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# THE

# POLICE POWER

## PUBLIC POLICY AND CONSTITUTIONAL RIGHTS

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BY

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# PREFACE

The term police power, while in constant use and indispensable in the vocabulary of American constitutional law, has remained without authoritative or generally accepted definition. It is therefore proper to state at the outset, that the term will be employed in the following pages as meaning the power of promoting the public welfare by restraining and regulating the use of liberty and property. Under this definition constitutional questions regarding civil and criminal justice, taxation, and public improvements and services, are outside of the scope of this treatise, the plan of which also excludes the administrative law of the police power, i. e., the common law and constitutional principles regarding the execution and enforcement of police legislation, and the remedies against unlawful official action in the pretended exercise of the police power.

The first part of the treatise develops the idea of the police power by assigning to it its place among governmental powers (chap. I); and by discussing its various methods of operation (chap. II); and a chapter is given to a summary of the relation of the federal government to the police power (chap. III).

The main division of the treatise is dictated by the consideration that certain rights yield to the police power, while it respects and accommodates itself to others. The part entitled the Public Welfare defines the conditions and interests which call for restraint or regulation. These are classified as primary social interests and economic interests. The former constitute the undisputed field of the police power, in which state control is universally regarded as legitimate. These interests are peace and security from crime (chap. IV), public safety and health (chap. V), public order and comfort (chap. VI), and public morals (gambling, drink and vice, chapters VII, VIII, IX). The control of dependent classes is treated in connection with these interests (chap. X).

The economic interests relating to the conditions of production and distribution of wealth constitute the debatable field



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of the police power. The prevention of fraud (chap. XI) is generally conceded to be a legitimate function, but the prevention of oppression is frequently met by the assertion of a constitutional right of liberty of contract. The legislation against oppression deals with the protection of debtors (chap. XII) and of laborers (chap. XIII), and with combinations of labor (chap. XIV) and of capital (chap. XV). Closely connected with the latter is the state control of corporations (chap. XVI), while the restraint of perpetuities (chap. XVII) presents but few constitutional aspects.

The important classes of business which require special state control by reason of natural monopoly or legal privileges, are treated under the head of business affected with a public interest (chap. XVIII), while the limitations upon rights of property resulting chiefly from public easements or natural conditions are discussed under the head of qualified property (chap. XIX). A chapter on compulsory benefits (chap. XX), showing how far the individual may be compelled to act for his own benefit or that of limited groups, concludes this part of the treatise.

The third part, entitled fundamental rights under the police power, is naturally divided into three main subportions: liberty, property, and equality.

Immunity from governmental restraint is generally conceded to the liberty of the body, and to the liberty of private conduct, classed together as personal liberty (chap. XXI); our constitutions expressly guarantee religious and political liberty (chap. XXII); of the economic aspects of liberty (chap. XXIII), that of migration and settlement is fully recognised, while the freedom of contract and of pursuit of livelihood has at best an uncertain status.

The subject of property is practically identical with that of vested rights, the protection of which under adverse claims of public policy forms one of the most difficult problems of constitutional law. A chapter on appropriation, injury and destruction (chap. XXIV) differentiates police power from eminent domain, regulation from taking, and useful property from dangerous things. Retroactive legislation sacrificing vested rights to a change of legislative policy is discussed under the heads of confiscatory regulation (chap. XXV) and public grants and licenses (chap. XXVI), and the chief his-

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torical illustrations of the conflict of vested rights and public policy are reviewed under the head of social and economic reforms (chap. XXVII).

The principle of equality (chap. XXVIII) constitutes a limitation upon the police power of equal importance with that of vested rights. It means that government shall neither impose particular burdens upon individuals or corporations to meet dangers for which they cannot in justice be held responsible (chap. XXIX), nor grant special privileges or monopolies (chap. XXX), and that all legislative discrimination should be justified by differences of status, act, or occupation, corresponding to the difference of legislative measures (chap. XXXI).

The law of the police power is practically a growth of the last thirty or forty years, and much of it remains unsettled. There has, however, been a sufficient amount of judicial discussion and decision to warrant the attempt to summarise the results so far reached. A work upon a subject which is still in a formative stage is necessarily constructive, and the writer must claim considerable independence in the classification and formulation of principles; but it is hoped that the substance of the law as given in this treatise will be found to be a faithful and accurate presentation of the authorities. The author will be satisfied if he has succeeded in making some contribution to the correct understanding of a branch of the law which yields to no other in importance and interest.

E. F.

University of Chicago,
January, 1904.

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# CONTENTS.

## THE POLICE POWER.

### FIRST PART: NATURE AND GENERAL SCOPE OF THE POLICE POWER.

#### CHAPTER I.

#### GOVERNMENTAL POWERS AND PUBLIC POLICY.


§ 1. Division of governmental powers.
§ 2. The term "police."
§ 3. The term "police power."

A. THE POLICE POWER AS A MEANS OF FURTHERING THE PUBLIC WELFARE. §§ 4-21.

§ 4. Division of objects of government.
§ 5. Maintenance of national existence.
§ 6. Supply of ways and means.
§ 7. Maintenance of right and the redress of wrong. Civil and criminal justice.
§ 8. Public welfare or internal public policy.
§ 9. Scope of internal public policy and welfare.
§ 10. The primary social interests: safety, order and morals.
§ 11. Care and control of dependents.
§ 12. Economic interests.
§ 13. Non-material or ideal interests.
§ 14. Political interests.
§ 15. Relative attitude of the government toward the three classes of interests.
§ 16. Relation between private right and public welfare.
§ 17. The constitution as judicially enforceable law.
§ 18. Specific limitations upon police legislation.
§ 19. General limitations.
§ 20. Due process of law.
§ 21. Justice and judicial policy.

B. THE POLICE POWER AS A POWER OF RESTRAINT AND COMPULSION. §§ 22-26.

§ 22. Corporate and moral capacity of the state.
§ 23. Corporate powers of state and individual rights.




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§ 24. Power over licenses and privileges.
§ 25. The police power and other restraining powers.
§ 26. Police legislation and the criminal law.

CHAPTER II.

METHODS OF THE POLICE POWER.

§ 27. Outline.
§ 28. Restraint as distinguished from regulation and prohibition.

*Positive standards and limitations.* §§ 29-34.

§ 29. General principle.
§ 30. Imposed standards as compared with customary standards.
§ 31. Regulations applied to innocuous conditions.
§ 32. Standards of articles of consumption.
§ 33. Regulation by municipal authority.
§ 34. Choice between measures of equal efficiency.

*Regulations to insure compliance with the law.* §§ 35-57.

§ 35. Prevention through publicity.

*Licenses.* §§ 36-39.

§ 36. In general.
§ 37. License or occupation tax.
§ 38. License as a police measure.
§ 39. High license as a method of restriction.
§ 40. Bonds and deposits.

*Notices, marks and signs.*

§ 41. Purpose and application.

*Reports and Registration.* §§ 42-46.

§ 42. In general.
§ 43. As applied to business.
§ 44. Statistical information.
§ 45. Passports and registration of strangers.
§ 46. Registration and equality.

*Inspection.* §§ 47, 48.

§ 47. Inspection and search.
§ 48. Secrecy of letters.

*Notice of a prejudicial character.* §§ 49-52.

§ 49. Offensive coloring.
§ 50. Goods marked convict made.
§ 51. Goods marked tenement made.
§ 52. Resulting injury.

Digitized by Google

*Notice of an incriminating character.* §§ 53-55.

§ 53. Requiring statement as to lawful conduct of business.
§ 54. Immunity from prosecution.
§ 55. Obligation to report subject to claim of privilege.

*Compulsory association.* §§ 56, 57.

§ 56. Legislation using it as a means of control.
§ 57. Principles applicable.

*Prohibition.* §§ 58-62.

§ 58. Meaning of prohibition.
§ 59. What kinds of business may be prohibited: lotteries, speculation, liquor.
§ 60. Trading stamp business.
§ 61. Ticket brokerage.
§ 62. Oleomargarine legislation.

*The principle of reasonableness.*

§ 63. Enforcement by courts.

CHAPTER III.

THE FEDERAL GOVERNMENT AND THE POLICE POWER.

§ 64. Police power in a federal state.

*Positive police legislation of the federal government.* §§ 65-67.

§ 65. Powers of Congress.
§ 66. Commerce and navigation.
§ 67. Indians and territories.

*Control over state police power.* §§ 68-85.

§ 68. Constitutional provisions applicable.
§ 69. The fourteenth amendment.

*The commerce clause.* §§ 70-85.

§ 70. Different subjects of legislation.
§ 71. Immigration and quarantine.
§ 72. Navigation and navigable waters.
§ 73. Railroads, and common carriers.
§ 74. Peddlers, auctioneers, brokers, and drummers.
§ 75. Inspection laws.
§ 76. Liquor.
§ 77. Foodstuffs and live stock.

*Principles underlying the decisions of the Supreme Court.* §§ 78-85.

§ 78. Nature of distinctions.
§ 79. Business which is commerce and business which is not commerce.
§ 80. Local and national aspect of commerce.

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§ 81. Point at which commerce ceases to be interstate or foreign commerce; original package doctrine.
§ 82. The principle of non-discrimination.
§ 83. Things which are lawful articles of commerce and things which are not. State power of exclusion.
§ 84. Conflict between state policy and freedom of commerce.
§ 85. Summary of principles.

## SECOND PART: THE PUBLIC WELFARE.

### FIRST: THE PRIMARY SOCIAL INTERESTS: SAFETY, ORDER AND MORALS.

### CHAPTER IV.

### PEACE AND SECURITY FROM CRIME.

§ 86. Police patrol and general vigilance.
§ 87. Arrest.
§ 88. Suppression of riot.
§ 89. Security of the peace.
§ 90. Concealed weapons.
§ 91. Military organisations.
§ 92. Bodies of armed men.
§ 93. Restraints upon business and upon particular dealings.
§ 94. Criminal character.
§ 95. Reputation.
§ 96. Known thieves.
§ 97. Vagrancy, vagabondage and criminal idleness.
§ 98. Vagrancy not a status of dependence.
§ 99. Vagrancy a criminal offense.
§ 100. Vagrancy as a means of dealing with suspects.
§ 101. Control over immigration.
§ 102. Control over criminals after conviction.
§ 103. Measures during imprisonment.
§ 104. Conditional pardon.
§ 105. Indeterminate sentence laws and parole.
§ 106. Question of delegation of judicial powers.
§ 107. Parole conditions a form of police supervision.
§ 108. Suspension of sentence and probation.
§ 109. Security of good behavior.
§ 110. Disabilities of ex-convicts.

### CHAPTER V.

### SAFETY AND HEALTH.

§ 111. Growth of legislation.
§ 112. Principal subjects of legislation.

Digitized by Google

*Safety legislation.* §§ 113-121.

§ 113. Classification of subjects.
§ 114. Protection against overflow and inundation.
§ 115. Mines.
§ 116. Railroads.
§ 117. Ships and navigation.
§ 118. Buildings and structures.
§ 119. Dangerous machinery, inflammable materials, explosives, poisons, &c.
§ 120. Dangerous sports.
§ 121. Destructive animals and vermin, noxious weeds, and other pests.

*Sanitary legislation.* §§ 122-133.

§ 122. Scope of state activity.
§ 123. Persons. Immigration and quarantine.
§ 124. Marriage.
§ 125. Burials and cemeteries.
§ 126. Dead bodies.
§ 127. Land, structures and buildings.
§ 128. Buildings and other establishments.
§ 129. Foodstuffs, &c.
§ 130. Other articles of consumption.
§ 131. Employment.
§ 132. Qualification for the exercise of callings affecting health.
§ 133. Practice of medicine.

*Limitations of the federal constitution upon the police power for the protection of safety and health.* §§ 134-139.

§ 134. Fourteenth Amendment and commerce clause.
§ 135. Safety legislation affecting commerce.
§ 136. Federal power not exclusive of protective state legislation.
§ 137. Exercise of state police power not conclusive.
§ 138. Discriminative legislation under color of sanitary power.
§ 139. Louisiana v. Texas.

*Local powers for the protection of safety and health.* §§ 140-142.

§ 140. Delegated ordinance powers.
§ 141. Principle of construction.
§ 142. Judicial control as to reasonableness.

*Limitations of health and safety powers with reference to conditions and measures.* §§ 143-155.

§ 143. The problems involved.
§ 144. Inconclusiveness of legislative judgment.
§ 145. Judicial notice of established scientific laws and general conditions.
§ 146. Sanitary purpose need not be expressed.
§ 147. Difference of objects as justifying different measures.
§ 148. Measure must tend to remove danger.

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§ 149. Measure need not be the most adequate conceivable.
§ 150. Measure proportionate to danger.
§ 151. Interference with established economic or social conditions.
§§ 152-154. The practice of medicine and freedom of science.
§ 155. Measures restraining a class for its own protection.

## CHAPTER VI.

## PUBLIC ORDER AND COMFORT.

*Authority exercising the power.* §§ 156-159.

§ 156. Municipal ordinance power.
§ 157. Concurrence of local and state authority.
§ 158. Reasonableness.
§ 159. Order and freedom of commerce.

*Power over encroachments on streets.* §§ 160-164.

§ 160. Fee and easement.
§ 161. Control of public use.
§ 162. Customary encroachments.
§ 163. Power to prohibit and regulate.
§ 164. Protection of streets from injury.

*The common right to use public places.* §§ 165-170.

§ 165. Nature of common use.
§ 166. Power to vacate highway.
§ 167. Power over use of street not absolute.
§ 168. Extent of common use.
§ 169. Obstruction and disorderly conduct.
§ 170. Use of rivers.
§ 171. Right to use parks, public buildings, etc.

*Special street uses.*

§ 172. Special uses of abutters.
§ 173. Use for profit.
§ 174. Use for parades, processions, public addresses and meetings.

*Power over places of public resort in private ownership.*

§ 175. Subject to police regulation.

