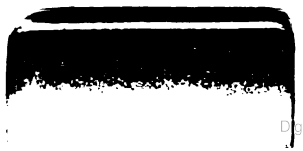

CONSTITUTIONAL PROHIBITIONS.

AN ESSAY

ON THE

CONSTITUTIONAL PROHIBITIONS

AGAINST

LEGISLATION IMPAIRING THE OBLIGATION OF CONTRACTS,

AND AGAINST RETROACTIVE AND EX POST FACTO LAWS.

BY

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PREFACE.

THE cardinal importance of the general subject of retroactive laws — and its especial importance as viewed in the light of the prohibitory clauses embodied in the Federal Constitution and in the constitutions of most of the American States — seems to demand its recognition as a distinctive branch of juristic science. And the large development of the subject in late years, with the valuable accretions of recent cases, renders it no longer practicable to give it adequate treatment within the narrow limits of an article or a chapter. Besides, the marked and increasing tendency of our day, to the specialization of functions, has found its way into the field of legal literature, and causes, while it also commends, the differentiation of subject-matters. Hence the author is led to hope that this essay may not prove unacceptable.

The historical method of treatment has been adopted wherever practicable. For the author believes this to be the best method for the exposition of topics belonging to the domain of doctrinal

jurisprudence; not only because it enables one to trace, step by step, the growth and development of a principle of law, but also because it presents, in their distinctness and interrelation, all the elements which have contributed to the structure of the truth in its final and crystallized form.

In the following pages it has been necessary to discuss some of the most vexed questions of constitutional law. In these cases the author has found, for the most part, that none of the decisions were hopelessly astray; but each contained some portion or some intuition of the truth, while none, perhaps, displayed the truth in its entirety. It was then his task, by a process of analysis and synthesis, to gather the scattered fragments of the doctrine, and weave the whole into a composite statement of the truth. How far he may have succeeded in such endeavor, is a matter upon which he has no other guarantee than the consciousness of patient and detailed investigation.

Frequent use has been made, in this work, of the writings of Story, Kent, Cooley, Parsons, and Morawetz. The author has intended, in each case where direct aid was levied from the investigations or opinions of those writers, to signify the fact in a foot-note. But if he should have omitted this at any time — and because he is conscious of owing to them much that could not be designated by volume and page — he desires, in this place, to

acknowledge the great assistance he has derived from their labors. About thirteen hundred cases have been cited, and the references have been brought down to, and include, the 117th volume of United States Reports.

The author is by no means insensible of the many shortcomings of his book; but neither is he unmindful of the indulgent generosity of that profession to which he is proud to belong.

H. C. B.

WILLIAMSPORT, PA.,
February 1, 1887.

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PART I.

LEGISLATION IMPAIRING THE OBLIGATION OF CONTRACTS.

CONSTITUTIONAL PROHIBITIONS.

PART I.

LEGISLATION IMPAIRING THE OBLIGATION OF CONTRACTS.

CHAPTER I.

INTRODUCTORY.

I. Causes which led to the Introduction of this Clause.
§ 1. Financial Condition of the Country before the Constitution.
2. Adoption of the Clause by the Convention.
3. Supposed Origin of the Phrase.

II. What is a Law within the Meaning of the Clause.
§ 4. A Constitutional Provision is a Law.
5. Municipal Ordinances.
6. Laws in force before the Constitution.
7. Acts of Confederate Government.
8. The Prohibition does not bind Congress.
9. The Clause does not apply to Prospective Legislation.
10. Rule of Construction in U. S. Supreme Court.

I. Causes which led to the Introduction of this Clause.

§ 1. **Financial Condition of the Country before the Constitution.** — The tenth section of the first article of the Constitution of the United States provides that "No State shall . . . emit bills of credit, make anything but gold and

silver coin a tender in payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Of all the prohibitions laid upon the power of the several States, at the formation of the Union, there is probably none the interpretation of which has been involved in a greater number of decided cases than the clause relating to the obligation of contracts. And the great body of constitutional learning which has grown up in its investigation and application, whether considered with reference to the far-reaching effects of its principles, to the multitudinous enactments on which it lays a restraining hand, to the magnitude and importance of the interests which it shelters, or to the profound and subtle intellects, from the time of Marshall to our own day, which have labored in its development, must be accorded a foremost place in the domain of doctrinal jurisprudence. In the history of the growth of these rules it has frequently been necessary to recur to the considerations which led the framers of the Constitution to the introduction of the limitations upon the legislative authority of the States, on that principle of interpretation which allows us to take into account the state of the old law and the mischief sought to be remedied. It will therefore be appropriate to preface this discussion with a brief review of the financial condition of the country before the adoption of the Constitution.

The long and arduous conflict which resulted in the independence of the United States left the people of the newly emancipated colonies with little save their autonomy and a vast but undeveloped country. So severe had been the drain upon their resources, so exhausting the exigencies of the war and the sacrifices which its prosecution had laid upon them, that they found themselves bankrupt in fortune, oppressed with heavy obligations, and at a loss for means to retrieve their prosperity or ameliorate their con-

dition. Nor did the ultimate restoration of internal peace appear to work any change for the better. For when the courts of justice resumed their suspended process and addressed themselves to the calling of debtors to account, many an honest man proved unable to discharge his obligations, and the seizure and sale of his property, at a ruinous valuation, left him homeless and destitute, without delivering him from the pressure of his debts. In this state of affairs there arose a great clamor for the enactment of laws tending to the relief of debtors. And many of the States, actuated by a short-sighted policy, which even the prevalent distress and the unsettled condition of the times could scarcely justify, began to put in operation various schemes for the temporary improvement of affairs in behalf of the debtor, and against the creditor. Some, allured by that favorite stimulant of revolutionary governments, — a paper currency, — but forgetting the depression which must follow its transient benefits, made large issues of bills of credit. They rightly judged that its rapid and accelerating depreciation would prove a boon to debtors, as it enabled them to discharge their obligations more and more below par; but at the same time they cast behind them the dictates of a sound political economy, as well as the immutable principles of justice and good faith. For, in general, this paper money was made a legal tender in payment of all debts, and yet no day was fixed for its redemption nor any fund provided; in other words, a promise to pay in gold and silver coin was discharged, with the sanction of the State, by a payment in irredeemable paper. In other communities debts were allowed to be cancelled by the delivery of specific property of the debtor at a fixed valuation, as, for example, tracts of pine-barren land. Elsewhere, instalment laws were passed, which authorized the discharge of contracts by payments extending over intervals of several years. The courts of justice were in

many places closed. And among the unwise theories of the day must not be omitted the arbitrary and unjust discrimination against British creditors.

But the disastrous effects of these measures were not long in making themselves felt. It was soon found that the evils which followed in their train were even more considerable than those from which it had been designed to rescue the country. In the money-market the utmost confusion and uncertainty prevailed, even in the most important transactions. Few men were willing to stake their property upon ventures which, instead of yielding them profit, might easily result in the wreck of their fortunes, through the practical impossibility of enforcing collections, or the necessity of accepting payment in a depreciating and almost worthless currency. So great was the general distrust and doubt that the best marketable bonds could not be sold but at a discount of thirty or even fifty per cent, while desirable real estate often went begging for a purchaser. It was the natural result that many persons who had hitherto been in affluent circumstances should find themselves reduced to comparative poverty, or even to positive want. Equally inevitable was the utter lack of confidence between man and man, the stagnation of trade, and the prostration of commerce, which now ensued. Nor was this all. A danger which threatened far more serious results to the national prosperity was discovered in the unwholesome influence of these measures upon the public morals. For when the inviolability of all public and private engagements was swept away, when the sanctity of good faith was obliterated, when justice was made subservient to the convenience of the hour, and the strong arm of the law was interposed between debtor and creditor, not to compel a strict observance of their compact, but to excuse the one and ruin the other, who could expect anything else than that honesty should become a reproach and

integrity be laid in the dust? Public credit also suffered. With this state of affairs at home, it was impossible to maintain a reputation for probity abroad, and the honor of the nation became seriously compromised in the opinion of foreign powers.

The crisis gave rise to two great political parties in each State, diametrically opposed in their theories, but equally zealous in the advocacy of their principles. The one pressed for further indulgence to the debtor class, for still less severity in the enforcement of contracts, for relaxing the administration of justice, for suspending collections, and for anything that would afford temporary relief to those whose misfortunes engaged their care. The other party contended for the great principle that a sacred observance of good faith and the strict enforcement of the laws are alike indispensable to the internal welfare of a people and the respect they seek abroad. They urged that personal honesty, manifested in the scrupulous fulfilment of all obligations, and governmental integrity, shown in the exact and equal administration of justice, constitute the only safe foundation on which to rear a superstructure of national greatness. They advised, therefore, that a return to habits of frugality and economy, the resumption of a specie payment, and the requirement that all contracts should be rigorously complied with, would furnish, notwithstanding the temporary inconvenience and distress, the only efficacious means of reviving commerce and industry, and putting the country at last on the direct highroad to prosperity and honor. It was at this juncture that the Constitutional Convention met.

Such was the state of the old law, and such the mischiefs that arose under it. It was with a view to remedy those mischiefs that the prohibitions upon the legislative power of the States were incorporated in the Constitution, and especially the clauses under consideration. Whether

the means adopted have proved equal to the end sought, let our subsequent history attest.[1]

§ 2. **Adoption of the Clause by the Convention.**—"The attention of the convention," says Chief Justice Marshall, "was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle,—that contracts should be inviolable. The Constitution therefore declares that no State shall pass 'any law impairing the obligation of contracts.'"[2] In point of fact, however, as the clause was first adopted the words relating to contracts were not contained in it. For it was supposed at the time that the phrase "*ex post facto* laws" was sufficiently comprehensive to include legislation relating to private civil engagements as well as matters of criminal jurisdiction. But it was discovered, before the Constitution was settled in its present shape, that the expression referred to had acquired, in the English jurisprudence, a limited and technical signification restricted entirely to crimes and criminal proceedings. Hence

[1] For further information in regard to the historical questions above discussed, the reader is referred to Marshall's Life of Washington, vol. v. pp. 75, 86; Phillips's Hist. Amer. Paper Currency; 2 Curt. Hist. of the Const. 366; Ramsey, Hist. U. S. 77; Fisher Ames, Works, ed. 1859, p. 120; Adams *v.* Storey, 1 Paine, C. C. 90; Johnson *v.* Duncan, 3 Mart. (La.) 530; Townsend *v.* Townsend, Peck, 1.

[2] Marshall, C. J., in Sturges *v.* Crowninshield, 4 Wheat. 205.

the words "or any law impairing the obligation of contracts" were added in order to give perfect security to rights resting in contract.[1] And indeed it is remarkable, as observed by Judge Cooley, "that this very important clause was passed over almost without comment during the discussions preceding the adoption of that instrument, though since its adoption no clause which the Constitution contains has been more prolific of litigation, or given rise to more animated and at times angry controversy. It is but twice alluded to in the papers of the Federalist;[2] and though its great importance is assumed, it is evident that

[1] So stated by Miller, J., in Kring *v.* Missouri, 107 U. S. 221. And see 2 Bancroft's Hist. of the Const. 213.

[2] The more important of the two passages referred to in the Federalist is found in No. 44, by James Madison, and is as follows; "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."

the writer had no conception of the prominence it was afterwards to hold in constitutional discussions, or of the very numerous cases to which it was to be applied in practice." [1]

§ 3. **Supposed Origin of the Phrase.** — The words "impairing the obligation of contracts" are certainly not taken from the common law, nor used as a classical or technical term of our jurisprudence (outside of their constitutional application) in any book of authority. And it is evident that they are not drawn from any English statute, nor from the acts in force in the several States prior to the adoption of the Constitution. It is therefore a plausible hypothesis that the phrase was furnished from the Roman law, where at least the term "obligation" is of frequent occurrence and exact meaning. Tradition says that Mr. Justice Wilson, who was a member of the convention that framed the Constitution and a Scottish lawyer learned in the civil law, was the author of the clause in question; but this rests largely on conjecture.[2] The clause is, however, entirely peculiar to our own organic law. Of course no such restriction upon the power of the British Parliament could be claimed for a moment to exist. And in Canada, there is no constitutional prohibition against the passage of laws impairing the obligation of contracts.[3]

II. What is a Law within the Meaning of the Clause.

§ 4. **A Constitutional Provision is a Law.** — It is well settled, upon the authorities, that if a State adopts a new constitution, and any of its provisions are found to impair

[1] Cooley, Const. Lim. 273.

[2] See argument of Mr. Hunter in the case of Sturges *v.* Crowninshield, 4 Wheat. 151.

[3] Canada Southern R. R. *v.* Gebhard, 109 U. S. 527.

the validity of existing contracts, such provision will be as much within the prohibition of the Federal Constitution as would a simple act of the legislature.[1] True, the constitution is the organic law of the State, not to be infringed or set aside at the will of any legislative assembly, and not to be altered save by the assent of the people in whom the sovereignty rests; but yet it is as truly a rule of conduct prescribed by the State, as any enactment of the body to whom, for the moment, the law-making power is confided. And both reason and policy demand that the controlling force of the limitation should be extended as well to a change in the organic law as to an ordinary statute. And the fact that the new constitution was sanctioned by Congress does not affect the question; because Congress cannot, by authorization or ratification, give the slightest effect to a State law or constitution which is in conflict with the Constitution of the United States.[2] Nor is it permitted to impair the obligation of contracts by an *amendment* to the State constitution.[3]

§ 5. **Municipal Ordinances.** — It follows as a matter of course that whatever restrictions are placed upon the power of the State, as such, rest equally upon the subordinate bodies politic, created by its authority to be its instruments and agents, and invested with a share of the governmental control. Hence if an ordinance passed by the legislative body of a municipal corporation tends to

[1] Dodge *v.* Woolsey, 18 How. 331; Railroad Co. *v.* McClure, 10 Wall. 511; White *v.* Hart, 13 Wall. 646; Gunn *v.* Barry, 15 Wall. 610; Clay County *v.* Savings Society, 104 U. S. 579; New Orleans Gas-Light Co. *v.* Louisiana Light and Heat Co., 115 U. S. 650, 672; New Orleans Water Works *v.* Rivers, 115 U. S. 674; Fisk *v.* Police Jury, 116 U. S. 131; Lehigh Valley R. R. *v.* McFarlan, 31 N. J. Eq. 706; Grigsby *v.* Peak, 57 Tex. 142; Delmas *v.* Insurance Co., 14 Wall. 661.

[2] Gunn *v.* Barry, 15 Wall. 610.

[3] State *v.* Young, 29 Minn. 474.

violate contract obligations, it will undoubtedly be void and of no effect.[1]

§ 6. **Laws in Force before the Constitution.** — The present Constitution of the United States did not commence its operation until the first Wednesday of March, 1789; and, in the nature of things, the inhibition against this species of legislation cannot be understood to extend to a State law enacted before that day and operating upon rights of property vested before that time.[2] On a similar principle, laws passed by the Republic of Texas, before its admission into the Union as a State, cannot be in conflict with the Federal Constitution, nor open to the scrutiny of the United States courts, whether they impair the obligation of contracts or divest property rights or not.[3]

§ 7. **Acts of Confederate Government.** — Any enactment of the late "Confederate Government" to which a State gave the force of law, is a statute of the State within the meaning of the clause relating to the jurisdiction of the Supreme Court; and, as remarked by Field, J.: "The constitutional provision prohibiting a State from *passing* a law impairing the obligation of contracts equally prohibits a State from *enforcing* as a law an enactment of that character, from whatever source originating."[4]

§ 8. **The Prohibition does not bind Congress.** — There is nothing in the Constitution of the United States which forbids Congress to pass laws impairing the obligation of contracts.[5] But here, as in all other matters, Congress must keep strictly within the scope of its delegated powers.[6]

[1] See Hestonville R. R. *v.* Philadelphia, 89 Pa. St. 210.
[2] Owings *v.* Speed, 5 Wheat. 420.
[3] League *v.* DeYoung, 11 How. 185; Herman *v.* Phalen, 14 How. 79.
[4] Williams *v.* Bruffy, 96 U. S. 176.
[5] Evans *v.* Eaton, Pet. C. C. 322, 337.
[6] Hopkins *v.* Jones, 22 Ind. 310.

§ 9. **The Clause does not apply to Prospective Legislation.** — Whether the constitutional prohibition was originally designed to forbid prospective legislation by the States, of such a character as to impair the obligation of contracts, or was merely levelled against retrospective laws of that nature, is a question that has provoked much difference of opinion. The view that it was intended to render ineffectual any legislative interference with contracts to be made after the statute took effect, is not to be too lightly dismissed, for it has the sanction of the great name of Marshall.[1] But whatever may have been the intention of the framers of the Constitution, the construction to be given to this clause was definitely and finally settled in the case of Ogden *v.* Saunders,[2] where the constitutionality of State insolvent laws, as applied to debts *subsequently* contracted, was upheld expressly on the ground that the constitutional prohibition did *not* apply to prospective laws. Mr. Justice Washington said: "It is thus most apparent that, whichever way we turn, whether to laws affecting the validity,

[1] Opinion of Marshall, C. J., in Ogden *v.* Saunders, 12 Wheat. 332. A writer in the American Law Register, vol. xi. p. 204, says: "We cannot but agree with Marshall, C. J., that the Constitution of the United States, in prohibiting the passage of laws impairing the obligation of contracts, was intended to apply as well to prospective as to retroactive laws, and that the former can be, and have been made, scarcely less mischievous than the latter. The experience of the country, we think, has shown that at all events such a construction would have been promotive of the honor and well-being of the people." And Dr. Wharton observes (2 Whart. on Contr. § 1061), that one of the motives for the introduction of the contract clause into the Constitution was the vindication of the inherent right of contracting, as may be learned from the debates and from contemporaneous exposition; and he seems to think that prospective legislation, as forbidding contracts of a certain kind to be thereafter made, might, in some instances, be unconstitutional.

[2] Ogden *v.* Saunders, 12 Wheat. 213. But Marshall, C. J., and Story and Duvall, JJ., dissented.

construction, or discharge of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction, between those which operate retrospectively, and those which operate prospectively. In all of them the law is pronounced to be void in the first class of cases, and not so in the second." And the rule thus established is accepted as final.[1]

An act of the legislature is *passed* only when it has gone through all the forms made necessary by the constitution to give it force and validity as a binding rule of conduct for the citizen. Whether it receives the signature of the governor, or remains in his hands unreturned for ten days, or, being vetoed, is carried by the necessary majority of the legislature, its passage is dated from the time when it ceased to be a mere proposition or bill and passed into a law. Hence an act must not be allowed to affect the obligation of a contract made after it has passed both houses of the legislature, but before its approval by the governor. That is to say, it cannot be considered prospective as regards contracts made in the interval.[2]

§ 10. **Rule of Construction in United States Supreme Court.** — In considering whether the judgment of a State court gave effect to a law of the State which, in violation of the Federal Constitution, impairs the obligation of contracts, the Supreme Court will decide for itself, independently of the decision of the State court, whether there is a contract and whether its obligation is impaired. And if the decision of the question as to the existence of the

[1] People's Savings Bank *v.* Tripp, 13 R. I. 621. An act declaring conditional agreements to pay attorney fees thereafter inserted in instruments for the payment of money void, is not unconstitutional. Churchman *v.* Martin, 54 Ind. 380.

[2] Wartman *v.* Philadelphia, 33 Pa. St. 202.

alleged contract requires a construction of State constitutions and laws, the court is not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property.[1]

[1] Louisville, &c. R. R. *v.* Palmes, 109 U. S. 244.

CHAPTER II.

CONTRACTS OF THE STATE WITH CORPORATIONS.

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I. Charters of Private Corporations.

§ 11. **Foundation of the Doctrine that a Private Charter is a Contract.** — At a very early day we find the opinion intimated that rights legally acquired under a charter of incorporation could not be arbitrarily divested by a subsequent legislature. Thus Chief Justice Parsons said: "We are also satisfied that the rights legally vested in this, or in any corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation."[1] But it was not until some years later that the matter was presented for decision in connection with the prohibitory clause against the impairment of contracts. And the first case bearing upon the question is that of Fletcher *v.* Peck,[2] where it was in effect held that a contract executed, as well as one which is executory, contains binding obligations; that a grant amounts, in its own nature, to an extinguishment of the right of the grantor, and imports a contract not to re-assert that right; that since the Constitution uses the general term "contracts," without distinction as to their execution, it must be understood to include both classes; that grants from the State are comprehended in the language used; and that a State is as much inhib-

[1] Parsons, C. J., in Wales *v.* Stetson, 2 Mass. 143 (1806).
[2] 6 Cranch, 87, 137.

ited from impairing the obligation of a contract made with itself as a contract between two individuals.

In the next case the court took a long step forward in the development of the doctrine. Its views were thus announced by Mr. Justice Story: "But that the legislature can repeal statutes creating private corporations or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the Constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine." [1]

But it was reserved for the justly celebrated case of Dartmouth College *v.* Woodward [2] to state the exact application of the constitutional prohibition to the charters of private corporations, and to define and settle the doctrine on broad and rational grounds. It appeared that a charter had been granted by the British crown to the trustees of Dartmouth College in 1769, incorporating the college as a private charitable institution. A subsequent act of the legislature of New Hampshire attempted to transfer the power of government from the trustees appointed according to the charter to the executive of New Hampshire; in effect converting a literary institution, moulded according to the will of its founders, and placed under the control of individuals, into a machine entirely subservient to the will of the State. It was held that *the charter was a contract*, to which the donors of property, the trustees, and the King

[1] Terrett *v.* Taylor, 9 Cranch, 43, 52.

[2] Dartmouth College *v.* Woodward, 4 Wheat. 518.

were the original parties, and made on a valuable consideration, for the security and disposition of property; that contracts of this kind were most reasonably within the purview and protection of the Constitution; and that the statute referred to, inasmuch as it altered the charter in a material particular, without the consent of the corporation, violated the obligation of the contract, and was therefore unconstitutional and void.

§ 12. **Influence and Effects of the Dartmouth College Case.** — The importance of this decision could scarcely be overestimated. It has been cited and applied in numberless cases. Though occasionally questioned, it has never been departed from, and its reasoning and conclusions have, for the most part, commanded instinctive assent and admiration. The rule which it established has thrown a shield of protection over many of the most important enterprises of the age. It was one of the greatest efforts of the great minds of Marshall and Story. For all these reasons it is justly entitled to be considered the most valuable constitutional decision ever rendered in this country. Indeed, as remarked by Chief Justice Waite, "the doctrines of the Dartmouth College Case, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the Constitution itself."[1] Another learned judge has said: "All the cases are saturated with this doctrine. It is sustained, not by a current, but by a torrent of authorities. No judge who has a decent respect for the principle of *stare decisis* — that great principle which is the sheet anchor of our jurisprudence — can deny that it is immovably established."[2] Certain it is, however, that the subsequent applications of the

[1] Stone *v.* Mississippi, 101 U. S. 814.

[2] Black, J., in Bank of Pennsylvania *v.* Commonwealth, 19 Pa. St. 151. See Iron City Bank *v.* Pittsburgh, 37 Pa. St. 345.

doctrine thus announced have carried it into fields of which its originators never dreamed; and that the astonishing growth of corporate power and corporate enterprise has extended the rule to concerns of the magnitude and variety of which they could have had no conception. Yet the fact that it has been found to meet all exigencies, and that no successful attempt has ever been made to break down the barrier which it erected, is surely an argument for the soundness of the principles on which it rests, and for the wisdom of its founders. "They builded better than they knew" — those sages of our early law — when they placed the life and liberty of corporations beneath the ægis of the Constitution. For although publicists and jurists have sometimes taken fright at the increasing influence and wealth of the great corporations of the country, and have affected to discover, in their immunity from legislative interference, a source of danger to the welfare of the community, or even to the utility of our republican institutions,[1] yet, as we shall endeavor hereafter to show, the safeguards which have grown up side by side with the rule will be ample to meet any probable case. And, on the other hand, it is to be remembered that "the decision in that case did more than any other single act proceeding

[1] Judge Cooley declares that "it is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence. Every privilege granted or right conferred — no matter by what means or on what pretence — being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the Federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil." Cooley, Const. Lim. 279, note.

from the authority of the United States, to throw an impregnable barrier around all rights and franchises derived from the grant of government; and to give solidity and inviolability to the literary, charitable, religious, and commercial institutions of our country."[1]

§ 13. **The Doctrine denied in Ohio.** — The only instance in which the State courts have directly refused to accept the doctrine announced in Dartmouth College *v.* Woodward is found in a series of cases in Ohio, which gave rise to a controversy between the appellate court of that State and the Supreme Court of the United States; a matter of some celebrity at the time, and therefore demanding a somewhat extended notice. The legislature of Ohio had chartered a system of State banks, with branches in the principal cities, and had enacted, in the charter, that the banks should pay a certain sum to the State which should be in lieu of any and all other taxes. After the banks had secured their charters and commenced operations, the State government passed into the hands of a political party opposed to the State banking system. Under their auspices a new constitution was adopted, one of the provisions of which required the legislature to levy taxes on the banks. In obedience to this mandate the legislature passed an act imposing a tax upon the State banks considerably in excess of the amount stipulated for in their charters. The banks disputed the validity of this tax, claiming that the clause in their acts of incorporation exempting them from the payment of duties beyond the amount named was a contract from which the State could not depart by any subsequent legislation. But the Supreme Court of Ohio sustained the constitutionality of the statute in question; declaring that the charter of a private corporation is, in form and in its inherent terms and nature, a law, and does not possess the essential elements of a contract, viz.: two

[1] 1 Kent's Comm. *418.

competent contracting parties, a proper subject-matter, a legal consideration, and a mutuality of obligation, and therefore does not come within the purview and true intent of the prohibitory clause of the Federal Constitution; and attempting also to show that the Dartmouth College case did not in fact decide the very point on which its authority is made to rest.[1] Several of these decisions were carried to the United States Supreme Court for review, and that tribunal overruled them all, affirmed its previous positions, and declared that the State could not constitutionally revoke its agreement not to tax the banks beyond the sum designated in their charters.[2] And in the case which closed the litigation the court said: "It has been decided three times by this court, that the 60th section of the charter of the State Bank of Ohio was a contract between the State and the Bank, within the meaning and entitled to the protection of the Constitution of the United States against any law of the State of Ohio impairing its obligation; and that the Acts of Ohio upon which the Supreme Court of Ohio has assumed the State's right to tax the State Bank of Ohio and its branches differently from the tax stipulated for in the 60th section of the charter, were and are unconstitutional and void."[3] Since that time the doctrine has never again been denied, except in the *dictum* of a solitary judge in Texas.[4]

§ 14. **Statement of the Principle as now settled.** — The doctrine as now settled and universally accepted may be

[1] Mechanics' Bank *v.* Debolt, 1 Ohio St. 591; Toledo Bank *v.* Bond, 1 Ohio St. 622. For some years after this the decisions in Ohio seem to have been hopelessly conflicting. Compare Morgan *v.* Auditor, 5 Ohio St. 444; Sandusky Bank *v.* Wilbor, 7 Ohio St. 481; Ross Bank *v.* Lewis, 5 Ohio St. 447.

[2] Piqua Branch Bank *v.* Knoop, 16 How. 369; Mechanics' Bank *v.* Debolt, 18 How. 380; Mechanics' Bank *v.* Thomas, 18 How. 384.

[3] Jefferson Branch Bank *v.* Skelly, 1 Black (U. S.) 436.

[4] State *v.* Southern, &c. R. R., 24 Tex. 80.

stated as follows: The charter of a private corporation is a contract, within the meaning of the Constitution of the United States, between the State granting the charter and the corporation created by it, and any constitutional provision or act of the legislature that impairs it, whether by enlarging the power of the State over the body corporate, or by abridging its franchises, or otherwise altering it in a material point, is repugnant to the Constitution and void.[1]

[1] Among the authorities supporting this proposition are the following: Fletcher *v.* Peck, 6 Cranch, 133; Dartmouth College *v.* Woodward, 4 Wheat. 518; Green *v.* Biddle, 8 Wheat. 1; Providence Bank *v.* Billings, 4 Pet. 514; Planters' Bank *v.* Sharp, 6 How. 301; Trustees *v.* Indiana, 14 How. 268; Piqua Bank *v.* Knoop, 16 How. 369; Bridge Proprietors *v.* Hoboken, 1 Wall. 116; Hawthorne *v.* Calef, 2 Wall. 10; The Binghamton Bridge, 3 Wall. 51; Miller *v.* State, 15 Wall. 478; Delaware Railroad Tax, 18 Wall. 206; Greenwood *v.* Freight Co., 105 U. S. 13; New Orleans Gas Light Co. *v.* Louisiana Light and Heat Co., 115 U. S 650; New Orleans Water Works *v.* Rivers, 115 U. S. 674; Lincoln Bank *v.* Richardson, 1 Me. 79; Yarmouth *v.* North Yarmouth, 34 Me. 411; Coffin *v.* Rich, 45 Me. 507; State *v.* Noyes, 47 Me. 189, 205; Backus *v.* Lebanon, 11 N. H. 19; Grammar School *v.* Burt, 11 Vt. 632; Wales *v.* Stetson, 2 Mass. 146; King *v.* Bank, 15 Mass. 447; Nichols *v.* Bertram, 3 Pick. 342; Central Bridge *v.* Lowell, 15 Gray, 106; Brighton *v.* Wilkinson, 2 Allen, 27; Washington Bridge Co. *v.* State, 18 Conn. 53; Lothrop *v.* Stedman, 42 Conn. 583; People *v.* Manhattan Co., 9 Wend. 351; Brown *v.* Hummel, 6 Pa. St. 86; Commonwealth *v.* Cullen, 13 Pa. St. 133; Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340; Chincleclamouche Lumber Co. *v.* Commonwealth, 100 Pa. St. 438; Zabriskie *v.* Railroad, 18 N. J. Eq. 178; Lehigh Valley R. R. *v.* McFarlan, 31 N. J. Eq. 706; Bailey *v.* Railroad, 4 Harr. (Del.) 389; Canal Co. *v.* Railroad Co., 4 Gill & J. 1; Norris *v.* Trustees, 7 Gill & J. 7; Regents *v.* Williams, 9 Gill & J. 365; Bank of the Dominion *v.* McVeigh, 20 Gratt. 457; Mills *v.* Williams, 11 Ired. 558; Bank of State *v.* Bank of Cape Fear, 13 Ired. 75; Attorney-General *v.* Bank of Charlotte, 4 Jones Eq. 287; State *v.* Heyward, 3 Rich. 389; Young *v.* Harrison, 6 Ga. 130; State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30; Commercial Bank *v* State, 6 Sm. & Mar. 599; New Orleans, &c. R. R. *v.* Harris, 27 Miss. 517; Maysville Turnpike Co. *v.* How, 14 B. Mon. 426; Louisville *v.* University, 15

§ 15. **Three Contracts to be considered.** — The contract between the State and the corporation is, that the latter shall enjoy its corporate existence in perpetuity, or for the time limited in its charter, as the case may be, and shall continue to use its rights, privileges, franchises, and immunities, *substantially as granted*, without interference or abridgment on the part of the State. But there are two other contracts, beside this, the obligation of which may be impaired by an unwarranted interposition of the legislature into the affairs of the corporation. The first is the contract between the corporators themselves. "The shareholders of such a corporation mutually agree to unite for the purposes indicated in their charter. Each shareholder agrees to contribute his proportional share of the capital of the association, and each, in return, becomes entitled to a share in the profits and in the management of the corporate affairs. The agreement thus created is, in the strictest sense of the word, a contract; and every reason exists for treating it as a contract within the meaning of the provision of the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts. A State is therefore prohibited by the Constitution from passing a law altering the purposes of the corporation, as set out in its charter, because such a law would impair the contract existing between the members of the association."[1] And the second is, any contract subsisting between the corporation and a third party. For it is obvious that a statute which should, by changing the purposes of a corpo-

B. Mon. 642; Edwards *v.* Jagers, 19 Ind. 407; Bruce *v.* Schuyler, 4 Gilm. 221; Bruffett *v.* Railroad, 25 Ill. 353; Miners' Bank *v.* U. S., 1 Greene (Iowa) 553; Gorman *v.* Railroad, 26 Mo. 441; Michigan State Bank *v.* Hastings, 1 Dougl. 225; People *v.* Jackson Plank Road, 9 Mich. 285; Flint Plank Road Co. *v.* Woodhull, 25 Mich. 99; McRoberts *v.* Washburne, 10 Minn. 23.

[1] 2 Morawetz on Corporations, § 1047.

ration or abridging its franchises, render it impossible for it to fulfil its contract with a third party as stipulated, or alter the terms and conditions of such contract, would be, as to the latter, unconstitutional and void.

§ 16. **Powers expressly granted to a Corporation are protected.** — The first and most obvious application of the rule above stated is, that a corporation is protected by the Constitution in the use and enjoyment of all such rights and powers as are specifically granted by its charter, and any legislation which takes away those rights or curtails those powers is invalid. For example, where a bank was invested, by its charter, with power to discount bills and notes and to make loans, and in the course of business under its charter the bank discounted and held promissory notes, and afterwards a statute was passed declaring that "it shall not be lawful for any bank in the State to transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt," it was held that the act was, as to the bank in question, repugnant to the Constitution and void.[1] Again, a statute which requires all corporations to pay a bonus to the State upon an increase of their capital stock cannot be made to apply to an existing corporation whose charter gives it the unconditional privilege of enlarging its capital from time to time as it may see fit.[2]

§ 17. **Incidental Powers. The Rule of Construction.** — Equally within the prohibitory clause are the rights and powers incidental to the transaction and management by the corporation of the business for which it was created,

[1] Planters' Bank *v.* Sharp, 6 How. 301.

[2] Commonwealth *v.* Erie Trans. Co., 107 Pa. St. 112. A railroad whose charter provides that no other company shall use its road without its consent, is not liable to the penalty imposed by a subsequent statute (Md. Acts 1874, ch. 446), enacting that all railroad companies shall permit the use of their tracks for five miles or less by other companies. Pennsylvania R. R. *v.* Balt. & Ohio R. R., 60 Md. 263.

and such as are proper and necessary to carry into effect the authorities granted by its charter.[1] Still, the rule of construction as stated by the Supreme Court forbids a too liberal interpretation of corporate powers. "All rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State."[2] It is very evident, however, that statutes professing to act only on rights claimed by the corporation as incident to its charter, might render impracticable the use of those powers which had been *expressly* granted, or so far obstruct its business as to make its franchise nugatory; and in that event they would undoubtedly be held unconstitutional.

§ 18. **Statutes dissolving the Corporation.** — It seems plain that a statute putting an end to the life of an existing corporation, or rendering impossible or illegal the further pursuit of the objects for which it was created, would violate the obligation of the contract between the State and the body corporate, whereby it was agreed that the latter should continue in existence and in the enjoyment of its franchises for the period named in its organic act.[3] But even if this view is denied, there is still another ground on which the proposition may rest, viz.: that such enactment would impair the contract entered into by the *stockholders*,

[1] Planters' Bank *v.* Sharp, 6 How. 301; Bank of the Republic *v.* Hamilton, 21 Ill. 53; Payne *v.* Baldwin, 3 Sm. & Mar. 661.

[2] Davis, J., in The Binghamton Bridge, 3 Wall. 51.

[3] *Supra*, § 15. And see Michigan State Bank *v.* Hastings, 1 Dougl. 225.

with the consent and sanction of the State, to unite in the transaction and management of the business which the company was designed to follow, and to share in its profits and burdens.[1] On this ground, if on no other, a statute dissolving a corporation against its consent, before the expiration of the charter, and without legal cause of forfeiture, should be held unconstitutional. We say nothing here of the right of the State to resume corporate franchises under the power of eminent domain, the subject being treated in another chapter.[2]

§ 19. **Law creating new Cause of Forfeiture.** — An act of the legislature making that a cause of forfeiture of corporate charters which was not previously so, is invalid as applied to a corporation organized and doing business before the passage of the act; since it would annex a condition subsequent to the contract not warranted by its terms.[3] And the same is true of a statute which declares a total forfeiture for that which, at the creation of the company, was cause of partial forfeiture only.[4] But this does not prevent the legislature from passing a law altering the remedy for enforcing a forfeiture against a corporation, for any cause of forfeiture existing at the time of granting the charter.[5] And it is equally clear that an act declaring a charter forfeited, in pursuance of a law which has been *accepted* by the corporation, will not be open to the constitutional objection of impairing the obligation of contracts.[6]

§ 20. **Changing Method of Elections.** — When the charter of a corporation prescribes the method of conducting

[1] See 2 Morawetz on Corporations, § 1048.

[2] *Infra*, § 72 *et seq.*

[3] State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30; Aurora Turnpike Co. *v.* Holthouse, 7 Ind. 59; People *v.* Jackson, &c. Co., 9 Mich. 285

[4] People *v.* Jackson, &c. Co., 9 Mich. 285.

[5] Aurora Turnpike Co. *v.* Holthouse, 7 Ind. 59.

[6] Mobile & Ohio R. R. *v.* State, 29 Ala. 573.

elections of officers and directors, or trustees, and regulates the manner in which the stockholder may use his votes, or when the same is established by the constitution, or by a general law in force at the organization of the company, the rule cannot be changed by an act of the legislature without the consent of the corporation.[1] For example, if the charter provides that each share of stock shall entitle the holder to one vote for each of the officers to be elected, this is the method which must continue in use during the existence of the corporation; and a constitutional enactment allowing the voter to cast the whole number of his votes for one candidate — thus enabling him to bring to the aid of one person a number of votes represented by the number of his shares multiplied by the whole number of persons to be elected — cannot be forced upon bodies already incorporated. This principle rests upon a double basis. In the first place, the method of voting prescribed by the charter constitutes a part of the organic law of the corporation. And if it be true that a charter is a contract which cannot be impaired or *altered* by subsequent statute, it is apparent that interference with this provision is beyond the pale of legislative authority. Hence (where the corporation is eleemosynary) it is immaterial whether any contributions have been made to the institution on the faith of the charter or not.[2] But, in the second place, this constitutes a part, and often a most important part, of the engagement between those who compose the body corporate. Among the contractual elements of their undertaking is most certainly to be reckoned the method prescribed for the election of the officers and directors of the association. "But if it be not a vested right," exclaims Judge Gordon, "in those who own the major part of the stock of

[1] Hays *v.* Commonwealth, 82 Pa. St. 518; Sheriff *v.* Loundes, 16 Md. 357; State *v.* Greer, 78 Mo. 188, overruling s. c. 9 Mo. App. 219.

[2] Sheriff *v.* Loundes, 16 Md. 357.

the corporation, to elect, if they see proper, every member of the board of directors, then I would like to know what a vested right means. This was part of the contract under which they entered into the company, and for which they paid their money. The compact was, that they should have the power to select those who should have the management and control of the funds which they adventured in this enterprise."[1] On principle, therefore, a law making a fundamental change in the method of conducting corporate elections is, as to existing companies, invalid as impairing the obligation of two contracts, — that between the State and the body corporate, and that between the corporators themselves.

§ 21. **Grant of License or Gratuity is revocable.** — "There is reason and authority for holding that a supplement to a charter of incorporation which merely confers upon [the corporation] a new right or enlarges an old one without imposing any new or additional burden upon it, is a mere license or promise by the State and may be revoked at pleasure. It is without consideration to support it,[2] and cannot bind a subsequent legislature."[3] Thus the grant by the legislature of a privilege to raise money by means of a lottery is a mere gratuity, not an act of incorporation, nor a contract, and it may be repealed at will, provided no rights have been acquired, nor any liability incurred, in consequence of its passage; but where vested

[1] Gordon, J., in Hays *v.* Commonwealth, 82 Pa. St. 522.

[2] But the consideration for the grant of an additional franchise *may* be drawn from the original grant, and if that was founded upon consideration no other is necessary for the further grant. Derby Turnpike Co. *v.* Parks, 10 Conn. 522.

[3] Paxson, J., in Philadelphia Passenger Co.'s Appeal, 102 Pa. St. 123. And the learned judge added: "In the present age of corporate greed it would be dangerous to hold the contrary doctrine. Were we to do so, corporations, instead of being the creatures of the State, might become its masters."

rights have been acquired under the grant before the passage of the repealing law, then, to the extent of such rights, such repealing act must be regarded as unconstitutional.[1]

§ 22. **Executory Contracts may be cancelled.** — But the State, in its dealings with corporations, stands upon the same footing as an individual, while the charter contract requires something further to its perfection and binding force. That is to say, where the alleged contract is *executory*, and depends upon some further action of the legislature or its agents for its execution, it is permissible to inquire whether it is founded upon a consideration in law or in fact; if not, it may be revoked, by the legislature, before its execution and before the existence of any consideration, without impairing any contract rights.[2] It is a cognate principle that the grant or contract must have been *accepted* by the grantee before its revocation can be made a breach of constitutional duty. Hence a law declaring the repeal of all charters under which a *bona fide* organization has not taken place and business been begun, at the time of the passage of the repealing act, is a valid exercise of power, and is not in conflict with the prohibitions of the Federal Constitution.[3]

§ 23. **Corporations are subject to the General Laws.** — Corporations, like natural persons, are subject to the operation of the general laws of the land. And their constitutional immunity from legislative interference cannot be carried so far as to exempt them from the proper and reasonable control of the State in cases where their privileges have been perverted or abused, or the rights of third

[1] Gregory *v.* Shelby College, 2 Met. (Ky.) 589; State *v.* Morris, 77 N. C. 512.

[2] Trustees *v.* Rider, 13 Conn. 87.

[3] Chincleclamouche Lumber Co. *v.* Commonwealth, 100 Pa. St. 438; see Slack *v.* Railroad, 13 B. Mon. 1.

persons are in danger of being compromised through their actions. In a recent decision Mr. Justice Harlan observes: "The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the State, in such way and by such modes of procedure as are consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. . . . Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created."[1]

And this principle is further strengthened if we adopt the new and philosophic view of corporations pointed out by Mr. Morawetz, viz.: that a corporation has no real existence outside of and beyond the individuals who compose it, — that it is merely an association of individuals, united for the pursuit of certain objects, and to whom the legislature has granted certain franchises or privileges by

[1] Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574; and see Bank of the Republic *v.* Hamilton, 21 Ill. 53. In Rodemacher *v.* Railroad, 41 Iowa, 301, Day, J., remarked: "There is no implied contract between a State and a corporation that there shall be no change in the laws existing at the time of the incorporation which shall render the use of the franchise more burdensome or less lucrative, any more than there is between the State and an individual that the laws existing at the time of the acquisition of property shall remain perpetually in force."

charter. For there is clearly no reason why the persons so organized should not remain subject to the operation of the general laws of the land, after their incorporation as well as before it. And, in this view, and in respect to the force of those laws, it makes no difference whether they act severally, or jointly, or in a corporate capacity. "It may therefore," he says, "be stated as a rule, that the general laws determining the rights and duties of individuals apply to corporations, except where they are not in the nature of things applicable to corporations, or when they are rendered inapplicable by act of the legislature." [1]

§ 24. **Police Power of the State over Corporations.** — The doctrine of the reserved police power of the State, in its application to corporate rights and corporate privileges, is fully considered in another part of this chapter.[2] At present (for the sake of logical connection), it is only desired to remark that ample power resides in the legislature to regulate and control a corporation in the use of its franchises and powers whenever their exercise trenches upon the public health, morals, or safety. In the language of Mr. Justice Harlan, "The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as one or the other may be involved in the execution of such contracts. Rights and privileges arising from a contract with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations." [3]

[1] 2 Morawetz on Corporations, § 1061.

[2] *Infra*, §§ 61–71.

[3] New Orleans Gas-Light Co. *v.* Louisiana Light and Heat Co., 115 U. S. 650, 672; Gorman *v.* Railroad, 26 Mo. 450.

§ 25. **Personal Liability of Stockholders.** — In this and the following sections it is supposed that no right of amendment or alteration is reserved in the charter, or in any general law applicable to the particular corporation. The effect of such a reservation will be considered hereafter.[1] But at present we are concerned with the extent of the power of the legislature to include existing corporations in the operation of general laws enacted for the welfare or good governance of the community. It is generally held that the State may constitutionally pass a law imposing a personal liability on stockholders of existing corporations for debts contracted by the company after the law takes effect.[2] If it were attempted to extend the provisions of such a law to the discharge of debts incurred *before* its passage, it would clearly be invalid; not only as infringing upon the compact of the shareholders with the body corporate, by creating a liability where none before existed, but also as interpolating new terms into the contract of the creditor with the company. And even as to prospective claims, the position is open to some doubt. It may well be questioned whether the exercise of such a power would not amount to an unwarranted alteration of the agreement between the corporators themselves at the time of their organization. It might be said that the *assent* of the stockholders to the imposition of this individual responsibility for future debts may be gathered from the fact of their incurring such debts during the existence of the law and with knowledge of its provisions. But this would necessitate the exemption from personal liability of any one shareholder who might dissent from the action of

[1] *Infra*, §§ 31–37.

[2] Coffin *v.* Rich, 45 Me. 507; Shufeldt *v.* Carver, 8 Ill. App. 545; Fogg *v.* Sidwell, 8 Ill. App. 551; Child *v.* Coffin, 17 Mass. 64; Gray *v.* Coffin, 9 Cush. 200; Stanley *v.* Stanley, 26 Me. 196; Hathorn *v.* Calef, 53 Me. 471.

the majority in binding the corporation by a debt. On the whole, therefore, the only plausible ground on which this right of the legislature can be predicated is, that such statutes are general in their operation and necessary to the welfare of the people and the security of those dealing with corporations, and that their effect (if any) on existing contracts is collateral only, and not direct.[1]

But the legislature certainly has the power to take away this liability where it already exists. For, since there is no privity of contract between the creditors of a corporation and the individual stockholders, the latter are liable, if at all, only by positive statute. Consequently a repeal of the statute imposing this liability will not impair the obligation of any contract. It merely takes away by statute what was given by statute. And this is clearly within the power of the legislative body, saving only vested rights; but the right of a party, where it exists only by statute, does not become vested until after judgment.[2]

§ 26. **Right of the State to regulate Tolls and Charges.**— Under the general head of enactments for the welfare of the community is also to be included the power of the legislature to reasonably limit and regulate the tariff of tolls and charges to be exacted by public carriers for hire for the transportation of persons and property within the jurisdiction of the State.[3] This power, however, may be divested from the State by a legislative contract to that effect with the owners of the road. But it will never be

[1] See 2 Morawetz on Corporations, § 1078, and Weidenger *v.* Spruance, 101 Ill. 278.

[2] Coffin *v.* Rich, 45 Me. 507. But see Hawthorne *v.* Calef, 2 Wall. 10.

[3] Stone *v.* Farmers' L. & T. Co., 116 U. S. 307; Stone *v.* Illinois Cent. R. R., 116 U. S. 347; Beekman *v.* Railroad, 3 Paige, Ch. 45, 75. The powers and functions of a railroad corporation under its charter are, by necessary implication, subject to the legislative power of the State to define, prohibit, and punish extortion. Illinois Cent. R. R. *v.* People, 10 Reporter, 200.

understood to have been waived, in any particular instance, unless by words of positive grant or words equivalent in law; that construction is to be adopted which makes most strictly against the grantee; and if a reasonable doubt arises, it is to be resolved in favor of the State. For example, a statute which gives to a railroad company the right "from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation" does not deprive the State of its power within the limits of its general authority, as controlled by the Federal Constitution, to act upon the reasonableness of the tolls and charges so fixed and regulated.[1]

But it is not competent to the legislature, under pretence of regulating the rates of fare, to render it illegal for the corporation to exact *any* toll, or to lay any charge upon a designated class of persons or property. This would be a manifest infringement of its constitutional rights. Thus, a statute authorizing certain persons to pass over a turnpike road without paying toll, who were not exempted by the act incorporating the turnpike company, is invalid as impairing the obligation of contracts.[2] So an act authorizing the toll-gates of any plank-road company to be thrown open, on the report of commissioners appointed by the probate court that such road is out of repair, is unconstitutional, on this ground, and because it takes away the vested franchise of the company without compensation, without trial by jury, and without due process of law.[3]

It is also to be remembered that the power of the State thus to regulate tolls and charges does not enable it to fix rates for public carriers which would be below a reasona-

[1] Stone *v.* Farmers' L. & T. Co., 116 U. S. 307; Stone *v.* Illinois Cent. R. R., 116 U. S. 347.

[2] Pingry *v.* Washburn, 1 Aik. 264; Attorney-General *v.* Turnpike Co., 55 Pa. St. 466.

[3] Powell *v.* Sammons, 31 Ala. 552.

ble compensation. The necessity of promoting the public welfare and convenience does not extend beyond holding the charges of carriers within reasonable bounds. To still further reduce their source of income, on the plea of public advantage, would amount to a confiscation of private property without warrant of law.[1] It would appear from this that the ultimate test of the reasonableness of rates of carriage is with the courts, not the legislature.

§ 27. **Regulation of Railroad Companies in regard to Fences, Stations, Bells, and Whistles.** — As it is within the authority and duty of the legislative body to make laws for the preservation of life and property, they have power to require all existing railroad corporations to erect suitable fences along their right of way, and to maintain cattle-guards, and to impose a liability upon them for all damages occasioned by the neglect of such precautionary measures; such statutes violate no charter rights.[2]

A law empowering the railroad commissioners to direct a railroad corporation to erect and maintain a station at a specified place on the line of its road, determined by them to be proper and in accordance with the demands of public convenience and necessity, is constitutional, and not incon-

[1] Stone *v.* Farmers' L. & T. Co., 116 U. S. 307.

[2] Gorman *v.* Railroad, 26 Mo. 441; Ohio, &c. R. R. *v.* McClelland, 25 Ill. 140; Thorpe *v.* Railroad, 27 Vt. 140; Norris *v.* Railroad, 39 Me. 273; Madison, &c. R. R. *v.* Whiteneck, 8 Ind. 217; Kansas Pacific R. R. *v.* Mower, 16 Kans. 573; Pennsylvania R. R. *v.* Riblet, 66 Pa. St. 164; New Albany, &c. R. R. *v.* Tilton, 12 Ind. 3; Indianapolis, &c. R. R. *v.* Kercheval, 16 Ind. 84. Judge Cooley says: "On the other hand, the right to require existing railroad corporations to fence their track, and to make them liable for all beasts killed by going upon it, has been sustained on two grounds: first, as regarding the division fence between adjoining proprietors, and in that view being but a reasonable provision for the protection of domestic animals; and second, and chiefly, as essential to the protection of persons being transported in the railway carriages." Cooley, Const. Lim. 579, citing numerous cases.

sistent with nor an infringement upon the charter of the company.[1]

On similar principles, it is within the power of the legislature to require that all railroad locomotives shall whistle, or ring a bell, before crossing any public road, and such a regulation will govern existing companies as well as those incorporated after its enactment.[2]

Under the police power is also included the right to regulate railroad crossings, and to determine whether, in a particular instance, a crossing at grade shall be allowed.[3]

"And it has even been intimated that it might be competent for the State to make railway corporations liable as insurers for the safety of all persons carried by them, in the same manner that they are by law liable as carriers of goods; though this would seem to be pushing the police power to an extreme."[4]

§ 28. **Statutes creating or modifying Remedies against Corporations.** — In furtherance of the due administration of justice, the legislature has power to enact laws changing, modifying, repealing, or adding to the remedies against

[1] Railroad Commissioners *v.* Portland, &c. R. R., 63 Me. 269; New Haven, &c. R. R. *v.* Hamersly, 104 U. S. 1.

[2] Galena, &c. R. R. *v.* Appleby, 28 Ill. 283. In Galena, &c. R. R. *v.* Loomis, 13 Ill. 548, Trumbull, J., observes: "That the legislature has the power, by the enactment of general laws from time to time, as the public exigencies may require, to regulate corporations in the exercise of their franchises, so as to provide for the public safety, admits of no doubt. The provision in question is a mere police regulation, enacted for the protection and safety of the citizens of the country, and in no matter interferes with or impairs the powers conferred on the defendants in their act of incorporation. There is nothing in the character of this or any other charter so sacred as to shield the corporators from punishment for criminal offenses committed in the exercise of their corporate powers. Nor is the corporation itself above the general laws enacted for the safety of the community."

[3] Pittsburg, &c. R. R. *v.* Southwest R. R., 77 Pa. St. 173.

[4] Cooley, Const. Lim. 580, citing Thorpe *v.* Railroad, 27 Vt. 152.

existing corporations for the enforcement of rights against them or the redress of wrongs attributable to them. A charter secures to the corporation immunity from changes of rights, not from changes of remedies. And if the legislature has limited its power over a corporation so as to render unconstitutional the imposition of any other or further duties or obligations than those contained in the charter, still it is not restricted in any enactment as to the mode, the time when, and the courts where, those duties or liabilities shall be enforced.[1] Thus the legislature has power to control and modify at its pleasure a summary remedy against defaulting stockholders given to a company by the act of its incorporation.[2] So a provision in the charter of an insurance company which limits a suit on the policy to the county where the company is located, pertains merely to the remedy, and may be changed by a general law upon the subject.[3] Again, the legislature may constitutionally confer upon the chancellor the power to sell "the road, right of way, franchises, and all property, real and personal," of the corporation, upon the application of "any creditor of the company whose debt may be due and unsatisfied," and direct the proceeds to be divided *pro rata* among all the creditors.[4] Again, an act was held constitutional which formulated a plan to relieve the corporation from its financial embarrassments, directed the calling of a meeting of the stockholders at which they might vote upon the adoption of the plan, and provided that every stockholder who neglected for three months to file his refusal in writing should be taken to assent.[5] An act giving to a

[1] Gowen *v.* Railroad, 44 Me. 140; Reapers' Bank *v.* Willard, 24 Ill. 433; Portland, &c. R. R. *v.* Grand Trunk R. R., 46 Me. 69.

[2] *Exp.* Northeast, &c. R. R., 37 Ala. 679.

[3] Sanders *v.* Insurance Co., 44 N. H. 238.

[4] Louisville, &c. Co. *v.* Ballard, 2 Met. (Ky.) 165.

[5] Union Canal Co. *v.* Gilfillin, 93 Pa. St. 95.

workman employed by a sub-contractor on a railroad the right to recover against the corporation is constitutionally applicable to companies organized, and to contracts made by them, before the passage of the law.[1] And the same is true of a statute giving the representatives of one killed in a railroad accident an action against the company in all cases where he would have had a right of action had he survived.[2]

§ 29. **Laws extending the Existence of a Corporation for the Settlement of its Affairs.** — A statute which continues the life of a business corporation for a limited period after the expiration of its charter, for the purpose of suing and being sued, settling and closing its concerns, and dividing the capital stock, but not for continuing the business for which it was established, is valid and constitutional.[3] "A provision of this nature violates no contract, and impairs no right of the corporators; its whole object is to provide a convenient remedy for those who are equitably entitled to the assets of the dissolved company."[4]

§ 30. **Taxation of Stock.** — Since the power of taxation is an essential attribute of sovereignty, necessary to the maintenance of government, and never understood to be relinquished except upon the clearest possible intention, there is no reason why its exercise should not extend to corporations as well as natural persons. And it is accordingly well settled that it is no infringement of the constitutional rights of a corporation already existing to levy a tax on its capital stock or other property.[5]

[1] Grannahan *v.* Railroad, 30 Mo. 546; Branin *v.* Railroad, 31 Vt. 214; Peters *v.* Railroad, 23 Mo. 107.

[2] Southwestern R. R. *v.* Paulk, 24 Ga. 356.

[3] Foster *v.* Essex Bank, 16 Mass. 245.

[4] 2 Morawetz on Corporations, § 1076, citing Foster *v.* Essex Bank, 16 Mass. 245; Lincoln Bank *v.* Richardson, 1 Me. 79; Franklin Bank *v.* Cooper, 36 Me. 179; Nevitt *v.* Bank, 6 Sm. & Mar. 513.

[5] Portland Bank *v.* Apthorp, 12 Mass. 252; Coffin *v.* Rich, 45 Me. 507.

§ 31. **Reservation of Power of Amendment.** — Hitherto we have been considering the power of the legislature to regulate the affairs of a corporation where no reservation of the right of amendment or alteration by the State was contained in the charter. Such a reservation is nowadays by no means uncommon. Very soon after the decision in the Dartmouth College Case, and the important principles which it announced, the States began to realize what a large measure of power they had been giving to incorporated companies with irrepealable privileges, and how little control they were able, within the constitutional limits, to exert upon them. As stated by Mr. Justice Miller: "It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the State and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the State legislatures could retain in a large measure this important power, without violating the provisions of the Federal Constitution, that Mr. Justice Story in his concurring opinion in the Dartmouth College Case suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation."[1] Hence it has be-

[1] Miller, J., in Greenwood *v.* Railroad, 105 U. S. 13. And see observations of Waite, C. J., in Spring Valley Water Works *v.* Schottler, 110 U. S. 352.

come the rule rather than the exception to make an express reservation of the right to repeal, alter, or amend the charter. And it is well settled that where such reservation exists, the power of the legislature to amend the charter is unquestionable, and its exercise does not impair the obligation of the contract.[1]

§ 32. **Wherein the Reservation may be made.** — This reservation of right to alter or amend the charter of a corporation may be, and frequently is, contained in the charter itself. And a provision in a charter that it shall not be altered in any other manner than by an act of the legislature is regarded as equivalent to an express reservation to the State of power to make any alterations in the charter which the legislature may deem expedient.[2] So where an incorporated company accepts a supplementary charter in which the power is reserved, in consideration of further grants and privileges, the original charter may then be amended, so no injustice is done to the stockholders.[3] But it is not at all indispensable that the right of amendment should be reserved in the charter itself. It may be reserved in the constitution of the State, and, in that case, will apply to all charters granted after the adoption of the constitution, without repetition in them.[4] So if several charters are granted in one act, it is enough if the power of repeal be reserved in any part of the same act, provided the language of the clause is sufficiently comprehensive to include the whole act.[5] Or the power to alter, modify, or repeal charters may be reserved to the State by a *general*

[1] Perrin *v.* Oliver, 1 Minn. 202; Ashuelot R. R. *v.* Elliot, 58 N. H. 451; Griffin *v.* Ins. Co., 3 Bush, 592; Miners' Bank *v.* U. S., 1 Morris (Iowa), 482; Commonwealth *v.* Fayette Co. R. R., 55 Pa. St. 452.

[2] Pennsylvania College Cases, 13 Wall. 190.

[3] Monongahela Nav. Co. *v.* Coon, 6 Pa. St. 379.

[4] Delaware R. R. *v.* Tharp, 5 Harr. (Del.) 454.

