. ed. 134, 26 Sup. Ct. 19, aff'g 128 Fed. 230, 64 C. C. A. 348, which aff'd 124 Fed. 409.

[4] Julian v. Central Trust Co., 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. 399. See Wiggins Ferry Co. v. Ohio & M. R. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. ed. 1055; Campbell v. Pittsburg & W. R. Co., 137 Pa. 574, 48 Phila. Leg. Int. 128, 21 Pitts. L. J. (N. S.) 149, 20 Atl. 949, 46 Am. & Eng. R. Cas. 353; Gulf, C. & S. F. R. Co. v. Newell (Tex.), 11 S. W. 342, 6 R. R. & Corp. L. J. 533. Compare Frank v. New York, L. E. & W. Co., 122 N. Y. 197, 33 N. Y. St. Rep. 235, 46 Am. & Eng. R. Cas. 356, 8 Ry. & Corp. L. J. 470, 25 N. E. 332, aff'g 7 N. Y. St. Rep. 814, 26 Wkly. D. 414.

Rights of creditor purchasing at foreclosure sale, when extinguished. See Venner v. Farmers' Loan & T. Co., 90 Fed. 348, 62 U. S. A. 141, 33 C. C. A. 95.

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Authorized by State.[5]—It is now well settled that an exemption or immunity from taxation cannot be transferred by the immediate grantee unless otherwise so declared in express terms. And although the obligations of a legislative contract granting immunity from the exercise of governmental authority are protected by the Federal Constitution from impairment by the State, the contract itself is not property which as such can be transferred by the owner to another, but is personal to him with whom it is made and incapable of assignment, unless by the same or a subsequent law the State authorizes or directs such transfer in terms making the legislative intent clearly apparent. The rule that every doubt is resolved in favor of the continuance of governmental power, and that clear and unmistakable evidence of the intent to part therewith is required, which applies to determining whether a legislative contract of exemption from such power was granted, also applies to determining whether its transfer to another was authorized or directed. If the State, by virtue of the same power which created the original contract of exemption, authorizes or directs, either by the same law or by subsequent laws, the transfer of the exemption to a successor in title, such exemption is taken not by reason of the inherent right of the original holder to assign it, but by the State's action in so authorizing or directing the transfer. A legislative authority, therefore, to transfer the estate, property, rights, privileges and franchises of a corporation to another corporation does not authorize the transfer of a legislative contract of exemption or immunity from taxation or assessment.[6] If a railroad corporation under its charter is to be

[5] See § 20, herein, upon point whether such immunity is a franchise.

[6] Rochester Railway Co. v. Rochester, 205 U. S. 236, 247, 248, 254, 51 L. ed. —, 27 Sup. Ct. 469, aff'g 182 N. Y. 116. In this case the court concluded that the words "the estate, property, rights, privileges, and franchises," did not, as to a purchasing corporation, embrace within their meaning the assessment or burden of paving employed by the railroad company from whom such rights, etc., had been acquired. It was claimed that the word "privileges" was sufficiently broad to embrace within its meaning such exemption, and that when added to the other words the legislative intent to transfer the exemption was clearly manifested, and that the above words of the law under consideration, "the

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forever exempt from taxation and its franchises are purchased by another railroad company and a statute is passed reciting

estate," etc., indicated the purpose to vest in the purchasing corporation every asset of the selling corporation which were of conceivable value. The court said that there was "authority sustaining this position" which would not "be set aside without examination." The court then reviews certain decisions which are as follows: Tennessee v. Whitworth, 117 U. S. 139, 29 L. ed. 833, 6 Sup. Ct. 649; Chesapeake & Ohio Railroad v. Virginia, 94 U. S. 718, 24 L. ed. 310; Southwestern R. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757; Humphrey v. Pegues, 16 Wall. (83 U. S.) 244, 21 L. ed. 326 (also citing Gunter v. Atlantic Coast Line, 200 U. S. 273, 26 Sup. Ct. 252, 50 L. ed. 477). The court then says: "If the authority of these four cases, supported by some *dicta* which need not be cited, remained unimpaired, it would justify the opinion that a legislative transfer of the 'privileges' of a corporation includes an exemption from the taxing or other governmental power granted by a contract with the State. But other and later cases have essentially modified the rule which may be deduced from them." The following cases are then reviewed: Gulf & Ship Island Rd. Co. v. Hewes, 183 U. S. 66, 22 Sup. Ct. 26, 46 L. ed. 86; Phenix Fire & Marine Ins. Co. v. Tennessee, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. ed. 660; Keokuk & Western Rd. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450; Wilmington & Weldon Rd. Co. v. Alsbrook, 146 U. S. 279, 297, 36 L. ed. 972, 13 Sup. Ct. 72; Picard v. East Tennessee, Virginia & Georgia Rd. Co., 130 U. S. 637, 9 Sup. Ct. 640, 32 L. ed. 1051, 6 R. R. & Corp. L. J. 131; Chesapeake & Ohio Rd. Co. v. Miller, 114 U. S. 176, 21 L. ed. 121, 5 Sup. Ct. 813. The court after such review of the conflicting cases says: "We think it is now the rule, notwithstanding earlier decisions and *dicta* to the contrary, that a statute authorizing or directing the grant or transfer of the 'privileges' of a corporation, which enjoys immunity from taxation or regulation, should not be included as including that immunity," and concludes as above stated.

See also as supporting the rule in the text the following cases: Mercantile Bank v. Tennessee, 161 U. S. 160, 171, 40 L. ed. 656, 16 Sup. Ct. 466 (exemption from taxation is "a personal privilege in favor of the corporation therein specifically referred to, and it did not pass with the sale of that charter, and there is no express or clear intention of the law requiring that exemption to pass as a continuing franchise to the purchaser thereof," per Peckham, J.). Memphis & Little Rock Rd. Co. v. Railroad Commissioners, 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. 899 (right will not pass to successor unless intent of statute to that effect is clear and express); Railroad Companies v. Gaines, 97 U. S. 697, 24 L. ed. 1091; Kentucky C. R. Co. v. Commonwealth, 10 Ky. L. Rep. 706, 5 R. R. & Corp. L. J. 293, 10 S. W. 269; Baltimore, Chesapeake & Atlantic Ry. Co. v. Wicomico County Commrs., 103 Md. 277, 63 Atl. 678; Baltimore, Chesapeake & Atlantic Ry. Co. v. Ocean City, 89 Md. 89, 42 Atl. 922, 14 Am. & Eng. R. Cas. (N. S.) 195; State v. Morgan, 28 La. Ann. 482 (considered in note under

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that the franchises and rights of the former corporation had been purchased by the latter, such enactment does not exempt the purchasing company from taxation; especially so where the charter of the vendee, containing a permission for taxing its property, was granted and accepted independently of the old corporation, and it is neither alleged nor proved that in accepting the provisions of the last enacted statute the purchasing company undertook to perform any duty to the State in consideration of the supposed exemption, or that it was thereby induced to do anything of peculiar advantage to the State.[7] Again, where a railroad company is, for the purpose of constructing and repairing its road, invested with the powers and privileges and subjected to the obligations contained in certain enumerated sections of the charter of another company which was exempt from taxation, such grant does not include immunity from taxation.[8] Another and different course of reasoning has been applied as follows: Where a corporation incorporates under a general act which creates certain obligations and regulations, it cannot receive by transfer from another corporation an exemption which is inconsistent with its own charter or with the constitution or laws of the State then applicable, even though under legislative authority the exemption is transferred by words which clearly include it.[9]

§ 480, herein); Rochester, City of, v. Rochester Ry. Co., 182 N. Y. 116, aff'd 205 U. S. 236.

[7] Evansville, Henderson & Nashville R. R. Co. v. Commonwealth, 9 Bush (72 Ky.), 438. See Seaboard & R. R. Co. v. Norfolk County, 83 Va. 195, 2 S. E. 278.

[8] Railroad Co. v. Commissioners, 103 U. S. 1, 26 L. ed. 359.

[9] Rochester Ry. Co. v. City of Rochester, 205 U. S. 236, 51 L. ed. —, 27 Sup. Ct. 469 (aff'g 182 N. Y. 116). In this case this rule was applied to a contract of exemption with a street railway company from assessments for paving between the tracks, and the court, per Moody, J., said: "Here a corporation, deriving its right to exist under the act of 1884, is asserting an exemption from a duty imposed upon it by the law which created it. The authorities are numerous and conclusive that no corporation can receive by transfer from another an exemption from taxation or governmental regulation which is inconsistent with its own charter or with the constitution or laws of the State then applicable, and this is true, even though, under legislative authority, the exemption is transferred by words which clearly include it. Trask v. Maguire, 18

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§ 480. Exemption or Immunity from Taxation, etc., Continued—Judicial Sale—Sale Under Mortgage or Statutory Lien.—Upon the sale of the property and franchise of a railroad corporation under a decree founded upon a mortgage which in terms covers the franchise, or under a process upon a money judgment against the company, immunity from taxation upon the property of the company provided in the act of incorporation does not accompany the property in its transfer to the purchaser. The immunity from taxation in such cases is a personal privilege of the company and not transferable.[10]

Wall. (85 U. S.) 391, 21 L. ed. 938; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Maine Central R. R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; Railroad Co. v. Georgia, 98 U. S. 359; Louisville & Nashville R. R. Co. v. Palmes, 109 U. S. 244, 25 L. ed. 185; Memphis & Little Rock Rd. Co. v. Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; St. Louis, Iron Mountain & Southern Rd. Co. v. Berry, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. 529; Keokuk & Western Rd. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 482; Norfolk & Western Rd. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. 413; Yazoo & Mississippi Valley Ry. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. 240; Grand Rapids & Indiana Ry. Co. v. Osborn, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. ed. 598; San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. 261.

"The principle governing these decisions, so plain that it needs no reasoning to support it, is that those who seek and obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws then in force, whether written in the constitution, in general laws or in the charter itself." *Id.*, pp. 254, 255. The railroad company in this case was incorporated on February 25, 1890, under a law of New York, enacted May 6, 1884, chap. 252, Laws N. Y. 1884.

[10] Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860. See also Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. 413, noted under § 481, herein.

The privilege of exemption from taxation is not a transferable right where it is apparent from the charter that the State never intended to confer on the grantee the power to convey such right to another corporation or to a natural person; such right of exemption is an indivisible obligation and cannot be broken up and divided into as many obligations and rights as the incorporators may desire, nor can the right to expropriate property be parceled out among purchasers of the various divisions of a railroad. Several corporations possessing the rights and franchises stated cannot spring into existence by the act of a railroad company in mortgaging and selling separate divisions of their road with the rights and franchises applicable to each division, because this would be the exercise of a prerogative by a

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Where a statute of West Virginia regulated sales under foreclosure of mortgages by railroad companies, and provided that "such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale have constructed;" and that "upon such conveyance to the purchaser, the said company shall ipso facto be dissolved;" and further, that "said purchaser shall forthwith be a corporation" and "shall succeed to all such franchises, rights and privileges * * * as would have been had * * * by the first company but for such sale and conveyance," it was held that purchasers thus becoming a corporation derived the corporate existence and powers of the corporation from this act, and were subject to the general laws as to corporations then in force, and also that an immunity from taxation was not embraced in the words of description in the act, and did not pass to the new corporation.[11] A judicial sale and conveyance made under order of court, of the franchises of a corporation whose taxation is limited by statute of the State incorporating it to a rate therein named, carries to the purchaser, if anything, only the franchise to be a corporation; and a corporation organized to receive and receiving conveyance of such franchises, is not the same corporation as the original corporation, and is liable to taxation according to the constitution and laws of the State in force at the time of the sale, or which may be subsequently adopted or enacted, and is not entitled to the limitation and exemption contained in the original act of incorporation.[12] Again, the legislature of Florida, acting under the constitution of the State, passed an improvement act, exempting from taxation the capital stock of railroad companies accepting its provisions. The Alabama and Florida

creature that belongs exclusively to its creator. State v. Morgan, 28 La. Ann. 482.

[11] Chesapeake & Ohio Ry. Co. v. Miller, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. ed. 121.

[12] Mercantile Bank v. Tennessee, 161 U. S. 160, 40 L. ed. 656, 16 Sup. Ct. 466.

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Railroad Company was organized, and constructed a railroad within the state limits, and became entitled to enjoy the exemption. In 1868 the State of Florida adopted a constitution which provided for a uniform and equal rate of taxation, and that the property of corporations theretofore or thereafter to be incorporated should be subject to taxation. The road and property rights, privileges and franchises of the A. & F. Co. being sold under the decree of foreclosure, became by *mesne* conveyances vested in the Pensacola and Louisville Railroad Co. In 1872 the legislature enacted that the P. & L. Co., as assignees of the A. & F. Co., should be exempted from taxation during the remainder of the period for which the A. & F. Co. would have been exempted. In 1877 the title of the P. & L. Co., to its road and other property, and its franchises, rights, privileges, easements and immunities were conveyed to the Pensacola Railroad Company, and the legislature authorized the P. R. Co. to acquire and enjoy them. The P. & L. Co. possessed, among other things, the power to lease to a railroad company out of the State. It was claimed that this right passed to the P. R. Co., and the latter leased its railroad and property rights, privileges, easements and immunities to the plaintiff in error. It was held that the right of exemption from taxation did not pass from the A. & F. Co. to the P. & L. Co., by the sale under the mortgage. It was also decided that the language of the act of 1877 was broad enough to create that right anew, if the legislative grant was valid; but that the legislature of Florida, after the adoption of the constitution of 1868, could not make an original grant to a railroad, exempting its railroad property from taxation; and that any right of this kind that could have been created by the act of 1877, was personal and not assignable.[13] Where a decree to enforce a statutory lien is retained by the State, upon the property, real and personal, stock and franchises of a railroad company, and the property and franchises are sold, such property is thereafter subject to taxation under the laws of the State, as immunity there-

[13] Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. 193.

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from, if possessed by the company, does not pass to the purchaser.[14]

§ 481. Exemption or Immunity from Taxation, etc., Continued—Whether Passes on Consolidation of Corporations.—The question whether an exemption or immunity from taxation or governmental regulation passes on consolidation [15] of corporations necessarily involves the points whether by such consolidation an entirely new corporation is called into existence and the old constituent companies dissolved and de-

[14] Railroad Co. v. Hamblen, County of, 102 U. S. 273, 26 L. ed. 152. See also Wilson v. Gaines, 103 U. S. 417, 421, 26 L. ed. 401. "In the present case the lien of the State was put by the statute only on the property of the company. It did not even in express terms include the franchises which were necessary to the operation of the road. Under such circumstances, if there were nothing more, it would seem to be clear beyond all question that a sale under the lien would not necessarily carry with it any immunity from taxation which the property enjoyed in the hands of the original company," per Waite, C. J.

[15] *Distinction between consolidation and merger.* See Yazoo & Mississippi Valley Ry. Co. v. Adams, 180 U. S. 1, 21, 45 L. ed. 395, 21 Sup. Ct. 240.

Consolidation is a merger. Green County v. Conness, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. 69; State, Nolan, v. Montana R. Co., 21 Mont. 221, 53 Pac. 623, 11 Am. & Eng. R. Cas. (N. S.) 353, 45 L. R. A. 271.

Meaning of word consolidation. See the following cases:

United States: Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 308, 14 Sup. Ct. 592, 38 L. ed. 450; St. Louis, I. M. & S. Ry. Co. v. Berry, 113 U. S. 465, 466, 28 L. ed. 1055, 5 Sup. Ct. 529; Green County v. Conness, 109 U. S. 104, 3 Sup. Ct. 69, 27 L. ed. 872; Railroad Co. v. Georgia, 98 U. S. 359, 361, 25 L. ed. 185; Clearwater v. Meredith, 1 Wall. (68 U. S.) 25, 17 L. ed. 604; East St. Louis Connecting Rd. Co. v. Jarvis, 92 Fed. 735, 743, 34 C. C. A. 639; Tod v. Kentucky Union Land Co., 57 Fed. 47, 56, 57, case rev'd Marbury v. Union Land Co., 62 Fed. 335, 336.

Alabama: Meyer v. Johnston, 61 Ala. 603, 656.

Indiana: McMahan v. Morrison, 16 Ind. 172, 79 Am. Dec. 418.

Massachusetts: Adams v. Yazoo & M. V. R. Co., 77 Mass. 194, 24 So. 200, 205, 60 L. R. A. 33.

Michigan: Shadford v. Detroit, Y. & A. A. Ry. 130 Mich. 300, 89 N. W. 960; Pingree v. Michigan Central R. Co., 118 Mich. 314, 338, 76 N. W. 635, 53 L. R. A. 274.

Montana: State, Nolan, v. Montana R. Co., 21 Mont. 221, 53 Pac. 623, 11 Am. & Eng. R. Cas. (N. S.) 353, 45 L. R. A. 271.

Nebraska: State v. Atchison & N. R. Co., 24 Neb. 143, 38 N. W. 43, 8 Am. St. Rep. 464.

Oklahoma: Overstreet v. Citizens' Bank, 12 Okl. 383, 72 Pac. 370.

Pennsylvania: Lauman v. Lebanon Valley R. Co., 30 Pa. 42, 72 Am. Dec. 685.

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stroyed; whether such consolidated company is subject to a new constitution; and also the effect of a reservation of the right of the State to alter, amend or repeal charters and statutory grants. In numerous cases it is held that by consolidation a new corporation is created and that the old consolidating companies cease their existence;[16] that such new consolidated corporation is subject to an existing new constitution of the State adopted prior to the consolidation;[17] that its franchises are left to be determined by the general law as it existed at the time of consolidating;[18] and that a consolidation merges the franchises and privileges of each original corporation in the new company so that they continue to exist in respect thereto, that is, the old constituent companies retain their original status towards the public and the State the same as if the consolidation had not taken place.[19] The effect of consolidation, however, depends in every case upon the legislative intent as evi-

[16] Shaw v. City of Covington, 194 U. S. 593, 48 L. ed. —, 24 Sup. Ct. —; Minneapolis & St. L. Ry. Co. v. Gardner, 177 U. S. 332, 24 L. ed. 793, 20 Sup. Ct. 656; Keokuk & Western R. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. 592; Pullman's Palace Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. ed. 499; St. Louis, I. M. & S. Ry. Co. v. Berry, 113 U. S. 465, 5 Sup. Ct. 529, 28 L. ed. 1055; Clearwater v. Meredith, 1 Wall. (68 U. S.) 25, 17 L. ed. 604; Winn v. Wabash R. Co., 118 Fed. 55, 58; Citizens' St. Ry. Co. v. City of Memphis, 53 Fed. 715, 731, per Hammond, J.; Market St. R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225. See Rochester Ry. Co. v. City of Rochester, 205 U. S. 236, aff'g 182 N. Y. 116, noted under §§ 479, 482, herein.

[17] San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. 261; Yazoo & Mississippi Valley Ry. Co. v. Adams, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. ed. 395; Keokuk & Western R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450; Adams v. Yazoo & Mississippi Valley Ry. Co., 77 Miss. 194, 1 Miss. Dec. (No. 30) 296, 24 So. 200, 317, 60 L. R. A. 33.

[18] Shaw v. City of Covington, 194 U. S. 593, 48 L. ed. —; 24 Sup. Ct. —; Railroad Company v. Maine, 96 U. S. 499, 24 L. ed. 836.

[19] Green County v. Conness, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. 69; Railroad Company v. Maine, 96 U. S. 499, 24 L. ed. 836; Branch v. Charleston, 92 U. S. 677, 23 L. ed. 750; Charleston, City of, v. Branch, 15 Wall. (82 U. S.) 470, 21 L. ed. 193; Tomlinson v. Branch, 15 Wall. (82 U. S.) 460, 21 L. ed. 189; Citizens' St. Ry. Co. v. City of Memphis, 53 Fed. 715, 731, per Hammond, J. See Chesapeake & Ohio R. Co. v. Virginia, 94 U. S. 718, 24 L. ed. 310; Delaware Railroad Tax, 18 Wall. (85 U. S.) 206, 21 L. ed. 888.

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denced by the statute under which corporations are permitted to consolidate.[20] But it may be stated generally that in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee.[21]

§ 482. **Same Subject—When Exemption Does and Does not Pass—Illustrative Decisions.**—Where a railroad company is reorganized under a special act of the legislature but no

[20] Central Railroad & Bkg. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757; Edison Electric Light Co. v. New Haven Electric Co., 35 Fed. 233, 236, per Shipman, J.; Chicago, S. F. & C. R. Co. v. Ashling, 160 Ill. 373, 43 N. E. 373.

"We have been referred to many cases in which the courts have construed acts consolidating two or more existing corporations into one, and some acts where the legislature has authorized a merger of the stock of an existing corporation into another existing corporation, and united the property and management of the two corporations into one. In these cases it has often become important to determine whether the act authorizing the consolidation or merger created a new corporation and dissolved the old ones, or whether the legislative intent was to leave the original corporation still existing, with its rights, privileges and immunities. This is always a question of intent, to be gathered from the language of the act and circumstances surrounding each enactment. Thus, in Railroad Co. v. Maine, 96 U. S. 499, 24 L. ed. 836, and Railroad Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185, it was determined that these acts of consolidation were new charters, and subject to amendment or repeal, although the act of consolidation gave, in terms, all of the franchises, privileges and immunities of the old charters which were passed without the reservation of the State to amend or repeal. In Tomlinson v. Branch, 15 Wall (82 U. S.) 460, 462, 21 L. ed. 189, and Central R. R. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757, the Supreme Court decided that it was not the legislative intent to dissolve the existing charters and create a new one, and hence the privileges and immunities of the original charters, which were not subject to the reserved right of the State to repeal or annul, could not be changed without the consent of the corporation. The conclusions in these cases, as in the other cases, were arrived at by a construction of the legislative act, construed by the light of the surrounding circumstances in each case." Henderson v. Central Passenger Ry. Co., 21 Fed. 358, 364, per Barr, J.

[21] Norfolk & W. R. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. 413.

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new corporation is chartered, a statutory exemption from taxation is not destroyed.[22] So the act of Minnesota of 1881,[23] authorizing the consolidation of several railroad companies, created a new corporation upon which it conferred the franchises and immunities of the constituent companies except an exemption of stockholders from corporate debts.[24] And when two railroad corporations, whose shares are by a state statute exempt from taxation in the State, consolidate themselves into a new company under a state law which makes no provision to the contrary, and issue shares in the new company in exchange for shares in the old company, the right of exemption from taxation in the State passes into the new shares, and into each of them.[25] The following case is important as to the effect on franchises and exemptions of the consolidation of railroads in different States. The facts were as follows: By an act of the legislature of Maryland, passed in 1831, and its supplement, a corporation called the Delaware and Maryland Railroad Company was created, with authority to construct and maintain a railroad from a point on the Delaware and Maryland line to some point on the Susquehanna River; and by the nineteenth section of the act it was provided that the shares of the capital stock of the company should be exempt from the imposition of any tax or burden by the State assenting to the act, except upon that portion of the permanent and fixed works of the company, which might be within the State of Maryland. By an act of the legislature of Delaware, passed in 1832, and its supplement, another corporation was created, called the Wilmington and Susquehanna Railroad Company, with authority to construct and maintain a railroad from a point on the boundary line of Pennsylvania and Delaware to the city of

[22] Powers v. Detroit, Grand Haven & M. Ry. Co., 201 U. S. 543, 50 L. ed. 860, 20 Sup. Ct. 556.

[23] Act March 2, 1881, chap. 113.

[24] Minneapolis & St. L. Ry. Co. v. Gardner, 177 U. S. 332, 44 L. ed. 793, 20 Sup. Ct. 656, aff'g Gardner v. Minneapolis & St. L. Ry. Co., 73 Minn. 517, 76 N. W. 282.

[25] Tennessee v. Whitworth, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. ed. 830. Explained in Rochester Ry. Co. v. City of Rochester, 205 U. S. 236. See note to this case under §§ 479, 482.

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Wilmington, and thence towards the Susquehanna in the direction of Baltimore. In 1835 these two companies were, under acts of the legislatures of Maryland and Delaware, consolidated into one company, under the name of the latter—the Wilmington and Susquehanna Railroad Company. The act of Delaware, authorizing the consolidation on her part, provided that the holders of the stocks of the two companies should, when consolidated, hold, possess and enjoy all the property, rights and privileges, and exercise all the power granted to, and vested in, the companies, or either of them, by that law, or any other law or laws of that State, or of Maryland. The act of Maryland, authorizing the consolidation on her part, contained a similar provision. It was held, that the purpose of the two provisions was to vest in the new company the rights and privileges which the original companies had previously possessed under their separate charters; the rights and privileges in Maryland which the Maryland company had there enjoyed, and the rights and privileges in Delaware which the Delaware company had there enjoyed; not to transfer to either State and enforce therein the legislation of the other. The new company, after the consolidation, stood in each State as the original company had previously stood in that State, invested with the same rights, and subject to the same liabilities. The act of consolidation, so far as Delaware was concerned, had only this effect.[26] Again, a railroad corporation, formed, under an act of the legislature, by the consolidation of existing companies, and "vested with all the rights, privileges, franchises and property which may have been vested in either company prior to the act of consolidation," acquires no greater immunity from taxation than they severally enjoyed as to the portions of the road which belonged to them under their respective charters. Whatever property was subject to taxation would, after the consolidation, remain so.[27] So a state statute granting to a company incorporated by it "all the rights and privileges" which had been granted by a previous statute of the State to another

[26] Delaware Railroad Tax, 18 Wall. (85 U. S.) 206, 21 L. ed. 888.

[27] Chesapeake & Ohio R. R. Co. v. Virginia, 94 U. S. 718, 24 L. ed. 310.

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corporation, does not confer upon the new company an exemption from taxation beyond a defined limit which was conferred upon the other company by the act incorporating it.[28] And where an exemption from liability to any greater tax than one-half of one per centum of its net annual income has been conferred upon C. by its charter, it is not in the power of the legislature to impose an increased tax after the consolidation is effected; and inasmuch as M., the other consolidating company, possessed no such immunity under its charter, the power of the legislature to tax its franchises, property and income, remained unimpaired after its consolidation with C.[29] But it is also held that the consolidation of a Missouri corporation, under the Missouri act of 1869,[30] with an Iowa corporation, operated to extinguish the old company, and to form a new one as of the date of the consolidation, and the provisions concerning exemption from taxation in the old charter did not pass to the new company. Thus a railroad corporation, chartered in Missouri in 1857, with a provision that its property should be exempt from taxation for a period of twenty years after its completion, which took place in 1872, was consolidated with an Iowa corporation in 1870, under a general law of Missouri, and in 1886 the consolidated road was sold under a decree of foreclosure of a mortgage to purchasers who conveyed it to an Iowa corporation, and it was held, that the new organization held the Missouri road subject to the provision in the constitution of Missouri adopted in 1865, that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State." [31] In another case, the Philadelphia, Wilmington and Baltimore Railroad Company was formed by the union of several railroad com-

[28] Phœnix Fire & M. Ins. Co. v. Tennessee, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. ed. 660.