*Offensiveness.* §§ 176-179.

§ 176. Offensiveness as a nuisance.
§ 177. Municipal power over offensive establishments.
§ 178. Reasonableness of standards.
§ 179. Assignment to specified districts.

*Unsightliness.* §§ 180-183.

§ 180. Limiting the height of buildings adjacent to public parks.
§ 181. Building regulations not for purely aesthetic purposes.

Digitized by Google

§ 182. Unsightly advertisements.
§ 183. Flag legislation.

*Sunday rest.* §§ 184-186.

§ 184. Legislation.
§ 185. Protection of customary quiet.
§ 186. Prohibition of business.

CHAPTER VII.

PUBLIC MORALS.

§ 187. In general.

GAMBLING.

§ 188. Justification of exercise of police power. § 730.
§ 189. Games for pastime and recreation.

*Games of chance.* §§ 190-191.

§ 190. Legislation.
§ 191. Aggravating circumstances.

*Games of skill and contests.* §§ 192-195.

§ 192. Playing for money.
§ 193. Billiard tables and bowling alleys.
§ 194. Horse races.
§ 195. Betting.

*Lotteries.* §§ 196-198.

§ 196. Authorized lotteries.
§ 197. Definition of a lottery.
§ 198. Gifts to attract custom.

*Speculation.* §§ 199-203.

§ 199. Legitimate speculation.
§ 200. Stock and produce speculation.
§ 201. Legislation restraining dealings in futures and options.
§ 202. Places facilitating speculation.
§ 203. Foreign legislation regarding exchanges.

CHAPTER VIII.

PUBLIC MORALS (Continued). INTOXICATING LIQUORS.

§ 204. Constitutional basis of control.
§ 205. Principal points of legislation and policy.

1. *Regulation of the liquor traffic.* §§ 206-212.

§ 206. Right to sell without license or issue of license as a matter of right—exclusion of administrative discretion.
§ 207. Right to sell subject to statutory disqualifications and conditions.

Digitized by Google

§ 208. Requirement of a license to be issued as a matter of judicial discretion.
§ 209. Judicial control.
§ 210. Considerations guiding discretion.
§ 211. Absolute limitation of numbers.
§ 212. Right to sell depending upon uncontrolled discretion.

2. *Prohibition.* §§ 213-217.

§ 213. Constitutionality.
§ 214. State wide prohibition.
§ 215. Scope of prohibition.
§ 216. Local power of prohibition.
§ 217. Local option.

3. *Public monopoly.* §§ 218-219.

§ 218. South Carolina dispensary law.
§ 219. Gotenburg system.

4. *Liquor not used as a beverage.* §§ 220-224.

§ 220. Subject to control.
§ 221. Liquor unsuitable for drink.
§ 222. Liquor suitable but not intended for a beverage, under the system of restrictive legislation.
§ 223. The same under the system of prohibition.
§ 224. Sale of wine for sacramental purposes.

5. *The excessive use of intoxicating liquors.* §§ 225-227.

§ 225. Intoxication.
§ 226. Habitual intemperance.
§ 227. Compulsory commitment to asylums.

6. *The liquor traffic and the federal constitution.* §§ 228-233.

§ 228. Provisions applicable.
§ 229. Right of citizenship.
§ 230. Freedom of commerce.
§ 231. License cases.
§ 232. Leisy v. Hardin and the Wilson Act.
§ 233. The South Carolina Law.

CHAPTER IX.

PUBLIC MORALS (Continued). VICE AND BRUTALITY.

1. *Sexual vice.* §§ 234-246.

§ 234. Purpose and scope of police control.

*Lasciviousness and obscenity.* §§ 235-239.

§ 235. Lewd and lascivious conduct.
§ 236. Obscene performances and publications.

Digitized by Google

§ 237. Tests of obscenity.
§ 238. Legitimate purposes: science, social reform, etc.
§ 239. Art and literature.

*Illicit sexual intercourse.* §§ 240-246.

§ 240. Notorious cohabitation.
§ 241. Autonomistic marriage.
§ 242. Prostitution. Scope and ground of state control.
§ 243. Systems of legislation.
§ 244. Measures against prostitutes.
§ 245. Houses of prostitution.
§ 246. Practices in aid of prostitution.

2. *Brutality and inhumanity.* §§ 247-249.

§ 247. Legislation.
§ 248. Brutal sports and entertainments.
§ 249. Cruelty to animals. Vivisection.

3. *Public amusements.* §§ 250-251.

§ 250. Ground and scope of police control.
§ 251. Control over theatres. Stage censorship.

CHAPTER X.

CONTROL OF DEPENDENTS.

*Insanity.* §§ 252-256.

§ 252. Restraints placed on the insane.
§ 253. Provisions held defective.
§ 254. Constitutional requirements.
§ 255. Right to discharge.
§ 256. Control of private asylums.

*Minors.* §§ 257-267.

§ 257. In general.
§ 258. Restrictive legislation.
§ 259. Constitutionality.
§ 260. Parental right of custody and commitment to reform institutions.
§ 261. Dependence or delinquency.
§ 262. Notice to parent.
§ 263. Discharge from institution.
§ 264. Compulsory education.
§ 265. Truant schools.
§ 266. Power over private education.
§ 267. Power over graduate instruction.

*Pauperism and charity.* §§ 268-271.

§ 268. General attitude of the state.
§ 269. The state and private charity.
§ 270. Compulsory support by relatives.
§ 271. Restrictive measures against paupers.

Digitized by Google

## SECOND: ECONOMIC INTERESTS.
## PROTECTION AGAINST FRAUD AND OPPRESSION.
## PUBLIC CONVENIENCE AND ADVANTAGE.

### CHAPTER XI.

### PROTECTION AGAINST FRAUD.

§ 272. Preventive measures against fraud.

*Weights, measures and packages.* §§ 273-275.

§ 273. Legislation.
§ 274. Determination and verification of standards.
§ 275. Compelling certain modes of dealing.

*Inspection laws.* §§ 276-278.

§ 276. Scope of legislation.
§ 277. Validity under federal constitution.
§ 278. Restrictions under state constitutions.

*Substitutes, imitations, adulterations.* §§ 279-286.

§ 279. Poor quality without deception.
§ 280. Deceptive practices. Adulteration.
§ 281. Commodities to which legislation applies. Gold and silver.
§ 282. Oleomargarine legislation.
§ 283. Absolute prohibition.
§ 284. Prohibition of imitation.
§ 285. Principles governing regulation and prohibition.
§ 286. Ordinances.

*Forms of business liable to abuse.* §§ 287-295.

§ 287. Nature of danger or evil.
§ 288. Peddlers.
§ 289. Scope of legislation.
§ 290. Auctioneers.
§ 291. Ticket brokerage.
§ 292. Bankrupt and fire sales.
§ 293. Gift sales and trade stamps.
§ 294. Peddling, etc., and the freedom of commerce.
§ 295. Non-discriminative license fees.

*Fidelity of agents, depositaries, and trustees.* §§ 296-297.

§ 296. Corporations, banking, insurance.
§ 297. Warehousemen and commission merchants.
§ 298. Public interest in prevention of fraud. Bottling Acts.

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## CHAPTER XII.

## PROTECTION OF DEBTORS.

§ 299. Protection against oppression in general.

*Collection of debts.* §§ 300-301.

§ 300. Scope of legislation.
§ 301. Annoying practices in the collection of debts.

*Usury laws.* §§ 302-304.

§ 302. History of legislation.
§ 303. American legislation.
§ 304. Question of constitutionality.

*Bankruptcy legislation.* §§ 305-307.

§ 305. Power to relieve insolvents.
§ 306. Prospective state insolvency laws.
§ 307. Retrospective bankruptcy legislation.

*Legislation against contracts payable in gold.* §§ 308, 309.

§ 308. Statutory provisions.
§ 309. Constitutionality.

## CHAPTER XIII.

## PROTECTION OF LABORERS.

§ 310. In general.
§ 311. Restriction of hours of labor of females.
§ 312. Commonwealth v. Hamilton Mfg. Co.
§ 313. Ritchie v. People.
§ 314. Question whether measure sanitary or social.
§ 315. Legislation for adult laborers.
§ 316. Hours of labor.
§ 317. Question of constitutionality.
§ 318. Rate of wages.
§ 319. Payment of wages: weekly payment and store order acts.
§ 320. Judicial decisions.
§ 321. Constitutional principle.
§ 322. Imposed conditions and penalties.
§ 323. Penalty for leaving without notice.
§ 324. Fines for imperfect work.
§ 325. Coercion to influence or prevent the exercise of political rights.
§ 326. Coercion against membership in trade unions.
§ 327. Blacklisting and clearance cards.
§ 328. Employment brokerage.
§ 329. Federal legislation for the protection of labor.

## CHAPTER XIV.

## COMBINATIONS OF LABORERS.

§ 330. Combinations under the English law.
§ 331. Earlier American cases and statutes.

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§ 332. Question of the legality of strikes.
§ 333. Intimidation and coercion.
§ 334. Malicious interference.
§ 335. Constitutional power over strikes.
§ 336. Strike as a source of disorder.
§ 337. Strikes and trusts.

## CHAPTER XV.

## COMBINATIONS OF CAPITAL. RESTRAINT OF TRADE, MANIPULATION OF PRICES, AND TRUSTS AND MONOPOLIES.

§ 338. English legislation.
§ 339. American legislation.
§ 340. Analysis of provisions.
§ 341. Federal anti-trust legislation.
§ 342. Division of control between states and United States.
§ 343. Restraint of trade at common law.
§ 344. Associations with restrictive by-laws.
§ 345. Agreements not to deal with persons acting contrary to agreement.
§ 346. Exclusive selling arrangements. Rebates.
§ 347. Agreements to fix prices, limit supplies, or divide business.
§ 348. Covenants by vendor of business.
§ 349. Consolidation of different concerns.
§ 350. Trusts.
§ 351. Consolidation of corporations.
§ 352. Monopolistic corporation.
§ 353. When is the point of monopoly reached?
§ 354. Interpretation of anti-trust acts.
§ 355. Constitutionality of anti-trust legislation.
§ 356. Discrimination between combinations for different purposes.

## CHAPTER XVI.

## CORPORATIONS.

§ 357. Association and incorporation.
§ 358. The right to incorporate as a license.
§ 359. Special charters and general incorporation laws.
§ 360. Restrictions on corporate capacity.
§ 361. The charter as a contract and reservation of legislative power.
§ 362. Modifications of the doctrine of the Dartmouth College case.
§ 363. Present effect of Dartmouth College decision.
§ 364. Compulsory incorporation.

## CHAPTER XVII.

## FREEDOM OF PROPERTY—PERPETUITIES.

§ 365. Legal policy.
§ 366. Devices for tying up property. Civil law.

Digitized by Google

§ 367. Common law. The rule against perpetuities.
§ 368. Mortmain legislation in England.
§ 369. Mortmain legislation in America.
§ 370. Perpetual rents.
§ 371. Long leases.

## CHAPTER XVIII.

## BUSINESS AFFECTED WITH A PUBLIC INTEREST.

§ 372. Statement of doctrine.
§ 373. Kinds of business and forms of control.

*Regulation of charges.* §§ 374-385.

§ 374. English legislation.
§ 375. American legislation.
§ 376. Attitude of the courts.
§ 377. Justification by legal or virtual monopoly.
§ 378. Constitutionality in other cases.
§ 379. Earlier doctrine that reasonableness legislative question.
§ 380. Regulation not confiscation.
§ 381. Rates fixed by commission and due process.
§ 382. Rates fixed by legislature.
§ 383. Jurisdiction of federal courts.
§ 384. Difficulties of judicial control.
§ 385. Judicial regulation.

*Requirement of equal service.* §§ 386-394.

§ 386. To what kind of business applicable.
§ 387. Equal and sufficient service.
§ 388. Grounds of requirement.
§ 389. Objects of discrimination.
§ 390. Legislation against discrimination.
§ 391. What constitutes unjust discrimination.
§ 392. Circumstances justifying discrimination.
§ 393. Discrimination allowed or prescribed by law.
§ 394. Discrimination forbidden though circumstances dissimilar.

*Requirements of particular arrangements in the interest of public convenience.* §§ 395-398.

§ 395. Particular arrangements not within common law duty of equal service.
§ 396. Cab and other privileges granted by railroad companies.
§ 397. Legislative requirements.
§ 398. Public convenience not ordinarily a ground of police control.

*Requirements and reductions in the interest of financial security.* §§ 399-401.

§ 399. Banking and insurance.
§ 400. Grounds of control.
§ 401. Restriction of right to carry on business.

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## CHAPTER XIX.

## QUALIFIED PROPERTY.

§ 402. In general.

*Navigable waters and riparian rights.* §§ 403-409.

§ 403. Title and easement of navigation.
§ 404. Land covered by water.
§ 405. Special grants. Commonwealth v. Alger.
§ 406. Establishment of harbor lines. Effect on existing wharves.
§ 407. Obstructions under act of Sept. 19, 1890.
§ 408. Easements of the riparian owners.
§ 409. Riparian land.

*Mill dam privileges.* §§ 410-413.

§ 410. Legislation.
§ 411. Theory of Massachusetts courts.
§ 412. Taxing for public use.
§ 413. Other legislation authorizing the flooding of land.

*Natural water as qualified property.* §§ 414-417.

§ 414. Common law easements.
§ 415. Doctrine of prior appropriation.
§ 416. Subordination of right to beneficial purpose.
§ 417. Constitutional recognition of doctrine.

*Game and fish.* §§ 418-421.

§ 418. Common law and legislation.
§ 419. Constitutionality.
§ 420. Game and fish laws and freedom of commerce.
§ 421. Property in dogs.

*Waste of natural wealth.* §§ 422-423.

§ 422. Game and fish. Natural gas.
§ 423. Forest preservation.

*Restrictions on property in the interest of other owners.* §§ 424-427.