[5] Ferguson *v.* Bank, 3 Sneed, 609.

law applicable to all corporations, or to all corporations of a particular class; and in that event the power may be exercised upon all charters thereafter granted with precisely the same effect as if the reservation were inserted in each charter.[1] And the power of the legislature, under such a reservation, is not exhausted by a single alteration of the charter, but may extend to an amendment of the amendment. For instance, where the general railroad law of a State provided that the charter of every corporation subsequently created, and any renewal, amendment, or modification thereof, should be subject to amendment, alteration, or repeal by legislative authority, and afterwards a railroad company was incorporated, and still later the legislature passed an act amending its charter by inserting a provision exempting its property from taxation during the continuance of the charter, it was held that this amendment was itself subject to the general reserved power of alteration or repeal, and that a subsequent statute taking away the exemption and imposing taxes on the property of the corporation was legal and constitutional.[2]

§ 33. **Repeal of Act containing Reservation.** — Where the reservation of the right of amendment or repeal is contained in a general act, and that act is subsequently repealed, its repeal does not operate as a surrender of the power to alter charters already granted and subject to its provisions. The reason is, that the reserving act merely fixes the meaning to be attached to future grants, and hence its repeal, while it changes the rule of construction applicable to future grants, does not alter the legal effect of existing charters.[3]

[1] Miller *v.* State, 15 Wall. 478; State *v.* Comm'r of Railroad Taxation, 37 N. J. L. 228; State *v.* Person, 32 N. J. L. 134.

[2] Tomlinson *v.* Jessup, 15 Wall. 454.

[3] 2 Morawetz on Corporations, § 1106; and see Beer Co. *v.* Massachusetts, 97 U. S. 31.

§ 34. **Object and Use of Reservation of Power to Amend Charters.** — The power of the legislature to alter a charter, when the right to do so is expressly reserved to the State, may be exercised in all cases, to any extent, to carry out the original purposes of the incorporation, and to secure the due administration of justice in respect to the rights of the creditors of the corporation, and the proper disposition of its assets.[1] The *object* of this reservation, as pointed out by Mr. Morawetz, is not only to enable the State to interfere with and alter the franchises of the corporation, but also to give the State a greater measure of control over its business and the management of its affairs than could be exercised merely by virtue of the general powers of legislation, or the right to enact police regulations, within the limits of the Constitution. It is designed to give the legislature, to a certain extent, the right to direct the use of the corporate funds and to interfere with the agreement among the shareholders.[2] Thus its practical effect is to place the State in substantially the same position of power over its corporations that it was understood to occupy before the origin of the doctrine that a charter is an inviolable contract. For it is said that where the right to repeal or amend is reserved, this right includes authority both to withdraw powers granted to the corporation, and to confer new powers upon it and require their exercise, and is entirely independent of the assent of the corporators.[3] It also confers the right to determine the manner in which the company shall exercise the franchises it already possesses: *e. g.*, in respect to railroads, to make changes in the level, grade, and connections of the road, to direct the construction of a new connecting track, to require the company to build and maintain the crossing when a way is

[1] Hyatt *v.* McMahon, 25 Barb. 457.
[2] 2 Morawetz on Corporations, § 1095.
[3] Worcester *v.* Railroad, 109 Mass. 103.

laid out over its track, or to extend its track and run its trains into a union passenger station and discontinue the use of a designated portion of its road.[1] In regard to the regulation of the internal affairs of a corporation, a recent case before the Supreme Court will furnish an illustration. It was held to be competent for the legislature, possessing this reserved power, to change the rules of a water company in such manner that the water-rates should be fixed by a commission selected without the intervention of the company, instead of a commission appointed, as theretofore, partly by the company and partly by the local governmental agencies.[2]

As we have already seen,[3] there may be some question about the constitutionality of a law imposing an individual liability upon the stockholders of existing corporations for corporate debts contracted after its passage, where no such responsibility was imposed by the charter, and the right to alter or amend the charter was not reserved to the State. We have now to add that where this reservation exists, the validity of such a law is beyond question.[4]

An act authorizing receivers of mutual insurance companies to make assessments is constitutional and valid, as well in regard to premium notes given before the passage of the act as to those given after that date, where the right to alter the charter of the company has been reserved by the legislature.[5]

This reserved power to alter or amend a charter is one to be exercised by the legislative body in any mode

[1] Fitchburg R. R. *v.* Grand Junction R. R., 4 Allen, 198; Portland, &c. R. R. *v.* Deering, 4 Eastern Reporter, 97; Worcester *v.* Railroad, 109 Mass. 103.

[2] Spring Valley Water Works *v.* Schottler, 110 U. S. 347.

[3] *Supra*, § 25.

[4] *In re* Oliver Lee & Co.'s Bank, 21 N. Y. 9.

[5] Hyatt *v.* McMahon, 25 Barb. 457.

consistent with the organic law of the State for the time being. Hence, where the constitution in force when a bank was chartered required two-thirds of the members of the legislature to concur in an act for the alteration of a corporation, this provision did not enter into the contract embodied in the charter so far as to render unconstitutional a statute of alteration which, though not passed by a two-thirds vote, had a sufficient majority under the constitution in force when it was enacted.[1]

§ 35. **Corporation cannot be forced into New Enterprises.** — But the reservation of a right to alter and amend corporate charters does not invest the legislature with arbitrary and irresponsible power over those bodies. It also has its limitations and restrictions, growing out of fundamental principles and the policy of the law. The power to alter or amend a charter is necessarily confined to the rights and franchises granted by the charter. For an alteration or modification must be predicated of the grant or thing to be altered or modified. The substitution of an entirely different thing falls without the logical and proper scope of these terms, and amounts to a change. Hence the reservation of this right does not authorize the legislature to force the corporation into new enterprises, not within the original objects of its incorporation.[2] "Under the pretence of amending its charter, the legislature cannot compel a company to embark upon a new enterprise radically and essentially different from that contemplated in the original grant of corporate franchises."[3] In a word, the exercise of this power must be *reasonable*, and it must be restricted to the accomplishment of the ends designed to be subserved by its reservation to the State.

[1] *In re* Reciprocity Bank, 22 N. Y. 9; s. c. 29 Barb. 369.

[2] Zabriskie *v.* Railroad, 18 N. J. Eq. 178; Ames *v.* Railroad, 21 Minn. 255; see Miller *v.* Railroad, 21 Barb. 513.

[3] Ames *v.* Railroad, 21 Minn. 255.

§ 36. Other improper Exercises of this Power. — Although the right of repeal or amendment is reserved, yet the legislature, in repealing a charter, cannot establish such rules in regard to the management and disposition of the assets of the corporation that the avails shall be diverted from the creditors or divided unfairly or unequally among them, nor, on the other hand, that the portion of the fund which belongs to the stockholders shall be sequestered and diverted from the owners, and thus injure vested rights.[1] Again, the power of amendment of the charter of a corporation does not give the right to deprive the corporators of the control of the corporate property, nor to change the object of the charter by taking from those entitled to it the right to select the officers of the corporation.[2]

It is also clear that this reservation does not give the legislature any semblance of authority to annul or impair the contracts which the corporation may have made with third parties. The corporators have given their assent in advance to any proper legislative modification of the compact they make among themselves, but they have obviously no power to bind strangers, who may thereafter deal with the company, to such changes in their rights and agreements as the legislature may see fit to make. Nor is it material that third persons have knowledge, in advance of their dealings with the corporation, that its charter is subject to amendment or repeal; they are in no sense parties to the contract between the State and the corporators. The reservation is therefore, as to them, inoperative, and whatever changes may be made in the powers or management of the corporation, their contract rights must be carefully guarded.[3]

[1] Lothrop *v.* Stedman, 42 Conn. 583.

[2] Orr *v.* Bracken County, 81 Ky. 593; and see, as to right of election of officers of corporation, *supra*, § 20.

[3] See dissenting opinion of Bradley, J., in Miller *v.* State, 15 Wall. 499, and 2 Morawetz on Corporations, § 1102.

§ 37. **Effect of Consolidation of two irrepealable Charters.** — Where two corporations, not subject to any power of amendment or repeal, are consolidated after the passage of a general law providing that all charters thereafter granted may be altered or repealed, what is the status of the consolidated company with respect to the exercise of this power? The question is definitely answered in a late case in the Supreme Court. It appeared that the statutory code of Georgia, adopted in 1863, enacted that private corporations were subject to be changed, modified, or destroyed at the will of the legislature, except so far as the law forbids, and that in the case of all private charters thereafter granted, the State reserves the right to withdraw the franchises, unless such right is expressly negatived in the charter. Two railroad companies created prior to 1863, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by an act of the legislature passed after the adoption of the code, 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. On this state of facts it was held, that by the consolidation a new corporation was created and the original companies were dissolved, and that the new corporation became subject to the provision of the code which reserved to the legislature the right to withdraw its charter, or to change, modify, or destroy it; and that consequently a subsequent statute, taxing the property of the corporation as other property in the State was taxed, was not in conflict with the prohibition against laws impairing the obligation of contracts.[1]

§ 38. **Procedure in Cases where Right to repeal Charter depends on Contingency.** — In many instances the power of

[1] Atlantic and Gulf R. R. *v.* Georgia, 98 U. S. 359; Shields *v.* Ohio, 95 U. S. 319.

the State to alter, amend, or revoke a charter, as reserved in the act of incorporation itself, is not unlimited, absolute, and uncontrolled, but is made to depend upon the happening of some event, — such as the failure of the corporation to effect a legal organization within a specified time, or the non-user or abuse of its privileges. Under such a provision the question arises whether the circumstances of the particular case are such as to render legitimate the exercise of this reserved power of the State. And it becomes important to determine whether the investigation and settlement of this question belongs to the judiciary or to the legislative body. The point is involved in considerable difficulty, and the authorities are in direct conflict. The view that the matter is one which calls for the intervention of the courts, and of which the legislature cannot, in the nature of things, be the final judge, is presented with much force and clearness in an important decision of the Supreme Court of Michigan, where the following conclusions are reached: "We are constrained, therefore, from all these considerations to say, that the determination whether a corporation has violated its charter is judicial in its nature. It requires the action of those tribunals which must hear before they condemn, and must proceed upon inquiry. If it were properly legislative, it may be that the legislature must be presumed to have given a hearing; but the fact, as we have seen in this case, is otherwise, and the cases in which presumptions are to be indulged against the facts ought not to be multiplied. It is sufficient to say that, in our opinion, the case is one in which the party is entitled to a trial of right *in fact*, and cannot be put off with one which rests exclusively in a presumption of law, indulged against the fact. The violation of the charter cannot be legally made to appear, except on trial in a tribunal whose course of proceeding is devised for the determination of questions of

this nature."[1] And this opinion is corroborated by several authorities entitled to weight.[2]

But the weight of authority appears to be with the cases which hold that the question whether the contingency has happened belongs, at least in the first instance, to the legislature to determine, and that the intervention of the courts is unnecessary. This on the ground that the reservation would otherwise be nugatory; that when the abuse of a charter is judicially ascertained the corporation will be dissolved without the action of the legislature; and that the State certainly meant to reserve something more than the right to dissolve a corporation after it shall have been dissolved by a court.[3]

§ 39. **Amendments may be accepted by Corporation.**— In the absence of any reservation of power to alter or amend the charter, it is protected, as we have seen, from invasion in any material point. But even in this case it is

[1] Flint Plank Road Co. *v.* Woodhull, 25 Mich. 99.

[2] State *v.* Noyes, 47 Me. 189; Canal Co. *v.* Railroad Co., 4 Gill & J. 122; Regents *v.* Williams, 9 Gill & J. 365; Cooley, Const. Lim. 106.

[3] Erie & Northeast R. R. *v.* Casey, 26 Pa. St. 287, 302; Miners' Bank *v.* U. S., 1 Greene (Iowa), 553; Lothrop *v.* Stedman, 42 Conn. 583; McLaren *v.* Pennington, 1 Paige, 102; Crease *v.* Babcock, 23 Pick. 334, 344. In the case last named Morton, J., observed: "But we do not believe that the inquiry into the affairs or defaults of a corporation, with a view to continue or discontinue it, is a judicial act. No issue is formed. No decree or judgment is passed. No forfeiture is adjudged. No fine or punishment is imposed. But an inquiry is had in such form as is deemed most wise and expedient, with a view to ascertain facts upon which to exert legislative power; or to learn whether a contingency has happened upon which legislative action is required. . . . It is indispensable that this inquiry should, in the first instance, be made by the legislature. No other body can do it for them. They have restricted themselves from exercising the power of repeal until a certain event happens. This they must necessarily ascertain before they can properly exercise the power. Their decision must *prima facie* be presumed to be right. Whether it be conclusive or not is a question which it is not necessary now to determine."

evident that the legislature may *authorize* the corporation to alter its original enterprise or exercise new franchises and powers, and that such a change in its charter, even though affecting its most essential features, if it be accepted and agreed to by the body corporate, will impair no contract obligations.[1] And — unless required in terms by the amendatory act — no formal acceptance of its provisions is necessary. The assent of the corporation to the proposed alteration of its charter may be inferred from such acts or omissions as would raise a similar presumption in the case of natural persons; that is, it will be bound by any acts performed by it under the amendment which are inconsistent with any other theory than that the amendment has been duly accepted.[2]

§ 40. **Power of Majority of Corporators to accept Amendment.** — It is a much vexed question whether an amendment of its charter offered to a corporation by the legislature, and which it has the option to accept or refuse, can be adopted by a majority of the stockholders, against the dissent of the minority, so as to bind the latter and the body corporate. How will such action affect the validity of the three contractual elements involved in the charter? There are a few cases holding the strict rule that a non-assenting stockholder cannot be compelled to embark in new enterprises and assume new duties and responsibilities, by the action of the majority, and that it is immaterial how far his interests may really have been affected, or what were

[1] Pennsylvania College Cases, 13 Wall. 190; Ehrenzeller *v.* Union Canal Co., 1 Rawle, 181; Attorney-General *v.* Clergy Society, 10 Rich. L. 604; Zabriskie *v.* Railroad, 18 N. J. Eq. 178; 2 Morawetz on Corporations, § 1083.

[2] United States *v.* Dandridge, 12 Wheat. 64; Bangor, &c. R. R. *v.* Smith, 47 Me. 34; Commonwealth *v.* Cullen, 13 Pa. St. 133; Vermont and Canada R. R. *v.* Vermont Cent. R. R., 34 Vt. 2; Palfrey *v.* Paulding, 7 La. An. 363; State *v.* Sibley, 25 Minn. 387; Covington *v.* Railroad, 10 Bush, 69.

his private reasons for withholding his consent, and consequently that no amendment to the charter can be duly made and accepted except with the assent of every stockholder in the corporation.[1]

But this rule, although undeniably founded on sound principles, has failed to commend itself to a majority of the courts, on account of its severity. It obviously places it in the power of a small and perhaps unreasonable minority to obstruct the progress of the corporation, even in the exercise of its legitimate functions, under an amendment which may materially further and promote the efficiency of its methods and means, or enlarge the scope of its business, yet without changing its structure or purpose to such

[1] Zabriskie *v.* Railroad, 18 N. J. Eq. 178; Central R. R. *v.* Collins, 40 Ga. 617; 1 Morawetz on Corporations, §§ 53, 196, 201. In the New Jersey case Chancellor Zabriskie said: "It is also settled upon the principles of the common law in this State, and most of the States of the Union, that when a number of persons associate themselves as partners, for a business and time specified in the agreement between them, or become members of a corporation for definite purposes and objects specified in their charter, which in such case is their contract, and for a time settled by it, that the objects and business of the partnership or corporation cannot be changed, or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators; one partner or corporator, however small his interest, can prevent it. And this is so, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter. This rule is founded on principle,—the great principle of protecting every man and his property by contracts entered into, a guiding principle in all right legislation, and incorporated into the Constitution of the United States, and of almost every State in the Union."

A writer in the American Law Register (vol. xi. p. 1), reaches the following conclusions: "That when the legislature authorizes a new enterprise, or an enlargement of the old, if a majority wish to undertake it, the only way in which it can be done, in spite of an unwilling minority, is for the majority to dissolve the corporation, sell the property at public auction, and divide out the proceeds."

an extent that the corporators could justly complain of being drawn into fields of operation not contemplated by their original contract. And again, it would open a ready door of escape to any who might wish to avoid the payment of their subscriptions to the capital stock. For they have only to say, "I never agreed to this amendment; therefore my contract is annulled, and I am no longer liable on my subscription." In a word, if a contrary rule would sacrifice the rights and interests of the minority to the will of the larger body, *this* rule would have the effect, in many instances, to sacrifice both the prosperity of the corporation itself and the energies and interests of the majority to the selfish or prejudiced counsels of the few. Thus it becomes necessary to devise a medium course, which shall do justice to both parties and still preserve the sanctity of all the contract relations involved. Accordingly, the law has been settled on a basis which commends itself as both reasonable and in entire accordance with equitable principles, as follows: —

§ 41. **The Rule as now established.** — If no power to alter or amend the charter is reserved to the legislature, either in the charter itself or in the constitution or some general law, and if the amendment proposed is of such a nature as to work a radical and fundamental change in the structure, functions, or field of operation of the corporation, then the acceptance of the amendment by a majority of the stockholders will have the effect to bind only those assenting thereto, and the dissenting minority will be discharged from their contract of subscription.[1]

[1] Clearwater *v.* Meredith, 1 Wall. 25, 40; Railway Co. *v.* Allerton, 18 Wall. 233; Printing House *v.* Trustees, 104 U. S. 711; Mowrey *v.* Railroad, 4 Biss. 86; Ashton *v.* Burbank, 2 Dill. 435; Old Town R. R. *v.* Veazie, 39 Me. 571; Union Locks *v.* Towne, 1 N. H. 44; Stevens *v.* Railroad, 29 Vt. 546; Middlesex Turnpike Co. *v.* Locke, 8 Mass. 267; Troy, &c. R. R. *v.* Kerr, 17 Barb. 581; Buffalo R. R. *v.* Potter,

But those changes in the charter which are not calculated to exert any material influence upon the contract subsisting between the shareholders; which, without directly extending or abridging the powers of the corporation, yet invest it with additional privileges, immunities, and opportunities in the exercise of its corporate functions; which are useful to the public and beneficial to the company and in furtherance of the understanding of the subscribers as to the object to be effected; and which, in brief, are not radical and fundamental, — may be accepted by a majority of the corporators with the effect to bind all the stockholders whether assenting or not.[1]

It is to be noted that if the *charter* provides that a majority of the stockholders may accept an amendment, they

18 Barb. 21; Hartford, &c. R. R. *v.* Croswell, 5 Hill (N. Y.), 383; Indiana Turnpike Co. *v.* Phillipps, 2 Pen. & W. 184; Brown *v.* Fairmount Min. Co., 10 Phila. 32; Lauman *v.* Railroad, 30 Pa. St. 42; Turnpike Co. *v.* Arndt, 31 Pa. St. 317; Kean *v.* Johnson, 9 N. J. Eq. 407; Black *v.* Delaware Canal Co., 24 N. J. Eq. 455, 466; Charlotte Bank *v.* Charlotte, 85 N. C. 433; Thompson *v.* Guion, 5 Jones, Eq. 113; Winter *v.* Railroad, 11 Ga. 438; Waring *v.* Mobile, 24 Ala. 701; New Orleans, &c. R. R. *v.* Harris, 27 Miss. 517; Hester *v.* Railroad, 32 Miss. 380; State *v.* Accommodation Bank, 26 La. An. 288; Fry *v.* Railroad, 2 Met. (Ky.) 314; Witter *v.* Railroad, 20 Ark. 488; Marietta, &c. R. R. *v.* Elliott, 10 Ohio St. 57; McCray *v.* Railroad, 9 Ind. 358; Booe *v.* Railroad, 10 Ind. 93; Shelbyville Turnp. Co. *v.* Barnes, 42 Ind. 498; Tuttle *v.* Mich. Air Line, 35 Mich. 247; Kenosha, &c. R. R. *v.* Marsh, 17 Wis. 13.

[1] Bank *v.* Richardson, 1 Me. 79; Bucksport R. R. *v.* Buck, 68 Me. 81; Fall River Iron Works *v.* Railroad, 5 Allen, 221; Agricultural R. R. *v.* Winchester, 13 Allen, 29; Poughkeepsie Plank-road Co. *v.* Griffin, 24 N. Y. 150; Irvine *v.* Turnpike Co., 2 Pen. & W. 466; Clark *v.* Monongahela Nav. Co., 10 Watts, 364; Everhart *v.* Railroad, 28 Pa. St. 339; Taggart *v.* Railroad, 24 Md. 564; Wilson *v.* Railroad, 33 Ga. 470; Waring *v.* Mobile, 24 Ala. 701; State *v.* Accommodation Bank, 26 La. An. 288; Fry *v.* Railroad, 2 Met. (Ky.) 322; Woodfork *v.* Bank, 3 Coldw. 488; Greeneville, &c. R. R. *v.* Johnson, 8 Baxt. 332; Peoria *v.* Preston, 35 Iowa, 115; Joy *v.* Railroad, 11 Mich. 155.

have power to bind the minority even to a radical and fundamental change; for, in that case, each subscriber gives his assent in advance.

There is, however, a certain line of cases holding that while the majority cannot control and bind the minority by their acceptance of a radical and fundamental change, yet this character is not to be attributed to any alteration which is strictly consistent with the original purposes of the corporation, however greatly its powers may be enlarged or the territory covered by its enterprises extended. That is to say, that the minority will be bound by an amendment to the charter accepted by the vote of the majority, although its effect is to greatly amplify the scope of the institution or its powers, provided the company still retains its general structure and is still to pursue the same *kind* of business.[1]

§ 42. **Examples of Radical Changes.** — As an instance of a change held fundamental, and therefore releasing dissenting stockholders, may be mentioned an amendment to the charter of a railroad company whereby the general course or direction of the roadway, as described in the act of incorporation, or its terminus, is sought to be altered, so as to make the road run through a different section of country, or otherwise depart from the original plan.[2] But "nothing is more common than alterations of railroad charters extending the time for completing the road, and such

[1] Barrett *v.* Railroad, 13 Ill. 504; Sprague *v.* Railroad, 19 Ill. 174; Ross *v.* Railroad, 77 Ill. 134; Pacific R. R. *v.* Renshaw, 18 Mo. 210; Pacific R. R. *v.* Hughes, 22 Mo. 297; Gray *v.* Monongahela Nav. Co., 2 Watts & S. 156; Cross *v.* Railroad, 90 Pa. St. 392.

[2] Middlesex Turnpike Co. *v.* Locke, 8 Mass. 267; Plank Road Co. *v.* Arndt, 31 Pa. St. 317; Thompson *v.* Guion, 5 Jones, Eq. 113; Stephens *v.* Railroad, 29 Vt. 545; Hester *v.* Railroad, 32 Miss. 380; Champion *v.* Railroad, 35 Miss. 692; Winter *v.* Railroad, 11 Ga. 45; Buffalo R. R. *v.* Potter, 18 Barb. 21; Marietta, &c. R. R. *v.* Elliott, 10 Ohio St. 57.

extensions do not fundamentally or very essentially change the character of the charter. We think it reasonable to hold that subscribers to the stock impliedly consent to them."[1] But it is well settled that the *consolidation* of two corporations, under amendments to their charters, introduces such a radical and fundamental change into the charter, franchises, obligations, and government of each, as to release a dissenting stockholder in either company.[2]

§ 43. **Stockholder may be estopped to set up Dissent.** — But even in cases where the change is radical and fundamental, a dissenting stockholder may find himself bound by the action of the majority as a consequence of his negligently resting on his rights. The law requires of him a prompt assertion of his non-agreement, for the sake of the others. If he takes part in the affairs of the concern, after the amendment, as by voting at elections or the like, or if he neglects to seek his remedy by injunction when he has the opportunity to do so, or even if he preserves complete

[1] Agricultural R. R. *v.* Winchester, 13 Allen, 33.

[2] Clearwater *v.* Meredith, 1 Wall. 25; Pearce *v.* Railroad, 21 How. 441; Mowrey *v.* Railroad, 4 Biss. 83; Knoxville *v.* Railroad, 22 Fed. Rep. 758; Tuttle *v.* Mich. Air Line, 35 Mich. 247; New Jersey, &c. R. R. *v.* Strait, 35 N. J. L. 322; McCray *v.* Railroad, 9 Ind. 358; Lauman *v.* Railroad, 30 Pa. St. 42. In Clearwater *v.* Meredith, Davis, J., said: "By virtue of this act, the consolidations in the plea stated were made. Clearwater, before the consolidation, was a stockholder in one corporation, created for a given purpose; after it he was a stockholder in another and different corporation with other privileges, powers, franchises, and stockholders. . . . Clearwater could have prevented this consolidation had he chosen to do so. . . . If a majority of the stockholders of the corporation of which he was a member had undertaken to transfer his interest against his wish, they would have been enjoined. There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company." As to when the consolidation can be accomplished, against the minority, under the power of eminent domain, see *infra*, § 77.

silence and inaction, fails to manifest his dissent, and allows the corporation (on the understanding that the amendment has been legally accepted) to expend money in the furtherance of its new powers or enterprises, or incur liabilities in respect of the same, or enter into contracts with third persons, he will then find it too late to assert his dissent from the amendment proposed.[1] This rule proceeds on the ground of justice to the majority, and on the principle that the man who sleeps on his rights cannot assert them for the first time when to do so would involve others in liability or embarrassment who have counted on his tacit approval.

II. Charters of Municipal Corporations.

§ 44. **Legislature has entire Control over Public Corporations.** — In construing the limitations of the power of the State over incorporated bodies, it is essential to bear in mind a very important distinction which runs through all the decided cases, viz.: that the prohibitory clause of the Federal Constitution was intended to apply, and does apply, only to private rights of property and private contracts, and that any charters granted to such bodies as are essentially *public* in their nature and purposes are not contracts within the meaning of that clause, nor protected by it from legislative interference. Over these public corporations the legislature has unlimited and autocratic power; it can change, modify, enlarge, or repeal their charters at its will;

[1] Bedford R. R. *v.* Bowser, 48 Pa. St. 29; Houston *v.* Jefferson College, 63 Pa. St. 428; Danbury, &c. R. R. *v.* Wilson, 22 Conn. 435; Hayworth *v.* Railroad, 13 Ind. 348; Gifford *v.* Railroad, 10 N. J. Eq. 176; Zabriskie *v.* Railroad, 18 N. J. Eq. 178; *Exp.* Booker, 18 Ark. 338; Mowrey *v.* Railroad, 4 Biss. 79; Upton *v.* Jackson, 1 Flip. 413; Owen *v.* Purdy, 12 Ohio St. 79; Goodin *v.* Evans, 18 Ohio St. 150; Martin *v.* Railroad, 8 Fla. 370.

the only guide for its action is the advantage of the public; the only restraint upon its authority is the necessity of preserving private rights which have become vested under the existing order of things.[1] Neither do the franchises, privileges, or immunities granted to such public organizations partake of the nature of contracts, except under special circumstances; ordinarily they may be revoked by the State at will.

§ 45. **Distinction between Public and Private Corporations.** — It becomes necessary, then, to establish the dividing line between private corporations, which are protected from invasion by the restraining provisions of the Constitution, and public bodies, which are under the unlimited control of the State. The distinction may be thus stated: Public corporations are those which are created for public purposes only; whose whole property and franchises are within the exclusive domain of the State itself; which are invested with subordinate political powers to be employed in the administration of government; which may be characterized as the agents or instruments of government; or which are created to control or manage funds belonging to the State, or to conduct transactions in which the State alone is interested.[2] It is evident that all municipal organizations — counties, towns, and cities — are included in this definition; and equally clear that it excludes all such corporations as are formed by the voluntary association of individuals for the pursuit of private enterprises and the gain of private profits, notwithstanding the existence of such companies may be essential to the public convenience

[1] Rader *v.* Road Distr., 36 N. J. L. 273; Berlin *v.* Gorham, 34 N. H. 266; Marietta *v.* Fearing, 4 Ohio, 427; Trustees *v.* Tatman, 13 Ill. 27; Louisville *v.* University, 15 B. Mon. 642; Cooley, Const. Lim. 192.

[2] Louisville *v.* University, 15 B. Mon. 642; Yarmouth *v.* North Yarmouth, 34 Me. 411.

or welfare. It is not enough that a corporation *serves* the people to make it a public body; it must *belong* to the people. Thus a bank is not a public corporation unless the State is the sole stockholder and the public funds its only capital. For, as Professor Parsons observes, private property is "anything and everything which has gone *out* of the public, by its grant or its sanction. To determine any particular case, therefore, we should take the instrument referring to the property, whether it be a statute or anything else, and ask whether, if read rationally and honestly, it leaves the usufruct of the property and interests substantially in the possession, or the management thereof within the control, of the public, by such agents as it may appoint, or not. If it does, then it is public property, and this clause does not attach; if it does not, then it is private property, and this clause does attach." [1]

§ 46. **Reason of the Distinction.** — The philosophy of this distinction between public and private corporations is clearly pointed out by the same learned author. He says: "This rule seems to spring from an obvious necessity; but it rests also upon an obvious and sufficient reason. This is, that in relation to public property there is no grant — no contract whatever, executed or executory. By such an act, the public by the legislature, which is its agent, gives something of its own to somebody else, who is also its agent. Nothing then, in fact, is given; for nothing goes forth from the public. The whole transaction amounts to no more than a change made by the public in the manner in which, or the agents by whom, it shall continue to hold and use a certain portion of its property or interests. The very essence of a contract — *two* parties, with mutual obligations — is wanting; and it is therefore no contract at all." [2]

[1] 3 Parsons on Contracts, *531.

[2] 3 Parsons on Contracts, *529.

§ 47. **Municipal Charters may be amended or repealed** — As respects municipalities, it has always been held that the law of the State creating them and conferring upon their officers a part of the sovereign authority as mandataries of the government is not a contract, and consequently that the legislature may amend, modify, or repeal their charters at its pleasure.[1] And this right of the State is not lost or impaired by the fact that the municipal charter is granted in the same act which creates a private corporation whose rights cannot be altered or repealed.[2] Thus, where a charter of incorporation was given to a city, and also certain lands for the benefit of said city with power to sell the same and apply the proceeds to build a jail and court house for the county, and the remainder for certain educational purposes, and the charter was repealed, it was held that the trust for education (while unexecuted) was still dependent on legislative will and could be revoked.[3] Nor, in general, can one legislature impose restrictions on the powers of a municipal corporation which a future legislature cannot modify or abrogate.[4]

§ 48. **Vested Rights must be preserved.** — The power of the legislature to repeal or alter the charters of public bodies is always subject to the proviso that it cannot so deal with a municipal corporation as to relieve it from the payment of its just debts already accrued, nor change the existing means for the enforcement and collection of those

[1] Brown *v.* Hummel, 6 Pa. St. 86; Moers *v.* Reading, 21 Pa. St. 188; Philadelphia *v.* Fox, 64 Pa. St. 169; Yarmouth *v.* North Yarmouth, 34 Me. 411; Berlin *v.* Gorham, 34 N. H. 266; Paterson *v.* Society, 24 N. J. L. 385; Bass *v.* Fontleroy, 11 Tex. 698; Moore *v.* New Orleans, 32 La. An. 726; Layton *v.* New Orleans, 12 La. An. 515; State *v.* Pilsbury, 31 La. An. 1; Marietta *v.* Fearing, 4 Ohio, 427; St. Louis *v.* Russell, 9 Mo. 507.

[2] Paterson *v.* Society, 24 N. J. L. 385.

[3] Bass *v.* Fontleroy, 11 Tex. 698.

[4] State *v.* Pilsbury, 31 La. An. 1.

debts in such a manner as to materially impair the rights of the creditors.[1] Thus if the charter of a city is revoked, and it is afterwards re-organized and re-incorporated, the transaction will not have the effect to wipe out the existing debts of the municipality nor work an escheat of its property to the State; such a construction would render it a violation of the Constitution.[2]

§ 49. **State may make irrepealable Contract with Municipality.** — Although a municipal corporation is the creature of the legislature and a public body, yet, as is well settled, the State may enter into a valid contract with the municipality, in matters outside of its charter, which cannot be impaired or annulled; and in that case the subordinate relation ceases, and the equality subsisting between all contracting parties arises, and however great the control of the legislature over the corporation, it cannot be so exercised as to violate the obligation of such a contract.[3]

III. Grants of Exclusive Privileges.

§ 50. **An Exclusive Franchise is a Contract.** — Notwithstanding some difference of opinion it may now be regarded as settled law that it is within the power of the legislature, when not forbidden by the organic law of the State, to grant to a corporation exclusive rights and privileges in the pursuit of its business, and that such grant constitutes a contract which no subsequent legislature can revoke or impair. The leading case on this subject is that of The Binghamton Bridge.[4] The question was, whether a charter

[1] Williams' Appeal, 72 Pa. St. 214; St. Louis *v.* Russell, 9 Mo. 507; Trustees *v.* Aberdeen, 13 Sm. & Mar. 645; Smith *v.* Morse, 2 Cal. 524; but see, *per contra*, Wallace *v.* Sharon, 84 N. C. 164.

[2] Smith *v.* Morse, 2 Cal. 524.

[3] Grogan *v.* San Francisco, 18 Cal. 590; Richland *v.* Lawrence, 12 Ill. 1; Bowdoinham *v.* Richmond, 6 Me. 112.

[4] 3 Wall. 51.

granted to a company authorizing it to build and maintain a bridge across a river in New York for the accommodation of the public, in consideration for which it was given a right to take certain tolls, and providing that it should be unlawful for any one to erect a bridge, or establish a ferry, within a distance of two miles on that river, either above or below that bridge, constituted a contract within the meaning of the Constitution. Under authority of a subsequent statute, another company erected a bridge across the same river, within a few rods above the old one, to the injury of the business of the latter. The argument was strenuously pressed that, while the legislature could dispose of all matters properly the subject of bargain, it had no authority to dispose of the right of passing a great river for four miles. The court held that the first company's charter was a contract between it and the State, within the protection of the Constitution of the United States, and that the charter to the last company was, therefore, null and void. Mr. Justice Davis, in delivering the opinion of the court, said: "The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on the government to provide for them; and, as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money and the employment of your time and

skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

In accordance with the doctrine announced in this case, it is generally conceded that a clause in the charter of a bridge company which declares that it shall not be lawful for any persons whatever to erect, or cause to be erected, any other bridge or bridges over the same river, within prescribed limits, imports a contract on the part of the State which cannot constitutionally be revoked by the legislature nor impaired by the grant of a similar and competing franchise,[1] unless under the power of eminent domain, to be referred to hereafter. On similar principles it is held that where the legislature, in granting a charter to a railroad corporation, expressly covenants and agrees that no other railroad shall, for a limited period, be authorized to be constructed between the terminal points of the grantee's line, this constitutes a valid and irrepealable contract.[2] So also it is competent for the legislature to invest a corporation with the exclusive privilege of supplying a city and its inhabitants with illuminating gas, by means of pipes and

[1] West River Bridge *v.* Dix, 6 How. 531; The Binghamton Bridge, 3 Wall. 51; Bridge Co. *v.* Hoboken Land Co., 13 N. J. Eq. 81; s. c. 1 Wall. 116; Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87, 92. Dr. Wharton says: "It is true that it has been ruled by the Supreme Court of the United States that a condition in a bridge charter providing that it shall not be lawful to build another bridge within the range of two miles, is a contract the State cannot recall. But it may be replied that this decision rests on a *petitio principii;* since, if such an engagement is unduly restrictive of trade, it is not, on the reasoning above given, a contract, and hence is not within the scope of the limitation before us." 2 Wharton on Contracts, § 1064. But it is submitted that this reasoning is too refined and technical to be satisfactory.

[2] Boston and Lowell R. R. *v.* Salem and Lowell R. R., 2 Gray, 1; State *v.* Noyes, 47 Me. 189.

conduits laid in the streets or other public ways of the city; and such a grant cannot be repealed or rendered nugatory by a subsequent legislature.[1] Again, the grant of a monopoly to a water company to supply a city with water is impaired by a grant of authority to an individual to lay pipes for the purpose of supplying water for his own use.[2]

§ 51. **Municipality cannot ordinarily grant Exclusive Privileges.** — A municipality, however, does not usually possess the same power in this respect that belongs to the legislature of the State. It cannot grant to a corporation an exclusive right or privilege in perpetuity, unless authorized to do so either by its own charter, by some general statute, or by the constitution of the State. Because, in the first place, the municipal corporation can exercise only such powers as are expressly conferred by its charter, or such as may be proper and necessary to carry into effect the powers so granted; and, in the second place, the same rule of construction which denies the alienation of any portion of the sovereign power, unless upon a manifest intention and by explicit terms, is to be applied in considering the organic law of a municipal corporation. Therefore it is not within the province of a city council to fetter the hands of its successor by the grant of an exclusive and irrepealable franchise, unless the authority to do so specifically proceeds from the constitution or from the law-making power of the State.[3]

§ 52. **The Rule of Construction.** — The rules to be applied in the construction of legislative grants are thus stated: First, in a grant designed by the sovereign power

[1] New Orleans Gas-Light Co. *v.* Louisiana Light and Heat Co., 115 U. S. 650.

[2] New Orleans Water Works *v.* Rivers, 115 U. S. 674.

[3] Norwich Gas-Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; Birmingham and Pratt Mines St. R. R. *v.* Birmingham Street R. R. (Sup. Ct. Ala. 1886).

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 must not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the language employed, and if this does not support the right claimed, it must fall. Second, where 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 a violation of the apparent objects of the grant, if, in such case, one interpretation would render the grant inoperative, and the other would give it force and effect, the latter should be adopted.[1] The rule that words are to be taken in their strongest sense against the party *using* them does not apply to a contract by a State embodied in a charter; for the promoters, rather than the legislature, must be considered the framers of the instrument.[2] Now, applying these principles to the consideration of a grant which is claimed to confer a monopoly, we may logically deduce the following rule: Such a grant is to be construed strictly against the corporation and in favor of the State; nothing will pass against the State by implication; the State will not be presumed to have parted with any portion of its sovereign power; and the privileges granted in an act of incorporation will not be deemed exclusive, unless it appears from the charter, in terms too clear and explicit to be mistaken, that it was the actual and deliberate intention of the legislature to preclude the State from granting similar franchises to any subsequent corporation.[3] As an

[1] Mills *v.* St. Clair, 8 How. 569.

[2] Raleigh, &c. R. R. *v.* Reid, 64 N. C. 155.

[3] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Rice *v.* Railroad, 1 Black (U. S.), 358; Ruggles *v.* Illinois, 108 U. S. 536 (Waite, C. J., saying: "Grants of immunity from legitimate govern-

instance of the application of this strict rule of construction may be cited a decision of the United States Supreme Court that an exclusive right to build and maintain a bridge at a certain point was not infringed by the establishment of a bridge for the passage of railway trains only.[1] And so the exclusive right to build a bridge at a designated point is not incompatible with the establishment of a ferry at the same place.[2] Again, where a water company was invested with the exclusive privilege of supplying water to the district covered by its charter, it was held that this right was exclusive only as against other water companies, and that its franchise would not prohibit the city or borough itself from providing its citizens with water by means of works constructed by itself.[3] And if a privilege, already vested, is made a monopoly by a subsequent act of the legislature, its exclusiveness will require an adequate and separate consideration, and, failing that, may be abolished.[4]

§ 53. **Creation of Rival Company.**—The most important consequence flowing from this rule of interpretation is the following proposition: If the rights and privileges granted to a corporation are not made exclusive by the specific terms of the grant, the legislature is not debarred from conferring similar franchises and powers upon a rival com-

mental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction, as the public interests may seem to require"); De Lancey *v.* Ins. Co., 52 N. H. 581; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87, 92; Dyer *v.* Tuskaloosa Bridge, 2 Port. (Ala.) 296; Collins *v.* Sherman, 31 Miss. 679; Gaines *v.* Coates, 51 Miss. 335; State *v.* Southern, &c. R. R., 24 Tex. 80.

[1] Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116.

[2] Parrott *v.* Lawrence, 2 Dill. 332.

[3] Lehigh Water Co.'s Appeal, 102 Pa. St. 515. But see New Orleans Water Works *v.* Rivers, 115 U. S. 674.

[4] Johnson *v.* Crow, 87 Pa. St. 184.

pany, covering the same territory and following the same avocations, notwithstanding the effect of the latter grant may be to injure the business and diminish the profits of the first company; the second act is constitutional and impairs no contract rights.[1] In other words, the legislature, in making a non-exclusive grant, does not undertake to preserve the monetary *value* of the franchise, but only that the franchise itself shall not be taken away nor its terms altered. And it is immaterial that the charter of the first company contains no express *reservation* of the right to grant similar franchises to other corporations; the inability to do so can only result from an express *renunciation* by the legislature.[2]

§ 54. **Constitutional Restrictions on granting Monopolies.** — If the power to create corporations with special and exclusive privileges is directly denied to the legislature by the organic law of the State, any such grant is of course unconstitutional and may be disregarded. In many of the

[1] Washington Turnpike Co. *v.* Maryland, 3 Wall. 210; Charles River Bridge *v.* Warren Bridge, 7 Pick. 344; 11 Pet. 420; Fort Plain Bridge Co. *v.* Smith, 30 N. Y. 44; Matter of Hamilton Ave., 14 Barb. 405; Thompson *v.* Railroad, 3 Sandf. Ch. 679; Mohawk Bridge Co. *v.* Railroad, 6 Paige, 554; Turnpike Co. *v.* Railroad Co., 10 Gill & J. 392; Tuckahoe Canal Co. *v.* Tuckahoe R. R., 11 Leigh, 42; s. c. 36 Amer. Dec. 374; Shorter *v.* Smith, 9 Ga. 517. In State *v.* Noyes, 47 Me. 189, Tenney, C. J., said: "If the legislature, having chartered a railroad or turnpike corporation, containing no provision that the legislature may not confer similar privileges in another act to others, and the same should be constructed and in operation, and it should subsequently pass another act creating a body corporate, for the purpose of constructing and putting in operation a similar railroad or turnpike, which should have termini near those of the former, the object being to give additional facilities for communication from one terminus to the other, the proper power having adjudged it to be of common necessity and convenience, the second grant is no infringement of any constitutional right of the first, and it becomes effectual as a contract."

[2] Fort Plain Bridge Co. *v.* Smith, 30 N. Y. 44.

States we find a clause in the constitution prohibiting the making of "any irrevocable grants of special franchises, privileges, or immunities."[1] In others "perpetuities and monopolies" are denounced as "contrary to the spirit of a free government and the principles of commerce."[2] About these there can be no question. But five of the States have incorporated into their constitutions a declaration that "no man or set of men are entitled to exclusive or separate public emoluments or privileges from the community, but in consideration of public services."[3] It therefore becomes important to determine what are public services, in the sense in which those words are here used; because if a corporation is chartered in violation of this constitutional prohibition, a subsequent act invading its special privileges is not unconstitutional. This clause in the Bill of Rights of Kentucky once came before the tribunals of that State for interpretation, and the Court of Appeals held that the legislature had no power to authorize an incorporated building association to charge interest on loans at a higher rate than was allowed by the general laws of the State to individuals. Judge Cofer remarked: "Permission to keep a tavern or a ferry, to erect a toll-bridge over a stream where it is crossed by a public highway, to build

[1] Alabama, Const. of 1875, Art. 1, § 23; Virginia, Const. 1870, Art. 1, § 6; California, Const. 1849, Art. 11, § 16; Colorado, Const. 1876, Art. 2, § 11; Illinois, Const. 1870, Art. 2, § 14; Iowa, Const. 1857, Art. 1, § 6; Kansas, Const. 1859, Bill of Rights, § 2; Missouri, Const. 1875, Art. 2, § 15; Nebraska, Const. 1875, Art. 1, § 16; Pennsylvania, Const. 1875, Art. 1, § 17.

[2] Arkansas, Const. 1874, Art. 2, § 19; Maryland, Const. 1867, Declaration of Rights, Art. 41; Tennessee, Const. 1870, Art. 1, § 22.

[3] Kentucky, Const. 1850, Art. 13, § 1; Connecticut, Const. 1818, Art. 1, § 1; North Carolina, Const. 1876, Art. 1, § 17; Texas, Const. 1876, Art. 1, § 3; Massachusetts, Const. 1780, Part I. Art. 6. The last named, however, evidently has no reference to the grant of monopolies in commercial enterprises. It proceeds to say: "The idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural."

a mill-dam across a navigable stream, and the like, are special privileges, and, being matters in which the public have an interest, may be granted by the legislature to individuals or corporations; but the grantee, upon accepting the grant, at once becomes bound to render that service to secure which the grant was made; and such obligation, on the part of the grantee, is just as necessary to the validity of a legislative grant of an exclusive privilege, as a consideration, either good or valuable, is to the validity of an ordinary contract."[1] And the Supreme Court of the United States has decided that a grant to a corporation of "the exclusive privilege of erecting and establishing gas-works in the city of Louisville, and of vending coal gas-lights, and supplying the city and citizens with gas by means of public works," constitutes a contract which is not forbidden by the clause in the Kentucky constitution against monopolies; inasmuch as the services to be performed, in consideration of the grant of such a franchise, are of a public nature.[2] Mr. Justice Harlan said: "Such a business is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas-lights. The former articles may be supplied by individual effort, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and sale. But as the distribution of gas in thickly populated districts is, for the reasons stated in the other case, a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as, under the constitution of Kentucky, authorized the legislature to grant to the

[1] Gordon *v.* Winchester, 12 Bush, 114.

[2] Louisville Gas Co. *v.* Citizens Gas-Light Co., 115 U. S. 683; New Orleans Gas-Light Co. *v.* Louisiana Light and Heat Co., 115 U. S. 650; see *In re* New York Central R. R., 63 N. Y. 326.

defendant the exclusive privileges in question."[1] It would appear, from these authorities, that a corporation renders "public services" only when the operations in which it is engaged are so essential to the *necessities* of the people — not their mere convenience — that it would be within the powers and duties of the local government, whether State or municipal, under our system of administration, to provide for the conduct of those operations through its own instruments and agencies.

IV. Exemption from Taxation.

§ 55. **Whether State can relinquish Right of Taxation.** — It was at one time made a serious question whether the legislature of a State could by any means relinquish the right to impose taxes on the property of an individual or a corporation, so that a future legislature might not constitutionally revoke the promise. In an early New Hampshire decision it was considered that the power of taxation is essentially an attribute of sovereignty, and that this power is inherent in the people, under a representative government, and so far inalienable that no legislature could make a contract by which it should be surrendered, without express authority thereto, either in the constitution or in some other way directly from the people themselves; that although no one would attempt to contravene the doctrine that several species of legislative grants come properly within the denomination of contracts, and therefore cannot be abrogated or impaired, yet there is a material difference between the right of a legislature to grant lands or corporate powers, and a right to grant away the essential attributes of sovereignty; and that the latter do

[1] Harlan, J., in Louisville Gas Co. *v.* Citizens Gas-Light Co., 115 U. S. 692.

not furnish subject-matter for a contract in any proper constitutional sense.[1] And several cases have been found to follow this view; most of which, however, are now overruled.[2]

But even before this time the United States Supreme Court had given its careful attention to the solution of this question, and had reached a conclusion which has become the settled law of the country. The case is that of The State of New Jersey *v.* Wilson.[3] It appeared that in 1758 the legislature of New Jersey passed an act to give effect to an agreement made by certain commissioners with the Delaware Indians, which agreement included the relinquishment by the Indians of their claim to all lands within the colony, in consideration of the purchase for them of a tract of land on which they might reside, and the act provided that such tract so purchased should not thereafter

[1] Brewster *v.* Hough, 10 N. H. 138, 143.

[2] Skelly *v.* Jefferson Bank, 9 Ohio St. 606, overruled in Jefferson Bank *v.* Skelly, 1 Black (U. S.), 436; see *ante*, § 13. In Mott *v.* Railroad, 30 Pa. St. 9, Lewis, C. J., said: "Although the taxing power is but an incidental one, to be exercised only as the necessary means of performing governmental duties, it is nevertheless a branch of the legislative power which always, in its nature, implies not only the power of making laws, but of altering and repealing them, as the exigencies of the State and circumstances of the times may require. If one portion of the legislative power may be sold, another may be disposed of in the same way. If the power to raise revenue may be sold to-day, the power to punish for crimes may be sold to-morrow, and the power to pass laws for the redress of civil rights may be sold the next day. If the legislative power may be sold, the executive and judicial powers may be put in the market with equal propriety. The result to which the principle must inevitably lead proves that the sale of any portion of governmental power is utterly inconsistent with the nature of our free institutions, and totally at variance with the object and general provisions of the constitution of the State." But see Pennsylvania citations in next section. See Shiner *v.* Jacobs, 62 Iowa, 392.

[3] 7 Cranch, 164.

be subject to any tax. In 1801 the Indians sold the tract, with the consent of the legislature, and removed from the State. In 1804 the legislature repealed that section of the act of 1758 which exempted the lands from taxation, assessed the lands, and demanded the tax from the purchasers; whereupon this controversy arose. The court held that the proceedings between the colony and the Indians constituted a contract, of which the exempting clause was an integral part, and that therefore the repeal of that clause violated the obligation of the contract and was void. An attempt was lately made to overturn the decision in this case, on the ground that the facts were not fully or properly before the court at the time of its rendition, but without success.[1]

§ 56. **The Power now generally Exercised.** — Upon the foundation thus laid has been reared the doctrine that it is within the power of a State legislature to exempt the property of a corporation, or a part thereof, from all future taxation, or from all assessment beyond a certain amount, or during a certain period, and that such an engagement, if express and positive, constitutes an irrevocable and inviolable contract under the Federal Constitution.[2] Thus if the

[1] Given *v.* Wright, 117 U. S. 648, 655, Bradley, J., observing: "We do not feel disposed to question the decision in New Jersey *v.* Wilson. It has been referred to and relied on in so many cases from the day of its rendition down to the present time, that it would cause a shock to our constitutional jurisprudence to disturb it now. If the question were a new one we might regard the reasoning of the New Jersey judges as entitled to a great deal of weight, especially since the emphatic declarations made by this court in Providence Bank *v.* Billings, 4 Pet. 514, and other cases, as to the necessity of having the clearest legislative expression in order to impair the taxing power of the State."

[2] New Jersey *v.* Wilson, 7 Cranch, 164; Gordon *v.* Appeal Tax Court, 3 How. 133; McGee *v.* Mathis, 4 Wall. 143; Wilmington, &c. R. R. *v.* Reid, 13 Wall. 264; Humphrey *v.* Pegues, 16 Wall. 244;

legislature, in creating a corporation, prescribes the *rate* at which its property shall be taxed, and expressly releases the power to impose other or further duties, a subsequent statute assessing the property at a higher rate is, as to such corporation, unconstitutional.[1] So if *all* the property of a corporation is exempted without reservation, no portion of it can at any future time be made liable to the payment of a tax.[2] Again, if the charter exempts the company from taxation for a designated period, or until the happening of a certain contingency, that time must elapse, or that event transpire, before the State can constitutionally lay a tax upon its property.[3] Where the legislature expressly

Delaware Railroad Tax, 18 Wall. 206; Pacific R. R. *v.* Maguire, 20 Wall. 36; Erie R. R. *v.* Pennsylvania, 21 Wall. 492; Northwestern University *v.* People, 99 U. S. 309; St. Anna's Asylum *v.* New Orleans, 105 U. S. 362; Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340; Commonwealth *v.* Pottsville Water Co., 94 Pa. St. 516; Commonwealth *v.* Girard Bank, 1 Pears. (Pa.) 323; Seymour *v.* Hartford, 21 Conn. 481; Atwater *v.* Woodbridge, 6 Conn. 223; Osborne *v.* Humphrey, 7 Conn. 335; O'Donnell *v.* Bailey, 24 Miss. 386; Union Bank *v.* State, 9 Yerg. 490; Memphis and Little Rock R. R. *v.* Berry, 41 Ark. 436; State *v.* Crittenden County Court, 19 Ark. 360.

[1] Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340; O'Donnell *v.* Bailey, 24 Miss. 386; Union Bank *v.* State, 9 Yerg. 490.

[2] Northwestern University *v.* People, 99 U. S. 309. A statute of Illinois declared that all the property of the Northwestern University should be forever free from taxation of all kinds; a subsequent statute limited this exemption to land and other property in immediate use by the institution, as it was construed by the assessors and by the Supreme Court of the State: *held*, that the latter act impaired the obligation of the contract of exemption.

[3] Pacific Railroad *v.* Maguire, 20 Wall. 36. In 1852 the legislature of Missouri passed an act declaring that the corporation plaintiff should be exempt from taxation "until the same shall be completely open and in operation and shall declare a dividend, when the road-bed, buildings, etc. of such completed road, at the actual cash value thereof, shall be subject to taxation at the rate assessed by the State on other real and personal property of like value. . . . Provided, that if said

exempts from taxation all the estates which may be given to the support and maintenance of an ecclesiastical society, the government thereby makes a contract with all such persons as shall give their property to the uses therein specified, that it shall be forever exempted from taxation; and so long as such property is applied to those uses, the government has no constitutional right or power, either directly or indirectly, to rescind or impair the contract.[1]

§ 57. **Construction strictly against Grantee.**—While the State may thus exempt the property of individuals or corporations from the payment of taxes, it is never to be presumed that the legislature has, in this respect, fettered its power in the future except upon clear and irresistible evidence that the engagement was in the nature of a private contract, as distinguished from a mere act of general legislation, and that such, in the particular instance, was the actual and deliberate intention of the State authorities.[2] In the leading case of the Delaware Railroad Tax, Mr. Justice Field said: "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. There is

company shall fail, for the period of two years after said roads respectively shall be completed and put in operation, to declare a dividend, then said company shall no longer be exempted from the payment of said tax." *Held*, that this constituted a contract between the company and the State, which the latter was not at liberty to violate by the levying of a tax upon the property of the road before the road was completed and had declared a dividend.

[1] Atwater *v.* Woodbridge, 6 Conn. 223; Osborne *v.* Humphrey, 7 Conn. 335.

[2] Delaware Railroad Tax, 18 Wall. 206; Providence Bank *v.* Billings, 4 Pet. 514; Philadelphia and Wilmington R. R. *v.* Maryland, 10 How. 376; Wilmington, &c. R. R. *v.* Reid, 13 Wall. 264; Erie R. R. *v.* Pennsylvania, 21 Wall. 492; Vicksburg, &c. R. R. *v.* Dennis, 116 U. S. 665; People *v.* Roper, 35 N. Y. 629; State *v.* Newark, 26 N. J. L. 519; Jones Mfg. Co. *v.* Commonwealth, 69 Pa. St. 137.

no safety to the public interests in any other rule. And with special force does the principle upon which the rule rests apply when the right, privilege, or immunity claimed calls for any abridgment of the powers of the government, or any restraint upon their exercise. The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this court has said, the whole community is interested in retaining it undiminished, and has 'a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.'"[1] We proceed to illustrate the application of this rule by certain examples. A provision in the charter of a railroad company that "the capital stock of said company shall be exempt from taxation, and its road, fixtures, etc., shall be exempt from taxation for ten years after the completion of said road within the limits of this State," was held not to exempt the road, fixtures, and appurtenances from taxation *before* the completion of the road.[2] A clause in the charter of a street railroad company that it shall pay such license for each car run as is paid by other passenger railroads in the city (which at the time was thirty dollars), is not a contract that the license charged for such cars shall never exceed thirty dollars, and it may be subsequently increased.[3] A provision in the act of incorporation of a railroad company, that it shall annually pay into the State treasury a tax of one fourth of one per cent upon its capital stock, does not create a contract on the part of the State that no additional tax shall be laid.[4] But if the charter provides that the corporation shall pay to the State a certain percentage

[1] Field, J., in Delaware Railroad Tax, 18 Wall. 206; citing Providence Bank *v.* Billings, 4 Pet. 561.

[2] Vicksburg, &c. R. R. *v.* Dennis, 116 U. S. 665.

[3] Union Passenger R. R. *v.* Philadelphia, 101 U. S. 528.

[4] Delaware Railroad Tax, 18 Wall. 206.

on its stock or profits, *which shall be in lieu of all taxes* to which the company or its stockholders would otherwise be subject, this is an express renunciation by the State of the right to impose further duties, and a subsequent act increasing the measure of taxation is unconstitutional.[1]

§ 58. **Necessity of Consideration to support Exemption from Taxation.** — There is still another requisite to be complied with before the corporation can successfully claim an exemption from taxation against the will of a succeeding legislature. The grant of this special privilege must have been founded upon an adequate consideration. Such a consideration would be furnished by the imposition of an additional service, duty, or obligation upon the company, or by its payment of a bonus to the State, or by its surrender to the public of some right or franchise. But if none such exists, the exemption is a mere spontaneous concession on the part of the legislature, does not constitute a contract, and may be revoked at will.[2]

§ 59. **Exemption, when a Personal Privilege.** — It was stated, in a late decision of the Supreme Court, that immunity from taxation conferred on a corporation by the legislature is not a franchise. Hence a provision in the charter of a railroad that "no taxation upon the property of said company shall be imposed by the State until the profits of said company shall amount to ten per cent on the capital," was personal to that corporation and did not inhere in the property so as to pass by a transfer of it.[3]

[1] Farrington *v.* Tennessee, 95 U. S. 679; Dodge *v.* Woolsey, 18 How. 331; Piqua Branch Bank *v.* Knoop, 16 How. 369.

[2] Christ Church *v.* Philadelphia County, 24 How. 300, affirming s. c. 24 Pa. St. 229; Home of the Friendless *v.* Rouse, 8 Wall. 430; People *v.* Comm'rs of Taxes, 47 N. Y. 501; Washington University *v.* Rowse, 42 Mo. 308.

[3] Chesapeake and Ohio R. R. *v.* Miller, 114 U. S. 176; Morgan *v.* Louisiana, 93 U. S. 217.