[29] Central Railroad & Bkg. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757.

[30] Act of March 2, 1869.

[31] Keokuk & Western R. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450.

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panies, which had been previously chartered by Maryland, Delaware and Pennsylvania, two of which were the Baltimore and Port Deposit Railroad Company, whose road extended from Baltimore to the Susquehanna, lying altogether on the west side of the river, and the Delaware and Maryland Railroad Company, whose road extended from the Delaware line to the Susquehanna, and lying on the east side of the river. The charter of the Baltimore and Port Deposit Railroad Company contained no exemption from taxation. The charter of the Delaware and Maryland Railroad Company made the shares of stock therein personal estate, and exempted them from any tax "except upon that portion of the permanent and fixed works which might be in the State of Maryland." It was held that under the Maryland law of 1841, imposing a tax for state purposes upon the real and personal property in the State, that part of the road of the plaintiff which belonged originally to the Baltimore and Port Deposit Railroad Company, was liable to be assessed in the hands of the company with which it became consolidated, just as it would have been in the hands of the original company. Also, that there was no reason why the property of a corporation should be presumed to be exempted from its share of necessary public burdens, there being no express exemption. The court also held, as it had on several other occasions held, that the taxing power of a State should never be presumed to be relinquished, unless the intention is declared in clear and unambiguous terms.[32] Again, although two corporations may be so united by one of them holding the stock and franchises of the other, that the latter may continue to exist and also to hold an exemption under legislative contract, that is not the case where its stock is exchanged for that of the former and by operation of law it is left without stock, officers, property or franchises, but under such circumstances it is dissolved by operation of the law which brings this condition into existence.[33] And where two or more corporations, sub-

[32] Philadelphia, W. & B. R. R. Co. v. Maryland, 10 How. (51 U. S.) 376, 13 L. ed. 461.

[33] Rochester Ry. Co. v. City of Rochester, 205 U. S. 236, 51 L. ed. —, 27 Sup. Ct. —, aff'g 182 N. Y. 116.

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jected to a special tax upon income of their roads, with immunity from other taxation—the amount of such special tax being dependent upon reports to be made and information communicated by their directors and other officers—are consolidated into a new corporation, with different directors and other officers, who are neither bound nor able to make the reports and give the information required of the original companies, the new corporation thus created is not entitled to the immunity of the original companies from general taxation.[34]

Upon this point the court, per Moody, J., said: "It is insisted that this is not a case of transfer of an exemption; that the rules governing transfer are not applicable here; that the Brighton Railroad has not ceased to exist as a corporation; that it has been merely joined by merger with the Rochester Railroad, which controls it by stock holdings, and operates it by virtue of its franchises; and that, therefore, the Rochester Railroad may claim and enjoy the exemption of the Brighton Railroad in its behalf in respect of its property. In support of this view counsel cite Tomlinson v. Branch, 15 Wall. (82 U. S.) 460, 21 L. ed. 189; Central Railroad v. Georgia, 92 U. S. 665, 23 L. ed. 757; Tennessee v. Whitworth, 117 U. S. 139, 6 Sup. Ct. 649, 29 L. ed. 833. These cases hold that where corporations are united in such manner that one continues to exist as a corporation, owning and operating its property, by virtue of its own charter, the corporation thus continuing to exist still holds its immunities and exemptions in respect of the property to which they apply. But the cases have no application here. It may well be that a proceeding for condemnation of property, begun by the Brighton Railroad, would not abate by reason of its consolidation with the Rochester Railroad, as held in 43 State Reporter, 651, affirmed 133 N. Y. 690. An examination, however, of the statute under which the union of the two corporations was made, and the transactions by which the union was accomplished, shows that the Brighton Railroad has ceased to exist as a corporation. The Rochester Railroad first took a lease of the Brighton Railroad, apparently for the purpose of bringing itself within the provisions of the act of 1879. Then all the stock of the latter corporation was acquired by exchange of shares of stock of the former corporation. Then a certificate of the transfer of stock was filed with the Secretary of State. Thereupon, by operation of the law, the 'estate, property, rights, privileges and franchises' of the Brighton Railroad vested in the Rochester Railroad, to be thereafter controlled by the Rochester Railroad in its own corporate name. The law does not expressly dissolve the selling corporation, but it leaves it without stock, officers, property, or franchise. A corporation without shareholders, without officers to manage its business, without property with which to do business, is dissolved by the operation of the law which brings this condition into existence." *Id.*, 255, 256.

[34] Railroad Co. v. Maine, 96 U. S. 499, 24 L. ed. 836.

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§ 483. **Exemption or Immunity from Taxation, etc.—Rule as to Effect of Reservation of Power to Alter, Amend or Repeal.**[35]—Whenever a consolidated corporation becomes, by the terms and intent of the statute under which its consolidation has been effected, a new company subject to existing constitutions and legislative enactments reserving the right to alter, amend or repeal charters or grants of franchises, an irrepealable contract right to an exemption from taxation or governmental regulation will not pass to it as successor. The rule is stated in a case in the Federal Supreme Court as follows: "It is, moreover, conclusively determined that where the constitution of a State reserves the power to repeal, alter or amend a charter, such provision is applicable to the charter of a consolidated corporation where, as the result of the consolidation, a new corporation takes being, new stock is provided for, new franchises are conferred and new officers appointed. In other words, that where a legislature is inhibited by the constitution from making an irrepealable charter it cannot create a new contract and bring into being a new corporation, and yet by the charter of such corporation give rise to the irrepealable contract which the constitution absolutely prohibits. To state the doctrine in another form, it is thus: That where a new corporation is chartered, subject to a constitution which forbids the granting of an irrepealable right, such new corporation cannot become endowed by the effect of a legislative contract with an irrepealable right forbidden by the constitution. If one of the constituent elements of the corporation possessed, prior to the formation of the new corporation, such right, and under the assumption that the right itself passed to the new body, it loses its irrepealable character, because the new corporation is subject to the very law of its being to the provision of the constitution forbidding irrepealable grants. The doctrine as just stated has been so frequently declared by this court that it is no longer open to discussion." [36]

[35] See §§ 301–340, 457–461, herein.

[36] Northern Central Ry. Co. v. Maryland, 187 U. S. 258, 267, 268, 47 L. ed. 167, 23 Sup. Ct. 60, per White, J., adding the following: "The whole subject has been so re-

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§ 484. **Same Subject—Illustrative Decisions.**—In the case quoted from in the last preceding section it is held that when a Maryland corporation, chartered in 1827, and possessing certain immunities from taxation, which under the then constitution might have been irrepealable, becomes merged with other corporations in an entirely new corporation possessing new rights and franchises, created after the constitution of 1850, under which the legislature had power to alter and repeal charters of, and laws creating, corporations, the right of exemption, if it ever passed to the new corporation, was subject to the right of repeal, and hence was not protected from repeal by the contract clause of the Federal Constitution. It was also decided that an act of the legislature compromising litigation between the State and such new corporation arising from the claim of the latter that it was exempt from taxation under the immunities at one time possessed by one of its constituent corporations, and fixing a rate of taxation to be paid annually thereafter by the new corporation, could not be regarded as a legislative contract granting an irrepealable right forbidden by the then existing constitution of the State. Therefore, if the legislature subsequently passed another act fixing a higher rate of taxation, and the highest court of the State has decided that such act repeals the former act and subjects the corporation to the higher rate of taxation, the latter act is not bad as impairing the obligation of contracts within the purview of the Constitution of the United States, as the compromise, when made, was subject to the right to repeal, reserved by the constitution of the State at that time.[37] In Covington & Lexington Turnpike R. Co. v. Sandford,[38] the legislature of Kentucky, by an act passed in 1834, created the Covington & Lexington Turnpike Road Company with authority to construct a turnpike from Covington to Lexington. One section prescribed rates of tolls

cently fully reviewed and restated it is sufficient to refer to that case: Yazoo & Mississippi Valley Ry. Co. v. Adams, 180 U. S. 1, 17 *et seq.*, 21 Sup. Ct. 240, 45 L. ed. 395, and authorities there cited."

[37] Northern Cent. Ry. Co. v. Maryland, 187 U. S. 258, 47 L. ed. 167, 23 Sup. Ct. 60.

[38] 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198.

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which might be exacted; another provided: "That if at the expiration of five years after the said road had been completed, it shall appear that the annual net dividends for the two years next preceding of said company, upon the capital stock expended upon said road and its repairs, shall have exceeded the average of fourteen per cent per annum thereof, then and in that case, the legislature reserves to itself the right, upon the fact being made known, to reduce the rates of toll, so that it shall give that amount of dividends per annum, and no more." In 1851 two new corporations were created out of the one created by the act of 1834, one to own and control a part of the road, and the other the remaining part, and each of the new companies was to possess and retain "all the powers, rights and capacities in severalty granted by the act of incorporation, and the amendments thereto, to the original company." In 1865 an act was passed reducing the tolls to be collected on the Covington and Lexington turnpike. In 1890 another act was passed largely reducing still further the tolls which might be exacted. It was held: (1) That the new corporations created out of the old one did not acquire the immunity and exemption granted by the act of 1834 to the original company from legislative control as to the extent of dividends it might earn; (2) that the statute of 1856,[39] reserving to the legislature the power to amend or repeal at will charters granted by it, had no application to charters granted prior to that date; (3) that an exemption of immunity from taxation is never sustained unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption. In Hoge v. Railroad Co.[40] it appeared that in 1856, the legislature of South Carolina incorporated the Air Line Railroad Company, with power to construct a road between certain points, and to equip, use and enjoy the same, with all the rights, privileges and immunities, granted to a certain other company which had been incorporated in 1845 by an act exempting it from taxation for the period of thirty-six

[39] Kentucky Act of February 14, 1856.

[40] 99 U. S. 348, 25 L. ed. 303.

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years, and from the operation of the provisions of the act of 1841.[41] The latter act declared "that it shall become part of the charter of every corporation which shall, at the present or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall, in express terms except it), that every charter of incorporation granted, renewed, or modified as aforesaid shall at all times remain subject to amendment, alteration, or repeal by the legislative authority." The act of 1856 also empowered the company to unite with any other, and consolidate their management, but contained no clause excepting, in express terms, the charter from the operation of the act of 1841. An amendment, passed in 1868, authorized it to adopt another corporate name, and it was consolidated with a corporation of Georgia under the name of the Atlanta and Richmond Air Line Railway Company. The constitution of South Carolina of 1868 having required that the property of corporations then existing or thereafter created should be subject to taxation, the legislature imposed a tax on such property. A stockholder of the latter company, alleging that it had acquired immunity from taxation for the same period as the company chartered in 1845, and that such immunity was beyond legislative control, brought suit to enjoin the collection of the tax. It was held: (1) That, as the act of 1856 granting the charter did not expressly exempt it from the provisions of the act of 1841, they were applicable to it; (2) that the charter must be read as if it declared that the capital stock of the company and its real estate should be exempt from taxation for thirty-six years, unless the legislature should in the meantime withdraw the exemption; (3) that if an exemption from future legislative control had been originally acquired by the company, it ceased when the amendment to the charter was obtained in 1868. In Railroad Company v. Georgia[42] a provision of the statutory code of Georgia[43] enacted that private corpo-

[41] Act of December 17, 1841.
[42] 98 U. S. 359, 25 L. ed. 185.
[43] In effect January 1, 1863.

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rations were subject to be changed, modified or destroyed at the will of the creator, except so far as the law prohibited it, and that in all cases of private charters thereafter granted, the State reserved the right to withdraw the franchise, unless such right was expressly negatived in the charter. Two railroad companies created prior to that date, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by virtue of an act of the legislature [44] which authorized a consolidation of their stocks, conferred upon the consolidated company full corporate powers, and continued to it the franchises, privileges and immunities which the companies had held by their original charters. It was decided that by the consolidation the original companies were dissolved, and a new corporation was created, which became subject to that provision of the Code. It was also held that a subsequent legislative act, taxing the property of such new corporation as other property in the State was taxed, was not prohibited by that provision of the Constitution of the United States which declares that no State shall pass a law impairing the obligation of contracts; and that the judgment of the highest court of a State, that a statute has been enacted in accordance with the requirements of the state constitution, was conclusive upon the Federal Supreme Court, and would, therefore, not be reviewed. And in Railroad Company v. Maine,[45] it is held that the statute of Maine of 1856, authorizing two or more existing corporations to consolidate and form a new corporation, was an act of incorporation of the new company; and the latter, upon its formation, became at once subject to the provisions of the general law of 1831, which declared that any act of incorporation subsequently passed should at all times thereafter "be liable to be amended, altered or repealed at the pleasure of the legislature, in the same manner as if express provision to that effect were therein contained, unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary." Therefore, so long as this provision remained unrepealed, subsequent legislation not re-

[44] Act of April 18, 1863.

[45] 96 U. S. 499, 24 L. ed. 836.

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pugnant to it was controlled by it, and should be construed and enforced in connection with it; and there being no limitation, in the act of 1851, upon the power of amendment, alteration and repeal, the State, by the reservation in the law of 1831, which is to be considered as embodied in that act, retained the power to alter it in all particulars constituting the grant of corporate rights, privileges and immunities to the new company formed under it, thereby keeping under control of the State the existence of the corporation, and its franchises and immunities derived directly from said State; although rights and interests acquired by the company and not constituting a part of the contract of incorporation were held to stand upon a different footing.

§ 485. **Forfeiture of Franchise—Legislative Power as to.**—Although a franchise must have its source in or emanate from the sovereign power, and that power alone can grant it and make possible its exercise,[46] still when it, or the charter which evidences it,[47] is once lawfully granted, either under a general or special act and accepted, it becomes surrounded by constitutional guarantees of protection which no legislative body can set aside and ignore by declaring a forfeiture or by otherwise unconstitutionally destroying the franchises, privileges or charter rights of a lawfully existing corporation. If, however, there is reserved by the State a right to alter, amend or repeal a charter or statutory rights, such reservation enters into and becomes a part of the contract between the State and a grantor, and the corporation or grantee, and the power of the State thereunder may be exercised subject to certain limitations.[48] The legislative power to enact any statute which repeals, revokes, forfeits, or annuls charters or statutory grants of rights, privileges or franchises to a corporation is, therefore, restricted. So that any attempt of a state legislature or of the council of a municipality to take away, or change the ownership of a franchise, or to confiscate the same or to forfeit or take

[46] See §§ 122, 132 *et seq.*, herein.
[47] See §§ 41–46, herein.
[48] See §§ 301–340, herein.

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forcible possession thereof or in effect to condemn the company's property, may constitute a taking of property without due process of law.[49] But it is held by the Federal Supreme Court that where a grant of land and connected franchises is made to a corporation for the construction of a railroad by a statute, which provides for their forfeiture upon failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act without judicial proceedings to ascertain and determine the failure of the grantee; and that public assertion by legislative act of the ownership of the State after the default of the grantee—such as an act resuming control of the road and franchises, and appropriating them to particular uses, or granting them to another corporation to perform the work—is equally effective and operative. This case, it will be observed, was one of condition precedent.[50] It is likewise decided that where an ordinance granting a franchise to a street railway company reserves an option to forfeit, if the company defaults in paying certain expenses for street paving, the city has a right to declare such forfeiture in case of such default.[51]

[49] Iron Mountain R. Co. v. Memphis, 96 Fed. 113, 37 C. C. A. 410; People v. O'Brien, 111 N. Y. 1, 19 N. Y. St. Rep. 173, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255. Examine Farmers' Loan & Tr. Co. v. Galesburg, 133 U. S. 156, 34 L. ed. 573, 10 Sup. Ct. —; Nebraska Teleph. Co. v. City of Fremont (Neb.), 99 N. W. 811; United Electric Co. v. City of Bayonne (N. J., 1906), 63 Atl. 996; Phillipsburg Electric Lighting, H. & P. Co. v. Town of Phillipsburg, 66 N. J. L. 505, 49 Atl. 445, 8 Am. Elec. Cas. 149; Seaboard Teleg. & Teleph. Co. v. Kearney, 74 N. Y. Supp. 15, 68 App. Div. 283; Archbald v. Carbondale Traction Co., 3 Pa. Dist. R. 751, 15 Pa. Co. Ct. 159.

[50] Farnsworth v. Minnesota & Pacific Rd. Co., 92 U. S. 49, 23 L. ed. 530. See Atlantic & Pacific R. Co. v. Mingue, 165 U. S. 413, 433, 41 L. ed. 770, 17 Sup. Ct. 348; Schlesinger v. Kansas City & S. Ry. Co., 152 U. S. 444, 453, 14 Sup. Ct. 647, 38 L. ed. 507; Bybee v. Oregon & California Ry. Co., 139 U. S. 663, 675, 11 Sup. Ct. 641, 35 L. ed. 305; McMichen v. United States, 97 U. S. 204, 218, 24 L. ed. 947; Oakland R. Co. v. Oakland, etc., R. Co., 45 Cal. 365. Examine Seaboard Teleg. & Teleph. Co. v. Kearney, 74 N. Y. Supp. 15, 68 App. Div. 283; Dusenberry v. New York, W. & C. Traction Co., 61 N. Y. Supp. 420. Compare Utah, N. & C. R. Co. v. Utah & C. Ry. Co., 110 Fed. 879.

As to condition subsequent and ipso facto, forfeiture see § 486, herein.

[51] Union St. Ry. Co. v. Snow, 113

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§ 486. Forfeiture of Franchise—Judicial Determination of—Quo Warranto—State Officials—Ipso Facto Forfeiture.—Although an exception may exist in that class of cases which rest upon an expressed condition for forfeiture in the grant, as appears in the Federal decision given in the last preceding section, nevertheless it seems to be a generally conceded rule that the question, whether or not a corporation has committed or omitted any act which should result in a forfeiture of its franchise or charter, is one which, in the absence of a reserved legislative power to repeal, alter or amend, is a matter for judicial cognizance, and can only be inquired into by a proceeding consistent with the law and appropriate for that purpose, instituted by the proper authorities. In other words, the default and forfeiture must be judicially determined, and the legislature excluded from the exercise of judicial junctions.[52] The State has, however, the right to determine through its courts whether the conditions upon which a charter was granted to a corporation have been complied with;[53] and a proper

Mich. 694, 4 Det. Leg. N. 455, 71 N. W. 1073.

[52] **Alabama**: Block v. O'Connor Min. & Mfg. Co., 129 Ala. 528, 29 So. 925, Code, § 3417.

California: Los Angeles Holiness Band v. Spires, 126 Cal. 541, 58 Pac. 1049; Arcata v. Arcata & M. R. Co., 92 Cal. 639, 28 Pac. 676.

Illinois: Lincoln Park Chapter, etc., v. Swatek, 204 Ill. 228, 68 N. E. 429, aff'g 105 Ill. App. 604.

Maine: Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001.

Nebraska: Nebraska Teleph. Co. v. City of Fremont (Neb.), 99 N. W. 811.

New York: Brooklyn Elevated R. Co., In re, 125 N. Y. 434, 35 N. Y. St. Rep. 451, 26 N. E. 474, 9 Ry. & Corp. L. J. 264, 46 Am. & Eng. R. Cas. 251, aff'g 32 N. Y. St. Rep. 1065, 11 N. Y. Supp. 161.

North Carolina: Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263.

South Carolina: State, Spartanburg, v. Spartanburg, C. & G. R. Co., 51 S. C. 129, 28 S. E. 145 (so unless contrary legislative intent clearly apparent).

Texas: Rippstein v. Haynes Medina Valley Ry. Co. (Tex. Civ. App.), 85 S. W. 314.

See Oliphant Sewage Drainage Co. v. Borough of Oliphant (Pa. Com. Pl.), 5 Lack. Leg. N. 346.

[53] New Orleans Debenture Redemption Co. v. Louisiana, 180 U. S. 320, 45 L. ed. 550, 21 Sup. Ct. —; Utah, N. & C. R. Co. v. Utah & C. Ry. Co., 110 Fed. 879.

Equity jurisdiction to decree forfeiture. See United States v. Union Pac. Ry. Co., 98 U. S. 569, 25 L. ed. 143; Coquard v. National Linseed Oil Co., 171 Ill. 480, 49 N. E. 563, aff'g 67 Ill. App. 20 (has no general

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remedy is by quo warranto, or an action in the nature of quo warranto at the suit of the State to test the right of a corporation to exercise its franchises, or to declare them forfeited.[54] A state banking board may also be empowered by the State to revoke a certificate of an investment company where sufficient grounds exist therefor under the statute.[55] But it is held in Texas that the Secretary of State has no power to forfeit a franchise under the statute of 1897.[56] A non-performance of a condition subsequent does not ipso facto forfeit the existence or rights of a corporation, but only constitutes a ground of forfeiture through proper judicial proceedings.[57]

power to); Seymour Water Co. v. City of Seymour (Ind.), 70 N. E. 514 (when will not be decreed); Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909 (when will not; but within judicial power to do so).

[54] New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. ed. 936; United States v. Union Pac. Ry. Co., 98 U. S. 569, 25 L. ed. 143; Utah, N. & C. R. Co. v. Utah & C. Ry. Co., 110 Fed. 879; People v. Chicago Telephone Co., 220 Ill. 238, 77 N. E. 245; People, McIlhany, v. Chicago Live Stock Exch., 170 Ill. 556, 48 N. E. 1062, 39 L. R. A. 373, 7 Am. & Eng. Corp. Cas. (N. S.) 341; Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001.

The ancient writ of quo warranto is the proper remedy to seize into the hands of the State the franchises of a corporation which has forfeited them by misuser or nonuser. State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 41 Am. Dec. 509.

[55] State v. Northwestern Trust Co. (Neb.), 101 N. W. 14, under Laws 1903, p. 275, c. 29, § 9.

[56] Rippstein v. Haynes Medina Valley Ry. Co. (Tex. Civ. App.), 85 S. W. 314, under Sayles' Ann. Civ. Stat. 1897, art. 5243*i*.

Private person; right of to insist on forfeiture. See People, Byars, v. Grand River Bridge Co. (Colo.), 21 Pac. 898, 2 Denver Leg. N. 225 (when cannot; when can); Brooklyn Elev. R. Co., In re, 125 N. Y. 434, 35 N. Y. St. R. 451, 26 N. E. 474, 9 Ry. & Corp. L. J. 264, 46 Am. & Eng. R. Cas. 251, aff'g 32 N. Y. St. Rep. 1065, 11 N. Y. Supp. 161; Attorney Genl. v. Continental Life Ins. Co., 53 How. (N. Y.) 16 (attorney general's power exclusive under N. Y. Laws 1853, ch. 463); Dern v. Salt Lake City R. Co., 19 Utah, 46, 56 Pac. 556 (when cannot).

[57] Utah, N. & C. R. Co. v. Utah & C. Ry. Co., 110 Fed. 879.

Examine as to ipso facto forfeiture or dissolution the following cases:

—**New York**; Coney Island, Ft. H. & B. R. Co. v. Kennedy, 44 N. Y. Supp. 825, 15 App. Div. 588 (when failure to construct street railway in certain time not ipso facto a forfeiture).

—**Pennsylvania**; West Manayunk Gas Light Co. v. New Gas Light Co., 21 Pa. Co. Ct. 369 (franchises revert ipso facto for failure to construct within certain time, under Pa. Act April 29, 1874, as am'd by Pa. Act April 17, 1876, P. L. 37).

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§ 487. **Courts Reluctant to Adjudge Forfeitures and Will Proceed with Caution.**—Because of their reluctance in adjudging a forfeiture [58] the courts will proceed with extreme caution in proceedings which are intended to effect a forfeiture of corporate franchises, and such forfeiture will not be allowed, except under express limitation, or for a plain abuse of power by which the corporation fails to fulfill the design and purpose of its organization.[59]

§ 488. **Forfeiture of Franchise—Abuse, Misuser or Non-user of Corporate Powers.**—A grant of corporate franchises is necessarily subject to the condition that the privileges and franchises conferred shall not be abused; or employed to defeat the ends for which they were conferred; and that when abused or misemployed, they may be withdrawn by proceedings consistent with law.[60] It is the neglect of corporate duties, or the abuse of them; or, in other words, the failure to live up to the fundamental law of their being, which the law regards as sufficient cause for extinguishing the existence of corporations;[61] and where the corporation does not fulfill the purposes for which it was organized or there is an abuse or a misuser, or non-user of corporate powers, or the express provisions of the law from which those powers are derived are

South Carolina: State, Spartanburg, v. Spartanburg, C. & G. R. Co., 51 S. C. 129, 28 S. E. 145 (when non-user or misuser does not ipso facto dissolve).

Texas: Houston v. Houston B. & M. P. R. Co., 84 Tex. 581, 19 S. W. 786 (statute self-executing; failure to construct and operate in specified time); Bywaters v. Paris & G. W. R. Co., 73 Tex. 624, 11 S. W. 856 (judicial proceedings unnecessary where construction not begun within time limit of Rev. Stat., art. 4278).

Wisconsin: Attorney Genl. v. Superior & St. C. R. Co., 93 Wis. 604, 67 N. W. 1138 (not ipso facto dissolved by suspension of business for one year or by non-user).

[58] Topeka v. Topeka Water Co., 58 Kan. 349, 49 Pac. 79.

[59] Commonwealth v. Monongahela Bridge Co., 216 Pa. 108, 116, 64 Atl. 909 (quoting from High on Extraordinary Leg. Rem., § 649). In this case all the shares in a bridge company were held by a municipality.

[60] Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. ed. 1084.

[61] State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 41 Am. Dec. 509.

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violated its franchises may be forfeited and the State has power to so forfeit through the courts.[62]

§ 489. **Nature and Extent of Misuser or Non-user Justifying Forfeiture.**—As to misuser, it must appear that there has

[62] **United States:** New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. 691; Given v. Wright, 117 U. S. 648, 656, 6 Sup. Ct. 907, 29 L. ed. 1021 ("non-user is one of the common grounds"); Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; Illinois Trust & Savings Bank v. Ottumwa Electric Ry. (C. C.), 89 Fed. 325.