§ 424. Easements of support.
§ 425. Natural waters.
§ 426. Malicious erections and private nuisances.
§ 427. Private roads.

## CHAPTER XX.

## COMPULSORY BENEFITS.

§ 428. Protection and bounties.
§ 429. Scope of police power.

*Compulsory measures against improvidence.* §§ 430-437.

§ 430. Sumptuary laws.
§ 431. Spendthrifts.

Digitized by Google

§ 432. Compulsory insurance.
§ 433. Its constitutional aspect.
§ 434. American legislation providing insurance.
§ 435. Insurance in connection with registration of titles.
§ 436. Teachers' pension funds.
§ 437. Compulsory insurance of workmen.

*Compulsory industry and improvement.* §§ 438-439.

§ 438. Former English and colonial legislation.
§ 439. Constitutional aspect of such legislation.

*Compulsory joint improvements.* §§ 440-444.

§ 440. Difference from cases before considered.
§ 441. Drainage and irrigation.
§ 442. Constitutional justification.
§ 443. Party walls.
§ 444. Division fences.

THIRD PART: FUNDAMENTAL RIGHTS UNDER THE POLICE POWER.

FIRST: LIBERTY.

CHAPTER XXI.

PERSONAL LIBERTY.

§ 445. Different aspects of liberty.
Note—The right to life.

*Liberty of the body.* §§ 446-452.

§ 446. Cases of deprivation of personal liberty.
§ 447. Compulsory vaccination.
§ 448. Compulsory service and labor contracts.
§ 449. Unreasonable contracts to serve.
§ 450. Contract labor laws.
§ 451. American legislation.
§ 452. Specific enforcement and criminal punishment.

*Liberty of private conduct.* §§ 453-457.

§ 453. Legislative policy.
§ 454. Private consumption of liquor.
§ 455. Question of constitutional right.
§ 456. Principle of statutory construction. Liquor in clubs.
§ 457. Freedom of social intercourse.

CHAPTER XXII.

CIVIL LIBERTY: RELIGIOUS AND POLITICAL.

*Freedom of religion.* §§ 458-470.

§ 458. The constitutional guaranty.
§ 459. Repressive sectarian legislation.

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§ 460. Support of church out of public funds.
§ 461. Religious disqualifications.
§ 462. Recognition of religion.
§ 463. The Bible in public schools.
§ 464. Protective and restrictive legislation.
§ 465. Blasphemy.
§ 466. Regulative legislation.
§ 467. Limits of religious freedom.
§ 468. Practices and doctrines in conflict with public safety and order.
§ 469. Conflict between civic and religious duties.
§ 470. Sunday laws.

*Freedom of speech and press.* §§ 471-479.

§ 471. The constitutional guaranty and censorship.
§ 472. Freedom of speech and press, and the law of libel.
§ 473. Fox's Libel Act.
§ 474. Prosecutions for seditious libel in America.
§ 475. Attacks upon government in general. Anarchism.
§ 476. Incitement to crime and violence.
§ 477. Anarchists' cases.
§ 478. Legislation.
§ 479. Freedom of culture.

*Freedom of assembly and association.* §§ 480-484.

§ 480. Right of assembly and use of public places.
§ 481. History of the right of association.
§ 482. Constitutional power in America.
§ 483. Political parties and primary election laws.
§ 484. Conclusions reached. Note—Social control.

## CHAPTER XXIII.

## CIVIL LIBERTY: ECONOMIC.

*Freedom of immigration and settlement.* §§ 485-491.

§ 485. Considerations of public welfare.
§ 486. Movement from and to foreign countries.
§ 487. Emigration and expatriation.
§ 488. Right to come into a state.
§ 489. Emigration from a state.
§ 490. Movement from and to United States territories.
§ 491. Migration and settlement within a state.

*Freedom of pursuit of livelihood.* §§ 492-497.

§ 492. Restriction on right to pursue business as distinguished from regulation.
§ 493. Classes of business requiring license.
§ 494. Legitimate grounds of restraint and protection from competition.
§ 495. Certification in place of license.
§ 496. Delegation of legislative power.
§ 497. Principle of equality.

Digitized by Google

*Freedom of contract.* §§ 498-503.

§ 498. Contract essential to property.
§ 499. Contract part of civil liberty.
§ 500. Freedom of contract and oppression.
§ 501. Legislation and United States Supreme Court.
§ 502. Decisions of state courts.
§ 503. Formulation of principle.

SECOND: PROPERTY.
VESTED RIGHTS UNDER THE POLICE POWER.

CHAPTER XXIV.

APPROPRIATION, INJURY AND DESTRUCTION.

*Taking for public use. Appropriation.* §§ 504-506.

§ 504. Principle of law of nature.
§ 505. Doctrine of English law.
§ 506. American constitutions and Fourteenth Amendment.

*Injury.* §§ 507-510.

§ 507. Property injuriously affected under acts of Parliament.
§ 508. Physical invasion.
§ 509. Doctrine of consequential damages.
§ 510. Modifications of doctrine.

*Taking to ward off public injury.* §§ 511-517.

§ 511. Difference between police power and eminent domain, and principle of compensation.
§ 512. Appropriation generally outside of the police power.
§ 513. Prejudicial regulation without compensation.
§ 514. Justification of such regulation.
§ 515. Regulation of property rights.
§ 516. Illustrations of regulation not amounting to taking.
§ 517. Cases of destruction or abrogation of property rights.

*Insubstantial invasion or destruction.* §§ 518-519.

§ 518. Transitory disturbance of possession.
§ 519. Property taken of slight value.

*Nuisances.* §§ 520-528.

§ 520. Property imminently dangerous.
§ 521. Summary abatement.
§ 522. Carcasses, garbage, &c.
§ 523. Abandoned animals.
§ 524. Infected cattle.
§ 525. Property unlawfully used and forfeiture.
§ 526. Judicial safeguards.

Digitized by Google

§ 527. Lawton v. Steele.
§ 528. Property erected or acquired in violation of law.

*Useful and offensive industries.* §§ 529-533.

§ 529. Status of noxious establishments.
§ 530. Exercise of municipal power.
§ 531. Judicial safeguards.
§ 532. Status of offensive industries under foreign laws.
§ 533. Massachusetts law.

*Destruction to avoid calamity.* §§ 534-537.

§ 534. Destruction to check spread of fire.
§ 535. Statutory compensation.
§ 536. Destruction for military purposes.
§ 537. Where not ordered by military authority.

CHAPTER XXV.

CONFISCATORY LEGISLATION.

A. Retroactive Prohibition. §§ 538-547.

§ 538. In general. Principle of non-retroactive operation.
§ 539. Prohibition against the use of property.
§ 540. Mugler v. Kansas.
§ 541. Powell v. Pennsylvania.
§ 542. Regulation involving partial prohibition.
§ 543. Prohibition operating upon established business or practice of profession.
§ 544. The test oath cases.
§ 545. Hawker v. New York.
§ 546. Criticism of Hawker v. New York.
§ 547. Prohibition of oleomargarine business.

B. Expensive Alterations and Improvements. §§ 548-549.

§ 548. What is an excessive requirement.
§ 549. Limit of constitutional power.

C. Reduction of Charges. §§ 550-554.

§ 550. Reasonableness and judicial control.
§ 551. Basis of calculation the whole business within the state.
§ 522. Value of particular service.
§ 553. Value of property.
§ 554. Fair return.

D. Impairment of the Obligation of Contracts. §§ 555-560.

§ 555. Police power restricted with reference to existing contracts.
§ 556. Impairment forbidden only if in interest of party obligated.
§ 557. Legislation for the relief of debtors.

Digitized by Google

§ 558. Retrospective legal tender laws.
§ 559. Contracts to pay in specific kind of money.
§ 560. Scaling laws.

## CHAPTER XXVI.

## PUBLIC GRANTS AND LICENSES.

§ 561. In general.

*License to pursue a business prejudicial to safety or morals.* §§ 562-564.

§ 562. Statement of principle.
§ 563. Lotteries.
§ 564. Liquor licenses.

*Useful but offensive undertakings carried on under license.*

§ 565. Cemeteries, markets, &c.

*Exemptions.* §§ 566-568.

§ 566. From personal services.
§ 567. From liability for debts.
§ 568. From taxation.

*Corporate powers and privileges.* §§ 569-572.

§ 569. Dartmouth College doctrine.
§ 570. Question whether contract or not.
§ 571. Illinois water rate cases.
§ 572. Reservation of power to alter and repeal.

*Licenses to use public property. Street and other franchises.* §§ 573-577.

§ 573. Public utilities.
§ 574. Question of municipal power.
§ 575. Question of surrender of police power.
§ 576. License a contract or a right of property.
§ 577. Revocability not effected by exclusiveness.

*Suggestions regarding rights claimed under affirmative sanction.* §§ 578-582.

§ 578. Theory of vested rights.
§ 579. Equity of executed consideration.
§ 580. Licenses limited in time not a surrender of the police power.
§ 581. Perpetual licenses unreasonable.
§ 582. Licenses in terms made revocable.

## CHAPTER XXVII.

## SOCIAL AND ECONOMIC REFORMS.

§ 583. In general.

*The abolition of slavery.* §§ 584-586.

§ 584. Early legislation.
§ 585. Legislation during the civil war and the question of compensation.

Digitized by Google

§ 586. Constitutional aspect of abolition.

*Trade privileges and Feudal rights.* §§ 587-588.

§ 587. Class and trade privileges and exemptions.
§ 588. Seignorial rights.

*Perpetuities and mortmain.* §§ 589-596.

§ 589. Perpetual rents.
§ 590. Perpetual covenants.
§ 591. Entails.
§ 592. Acts of secularisation.
§ 593. Suppression of monastaries in England.
§ 594. Virginia legislation.
§ 595. Pawlet v. Clark.
§ 596. The Mormon Church case.

*Legislative power over eleemosynary trusts.* §§ 597-601.

§ 597. Eleemosynary trusts and the Dartmouth College doctrine.
§ 598. Doctrines laid down in Mormon Church case.
§ 599. Effect of reserved power over corporate charter.
§ 600. Trust objects becoming contrary to public policy.
§ 601. English legislation.
Note—Power over eleemosynary trusts by Prussian law.
§ 602. Summary of principles regarding property under the police power.

FUNDAMENTAL RIGHTS.

THIRD. EQUALITY.

CHAPTER XXVIII.

EQUALITY AS A POLITICAL PRINCIPLE.

§ 603. Social and natural inequality.
§ 604. Political inequality.
§ 605. Equality in England.
§ 606. Equality in France.
§ 607. Equality in Prussia.
§ 608. Equality under American state constitutions.
§ 609. The Fourteenth Amendment and the Slaughter House cases.
§ 610. Equality and the equal protection of the laws.
§ 611. Equality and due process of law.

CHAPTER XXIX.

PARTICULAR BURDENS.

§ 612. Subject selected to be responsible for condition calling for burden and responsibility.
§ 613. Particular services.
§ 614. Emergency services.
§ 615. Underwriters' patrols.

Digitized by Google

*Dangers due to natural conditions.* §§ 616-620.

§ 616. At common law.
§ 617. Under the police power.
§ 618. Reasonableness of requirement.
§ 619. Where land not the source of the danger.
§ 620. Cleaning sidewalks.

*Special liability in connection with hazardous undertakings.* §§ 621-638.

§ 621. Extension of liability beyond common law principles.
§ 622. Liability for cost of official supervision.
§ 623. Liability for the cost of remedial measures.
§ 624. Liability for acts of persons employed under legal compulsion.
§ 625. Ship's liability for fault of pilot.
§ 626. Civil Damage acts. Note—Subcontractors' liens.
§ 627. Liens under U. S. Revenue laws.
§ 628. Dangers incident to the operation of railroads.
§ 629. Injuring or killing of cattle.
§ 630. Fire started by sparks from locomotives.
§ 631. Railroad crossings.
§ 632. Injury to passengers.
§ 633. Absolute liability for personal injuries under other legal systems.
§ 634. Constitutionality of absolute liability.
§ 635. Penal liability and fault, wrongful intent dispensed with.
§ 636. Knowledge presumed.
§ 637. Penal liability of railroad companies.
§ 638. Penalty corresponding to fault.

CHAPTER XXX.

SPECIAL PRIVILEGES.

A. Discriminative Licenses. §§ 639-655.

§ 639. Cases calling for discrimination.
§ 640. Right to equality notwithstanding liability to entire prohibition.

*Restrictions based on objective conditions.* §§ 641-645.

§ 641. Regulations superseding administrative discretion.
§ 642. License a ministerial or a judicial act.
§ 643. Unregulated discretion: cases in which held unconstitutional.
§ 644. Unregulated discretion: cases in which sustained.
§ 645. Vote or consent of people of locality.

*Professional qualification.* §§ 646-650.

§ 646. Methods of ascertaining fitness.
§ 647. Discrimination in tests of fitness.
§ 648. Encroachment upon judicial power.
§ 649. Delegation of legislative power.
§ 650. Privileges accompanying professional license.

Digitized by Google

*Qualification of character.* §§ 651-653.

§ 651. Administrative determination.
§ 652. Substitution of ministerial function.
§ 653. Administrative discretion as regards business intrinsically harmless.

*Judicial Control.* §§ 654-655.

§ 654. Judicial character of discretion.
§ 655. Federal protection against arbitrary discretion.

B. MONOPOLIES. §§ 656-681.

§ 656. Historical remarks.
§ 657. American constitutional provisions.

*Monopolies of necessity (franchises).* §§ 658-662.

§ 658. Right to occupy highway.
§ 659. Right of condemnation of property.
§ 660. Temporarily exclusive right under special legislation.
§ 661. Canals and river improvements.
§ 662. Bank notes.

*Monopolies to secure the benefit of original production (authors' and inventors' rights).* §§ 663-665.

§ 663. Equity of exclusive right.
§ 664. Federal legislation.
§ 665. Monopoly character.