§ 60. **Revocation of Exemption under Eminent Domain.** — It is probable that an immunity from taxation, like any other property, may be resumed by the State, in the exercise of its power of eminent domain, upon compensation made. But the discussion of this question is reserved for another part of the chapter.[1]

V. Corporations are Subject to Police Power of the State.

§ 61. **Police Power can never be curtailed.** — There is an inherent and plenary power in the State to make all such regulations as may be necessary for the safety and good order of society. This power, which is alike essential to the maintenance of government and indispensable to the welfare and prosperity of the people, takes its origin in the very framework of the organized State. It antedates all statutory laws, for it springs from the fundamental guarantees of the social compact. It is an inalienable attribute of sovereignty, and can never be curtailed or diminished. Hence this prerogative is present, by implication, in every act of legislation. No legislature can surrender or sell it; no legislature can destroy or hamper the power of its successors to make such enactments as they may deem proper in matters of public police. Every grant from the State is taken subject to its exercise. It follows, therefore, that if any irrevocable grant of franchises or any contract made by the legislature with an individual or corporation specifies or implies a relinquishment of the police power of the State, it is to that extent invalid, the legislature having exceeded the authority delegated to it by the people. In other words, the exercise by the State, at any time, of its right to legislate for the protection and good government

[1] *Infra*, § 75.

of the community can never be construed into a violation of the Federal Constitution, as impairing the obligation of contracts, notwithstanding its effect may be to repeal existing charters or otherwise invade the terms of legislative engagements.[1]

§ 62. **Constitutional Limits of Police Power.** — It is evident that the term "police power" is a very flexible and comprehensive expression, and difficult of exact definition. But it must not be extended beyond its necessary and proper limits. When the police power has fulfilled the essential objects of its reservation to the State, it has also reached the boundaries of its legitimate exercise. It is necessary to adjust the nice balance between the inviolability of contracts and the duty of the State to protect its citizens and their property. Thus a learned judge in Michigan has said: "Powers which can only be justified on this specific ground [as being police regulations], and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort, and well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."[2]

[1] Stone *v.* Mississippi, 101 U. S. 814 (the contracts which the Constitution protects are those relating to *property* rights, not governmental); Boyd *v.* Alabama, 94 U. S. 645; Farmers' L. & T. Co. *v.* Stone (C. C. Sou. Dist. Miss. 1884), 20 Fed. Rep. 270; Baker *v.* Boston, 12 Pick. 184; Thorpe *v.* Railroad, 27 Vt. 149; Lake Hill *v.* Cemetery Co., 70 Ill. 191; and citations in following notes.

[2] Christiancy, J., in People *v.* Jackson Plank Road, 9 Mich. 307. Judge Cooley observes: "The limit to the exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict

But it was not until recently that the police power of the State received its exact definition and limitation, in this constitutional aspect. For this valuable contribution to our jurisprudence we are indebted to the very able opinion of Mr. Justice Harlan, in the case of The New Orleans Gas-Light Co. *v.* Louisiana Light and Heat Producing Co.[1] It appeared that the legislature of Louisiana had granted to the New Orleans Gas-Light Company the exclusive right, for a period of fifty years, to manufacture and distribute gas in that city by means of pipes, mains, and conduits laid in its streets, to such persons or corporations as might choose to contract for the same. A few years later the new constitution of the State was adopted, wherein it is provided that "the monopoly features in the charter of any corporation now existing in this State, save such as may be contained in the charter of railroad companies, are hereby abolished." Another gas-company was then incorporated, and given the privilege of supplying New Orleans with gas. The first company thereupon sought an injunction to restrain the second company from digging up the streets of the city, for the purpose of laying its pipes, and from asserting any right to do so until the expiration of fifty years from the date of complainant's charter. For the plaintiff it was contended that the grant of exclusive privileges contained in its charter constituted a contract which the State was not at liberty to impair, either by a subsequent

with any of the provisions of the charter; and they must not, under pretence of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise. The maxim, *Sic utere tuo ut alienum non laedas*, is that which lies at the foundation of the power; and to whatever enactment affecting the management and business of private corporations it cannot fairly be applied, the power itself will not extend." Cooley, Const. Lim. 577.

[1] 115 U. S. 650.

legislative enactment or by a change in her organic law. It was answered for the defendant that since the supplying of the city with gas had relation to the public comfort, and, in some sense, to the public health and safety, it was an object embraced within the police power of the State, and that it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects; consequently that the State might, at pleasure, recall the grant of exclusive privileges to the plaintiff, and that to do so, in the exercise of the police power, would in no sense impair any contract within the meaning of the Federal Constitution. The opinion of the court was delivered by Mr. Justice Harlan, who, after stating that the police power was, from its very nature, incapable of very precise definition or limitation, and that it was often taken in such a broad sense as to include all legislation and almost every function of civil government, proceeded to show that, in *this* sense, its exercise must always be subject to the condition that it shall not encroach upon the powers of the General Government, or rights granted or secured by the supreme law of the land. By way of illustration, he cited cases where ordinances which interfered with the paramount authority of Congress to regulate commerce with foreign nations and between the several States, were denied to be within the police power, and cases in which grants of exclusive privileges respecting public highways and bridges had been sustained as contracts the obligation of which was protected from impairment by the States. He then reviewed the recent adjudications of the Supreme Court in which the extent and limitations of the police power had been pointed out, and reached the conclusion that, where reference is made to that police power which is always reserved to the State, with which the State never parts, which the legislature can never sell or bargain away, its sphere must be limited to the two

subjects of the *public health* and the *public morals.* "The principle," says the learned judge, "on which the decisions [in these cases [1]] rested, is, that one legislature cannot so limit the discretion of its successors, that they may not enact such laws as are necessary to protect the public health or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of these cases, that statutory authority, given by the State under her police power to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others."

"The present case," he continues, "involves no such considerations. For, as we have seen, 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 every one 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 the public convenience and the public safety." [2]

[1] Beer Co. *v.* Massachusetts, 97 U. S. 32; Fertilizing Co. *v.* Hyde Park, 97 U. S. 663; Stone *v.* Mississippi, 101 U. S. 814; Butchers' Union Co. *v.* Crescent City Live-Stock Co., 111 U. S. 746.

[2] Harlan, J., in New Orleans Gas-Light Co. *v.* Louisiana Light and Heat Co., 115 U. S. 650; Boyd *v.* Alabama, 94 U. S. 645; Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746.

§ 63. **Public Health and Public Morals.** — We learn, therefore, that the public health and the public morals are the two subjects embraced within the strict and constitutional meaning of the term "police power;" and that the grant by the State to an individual or corporation of the privilege (whether exclusive or not) of pursuing any species of business, the conduct of which must necessarily be attended with more or less injury to one or both of these subjects, *is not a contract;* and a subsequent statute, revoking the grant or burdening it with restrictions, is not invalid. But —

§ 64. **Does not extend to Public Convenience:** — there is no possibility, upon any principle of logical deduction from the adjudged cases or the nature of the subject, of stretching the limits of the police power so as to make it include matters which are merely connected with the *convenience* of the public. There are decisions which might seem, at first blush, to lend countenance to such a proposition, but an attentive consideration will show that they either used the term in its broad and general sense, or had reference to matters concerning the *safety* of the people, not their convenience.[1]

§ 65. **Prohibitory Liquor Laws.** — The right to prohibit the manufacture and sale of liquor within the territorial jurisdiction of the State is included, on the strictest reasoning, in the definition above given of the police power. And this is also the unanimous voice of the decisions. The leading case on the subject is that of the Beer Company *v.* Massachusetts.[2] One of the questions considered was, whether the charter of a private corporation, authorizing it to engage in the manufacture of malt liquors, and, as incidental thereto, to dispose of the product, constituted a contract protected against subsequent legislation

[1] See remarks of Tenney, C. J., in State *v.* Noyes, 47 Me. 189, 212.
[2] 97 U. S. 25.

prohibiting the manufacture of liquors within the State. The beer company claimed the right, under its charter, to manufacture and sell beer without limit as to time, and without reference to any exigencies in the health or morals of the community requiring such manufacture to cease. It was decided that, while the company acquired by its charter the capacity, as a corporation, to engage in the manufacture of malt liquors, its business was at all times subject to the same governmental control as like business conducted by individuals; and that the legislature could not divest itself of the power, by such appropriate means, applicable alike to corporations and individuals, as its discretion might devise, to protect the lives, health, and property of the people, or to preserve good order and the public morals. The prohibitory enactment of which the beer company complained was held to be a mere police regulation, which the State could establish even had there been no reservation of authority to amend or repeal its charter.[1] And a prohibitory statute of this character is not in conflict with the Constitution, as impairing the obligation of contracts, because its effect is to lessen the value of liquors owned in the State previous to, and held at the time of, its passage.[2] On similar principles, licenses to sell liquor are not contracts between the State and the licensee (notwithstanding a fee may have been paid), giving the latter vested rights protected by the Federal Constitution. Such licenses are mere temporary permits to do what otherwise would be unlawful, and are not property in any legal or constitutional sense. They may therefore be revoked by

[1] Beer Co. *v.* Massachusetts, 97 U. S. 25. In the above account of this case I have used the language of Mr. Justice Harlan, in New Orleans Gas-Light Co. *v.* Louisiana Light and Heat Co., 115 U. S. 665.

[2] State *v.* Paul, 5 R. I. 185; State *v.* Keeran, 5 R. I. 497; People *v.* Hawley, 3 Mich. 330; Reynolds *v.* Geary, 26 Conn. 179.

the State before their expiration.[1] And it is immaterial that the statutes authorizing the grant of licenses had appropriated the money derived from the sale thereof to the support of paupers or other specific purposes; they may nevertheless be repealed at the will of the legislature.[2] The passage of a law increasing the license-tax operates as a revocation, unless the additional amount is paid.[3]

§ 66. **Suppression of Lotteries.** — In the leading case of Stone *v.* Mississippi,[4] it appeared that the legislature of that State had chartered a corporation with the privilege of holding lotteries for a designated period, in consideration of certain payments to be made to the State. Before the expiration of the charter, the State adopted a new constitution, one clause of which forbade the drawing of any lotteries theretofore authorized. It was claimed that this clause was repugnant to the Federal Constitution, as impairing the company's charter. But Mr. Chief Justice Waite, in delivering the opinion of the court, stated that it could not be denied that lotteries were proper subjects for the exercise of the police power of the State; that the legislature could not, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst; that no legislature could bargain away the public health or the public morals; that the right to suppress lotteries is governmental, to be exercised at all times by those in power, at their discretion; any one, therefore, who accepts a lottery charter, does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it

[1] Rowland *v.* State, 12 Tex. App. 418; Santo *v.* State, 2 Iowa, 165; Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657.

[2] Gutzweller *v.* People, 14 Ill. 142.

[3] Rowland *v.* State, 12 Tex. App. 418.

[4] 101 U. S. 814.

at any time when the public good shall require, whether it be paid for or not.

§ 67. **Regulation of Slaughter-Houses.** — It has been decided by the Supreme Court that a statute granting to a certain corporation the exclusive privilege of establishing and maintaining stock-yards and slaughter-houses for a particular city, at which all stock must be landed, and all animals intended for food must be slaughtered, is a mere police regulation for the health and comfort of the people, and within the constitutional power of the legislature.[1] And subsequently, that the obligation of a contract did not arise out of such a regulation; for the legislature would have no authority to continue such a right so that no future legislature, or even the same body, could repeal or modify it; and therefore that the monopoly features of the grant in question could legally be abolished.[2]

§ 68. **Discontinuance of Cemeteries.** — In further illustration of the same principle — that the right and duty of the State to throw safeguards around the public health are paramount to the chartered privileges of any corporation — we may cite a case where an ordinance of a municipal corporation authorized by an act of the legislature, prohibiting interments in certain places, was held valid, although those places had been held and used as burial-grounds for more than a century under grants for that purpose.[3]

§ 69. **Right to direct Corporation in the Use of its Franchises.** — But it is not only in cases where the exercise of the police power demands the revocation of a charter, or the abolition of a monopoly, that its purview may touch upon the rights and duties of incorporated companies.

[1] Slaughter-House Cases, 16 Wall. 36; Crescent City Slaughter-House Co. *v.* New Orleans, 33 La. An. 934.

[2] Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746.

[3] Coates *v.* Mayor of New York, 7 Cow. 585.

Even without going to this extent, it properly embraces authority to so direct the affairs of a corporation that the use of its franchises and privileges shall not be detrimental to the health or safety of the people. In a case above cited,[1] it was stated that a grant of exclusive privileges to a body corporate does not destroy the power of the State to establish and enforce such regulations, not inconsistent with the essential rights granted by the charter, as may be necessary for the protection of the public against injury, whether arising from the want of due care on the part of the company in the conduct of its business, or from an improper use of its franchises. That is to say, while the police power does not extend to the repeal of a charter (or the revocation of exclusive privileges), granted to a corporation, the conduct of whose business is *not* necessarily attended with greater or less injury to the public morals or the public health,[2] yet the principle which protects such bodies from material invasions of their franchises, is not exclusive of, but subordinate to, the principle which makes all rights and privileges arising from contracts with a State subject to regulations for the protection of the public health, morals, or safety, as one or the other may be involved in the execution of such contracts. Thus,

§ 70. **Railroads:** — as we have already seen, it is within the power of the legislature to require railroad companies to maintain suitable fences along their right of way, and to make them responsible for injuries attributable to the neglect of such measures; to require the establishment of stations at specified places on the line of the road; to require that their locomotives shall whistle, or ring a bell, before crossing any public highway, etc.[3]

[1] New Orleans Gas-Light Co. *v.* Louisiana Light and Heat Co., 115 U. S. 650, 671. See Baker *v.* Boston, 12 Pick. 184.

[2] *Supra*, § 63.

[3] *Supra*, § 27.

§ 71. **Manufacturing Corporations.** — In strict accordance with this doctrine is the decision that a statute prohibiting the employment of all persons under the age of eighteen, and of all women, in laboring in any manufacturing establishment, more than sixty hours per week, is constitutional as a police regulation, and does not violate any contract implied in the charter of a manufacturing company.[1]

VI. Franchises are Subject to Eminent Domain.

§ 72. **Franchises may be taken by the State under this Power.** — The right of eminent domain furnishes to the State one of its most important methods of controlling the existence and transactions of the corporations which it

[1] Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 383. A city ordinance prohibiting the erection of wooden buildings within certain limits is not unconstitutional as applied to contracts for the erection of such buildings made before its passage: Knoxville *v.* Bird, 12 Lea, 121; s. c. 47 Am. Rep. 326. So a statute making it a misdemeanor to sell any pistols except such as are known as "navy pistols" is valid and constitutional: Dabbs *v.* State, 39 Ark. 353. A statute regulating the inspection and gauging of oils and fluids is a mere police regulation within the power of the State; and the right conferred upon a patentee and his assignees to use and vend an oil for illuminating purposes, must be exercised in subordination to the police power of the State as exerted in such statute: Patterson *v.* Kentucky, 97 U. S. 501. In Connecticut it is even held that the power of the legislature to declare certain anniversaries public holidays is a matter of police regulation, designed to promote the comfort and welfare of the people. This principle was applied to a case where a promissory note was made payable at such a time that the last day of grace would fall on the first of January; but in the interval the legislature passed an act making that day a legal holiday. It was held that the rights of the parties to the note were affected by this statute, and that it was not, in such application, unconstitutional as impairing the obligation of contracts, and that the note could be collected on the last day of December: Barlow *v.* Gregory, 31 Conn. 261.

has created. In several respects it resembles the reserved power of the State last adverted to. It is, like that, an inherent element of sovereignty, and so far inalienable that no legislative body can have authority to bind the State to refrain from its exercise when a proper emergency arises. Its preservation, unimpaired and unfettered, is essential to the welfare and growth of the community. Like the police power also, it enters as a necessary implication into every grant and contract from the government. The resumption, therefore, under the power of eminent domain, of anything held directly from the State, violates no contract rights, because its tenure was subject to the condition subsequent that the grantor might take it again if the public need required. But, unlike the police power, it cannot lawfully be exercised unless due compensation is made to the party whose property is taken.

Now a franchise granted to an incorporated company is *property*. And there is nothing in its nature or attributes to make it more sacred than any other species of property. Hence the franchise may be taken from the grantee by the State, under the right of eminent domain, and subject to the conditions necessary for the legal exercise of that power. And when adequate compensation is provided, the obligation of the contract is not impaired, but recognized. This is the purport of the authorities, without a dissentient voice.[1] And it makes no difference

[1] West River Bridge *v.* Dix, 6 How. 507; Richmond, &c. R. R. *v.* Louisa R. R., 13 How. 71; New Orleans Gas-Light Co. *v.* Louisiana Light and Heat Co., 115 U. S. 650, 673; Enfield Toll Bridge Co. *v.* Railroad, 17 Conn. 40; Backus *v.* Lebanon, 11 N. H. 19; Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35; Central Bridge Co. *v.* Lowell, 4 Gray, 474; Boston Water Power Co. *v.* Railroad, 23 Pick. 360; *In re* Citizens' Passenger R. R., 2 Pittsb. 10; *In re* Towanda Bridge, 91 Pa. St. 216; *In re* Twenty-Second Street, 102 Pa. St. 108; Benson *v.* New York, 10 Barb. 223; Shorter *v.* Smith, 9 Ga. 517; Cooley, Const. Lim. 281; 3 Parsons on Contracts, *537; 2 Morawetz on Corp. § 1086.

that the powers of the corporation are thereby suspended, or the corporation itself in fact dissolved.[1]

In Enfield Toll Bridge Co. *v.* Railroad, *supra*, Williams, C. J., said: "What are the rights of the plaintiffs? They are derived from the grant of the legislature, and are what in law is known to be a *franchise;* and 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. The owner of such property may repose, with the same security for its protection, under the wings of the Constitution; but we know not why he should expect any greater exemption from public burden than the owner of any other estate. It was the intention of those who made that instrument, that the rights of all should be secured, and equally secured. If, as we believe, it is a conceded point, that the owners of lands, buildings, and all property of this description, must yield up that property for public use, upon compensation, how is it that property of this kind claims a higher privilege, or is guarded by stronger force? If any property ought to be peculiarly guarded, it certainly is not that which is merely a matter of dollars and cents, but it should be the homestead, the fireside, the place where the owner has enjoyed his domestic comforts, and where he hopes to spend his declining years; and yet this must be yielded to public exigencies. The one, it is said, is holden directly by grant of the legislature, and to take it away is impairing the contract. But are not all our lands held under a grant from the legislature, directly or indirectly? Was not the property all apportioned out, under legislative supervision? Take the case of a grant of land made, as may have been, and as in some States they constantly are now made, directly by the State to an individual; may not this land be taken by the government for highways, for railroads, or any other public purposes? This will not be denied. Is this impairing the contract? It will hardly be claimed. But when the State grants a tract of land, they grant an estate in fee, as much as when an individual grants it; but in both cases, it is subject to the right to retake it for public use, on compensation made. The fact is, that such has been the law of nations upon this subject, that there is reserved or implied a right in the State of this sort; that is to say, they have the same right to the use of the property they have granted that they have to other property, and no more. They have the right of eminent domain; and

[1] Backus *v.* Lebanon, 11 N. H. 19.

§ 73. **Bridges and Turnpikes.** — As we have already seen (§ 50), a franchise consisting of the exclusive right to build and maintain a bridge across a river within certain designated limits is a contract between the State and the corporation which the legislature cannot impair by subsequently authorizing another bridge within those limits. Yet this franchise is, on the principles already set out, only a species of property, and therefore subject to the power of eminent domain. It follows that it may be taken by the State for public use. That is, a second bridge may be chartered, for the accommodation of the public, within the territory covered by the first company's privileges, provided adequate compensation be made to the original grantee.[1] It is the payment of just remuneration, and the need of the public, that differentiates this method of abolishing the exclusive character of the grant from a mere arbitrary invasion of the company's privileges. By virtue of this power also, a toll-bridge owned by an incorporated body may be condemned for the public use and made a *free* bridge or public highway.[2] And in the same manner the legislature may authorize a bridge to be erected so as to occupy and destroy a ferry, or a railroad company or a city may be empowered to appropriate a bridge property though the franchise of the corporation be thereby destroyed, provided always that compensation is at the same time secured

we know of no principle which should limit this right to lands, or other real estate. The right rests upon the principle that individual interests must be subservient to that of the public, and that they must yield when public necessities require. This, however, in constitutional governments, is not to be done but upon compensation. The principle, then, is broad enough to include all kinds of property." Williams, C. J., in Enfield Toll Bridge Co. *v.* Railroad, 17 Conn. 40, 60.

[1] Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35. See West River Bridge *v.* Dix, 6 How. 507.

[2] *In re* Towanda Bridge, 91 Pa. St. 216; Central Bridge Co. *v.* Lowell, 4 Gray, 474.

to the party thus deprived of the prior franchise.[1] On similar principles, the legislature has power to pass an act providing that a turnpike-road shall be laid out as a public highway, and that the court shall appoint commissioners to estimate and award the amount to be paid to the turnpike company as damages for taking their property.[2]

§ 74. **Opening of Streets.** — The right of the State to open streets in cities, for the accommodation of public travel, in the exercise of its power of eminent domain, will not be lost because an act of the legislature has granted to a certain corporation perpetual immunity against the opening of streets through its cemetery.[3]

§ 75. **Repeal of Exemption from Taxation.** — The exemption of the property of a corporation from all taxation, or from all assessment beyond a certain amount, is undoubtedly a valuable property right vested in the company. And *a priori* one would certainly say that this franchise might, like any other, be resumed by the State under the power of eminent domain. The remarks of Professor Parsons on this point are very suggestive. "The property thus exempted," he says, "may be taxed, and compensation made. It might be said that it involves an absurdity to suppose a legislature laying a tax of an hundred dollars, and voting the same sum to be paid to the taxed party; and it must be precisely that sum, or it would not be compensation. And the effect would be only to put the State to the trouble and expense, first, of collecting the tax, and

[1] 2 Washburn, Real Prop. (4th ed.) 295.

[2] Hingham Bridge Co. *v.* Norfolk, 6 Allen, 353.

[3] *In re* Twenty-second Street, 102 Pa. St. 108. A contract ceding to a telegraph company the exclusive right of operating and maintaining its lines over the right of way of a railroad company, even if otherwise valid, cannot debar the State, in the exercise of the right of eminent domain, from authorizing the establishment of another telegraph line over the same right of way. New Orleans, &c. R. R. *v.* Southern Tel. Co., 53 Ala. 211.

then of paying the money. But while it may be true, that if money be paid in compensation, it must be the same sum that is taken, it is not true that the compensation must necessarily be made in money. It is at least supposable that there may be other modes of compensation equally just, satisfactory, and expedient. And then the whole case might be brought, by construction, within the principle of something given, which may be resumed upon compensation."[1] And, at any rate, the compensation should probably include the surrender to the corporation of that consideration which, as we have seen, is absolutely necessary to support a grant of exemption from taxation.[2]

§ 76. **As applied to Monopolies.** — There is nothing in the nature of the case to distinguish a grant of a monopoly to a corporation, as respects its appropriation by the State under the power of eminent domain, from an ordinary franchise not in terms made exclusive; except this, that the exclusiveness of the grant is simply *one element of value*, to be taken into account in assessing the compensation for its resumption. "If, in the judgment of the State," says Mr. Justice Harlan, "the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations, other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result, with respect to corporations whose contracts with the State are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the State's power of eminent domain."[3] And

[1] 3 Parsons on Contracts, *543.

[2] *Supra*, § 58.

[3] New Orleans Gas-Light Co. *v.* Louisiana Light and Heat Co., 115 U. S. 650, 673.

Judge Cooley thinks that an express agreement in the charter, that the power of eminent domain should never be exercised so as to impair or affect the franchises granted, "if not void as an agreement beyond the power of the legislature to make [which it surely would be, the right being inalienable], must be considered as only a valuable portion of the privilege secured by the grant, and as such liable to be appropriated under the power of eminent domain."[1]

§ 77. **Appropriation of Corporate Stock.** — Although it is not possible for the majority of the stockholders of a corporation to force an unwilling minority into an arrangement by which their company is merged in or consolidated with another,[2] yet there seems to be reason and authority for holding that the minority may be worked out of the transaction altogether, by invoking the State's power of eminent domain, and paying them the full value of their shares. If the object to be effected by the consolidation is a "public purpose," the road to this conclusion is easy. For of course the property and privileges of the individual stockholders of a corporation are as much subject to the power of eminent domain as those held by the corporation collectively.[3]

§ 78. **Limits to Exercise of Power.** — The power of eminent domain, like every other governmental authority, is subject to certain restrictions. Thus, it is not competent for the legislature, under pretence of exercising this right, to take one man's private property and give it to another, when no public exigency intervenes.[4] Such an act

[1] Cooley, Const. Lim. 281.

[2] *Supra*, §§ 40–43.

[3] Black *v.* Delaware Canal Co., 24 N. J. Eq. 455. See 2 Morawetz on Corp. § 1089.

[4] Boston Water Power Co. *v.* Railroad, 23 Pick. 360, 393, Shaw, C. J., saying: "If it is suggested that, under this claim of power, the legislature might authorize a new turnpike, canal, or railroad on the same

would be contrary to the fundamental guarantees of our constitutions. Hence a statute by which the franchises of a corporation should be taken and itself destroyed, merely in order to confer the same franchises on another company, identical with the first in its organization, business, and scope, and standing in precisely the same relation to the public, would be unconstitutional.

§ 79. **Conclusion.** — If it is true, as sometimes asserted, that the rapid growth of corporate influence and power, under the sheltering doctrines of the Supreme Court, threatens to become an awkward factor in the administration of government in this country, we have at least discovered a number of very important particulars, in the course of this chapter, in which the State may exercise control over her corporate children. For (1) corporations are subject to the operation of all general laws enacted for the welfare and good order of the community;[1] (2) the power to amend future charters may be reserved to the State;[2] (3) when this is done the State may interfere in the business and methods of the corporation to any reasonable extent;[3] (4) where no such power is reserved, the State may still *induce* the corporation to accept an amendment;[4] (5) no privileges pass against the State by presumption or implication;[5] (6) in the absence of a specific

line with a former one to its whole extent, we think the proper answer is, that such a measure would be substantially and in fact, under whatever color or pretence, taking the franchise from one company and giving it to another, in derogation of the first grant, not warranted by the right of eminent domain, and incompatible with the nature of legislative power. In that case the object would be to provide for the public the same public easement which is already provided for, and secured to the public by the prior grant, and for which there could be no public exigency. Such a case therefore cannot be presumed."

[1] *Supra*, § 23.
[2] *Supra*, § 31.
[3] *Supra*, § 34.
[4] *Supra*, § 39.
[5] *Supra*, § 52.

grant of a monopoly, rival companies may be chartered;[1] (7) corporations are subject to the police power of the State, and in the valid exercise of this power monopolies may be abolished, charters revoked, or companies controlled and regulated in the conduct of their affairs;[2] (8) when the public need requires, their franchises may be taken away, under the power of eminent domain, even to the extent of dissolving the corporation, provided compensation be made.[3]

[1] *Supra*, § 53. [2] *Supra*, § 61. [3] *Supra*, § 72.

CHAPTER III.

LEGISLATIVE CONTRACTS WITH PRIVATE PERSONS.

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§ 95. Public Office is not a Contract.
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I. Contracts of the State and of Municipalities with Private Individuals.

§ 80. **Contracts to which the State is a Party.** — The prohibitory clause of the Federal Constitution, protecting

the obligation of contracts from impairment, applies equally to all classes of contractual engagements, including those to which the State itself is a party, and whether the other party be one of its individual citizens, or a corporation, or another State.[1]

§ 81. **State may contract with Individual** —That a State may make a valid and binding engagement, in the nature of a contract, with one of its own citizens, is no longer open to doubt upon the authorities. Rights once vested, privileges once granted or sanctioned by the law of the State, if within the constitutional limits, may be forfeited, but cannot be arbitrarily divested or withdrawn by any future legislation.[2] Thus a sale for taxes made by a public officer is a contract, the obligation of which the legislature cannot impair by repealing that portion of the statute which provides that the officer making the sale shall execute a conveyance in pursuance thereof.[3] So where commissioners, appointed by the legislature for that purpose, sold a tract of land at public auction, and took the bond of the purchaser for the price, which was afterwards paid and accepted by the State, a subsequent act of the legislature, granting the same land to another person, was held void.[4] Again, a law authorizing land, which had been dedicated by its owner for the purpose of a public square, to be put to a different use, is unconstitutional.[5] To take another illustration; a contract for printing the public statutes having been let under the general law in that regard, the legislature could by no special act provide for

[1] Green *v.* Biddle, 8 Wheat. 1; Canal Co. *v.* Railroad Co., 4 Gill & J. 1; United States *v.* Great Falls Co., 21 Md. 119.

[2] Woodruff *v.* State, 3 Pike, 285; Brooklyn, &c. R. R. *v.* Brooklyn, &c. R. R., 32 Barb. 358; Drew *v.* Railroad, 32 P. F. Smith, 46; Winter *v.* Jones, 10 Ga. 190; Commercial Bank *v.* Chambers, 8 Sm. & Mar. 9.

[3] Bruce *v.* Schuyler, 4 Gilm. 221.

[4] Stanmire *v.* Taylor, 3 Jones (N. C.), 207.

[5] Warren *v.* Lyons, 22 Iowa, 351.

any valid contract for printing any statutes embraced in the first contract.[1] Again, in those States where the convict-lease system obtains, when the State has, by lease, given a vested right in the labor of its convicts to one person, it may not take that right from him and confer it upon another.[2] These illustrations will serve to suggest the numberless instances in which a State may enter into a binding and irrefragable contract with one of its own citizens. In every such case, the contract is as much protected from legislative interference as if it had been struck between two private persons. At the same time, it must be remembered that not every transaction in which the State is concerned will necessarily constitute a contract as against it. There must exist in the affair some sufficient evidence of the intention of the State to enter into a valid and binding engagement.[3]

§ 82. **Essentials to a Valid Contract with the State.**— The familiar principles relating to the formation of a con-

[1] State *v.* Barker, 4 Kans. 379.

[2] Georgia Penitentiary Co. *v.* Nelms, 71 Ga. 301.

[3] In Corning *v.* Greene, 23 Barb. 33, it appeared that an act of the legislature of New York, passed in 1823, provided for the construction at Albany of a pier and basin. By the terms of the act the pier was to be constructed by commissioners, who were primarily to raise the funds by voluntary subscriptions of individuals in Albany or elsewhere. The subscribers were to be reimbursed by a sale of the pier, after it had been finished and divided into lots. There was no restriction as to who should become purchasers at the sale of the lots, nor were the purchasers organized into a company or association, and there was nothing in the act on which to found the inference that the State professed to deal with them in the accomplishment of the work contemplated by the act. The act of 1850 released all vessels entering the basin from the payment of wharfage to the pier-owners, unless they came to, lay at, or made fast to the pier on either side. On this state of facts it was *held* that the act of 1823 vested no rights in the purchasers of lots, as under a contract with the State, and that the act of 1850 was not unconstitutional as violating the obligation of contracts.

tract are to be applied to the liabilities of a State as well as elsewhere. Hence a mere promise or offer on the part of the State, while it remains unaccepted and before any consideration has passed, may be revoked and annulled without the violation of any constitutional sanction. For example, an offer on the part of the State to issue new bonds for all its valid bonds outstanding, whenever the holders choose to accept the terms on which the exchange is to be made, creates no contract with the holders of such bonds that this shall be done, and may be recalled by the legislature, before acceptance.[1] But an agreement by the State to convey lands upon the performance of a condition precedent by the grantee creates a contract with parties accepting and partly performing the condition, which the legislature cannot abrogate by a repeal of the granting act.[2] To this class of laws, also, is to be referred the case of a statute promising the payment of a bounty or gratuity to any one who will do some particular act supposed to be for the State's interest. At any time before the proposition has been accepted by the performance of the act in question, the statute may be repealed; but after that, the contract is complete, and the promised gratuity becomes a legal debt.[3]

§ 83. **State and Municipal Bonds and Warrants.** — By far the largest mass of instances in which the contracts of the government with individuals have been called in question is furnished by the litigation growing out of the bonded indebtedness of States and cities. In many cases where States or municipalities, in re-funding or otherwise re-arranging their debts, have attempted to alter the terms

[1] Durkee *v.* Board of Liquidation, 103 U. S. 646. See Brinsfield *v.* Carter, 2 Kelly (Ga.), 143.

[2] Montgomery *v.* Kasson, 16 Cal. 189.

[3] Cooley, Const. Lim. 284, citing People *v.* Auditor-General, 9 Mich. 327.

and conditions of the bonds, or the security offered to the creditors, interesting and difficult questions have been presented to the courts for solution. And in the first place, it is well settled that when a State or city puts into operation a plan for the funding of its floating debt, this constitutes, when accepted, a new contract with each individual creditor, substantially beyond the further control of the legislature, and not to be altered or impaired by any subsequent modification or repeal.[1] For example, a statute requiring the authorities of a certain city to execute to a banking institution duplicates of city bonds which had been stolen from the bank, upon publication of notice and execution of an indemnity bond, and declaring the city to be discharged from liability on the stolen bonds, but giving to *bona fide* holders thereof a right of action against the bank upon its indemnity bond, was held unconstitutional as impairing the obligation of contracts.[2]

§ 84. **Acts imposing New Conditions on Bondholders.** — Upon this principle, it is not competent for the State to impose upon the holders of its bonds any conditions for the validity or enforcement of the same not contained in the original agreement. This point is illustrated by a recent decision from Arkansas. The question was as to the validity of a statute[3] which directed the holders of school warrants, upon ninety days' notice, to submit the validity of such warrants to the county judge and clerk, whose decision should be final; if the warrants were rejected, or not presented, they were to be void; if found valid, the holders were to receive in lieu thereof the county clerk's warrants against the school district. It was held that these provisions imposed conditions upon the holders

[1] People *v.* Woods, 7 Cal. 579; People *v.* Bond, 10 Cal. 563; Babcock *v.* Middleton, 20 Cal. 643.

[2] People *v.* Otis, 90 N. Y. 48; s. c. 24 Hun, 519.

[3] Ark. Act of Nov. 30, 1875.

which did not exist in the law as it stood when the warrants were issued, and that the act was for that reason unconstitutional.[1]

However, it is allowable for the State to require its bonds to be registered in a certain manner before they shall be paid, when it is not designed thereby to repudiate any of the indebtedness of the State, but only to provide a safeguard against the State's being called upon a second time to pay bonds it had already discharged.[2] We shall have occasion to advert to this subject again, in connection with the Virginia Coupon cases.[3]

§ 85. **Altering the Security for the Bonds.** — It is a matter of course that any law which materially changes or reduces the security which the State or municipality has offered to its bondholders should impair the value of their contracts. And this also is forbidden. Thus a statute authorized a city to refund its debt, and contained, among other stringent measures to secure the prompt payment of the new bonds, a provision that the councils of the city should not issue its bonds thereafter "for any other purpose whatever except in payment of the bonded debt of said city;" and it was held that when the arrangement was accepted by the creditors of the city, and new bonds issued, this provision of law was a material element of the new contract, and it was not the subject of legislative repeal or amendment so as to impair the rights or diminish the security of the creditors without their assent.[4] Again,

[1] McCracken *v.* Moody, 33 Ark. 81. So where county bonds of Kansas were payable on their face at a particular bank in the city of New York, it was held that they could not, by a subsequent act establishing a fiscal agency for Kansas in New York city, be made payable at that agency alone: Dillingham *v.* Hook. 32 Kans. 185.

[2] Gurnee *v.* Speer, 68 Ga. 711.

[3] *Infra*, § 87.

[4] Smith *v.* Appleton, 19 Wis. 468.

where an amendment to the constitution of the State authorized the issue of a certain series of railroad bonds, and afterwards another amendment was adopted, providing that no law levying a tax or making other provisions for the payment of the bonds should take effect until submitted to the people and voted for by a majority of them, it was held that the latter amendment impaired the obligation of the contracts created by the issue of the bonds, and was void.[1] But a statute authorizing a debtor of a municipal corporation to procure the obligations of the municipality and use them as a set-off for his own debt, is not liable to constitutional objection, as divesting creditors of the municipality of vested rights, or as impairing the obligation of contracts.[2]

§ 86. **Statutes changing Terms of Bonds.** — It is not constitutional for the legislature to introduce any new terms into the outstanding bonds of the State, whether as respects their time of payment, rate of interest, or negotiability. Thus an ordinance of a city directing that a tax assessed by it on its bonds shall be retained by its treasurer

[1] State *v.* Young, 29 Minn. 474. So where the holders of a certain series of bonds were entitled to payment by taxes collected in the same way as other necessary taxes, it was held that a subsequent statute providing that the tax-collector might give a bond for the collection of the general taxes only, and that another person might be appointed for the collection of such special taxes as were required to pay said bonds, was unconstitutional: Edwards *v.* Williamson, 70 Ala. 145. But in a case in Nevada, where there were warrants outstanding against a county payable out of its general fund, and meanwhile certain statutes were passed providing that the revenues which formerly had gone into such general fund should constitute a "redemption fund" for the payment of such warrants as should be offered at the lowest price, it was held that as the holders of such outstanding warrants never had any security for payment except the good faith of the State, and as the legislature had entire control over the revenues, the statutes in question did not impair the obligation of any contract. Youngs *v.* Hall, 9 Nev. 212.

[2] Amy *v.* Shelby Co., 114 U. S. 387.

out of the interest due on the bonds to their holders, is invalid.[1] So an act requiring the holder of a county warrant, which is overdue and which draws ten per cent interest, to present such warrant at the treasury and surrender it, and take in its place bonds drawing a lower rate of interest, and payable at a future day, is unconstitutional as impairing contracts.[2] So if coupons or warrants are expressly made receivable for taxes, this quality cannot be taken from them, nor the time limited within which they shall be so receivable, without violating the rights of the holders.[3]

§ 87. **History of the "Virginia Coupon" Litigation.** — In consequence of the separation of West Virginia from Virginia, during the progress of the civil war, it became necessary for the two States to ascertain and adjust the proportion which each should bear of the public debt of the old State of Virginia. In order to facilitate this measure, Virginia, in 1871, passed an act commonly known as the "Funding Act," whereby it was provided that the owners of the bonds, stocks, or interest certificates of the State, might fund two-thirds of the same and two-thirds of the interest thereon, in new six per cent coupon bonds of the State, the bonds to be made payable to order or bearer, and the coupons to bearer. The act further declared that the coupons should be payable semi-annually, and should "*be receivable at and after maturity for all taxes, debts, dues, and demands due the State*," and that this should be so expressed on their face. Many holders of the old bonds accepted the provisions of this act. Notwithstanding this explicit promise, in the following year (1872), the legisla-

[1] Murray *v.* Charleston, 96 U. S. 432. See next section as to tax on Virginia bonds.

[2] Brewer *v.* Otoe, 1 Nebr. 373.

[3] New Orleans *v.* City Hotel, 28 La. An. 423. See next section.

ture of Virginia passed an act declaring that thereafter it should not "be lawful for the officers charged with the collection of taxes or other demands of the State," then due or which should thereafter accrue, "to receive in payment thereof anything else than gold or silver coin, United States Treasury notes, or notes of the national banks of the United States." The validity of this statute was soon attacked in the courts, on constitutional grounds, and the supreme judicial tribunal of the State pronounced it incompetent and void.[1] Moreover the United States Supreme Court several times took occasion to declare, in the most emphatic terms, that the clause in the Funding Act providing that the coupons should be receivable for taxes, gave rise to a contract between the State of Virginia and each coupon-holder, the obligation of which the legislature could in no wise alter or impair.[2]

But in 1873 the legislature passed an act, providing that from the interest payable on the State bonds, whether funded or unfunded, there should be retained a tax equal to five mills on their market value, and making it the duty of every officer charged with the collection of taxes to deduct from the matured coupons that might be tendered him in payment of taxes, or other dues to the State, such tax as was then or might thereafter be imposed on the bonds. And these provisions were substantially re-enacted in 1876. The constitutionality of the last-named statute came before the Supreme Court of the United States in the case of Hartman *v.* Greenhow; and it was held that the act could not be applied to coupons separated from the bonds, and held by different owners, without impairing the contract with such bondholders contained in

[1] Antoni *v.* Wright, 22 Gratt. 833; Wise *v.* Rogers, 24 Gratt. 169; Clarke *v.* Tyler, 30 Gratt. 137.

[2] Hartman *v.* Greenhow, 102 U. S. 672; Antoni *v.* Greenhow, 107 U. S. 766; Virginia Coupon Cases, 114 U. S 270.

the Funding Act, and the contract with the bearer of the coupons.[1]

After the lapse of a few years another phase of this controversy was presented, and another question presented to the courts for determination. It appeared that, as the law stood at the time the coupons were issued, the proper remedy to compel a collector to accept them when offered in payment of taxes was by *mandamus* from the Court of Appeals of the State, but this implied a suit, with process, pleadings, issues, trial, and judgment. But whereas many of the coupons thus presented for cancellation were suspected to have been re-issued, or to come from spurious, stolen, or forged bonds, it was enacted by the legislature (1882) that thereafter the method of receiving the coupons in payment of State dues should be as follows: If coupons are tendered in payment of taxes, the collector shall take and receipt for them for the purpose of identification and verification; he shall then require payment of the taxes *in money*, and after marking the coupons with the initials of the owner, shall deliver them to the county judge; the tax-payer may then file his petition in the county or hustings court against the Commonwealth to have a jury impanelled to try whether the coupons "are genuine, legal coupons, which are legally receivable for taxes;" the Commonwealth may be brought into court by service of a summons on her attorney; a trial by jury is then to be had; and if the suit is finally decided in favor of the tax-payer, he is to have the amount paid by him for the taxes refunded out of the first money in the Treasury, in preference to all other claims. The legality of this statute came before the United States Supreme Court in the case of Antoni *v.* Greenhow, the precise question presented being this: Do these changes in the law so far invalidate or embarrass the remedy provided

[1] Hartman *v.* Greenhow, 102 U. S. 672. See Murray *v.* Charleston, 96 U. S. 432.

as to impair the obligation of the contract which the State is under in respect to the receivability of the coupons? The court held that the remedy established by the act of 1882 was substantially equivalent to that in force when the coupons were issued, and hence no contract rights were impaired.[1]

In a still later series of decisions, the court again recognized the inviolability of the contract created by the Funding Act; and proceeded further to hold that an action of detinue would lie against a tax-collector who, in obedience to the act forbidding him to receive the coupons in payment of taxes, had declined to accept them when tendered for that purpose, and had proceeded to levy upon the debtor's goods. For, argued the court, the act in question being in violation of a contract is unconstitutional and void; now the State cannot pass a void law; therefore in contemplation of law it has passed no such statute; no such statute enters into or forms a part of the law of Virginia. On the other hand, the Federal Constitution and

[1] Antoni *v.* Greenhow, 107 U. S. 766. Field and Harlan, JJ., dissented, holding that the remedy was so far obstructed as to destroy the value of the contract. The constitutionality of laws invalidating or embarrassing the remedies for the enforcement of contracts properly belongs to another part of this work, but the Antoni Case is inserted here for the sake of its historical connection.

In a very ingenious and forcible article in the American Law Review for 1883, p. 684, Professor J. N. Pomeroy animadverted severely upon the ruling of the Supreme Court in the Antoni Case, asserting that the court had practically abandoned the principles inaugurated by Chief Justice Marshall and continued unbroken down to recent times, and had impliedly sanctioned the scheme of repudiation devised by the Virginia legislature. But, with all the respect that is due to the name of that eminent writer, we are compelled to submit that a careful reading of the article in question will disclose the fact that it proceeds largely upon a mistaken conception of the precise attitude of the court, is unduly colored by the author's individual politics, and is much exaggerated by the spectral fears of the alarmist.

the Virginia Funding Act do enter into and form a part of that law; and those, both irrepealable by any act of Virginia, make it the duty of the collector to receive the coupons tendered in payment of taxes, and make every step thereafter taken to enforce the tax a wrong and without warrant of law. This strips the defendant of his official character, and makes him a private wrong-doer and liable to a personal action. Thus far the court were not divided. But the Chief Justice and Justices Bradley, Miller, and Gray dissented from the judgment of the court on the ground that such an action would be, substantially and in its legal effect, a suit against the State of Virginia, within the meaning of the Eleventh Amendment, and therefore not to be maintained. This, however, does not affect the value of the case as an authority upon the subject of legislation impairing the obligation of contracts.[1]

Finally, the Supreme Court has decided that an assessment which, by a Virginia statute, is made a condition precedent to obtaining a license for pursuing a business or profession within the State, is a tax, debt, or demand, within the meaning of the Funding Act making the coupons receivable for taxes, etc.; and a person making a tender of the proper amount in coupons is at once entitled (other requisites being complied with) to enter upon his business or profession.[2] We have thus stated the points of law involved and decided in the course of this remarkable litigation. It is not our province to comment upon the ethical or political aspects of the story. But surely it is not too much to say that it would be difficult, in all

[1] Poindexter *v.* Greenhow, 114 U. S. 270; White *v.* Greenhow, 114 U. S. 307; Chaffin *v.* Taylor, 114 U. S. 309; Allen *v.* Railroad, 114 U. S. 311; Carter *v.* Greenhow, 114 U. S. 317; Pleasants *v.* Greenhow, 114 U. S. 323.

[2] Royall *v.* Virginia, 116 U. S. 572; Harvey *v.* Virginia (U. S. Cir. Ct. E. Dist. Va. 1884), 20 Fed. Rep. 411.

the annals of history, to match this spectacle of a great commonwealth persistently seeking a means to violate its plighted faith, and lashed back to its duty by the unsparing hand of the judiciary.

§ 88. **State Banks and their Notes.** — The questions that have arisen out of the establishment, by several of the States, of fiscal agencies, and the quality imparted to their notes of being legal tender to the State for taxes and other demands, are closely allied in principle to those discussed in the preceding section. Thus, in 1836, the State of Arkansas chartered a bank, the whole of the capital stock of which belonged to the State, and of which the president and directors were appointed by the legislature; it was provided in the charter that the bills and notes of this institution should be receivable in payment of all debts due to the State; but in 1845 this provision was repealed. It was held by the Supreme Court of the United States that the clause imparting to the paper of the bank the quality of receivability for State dues constituted a contract between the State on the one hand and all the holders of the bank's bills on the other, and that the repeal could not be allowed to affect such bills as were in circulation at the time.[1] But the court ruled, on a very similar state of facts, that a statute was not unconstitutional which changed the remedy against a collector who wrongfully refused to accept the notes when tendered in payment of taxes, from a proceeding by *mandamus* to a process by which the debtor

[1] Woodruff *v.* Trapnall, 10 How. 190 (overruling Woodruff *v.* Attorney-General, 3 Engl. 236; Paup *v.* Drew, 4 Engl. 205); Curran *v.* Arkansas, 15 How. 304. See Graniteville Co. *v.* Roper, 15 Rich. 138. The charter of the Bank of Tennessee contained a clause making its circulating notes receivable in payment of taxes, but afterwards, by a constitutional amendment adopted in 1865, the State declared the issues of the bank during the insurrectionary period void, and forbid their receipt for taxes. *Held*, that this was within the constitutional prohibition: Keith *v.* Clark, 97 U. S. 454.

was required to make payment in money under protest, sue the collector in any court of competent jurisdiction, and obtain a judgment for the refunding of his money.[1]

§ 89. **Payment of Judgments against Municipalities.** — An act of the legislature forbidding a city to levy taxes to pay judgments against it is unconstitutional, when, as the law stands, the effect of the legislation is to deprive the creditor of the only effectual means of collecting his debt.[2] So a State statute declaring that the taxes levied by a certain city shall not exceed a given amount annually, does not excuse the municipality from levying a tax to pay a judgment recovered against it, when it had authority so to do at the date of the contract on which the judgment is founded.[3] Nor is the creditor's right to have certain assessments made for the purpose of paying his judgment lost by the fact that such assessments were not properly made.[4] Again, a statute to the effect that no judgment shall be entered against a municipal corporation, except upon proof that the amount sought to be recovered still remains unexpended in the treasury to the credit of the appropriation to the specific object or purpose under the claim sued for, cannot affect a claim for work performed before the passage of that act.[5] So an act prohibiting execution upon judgments thereafter recovered against a

[1] Tennessee *v.* Sneed, 96 U. S. 69; South Carolina *v.* Gaillard, 101 U. S. 433; State *v.* Gaillard, 11 S. C. 309.

[2] Soutter *v.* Madison, 15 Wis. 30. But in the case of Sharp *v.* Contra Costa County, 34 Cal. 284, it is said that the law of private contracts is not applicable where the State or a county government is a party, in respect to the mode or measure of enforcement.

[3] Butz *v.* Muscatine, 8 Wall. 575. But this does not apply to the case of raising money by taxation to pay a judgment founded on a *tort*; a judgment in tort is not a contract. Louisiana *v.* Mayor of New Orleans, 109 U. S. 285. And see *infra*, § 131.

[4] Favrot *v.* East Baton Rouge, 34 La. An. 491.

[5] Wood *v.* Mayor, 6 Rob. (N. Y.) 463.

municipal corporation, unless the legislature shall make provision for the payment thereof, is unconstitutional and void as to judgments upon contracts entered into before the act took effect.[1] But an act requiring judgments against a city to be registered with its controller before they are paid, does not impair existing remedies so far as to be unconstitutional.[2]

§ 90. **Repeal of Appropriations and Tax Laws.** — After an appropriation has been made by the legislature to meet the requirements of a contract entered into by the State, and after the funds have been received into the treasury, it cannot deprive the party entitled thereto of the funds by repealing the appropriation.[3] So an act requiring that demands against the State, excepting for the salaries of officers, must receive the approval of a board of examiners before warrants therefor can be issued by the State controller, is unconstitutional so far as it applies to previous contracts by the State giving an absolute right to such warrants; since, whether considered as affecting the right or the remedy, it impairs the obligation of such contracts.[4] When a municipal corporation, having general power to

[1] Hadfield *v.* Mayor, 6 Rob. (N. Y.) 501. But a State statute which authorizes a city to sell its waterworks (which were *not* liable to judicial sale for the debts of the city) for stock of a corporation, and declares that such stock shall not be liable to seizure for the debts of the municipality, is not void under the United States Constitution as impairing the obligation of existing contracts against the city. New Orleans *v.* Morris, 105 U. S. 600. And in Louisiana it is said that the judicial mortgage resulting from the inscription of a judgment forms no part of the contract on which the judgment was rendered; hence a law declaring that no inscription of a judgment against a certain city shall operate as a judicial mortgage, is not unconstitutional. New Orleans *v.* Holmes, 13 La. An. 502.

[2] Louisiana *v.* New Orleans, 102 U. S. 203.

[3] McCauley *v.* Brooks, 16 Cal. 11; Dodd *v.* Miller, 14 Ind. 433. But see Young *v.* Territory, 1 Oreg. 213.

[4] McCauley *v.* Brooks, 16 Cal. 11.

levy taxes to pay its debts, enters into a contract, the legislature cannot take away or substantially impair the right to compel the corporation, by *mandamus*, to exert its taxing power;[1] nor repeal or modify the taxing power of the corporation to such an extent as to deprive the holder of the contract of all adequate and efficacious remedy.[2]

§ 91. **Regulation of Public Affairs.** — There are certain cases in which the State has been allowed to depart from the express terms of its contracts, on the ground that such change is expedient for the public economy, or necessary for the due regulation of its internal affairs. In such case, it is understood that the other contracting party has had this contingency in view, and hence his rights are not infringed. For instance, the legislature has constitutional power to pass an act changing the location of the seat of justice of a county, although a contract for the purchase of a particular site had already been made by the commissioners appointed by law for that purpose.[3] So a right of exemption from jury duty by five years' service in certain fire companies, chartered with that right, may be repealed by the legislature even in reference to a person who has performed that service.[4] In another case, the legislature had conferred power upon the board of supervisors to publish the delinquent tax-list of the county; the board entered into a contract with the publisher of a newspaper for publishing such list; but before publication the act conferring that power upon the board was repealed. It was held that the repealing act was not in violation of the contract for publishing; and that the publisher, in entering into the

[1] Rahway Tax Assessors *v.* State, 44 N. J. L. 395.

[2] Louisiana *v.* Police Jury, 111 U. S. 716; Goodale *v.* Fennell, 27 Ohio St. 426.

[3] State *v.* Jones, 1 Ired. 414.

[4] Dunlap *v.* State, 76 Ala. 460. The legislature may take away an immunity given from working the roads. *Exp.* Thompson, 20 Fla. 887.

contract, must be deemed to have acted with reference to the fact that the matter of publishing the list was within the control of the legislature.[1]

§ 92. **Contracts of City for Municipal Improvements.** — When a city has granted to a party, for a consideration, the right to introduce, distribute, and sell water within the city (or, in general, to make any municipal improvement), it cannot, in derogation of its contract, by ordinance or otherwise, impose additional burdens on the grantee, or vary the conditions contained in the contract.[2]

§ 93. **Distinction between Breach of Contract and Violation of its Obligation.** — While it is true that the State cannot violate the obligation of its contracts, yet it is sometimes said that the State, while recognizing the binding force of its engagements, may, like any individual, refuse to proceed further with them and abide the consequences. Thus it is said: "The State may at any time abandon an enterprise which it has undertaken, and refuse to allow the contractor to proceed, or it may assume the control and do the work embraced in the contract, by its own immediate servants and agents, or enter into a new contract for its performance by other persons, without reference to the contract previously made, and although there has been no default on the part of the contractor. The State in the case supposed would violate the contract, but the obligation of the contract would not be impaired by the refusal of the State to perform it. The original

[1] Pott *v.* Sheboygan Co., 25 Wis. 506.

[2] Los Angeles *v.* Los Angeles City Water Co., 61 Cal. 65. Where a city granted the right of way to a horse-railroad company, and the company accepted the grant and built a part of the road at great expense, it was *held*, that an act of the legislature making the right of the company to build the rest of the road dependent on the consent of a majority of the abutting property-owners, was unconstitutional as impairing the obligation of the contract. Hovelman *v.* Railroad, 79 Mo. 632.

party would have a just claim against the State for any damages sustained by him from the breach of the contract, and although the claim could not be enforced through an action at law, the remedy by appeal to the legislature is open to him, which can, and it must be presumed will, do whatever justice may require in the premises."[1] But this doctrine, it is submitted, must be applied with great caution, and only in cases where the distinction is perfectly clear. Suppose, for example, that it had been urged, in the Virginia Coupon cases,[2] that the act repealing the law whereby the coupons were made legal tender for taxes was merely a *breach* of contract by the State, not a violation of its obligation, — that the State recognized the validity of its engagement, but simply declined to proceed further with it, — would that have altered the decision of the court in those cases? It is impossible to think so.

§ 94. **Right to sue the State is not a Contract.** — When a State passes an act permitting itself to be sued, it may prescribe the terms and conditions on which the privilege may be claimed, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it; in doing the latter, it impairs no contract rights.[3] But this does not apply to counties.[4]

II. Tenure of Public Office and Compensation.

§ 95. **Public Office is not a Contract.** — Among the contracts between a State and an individual, which are pro-

[1] Andrews, J., in Lord *v.* Thomas, 64 N. Y. 107. This view may seem to derive some support from Brown *v.* Colorado, 106 U. S. 95; but the question was not necessary to that decision.

[2] *Supra*, § 87.

[3] Beers *v.* Arkansas, 20 How. 527.

[4] Western Arkansas Bank *v.* Sebastian Co., 5 Dill. 414.

tected from invasion by the Federal Constitution, is not to be reckoned the tenure by which a public officer holds his position. His appointment or election to office does not create any contract between the government and himself, within the meaning of the prohibitory clause, that he shall continue the incumbent of that office for the period named, or that his duties shall remain the same, or that the emoluments of the office shall not be changed, unless, indeed, the matter is regulated by the constitution of the State.[1]

[1] Butler *v.* Pennsylvania, 10 How. 402; Conner *v.* New York, 5 N. Y. 285; Benford *v.* Gibson, 15 Ala. 521; State *v.* Smedes, 26 Miss. 47; Supervisors *v.* Luck, 9 Va. L. Jour. 186; Farwell *v.* Rockland, 62 Me. 296; State *v.* Hermann, 11 Mo. App. 43; People *v.* Banvard, 27 Cal. 470; People *v.* Haskell, 5 Cal. 357; Commonwealth *v.* Bailey, 81 Ky. 395; Barker *v.* Pittsburgh, 4 Pa. St. 49; Harvey *v.* Rush County, 32 Kans. 159; People *v.* Devlin, 33 N. Y. 269; Coffin *v.* State, 7 Ind. 157; Donahue *v.* Will County, 100 Ill. 94 (Walker, J., saying: "It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties, not for his but the public benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office, or had any title to it"). And see other citations in the following notes. The only State where this doctrine is positively denied is North Carolina. In King *v.* Hunter, 65 N. C. 603, it is said: "Nothing is better settled than that an office is property. There is a contract between him and the State that he will discharge the duties of his office, and he is pledged by his bond and oath; and that he shall have the emoluments, and the State is pledged by its honor. When the contract is struck, it is as complete and binding as a contract between individuals; and it cannot be abrogated or impaired except by the consent of both parties. We do not wish to be understood as holding that there is any iron rule of construction of the details of the contract; on the contrary, there must be some flexibility to suit the convenience of the public and the convenience of the officer, such as would be implied from the nature of the contract, and such as circumstances make necessary, *e. g.*, that if it happened that the emoluments are so inadequate that for them the officer cannot afford to serve the public,

Nor are public offices incorporeal hereditaments; nor have they the properties or qualities of grants; at least in this country.[1] In the leading case on this subject it is said: "The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain definite, fixed rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so too are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to re-appoint them after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would

they may be increased, or if they be so extravagant as to be burdensome to the public, they may be diminished. But this must be done in good faith and in fair dealing, and with no view to evade or directly or indirectly to impair the substance of the contract." And see Hoke *v.* Henderson, 4 Dever. 1; Cotten *v.* Ellis, 7 Jones (N. C.), 545; Brown *v.* Turner, 70 N. C. 93; Vann *v.* Pipkin, 77 N. C. 408.

[1] Conner *v.* New York, 5 N. Y. 285. But see 2 Blackstone's Comm. 36.

appear to be reconcilable with neither common justice nor common sense."[1]

§ 96. **Permanence of Office, Term, Duties, Vacancy.** — Applying these principles, we find, in the first place, that where a particular office has been created by statute, and is not regulated by the organic law of the State, the legislature may, in their discretion, *abolish the office*, without regard to the tenure or expectations of any one who happens to fill it at the time; and this without overstepping their constitutional power.[2]

In the second place, in the absence of constitutional restrictions, a legislature, having power to create a particular office, and to regulate the manner in which it shall be filled and the duties of the incumbent, has authority to pass an act lengthening or abridging the *term* of such office; and its action in the matter will govern the case of an officer elected or appointed before the amendatory law was enacted.[3]

In the next place, the legislature may increase the burdens or *duties* of the office without enhancing the compensation paid to the incumbent, or diminish the compensation without lessening the duties.[4] It would undoubtedly be competent to require, for example, that the officer should give bonds in a larger amount than was fixed by law at the time of his appointment.

Again, the incumbent of a public office, created by statute, holds it subject to the power of the legislature to declare the office vacant, and to appoint another person

[1] Butler *v.* Pennsylvania, 10 How. 402, 416, opinion by Daniel, J.