Arkansas: State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 41 Am. Dec. 509 (misuser and non-user are the only grounds).

Illinois: People v. Chicago Teleph. Co., 220 Ill. 238, 77 N. E. 245 (information alleging misuse and abuse; State's ground for relief).

Louisiana: State v. New Orleans Waterworks Co., 107 La. 1, 31 So. 395 (misuse and injury to the public; and acts or omissions willful and continued).

Maine: Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001 (unreasonable neglect of public duty and discrimination may constitute ground for forfeiture).

Minnesota: See Tower v. Tower & S. Street R. Co., 68 Minn. 500, 38 L. R. A. 541, 71 N. W. 691.

Missouri: State, Hadley, v. Delmar Jockey Club (Mo., 1906), 92 S. W. 185 (substantial failure to fulfill purposes for which organized); State, Kansas City, v. East Fifth St. R. Co., 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218 (non-user; entire failure to operate as required by ordinance, continued for three years).

New Jersey: Phillipsburg Electric Lighting, H. & P. Co. v. Town of Phillipsburg, 66 N. J. L. 505, 49 Atl. 445, 8 Am. Elec. Cas. 149 (violation of charter or laws of State renders liable to proceedings to forfeit; but ordinance of common council granting permission to erect poles and wires cannot for that reason be repealed).

Tennessee: State v. Chilowee Woolen Mills, 115 Tenn. 266, 89 S. W. 741 [statute (Shannon's Code, §§ 5165, 5181) as to forfeiture for non-user, omissions, negligence, abuse, or surrender of corporate powers].

Texas: City Water Co. v. State (Tex. Civ. App.), 33 S. W. 259 (neglect to perform corporate duties, such as non-election of officers or directors, failure to hold meetings, etc., for eight years).

What does not constitute misuse, non-use or abuse of corporate powers, etc. See Commonwealth v. Newport L. & A. Turnpike Co., 29 Ky. L. Rep. 1285, 997 S. W. 375, 30 Ky. L. Rep. 1235, 100 S. W. 871; Belton, In re, 47 La. Ann. 1614, 18 So. 642, 30 L. R. A. 648, 2 Am. & Eng. Corp. Cas. (N. S.) 219 (death of or failure to elect officers, or burning of corporate plant works of itself no dissolution); Philadelphia & M. R. Co.'s Appeal, 187 Pa. 123, 42 W. N. C. 419, 40 Atl. 967 (non-exercise of added privilege or of one of several privileges); Wright v. Milwaukee Electric R. & L. Co., 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47 (no such

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been such neglect or disregard of the trust, or such perversion of it to the private purposes of the corporation or corporations, as in some manner or degree to lessen its utility to those for whose benefit it was instituted, or else to work some other public injury. It must be, in some sense or other, a misdemeanor in violation of the trust.[63] So a single case of misuser

abandonment or non-user of to warrant presumption of surrender of franchise; non-user continued for four years although old, but worthless rails and ties removed, some of the property was left in place, however, and the period was one of great financial and industrial depression).

See also as to abandonment, McCutcheon v. Merz Capsule Co., 71 Fed. 787, 19 C. C. A. 108 (holding stock in other corporations); Africa v. Knoxville (C. C.), 70 Fed. 729 (franchise of street railway under city's consent; abandonment must arise in same way as though franchise directly from State); Babcock v. Scranton Traction Co. (Pa. C. P.), 1 Lack. L. News, 223 (permitting, without objection, another street railway company to lay tracks in same street abandons franchise of street railway company).

Consent of sovereign power necessary to enable corporation to cease operation of street railway lines. State, Grinsfelder, v. Spokane St. R. Co., 19 Wash. 518, 11 Am. & Eng. R. Cas. (N. S.) 62, 53 Pac. 719, 41 L. R. A. 515.

Municipality cannot contract away right to forfeiture for non-user of a franchise of a street railway company to its streets. State, Kansas City, v. East Fifth St. R. Co., 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 248.

"For all Franchises are derived from the Crown, and therefore are extinguished, if they come to the Crown again, by Escheat, Forfeiture, or the like, for the greater drowns the less. A Franchise * * * is forfeited by Misuser thereof. * * * Misuser of any Point, where there is many in one Franchise, is a Forfeiture of the whole; but not where the Franchises are several." Finch's Laws of Eng., 126 [38].

"A private corporation created by the legislature may lose its franchises by a misuser or non-user of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished." Terrett v. Taylor, 9 Cranch (13 U. S.), 43, 51, 3 L. ed. 650, per Story, J.

[63] State v. Real Estate Bank, 5 Pike (5 Ark.), 595, 41 Am. Dec. 509.

"Hence, if they engage in any business not authorized by the statute, it is *ultra vires*, or in excess of their powers, but not a usurpation of franchises not granted, not necessarily a misuser of those granted. Acts in excess of power may undoubtedly be carried so far as to amount to a misuser of the franchise to be a corporation and a ground for

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without resulting public injury, or suspension, or delay or non-user for a limited time, or a temporary interruption by *vis major* of the use of a franchise will not constitute a ground of forfeiture,[64] and in New York, under the Code, the period of non-user must have been continued for at least one year; that is, the corporation must have suspended its ordinary and lawful business for that period.[65]

§ 490. **When Franchise Will Be Forfeited—Instances.**—Where a statute or charter imposes upon a railroad corporation any or all of the conditions that it shall begin construction or complete or operate its road within a certain time, its franchise may be forfeited or the corporation dissolved by non-compliance therewith.[66] A failure to furnish pure water, or to

its forfeiture. How far it must go to amount to this the courts have wisely never attempted to define, except in very general terms, preferring the safer course of adopting a gradual process of judicial inclusion and exclusion as the cases arise. But we think it may be safely stated as the general *consensus* of the authorities that, to constitute a misuser of the corporate franchise, such as to warrant its forfeiture, the *ultra vires* acts must be so substantial and continued as to amount to a clear violation of the condition upon which the franchise was granted, and so derange and destroy the business of the corporation that it no longer fulfills the end for which it was created. But, in case of excess of powers, it is only where some public mischief is done or threatened that the State, by the Attorney General, should interfere." State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 225, 226, 41 N. W. 1020, 3 L. R. A. 510, per Mitchell, J.

[64] Bridgewater Ferry Co. v. Sharon Bridge Co., 145 Pa. 404, 29 W. N. C. 141, 22 Pitts. L. J. (N. S.) 143, 48 Leg. Int. 516, 22 Atl. 1039; Commonwealth v. New York, L. E. & W. C. & R. Co., 10 Pa. Co. Ct. 129.

[65] People v. Atlantic Ave. R. Co., 125 N. Y. 513, 35 N. Y. St. Rep. 872, 26 N. E. 622, 9 Ry. & Corp. L. J. 262, aff'g 10 N. Y. Supp. 907, 32 N. Y. St. Rep. 717, 57 Hun, 378, under N. Y. Code Civ. Proc., § 1785. Examine People v. Seneca Lake Grape & Wine Co., 52 Hun (N. Y.), 174, 17 C. P. 130, 23 N. Y. St. Rep. 346, 5 N. Y. Supp. 136, aff'd 126 N. Y. 631, 36 N. Y. St. Rep. 1013, 27 N. E. 410; Ward v. Sea Ins. Co., 7 Paige (N. Y.), 294; Bliven v. Peru S. & I. Co., 9 Abb. N. C. (N. Y.) 205.

[66] Commonwealth v. Middletown Electric Ry. Co., 23 Pa. Co. Ct. R. 262, 2 Dauph. Co. Rep. 316, 6 Lack. Leg. N. 81 (holding also that delay was occasioned by injunction no excuse); State, Ellis, v. Nonconnah Turnp. Co. (Tenn.), 17 S. W. 128. Examine Bonaparte v. Baltimore, H. & L. R. Co., 75 Md. 340, 23 Atl. 784, 49 Am. & Eng. R. Cas. 198 (where time limit for commencing and completing road has expired, street railway company has no legal existence); Brooklyn, Q. C. & S. R. Co., In re, 94

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furnish a proper supply of water may warrant a forfeiture;[67] and discrimination to prevent competition may be a ground for a forfeiture.[68] So a forfeiture will be adjudged for charging higher rates for water than are charged by a city;[69] and for failure to keep general offices and the treasurer's office and its moneys within a State.[70]

§ 491. **When Franchise Will not Be Forfeited —Instances.** —A franchise will not be forfeited or the corporation dissolved for non-compliance with a condition in its charter or statute requiring it to organize and commence business within a specified time, or where there is a failure on the part of a railroad company to comply with any or all of the conditions imposed by its charter or statute as to beginning, completing or operating its road within a certain time, where the circumstances are such as to excuse such non-compliance or failure or

N. Y. Supp. 113, 106 App. Div. 240, aff'd 185 N. Y. 171, 77 N. E. 994 (statutory limitation as to beginning construction, expending a certain per cent of stock on road, completing and operating same includes extensions); Dusenberry v. New York, W. & C. Traction Co., 61 N. Y. Supp. 420 (if no excuse offered for street railway's failure to comply with condition as to completion and operation it will be temporarily enjoined); Houston v. Houston, B. & M. P. R. Co., 84 Tex. 581, 19 S. W. 786 (forfeiture applies only to uncompleted portions of railway in accordance with condition; substantial completion necessary); Rio Grande & W. R. Co. v. Telluride Power Transmission Co., 16 Utah, 125, 51 Pac. 146, under Comp. Laws 1888, chap. 3, §§ 2360 *et seq.* (when time limit for completion and operation commences to run).

[67] Capital City Water Co. v. State, Macdonald, 105 Ala. 406, 18 So. 62; Commonwealth v. Potter County Water Co., 212 Pa. 463, 61 Atl. 1099; Palestine Water Co. v. Palestine, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203, aff'g 41 S. W. 659. Examine Farmers' Loan & Tr. Co. v. Galesburg, 133 U. S. 156, 34 L. ed. 573, 10 Sup. Ct. —; St. Cloud, City of, v. Water, Light & Power Co. (Minn.), 92 N. W. 1112.

[68] Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001.

[69] State v. New Orleans Waterworks Co., 107 La. 1, 31 So. 395. Writ of error dismissed in New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. 691.

Collection of tolls by turnpike company. See Commonwealth v. Newport L. & A. Turnpike Co., 29 Ky. L. Rep. 1285, 97 S. W. 375, 30 Ky. L. Rep. 1235, 100 S. W. 871.

[70] State, Safford, v. Topeka Water Co., 59 Kan. 151, 52 Pac. 422, 8 Am. & Eng. Corp. Cas. (N. S.) 771. See § 491, herein.

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it is evident that the acts of the corporation, in attempting to comply with the imposed conditions, are such as to exclude it from the operation of the forfeiture or dissolution clause.[71] Nor will a forfeiture be decreed for non-user of privileges not required to be exercised under the grant;[72] nor where the statute does not declare that the omission to do the specified act shall constitute a ground for forfeiture;[73] nor for exacting more than ten hours' labor contrary to a statute;[74] nor by the assumption of questionable rights, or for wrong to creditors and stockholders where there is an adequate remedy for the claimed injury.[75] Nor by the failure to elect officers,[76] or to file sworn reports,[77] or to keep books at a certain place in the State.[78]

[71] **California:** People v. Rosentein-Cohn Cigar Co., 131 Cal. 153, 63 Pac. 163 (in this case the corporation organized, elected officers, made by-laws and adopted a seal within the time limit); Arcata v. Arcata & M. R. R. Co., 92 Cal. 639, 28 Pac. 676 (no time limit for construction; franchise must be accepted and exercised within reasonable time).

Iowa: Young v. Webster City & So. West. R. Co., 75 Iowa, 140, 39 N. W. 234 (capital stock not paid, but persistent efforts made to procure means for constructing road).

Maryland: Murphy v. Wheatley, 102 Md. 501, 63 Atl. 62.

New York: People v. Ellison, 101 N. Y. Supp. 444, 51 Misc. 413, aff'd 101 N. Y. Supp. 55, 115 App. Div. 254, also aff'd 188 N. Y. 523, 81 N. E. 447.

North Carolina: Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263.

[72] Cincinnati, City of, v. Covington & C. Bridge Co., 20 Ohio Cir. Ct. Rep. 396.

[73] State v. Cumberland Teleph. & Teleg. Co., 114 Tenn. 194, 86 S. W. 390. See State v. United States Endowment & Trust Co., 140 Ala. 610, 37 So. 442.

[74] People v. Atlantic Ave. Rd. Co., 125 N. Y. 513, 35 N. Y. St. Rep. 872, 26 N. E. 622, 9 Ry. & Corp. L. J. 262, aff'd 10 N. Y. Supp. 907, 57 Hun, 378, 32 N. Y. St. Rep. 717.

[75] State v. Southern Bldg. & Loan Assoc. (Ala.), 31 So. 375.

[76] Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175.

[77] State v. Galena Water Co. (Kan.), 65 Pac. 257.

[78] State v. United States Endowment & Trust Co., 140 Ala. 610, 37 So. 442. See § 490, herein.

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APPENDIX A.

PUBLIC SERVICE COMMISSIONS LAW

OF

NEW YORK.

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APPENDIX A.

LAWS OF NEW YORK.

[Every law, unless a different time shall be prescribed therein, shall not take effect until the twentieth day after it shall have become a law. Section 43, article II, chapter 8, General Laws.]

CHAPTER 429.

AN ACT to establish the public service commissions and prescribing their powers and duties, and to provide for the regulation and control of certain public service corporations and making an appropriation therefor.

Became a law, June 6, 1907, with the approval of the Governor. Passed, three-fifths being present.

Passed without the acceptance of the city of New York.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

THE PUBLIC SERVICE COMMISSIONS LAW.

Article I. Public service commissions; general provisions (§§ 1–23).

II. Provisions relating to railroads, street railroads and common carriers (§§ 25–40).

III. Provisions relating to the powers of the commissions in respect to railroads, street railroads and common carriers (§§ 45–60).

IV. Provisions relating to gas and electric corporations; regulation of price of gas and electricity (§§ 65–77).

V. Commissions and offices abolished; saving clause; repeal (§§ 80–89).

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ARTICLE I.

PUBLIC SERVICE COMMISSIONS; GENERAL PROVISIONS.

§ 1. Short Title.
2. Definitions.
3. Public Service Districts.
4. Commissions Established; Appointment; Removal; Terms of Office.
5. Jurisdiction of Commissions.
6. Counsel to the Commissions.
7. Secretary to the Commissions.
8. Additional Officers and Employees.
9. Oath of Office; Eligibility of Commissioners and Officers.
10. Offices of Commissions; Meetings; Official Seal; Stationery.
11. Quorum; Powers of a Commissioner.
12. Counsel to the Commissions; Duties.
§ 13. Salaries and Expenses.
14. Payment of Salaries and Expenses.
15. Certain Acts Prohibited.
16. Annual Report of Commissions.
17. Certified Copies of Papers Filed to Be Evidence.
18. Fees to Be Charged and Collected by the Commissions.
19. Attendance of Witnesses and Their Fees.
20. Practice Before the Commissions; Immunity of Witnesses.
21. Court Proceedings; Preference.
22. Rehearing Before Commission.
23. Service and Effect of Orders.

SECTION 1. **Short Title.**—This chapter shall be known as the public service commissions law, and shall apply to the public services herein described, and to the commissions hereby created.

§ 2. **Definitions.**—The term "commission," when used in this act, means either public service commission, hereby created, which by the terms of this act is vested with the power or duty in question.

The term "commissioner," when used in this act, means one of the members of such commission.

The term "corporation," when used in this act, includes a corporation company, association and joint-stock association.

The word "person," when used in this act, includes an individual and a firm or copartnership.

The term "street railroad," when used in this act, includes

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every railroad by whatsoever power operated, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons or property for compensation, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city, village or town, and including all switches, spurs, tracks, right of trackage, subways, tunnels, stations, terminals and terminal facilities of every kind used, operated, controlled or owned by or in connection with any such street railroad; but the said term "street railroad," when used in this act, shall not include a railroad constituting or used as part of a trunk line railroad system.

The term "railroad," when used in this act, includes every railroad, other than a street railroad, by whatsoever power operated for public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, switches, spurs, tracks, stations and terminal facilities of every kind used, operated, controlled or owned by or in connection with any such railroad.

The term "street railroad corporation," when used in this act, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, managing or controlling any street railroad or any cars or other equipment used thereon or in connection therewith.

The term "railroad corporation," when used in this act, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, managing or controlling any railroad or any cars or other equipment used thereon or in connection therewith.

The term "common carrier," when used in this act, includes all railroad corporations, street railroad corporations, express companies, car companies, sleeping-car companies, freight companies, freight-line companies and all persons and associations of persons, whether incorporated or not, operating such agencies

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for public use in the conveyance of persons or property within this State.

The term "gas corporation," when used in this act, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, managing or controlling any plant or property for manufacturing and distributing and selling for distribution or distributing illuminating gas (natural or manufactured) for light, heat or power.

The term "electrical corporation," when used in this act, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad corporation generating electricity for its own use exclusively), owning, operating, managing or controlling any plant or property for generating and distributing, or generating and selling for distribution, or distributing electricity for light, heat or power or for the transmission of electric current for such purposes.

The term "transportation of property or freight," when used in this act, includes any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage and handling of the property or freight transported.

The term "municipality," when used in this act, includes a city, village, town or lighting district, organized as provided by a general or special act.

§ 3. **Public Service Districts.**—There are hereby created two public service districts, to be known as the first district and the second district. The first district shall include the counties of New York, Kings, Queens and Richmond. The second district shall include all other counties of the State.

§ 4. **Commissions Established; Appointment; Removal; Terms of Office.**—There shall be a public service commission for each district, and each commission shall possess the powers

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and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this act. The commission of the first district shall consist of five members and the commission of the second district shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate, one of whom designated by the governor shall, during his term of office, be the chairman of the commission of which he is a member. Each commissioner shall be a resident of the district for which he is appointed.

The governor may remove any commissioner for inefficiency, neglect of duty or misconduct in office, giving to him a copy of the charges against him, and an opportunity of being publicly heard in person or by counsel in his own defense, upon not less than ten days' notice. If such commissioner shall be removed the governor shall file in the office of the Secretary of State a complete statement of all charges made against such commissioner, and his findings thereon, together with a complete record of the proceedings.

Of the members of the commission in each district first appointed hereunder, one shall hold office until February first, nineteen hundred and nine, one until February first, nineteen hundred and ten, one until February first, nineteen hundred and eleven, one until February first, nineteen hundred and twelve, and one until February first, nineteen hundred and thirteen; the term of office of each commissioner so appointed shall begin on the first day of July, nineteen hundred and seven. Upon the expiration of each of such terms, the term of office of each commissioner thereafter appointed shall be five years from the first of February. Vacancies shall be filled by appointment for the unexpired term.

§ 5. **Jurisdiction of Commissions.**—The jurisdiction, supervision, powers and duties of the public service commission in the first district shall extend under this act:

1. To railroads and street railroads lying exclusively within that district, and to the persons or corporations owning, leasing, operating or controlling the same.

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2. To street railroads any portion of whose lines lies within that district, to all transportation of persons or property thereon within that district or from a point within either district to a point within the other district, and to the persons or corporations owning, operating, controlling or leasing the said street railroads; provided, however, that the commission for the second district shall have jurisdiction over such portion of the lines of said street railroads as lies within the second district, and over the persons or corporations owning, operating, controlling or leasing the same, so far as concerns the construction, maintenance, equipment, terminal facilities and local transportation facilities of said street railroads within the second district.

3. To such portion of the lines of any other railroad as lies within that district, and to the person or corporation owning, leasing, operating or controlling the same, so far as concerns the construction, maintenance, equipment, terminal facilities and local transportation facilities, and local transportation of persons or property within that district.

4. To any common carrier operating or doing business exclusively within that district.

5. To the manufacture, sale or distribution of gas and electricity for light, heat and power in said district, and to the persons or corporations owning, leasing, operating or controlling the same.

6. And in addition thereto, the commission in the first district shall have and exercise all powers heretofore conferred upon the board of rapid transit railroad commissioners under chapter four of the laws of eighteen hundred and ninety-one, entitled: "An act to provide for rapid transit railways in cities of over one million inhabitants," and the acts amendatory thereto.

All jurisdiction, supervision, powers and duties under this act not specifically granted to the public service commission of the first district shall be vested in, and be exercised by, the public service commission of the second district, including the regulation and control of all transportation of persons or property, and the instrumentalities connected with such transportation,

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on any railroad other than a street railroad from a point within either district to a point within the other district.

§ 6. **Counsel to the Commissions.**—Each commission shall appoint as counsel to the commission an attorney and counsellor-at-law of the State of New York, who shall hold office during the pleasure of the commission. Each counsel to the commission shall, subject to the approval of the commission, have the power to appoint, and at pleasure remove, attorneys and counsellors-at-law, to assist him in the performance of his duties, and also to employ and remove stenographers and process-servers.

§ 7. **Secretary to the Commissions.**—Each commission shall have a secretary to be appointed by it and to hold office during its pleasure. It shall be the duty of the secretary to keep a full and true record of all proceedings of the commission, of all books, maps, documents and papers ordered filed by the commission and of all orders made by a commissioner and of all orders made by the commission or approved and confirmed by it and ordered filed, and he shall be responsible to the commission for the safe custody and preservation of all such documents at its office. Under the direction of the commission the secretary shall have general charge of its office, superintend its clerical business and perform such other duties as the commission may prescribe. He shall have power and authority to administer oaths in all parts of the State, so far as the exercise of such power is properly incidental to the performance of his duty or that of the commission. The secretary shall designate, from time to time, one of the clerks appointed by the commission to perform the duties of secretary during his absence and, during such time, the clerk so designated shall at the office possess the powers of the secretary of the commission.

§ 8. **Additional Officers and Employees.**—Each commission shall have power to employ, during its pleasure, such officers, clerks, inspectors, experts and employees as it may deem to be necessary to carry out the provisions of this act, or to perform

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the duties and exercise the powers conferred by law upon the commission.

§ 9. **Oath of Office; Eligibility of Commissioners and Officers.**—Each commissioner and each person appointed to office by a commission or by counsel to a commission shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office. No person shall be eligible for appointment or shall hold the office of commissioner or be appointed by a commission or by counsel to a commission to, or hold, any office or position under a commission, who holds any official relation to any common carrier, railroad corporation, street railroad corporation, gas corporation or electrical corporation subject to the provisions of this act, or who owns stocks or bonds therein.

§ 10. **Offices of Commissions; Meetings; Official Seal; Stationery, etc.**—The principal office of the commission of the the first district shall be in the borough of Manhattan, city of New York; and the office of the second district shall be in the city of Albany, in rooms designated by the trustees of public buildings. Each commission shall hold stated meetings at least once a month during the year at its office. Each shall have an official seal to be furnished and prepared by the Secretary of State as provided by law. The offices shall be supplied with all necessary books, maps, charts, stationery, office furniture, telephone and telegraph connections and all other necessary appliances, to be paid for in the same manner as other expenses authorized by this act.

2. The offices of each commission shall be open for business between the hours of eight o'clock in the morning and eleven o'clock at night every day in the year, and one or more responsible persons, to be designated by the commission or by the secretary under the direction of the commission, shall be on duty at all times in immediate charge thereof.

§ 11. **Quorum; Powers of a Commissioner.**—A majority of the commissioners shall constitute a quorum for the transac-

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tion of any business, for the performance of any duty or for the exercise of any power of the commission, and may hold meetings of the commission at any time or place within the State. Any investigation, inquiry or hearing which either commission has power to undertake or to hold may be undertaken or held by or before any commissioner. All investigations, inquiries, hearings and decisions of a commissioner shall be and be deemed to be the investigations, inquiries, hearings and decisions of the commission and every order made by a commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be and be deemed to be the order of the commission.

§ 12. **Counsel to the Commissions; Duties.**—It shall be the duty of counsel to a commission to represent and appear for the people of the State of New York and the commission in all actions and proceedings involving any question under this act, or under or in reference to any act or order of the commission, and, if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute all actions and proceedings directed or authorized by the commission, and to expedite in every way possible final determination of all such actions and proceedings; to advise the commission and each commissioner when so requested in regard to all matters in connection with the powers and duties of the commission and of the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.

§ 13. **Salaries and Expenses.**—The annual salary of each commissioner shall be fifteen thousand dollars ($15,000). The annual salary of counsel to a commission shall be ten thousand dollars ($10,000). The annual salary of a secretary to a commission shall be six thousand dollars ($6,000). All officers, clerks, inspectors, experts and employees of a commission, and all persons appointed by the counsel to a commission, shall receive the compensation fixed by the commission.

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The commissioners, counsel to the commission and the secretary, and their officers, clerks, inspectors, experts and other employees, shall have reimbursed to them all actual and necessary travelling and other expenses and disbursements incurred or made by them in the discharge of their official duties.

§ 14. **Payment of Salaries and Expenses.**—1. The salaries of the commissioners, the counsel to the commission, and the secretary to the commission in the first district shall be audited and allowed by the state comptroller, and paid monthly by the state treasurer upon the order of the comptroller out of the funds provided therefor. All other salaries and expenses of the commission of the first district shall be audited and paid as follows: The board of estimate and apportionment of the city of New York, or other board or public body on which is imposed the duty and in which is vested the power of making appropriations of public moneys for the purposes of the city government shall, from time to time, on requisition duly made by the public service commission of the first district, appropriate such sum or sums of money as may be requisite and necessary to enable it to do and perform, or cause to be done and performed, the duties in this or in any other act prescribed, and to provide for the expenses and the compensation of the employees of such commission, and such appropriation shall be made forthwith upon presentation of a requisition from the said commission, which shall state the purposes for which such moneys are required by it. In case the said board of estimate and apportionment, or such other board or public body, fail to appropriate such amount as the said commission deems requisite and necessary, the said commission may apply to the appellate division of the Supreme Court in the first department, on notice to the board of estimate and apportionment or such other board or public body aforesaid, to determine what amount shall be appropriated for the purposes so required and the decision of said appellate division shall be final and conclusive; and the city shall not be liable for any indebtedness incurred by the said commission in excess of such appropriation or appropriations.