*Monopolies against common right.* §§ 666-673.

§ 666. State monopolies.
§ 667. Municipal monopolies.
§ 668. Private monopolies against common right. Ferries.
§ 669. Monopoly as a means of police control. Slaughter house cases.
§ 670. License, lease or contract.
§ 671. Power over monopolised business.
§ 672. Restriction of numbers.
§ 673. Resulting privileges.

*Revocability of monopolies and grant of competing rights.* §§ 674-681.

§ 674. Distinguished from prohibition of business.
§ 675. Unequivocal grant of exclusive character required.
§ 676. Principle of strict construction justified.
§ 677. Rival public undertakings.
§ 678. Question of power to make exclusiveness a matter of right.
§ 679. Grant of competing right as impairing the obligation of contracts.
§ 680. Louisiana Slaughter House and Gas Company cases.
§ 681. Perpetual monopolies and monopolies limited in time.

Digitized by Google

## CHAPTER XXXI.

## CLASSIFICATION AND DISCRIMINATION.

§ 682. Statement of problem.

A. Discrimination Based on Time. Exceptions in Favor of Existing Conditions. §§ 683-687.

§ 683. 1. Where new measure amounts merely to regulation.
§ 684. Exemption of established practitioners.
§ 685. 2. Where new regulation is destructive of vested interests.
§ 686. 3. Where new measure amounts to prohibition.
§ 687. Exception in favor of existing rights.

B. Discrimination Between Localities. §§ 688-690.

§ 688. Constitutional provisions.
§ 689. Discrimination in location of noxious establishments.
§ 690. Discrimination to be justified by local conditions.

C. Discrimination Based on Personal Status. §§ 691-720.

*Race.* §§ 691-700.

§ 691. Indians, Chinese and free negroes before the Fourteenth Amendment.
§ 692. Fourteenth Amendment.
§ 693. Federal civil rights legislation.
§ 694. State legislation forbidding discrimination.
§ 695. Discrimination apart from statute.
§ 696. Compulsory separation.
§ 697. a. Miscegenation.
§ 698. b. Education.
§ 699. c. Separation in public conveyances.
§ 700. Segregation and equality.

*Sex.* §§ 701-703.

§ 701. Civil and political status.
§ 702. Status under the police power.
§ 703. Employment of women in the liquor business.

*Aliens.* §§ 704-707.

§ 704. Power of the United States.
§ 705. Power of the states.
§ 706. Equal protection and equal capacity.
§ 707. Resident and non-resident aliens.

*Non-residents.* §§ 708-712.

§ 708. Citizens of other states.
§ 709. Non-resident U. S. citizens.

Digitized by Google

§ 710. Non-residence relevant for police purposes.
§ 711. Practice of medicine, &c.
§ 712. Proprietary resources of state.

*Corporations.* §§ 713-715.

§ 713. Irregularities due to special charters.
§ 714. Discrimination in administration of justice.
§ 715. Corporate capacity and vested rights.

*Foreign corporations.* §§ 716-720.

§ 716. Foreign corporations not engaged in commerce.
§ 717. Foreign corporations engaged in commerce.
§ 718. Exercising corporate powers within state.
§ 719. Foreign railroad companies.
§ 720. Fixed corporate property within the state.

D. Discrimination Based on Difference of Acts and Occupations: §§ 721-738.

§ 721. Police power may single out particular evils.
§ 722. Police power may single out one side of a relation.
§ 723. Discrimination between similar evils.
§ 724. Abstract classification according to degree of danger.
§ 725. Classification by social or economic groups.
§ 726. Synopsis of decisions.
§ 727. Legislation for the prevention of accidents.
§ 728. Sanitary legislation.
§ 729. Public order.
§ 730. Legislation against gambling.
§ 731. Legislation against fraud.
§ 732. Licensing occupations.
§ 733. Regulation of rates and charges.
§ 734. Anti-trust legislation.
§ 735. Labor legislation.
§ 736. Principles deducible from decisions.
§ 737. Systematic legislation.
§ 738. Formation of principle.

Digitized by Google

# TABLE OF CASES CITED.

[REFERENCES ARE TO SECTIONS.]


Abeel v. Clark, 84 Cal. 226, 24 Pac. 383..... 447
Acton v. Blundell, 12 M. & W. 324 ..... 425
Adams v. Brennan, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222..... 673
Adams v. Cronin, 29 Colo. 488, 69 Pac. 590..... 703
Adams v. Hackett, 27 N. H. 289, 59 Am. Dec. 376..... 564
Addyston Pipe and Steel Company v. United States, 175 U. S. 211, 20 Sup. Ct. Rep. 96..79, 341
Adler v. Whitbeck, 44 Oh. St. 539, 9 N. E. 672..... 37
Aetna Insurance Company v. Commonwealth, 21 Ky. Law. Rep. 503, 45 L. R. A. 355.... 340
African M. E. Church v. New Orleans, 15 La. Ann. 441.... 691
Ah Lit, Ex parte, 26 Fed. 512.. 455
Albany etc. R. Co. v. Brownell, 24 N. Y. 345..... 631
Albrecht v. People, 78 Ill. 510 ..... 454
Albright v. Cortright, 64 N. J. L. 330, 45 Atl. 634, 48 L. R. A. 616, 81 Am. St. Rep. 504 .....418, 419
Alden v. St. Peter's Parish Church, 158 Ill. 631, 42 N. E. 392, 30 L. R. A. 232..... 466
Aldrich v. Metropolitan West Side Elevated R. Company, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237..... 510
Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339..... 419
Alexander v. Greenville, 54 Miss. 659..... 141
Alexander W. and K. Ferry Co. v. Wisch, 73 Mo. 655, 39 Am. Rep. 535..... 668
Alexandria Ferry Co. v. Wisch, 73 Mo. 655, 39 Am. Rep. 535.. 668
Allardt v. The People of the State of Illinois, 197 Ill. 501, 64 N. E. 533..... 61
Alleghany v. Zimmerman, 95 Pa. 287, 40 Am. Rep. 649.... 162
Allen v. Boston, 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423 ..... 161
Allen v. Flood, L. R. 1898, A. C. 1 ..... 334
Allen v. McKeen, 1 Sumn. 276, 1 Fed. Cas. 489..... 599
Allen v. Sackrider, 37 N. Y. 341 ..... 388
Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568..... 369
Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427.. 716
Allnutt v. Inglis, 12 East. 527.. 377
Allopathic State Board of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 Sou. 809 .....153, 647
Allstock v. Page, 77 Va. 386... 209
Altenburg v. Commonwealth, 126 Pa. St. 602, 17 Atl. 799, 4 L. R. A. 543..... 454
American Express Co. v. People, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138, 23 Am. St. Rep. 641..... 419
American Live Stock Commis-




Digitized by Google

[REFERENCES ARE TO SECTIONS.]

sion Co. v. Chicago Live Stock Exchange, 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190 .....345, 389
American Print Works v. Lawrence, 3 Zabr. (N. J.) 590, 57 Am. Dec. 420..... 534
American Rapid Telegraph Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454, 21 Am. St. Rep. 764..... 362
American Steel House Co. v. Willcox, 38 Miscellaneous Rep. 571, 77 N. Y. Supp. 1010.... 670
Ammon v. Newton, 50 N. J. L. 543, 14 Atl. 610..... 32
Anderson v. Brewster, 44 Oh. St. 576, 9 N. E. 683..... 37
Anderson v. Locke, 64 Miss. 283, 1 So. 251..... 168
Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. Rep. 50.....341, 345
Anderson v. Wellington, 40 Kan. 173, 19 Pac. 719, 2 L. R. A. 110, 10 Am. St. Rep. 175 .....174, 468, 480, 643
Andrews, Ex parte, 18 Cal. 678 ..... 185
Andrews v. United States, 162 U. S. 420, 16 Sup. Ct. Rep. 798 ..... 236, 453
Andrews v. Wightman, 29 Fed. 636 ..... 236
Application to Admission to Practice, In Re, 14 S. D. 429, 85 N. W. 992..... 543
Archer v. Baltimore Building & Loan Association, 45 W. Va. 37, 30 S. E. 327..... 304
Arensberg, People of State of New York v., 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483 ..... 49
Argentine, City of v. Atchison, T. and S. F. R. Co., 55 Kan. 730, 41 Pac. 946, 30 L. R. A. 255 .....548, 631
Arimond v. Green Bay etc. Co., 31 Wis. 316..... 409
Arkadelphia, Town of v. Clark, 52 Ark. 23, 11 S. W. 957, 20 Am. St. Rep. 154....33, 141
Arms v. Ayer, 192 Ill. 601, 61 N. E. 851, 85 Am. St. Rep. 357 ..... 34
Armstrong v. Murphy, 65 Appl. Div. (N. Y.) 123, 72 N. Y. Suppl. 473.....251, 652
Armstrong v. Treasurer of Athens Co., 16 Pet. 281..... 568
Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 558, 23 Am. Rep. 190..... 347
Arthur v. Craig, 48 Ia. 264, 30 Am. Rep. 395..... 105
Arthur v. Oakes, 63 Fed. 310, 25 L. R. A. 414, 24 U. S. App. 239, 11 C. C. A. 209.....450, 452
Ash v. The People, 11 Mich. 347, 83 Am. Dec. 740..... 38
Ashbrook v. Commonwealth, 1 Bush. (Ky.) 139, 89 Am. Dec. 616 .....176, 529
Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. Rep. 1..... 295
Atchison v. Lucas, 83 Ky. 451 ..... 701
Atchison v. Peterson, 20 Wall. 507 ..... 414
Atchison and Nebraska R. Co. v. Baty, 6 Neb. 37..... 637
Atchison St. R. Co. v. Missouri Pacific R. Co., 31 Kan. 660, 3 Pac. 284..... 658
Atchison, Topeka & Santa Fe R. R. Co. v. Campbell, 61 Kan. 439, 59 Pac. 322, 48 L. R. A. 251, 78 Am. St. Rep. 328 ..... 394
Atchison, Topeka & Santa Fe R. Co. v. Denver & N. O. R. Co., 110 U. S. 667, 4 Sup. Ct. Rep. 185..... 397
Atchison, Topeka and Santa Fe R. Co. v. Matthews, 174

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

U. S. 96, 19 Sup. Ct. Rep. 609.....300, 610, 637, 727, 736
Atkin v. Kansas, 191 U. S. 207.. 310
Atkins v. Atkins, 18 Neb. 474, 25 N. W. 724..... 709
Atlantic, City of v. Turner, 67 N. J. L. 520, 51 Atl. 691..... 41
Attorney General v. Abbott, 121 Mich. 540, 80 N. W. 372, 47 L. R. A. 92..... 701
Attorney General v. Metropolitan R. Co., 125 Mass. 515, 28 Am. Rep. 264..... 576
Attorney General v. Old Colony R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112.. 397
Attorney General v. Tongue, 12 Price 51..... 288
Attorney General v. Williams et al., 174 Mass. 476, 55 N. E. 77 .....23, 180, 514
Attorney General ex rel. Dusenbury v. Looker, 111 Mich. 498, 69 N. W. 929, 56 L. R. A. 947..... 363
Augusta, City Council of v. Burum, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340.....163, 581
Augusta and S. R. Co. v. Randall, 79 Ga. 304, 4 S. E. 165.. 628
Austerberry v. Corporation of Oldham, L. R. 29 Ch. D. 750, 784 ..... 372
Austin v. Augusta Terminal R. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755..... 510
Austin v. State, 22 Ind. App. 221, 53 N. E. 481..... 454
Austin v. State, 110 Tennessee 563, 50 L. R. A. 478..... 129
Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. Rep. 132 .....81, 84, 134, 137, 145, 295
Avent-Beattyville Coal Company v. Commonwealth, 96 Ky. 218, 16 Ky. Law Rep. 414, 28 S. W. 502, 28 L. R. A. 273..... 319
Avis v. Borough of Vineland, 56 N. J. L. 474, 28 Atl. 1039, 22 L. R. A. 685..... 610
Ayres v. Chicago & Northwestern R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226 ..... 387
Ayres v. Richards, 38 Mich. 214 ..... 427
Babcock v. Buffalo, 56 N. Y. 268 ..... 525
Bacon v. Wayne Co., 1 Mich. 461 ..... 613
Bailey v. Master Plumbers' Association of Memphis, 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561..... 344
Bailey v. The People of the State of Illinois, 190 Ill. 28, 60 N. E. 98, 54 L. R. A. 838, 83 Am. St. Rep. 116..46, 728, 737
Bailey v. Phildelphia W. and B. R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593..... 576
Baker, Re, 29 How. Pr. 486... 227
Baker v. City of Cincinnati, 11 Oh. St. 534, 80 Am. Dec. 375 .....37, 250
Baker v. Normal, 81 Ill. 108.. 164
Baker v. State, 54 Wis. 368, 12 N. W. 12..... 731
Ball v. Herbert, 3 Term Rep. 253 ..... 409
Ballance v. Peoria, 180 Ill. 29, 54 N. E. 428..... 404
Ballard v. Mississippi Cotton Oil Co. (Miss.), 34 Sou. 533.. 715
Ballentine v. North Missouri R. R. Co., 40 Mo. 491, 93 Am. Dec. 315..... 387
Ballock v. State, 73 Md. 1, 20 Atl. 184, 8 L. R. A. 671, 25 Am. St. Rep. 559..... 198
Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239..... 643
Baltimore and O. S. W. R. Co. v. State ex rel. Greenwood (Ind.), 65 N. E. 508.... 631