[2] State *v.* Hermann, 11 Mo. App. 43; Bryan *v.* Cuttell, 15 Iowa, 538; Conner *v.* New York, 2 Sandf. 355.

[3] Territory *v.* Pyle, 1 Oreg. 149; People *v.* Van Gaskin (Sup. Ct. Montana, 1885), 5 West C. Rep. 651.

[4] Turpen *v.* Comm'rs, 7 Ind. 172; Conner *v.* New York, 2 Sandf. 355; Bryan *v.* Cuttell, 15 Iowa, 538.

to fill the vacancy.[1] "We are equally clear," say the court in Iowa, "that it is within the legislative power to add to or change the method in which vacancies may occur, and make such change applicable to existing offices and those holding them."[2]

§ 97. **Salary may be diminished.** — It is equally well settled that an act reducing the compensation or salary of a statutory officer, after he has entered upon his term of service, is valid and constitutional.[3] Such an act violates no contract rights. Thus it is said, of statutory offices as distinguished from those provided for by the constitution, "That there is no contract, express or implied, for the permanence of a salary, is shown by the constitutional provision for the permanence of the salaries of the governor and judges as exceptions. That there is a strong moral obligation, independent of constitutional provisions, is not to be disputed; but a moral obligation, however sacred, is not a ground for the enforcement of it as a legal right, with which alone we have power to deal."[4] So where a judge has been elected by the legislature, the legislature may curtail the territory of his jurisdiction down to the constitutional minimum, although the effect is to diminish his compensation.[5] And so, if the emoluments of the office are derived from fees, the legislature has authority to abolish some of the fees and reduce others, or to do away with them altogether and substitute a compensation by salary.[6]

[1] People *v.* Banvard, 27 Cal. 470; Attorney-General *v.* Squires, 14 Cal. 13; People *v.* Haskell, 5 Cal. 357; People *v.* Van Gaskin, 5 West C. Rep. 651.

[2] Bryan *v.* Cuttell, 15 Iowa, 538, Wright, C. J.

[3] Commonwealth *v.* Bacon, 6 Serg. & R. 322; People *v.* Devlin, 33 N. Y. 269; Commonwealth *v.* Bailey, 81 Ky. 395; State *v.* Smedes, 26 Miss. 47; Harvey *v.* Rush Co., 32 Kans. 159.

[4] Barker *v.* Pittsburgh, 4 Pa. St. 49.

[5] Foster *v.* Jones, 79 Va. 642.

[6] Conner *v.* New York, 2 Sandf. 355.

§ 98. **Salary actually earned may be recovered.** — It was at one time held, in Louisiana, that since the obligation of a municipal corporation to pay a salary fixed by law, to one of its officers, was not a matter of contract, therefore a constitutional inhibition of a special tax to satisfy a judgment enforcing such an obligation was not in contravention of the Federal Constitution.[1] But the United States Supreme Court holds that the duty of paying for services which have been actually rendered by a public officer and accepted by the governing power, no longer rests in the discretion of the legislature, but is as imperative as any other obligation arising *ex contractu*. Mr. Justice Miller says: "After the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement. The vice of the argument of the supreme court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation;" and hence a statute which so limits the taxing power of the municipality indebted for

[1] State *v.* Madison Police Jury, 35 La. An. 544; Scale *v.* Madison, 34 La. An. 365. See State *v.* Jefferson Police Jury, 34 La. An. 41. In Swann *v.* Buck, 40 Miss. 268, it was held that a joint resolution directing the auditor to issue no more warrants on the treasurer until further orders, did not impair the obligation of any contract between the State and one of its officers, whose salary remained unpaid, in consequence, after it was due. But this decision also is incompatible with the rulings of the United States Supreme Court.

the services rendered that the promised compensation cannot be paid, is invalid.[1] And in another case it is said: "The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity."[2]

§ 99. **Distinction as to Constitutional Offices.** — There is an important difference, as respects legislative control, between those offices which are created by statute, and those which are provided for by the organic law of the commonwealth. Where the constitution of the State provides for the appointment to an office in a particular manner, the legislature has no power to create a new office for the performance of the same or the principal part of the same duties, and to direct the appointment to be made in another manner.[3] And so where the constitution prescribes the duration of certain offices, the legislature has no authority, even for the purpose of changing the beginning of the term, to alter the duration.[4] Nor has the general assembly power to legislate out of office a judge whose office is created, and whose tenure of office prescribed, by the constitution.[5] It is needless to add that when the compensation of a public officer is fixed by the constitution, the legislature cannot interfere with it, either by addition or subtraction.

[1] Fisk *v.* Police Jury, 116 U. S. 131, per Miller, J. Where a certain fee is allowed to the prosecuting attorney upon securing a conviction, he has no vested right to the fee until the conviction, and therefore an act passed after an indictment found, but before a conviction, will govern as to his compensation for such conviction. Haynes *v.* State, 3 Humph. 480; s. c. 39 Am. Dec. 187.

[2] Butler *v.* Pennsylvania, 10 How. 402, 416.

[3] Warner *v.* People, 2 Denio, 272.

[4] Howard *v.* State, 10 Ind. 99.

[5] State *v.* Draper (Sup. Ct. Mo. 1872), 11 Am. L. Reg. 552. See Chancellor's Case, 1 Bland, Ch. 595.

But although the legislature cannot abolish, either directly or virtually, a constitutional office, yet it is held (and with reason) that when an office is created by the constitution, and defined as to term and salary, the *people*, in their sovereign capacity, may, by the adoption of a new constitution, terminate both, without regard to the rights, the interests, or the expectations of the incumbent;[1] but saving, of course, his vested right to compensation already earned.

But when the tenure and salary of an office are fixed by a statute, though the office itself is created by the constitution, it is equally within the legislative control, as to such tenure and compensation, as in the case of offices created by statute, except that the office could not be virtually abolished by a colorable reduction of the compensation, or by taking it away altogether.[2]

§ 100. **Not Everyone employed by the State is a Public Officer.** — One may be employed to perform a service under a contract with a State without becoming a public officer, and when such is the case, the legislature has no power to vary the terms of the contract or repudiate it.[3]

[1] Conner *v.* New York, 2 Sandf. 355; Coffin *v.* State, 7 Ind. 157.

[2] Conner *v.* New York, 2 Sandf. 355; Warner *v.* People, 2 Denio, 272.

[3] Hall *v.* Wisconsin, 103 U. S. 5.

CHAPTER IV.

LEGISLATIVE INTERFERENCE WITH CONTRACTS BETWEEN INDIVIDUALS.

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I. Private Contracts in General.

§ 101. **What Contracts are protected.** — The language of that clause of the Federal Constitution which forbids the States to "pass any law impairing the obligation of contracts" is sufficiently comprehensive to include every species of contract known to the law. That a grant by a State, completely executed, is embraced within the protection of this clause, we have already had occasion to demonstrate.[1] There is therefore no difference, in this respect, between executed and executory contracts. It is also sufficiently apparent from the rulings of the Supreme Court that no distinction is to be taken, in the application of this principle, between contracts which rest upon the express agreement of the parties and those which the law implies from their conduct or dealings.[2] Hitherto we have been concerned with contracts to which a State was a party; it is now our purpose to examine the force of the constitutional prohibition in its application to contracts exclusively between private individuals.

§ 102. **How a Contract may be impaired.** — In the first place, it is perfectly clear that the interference of the legislature in the transactions of private parties, by way of destroying their contracts, or by annulling or modifying the

[1] *Supra*, § 11.

[2] See, for example, Fisk *v.* Police Jury, 116 U. S. 131.

terms and conditions which the parties have expressly incorporated into their contracts, is not the only method in which such contracts can be impaired. There remains the whole body of the law applicable to existing contracts, — those rules of municipal, commercial, or international law which give force and validity to the engagement of the parties, or color and define their intentions, or supply the unwritten terms of their agreement. This, by some judges, is denominated the *law* of the contract, in contradistinction from the contract itself or its expressed terms.[1] "It is also settled," says Mr. Justice Swayne, "that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement."[2] So Judge Story says: "It is perfectly clear that any law which enlarges, abridges, or in any manner changes the intention of the parties resulting from the stipulations

[1] In the dissenting opinion of Gardiner, J., in Danks *v.* Quackenbush, 1 N. Y. 129, he says: "And indeed the distinction between the contract itself and the *law* of the contract is rather formal than substantial. The first, according to the spirit of the authorities, applies where the parties have defined their obligations and duties in express terms. The second, to those cases where the agreement is incomplete, and frequently unintelligible in these respects without the aid of the law, which, in the language of Judge Story, 'performs the office only of expressing what is tacitly admitted by the parties to be a part of their intention.'"

[2] Van Hoffman *v.* Quincey, 4 Wall. 535, Swayne, J. The learned judge continues: "Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages; and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement."

in the contract necessarily impairs it."[1] We may therefore conclude that any statute is unconstitutional, as impairing the obligation of contracts, which introduces a change into (1) the express terms of the contract, (2) its legal construction, (3) its validity, (4) its discharge, or (5) the remedy for its enforcement. The last item, however, is subject to such important qualifications, and has given rise to such extended and varied litigation, that it requires treatment in a separate chapter.[2] These several points, in which the legislature may infringe upon the contract rights of private parties, will be considered in their order. But first it is important to note that the —

§ 103. **Extent of the Change is immaterial.** — As stated by Mr. Justice Washington: "The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."[3] In respect to the *remedy*, however, the rule is otherwise, as we shall see more fully hereafter. It is not every change in the remedy that impairs the obligation of the contract, but only those which so far hinder or embarrass it as to leave practically no substantive remedy to the creditor.[4]

§ 104. **Laws changing Terms of Contract.** — Any provision in a statute substantially defeating the ends contem-

[1] 3 Story, Comm. on Const. p. 250; stating that whether the law affects the validity, construction, duration, discharge, or evidence of the contract, it impairs its obligation.

[2] *Infra*, Chap. V.

[3] Green *v.* Biddle, 8 Wheat. 1, 84, Washington, J.; Winter *v.* Jones, 10 Ga. 190.

[4] *Infra*, §§ 139–144.

plated by the parties to a contract, as by making necessary the performance of new conditions, not required by the law of the contract, must necessarily impair its obligation.[1] But the mere allowance to a defendant, who has taken and held possession of land in good faith, of full payment for improvements, does not destroy or impair any rights of the owner.[2]

§ 105. **Redemption Laws.** — A statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period for redemption beyond the time formerly allowed, cannot constitutionally apply to the case of a sale under a mortgage executed before its passage. It would impair either the express terms of the contract or the *law* of the contract. That is, if the mortgage contains stipulations as to the terms and conditions of sale upon default, these cannot be modified. And if not, then the provisions of the existing law as to redemption are written into the contract by implication of law, and cannot be varied. Thus Chief Justice Taney, in speaking of a certain State law, says: "It declares that, although the mortgaged premises should be sold under the decree of the Court of Chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment-creditor to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive

[1] Robinson *v.* Magee, 9 Cal. 81.

[2] Scott *v.* Mather, 14 Tex. 235. But see, *per contra*, Nelson *v.* Allen, 1 Yerg. 360.

the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value. . . . Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligation, and is prohibited by the Constitution."[1] This view is denied in one State,[2] but the preponderance of authority is in its favor.[3]

On the same principle it is held that where lands have been sold for taxes, during the existence of a law which entitled the purchaser to an absolute deed, or to a lease for a limited term, in case the premises were not redeemed within a specified term, it is not competent for the legislature to extend the time for the redemption, and thus to deprive the purchaser of the right to the possession and enjoyment of the premises, without providing an adequate compensation for his loss of the use of the premises during the time of such extension.[4] But a statute requiring the holder of a certificate of tax-sale to give notice to any person who might be found in possession of the premises, before being entitled to a deed, does not impair the obligation of the contract made at the sale; for it does not "lessen the binding efficacy of plaintiff's contract."[5]

[1] Bronson *v.* Kinzie, 1 How. 311, 319, Taney, C. J.

[2] Heyward *v.* Judd, 4 Minn. 483; Berthold *v.* Holman, 12 Minn. 335; Berthold *v.* Fox, 13 Minn. 501. These cases hold that an act regulating the foreclosure of real estate, extending the time of redemption, and reducing the rate of interest, and giving the mortgagor the right of possession upon certain terms during the time of redemption, does not interfere with the obligation of a mortgage contract entered into before its passage, and is not, on that ground, unconstitutional.

[3] Bronson *v.* Kinzie, 1 How. 311; Howard *v.* Bugbee, 24 How. 461; Coddington *v.* Bispham, 36 N. J. Eq. 574; Malony *v.* Fortune, 14 Iowa, 417; Mundy *v.* Monroe, 1 Mann. (Mich.) 68.

[4] Dikeman *v.* Dikeman, 11 Paige, Ch. 484; Robinson *v.* Howe, 13 Wis. 341.

[5] Curtis *v.* Whitney, 13 Wall. 68.

§ 106. **Laws changing Rate of Interest.** — The obligation of the debtor to pay interest on money due by contract, after the maturity of the debt, is an integral part of the contract, whether incorporated by the parties in their agreement or implied by law from their presumed intention; hence an act changing the legal rate of interest cannot affect contracts entered into before its passage, although they may become due and payable after the enactment.[1] This rule, as applied to cases where the rate of interest is not specified by the parties, is one of the best examples of the application of the prohibition to statutes affecting the *law* of the contract, as distinguished from the contract itself. But it is held that an act which entitles the purchaser at a foreclosure sale, in case of redemption, to receive interest upon his bid at a lower rate than that prescribed by the previous law, is applicable to all decretal sales of mortgaged premises thereafter made, although the mortgage was given before the passage of the act.[2] The reason of this is, that such a change does not affect the obligation of the contract between the parties to the mortgage, since it does not diminish the duty of the mortgagor to pay what he agreed to pay, nor affect any remedy which the mortgagee had, by existing law, for the enforcement of his contract; while, as to the rights of the purchaser himself, it is prospective. And it is said that an act introducing a change in the interest laws, which is mainly by way of relief from penalties or consequences in the nature of penalties, does not impair the obligation of contracts in being at the time of its passage, but rather enforces or validates them.[3]

[1] Roberts *v.* Cocke, 28 Gratt. 207; Cecil *v.* Deyerle, 28 Gratt. 775; Myrick *v.* Battle, 5 Fla. 345.

[2] Connecticut Mutual Life Ins. Co. *v.* Cushman, 108 U. S. 51.

[3] Wood *v.* Kennedy, 19 Ind. 68.

§ 107. **Laws affecting Negotiable Instruments.** — In the law relating to negotiable paper there are several important elements which usage, or the doctrines of commercial law, cause to be appended to the written terms of the contract. And these implied stipulations cannot constitutionally be altered by a retroactive statute. For example, as the condition of due notice is regarded as incorporated in the contract of the drawers and indorsers of notes and bills, it is not within the power of the State legislature to dispense with it, by statute, or to change the time within which notice must be given, so as to affect existing instruments.[1] Again, it was held in Massachusetts, at the common law, that a third person who indorses a promissory note in blank, without individual consideration, before its delivery to the payee, and for the purpose of lending faith and credit to the note, is liable as a joint-maker, and hence not entitled to notice or protest.[2] But in 1874 a statute was passed providing that "all persons becoming parties to promissory notes payable on time by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof the same as indorsers." It was held that this act could not constitutionally be made to apply to a note executed before the passage of the statute.[3] But a

[1] 2 Daniel on Neg. Instr. § 970 *a*, citing Duerson *v.* Alsop, 27 Gratt. 230; Farmers' Bank *v.* Gunnell, 26 Gratt. 144; Cook *v.* Googins, 126 Mass. 410. In Farmers' Bank *v.* Gunnell, *supra*, it was held that an ordinance of the Virginia Convention passed June 24, 1861, which provided that parties to notes, bills, and checks, payable in certain cities and towns, should remain bound after the maturity of such notes, etc., without demand, protest, or notice, was, as to notes made and discounted before its passage, unconstitutional as impairing the obligation of contracts.

[2] Essex Co. *v.* Edmands, 12 Gray, 273; Austin *v.* Boyd, 24 Pick. 64; Way *v.* Butterworth, 108 Mass. 509.

[3] Cook *v.* Googins, 126 Mass. 410. The act referred to was Mass. Stat. 1874, c. 404.

law under which the signer of a note made in one State and payable generally to a citizen of another State or order, may be charged as the trustee of the payee, is not unconstitutional as impairing the obligation of contracts.[1]

§ 108. **Dower.** — There is no constitutional provision guarding the common law right of dower; it is not a part of the marriage contract, but results from the operation of laws existing at the time of the husband's death. Consequently a law affecting this subject may constitutionally apply to cases where the marriage was contracted before its passage, but the death of the husband occurred after it went into operation.[2]

§ 109. **Statutes affecting the Construction of Contracts.** — It is in general true that no act of the legislature can alter the nature and legal effect of an existing contract, to the prejudice of either party, nor give to such a contract a judicial construction which shall be binding on the parties or on the courts of law.[3] Still, a law which merely establishes a rule of evidence with respect to certain past transactions cannot be said to impair the obligation of contracts.[4] It is on this principle that we must support the decisions that a statute providing that no action shall be brought and maintained upon a special contract or promise to pay a debt from which the debtor has been discharged by the bankrupt law of the United States or the insolvent laws of the State, unless such promise is in writing and signed by the party to be charged, may constitutionally apply to suits instituted after the passage of the act, and based on a verbal promise made before its enactment. As observed by Judge Kent, "The act does not, in terms, declare the con-

[1] Philbrick *v.* Philbrick, 39 N. H. 468.

[2] Melizet's Appeal, 17 Pa. St. 449; Barbour *v.* Barbour, 46 Me. 9; Lawrence *v.* Miller, 1 Sandf. 516; Magee *v.* Young, 40 Miss. 164.

[3] King *v.* Bank, 15 Mass. 447; Weaver *v.* Maillot, 15 La. An. 395.

[4] Herbert *v.* Easton, 43 Ala. 547.

tract void, nor does it affect, in any way, the original debt or judgment. It simply gives a rule of evidence as to the proof of a new promise to revive the old debt; or, in other words, declares that the law will furnish no remedy to enforce such a promise, unless it is in writing."[1] So a statute making the protest of an inland promissory note evidence of the facts therein stated, applies as well to protests made before as after its passage, and is not unconstitutional.[2] On the same principle, an act allowing the defense of want of consideration to be pleaded to all actions on sealed contracts does not impair their obligation; and in an action brought on a sealed instrument executed in another State, where the common-law rule in regard to the consideration of sealed instruments prevails, the want of consideration may be shown.[3] Again, a statute provided that a creditor might compound or compromise with a joint-contractor or co-obligor without releasing the others, and that the right of contribution should not be affected thereby; it was held that the obligation of contracts then existing was not impaired by this provision of law.[4]

§ 110. **Laws impairing the Validity of Contracts.** — It is plain that any statute which should declare all existing contracts of a certain class to be invalid would, in the broadest sense, impair their obligation. But not every act

[1] Kingley *v.* Cousins, 47 Me. 91. "Where, however, by the operation of existing laws, a contract cannot be enforced without some new action of a party to fix his liability, it is as competent to prescribe by statute the requisites to the legal validity of such act as it would be in any case to prescribe the legal requisites of a contract to be thereafter made. Thus, though a verbal promise is sufficient to revive a debt barred by the statute of limitations or by bankruptcy, yet this rule may be changed by a statute making all such future promises void unless in writing." Cooley, Const. Lim. 293.

[2] Fales *v.* Wadsworth, 23 Me. 553.

[3] Williams *v.* Haines, 27 Iowa, 251.

[4] Yuille *v.* Wimbish, 77 Va. 308.

which touches upon the validity of contracts is for that reason unconstitutional. A distinction is to be taken between laws which remove a previous stigma of illegality from a contract, and such as interpose a new obstacle to its being held valid. That is, an act declaring that certain circumstances which, at the making of the contract, would have rendered its consideration illegal and so prevented its enforcement by process of law, shall no longer constitute a defense to an action upon it, is not within the purview of the limitation.[1] For example, a statute which repeals existing usury laws, and destroys defenses to existing contracts on the ground of usury, does not deprive parties of vested rights nor impair the obligation of contracts.[2] But on the other hand, the legislature cannot declare that certain facts shall be a defense to actions brought on previously existing contracts.[3] This would obviously impair their validity, and so overstep the constitutional power of the legislature. An apposite example is found in the provision of the Florida constitution that "all judgments and decrees rendered in any of the courts of this State since the tenth day of January, 1861, upon all deeds or bills of sale, or upon any bond, bill, note, or other evidence of debt, based upon the sale or purchase of slaves, are hereby declared set aside, and the plea of failure of consideration shall be held a good defense in all actions to said suit." This was held to be a law operating retroactively upon the contract; its effect is to make that which was a good consideration for a contract, at the time and place it was en-

[1] Hill *v.* Smith, 1 Morris (Iowa), 70.

[2] Ewell *v.* Daggs, 108 U. S. 143; citing Curtis *v.* Leavitt, 15 N. Y. 9; Bank *v.* Allen, 28 Conn. 97; Welch *v.* Wadsworth, 30 Conn. 149; Andrews *v.* Russell, 7 Blackf. 474; Wood *v.* Kennedy, 19 Ind. 68; Danville *v.* Pace, 25 Gratt. 1; Parmelee *v.* Lawrence, 48 Ill. 331; Woodruff *v.* Scruggs, 27 Ark. 26.

[3] Cornell *v.* Hichens, 11 Wis. 353.

tered into, not a good consideration; this is to destroy the obligation of the contract, and it is therefore void. The abolition of slavery, added the court, or the emancipation of the slave, does not destroy the right of action which a vendor of the slave so emancipated has against the purchaser who owned the slave at the time of his emancipation; and any action of a convention of this character, which directs the courts to hold otherwise, is unconstitutional.[1] An exactly parallel case is that of a law, or constitutional enactment, declaring that all agreements the consideration of which was Confederate money, notes, or bonds, are null and void, and that no action shall be brought or maintained in the courts of the State on any such contract. Such provisions have several times been held invalid, as not only impairing, but absolutely destroying, the obligation of the contract.[2]

§ 111. **Recording Acts.** — A right cannot in general be said to be impaired by a statute which merely imposes an additional duty on the owner in order to preserve it. Hence a law requiring previously executed conveyances to be recorded, in order to be valid against subsequent purchasers, does not impair the obligation of contracts nor divest vested rights.[3] Mr. Justice Baldwin said: "It is within the undoubted power of State legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded

[1] McNealey *v.* Gregory, 13 Fla. 417, the clause under consideration being Fla. Const. of 1868, Art. 17, § 26. The precise point was decided the same way in McElvain *v.* Mudd, 44 Ala. 48; Fitzpatrick *v.* Hearne, 44 Ala. 171; Curry *v.* Davis, 44 Ala. 282, the law being § 3 of Ordinance 38, adopted by Alabama Convention of 1867; and in Calhoun *v.* Calhoun, 2 S. C. 283.

[2] Henderson *v.* Ins. Co., 25 La. An. 343; Forcheimer *v.* Holby, 14 Fla. 239.

[3] Stafford *v.* Lick, 7 Cal. 479; Rochereau *v.* Delacroix, 26 La. An. 584; Vance *v.* Vance, 32 La. An. 186.

within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts."[1] But it is supposed that it would be necessary for such a law to give a reasonable time, after it went into operation, for the recording of existing conveyances. If its effect was to instantaneously annul a prior deed, it would be, so far, unconstitutional.[2]

On the same principle it is held that a law requiring a judgment to be docketed in each county where it is sought to bind real estate of the defendant, although previously it was a lien throughout the State without this, is constitutional and valid.[3] The same is true of an act requiring the acknowledgment of deeds and mortgages.[4] The rule is further illustrated by a recent case in the Supreme Court of the United States. It appeared that a township had agreed, by a contract of subscription, to take stock in a railroad and pay for it in valid negotiable bonds, and, when the subscription was made, a bond signed by the presiding justice of the county court alone would have been sufficient: it was held that the contract of subscription was not impaired by a subsequent law that required the signature of the clerk of the court to the bond in addition to that of the presiding justice; nor was the case different in regard to a subsequent act requiring the bonds to be registered and certified.[5]

§ 112. **Laws affecting the Rule or Mode of Discharge of Contracts.** — Statutes which change the rules relating to

[1] Jackson *v.* Lamphire, 3 Pet. 280, 290, per Baldwin, J.
[2] See *infra*, § 152.
[3] Tarpley *v.* Hamer, 9 Sm. & Mar. 310.
[4] Parrott *v.* Kumpf, 102 Ill. 423.
[5] Hoff *v.* Jasper Co., 110 U. S. 53.

the discharge of contracts, the medium of payment, or the measure of damages, constitute the fourth mode in which legislative interference may impair the obligation of contracts between private individuals.[1] And in the first place, a law which authorizes the discharge of an obligation by payment in anything else than the medium of payment stipulated for by the parties, or which they must be understood to have agreed upon, is unconstitutional as applied to existing contracts.[2] Thus a statute which allows a defendant to elect to give up the property in his possession, for which the contract in suit was made, in full discharge of his indebtedness, impairs the obligation of the contract.[3] It will be remembered that the alterations in the law of legal tender, and the acts passed by several of the States authorizing the satisfaction of debts by the delivery of tracts of barren land or other specific property, were among the very evils sought to be rectified by the introduction of the contract clause into the Constitution.[4] But an act designed to compel parties whose demands are secured in a particular manner to proceed first to exhaust their securities before suing on the original claim, is not an unwarranted assertion of power by the legislature and not in conflict with the Constitution.[5]

An act providing that where the depositor of money in bank disappears and fails to claim it for eight years, the title to it shall, *ipso facto* and without any judicial investigation, vest in the board of trustees of public schools, is unconstitutional as to deposits made before the passage of the act, because it impairs the contract between the bank and the depositor. The disappearance of the depositor for

[1] *Supra*, § 102.
[2] Dundas *v.* Bowler, 3 McLean, 397.
[3] Abercrombie *v.* Baxter, 44 Ga. 36.
[4] *Supra*, § 1.
[5] Swift *v.* Fletcher, 6 Minn. 550.

that length of time and his failure to claim the money, though negative evidence, authorizes the presumption of death, but not that he died without issue, and still less without heirs.[1]

A State statute providing that in all suits founded on any debt or contract made prior to a certain date or in renewal thereof, the plaintiff shall not have a verdict or judgment until he has made it clear to the tribunal trying the cause that all taxes chargeable by law upon the same have been duly paid for each year since the making of the debt or contract, and that the giving in of the debt for taxation and the payment of taxes shall be a condition precedent to a recovery, is unconstitutional, at least so far as regards debts or contracts made before its passage. Bradley, J., said: "It imposes upon the plaintiff conditions for a recovery which were not required to be performed when the contract was made, — conditions onerous and, if he has not paid the taxes, impossible to be performed."[2]

The right to recover *costs* is no part of the remedy which inheres in the contract; it is purely incidental, and depends on the state of the law when the suit is determined; the right to recover costs does not become vested until judgment is rendered. The legislature may therefore, after a contract is made, change the laws which determine the amount of costs recoverable in an action upon it, or even deprive the party of costs altogether.[3]

§ 113. **Measure of Damages in Contracts founded on Confederate Money.** — During the early part of the War of the Rebellion, the paper currency issued by the insurgent

[1] Bank of Louisville *v.* Trustees of Public Schools (Ct. of App. of Ky., Oct. 1885), 19 Am. Law Rev. 962.

[2] Lathrop *v.* Brown (U. S. Cir. Ct. S. Dist. Ga., 1871), 10 Am. Law Reg. 638.

[3] Rader *v.* Road District, 36 N. J. L. 273; Gardenshire *v.* McCombs, 1 Sneed, 83.

States largely superseded the use of gold and silver in that section of the country, and formed the principal basis of most business transactions. At a later period, however, it depreciated very rapidly and eventually became worthless. But in the mean time many contracts had been formed, either with an express reference to this species of money as their medium of payment, or with an implied understanding that it should form the basis of their liquidation; and, at the restoration of peace, a considerable proportion of these remained to be adjudicated by the courts. It was at once evident that, if anything like justice was to be done between the parties, the courts must direct these contracts to be discharged in some other medium than the valueless Confederate notes. Accordingly, the United States Supreme Court formulated the rule that evidence should be admissible to show, first, whether the Confederate currency had formed the basis of the stipulations of the parties, and then, this being ascertained to be the case, what was the value of that currency, in money of the United States, at the time and in the locality where the contract was made; and that the value so determined should fix the measure of damages for a breach of the contract. Thus only, it was held, could the obligation of the contract be *preserved*.[1] This rule was generally accepted, and was cast in the form of a statute in several of the States.[2] But North Carolina, in 1866, passed a statute enacting that in all civil actions "for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated,

[1] Hanauer *v.* Woodruff, 15 Wall. 448; Confederate Note Case, 19 Wall. 556; Wilmington, &c. R. R. *v.* King, 91 U. S. 3.

[2] Kirtland *v.* Molton, 41 Ala. 548; Rutland *v.* Copes, 15 Rich. 84. But in Arkansas it was denied to be constitutional. Leach *v.* Smith, 25 Ark. 246; Woodruff *v.* Tilly, 25 Ark. 309. These cases, however, are not satisfactory.

it shall be admissible for either party to show on the trial, by affidavit or otherwise, what was the consideration of the contract, and that the jury, in making up their verdict, shall take the same into consideration and determine the value of said contract in present currency in the particular locality in which it is to be performed, and render their verdict accordingly." When this act came before the United States Supreme Court for consideration it was held that, in so far as the same authorized the jury in such actions, upon the evidence thus before them, to place their own estimate upon the value of the thing contracted for, instead of taking the value of the currency stipulated for by the parties, according to the rule already announced, it impaired the obligation of the contract and was within the constitutional inhibition.[1]

A later case was concerned with the constitutionality of a statute of Virginia, enacted in 1867, which provided that in an action on any contract made between 1862 and 1865, it should be permissible to show, by parol or other evidence, what was the understanding and agreement of the parties, express or implied, in relation to the kind of currency (whether Confederate or otherwise) in which the contract was to be discharged, or with reference to which, as a standard of value, it was made; and provided further that, when the cause of action grew out of a sale or hiring of property, if the court or jury should think that, under all the circumstances, the fair value of the property sold, or the fair rent or hire of it, would be the most just measure of recovery in the action, then that valuation might be adopted as a standard of recovery, instead of the express terms of the contract. This act was held unconstitutional and void as impairing the obligation of contracts, in that it varied the terms of the agreement made by the parties

[1] Wilmington, &c. R. R. *v.* King, 91 U. S. 3.

themselves.[1] These cases are instructive as illustrating the principle that a State statute which allows a verdict to be computed, in any case, on a different measure of damages than that stipulated for by the parties in their contract, is invalid, because its effect is to substitute a new contract.

§ 114. **Other Questions relating to Discharge of Contracts.** — There are certain other matters which have to do, in a certain sense, with the discharge of contracts, though they fall more properly within a different division of the general subject. These are questions relating to the effect on existing contracts of acts of limitations, statutes increasing the amount of property exempt from execution, stay-laws, and statutes concerning imprisonment for debt, appraisal, and redemption. These will be treated in the chapter on remedies and remedial process.[2]

§ 115. **Who may object to a Law as impairing Contracts.** — It is for the party only whose rights are invaded to plead the nullity of a law as impairing the obligation of contracts.[3] For a law, unconstitutional only because it violates contract rights, is not necessarily null as to the rights of persons not concerned in the contracts whose obligations are so impaired.[4] For example, where the State, through its attorney-general, seeks to restrain a railroad company from operating its road, the State and the railroad company alone being parties to the suit, the question of the constitutionality of the law under which the company acts, — its constitutionality being denied, as infringing on the

[1] Effinger *v.* Kenney, 115 U. S. 566.

[2] *Infra*, Chapter V.

[3] New Orleans Navigation Co. *v.* New Orleans, 12 La. An. 364; Moore *v.* New Orleans, 32 La. An. 726. An objection that a law is void because it seeks to divest the rights of remainder-men cannot be taken successfully by a stranger to the remainder, as void also in relation to the particular estate; the remainder-men only can make such objection. Sinclair *v.* Jackson, 8 Cow. 543.

[4] Moore *v.* New Orleans, 32 La. An. 726.

obligation of a contract to which certain land-owners were parties, — cannot be raised, the land-owners not being before the court, and their rights not being involved in the issue.[1]

II. The Effect of State Insolvent Laws.

§ 116. **Constitutionality of National Bankrupt Law.** — Since there is nothing in the Constitution of the United States to prohibit Congress from passing laws impairing the obligation of contracts, it is universally conceded that a national bankrupt law, when there is one in existence, with provisions compulsory upon creditors, is valid and constitutional.[2] Thus, the clause usually inserted in such acts in relation to compositions is not open to constitutional objections.[3] And a national bankrupt law which, by its terms, is made applicable to all the States alike, without distinction or discrimination, is not unconstitutional merely because its operation may be wholly different in one State from another, *e. g.*, in the matter of homestead exemptions.[4]

§ 117. **Review of the Early Cases on State Insolvent Laws.** — The power of the several States to pass insolvent laws, whereby a debtor should be discharged from his obligations upon the surrender of his property and its distribution among his creditors, is a topic which has provoked much discussion, and which for a long time was involved in the greatest uncertainty and confusion. An answer to the question how far such acts were consistent with the restraining influence of the constitutional inhibition under

[1] People *v.* Brooklyn, &c. R. R., 89 N. Y. 75.

[2] *In re* Beckerford, 1 Dill. 45; *In re* Owens, 12 N. B. R. 518; Keene *v.* Mould, 16 Ohio, 12; Morse *v.* Hovey, 1 Barb. Ch. 404.

[3] *In re* Reiman, 7 Bened. 455; s. c. 12 Blatch. 562.

[4] Darling *v.* Berry, 4 McCrary, 470.

consideration, was not struck out at one blow in a definite and final shape; but it required the gradual accretions of a series of cases, each contributing some new element, to mould the doctrine into a form that should preclude all further doubt and command universal acquiescence. The postponement of this result has been largely due to a misapprehension of the precise tenets of the early cases before the United States Supreme Court.

The first of these cases was Sturges *v.* Crowninshield.[1] The defendant was sued in one of the Federal courts upon two promissory notes given in March, 1811, and he pleaded his discharge under an insolvent act of New York passed in April of the same year. This statute was retrospective, and discharged the debtor upon his single petition, and upon his surrendering his property in the manner therein prescribed, without the concurrence of any creditor, from all his existing debts, and from all liability and responsibility by reason thereof. It was held by the court, Chief Justice Marshall delivering the opinion, that a law which discharged the debtor from his contract to pay a debt by a given time, without performance, and released him without payment entirely from any future obligation to pay, impaired, because it entirely discharged, the obligation of that contract, and consequently that the discharge of the defendant, under the act of 1811, was no bar to the suit. But the case in which this decision was made was one in which the contract was *in existence* at the time the law was passed; and the court expressly stated that their opinion was confined to the circumstances of the case.

In the next case,[2] the court went a step further and held that a discharge under a State insolvent law, which had been passed and was in operation when the contract was made, was equally a law impairing its obligation.

[1] 4 Wheat. 122.

[2] McMillan *v.* McNeill, 4 Wheat. 209.

But the fact must be carefully noted that the discharge here considered was obtained under the insolvent law of a different government from that where the contract was made. Its authority is therefore limited to this particular state of facts.

A few years later it was held that a State insolvent law which discharged a debtor from all liability for debts contracted previous to his discharge, could not constitutionally apply to the case of contracts made before its enactment, and that, as to such contracts, it was immaterial that the suit was brought in a court of the State of which both parties were citizens, where the contract was made and the discharge obtained, and where they continued to reside until suit brought.[1]

But it was reserved for the case of Ogden *v.* Saunders[2] to sum up the fragments of doctrine previously announced and knit them into a compact rule. In this case, after elaborate argument and the delivery of carefully reasoned opinions by all the judges, it was decided that: A State insolvent law, discharging the person and property of the debtor, upon his compliance with its requirements, is valid and constitutional when applied to contracts made subsequently to its passage, within the State, and wholly between citizens thereof; but it can have no effect upon contracts entered into by the debtor with a citizen of another State, or not to be performed within the State. And the ultimate opinion of Mr. Justice Johnson in this case is regarded and accepted as the authoritative and final decision of the court of last appeal upon this topic.[3]

Now it will be apparent to the reader that these successive decisions of the Supreme Court are in no sort of

[1] Farmers' and Mechanics' Bank *v.* Smith, 6 Wheat. 131.

[2] Ogden *v.* Saunders, 12 Wheat. 213.

[3] Boyle *v.* Zacharie, 6 Pet. 348; Frey *v.* Kirk, 4 Gill & J. 509; s. c. 23 Amer. Dec. 581.

conflict one with another, but on the contrary, in entire harmony. They exhibit a gradual progression to the formation of a settled doctrine. And they will, in fact, furnish us with all the principles we shall need for the discussion of the general subject. There are three elements, then, which must be considered before we can pronounce for or against the constitutionality of the statute; first, whether the debt was contracted before or after the passage of the law; second, whether the parties are both citizens of the State which grants the discharge or not; third, the place of performance of the contract. And in the first place, —

§ 118. **State Insolvent Laws cannot affect Antecedent Debts.** — This position has always been maintained by the Federal courts and universally accepted by the tribunals of last resort in the several States.[1] The distinction is obvious. For if, after a contract is made, the State passes an insolvent law, which declares that if the debtor finds it impossible to perform it, he may escape its stipulations by making an assignment for the benefit of his creditors and leaving the matter to be settled with the rest of his affairs, nothing can be plainer than that the obligation of the contract is impaired. But, as we have already seen, the constitutional prohibition does not apply to *prospective* legislation; in fact, it was in connection with this very question that the point was so ruled.[2] Hence if the parties choose to contract, during the existence of an insolvent law in the State and with knowledge of its provisions, they must be understood to have incorporated it, like any other

[1] Sturges *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 Wheat. 213; Farmers' and Mechanics' Bank *v.* Smith, 6 Wheat. 131; Golden *v.* Prince, 3 Wash. C. C. 313; Roosevelt *v.* Cebra, 17 Johns. 108; Smith *v.* Mead, 3 Conn. 253; Hammett *v.* Anderson, 3 Conn. 304; Medbury *v.* Hopkins, 3 Conn. 472.

[2] *Supra*, § 9.

contemporary municipal law, in their contract; they have written into their agreement, as one of its implied terms, the condition that the debtor, becoming insolvent, may take advantage of the law provided for such cases.

§ 119. **Such Laws invalid against Foreign Creditors.** — But the operation of State insolvent laws is further restricted to the case of contracts between parties both resident in the State granting the discharge. It is well settled that such a discharge cannot be pleaded in bar of an action on a contract made by the insolvent with a citizen of another State.[1] And in respect to such contracts, it is immaterial whether the law under which the discharge was obtained was enacted before or after the making of the contract.[2] So a State insolvent law which invalidates a transfer by a domestic debtor to a foreign creditor, and directs that the property so transferred shall be distributed among the domestic creditors of the insolvent, unless the foreign creditor will consent to the insolvent's discharge, impairs the obligation of contracts and is void.[3] And so stringently is this rule applied that it is held that a discharge in insolvency under the laws of one State is no bar to an action by a citizen of another State, on a contract made and to be performed in the former State, with the defendant, a citizen thereof, although the defendant made the contract with the plaintiff's agent, who was also a citizen of the discharging State, supposing him to be the principal, and the fact that he was merely an agent not

[1] Baldwin *v.* Hale, 1 Wall. 223; Cook *v.* Moffat, 5 How. 295; Sloane *v.* Chiniquy, 22 Fed. Rep. 213; Donnelly *v.* Corbett, 7 N. Y. 500; Hicks *v.* Hotchkiss, 7 Johns. Ch. 297; Larrabee *v.* Talbott, 5 Gill, 426; Guernsey *v.* Wood, 130 Mass. 503; Felch *v.* Bugbee, 48 Me. 9; Whitney *v.* Whiting, 35 N. H. 467; Pratt *v.* Chase, 44 N. Y. 597; Story on Confl. Laws, § 341.

[2] Cook *v.* Moffat, 5 How. 295.

[3] Larrabee *v.* Talbott, 5 Gill, 426.

being disclosed.[1] But a regular discharge of a promisor in a negotiable note pursuant to the insolvent laws of the State where the contract was made, and of which the parties were citizens, is a good defense to an action brought in another State by a citizen thereof to whom the note had been indorsed after the discharge was obtained.[2] And if a contract is made between two citizens of the same State, within the State, and one of them afterwards *removes* therefrom and becomes a citizen of another State, and the other then obtains a discharge under the provisions of an insolvent law of the State where the contract was made, which was enacted and in force before the date of the contract, such a discharge is effectual as a bar to a suit upon the contract.[3]

§ 120. **Why inoperative against Foreign Creditors.** — The reason why a discharge under the insolvent laws of a State can have no effect against contracts made with foreign creditors is, briefly, that State laws have no extra-territorial validity. It is only upon the principle of comity that the statutes of one State can be allowed any force or efficacy whatever in any other State. And the moment a State attempts to lay its hand upon the rights of those whose domicile and whose affairs are beyond its borders, its acts are null. As stated by Mr. Justice Clifford: "Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case."[4]

[1] Guernsey *v.* Wood, 130 Mass. 503.

[2] Baker *v.* Wheaton, 5 Mass. 509.

[3] Stoddard *v.* Harrington, 100 Mass. 87; Brigham *v.* Henderson, 1 Cush. 430; Converse *v.* Bradley, 1 Cush. 434, note.

[4] Baldwin *v.* Hale, 1 Wall. 223. So it is stated by Miller, J., in

It has been suggested that the same principle which makes the insolvent law of the State an unwritten stipulation in the contract of two of its citizens — so that, when prospective, it cannot be said to impair the contract — would apply equally to the case of a foreign creditor. And it is said that if the domestic creditor must be understood to have contracted with reference to the insolvent law, so must also the alien creditor. But there is an insuperable objection to this view. It would necessitate the interpolation into the agreement, by implication, of a law which would bind one of the parties and not the other; and would import a surrender by the foreign creditor, by implication, of his constitutional rights. That the law will not *imply* such things as these seems too plain for argument.[1]

Sloane *v.* Chiniquy, 22 Fed. Rep. 213, that "No State insolvent law, as has been repeatedly decided, can discharge or release the debtor from his obligation to pay, under that contract, where the creditor is a citizen of another State, because the law cannot operate upon a citizen not within its jurisdiction. The theory of that is, that the judgment of a court discharging a debtor from his obligations is, as to creditors residing in another State, an *ex parte* judgment; but if he comes within the State and submits himself to the jurisdiction of the court, it has never been held that the contract may not be discharged."

[1] The author believes this to be the only true argument with which to refute the suggestion above named. In so holding, he is compelled to differ from the learned judge who delivered the opinion of the court in Donnelly *v.* Corbett, 7 N. Y. 500, where, in order to dissipate the idea that the non-resident creditor might be supposed to have made the insolvent law of the debtor's domicile a part of the contract, it was said: "The notion, however, that insolvent laws constitute a part of the agreement of parties, under any circumstances, has been considered as fallacious by judges of the court in which the doctrine was first broached (5 Howard, 311). The permission by these laws accorded to a debtor to absolve himself is an act of sovereignty, induced by considerations of public expediency. It is the exercise of a power not derived from or dependent upon contract, but beyond and in hostility to it. The public good or the exigencies of a State may require the taking of private property without the consent of the owner, or the discharge of

§ 121. **Place of Performance Immaterial.** — It was at one time thought that the general rule of private international law — that where the place of performance of a contract is specified it is to be interpreted and governed by the *lex loci solutionis*[1] — would apply to the case of discharges under State insolvent laws. That is, that although the contract was made with a foreign creditor, yet, if it was expressly to be performed in the State of the debtor's domicile, his discharge in that State would bar an action upon it. This position was taken obliquely in a number of *dicta*, and directly in a few decisions.[2] Thus we find Judge Fowler saying, in regard to the waiver of their constitutional rights by foreign creditors, "We think this may perhaps be regarded as having been done by entering into a contract expressly to be performed in the State of the other contracting party; and therefore, on well-established general principles, subject to its laws, so far as its construction, validity, and obligation are concerned."[3] But this doctrine has always been discountenanced in the Supreme Court of the United States, and the disposition has been manifested to restrain the operation of State laws within the limits of their personal and territorial jurisdiction. The cases adverted to have therefore been overruled, and the principle is now firmly established, in all the courts, that although the contract was made and, by its terms, expressly to be performed, in the State where the debtor resides and where he obtains his discharge in insolvency,

a debt without the consent of a creditor; but the idea that the justification in either case rests on contract or depends upon the assent of the holder, has scarcely the merit of plausibility." The fallacies of this argument are easily discernible; and in point of fact it is opposed to some of the best reasoning in the books.

[1] Story, Conflict of Laws, § 280, and cases cited.

[2] Scribner *v.* Fisher, 2 Gray, 43; Blanchard *v.* Russell, 13 Mass. 1; Whitney *v.* Whiting, 35 N. H. 457.

[3] Whitney *v.* Whiting, 35 N. H. 457, 467.

yet, if the creditor be a citizen of another State, the debt is not discharged.[1]

§ 122. **Foreign Creditors may submit to Jurisdiction.** — Since it is always within the option of a foreign creditor to come into the courts of the debtor's domicile and submit to their jurisdiction, in order to share in the distribution of the estate, it is entirely in accordance with established principles to hold that he may put himself on a footing with citizens, and be equally bound by the debtor's discharge, by becoming a party to the proceedings, by proving his debt under the commission of insolvency, by accepting dividends, or by any other act which clearly shows his submission to the jurisdiction.[2] Thus a State insolvent law, allowing an assignment for the benefit only of *consenting* creditors, does not contravene the constitutional prohibition, and the assignment is not void merely because some of the creditors are citizens of other States.[3]

§ 123. **State Insolvent Laws when Valid.** — The insolvent laws of a State are not in contravention of the Constitution of the United States in so far as they operate to discharge the person and after-acquired property of the debtor from liability for any contract made, subsequent to their enactment, with a citizen of that State.[4]

[1] Baldwin *v.* Hale, 1 Wall. 223; Gilman *v.* Lockwood, 4 Wall. 409; Stoddard *v.* Harrington, 100 Mass. 88; Guernsey *v.* Wood, 130 Mass. 503; Kelley *v.* Drury, 9 Allen, 28; Pratt *v.* Chase, 44 N. Y. 597; Newmarket Bank *v.* Butler, 45 N. H. 236; Felch *v.* Bugbee, 48 Me. 9; Chase *v.* Flagg, 48 Me. 182.

[2] Whitney *v.* Whiting, 35 N. H. 457; Pratt *v.* Chase, 44 N. Y. 597.

[3] Keating *v.* Vaughn, 61 Tex. 518.

[4] Wheelock *v.* Leonard, 20 Pa. St. 440; Betts *v.* Bagley, 12 Pick. 572; Hempstead *v.* Reed, 6 Conn. 480; Smith *v.* Parsons, 1 Ohio, 236; Wilson *v.* Matthews, 32 Ala. 332.

§ 124. **Recapitulation.** — From the preceding discussion it will be seen that the following propositions may now be regarded as settled law: —

1. State insolvent laws cannot discharge a debtor from liabilities contracted before their enactment; and in this case it is immaterial whether the creditor be a citizen or a non-resident.

2. They are inoperative against foreign creditors; and in this case the date of the contract is immaterial.

3. Although a contract is expressly to be performed in the State of the debtor's domicile, yet, if the creditor is a non-resident, it is not discharged.

4. Foreign creditors may submit themselves to the jurisdiction of the insolvency court, and in that case they are bound by the discharge.

5. State insolvent laws are in general operative only upon future contracts between citizens of the State.

III. Marriage and Divorce.

§ 125. **Marriage not a Contract.** — There are several instances in which statutes bearing upon the marriage relation and its incidents might be supposed to contravene the constitutional limitation against laws impairing the obligation of contracts. In order to determine the constitutionality of such acts, it is necessary in the first place to determine how far and to what purposes marriage may be considered a contract. Now there is a great deal of loose talk in the books about the "contract of marriage," and the author's research has enabled him to find two cases holding that it is purely and simply a contract, and therefore within the constitutional prohibition before us.[1] But the overwhelming weight of authority is to the effect that,

[1] Ponder *v.* Graham, 4 Fla. 23; Bryson *v.* Bryson, 44 Mo. 232.

while certain contractual elements do indeed enter into the marriage relation, it is more properly to be regarded as an institution of society, in the abstract, and, in the concrete, as a well-defined *status* of two individuals; and therefore an act destroying the marital *status* of two persons is not open to the objection that it impairs contracts.[1] In the leading case on this point, Robertson, C. J., says: "Marriage, though in one sense a contract, — because, being both stipulatory and consensual, it cannot be valid without the spontaneous concurrence of two competent minds, — is, nevertheless, *sui generis*, and unlike ordinary or commercial contracts is *publici juris;* because it establishes fundamental and most important domestic relations. And therefore as every well-organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and cannot, like *mere contracts*, be dissolved by the mutual consent only of the contracting parties, but may be abrogated by the sovereign will, either

[1] Adams *v.* Palmer, 51 Me. 480; Cronise *v.* Cronise, 54 Pa. St. 255; Cabell *v.* Cabell, 1 Met. (Ky.) 319; Maguire *v.* Maguire, 7 Dana, 181; Carson *v.* Carson, 40 Miss. 349; Noel *v.* Ewing, 9 Ind. 37; Rugh *v.* Ottenheimer, 6 Oreg. 231; s. c. 25 Am. Rep. 513; Cooley, Const. Lim. 284; 2 Wharton on Contr. § 1069; 3 Parsons on Contr. *545; 1 Bishop, Mar. and Div. § 667. It may be thought, from the language employed by Justice Story in the Dartmouth College Case (4 Wheat. 695), that he regarded marriage as within the constitutional prohibition. However this may be, it is certain that he reconsidered this view, for he says (Conflict of Laws, § 108, note): "I have throughout treated marriage as a contract in the common sense of the word, because this is the light in which it is ordinarily viewed by jurists, domestic and foreign. But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation different from what belong to ordinary contracts."

with or without the consent of *both parties*, whenever the public good, or justice to both or either of the parties, will be thereby subserved. Such a remedial and conservative power is inherent in every independent nation, and cannot be surrendered or subjected to political restraint or foreign control, consistently with the public welfare. And therefore marriage, being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts. The obligation is created by the public law, subject to the public will, and not to that of the parties."[1]

§ 126. **Special Divorce Legislation.** — This brings us, primarily, to the question whether a special act of the legislature dissolving the bonds of matrimony between two individuals is liable to objection on constitutional grounds. And from the principles already established we are prepared to return a negative answer. Marriage not being a contract, in the constitutional sense, a law putting an end to it, in a particular case, cannot be said to impair a contract.[2] Another view, reaching the same conclusion, is thus presented by the Supreme Court of Pennsylvania: "For reasons of state, the marriage relation is indissoluble by consent or by the courts for causes not committed to their jurisdiction. This being the law of the relation, it must stand until it be repealed. A divorce act operates in each case as a repeal, so far, of the general law. This is a reason, and probably was the origin, of the legislative interposition which turned individual cases into that forum. The provision as to contracts in the State and Federal constitutions does not prevent a severance of the marriage relation by consent or by the courts for cause,

[1] Maguire *v.* Maguire, 7 Dana, 181, 183, per Robertson, C. J. See Starr *v.* Hamilton, Deady, 268; Ditson *v.* Ditson, 4 R. I. 87.

[2] See 1 Bishop, Mar. and Div., §§ 665–669.

for this right attaches generally to all contracts. It is the law only which forbids the dissolution. The legislative assent being necessary, the Assembly becomes the power to declare the dissolution, and the presumption is, that it acts upon sufficient cause." [1]

§ 127. **Acts authorizing Judicial Divorces for Past Causes.** — In the next place, still resting on the general principle, and supported by the great preponderance of authority, it is safe to assert that the legislature may constitutionally authorize divorces to be granted by the courts, dissolving marriages previously contracted, for causes happening before the passage of the act, and which, at the time of their occurrence, were lawful and innocent, and furnished no ground for such a proceeding.[2] In the Dartmouth College Case, Chief Justice Marshall said that this provision in the Constitution "never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some

[1] Cronise *v.* Cronise, 54 Pa. St. 255, 261, per Agnew, J. Whether special divorce acts are unconstitutional simply as being *retroactive*, is considered in another connection. *Infra*, § 220.

[2] Carson *v.* Carson, 40 Miss. 349; Maguire *v.* Maguire, 7 Dana, 181; Berthelemy *v.* Johnson, 3 B. Mon. 90; Jones *v.* Jones, 2 Tenn. 2; see also West *v.* West, 2 Mass. 223; Smith *v.* Smith, 3 Serg. & R. 248; Bigelow *v.* Bigelow, 108 Mass. 38; Hunt *v.* Hunt, 9 Hun, 622; 1 Bish. Mar. and Div. §§ 696–700. In Clark *v.* Clark, 10 N. H. 380, 387, Chief Justice Parker said: "A statute which attempts to confer authority upon the courts to grant a divorce for matters already past, and which, at the time when they occurred, furnished no ground for a dissolution of the marriage, or for other legal proceedings, is, in our view, clearly a retrospective law and well entitled to the epithets applied to such laws in the Constitution." But it is to be noted that retrospective laws are forbidden, *eo nomine*, by the constitution of New Hampshire; and the case cited was strictly concerned only with that prohibition. Hence it is not in reality an authority upon the general subject of laws impairing the obligation of contracts. And even if it were, it stands opposed to the preponderance of authority.

tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other."[1] A statute authorizing divorces for antecedent causes was held, in one case, to be an *ex post facto* law.[2] But it is settled beyond all peradventure that that phrase relates only to crimes and criminal proceedings;[3] hence the case mentioned deserves no consideration. The question whether such acts are invalid as being simply *retroactive* in their operation is reserved for discussion in another place.[4] The weight of authority is to the effect that they are not.

§ 128. **Incidents to the Marriage.** — As we have already seen, dower is not a matter of contract and does not become a vested right until the death of the husband.[5] Consequently a statute dissolving the marriage relation, or authorizing it to be terminated, is not constitutionally objectionable merely because it takes away the woman's prospective dotal rights.[6] But it is held in a New York case that, as respects property, the contract of marriage must stand upon the same footing as other contracts, and that where the husband, by virtue of the marriage relation or as incident thereto, becomes entitled to the property of the wife, a law passed subsequent to their marriage, and vesting her property solely in herself, is void as impairing the obligation of a contract.[7] And Mr. Bishop says, in regard to judicial divorces: "There is room for the suggestion that, as to the effect which can be given to the divorce, it,

[1] Dartmouth College *v.* Woodward, 4 Wheat. 629. This language is quoted approvingly in Hunt *v.* Hunt (U. S. Sup. Ct., Oct. Term, 1878), 97 U. S., Lawyers' Co-op. Ed., 1109.

[2] Dickinson *v.* Dickinson, 3 Murph. 327.

[3] *Infra*, § 225.

[4] *Infra*, § 220.

[5] *Supra*, § 108.

[6] See Levins *v.* Sleator, 2 Greene (Iowa), 604.

[7] Holmes *v.* Holmes, 4 Barb. 295. See White *v.* White, 5 Barb. 474; Metropolitan Bank *v.* Hitz, 1 Mackey, 111.

like a legislative one, can operate only on those property rights which depend on the *vinculum* of the marriage, not authorizing such a collateral decree as for alimony."[1]

IV. Whether Judgments are to be Considered Contracts.

§ 129. **Conflicting Views on this Question.** — If a judgment is a contract, then any statute which impairs its obligation is within the constitutional prohibition. It therefore becomes necessary to consider the grounds on which is based the doctrine that judgments are contracts. This theory appears to have been first advanced by Sir William Blackstone. In speaking of such agreements as are implied by law, he says: "Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation, of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge."[2] And the views of the learned commentator on this point have been accepted without demur and followed without question in a number of American decisions.[3] Thus, in a New

[1] 1 Bishop, Mar. and Div. § 697, citing Curtis *v.* Hobart, 41 Me. 230, 232.

[2] 3 Blackst. Comm. 160.

[3] Taylor *v.* Root, 4 Keyes (N. Y.), 344; Morse *v.* Toppan, 3 Gray, 411; Lockwood *v.* Barefield, 7 Ga. 393; Bridges *v.* North, 22 Ga. 52;

York case, we find it said: "Contracts are of three kinds: simple contracts, contracts by specialty, and contracts of record. A judgment is a contract of the highest nature known to the law. Actions upon judgments are actions on contracts."[1]

But on the other hand, a carefully considered English case, subsequent in date to the publication of the Commentaries, holds that a judgment is not in any sense a contract; and this view has found favor in some of the American courts.[2] Thus it is said in Illinois: "We cannot agree with the counsel that a judgment is a contract within the meaning of the statute. . . . A judgment is no more a contract than is a tort. In one sense it is true that every member of society impliedly agrees to pay all judgments that may be rendered against him; and in the same sense does he impliedly agree to make amends for all torts he may commit."[3]

§ 130. **How in Regard to Impairment of Contracts.** — In regard to the inclusion of judgments within the constitutional limitation against the impairment of contracts, the

Johnson *v.* Butler, 2 Iowa, 540; McGuire *v.* Gallagher, 2 Sandf. 402; Humphrey *v.* Persons, 23 Barb. 313; Reed *v.* Eldredge, 27 Cal. 348; Farmers' Bank *v.* Mather, 30 Iowa, 283. In New York it is held that a judgment is a contract within the meaning of the code of that State giving assistant justices jurisdiction of actions arising on contracts for the recovery of money. McGuire *v.* Gallagher, 2 Sandf. 402. And in Vermont, where the statute provides that the body of the debtor shall not be taken on an execution issuing on a judgment recovered in an action of contract express or implied, it is thought that an action of debt on a judgment comes within this statute, the judgment being a contract at least to that extent. Sawyer *v.* Vilas, 19 Vt. 43.

[1] Taylor *v.* Root, 4 Keyes (N. Y.), 344, per Woodruff, J.

[2] Biddleson *v.* Whytel, 3 Burr. 1548; Rae *v.* Hulburt, 17 Ill. 572; Williams *v.* Waldo, 3 Scam. 268; Napier *v.* Gidiere, 1 Speers, Eq. 215; Jordan *v.* Robinson, 15 Me. 168; Smith *v.* Harrison, 33 Ala. 706.