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It shall be the duty of the auditor and comptroller of said city, after such appropriation shall have been duly made, to audit and pay the proper expenses and compensation of the employees of said commission other than its counsel and secretary, upon vouchers therefor, to be furnished by the said commission, which payments shall be made in like manner as payments are now made by the auditor, comptroller or other public officers of claims against and demands upon such city; and for the purpose of providing funds with which to pay the said sums, the comptroller or other chief financial officer of said city, is hereby authorized and directed to issue and sell revenue bonds of such city in anticipation of receipt of taxes and out of the proceeds of such bonds to make the payments in this section required to be made. The amount necessary to pay the principal and interest of such bonds shall be included in the estimates of moneys necessary to be raised by taxation to carry on the business of said city, and shall be made a part of the tax levy for the year next following the year in which such appropriations are made. The commission may provide that all or any portion of the expenses so incurred and paid by said city as in this section provided, and for which said city shall be liable, shall be repaid, with interest, by the bidder or bidders at the public sale of the rights, privileges and franchises, as provided in chapter four of the laws of eighteen hundred and ninety-one, entitled: "An act to provide for rapid transit railways in cities of over one million inhabitants," and the acts amendatory thereto. The said comptroller shall pay the proper salaries and the expenses of the said commission upon its requisition, for the remainder of the fiscal year after this act shall take effect, from any funds that may have been heretofore appropriated for the board of rapid transit railroad commissioners, which appropriation is hereby transferred to the credit of the public service commission of the first district. In case the said appropriation shall not be sufficient to meet such salaries and expenses, the comptroller of said city is hereby authorized and directed to issue and sell revenue bonds of said city, in anticipation of receipt of taxes, as hereinbefore provided.

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2. All salaries and expenses of the commission in the second district shall be audited and allowed by the state comptroller and paid monthly by the state treasurer upon the order of the comptroller, out of the funds provided therefor.

§ 15. **Certain Acts Prohibited.**—Every commissioner, counsel to a commission, the secretary of a commission, and every person employed or appointed to office, either by a commission or by the counsel to a commission, is hereby forbidden and prohibited to solicit, suggest, request or recommend, directly or indirectly, to any common carrier, railroad corporation or street railroad corporation, or to any officer, attorney, agent or employee thereof, the appointment of any person to any office, place, position or employment. And every common carrier, railroad corporation, street railroad corporation, gas corporation and electrical corporation, and every officer, attorney, agent and employee thereof, is hereby forbidden and probibited to offer to any commissioner, to counsel to a commission, to the secretary thereof, or to any person employed by a commission or by the counsel to a commission, any office, place, appointment or position, or to offer or give to any commissioner, to counsel to a commission, to the secretary thereof, or to any officer employed or appointed to office by the commission or by the counsel to the commission, any free pass or transportation or any reduction in fare to which the public generally are not entitled or free carriage for freight or property or any present, gift or gratuity of any kind. If any commissioner, counsel to a commission, the secretary thereof or any person employed or appointed to office by a commission or by counsel to a commission, shall violate any provision of this section he shall be removed from the office held by him. Every commissioner, counsel to the commission, the secretary thereof and every person employed or appointed to office by the commission or by counsel to the commission, shall be and be deemed to be a public officer.

§ 16. **Annual Report of Commissions.**—All proceedings of each commission and all documents and records in its posses-

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sion shall be public records, and each commission shall make an annual report to the legislature on or before the second Monday of January in each year, which shall contain copies of all orders issued by it, and any information in the possession of the commission which it shall deem of value to the legislature and the people of the State. Five hundred copies of each report, together with the abstracts of the reports to such commission of common carriers, railroad corporations and street railroad corporations, and gas and electrical corporations, in addition to the regular number prescribed by law, shall be printed as a public document of the State, bound in cloth, for the use of the commissioners and to be distributed by them in their discretion to railroad, street railroad, gas and electrical corporations and other persons interested therein.

§ 17. **Certified Copies of Papers Filed to Be Evidence.**—Copies of all official documents and orders filed or deposited according to law in the office of either commission, certified by a commissioner or by the secretary of the commission to be true copies of the originals, under the official seal of the commission, shall be evidence in like manner as the originals.

§ 18. **Fees to Be Charged and Collected by the Commissions.**—Each commission shall charge and collect the following fees: For copies of papers and records not required to be certified or otherwise authenticated by the commission, ten cents for each folio; for certified copies of official documents and orders filed in its office, fifteen cents for each folio, and one dollar for every certificate under seal affixed thereto; for certifying a copy of any report made by a corporation to the commission, two dollars; for each certified copy of the annual report of the commission, one dollar and fifty cents; for certified copies of evidence and proceedings before the commission, fifteen cents for each folio. No fees shall be charged or collected for copies of papers, records or official documents, furnished to public officers for use in their official capacity, or for the annual reports of the commission in the ordinary course of distribution.

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All fees charged and collected by the commission of the first district shall belong to the city of New York, and shall be paid monthly, accompanied by a detailed statement thereof, into the treasury of the city to the credit of the general fund, and all fees charged and collected by the commission of the second district shall belong to the people of the State, and shall be paid monthly, accompanied by a detailed statement thereof, into the treasury of the State to the credit of the general fund.

§ 19. **Attendance of Witnesses and Their Fees.**—1. All subpœnas shall be signed and issued by a commissioner or by the secretary of a commission and may be served by any person of full age. The fees of witnesses required to attend before a commission, or a commissioner, shall be two dollars for each day's attendance, and five cents for every mile of travel by the nearest generally travelled route in going to and from the place where attendance of the witness is required, such fees to be paid when the witness is excused from further attendance; and the disbursements made in the payment of such fees shall be audited and paid in the first district in the same manner provided for the payment of expenses of the commission.

2. If a person subpœnaed to attend before a commission, or a commissioner fails to obey the command of such subpœna, without reasonable cause, or if a person in attendance before a commission, or commissioner, shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or papers, when ordered so to do by the commission, or a commissioner, or to subscribe and swear to his deposition after it has been correctly reduced to writing, he shall be guilty of a misdemeanor and may be prosecuted therefor in any court of competent criminal jurisdiction.

If a person in attendance before a commission or a commissioner refuses without reasonable cause to be examined or to answer a legal and pertinent question or produce a book or paper, when ordered so to do by a commission or a commissioner, the commission may apply to any justice of the Supreme Court upon proof by affidavit of the facts for an order returnable

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in not less than two nor more than five days directing such parson to show cause before the justice who made the order, or any other justice of the Supreme Court, why he should not be committed to jail; upon the return of such order the justice before whom the matter shall come on for hearing shall examine under oath such person whose testimony may be relevant, and such person shall be given an opportunity to be heard; and if the justice shall determine that such person has refused without reasonable cause or legal excuse to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was ordered to bring, he may forthwith, by warrant, commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

§ 20. **Practice Before the Commissions; Immunity of Witnesses.**—All hearings before a commission or a commissioner, shall be governed by rules to be adopted and prescribed by the commission. And in all investigations, inquiries or hearings the commission, or a commissioner, shall not be bound by the technical rules of evidence. No person shall be excused from testifying or from producing any book or papers in any investigation or inquiry by or upon any hearing before a commission or any commissioner, when ordered to do so by the commission, upon the ground that the testimony or evidence, books or documents required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained is intended to give, or shall be construed as in any manner giving unto any corporation immunity of any kind.

§ 21. **Court Proceedings; Preferences.**—All actions and proceedings under this act, and all actions and proceedings

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commenced or prosecuted by order of either commission, and all actions and proceedings to which either commission or the people of the State of New York may be parties, and in which any question arises under this act or under the railroad law, or under or concerning any order or action of the commission, shall be preferred over all other civil causes except election causes in all courts of the State of New York and shall be heard and determined in preference to all other civil business pending therein excepting election causes, irrespective of position on the calendar. The same preference shall be granted upon application of counsel to the commission in any action or proceeding in which he may be allowed to intervene.

§ 22. **Rehearing Before Commission.**—After an order has been made by a commission any party interested therein may apply for a rehearing in respect to any matter determined therein, and the commission may grant and hold such a rehearing if in its judgment sufficient reason therefor be made to appear; if a rehearing shall be granted, the same shall be determined by the commission within thirty days after the same shall be finally submitted. An application for such a rehearing shall not excuse any common carrier, railroad corporation or street railroad corporation from complying with or obeying any order or any requirement of any order of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. If, after such rehearing and a consideration of the facts, including those arising since the making of the order, the commission shall be of opinion that the original order or any part thereof is in any respect unjust or unwarranted, the commission may abrogate, change or modify the same. An order made after any such rehearing abrogating, changing or modifying the original order shall have the same force and effect as an original order but shall not affect any right or the enforcement of any right arising from or by virtue of the original order.

§ 23. **Service and Effect of Orders.**—Every order of a commission shall be served upon every person or corporation to be

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affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby or, in the case of a corporation, to any officer or agent thereof upon whom a summons may be served in accordance with the provisions of the code of civil procedure. It shall be the duty of every person and corporation to notify the commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notification must be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the commission every person and corporation upon whom it is served must if so required in the order notify the commission in like manner whether the terms of the order are accepted and will be obeyed.

Every order of a commission shall take effect at a time therein specified and shall continue in force for a period therein designated unless earlier modified or abrogated by the commission or unless such order be unauthorized by this or any other act or be in violation of a provision of the constitution of the State or of the United States.

ARTICLE II.

PROVISIONS RELATING TO RAILROADS, STREET RAILROADS AND COMMON CARRIERS.

§ 25. Application of Article.
26. Adequate Service; Just and Reasonable Charges.
27. Switch and Side-track Connections; Powers of Commissions.
28. Tariff Schedules; Publication.
29. Changes in Schedule; Notice Required.
30. Concurrence in Joint Tariffs; Contracts, Agreements or Arrangements Between any Carriers.
31. Unjust Discrimination.
32. Unreasonable Preference.
§ 33. Transportation Prohibited Until Publication of Schedules; Rates as Fixed to Be Charged; Passes Prohibited.
34. False Billing, etc., by Carrier or Shipper.
35. Discrimination Prohibited; Connecting Lines.
36. Long and Short Haul.
37. Distribution of Cars.
38. Liability for Damage to Property in Transit.
39. Continuous Carriage.
40. Liability for Loss or Damage by Violation of This Act.

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§ 25. **Application of Article.**—The provisions of this article shall apply to the transportation of passengers, freight or property, from one point to another within the State of New York, and to any common carrier performing such service.

§ 26. **Safe and Adequate Service; Just and Reasonable Charges.**—Every corporation, person or common carrier performing a service designated in the preceding section, shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation, person or common carrier for the transportation of passengers, freight or property or for any service rendered or to be rendered in connection therewith, as defined in section two of this act, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this act. Every unjust or unreasonable charge made or demanded for any such service or transportation of passengers, freight or property or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited.

§ 27. **Switch and Side-track Connections; Powers of Commissions.**—1. A railroad corporation, upon the application of any shipper tendering traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection or connections with a lateral line of railroad or private side-track owned, operated or controlled by such shipper, and shall, upon the application of any shipper, provide upon its own property a side-track and switch connection with its line of railroad, whenever such sidetrack and switch connection is reasonably practicable, can be put in with safety and the business therefor is sufficient to justify the same.

2. If any railroad corporation shall fail to install or operate any such switch connection with a lateral line of railroad or any such side-track and switch connection as aforesaid, after written application therefor has been made to it, any corporation or

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person interested may present the facts to the commission having jurisdiction by written petition, and the commission shall investigate the matters stated in such petition, and give such hearing thereon as it may deem necessary or proper. If the commission be of opinion that it is safe and practicable to have a connection, substantially as prayed for, established or maintained, and that the business to be done thereon justifies the construction and maintenance thereof, it shall make an order directing the construction and establishment thereof, specifying the reasonable compensation to be paid for the construction, establishment and maintenance thereof, and may in like manner upon the application of the railroad corporation order the discontinuance of such switch connection.

§ 28. **Tariff Schedules; Publication.**—Every common carrier shall file with the commission having jurisdiction and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property within the State between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid shall plainly state the places between which property and passengers will be carried, and shall also contain the classification of passengers, freight or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules or regulations which may in any wise change, affect or de-

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termine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedules shall be plainly printed in large type; copies thereof for the use of the public shall be kept posted in two public and conspicuous places in every depot, station and office of every common carrier where passengers or property are received for transportation, in such manner as to be readily accessible to and conveniently inspected by the public. The form of every such schedule shall be prescribed by the commission and shall conform as nearly as possible to the form of schedule required by the Interstate Commerce Commission under the act of Congress, entitled: "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended by act approved June twenty-ninth, nineteen hundred and six, and other amendments thereto. Where any similar schedule is required by law to be filed with both commissions they shall agree upon an identical form for such schedule. The commission shall have power from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient.

§ 29. **Changes in Schedule; Notice Required.**—Unless the commission otherwise orders no change shall be made in any rate, fare or change, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the requirements of this act, except after thirty days' notice to the commission and publication for thirty days as required by section twenty-eight of this act, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for, by duly

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filing and publishing in such manner as it may direct an order specifying the change so made and the time when it shall take effect; all such changes shall be immediately indicated upon its schedules by the common carrier.

§ 30. **Concurrence in Joint Tariffs; Contracts, Agreements or Arrangements Between any Carriers.**—1. The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission; and where such evidence of concurrence or acceptance is filed, it shall not be necessary for the carriers filing the same also to file copies of the tariffs in which they are named as parties.

2. Every common carrier shall file with the commission sworn copies of every contract, agreement or arrangement with any other common carrier or common carriers relating in any way to the transportation of passengers, property or freight.

§ 31. **Unjust Discrimination.**—No common carrier shall, directly or indirectly, by any special rate, rebate, drawback, or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered in the transportation of passengers, freight or property, except as authorized in this act, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances and conditions.

§ 32. **Unreasonable Preference.**—No common carrier shall make or give any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever.

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§ 33. **Transportation Prohibited Until Publication of Schedules; Rates as Fixed to Be Charged; Passes Prohibited.** —No common carrier subject to the provisions of this act shall after the first day of November, nineteen hundred and seven, engage or participate in the transportation of passengers, freight or property, between points within the State, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this act. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers, freight or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances. No common carrier subject to the provisions of this act shall, directly or indirectly, issue or give any free ticket, free pass or free transportation for passengers or property between points within this State, except to its officers, employees, agents, pensioners, surgeons, physicians, attorneys-at-law, and their families; to ministers of religion, officers and employees of railroad young men's Christian associations, inmates of hospitals, charitable and eleemosynary institutions and persons exclusively engaged in charitable and eleemosynary work; and to indigent, destitute and homeless persons and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of property in transit; to employees of sleeping-car companies, express companies, telegraph and telephone companies doing business along

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the line of the issuing carrier; to railway mail service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation or proceeding in which the common carrier is interested, persons injured in accidents or wrecks and physicians and nurses attending such persons; to the carriage free or at reduced rates of persons or property for the United States, state or municipal governments, or of property to or from fairs and expositions for exhibit thereat. Nothing in this act shall be construed to prohibit the interchange of free or reduced transportation between common carriers of or for their officers, agents, employees, attorneys and surgeons and their families, nor to prohibit any common carrier from carrying passengers or property free, with the object of providing relief in cases of general epidemic, pestilence or other calamitous visitation; nor to prohibit any common carrier from transporting persons or property as incident to or connected with contracts for construction, operation or maintenance, and to the extent only that such free transportation is provided for in the contract for such work.

Provided further, that nothing in this act shall prevent the issuance of mileage, excursion, or commutation passenger tickets, or joint interchangeable mileage tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand miles or more. But before any common carrier, subject to the provision of this act, shall issue any such mileage, excursion, commutation passenger ticket or joint interchangeable mileage ticket, with special privileges as aforesaid, it shall file with the commission copies of the tariffs of rates, fares or charges on which such tickets are to be based, together with the specifications of the amount of free baggage permitted to be carried under such joint interchangeable mileage ticket, in the same manner as common carriers are required to do with regard to other rates by this act. Nor shall anything in this act prevent the issuance of passenger transportation in exchange for advertising space in newspapers at full rates.

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§ 34. **False Billing, etc., by Carrier or Shipper.**—No common carrier or any officer or agent thereof or any person acting for or employed by it, shall assist, suffer or permit any person or corporation to obtain transportation for any passenger, freight or property between points within this State at less than the rates then established and in force in accordance with the schedules filed and published in accordance with the provisions of this act, by means of false billing, false classification, false weight or weighing, or false report of weight, or by any other device or means. No person, corporation or any officer, agent or employee of a corporation, who shall deliver freight or property for transportation within the State to a common carrier, shall seek to obtain or obtain such transportation for such property at less than the rates then established and in force therefor, as aforesaid, by false billing, false or incorrect classification, false weight or weighing, false representation of the contents of a package, or false report or statement of weight, or by any other device or means, whether with or without the consent or connivance of the common carrier, or any of its officers, agents or employees.

§ 35. **Discrimination Prohibited; Connecting Lines.**—Every common carrier is required to afford all reasonable, proper and equal facilities for the interchange of passenger, freight and property traffic between the lines owned, operated, controlled or leased by it and the lines of every common carrier, and for the prompt transfer of passengers and for the prompt receipt and forwarding of freight and property to and from its said lines; and no common carrier shall in any manner discriminate in respect to rates, fares or charges or in respect to any service or in respect to any charges or facilities for any such transfer in receiving or forwarding between any two or more other common carriers or between passengers, freight or property destined to points upon the lines of any two or more other common carriers or in any respect with reference to passengers, freight or property transferred or received from any two or more other common carriers. This section shall not be con-

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strued to require a common carrier to permit or allow any other common carrier to use its tracks or terminal facilities. Every common carrier, as such, is required to receive from every other common carrier, at a connecting point, freight cars of proper standard, and haul the same through to destination, if the destination be upon a line owned, operated or controlled by such common carrier, or if the destination be upon a line of some other common carrier, to haul any car so delivered through to the connecting point upon the line owned, operated, controlled or leased by it, by way of route over which such car is billed, and there to deliver the same to the next connecting carrier. Nothing in this section shall be construed as in anywise limiting or modifying the duty of a common carrier to establish joint rates, fares and charges for the transportation of passengers, freight and property over the lines owned, operated, controlled and leased by it and the lines of other common carriers, nor as in any manner limiting or modifying the power of the commission to require the establishment of such joint rates, fares and charges. A railroad corporation and a street railroad corporation shall not be required to interchange cars except on such terms and conditions as the commission may direct.

§ 36. **Long and Short Haul.**—No common carrier, subject to the provisions of this act, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any such common carrier to charge and receive as great a compensation for a shorter as for a longer distance or haul. Upon application of a common carrier the commission may by order authorize it to charge less for longer than for shorter distances for the transportation of passengers or property in special cases after investigation by the commission, but the order must specify and prescribe the extent to

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which the common carrier making such application is relieved from the operation of this section, and only to the extent so specified and prescribed shall any common carrier be relieved from the operation and requirements of this section.

§ 37. **Distribution of Cars.**—1. Every railroad corporation or other common carrier engaged in the transportation of freight shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor, and offer freight for transportation, sufficient and suitable cars for the transportation of such freight in car-load lots. Every railroad corporation and street railroad corporation shall have sufficient cars and motive power to meet all requirements for the transportation of passengers and property which may reasonably be anticipated, unless relieved therefrom by order of the commission. In case, at any particular time, a common carrier has not sufficient cars to meet all requirements for the transportation of property in car-load lots, all cars available to it for such purposes shall be distributed among the several applicants therefor, without discrimination between shippers, localities or competitive or non-competitive points, but preference may always be given in the supply of cars for shipment of livestock or perishable property.

2. The commission shall have power to make, and by order shall make, reasonable regulations for the furnishing and distribution of freight cars to shippers, for the switching of the same, for the loading and unloading thereof, for demurrage charges in respect thereto, and for the weighing of cars and freight offered for shipment or transported by any common carrier.

§ 38. **Liability for Damage to Property in Transit.**—Every common carrier and every railroad corporation and street railroad corporation shall, upon demand, issue either a receipt or bill of lading for all property delivered to it for transportation. No contract, stipulation or clause in any receipt or bill of lading shall exempt or be held to exempt any common

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carrier, railroad corporation or street railroad corporation from any liability for loss, damage or injury caused by it to freight or property from the time of its delivery for transportation until the same shall have been received at its destination and a reasonable time shall have elapsed after notice to consignee of such arrival to permit of the removal of such freight or property. Every common carrier, railroad corporation and street railroad corporation shall be liable for all loss, damage or injury to property caused by delay in transit due to negligence while the same is being carried by it, but in any action to recover for damages sustained by delay in transit the burden of proof shall be upon the defendant to show that such delay was not due to negligence. Every common carrier and railroad corporation shall be liable for loss, damage and injury to property carried as baggage up to the full value and regardless of the character thereof, but the value in excess of one hundred and fifty dollars shall be stated upon delivery to the carrier, and a written receipt stating the value shall be issued by the carrier, who may make a reasonable charge for the assumption of such liability in excess of one hundred and fifty dollars and for the carriage of baggage exceeding one hundred and fifty pounds in weight upon a single ticket. Nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

§ 39. **Continuous Carriage.**—No common carrier shall enter into or become a party to any combination, contract, agreement or understanding, written or oral, express or implied, to prevent by any arrangement or by change of arrangement of time schedule, by carriage in different cars or by any other means or device whatsoever the carriage of freight and property from being continuous from the place of shipment to the place of destination. No breakage of bulk, stoppage or interruption of carriage made by any common carrier shall prevent the carriage of freight and property from being treated as one continuous carriage from the place of shipment to the place of destination. Nor shall any such breakage of bulk, stoppage or

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interruption of carriage be made or permitted by any common carrier except it be done in good faith for a necessary purpose without intention to avoid or unnecessarily interrupt or delay the continuous carriage of such freight or property or to evade any of the provisions of law, of this act or of an order of the commission.

§ 40. **Liabilty for Loss or Damage Caused by Violation of This Act.**—In case a common carrier shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of the State of New York, by this act or by an order of the commission, such common carrier shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, and in case of recovery, if the court shall find that such act or omission was willful, it may in its discretion fix a reasonable counsel or attorney's fee, which fee shall be taxed and collected as part of the costs in the case. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any such person or corporation.

ARTICLE III.

PROVISIONS RELATING TO THE POWERS OF THE COMMISSIONS IN RESPECT TO COMMON CARRIERS, RAILROADS AND STREET RAILROADS.

§ 45. General Powers and Duties of Commissions in Respect to Common Carriers, Railroads and Street Railroads.
46. Reports of Common Carriers, Railroad Corporations and Street Railroad Corporations.
47. Investigation of Accidents.
48. Investigations by Commission.
49. Rates and Service to Be Fixed by the Commissions.
50. Power of Commissions to Order Repairs or Changes.
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56. Forfeiture; Penalties.

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§ 57. Summary Proceedings.
58. Penalties for Other Than Common Carriers.
§ 59. Action to Recover Penalties or Forfeitures.
60. Duties of Commissions as to Interstate Traffic.

§ 45. General Powers and Duties of Commissions in Respect to Common Carriers, Railroads and Street Railroads.—1. Each commission and each commissioner shall have power and authority to administer oaths, in all parts of the State, to witnesses summoned to testify in any inquiry, investigation, hearing or proceeding; and also to administer oaths in all parts of the State whenever the exercise of such power is incidentally necessary or proper to enable the commission or a commissioner to perform a duty or to exercise a power.

2. Each commission shall have the general supervision of all common carriers, railroads, street railroads, railroad corporations and street railroad corporations within its jurisdiction as hereinbefore defined, and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines, owned, leased, controlled or operated, are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all provisions of law, orders of the commission and charter requirements.

3. Each commission and each commissioner shall have power to examine all books, contracts, records, documents and papers of any person or corporation subject to its supervision, and by subpœna duces tecum to compel production thereof. In lieu of requiring production of originals by subpœna duces tecum, the commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers or parts thereof to be filed with it.

4. Either commission shall conduct a hearing and take testimony as to the advisability of any proposed change of law relating to any common carrier, railroad corporation or street railroad corporation, if requested to do so by the legislature, by the senate or assembly committee on railroads, or by the gov-

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ernor, and may conduct such a hearing, when requested to do so by any person or corporation, and shall report its conclusions to the officer, body, person or corporation at whose request the hearing was held. The commission may also recommend the enactment of such legislation, with respect to any matter within its jurisdiction, as it deems wise or necessary in the public interest, and may draft or cause to be drafted such bills or acts as it may deem necessary or proper to enact into law the legislation recommended by it.

§ 46. **Reports of Common Carriers, Railroad Corporations and Street Railroad Corporations.**—Each commission shall prescribe the form of the annual reports required under this act to be made by common carriers, railroad and street railroad corporations, and may from time to time make such changes therein and additions thereto as it may deem proper; provided, however, that if any such changes or additions require any alteration in the method or form of keeping the accounts of such corporations, the commission shall give to them at least six months' notice before the expiration of any fiscal year of any such changes or additions, and on or before June thirtieth, in each year, shall furnish a blank form for such report. The contents of such report and the form thereof shall conform as near as may be to that required of common carriers under the provisions of the act of congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and the act amendatory thereof approved June twenty-ninth, nineteen hundred and six, and other amendments thereto. The commission may require such report to contain information in relation to rates or regulations concerning fares or freights, agreements or contracts affecting the same, so far as such rates or regulations pertain to transportation within the State. When the report of any such corporation is defective, or believed to be erroneous, the commission shall notify the corporation to amend the same within thirty days. The originals of the reports, subscribed and sworn to as prescribed by law, shall be preserved in the office of the

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commission. The commission may also require such corporations to file monthly reports of earnings and expenses within a specified time. The commission may require of all such corporations specific answers to questions upon which the commission may need information. The annual report required to be filed by a common carrier, railroad or street railroad corporation shall be so filed on or before the thirtieth day of September in each year. The commission may extend the time for making and filing such report for a period not exceeding sixty days. If such corporation shall fail to make and file the annual report within the time above specified or within the time as extended by the commission, or shall fail to make specific answer to any question, or shall fail to make the monthly reports when required by the commission as herein provided, within thirty days from the time when it is required to make and file any such report or answer, such corporation shall forfeit to the State the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report or answer. Such forfeiture shall be recovered in an action brought by the commission in the name of the people of the State of New York. The amount recovered in any such action shall be paid into the state treasury and credited to the general fund. Any railroad corporation operating a line partly within the second district and partly within the first district shall report to the commission of the second district; but the commission of the first district may, upon reasonable notice, require a special report from such railroad corporation. Any street railroad corporation operating a line partly within the first district and partly within the second district shall report to the commission of the first district; but the commission of the second district may, upon reasonable notice, require a special report from such street railroad corporation.