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Baltimore and Ohio R. Co. v. Kreager, 61 Oh. St. 312, 56 N. E. 203..... 630
Bancroft v. Cambridge, 126 Mass. 438 .....518, 617
Bank of Columbia v. Okely, 4 Wheaton 235..... 20
Bank of Commerce v. Tennessee, Use of City of Memphis, 163 U. S. 416, 16 Sup. Ct. Rep. 1113 ..... 568
Banks, In re, 56 Kans. 242, 42 Pac. 693..... 472
Banta v. City of Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611..... 37
Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 433..... 690
Barclay v. Pearson, L. R. 1893 2 Ch. 154..... 198
Barden v. Montana Club, 10 Mont. 330, 25 Pac. 1042, 11 L. R. A. 593, 24 Am. St. Rep. 17 ..... 456
Bardwell v. Mann, 46 Minn. 285, 48 N. W. 1120..... 626
Barnes v. Barnes, 8 Jones L. (N. C.) 366..... 557
Barnett v. Atlantic and Pacific R. Co., 68 Mo. 56, 30 Am. Rep. 773..... 637
Barney v. The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 1030 ..... 386
Barney v. Keokuk, 94 U. S. 324 ..... 160
Barney v. Oyster Bay and Huntington Steamboat Co., 67 N. Y. 301, 23 Am. Rep. 115.. 395
Barrows v. McDermott, 73 Me. 441 ..... 518
Bartemeyer v. Iowa, 18 Wall. 129 ..... 539
Barthet v. New Orleans, 24 Fed. 564..... 643
Bartlett v. Grand Rapids Street R. Co., 82 Mich. 658, 46 N. W. 1034..... 316
Bass v. The State, 34 La. Ann. 494 ..... 409
Batters v. Dunning, 49 Conn. 479. ..... 651
Baylies v. Curry, 128 Ill. 287, 21 N. E. 595.....389, 694, 695
Beadles v. Bless, 27 Ill. 320, 81 Am. Dec. 231..... 195
Beardsley v. New York, Lake Erie & Western R. Co., 162 N. Y. 230, 56 N. E. 488..... 393
Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421..... 333
Bedford, Duke of, v. Trustees of British Museum, 2 Myl. & K. 552 ..... 590
Bedore v. Newton, 54 N. H. 117 ..... 626
Beebe v. The State, 6 Ind. 501, 63 Am. Dec. 391..59, 213, 214, 218
Beer Company v. Massachusetts, 97 U. S. 25.....24, 362, 564
Beha v. State (Neb.), 93 N. W. 155..... 284
Beiling v. Evansville, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272 .....141, 530, 641
Bell v. Quebec, L. R. 5 App. C. 84..... 408
Bennett v. Bennett, 13 N. J. Eq. 114..... 260
Bennett v. Dutton, 10 N. H. 481 ..... 388
Bennett v. Harms, 51 Wis. 251, 8 N. W. 22..... 709
Bennett v. The Mayor etc. of Town of Pulaski (Tenn.), 52 S. W. 913, 47 L. R. A. 278.. 52
Bent v. Emery, 173 Mass. 495, 53 N. E. 910.....508, 518
Bergman v. Cleveland, 39 Oh. St. 651..... 703
Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.....20, 626
Bertonneau v. Board of Directors, 3 Woods 177..... 698

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558 .....493, 497, 646, 688
Bessonies v. City of Indianapolis, 71 Ind. 189..33, 38, 141, 643
Betts v. State, 93 Ind. 375.... 245
Beyman v. Black, 47 Tex. 558. 20
Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. Rep. 950..... 201
Bibber v. Simpson, 59 Me. 181.. 133
Bielenberg v. Montana Union Ry. Co., 8 Mont. 271, 20 Pac. 314, 2 L. R. A. 813..... 629
Biesecker, People v., 169 N. Y. 50, 61 N. E. 990, 57 L. R. A. 178 ..... 32
Billis v. Burghall, 2 Esp. 722. 250
Billmeyer v. Evans, 40 Pa. St. 321 ..... 557
Binghamton Bridge, 3 Wall. 51 .....363, 577, 675, 679
Birdsall v. Twenty-third Street R. Co., 8 Daly (N. Y.) 419... 323
Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 46 Am. St. Rep. 92..... 629
Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299..... 274
Bishop v. American Preservers' Co., 157 Ill. 284, 41 N. E. 611 ..... 353
Bishop Auckland Local Board v. Bishop Auckland Iron and Steel Co. Ltd., L. R. 10 Q. B. D. 138 ..... 176
Bissell v. Davison, 65 Conn. 183, 32 Atl. 348, 65 L. R. A. 183 ..... 447
Bissell v. Heath, 98 Mich. 472, 57 N. W. 585..... 567
Blackwell v. Old Colony R. Co., 122 Mass. 1..... 408
Blades v. Higgs, 11 House of Lords Cases, 621..... 418
Blair v. Forehand, 100 Mass. 136, 1 Am. Rep. 94..... 526
Blair v. Kilpatrick, 40 Ind. 312 .....640, 703
Blair v. Williams, 4 Littell 34. 558
Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. Rep. 165.... 709
Blaxton v. Pye, 2 Wils. 309.... 194
Blewitt, Re, 131 N. Y. 451, 30 N. E. 587..... 252
Bliss, Ex parte, 63 N. H. 135.. 710
Bliss v. Ball, 99 Mass. 597.... 163
Bliss v. Commonwealth, 2 Littell (Ky.) 90, 13 Am. Dec. 251. 90
Bloom v. State, 20 Ga. 443.... 566
Blount v. Layard, L. R. 1891, 2 Ch. 681 ..... 418
Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64.... 447
Blythe v. State, 4 Ind. 525.... 613
Board of Education v. Minor, 23 Oh. St. 211, 13 Am. Rep. 233 ..... 463
Board of Police Commissioners v. Wagner, 93 Md. 182, 48 Atl. 455..... 526
Bohen, Ex parte, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618.. 687
Bohn Manufacturing Co. v. W. G. Hollis, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319 ..... 345
Boom Co. v. Paterson, 98 U. S. 403 ..... 506
Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. Rep. 425..59, 201, 730
Booth v. People of the State of Illinois, 186 Ill. 43, 57 N. E. 798, 50 L. R. A. 762, 78 Am. St. Rep. 229n.59, 201, 730, 737
Bostock v. Sams, 95 Md. 400, 52 Atl. 665..... 181
Boston v. Schaffer et al., 9 Pick. 415, 19 Am. Dec. 332 .....37, 250
Boston and Albany R. Co. v. Brown, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418..... 396
Boston and Albany R. Co. v. Cambridge, 159 Mass. 283, 34 N. E. 382..... 631
Boston and Albany R. Co. v.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

County Commissioners, 116 Mass. 73..... 631
Boston and Maine R. Co. v. County Commissioners, 79 Me. 386, 10 Atl. 113.....397, 631
Boston and Roxbury Mill Corporation v. Newman, 12 Pick. 467, 23 Am. Dec. 622..... 412
Bottoms v. Brewer, 54 Ala. 288 412
Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746..... 344
Bowditch v. Boston, 101 U. S. 16 ..... 534
Bowe v. State, 25 Ind. 415... 191
Bowen v. Hall, L. R. 6 Q. B. D. 333..... 333
Bowie v. Birmingham Railway Co., 125 Ala. 397, 27 So. 1016, 50 L. R. A. 632, 82 Am. St. Rep. 247..... 695
Bowlin v. Lyon, 67 Ia. 536, 25 N. W. 766, 56 Am. Rep. 355 .....388, 695
Bowman v. Chicago and Northwestern Railway Company, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062.....74, 76, 80, 82, 83, 231
Boyd, State v., 63 Neb. 829, 89 N. W. 417, 58 L. R. A. 108... 37
Boyd v. Alabama, 94 U. S. 645 563
Boyd v. State, 46 Ala. 329.... 563
Boyd v. United States, 116 U. S. 616 ..... 44
Braceville Coal Company v. People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206.....320, 502, 715, 735
Braddy v. City of Milledgeville, 74 Ga. 516, 58 Am. Rep. 443 ..... 99
Bradlaugh v. Reg, L. R. 3 Q. B. D. 607..... 237
Bradley v. Pierson, 148 Pa. St. 502, 24 Atl. 65..... 327
Bradwell, Re, 55 Ill. 535..... 702
Bradwell v. Illinois, 16 Wall. 130 .....702, 708
Brady v. McArgle, 14 L. R. (Ireland) 174..... 249
Bragg v. People, 78 Ill. 328... 566
Bragg v. State (Ala.), 58 L. R. A. 925, 32 Sou. 767..... 133
Branson v. Philadelphia, 47 Pa. St. 329..... 556
Brass v. North Dakota, ex rel. Stoeser, 153 U. S. 391, 14 Sup. Ct. Rep. 857.....376, 394
Brewster v. Hough, 10 N. H. 138 ..... 568
Brewster v. J. & J. Rogers Co., 169 N. Y. 73, 62 N. E. 164... 413
Breyer v. State, 102 Tenn. 103, 50 S. W. 769..... 735
Brick Presbyterian Church v. Mayor, 5 Cow. 538..... 565
Brigham v. Edmands, 7 Gray 359 ..... 508
Brightman v. Bristol, 65 Me. 426, 20 Am. Rep. 711..... 525
Brim v. Jones, 11 Utah 200, 39 Pac. 825, 29 L. R. A. 97..... 634
Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. Rep. 213....77, 138
Briscoe v. Bank of Commonwealth of Kentucky, 11 Pet. 257 ..... 662
Bristol v. Barker, 14 Johns. 205 ..... 401
Broadway etc. Ferry Co. v. Hankey, 31 Md. 346..... 668
Brodbine v. Inhabitants of Revere (Mass.), 66 N. E. 607... 171
Bronson v. Rodes, 7 Wall. 229 ..... 308, 559
Brooke v. Philadelphia, 162 Pa. St. 123, 29 Atl. 387, 24 L. R. A. 781.....548, 631
Brooklyn v. Nodine, 26 Hun. 512 ..... 168
Brooks v. Cedar Brooks and S. C. R. Improvement Co., 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. Rep. 459..... 409
Broughton v. Singleton, 2 Nott & McC. (S. C.) 388..... 418

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Brown et al. v. Houston, Collector et al., 114 U. S. 622, 5 Sup. Ct. Rep. 1091..... 81
Brown v. Hummel, 6 Pa. St. 86, 47 Am. Dec. 431..... 361
Brown v. New York Central & Hudson River R. Co., 75 Hun 355, 27 N. Y. Supp. 1126. 396
Brown v. Perkins, 12 Gray 89. 526
Brown v. State, 82 Ga. 224, 7 S. E. 915..... 564
Brown et al. v. State of Maryland, 12 Wheat. 419.....
.....63, p. 58, 74, 81, 230, 295
Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. Rep. 644..54, p. 48
Brown v. Weaver, 76 Miss. 7, 23 So. 388, 42 L. R. A. 423, 71 Am. St. Rep. 512..... 445
Brown & Allen v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 126..... 345
Brua's Appeal, 55 Pa. 294.... 200
Bryan v. Lewis, Ry. and M. 386 ..... 200
Buccleuch, Duke of, v. Board &c., L. R. 5 H. L. 418..... 408
Budd v. New York, 143 U. S. 517, 12 Sup. Ct. Rep. 468....
.....93, 376, 382, 394, 497, 688
Budd v. State, 3 Humph. 483, 39 Am. Dec. 189..... 731
Buell v. State, 45 Ark. 336... 96
Buffalo v. Buffalo Gas Co., 80 App. Div. 505, 80 N. Y. Suppl. 1093 ..... 394
Buffalo v. Chadeayne, 134 N. Y. 163, 31 N. E. 443.....538, 565
Buffalo v. Colfins etc. Co., 39 App. Div. 342, 57 N. Y. Suppl. 347 ..... 275
Buffalo East Side Street R. Co. v. Buffalo Street R. Co., 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 384..... 556
Buffington v. Grosvenor, 46 Kan. 730, 27 Pac. 137, 13 L. R. A. 283..... 709
Bulling v. Frost, 1 Esp. 235.. 195
Burdick v. The People of the State of Illinois, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329.....61, 291
Burgess v. Sims Drug Co., 114 Iowa 275, 86 N. W. 307, 54 L. R. A. 364..... 624
Burlington & H. C. Ferry Co. v. Davis, 48 Ia. 133, 30 Am. St. Rep. 390..... 678
Burlington v. Burlington St. R. Co., 49 Iowa 144, 31 Am. Rep. 145 ..... 576
Burlington C. R. and N. Ry. Co. v. Dey, 82 Ia. 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436..... 394
Burnham v. Thompson, 35 Ia. 421 ..... 412
Matter of Burns, 155 N. Y. 23, 49 N. E. 246 ..... 413
Burns v. State, 48 Ala. 195, 17 Am. Rep. 34 ..... 697
Busbee v. Commissioners of Wake County, 93 N. C. 143.. 444
Bussy v. Donaldson, 4 Dall. 206 ..... 625
Butchers' Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 4 Sup. Ct. Rep. 652
.....577, 671, 679
Butler v. Chambers, 36 Minn. 69, 30 N. W. 308.....62, 283
Butler v. Pennsylvania, 10 How. 402..... 579
Butler v. State, 97 Ind. 373... 108
Byers and Davis v. Commonwealth, 42 Pa. St. 89..... 96
Byrd, Ex parte, 84 Ala. 17, 4 Sou. 397, 5 Am. St. Rep. 328
.....641, 667
Cadell v. Palmer, 1 Cl. & F. 372 ..... 367
Cadwell v. State, 17 Conn. 467 245