[3] Rae *v.* Hulburt, 17 Ill. 572.

authorities are doubtful and unsettled. One case holds that judgments are protected by this clause equally with any other contractual obligations.[1] Another positively contradicts this assertion.[2] And others hold that, at any rate, judgments founded upon a cause of action sounding in *tort* and having no reference to contracts, cannot properly be regarded as within the prohibition.[3]

§ 131. **Views of United States Supreme Court.** — The Supreme Court of the United States, without going to the length of holding that no judgment can be considered a contract under this clause, is sufficiently decided in maintaining that a judgment founded on an action of tort cannot be so regarded. Mr. Justice Field remarks: "It may be doubted whether a judgment not founded upon an agreement express or implied, is a contract within the meaning of the constitutional prohibition. It is sometimes called by text-writers a contract of record, because it establishes a legal obligation to pay the amount recovered, and, by fiction of law, where there is a legal obligation to pay, a promise to pay is implied. It is upon this principle, says Chitty, that an action in form *ex contractu* will lie on a judgment of a court of record. But it is not perceived how this fiction can convert the result of a proceeding, not founded upon an agreement express or implied, into a contract within the meaning of the clause of the Federal Constitution which forbids any legislation impairing its obligation. The purpose of the constitutional provision was the maintenance of good faith in the stipulations of parties against any State interference. If no assent be given to a transaction, no faith is pledged in respect to it, and there would seem in such case to be no room for the

1 Weaver *v.* Lapsley, 43 Ala. 224.

2 Sprott *v.* Reid, 3 Greene (Iowa), 489.

3 McAfee *v.* Covington, 71 Ga. 272; 51 Am. Rep. 263; State *v.* New Orleans, 32 La. An. 709.

operation of the prohibition."[1] And in a later case it was held that the right to reimbursement from a city for damages caused by a mob is not founded upon any contract between the city and the sufferers, and the obligation to make indemnity, created by a statute for that purpose, has no more element of contract in it, because merged in a judgment, than it had previously; hence a State law limiting the power of the city to raise money by taxation, is not unconstitutional because it prevents the collection of such a judgment against the city.[2]

§ 132. **Conclusions.** — Supposing a judgment to be a contract, how can its obligation be impaired? Obviously in no other way than by excusing the judgment-debtor from the performance of it, or by rendering it impracticable for the creditor to obtain satisfaction. Now if the judgment is rendered upon a cause of action arising *ex contractu*, any statute which produces this result is unconstitutional, not because it affects the judgment, but because, as we shall hereafter see, it violates the obligation of the *original contract*. Hence it is immaterial, in respect to the constitutional prohibition, whether a judgment based

[1] Garrison *v.* New York, 21 Wall. 196, per Field, J.

[2] Louisiana *v.* Mayor of New Orleans, 109 U. S. 285. Field, J., said: "Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any State action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition. Garrison *v.* City of New York, 21 Wall. 203. There is, therefore, nothing in the liability of the city, by reason of which the relators recovered their judgments, that precluded the State from changing the taxing power of the city, even though the taxation be so limited as to postpone the payment of the judgments." And see State *v.* New Orleans, 32 La. An. 709.

on contract is itself a contract or not. The same result is reached either way. In the other case, where the judgment is founded upon a right of action sounding in tort, we have sufficient reason and authority for holding that it cannot, in any proper constitutional sense, be regarded as a contract.

CHAPTER V.

REMEDIES AND REMEDIAL PROCESS.

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I. Distinction between Obligation and Remedy.

§ 133. **Origin of the Distinction.** — At an early day in the history of our jurisprudence, a difference was discovered between the obligation of a contract and the remedy provided by law for its enforcement. It was thought that the two were distinct things, the one arising at the making of the contract, the other upon failure to perform it; that while the laws relating to the construction, validity, and discharge of contracts may be supposed to enter by implication into the agreement of parties, the law does not suppose them to contract with any reference to the remedy; and that although the Constitution of the United States prohibited the passage of any law impairing the obligation of contracts, yet the power still remained with the several State legislatures to alter and modify the legal remedies as their discretion and judgment might suggest.[1] This idea probably took its origin from a remark of Chief Justice Marshall, to the effect that "the distinction between the obligation of a contract, and the remedy given by the leg-

[1] United States *v.* Conway, 1 Hempst. 313; Rathbone *v.* Bradford, 1 Ala. 312; Williams *v.* Waldo, 3 Scam. 264; Rader *v.* Road District, 36 N. J. L. 273; Heyward *v.* Judd, 4 Minn. 483, where it is said that only such laws enter into and become part of a contract as would be enforced by courts of a foreign jurisdiction; acts of legislation do so only when they have the full force of law wherever the contract is sought to be enforced.

islature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."[1] The distinction seems plain enough on its face; and yet it is not too much to say that, in the whole range of constitutional law, there is no other point which has given rise to so much confusion and misapprehension, to such hopeless conflict among the authorities, or to so much embarrassment to courts and legislatures. It is believed, however, that a thread of harmony can be traced through the decisions, and a correct basis of principle pointed out; and that is the object of the present chapter. But first, it is important to be noted that there is a —

§ 134. **Presumption in favor of Remedial Statutes.** — Every presumption is to be indulged in favor of a statute dealing with remedies and remedial process, and any attempted evasion of the constitutional restriction upon laws impairing the obligation of contracts, by an act affecting remedies, must clearly appear, or the statute will be vindicated.[2]

§ 135. **Control over Remedies claimed by the States.** — It is apparent that any change in the remedy which practically annuls the duty of the debtor to perform his agreement according to its terms, or which destroys the power of the creditor to exact compliance with it, or compensation for its breach, strikes at the obligation of the contract. But, keeping within this limitation, and starting from the *dictum* of Chief Justice Marshall above mentioned, the States have always claimed the right to regulate and control legal remedies. And the doctrine is now firmly established — so far as the State authorities go — that the remedy provided by law for the enforcement of a contract

[1] Sturges *v.* Crowninshield, 4 Wheat. 122, 200.

[2] Heyward *v.* Judd, 4 Minn. 483.

is no part of its obligation, and that whatever pertains merely to the remedy may be changed, modified, or abrogated by the legislature, in its discretion and to any extent, provided a substantive remedy be still left to the creditor, and that such changes may constitutionally apply to existing contracts.[1] Thus we find the Pennsylvania court saying: "It is now clearly established by repeated decisions that the legislature may pass laws altering, modifying, or even taking away remedies for the recovery of debts, without incurring a violation of the clauses in the Constitution which forbid the passage of *ex post facto* laws, or laws impairing the obligation of contracts."[2] Now let us see how this accords with the views of the United States Supreme Court. For to that tribunal belongs the ultimate decision of the question, and its view must control all other authorities.

[1] Oriental Bank *v.* Freeze, 18 Me. 109; Long's Appeal, 87 Pa. St. 114; Huntzinger *v.* Brock, 3 Grant (Pa.), 243; Cutts *v.* Hardee, 38 Ga. 350; Rathbone *v.* Bradford, 1 Ala. 312; Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120; Ward *v.* Hubbard, 62 Tex. 559; Williams *v.* Waldo, 3 Scam. 264; Templeton *v.* Horne, 82 Ill. 491; Holland *v.* Dickerson, 41 Iowa, 367; Penrose *v.* Erie Canal Co., 56 Pa. St. 48; Woodruff *v.* Scruggs, 27 Ark. 26; James *v.* Stull, 9 Barb. 482; Cooley, Const. Lim. 286, where it is said: "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made." See, *per contra*, Nevitt *v.* Bank, 6 Sm. & Mar. 513. In New Jersey the legislature is forbidden, by a constitutional restriction, to pass any law "depriving a party of any remedy for enforcing a contract which existed when the contract was made." But even here it is held that not *every* modification of existing remedies will amount to an infringement of this prohibition. See Baldwin *v.* Newark, 38 N. J. L. 158; Rader *v.* Road District, 36 N. J. L. 273; State *v.* Rahway, 43 N. J. L. 338.

[2] Evans *v.* Montgomery, 4 Watts & S. 220, opinion by Sargeant, J.

§ 136. **Development of the Principle in the Supreme Court.** — The first case where this point came before the Supreme Court of the nation was the one already adverted to as containing a *dictum* of Chief Justice Marshall that "the distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things."[1] And this opinion was further developed in the next decision, where Taney, C. J., said: "If the laws of the State passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For undoubtedly a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. . . . And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered at the will of the State, provided the alteration does not impair the obligation of the contract."[2]

When we come to the case of Van Hoffman *v.* Quincy — the next in historical order — the decision would appear, at first sight, to involve a direct and positive repudiation of the foregoing views. For Mr. Justice Swayne observes: "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guarantied by the Constitution against inva-

[1] Sturges *v.* Crowninshield, 4 Wheat. 122, 200.

[2] Bronson *v.* Kinzie, 1 How. 311, 315.

sion." Yet this case cannot be taken as authority for the proposition that the remedy is a part of the contract, at least in such sense as to place it beyond legislative control. For the same judge adds: "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired."[1]

And this view of the question — or rather, this standpoint from which to regard the subject — appears to have been in the ascendant for a considerable period of the court's history. For in a later case we find it said: "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation." Although, indeed, it is added in the next sentence: "A State may change them, provided the change involve no impairment of a substantial right."[2] And Mr. Justice Swayne, in a subsequent decision, repeated his opinion that the laws which exist at the time and place of the making of a contract, enter into and form a part of it; that nothing is more material to the obligation of a contract than the means of its enforcement; and that both validity and remedy are parts of the obligation and protected by the Constitution.[3]

[1] Van Hoffman *v.* Quincy, 4 Wall. 535, per Swayne, J. The learned Justice also adds: "If these doctrines were *res integrae*, the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy, — or, to speak more accurately, between the remedy and the other parts of the contract, — might perhaps well be doubted. But they rest in this court upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct."

[2] Gunn *v.* Barry, 15 Wall. 610.

[3] Walker *v.* Whitehead, 16 Wall. 314. Yet he adds: "The States may change the remedy, provided no substantial right secured by the contract is impaired."

But after the lapse of some years, another opinion was written which indicated a return to the standpoint originally taken by the court, supplemented, however, by a marked advance toward the enunciation of a clear rule of construction. Mr. Justice Hunt said: "Our own reports and those of the States are full of cases holding that the legislature may alter and modify the remedy to enforce a contract without impairing its obligation. . . . The rule seems to be that in modes of proceeding and of forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right."[1] Nevertheless, immediately following this decision, came another presentation of the extreme view against legislative control over existing remedies, urged with greater directness than before.[2] And also the statement that a creditor by contract has a vested right to the remedies for the recovery of the debt which existed at law when the contract was made.[3] And in a still later case, Mr. Justice Field said: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation."[4] But in the latest utterance of the

[1] Tennessee *v.* Sneed, 96 U. S. 69.

[2] Edwards *v.* Kearzey, 96 U. S. 595, where Swayne, J., said: "The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the Constitution, and is therefore void."

[3] Memphis *v.* United States, 97 U. S. 293.

[4] Louisiana *v.* New Orleans, 102 U. S. 203, per Field, J. But in Penniman's Case, 103 U. S. 714, Mr. Justice Woods observed: "The general doctrine of this court on this subject may be thus stated: In

court upon this subject the language is quoted approvingly which was used in Van Hoffman *v.* Quincy, that "it is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired." And the court added: "No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights."[1]

§ 137. **Remarks on the Foregoing Decisions.** — Now, in attempting to deduce settled principles and rules of guidance from the authorities which we have thus passed under review, it is necessary to be observed, in the first place, that however divergent and incompatible the various views expressed may on their face appear to be, they are, in reality, in no sort of conflict whatever. Two theories have divided the adherence of the members of the court. One was, that whatever pertained merely to the remedy was no part of the contract and was subject to legislative control. But the advocates of this theory have always held that a vital infringement of the remedy might touch the obligation of the contract, and so fall within the constitutional prohibition. The other theory involves the assumption that all laws existing at the making of a contract, including those providing a remedy, form an integral part of the agreement; or even, as stated by some judges, that the obligation *is* the remedy. Yet those who hold this theory have never hesitated to admit that the rules and forms of procedure may be modified at will, provided no substan-

modes of proceeding and forms to enforce the contract, the legislature has the control and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right."

[1] Antoni *v.* Greenhow, 107 U. S. 766.

tial right is invaded. Thus it will be perceived that the practical application of the two theories is entirely harmonious. They are joined, each on its own side, by a strong connecting link, to the same middle ground, — the underlying and settled doctrine of the court. From whichever standpoint we start, our course of reasoning must bring us, in the last analysis, to precisely the same result.[1]

§ 138. **Doctrine of the Supreme Court stated.** — We are now able to formulate the exact and settled doctrine of the Supreme Federal Court on this point. It is as follows: Remedies and remedial process are distinguishable from the obligation of the contract, in so far that the legislature may enlarge, modify, or curtail the former, to any extent, provided there still remains to the creditor a substantive and available remedy; but if a statute destroys the remedy altogether, or so loads it with conditions and restrictions as to desiccate it and render it practically worthless, or to abrogate a valuable right secured by the contract, it violates the obligation of the contract and is in contravention

[1] To show how seriously this question, and the precise doctrine of the Supreme Court in regard to it, has been at times misapprehended, compare with the authorities reviewed in the last section the following language of a late jurist of eminence: "It is a rule in the construction of contracts, that the law existing when a contract is made enters into it and necessarily forms a part of it. The remedies prescribed for enforcing performance, are regarded by the parties as constituting that 'obligation' of the contract which is within the protection of the Constitution. If the remedies were taken away, there would be nothing but the *moral obligation* left, and it is absurd to suppose that this was the 'obligation of the contract' which the legislature was prohibited from impairing. Plain common sense, responding to the demands of justice, has scattered to the winds the flimsy distinction between the *right* and *remedy*, so far as to declare that any change of the nature or extent of the latter, so as to impair the former, is just as much a violation of the compact as if the right itself was directly destroyed." Lewis, C. J., in Western Saving Society *v.* Philadelphia, 31 Pa. St. 175, 181.

of the Constitution. And this rule is the same as that already mentioned as having been claimed by the State courts.[1] Still, as much conflict of opinion has attended the application of this abstract rule to particular cases, it will be expedient to examine a little more closely the true meaning of these terms "obligation" and "remedy."

§ 139. **True Nature of the Distinction stated.** — In the first place, therefore, we inquire, what is meant by the term "remedy"? About this there can be no difficulty. A remedy, in contemplation of law, to enforce a contract, must consist of a mode, authorized and provided by the law, through the courts of justice, of establishing the right, and of enforcing it either by a specific decree or by a judgment for damages.[2] In the next place, what is the obligation of a contract? In its most natural and obvious sense, it is that which *obliges* a man to adhere to the letter of his contract. It is that coercive force which forbids him to disregard the agreement which he has made. Now it is evident that this force consists of two distinct branches. Two elements enter into it as constituent parts. The one addresses itself to our moral constitution, the other prohibits an infraction of the laws. The former is that principle of ethics which declares it to be inconsistent with correct moral conduct that a man should retract a promise once validly passed, or act in a manner incompatible with its due observance; and this exists only in the forum of the conscience. The latter is that fundamental rule of law which requires the preservation of exact good faith in the dealings of man with man. This is a *legal* duty, as distinguished from a moral obligation; and it exists both in the forum of the law and the forum of the conscience, since obedience to the laws is also a principle of ethics. Now although both these duties enter into the composition of a contractual

[1] *Supra*, § 135.

[2] See Commercial Bank *v.* Chambers, 8 Sm. & Mar. 9.

obligation, it does not necessarily follow that a statute impairing either will violate the obligation of the contract. For although we can scarcely conceive of a law which should obliterate the *moral* duty of performing one's agreement, while leaving the binding force of the law intact, yet, if any such should arise, it would not be open to constitutional objection, because the legal duty is the only one of which the law can take cognizance and which, in its contemplation, exists. But on the other hand, a law which should reduce an obligation recognized both in the forum of the conscience and of the law to one subsisting only in the former — or which, in other words, takes away the legal duty, though the moral right may still remain — would undoubtedly produce the forbidden effect. Perhaps it could not be said to *destroy* the obligation of the contract, taking the word in its broadest acceptation; but it would certainly impair it, because the obligation is thereby shorn of its coercive and effective half, — the only part known to the law. We infer, therefore, that for judicial purposes, and in the constitutional sense, the "obligation" of a contract is that duty of performing it which the *law* recognizes and enforces.[1]

[1] In Johnson *v.* Duncan, 3 Mart. (La.) 530 (a decision which is justly regarded as a masterly exposition of constitutional law), Martin, J., observes: "The obligation of contracts consists in the necessity under which a man finds himself to do, or refrain from doing something. This obligation exists generally both *in foro legis* and *in foro conscientiae*, though it does at times exist in one of these only. It is certainly of the first, that *in foro legis*, which [that] the framers of the Constitution spoke, when they prohibited the passage of any law impairing the obligation of contracts. Now a law absolutely recalling the power which the creditor enjoys, of compelling his debtor *in foro legis* to perform the obligation of the contract, would be a law destroying the obligation of the contract *in foro legis*; since a right, without a legal remedy, ceases to be a legal right. It would impair the obligation of the contract by destroying its legal obligation; in other words, by reducing an obligation both *in foro legis* and *in foro conscientiae* to an

Now what is the nature of this duty? We reply that it is the *sanctioning right* which the law extends over the preservation and enforcement of contracts. It belongs to one party as a right; it rests upon the other as a binding power. But that it is distinguishable from the remedy, will conclusively appear from two considerations. In the first place, the sanctioning right is a *fact*. It is the voice of justice saying to the one: "You shall enjoy the benefits secured by your contract;" to the other: "You shall abide by your promise at all hazards." And on the other hand, the remedy provided by law is the *process*, by which the sanctioning right is vindicated. It is a means to an end. It is not the coercive power of the law, but its application to a particular case. It is not the right of the creditor, but the instrument of its preservation. It is not the duty of the debtor, but the consequence of its non-

obligation *in foro conscientiae* only; a legal and moral right to a moral right only. The remedy *in foro legis* constituting the legal right of the creditor, constitutes also its correlative, the legal duty or obligation of the debtor; and a law which reduces a legal to a moral obligation, is one which *in foro legis* destroys the obligation. It appears therefore to me incorrect to say that the legislature may effectually do, as to the remedy or effect of the obligation, that which it cannot do as to the right; and I conclude that a law destroying or impairing the remedy is as unconstitutional as one affecting the right in the same manner; for, *in foro legis*, the effects of both laws must be the same." We cannot subscribe *in toto* to the last conclusion of the learned judge, but he has undoubtedly drawn the correct distinction between the moral and legal parts of the obligation. Of the same opinion is Judge Story; "Secondly, the obligation of the contract, which, though often confounded with, is distinguishable from, its nature. The obligation of a contract is the duty to perform it, whatever may be its nature. It may be a moral obligation, or a legal obligation, or both. But when we speak of obligation generally, we mean legal obligation, that is, the right to performance which the law confers on one party, and the corresponding duty of performance to which it binds the other." Story, Confl. of Laws, § 266. And see Penrose *v.* Erie Canal Co., 56 Pa. St. 48; Bunn *v.* Gorgas, 41 Pa. St. 446; Aycock *v.* Martin, 37 Ga. 124.

observance. Then if fact and process, if cause and effect, if object and method can be distinguished, so may also the obligation and the remedy. And in the second place, the legal duty enters into a contract at its inception and continues throughout its life; the remedy only comes into existence when the particular contract is broken. Before any breach of contract occurs, it would be erroneous to say that the remedy inheres in its obligation. The fact that *there will be* a remedy, if the stipulations of the contract be violated, is present all the time; and this is precisely that sanctioning right of which we have spoken. As a learned judge remarks: "To me, the right which the law gives to one party, to force the other to comply with his obligation, is a thing totally different from the contract itself. Pothier calls that one of the *effects* of the obligation, which is evidently correct; after the party bound has refused or neglected to comply, that effect of the obligation commences."[1]

We should therefore hold, *a priori*, that the legislature might change and modify remedies at will, without incurring a violation of the constitutional prohibition. But what would be the effect of a statute abolishing *all* remedies for the breach of a particular species of contracts, or for the enforcement of a particular class of rights? Simply to eviscerate the legal duty. For, distinguishable as the two are, the sanctioning right of the law depends for its virility and coercive power upon the means provided for its vindication. Such a statute would reduce it to a mere threat. It would not repeal or abrogate it, but would deny it any binding force. Thus the obligation of the contract would be impaired, indirectly, *through* the remedy. And we venture to suggest that it is precisely here that much of the misapprehension of this question arises. It is a common mistake to suppose that the parties have a vested

[1] Derbigny, J., in Johnson *v.* Duncan, 3 Mart. (La.) 530.

right to the remedy in existence when the contract was made. The truth is, as we have just seen, that the parties have a vested right to *a* remedy, — to an efficacious remedy, should an appeal to the courts become necessary. And the above remarks will apply, with equal force, to the case of a statute which should so overload a remedy with conditions and restrictions as to render it practically worthless and nugatory. This, also, would sap the constraining power of the legal sanction and so impair the obligation of the contract. But beyond this we cannot go. A modification of the remedy which merely renders it less speedy or convenient has obviously no reaction upon the legal duty of performance. A *substantive* remedy is required, not necessarily a convenient one.

Upon principle, therefore, we find that the doctrine of the United States Supreme Court, as formulated in the preceding section, is not only correct in the nature of things and founded on sound reasoning, but is the only true rule on the subject.

We proceed now to see how these theories are borne out by the authorities, and what is their application to specific cases.

§ 140. **Statutes abolishing all Remedy are Unconstitutional.** — One of the conclusions reached in the last section was, that an act of the legislature taking away *all* remedies for the breach of an agreement or to secure a specific right, would impair the obligation of the contract, because it would rob the sanctioning power of the law of all its efficacy, and so reduce the complex nature of the obligation to the level of a simple moral duty. And this proposition is supported by the authorities.[1]

§ 141. **Parties have no Vested Right to a Particular Remedy.** — But, as we also saw in the last section, con-

[1] Johnson *v.* Bond, 1 Hempst. 533; Bruce *v.* Schuyler, 4 Gilm. 221; Robinson *v.* Magee, 9 Cal. 81.

tracting parties have no vested and indefeasible right to any particular remedy which may be held out to them by the law at the time the contract is made. Consequently, while the legislature cannot, with respect to past transactions, deny all remedy, nor replace an efficacious remedy by a nugatory one, yet they may take away the specific remedy previously existing and substitute for it another and equally substantive remedy.[1] Thus a statute abolishing distress for rent, and substituting a right of re-entry for condition broken, after notice, etc., may constitutionally apply to leases in force at the date of its passage.[2] So a statute which merely gives a remedy at law, where it could previously have been available in equity only, or *vice versa*, may, consistently with the Constitution, operate retrospectively.[3] Again, an act which raises a trustee, or receiver, to wind up the affairs of an insolvent corporation organized under a limited liability law, and transfers all rights of action from the creditors to the trustee, and directs a resort to the assets of the corporation as the primary fund instead of the personal responsibility of the stockholders, is not unconstitutional as impairing the obligation of contracts.[4]

In New Jersey there is a clause inserted in the constitution[5] which forbids the legislature to pass any law

[1] Lockett *v.* Usry, 28 Ga. 345; Bruce *v.* Schuyler, 4 Gilm. 221. In Memphis *v.* United States, 97 U. S. 293, Strong, J., says: "A creditor by contract has a vested right to the remedies for the recovery of the debt which existed at law when the contract was made, and the legislature of a State cannot take them away without impairing the obligation of the contract." But he adds: "It may modify them, *and even substitute others*, if a sufficient remedy be left, or another sufficient one be provided." The italics are mine.

[2] Van Rensselaer *v.* Snyder, 13 N. Y. 299.

[3] Paschall *v.* Whitset, 11 Ala. 472.

[4] Story *v.* Furman, 25 N. Y. 214. And see Leathers *v.* Bank, 40 Me. 386.

[5] Const. of New Jersey of 1844, Art. 4, § 7, subdiv. 3.

"depriving a party of any remedy for enforcing a contract which existed when the contract was made." But even in that State, it would appear from the authorities, the power of the legislature to substitute another and equally efficacious remedy, or at least to change the *form* of the remedy where no substantial right under the contract is impaired, is not questioned.[1]

There is some authority for holding that, although a contract contains a provision that a party may resort to a specified legal remedy for its enforcement, yet an act of the legislature abolishing such remedy does not impair the obligation of the contract if another be left or substituted.[2] But, as we shall hereafter have occasion to show, this view is peculiar to one State, and is unsound in principle.[3]

§ 142. **Statutes impeding Remedies.** — Although the new remedy substituted by the legislature for the one in existence when the contract was made may be deemed less *convenient* and easy of execution than the old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional.[4] If the remedy still remains a substantive one, and adequate to its purpose, that is all the parties have a right to demand.

And it appears that it would also be competent for the legislature, in cases where a party may have had his choice of several methods to establish his rights, to abolish some, or prohibit a resort to them, and confine him to one specific and available remedy. Thus an act requiring a creditor of an insolvent estate to prove his claim before

[1] Baldwin *v.* Newark, 38 N. J. L. 158.

[2] Conkey *v.* Hart, 14 N. Y. 22.

[3] *Infra*, § 149.

[4] Bronson *v.* Kinzie, 1 How. 311, 315, Taney, C. J.; Penrose *v.* Erie Canal Co., 56 Pa. St. 48, Strong, J.; James *v.* Stull, 9 Barb. 482; State *v.* Wiley (Sup. Ct. New Jersey, Nov. 1884), 19 Reporter, 122.

the commissioners within the time and according to the method prescribed by the act, or be forever barred, unless he shall find property of the intestate not accounted for by the administrator before distribution, may validly apply to existing claims of that character, since it does not take away all remedy from the creditor, but limits him to a specific one.[1] But it would probably be necessary, in this connection, to make an exception in favor of New Jersey, where the matter is regulated by a peculiar constitutional provision.[2]

§ 143. **Legislature cannot burden a Remedy to Worthlessness.** — A statute which imposes upon an existing remedy so many and such radical conditions or restrictions for its prosecution as to render it practically worthless, which leaves the right of the creditor not worth the pursuit, and substitutes an empty process for a constraining power, produces, in reality, the same effect as an act abolishing all remedies; and is therefore unconstitutional and void as applied to previous contracts.[3] This, then, is the crucial test of the power of the legislature to modify remedies upon existing contracts. Does the alteration leave to the creditor a practical remedy, commensurate with his rights? If it does, it is constitutional; if it does not, it is void. And in determining whether a change in the remedy is reasonable and just, the courts must look behind the

[1] Lightfoot *v.* Cole, 1 Wis. 26.

[2] In Baldwin *v.* Flagg, 43 N. J. L. 495, it was held that a law which provides that "in all cases where a bond and mortgage has been or may hereafter be given for the same debt, all proceedings to collect said debt shall be first to foreclose the mortgage," and if, at the sale, there is a deficiency, then resort may be had to the bond, is unconstitutional and void as to antecedent obligations.

[3] Huntzinger *v.* Brock, 3 Grant (Pa.), 243; Smith *v.* Morse, 2 Cal. 524; Canal Co. *v.* Railroad Co., 4 Gill & J. 1; Johnson *v.* Winslow, 64 N. C. 27; Oatman *v.* Bond, 15 Wis. 20.

statute to the state of the country and the causes that led to the enactment of the new remedy.[1]

§ 144. **Laws creating, enlarging, or reviving Remedies.**— There is a distinction in favor of the constitutionality of an act which prolongs or revives a remedy, as compared with one which cuts off or takes away the remedy. To extend a new remedy to one who has a right of action, but has lost the remedy the statute gave, does not necessarily impair the obligation of any contract nor invade any vested right.[2] (But it is not competent for the legislature, by a repeal or extension of the statute of limitations, to give a right of action on a claim already barred thereby.[3]) There is therefore, in general, no constitutional objection to a statute which merely provides a new or additional remedy for a just right already in being, and which would be lost and destroyed if no remedy were provided.[4] For this reason a retroactive law which gives to a mere debt the quality it did not previously possess, of attaching as a lien on the realty of the debtor, is constitutional.[5] And a statute giving a remedy at law, to enforce a right which

[1] Baumbach *v.* Bade, 9 Wis. 559.

[2] Caperton *v.* Martin, 4 West Va. 138.

[3] *Infra*, §§ 154, 190.

[4] Hope *v.* Johnson, 2 Yerg. 125; United States *v.* Samperyac, 1 Hempst. 118; Hepburn *v.* Curts, 7 Watts, 300. In the case last cited, Sergeant, J., said: "The legislature, provided it does not violate the constitutional prohibitions, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of recovering redress by legal proceedings."

[5] Bolton *v.* Johns, 5 Pa. St. 145. So in Blann *v.* State, 39 Ala. 353, it was held that the legislature has power to make criminal the breach of a pre-existing contract, where such breach is in its nature prejudicial to the public good, and was before only subject to a suit for damages by an injured party. Such a law does not impair the obligation of contracts, but simply makes a specified breach a penal offense.

before could only be established in equity, may be allowed to operate upon existing claims, as it touches the remedy only and not the obligation.[1]

The opinion has been advanced that it is not within the province of the legislature to create a cause of action out of an existing transaction for which, at the time of its occurrence, there was no legal remedy.[2] But the more approved theory seems to be, that where a just right, or moral obligation, already exists, the legislature has constitutionally the power to devise and provide a remedy for it.[3]

It is equally true that no constitutional objection can be urged against a law which operates upon the remedy in such manner as to render it more efficacious, speedy, or cumulative, whether this result be attained by facilitating process, or making the procedure more direct, or relieving the remedy of formalities or restrictions.[4] Thus an act by which the receivers who had been appointed by the court over an insolvent corporation were authorized to sell the real estate, franchises, and works of the company free and clear of all incumbrances (whereas, under the former law, such a sale could only have been made subject to existing incumbrances), but providing that nothing in the act should be construed to impair the rights of lien creditors, or invalidate existing leases, is constitutional and valid; because it operates only upon the remedy and is designed to afford a more speedy and efficacious relief.[5] So an amendment to the revenue law, authorizing the foreclosure of tax-liens,

[1] Bartlett *v.* Lang, 2 Ala. 401. *Supra*, § 141.

[2] Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120.

[3] Lycoming *v.* Union, 15 Pa. St. 166; Sutherland *v.* De Leon, 1 Tex. 250.

[4] Stoddart *v.* Smith, 5 Binn. 355; Schoenheit *v.* Nelson, 16 Neb. 235; Potts *v.* Delaware Water Power Co., 9 N. J. Eq. 592; Maynes *v.* Moore, 16 Ind. 116.

[5] Potts *v.* Delaware Water Power Co., 9 N. J. Eq. 592.

only authorizes an additional remedy, and is therefore not unconstitutional though made applicable to taxes then due.[1] And in New Jersey, where the legislature may not pass any law "depriving a party of any remedy for enforcing a contract which existed when the contract was made," it is held that a remedial statute superseding a remedy in force at the time of making a contract, and giving the party satisfaction in a shorter time and more direct mode, does not "deprive" him of a previously existing remedy.[2]

§ 145. **Repeal of Special or Extraordinary Remedies.** — Where the law existing at the time a contract was formed, conferred upon the creditor a peculiar or especial remedy, outside the usual forms of legal procedure, it is plain that a subsequent act, repealing this privilege and remanding the creditor to the ordinary methods of legal redress, will not be liable to constitutional objections. For the one requisite remains, — a substantive remedy for the enforcement of the agreement. Extraordinary remedies, therefore, placed in the hands of a particular class of creditors, may be taken away by a retroactive statute.[3] Thus an act

[1] Schoenheit *v.* Nelson, 16 Neb. 235.

[2] Potts *v.* New Jersey Arms Co., 17 N. J. Eq. 395.

[3] South Carolina *v.* Gaillard, 101 U. S. 433; Stocking *v.* Hunt, 3 Denio, 274. Where, by the constitution of a State, a liability to double the amount of their stock was imposed upon stockholders in private corporations, and subsequently, by an amended constitution, this provision was changed so that the liability did not extend beyond the amount of subscribed and paid-up stock, and the Supreme Court of the State had construed the amendment so as to relieve stockholders in corporations subscribing *after* it went into operation from the effects of the former constitution as to debts contracted *prior* to the amendment; it was *held* that the amendment, thus interpreted, had not the effect of impairing the obligation of the contract as to such debts within the meaning of the Constitution of the United States; because there remained the same security for debts contracted before the amendment as existed at their creation, viz.: that of those persons who were then stockholders, for the latter remained liable as before. Ochiltree *v.* Contracting Co., 21 Wall. 249.

which takes away the preference given by a former statute to judgments, in the order of payment of the debts of decedents, is not unconstitutional in its application to judgments obtained between the dates of the two acts.[1] So a special remedy given to a railroad corporation for the condemnation of land may be taken away by a general act applicable to all railroads; there is no element of contract in the case.[2]

On the same principle, where a State accords to its creditors the right to sue the State, this cannot be regarded, in legal effect, as a judicial remedy for the enforcement of its contracts; because the privilege stops with the rendition of a judgment against the State, and everything thereafter depends on the will of the State; hence, when this right is taken away, it cannot be said that the obligation of the contracts is impaired.[3]

§ 146. **State may regulate Modes of Procedure.** — It follows, as a necessary corollary from the principles already deduced, that the legislature of a State has the constitutional power to change and regulate the practice and modes of procedure in civil actions in its courts; and that such modifications may well apply to past transactions, and even to the future steps of actions already instituted.[4] Such alterations operate upon the remedy only, and are evidently not within the constitutional prohibition, unless, indeed, their practical effect should be to deny a remedy altogether. Thus it is held that a statute which prescribes a mode of service of judicial process upon a corporation, different from that provided for in its charter, is not void as impairing the obligation of the contract contained in the charter.

[1] Deichman's Appeal, 2 Whart. 395.

[2] Chattaroi Railroad *v.* Kinner, 81 Ky. 221.

[3] Memphis, &c. R. R. *v.* Tennessee, 101 U. S. 337; South and North Alabama R. R. *v.* Alabama, 101 U. S. 832.

[4] United States *v.* Conway, 1 Hempst. 313; Lewis and Nelson's Appeal, 67 Pa. St. 153. But see Merwin *v.* Ballard, 66 N. C. 398.

"The regulation of the forms of administering justice by the courts," says Chief Justice Waite, "is an incident of sovereignty. The surrender of this power is never to be presumed. Unless, therefore, it clearly appears to have been the intention of the legislature to limit its power of bringing this corporation before its judicial tribunals to the particular mode mentioned in the charter, the subsequent legislation upon that subject was not invalid. . . . The provision is one which evidently belongs to remedies against the corporation, and not to the grant of rights. As to remedies, it has always been held that the legislative power of change may be exercised when it does not affect injuriously rights which have been secured."[1]

So also, although the implied elements of the contract entered into by indorsers of negotiable paper entitle them to notice and protest, which requirement cannot lawfully be abrogated by a retroactive statute,[2] yet an act regulating the *mode* of giving notice to indorsers relates to the remedy only, impairs no contract rights, and is constitutional.[3] And among the class of enactments which pertain only to the regulation of judicial administration, is to be reckoned a statute changing the venue of a suit already commenced and proceeded in. Such a law is not unconstitutional.[4]

As we have already seen, an act which merely establishes a rule of evidence with respect to certain past transactions cannot, in general, be said to impair the obligation of contracts; it touches the remedy only.[5] On this principle the courts have sustained the validity of a statutory enactment making one party to a contract incompetent as a witness

[1] Cairo, &c. R. R. *v.* Hecht, 95 U. S. 168; New Albany, &c. R. R. *v.* McNamara, 11 Ind. 543. See Long's Appeal, 87 Pa. St. 119.

[2] *Supra*, § 107.

[3] Levering *v.* Washington, 3 Minn. 323.

[4] Lewis and Nelson's Appeal, 67 Pa. St. 153.

[5] *Supra*, § 109.

in a suit on such agreement when the other party is dead.[1] So it is said that a statute dispensing with the necessity of proof of the names of the members of a firm, in an action against a partnership, may well apply to cases commenced before its passage.[2] And a statute establishing a proper mode of procedure upon discovery that a levy made under an execution is invalid, may govern existing causes, for it touches the remedy only.[3]

But after a cause has once passed to final judgment, it becomes incompetent for the legislature to pass any act which, by a retrospective operation, should invalidate the previous proceedings or unsettle the conclusive nature of a definitive adjudication at law. Thus a statute authorizing the opening of judgments rendered since a certain time is unconstitutional.[4] And the same is true of laws granting a new trial, in actions where no such privilege attached to the circumstances of the suit at the date of the entry of judgment.[5] There may perhaps be some difficulty in the way of proving the unconstitutionality of such statutes on the ground of their impairing the obligation of contracts, unless, indeed, we consider the judgment itself as a contract.[6] But their invalidity may be demonstrated on two other grounds, equally conclusive. In the first place, they divest the vested rights of the successful litigant. And in the second place, they amount to an encroachment upon the province of the judicial department of the government.[7] But a statute allowing a parlance term affects the remedy

[1] Goodlett *v.* Kelly, 74 Ala. 213.

[2] Ballard *v.* Ridgley, 1 Morris (Iowa), 27.

[3] Grosvenor *v.* Chesley, 48 Me. 369.

[4] Ratcliffe *v.* Anderson, 31 Gratt. 105.

[5] Stewart *v.* Davidson, 10 Sm. & Mar. 351; Lewis *v.* Webb, 3 Me. 326; Merrill *v.* Sherburne, 1 N. H. 199.

[6] *Supra*, §§ 129–132.

[7] *Infra*, § 197.

merely, and may constitutionally apply to actions commenced before its passage.[1]

§ 147. **Laws in regard to Parties to Actions.** — Under the division last considered — the power of the State to regulate the forms of procedure in its courts — belongs also the authority of the legislature to pass statutes regulating the joinder of parties in causes of action already accrued. Thus an act requiring makers and indorsers of promissory notes to be sued in joint actions, affects the remedy only, does not impair the obligation of contracts, and is constitutional.[2] So a provision that the real party in interest must sue may apply to past transactions without infringing rights secured by the contract.[3] And a statute authorizing the *bona fide* holder of certain non-negotiable coupons to maintain an action thereon in his own name, does not impair the obligation of the contract in bonds already issued, being wholly remedial.[4] And an act directing that promissory notes given to the cashier of a bank may be sued and collected in the name of the bank, is not, as applied to notes executed before its passage, open to constitutional objection, as it deals with the remedy alone.[5] But probably such statutes would not affect *suits* instituted before their passage.

§ 148. **Statutes affecting Liens.** — Although there may be some doubt upon the authorities, the better opinion seems to be that a statutory lien is only a part of the remedial machinery provided by law for the enforcement of the claim, and that a statute repealing such lien may apply to antecedent transactions, without incurring a violation of the constitutional prohibitions, if a substantive

[1] Woods *v.* Buie, 5 How. (Miss.) 285.
[2] McMillan *v.* Sprague, 4 How. (Miss.) 647.
[3] Hancock *v.* Ritchie, 11 Ind. 48.
[4] Augusta Bank *v.* Augusta, 49 Me. 507.
[5] Crawford *v.* Bank, 7 How. 279.

remedy is left to the creditor. Thus it is held that a lien, created by statute in favor of a contract-creditor, is merely a part of the remedy afforded for the collection of the debt; and hence a repeal of the provision giving that lien will defeat the lien even in cases where the proceedings prescribed by the statute for the enforcement of the lien had been instituted and were duly pending in court, for, acting only on the remedy, it impairs no contract obligations.[1] At any rate, a statute changing the mode of acquiring a lien under an existing judgment upon the property of the debtor (for example, by substituting the lien of a docketed judgment for that formerly created by a *fieri facias*), is not objectionable on constitutional grounds.[2]

It may be open to serious question whether a statute abolishing judgment liens which had already been perfected, and had definitely attached to the debtor's property, might not be considered invalid on the ground of its divesting vested rights, to say nothing of contractual obligations.[3] But however this may be, it is certain that a statute denying to final judgments *thereafter* rendered the incident of a lien on real property does not impair the obligation of contracts made before the passage of the act.[4]

§ 149. **Remedy incorporated in Contract cannot be changed.** — There is only one exception to the rule that the legislature may alter and modify whatever pertains

[1] Bangor *v.* Goding, 35 Me. 73; McCormick *v.* Alexander, 2 Ohio, 65. In the case last cited the statute provided that "No judgment heretofore rendered or that may be hereafter rendered, on which execution shall not have been taken out and levied within a year next after the rendition of judgment, shall operate as a lien on the estate of a debtor to the prejudice of any other *bona fide* judgment creditor." It was held not to be unconstitutional as impairing vested rights. But see Tillotson *v.* Millard, 7 Minn. 513.

[2] Whitehead *v.* Latham, 83 N. C. 232.

[3] See McCormick *v.* Alexander, 2 Ohio, 65.

[4] Moore *v.* Holland, 16 S. C. 15.

merely to the remedy, but it is an exception of great importance. It is as follows: If the parties to a contract include in it, in express terms, the remedy to be sought upon its breach, or the means to be used for securing its performance, subsequent legislation changing the remedial process they have agreed upon is, as to them, inoperative.[1] For the theory which allows the State to modify its modes of procedure and remedial process rests entirely upon the fact that the remedy is no part of the obligation; but this plainly ceases to be true when the parties have chosen to make such modes and process an express ingredient of their contract. Thus it is said: "A statute strictly remedial may impair the obligation of contracts, and when this happens the act is unconstitutional. This always happens

[1] Billmeyer *v.* Evans, 40 Pa. St. 324; Breitenbach *v.* Bush, 44 Pa. St. 313; Lewis *v.* Lewis, 47 Pa. St. 127; Hunt *v.* Thomas, 3 Phila. 121; Taylor *v.* Stearns, 18 Gratt. 244; Pool *v.* Young, 7 B. Mon. 588; Boice *v.* Boice, 27 Minn. 371. This doctrine is denied in one State only, New York. Judge Johnson observes: "In the view taken by the supreme court, the contract in substance contains a stipulation between these parties that this State shall continue in force the legal process of distraining for rent. If this is a subject on which parties can contract, and if their contracts when made become by virtue of the Constitution of the United States superior to the power of the legislature, then it follows, that whatever at any time exists as part of the machinery for the administration of justice may be perpetuated if parties choose so to agree. That this can scarcely have been within the contemplation of the makers of the Constitution, and that if it prevail as law it will give rise to grave inconveniences, is quite obvious. Every such stipulation is in its own nature conditional upon the lawful continuance of the process. The State is no party to their contract. It is bound to afford adequate process for the enforcement of rights; but it has not tied its own hands as to the modes by which it will administer justice. Those from necessity belong to the superior power to prescribe, and their continuance is not the subject of contract between private parties." Conkey *v.* Hart, 14 N. Y. 22, 29. But this decision, even if its reasoning were of a nature calculated to persuade, stands confronted by the entire balance of the authorities.

where the parties make legal remedies a subject of their contract, and subsequent legislation conflicts with what they have expressed in their agreement. If they do not prescribe the rule of remedy in their contract, the law-making power is free; but if they do, they become a law to themselves, and the legislature must let them alone. . . . If the thing provided for by the legislature be within their general competence, and yet be the very thing expressly excluded by a particular contract, it is plain that, as to the parties to that contract, the law is unconstitutional and void, because it impairs the obligation of their contract. Nor do you rescue the law from this consequence by calling it remedial. The legislature can no more overthrow the lawful contracts of parties under guise of remedial legislation, than by direct assault."[1] Hence, for example, if the parties incorporate in their agreement that there shall be no stay of execution taken upon a judgment founded on the contract, or that the defendant waives the benefit of all exemption laws of the State, a subsequent act cannot so alter or modify this remedial process as to annul the stipulations of the parties.[2] And again, when the contract between the parties has placed a remedy in the hands of one, which may be exercised without involving the assistance of legal process of any kind, it is a substantial part of the contract, the obligation of which is as inviolable as any other.[3] Thus if a mortgage, or deed of trust to secure a debt, makes provision for the time and terms of sale, upon the failure of the mortgagor or grantor to pay the debt, this is of the obligation of the contract, and a law forbidding sales under such conveyances for a limited time, or otherwise altering the arrangement

[1] Billmeyer *v.* Evans, 40 Pa. St. 324.

[2] Breitenbach *v.* Bush, 44 Pa. St. 313; Lewis *v.* Lewis, 47 Pa. St. 127; White *v.* Crawford, 84 Pa. St. 433.

[3] Hunt *v.* Thomas, 3 Phila. 121.

agreed upon by the parties, is, as to them, inoperative and void.[1]

II. Statutes of Limitation.

§ 150. **Statutes of Limitation relate to Remedy only.** — A statute prescribing the time within which suits must be brought upon specified causes of action is a remedial act in the strictest constitutional sense. It declares that, if parties neglect to avail themselves of the opportunities offered by the courts, then, after the lapse of a certain period, the law will no longer afford a remedy for the enforcement of their claims. It does *not* declare that, at the expiration of the time limited, the obligation of the contract shall be discharged. For the fact that, if a new promise intervenes to stop the running of the statute, it is not necessary to declare upon such promise as a new engagement, but upon the original contract, shows conclusively that the obligation was never obliterated, but that the plaintiff, by failing to take the proper steps within the designated time, would simply have put it out of his own power to insist upon its recognition.[2] Statutes of limitation, then, relate only to the remedy, not the obligation of the contract, and may (with certain restrictions to be hereafter noted) legally apply to antecedent transactions.[3]

[1] Taylor *v.* Stearns, 18 Gratt. 244; Pool *v.* Young, 7 B. Mon. 588; Boice *v.* Boice, 27 Minn. 371.

[2] In Waltermire *v.* Westover, 14 N. Y. 16, 20, Selden, J., observed that the distinction between the obligation and the remedy "is virtually included in the doctrine universally received and acted upon, that where there is a new promise to pay a debt barred by the statute of limitations, it is not necessary to count upon this as a *new contract;* but the action may be brought upon the original obligation. This practice can only be sustained upon the ground that the debt is not discharged, and that the operation of the statute upon the remedy being removed by the new promise the parties are left *in statu quo.*"

[3] Cox *v.* Berry, 13 Ga. 306; Edwards *v.* McCaddon, 20 Iowa,

§ 151. **Their Application to Existing Rights.**—The rule is now firmly settled upon the authorities that it is competent for the legislature to pass a statute requiring suit to be brought, or other steps to be taken, upon causes of action already accrued at the date of its passage, within a less period of time than was by law allowed for such suit or action at the time when the contract was made or liability incurred, provided the period be not so unreasonably shortened as practically to deprive parties of a remedy altogether.[1] Such a statute affects the remedy only, not the obligation of the contract, impairs no vested rights, and is therefore constitutional. And of course it is immaterial that a part even of the *new* limitation has already run against the particular claim, so a proper time be left.

520; Swickard *v.* Bailey, 3 Kans. 507; Cook *v.* Kendall, 13 Minn. 324.

[1] Jackson *v.* Lamphire, 3 Pet. 280; Hawkins *v.* Barney, 5 Pet. 457; Phalen *v.* Virginia, 8 How. 163; Christmas *v.* Russel, 5 Wall. 290; Sohn *v.* Waterson, 17 Wall. 596; Terry *v.* Anderson, 95 U. S. 628; Mitchell *v.* Clark, 110 U. S. 633; Lewis *v.* Broadwell, 3 McLean, 568; Samples *v.* Bank, 1 Woods, 523; Barker *v.* Jackson, 1 Paine, 559; Beal *v.* Nason, 14 Me. 344; Cummings *v.* Maxwell, 45 Me. 190; Sampson *v.* Sampson, 63 Me. 328; Bell *v.* Roberts, 13 Vt. 582; Call *v.* Hagger, 8 Mass. 423; Rexford *v.* Knight, 11 N. Y. 308; Butler *v.* Palmer, 1 Hill (N. Y.), 324; Miller *v.* Commonwealth, 5 Watts & S. 488; State *v.* Jones, 21 Md. 432; Griffin *v.* McKenzie, 7 Ga. 163; McKenny *v.* Compton, 18 Ga. 170; George *v.* Gardner, 49 Ga. 441; Briscoe *v.* Anketell, 28 Miss. 361; State *v.* Bermudez, 12 La. An. 352; De Cordova *v.* Galveston, 4 Tex. 470; Lockhart *v.* Yeiser, 2 Bush, 231; Lewis *v.* Harbin, 5 B. Mon. 564; Pearce *v.* Patton, 7 B. Mon. 162; Walker *v.* Bank, 2 Eng. (Ark.) 500; Blackford *v.* Peltier, 1 Blackf. 36; Webb *v.* Moore, 25 Ind. 4; Newland *v.* Marsh, 19 Ill. 376; Stearns *v.* Gittings, 23 Ill. 387; Maltby *v.* Cooper, 1 Morris (Iowa), 59; Stephens *v.* Bank, 43 Mo. 385; Holcombe *v.* Tracy, 2 Minn. 241; Stone *v.* Bennett, 13 Minn. 153; Smith *v.* Packard, 12 Wis. 371; Willard *v.* Harvey, 24 N. H. 344; Korn *v.* Browne, 64 Pa. St. 55; Vance *v.* Vance, 108 U. S. 514; Kenyon *v.* Stewart, 44 Pa. St. 179.

Thus it is said: "It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred, unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect."[1] For example, an act providing that all suits on constables' bonds shall thereafter be brought within five years from the date of the bond, or be barred, will apply to such a bond executed prior to its passage, although, as the law stood when the bond was made, it would have continued actionable for twelve years. The statute, by abridging the period within which such suits could be brought, does not so affect the right of action as to fall within the constitutional inhibition.[2] In another case it appeared that a judgment was entered at a time when the period allowed for bringing a writ of error was four years; but about one year after the rendition of the judgment a statute was passed which reduced this period to two years; it was held that a writ of error issued more than two years from the date of the judgment was barred.[3]

And the rule is the same in regard to a statute prescribing a new period of limitation where none before existed. Such an act is not unconstitutional, although a part of the time limited may, in a particular case, have expired before its passage, if a reasonable time remains to bring an action.[4] Thus an act declaring that an uncontested probate by the

[1] Koshkonong *v.* Burton, 104 U. S. 668, Harlan, J.
[2] State *v.* Jones, 21 Md. 432.
[3] Smith *v.* Packard, 12 Wis. 371.
[4] Willard *v.* Harvey, 24 N. H. 344.

register of the proper county of any will devising real estate, shall be conclusive after five years from its date, applies to a will proved before its passage, and is not unconstitutional because retroactive.[1] To take another illustration; a certain statute provided that "In all cases where no payment, claim, or demand shall have been made on account of or for any ground-rent, annuity, or other charge upon real estate for twenty-one years, a release or extinguishment thereof shall be presumed, and such ground-rent, annuity, or charge shall thereafter be irrecoverable, provided that this section shall not go into effect until three years from the passage of this act." This was held to be constitutional.[2] So a statute that provides that tacit mortgages shall cease to have effect against third persons unless recorded within a stated reasonable time, does not impair the obligation of contracts in such cases, even as to minors, being in its nature a statute of limitation.[3]

[1] Kenyon *v.* Stewart, 44 Pa. St. 179.

[2] Korn *v.* Browne, 64 Pa. St. 55.

[3] Vance *v.* Vance, 108 U. S. 514. So a State statute authorizing an agreement between a company pecuniarily embarrassed and its creditors, for funding its debts, providing for notice to the bondholders to appear and express in writing their assent or dissent, and for the preservation of all the original rights of such as dissented, and making the failure of a bondholder to signify his refusal to concur in the agreement of settlement within a specified time equivalent to an express assent in writing, does not impair the obligation of his bond. Gilfillan *v.* Union Canal Co., 109 U. S. 401. But in Priestly *v.* Watkins, 62 Miss. 798, it was held that the Mississippi Act of March 15, 1884, requiring all holders of the outstanding bonds of a particular county to present them for registration within a specified time, with an affidavit of the number of the bond, the amount, and the persons through whom the holder derives title, and providing that on failure to file such affidavit they shall not be registered, and all payment of principal or interest thereon shall be stopped, was unconstitutional as to bonds not yet matured, as impairing the obligation of the contract created by them.

§ 152. **Legislature cannot cut off a Right of Action instantaneously.** — But if a statute so reduces the period of limitation that the time will already have run against a particular cause of action, this will be tantamount to an entire extinguishment of the remedy. Such an effect is, as we have seen, virtually an impairment of the obligation of the contract. And the act would therefore be simply inoperative as to the supposed case. Accordingly it is held that a statute reducing the period of limitations of actions can have no application to a right which, not being barred by lapse of time under the old law, would be instantaneously cut off by the provisions of the new act.[1] It is customary, in the enactment of such statutes, to provide that all suits on existing causes of action covered by the act shall be brought within a specified time *after its passage.* But there have been instances in which the period of limitation has been simply reduced without the introduction of any such saving clause. Now it is evident that such an act might have three different applications, according to the circumstances of the particular case on which it was brought to bear. It might still leave to the creditor a proper period within which to assert his claim; and in this event its validity would be undoubted. Or it might cut off the remedy instantaneously; and in this case it could not lawfully be made to apply to the specific action. It would not be necessary to declare the statute void *in toto* merely because it happens to impair the rights of one or a number of individuals. As to them, not the statute itself, but the application of it, would be unconstitutional. The overruling power of the prohibition simply plucks the particular case out of the operation of the statute. Or, in the third place, the statute might, without

[1] Chapman *v.* Douglas County, 107 U. S. 348; Price *v.* Hopkin, 13 Mich. 318; Osborn *v.* Jaines, 17 Wis. 573; Cook *v.* Kendall, 13 Minn. 324; Auld *v.* Butcher, 2 Kans. 135.

absolutely cutting off a remedy, leave so small a fragment of time in which to bring the suit that it could not be considered as allowing a reasonable period for that purpose. In this case (and whether the limitation is to run from the passage of the act or not), the particular action would be exempted from its provisions. For a law which interposes a bar at the end of a period that is unreasonably and oppressively short, plainly falls within the category of those acts of legislation which so overload and embarrass a remedy with conditions and restrictions as to leave the right scarcely worth pursuing and the remedy practically nugatory. Their unconstitutionality has already been demonstrated.[1]

§ 153. **What is a Reasonable Time.** — But when we inquire, what is a reasonable time to allow for the enforcement of existing rights of action by legal process, we discover the impossibility of formulating a universal rule on the subject. It is obviously a question for the courts to determine by a reference to the circumstances surrounding the particular case, or to the nature, peculiarities, and usual circumstances of the specific *class* of cases affected by the act. Such of the authorities as illustrate the application of the principle are mentioned in the note.[2]

[1] *Supra*, §§ 138, 139, 143.

[2] In Berry *v.* Ransdall, 4 Met. (Ky.) 292, it was held that the act of March 15, 1862, by which, after thirty days, the limitations of actions contained in ch. 63 of the Revised Statutes of that State should extend to and embrace all cases, whether the right of action accrued before or after the Revised Statutes took effect, was unconstitutional and void, because the thirty days allowed for the commencement of suits on existing causes of action was unreasonably and oppressively short. In Pearce *v.* Patton, 7 B. Mon. 162, it was thought that six months is not a reasonable time in which to bar a right to sue for the recovery of land. And in Morris *v.* Carter, 46 N. J. L. 260, the New Jersey Act of March 23, 1881, providing that suits on bonds shall be commenced within six months from the date of the sale of mortgaged premises, was held unconstitutional as to antecedent obligations.

§ 154. **Repeal of Statute of Limitations.** — When a right of action has once become barred by the statute of limitations in force when the liability was incurred, or vested rights of property have been acquired by the expiration of the period prescribed for suits, it is not competent for the legislature, by repealing the statute altogether, or by extending the time beyond its original limits, to revive such right of action or jeopardize the vested interests so secured.[1] To adopt the language of Judge Cooley: "When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly, and is as safe from legislative interference, as it would have been if it had been perfected in the owner by grant or any species of assurance."[2] Whether *criminal* actions which have become barred by lapse of time can be revived by a repeal or extension of the statute of limitations, — in other

[1] Wright *v.* Oakley, 5 Met. 400; Kinsman *v.* Cambridge, 121 Mass. 558; Davis *v.* Minor, 1 How. (Miss.) 183; Sprecker *v.* Wakeley, 11 Wis. 432; Hill *v.* Kricke, 11 Wis. 442; Knox *v.* Cleveland, 13 Wis. 245; Parish *v.* Eager, 15 Wis. 532; but see Swickard *v.* Bailey, 3 Kans. 507. In Woart *v.* Winnick, 3 N. H. 473, it was held that an act repealing the statute of limitations is, with respect to all actions pending at the time of the repeal, and which are barred by the statute, a "retroactive law for the trial of a civil cause," and therefore unconstitutional and void. That the statute in question would be obnoxious as divesting vested rights does not appear to have been made a point in the case; it was decided under a peculiar constitutional provision in that State, embracing the words quoted.

[2] Cooley, Const. Lim. 365.

words, whether a person can acquire a vested right to acquittal as against the State, — is a question that properly belongs to another part of this work.[1]

§ 155. **Extension of Period of Limitation.** — But inasmuch as the statute of limitations does not in any proper sense constitute a part of the agreement of the parties, its repeal, *before* any action is barred, disturbs no vested rights and is not unconstitutional.[2] So it is also within the power of the legislature to *extend* the period of time within which suit may be brought, and the act will apply to causes of action not already lapsed.[3] And in a recent case, where the right to maintain replevin had been lost by limitation, but not the right to maintain detinue or trover, it was held that the legislature might constitutionally extend the limitation as to replevin, as such legislation concerned only the form of the remedy.[4]

III. Laws Affecting the Collection of Judgments.

§ 156. **Statutes suspending Civil Process.** — Among the authorities bearing upon our general subject is found a large class of cases which have to do with the validity of State laws suspending judicial process, granting stay of execution upon judgments, and exempting property from levy and sale. And these cases present some of the most serious and perplexing questions of constitutional law. It will be remembered that, at an early period of our national history, when the greatest financial embarrassment and distress prevailed, exemption and stay laws were among the measures resorted to by several of the States for the tem-

[1] *Infra*, § 235.
[2] Billings *v.* Hall, 7 Cal. 1.
[3] Pleasants *v.* Rohrer, 17 Wis. 577.
[4] Power *v.* Telford, 60 Miss. 195.

porary relief of the debtor-class, and that their flagrant abuse was an element in the motives for the introduction of the contract clause into the Federal Constitution.[1] And at a later day, when the exigencies of a civil war had brought upon a large section of the country a state of affairs which might, without much exaggeration, be compared to the needs and distresses of the earlier period, the same sort of measures were, in many cases, adopted, in the same hope and for the same purpose. It is now our business to inquire how they have stood the test of the Constitution.