§ 47. **Investigation of Accidents.**—Each commission shall investigate the cause of all accidents on any railroad or street railroad within its district which result in loss of life or injury to persons or property, and which in its judgment shall require

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investigation. Every common carrier, railroad corporation and street railroad corporation is hereby required to give immediate notice to the commission of every accident happening upon any line of railroad or street railroad owned, operated, controlled or leased by it, within the territory over which such commission has jurisdiction in such manner as the commission may direct. Such notice shall not be admitted as evidence or used for any purpose against such common carrier, railroad corporation or street railroad corporation giving such notice in any suit or action for damages growing out of any matter mentioned in said notice.

§ 48. **Investigations by Commission.**—1. Each commission may, of its own motion, investigate or make inquiry, in a manner to be determined by it, as to any act or thing done or omitted to be done by any common carrier, railroad corporation or street railroad corporation, subject to its supervision, and the commission must make such inquiry in regard to any act or thing done or omitted to be done by any such common carrier, railroad corporation or street railroad corporation in violation of any provision of law or in violation of any order of the commission.

2. Complaints may be made to the proper commission by any person or corporation aggrieved, by petition or complaint in writing setting forth any thing or act done or omitted to be done by any common carrier, railroad corporation or street railroad corporation in violation, or claimed to be in violation, of any provision of law or of the terms and conditions of its franchise or charter or of any order of the commission. Upon the presentation of such a complaint the commission shall cause a copy thereof to be forwarded to the person or corporation complained of, accompanied by an order, directed to such person or corporation, requiring that the matters complained of be satisfied, or that the charges be answered in writing within a time to be specified by the commission. If the person or corporation complained of shall make reparation for any injury alleged and shall cease to commit, or to permit, the violation of law, franchise or

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order charged in the complaint, and shall notify the commission of that fact before the time allowed for answer, the commission need take no further action upon the charges. If, however, the charges contained in such petition be not thus satisfied, and it shall appear to the commission that there are reasonable grounds therefor, it shall investigate such charges in such manner and by such means as it shall deem proper, and take such action within its powers as the facts justify.

3. Whenever either commission shall investigate any matter complained of by any person or corporation aggrieved by any act or omission of a common carrier, railroad corporation or street railroad corporation under this section it shall be its duty to make and file an order either dismissing the petition or complaint or directing the common carrier, railroad corporation or street railroad corporation complained of to satisfy the cause of complaint in whole or to the extent which the commission may specify and require.

§ 49. **Rates and Service to Be Fixed by the Commission.**—Whenever either commission shall be of opinion, after a hearing, upon a complaint made as provided in this act, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons, freight or property within the State, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, the commission shall determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed. And whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon complaint,

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that the regulations, practices, equipment, appliances, or service of any such common carrier, railroad corporation or street railroad corporation in respect to transportation of persons, freight or property within the State are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and service thereafter to be in force, to be observed and to be used in such transportation of persons, freight and property and so fix and prescribe the same by order to be served upon every common carrier, railroad corporation and street railroad corporation to be bound thereby; and thereafter it shall be the duty of every common carrier, railroad corporation and street railroad corporation to observe and obey each and every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all its officers, agents and employees. The commission shall have power by order to require any two or more common carriers or railroad corporations whose lines, owned, operated, controlled or leased, form a continuous line of transportation or could be made to do so by the construction and maintenance of switch connection, to establish through routes and joint rates, fares and charges for the transportation of passengers, freight and property within the State as the commission may, by its order, designate; and in case such through routes and joint rates be not established by the common carriers or railroad corporations named in any such order within the time therein specified, the commission shall establish just and reasonable rates, fares and charges to be charged for such through transportation, and declare the portion thereof to which each common carrier or railroad corporation affected thereby shall be entitled and the manner in which the same shall be paid and secured.

§ 50. **Power of Commissions to Order Repairs or Changes.** —If, in the judgment of the commission having jurisdiction, repairs or improvements to or changes in any tracks, switches,

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terminals or terminal facilities, motive power, or any other property or device used by any common carrier, railroad corporation or street railroad corporation in or in connection with the transportation of passengers, freight or property ought reasonably to be made, or that any additions should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers, freight or property, the commission shall, after a hearing either on its own motion or after complaint, make and serve an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every common carrier, railroad corporation and street railroad corporation is hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it.

§ 51. **Power of Commissions to Order Changes in Time Schedules; Running of Additional Cars and Trains.**—If, in the judgment of the commission having jurisdiction, any railroad corporation or street railroad corporation does not run trains enough or cars enough or possess or operate motive power enough, reasonably to accommodate the traffic, passenger and freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the commission shall, after a hearing either on its own motion or after complaint, have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car or make any other suitable order that the commission may determine reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation.

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§ 52. **Uniform System of Accounts; Access to Accounts, etc.; Forfeitures.**—Each commission may, whenever it deems advisable, establish a uniform system of accounts to be used by railroad and street railroad corporations or other common carriers which are subject to its supervision, and may prescribe the manner in which such accounts shall be kept. It may also in its discretion prescribe the forms of accounts, records and memoranda to be kept by such corporations, including the accounts, records and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The system of accounts established by the commission and the forms of accounts, records and memoranda prescribed by it as provided above shall conform as near as may be to those from time to time established and prescribed by the interstate commerce commission under the provisions of the act of congress entitled "An act to regulate commerce" approved February fourth, eighteen hundred and eighty-seven, as amended by the act approved June twenty-ninth, nineteen hundred and six, and amendments thereto. The commission shall at all times have access to all accounts, records and memoranda kept by railroad and street railroad corporations and may prescribe the accounts in which particular outlays and receipts shall be entered, and may designate any of its officers or employees who shall thereupon have authority under the order of the commission to inspect and examine any and all accounts, records and memoranda kept by such corporations. Where the commission has prescribed the forms of accounts, records and memoranda to be kept by such corporations it shall be unlawful for them to keep any other accounts, records or memoranda than those so prescribed, or those prescribed by or under authority of the United States. Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination except in so far as he may be directed by the commission, or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor.

§ 53. **Franchises and Privileges.**—Without first having ob-

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tained the permission and approval of the proper commission no railroad corporation, street railroad corporation or common carrier shall begin the construction of a railroad or street railroad, or any extension thereof, for which prior to the time when this act becomes a law a certificate of public convenience and necessity shall not have been granted by the board of railroad commissioners or where prior to said time said corporation or common carrier shall not have become entitled by virtue of its compliance with the provisions of the railroad law to begin such construction; nor, except as above provided in this section, shall any such corporation or common carrier exercise any franchise or right under any provision of the railroad law, or of any other law, not heretofore lawfully exercised, without first having obtained the permission and approval of the proper commission. The commission within whose district such construction is to be made, or within whose district such franchise or right is to be exercised, shall have power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the franchise or privilege is necessary or convenient for the public service. And if such construction is to be made, or such franchise to be exercised in both districts, the approval of both commissions shall be secured.

§ 54. **Transfer of Franchises or Stocks.**—No franchise nor any right to or under any franchise, to own or operate a railroad or street railroad shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting any such franchise or right be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement shall have been approved by the proper commission. The permission and approval of the commission, to the exercise of a franchise under section fifty-three, or to the assignment, transfer or lease of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise, or to enlarge or add to the powers and privileges contained in the grant of any franchise, or to waive any forfeiture.

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No railroad corporation, or street railroad corporation, domestic or foreign, shall hereafter purchase or acquire, take or hold, any part of the capital stock of any railroad corporation or street railroad corporation or other common carrier organized or existing under or by virtue of the laws of this State, unless authorized so to do by the commission empowered by this act to give such consent; and save where stock shall be transferred or held for the purpose of collateral security only with the consent of the commission empowered by this act to give such consent, no stock corporation of any description, domestic or foreign, other than a railroad corporation or street railroad corporation, shall purchase or acquire, take or hold, more than ten per centum of the total capital stock issued by any railroad corporation or street railroad corporation or other common carrier organized or existing under or by virtue of the laws of this State. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation, in violation of any provision of this act, shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such railroad corporation or street railroad corporation, or shall be recognized as effective for any purpose. The power conferred by this section to approve or disapprove a transaction relating to franchises, rights or stock of any railroad corporation or street railroad corporation, or other common carrier, shall be exercised by the commission which is authorized by this act to approve the issue of stock by such railroad corporation or street railroad corporation.

§ 55. **Approval of Issues of Stock, Bonds and Other Forms of Indebtedness.**—A common carrier, railroad corporation or street railroad corporation organized or existing, or hereafter incorporated, under or by virtue of the laws of the State of New York, may issue stocks, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of

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property, the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations, provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof and stating that, in the opinion of the commission, the use of the capital to be secured by the issue of such stock, bonds, notes or other evidence of indebtedness is reasonably required for the said purposes of the corporation, but this provision shall not apply to any lawful issue of stock, to the lawful execution and delivery of any mortgage or to the lawful issue of bonds thereunder, which shall have been duly approved by the board of railroad commissioners before the time when this act becomes a law. For the purpose of enabling it to determine whether it should issue such an order, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it may deem of importance in enabling it to reach a determination. Such common carrier, railroad corporation or street railroad corporation may issue notes, for proper corporate purposes and not in violation of any provision of this or any other act, payable at periods of not more than twelve months without such consent, but no such notes shall, in whole or in part, directly or indirectly be refunded by any issue of stock or bonds or by any evidence of indebtedness running for more than twelve months without the consent of the proper commission. Provided, however, that the commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to a political subdivision thereof as the consideration for the grant of such franchise or right; nor shall the capital stock of a corporation formed by the merger or consolidation of two or more other corporations, exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof, or such sum and any additional sum actually paid

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in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger. Whenever it shall happen that any railroad corporation shall own or operate its lines in both districts it shall, under this section, apply to the commission of the second district. Whenever it shall happen that any street railroad corporation shall own or operate its lines in both districts, it shall, under this section, apply to the commission of the first district. Any other common carrier not operating exclusively in the first district shall apply to the commission of the second district.

§ 56. **Forfeiture; Penalties.**—1. Every common carrier, railroad corporation and street railroad corporation, and all officers and agents of any common carrier, railroad corporation or street railroad corporation shall obey, observe and comply with every order made by the commission, under authority of this act, so long as the same shall be and remain in force. Any common carrier, railroad corporation or street railroad corporation which shall violate any provision of this act, or which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission, shall forfeit to the people of the State of New York not to exceed the sum of five thousand dollars for each and every offense; every violation of any such order or direction or requirement, or of this act, shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance thereof shall be and be deemed to be a separate and distinct offense.

2. Every officer and agent of any such common carrier or corporation who shall violate, or who procures, aids or abets any violation by any such common carrier or corporation, of any provision of this act, or who shall fail to obey, observe and comply with any order of the commission or any provision of an order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and

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comply with any such order or provision, shall be guilty of a misdemeanor.

§ 57. **Summary Proceedings.**—Whenever either commission shall be of opinion that a common carrier, railroad corporation or street railroad corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the Supreme Court of the State of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the Supreme Court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time not exceeding twenty days after service of a copy of the petition, within which the common carrier, railroad corporation or street railroad corporation complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations as the court shall deem necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

§ 58. **Penalties for Other Than Common Carriers.**—1. Any

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corporation, other than a common carrier, railroad corporation or street railroad corporation, which shall violate any provision of this act, or shall fail to obey, observe and comply with every order made by the commission under authority of this act, so long as the same shall be and remain in force, shall forfeit to the people of the State of New York a sum not exceeding one thousand dollars for each and every offense; every such violation shall be a separate and distinct offense, and the penalty or forfeiture thereof shall be recovered in an action as provided in section fifty-nine of this act.

2. Every person who, either individually or acting as an officer or agent of a corporation other than a common carrier, railroad corporation or street railroad corporation, shall violate any provision of this act or fail to obey, observe or comply with any order made by the commission under this act, so long as the same shall be or remain in force, or who shall procure, aid or abet any such corporation in its violation of this act or in its failure to obey, observe or comply with any such order, shall be guilty of a misdemeanor.

3. In construing and enforcing the provisions of this act relating to forfeitures and penalties the act of any director, officer or other person acting for or employed by any common carrier, railroad corporation, street railroad corporation or corporation, acting within the scope of his official duties or employment, shall be in every case and be deemed to be the act of such common carrier, railroad corporation, street railroad corporation or corporation.

§ 59. **Action to Recover Penalties or Forfeitures.**—An action to recover a penalty or a forfeiture under this act may be brought in any court of competent jurisdiction in this State in the name of the people of the State of New York, and shall be commenced and prosecuted to final judgment by counsel to the commission. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a

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waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order of the commission the defendant was actually and in good faith prosecuting a suit, action or proceeding in the courts to set aside such order, the court shall remit the penalties or forfeitures incurred during the pendency of such suit, action or proceeding. All moneys recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund.

§ 60. **Duties of Commissions as to Interstate Traffic.**— Either commission may investigate freight rates on interstate traffic on railroads within the State, and when such rates are, in the opinion of either commission, excessive or discriminatory or are levied or laid in violation of the interstate commerce law, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission may apply by petition to the interstate commerce commission for relief or may present to the interstate commerce commission all facts coming to its knowledge, as to violations of the rulings, orders or regulations of that commission or as to violations of the interstate commerce law.

ARTICLE IV.

PROVISIONS RELATING TO GAS AND ELECTRICAL CORPORATIONS; REGULATION OF PRICE OF GAS AND ELECTRICITY.

§ 65. Application of Articles.
66. General Powers of Commissions in Respect to Gas and Electricity.
67. Inspection of Gas and Electric Meters.
68. Approval of Incorporation and Franchises; Certificate.
69. Approval of Issue of Stock, Bonds and Other Forms of Indebtedness.
§ 70. Approval of Transfer of Franchises.
71. Complaints as to Quality and Price of Gas and Electricity; Investigation by Commission; Forms of Complaints.
72. Notice and Hearing; Order

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Fixing Price of Gas or Electricity, or Requiring Improvements.
§ 73. Forfeiture for Noncompliance With Order.
§ 74. Summary Proceedings.
75. Defense in Case of Excessive Charge for Gas or Electricity.
76. Jurisdiction.
77. Powers of Local Officers.

§ 65. **Application of Article.**—This article shall apply to the manufacture and furnishing of gas for light, heat or power and the furnishing of natural gas for light, heat or power, and the generation, furnishing and transmission of electricity for light, heat or power.

§ 66. **General Powers of Commissions in Respect to Gas and Electricity.**—Each commission shall within its jurisdiction:

1. Have the general supervision of all persons and corporations having authority under any general or special law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors.

2. Investigate and ascertain, from time to time, the quality of gas supplied by persons, corporations and municipalities; examine the methods employed by such persons, corporations and municipalities in manufacturing and supplying gas or electricity for light, heat or power and in transmitting the same, and have power to order such improvements as will best promote the public interest, preserve the public health and protect those using such gas or electricity and those employed in the manufacture and distribution thereof, or in maintenance and operation of the works, wires, poles, lines, conduits, ducts and systems maintained in connection therewith.

3. Have power to fix the standard of illuminating power and purity of gas, not less than that prescribed by law, to be manufactured or sold by persons, corporations or municipalities for lighting, heating or power purposes, and to prescribe methods of regulation of the electric supply system as to the use for in-

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candescent lighting and fix the initial efficiency of incandescent lamps furnished by the persons, corporations or municipalities generating and selling electric current for lighting, and by order to require the gas so manufactured or sold to equal the standard so fixed by it, and to establish the regulations as to pressure at which gas shall be delivered. For the purpose of determining whether the gas sold by such persons, corporations or municipalities for lighting, heating or power purposes conforms to the standard of illuminating power and purity and, of its own motion, examine and investigate the methods employed in manufacturing, delivering and supplying the gas so sold, and shall have access through its members or persons employed and authorized by it to make such examinations and investigations to all parts of the manufacturing plants owned, used or operated for the manufacture or distribution of gas by any such person, corporation or municipality. Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination, except in so far as he may be directed by the commission, or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor.

4. Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by the persons, corporations and municipalities engaged in the manufacture, sale and distribution of gas and electricity for light, heat or power.

5. Examine all persons, corporations and municipalities under its supervision, keep informed as to the methods employed by them in the transaction of their business and see that their property is maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

6. Require every person and corporation under its supervision to submit to it an annual report, verified by the oath of the president, treasurer, or general manager thereof, showing in detail (1) the amount of its authorized capital stock and the amount thereof issued and outstanding; (2) the amount of its

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authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding; (3) its receipts and expenditures during the preceding year; (4) the amount paid as dividends upon its stock and as interest upon its bonds; (5) the name of, and the amount paid as salary to each officer and the amount paid as wages to its employees; (6) the location of its plant or plants and system, with a full description of its property and franchises, stating in detail how each franchise stated to be owned was acquired, and (7) such other facts pertaining to the operation and maintenance of the plant and system, and the affairs of such person or corporation as may be required by the commission. Such reports shall be in the form, cover the period and be submitted at the time prescribed by the commission. The commission may, from time to time, make changes and additions in such forms, giving to the persons, corporations and municipalities six months' notice before the time fixed by the commission as the expiration of the fiscal year of any changes or additions which would require any alteration in the method or form of keeping their accounts for the ensuing year. When any such report is defective or believed to be erroneous, the commission shall notify the person, corporation or municipality making such report to amend the same within thirty days. Any such person or corporation or municipality which shall neglect to make any such report within the time specified by the commission, or which shall fail to correct any such report within thirty days after notice, shall be liable to a penalty of one hundred dollars and an additional penalty of one hundred dollars for each day after the prescribed time for which it shall neglect to file or correct the same, to be sued for in the name of the people of the State of New York. The amount recovered in any such action shall be paid into the state treasury and be credited to the general fund. The commission may extend the time herein limited for cause shown.

7. Require each municipality engaged in operating any works or systems for the manufacture and supplying of gas or electricity to make an annual report to the commission, verified by

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the oath of the general manager or superintendent thereof, showing in detail, (1) the amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding for lighting purposes; (2) its receipts and expenditures during the preceding year; (3) the amount paid as interest upon its bonds and upon other forms of evidence of indebtedness; (4) the name of and the amount paid to each person receiving a yearly or monthly salary, and the amount paid as wages to employees; (5) the location of its plant and system with a full description of the property, and (6) such other facts pertaining to the operation and maintenance of the plant and system, as may be required by the commission. Such report shall be in the form, cover the period and be submitted at the time prescribed by the commission.

8. Have power, either through its members or inspectors or employees duly authorized by it, to enter in or upon and to inspect the property, buildings, plants, factories, power houses and offices of any of such corporations, persons or municipalities.

9. Have power to examine the books and affairs of any such corporation, persons or municipalities, and to compel the production before it of books and papers pertaining to the affairs being investigated by it.

10. Have power, either as a commission or through its members, to subpœna witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it in reference to any matter within its jurisdiction under this article.

§ 67. **Inspection of Gas and Electric Meters.**—1. Each commission shall appoint inspectors of gas and electric meters whose duty it shall be when required, to inspect, examine, prove and ascertain the accuracy of any and all gas meters used or intended to be used for measuring or ascertaining the quantity of illuminating or fuel gas or natural gas furnished by any gas corporation to or for the use of any person and any and all

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electric meters used or intended to be used for measuring and ascertaining the quantity of electric current furnished for light, heat and power by any electrical corporation to or for the use of any person or persons and when found to be or made to be correct, the inspector shall stamp or mark all such meters and each of them with some suitable device, which device shall be recorded in the office of the secretary of state.

2. No corporation or person shall furnish or put in use any gas meter which shall not have been inspected, proved and sealed, or any electric meter which shall not have been inspected, approved, stamped or marked by an inspector of the commission. Every gas and electrical corporation shall provide or keep in and upon its premises a suitable and proper apparatus, to be approved and stamped or marked by the commission, for testing and proving the accuracy of gas and electric meters furnished for use by it, and by which apparatus every meter may and shall be tested, on the written request of the consumer to whom the same shall be furnished, and in his presence if he desires it.

If any consumer to whom a meter has been furnished, shall request the commission in writing to inspect such meter, the commission shall have the same inspected and tested; if the same on being so tested shall be found to be, four per cent. if an electric meter, or two per cent. if a gas meter, defective or incorrect to the prejudice of the consumer, the inspector shall order the gas or electrical corporation forthwith to remove the same and to place instead thereof a correct meter, and the expense of such inspection and test shall be borne by the corporation; if the same on being so tested shall be found to be correct the expense of such inspection and test shall be borne by the consumer. A uniform reasonable charge shall be fixed by the commission for this service.

§ 68. **Approval of Incorporation and Franchises; Certificate.**—No gas corporation or electrical corporation incorporated under the laws of this or any other State shall begin construction, or exercise any right or privilege under any franchise

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hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised without first having obtained the permission and approval of the proper commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation,* showing that it has received the required consent of the proper municipal authorities. No municipality shall build, maintain and operate for other than municipal purposes any works or systems for the manufacture and supplying of gas or electricity for lighting purposes without a certificate of authority granted by the commission. If the certificate of authority is refused, no further proceedings shall be taken before the commission, but a new application may be made therefor after one year from the date of such refusal.

§ 69. **Approval of Issues of Stock, Bonds and Other Forms of Indebtedness.**—A gas corporation or electrical corporation organized or existing, or hereafter incorporated, under or by virtue of the laws of the State of New York, may issue stocks, bonds, notes or other evidence of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its plant or distributing system, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations, provided and not otherwise that there shall have been secured from the proper commission an order authorizing such issue, and the amount thereof, and stating that, in the opinion of the commission, the use of the capital to be secured by the issue of such stock, bonds, notes or other evidence of indebtedness is reasonably required for the said purposes of the corporation. For the purpose of enabling it to determine whether or not it should issue such an order, the commission shall make such inquiry or investigation, hold such hearings and examine such witnesses, books, papers, documents or contracts as it

* So in original.

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may deem of importance in enabling it to reach a determination. Such gas corporation or electrical corporation may issue notes, for proper corporate purposes and not in violation of any provision of this or of any other act, payable at periods of not more than twelve months without such consent; but no such notes shall, in whole or in part, directly or indirectly be refunded by any issue of stock or bonds or by any evidence of indebtedness running for more than twelve months without the consent of the proper commission. Provided, however, that the commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to any political subdivision thereof as the consideration for the grant of such franchise or right. Nor shall the capital stock of a corporation formed by the merger or consolidation of two or more other corporations, exceed the sum of the capital stock of the corporations, so consolidated, at the par value thereof, or such sum and any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger.

§ 70. **Approval of Transfer of Franchise.**—No gas corporation or electrical corporation shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person or corporation or contract for the operation of its works and system, without the written consent of the proper commission. The permission and approval of the commission, to the exercise of a franchise under section sixty-eight of this act, or to the assignment, transfer or lease of a franchise under this section shall not be construed to revive or validate any lapsed or invalid franchise or to enlarge or add to the powers and privileges contained in the grant of any franchise or to waive any forfeiture. No such corporation shall

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directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality, unless authorized so to do by the commission. Save where stock shall be transferred or held for the purpose of collateral security only with the consent of the commission empowered by this act to give such consent, no stock corporation of any description, domestic or foreign, other than a gas or electrical corporation, shall purchase or acquire, take or hold, more than ten per centum of the total capital stock issued by any gas corporation or electrical corporation organized or existing under or by virtue of the laws of this State. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation, in violation of any provision of this act, shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such gas corporation, or electrical corporation, or shall be recognized as effective for any purpose.

§ 71. **Complaints as to Quality and Price of Gas and Electricity; Investigation by Commission; Forms of Complaints.**—Upon the complaint in writing of the mayor of a city, the trustees of a village or the town board of a town in which a person or corporation is authorized to manufacture, sell or supply gas or electricity for heat, light or power, or upon the complaint in writing of not less than one hundred customers or purchasers of such gas or electricity in cities of the first or second class, or of not less than fifty in cities of the third class, or of not less than twenty-five elsewhere, either as to the illuminating power, purity, pressure or price of gas or the initial efficiency of the electric incandescent lamp supply, or the regulation of the voltage of the supply system used for incandescent lighting, or price of electricity sold and delivered in such municipality, the proper commission shall investigate as to the

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cause for such complaint. When such complaint is made, the commission may, by its agents, examiners and inspectors, inspect the works, system, plant and methods used by such person or corporation in manufacturing, transmitting and supplying such gas or electricity, and may examine or cause to be examined the books and papers of such person or corporation pertaining to the manufacture, sale, transmitting and supplying of such gas or electricity. The form and contents of complaints made as provided in this section shall be prescribed by the commission. Such complaints shall be signed by the officers, or by the customers, purchasers or subscribers making them, who must add to their signatures their places of residence, by street and number, if any.

§ 72. **Notice and Hearing; Order Fixing Price of Gas or Electricity, or Requiring Improvement.**—Before proceeding under a complaint presented as provided in section seventy-one, the commission shall cause notice of such complaint, and the purpose thereof, to be served upon the person or corporation affected thereby. Such person or corporation shall have an opportunity to be heard in respect to the matters complained of at a time and place to be specified in such notice. If an investigation be instituted upon motion of the commission the person or corporation affected by the investigation may be permitted to appear before the commission at a time and place specified in the notice and answer all charges which may be preferred by the commission. After a hearing and after such investigation as may have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of gas or electricity to be charged by such corporation or person, or may order such improvement in the manufacture or supply of such gas, in the manufacture, transmission or supply of such electricity, or in the methods employed by such person or corporation, as will in its judgment improve the service. The price so fixed by the commission shall be the maximum price to be charged by such person or corporation for gas or electricity in

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such municipality until the commission shall upon complaint as provided in this section or upon an investigation conducted by it on its own motion, again fix the maximum price of such gas or electricity. In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein.