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Cairo, St. Louis R. Co. v. People, 92 Ill. 97, 34 Am. Rep. 112 ..... 637
Calder v. Kurby, 5 Gray 597.. 564
Caldwell v. Alton, 33 Ill. 416, 85 Am. Dec. 282..... 667
Callaghan v. Society Prev. Cruelty to Animals, 16 L. R. (Ireland) 235 ..... 249
Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. Rep. 831 ..... 172
Callender v. Marsh, 1 Pick. 417 .....510, 509
Cambridge v. Trelegan, 181 Mass. 565, 64 N. E. 204..... 565
Campbell, Ex parte, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418 ..... 216
Campau v. Langley, 39 Mich. 451, 33 Am. Rep. 414n....168, 526
Campbell v. District of Columbia, 19 App. D. C. 131.... 522
Campbell v. Evans, 45 N. Y. 356 ..... 168
Campbellsburg, City of v. Odewalt, 24 Ky. L. Rep. 1717, 1739, 72 S. W. 314..... 626
Canada Southern R. Co. v. International Bridge Co., L. R. 8 App. Cas. 723..... 552
Canal Appraisers v. People, 17 Wend. 571..... 408
Capital City Dairy Co. v. Ohio, 183 U. S. 238, 22 Sup. Ct. Rep. 120..... 731
Cardwell v. American Bridge Company, 113 U. S. 205, 5 Sup. Ct. 423..... 72
Cargill Co. v. Minnesota, 180 U. S. 452, 21 Sup. Ct. Rep. 423 .....297, 493
Carl v. State, 87 Ala. 17, 4 L. R. A. 380, 6 So. 118..... 221
Carlson v. St. Louis River Dam and Improvement Co., 73 Minn. 128, 75 N. W. 1044, 41 L. R. A. 371, 72 Am. St. Rep. 610..... 410
Carrol v. Olmsted, 16 Oh. 251.. 590
Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884.....668, 678
Carson v. Blazer, 2 Binn. (Pa.) 475, 4 Am. Dec. 463..... 418
Carson v. State, 69 Ala. 235... 223
Carter v. Colby, 71 N. H. 230, 51 Atl. 904..... 523
Carter v. Coleman, 84 Ala. 256, 4 So. 151..... 733
Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490. 620
Cary Library v. Bliss, 151 Mass. 365, 25 N. E. 92..... 599
Casinello, Ex parte, 62 Cal. 538 164
Castner v. Riegel, 54 N. J. L. 498, 24 Atl. 484..... 444
Cateril v. Union Pacific R. Co., 2 Id. 540, 21 Pac. 416..... 629
Cearfoss v. State, 42 Md. 403.. 454
Cecil v. Green, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566... 389
Central Bridge Corporation v. Lowell, 70 Mass. (4 Gray) 474 ..... 587
Central Elevator Co. v. People, 174 Ill. 203, 51 N. E. 254, 43 L. R. A. 658..... 297
Central Military Tract R. Co. v. Rockafellow, 17 Ill. 541... 461
Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666..... 347
Central Union Tel. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 713. 376
Central Union Telephone Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035..... 398
Chambers v. Church, 14 R. I. 398, 51 Am. Rep. 410..... 712
Chambers v. Warkhouse, 3 Salk. 140 ..... 421
Champer v. City of Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390..... 52

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Champion v. Ames (Lottery Case), 188 U. S. 321, 23 Sup. Ct. Rep. 321...58, 65, 66, 198, 236
Chariton v. Simmons, 87 Ia. 226, 54 N. W. 146..... 174
Charles River Bridge v. Warren Bridge, 11 Pet. 419..... 675
Charless v. Rankin, 22 Mo. 566, 66 Am. Dec. 642..... 424
Charlotte C. and A. R. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. Rep. 255..... 622
Chase v. Hathaway, 14 Mass. 222 ..... 252
Chase v. Stephenson, 71 Ill. 383 698
Chasemore v. Richards, 7 H. L. C. 349..... 425
Chatfield v. Wilson, 28 Vt. 49. 425
Chavannes v. Priestly, 80 Ia. 316, 45 N. W. 766, 9 L. R. A. 737 ..... 252
Cheesom v. State, 8 Black 332. 194
Chemung Canal Bank v. Lowery, 93 U. S. 72..... 709
Chesapeake and Ohio Railway Company v. Kentucky, 179 U. S. 388, 21 Sup. Ct. Rep. 101 .....73, 699
Chesapeake Potomac Telephone Co. v. Baltimore & O. Tel. Co., 66 Md. 399, 7 Atl. 809 ..... 389
Chicago Anarchists' Case (Spies v. People), 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.....476, 477
Chicago v. Bartee, 100 Ill. 57. 288
Chicago v. Bureky, 158 Ill. 103, 42 N. E. 178, 29 L. R. A. 568, 49 Am. St. Rep. 142..... 166
Chicago v. Chicago Union Traction Company, 199 Ill. 259, 65 N. E. 243 ..... 620
Chicago v. Collins, 175 Ill. 445, 49 L. R. A. 408, 51 N. E. 907, 67 Am. St. Rep. 224.....38, 168
Chicago v. Jackson, 196 Ill. 496, 63 N. E. 1013.....511, 631
Chicago v. Laflin, 49 Ill. 172.. 576
Chicago v. O'Brien, 111 Ill. 532, 53 Am. Rep. 640..... 620
Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, 75 Am. St. Rep. 93..148, 494
Chicago v. Rumpf, 45 Ill. 90, 92 Am. Dec. 196..... 670
Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. Rep. 325...645, 689
Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. Rep. 820..... 510
Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359.....174, 468, 480, 643
Chicago v. Union Stockyards Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281..... 525
Chicago & Alton R. Co. v. Erickson, 91 Ill. 613, 33 Am. Rep. 70..... 387
Chicago & Alton R. Co. v. Joliet etc. R. Co., 105 Ill. 388, 44 Am. Rep. 799..... 631
Chicago & Alton R. Co. v. People, ex rel. Attorney General, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224..... 395
Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. Rep. 581.506, 631
Chicago, Burlington and Quincy R. Co. v. Hague, 48 Neb. 97, 66 N. W. 1000..... 632
Chicago, Burlington & Quincy R. Co. v. Iowa, 94 U. S. 155 .....362, 379, 393, 556, 733
Chicago, Burlington & Quincy R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278..... 381
Chicago, Burlington & Quincy R. Co. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. Rep. 513..... 631
Chicago City Railway Co. v. People, ex rel. Story, 73 Ill. 541.....576, 658, 670
Chicago etc. Coal Co. v. People,

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

181 Ill. 270, 54 N. E. 961, 48 L. R. A. 554..... 622
Chicago Dock Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448 ..... 162
Chicago and Erie R. Co. v. Keith, 67 Oh. 279, 65 N. E. 1020 .....426, 439
Chicago and Grand Trunk R. Co. v. Hough, 61 Mich. 507, 28 N. E. 532..... 631
Chicago and G. T. Ry. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. Rep. 400..... 384
Chicago Life Insurance Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. Rep. 681..... 362
Chicago, Milwaukee & St. Paul R. Co. v. Ackley, 94 U. S. 179 379
Chicago, Milwaukee & St. Paul R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702 .....381, 570, 611
Chicago, Milwaukee and St. Paul Railway Company v. Solan, 169 U. S. 133, 18 Sup. Ct. Rep. 940.....73, 79
Chicago Municipal Gas Light and Fuel Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616..576, 579
Chicago and Northwestern R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 546..... 631
Chicago & Northwestern Railroad Company v. Fuller, 17 Wall. 560 .....41, 73
Chicago & Northwestern R. Co. v. Morehouse, 112 Wis. 1, 56 L. R. A. 240, 88 Am. St. Rep. 918..... 427
Chicago & Northwestern R. Co. v. Ohle, 117 U. S. 123, 6 Sup. Ct. Rep. 632..... 708
Chicago & Northwestern R. R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690 .....389, 395
Chicago & Northwestern R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641..... 695
Chicago, Rock Island and Pacific R. Co. v. Young, 58 Neb. 678, 79 S. W. 556..... 632
Chicago, Rock Island and Pacific R. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26, 55 L. R. A. 610..... 632
Chicago, Rock Island and Pacific R. Co. v. Zernecke, 183 U. S. 582..... 632
Chicago, St. Louis and N. O. R. Co. v. Moss, 60 Miss. 641. 714
Chicago Union Traction Co. v. Chicago, 199 Ill. 484 and 579, 65 N. E. 451 and 470....374, 376
Chilcott v. Hart, 23 Col. 40, 45 Pac. 391, 35 L. R. A. 41..367, 591
Chilton v. St. Louis and I. M. R. Co., 114 Mo. 88, 21 S. W. 825, 19 L. R. A. 269..... 695
China, The, 7 Wall. 53..... 625
Chirac v. Chirac, 2 Wh. 259.. 706
Chrisman v. Brookhaven, 70 Miss. 477, 12 Sou. 458..... 698
Christ Church v. Philadelphia County, 24 How. 300..... 568
Christian County v. Merrigan, 191 Ill. 484, 61 N. E. 479..... 316
Chy Lung v. Freeman et al., 92 U. S. 275.....71, 101, 486, 705
Cincinnati, H. and D. R. Co. v. Bowling Green, 57 Oh. St. 336, 49 N. E. 121, 41 L. R. A. 422. 672
Cincinnati H. and I. R. Co. v. Clifford, 113 Ind. 460, 15 N. E. 524..... 579
City of, see name of city and Mayor.
City Council v. Baptist Church, 4 Strob. (S. C.) 306..... 141
City Council of Augusta v. Burum, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340.....163, 581
Civil Rights Cases, 109 U. S. 1, 3 Sup. Ct. Rep. 18..... 693

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Clack v. White, 2 Swan (Tenn.) 540..... 427
Clark, Matter of Mary, 1 Blackf. 122 ..... 449
Clark v. Mitchell et al., 64 Mo. 564 ..... 20
Clark v. Washington, 12 Wh. 40 ..... 196
Classen v. Chesapeake Guano Co., 81 Md. 258, 31 Atl. 437.. .....406, 579
Cleland v. Anderson (Neb.), 92 N. W. 306.....337, 356
Cleveland, City of v. Clements Brothers Construction Co., 67 Ohio 197, 65 N. E. 885..... 310
Cleveland C. C. and St. Louis R. Co. v. Connersville, 147 Ind. 277, 46 N. E. 579, 37 L. R. A. 175, 62 Am. St. Rep. 418.. 612
Cleveland, Cincinnati, Chicago and St. Louis R. Co. v. Illinois, 177 U. S. 514..... 395
Clews v. Jamieson, 182 U. S. 461 ..... 200
Clinton, City of v. Phillips, 58 Ill. 102, 11 Am. Rep. 52..... 43
Clintsman v. Northrup, 8 Cow. (N. Y) 46..... 276
Coates v. Mayor, 7 Cow. 585.. 565
Cobb v. Commissioners of Lincoln Park, 202 Ill. 427, 67 N. E. 5 ..... 72
Cochrane v. Frostburg, 81 Md. 54, 31 Atl. 808, 27 L. R. A. 728, 48 Am. St. Rep. 479..... 156
Coffey v. United States, 116 U. S. 427, 6 Sup. Ct. Rep. 432... 526
Coffin v. Nantucket, 5 Cush. 269.. 534
Cohen v. Berlin & Jones Envelope Co., 166 N. Y. 292, 59 N. E. 906.....347, 353
Cohn v. Wausau Boom Co., 47 Wis. 314, 2 N. W. 546..... 408
Colby v. Jackson, 12 N. H. 526.. 252
Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. Rep. 269.... 709
Collins v. Hatch, 18 Ohio 523. 156
Collins v. New Hampshire, 171 U. S. 30, 18 Sup. Ct. Rep. 768 .....49, 58, p. 54, 77, 284
Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609 527
Columbia Carriage Co. v. Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288..... 346
Columbia College, Trustees of v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365..... 590
Columbus City v. Cutcomp, 61 Iowa 672, 17 N. W. 47..... 564
Combs v. Agricultural Ditch Co., 17 Col. 146, 28 Pac. 966, 31 Am. St. Rep. 275..... 416
Commissioners of Easton v. Covey, 74 Md. 262, 22 Atl. 266 ..... 644
Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247 .....407, 418
Commissioners of the Sinking Fund v. Green etc. River Navigation Co., 79 Ky. 73 .....587, 661
Commonwealth v. Alger, 7 Cush. 53.....405, 409, 576, 617, 620
Commonwealth v. Bacon, 13 Bush. (Ky.) 210, 26 Am. Rep. 189 .....175, 464
Commonwealth v. Bean, 14 Gray 52..... 156
Commonwealth v. Bearse, 132 Mass. 542, 42 Am. Rep. 450 .....175, 336, 464
Commonwealth v. Bird, 12 Mass. 443, 9 Am. Dec. 161... 566
Commonwealth v. Blackington, 24 Pick. 352.....651, 672
Commonwealth v. Blanding, 3 Pick. 304 ..... 471
Commonwealth v. Blaisdell, 107 Mass. 234..... 162
Commonwealth v. Brinton, 132 Pa. St. 69, 18 Atl. 1092...288, 294