A very early decision in Georgia held that a statute of that State, designed "to alleviate the condition of debtors and afford them temporary relief," which enacted that the courts should not "issue out any civil process, or try any civil case, except for the trial of the right of property real and personal" for a definite period, did not impair the obligation of contracts nor abrogate the right of trial by jury.[2] On the same principle, an act which provided that suits commenced before its passage should not be tried at the term to which the summons was made returnable, but that a delay of two terms should elapse before trial, was held to be constitutional, since it affected the remedy only and not the obligation.[3] Again, it is said that a statute abolishing existing courts and thereby creating delay in

[1] *Supra*, § 1.

[2] Grimball *v.* Ross, Charlt. 175.

[3] *Exp.* Woods, 40 Ala. 75. It was also held that the act in question was not in conflict with § 14 of the Alabama Bill of Rights, which declares that all courts shall be open, and every person shall have remedy without delay. So a statute providing that in actions for the foreclosure of mortgages, the defendants shall not be held to answer therein until the expiration of a specified period from the date of the service of the original notice, is not invalid as impairing contracts. Halloway *v.* Sherman, 12 Iowa, 282; Baumbach *v.* Bade, 9 Wis. 599; Starkweather *v.* Hawes, 10 Wis. 125.

enforcing the claims of suitors, is not void as impairing contracts, for such delay does not, in any degree, invalidate the contract itself.[1] And a statute forbidding the rendition of judgments for money for the period therein named, has been held not unconstitutional.[2]

On the other hand, the courts of Mississippi have held that the stay laws enacted in that State in 1861 and 1865, which, in effect, closed the courts of justice for more than two years, were unconstitutional, basing their decision on the ground that the laws in question so far changed and obstructed the remedy upon a contract as materially to impair the value of the contract as it existed when made.[3] And in South Carolina, it is said that an act designed "to alter and fix the times for holding the courts of common pleas in this State," so far as it postpones the return of writs and other process in actions *ex contractu*, and suspends proceedings in such actions, cannot constitutionally apply to contracts existing at the time of its passage.[4]

Now, whatever may be said of the wisdom and expediency of such statutes, and whatever considerations, drawn from the fundamental guarantees of the organized state in regard to the prompt and unhindered administration of justice, might be addressed to their validity, we are only concerned at present with their constitutionality under the contract clause. And in the first place, such acts do not touch the obligation of existing contracts. They neither import a new stipulation into the agreement of the parties, nor eliminate or change any of its express or implied terms. They affect the remedy only. If the remedy were entirely destroyed, this, on settled principles, would contravene the constitutional prohibitions; but no such effect is attributa-

[1] Newkirk *v.* Chapron, 17 Ill. 344.
[2] Barkley *v.* Glover, 4 Met. (Ky.) 44.
[3] Coffman *v.* Bank, 40 Miss. 29; Hill *v.* Boyland, 40 Miss. 618.
[4] Wood *v.* Wood, 14 Rich. 148; State *v.* Carew, 13 Rich. 498.

ble to the acts in question; they merely delay the use or completion of the remedy. There is therefore only one ground on which they could be held unconstitutional, viz.: that they so embarrass the remedy with conditions and restrictions as to render it practically nugatory and leave the right scarcely worth pursuing. (For, as we have seen, it is not enough that the new remedy is less speedy and convenient; the statute is valid if a substantive remedy remains.[1]) That this result would attend a statute closing the courts or interdicting process for an unreasonable length of time may be conceded. But if the delay is but transitory, or not unreasonably prolonged, it is difficult to see how such consequences could be anticipated. Where to draw the line, however, is a difficult question, and one that does not appear to admit of a categorical answer. In many jurisdictions, owing to the crowded state of the dockets, a case may not be reached in its order until a year, or two years, or even a longer period, after issue joined. Yet we should be surprised to hear men say, under such circumstances, that their remedy was nugatory, or that they had no legal rights worth pursuing. Why, then, should a statute, enacted from considerations of public policy, be held to produce such a result, when the same delay, arising from the volume of litigation or from defective administration, does not? It is probable, however, that the solution of the problem should be made to rest largely upon the circumstances of the particular case. For instances may readily be imagined where a delay would be fatal, which in another case might be only a natural incident of its progress through the courts.

§ 157. **Stay Laws held Unconstitutional.** — An entirely different question is presented when the legislature undertakes to grant a stay of execution to debtors upon judgments rendered before the passage of the act, or upon

[1] *Supra*, § 142.

judgments to be subsequently recovered on contracts formed before it went into operation. Such laws have been generally held unconstitutional, as impairing the obligation of contracts.[1] Thus, in a case in Tennessee, a statute was held invalid which directed that, upon any judgment thereafter to be obtained, execution should not issue until two years had expired, unless the plaintiff would indorse on the execution that the officer might receive, in satisfaction thereof, notes on certain specified banks.[2] And the same view was taken, in another State, of an act staying execution for a similar period, unless the plaintiff would take payment in property at two thirds of its value.[3]

Now it is not necessary to base our objections to the constitutionality of these stay laws solely on the ground of their embarrassing the remedy to such an extent as materially to impair its efficacy. If the stay granted were for an indefinite or unduly protracted period, this result would undoubtedly follow. And, under any circumstances, a strong argument against the validity of such laws may be drawn from this consideration.[4] But if this were all, the case

[1] Webster *v.* Rose, 6 Heisk. 93; Jacobs *v.* Smallwood, 63 N. C. 112; McClain *v.* Easly, 4 Baxt. 520; *Exp.* Woods, 40 Ala. 70; Hudspeth *v.* Davis, 41 Ala. 389; Luter *v.* Hunter, 30 Tex. 688; Canfield *v.* Hunter, 30 Tex. 712; Culbreath *v.* Hunter, 30 Tex. 713; Levison *v.* Krohne, 30 Tex. 714; Johnson *v.* Duncan, 3 Mart. (La.) 530; Stevens *v.* Andrews, 31 Mo. 205; Thorne *v.* San Francisco, 4 Cal. 127.

[2] Townsend *v.* Townsend, Peck, 1.

[3] Baily *v.* Gentry, 1 Mo. 164.

[4] In a very able decision rendered by the court in Louisiana it is said: "A law procrastinating the remedy, generally speaking, destroys part of the right. He pays less who pays later. *Minus solvit qui serius solvit.* Neither is the procrastination properly compensated by the allowance of interest in the mean while. To many men in many circumstances there is a wide difference between a hundred dollars payable to-day and a hundred and six dollars payable in a twelvemonth, whatever may be the certainty that no disappointment will occur; and

would scarcely be distinguishable from that of laws closing the courts or impeding the recovery of judgments; which laws, as we have seen, if only transitory in their operation, are not properly objectionable on constitutional grounds.[1] But there is one circumstance which clearly differentiates the two cases. A stay law, as applied to antecedent agreements, interpolates a new condition in the contract itself. It is a settled principle that a statute which changes any of the terms of the contract, whether relating to its construction, validity, or discharge, is unconstitutional and void, no matter how slight or apparently immaterial the variation may be.[2] Now the understanding of the parties is, that the contract shall be discharged at its maturity. And a judgment at law merely ascertains and reiterates this stipulation, with the added sanction of a judicial determination. Afterwards, a stay law intervenes, and declares that the debt shall not be solvable at maturity, but at the expiration of a more or less protracted period of time. It appears impossible to escape the conclusion that the statute has then, in effect, erased one very important element of the agreement of the parties, and substituted in its place a wholly different condition. That such an effect amounts to an impairment of the contract is beyond all question. This view is urged with much force in an early case, where it is said: "If an act postponing the payment of debts be constitutional, what reasonable objection could be made to an act which should enforce the payment before the debt becomes due? If, notwithstanding the con-

in many cases the delay is likely to be productive of considerable danger to the solvability of the debtor. Any indulgence therefore, in point of time, afforded by the legislature to the debtor, is a correlative injury to the creditor in the same degree, though of a different nature, as a correspondent indulgence by a proportionate reduction of the debt." Martin, J., in Johnson *v.* Duncan, 3 Mart. (La.) 530.

[1] *Supra*, § 156.

[2] *Supra*, §§ 102, 103.

stitutional barrier, it is competent for the legislature to hold out to all debtors, that although they fail to pay their debts when they become due, and their creditors are in consequence compelled to sue them, they shall nevertheless be indulged with a certain time beyond the judgment, superadded to the ordinary delays of the law; may not the legislature with equal authority announce to all creditors the right of suing for their debts and enforcing payment before the day? Yet the rights of both parties, established by the contract, are, in the eye of justice, equally sacred; and whether those of the creditor are sacrificed to the convenience of the debtor, or the subject be reversed, we are compelled to think that the Constitution is overlooked."[1]

§ 158. **Stay Laws, if not unreasonable, sometimes held Valid.** — In some jurisdictions an attempt is made to discriminate in favor of remedial statutes which grant a stay of execution for a period that is neither indefinite nor unreasonable in its extension. Thus the opinion is advanced that a law postponing the collection of judgments for a prescribed term (as a year), and when adequate security is furnished, does not amount to such an invasion of the remedy as will leave it practically worthless.[2] This is the view taken by the courts of Pennsylvania, whose rule is thus stated: "In respect to contracts which do not treat of remedies, we hold any law to be constitutional which gives a stay for a time that is definite and not unreasonable, but unconstitutional if the stay be for an indefinite time, or for a time that is unreasonable, though definite."[3] This, however, as indicated in the preceding section, is not the proper basis from which to argue concerning the validity of such

[1] Jones *v.* Crittenden, 1 Carolina Law Repos. 385; s. c. 6 Amer. Dec. 531, per Taylor, C. J.

[2] United States *v.* Conway, 1 Hempst. 313; Farnsworth *v.* Vance, 2 Cold. (Tenn.) 108; Chadwick *v.* Moore, 8 Watts & S. 50.

[3] Breitenbach *v.* Bush, 44 Pa. St. 313, 318, per Woodward, J.

enactments. But, pursuing this distinction, the tribunals of that State have held that a statute which directs the courts to grant a stay of execution against a defendant, on proof of an agreement in writing to that effect by a majority of his creditors whose demands exceed two thirds of his indebtedness, is unconstitutional, as touching the remedy in a vital point and thereby impairing the obligation of the contract; because the stay, under such an act, might be indefinitely, even perpetually, extended.[1]

§ 159. **Suspension of Process justified by Emergencies.** —There is reasonable ground for holding that when some public necessity exists, as in case of war or invasion, an act suspending legal proceedings for a limited period is not unconstitutional; for a statute of this character, prompted by such an emergency, rather conduces to the due administration of justice, and is beneficial to parties litigant.[2] Accordingly it is held that an act providing that no civil process should be issued or enforced against any person in the military service of the State or of the United States, during the term he should be engaged in such service (the term being definitely limited), was no infringement of constitutional rights.[3] This decision was rested partly on the ground that "the occasion is extraordinary, and the stretch of power must be estimated by the exigencies which called it forth."[4] But it was also held that a volunteer mustered into the service of the United States for a term that was described as "during the war," could not claim the benefit of the stay laws enacted for the relief of soldiers; because, his term of enlistment being necessarily indefinite,

[1] Bunn *v.* Gorgas, 41 Pa. St. 441; and see Williams's Appeal, 72 Pa. St. 214, per Trunkey, P. J.

[2] Johnson *v.* Duncan, 3 Mart. (La.) 530.

[3] Coxe *v.* Martin, 44 Pa. St. 322; Breitenbach *v.* Bush, 44 Pa. St. 313. See, *per contra*, Hasbrouck *v.* Shipman, 16 Wis. 296.

[4] Woodward, J., in Coxe *v.* Martin, 44 Pa. St. 326.

the statute, as applied to such a case, would be unconstitutional.[1]

§ 160. **Prospective Stay Laws, and Judgments on Torts.** — An act granting a stay of execution is of course constitutional and binding so far as it relates to future contracts made within the State and to be performed there.[2] For the constitutional inhibition does not include the case of *prospective* laws;[3] inasmuch as all statutes in force at the time a contract is made, and which concern its validity, construction, or discharge, must be considered as entering into it and forming the unwritten Part of its stipulations.[4] But the principles already adduced will lead us to the conclusion that a statute *extending* the stay of execution on existing judgments to a longer period than was by law allowed when the contract was made, or judgment rendered, would be unconstitutional.

There is room for the suggestion that a stay law, though retroactive in its operation, would be valid as applied to causes of action arising *ex delicto*. For a right of action sounding in tort has none of the essential elements of a contract, and is plainly not within the constitutional prohibition. And if we consider the stay law as affecting rather the judgment than the right of action, still, as we have seen, a judgment in tort cannot be regarded, in any proper constitutional sense, as a contract.[5]

§ 161. **Express Waiver of Stay Laws cannot be remitted.** — A remedy incorporated by parties in their contract is a part of its obligation. Hence if the agreement, by its express terms, provides that judgment may be entered without stay of execution after the day of payment, it is not competent for the legislature, by a subsequent act, to dis-

[1] Clark *v.* Martin, 3 Grant (Pa.), 393.
[2] Barry *v.* Iseman, 14 Rich. 129.
[3] *Supra*, § 9.
[4] *Supra*, § 102.
[5] *Supra*, §§ 131, 132.

regard this stipulation and grant a stay.[1] "It sometimes happens," says Judge Woodward, "that the parties contract concerning the remedy, — that they stipulate in the body of the contract, that in case of failure of payment by a certain day, there shall be no stay of execution, or that the mortgagee may enter and sell the mortgaged estate, — or that all exemption rights shall be waived. In such cases the rule is that the remedy becomes part of the obligation of the contract, and any subsequent statute which affects the remedy impairs the obligation, and is unconstitutional."[2]

§ 162. **Imprisonment for Debt may be abolished by Statute.** — Imprisonment of the debtor is only one element of the remedy provided by law for the enforcement of the creditor's claim. And if this part be taken away, there still remains a valid and substantive remedy. Hence it is well settled, that a State legislature may pass a law abolishing imprisonment for debt on contracts made or judgments rendered when imprisonment of the debtor was one of the remedies to which his creditor was by law entitled to resort.[3] As remarked by Mr. Justice Story: "There is no doubt that the legislature of Ohio possessed full constitutional authority to pass laws whereby insolvent debtors should be released, or protected from arrest or imprisonment of their persons on any action for any debt or demand due by them. The right to imprison constitutes no part of the contract, and a discharge of the person of the

[1] Lewis *v.* Lewis, 47 Pa. St. 127; White *v.* Crawford, 84 Pa. St. 433. *Supra*, § 149.

[2] Breitenbach *v.* Bush, 44 Pa. St. 318.

[3] Penniman's Case, 103 U. S. 714; Mason *v.* Haile, 12 Wheat. 370; Beers *v.* Haughton, 9 Pet. 329; Sturges *v.* Crowninshield, 4 Wheat. 200; Gray *v.* Munroe, 1 McLean, 528; Woodfin *v.* Hooper, 4 Humph. 13; Fisher *v.* Lackey, 6 Blackf. 373; Newton *v.* Tibbatts, 2 Engl. (Ark.) 150; Bronson *v.* Newberry, 2 Dougl. 38; Ware *v.* Miller, 9 S. C. 13; Brown *v.* Dillahunty, 4 Sm. & Mar. 713; People *v.* Carpenter, 46 Barb. 619.

party from imprisonment does not impair the obligation of the contract, but leaves it in full force against his property and effects."[1]

§ 163. **Statutes increasing Exemption cannot affect Past Contracts.** — Whether an act of the legislature increasing the amount or value of the debtor's property which is exempt from levy and sale on execution, can constitutionally apply to the collection of judgments entered before its passage, is a question that is involved in considerable doubt and uncertainty upon the authorities. There is a large class of cases holding that such an application of an exemption law would be unconstitutional, not, indeed, as impairing the obligation of the contract, but because it would materially invade the remedy.[2] And many of these cases present forcible and convincing arguments for their conclusions.

§ 164. **In some Jurisdictions such Laws held Valid.** — But there is also a respectable body of authorities in sup-

[1] Beers *v.* Haughton, 9 Pet. 329, 359. But it was held that an act of the legislature of Vermont, releasing the body of a debtor from imprisonment, and directing that the bond which he had given to the sheriff for the prison liberties, and which the sheriff had assigned to the creditor, should be discharged, could not be construed to extend to the case of an escape committed before the passage of the act; and if it were so worded as to extend to such a case, it would be void as impairing the obligation of contracts. Starr *v.* Robinson, 1 D. Chip. 257.

[2] Gunn *v.* Barry, 15 Wall. 610; Edwards *v.* Kearzey, 96 U. S. 595; Baldwin *v.* Flagg, 43 N. J. L. 495; Barnes *v.* Barnes, 8 Jones (N. C.), 366; Wilson *v.* Brown, 58 Ala. 62 (submitting to the authority of Gunn *v.* Barry, *supra*); Johnson *v.* Fletcher, 54 Miss. 628; Lessley *v.* Phipps, 49 Miss. 790; Homestead Cases, 22 Gratt. 266; Vedder *v.* Alkenbrack, 6 Barb. 327; Quackenbush *v.* Danks, 1 Denio, 128; Danks *v.* Quackenbush, 1 N. Y. 129; Forsyth *v.* Marbury, R. M. Charlt. 324. An interesting article on the homestead and exemption laws passed in many of the southern States directly after the war, their manifest unconstitutionality, and the doctrines resorted to by some of the courts in order to uphold them, is found in 10 Am. Law Reg. 137.

port of the contrary proposition. In several of the States it is held that a homestead exemption law, or other statute making a reasonable amount of the debtor's property exempt from execution for his debts, is not objectionable as impairing the obligation of contracts, even in application to debts incurred before the act took effect, nor as disturbing vested rights; that such laws fall within the general power of the legislature to modify the remedies for enforcing contracts; that it is not in virtue of the contract, but by authority of the law of the remedy, that the creditor acquires a right to sell any specific property of his debtor for payment.[1] And it is thought, by these courts, that a material diminution of the remedy is not to be predicated of such statutes, as that result would not be likely to attend their application to the large mass of instances, although isolated cases might occur in which the articles exempted would comprise the debtor's whole property.[2]

§ 165. **Exemption of Debtor's whole Property Unconstitutional.** — But all the cases agree that a statute whereby the entire property of a debtor is withdrawn from the operation of legal process, nothing being left to the creditor but a mere barren right to sue, virtually destroys the latter's remedy, and is, for that reason, unconstitutional

[1] Hardeman *v.* Downer, 39 Ga. 425; Hill *v.* Kessler, 63 N. C. 437; Stephenson *v.* Osborne, 41 Miss. 119 (but see Johnson *v.* Fletcher, 54 Miss. 628; Lessley *v.* Phipps, 49 Miss. 790); Cusic *v.* Douglas, 3 Kans. 123; Root *v.* McGrew, 3 Kans. 215; Coriell *v.* Ham, 4 Greene (Iowa), 455; Rockwell *v.* Hubbell, 2 Dougl. (Mich.) 197. An act providing that a failure to file a declaration of homestead shall work a forfeiture of the exemption is constitutional. Noble *v.* Hook, 24 Cal. 638.

[2] Morse *v.* Goold, 11 N. Y. 281. In this case the decision in Danks *v.* Quackenbush, 1 N. Y. 129, was overruled; or, as the opinion there was given by an equally divided court, it was not considered as entitled to the weight of a precedent.

and void.[1] Thus Judge Strong, in speaking of a certain scheme to withdraw the property of a corporation from the direct reach of its creditors, declared: "No one would contend that a law exempting all a natural person's property from seizure for satisfaction of his debts until he had been proved guilty of mismanaging it, or of wilful delay or of misapplication of his funds, could stand an hour, except as applicable to contracts made after its enactment."[2]

§ 166. **Proper Limitations of Exemption Laws.** — The authorities being thus contradictory, it is necessary to scrutinize the question a little more closely. And in the first place, statutes creating or increasing an exemption of property from execution are clearly distinguishable in principle from such as abolish imprisonment for debt. The latter will, in any case, leave to the creditor a valid and substantive remedy, viz.: his right of execution upon the debtor's property and effects; the former may or may not. In the next place, it is evident that exemption laws do not affect the obligation of the contract. They pertain to the remedy solely, and if they can become prejudicial to contract rights, it is only by reacting upon them through the remedy. Yet if such a statute removes *all* the property of a

[1] State *v.* Bank of the State, 1 S. C. 63; Penrose *v.* Erie Canal Co., 56 Pa. St. 46; Lockhart *v.* Tinley, 15 Ga. 496. In Smith *v.* Morse, 2 Cal. 524, it was held that an act which exempts the property of the judgment-debtor (a municipal corporation) from execution, places it in the hands of trustees, with power to sell as they may think proper, and compels the creditor, if he wishes any benefit whatever, to fund his scrip at a lower rate of interest, and submit to the delay of twenty years, without any guaranty that he will then receive the principal, as it attempts to withdraw the property out of which the creditor had a right to make his money, and so far impairs his remedy as to make it worthless, is unconstitutional and void. But an act exempting county property from forced sale on execution is in affirmance of the common law, and therefore impairs no previous contracts. Gilman *v.* Contra Costa County, 8 Cal. 52.

[2] Penrose *v.* Erie Canal Co., 56 Pa. St. 46, 50.

debtor from the reach of execution, it is certainly unconstitutional, because it entirely destroys the remedy. And again, — to recur to fundamental principles, — if the increase of exemption is so large that it leaves practically no fund out of which to collect the judgment, it is objectionable as hampering the remedy to such an extent as to make it worthless. But, on the other hand, if the additional exemption is so inconsiderable that, in the large majority of instances, it will make no important difference in the satisfaction of claims by legal process, there can be no objection to its retroactive effect. For it is no ground for holding a statute unconstitutional that it merely renders the remedy less speedy and convenient. The difficulty is, in drawing the line between valid and void retroactive exemption laws. Some of the courts have refused even to attempt it. Thus Bronson, C. J., says: "There is, I think, no well defined middle ground between holding that none of the debtor's property can, by a subsequent law, be withdrawn from the reach of the creditor, or else admitting that the whole of his estate may be exempted from sale on execution."[1]

In an early case before the Supreme Court — where, however, all that relates to exemptions is entirely *obiter* — Chief Justice Taney said: "A State may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not, by every sovereignty, according to its own views of policy and humanity."[2] But even this moderate

[1] Quackenbush *v.* Danks, 1 Denio, 128.

[2] Bronson *v.* Kinzie, 1 How. 311, per Taney, C. J. See Cooley, Const. Lim. 287; 2 Wharton on Contracts, § 1067.

view of the subject has been attacked with some force in a later decision of the same court.[1] Still, the separate opinions of some of the judges incline to an adoption of the rule originally laid down.[2]

From the scanty and insufficient data before us it is impossible to make an accurate forecast of the position that will be taken by the supreme national court when the precise distinction shall be required to be drawn. But all the indications seem to point to the final establishment of the view first advanced by Chief Justice Taney.

§ 167. **Express Waiver of Exemption cannot be Remitted.** — If the parties incorporate in their contract, in express terms, an agreement that if the claim is prosecuted to judgment the defendant will not take the benefit of any of the exemption laws of the State, this stipulation becomes of the obligation of the contract, and cannot be annulled or modified by any subsequent act of the legislature.[3]

§ 168. **Constitutionality of Appraisement Laws.** — Where a contract is solvable in money, and, by the law in force when it was made, the debtor's property is liable to be seized and sold on execution to the highest bidder, to satisfy any judgment recovered on the contract, a subsequent statute, which forbids property to be sold on execution unless it will bring two-thirds of the valuation set upon it

[1] Edwards *v.* Kearzey, 96 U. S. 595, where Mr. Justice Swayne says: "The learned Chief Justice seems to have had in his mind the maxim, *De minimis, etc.* Upon no other ground can any exemption be justified. 'Policy and humanity' are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it."

[2] See separate opinions of Clifford and Hunt, JJ., in Edwards *v.* Kearzey, 96 U. S. 595.

[3] *Supra*, §§ 149, 161.

by appraisers, pursuant to the directions contained in the law, though professing to act only on the remedy, amounts practically to a denial of the rights secured by the contract, or to so serious an obstruction as to render it obnoxious to the constitutional prohibition.[1] But it is held that a statute which suspends for a reasonable time (as one year) a sale upon execution for less than two-thirds of the appraised value of the property, may constitutionally apply to judgments on contracts formed before its passage; the decision resting on the ground that the statutes held unconstitutional in the other cases on this point made the stay *perpetual*, unless the property would bring the arbitrary value assigned, while in the present instance, it was only for a limited and not unreasonable time.[2] And a statute changing the *mode* of appraising property for sale on foreclosure is not void as impairing the obligation of contracts, although passed after the execution of the mortgage; for it affects only the remedy, and that not injuriously.[3] So a statute requiring sales on execution to be made for cash without appraisement, merely modifies an existing remedy.[4]

§ 169. **Redemption Laws.** — A statute extending the period allowed for the redemption of real estate sold upon

[1] McCracken *v.* Hayward, 2 How. 608; Moore *v.* Fowler, 1 Hempst. 536; Rawley *v.* Hooker, 21 Ind. 144; Robards *v.* Brown, 40 Ark. 423 (overruling Turner *v.* Watkins, 31 Ark. 429); Willard *v.* Longstreet, 2 Dougl. (Mich.) 172. *Per contra*, Williams *v.* Waldo, 3 Scam. 264. In Sprott *v.* Reid, 3 Greene (Iowa), 489, it was held that a law requiring property sold on execution to bring two-thirds of its appraised value applies to judgments rendered before its passage; but solely on the ground that "a judgment is not a contract." The court does not seem to have seen that the act in question would amount to an unwarranted impairment of the remedy.

[2] Chadwick *v.* Moore, 8 Watts & S. 49.

[3] Jones *v.* Davis, 6 Nebr. 33.

[4] Catlin *v.* Munger, 1 Tex. 598.

execution, or upon foreclosure of a mortgage, cannot constitutionally apply to sales made before its passage.[1] "For in such a case the contract with the purchaser, and for which he has paid his money, is, that he shall have title at the time then provided by law; and to extend the time for redemption is to alter the substance of the contract, as much as would be the extension of the time for payment of a promissory note."[2]

[1] *Supra*, § 105. And see Collins *v.* Collins, 79 Ky. 88; Scobey *v.* Gibson, 17 Ind. 572; Iglehart *v.* Wolfin, 20 Ind. 32; Travellers' Ins. Co. *v.* Brouse, 83 Ind. 62; McKinney *v.* Carrol, 5 B. Mon. 98; Lapsley *v.* Brashears, 4 Litt. 53; Blair *v.* Williams, 4 Litt. 34; Tuolumne Co. *v.* Sedgwick, 15 Cal. 515.

[2] Cooley, Const. Lim. 291.

PART II.

RETROACTIVE LAWS.

PART II.

CHAPTER VI.

THE CONSTITUTIONAL STATUS OF RETROACTIVE LAWS.

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I. Under the United States Constitution.

§ 170. **Definition of Retroactive Laws.** — The phrase "retroactive laws," a term well known in constitutional jurisprudence, is one of very broad and comprehensive signification. In its most obvious sense it includes every

species of legislation calculated to exercise an influence upon matters already past. Thus laws which impair the obligation of contracts are fairly embraced within the meaning of this expression. In point of fact, it is precisely their retroactive operation which lays them open to constitutional objection. If prospective only, laws affecting contracts are not invalid. But we have detached this kind of statutes from the general class of retroactive laws, and considered them separately, following, in this respect, the common usage. They are therefore eliminated from the present discussion. But again, all *ex post facto* laws are necessarily retroactive in their operation; though not all retroactive legislation is *ex post facto* in the sense in which the latter term is used in the phraseology of constitutional law. The general term may include criminal statutes as well as those of a civil nature. But the words "*ex post facto*" have acquired a technical meaning which limits them solely to ordinances relating to crimes and their punishments, and criminal trials. And these last present so many important questions as to require a separate consideration. We propose therefore, for the purposes of this work, to formulate a more restricted definition of the term "retroactive laws." It will be as follows: Retroactive laws are those statutes which, without impairing the obligation of contracts or trenching upon criminal proceedings, affect antecedent transactions or rights already accrued, and impart to them characteristics, or ascribe to them effects, which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence.

§ 171. **Retroactive Laws not forbidden by the Federal Constitution.** — Now, taking the term in this restricted sense, it is evident that retroactive laws are not forbidden by the Constitution of the United States. That instrument prohibits the several States from passing any bill of

attainder, *ex post facto* law, or law impairing the obligation of contracts; but retroactive legislation, *eo nomine*, is not mentioned. It follows, therefore, — and this is the unanimous voice of the decisions, — that any act of a State legislature, retroactive in its operation, but which does not impair the obligation of contracts or partake of the nature of *ex post facto* laws or bills of attainder, is not in contravention of the organic law of the Union, no matter how seriously it may affect vested interests, or how obnoxious it may be to every principle of sound and wholesome legislation.[1] Mr. Justice Paterson, who was a member of the Constitutional Convention, declares that he had "an ardent desire to have extended the provision in the Constitution to retrospective laws in general." "There is neither policy nor safety," he says, "in such laws, and therefore I have always had a strong aversion against them. It may in general be truly observed of retrospective laws of every description, that they neither accord with sound legislation nor the fundamental principles of the social compact."[2] But since the prohibitory clause of the Constitution was eventually framed so as to designate only the two specific classes of retroactive laws, it cannot be extended by implication to embrace the other varieties. And if there is any limitation upon the power of the several State legislatures to pass retroactive laws (still using the term in its restricted

[1] Satterlee *v.* Matthewson, 2 Pet. 380; Watson *v.* Mercer, 8 Pet. 88; Charles River Bridge *v.* Warren Bridge, 11 Pet. 539; Balto. & Susq. R. R. *v.* Nesbit, 10 How. 395; Carpenter *v.* Pennsylvania, 17 How. 456; Locke *v.* New Orleans, 4 Wall. 172; Drehman *v.* Stifle, 8 Wall. 595; s. c. 41 Mo. 184; Randall *v.* Krieger, 23 Wall. 137; Beach *v.* Woodhull, Pet. C. C. 2; Albee *v.* May, 2 Paine, 74; People *v.* Supervisors, 63 Barb. 85; Grim *v.* School District, 57 Pa. St. 433; Lane *v.* Nelson, 79 Pa. St. 407; Wilson *v.* Hardesty, 1 Md. Ch. 66; Baugher *v.* Nelson, 9 Gill, 299; Reed *v.* Beall, 42 Miss. 472; State *v.* New Orleans, 32 La. An. 709; State *v.* Squires, 26 Iowa, 340.

[2] Calder *v.* Bull, 3 Dall. 397, opinion of Paterson, J.

signification), it must be sought for in the organic law of the particular State, or in the general principles of statutory jurisprudence.

II. Under the State Constitutions.

§ 172. **Constitutional Enactments of the several States in respect to Retroactive Laws.** — Although most of the State constitutions contain prohibitory clauses against this general species of legislation, yet their language, and the particularity with which the forbidden acts are described, exhibit a wide diversity. And it will be found that retroactive laws, in the limited sense, are specifically mentioned in but few. Thus,

Alabama. In this State it is provided "that no *ex post facto* law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed by the general assembly."[1]

Arkansas. The constitution provides that "no bill of attainder, *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be passed."[2]

California. The same clause as in the constitution of Arkansas.[3]

Colorado. "That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, shall be passed by the general assembly."[4]

Connecticut. In this State it is merely provided that "no person shall be attainted of treason or felony by the legislature."[5]

Florida. The earliest constitution declares that "retro-

[1] Alabama, Const. 1875, Art. 1, § 23.
[2] Arkansas, Const. 1874, Art. 2, § 17.
[3] California, Const. 1849, Art. 1, § 16.
[4] Colorado, Const. 1876, Art. 2, § 11.
[5] Connecticut, Const. 1818, Art. 1, § 1.

spective laws, punishing acts committed before the existence of such laws, and by them only declared penal or criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law shall ever be made." And "that no law impairing the obligation of contracts shall ever be passed."[1] But a more recent constitutional enactment omits the definition and provides that "no bill of attainder, or *ex post facto* law, impairing the obligation of contracts, shall ever be passed."[2]

Georgia. The constitution of 1865 provides that "*ex post facto* laws, laws impairing the obligation of contracts, and retroactive laws injuriously affecting any right of the citizen, are prohibited."[3] But this clause appears to have been omitted from the constitution of 1868.

Illinois. In this State, *ex post facto* laws and statutes impairing the obligation of contracts are specifically forbidden.[4]

Indiana. The same prohibition as in Illinois.[5]

Iowa. Here the language used is: "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed."[6]

Kansas. In the first constitution of the State it was provided that "The general assembly shall not have power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties and officers, by curing omissions, defects, and errors in instruments and

[1] Florida, Const. 1838, Art. 1, §§ 18, 19. Const. 1865, Art. 1, §§ 18, 19.
[2] Florida, Const. 1868, Art. 1, § 17.
[3] Georgia, Const. 1865, Art. 1, § 14.
[4] Illinois, Const. 1870, Art. 2, § 14.
[5] Indiana, Const. 1851, Art. 1, § 24.
[6] Iowa, Const. 1857, Art. 1, § 21.

proceedings, arising out of a want of conformity with the laws of this State."[1] But this clause was not incorporated in the constitution of 1859.

Kentucky. "That no *ex post facto* law nor any law impairing contracts shall be made."[2]

Louisiana. "No *ex post facto* or retroactive law, nor any law impairing the obligation of contracts shall be passed, nor vested rights be divested, unless for purposes of public utility and for adequate compensation made."[3]

Maine. "The legislature shall pass no bill of attainder, *ex post facto* law, nor law impairing the obligation of contracts."[4]

Maryland. In this State the language of the constitutional enactment is peculiar. "That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made, nor any retrospective oath or restriction be imposed or required."[5]

Massachusetts. Here it is declared that "Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government." And "No subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature."[6]

Michigan. The same provision as in Maine.[7]

Minnesota. The same provision as in Maine.[8]

[1] Kansas, Const. 1855, Art. 4, § 20.
[2] Kentucky, Const. 1799, Art. 10, § 18. Const. 1850, Art. 13, § 20.
[3] Louisiana, Const. 1868, Art. 110.
[4] Maine, Const. 1820, Art. 1, § 11.
[5] Maryland, Const. 1867, Declaration of Rights, Art. 17.
[6] Massachusetts, Const. 1780, Part I., Arts. 24, 25.
[7] Michigan, Const. 1850, Art. 4, § 43.
[8] Minnesota, Const. 1857, Art. 1, § 11.

Mississippi. "No *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed." [1]

Missouri. In this State retroactive laws are specifically forbidden. Thus, "That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, can be passed by the general assembly." [2]

Nebraska. The same provision as in Maine.[3]

Nevada. The same provision as in Maine.[4]

New Hampshire. In the constitution of this State it is said: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offenses." [5]

New Jersey. The constitution of this State provides that "The legislature shall not pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." [6]

North Carolina. The language of the prohibition is as follows: "That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be

[1] Mississippi, Const. 1868, Art. 1, § 9.

[2] Missouri, Const. 1875, Art. 2, § 15.

[3] Nebraska, Const. 1875, Art. 1, § 16.

[4] Nevada, Const. 1864, Art. 1, § 15.

[5] New Hampshire, Const. 1792, Part I., Art. 23.

[6] New Jersey, Const. 1844, Art. 4, § 7, subd. 3. It appears from the remarks of Judge Depue in Rader *v.* Road District, 36 N. J. L. 278, that the last clause in this paragraph of the New Jersey constitution (forbidding the taking away of existing remedies) was not in the section originally reported, but was added by amendment, advocated by Messrs. Ryerson, Vroom, and Green, and adopted by the decisive vote of 36 to 9. Afterwards, a motion was made to strike it out, which, after discussion, was lost without a division.

made; and no law taxing retrospectively sales, purchases, or other acts previously done ought to be passed."[1]

Ohio. It is provided that "The general assembly shall have no power to pass retrospective laws, but may by general laws authorize courts to carry into effect, upon such terms as may be just and equitable, the manifest intention of parties and officers, by curing omissions, defects, and errors in instruments and proceedings, arising out of their want of conformity with the laws of this State."[2]

Oregon. "No *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed."[3]

Pennsylvania. "No *ex post facto* law, nor any law impairing the obligation of contracts, shall be passed."[4]

Rhode Island. The same provision as in Pennsylvania.[5]

South Carolina. Same provision as in Maine.[6]

Tennessee. The constitution of this State forbids *ex post facto* laws, and provides that "no retrospective law, or law impairing the obligation of contracts, shall be made."[7]

Texas. "No bill of attainder, *ex post facto* law, retro-

[1] North Carolina, Const. 1876, Art. 1, § 32.

[2] Ohio, Const. 1851, Art. 2, § 28.

[3] Oregon, Const. 1857, Art. 1, § 22.

[4] Pennsylvania Const. 1873, Art. 1, § 17. See Weister *v.* Hade, 52 Pa. St. 474. As we learn from the Debates Penna. Const. Convention, vol. v. p. 313, a section was proposed (for the constitution of 1873), exactly corresponding with that in Ohio, — forbidding retroactive laws, but allowing curative and confirmatory acts, — but was voted down. And at p. 632 it appears that an amendment was proposed as follows: "Or any law depriving the party of any remedy for the enforcement of a contract which existed when the contract was made." But the amendment was lost.

[5] Rhode Island, Const. 1842, Art. 1, § 12.

[6] South Carolina, Const. 1868, Art. 1, § 21.

[7] Tennessee, Const. 1870, Art. 1, §§ 11, 20.

active law, or any law impairing the obligation of contracts, shall be made."[1]

Virginia. "The general assembly shall not pass any bill of attainder, or any *ex post facto* law, or any law impairing the obligation of contracts."[2]

West Virginia. Same provision as in Maine.[3]

Wisconsin. Same provision as in Maine.[4]

§ 173. **Recapitulation.** — The foregoing review of the constitutional enactments of the several States on this subject shows, that while *ex post facto* laws are expressly prohibited in twenty-nine States, and laws impairing the obligation of contracts in twenty-six (in addition to the controlling force of the Federal Constitution), retroactive laws, as such, are prohibited in only seven, viz.: Colorado, Louisiana, Missouri, New Hampshire, Ohio, Tennessee, and Texas.

III. Substantive Harmony of the Decisions.

§ 174. **Statement of the Point of Union.** — Notwithstanding this lack of uniformity in the constitutional enactments of the several States, in regard to retroactive laws, it will be found that their legislative practice in this respect is not essentially different; and there seems to be good ground for the hope that a practical harmony will be ultimately reached, both in theory and practice, and both on the part of legislatures and courts. For, in the first place, all theories on this subject start with the postulate that the people of a State, in creating by their organic law a legislative department of government, confer upon it the

[1] Texas, Const. 1876, Art. 1, § 16.
[2] Virginia, Const. 1870, Art. 5, § 14.
[3] West Virginia, Const. 1872, Art. 3, § 4.
[4] Wisconsin, Const. 1848, Art. 1, § 12.

whole of their inherently sovereign and uncontrolled power of legislation, except in so far as they have delegated this power, in respect to certain subjects and under certain restrictions, to the Congress of the United States, and except also, in so far as they contemporaneously impose checks and limits upon the legislative authority. Hence, that the legislature of a State may enact any law, of any character or on any subject, unless it is prohibited, either in express terms or by necessary implication, in the Constitution of the United States or of that State. Thus it is said: "The distinction between the United States Constitution and our State constitution is, that the former confers upon Congress certain specified powers only, while the latter confers upon the legislature *all* legislative power. In the one case the powers specifically granted can only be exercised. In the other, all legislative powers not prohibited may be exercised." [1]

Now we should infer from this, *a priori*, that in those States where retroactive laws are formally prohibited, it would be without the scope of the legislative authority to enact any statute having a backward operation upon antecedent transactions. Yet we shall find that several classes of retroactive laws — such as curative and confirmatory acts, and statutes relating to judicial proceedings and remedial process — are, in those States, held valid and constitutional. We should also infer that, in those jurisdictions where no specific inhibition is levelled against retroactive laws, any civil ordinance, retroactive in its nature, would be consistent with the limits of legislative authority, unless it happened to impair the obligation of contracts. But an examination of the authorities will disclose the fact that, in these commonwealths, retroactive laws which disturb vested rights or violate the fundamental principles of the social organization, have frequently been pronounced

[1] People *v.* Flagg, 46 N. Y. 401, per Church, C. J.

void; and, in fact, the *valid* classes of retroactive laws have been generally confined to those species mentioned above. Thus certain States, starting with an express constitutional prohibition, and certain others, starting without it, reach practically the same position, and substantially agree in holding the same laws valid and the same laws invalid. This is the *result* of the authorities. But it will be expedient to state them more in detail.

§ 175. **How in States where Retroactive Laws are Forbidden.** — The strongest prohibition against retroactive laws is found in the constitution of New Hampshire, where they are denounced as "highly injurious, oppressive, and unjust." Yet in that State it is held that any statute which changes or affects the remedy merely, and does not destroy or impair vested rights, is not unconstitutional though it be retrospective, and although in changing or modifying the remedy the rights of parties may be incidentally affected.[1] So in Ohio, it is said that a statute purely remedial in its operation on pre-existing rights, obligations, duties, and interests, is not within the mischiefs intended to be guarded against by that clause of the constitution which forbids the passage of retroactive laws, and therefore not within a just construction of its terms.[2] And the courts of Tennessee hold that a statute which does not create or divest a right, but merely regulates a remedy, is not a retroactive law in the sense in which such acts are prohibited by the State constitution.[3] And in Texas, laws are deemed retroactive and within the constitutional prohibition which, by retroactive operation, destroy or impair vested rights, or rights to do certain actions or possess

[1] Rich *v.* Flanders, 39 N. H. 304; Simpson *v.* Bank, 56 N. H. 466.

[2] Rairden *v.* Holden, 15 Ohio St. 207; Trustees *v.* McCaughey, 2 Ohio St. 152; Butler *v.* Toledo, 5 Ohio St. 225.

[3] Brandon *v.* Green, 7 Humph. 130; Wynne *v.* Wynne, 2 Swan, 405.

certain things according to the laws of the land; but laws which affect the remedy merely are not within the scope of the inhibition, unless the remedy be taken away altogether or unduly embarrassed.[1] In Louisiana, also, it is held that a retroactive law which has no relation to crimes and penalties, and does not impair the obligation of contracts, nor tend to divest vested rights, is not unconstitutional.[2] Further, in these States, it is generally thought that a statute curing defects or omissions in existing instruments or judicial proceedings, or confirming titles or rights liable to be overthrown for want of conformity with the laws, is not within the legitimate scope of the prohibition.[3] And in at least one of these States it is held that a statute authorizing the courts to grant divorces for causes which, at the time of the marriage, constituted no ground for such proceedings, is not within the prohibition against retroactive laws.[4]

We may therefore conclude that, in those States where retroactive laws are specifically and formally prohibited, there are nevertheless certain classes of statutes of that character which are held valid and constitutional, as being salutary and wholesome regulations and not within a just

[1] De Cordova *v.* Galveston, 4 Tex. 470; Sutherland *v.* De Leon, 1 Tex. 250.

[2] New Orleans *v.* Cordeviolle, 13 La. An. 268; New Orleans *v.* Poutz, 14 La. An. 853.

[3] Hughes *v.* Cannon, 2 Humph. 589; Morris *v.* State, 62 Tex. 728; Chesnut *v.* Shane, 16 Ohio, 599. In Sturges *v.* Carter, 114 U. S. 511, it was held that a statute of Ohio authorizing auditors to extend inquiries into returns of property for taxation over a period of four years next before that in which the inquiry is made, is no violation of the constitutional prohibition in that State against retroactive laws; because it does not take away any vested right of the tax-payer, nor subject him to any new disability in reference to past transactions, or impose upon him a new duty or obligation.

[4] Jones *v.* Jones, 2 Overt. (Tenn.) 2; s. c. 5 Am. Dec. 645.

construction of the inhibition. In the next place, in the States where no such restriction exists, still —

§ 176. **Vested Rights must not be Impaired.** — This is, indeed, a rule of universal application. It is not competent for the legislature (leaving out of the question the right of eminent domain and the police power of the State) to pass any law divesting settled rights of property.[1] And this restriction does not necessarily depend upon the express terms of any constitutional enactment, but is grounded on the implications drawn from the policy and the guarantees of the fundamental law of the land. Thus Judge Jewett declares: "I cannot assent to the doctrine supposed to be advanced in Butler *v.* Palmer, 1 Hill, 324, that the legislature has unlimited power to interfere with vested rights, unless they be saved by some restriction to be found in the Federal or State constitution."[2]

§ 177. **Statutes contrary to Fundamental Principles of Justice.** — But suppose that a retroactive law, without coming under any of the specific heads already adverted to, is objected to on the ground that it is contrary to the spirit of the constitution and the implications necessarily drawn from it, or to the fundamentals of justice and good government, or to those cardinal principles of the social compact which antedate all laws and enter into the very framework of representative government. If, in the particular State, there exists no prohibition against retroactive laws, is it within the province of the judiciary to declare

[1] Benson *v.* New York, 10 Barb. 223; Bay *v.* Gage, 36 Barb. 447; Kenyon *v.* Stewart, 44 Pa. St. 179, 192; Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394; Coffin *v.* Rich, 45 Me. 507, 514; Hinton *v.* Hinton, Phill. (N. C.) 410; Houston *v.* Bogle, 10 Ired. 496; Commercial Bank *v.* Chambers, 8 Sm. & Mar. 9; Paschal *v.* Perez, 7 Tex. 348; Chesnut *v.* Shane, 16 Ohio, 599; Wright *v.* Marsh, 2 Greene (Iowa), 94; Tilton *v.* Swift, 40 Iowa, 78.

[2] Burch *v.* Newbury, 10 N. Y. 374, 393.

such an act unconstitutional? This question is by no means free from doubt. But the preponderance of authority returns an affirmative answer. Thus, in an important Maryland decision, it is said: "But the objection to the validity of the act of 1825 does not rest alone for support upon the construction of the Constitution of the United States. Independent of that instrument, and of any express restriction in the constitution of the State, there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact (in this country at least), the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty, and property of the citizen from violation, in the unjust exercise of legislative power."[1] To the same effect is a decision of the Supreme Court of Connecticut, where Judge Butler observed: "But the power of the legislature in this respect is not unlimited. They cannot entirely disregard the fundamental principles of the social compact. Those principles underlie all legislation, irrespective of constitutional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void. . . . Although it is to be assumed that the legislature supposed they had authority to pass the particular retrospective act, and judged it to be reasonable and just, yet they may have erred; and if it is shown to the court, with entire clearness and certainty, to be so unreasonable and unjust in its operation upon antecedent legal rights, that the action of the legislature cannot be vindicated by any reasonable intendment or allowable presumption, it is our

[1] Regents *v.* Johnson, 9 Gill & J. 365, per Buchanan, C. J.

duty to declare it void."[1] The leading case of Calder *v.* Bull is sometimes cited as an authority directly against the proposition we are now seeking to maintain. But a careful reading of the decision will show it to be, in fact, strongly in favor of the power of the judiciary to declare a statute void which contravenes the fundamental maxims of constitutional government. The important part of the opinion is given in a note.[2] This was at all times the view

[1] Welch *v.* Wadsworth, 30 Conn. 149, 155; Goshen *v.* Stonington, 4 Conn. 225.

[2] Calder *v.* Bull, 3 Dall. 386. Chase, J., said: "I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution, or fundamental law of the State. The people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the federal or State legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. . . . The genius, the nature, and the spirit of our State governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; they may de-

taken by Mr. Justice Story; and other decisions are not lacking to lend support to this side of the question.[1]

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

clare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt, or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property. To maintain that our federal or State legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in our free republican governments."

[1] Wilkinson *v.* Leland, 2 Pet. 657; Terrett *v.* Taylor, 9 Cranch, 43; Goshen *v.* Stonington, 4 Conn. 225; Benson *v.* New York, 10 Barb. 244; Bowman *v.* Middleton, 1 Bay, 252; Ham *v.* McClaws, 1 Bay, 98.

will to prevent us from demolishing it entirely."[1] But there is a circumstance which seriously detracts from the authority of this decision. During a considerable period of the earlier history of the judiciary of Pennsylvania, its attitude towards the legislative department of that State was marked by the most extreme diffidence. And hence, where the judges failed to vindicate their entire independence in matters clearly within the scope of their constitutional power, it is not to be expected that they would assert it in respect to questions of authority that might be open to plausible doubt. But it is not unreasonable to surmise that if the precise point were again presented to that court, a different answer might be returned.[2]

[1] Sharpless *v.* Mayor of Philadelphia, 21 Pa. St. 147, 161. To the same effect is Commonwealth *v.* McCloskey, 2 Rawle, 369, 374, where Judge Rogers said: "If the legislature should pass a law in plain, unequivocal, and explicit terms, within the general scope of their constitutional power, I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice."

[2] In Grim *v.* School District, 57 Pa. St. 433, 436, Judge Sharswood says: "The judicial current, indeed, for a long period ran riot in sustaining acts of legislation of the most extreme character. Retroactive legislation began and was continued because the judiciary thought itself too weak to withstand; too weak, because it had neither the patronage nor the prestige to sustain it against the antagonism of the legislature and the bar. This, at least, is the account which Chief Justice Gibson gave of the matter in Greenough *v.* Greenough, 1 Jones, 489–495, and his testimony is certainly worthy to be implicitly received, for he could truly say, *quorum pars magna fui*. In Harvey *v.* Thomas, 10 Watts, 66, he had himself gone the length of asserting that the legislature had power to take the property of an individual, even for a private purpose and without compensation. In other words, could take the property of A and give it to B; but in Norman *v.* Heist, 5 W. & S. 174, he himself, with characteristic frankness, repudiated such a doctrine. So Bradee *v.* Bromfield, 2 W. & S. 271, was overruled in De Chastelling *v.* Fairchild, 3 Harris, 18, and Menges *v.* Wertman, 1 Penna. R 218, and in Menges *v.* Dentler, 9 Casey, 495. These were cases lying on the

So in Connecticut it is said: "There may not often be any great difficulty in determining what are the principles of natural justice, nor what would tend to undermine that which theorists may suppose to be the fundamental principles of the social compact, especially by those who acknowledge the precepts and obligations of revealed religion; yet these principles are not always of easy and undoubted application to the infinitely varied forms of human action. And we know of no other municipal power which can more safely make such application than the legislature; and as a court, although we might dissent from its conclusions, yet we disclaim any right to disregard them, for no other reason than that we might consider them unreasonable, impolitic, or unjust."[1] But both earlier and later cases in that court take a different view of the subject.[2] Finally, in a Tennessee decision it is said: "It is not for the judiciary or the executive department to inquire whether the legislature has violated the genius of the government or the general principles of liberty and the rights of man, or whether their acts are wise and expedient or not, but only whether it has transcended the limits prescribed for it in the constitution. By these alone is the power of that body bounded; that is the touchstone by which all its acts are to be tested."[3] The question is one

extreme verge of legislative power, and it is evident that the judicial current was turned backward. I may venture to say, as I think, that Satterlee *v.* Matthewson [16 S. & R. 191] would not now be decided as it was in 1827; and that the [dissenting] opinion of Judge Duncan would better express the ripened judgment of the profession and the courts." And see Palairet's Appeal, 67 Pa. St. 479, for a construction of the Bill of Rights of Pennsylvania.

[1] Bridgeport *v.* Railroad, 15 Conn. 475, 497, Church, J.

[2] Goshen *v.* Stonington, 4 Conn. 225; Welch *v.* Wadsworth, 30 Conn. 149, 155.

[3] Louisville, &c. R. R. *v.* County Court, 1 Sneed, 687, Caruthers, J. Judge Cooley thinks that the courts are not at liberty to declare a stat-

of great delicacy. For while the importance of an independent judiciary, acting as a balance-wheel in the governmental machinery, could scarcely be overestimated, yet it is equally true that any assumption of legislative power by that body would be quite inconsistent with the theory of a tripartite division of civil power. It may readily be conceded that the courts have nothing to do with the political sagacity or social wisdom, or the lack of it, that may be displayed by the legislature in their enactment of laws. Still, as before intimated, we think the preponderance of authority is in favor of the power of the judiciary to declare a statute invalid which violates the fundamental guarantees of the social compact or the spirit and genius of the Constitution.

§ 178. **Conclusions as to Retroactive Laws.** — This review of the authorities brings us to the same point that was stated in an earlier section, — the substantive harmony of the decisions as to the constitutional status of retroactive laws. In certain States they are expressly prohibited; yet there are several classes that are held valid, because not within a just construction of the inhibition. In other States, retroactive laws, as such, are not mentioned; yet the exclusion of such statutes as disturb vested rights, or violate the spirit of the constitution or the implications necessarily drawn from it, leaves certain classes of retroactive laws held valid, which are practically coincident with those just mentioned. In our future discussions, therefore, it will not often be necessary to discriminate between the constitutional provisions of the different States.

ute void, because, in their opinion, it invades the fundamental principles of civil liberty or violates the maxims of republican government, unless those principles are declared and guaranteed by the Constitution; nor because the act is opposed to the *spirit* of the Constitution. Cooley, Const. Lim. 164 *et seq.*

IV. The Rule of Construction.

§ 179. **Statutes construed Prospectively whenever possible.** — It is an inflexible rule that a statute will be construed as prospective and operating *in futuro* only, unless the intention of the legislature to give it a retroactive effect is expressed in language too clear and explicit to admit of a reasonable doubt.[1] Thus Judge Duncan ob-

[1] Auffmordt *v.* Rasin, 102 U. S. 620; United States *v.* Starr, 1 Hempst. 469; Torrey *v.* Corliss, 32 Me. 33; Coffin *v.* Rich, 45 Me. 507; Atkinson *v.* Dunlop, 50 Me. 111; Hastings *v.* Lane, 3 Shep. 134; Colony *v.* Dublin, 32 N. H. 432; Briggs *v.* Hubbard, 19 Vt. 86; Whitman *v.* Hapgood, 13 Mass. 464; Medford *v.* Learned, 16 Mass. 215; Goshen *v.* Stonington, 4 Conn. 209; Perkins *v.* Perkins, 7 Conn. 558; Plumb *v.* Sawyer, 21 Conn. 351; Hubbard *v.* Brainerd, 35 Conn. 576; State *v.* Smith, 38 Conn. 397; Dash *v.* Van Kleeck, 7 Johns. 477; Watkins *v.* Haight, 18 Johns. 138; Quackenbush *v.* Danks, 1 Denio, 128; Sayre *v.* Wisner, 8 Wend. 661; Ray *v.* Gage, 36 Barb. 447; Norris *v.* Beryea, 13 N. Y. 273; New York, &c. R. R. *v.* Van Horn, 57 N. Y. 473; Jarvis *v.* Jarvis, 3 Edw. Ch. 462; Oliphant *v.* Smith, 6 Watts, 449; Bedford *v.* Shilling, 4 Serg. & R. 401; Ogle *v.* Turnpike Co., 13 Serg. & R. 256; Kenyon *v.* Stewart, 44 Pa. St. 179; Tyson *v.* School Directors, 51 Pa. St. 9; Haley *v.* Philadelphia, 68 Pa. St. 137; State *v.* Scudder, 32 N. J. L. 203; Vreeland *v.* Bramhall, 39 N. J. L. 1; Baugher *v.* Nelson, 9 Gill, 299; Clark *v.* Baltimore, 29 Md. 277; Williams *v.* Johnson, 30 Md. 500; Merwin *v.* Ballard, 66 N. C. 398; *Exp.* Graham, 13 Rich. 277; Davis *v.* Minor, 1 How. (Miss.) 183; Garrett *v.* Beaumont, 24 Miss. 377; Oyon's Succession, 6 Rob. (La.) 504; Slack *v.* Railroad, 13 B. Mon. 1; Allbyer *v.* State, 10 Ohio St. 588; Lewis *v.* Brackenridge, 1 Blackf. 220; State *v.* Barbee, 3 Ind. 258; Aurora Turnpike Co. *v.* Holthouse, 7 Ind. 59; Garrett *v.* Doe, 1 Scam. 335; Guard *v.* Rowan, 2 Scam. 499; Bruce *v.* Schuyler, 4 Gilm. 221; Thompson *v.* Alexander, 11 Ill. 54; Conway *v.* Cable, 37 Ill. 82; Bartruff *v.* Remey, 15 Iowa, 257; Bennett *v.* Fisher, 26 Iowa, 497; State *v.* Auditor, 41 Mo. 25; State *v.* Blakeman, 52 Mo. 578; State *v.* Ferguson, 62 Mo. 77; State *v.* Atwood, 11 Wis. 422; Von Schmidt *v.* Huntington, 1 Cal. 55; Thorne *v.* San Francisco, 4 Cal. 127; Cooley, Const. Lim. 370.

serves: "Where a law is in its nature a contract, where absolute rights are vested under it, a law retrospecting, even if it were constitutional, would not be extended by any liberal construction, nor would it be construed by any general words to embrace cases where actions are brought. It would be confined to future actions. Statutes are *prima facie* prospective in their operation; and retrospective laws being in their nature odious, it ought never to be presumed the legislature intended to pass them, where the words will admit of any other meaning." [1] But a statute applying to future transactions does not operate retroactively merely because they relate to antecedent events, or because part of the requisites of its action are drawn from time before its passage.[2] And it is said that the occasion of the enacting of a law may be looked to, to assist in determining its character as retrospective or prospective.[3]

§ 180. **Strict Construction of Retroactive Laws.** — Where the retroactive character of a statute is clearly indicated on its face, and although it is free from constitutional objections, yet it will always be subjected to the most circumscribing construction that can possibly be made consistent with the intention of the legislature.[4] Hence, to a statute explicitly retroactive to a certain extent and for a certain purpose, the court will not, by construction, give a retroactive operation to any greater extent or for any other purpose.[5] So, before an act can be held to operate retrospectively to bar an action for a prior injury, it must clearly appear that it embraces the very case.[6]

[1] Underwood *v.* Lilly, 10 Serg. & R. 97, 101.
[2] Johnston *v.* United States, 17 Ct. of Cl. 157.
[3] People *v.* Supervisors, 70 N. Y. 228.
[4] Hedger *v.* Remaker, 3 Met. (Ky.) 255.
[5] Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550.
[6] Chalker *v.* Ives, 55 Pa. St. 81.