§ 73. **Forfeiture for Noncompliance with Order.**—Every gas corporation and electrical corporation and the officers, agents or employees thereof shall obey, observe and comply with every order made by the commission under authority of this act, so long as the same shall be and remain in force. Any such corporation, or any officer, agent or employee thereof, who knowingly fails or neglects to obey or comply with such order, or any provision of this act, shall forfeit to the State of New York not to exceed the sum of one thousand dollars for each offense. Every distinct violation of any such order or of this act, shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. An action to recover such forfeiture may be brought in any court of competent jurisdiction in this State in the name of the people of the State of New York, and shall be commenced and prosecuted to final judgment by counsel to the commission. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order of the commission the defendant was actually and in good faith prosecuting the suit, action or proceeding in the courts to set aside such order, the court shall remit the penalties or forfeitures incurred during the pendency of such suit, action or proceeding. All moneys recovered in any such action, together

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with the costs thereof, shall be paid into the state treasury to the credit of the general fund.

§ 74. **Summary Proceedings.**—Whenever either commission shall be of opinion that a gas corporation, electrical corporation or municipality within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the Supreme Court of the State of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the Supreme Court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time not exceeding twenty days after service of a copy of the petition within which the gas corporation, electrical corporation or municipality complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations, as it shall seem to the court, necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

§ 75. **Defense in Case of Excessive Charges for Gas or Electricity.**—If it be alleged and established in an action

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brought in any court for the collection of any charge for gas or electricity, that a price has been demanded in excess of that fixed by the commission or by statute in the municipality wherein the action arose, no recovery shall be had therein, but the fact that such excessive charges have been made shall be a complete defense to such action.

§ 76. **Jurisdiction.**—Whenever any corporation supplies gas or electricity to consumers in both districts, any application or report to a commission required by this act shall be made to the commission of the district within which it is mainly supplying, or proposing to supply, such service to consumers. But nothing herein contained shall be construed to deprive the commission of either district of the power of supervision and regulation within its district. And either commission shall have power to enter and inspect the plant of such corporation, wherever situated.

§ 77. **Powers of Local Officers.**—If in any city of the first or second class there now exists or shall hereafter be created a board, body or officer having jurisdiction of matters pertaining to gas or electric service, such board, body or officer shall have and may exercise such power, jurisdiction and authority in enforcing the laws of the State and the orders, rules and regulations of the commission as may be prescribed by statute or by the commission.

ARTICLE V.

COMMISSIONS AND OFFICES ABOLISHED; SAVING CLAUSE; REPEAL.

§ 80. Board of Railroad Commissioners Abolished; Effect Thereof.
81. Commission of Gas and Electricity Abolished; Effect Thereof.
82. Inspector of Gas Meters Abolished; Effect Thereof.
83. Board of Rapid Transit Railroad Commissioners Abolished; Effect Thereof.
§ 84. Transfer of Records.
85. Pending Actions and Proceedings.
86. Construction.
87. Repeal.
88. Appropriation.
89. Time of Taking Effect.

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§ 80. **Board of Railroad Commissioners Abolished; Effect Thereof.**—On and after the taking effect of this act the board of railroad commissioners shall be abolished. All the powers and duties of such board conferred and imposed by any statute of this State shall thereupon be exercised and performed by the public service commissions.

§ 81. **Commission of Gas and Electricity Abolished; Effect Thereof.**—On and after the taking effect of this act the commission of gas and electricity shall be abolished. All the powers and duties of such commission conferred and imposed by any statute of this State shall be exercised and performed by the public service commissions.

§ 82. **Inspector of Gas Meters Abolished; Effect Thereof.**—On and after the taking effect of this act the offices of inspector and deputy inspectors of gas meters shall be abolished. All the powers and duties of such inspector conferred and imposed by any statute of this State shall be exercised and performed by the public service commissions. But any meter inspected, proved and sealed, by the said inspector of gas meters, prior to the taking effect of this act, shall be deemed to have been inspected by the commission.

§ 83. **Board of Rapid Transit Railroad Commissioners Abolished; Effect Thereof.**—On and after the taking effect of this act the board of rapid transit railroad commissioners shall be abolished. All the powers and duties of such board conferred and imposed by any statute of this State shall thereupon be exercised and performed by the public service commission of the first district.

§ 84. **Transfer of Records.**—1. The board of railroad commissioners, the commission of gas and electricity, and the inspector of gas meters, shall transfer and deliver to the public service commission of the second district all books, maps, papers and records of whatever description, now in their pos-

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session; and upon taking effect of this act, the said commission is authorized to take possession of all such books, maps, papers and records.

2. The board of rapid transit railroad commissioners shall transfer and deliver to the public service commission of the first district all contracts, books, maps, plans, papers and records of whatever description, now in their possession; and upon taking effect of this act, the said commission is authorized to take possession of all such contracts, books, maps, plans, papers and records. The said commission may also, at its pleasure, retain in its employment any person or persons not employed by the said board of rapid transit railroad commissioners, and all said persons shall be eligible for transfer and appointment to positions under the public service commission of the first district.

§ 85. **Pending Actions and Proceedings.**—This act shall not affect pending actions or proceedings, civil or criminal, brought by or against the board of railroad commissioners or the commission of gas and electricity, or the board of rapid transit railroad commissioners, but the same may be prosecuted or defended in the name of the public service commission, provided the subject-matter thereof is within the statutory jurisdiction of such commission. Any investigation, examination or proceeding undertaken, commenced or instituted by the said boards or commission or either of them prior to the taking effect of this act may be conducted and continued to a final determination by the proper public service commission in the same manner, under the same terms and conditions, and with the same effect as though such boards or commission had not been abolished.

§ 86. **Construction.**—Wherever the terms board of railroad commissioners, or commission of gas and electricity, or inspector of gas meters or board of rapid transit railroad commissioners occur in any law, contract or document or whenever in any law, contract or document reference is made to such boards,

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commission or inspector, such terms or reference shall be deemed to refer to and include the public service commissions as established by this act, so far as such law, contract or document pertains to matters which are within the jurisdiction of the said public service commissions. Nothing in this act contained shall be deemed to apply to or operate upon interstate or foreign commerce.

§ 87. **Repeal.**—The following acts and parts of acts, together with all other acts amendatory of such acts, and all acts and parts of acts otherwise in conflict with this act, are hereby repealed:

Laws of 1905, chapter 737.
Laws of 1905, chapter 728.
Laws of 1904, chapter 158.
Laws of 1902, chapter 373.
Laws of 1896, chapter 456.
Laws of 1894, chapter 452.
Laws of 1892, chapter 534.
Laws of 1891, chapter 4, sections 1, 2 and 3.
Laws of 1890, chapter 565, sections 150 to 172, inclusive.
Laws of 1890, chapter 566, sections 62, 63 and 64.

§ 88. **Appropriation.**—There shall be appropriated for the use of the commissions, and for the payment of salaries and disbursements under this act, from money not otherwise appropriated, the sum of three hundred thousand dollars, one hundred and fifty thousand dollars for the use of the commission of the first district and one hundred and fifty thousand dollars for the use of the commission of the second district.

§ 89. **Time of Taking Effect.**—This act shall take effect July first, nineteen hundred and seven.

Purchase of Rapid Transit Railways—Powers of Public Service Commission.—Act of May 22, 1908, Laws of New York, 1908, p. 1675, chap. 472, entitled: "An act to amend chapter

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four of the laws of eighteen hundred and ninety-one, entitled 'an act to provide rapid transit railways in cities of over one million inhabitants,' in regard to the purchase by such cities and the equipment, maintenance and operation of railways for rapid transit purposes," empowers, under § 34*f*, the public service commission of the first district, successor of the rapid transit railroad commissioners, with the approval of the board of estimate and apportionment, or other analogous local authority of such city, to purchase for such price and upon such terms and conditions as may be agreed upon, and acquire by conveyance or grant to such city, to be delivered to said board, any line of railway already constructed or in process of construction of the character which might be constructed as a rapid transit railway or railways under the provisions of this act, and which in the opinion of the board it is for the interest of the public and the city to acquire for rapid transit purposes. This amendment further provides for the raising and payment of the necessary monies; that such railway or railways shall be deemed to have been constructed at the expense of the city; for consents to such construction and operation; for contracts with any firm or corporation for equipment, etc.; for the term of maintenance and operation; and for conditions as to rates of fare, character of service and rental to be paid, having in view the public interests. Section 37 of said act, as amended by chap. 534 of the Laws of 1907, is amended for the purpose of providing the necessary means for such construction or equipment or both, or acquiring by purchase at the public expense, of any such road or roads, including galleries, ways, subways and tunnels for sub-surface structures and the necessary means to pay for lands, etc., and meeting the interest on the bonds. Other provisions are also made in the matter of such bonds and the issuance thereof, their sale value, their freedom from taxation, their payment, etc.; and for public hearing, upon notice, before finally fixing the terms or conditions of any contract provided by the amendment.

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APPENDIX B.

PUBLIC UTILITY LAW

OF

WISCONSIN.

GIVING THE WISCONSIN RAILROAD COMMISSION
JURISDICTION OVER PUBLIC UTILITIES.

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APPENDIX B.

PUBLIC UTILITY LAW

OF

WISCONSIN.

[No. 933, A. Published July 10, 1907.]

CHAPTER 499.

AN ACT to create section 1797m—1 to 1797m—108, inclusive, statutes of 1898, giving the Wisconsin railroad commission jurisdiction over public utilities, providing for the regulation of such public utilities, appropriating a sum sufficient to carry out the provisions of this act, and repealing certain acts in conflict with the provisions hereof.

The People of the State of Wisconsin, represented in Senate and Assembly do enact as follows:

SECTION 1. There are added to the statutes of 1898, 108 new sections to read:* Section 1797m—1. 1. The term "public utility" as used in this act shall mean and embrace every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every town, village or city that now or hereafter may own, operate, manage or control any plant or equipment or any part of a plant or equipment within the State, for the conveyance of telephone messages or for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public.

2. The term "municipal council" as used in this act shall

*Contents are given on page 978, herein.

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mean and embrace the common council, the board of aldermen, the board of trustees, the town or village board, or any other governing body of any town, village or city wherein the property of the public utility or any part thereof is located.

3. The term "municipality" as used in this act shall mean any town, village or city wherein property of a public utility or any part thereof is located.

4. The term "service" is used in this act in its broadest and most inclusive sense.

5. The term "indeterminate permit" as used in this act shall mean and embrace every grant, directly or indirectly from the State, to any corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, of power, right or privilege to own, operate, manage or control any plant or equipment or any part of a plant or equipment within this State for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public, which shall continue in force until such time as the municipality shall exercise its option to purchase as provided in this act or until it shall be otherwise terminated according to law.

6. The term "commission" as used in this act shall mean the railroad commission of Wisconsin.

§ 1797m—2. The railroad commission of Wisconsin is vested with power and jurisdiction to supervise and regulate every public utility in this State and to do all things necessary and convenient in the exercise of such power and jurisdiction.

§ 1797m—3. Every public utility is required to furnish reasonably adequate service and facilities. The charge made by any public utility for any heat, light, water or power produced, transmitted, delivered or furnished or for any telephone message conveyed or for any service rendered or to be rendered in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful.

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§ 1797m—4. 1. Every public utility, and every person, association or corporation having conduits, subways, poles or other equipment on, over or under any street or highway shall for a reasonable compensation permit the use of the same by any public utility whenever public convenience and necessity require such use and such use will not result in irreparable injury to the owner or other users of such equipment nor in any substantial detriment to the service to be rendered by such owners or other users.

2. In case of failure to agree upon such use or the conditions or compensation for such use any public utility or any person, association or corporation interested may apply to the commission, and if after investigation the commission shall ascertain that public convenience and necessity require such use and that it would not result in irreparable injury to the owner or other users of such equipment nor in any substantial detriment to the service to be rendered by such owner or other users of such equipment, it shall by order direct that such use be permitted and prescribe reasonable conditions and compensation for such joint use.

3. Such use so ordered shall be permitted and such conditions and compensations so prescribed shall be the lawful conditions and compensation to be observed, followed and paid, subject to recourse to the courts upon the complaint of any interested party as provided in section 1797m—64 to 1797m—73, inclusive, and such sections so far as applicable shall apply to any action arising on such complaint so made. Any such order of the commission may be from time to time revised by the commission upon application of any interested party or upon its own motion.

§ 1797m—5. The commission shall value all the property of every public utility actually used and useful for the convenience of the public. In making such valuation the commission may avail itself of any information in possession of the state board of assessment.

§ 1797m—6. 1. Before final determination of such value the

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commission shall, after notice to the public utility, hold a public hearing as to such valuation in the manner prescribed for a hearing in sections 1797m—45 to 1797m—55 inclusive, and the provisions of such sections so far as applicable shall apply to such hearing.

2. The commission shall within five days after such valuation is determined serve a statement thereof upon the public utility interested, and shall file a like statement with the clerk of every municipality in which any part of the plant or equipment of such public utility is located.

§ 1797m—7. The commission may at any time on its own initiative make a re-valuation of such property.

§ 1797m—8. 1. Every public utility shall keep and render to the commission in the manner and form prescribed by the commission uniform accounts of all business transacted.

2. Every public utility engaged directly or indirectly in any other business than that of the production, transmission or furnishing of heat, light, water or power or the conveyance of telephone messages shall, if required by the commission, keep and render separately to the commission in like manner and form the accounts of all such other business, in which case all the provisions of this act shall apply with like force and effect to the books, accounts, papers and records of such other business.

§ 1797m—9. The commission shall prescribe the forms of all books, accounts, papers and records required to be kept, and every public utility is required to keep and render its books, accounts, papers and records accurately and faithfully in the manner and form prescribed by the commission and to comply with all directions of the commission relating to such books, accounts, papers and records.

§ 1797m—10. The commission shall cause to be prepared suitable blanks for carrying out the purposes of this act, and shall, when necessary, furnish such blanks to each public utility.

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§ 1797m—11. No public utility shall keep any other books, accounts, papers or records of the business transacted than those prescribed or approved by the commission.

§ 1797m—12. Each public utility shall have an office in one of the towns, village or cities in this State in which its property or some part thereof is located, and shall keep in said office all such books, accounts, papers and records as shall be required by the commission to be kept within the State. No books, accounts, papers or records required by the commission to be kept within the State shall be at any time removed from the State, except upon such conditions as may be prescribed by the commission.

§ 1797m—13. The accounts shall be closed annually on the 30th day of June and a balance sheet of that date promptly taken therefrom. On or before the first day of August following, such balance sheet together with such other information as the commission shall prescribe, verified by an officer of the public utility, shall be filed with the commission.

§ 1797m—14. 1. The commission shall provide for the examination and audit of all accounts, and all items shall be allocated to the accounts in the manner prescribed by the commission.

2. The agents, accountants or examiners employed by the commission shall have authority under the direction of the commission to inspect and examine any and all books, accounts, papers, records and memoranda kept by such public utilities.

§ 1797m—15. 1. Every public utility shall carry a proper and adequate depreciation account whenever the commission after investigation shall determine that such depreciation account can be reasonably required. The commission shall ascertain and determine what are the proper and adequate rates of depreciation of the several classes of property of each public utility. The rates shall be such as will provide the amounts re-

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quired over and above the expense of maintenance, to keep such property in a state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation accounts to such rates so ascertained and determined by the commission. The commission may make changes in such rates of depreciation from time to time as it may find to be necessary.

2. The commission shall also prescribe rules, regulations, and forms of accounts regarding such depreciation which the public utility is required to carry into effect.

3. The commission shall provide for such depreciation in fixing the rates, tolls and charges to be paid by the public.

4. All moneys thus provided for shall be set aside out of the earnings and carried in a depreciation fund. The moneys in this fund may be expended in new constructions, extensions or additions to the property of such public utility, or invested, and if invested the income from the investments shall also be carried in the depreciation fund. This fund and the proceeds thereof shall be used for no other purpose than as provided in this section and for depreciation.

§ 1797m—16. The commission shall keep itself informed of all new construction, extensions and additions to the property of such public utilities and shall prescribe the necessary forms, regulations and instructions to the officers and employees of such public utilities for the keeping of construction accounts, which shall clearly distinguish all operating expenses and new construction.

§ 1797m—17. 1. Nothing in this act shall be taken to prohibit a public utility from entering into any reasonable arrangement with its customers or consumers or with its employees, for the division or distribution of its surplus profits, or providing for a sliding scale of charges, or other financial device that may be practicable and advantageous to the parties interested. No such arrangement or device shall be lawful until it shall be found by the commission, after investigation, to be reasonable and

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just and not inconsistent with the purposes of this act. Such arrangement shall be under the supervision and regulation of the commission.

2. The commission shall ascertain, determine and order such rates, charges and regulations as may be necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges and regulations as the commission may ascertain and determine to be necessary and reasonable and the right to revoke its approval and amend or rescind all orders relative thereto is reserved and vested in the commission notwithstanding any such arrangement and mutual agreement.

§ 1797m—18. Each public utility shall furnish to the commission in such form and at such time as the commission shall require, such accounts, reports and information as shall show in itemized detail: (1) the depreciation per unit, (2) the salaries and wages separately per unit, (3) legal expenses per unit, (4) taxes and rentals separately per unit, (5) the quantity and value of material used per unit, (6) the receipts from residuals, by-products, services or other sales separately per unit, (7) the total and net cost per unit, (8) the gross and net profit per unit, (9) the dividends and interest per unit, (10) surplus or reserve per unit, (11) the prices per unit paid by consumers; and in addition such other items, whether of a nature similar to those hereinbefore enumerated or otherwise, as the commission may prescribe in order to show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public.

§ 1797m—19. 1. The commission shall publish annual reports showing its proceedings and showing in tabular form the details per unit as provided in section 1797m—18 for all the public utilities of each kind in the State, and such monthly or occasional reports as it may deem advisable.

2. The commission shall also publish in its annual reports the value of all the property actually used and useful for the con-

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venience of the public and the value of the physical property actually used and useful for the convenience of the public, of every public utility as to whose rates, charges, service or regulations any hearing has been held by the commission under section 1797m—45 and 1797m—46 or the value of whose property has been ascertained by it under section 1797m—5.

§ 1797m—20. All facts and information in the possession of the commission shall be public and all reports, records, files, books, accounts, papers and memoranda of every nature whatsoever in their possession shall be open to inspection by the public at all reasonable times except as provided in section 1797m—21.

§ 1797m—21. 1. Whenever the commission shall determine it to be necessary in the interest of the public to withhold from the public any facts or information in its possession, such facts may be withheld for such period after the acquisition thereof not exceeding ninety days as the commission may determine.

2. No facts or information shall be withheld by the commission from the public for a longer period than ninety days nor be so withheld for any reason whatsoever other than in the interest of the public.

§ 1797m—22. The commission shall ascertain and prescribe for each kind of public utility suitable and convenient standard commercial units of product or service. These shall be lawful units for the purposes of this act.

§ 1797m—23. 1. The commission shall ascertain and fix adequate and serviceable standards for the measurement of quality, pressure, initial voltage or other condition pertaining to the supply of the product or service rendered by any public utility and prescribe reasonable regulations for examination and testing of such product or service and for the measurement thereof.

2. It shall establish reasonable rules, regulations, specifica-

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tions and standards to secure the accuracy of all meters and appliances for measurements, and every public utility is required to carry into effect all orders issued by the commission relative thereto.

3. Nothing contained in this section shall limit in any manner any powers or authority vested in municipal corporations as provided in section 1797m—87.

§ 1797m—24. 1. The commission shall provide for the examination and testing of any and all appliances used for the measuring of any product of service of a public utility.

2. Any consumer or user may have any such appliance tested upon payment of the fees fixed by the commission.

3. The commission shall declare and establish reasonable fees to be paid for testing such appliances on the request of the consumers or users, the fee to be paid by the consumer or user at the time of his request, but to be paid by the public utility and repaid to the consumer or user if the appliance be found defective or incorrect to the disadvantage of the consumer or user.

§ 1797m—25. The commission may purchase such materials, apparatus and standard measuring instruments for such examinations and tests as it may deem necessary.

§ 1797m—26. The commission, its agents, experts or examiners, shall have power to enter upon any premises occupied by any public utility for the purpose of making the examinations and tests provided in this act and to set up and use on such premises any apparatus and appliances and occupy reasonable space therefor.

§ 1797m—27. Every public utility shall file with the commission within a time to be fixed by the commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the State, or for any service in connection therewith or performed by any public

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utility controlled or operated by it. The rates, tolls and charges shown on such schedules shall not exceed the rates, tolls and charges in force April 1, 1907.

§ 1797m—28. Every public utility shall file with and as a part of such schedule all rules and regulations that in any manner effect the rates charged or to be charged for any service.

§ 1797m—29. A copy of so much of said schedules as the commission shall deem necessary for the use of the public shall be printed in plain type, and kept on file in every station or office of such public utility where payments are made by the consumers or users, open to the public, in such form and place as to be readily accessible to the public and as can be conveniently inspected.

§ 1797m—30. Where a schedule of joint rates or charges is or may be in force between two or more public utilities, such schedules shall in like manner be printed and filed with the commission and so much thereof as the commission shall deem necessary for the use of the public shall be filed in every such station or office as provided in section 1797m—29.

§ 1797m—31. No change shall thereafter be made in any schedule, including schedules of joint rates, except upon ten days' notice to the commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu thereof ten days prior to the time the same are to take effect; provided, that the commission, upon application of any public utility, may prescribe a less time within which a reduction may be made.

§ 1797m—32. Copies of all new schedules shall be filed as hereinbefore provided in every station and office of such public utility where payments are made by consumers or users ten days prior to the time the same are to take effect, unless the commission shall prescribe a less time.

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§ 1797m—33. It shall be unlawful for any public utility to charge, demand, collect or receive a greater or less compensation for any service performed by it within the State or for any service in connection therewith than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, or to demand, collect or receive any rate, toll or charge not specified in such schedule. The rates, tolls and charges named therein shall be the lawful rates, tolls and charges until the same are changed as provided in this act.

§ 1797m—34. The commission may prescribe such changes in the form in which the schedules are issued by any public utility as may be found to be expedient.

§ 1797m—35. The commission shall provide for a comprehensive classification of service for each public utility and such classification may take into account the quantity used, the time when used, the purpose for which used, and any other reasonable consideration. Each public utility is required to conform its schedules of rates, tolls and charges to such classification.

§ 1797m—36. The commission shall have power to adopt reasonable and proper rules and regulations relative to all inspections, tests, audits and investigations and to adopt and publish reasonable and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. All hearings shall be open to the public.

§ 1797m—37. The commission shall have authority to inquire into the management of the business of all public utilities and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from any public utility all necessary information to enable the commission to perform its duties.

§ 1797m—38. 1. The commission or any commissioner or

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any person or persons employed by the commission for that purpose shall, upon demand, have the right to inspect the books, accounts, papers, records and memoranda of any public utility and to examine, under oath, any officer, agent or employee of such public utility in relation to its business and affairs.

2. Any person other than one of said commissioners, who shall make such demand shall produce his authority to make such inspection.

§ 1797m—39. 1. The commission may require, by order or subpœna to be served on any public utility in the same manner that a summons is served in a civil action in the circuit court, the production within this State at such time and place as it may designate, of any books, accounts, papers or records kept by said public utility in any office or place without the State of Wisconsin, or verified copies in lieu thereof, if the commission shall so order, in order that an examination thereof may be made by the commission or under its direction.

2. Any public utility failing or refusing to comply with any such order or subpœna shall, for each day it shall so fail or refuse, forfeit and pay into the state treasury a sum of not less than fifty dollars nor more than five hundred dollars.

§ 1797m—40. The commission is authorized to employ such engineers, examiners, experts, clerks, accountants and other assistants as it may deem necessary, at such rates of compensation as it may determine upon.

§ 1797m—41. 1. For the purpose of making any investigation with regard to any public utility the commission shall have power to appoint, by an order in writing, an agent whose duties shall be prescribed in such order.

2. In the discharge of his duties such agent shall have every power whatsoever of an inquisitorial nature granted in this act to the commission and the same powers as a court commissioner with regard to the taking of depositions, and all powers

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granted by law to a court commissioner relative to depositions are hereby granted to such agent.

3. The commission may conduct any number of such investigations contemporaneously through different agents, and may delegate to such agent the taking of all testimony bearing upon any investigation or hearing. The decision of the commission shall be based upon its examination of all testimony and records. The recommendations made by such agents shall be advisory only and shall not preclude the taking of further testimony if the commission so order nor further investigation.

§ 1797m—42. 1. Every public utility shall furnish to the commission all information required by it to carry into effect the provisions of this act, and shall make specific answers to all questions submitted by the commission.

2. Any public utility receiving from the commission any blanks with directions to fill the same, shall cause the same to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall give a good and sufficient reason for such failure; and said answer shall be verified under oath by the president, secretary, superintendent or general manager of such public utility and returned to the commission at its office within the period fixed by the commission.

3. Whenever required by the commission, every public utility shall deliver to the commission any or all maps, profiles, contracts, reports of engineers and all documents, books, accounts, papers and records or copies of any or all of the same, with a complete inventory of all its property, in such form as the commission may direct.

§ 1797m—43. Upon a complaint made against any public utility by any mercantile, agricultural or manufacturing society or by any body politic or municipal organization or by any twenty-five persons, firms, corporations or associations, that any of the rates, tolls, charges or schedules or any joint rate or rates are in any respect unreasonable or unjustly dis-

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criminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power or any service in connection therewith or the conveyance of any telephone message or any service in connection therewith is in any respect unreasonable, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, measurements, practice or act complained of shall be entered by the commission without a formal public hearing.

§ 1797m—44. The commission shall, prior to such formal hearing, notify the public utility complained of that a complaint has been made, and ten days after such notice has been given the commission may proceed to set a time and place for a hearing and an investigation as hereinafter provided.

§ 1797m—45. The commission shall give the public utility and the complainant, if any, ten days' notice of the time and place when and where such hearing and investigation will be held and such matters considered and determined. Both the public utility and complainant shall be entitled to be heard and shall have process to enforce the attendance of witnesses.

§ 1797m—46. 1. If upon such investigation the rates, tolls, charges, schedules or joint rates, shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any provisions of this act, the commission shall have power to fix and order substituted therefor such rate or rates, tolls, charges or schedules as shall be just and reasonable.

2. If upon such investigation it shall be found that any regulation, measurement, practice, act, or service complained of is unjust, unreasonable, insufficient, preferential, unjustly

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discriminatory or otherwise in violation of any of the provisions of this act, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts and to make such order respecting, and such changes in such regulations, measurements, practices, service or acts as shall be just and reasonable.