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Commonwealth v. Brown, 167 Mass. 144, 45 N. E. 1..... 105
Commonwealth v. Brown, 141 Mass. 78, 6 N. E. 751..... 244
Commonwealth v. Carey, 151 Pa. St. 368, 25 Atl. 140..... 454
Commonwealth v. Carter, 132 Mass. 12..... 519
Commonwealth v. Chapin, 5 Pick. 199, 16 Am. Dec. 386 .....418, 419
Commonwealth v. Cobb, 120 Mass. 356..... 245
Commonwealth v. Collberg, 119 Mass. 350, 20 Am. Rep. 328.. 248
Commonwealth v. Conlin (Mass.), 68 N. E. 207..... 225
Commonwealth v. Crowell, 156 Mass. 215, 30 N. E. 1015.... 292
Commonwealth v. Curren, 3 Pittsb. 143..... 331
Commonwealth v. Curtis, 9 Allen 266..... 156
Commonwealth v. Davis, 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. Rep. 389.....167, 174, 480, 644
Commonwealth v. Doherty, 137 Mass. 245.....99, 244
Commonwealth v. Dowdican's Bail, 115 Mass. 133 ..... 108
Commonwealth. v. Duane, 98 Mass. 1 ..... 376
Commonwealth v. Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555 .....363, 395
Commonwealth v. Ellis, 158 Mass. 555, 33 N. E. 388..... 157
Commonwealth v. Emerson, 165 Mass. 146, 42 N. E. 559....60, 198
Commonwealth v. Essex Co., 13 Gray, 239 .....362, 407
Commonwealth v. Evans, 132 Mass. 11 ..... 635
Commonwealth v. Ewig, 145 Mass. 119, 13 N. E. 365..... 456
Commonwealth v. Farren, 9 Allen 489 ..... 635
Commonwealth v. Fenton, 139 Mass. 195, 29 N. E. 653 ..157, 173
Commonwealth v. Fitchburg R. Co., 12 Gray 180 ..... 395
Commonwealth v. Fowler, 96 Ky. 166, 28 S. W. 786, 33 L. R. A. 839 .....59, 222, 650
Commonwealth v. Gage, 114 Mass. 328 ..... 376
Commonwealth v. Gardner, 133 Pa. State, 284, 19 Atl. 550, 7 L. R. A. 666, 19 Am. St. Rep. 645 ..... 294
Commonwealth v. Gilbert, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439 .....419, 422
Commonwealth v. Goding, 3 Mete. 130 ..... 193
Commonwealth v. Gordon, 159 Mass. 8, 33 N. E. 709 ..... 32
Commonwealth v. Haggerty, 4 Brewst. 326 ..... 104
Commonwealth v. Hallett, 103 Mass. 452 ..... 223
Commonwealth v. Hamilton Manufacturing Company, 120 Mass. 383 .....149, 312
Commonwealth v. Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475 ..... 712
Commonwealth v. Hopkins, 2 Dana, 418 .....96, 191
Commonwealth v. Hunt, Thatcher Cr. C. 609..... 331
Commonwealth v. Hunt, 4 Mete. 111, 38 Am. Dec. 346. .....331, 333, 334, 356
Commonwealth v. Julius, 143 Mass. 132, 8 N. E. 898..... 635
Commonwealth v. Keary, 198 Pa. St. 500, 48 Atl. 472..61, 291
Commonwealth v. Kendall, 12 Cush. 414 ..... 214
Commonwealth v. Kidder, 107 Mass. 188 ..... 176
Commonwealth v. Kimball, 24 Pick. 366 ..... 223

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Commonwealth v. Kneeland, 20 Pick. 206 ..... 465
Commonwealth v. Lagorio, 141 Mass. 81, 6 N. E. 546 ..... 157
Commonwealth v. Lambert, 12 Allen 177 ..... 245
Commonwealth v. Landis, 8 Phila. 453 .....237, 238
Commonwealth v. Lewis, 140 Pa. St. 261, 21 Atl. 396, 11 L. R. A. 522 ..... 249
Commonwealth v. Look, 108 Mass. 452 ..... 419
Commonwealth v. McCafferty, 145 Mass. 384, 14 N. E. 451.. 168
Commonwealth v. McDonough, 13 Allen, 581 ..... 245
Commonwealth v. Mash, 7 Mete. 472 ..... 635
Commonwealth v. Miller, 139 Pa. St. 77, 21 Atl. 138, 23 Am. St. Rep. 170 ..... 531
Commonwealth v. Mobile and Ohio R. Co., 23 Ky. Law Rep. 784, 54 L. R. A. 916 ..... 719
Commonwealth v. Morningstar, 144 Pa. St. 103..... 390
Commonwealth v. Munson, 127 Mass. 459, 34 Am. Rep. 411.. 241
Commonwealth v. Murphy, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606 .....90, 91
Commonwealth v. Parks, 155 Mass. 531, 30 N. E. 174 ..... 62
Commonwealth v. Passmore, 1 S. & R. 217 ..... 172
Commonwealth v. Pear (Mass.), 66 N. E. 719 ..... 447
Commonwealth v. Pennsylvania Canal Co., 66 Pa. 41, 5 Am. Rep. 329 ..... 407
Commonwealth v. Perry, 139 Mass. 198, 29 N. E. 653 .... 176
Commonwealth v. Perry, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325, 31 Am. St. Rep. 533 ..... 324
Commonwealth v. Petranich (Mass.), 66 N. E. 807..... 232
Commonwealth v. Plaisted, 148 Mass. 375, 19 N. E. 41, 2 L. R. A. 42, 12 Am. St. Rep. 566...36, 158, 174, 468, 480, 644, 729
Commonwealth v. Ramsdell, 130 Mass. 68 ..... 221
Commonwealth v. Regan, 182 Mass. 22, 64 N. E. 407....205, 636
Commonwealth v. Roberts, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400 ..... 542
Commonwealth v. Rumford Chemical Works, 16 Gray 231. ..... 176, 179
Commonwealth v. Schaffner, 146 Mass. 512, 16 N. E. 280.. 32
Commonwealth v. Sisson, 178 Mass. 578, 60 N. E. 385...60, 198
Commonwealth v. Smith, 102 Mass. 144 ..... 456
Commonwealth v. Smith, 166 Mass. 370, 44 N. E. 503 ..... 636
Commonwealth v. Sylvester, 13 Allen, 247 ..... 389
Commonwealth v. Tay, 170 Mass. 192, 48 N. E. 1086 .... 97
Commonwealth v. Tewksbury, 11 Mete. 55....114, 409, 424, 619
Commonwealth v. Turner, 145 Mass. 296, 14 N. E. 130 ..... 249
Commonwealth v. Upton, 6 Gray 473 .....176, 529
Commonwealth v. Vrooman, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603 .....219, 364, 401
Commonwealth v. Waldman, 140 Pa. 89, 21 Atl. 248, 11 L. R. A. 563..... 735
Commonwealth v. Wardell, 128 Mass. 52, 35 Am. Rep. 357... 235
Commonwealth v. Wentworth, Brightly (Pa.), 318 ..... 162
Commonwealth v. Wetherbee, 153 Mass. 159, 26 N. E. 414.. 32

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Commonwealth v. Whitney, 5 Gray 85 ..... 225
Commonwealth v. Willard, 22 Pick. 476 ..... 722
Commonwealth v. Zelt, 138 Pa. 615, 1 L. R. A. 602.....232, 635
Commonwealth ex. rel. Chew v. Carlisle, Brightly N. P. (Pa.), 36 ..... 331, 332
Compagnie Francaise de Navigation v. Louisiana State Board of Health, 186 U. S. 380...31, 71, 82, 136, 486, 488, 705
Concord & Montreal R. Co. v. Boston & Maine R. Co., 67 N. H. 464, 41 Atl. 263..... 395
Conditional Discharge of Convicts, In Re, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658..... 105
Conner v. Elliott, 18 How. 591.. 709
Connor v. Black, 119 Mo. 126, 24 S. W. 772 ..... 201, 202
Conolly v. Union Sewer Pipe Co., 184 U. S. 540.....
.....339, 356, 610, 734, 736
Considine, Re, 83 Fed. 157... 703
Consolidated Coal Co. v. Illinois, 185 U. S. 203.....724, 727
Cook v. Gregg, 46 N. Y. 439.. 168
Cook v. Lillo, 103 U. S. 793... 560
Cook v. Pennsylvania, 97 U. S. 566 ..... 294, 295
Cooley v. Board of Wardens of Port of Philadelphia et al., 12 How. 299 .....72, 80, 135, 434
Coomes v. Burt, 22 Pick. 422. 441
Cooper, In re, 22 N. Y. 67..... 648
Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. Rep. 739 ..... 720
Corbett, State of Minnesota v., 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498..... 61
Cordes v. State, 37 Kan. 48, 14 Pac. 493 ..... 638
Cordwainer's Case, Carson Criminal Conspiracies 150..... 331
Corfield v. Coryell, 4 Wash. C. C. 371 ..... 712
Corwin v. New Haven & Erie R. Co., 13 N. Y. 42..... 629
Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738 ..... 698
Coster v. Albany, 43 N. Y. 399 ..... 166, 510
Cote v. Murphy, 159 Pa. St. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686.....
.....326, 337, 356
Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646..... 200
Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard), 183 U. S. 79.....375, 390, 552, 554, 610, 637, 724, 733, 736
Cottrell v. Myrick, 12 Me. 222. 418
Council of Reading v. Commonwealth, 11 Pa. St. 196, 51 Am. Dec. 534..... 163
Counselman v. Hitchcock, 142 U. S. 547..... 54
County of, see name of county.
Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495 ..... 582
Covington & Cincinnati Bridge Company v. Kentucky, 154 U. S. 204, 14 Sup. Ct. Rep. 1087. 72
Covington & Lexington Turnpike Road Company v. Sandford, 164 U. S. 578, 17 Sup. Ct. Rep. 198.63, p. 60, 363, 554, 715
Cowden v. Pacific Coast Steamship Co., 94 Cal. 470..... 389
Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171..... 354
Craig v. Board of Medical Examiners, 12 Mont. 203, 29 Pac. 532 ..... 711
Craig v. Gerrish, 58 N. H. 513. 635
Crandall v. Nevada, 6 Wal. 35. ..... 488, 489
Crane v. People, 168 Ill. 395... 240
Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106..... 396
Crawford v. Topeka, 51 Kan.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

756, 33 Pac. 476, 20 L. R. A. 692, 37 Am. St. Rep. 323.... 182
Crease v. Babcock, 23 Pick. 334, 34 Am. Dec. 61 ..... 363
Crendall v. White, 164 Mass. 54, 41 N. E. 204 ..... 201
Crescent Creamery, State v., 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. Rep. 464 ..... 32
Cronin v. People, 82 N. Y. 318, 37 Am. Rep. 564 .....530, 641
Cross v. Morristown, 18 N. J. Eq. 305 ..... 163
Cross v. People, 18 Col. 321, 32 Pac. 821, 36 Am. St. Rep. 292 ..... 198
Crouse, Ex parte, 4 Whart. (Pa.), 9 ..... 260
Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. Rep 13.... ...204, 210, 212, 229, 493, 652, 706
Crowley v. West, 52 La. Ann. 526, 27 So. 53, 47 L. R. A. 652, 78 Am. St. Rep. 355..... 687
Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851... ..... 73, 74, 342, 717
Culley v. Baltimore & Ohio R. Co., 1 Hughes 536 ..... 699
Cummings v. Chicago, 188 U. S. 410 ..... 72
Cummings v. Missouri, 4 Wall. 277 ..... 544
Cummings v. Richmond County Board of Education, 175 U. S. 528, 20 Sup. Ct. Rep. 197 ..... 698, 700
Cummings v. Union Bluestone Co., 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655 .....347, 353, 354
Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496..... 327
Cushing v. Boston, 122 Mass. 173, 124 Mass. 434, 128 Mass. 330 ..... 161
The Cynosure, 1 Sprague 88... 488
D. R. Martin, The, 11 Blatchf. 233 ..... 386
Dailey v. Superior Court of City and County of San Francisco, 112 Cal. 94, 44 Pac. 458, 32 L. R. A. 273, 53 Am. St. Rep. 160 ..... 251
Daly v. Georgia S. F. R. Co., 80 Ga. 793, 7 S. E. 146, 12 Am. St. Rep. 286 ..... 161
Dane Co. v. Smith, 13 Wis. 585, 80 Am. Dec. 754 ..... 613
Daniels v. Hilgard, 77 Ill. 640. 724
Danville v. Danville Water Co., 178 Ill. 299, 53 N. E. 118, 60 Am. St. Rep. 304 ..... 571
Danville Water Co. v. Danville, 180 U. S. 619, 21 Sup. Ct. Rep. 505 ..... 571
Darcy v. Allen, 11 Coke Rep. 84 ..... 656
Darlington v. Ward, 48 S. C. 570, 38 L. R. A. 326..... 141
Darst v. People, 51 Ill. 286.... 526
Dartmouth College v. Woodward, 4 Wheat. 518..... .....24, 361, 363, 561, 597
Dassler, Re, 35 Kan. 678, 12 Pac. 130 ..... 614
Davenport v. Richmond City, 81 Va. 636, 59 Am. Rep. 694. 565
Davidson v. Lanier, 4 Wall. 447 ..... 662
Davidson v. New Orleans, 96 U. S. 97 .....20, 511, 613
Davis v. Board of County Commissioners of St. Louis County, 65 Minn. 310, 67 N. W. 997, 33 L. R. A. 432, 60 Am. St. Rep. 475.....29, 519
Davis v. Commonwealth of Massachusetts, 167 U. S. 43, 17 Sup. Ct. Rep. 731..... ..... 174, 480, 644, 655
Davis v. Mayor, 14 N. Y. 506, 67 Am. Dec. 186..... 658