§ 181. **Construction of State Constitution.** — There is reason and authority for holding that the same rule should be applied in the construction of a State constitution which governs the interpretation of an ordinary statute; that it should be held to operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect. If the rule, as applied to statutes, is founded in justice and convenience, there appears to be no good reason why the same principles will not hold in the interpretation of constitutional enactments.[1] There is, however, a *dictum* to the contrary effect to be found in a New York case.[2]

§ 182. **Retroactive Interpretation of Divorce Laws.** — It has been made a question whether divorce statutes should not be made an exception to the general rule of construction. And there are certain suggestions which seem to favor this view. Mr. Bishop, after a careful and instructive discussion of the question whether divorce statutes should be construed retrospectively, so as to authorize a dissolution of the marriage for causes which, at the time of their occurrence, would not warrant it, reaches the following conclusion: "It being the primary object of the divorce suit to regulate the order of society and purify the fountains of morality, while still as between the parties it is a private controversy, and the proceeding being in the highest degree remedial, so that the spirit and reason of the divorce statutes should be pre-eminently the guides to their inter-

[1] Cooley, Const. Lim. 62, and cases cited.

[2] *In re* Oliver Lee & Co.'s Bank, 21 N. Y. 12. Denio, J., says: "The rule laid down in Dash *v.* Van Kleeck, 7 Johns. 477, and other cases of that class, by which the courts are admonished to avoid, if possible, such an interpretation as would give a statute a retrospective operation, has but a limited application, if any, to the construction of a constitution."

pretation, — we should, in all cases where the legislative intent is not plain in the words, prefer the construction which makes the statute applicable to past offences, the same as to future." [1]

[1] 1 Bishop, Marriage and Divorce, § 102.

CHAPTER VII.

THE INVALID CLASSES OF RETROACTIVE LAWS.

I. Statutes impairing Vested Rights are Unconstitutional.

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184. Meaning of the Term.
185. Contingent Rights.
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187. Rights incident to the Marriage Relation.
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II. Statutes expository of Prior Acts.

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IV. Statutes creating New Liabilities.

§ 204. Laws imposing New Liabilities.
205. Enforcing Moral Obligations.

I. Statutes impairing Vested Rights are Unconstitutional.

§ 183. **Protection of Vested Rights.** — The chief restriction upon that species of legislation known as retroactive is this, that vested rights of property must not be impaired. The principle is well established that any statute which, operating upon existing or antecedent transactions or rights, has the effect to destroy or transfer vested interests or estates, is unconstitutional and void.[1] But it is apparent at a glance that this rule is subject to several qualifications and restrictions. For it is not always true that a man has an indefeasible title to that which he owns, as against the State. For example, where the legislature has granted to an individual or a corporation the exclusive privilege of engaging in a business the ordinary conduct of which must necessarily be attended with more or less detriment to the public health or the public morals, the permission so accorded may be at any time rescinded.[2] Here a right — in one sense a "vested" right — is abrogated; but it is done by invoking the police power of the State, and that is one of the limitations under which private property is held. Again, the property of an individual may be taken by the State, for public necessities, and upon adequate compensation made, under the paramount right of eminent domain. And the same is true, to a certain extent, of the exercise of the sovereign power of taxation. And so it frequently happens that the seizure and sale of a man's lands or effects is the consequence of a judicial ascertainment of

[1] Benson *v.* New York, 10 Barb. 223; Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394; Norman *v.* Heist, 5 W. & S. 171; Houston *v.* Bogle, 10 Ired. 496; Commercial Bank *v.* Chambers, 8 Sm. & Mar. 9; Paschal *v.* Perez, 7 Tex. 348; Chesnut *v.* Shane, 16 Ohio, 599; Wright *v.* Marsh, 2 Greene (Iowa), 94.

[2] *Supra*, §§ 62, 63, 69.

his liability for a breach of contract or a tort. Now the statutes which may have authorized these several instances of the impairment of vested rights or interests, though retroactive in their effect, are evidently open to no constitutional objection. But on the other hand, there is no rule or principle known to our judicial or governmental systems which will sanction the taking of private property from one citizen and its transfer to another, against the will of the former and for the personal use and benefit of the latter, whether by general law or special enactment.[1] We perceive, therefore, that the principle of law which forbids the passage of retroactive laws impairing or divesting vested rights rests upon, and is deduced from, that constitutional guarantee which secures to every man the enjoyment of all his property, except as the same may be taken from him by "due process of law" or "the law of the land." These phrases (which are adjudged to be convertible), found in the organic law of every State, as well as of the Union, are thus tersely defined by a distinguished writer: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."[2] By these principles, then, the rule under consideration is to be interpreted and limited. And a statute affecting vested rights, if it is free from every other constitutional objection, is not invalid when it authorizes their impairment by "due process of law" and is in pursuance of "the law of the land."

§ 184. **Meaning of the Term.** — In the next place, it is necessary to determine the exact meaning of the term

[1] Cooley, Const. Lim. 357, citing Taylor *v.* Porter, 4 Hill, 140; Osborn *v.* Hart, 24 Wis. 91.

[2] Cooley, Const. Lim. 356.

"vested rights." And in this connection we cannot do better than adopt the language of Judge Cooley. "In its application," he says, "as a shield of protection, the term 'vested rights' is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The right to private property is a sacred right; not, as has been justly said, 'introduced as the result of princes' edicts, concessions, and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm.'[1] But as it is a right which rests upon equities, it has its reasonable limits and restrictions; it must have some regard to the general welfare and public policy; it cannot be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds, which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all."[2] From this definition it will be seen that the phrase is broad enough to include many other species of acquired rights and interests than the mere ownership of lands or chattels; while it is also strict enough to exclude all interests resting solely in expectation, or which depend, for their future accruing, upon a continuance of the existing laws.

§ 185. **Contingent Rights.** — Thus a statute is not objectionable, as retroactive, because it purports to operate on prior *contingent* or *qualified* rights, but only where it operates to divest settled and vested rights.[3]

[1] Nightingale *v.* Bridges, Shower, 138.
[2] Cooley, Const. Lim. 358.
[3] Clarke *v.* McCreary, 12 Sm. & Mar. 347.

§ 186. **Interests in Expectancy.** — It is clear also that a right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than such a mere expectation of future benefit or interest as may be founded upon an anticipated continuance of the existing general laws. Hence, while a vested and settled right to the enjoyment of an estate at a future day would undoubtedly be protected, equally with the title to property already held in possession, yet a mere probability or presumption that such a right will hereafter accrue is not, in any proper sense, within the rule. "Most civil rights," says Judge Woodbury, "are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee."[1] Thus an anticipated interest in property cannot be said to be vested in any person so long as the owner of the interest in possession has full power, by virtue of his ownership, to cut off the expectant right by grant or devise. And it is for this reason that statutes regulating the descent and distribution of intestate estates may validly apply to all estates not already passed to the heir by the death of the owner. For *nemo est haeres viventis;* and the relation of the presumptive heir to the estate amounts to no more than an expectation of succeeding to the property *unless* the laws in that behalf should be changed in the interval. This, clearly, is not such a vested right as will fall within the prohibition.[2] But of course a statute regulating the

[1] Merrill *v.* Sherburne, 1 N. H. 213.

[2] "The heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the statute of descents. But this promise is no more than a declaration by the legislature as to its present view of public policy as regards the proper order of succes-

descent and distribution of property cannot be so modified by subsequent enactment as to divest estates which have already passed to the heir.[1]

Again, a will does not take effect, nor are there any rights acquired under it, until the death of the testator; and its construction must depend upon the law as it stands at the time of that event. Consequently, a statute passed after the making of a will, but before the death of the testator, by which the common law in this respect is changed, will operate upon the will. To give the statute such an effect is not to make it retroactive in its operation, since it affects no rights vested before its passage.[2] And it is held that an act giving property owners in a certain city two years to redeem from sales for municipal claims, will apply to cases of sales made before its passage but in which no deeds had then been executed to the purchasers.[3]

§ 187. **Rights incident to the Marriage Relation.** — The constitutionality of statutes affecting the property rights incident to the marriage relation must also be tested by the same principle, — the difference in law between a vested right and a mere expectation of a future interest. At com-

sion, — a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property; it cannot be sold or mortgaged; it is not subject to debts; and it is not in any manner taken notice of by the law until the moment of the ancestor's death, when the statute of descents comes in, and for reasons of general public policy transfers the estate to persons occupying particular relations to the deceased, in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir, to be protected by the Constitution." Cooley, Const. Lim. 359.

[1] Rock Hill College *v.* Jones, 47 Md. 1.

[2] Loveren *v.* Lamprey, 22 N. H. 434. So a bequest providing for the emancipation of slaves, which is valid at the time of the testator's death, may, at any time before its execution, be avoided by an act of the legislature. Blackman *v.* Gordon, 2 Rich. Eq. 43.

[3] Gault's Appeal, 33 Pa. St. 94.

mon law, the husband, immediately upon the marriage, succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, by virtue of the marriage. Hence a statute repealing or modifying the common law in this respect can have no retroactive effect upon interests of this character arising out of marriages previously contracted. Thus a statute of the District of Columbia provided that "the right of any married woman to any property belonging to her at the time of marriage, or acquired during marriage, shall be as absolute as if she were not married:" it was held that this law was not designed to have a retroactive effect so as to divest the vested right of a husband in his wife's property; but if it were so intended it would be unconstitutional.[1] But the case is different in regard to the husband's expectant interest in the after-acquired personalty of the wife. This depends, in a certain sense, on the marriage, but cannot properly be regarded as a vested right until made tangible by the acquisition.[2]

In regard to tenancy by the curtesy, it must be remembered that this species of estate does not arise from the marriage alone. It depends upon the happening of a future event. Until it becomes *initiate*, by the birth of a child capable of inheriting, it is a mere expectation and no vested estate. After that, — though not yet *consummate* till the death of the wife, — it is regarded as a vested right which must not be disturbed by retroactive legislation. At the common law, the husband "could have a right as tenant by the curtesy initiate in the wife's estates of inheritance the moment a child was born of the marriage, who

[1] Metropolitan Bank *v.* Hitz, 1 Mackey, 111. *Supra*, § 128. And see Holmes *v.* Holmes, 4 Barb. 295; White *v.* White, 5 Barb. 474; Westervelt *v.* Gregg, 12 N. Y. 208.

[2] Westervelt *v.* Gregg, 12 N. Y. 208; Norris *v.* Beryea, 13 N. Y. 273. But see Dunn *v.* Sargeant, 101 Mass. 336.

might by possibility become heir to such estates. This right would be property, subject to conveyance and to be taken for debts; and must therefore be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed. But while this interest remains in expectancy merely, — that is to say, until it becomes initiate, — the legislature must have full right to modify it, or even to abolish it."[1] Hence the statutes passed in several of the American States, purporting to abolish estates by curtesy, may constitutionally apply to all future marriages, and to such antecedent marriages as had not yet given rise to an initiate tenancy; but not to cases where a tenancy by the curtesy initiate, or in full enjoyment, existed at the passage of the act.[2]

The law is much the same in regard to *dower*, except that the right to the latter remains a mere inchoate interest or expectancy (or a capacity to *acquire* a right) until consummated by the death of the husband. As we have already seen, dower arises by operation of law and not by force of any contract; and hence a statute affecting this matter does not fall within the constitutional prohibition of laws impairing the obligation of contracts no matter what changes it may effect.[3] But when we consider such a statute in relation to its effect on vested rights, a different question arises. The law appears to be well settled that the wife has no vested right of any kind to dower in the estate of her husband before his decease, and until that event, her right may be modified, changed, or abolished by the legislature. Hence a statute restricting the widow's

[1] Cooley, Const. Lim. 361. See 2 Blackst. Comm. 128.

[2] Strong *v.* Clem, 12 Ind. 37; Wyatt *v.* Smith, 25 West Va. 813; Hathorn *v.* Lyon, 2 Mich. 93; Tong *v.* Marvin, 15 Mich. 60.

[3] *Supra*, §§ 108, 127. See Lawrence *v.* Miller, 1 Sandf. 516; Magee *v.* Young, 40 Miss. 164.

right of dower in lands mortgaged by her husband before marriage, applies to all cases where the death of the husband occurs after the act was passed, although the mortgage may have been redeemed before that time.[1] But an act empowering the owner of land subject to a dower interest to hold discharged therefrom, on giving security for the payment of the annual value of the interest, is unconstitutional so far as it relates to dower assigned before its enactment.[2]

§ 188. **Rights to Penalties.** — When a party, by statutory provisions, becomes entitled to recover a judgment, in the nature of a penalty, for a sum greater than that which is justly due to him, the right to the amount which may be recovered does not become a vested right until judgment is obtained; hence a repeal of the statute conferring the right will purge all past transactions of their penal character under it, unless they have already passed to judgment.[3] It is not enough that an action has been commenced for the recovery of the penalty; it is the judgment only that vests the right.[4] Thus an informer in a *qui tam* action, brought under the statute, does not acquire a vested

[1] Barbour *v.* Barbour, 46 Me. 9.

[2] Talbot *v.* Talbot, 14 R. I. 57.

[3] Oriental Bank *v.* Freeze, 18 Me. 109; Pierce *v.* Kimball, 9 Me. 54; Confiscation Cases, 7 Wall. 454; United States *v.* Tynen, 11 Wall. 88; West Troy Fire Dept. *v.* Ogden, 59 How. Pr. 21; Engle *v.* Schurtz, 1 Mich. 150; Washburn *v.* Franklin, 35 Barb. 599; Welch *v.* Wadsworth, 30 Conn. 149; Bank of St. Mary's *v.* State, 12 Ga. 475. In New Hampshire a contrary view obtains. In Dow *v.* Norris, 4 N. H. 16, it is held that where a statute gives a penalty to an individual, his right cannot be taken away, although no proceedings for its recovery have been commenced at the time of the repeal. But in that State a distinction is also taken, as follows: when the act gives a penalty to any one of a class named who shall first sue, there is no vested right in any one until suit is brought, even if there is before judgment. Lakeman *v.* Moore, 32 N. H. 410.

[4] West Troy Fire Dept. *v.* Ogden, 59 How. Pr. 21.

right to the penalty until after judgment; and if the legislature repeal the act under which the suit was brought before final judgment, no legal judgment can afterwards be rendered therein; nor does such repeal impair any vested right of the informer.[1] So a right to a threefold forfeiture of all the interest reserved on a contract, on account of usury, is not a vested right which the legislature cannot take away.[2]

§ 189. **Statutory Privileges and Exemptions.** — It is the opinion of Judge Cooley that the citizen has no vested right in statutory privileges and exemptions. Exemptions from the performance of public duties upon juries,[3] or in the militia, and the like; exemptions of the property or person from assessment for the purposes of taxation (when the exemption was granted as a mere privilege or gratuity, and not upon a consideration moving to the public);[4] exemptions of property from being seized on attachment or execution, or for the payment of taxes;[5] exemptions from being called upon to do labor on the public highways,[6] — any of these may be revoked by the legislature, without incurring a violation of the principle which guards vested rights from invasion.[7]

While it is in general true that vested rights of property, acquired by virtue of a statute, cannot be divested or destroyed by a repeal or modification of the statute;[8] yet it is equally true that mere inchoate rights, depending for their original existence on the law itself, may be abridged

[1] Bank of St. Mary's *v.* State, 12 Ga. 475.
[2] Parmelee *v.* Lawrence, 44 Ill. 405.
[3] *Supra*, § 91.
[4] *Supra*, § 58.
[5] Bull *v.* Course, 13 Wis. 238.
[6] *Exp.* Thompson, 20 Fla. 887.
[7] Cooley, Const. Lim. 383.
[8] Benson *v.* Mayor of New York, 10 Barb. 223; Streubel *v.* Railroad, 12 Wis. 67.

or modified by law; and statutes of this character apply to such rights existing at the time of their passage, provided a reasonable time is left, after the passage of the act and before its operation in bar, for the party to exercise the right.[1]

§ 190. **Rights vested under Statutes of Limitation.** — It is also possible for a party, by the operation of the statute of limitation, to acquire a vested right to be protected against the assertion of specific demands upon him. "When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly and is as safe from legislative interference as it would have been if it had been perfected in the owner by grant, or any species of assurance."[2] Thus a statute authorizing a probate court to renew a commission for the allowance of claims upon the estate of a deceased person, after the close of such commission and the expiration of the time limited by the general law for its renewal, is unconstitutional as impairing vested rights and reviving rights already extinguished.[3]

§ 191. **Laws changing Nature of Tenure.** — The disfavor with which entailed estates have been generally regarded in American jurisprudence has led the several States to pass acts, either providing a simple and easy method of

[1] Smith *v.* Packard, 12 Wis. 371.

[2] Cooley, Const. Lim. 365, citing numerous cases. And see *supra*, § 154.

[3] Bradford *v.* Brooks, 2 Aik. (Vt.) 284.

cutting off the entail, or else abolishing this species of tenure altogether and changing estates so held into estates in fee-simple. As applied to existing entails, the validity of such statutes has not usually been thought open to question.[1] It is evident that they do not impair the vested rights of the tenant in tail, because, on the contrary, their effect is to enlarge and render more beneficial the interest which he possesses; and there is no other person who has any vested right, either in expectancy or in possession, to be affected by the change. Probably, however, an exception should be made in the case of a tenant in tail after possibility of issue extinct. For here the tenant's estate has ceased to be an inheritance, and the interest of the remainderman or reversioner has likewise ceased to be a mere contingency, and has become a vested right of future enjoyment.[2]

On the same principle it is held that a statute making joint heirs tenants in common may constitutionally embrace estates existing at the time of its passage, as well as those acquired by descents afterwards cast. For such an act impairs no vested rights, but renders the tenure more beneficial.[3]

§ 192. **No Vested Right to a Particular Remedy.** — As we have already seen, a statute which affects the remedy merely — which changes or modifies the remedy to an extent not incompatible with the possession by the creditor of an actual and adequate means of enforcing his rights — is not obnoxious to the constitutional prohibition against laws impairing the obligation of contracts.[4] It remains to be stated, in this connection, that the right of a creditor to

[1] De Mill *v.* Lockwood, 3 Blatchf. 56.

[2] See 1 Washburn on Real Prop., 81–84; 2 Bl. Comm. 124–125.

[3] Stevenson *v.* Cofferin, 20 N. H. 150; Holbrook *v.* Finney, 4 Mass. 567; Anable *v.* Patch, 3 Pick. 363.

[4] *Supra*, § 141.

any particular remedy is *not a vested right.* The State is bound to afford substantive and available remedies to the suitors in her courts; but no party can claim a vested right in the permanence of a particular system of courts, or the continuance of a special mode of procedure, or the perpetuation of any remedy or remedial process which can be modified or abolished without impairing or taking away the right itself, when public policy or the convenience of justice demands a change.[1]

§ 193. **Right to take Advantage of Defects and Informalities.** — Among the valid classes of retroactive laws, as will appear more fully hereafter, are to be reckoned those which confirm and settle existing rights, by removing impediments in the way of their enforcement, or by curing defects, irregularities, or informalities.[2] And it follows, as a corollary from this proposition, that a party has no vested right in a defense based upon an informality not affecting his substantial equities. To take a single example, — the right to avoid a contract because of the want of a revenue stamp upon it, is not such a vested right as to preclude Congress from permitting the other party to affix a stamp and thereby to give validity to the instrument.[3]

II. Statutes expository of Prior Acts.

§ 194. **Declaratory Laws generally Unconstitutional.** — It is a matter of frequent occurrence that the common law — or previous statute law — on a particular subject, is found to be ambiguous and uncertain, and that the

[1] See cases cited in §§ 218, 219. But, for example, where bail are absolutely fixed, the judgment-creditor's right to his debt from the bail is a vested right, of which no subsequent legislation can deprive him. Lewis *v.* Brackenridge, 1 Blackf. 220.

[2] *Infra*, §§ 206 *et seq.*

[3] Gibson *v.* Hibbard, 13 Mich. 214.

legislature passes an act declaring what the common law is and has been on that topic, or explaining the meaning of the language employed in the former act, and the inferences to be drawn from its terms. A declaratory statute, in effect, promulgates a rule of construction or interpretation. Such laws are usually enacted in consequence of the establishment, by the judicial department, of a settled doctrine in regard to an ambiguous law. But the legislative exposition is not always in affirmance of the view taken by the courts. And thereupon there arises an important question as to the respective powers and authorities of the two branches of government. The judiciary are certainly within their peculiar province in declaring the meaning and effect of a doubtful or ambiguous law; is the legislature equally so? It has been thought, in several cases, that the legislative body cannot compel the courts to adopt a particular construction of a law which the legislature permits to remain in force, even when the expository act is entirely prospective in its operation and expressly confined to future cases.[1] But with this question we are not at present concerned: we are considering retroactive laws only. And it is well settled that an act of the legislature, declaring the interpretation to be placed upon a previous statute, is not obligatory upon the courts with respect to the application of the first statute to transactions which occurred, or rights of action which accrued, prior to the second.[2] If no other objection to such a law could

[1] Dash *v.* Van Kleeck, 7 Johns. 498; Governor *v.* Porter, 5 Humph. 165; People *v.* Supervisors, 16 N. Y. 424; Reiser *v.* Saving Assn., 39 Pa. St. 137.

[2] Union Iron Co. *v.* Pierce, 4 Biss. 327; Kelsey *v* Kendall, 48 Vt. 24; Greenough *v.* Greenough, 11 Pa. St. 494; West Branch Boom Co. *v.* Dodge, 31 Pa. St. 285; Reiser *v.* Saving Assn., 39 Pa. St. 137; Haley *v.* Philadelphia, 68 Pa. St. 45; Dequindre *v.* Williams, 31 Ind. 444; McManning *v.* Farrar, 46 Mo. 376; Lincoln Building Assn. *v.* Graham, 7 Nebr. 173. *Per contra*, Baker *v.* Herndon, 17 Ga. 568.

be formulated, it is most certainly an unwarranted assumption of judicial power by the legislature. Thus it is said: "So far as it [an expository statute] undertook, in declaring the true intent and meaning of a previous statute, to give that meaning a retrospective operation, it was nugatory. It is not competent for the legislative department of government to declare the meaning of previous statutes for such a purpose. That is the province of the courts. If the new statute declares the law to mean what the courts declare it to mean, then it is useless. If it undertake to give the law a meaning different from that given by the courts, then it is void. To declare what the law is, or has been, is a judicial function. To declare what it shall be, is legislative."[1] The nature of the distinction is more fully stated by the Pennsylvania court, in the following language: "A State, or any other party to a grant, may certainly consent, at any time after its execution, that it shall be interpreted differently from its expression; but there seems to be no reasonable principle on which exposi-

Judge Cooley thinks that "the decision of this question must depend upon the practical application which is sought to be made of the declaratory statute, and whether it is designed to have practically a retrospective operation, or only to establish a construction of the doubtful law for the determination of cases that may arise in the future. It is always competent to change an existing law by a declaratory statute; and where it is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts." Cooley, Const. Lim. 94.

[1] Gorman *v.* Sinking Fund Commissioners (U. S. Cir. Ct. E. D. Va., November 1885), 9 Va. Law Journ. 657.

tory statutes can be founded beyond this, except by regarding them as creative of a new law, and not as interpreting an old one. Law, in its proper sense, is a rule of *future* conduct, and not a test of conduct that precedes it. Legislation and interpretation are naturally and radically distinct functions. Every man must, in the first instance, interpret the law for himself in endeavoring to obey it. It becomes matter of official interpretation only when a case arises in which it is alleged to have been violated; and then, of necessity, the courts must ascertain the interpretation, not according to the terms of any *post facto* expository statute, but according to the terms of the law as it stood when the act was done. In the very nature of things, interpretation follows legislation, and is not to be confounded with it, either as an act or as an authority. The duties are as distinct as possible, and the performance of them is given to different offices; yet without preventing the legislature from embodying, in a statute, rules for its interpretation, or from making a new law, by changing the application or interpretation of an old one, relative to future cases." [1]

§ 195. **Effect on Vested Rights.** — But it is not only on account of its interference with the powers of the judiciary that a declaratory statute may be pronounced unconstitutional. It cannot be allowed, by a retroactive operation, to alter or impair vested rights, which have grown up under the protection of the courts in their interpretation of the former law. To give it such a construction would cause it to violate the constitutional guarantee which secures to every man his property, except as the same may be taken by "due process of law." [2] For of course the

[1] West Branch Boom Co. *v.* Dodge, 31 Pa. St. 285, 288, Lowrie, C. J. In a later case (Reiser *v.* Saving Assn., 39 Pa. St. 137), the same judge remarks: "We hope we have seen the last expository statute under our constitution: all such are fundamentally vicious."

[2] Lambertson *v.* Hogan, 2 Pa. St. 22; Haley *v.* Philadelphia, 68 Pa. St. 45.

very statute which takes away the right cannot itself be regarded as "the law of the land" in this sense. And even in those jurisdictions where no force is conceded to the objection that the declaratory statute amounts to an assumption of judicial power, still, if it impairs vested rights, it is for that reason held invalid. Thus, in Georgia, it is said that if the expository act interferes with no vested rights, impairs the obligation of no contract, and is not in conflict with the primary principles of the 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, and the construction of the old law belongs to the courts.[1]

§ 196. **New Statute preferable.** — When the legislature wishes to exercise its power of changing the law, and establishing a new rule for the regulation of future conduct, it should certainly proceed by the enactment of a new statute, not by the declaration of a new rule of construction. Still, as remarked by Judge Cooley: "In any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted."[2]

III. Statutes affecting Judicial Proceedings.

§ 197. **Statutes granting New Trials.** — If the legislature cannot invade the province of the courts by imposing upon

[1] McLeod *v.* Burroughs, 9 Ga. 213; but see Peyton *v.* Smith, 4 McCord, 476.

[2] Cooley, Const. Lim. 95.

them, by a retroactive statute, the necessity of adopting a different interpretation of an existing law from that which they had already placed upon it, it follows, *a fortiori*, that the legislature cannot *directly* control the action of the courts by setting aside their judgments or ordering a reconsideration of the adjudications they have duly and formally reached. Hence an act of the legislature awarding a new trial in an action which has been decided in a court of law is unconstitutional.[1] Thus it was said by Chief Justice Gibson: "If anything is self-evident in the structure of our government, it is, that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new trials is judicial; but the power of the legislature is not judicial. . . . The legislature has gone no farther than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor, than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, risk, and expense of another contest."[2] Hence it will appear that a statute of this character is not only a practical assumption of judicial power, but also is obnoxious to the provisions which guard vested rights from invasion; and is therefore properly

[1] Merrill *v.* Sherburne, 1 N. H. 199; Lewis *v.* Webb, 3 Me. 326; Bates *v.* Kimball, 2 Chip. 77; De Chastellux *v.* Fairchild, 15 Pa. St. 18; Taylor *v.* Place, 4 R. I. 324; Miller *v.* State, 8 Gill, 145; Weaver *v.* Lapsley, 43 Ala. 224; Lanier *v.* Gallatas, 13 La. An. 175; Beebe *v.* State, 6 Ind. 515.

[2] De Chastellux *v.* Fairchild, 15 Pa. St. 18, 20, Gibson, C. J. On similar principles it has been held that where a sum of money is awarded to an individual, by the verdict of a jury duly confirmed, for damages sustained by him by a road or street laid out over his land, he acquires a vested right to it which cannot be divested by discontinuing the proceedings. Hawkins *v.* Rochester, 1 Wend. 53.

within our subject, and objectionable because of its retroactive effect upon past transactions.

§ 198. **Statutes regulating Appeals.** — On the same principle it is held that the legislature has no constitutional power to grant to a party litigant a right to an appeal or writ of error, in cases where no such right existed when judgment was pronounced, or where the right has been definitely forfeited.[1] For example, where the law stood thus, — that a party who failed to take out a writ of error until an adjudication had been made by the appellate court on his adversary's writ of error, waived or lost his right to do so, — it was held that a subsequent statute giving the right to any litigant to take out a writ of error after an adjudication upon a former one taken by the opposite party in the same case, could not apply to a case already determined on one writ of error, because it would impair the vested right of the successful party to rely upon the conclusiveness of the judgment.[2]

But the converse of this rule would not be equally true. That is to say, a statute which *takes away* the right to a future appeal in an action pending and undetermined when the statute takes effect, is not unconstitutional. For the right to an appeal does not become a vested right (if at all) until the case is fully determined below.[3] And the Supreme Court of the United States goes even further than this, and holds that such a statute may validly apply to cases which have been adjudged in the trial court and are pending (but undetermined) in the appellate court. "A

[1] Lewis *v.* Webb, 3 Me. 326; Hill *v.* Sunderland, 3 Vt. 507; Burch *v.* Newberry, 10 N. Y. 374. But in Converse *v.* Burrows, 2 Minn. 229, it was thought that a statute giving a right of appeal is simply remedial, and therefore may be retroactive. And see Prout *v.* Berry, 2 Gill, 147; State *v.* Northern Central R. R., 18 Md. 193.

[2] McCabe *v.* Emerson, 18 Pa. St. 111.

[3] Grover *v.* Coon, 1 N. Y. 536.

party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary."[1]

§ 199. **Authorizing Opening of Judgments.** — In accordance with the principles already announced, it is well ruled that a statute authorizing the opening of judgments rendered since a certain anterior date, impairs vested rights and infringes on the judicial department of the government.[2] So a statute authorizing the probate court to entertain a bill to review its own decrees, has not a retroactive effect so as to support a bill to review a decree rendered before the passage of the act.[3]

§ 200. **Creation of Special Courts.** — While parties have in general no vested right to insist upon the permanence of a particular system of judicial tribunals, that being a matter pertaining merely to the remedy, and hence within the controlling power of the State,[4] yet it is held that special courts cannot be created for the trial of the rights and obligations of particular parties.[5] Thus a party who has a right of action for which the privilege of trial by jury is secured cannot be required, by retroactive legislation, to submit his cause of action to a tribunal not proceeding according to the course of the common law.[6] But where the corporation of a city had a right, under their charter, to establish, by ordinance, a tribunal before whom contested

[1] Baltimore and Potomac R. R. *v.* Grant, 98 U. S. 398, Waite, C. J. And see *Exp.* McCardle, 7 Wall. 506.

[2] Ratcliffe *v.* Anderson, 31 Gratt. 105.

[3] Stewart *v.* Davidson, 10 Sm. & Mar. 351.

[4] *Supra*, § 192.

[5] Bank of the State *v.* Cooper, 2 Yerg. 599.

[6] *In re* Townsend, 39 N. Y. 171.

elections should be tried, and to provide the forms of such trial, it was held that such an ordinance might be passed after an election had taken place, and that the tribunal so created could take cognizance of the previous election.[1]

§ 201. **Laws regulating Parties to Actions.** — A statute which authorizes a person named to prosecute a particular suit, the plaintiff having died, without taking out letters of administration on the estate of the decedent, impairs vested rights and is unconstitutional.[2] So an act allowing the revival of actions of forcible entry and detainer, in the name of the heir or legal representative of the deceased party, is, as to such cases as were pending at the time of its passage, retroactive in its operation, and is so far invalid.[3] This subject has already been discussed, in connection with the constitutionality of laws which affect the remedy merely.[4]

§ 202. **Altering Rules of Evidence.** — Although the State cannot, while litigation is pending, pass a law which shall have a retroactive effect in favor of one of the litigants concerning the matter in controversy,[5] yet the legislature has undoubted power to regulate the mode of procedure in the courts, in relation to past as well as fu-

[1] State *v.* Johnson, 17 Ark. 407.

[2] Officer *v.* Young, 5 Yerg. 320, 26 Am. Dec. 268.

[3] Tucker *v.* Burns, 2 Swan (Tenn.), 35. But in Hinckle *v.* Riffert, 6 Pa. St. 196, it is held that a statute providing that in all actions of ejectment now pending, or hereafter to be commenced, by more than one plaintiff, if, on the trial, any of the plaintiffs shall fail to establish his, her, or their right to recover, judgment of nonsuit may be entered against the plaintiff or plaintiffs so failing, and a verdict and judgment may be rendered in favor of the other plaintiff or plaintiffs, for the interest in the premises which they may be respectively entitled to recover, touches no vested right of property, and only removes a technical obstruction out of the way of those whose rights have been established on a trial by due course of law, and it is therefore constitutional.

[4] *Supra*, § 147.

[5] Thweatt *v.* Hopkinsville Bank, 81 Ky. 1.

ture contracts. Such changes, not affecting the validity of contracts nor impairing vested rights, are within the general control which the State exercises over remedial process and the judicial machinery provided for the use of suitors, and are limited only by the convenience of the courts and the promotion of the ends of justice.[1] Hence it is obvious that no one can acquire a vested right to have his controversies judged and determined by the existing rules of evidence. "These rules pertain to the remedies which the State provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature."[2] Thus a statute which removes the disqualification of interest in witnesses, and thereby enables parties to actions to testify, is not unconstitutional although it applies to cases in which the cause of action accrued and the rights became vested prior to its passage; for no person can acquire a vested right to the testimony of any particular witness, or to have the testimony of such witness excluded on trial.[3] So an act making one party to a contract incompetent as a witness in a suit thereon, when the other is dead, pertains only to the remedy, and is therefore constitutional.[4] And

[1] Ralston *v.* Lothain, 18 Ind. 303. And see *supra*, §§ 141, 192.

[2] Cooley, Const. Lim. 367.

[3] Rich *v.* Flanders, 39 N. H. 304; Little *v.* Gibson, 39 N. H. 505. It will be perceived that the statement of the text applies equally to those States where retroactive laws are expressly prohibited and to those where they are not. For such a statute would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retroactive even though some of the controversies upon which it might act were in progress before its passage.

[4] Goodlett *v.* Kelly, 74 Ala. 213.

a statute dispensing with proof of the names of members of a partnership, in an action against the firm, may validly apply to cases commenced before its passage.[1] Again, the legislature has power to pass a statute providing that the validity of existing marriages shall not be questioned on the trial of collateral issues on account of the insanity or idiocy of either party.[2] And the same is true of a statute which modifies the common-law rule excluding parol evidence to vary the terms of a written contract.[3] In regard to the power of the State to prescribe the effect of tax-deeds when offered as evidence of title, there is some difference of opinion. But we are inclined to agree with a learned author who says: "A statute which should make a tax-deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property."[4]

§ 203. **Laws validating Judicial Proceedings.** — Retrospective statutes curing defects and informalities in legal proceedings which are, in their nature, merely irregularities, and do not extend to matters of jurisdiction, — or which, in other words, the legislature might constitutionally have declared to be unnecessary or immaterial by a prior statute, — are not generally open to constitutional objection, unless specifically prohibited. This subject will be taken up in another connection.[5] At present it is only desired to

[1] Ballard *v.* Ridgley, 1 Morris (Iowa), 27.

[2] Goshen *v.* Richmond, 4 Allen, 458.

[3] Gibbs *v.* Gale, 7 Md. 76.

[4] Cooley, Const. Lim. 368, 369, citing Groesbeck *v.* Seeley, 13 Mich. 329; Case *v.* Dean, 16 Mich. 13; White *v.* Flynn, 23 Ind. 46; Corbin *v.* Hill, 21 Iowa, 70; Abbott *v.* Lindenbower, 42 Mo. 162; McCready *v.* Sexton, 29 Iowa, 356; Wright *v.* Cradlebaugh, 3 Nev. 349.

[5] *Infra*, §§ 208, 209.

call attention to the following language of the court in Pennsylvania: "While the legislature may not by a retroactive law render valid judicial proceedings which were utterly void for want of jurisdiction, it is equally clear that in cases where the jurisdiction has attached, and there has been a formal defect in the proceedings, where the equity of the party is complete, and all that is wanted is legal form, it is within the recognized power of the legislature to correct such defect and to provide a remedy for the legal right."[1]

IV. Statutes creating New Liabilities.

§ 204. **Laws imposing New Liabilities.** — A statute which, operating upon facts existing at the time of its passage, attempts to impose upon one person a debt or duty to another, where there was no right and no obligation in existence before the passage of the statute, is in violation of the constitutional prohibitions.[2] So the legislature may impose a penalty for non-payment of future accruing taxes, but cannot attach it to taxes which accrued before the statute imposing the penalty.[3]

§ 205. **Enforcing Moral Obligations.** — It is frequently said, however, that where a moral obligation exists, the legislature may give it legal effect by a statute retroactive in its operation.[4] Much to this effect is the language of Mr. Justice Field in a recent case: "The constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation [as that now in question]. A law requiring a municipal corporation to pay a demand which is without legal obligation,

[1] Lane *v.* Nelson, 79 Pa. St. 407.
[2] Towle *v.* Railroad, 18 N. H. 547.
[3] Ryan *v.* State, 5 Nebr. 276.
[4] Lycoming *v.* Union, 15 Pa. St. 166, and cases cited.

but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law, — no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligations of the State, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion."[1]

[1] New Orleans *v.* Clark, 95 U. S. 654.

CHAPTER VIII.

THE VALID CLASSES OF RETROACTIVE LAWS.

I. Curative and Confirmatory Acts.

§ 206. Curative Acts in general.
207. Limitations of the Power.
208. Void Judicial Proceedings cannot be cured.
209. Confirmation of Proceedings merely Irregular.
210. Defective Acknowledgment and Record of Deeds.
211. Conveyances by Persons under Disabilities.
212. Defective Execution of Powers.
213. Wills and Legacies.
214. Defective Exercise of Corporate Powers.
215. Irregular Assessment and Levy of Taxes.
216. Validation of Defective Contracts.
217. Confirmation of Irregular Marriages.

II. Statutes Valid if affecting the Remedy alone.

§ 218. No Vested Right to a particular Remedy.
219. Laws creating or liberating Remedies.

III. Retroactive Divorce Laws.

§ 220. Such Statutes are Constitutional.

IV. Statutes adverse to the State's own Interest.

§ 221. Such Statutes are Constitutional.

I. Curative and Confirmatory Acts.

§ 206. **Curative Acts in general.** — Statutes are frequently passed for the purpose of validating and giving effect to antecedent transactions of private parties, or of courts or public officers, which, though founded in equity and embodying their substantive intention, would have

failed to stand the test of a judicial investigation, on account of some irregularity, defect, or informality discoverable in them. And these constitute the most usual and frequent class of retroactive laws. It is not improbable that the theory of this power may be ultimately predicated upon the omnipotence ascribed to Acts of the Parliament of Great Britain. For although no legislative body in this country claims sovereignty, and although the powers and province of each are strictly circumscribed by written constitutions, yet the political heritage of the American States may well be supposed to have carried with it the doctrine that the legislature, expressing the supreme will of the nation or the State, could heal defective proceedings; not indeed by overriding the laws and sanctioning their violation, but by relieving parties from the consequences which would ordinarily attend an irregular or defective compliance with them. At any rate, it is certain that such laws, in so far as they do not impair vested rights and only aim to carry out the intention of parties, are wholesome in themselves and conducive to the promotion of substantial justice. And the power to make them has always been claimed and exercised by the several States. In at least two States they are provided for by constitutional enactment;[1] and in the others, the absence of any specific prohibition is considered as ample warrant to the legislature to pass such curative acts.

§ 207. **Limitations of the Power.** — But this power of passing curative or confirmatory statutes is to be taken

[1] The constitution of Ohio (1851, Art. 2, § 28), provides that "The general assembly shall have no power to pass retroactive laws, but may by general laws authorize courts to carry into effect, upon such terms as may be just and equitable, the manifest intention of parties and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this State." Same provision in Kansas Const. 1855, Art. 4, § 20.

subject to two very important limitations. In the first place, such acts of legislation must be carefully restricted to the original parties, and must not be allowed to divest the intervening and established rights of third persons. And in the second place, the legislature cannot retroactively excuse errors or informalities which it could not have dispensed with in advance. The rule on this point has been thus stated: "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."[1] That is, the legislature cannot give validity, by ratification or curative law, to past defective proceedings of officers or individuals, if it has not power to authorize such proceedings, or that manner of conducting them, directly. Its power to ratify is subject to whatever limits describe its power to grant authority. Hence, for example, after a constitutional amendment has forbidden the legislature to pass a special law for the collection of taxes, it cannot cure defective proceedings taken under a previous special law.[2] The

[1] Cooley, Const. Lim. 371; Green *v.* Abraham, 43 Ark. 420; Exchange Bank Tax Cases, 21 Fed. Rep. 99. In Bridgeport *v.* Railroad, 15 Conn. 475, 495, it is said: "Although individuals may not have power to make good *ab initio* that which was originally void, by subsequent deeds or acts of confirmation, yet this cannot be true of acts of sovereignty, — acts of legislation not conflicting with constitutional right." But this is to be taken with the limitation stated in the text; that is, if the transaction is void *only because* of some defect or informality which might have been dispensed with, or rendered immaterial, in advance, then it can be cured, but not otherwise.

[2] Kimball *v.* Rosendale, 42 Wis. 407.

nature of this distinction will appear more fully as we proceed.

§ 208. **Void Judicial Proceedings cannot be cured.** — If the judicial proceedings which the confirmatory act is designed to remedy were absolutely *void*, for any reason, then the attempted cure cannot be effected, and the rights of the parties must stand as they were.[1] Thus an act of the legislature undertaking to validate a judgment of a court which was void for want of jurisdiction, is an attempted exercise of judicial power by the legislature, since, the proceedings in court having been void, it would be the statute alone which should constitute an adjudication upon the rights of the parties; and it would also be objectionable as contravening the constitutional provision which secures to every man the enjoyment of his property except as the same may be taken from him by "due process of law," for this last phrase includes the attaching of jurisdiction, due notice, and an opportunity to be heard.[2] So when property has been attempted to be taken by a judicial proceeding which is void for want of jurisdiction, the legislature, for similar reasons, cannot validate it.[3] Again, where a bill of exceptions was not seasonably reduced to writing, and was therefore, under the law then existing, a nullity, it was held that no validity could be given to it by an act of

[1] McDaniel *v.* Correll, 19 Ill. 226; Denny *v.* Mattoon, 2 Allen, 361; Lane *v.* Nelson, 79 Pa. St. 407; Richards *v.* Rote, 68 Pa. St. 248; Pryor *v.* Downey, 50 Cal. 388.

[2] Pryor *v.* Downey, 50 Cal. 388. So where, by reason of non-compliance with the law regulating constructive service, jurisdiction has not attached, a retroactive statute cannot cure the defect. Israel *v.* Arthur, 7 Colo. 5.

[3] Richards *v.* Rote, 68 Pa. St. 248. The legislature cannot constitutionally confirm a patent or survey of land which was absolutely void, so as to divest a title legally acquired before the attempted confirmation. Sherwood *v.* Fleming, 25 Tex. (Supp.) 408; Wright *v.* Hawkins, 28 Tex. 452.

the legislature subsequently passed.[1] So a statute directing a deposition, which was not taken according to law, to be read on the trial of a cause, is unconstitutional and void.[2]

§ 209. **Confirmation of Proceedings merely Irregular.** — But while the legislature cannot, by a retroactive law, render valid judicial proceedings which were utterly void for want of jurisdiction, yet in cases where the jurisdiction has attached, and there has been a formal defect in the proceedings, where the equity of the party is complete, and all that is wanted is legal form, it is within the recognized power of the legislature to correct such defect and to provide a remedy for the legal right.[3] Such statutes, "if they are only in aid of judicial proceedings, and tend to their support by precluding parties from taking advantage of errors which do not affect their substantial rights, cannot be obnoxious to the charge of usurping judicial power. The legislature does, or may, prescribe the rules under which the judicial power is exercised by the courts; and in doing so, it may dispense with any of those formalities which are not essential to the jurisdiction of the court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the court has failed to observe any of those formalities."[4] This rule will be best illustrated by some of the cases. Thus in Wisconsin, it is held that the legislature has power to declare that executions previously issued by justices of the peace more than two, and less than five, years after the judgments under which they were issued were rendered,

[1] Yeatman *v.* Day, 79 Ky. 186.
[2] Dupy *v.* Wickwire, 1 D. Chip. 237.
[3] Lane *v.* Nelson, 79 Pa. St. 407; State *v.* Union, 33 N. J. L. 350.
[4] Cooley, Const. Lim. 107.

shall not be invalid on that account.[1] So in Connecticut, it is held that an act providing that no levy on execution shall be deemed void by reason of the officer having included greater fees than were by law allowable, but that all such levies, not in other respects defective, shall be valid and effectual to transmit the title of the real estate levied upon, will cure prior levies objectionable in that particular only.[2] Again, a statute providing that subscriptions to the stock of a railroad company, previously made by a county court, if approved after the passage of the act by such court, shall be valid and binding, is constitutional.[3]

§ 210. **Defective Acknowledgment and Record of Deeds.** — The most frequent examples of that class of retroactive laws which we have denominated "curative or confirmatory" are statutes passed for the purpose of healing defects in the acknowledgment of prior deeds or other conveyances, or excusing other informalities in their execution or registration, and so carrying out the intention of the parties on equitable principles. These acts are generally held valid.[4] Thus in Ohio, certain deeds made by married women were ineffectual for the purposes of record and evidence, because the officer who took the acknowledgment had omitted to state in his certificate that he had made known the contents of the instrument to the grantor before or at the time of taking the acknowledgment. But afterwards an act was passed which provided that "any deed heretofore executed pursuant to law, by husband and

[1] Selsby *v.* Redlon, 19 Wis. 17.

[2] Beach *v.* Walker, 6 Conn. 197; Booth *v.* Booth, 7 Conn. 350; Mather *v.* Chapman, 6 Conn. 54.

[3] Hannibal, &c. R. R. *v.* Marion County, 36 Mo. 294.

[4] Chesnut *v.* Shane, 16 Ohio, 599; Ferguson *v.* Williams, 58 Iowa, 717; Brinton *v.* Seevers, 12 Iowa, 389; Barton *v.* Morris, 15 Ohio, 408; Journeay *v.* Gibson, 56 Pa. St. 57; Barnet *v.* Barnet, 15 Serg. & R. 72; Maxey *v.* Wise, 25 Ind. 1; Dulany *v.* Tilghman, 6 Gill & J. 461.

wife, shall be received in evidence in any of the courts of this State, as conveying the estate of the wife, although the magistrate taking the acknowledgment of such deed shall not have certified that he read or made known the contents of such deed before or at the time she acknowledged the execution thereof." And this act was held constitutional. For, argued the court, as the statute created no new title, and affected no rights but such as equitably flowed from the grantor, and only accomplished what, upon the principles of justice, a court of chancery ought to decree, there could be no sound objection to its retroactive operation.[1] So the legislature has constitutional power to declare deeds valid which are defective through the failure of a notary to affix his seal to the acknowledgment.[2] And an act validating acknowledgments of deeds made before certain officers of other States, not previously recognized by the laws of the legislating State as authorized to take acknowledgments, is constitutional and applies to prior cases.[3]

The cases which we have thus far considered only go to the length of holding a curative statute valid when the defects in the conveyance were such as to incapacitate it for purposes of record or for use in evidence. And there are some decisions which decline to countenance the exercise of the power beyond this limit; holding that if the defects in the deed were such as to render it positively ineffectual to convey the grantor's title, a subsequent curative statute would be objectionable as depriving the party of his property without due process of law; inasmuch as such an act must necessarily proceed upon the theory that the title still remains in the grantor, and that the act was required

[1] Chesnut *v.* Shane, 16 Ohio, 599; overruling Good *v.* Zercher, 12 Ohio, 364, and other earlier cases.

[2] Maxey *v.* Wise, 25 Ind. 1.

[3] Journeay *v.* Gibson, 56 Pa. St. 57.

for the purpose of transferring it to the grantee.[1] It must be conceded that there is a certain amount of force in this view. But the objection is purely technical. And after all, such a statute does but carry out the manifest intention of the parties; and all that it takes away from the grantor is the mere naked right to avoid his own contract,—a right which is seldom consonant with justice, and which the constitutional guarantees were never designed to protect. The validity of such acts of legislation is upheld by several cases of respectable authority.[2]

But there is a very important principle which must here be borne in mind, viz.: that the operation of such statutes must be carefully confined to the parties to the original contract and to such other persons as may have succeeded to their rights with no greater equities. "A subsequent *bona fide* purchaser cannot be deprived of the property which he has acquired, by an act which retrospectively deprives his grantor of the title which he had when the purchase was made. Conceding that the invalid deed may be made good as between the parties, yet if, while it remained invalid, and the grantor still retained the legal title to the land, a third person has purchased and received a conveyance, with no notice of any fact which should preclude his acquiring an equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to divest him of the title he has acquired."[3]

It is competent for the legislature to enact laws for the

[1] Russell *v.* Rumsey, 35 Ill. 362; Alabama Ins. Co. *v.* Boykin, 38 Ala. 510; Orton *v.* Noonan, 23 Wis. 102.

[2] Barnet *v.* Barnet, 15 Serg. & R. 72; Watson *v.* Mercer, 8 Pet. 88; Davis *v.* Bank, 7 Ind. 316; Dentzel *v.* Waldie, 30 Cal. 138; Goshorn *v.* Purcell, 11 Ohio St. 641.

[3] Cooley, Const. Lim. 378; Meighen *v.* Strong, 6 Minn. 177; Green *v.* Drinker, 7 Watts & S. 440.

purpose of curing defects in the registration of deeds under prior laws.[1]

§ 211. **Conveyances by Persons under Disabilities.** — We see the most common application of the principles stated in the last section in acts professing to cure defects in conveyances made by persons who are under the disability of coverture or infancy. Thus, statutes are valid which confirm deeds that are irregular only through an imperfect compliance with the peculiar statutory provisions governing the acknowledgments of married women.[2] But in regard to the subsequent validation of conveyances by married women which were originally ineffectual to pass the title, the cases are much divided. In some States it is thought that, when the mode in which a wife can relinquish her dower (for example) has been prescribed by statute, the legislature cannot declare in a subsequent act that deeds executed in a certain way previously to its passage, but not following the provisions of the former law, shall operate to cut off the right of dower; the married woman has a vested right therein, of which it is incompetent for the legislature to deprive her.[3] But the better opinion seems to be with those decisions which hold (in accordance with the principles indicated in the preceding section) that where the statute is designed to carry out the manifest intention of the parties, and only deprives the grantor of a mere technical right to avoid his contract, it is not open to constitutional objection.[4]

[1] Hughes *v.* Cannon, 2 Humph. 589.

[2] Johnson *v.* Richardson, 44 Ark. 365; Barnet *v.* Barnet, 15 Serg. & R. 72. But such a curative act cannot be made to apply to a judgment rendered previous to its passage so as to make that judgment erroneous. Barnet *v.* Barnet, *supra*.

[3] Russell *v.* Rumsey, 35 Ill. 362; Pearce *v.* Patton, 7 B. Mon. 162.

[4] Goshorn *v.* Purcell, 11 Ohio St. 641; Chesnut *v.* Shane, 16 Ohio, 599 (overruling Good *v.* Zercher, 12 Ohio, 364); Dentzel *v.* Waldie, 30 Cal. 138.

But it is to be observed that if the invalidity of the conveyance arises from a *want of power* in the grantor to convey the particular estate, and not from any informality in its execution, nor merely from a disability imposed by the policy of the law, it is not in the power of the legislature to confer retroactive efficacy upon the deed; both because the rights of third parties are necessarily involved, and because the legislature could not, in advance, have authorized such a conveyance. For instance, where an act of the legislature undertakes to impart to an antecedent deed of a married woman (who held under a devise, with an express restraint upon her power to alienate), the same force and effect as if a power of sale had been contained in the instrument creating her separate estate, this being after her death, its effect is simply to divest the estate of her children, by conferring upon the mother, after her death and after the estate had vested in them, a power to sell which she did not previously possess; this would be an arbitrary and unjust exercise of power, and unconstitutional.[1]

It has been declared that the legislature has no power to legalize a deed made previously by an insane person.[2] But a statute authorizing the confirmation of prior sales of

[1] Shonk *v.* Brown, 61 Pa. St. 320. Judge Agnew observed: "In all of [the cases cited to the court] there was a power to convey, and only a defect in the mode of its exercise. Here there is an absolute want of power to convey in any mode. In ordinary cases a married woman has both the title and the power to convey or to mortgage her estate, but is restricted merely in the manner of its exercise. This is a restriction it is competent for the legislature to remove, for the defect arises merely in the form of the proceeding, and not in any want of authority. Those to whom her estate descends, because of the omission of a prescribed form, are really not injured by the validation. It was in her power to cut them off, and in truth and conscience she did so, though she failed at law. They cannot complain, therefore, that the legislature interferes to do justice. But the case before us is different."

[2] Routsong *v.* Wolf, 35 Mo. 174.

infants' real estate does not divest vested rights, and is constitutional.[1]

§ 212. **Defective Execution of Powers.** — Laws passed to remedy the defective execution of powers, when intended to carry out the manifest intention of the parties, and not affecting vested rights, are not unconstitutional though retroactive.[2] And this principle is applied to the case of defective or informal conveyances of real estate by foreign executors and trustees, where the purchase was made in good faith and the price paid, and the irregularities are merely technical.[3]

§ 213. **Wills and Legacies.** — It is not doubted that the legislature has constitutional authority to pass a statute affecting the execution of wills, and to give it a retrospective effect upon testaments already made at the time of its passage, but which have not yet taken effect by the death of the testator; because no interests can become vested or fixed under a will until the testator's demise.[4] But it is not competent to the legislature to validate a will which, at the time of its execution, was void, as for want of signature, where the testator has died before the passage of the validating act. Thus, in Pennsylvania, the courts had decided, in several cases, that a testator's mark to his name, at the foot of a testamentary paper, but without proof that the name was written by his express direction, was not the signature required by the statute. Thereupon the legislature passed an act providing that "every last will and testament heretofore made or hereafter to be

[1] Thornton *v.* McGrath, 1 Duvall, 349.

[2] State *v.* Newark, 27 N. J. L. 185.

[3] Smith *v.* Callaghan (Sup. Ct. Iowa, 1885), 24 N. W. Rep. 50; 21 Cent. L. Jour. 194, distinguishing Lucas *v.* Tucker, 17 Ind. 41. See Davis *v.* State Bank, 7 Ind. 316.

[4] Long *v.* Zook, 13 Pa. St. 400; American Baptist Union *v.* Peck, 10 Mich. 341; Loveren *v.* Lamprey, 22 N. H. 434.

made, excepting such as may have been finally adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction and authority, or to which the testator hath made his mark or cross, shall be deemed and taken to be valid in all respects." But it was held that this provision, as applied to the will of one who died before the passage of the act, was unconstitutional, as divesting vested rights.[1] On the same principle, the legislature has no authority to declare that a body or association incapable of taking a legacy when a will took effect, because unincorporated, should, when incorporated, be capable of taking a legacy which by this reason had become void and was vested in the next of kin; such a statute would transcend its constitutional power.[2] And a retroactive law cannot operate to make anything devisable which could not be devised previously.[3]

§ 214. **Defective Exercise of Corporate Powers.** — Irregularities in the organization or elections of corporations are frequently rectified by subsequent curative statutes. Thus, a certain bank not having been organized in strict conformity with the statute, an act was passed declaring that the said bank should be deemed to be a valid corporation and to have been duly organized. It was held that this act, so far as it gave remedies which did not exist before, interfered with no rights which were vested in a sense which placed them beyond the reach of legislative control.[4] So a statute which makes valid a municipal ordinance, adopted before it was authorized by the municipal charter, is not obnoxious to the constitutional prohibition against retro-

[1] McCarty *v.* Hoffman, 23 Pa. St. 507; Greenough *v.* Greenough, 11 Pa. St. 489.

[2] State *v.* Warren, 28 Md. 338.

[3] Southard *v.* Railroad, 26 N. J. L. 13.

[4] Syracuse Bank *v.* Davis, 16 Barb. 188. **And see** Mitchell *v.* Deeds, 49 Ill. 416.

active laws.[1] And a curative statute, purporting to validate proceedings had by town trustees, which proceedings, notwithstanding their irregularity under the existing law, might have been valid had the law permitted, is constitutional.[2] An act of assembly validating a city ordinance for the grading and paving of certain streets, which had become null and void for want of record as required by law, is not unconstitutional because it provides that the omission to record shall not affect or impair the lien of the assessments against the lot-owners.[3]

§ 215. **Irregular Assessment and Levy of Taxes.** — It is well settled upon the authorities that the legislature has constitutional power to pass curative statutes healing irregularities and defects in the previous assessments of property for taxation and the levy of taxes thereon.[4] And in one case it is held that the authority of the legislature to cause an irregular tax to be reassessed in a subsequent year must be sustained, notwithstanding the fact that the rights of *bona fide* purchasers have intervened; for, said the court, this power is "a salutary and highly beneficial feature of our systems of taxation, and not to be abandoned because in some instances it produces individual hardships;" and purchasers, as between themselves and the State, must take their purchases subject to all public burdens justly resting upon them.[5]

[1] Morris *v.* State, 62 Tex. 728.

[2] Gardner *v.* Haney, 86 Ind. 17.

[3] Schenley *v.* Commonwealth, 36 Pa. St. 29, 57.

[4] Boardman *v.* Beckwith, 18 Iowa, 292; Musselman *v.* Logansport, 29 Ind. 533; Chamberlain *v.* Taylor, 36 Hun, 24; Butler *v.* Toledo, 5 Ohio St. 225; Strauch *v.* Shoemaker, 1 Watts & S. 175; Montgomery *v.* Meredith, 17 Pa. St. 42; Walter *v.* Bacon, 8 Mass. 472; Locke *v.* Dane, 9 Mass. 360; Patterson *v.* Philbrook, 9 Mass. 153; Brevoort *v.* Detroit, 23 Mich. 322; State *v.* Newark, 34 N. J. L. 237.

[5] Tallman *v.* Janesville, 17 Wis. 71. But it is held that the legislature cannot make good a tax-sale effected by fraudulent combination

But here we must take into consideration a rule which has been already adverted to, viz.: that a curative statute can only be valid when the defect which it seeks to obviate consists in the lack of some formality which the legislature might have dispensed with in advance, or when the irregularity which is intended to be excused is one which the legislature might, in advance, have rendered immaterial. Hence if the fault is in the nature of the tax itself, it cannot be obviated by subsequent act. It will continue and be fatal, no matter how often a reassessment may be had. Thus the court in Wisconsin, in speaking of the authority of the legislature to validate an irregular tax-assessment, observes: "This rule must of course be understood with its proper restrictions. The work for which the tax is sought to be assessed must be of such a character that the legislature is authorized to provide for it by taxation. The method adopted must be one liable to no constitutional objection. It must be such as the legislature might originally have authorized had it seen fit. With these restrictions, where work of this character has been done, I think it competent for the legislature to supply a defect of authority in the original proceedings, to adopt and ratify the improvement, and provide for a reassessment of the tax to pay for it."[1] Judge Cooley very justly remarks: "If a part of the property in a taxing district should be assessed at one rate, and a part at another, for a burden resting equally upon all, there would be no such apportionment as is essential to taxation, and the roll would be

between the officers and the purchasers. Conway *v.* Cable, 37 Ill. 82.