§ 1797m—47. If upon such investigation it shall be found that any rate, toll, charge, schedule or joint rate or rates is unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of this act, or that any regulation, practice, act or service complained of is unjust, unreasonable, insufficient, preferential, or otherwise in violation of the provisions of this act, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the public utility found to be at fault shall pay the expenses incurred by the commission upon such investigation.

§ 1797m—48. The commission may, in its discretion, when complaint is made of more than one rate or charge, order separate hearings thereon, and may consider and determine the several matters complained of separately and at such times as it may prescribe. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

§ 1797m—49. Whenever the commission shall believe that any rate or charge may be unreasonable or unjustly discriminatory or that any service is inadequate or cannot be obtained or that an investigation of any matter relating to any public utility should for any reason be made, it may on its own motion, summarily investigate the same with or without notice.

§ 1797m—50. If, after making such investigation, the commission becomes satisfied that sufficient grounds exist to warrant

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a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement notifying the public utility of the matters under investigation. Ten days after such notice has been given the commission may proceed to set a time and place for a hearing and an investigation as hereinbefore provided.

§ 1797m—51. Notice of the time and place for such hearing shall be given to the public utility and to such other interested persons as the commission shall deem necessary as provided in section 1797m—45, and thereafter proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint had been filed with the commission relative to the matter investigated, and the same order or orders may be made in reference thereto as if such investigation had been made on complaint.

§ 1797m—52. Any public utility may make complaint as to any matter affecting its own product or service with like effect as though made by any mercantile, agricultural or manufacturing society, body politic or municipal organization or by any twenty-five persons, firms, corporations or associations.

§ 1797m—53. 1. Each of the commissioners and every agent provided for in section 1797m—41 of this act for the purposes mentioned in this act, shall have power to administer oaths, certify to official acts, issue subpœnas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony.

2. In case of disobedience on the part of any person or persons to comply with any order of the commission or any commissioner or any subpœna, or, on the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated before the commission or its agent authorized as provided in section 1797m—41, it shall be the duty of the circuit court of any county or the judge thereof, on application of a commissioner to compel obedience by attachment pro-

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ceedings for contempt as in the case of disobedience of the requirements of a subpœna issued from such court or a refusal to testify therein.

§ 1797m—54. 1. Each witness who shall appear before the commission or its agent by its order, shall receive for his attendance the fees and mileage now provided for witnesses in civil cases in courts of record, which shall be audited and paid by the State in the same manner as other expenses are audited and paid, upon the presentation of proper vouchers sworn to by such witnesses and approved by the chairman of the commission.

2. No witness subpœnaed at the instance of parties other than the commission shall be entitled to compensation from the State for attendance or travel unless the commission shall certify that his testimony was material to the matter investigated.

§ 1797m—55. The commission or any party may, in any investigation, cause the depositions of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in circuit courts.

§ 1797m—56. A full and complete record shall be kept of all proceedings had before the commission or its agent on any formal investigation had and all testimony shall be taken down by the stenographer appointed by the commission.

§ 1797m—57. Whenever any complaint is served upon the commission under the provisions of section 1797m—64 of this act, the commission shall, before said action is reached for trial, cause a certified transcript of all proceedings had and testimony taken upon such investigation to be filed with the clerk of the circuit court of the county where the action is pending.

§ 1797m—58. A transcribed copy of the evidence and proceedings or any specific part thereof, on any investigation taken

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by the stenographer appointed by the commission, being certified by such stenographer to be a true and correct transcript in longhand of all the testimony on the investigation of a particular witness, or of other specific part thereof, carefully compared by him with his original notes, and to be a correct statement of the evidence and proceedings had on such investigation so purporting to be taken and transcribed, shall be received in evidence with the same effect as if such reporter were present and testified to the fact so certified.

§ 1797m—59. A copy of such transcript shall be furnished on demand free of cost to any party to such investigations.

§ 1797m—60. 1. Whenever, upon an investigation made under the provisions of this act, the commission shall find any existing rates, tolls, charges, schedules or joint rate made under the provisions of this act, the commission shall find any existing rates, tolls, charges, schedules or joint rate or rates to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of this act, the commission shall determine and by order fix reasonable rates, tolls, charges, schedules or joint rates to be imposed, observed and followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of this act.

2. Whenever, upon an investigation made under the provisions of this act, the commission shall find any regulations, measurements, practices, acts or service to be unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of any of the provisions of this act; or shall find that any service is inadequate or that any service which can be reasonably demanded cannot be obtained, the commission shall determine and declare and by order fix reasonable measurements, regulations, acts, practices or service to be furnished, imposed, observed and followed in the future in lieu of those found to be unjust, unreasonable, insufficient, prefer-

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ential, unjustly discriminatory, inadequate or otherwise in violation of this act as the case may be, and shall make such other order respecting such measurement, regulation, act, practice or service as shall be just and reasonable.

3. Whenever, upon an investigation made under the provisions of this act, the commission shall find that any rate, toll, charge, schedule or joint rate or rates is unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of this act, or that any measurement, regulation, practice, act or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of any of the provisions of this act, or it shall find that any service is inadequate or that any service which can reasonably be demanded cannot be obtained, the commission shall ascertain and declare and by order fix the expenses incurred by the commission upon such investigation and shall by such order direct such public utility to pay to the state treasurer within twenty days thereafter such expenses so incurred.

4. The commission shall cause a certified copy of all such orders to be delivered to an officer or agent of the public utility affected thereby, and all such orders shall of their own force take effect and become operative twenty days after service thereof, unless a different time be provided by said order.

§ 1797m—61. All public utilities to which the order applies shall make such changes in their schedule on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any public utility in any such rates, tolls or charges, or in any joint rate or rates, without the approval of the commission. Certified copies of all other orders of the commission shall be delivered to the public utility affected thereby in like manner and the same shall take effect within such time thereafter as the commission shall prescribe.

§ 1797m—62. The commission may at any time, upon notice

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to the public utility and after opportunity to be heard as provided in section 1797m—45, rescind, alter or amend any order fixing any rate or rates, tolls, charges or schedules, or any other order made by the commission, and certified copies of the same shall be served and take effect as herein provided for original orders.

§ 1797m—63. All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie reasonable until finally found otherwise in an action brought for that purpose pursuant to the provisions of section 1797m—64.

§ 1797m—64. 1. Any public utility and any person or corporation in interest being dissatisfied with any order of the commission fixing any rate or rates, tolls, charges, schedules, joint rate or rates or any order fixing any regulations, practices, act or service may commence an action in the circuit court for Dane county against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, tolls, charges, schedules, joint rate or rates, fixed in such order is unlawful, or that any such regulation, practice, act or service fixed in such order is unreasonable, in which action the complaint shall be served with the summons.

2. The answer of the commission to the complaint shall be served and filed within ten days after service of the complaint, whereupon said action shall be at issue and stand ready for trial upon ten days' notice to either party.

3. All such actions shall have precedence over any civil cause of a different nature pending in such court, and the circuit court shall always be deemed open for the trial thereof, and the same shall be tried and determined as other civil actions.

§ 1797m—65. Every proceeding, action or suit to set aside,

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vacate or amend any determination or order of the commission or to enjoin the enforcement thereof or to prevent in any way such order or determination from becoming effective, shall be commenced, and every appeal to the courts or right of recourse to the courts shall be taken or exercised within ninety days after the entry or rendition of such order or determination, and the right to commence any such action, proceeding or suit, or to take or exercise any such appeal or right of recourse to the courts, shall terminate absolutely at the end of such ninety days after such entry or rendition thereof.

§ 1797m—66. No injunction shall issue suspending or straying [staying] any order of the commission, except upon application to the circuit court or presiding judge thereof, notice to the commission, and hearing.

§ 1797m—67. 1. If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission or its authorized agent, or additional thereto, the court, before proceeding to render judgment unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceedings in said action for fifteen days from the date of such transmission.

2. Upon the receipt of such evidence the commission shall consider the same and may alter, modify, amend or rescind its order relating to such rate or rates, tolls, charges, schedules, joint rate or rates, regulations, practice, act or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

§ 1797m—68. 1. If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance.

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2. If the original order shall not be rescinded or changed by the commission judgment shall be rendered upon such original order.

§ 1797m—69. Either party to said action, within sixty days after service of a copy of the order or judgment of the circuit court, may appeal to the supreme court. Where an appeal is taken the cause shall, on the return of the papers to the supreme court, be immediately placed on the state calendar of the then pending term and shall be assigned and brought to a hearing in the same manner as other causes on the state calendar.

§ 1797m—70. In all trials, actions and proceedings arising under the provisions of this act or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.

§ 1797m—71. In all actions and proceedings in court arising under this act all processes shall be served and the practice and rules of evidence shall be the same as in civil actions, except as otherwise herein provided. Every sheriff or other officer empowered to execute civil processes shall execute any process issued under the provisions of this act and shall receive such compensation therefor as may be prescribed by law for similar services.

§ 1797m—72. No person shall be excused from testifying or from producing books, accounts and papers in any proceeding based upon or growing out of any violation of the provisions of this act on the ground or for the reason that the testimony or evidence, documentary or otherwise, required by him may

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tend to incriminate him or subject him to penalty or forfeiture; but no person having so testified shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may have testified or produced any documentary evidence; provided, that no person testifying shall be exempted from prosecution or punishment for perjury in so testifying.

§ 1797m—73. Upon application of any person the commission shall furnish certified copies, under the seal of the commission, of any order made by it, which shall be prima facie evidence of the facts stated therein.

§ 1797m—74. 1. No license, permit or franchise shall be granted to any person, copartnership or corporation to own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power in any municipality where there is in operation under an indeterminate permit as provided in this act a public utility engaged in similar service without first securing from the commission a declaration after a public hearing of all parties interested, that public convenience and necessity require such second public utility.

2. Any existing permit, license or franchise which shall contain any term whatsoever interfering with the existence of such second public utility is hereby amended in such a manner as to permit such municipality to grant an indeterminate permit for the operation of such second public utility pursuant to the provisions of this act.

3. No municipality shall hereafter construct any such plant or equipment where there is in operation under an indeterminate permit as provided in this act, in such municipality a public utility engaged in similar service, without first securing from the commission a declaration, after a public hearing of all parties interested, that public convenience and necessity require such municipal public utility. But nothing in this section shall be construed as preventing a municipality acquir-

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ing any existing plant by purchase or by condemnation as hereinafter provided.

4. Nothing in this section shall be construed so as to prevent the granting of an indeterminate permit or the construction of a municipal plant where the existing public utility is operating without an indeterminate permit as provided in this act.

§ 1797m—75. No license, permit or franchise to own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power shall be hereafter granted, or transferred except to a corporation duly organized under the laws of the State of Wisconsin.

§ 1797m—76. Every license, permit or franchise hereafter granted to any public utility shall have the effect of an indeterminate permit subject to the provisions of this act, and subject to the provision that the municipality in which the major part of its property is situate may purchase the property of such public utility actually used and useful for the convenience of the public at any time as provided herein, paying therefor just compensation to be determined by the commission and according to the terms and conditions fixed by said commission. Any such municipality is authorized to purchase such property and every such public utility is required to sell such property at the value and according to the terms and conditions determined by the commission as herein provided.

§ 1797m—77. Any public utility, being at the time a corporation duly organized under the laws of the State of Wisconsin, operating under an existing license, permit or franchise shall, upon filing at any time prior to the expiration of such license, permit or franchise and prior to July 1, 1908, with the clerk of the municipality which granted such franchise and with the commission, a written declaration legally executed that it surrenders such license, permit or franchise, receive by operation of law in lieu thereof, an indeterminate permit as pro-

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vided in this act; and such public utility shall hold such permit under all the terms, conditions and limitations of this act. The filing of such declaration shall be deemed a waiver by such public utility of the right to insist upon the fulfillment of any contract theretofore entered into relating to any rate, charge or service regulated by this act.

§ 1797m—78. Any public utility accepting or operating under any license, permit or franchise hereafter granted shall, by acceptance of any such indeterminate permit be deemed to have consented to a future purchase of its property actually used and useful for the convenience of the public by the municipality in which the major part of it is situate for the compensation and under the terms and conditions determined by the commission, and shall thereby be deemed to have waived the right of requiring the necessity of such taking to be established by the verdict of a jury, and to have waived all other remedies and rights relative to condemnation, except such rights and remedies as are provided in this act.

§ 1797m—79. 1. Any municipality shall have the power, subject to the provisions of this act, to construct and operate a plant and equipment or any part thereof for the production, transmission, delivery or furnishing of heat, light, water or power.

2. Any municipality shall have the power, subject to the provisions of this act, to purchase by an agreement with any public utility any part of any plant, provided, that such purchase and the terms thereof shall be approved by the commission after a hearing as provided in sections 1797m—81 and 1797m—82.

3. Any municipality shall have the power, subject to the provisions of this act to acquire by condemnation the property of any public utility actually used and useful for the convenience of the public then operating under a license, permit or franchise existing at the time this act takes effect, or operating in such municipality without any permit or franchise.

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4. Any municipality shall have the power, subject to the provisions of this act, to acquire by purchase as provided in this act, the property of any public utility actually used and useful for the convenience of the public operating under any indeterminate permit as provided herein.

§ 1797m—80. If the municipality shall have determined to acquire an existing plant then operated under a license, permit or franchise existing at the time this act takes effect, such municipality shall bring an action in the circuit court against the public utility as defendant praying the court for an adjudication as to the necessity of such taking by the municipality, in which action the complaint shall be served with the summons. The public utility shall serve and file its answer to such complaint within ten days after the service thereof, whereupon such action shall be at issue and stand ready for trial upon ten days' notice by either party. Unless the parties thereto waive a jury, the question as to the necessity of the taking of such property by the municipality shall be as speedily as possible submitted to a jury.

§ 1797m—81. If the municipality shall have determined to acquire an existing plant and the public utility owning such plant shall have consented to the taking over of such plant by the municipality by acceptance of an indeterminate permit as provided herein, or, in case such public utility shall not have waived or consented to such taking, if the jury shall have found that a necessity exists for the taking of such plant, then the municipality shall give speedy notice of such determination and of such consent or such verdict of a jury to the public utility and to the commission.

§ 1797m—82. The commission shall thereupon after public hearing and within three months from the receipt of such notice and upon notice to the municipality and the public utility interested, by order fix and determine and certify to the municipal council and to the public utility just compensation to be

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paid for the taking of the property of such public utility actually used and useful for the convenience of the public and all other terms and all conditions of sale and purchase which it shall ascertain to be reasonable. The compensation and other terms and the conditions of sale and purchase thus certified by the commission shall constitute the compensation and terms and conditions to be paid, followed and observed in the purchase of such plant from such public utility. Upon the filing of such certificate with the clerk of such municipality the exclusive use of the property taken shall vest in such municipality.

§ 1797m—83. Any public utility or the municipality being dissatisfied with such order may commence and prosecute an action in the circuit court to alter or amend such order or any part thereof as provided in sections 1797m—64 to 1797m—73, inclusive, and said sections so far as applicable shall apply to such action.

§ 1797m—84. If the plaintiff shall not establish to the full satisfaction of the court that the compensation fixed and determined in such order is unlawful or that some of the terms or conditions fixed and determined therein are in some particulars unreasonable, the compensation, terms and conditions fixed in said order shall be the compensation, terms and conditions to be paid, followed and observed in the purchase of said plant from such public utility.

§ 1797m—85. If the plaintiff shall establish to the full satisfaction of the court and the court shall adjudge that such compensation is unlawful or that some of such terms or conditions are unreasonable, the court shall remand the same to the commission with such findings of fact and conclusions of law as shall set forth in detail the reasons for such judgment and the specific particulars in which such order of the commission is adjudged to be unreasonable or unlawful.

§ 1797m—86. 1. If the compensation fixed by the previous order of the commission be adjudged to be unlawful, the com-

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mission shall forthwith proceed to set a re-hearing for the re-determination of such compensation as in the first instance.

2. The commission shall forthwith otherwise alter and amend such previous order with or without a re-hearing as it may deem necessary so that the same shall be reasonable and lawful in every particular.

§ 1797m—87. Every municipal council shall have power. (1) To determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product of service within said municipality and all other terms and conditions not inconsistent with this act upon which such public utility may be permitted to occupy the streets, highways or other public property within such municipality and such contract, ordinance or other determination of such municipality shall be in force and prima facie reasonable. Upon complaint made by such public utility or by any qualified complainant as provided in section 1797m—43, the commission shall set a hearing as provided in sections 1797m—45 and 1797m—46 and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void.

(2) To require of any public utility by ordinance or otherwise such additions and extensions to its physical plant within said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such additions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by the commission as provided in subdivision 1 of this section.

(3) To provide for a penalty for non-compliance with the provisions of any ordinance or resolution adopted pursuant to the provisions hereof.

(4) The power and authority granted in this section shall exist and be vested in said municipalities, anything in this act to the contrary notwithstanding.

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§ 1797m—88. No public utility or any agent or officer thereof, or any agent or officer of any municipality constituting a public utility as defined in this act shall offer or give for any purpose to any political committee or any member or employee thereof, to any candidate for, or incumbent of, any office or position under the constitution or laws or under any ordinance of any municipality of this State, or to any person at the request, or for the advantage of all or any of them, any frank, or any privilege withheld from any person for any product or service produced, transmitted, delivered, furnished or rendered, or to be produced, transmitted, delivered, furnished or rendered by any public utility, or the conveyance of any telephone message or communication or any free product or service whatsoever.

2. No political committee and no member or employee thereof, no candidate for and no incumbent of any office or position under the constitution or laws or under any ordinance of any town or municipality of this State, shall ask for or accept from any public utility or any agent or officer thereof, or any agent or officer of any municipality constituting a public utility as defined in this act, or use in any manner or for any purpose any frank or privilege withheld from any person, for any product or service produced, transmitted, delivered, furnished or rendered, or to be produced, transmitted, delivered, furnished or rendered by any public utility, or the conveyance of any telephone message or communication.

3. Any violation of any of the provisions of this section shall be punished by imprisonment in the state prison not more than five years nor less than one year or by fine not exceeding one thousand dollars nor less than two hundred dollars.

§ 1797m—89. 1. If any public utility or any agent or officer thereof, or any officer of any municipality constituting a public utility as defined in this act shall, directly or indirectly, by any device whatsoever or otherwise, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it in or affecting or relating to the production, transmission,

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delivery or furnishing of heat, light, water or power or the conveyance of telephone messages or for any service in connection therewith than that prescribed in the published schedules or tariffs then in force or established as provided herein, or than it charges, demands, collects or receives from any other person, firm or corporation for a like and contemporaneous service, such public utility shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful, and upon conviction thereof shall forfeit and pay into the state treasury not less than one hundred dollars nor more than one thousand dollars for each offense; and such agent or officer so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars for each offense.

§ 1797m—90. It shall be unlawful for any public utility to demand, charge, collect or receive from any person, firm or corporation less compensation for any service rendered or to be rendered by said public utility in consideration of the furnishing by said person, firm or corporation of any part of the facilities incident thereto; provided nothing herein shall be construed as prohibiting any public utility from renting any facilities incident to the production, transmission, delivery or furnishing of heat, light, water or power or the conveyance of telephone messages and paying a reasonable rental therefor.

§ 1797m—91. If any public utility make or give any undue or unreasonable preference or advantage to any particular person, firm or corporation or shall subject any particular person, firm or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such public utility shall be deemed guilty of unjust discrimination which is hereby prohibited and declared unlawful.

The furnishing by any public utility, of any product or service at the rates and upon the terms and conditions provided for in any existing contract executed prior to April 1, 1907, shall not constitute a discrimination within the meaning speci-

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fied. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars for each offense.

§ 1797m—92. It shall be unlawful for any person, firm or corporation knowingly to solicit, accept or receive any rebate, concession or discrimination in respect to any service in or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power or the conveying of telephone messages within this State, or for any service in connection therewith whereby any such service shall, by any device whatsoever, or otherwise, be rendered free or at a less rate than that named in the published schedules and tariffs in force as provided herein, or whereby any service or advantage is received other than is herein specified. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one thousand dollars for each offense.

§ 1797m—93. If any public utility shall do or cause to be done or permit to be done any matter, act or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, such public utility shall be liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation; provided, that any recovery as in this section provided, shall in no manner affect a recovery by the State of the penalty prescribed for such violation.

§ 1797m—94. Any officer, agent or employee of any public utility or of any municipality constituting a public utility as defined in this act who shall fail or refuse to fill out and return any blanks as required by this act, or shall fail or refuse to answer any question therein propounded, or shall knowingly

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or willfully give a false answer to any such question or shall evade the answer to any such question where the fact inquired of is within his knowledge or who shall, upon proper demand, fail or refuse to exhibit to the commission or any commissioner or any person authorized to examine the same, any book, paper, account, record, or memoranda of such public utility which is in his possession or under his control or who shall fail to properly use and keep his system of accounting or any part thereof as prescribed by the commission, or who shall refuse to do any act or thing in connection with such system of accounting when so directed by the commission or its authorized representative, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one thousand dollars for each offense.

2. And a penalty of not less than five hundred dollars nor more than one thousand dollars shall be recovered from the public utility for each such offense when such officer, agent or employee acted in obedience to the direction, instruction or request of such public utility or any general officer thereof.

§ 1797m—95. 1. If any public utility shall violate any provision of this act, or shall do any act herein prohibited or shall fail or refuse to perform any duty enjoined upon it for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement or order made by the commission or the municipal council or any judgment or decree made by any court upon its application, for every such violation, failure or refusal such public utility shall forfeit and pay into the treasury a sum not less than one hundred dollars nor more than one thousand dollars for each such offense.

2. In construing and enforcing the provisions of this section the act, omission or failure of any officer, agent or other person acting for or employed by any public utility acting within the scope of his employment shall in every case be deemed to be the act, omission or failure of such public utility.

§ 1797m—96. If any officer of any town, village or city con-

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stituting a public utility as defined in this act shall do or cause to be done or permit to be done any matter, act or thing in this act prohibited or declared to be unlawful, or shall omit, fail, neglect or refuse to do any act, matter or thing required by this act of such officer to be done, or shall omit, fail, neglect or refuse to perform any duty enjoined upon him and relating directly or indirectly to the enforcement of this act, or shall omit, fail, neglect or refuse to obey any lawful requirement or order made by the commission or any judgment or decree made by the court upon its application, for every such violation, failure or refusal such officer shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars.

§ 1797m—97. 1. Any person who shall destroy, injure or interfere with any apparatus or appliance owned or operated by or in charge of the commission or its agent shall be deemed guilty of a misdemeanor and upon conviction shall be punished by fine not exceeding one hundred dollars or imprisonment for a period not exceeding thirty days or both.

2. Any public utility permitting the destruction, injury to, or interference with, any such apparatus or appliance, shall forfeit a sum not exceeding one thousand dollars for each offense.

§ 1797m—98. Every day during which any public utility or any officer, agent or employee thereof shall fail to observe and comply with any order or direction of the commission or to perform any duty enjoined by this act shall constitute a separate and distinct violation of such order or direction or of this act as the case may be.

§ 1797m—99. 1. The commission shall have power, when deemed by it necessary to prevent injury to the business or interests of the people or any public utility of this State in case of any emergency to be judged of by the commission, to tempo-

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rarily alter, amend, or with the consent of the public utility concerned, suspend any existing rates, schedules and order relating to or affecting any public utility or part of any public utility in this State.

2. Such rates so made by the commission shall apply to one or more of the public utilities in this State or to any portion thereof as may be directed by the commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the commission.

§ 1797m—100. Whenever, after hearing and investigation as provided in this act, the commission shall find that any rate, toll, charge, regulation or practice for, in, or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power or the conveying of any telephone message or any service in connection therewith not hereinbefore specifically designated, is unreasonable or unjustly discriminatory, it shall have the power to regulate the same as provided in sections 1797m—43 to 1797m—51 and 1797m—60 to 1797m—62, inclusive.

§ 1797m—101. 1. Every public utility shall, whenever an accident attended with loss of human life occurs within this State upon its premises or directly or indirectly arising from or connected with its maintenance or operation, give immediate notice thereof to the commission.

2. In the event of any such accident the commission, if it deem the public interest require it, shall cause an investigation to be made forthwith, which investigation shall be held in the locality of the accident, unless for greater convenience of those concerned it shall order such investigation to be held at some other place; and said investigation may be adjourned from place to place as may be found necessary and convenient. The commission shall seasonably notify the public utility of the time and place of the investigation.

§ 1797m—102. 1. The commission shall inquire into any neglect or violation of the laws of this State by any public

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utility doing business therein, or by the officers, agents or employees thereof or by any person operating the plant of any public utility, and shall have the power and it shall be its duty to enforce the provisions of this act as well as all other laws relating to public utilities, and to report all violations thereof to the attorney general.

2. Upon the request of the commission it shall be the duty of the attorney general or the district attorney of the proper county to aid in any investigation, hearing or trial had under the provisions of this act, and to institute and prosecute all necessary actions or proceedings for the enforcement of this act and of all other laws of this State relating to public utilities and for the punishment of all violations thereof.

3. Any forfeiture or penalty herein provided shall be recovered and suit therein shall be brought in the name of the State of Wisconsin in the circuit court for Dane county. Complaint for the collection of any such forfeiture may be made by the commission or any member thereof, and when so made the action so commenced shall be prosecuted by the attorney general.

4. The commission shall have authority to employ counsel in any proceeding, investigation, hearing or trial.

§ 1797m—103. A substantial compliance with the requirements of this act shall be sufficient to give effect to all the rules, orders, acts and regulations of the commission and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto.

§ 1797m—104. This act shall not have the effect to release or waive any right of action by the State or by any person for any right, penalty or forfeiture which may have arisen or which may hereafter arise, under any law of this State; and all penalties and forfeitures accruing under this act shall be cumulative and a suit for any recovery of one shall not be a bar to the recovery of any other penalty.

§ 1797m—105. 1. Unless the commission shall otherwise order, it shall be unlawful for any public utility within this State

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to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedules of rates for the same service on the first day of April, 1907.

2. Every public utility in this State shall, within thirty days after the passage and publication of this act, file in the office of the commission, copies of all schedules of rates and charges including joint rates, in force on the first day of April, 1907, and all rates in force at any time subsequent to said date.

3. Any public utility desiring to advance or discontinue any such rate or rates may make application to the commission in writing stating the advance in or discontinuation of the rate or rates desired, giving the reasons for such advance or discontinuation.

4. Upon receiving such application the commission shall fix a time and place for hearing and give such notice to interested parties as it shall deem proper and reasonable. If, after such hearing and investigation, the commission shall find that the change or discontinuation applied for is reasonable, fair and just, it shall grant the application either in whole or in part.

5. Any public utility being dissatisfied with any order of the commission made under the provisions of this section may commence an action against it in the circuit court in the manner provided in sections 1797m—64 to 1797m—73, inclusive, of this act, which action shall be tried and determined in the same manner as is provided in said sections.

§ 1797m—106. The employment of agents, experts, engineers, accountants, examiners or assistants by the commission as provided in this act, and the payment of their compensation and travelling and other expenses, shall be under the provisions of section 1, chapter 362, of the laws of 1905, and acts amendatory thereof.

§ 1797m—107. A sum sufficient to carry out the provisions of this act is appropriated out of any money in the state treasury not otherwise appropriated, not exceeding fifty-two thousand dollars.

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§ 1797m—108. All acts and parts of acts conflicting with the provisions of this act are repealed in so far as they are inconsistent herewith.

SECTION 2. Section 925—97a, statutes of 1898, chapter 389, laws of 1905, and chapter 459, laws of 1905, are repealed.

SECTION 3. This act shall take effect and be in force from and after its passage and publication.

Approved July 9, 1907.

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APPENDIX C.

WILLCOX *v.* CONSOLIDATED GAS COMPANY.

212 U. S. 19.

[January 4, 1909.]

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APPENDIX C.

WILLCOX *v.* CONSOLIDATED GAS COMPANY.

212 U. S. 19.

Nos. 396, 397 and 398.—October Term, 1908.

William R. Willcox et al., Constituting the Public Service Commission, &c., of New York, Appellants,
396 v.
Consolidated Gas Company of New York.
The City of New York, Appellant,
397 v.
Consolidated Gas Company of New York.
William S. Jackson, as Attorney General of the State of New York, Appellant,
398 v.
Consolidated Gas Company of New York.

Appeals from the Circuit Court of the United States for the Southern District of New York.

[January 4, 1909.]

HEADNOTES.*

It is not a question of discretion or comity for the Federal court to take jurisdiction of a case; it is the duty of that court to take jurisdiction when properly appealed to; and it should not be criticized for so doing even though the case be one of local interest. Cohens v. Virginia, 6 Wheat. (19 U. S.) 264, 404, 5 Sup. Ct. 257. The right of a party plaintiff to choose the Federal court cannot be properly denied. Re Metropolitan Receivership, 208 U. S. 90, 110.

Rates, when fixed by legislative authority, for public service corporations, should allow a fair return upon the reasonable value of the

* Headnotes, Statement of Case and Opinion are official; L. ed. and Sup. Ct. citations are not in original.

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property at the time it is being used, but the legislative act will not be declared invalid by the courts unless the rates are so unreasonably low that their enforcement would amount to taking the property for public use without compensation. San Diego Land and Town Co. Cases, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 257; s. c. 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. 571.

Except in very clear cases, courts should not interfere with state rate legislation before the legislation goes into effect. Knoxville v. Water Co., 212 U. S. 1.

Value of the property employed being an essential element in determining whether a rate is or is not confiscatory, and being also largely a matter of opinion, where the determination of the question depends upon such value, a court of equity should hesitate to interfere by injunction to suspend the rate before it goes into operation and a fair trial has been made.

Franchises of public service corporations are property and cannot be taken or used by others without compensation, and, where a State has by legislative enactment permitted such corporations to capitalize such franchises, their value at the time of such capitalization should be included in the value of the property as an element for fixing rates; but no increased value of such franchises should be allowed.

Public service corporations, such as gas companies, are subject to the legislative right to fix rates which permit not more than a fair return on the property used.

Whether a rate yields such a fair return as not to be confiscatory depends upon circumstances, locality and risk, and no particular rate can be established for all cases.

Under all the circumstances of this case this court concurs with the court below that six per cent is a fair return on the value of property employed in supplying gas in the city of New York, and a rate yielding that return is not confiscatory.

In estimating value of franchises for the purpose of fixing rates, it is immaterial that the corporation is taxed on a greater value than that allowed if it charges its taxes as operating expenses in determining net income.

Where a public service corporation has a monopoly, such as of supplying gas in a large city, "good will" cannot be considered as an element of value of the property employed.

For purpose of fixing rates the value of property employed should be determined as of the time when the inquiry is made, and, as a general rule, the corporation is entitled to the benefit of increased value since acquisition.

A provision in a state statute, requiring a public service corporation to

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perform its service in such a manner that its entire plant would have to be rebuilt at a cost on which no return could be obtained at the rate fixed, deprives the company of its ability to secure such return and is unconstitutional and void.

Ex parte Young, 209 U. S. 123, followed as to the unconstitutionality of provisions in a state statute for penalties for violations so enormous as to be overwhelming.

Provisions in a gas rate bill for rate, pressure and penalties for violation, may be, as held in this case, separable and the unconstitutionality of the provisions as to pressure and penalties will not affect the provisions as to rate.

Provision in a gas rate act establishing one rate for the municipality and another for individual consumers is not an unreasonable classification and does not render the act unconstitutional under the equal protection clause of the Fourteenth Amendment.

Where none of the different classes of consumers complain of different rates the corporation cannot complain of such differences provided the total receipts are sufficient to yield an adequate return.

Where, as in this case, in an action brought before the rate takes effect, complainant fails to sustain the burden of clearly showing that a rate act is confiscatory, the bill should be dismissed without prejudice to right of the complainant to bring another action after the rate goes into effect if it then proves to be confiscatory.

So held in regard to the New York Eighty-Cent Gas Law.

157 Fed. Rep. 849, reversed.

STATEMENT OF CASE.

The appellee, complainant below, filed its bill May 1, 1906, in the United States Circuit Court for the Southern District of New York against the city of New York, the Attorney General of the State, the District Attorney of New York County and the Gas Commission of the State, to enjoin the enforcement of certain acts of the legislature of the State, as well as of an order made by the Gas Commission, February 23, 1906, to take effect May 1, 1906, relative to rates for gas in New York City.

Since the commencement of the suit the Gas Commission has been abolished and the Public Service Commission has been created by the legislature in its stead. The official term of Attorney General Meyer has also expired, and Attorney General Jackson, his successor, has been substituted in his place.

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The ground for the relief asked for in the bill was the alleged unconstitutionality of the acts and the order, because the rates fixed were so low as to be confiscatory. Upon filing the bill a preliminary injunction was granted (146 Fed. 150), and after issue was joined the case was referred to one of the standing masters of the court to take testimony, in conformity to the practice indicated in Railroad v. Tompkins, 176 U. S. 167, 179, 44 L. ed. 417, 20 Sup. Ct. 336.

A hearing was had before the master, who reported in favor of the complainant. The case then came before the Circuit Court, and, after argument, a final decree was entered, restraining defendants from enforcing the provisions of the acts and the order relating to rates or penalties. 157 Fed. 849. These various defendants, except the District Attorney, have taken separate appeals directly to this court from the decree so entered. The acts which are declared void as unconstitutional are chapter 736 of the Laws of 1905, which limits the price of gas sold to the city of New York to a sum not to exceed 75 cents per thousand cubic feet. The act also requires that the gas sold shall have a specified illuminating power, and a certain pressure at all distances from the place of manufacture. Penalties are attached to a violation of the act. The other act is chapter 125 of the Laws of 1906, limiting the prices of gas in the boroughs of Manhattan and the Bronx, to other consumers than the city of New York, to 80 cents per thousand cubic feet, with like penalties as in the act of 1905, and with the same provisions as to illuminating power and the pressure in the service mains. The order which was declared invalid was one made by the Gas Commission created under and by virtue of chapter 737 of the Laws of 1905, the order providing that the price of gas in the city should be not more than 80 cents to consumers other than the city of New York. The order had the same provisions as to illuminating power and pressure as the acts above mentioned. The master and the court below found that the 80 cent rate was so low as to amount to confiscation, and hence the acts and the order were invalid as in violation of the Federal Constitution.

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MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the

OPINION OF THE COURT.

"At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by counsel for the appellants, the Public Service Commission, in their brief in this court. They assume to criticise that court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction [Cohens v. Virginia, 6 Wheat. (19 U. S.) 264, 404, 5 L. ed. 257], and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different States or a question is involved which by law brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied. In re Metropolitan Railway Receivership, 208 U. S. 90–110; Prentis v. Atlantic Coast Line et al., 211 U. S. 210. In the latter case it was said that a plaintiff could not be forbidden to try the facts upon which his right to relief is based before a court of his own choice, if otherwise competent. It is true an application for an injunction was denied in that case because the plaintiff should in our opinion have taken the appeal allowed him by the law of Virginia while the rate of fare in litigation was still at the legislative stage, so as to make it absolutely certain that the officials of the State would try to establish and enforce an unconstitutional rule.

"The case before us is not like that. It involves the constitutionality, with reference to the Federal Constitution, of two acts of the legislature of New York, and it is one over which the Circuit Court undoubtedly had jurisdiction under the act of

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Congress, and its action in taking and hearing the case cannot be the subject of proper criticism.

"An examination of the record herein, with reference to the questions involved in the merits, shows that the act under which the Gas Commission was appointed was subsequently to the commencement and trial of this suit, declared, on grounds not here material, to be unconstitutional by the Court of Appeals of New York. 191 N. Y. 123, February 18, 1908. The order made by the commission must therefore be regarded as invalid. It is not important in this case, because the act of the legislature of 1906, makes the same provision as to the price of gas to consumers other than the city that the order does. We have as remaining to be considered the above-mentioned two acts of the legislature.

"The question arising is as to the validity of the acts limiting the rates for gas to the prices therein stated. The rule by which to determine the question is pretty well established in this court. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. San Diego Land & Town Company v. National City, 174 U. S. 739, 767, 43 L. ed. 1154, 19 Sup. Ct. 804; Same plaintiff v. Jasper, 189 U. S. 439, 442, 47 L. ed. 892, 23 Sup. Ct. 892.

"Many of the cases are cited in Knoxville v. Knoxville Water Co., just decided. The case must be a clear one before the court ought to be asked to interfere with state legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates. In this case the rates have not been enforced as yet, because the bill herein was filed and an injunction obtained restraining their enforcement before they came into actual operation.

"In order to determine the rate of return upon the reasonable value of the property at the time it is being used for the public it, of course, becomes necessary to ascertain what that value is.

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A very great amount of evidence was taken before the master upon that subject, which is included in five large volumes of the record. Valuations by expert witnesses were given as to the value of the real estate owned by the complainant, and as to the value of the mains, service pipes, plants, meters and miscellaneous personal property.

"The value of real estate and plant is to a considerable extent matter of opinion, and the same may be said of personal estate when not based upon the actual cost of material and construction. Deterioration of the value of the plant, mains and pipes is also to some extent based upon opinion. All these matters make questions of value somewhat uncertain; while added to this is an alleged prospective loss of income from a reduced rate, a matter also of much uncertainty, depending upon the extent of the reduction and the probable increased consumption, and we have a problem as to the character of a rate which is difficult to answer without a practical test from actual operation of the rate. Of course, there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature, and in that event there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate. But where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts.

"A short history of the complainant, as to its incorporation and its capital, and the method by which the value of its fran-

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chises was arrived at, will render the further examination of the case more intelligible.

"Prior to 1884 there were seven gaslight companies in New York City, each operated under separate charters, granted at different times between the years 1823 and 1865 or 1871. They each had the right to use the streets of certain portions of the city for the purpose of laying their mains and service pipes in order to furnish gas to the city and the citizens. Not one of the companies had ever been called upon to pay a penny for such right, but the grant to each was in that aspect a gratuity. It was not, at the time of granting franchises such as these, the custom to pay for them.

"In 1884, by chapter 367 of the laws of that year, authority to consolidate manufacturing corporations was granted upon conditions mentioned in the act. The directors of the corporations proposing to consolidate were to make an agreement for consolidation, embracing, among other things, the amount of capital and the number of shares of stock into which it should be divided, the capital not to be in amount more 'than the fair aggregate value of the property, franchises and rights of the several companies to be consolidated.' The agreement was not to be valid until submitted to the stockholders of each of the companies and approved by two-thirds of each. The constituent companies, which were afterwards consolidated under their agreement, and pursuant to the act mentioned, were six in number, the seventh, the Mutual Company, withdrawing. The companies agreed upon the valuation of their property, which was to be paid for in the stock of the consolidated company, and the original stock held by the stockholders of each company was surrendered to the consolidated company. The value of the franchises of all the companies was set at the figure of $7,781,000. The court below said that the master reported there was little direct evidence before him as to the value of the franchises, to which the court added that if the master, by direct evidence, meant testimony of the same kind regarding their value as had been offered regarding every item of tangible property, there was none at all.

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"The court further stated 'that it does not appear in the evidence how the valuation of the franchises was measured, or why the figures selected were chosen, but that it was true that when complainant was organized, in 1884, under the consolidation statute, which in terms permitted it to acquire the property and franchises of the other companies, it issued stock of the par value of $7,781,000, representing the franchises it then acquired and nothing else, and that the stock was held by purchasers, who, I am compelled to think, had a right to rely upon legal protection for legally issued stock.' It is not, of course, contended there was special stock issued for this particular item, but it was included in the total sum for which the consolidated company issued its stock and upon its receipt the stockholders in the various companies surrendered their stock in those companies. The result was that the amount of the stock issued by the consolidated company was increased by $7,781,000, representing a value of franchises which was agreed upon by the stockholders in the companies, and which had never cost any of them a single penny.

"It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation. Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. 622; People v. O'Brien, 111 N. Y. 1, 19 N. Y. St. Rep. 173, 18 N. E. 692, and cases cited. The important question is always one of value. Taking their value in this case as arrived at by agreement of their owners, at the time of the consolidation, that value has been increased by the finding of the court below to the sum of $12,000,000 at the time of the commencement of this suit. The trial court said: "If, however, complainant's franchises were worth $7,781,000 in 1884, and its tangible property, at the same time, was appraised (as appears in evidence), at $30,000,000 (in round figures), then since complainant's business (in sales volume) has, in twenty-three years, almost quadrupled, and its tangible assets grown to $47,000,000, it appears to me that a fair method of fixing value of the franchises in 1905 is to assume the same growth in value for the franchises as is demonstrated by the evidence in the

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case of tangible property. If, therefore, the franchise valuation of 1884 was proportioned to personalty and realty of $30,000,000, a franchise valuation proportioned to $47,000,000 in 1905 would be over $12,000,000. This, I think, a logical result from the assumption I am compelled to start with, *i. e.*, that franchises have a separate and independent value. But there is, however, no method of valuing franchises, except by a consideration of earnings; earnings must be proportioned to assets; and both kinds of assets, tangible and intangible, must stand upon the same plane of valuation; having, therefore, a measure of growth of tangible assets from 1884 to 1905, the franchise assets must be assumed to have grown in the same proportion. I find that the value of complainants' franchises at the date of inquiry was not less than $12,000,000, making a total valuation of $59,000,000, upon which the probable return is $3,030,000, or very considerably less than 6 per cent.' The judge stated his own views as opposed to including these franchises in the property upon the value of which a return is to be calculated in fixing the amount of rates, but held that he was bound by decided cases to hold against his personal views.

"We are not prepared to hold with the court below as to the increased value which it attributes to the franchises. It is not only too much a matter of pure speculation, but we think it is also opposed to the principle upon which such valuation should be made. This corporation is one of that class which is subject to regulation by the legislature in the matter of rates, provided they are not made so low as to be confiscatory. The franchises granted the various companies and held by complainant consisted in the right to open the streets of the city and lay down mains and use them to supply gas, subject to the legislative right to so regulate the price for the gas as to permit not more than a fair return (regard being had to the risk of the business) upon the reasonable value of the property at the time it is being used for the public.

"The evidence shows that from their creation, down to the consolidation in 1884, these companies had been free from leg-

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islative regulation upon the amount of the rates to be charged for gas. They had been most prosperous and had divided very large earnings in the shape of dividends to their stockholders, dividends which are characterized by the Senate committee, appointed in 1885 to investigate the facts surrounding the consolidation, as enormous. The report of that committee shows that several of the companies had averaged, from their creation, dividends over sixteen per cent, and the six companies in the year 1884 paid a dividend upon capital which had been increased by earnings, as in the case of the Manhattan and the New York, of eighteen per cent, and, had it been upon the money actually paid in, it would have been nearly twenty-five per cent.

"The committee also said in the same report that these 'franchises were in force November 10, 1884, the time of the consolidation, and the money invested in them was earning the same enormous dividends. So far as the evidence shows, there was nothing in the condition of affairs on the 10th of November to indicate that these franchises would not be as valuable for the next twenty years as they had been in the past. There were gas companies enough in the city with a capacity capable of supplying the demands for the next twenty years. A law was on our statute books that virtually prohibited the laying of any more gas pipes in the streets. The gas companies had an agreement among themselves, fixing the price of gas at a figure that paid these dividends. The people were paying this price, as they had in the past, without objection or protest. This price may have been too high, and the dividends were excessive, but they were not illegal, and the valuation of the franchises computed upon these dividends, and that state of facts cannot be called a violation of a law that expressly authorized it to be done, unless such valuation was too high.'

"The committee, upon these facts, were of opinion that the valuation of $7,781,000 for the franchises was not more than their fair aggregate value.

"Assuming, as the committee did, that the company would be permitted to charge the same prices in the future which in

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the past had resulted in these 'enormous' or 'excessive' dividends, it need not be matter of surprise that a franchise by means of which such dividends had been possible was not regarded as overvalued at the sum stated in 1884.

"We think that under the above facts the courts ought to accept the valuation of the franchises fixed and agreed upon under the act of 1884 as conclusive at that time. The valuation was provided for in the act, which was followed by the companies, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years past on the basis of the validity of the valuation and of the stock issued by the company.

"But although the State ought, for these reasons, to be bound to recognize the value agreed upon in 1884 as part of the property upon which a reasonable return can be demanded, we do not think an increase in that valuation ought to be allowed upon the theory suggested by the court below. Because the amount of gas supplied has increased to the extent stated, and the other and tangible property of the corporations has increased so largely in value, is not, as it seems to us, any reason for attributing a like proportional increase in the value of the franchise. Real estate may have increased in value very largely, as also the personal property, without any necessary increase in the value of the franchise. Its past value was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company, without legislative interference with the price for the supply of gas, but that immunity for the future was, of course, uncertain, and the moment it ceased and the legislature reduced the earnings to a reasonable sum the great value of the franchise would be at once and unfavorably affected, but how much so it is not possible for us now to see. The value would most certainly not increase. The question of the regulation of rates did from time to time thereafter arise in the legislature, and finally culminated in these acts which were in existence when the court below found this increased value of the franchises. We cannot, in any view of the case, concur in that finding.

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"This increase in value did, however, form part of the sum upon which the court below held the complainant was entitled to a return. That court found the value of the tangible assets actually employed at the time of the commencement of this suit in the business of supplying gas by the complainant to be $47,831,435, to which it added the $12,000,000 as the value of the franchises as found by it, making the total of $59,831,435, upon which it held that the company was entitled to a return of 6 per cent, being $3,589,886.10. It also found its total net income for the year 1905 amounted to $5,881,192.45, almost 10 per cent upon the sum above named. Altering the finding of the court so far only as to place the value of the franchises at the time agreed upon in 1884, $7,781,000, the total value upon that basis of the property employed by the company would be $55,612,435, upon which 6 per cent would be $3,336,746.10, while the sum, estimated as the return on 80 cent gas would have been $3,024,592.14, which is nearly 5½ per cent on the above total of $55,612,435.

"What has been said herein regarding the value of the franchises in this case has been necessarily founded upon its own peculiar facts, and the decision thereon can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us. We simply accept the sum named as the value under the circumstances stated.

"There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which in some cases might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without

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legislative interference. The less risk, the less right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return without legislative interference, than can be obtained from an investment in Government bonds or other perfectly safe security. The man that invested in gas stock in 1823 had a right to look for and obtain, if possible, a much greater rate upon his investment than he who invested in such property in the city of New York years after the risk and danger involved had been almost entirely eliminated.

"In an investment in a gas company, such as complainants', the risk is reduced almost to a minimum. It is a corporation, which in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a considerable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business. The court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently subject to many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of six per cent would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York.

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"Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use. But assuming that the company is entitled to six per cent upon the value of its property actually used for the public, the total value fixed by the court below is, as we have seen, much too large. We must first strike out the increased value of the franchises asserted by the court over the amount agreed upon in 1884, when the company was consolidated. We also find that the total value of the tangible property is made up of several items, two of which are—

Real estate	$11,985,435
Plants	15,000,000

"Both depend largely upon the opinions of expert witnesses as to the value of that kind of property. Where a large amount of the total value of a mass of different properties consists in the value of real estate, which is only ascertained by the varying opinions of expert witnesses, and where the opinions of the plaintiffs' witnesses differ quite radically from those of the defendants', it is apparent that the total value must necessarily be more or less in doubt. It, in other words, becomes matter of speculation or conjecture to a great extent. It may be, as already suggested, that in many cases the rates objected to might be so low that there could be no reasonable doubt of their inadequacy upon any fair estimate of the value of the property. In such event the enforcement of the rates should be enjoined even in a case where the value of the property depends upon the value to be assigned to real estate by the evidence of experts. But there may be other cases where the evidence as to the probable result of the rates in controversy would show they were so nearly adequate that nothing but a practical test could satisfy the doubt as to their sufficiency.

"In this case a slight reduction in the estimated value of the real estate, plants and mains, as given by the witnesses for complainant, would give a six per cent return upon the total value of the property as above stated. And again increased consumption at the lower rate might result in increased earn-

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ings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished.

"The elevated railroads in New York when first built charged ten cents for each passenger, but when the rate was reduced to five cents it is common knowledge that their receipts were not cut in two, but that from increased patronage the earnings increased from year to year, and soon surpassed the highest sum ever received upon the ten cent rate.

"Of course, there is always a point below which a rate could not be reduced and at the same time permit the proper return on the value of the property, but it is equally true that a reduction in rates will not always reduce the net earnings, but on the contrary may increase them. The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are from the evidence so uncertain, and where the margin between possible confiscation and valid regulation is so narrow we cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient.

"The complainant also contends that the State having taxed it upon its franchises cannot be heard to deny their existence or their value as taxed.

"The fact that the State has taxed the company upon its franchises at a greater value than is awarded them here, is not material. Those taxes, even if founded upon an erroneous valuation, were properly treated by the company as part of its operating expenses, to be paid out of its earnings before the net amount could be arrived at applicable to dividends, and if such latter sums were not sufficient to permit the proper return on the property used by the company for the public, then the rate would be inadequate. The future assessment of the value of the franchises, it is presumed, will be much lessened if it is seen that the great profits upon which that value was based are largely reduced by legislative action. In that way

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the consumer will be benefited by paying a reduced sum (although indirectly) for taxes.

"We are also of opinion that it is not a case for a valuation of 'good will.' The master combined the franchise value with that of good will, and estimated the total value at $20,000,000.

"The complainant has a monoply in fact, and a consumer must take gas from it or go without. He will resort to the 'old stand,' because he cannot get gas anywhere else. The court below excluded that item, and we concur in that action.

"And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented.

"The matter of the increased cost of the gas, resulting from the provisions of the acts, as to making the gas equal to 22 candle power, is also alleged as a reason for inadequacy of rate.

"It appears that the average candle power actually produced in the first six months of the year 1905 was 22, while but 20 candle power was exacted by law, and for the last six months of that year, while 22 candle power was exacted, the average amount was 24.19. This expense was included in the operating expense of that year, which resulted in the net earnings above mentioned, while the company was complying with the requirements of the act in this particular.

"It is unnecessary, therefore, to further inquire as to the additional expense caused by this requirement.

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"Again, it has been asserted that the laws are unconstitutional, because of the provision as to pressure, and also by reason of the penalties which a violation of the acts may render a corporation liable to.

"The acts provide that the pressure of the gas in the service mains at any distance from the place of manufacture shall not be less than one inch nor more than two and a half inches.

"The evidence shows that to put a pressure such as is demanded by the acts upon the mains and other service pipes in their present condition would be to run a great risk of explosion, and consequent disaster. Before compliance with this provision would be safe the mains and other pipes would have to be strengthened throughout their whole extent, and at an expenditure of many millions of dollars, from which no return could be obtained at the rates provided in the acts. This would take from the complainant the ability to secure the return to which it is entitled upon its property, used for supplying gas, and the provision as to the amount of pressure is therefore void. This particular duty imposed by the acts is, however, clearly separable from the enactments as to rates, and we have no doubt that the remainder of the statute would have been enacted, even with that provision omitted.

"The obligation would remain upon the company to have a pressure sufficient to insure a light of 22 candle power, as provided in the acts.

"We are of the same opinion as to the penalties provided for a violation of the acts. They are not a necessary or inseparable part of the acts, without which they would not have been passed. If these provisions as to penalties have been properly construed by the court below, they are undoubtedly void, within the principle decided in Ex parte Young, 209 U. S. 123, and the cases there cited, because so enormous and overwhelming in their amount.

"When the objectionable part of a statute is eliminated, if the balance is valid and capable of being carried out, and if the court can conclude it would have been enacted if that portion which is illegal had been omitted, the remainder of the stat-

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ute thus treated is good. Reagan v. Trust Co., 154 U. S. 362, 395, 38 L. ed. 1014, 14 Sup. Ct. 1047; Berea College v. Commonwealth of Kentucky, 211 U. S. 45–54.

"This is a familiar principle.

"Lastly, it is objected that there is an illegal discrimination as between the city and the consumers individually. We see no discrimination which is illegal or for which good reasons could not be given. But neither the city nor the consumers are finding any fault with it, and the only interest of the complainant in the question is to find out whether, by the reduced price to the city, the complainant is upon the whole unable to realize a return sufficient to comply with what it has the right to demand. What we have already said applies to the facts now in question.

"We cannot see from the whole evidence that the price fixed for gas supplied to the city by the wholesale, so to speak, would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant. So long as the total is enough to furnish such return it is not important that with relation to some customers the price is not enough. Minneapolis &c. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. 900; Atlantic Coast Line v. North Carolina Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. 585.

"Upon a careful consideration of the case before us we are of opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the State of New York are in fact confiscatory.

"It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice, and

"*It is so ordered.*"

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