[1] May *v.* Holdridge, 23 Wis. 93, Paine, J. As to what defects may be obviated by subsequent curative act, and what not, see Billing *v.* Detten, 15 Ill. 218; Conway *v.* Cable, 37 Ill. 82; Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550; Allen *v.* Armstrong, 16 Iowa, 508; Smith *v.* Cleveland, 17 Wis. 556; Abbott *v.* Lindenbower, 42 Mo. 162.

beyond the reach of curative legislation. And if persons or property should be assessed for taxation in a district which did not include them, the assessment would not only be invalid, but a healing statute would be ineffectual to charge them with the burden. In such a case there would be a fatal want of jurisdiction; and even in judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it."[1]

§ 216. **Validation of Defective Contracts.** — Where a person has designed and attempted to enter into a particular contract, but has failed to bind himself, in the contemplation of the law, either in consequence of a personal disability on his part, or of considerations of public policy existing at that time, or by reason of the neglect of some legal formality or requirement, he cannot complain of a subsequent statute validating the contract and fixing his liability. Such an act merely carries out his presumed intention, and is clearly within the constitutional power of the legislature. This is the general rule deducible from the adjudged cases. It has already been illustrated, to a certain extent, in the preceding sections, but it will be expedient to add some examples more particularly addressed to contracts properly so called. Thus, in the first place, a statute validating certain usurious contracts previously made, and which, under the statute in regard to usury, were void in part, is constitutional.[2] In another case, a bond to the State was executed at a time when such bonds were required by the revenue laws of the State to be on stamped paper; a suit was brought on this bond, and the court refused to admit it in evidence for want of the stamp;

[1] Cooley, Const. Lim. 382.

[2] Mechanics' Savings Bank *v.* Allen, 28 Conn. 97; Andrews *v.* Russell, 7 Blackf. 474; Grimes *v.* Doe, 8 Blackf. 371; Thompson *v.* Morgan, 6 Minn. 292; Parmelee *v.* Lawrence, 48 Ill. 331; Curtis *v.* Leavitt, 17 Barb. 309. *Supra*, § 110.

an appeal was taken, and, pending the appeal, the stamp law was repealed, and validity was given to all contracts previously made on unstamped paper. It was held that the retroactive effect of the statute was constitutional, and the judgment must be reversed.[1] This may be regarded as a very strong application of the principle under consideration. So again, by a certain statute of Ohio, all negotiable paper made payable or negotiable at any unauthorized bank was declared to be void. But a subsequent act authorized the trustee or receiver of such an institution to maintain suit on bills and notes made payable or to be discounted at such bank, and declared that it should not be lawful for the defendant in such a suit to set up in defense that his bill or note was void on account of its being "against or in violation of any statute law of this State, or on account of being contrary to public policy." This act was adjudged constitutional.[2] As a party has no vested right to expect that the public policy of the State shall remain unchanged, so he cannot complain of a statute which takes away a defense resting solely in that ground. So a statute authorizing a guardian, who holds the title of the infant's real estate, to convey the same to a person to whom the ward's parent, before his death, contracted to sell it, is constitutional.[3] Again, it is competent for the legislature to impose upon a city the payment of claims just in themselves, and for which an equivalent has been received, but which, from some irregularity or omission in the proceedings by which they were created, cannot be enforced at law.[4]

[1] State *v.* Norwood, 12 Md. 195. See Gibson *v.* Hibbard, 13 Mich. 215; Harris *v.* Rutledge, 19 Iowa, 389.

[2] Lewis *v.* McElvain, 16 Ohio, 347; Johnson *v.* Bentley, 16 Ohio, 97; Trustees *v.* McCaughey, 2 Ohio St. 155.

[3] Estep *v.* Hutchman, 14 Serg. & R. 435.

[4] New Orleans *v.* Clark, 95 U. S. 644.

§ 217. **Confirmation of Irregular Marriages.** — It has also been held — and we think justly — that it is within the constitutional authority of the legislature, by a retroactive statute, to legalize prior marriages, the validity of which might be open to question on account of a want of power, under the State laws, in the person attempting to perform the ceremony.[1] This decision may be sustained on the principles which govern the whole class of curative statutes; for, in the first place, the act in question merely gives effect to the intention of the parties; and, in the second place, it excuses the want of compliance with a formality which the legislature *might* have dispensed with in advance. Again, a statute, remedial in its nature, and intended to legitimate the issue of marriages otherwise void, may properly be applied retrospectively.[2]

II. Statutes Valid if affecting the Remedy alone.

§ 218. **No Vested Right to a Particular Remedy.** — We have already had occasion to show that the remedy provided by law for the enforcement of a contract is essentially distinguishable from its obligation, and that the legislature may change or modify the remedy, within certain limits, without violating the obligation of the contract;[3] that parties have in general no vested right to a particular remedy, but the legislature may take away one remedy and substitute another substantially as good;[4] and that no party can claim a vested interest in the permanence of a particular system of courts, or the continuance of a specific mode of procedure, or in the perpetuation of any remedy

[1] Goshen *v.* Stonington, 4 Conn. 209.
[2] Brower *v.* Bowers, 1 Abb. App. Dec. 214.
[3] *Supra*, §§ 133–140. [4] *Supra*, §§ 141, 192.

or remedial process which can be modified or abolished without substantially invading his secured rights.[1] These propositions all converge to the general statement that a law which affects the remedy alone is not constitutionally objectionable because it is *retroactive*. That is to say, first, in those States where retroactive legislation is *eo nomine* forbidden, laws are deemed retroactive and within the constitutional prohibition which, by retroactive operation, destroy or impair vested rights, or rights to do certain actions or possess certain things according to the laws of the land; but laws which affect the remedy merely are not within the mischiefs intended to be guarded against by the inhibition, and therefore not within a just construction of its terms;[2] and second, in the other States, such laws are not considered as obnoxious to the constitutional guarantees guarding property rights.[3] It is of course understood

[1] *Supra*, § 192.

[2] DeCordova *v.* Galveston, 4 Tex. 470; Paschal *v.* Perez, 7 Tex. 348; Rairden *v.* Holden, 15 Ohio St. 207; Rich *v.* Flanders, 39 N. H. 304; Henchall *v.* Schmidtz, 50 Mo. 454.

[3] Bird *v.* Keller, 77 Me. 270; Searcy *v.* Stubbs, 12 Ga. 437; Chaffee *v.* Aaron, 62 Miss. 29. In the case last cited, a statute providing that "the chancery court shall have power in its discretion to refuse confirmation of any sale made in pursuance of its decree, on the ground that the price bid is inadequate," was held constitutional as applied to prior mortgages. So registry acts having a retroactive operation have never been considered as falling within the constitutional inhibitions: Tucker *v.* Harris, 13 Ga. 1. A statute which changes the time when judgments first become a lien is constitutional, although it applies to those previously existing, as it merely affects the remedy: Curry *v.* Landers, 35 Ala. 280. A statute allowing a parlance term affects the remedy merely and applies to actions commenced before its passage: Woods *v.* Buie, 5 How. (Miss.) 285. If a statute providing a remedy is repealed while proceedings are pending, such proceedings will be thereby determined, unless the legislature shall otherwise provide, and if it is merely amended, the judgment pronounced in such proceedings must be according to the law as it then stands: Bank *v.* Dudley, 2 Pet. 492; Ludlow *v.* Jackson, 3 Ohio, 553; Eaton *v.* United States, 5 Cranch, 281.

that the particular statute must not so deal with the remedy as to cut it off altogether or leave it impracticable or not worth pursuing.

§ 219. **Laws creating or liberating Remedies.**—Statutes having this effect are regarded with favor. And while no actual valuable right ought to be divested by changing the remedy, yet "there can be no vested right to do wrong,"—none to violate a moral duty, or to resist the performance of a moral obligation. Hence statutes providing a legal remedy for these imperfect obligations have always been considered as within the constitutional power of the legislature.[1] On analogous principles we may assert the constitutionality of statutes taking away the right to interpose a particular defense based solely on considerations of public policy which, though having the sanction of law at the inception of the agreement, have been modified or abrogated by subsequent legislation.[2]

III. Retroactive Divorce Laws.

§ 220. **Such Statutes are Constitutional.**—It has already been seen that the law does not contemplate marriage as a contract; and consequently that a special act of the legislature dissolving the marriage relation between two individuals, or a general law empowering the courts to do so for antecedent causes, is not obnoxious to the constitu-

[1] Baugher *v.* Nelson, 9 Gill, 299. See *supra*, § 205.

[2] As to statutes taking away the defense of usury, see *supra*, §§ 110, 216. See, in general, § 216. So a statute (Maine Rev. Stat. ch. 82, § 116) providing that "no person who receives any money or valuable thing as the consideration for a contract made or entered into on Sunday shall be permitted to defend on the ground that it was so made, until he shall restore such consideration," was held applicable to contracts existing at its passage, but not to be unconstitutional, as it related only to the remedy. Berry *v.* Clary, 77 Me. 482.

tional provision against impairing the obligation of contracts.[1] But it now remains to inquire whether a statute, purporting to confer authority upon the courts to grant divorces for causes occurring before the passage of the authorizing statute, and which, at the time of their happening, furnished no ground for the dissolution of the marriage relation, is valid or not, considered without reference to the contract clause, and simply as a retroactive law. This question is involved in much confusion and embarrassment. Some of the cases lend a direct affirmative support to the validity of such laws.[2] Others return an equally emphatic negative.[3] Thus, in a New Hampshire decision it is said: "A statute which attempts to confer authority upon the courts to grant a divorce for matters already past, and which, at the time when they occurred, furnished no ground for a dissolution of the marriage, or for other legal proceedings, is, in our view, clearly a retrospective law, and well entitled to the epithets applied to such laws in the constitution."[4] An extended discussion of the topic is not germane to the plan of this work; but the reader is referred to Mr. Bishop's excellent treatise on Marriage and Divorce, where the whole subject is reviewed with much learning and candor, and the conclusion is reached that such statutes are not unconstitutional.[5] A few pertinent suggestions, however, may be added. In the first place, under the definitions already given, such a law is most certainly not *ex post facto;* it is

[1] *Supra*, §§ 125–128.

[2] Jones *v.* Jones, 2 Overt. (Tenn.) 2; Berthelemy *v.* Johnson, 3 B. Mon. 90; Carson *v.* Carson, 40 Miss. 349; West *v.* West, 2 Mass. 223; Bigelow *v.* Bigelow, 108 Mass. 38.

[3] Clark *v.* Clark, 10 N. H. 387; Greenlaw *v.* Greenlaw, 12 N. H. 200; Jarvis *v.* Jarvis, 3 Edw. Ch. 462; Given *v.* Marr, 27 Me. 212; Sherburne *v.* Sherburne, 6 Me. 210.

[4] Clark *v.* Clark, 10 N. H. 380, 387, Parker, C. J.

[5] 1 Bishop, Mar. and Div. §§ 670–680, and 696–700.

in no sense penal or criminal.[1] And again, as we have already seen, the practical tendency of the constitutional learning of *all* the States is to restrict the meaning of the word "retroactive," as designating a particular class of unconstitutional laws, to such statutes as are calculated to impair or divest antecedently acquired rights of property. The advocates of the theory that retroactive divorce legislation is unconstitutional are therefore driven to the necessity of holding that the *marital status itself* is a species of property, vested in each of the parties to that relation, and such that it may not lawfully be taken away by subsequent legislation. But this view is utterly untenable. As Mr. Bishop observes: "Since marriage is a status of the highest public interest, its dissolution should, in reason, be always competent, whenever the public good requires, — a question the determination of which is properly for the legislature. And the constitutional provisions, made to preserve private interests, should not be construed as having any relation to this public one of marriage."[2]

IV. Statutes adverse to the State's own Interest.

§ 221. **Such Statutes are Constitutional.** — Since any person having an interest may waive the benefit of a constitutional provision in his favor, so may also the State. Hence the State may pass a retroactive law impairing her own right.[3] For example, a supplementary act passed after a forfeiture incurred to the State under a former act, declaring it not to be incurred by the true intent and meaning of the previous law, releases the penalty.[4]

[1] *Supra*, § 127.

[2] 1 Bishop, Mar. and Div. § 700.

[3] Davis *v.* Dawes, 4 Watts & S. 401; Lewis *v.* Turner, 40 Ga. 416; Mayers *v.* Bryne, 19 Ark. 308.

[4] Davis *v.* Dawes, 4 Watts & S. 401.

PART III.

EX POST FACTO LAWS AND BILLS OF ATTAINDER.

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CHAPTER IX.

EX POST FACTO LAWS.

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I. Of Ex Post Facto Laws in General.

§ 222. **Prohibitions against Ex Post Facto Laws.** — By the provisions of the Constitution of the United States the passage of any *ex post facto* law is expressly prohibited, both to the Federal Congress and to the legislatures of the several States.[1] And, in addition to this controlling sanction, we find *ex post facto* laws specifically inhibited in the constitutional enactments of no less than twenty-nine of the States.[2] The result is, that no statute of this character can lawfully be passed by any legislative body in the length and breadth of the Union. Now the extreme care which was manifested in the incorporation of this clause into the expression of the permanent will both of the nation and of so many of the individual States, points to the conviction that such statutes are opposed not only to the fundamentals of justice but also to the spirit of civil liberty. That such is indeed the case will admit of no doubt.

§ 223. **Injustice of such Laws.** — For it is evident that intention or inadvertence is necessary to constitute an injury or a criminal act. Now if, at the time the deed is committed, there is no law in existence prohibiting it, the party certainly does not and cannot know that he is violating a law. The sanction cannot operate as a motive to

[1] Constitution of the United States, Art. I. §§ 9, 10.

[2] *Supra*, § 172.

obedience, inasmuch as there was nothing to obey.[1] An *ex post facto* law, therefore, in reality, turns innocence into guilt. As observed by Sir William Blackstone: "There is still a more unreasonable method than this, which is called making of laws *ex post facto;* when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that a party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust."[2] And the learned commentator intimates that such laws were condemned, for similar reasons, by the Roman statesmen.[3]

[1] Austin on Jurisprudence, § 693.

[2] 1 Blackst. Comm. 46.

[3] In a note to the section quoted, Blackstone refers to two passages in the writings of Cicero. The first (De Legibus, Lib. 3, p. 19) is in the following language: "Negotialis quidem admirandum tantum majores in posterum providisse: in privatos homines leges ferri noluerunt; id est enim privilegium, quo quid est injustius, cum legis haec vis sit, scitum est jussum in omnes?" The second (Oratio pro Domo, 17) is as follows: "Vetant leges sacratae, vetant duodecim tabulae, leges privatis hominibus irrogari; id enim est privilegium. Nemo unquam tulit, nihil est crudelius, nihil est pernicifius, nihil quod minus haec civitas ferre possit." It is probable that Cicero, having in mind the language of the Twelve Tables, "privilegia ne irroganto," — in which connection the word "privilegia" is undoubtedly equivalent to "bills of pains and penalties"— intended to stigmatize the general class of retroactive criminal laws. If he did, it would go to show the universal sentiment of rational men against such legislation, in all ages. But, at a later period, as Austin points out, there were two species of privilegia. "By a special constitution of another class, the Emperor conferred on some single person some anomalous or irregular right, or imposed upon some single person some anomalous or irregular obligation, or inflicted on some single person some anomalous or irregular punishment. Such constitutions were styled "privilegia." When such privilegia conferred anomalous rights,

§ 224. **Reasons for the Prohibition in the Federal Constitution.** — It is altogether probable that the framers of the Constitution were led to the introduction of this clause against *ex post facto* laws mainly by considerations drawn from the history of England. At that time, the period when bills of attainder and similar acts had been used as the cruel and destructive weapons of personal or political vengeance was not so remote as to have lost its force as an example and a warning. And however unlikely it may be that measures so sanguinary, or so barbaric in their injustice, could ever again be resorted to, in that country or our own, it is at least an illustration of the growth of civil liberty that we owe this most valuable guarantee of life and property to the days and doings of the Tudors and the Stuarts. Thus it is said by Mr. Justice Chase: "All the restrictions contained in the Constitution of the United States on the power of the State legislatures, were provided in favor of the authority of the Federal government. The prohibition against their making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishments. These acts were legislative judgments, and an exercise of judicial power. Sometimes they respected the crime, by declaring acts to be treason which were not treason when committed; at other times they

they were styled favorable. When they imposed anomalous obligations, or inflicted anomalous punishments, they were styled odious. An act of the British Parliament, giving to the inventor of a machine an exclusive right of selling it, would be styled in the language of the Roman law 'a favorable privilege.' An Act of Attainder would be styled in the same language 'an odious privilege.'" Austin on Jurisprudence, § 748. But, happily for us, it is not for our notions of liberty or personal rights that we turn to the Corpus Juris.

violated the rules of evidence, to supply a deficiency of legal proof, by admitting one witness when the existing law required two, by receiving evidence without oath, or the oath of the wife against the husband, or other testimony which the courts of justice would not admit; at other times, they inflicted punishments where the party was not by law liable to any punishment; and in other cases, they inflicted greater punishment than the law annexed to the offense. The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure. With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. To prevent such, and similar acts of violence and injustice, I believe, the Federal and State legislatures were prohibited from passing any bill of attainder or any *ex post facto* law."[1]

§ 225. **The Term confined to Criminal Actions.** — All *ex post facto* laws are necessarily retroactive; but not all retroactive laws are *ex post facto*, in the sense in which the latter term is universally accepted in constitutional jurisprudence. On the face of it, there is nothing to show

[1] Calder *v.* Bull, 3 Dall. 386, 389. In the case of Green *v.* Shumway, 39 N. Y. 418, 421, Miller, J., in speaking of bills of attainder and *ex post facto* laws, said: "Laws of this character were considered among the most mischievous and vicious class of judicial legislation, and, in England, were made the instrument for gross abuse, and a tremendous engine of political power. Resorted to in times of high political excitement, they were the means of inflicting great wrong and injustice. They sometimes affected the dead as well as the living, and were the instrument of transcendent iniquity. In a free government, such legislation could not be endured, and hence it was that the Constitution so emphatically prohibited it." See 2 Story on Const. § 1344. For historical examples of the use of bills of attainder, consult Macaulay's Hist. of Engl. chaps. 5 and 12.

that the phrase should have any more special application to criminal matters than to civil proceedings. But the authorities, early and late, are unanimous in holding that "*ex post facto*," is a technical term, and relates only to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retroactively.[1]

In an almost contemporary exposition of this part of the Constitution, Mr. Justice Chase, speaking of the clause under consideration, remarked: "I do not think it was inserted to secure the citizen in his private rights of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any *ex post facto* law was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected or injured by such law, and the

[1] Watson *v.* Mercer, 8 Pet. 88; Baltimore and Susquehanna R. R. *v.* Nesbit, 10 How. 395; Carpenter *v.* Pennsylvania, 17 How. 456; Locke *v.* New Orleans, 4 Wall. 172; Locke *v.* Dane, 9 Mass. 360; Bridgeport *v.* Hubbell, 5 Conn. 240; Dash *v.* Van Kleeck, 7 Johns. 477; Grim *v.* School District, 57 Pa. St. 433; Suydam *v.* Receivers, 3 N. J. Eq. 114; Baugher *v.* Nelson, 9 Gill, 299; Tucker *v.* Harris, 13 Ga. 1; Commonwealth *v.* Bailey, 81 Ky. 395. In Watson *v.* Mercer, *supra*, Story, J., said: "The Constitution of the United States does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws. Now it has been solemnly settled by this court that the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws, which punish no [a] party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively."

prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective."[1]

In point of fact, however, the words "or any law impairing the obligation of contracts" were not in this clause of the Constitution as it was originally adopted by the Convention. For it was supposed that the phrase "*ex post facto*" was comprehensive enough to embrace civil as well as criminal matters. But it was discovered that the term had acquired a restricted and technical meaning, and could not be so construed as to include laws which merely infringed upon antecedent contractual rights. Wherefore the contract clause was added.[2]

§ 226. **The Distinction illustrated.** — This distinction between *ex post facto* laws and retroactive laws relating to civil matters only, is well illustrated by a certain statute of Rhode Island, entitled "Of the Suppression of certain Nuisances," and which prohibited manufacturers and others from selling, or keeping for sale within the State, any intoxicating liquors which might have been manufactured or bought by them previous to its passage. This act, so it was held, was not, for that reason, an *ex post facto* law; since so far as it punished such selling and keeping it was prospective; and if it lessened the value of liquors owned in the State previous to, and held at the time of, its passage, such civil consequences did not make it retroact criminally, in such sense as to bring it within the definition of an *ex post facto* law.[3] On similar principles, and because a divorce is not a punishment, a statute authorizing a dissolution of the marriage for causes happening prior to

[1] Calder *v.* Bull, 3 Dall. 390, Chase, J.

[2] Kring *v.* Missouri, 107 U. S. 221; 2 Bancroft's History of the Constitution, 213; 3 Madison Papers, 1399, 1450, 1579.

[3] State *v.* Paul, 5 R. I. 185; State *v.* Keeran, 5 R. I. 497.

its passage is not objectionable as *ex post facto*.[1] Again, an act altering the compensation of public officers is not an *ex post facto* law, nor a law impairing the obligation of the contract with one in office at the date of its enactment.[2] So also, registry acts, although retrospective, are not considered as within this prohibition.[3] Other illustrations might be adduced, but enough have been cited to show the nature of the distinction.

§ 227. **Definition of Ex Post Facto Laws.** — Our next inquiry must be, to what branches of the criminal law does this prohibition extend, and what classes of criminal legislation are to be regarded as within its terms? This question is categorically answered in the leading case of Calder *v.* Bull. The definition there given by Mr. Justice Chase is universally accepted as correct. It is in the following language: "I will state what laws I consider *ex post facto* laws within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and op-

[1] Carson *v.* Carson, 40 Miss. 349. *Supra*, § 127. There is indeed one case holding such a statute to be *ex post facto* (Dickinson *v.* Dickinson, 3 Murph. 327), but this is certainly not good law. It is spoken of by Mr. Bishop as "a very singular doctrine." 1 Bishop, Mar. and Div. § 698.

[2] Commonwealth *v.* Bailey, 81 Ky. 395. *Supra*, § 97.

[3] Tucker *v.* Harris, 13 Ga. 1.

pressive. . . . But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction."[1]

To the classes of laws here enumerated must be added any statute which deprives an individual of a valuable privilege — such as that of the elective franchise, or the right to pursue a certain lawful avocation — as a consequence of acts which, at the time of their commission, were not punishable at all, or not in that manner; on the ground that such a law retroactively imposes a penalty or forfeiture.[2] And probably, also, the case where the period of limitation for the prosecution of offenses has been enlarged, and it is attempted to include within it an instance where a right to acquittal had been absolutely acquired by the completion of the period prescribed when the offense was committed.[3] With these additions, we obtain a practical definition of *ex post facto* laws.

§ 228. **Time the Primary Test.** — We have seen that a law cannot be said to impair the obligation of contracts if it applies to future cases only.[4] On the same principle, a statute creating or aggravating crimes or punishments is not *ex post facto* if prospective only. "Whether it is *ex post facto* or not relates, in criminal cases, to which alone the phrase applies, to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed after the commission of the offense, it is as to that *ex post facto*, though whether of the class forbidden by the Constitution may depend on other matters.

[1] Calder *v.* Bull, 3 Dall. 390.
[2] *Infra*, §§ 244, 245.
[3] *Infra*, § 235.
[4] *Supra*, § 9.

But so far as this depends on the *time* of its enactment, it has reference solely to the date at which the offense was committed, to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character."[1]

II. Acts regulating Criminal Procedure.

§ 229. **Forms of Procedure may be changed.** — "So far as mere modes of procedure are concerned," says Judge Cooley, "a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."[2] This statement is un[redacted]ly sound. For it is evident that the changes and modifications here indicated do not fall within the scope of the original definition of *ex post facto* laws, nor the amplifications of it which subsequent jurisprudence has found necessary; and it is equally apparent that they are not properly within the spirit of the prohibition nor the mischiefs intended to be guarded against.[3]

[1] Kring *v.* Missouri, 107 U. S. 221, Miller, J.

[2] Cooley, Const. Lim. 272.

[3] Perry's Case, 3 Gratt. 632; People *v.* Mortimer, 46 Cal. 114; and cases cited in following sections.

§ 230. **Jurisdiction of the Courts.** — In accordance with the principle just announced, and because the legislature has entire control over the establishment and jurisdiction of the courts (except where otherwise provided in the organic law), and no individual has a constitutional right to insist upon the permanence of a particular system of tribunals, it is held that a statute creating a new court, or giving jurisdiction to an existing court to try past offenses, is not an *ex post facto* law.[1] So an act reviving the jurisdiction of a superior court, so as to enable it to try persons for offenses committed during a period when an inferior court had exclusive jurisdiction to try them, is not *ex post facto* in the sense of the prohibition.[2]

§ 231. **Changing the Venue of Criminal Actions.** — A statute changing the place of trial from one county to another county in the same district, or to a different district from that in which the offense was committed or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment.[3] So an act which divides a county into judicial districts, and provides for the selection of a jury exclusively from one district to try an indictment for felony pending in that district at the passage of the act, was held constitutional, as being applicable simply to procedure and depriving the defendant of no substantial right.[4]

§ 232. **Amendment of Indictment.** — Statutes authorizing the amendment of indictments have been sustained as applicable to past transactions. Thus an act allowing an amendment of the name of the defendant, in cases of misnomer in an indictment, was held to apply to indictments

[1] Commonwealth *v.* Phillips, 11 Pick. 28.
[2] State *v.* Sullivan, 14 Rich. 281.
[3] Gut *v.* Minnesota, 9 Wall. 35.
[4] Potter *v.* State, 42 Ark. 29.

pending when the law was enacted.[1] But it is submitted that this rule ought to be carefully restricted to cases where such allowance of amendments will work no prejudice to the substantial rights of the accused. For although the right to take advantage of defects and informalities is not in general a vested right, yet it is equally true that the legislature cannot retroactively cure a defect arising from a want of compliance with requisitions which it could not have dispensed with or rendered immaterial in advance.[2] And although a defendant in a criminal action, tried under an indictment so radically bad that he would be entitled, for that reason, to have any judgment against him set aside, may not have been placed in actual legal jeopardy, yet a statute authorizing an amendment, after the finding of such an indictment and before conviction, would certainly appear to alter the situation to the disadvantage of the accused, and therefore to fall within the proper scope of the prohibition against *ex post facto* laws.

And in Texas it is held that an indictment, bad when found, by reason of the incompetency of a grand juror according to the then existing law, may be objected to by a plea filed after the Code went into operation, although, under the Code, the defect would have been deemed waived unless objected to by challenge to the jury when impanelled; for any other construction would take away a right of the prisoner.[3]

But — to return to the original proposition — a statute

[1] State *v.* Manning, 14 Tex. 402. In State *v.* Johnson, 81 Mo. 60, the Mo. Rev. Stat. 1879, § 1655, authorizing the conviction "of any offense the commission of which is necessarily included in that charged," was *held* not retroactive where the indictment was found prior to its taking effect and the trial had thereafter, though such conviction was not authorized when the indictment was found.

[2] *Supra*, § 207.

[3] Martin *v.* State, 22 Tex. 214.

requiring any court to which application is made by *habeas corpus* for the release of a prisoner confined under a sentence which is erroneous as to time or place, to sentence him to the proper place of imprisonment, or for the correct length of time, authorizes the correction of erroneous sentences passed previous to its date, and is not *ex post facto*.[1]

§ 233. **Allowance of Challenges to the State.** — It is also held, on the same principle, that a statute allowing to the commonwealth a reasonable number of peremptory challenges to petit jurors in criminal actions, although it expressly extends to the trial of cases where the offense was committed, or the indictment found, prior to its passage, is not an *ex post facto* law nor otherwise unconstitutional.[2] "The mode of selection, and the right to challenge," say the New Hampshire court, "seem to be mere rules suggested by experience and prescribed by law, to be observed as most likely to secure the greatest amount of intelligence, integrity, and impartiality to the trial by jury; and of course have been at all times subject to those modifications and changes which grow out of the constant changes which civil society is undergoing."[3] In one of the cases cited the number of challenges allowed to the State was seven; in another, five; and in a third, a number equal to that granted to the defendant. But, as observed by the same court, "a very different question would be presented by a statute allowing the State so many peremptory challenges as to give the State an unfair advantage over the respondent, or to make it very difficult to obtain a jury at all."[4]

[1] *Exp.* Bethurum, 66 Mo. 545.

[2] State *v.* Ryan, 13 Minn. 370; Walston *v.* Commonwealth, 16 B. Mon. 15; State *v.* Wilson, 48 N. H. 398; Commonwealth *v.* Dorsey, 103 Mass. 412.

[3] State *v.* Wilson, 48 N. H. 398, Smith, J.

[4] State *v.* Wilson, 48 N. H. 398.

It would be difficult to fix the line; but probably the allowance must depend on its reasonableness.

§ 234. **Statutes changing Rules of Evidence.** — It will be remembered that one of the classes of *ex post facto* laws specifically designated in the leading case was "every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."[1] Undoubtedly any modification of this character which alters the situation of the accused to his disadvantage would be constitutionally objectionable. Hence, for example, an act providing that the rule of law prohibiting a conviction in a criminal case on the uncorroborated evidence of an accomplice should not apply to misdemeanors, is inoperative in a trial for a misdemeanor committed before its passage.[2]

In a certain New York decision, in regard to a statute making husband and wife competent witnesses for or against each other, on the trial of actions pending at its passage, the court apparently inclines to the opinion that, even if applied to criminal actions, it would not be *ex post facto*.[3] But this statement was entirely *obiter*, and it is, at all events, opposed to the weight of opinion.

§ 235. **Repeal or Extension of Statute of Limitations.** — We have seen that rights acquired by virtue of the running of the statute of limitations, in civil matters, are as much "vested," in the eye of the law, and are as completely beyond the reach of legislative interference, as if they had

[1] Calder *v.* Bull, 3 Dall. 390.

[2] Hart *v.* State, 40 Ala. 32. But a law providing that "in all questions affecting the credibility of a witness, his general moral character may be given in evidence," furnishes merely a rule of practice for all trials, and is not an *ex post facto* law as to crimes committed before its passage. Robinson *v.* State, 84 Ind. 452.

[3] Southwick *v.* Southwick, 49 N. Y. 510. *Supra*, § 202.

been secured by any other species of title or assurance.[1] We are now to inquire whether this rule applies equally to criminal actions. To state the question concisely, — what is the constitutional status of a law repealing the statute of limitations, or extending the time previously limited for the prosecution of criminal offenses, as applied to a case where the period prescribed by the law as it stood when the offense was committed has already completely expired? The cases upon this point are not at all numerous, but they unmistakably point to the conclusion that such an act would be *ex post facto* in the strict sense, and void.[2] And this conclusion is agreeable both to right reason and the analogies of the law. For a statute which declares that, after the expiration of a given period, a man shall be confirmed in the presumption of his innocence, or, if he be guilty, that the State will surrender its right to visit him with the penalties of violated law, is an act of grace, an amnesty, a condonation of the prior offense. It is to be construed liberally and generously in favor of the offender. Its effect upon his status, as an innocent or guilty man,

[1] *Supra*, § 190.

[2] Moore *v.* State, 13 Vroom, 203; s. c. 39 Am. Rep. 558; State *v.* Sneed, 25 Tex. (Supp.) 66; State *v.* Keith, 63 N. C. 140; Commonwealth *v.* Duffy, 96 Pa. St. 506. Dr. Wharton, in his treatise on Criminal Law (§ 444 *a*, note *b*), after alluding to certain liberal provisions in the Roman systems, says: "An extraordinary contrast to this is to be found in the Act of Congress of March 3, 1869, by which the time for finding indictments in the 'late rebel States' is extended for the period of two years from and after said States are restored to representation in Congress. So far as this statute undertakes to authorize prosecutions for offenses which prior statutes of limitations have cancelled, it is not merely an *ex post facto* law, and hence void, but is void in undertaking to make punishable an offense which has previously been extinguished by an act of grace. This statute has never been judicially invoked, and is now practically expired. But it is important here to touch the principle as applicatory to any future legislative attempts to institute prosecutions for offenses which prior statutes have cancelled."

is, therefore, in reality, the same as if he had secured a pardon from the executive or had received and fulfilled a sentence. Now a subsequent statute repeals the act of limitations, and again opens the courts for the investigation and punishment of the offense. Such a statute may not, in strict language, make that a crime which was not previously a crime. But it certainly makes that a punishable offense which was previously a condoned and obliterated offense. If there is any difference, from the standpoint of justice and principle, we cannot discover it. And the act supposed would fall within the precise terms of the definition given by Mr. Justice Story: "Criminal laws, which punish a party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed."[1] It would be superfluous to point out that such an act would fall within the evils intended to be guarded against by the prohibition in question.

But when a right to acquittal has *not* been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the prohibition.[2]

III. Statutes affecting Punishments.

§ 236. **Punishment may be changed, but not aggravated.**— One of the four classes of *ex post facto* laws enumerated in the universally accepted definition of Mr. Justice Chase was as follows: "Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed."[3] Now, taking these words

[1] Watson *v.* Mercer, 8 Pet. 88, 110.
[2] Commonwealth *v.* Duffy, 96 Pa. St. 506.
[3] Calder *v.* Bull, 3 Dall. 390.

in their most obvious meaning, the principle would seem to be, that the legislature may lawfully substitute a different punishment for past offenses, which may be less or equal to the penalty prescribed when the offense was committed, but must not be greater. And this is held, in several cases, to be the true rule. For example, a statute changing the punishment of larceny from the common-law penalty of whipping and imprisonment to imprisonment only, and that for a limited time, is not liable, as applied to larcenies committed before the passage of the act, to the objection of being an *ex post facto* law; the rule is, not that a punishment cannot be changed, but that it cannot be aggravated.[1] So in Alabama, an act was held constitutional which authorized the jury, in their discretion, to inflict fine or imprisonment, one or both, in lieu of imprisonment in the penitentiary for not less than two, nor more than five years.[2] But on the other hand, an act increasing costs on conviction for an offense, cannot be applied to acts committed before its passage; this would render it *ex post facto*, because it would aggravate the punishment.[3]

In the abstract, this proposition is a very just and reasonable one. But when we come to apply it to particular instances, and to inquire what changes in the penalty are allowable and what prohibited, considerable difficulty arises, and the authorities are found to be very conflicting.

§ 237. **Mitigation of Punishment is Constitutional.** — In the first place, since the constitutional prohibition was designed for the protection and security of accused persons against arbitrary and oppressive legislative action, it is evident that any change in the law which reduces or mitigates the punishment for past offenses is not properly within the

[1] State *v.* Kent, 65 N. C. 311.
[2] Turner *v.* State, 40 Ala. 21.
[3] Caldwell *v.* State, 55 Ala. 133.

prohibition. Thus far the cases agree.[1] And of course if the change consists in reducing the term of imprisonment from ten years to five, or the fine from a hundred dollars to fifty, it is very easy to see that the penalty is mitigated and the law unobjectionable. But, as Judge Cooley very pertinently inquires: "Who shall say, when the nature of the punishment is altogether changed, and a fine is substituted for the pillory, or imprisonment for whipping, or imprisonment at hard labor for life for the death penalty, that the punishment is diminished, or at least not increased, by the change made? What test of severity does the law or reason furnish in these cases? And must the judge decide upon his own view of the pain, loss, ignominy, and collateral consequences usually attending the punishment? Or may he take into view the peculiar condition of the accused, and upon that determine whether, in his particular case, the punishment prescribed by the new law is more severe than that under the old or not?"[2]

§ 238. **What amounts to Mitigation of Punishment.**— In Massachusetts it is held that a statute which imposes a sentence of imprisonment for life, instead of the death-penalty, is not *ex post facto* as applied to offenses previously committed. "The substitution of imprisonment for life, in place of death, is a mitigation in the eye of the law; it is everywhere so regarded; it is on that ground that the executive power of commutation is founded."[3] But this view is directly denied in New York.[4] Again, where, at the time of the commission of a forgery, the

[1] State *v.* Arlin, 39 N. H. 179; Hair *v.* State, 16 Nebr. 601; Boston *v.* Cummins, 16 Ga. 102; Strong *v.* State, 1 Blackf. 193; Keen *v.* State, 3 Chand. 109; Woart *v.* Winnick, 3 N. H. 473; Clarke *v.* State, 23 Miss. 261; Maul *v.* State, 25 Tex. 166.

[2] Cooley, Const. Lim. 267.

[3] Commonwealth *v.* Gardner, 11 Gray, 438, 443; Commonwealth *v.* Wyman, 12 Cush. 237.

[4] Shepherd *v.* People, 25 N. Y. 406.

punishment was death, but it was changed before final judgment to fine, whipping, and imprisonment, the new law was held applicable to the case at bar.[1] But on the other hand it has been held, in Texas, that the infliction of stripes, from the peculiarly degrading character of the punishment, was worse than the death-penalty. "Among all nations of civilized man," say the court, "from the earliest ages, the infliction of stripes has been considered more degrading than death itself."[2] An early Indiana case, without going to the length of the decision last cited, is evidently inclined to regard the infliction of corporal punishment in the same light. The prisoner was indicted and convicted of perjury. At the time the offense was committed, the punishment prescribed was whipping, not to exceed one hundred stripes. Afterwards, and before the trial, a statute was passed changing this punishment to imprisonment in the penitentiary for a period not to exceed seven years. It was held that this amendatory law was not *ex post facto* as applied to the case at bar. For, applying the definition in Calder *v.* Bull, the court reached the conclusion that this statute did not create a new offense, did not increase the malignity of that which was already an offense, did not change the rules of evidence so as to make conviction more easy, and *did not increase the punishment.*[3]

§ 239. **The Rule in New York.** — In the important case of Hartung *v.* People,[4] Judge Denio said: "In my opinion, it would be perfectly competent for the legislature, by a general law, to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with

[1] State *v.* Williams, 2 Rich. 418.
[2] Herber *v.* State, 7 Tex. 69.
[3] Strong *v.* State, 1 Blackf. 193.
[4] 22 N. Y. 95, 105.

either the fine or the imprisonment might, I think, be lawfully applied to existing offenses; and so, in my opinion, the term of imprisonment might be reduced, or the number of stripes diminished in cases punishable in that manner. Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. And any change which should be referable to prison discipline, or penal administration, as its primary object, might also be made to take effect upon past as well as future offenses, as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the severity of the punishment of the convict, but would not raise any question under the constitutional provision we are considering." And, speaking of the case at bar: "The sword is indefinitely suspended over his head, ready to fall at any time. It is not enough to say, if even that can be said, that most persons would probably prefer such a fate to the former capital sentence. It is enough to bring the law within the condemnation of the Constitution, that it changes the punishment after the commission of the offense, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law."[1] This case has been always followed in that State. And it is now declared to be the settled law of New York that a statute changing the punishment for offenses committed before its passage is *ex post facto* and void, unless the change consists in the *remission of some separable part* of the punishment before prescribed, or is referable to prison

[1] Hartung *v.* People, 22 N. Y. 95, 105.

discipline, or penal administration, as its primary object; and it is immaterial, where this is not the case, whether the new punishment appears, on the face of it, to be more or less severe than the old.[1]

§ 240. **Statement of the Rule.** — If there existed a graduated scale by which we could test the comparative enormity of all offenses against the public, it would also be possible to tabulate a statement of the relative severity of the different species of punishment known to the law; because, in that case, the two would be mutually dependent, and each would ascend *gradatim*. But since, in the very nature of the case, there is not, and cannot be, a common standard by which all minds, however constituted, may judge of the relative severity and ignominy, we must give over the attempt to discriminate between various kinds of punishment so far as to say of one that it is more aggravated than another. This brings us, necessarily, to the adoption of the rule prevailing in New York, as last above stated. To this, however, one important qualification must be added, — that the substitution of any other punishment for the death-penalty must be regarded as a mitigation of the sentence. For the history of the race teaches us that, in all ages, death has been considered the ultimatum of punishment, the last and most dreadful reprisal which men could inflict on men.

§ 241. **Punishment of Second Offenses.** — A law is not objectionable as *ex post facto* which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into account, and the punishment to be graduated accordingly. For instance, a statute providing that where a person has been once convicted of a penitentiary offense, he shall, on a repetition of the crime,

[1] Ratzky *v.* People, 29 N. Y. 124; Shepherd *v.* People, 25 N. Y. 406; Kuckler *v.* People, 5 Parker, 212.

or perpetration of an offense punishable in like manner, receive a punishment in addition to the one prescribed by law for this last offense, is not *ex post facto* as applied to a case where the second offense was committed after the passage of the law.[1] For it is the second offense to which the additional penalty is attached, not the first, and the law is therefore prospective. But if both the first and second offense preceded the enactment of the law, then it would be unconstitutional; for it would aggravate the punishment of a crime already past.[2]

§ 242. **Right to have the Jury fix the Penalty.** — In several jurisdictions in this country, the law imposes upon the jury (especially in trials for murder) the duty of fixing the penalty, within certain limits, in their verdict. When this provision exists, it confers upon the prisoner a valuable right, which cannot constitutionally be taken away by *ex post facto* legislation. Thus, in a late case before the Supreme Court of Nebraska, it appeared that, at the time of the commission of the alleged offense, the punishment prescribed for the crime of murder was either death or imprisonment for life, the penalty to be fixed by the jury in their verdict. After the commission of the offense the law was changed so as to make death the punishment for murder in the first degree, and divesting the jury of authority to fix the penalty. It was held that, so far as the law affected the rights of the party charged with the offense by depriving him of the right to the verdict of the jury upon the question of punishment, it was *ex post facto* and void. The court said: "It is very evident that the law under which the plaintiff in error was tried 'inflicts a greater punishment than the law annexed to the crime

[1] Ross's Case, 2 Pick. 165; Rand *v.* Commonwealth, 9 Gratt. 738; *Exp.* Gutierrez, 45 Cal. 430; People *v.* Butler, 3 Cow. 347; Cooley, Const. Lim. 273.

[2] Ross's Case, 2 Pick. 165.

when committed.' By that law the punishment was either death or imprisonment. By the latter enactment it is death. By that law the party charged had the right to have the jury pass upon the question as to whether he should live or die. By the latter act, if found guilty, he is deprived of his life, and the jury by whom he is tried have nothing to say upon the subject of what his punishment shall be. This right being, at the time of the alleged act, his, he cannot be deprived of it by a law subsequently passed."[1]

§ 243. **Privilege attached to Pleading Guilty.** — The fact that a prisoner must be tried and sentenced by the law as it stood when the crime was committed, and that any privileges or immunities secured to him as a consequence of his pleading guilty cannot be taken away by retroactive legislation, was ably vindicated in a recent case in Colorado. As the law stood at the time the homicide was committed, the defendant could escape all hazard of the death-penalty by pleading guilty; because it was provided that the sentence of death should not be passed unless the jury, in their verdict, should indicate that the killing was deliberate or premeditated, and no provision was made for submitting this question to the jury except upon a plea of not guilty and trial. But a subsequent statute enacted that a jury might be impanelled, notwithstanding a plea of guilty, — or rather, in cases where that plea *was* entered, — to try the question whether or not the killing was deliberate or premeditated, and the sentence made to depend on their verdict. It was held that, as applied to a case where the homicide was committed before the second statute was enacted, it was *ex post facto* and void, because it altered the situation of the accused to his disadvantage.[2]

[1] Marion *v.* State, 16 Nebr. 349; 5 Crim. Law Mag. 859.

[2] Garvey *v.* People, 6 Colo. 559; s. c. 45 Am. Rep. 531; 16 Reporter, 262.

On a state of facts similar to those just described, the Supreme Court of the United States has lately reached an identical conclusion. The case was this: The defendant, indicted for murder, pleaded guilty of murder in the second degree, and was sentenced; by the law in force when the homicide was committed, this conviction was an acquittal of the higher crime of murder in the first degree; but the law was changed, after the crime, but before the plea of guilty, so that a judgment on that plea, set aside lawfully, should not be an acquittal of the higher grade as before; the prisoner's plea was set aside. But it was held that, as to the case at bar, the new law was *ex post facto*, and the defendant could not again be tried for murder in the first degree.[1]

Now the point and principle of the cases above detailed is this: That no person can be punished in this country except in accordance with the law set for his governance by the sovereign authority at the time his deed was done; that any statute is unconstitutional which so changes the criminal law as to alter his situation before the face of justice to his material and substantial disadvantage; and that any rights, privileges, or immunities which are accorded to him by the law relating to crimes, to criminal procedure, or to pleading or evidence, cannot be abrogated by retroactive legislation. In so far as they emphasize these truths, these cases are important contributions to our constitutional jurisprudence.

IV. Constitutionality of Laws denying Political or Professional Privileges as a Consequence of Past Conduct.

§ 244. **Test-oaths as a Condition of Right to pursue One's Calling.** — Among the incidents which followed the

[1] Kring *v.* Missouri, 107 U. S. 221.

close of the War of the Rebellion, and which grew out of that conflict, was the passage, both by Congress and by several of the States, of statutes imposing a test-oath of past loyalty to the National Government as a condition precedent to the right to enjoy certain civil or political privileges. And the adjudication of these laws by the courts has demonstrated, in a most conclusive manner, the practical value of the constitutional prohibitions against *ex post facto* laws and bills of attainder. These decisions are so important that they seem to require a detailed method of treatment.

In the first place, Missouri, upon the adoption of a new constitution, established a test-oath of past loyalty, and made it a condition precedent to the right of suffrage, or to the right to hold public office, to serve as a juror, practise as an attorney-at-law, or act as a professor, teacher, or clergyman. And the Supreme Court of that State held this provision valid and constitutional in numerous cases.[1] But one of these decisions was carried to the Supreme Court of the United States and there reversed.[2] In an able and well-reasoned opinion by Mr. Justice Field (from which, however, four justices dissented) it was adjudged that the enactment in question was in violation of that clause of the Federal Constitution which forbids the passage of bills of attainder and *ex post facto* laws. The ground taken by the court was this: the disabilities which are made to follow the refusal to take this oath must be regarded as penalties, and as constituting punishment; for the deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Field, J., said: "The clauses in the Missouri constitution,

[1] State *v.* Garesche, 36 Mo. 256; State *v.* Cummings, 36 Mo. 263; State *v.* Bernoudy, 36 Mo. 279; State *v.* McAdoo, 36 Mo. 452.

[2] Cummings *v.* Missouri, 4 Wall. 277.

which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted; but they produce the same result upon the parties against whom they are directed, as though the crimes were defined, and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning in the constitution were not such the fact. They are aimed at past acts, and not future acts. They were intended especially to operate upon parties who, in some form or manner, by actions or words, directly or indirectly, had aided or countenanced the Rebellion, or sympathized with parties engaged in the Rebellion, or had endeavored to escape the proper responsibilities and duties of a citizen in time of war; and they were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment; nor is it any less so because a way is open for escape from it by the expurgatory oath. The framers of the constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right depend upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else. Now, some of the acts to which the expurgatory oath is directed were not offenses at the time they were committed. It was no offense against any law to enter or leave the State of Missouri for the purpose of avoiding enrolment or draft in the military service of the United States, however much the evasion of such service might

be the subject of moral censure. 'Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex post facto* law, — 'they impose a punishment for an act not punishable at the time it was committed.' Some of the acts at which the oath is directed constituted high offenses at the time they were committed, to which, upon conviction, fine and imprisonment, or other heavy penalties, were attached. The clauses which provide a further penalty for these acts are also within the definition of an *ex post facto* law, — 'they impose additional punishment to that prescribed when the act was committed.'"[1]

But Congress, also, had passed an act, prescribing a test-oath, to the effect that the deponent had never voluntarily borne arms against the United States or given aid or encouragement to their enemies, as a qualification for the admission of attorneys to practise in the Federal courts. But the Supreme Court held this statute unconstitutional and void, as being both a bill of attainder and an *ex post facto* law.[2]

§ 245. **As a Condition to Exercise of Elective Franchise.** — It will be observed that although the enactment in Missouri, above referred to, made the taking of the test-oath a condition of the right of suffrage, among other things, and although the whole law was pronounced unconstitutional in Cummings *v.* Missouri, yet the reasoning of that case was concerned solely with the effect of a deprivation of the right to pursue a lawful and ordinary calling, and the attention of the court was not specially called to the matter of electoral rights. Upon this question — whether

[1] Cummings *v.* Missouri, 4 Wall. 277.

[2] *Exp.* Garland, 4 Wall. 333; Pierce *v.* Carskadon, 16 Wall. 234. This decision was not at first universally acceded to: *Exp.* Magruder, 6 Am. Law Reg. 292; *Exp.* Hunter, 2 West Va. 122; *Exp.* Quarrier, 4 West Va. 210.

a statute which denies the right of voting, as a consequence of conduct that precedes the statute, is, properly speaking, an *ex post facto* law — the authorities are in most perplexing confusion. In a recent case in Alabama, it appeared that the constitution of 1875 denied the privilege of voting to those "who shall have been convicted of treason, embezzlement, etc." The former constitution contained no such provision. It was held that a person who had been convicted of one of the enumerated crimes in 1871, might be punished, under the statute against illegal voting, for voting in 1884. This decision was based on the ground that the right of suffrage is not a vested, natural, and inherent right, but rather a privilege, the exercise of which should be subject to the proper control of the State; and that consequently the withholding of it, in cases like the present, must be regarded as a mere disqualification, imposed for protection and not for punishment, — withholding an honorable privilege, and not denying a personal right or attribute of personal liberty; the clause in question was not *ex post facto*. It was thought that the case could be distinguished from *Ex parte* Garland and Cummings *v.* Missouri,[1] where a test-oath, obviously punitive in its nature, was held to be unconstitutional so far as it was made a prerequisite for the exercise of an ordinary calling, as that of an attorney or a clergyman. The right to exercise these callings was a natural right, which was not conferred by government, but would exist without it, though subject to legislative regulation; it was a valuable attribute of personal liberty, the deprivation of which was punitive in its character.[2] And this view has the support of several respectable authorities.[3] But on the other hand,

[1] *Exp.* Garland, 4 Wall. 333; Cummings *v.* Missouri, 4 Wall. 270.

[2] Washington *v.* State, 75 Ala. 582; 51 Am. Rep. 479.

[3] Anderson *v.* Baker, 23 Md. 531; Blair *v.* Ridgely, 41 Mo. 63; State *v.* Woodson, 41 Mo. 227; State *v.* Neal, 42 Mo. 119.

a very logical and well-reasoned opinion of the Court of Appeals of New York strongly maintains the position, that to deprive a citizen of the privilege of exercising the elective franchise, for any conduct of which he has previously been guilty, is to inflict a punishment for the act done; and that a statute having this effect is both a bill of attainder (or of pains and penalties) and an *ex post facto* law.[1]

It was at first thought that the eighth section of the Act of Congress of March 22, 1882, imposing political dis-

[1] Green *v.* Shumway, 39 N. Y. 418, 421. Miller, J., said: "The provision of the act which is to be considered declares that no person shall vote at the election for delegates to said convention who will not, if duly challenged, take and subscribe an oath that he has not done certain acts mentioned therein, and inflicts the penalty of political disfranchisement, without any preliminary examination or trial, for a refusal to take said oath. By this enactment, the citizen is deprived, upon declining to conform to its mandate, of a right guaranteed to him by the Constitution and the laws of the land, and one of the most inestimable and invaluable privileges of a free government. There can be no doubt, I think, that to deprive a citizen of the privilege of exercising the elective franchise, for any conduct of which he has previously been guilty, is to inflict a punishment for the act done. It imposes upon him a severe penalty, which interferes with his privileges as a citizen, affects his respectability and standing in the community, degrades him in the estimation of his fellow-men, and reduces him below the level of those who constitute the great body of the people of which the government is composed. It moreover inflicts a penalty which, by the laws of this State, is a part of the punishment inflicted for a felony, and which follows conviction for such a crime. It is one of the peculiar characteristics of our free institutions, that every citizen is permitted to enjoy certain rights and privileges, which place him upon an equality with his neighbors. Any law which takes away or abridges these rights, or suspends their exercise, is not only an infringement upon their enjoyment, but an actual punishment. That such is the practical effect of the test-oath required by the act in question can admit of no doubt, in my judgment. It arbitrarily and summarily and without any of the forms of law punishes for an offense created by the law itself."

franchisement upon bigamists or polygamists, might be regarded as an *ex post facto* law in so far as it affected those who had previously contracted polygamous marriages. But the Supreme Court has decided that it was not intended to operate, and does not operate, as an additional penalty prescribed for the punishment of the offense of polygamy, but merely defines it as a disqualification of a voter. The disfranchisement operates upon the existing status and condition of the individual at the time when he offers to be registered as a voter, and not upon a past offense. It therefore has no retroactive operation and is not objectionable as *ex post facto*.[1]

§ 246. **Statutes prescribing Qualifications for particular Pursuits.** — An act of the legislature prescribing certain qualifications for all those who propose to follow a particular avocation within the State, — for example, to practise medicine, surgery, or dentistry, — and prohibiting all who do not possess such qualifications from so practising, under a penalty, must make an exception in favor of those who, at the time of its passage, may be lawfully engaged in such business; otherwise it will be, as to them, *ex post facto* and void.[2]

[1] Murphy *v.* Ramsey, 114 U. S. 15.

[2] Commonwealth *v.* Wasson, 29 Pitts. L. J. 434; Fox *v.* Territory, 5 West Coast Rep. 339; Byrne *v.* Stewart, 3 Desau. 466.

CHAPTER X.

BILLS OF ATTAINDER.

§ 247. Nature of Bills of Attainder.
248. Inclusion of the Term.
249. Historical Reasons for the Prohibition.
250. Examples of such Acts in this Country.

§ 247. **Nature of Bills of Attainder.** — By the Federal Constitution bills of attainder are prohibited to be passed either by Congress or by the several States.[1] In the strict signification, the word "attainder" means an extinction of civil and political rights, and its two incidents, forfeiture and corruption of the blood, followed as a necessary consequence, at the common law, upon a conviction and sentence to death.[2] And a bill of attainder was a legislative action, directed against a designated person (or several persons), pronouncing him guilty of an alleged crime — usually treason — and passing sentence of death and attainder upon him. "A bill of attainder," says Mr. Justice Field, "is a legislative act which inflicts punishment without a judicial trial. . . . In these cases, the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or

1 Constitution of the United States, Art. 1, §§ 9, 10.
2 4 Blackst. Comm. 380, 381.

otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense." [1]

It will thus be seen that the bill of attainder is, theoretically, distinguishable from an *ex post facto* law in several important particulars. For instance, an *ex post facto* law declares that to be a crime which was not so at the time of its commission; whereas the sentence passed by a bill of attainder might be, and usually was, for a crime already well known to the law of the land. Again, a bill of attainder was always an assumption of judicial power, a legislative trial, conviction, and sentence; while the enactment of an *ex post facto* law commonly leaves its interpretation and enforcement to the courts. But it is evident that a particular statute may well be objectionable on both these grounds. And such has been the case in every instance where the American courts have been called upon to pronounce a statute void as being a bill of attainder.

§ 248. **Inclusion of the Term.** — But the sentence of death was not the only species of legislative punishment known to parliamentary history. In some cases a less severe penalty was inflicted, and, in that event, the judgment was denominated a bill of pains and penalties. However, as the two kinds of bills partake of the same nature and characteristics, and as the one is more shocking to our sense of right and justice only because it inflicts a more terrible punishment, they are evidently to be classed in the same category, — and, in fact, the term "bill of attainder" has come to be used in a generic sense, including also a bill of pains and penalties. It is in this comprehensive signification that it is used in the Federal Constitution.[2]

[1] Cummings *v.* Missouri, 4 Wall. 277.

[2] Fletcher *v.* Peck, 6 Cranch, 138; Cummings *v.* Missouri, 4 Wall. 277; *Exp.* Garland, 4 Wall. 333; Story on Const. § 1344.

§ 249. **Historical Reasons for the Prohibition.** — The considerations already adverted to,[1] as drawn from the history of other nations and furnishing a warning and an example, which led the framers of the Constitution to prohibit the passage of *ex post facto* laws, must also have been largely instrumental in convincing them of the wisdom of excluding the enactment of bills of attainder from the powers of our legislative bodies. But this provision was not incorporated alone from the recollection of the oppressions of which such acts had been made the engine in the hands of the English Parliament, but also as a safeguard against the repetition of certain measures which had been taken by some of the newly autonomous States during the stormy times of the Revolution. In several cases, legislative enactments declared the forfeiture of all the estates (within the territorial jurisdiction) of subjects of the British crown who had abandoned the country on account of their political tenets, or because not in sympathy with the movement which had led the colonies to invoke the arbitrament of war. In these instances, no other trial or examination of any species was allowed than an inquiry into the fact of desertion. And a still nearer approach to the original methods of using the bill of attainder was found in cases, by no means infrequent, where statutes were directed against particular persons by name, and adjudged them guilty of aiding and adhering to the enemies of the State, and proceeded to a confiscation of such property of theirs as might be found within the limits of the commonwealth.[2] Whether or not the circumstances of the time — the exigencies of the young republic strug-

[1] *Supra*, § 224.

[2] See Thompson *v.* Carr, 5 N. H. 510, as a case showing how New Hampshire, in 1778, passed an act to confiscate the property of certain persons therein named, as having aided and abetted the enemy. See also Ramsay's History of South Carolina, ii. 351.

gling in the throes of revolution, the grim truth that her all was staked upon success, the extreme peril from treason within her gates — could justify the enactment of such measures, it was clearly discerned by the framers of the Constitution that the power to pass such laws was far too dangerous to the liberty of the citizen to remain in the hands of the legislatures.

§ 250. **Examples of such Acts in this Country.** — From the adoption of the Constitution to the close of the Rebellion there are no examples of an attempt, by any legislative body in this country, to pass a bill of attainder or of pains and penalties. But at the period last mentioned enactments were made in several of the States — as also an act of Congress — denying to all persons the right to exercise certain civil or political privileges (as the right of suffrage, the right to hold public office, the right to pursue an ordinary and lawful business), unless they would first take and subscribe a stringent oath as to the loyalty of their past conduct towards the Federal Government. These statutes were held to be *ex post facto* laws and unconstitutional. And they were also adjudged to be bills of attainder, on the following ground: since it was certain that there were individuals who would be unable to take the oath prescribed, the legislative action in question was tantamount to a declaration that those persons were guilty of the crimes alleged, and to a sentence, passed upon them without trial, imposing heavy penalties for their past conduct. The cases in which these conclusions were reached have already been noticed in detail.[1]

[1] *Supra*, §§ 244, 245.

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