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Davis v. State, 68 Ala. 58, 44 Am. Rep. 128 ..... 93
Dawson v. Chicago & Alton R. Co., 79 Mo. 296..... 395
Dawson v. Lee, 83 Ky. 49.... 698
Day, Re, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519..648, 651, 684
Debs, In re, 158 U. S. 564, 15 Sup. Ct. Rep. 900 ..... 65
Decie v. Brown, 167 Mass. 290, 45 N. E. 765 ..... 211, 672
Delaplaine v. Chicago & North-Western R. Co., 42 Wis. 314. 408
De La Vergne Refrigerating Machine Co. v. German Savings Institution, 175 U. S. 40, 20 Sup. Ct. Rep. 20 ..... 349
Delaware, Lackawanna & Western R. R. Co. v. Central Stock Yards & Transit Co., 45 N. J. Eq. 50, 6 L. R. A. 855.. 389
Demoville v. Davidson Co., 87 Tenn. 214, 10 S. W. 353 ..... 222
Denham v. Bristol, 108 Mass. 202 ..... 427
Dennehy v. The City of Chicago, 120 Ill. 627, 12 N. E. 227 ..... 39, 205, 215
Dennis v. Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302... 309
Dennis v. Simon, 51 Oh. St. 233, 36 N. E. 832 ..... 614
Denny v. Tyler, 3 Allen 225.. 252
Dent v. West Virginia, 129 U. S. 114, 9 Sup. St. Rep. 231.. .....133, 493, 543, 646, 683
Deshong v. New York, 176 N. Y. —, 68 N. E. 880..... 162
Desplaines, Village of, v. Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524..... 250
Detroit v. Detroit Citizens' Street Railway Co., 184 U. S. 368 ..... 363, 570
Detroit v. Detroit and H. Plank Road Co., 43 Mich. 140, 5 N. W. 275 ..... 363
Detroit Citizens' Street R. Co. v. City of Detroit, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859, 64 Am. St. Rep. 350.. 678
Detroit Citizens' Street R. Co. v. Detroit Railway, 171 U. S. 48, 18 Sup. Ct. Rep. 732.... 678
Detroit, Fort Wayne and B. I. R. Co. v. Commissioners of Railroads, 127 Mich. 219, 86 N. W. 842 ..... 631
Detroit, Fort Wayne, B. I. Co. v. Osborn, 189 U. S. 383..... 631
Dewees v. Miller, 5 Harr. 347. 195
Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464 ..... 348, 353
Dickey v. Tennison, 27 Mo. 373 ..... 427
Distilling & Cattle Feeding Co. v. People ex rel Moloney, 156 Ill. 448, 41 N. E. 188, 47 Am. St. Rep. 200 ..... 352
Dixon v. Poe (Ind.), 65 N. E. 518 ..... 735
Doane v. Chicago City R. Co., 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588 ..... 207
Dobbins v. Los Angeles, 72 Pac. 970 ..... 565
Dobbins v. United States, 96 U. S. 395 ..... 627
Dodge v. Woolsey, 18 How. 331 ..... 361
Dodson v. State, 61 Ark. 57, 31 S. W. 977 ..... 697
Donahoe v. Richards, 38 Me. 376 ..... 463
Donahoe v. Richards, 38 Me. 379 ..... 463
Donaldson v. Becket, 4 Burr. 2408 ..... 663
Donaldson v. State (Ind.), 67 N. E. 1029 ..... 516
Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375 .....694, 695
Donnelly v. Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637 ..... 442

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Donovan v. Vicksburg, 29 Miss. 247, 64 Am. Dec. 143... 168
Doolittle et al., Re, 23 Fed. 544 ..... 333
Dorsey v. The State, 38 Tex. Crim. App. 527, 44 S. W. 514, 40 L. R. A. 201, 70 Am. St. Rep. 762 .....41, 724
Douglas' Appeal, 118 Pa. St. 65, 12 Atl. 834 .....668, 718
Douglas v. Kentucky, 168 U. S. 488, 18 Sup. Ct. Rep. 199.. .....556, 563, 674, 679
Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. Rep. 1028.... ..... 380, 393, 553, 733
Dowdell, Re, 169 Mass. 387, 47 N. E. 1033 ..... 252, 255
Downes v. Bidwell, 182 U. S. 244 ..... 490
Downham v. Alexandria Council, 10 Wall. 173..... 76
Doyle v. Continental Insurance Co., 94 U. S. 535 ..... 716
Drake v. State, 14 Neb. 535, 17 N. W. 117 ..... 245
Dred Scott v. Sanford, 19 How. 393 ..... 691
Ducat v. Chicago, 10 Wall. 410 ..... 716
Dudley v. Flushing Jockey Club, 14 Misc. (N. Y.) 58, 35 N. Y. Supp. 245 ..... 192
Dueber Watch Case Co. v. Howard Watch Co., 66 Fed. 637 ..... 346
Duffield v. Williamsport School District, 162 Pa. St. 476, 29 Atl. 742, 25 L. R. A. 152..... 447
Dugger v. Mechanics' & Traders' Insurance Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796 ..... 501
Duluth, City of, v. Krupp, 46 Minn. 435, 49 N. W. 235..... 39
Dunlap v. State, 76 Ala. 160.. 566
Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. Rep. 375 .....237, 246
Dunn v. Commonwealth, 20 Ky. L. Rep. 1649, 43 L. R. A. 701, 49 S. W. 813 ..... 244
Dunne v. The People of State of Illinois, 94 Ill. 120, 34 Am. Rep. 213 ..... 91
Durkin v. Kingston Coal Co., 171 Pa. St. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801 ..... 624
Dutton v. Strong, 1 Black 23.. 408
Eagle Insurance Co. v. Lafayette Insurance Co., 9 Ind., 443 ..... 199
Eagle Insurance Co. v. Ohio, 153 U. S. 446, 14 Sup. Ct. Rep. 868 ..... 362
Earp v. Lee, 71 Ill. 193..... 525
East India Company v. Sandys, 10 St. Tr. 371 ..... 656
East Tennessee, Virginia and Georgia R. Co. v. Interstate Commerce Commission, 181 U. S. 1 ..... 392
Eaton v. Boston, Concord, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147 ..... 508
Eaton v. Kegan, 114 Mass. 443, 275
Eden v. People, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108, 52 Am. St. Rep. 365.... 735
Edson v. Crangle, 62 Oh. St. 49, 56 N. E. 647 ..... 527
Effinger v. Kenney, 115 U. S. 566, 6 Sup. Ct. Rep. 179 ..... 560
Egan v. Hart, 45 La. Ann. 1358, 14 Sou. 244 ..... 409
Eichels v. Evansville Street R. Co., 78 Ind. 261, 41 Am. Rep. 56 ..... 658
Eichenlaub v. St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590 ..... 528
Eight Hour Bill, Re, 21 Colo. 29, 39 Pac. 328 ..... 317
Eisenbach v. Hatfield, 2 Wash.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

236, 26 Pac. 539, 12 L. R. A. 632 ..... 404
Ekiu v. United States, 142 U. S. 651, 12 Sup. Ct. Rep. 336.. 704
Elder v. Chapman, 176 Ill. 142, 52 N. E. 10 ..... 197
Eldridge v. Trezevant, 160 U. S. 452, 16 Sup. Ct. Rep. 345. ..... 114, 409, 509
Electric R. Co. v. Grand Rapids, 84 Mich. 257, 47 N. W. 581 ..... 576
Ellis v. Beale, 18 Me. 337, 36 Am. Dec. 726 ..... 194
Ely v. Niagara Co. Supervisors, 36 N. Y. 297 .....245, 525
Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. Rep. 325.... ..... 74, 289, 294
Emery's Case, 107 Mass. 172, 9 Am. Rep. 22 ..... 54
Emmons v. Lewistown, 132 Ill. 380, 24 N. E. 58, 8 L. R. A. 328, 22 Am. St. Rep. 540.... 288
Ensminger v. People, 47 Ill. 284 ..... 409
Erie R. Co. v. Casey, 26 Pa. St. 287 ..... 363
Escanaba Company v. Chicago, 107 U. S. 678.....72, 159
Estes v. State, 2 Humph. 496..... 109
Everett v. Marquette, 53 Mich. 450, 19 N. W. 140 ..... 163
Express Cases, 117 U. S. 1, 6 Sup. Ct. Rep. 542.....395, 397
Fairbank v. Leary, 40 Wis. 637 ..... 354
Fairbanks v. Kerr, 70 Pa. 86, 10 Am. Rep. 664 ..... 174
Fall v. Sutter, 21 Cal. 237.668, 675
Fairfax v. Hunter, 7 Cr. 602.. 706
Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56 ..... 441
Fanning v. Gregoire, 16 How. 523 ..... 675
Farist Steel Co. v. Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590 ..... 181
Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918 .....417, 425
Farmer v. People, 77 Ill. 400.. 635
Farmers' and Merchants Insurance Co. v. Dobney, 62 Neb. 213, 86 N. W. 1070.....714, 727
Farmers' and Merchants Insurance Co. v. Dobney, 189 U. S. 301 .....714, 727
Farmers' Loan and Trust Co. v. Chicago and Alton R. R. Co., 27 Fed. 146 ..... 706
Farnham v. Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452 .....261, 263
Farrell v. State, 45 Ind. 371.. 635
Faw v. Marsteller, 2 Cranch. 10 ..... 560
Feek v. Township Board of Bloomingdale, 82 Mich. 390, 47 N. W. 37, 10 L. R. A. 69.. 217
Fell v. State, 42 Md. 71, 20 Am. Rep. 83 ..... 564
Felsenheld v. United States, 186 U. S. 126 .....25, 275
Ferguson v. Gies, 82 Mich. 358, 46 N. W. 718, 9 L. R. A. 589, 21 Am. St. Rep. 576 .... 389, 695
Ferguson v. Selma, 43 Ala. 398 ..... 520
Ferner v. State, 151 Ind. 247, 51 N. E. 360 ..... 673
Ferrier, Ex parte, 103 Ill. 367, 42 Am. Rep. 10 ..... 260
Ferriter v. Tyler, 48 Vt. 444, 21 Am. Rep. 133 ..... 469
Festorazzi v. St. Joseph's Catholic Church of Mobile, 104 Ala. 327, 18 So. 394, 25 L. R. A. 360, 53 Am. St. Rep. 48 ..... 369
Ficklen v. Taxing District of Shelby County, 145 U. S. 1, 12 Sup. Ct. Rep. 810 ..... 295

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Fidelity Mutual Life Association v. Mettler, 185 U. S. 308 ..... 714, 727
Field v. Chicago, 44 Ill. App. 410 ..... 177
Field v. Des Moines, 39 Ia. 575, 18 Am. Rep. 46 ..... 534
Fields v. Stokley, 99 Pa. St. 306, 44 Am. Rep. 109..... 528
Fire Department of the City of New York v. Gilmour, 149 N. Y. 453 ..... 142
Fishburn v. Chicago, 171 Ill. 338, 49 N. E. 532, 39 L. R. A. 482, 63 Am. St. Rep. 236. 673
Fisher v. Horicon Iron and Man. Co., 10 Wis. 351..... 411
Fisher v. McGirr, 1 Gray 1, 61 Am. Dec. 381 ..... 526
Fisk v. Jefferson Police Jury, 116 U. S. 131, 6 Sup. Ct. Rep. 329 ..... 579
Fiske, Ex Parte, 72 Cal. 125, 13 Pac. 310 ..... 644
Fiske v. Framington Mfg. Co., 12 Pick. 68 ..... 411
Fitchburg R. Co. v. Gage, 12 Gray 393 ..... 389
Fitchburg R. Co. v. Grand Junction R. Co., 4 Allen 198. 397
Flagg v. Baldwin, 38 N. J. Eq. 219, 48 Atl. 319 ..... 200
Flaherty, Re, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529... ..... 174, 644
Fleming v. Hull, 73 Ia. 598, 35 N. W. 673 ..... 427
Fletcher v. Peck, 6 Cranch. 87. 561
Flinn v. New York Central and Hudson River Railroad, 142 N. Y. 11, 36 N. E. 1046 ..... 630
Fluker v. Georgia R. and Banking Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843 ..... 396
Flukes, Re, 157 Mo. 125, 51 L. R. A. 176, 57 S. W. 545.. 301
Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. Rep. 1016.....486, 487, 704
Foote v. Buchanan, 113 Fed. Rep. 156 .....54, p. 48
Ford v. State, 85 Md. 465, 37 Atl. 172, 41 L. R. A. 551, 60 Am. St. Rep. 337 ..... 198, 635
Ford v. Thralkill, 84 Ga. 169.. 141
Fort Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 58 L. R. A. 921 ..... 38, 168
Fortenbury v. State, 47 Ark. 188, 1 S. W. 58..... 201
Foster v. Police Commissioners, 102 Cal. 483, 37 Pac. 763. ..... 546, 703
Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. Rep. 658 ..... 346
Fowler v. State, 5 Day (Conn.) 81 ..... 235, 453
Fox v. Washington Territory, 2 Wash. 297, 5 Pac. 603 ..... 684
France v. State, 57 Oh. St. 1, 47 N. E. 1041 ..... 647
Francois, Ex Parte, 3 Woods 367 ..... 697
Fraser v. McConway & Torley Co., 82 Fed. 257..... 706
Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131 ..... 697
Frazee, Re, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310. ..... 174, 468, 643, 673
Ex parte Frazer, 54 Cal. 94.... 673
Frazer v. Chicago, 186 Ill. 480, 57 N. E. 1055.....178, 510, 511
Freeport Water Co. v. Freeport, 186 Ill. 179, 57 N. E. 862.... 571
Freeport Water Co. v. Freeport, 130 U. S. 587.....571, 679
Freleigh v. State, 8 Mo. 606.. ..... 563, 579
French v. State (Texas Cr. App.), 58 S. W. 1015, 52 L. R. A. 160 ..... 294
Frisbie v. United States, 157 U. S. 160, 15 Sup. Ct. Rep. 586 ..... 24

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492. ..... 320, 735
Frost v. Chicago, 178 Ill. 250, 52 N. E. 869, 49 L. R. A. 657, 69 Am. St. Rep. 301..... 286
Frost v. People, 193 Ill. 635, 61 N. E. 1054..... 526
Frost v. Washington County R. Co., 96 Me. 76, 51 Atl. 806... 408
Fry v. The State, 63 Ind. 552, 39 Am. St. Rep. 238 ..... 61, 291
Fuller v. Mt. Vernon, 171 N. Y. 247, 63 N. E. 964..... 510
Fuller v. State, 122 Ala. 32, 26 So. 146, 45 L. R. A. 502, 82 Am. St. 17 ..... 104, 107
Gaines v. Buford, 31 Ky. 481.. 439
Gaines v. Coates, 51 Miss. 335. 274
Gallagher v. Dodge, 48 Conn. 387, 40 Am. St. Rep. 182.... 426
Gannon v. Doyle, 16 R. I. 726, 19 Atl. 331, 5 L. R. A. 359... 252
Gardner v. Hope Insurance Company, 9 R. I. 194, 11 Am. Rep. 238 ..... 567
Garland, Ex Parte, 4 Wall. 33. 544
Garland Novelty Co. v. State (Ark.), 71 S. W. 257..... 526
Garnett, et als., In Re, 141 U. S. 1, 11 Sup. Ct. Rep. 840.... 66
Garst v. Harris, 177 Mass. 72, 58 N. E. 174..... 346
Garton v. Bristol and Exeter R. Co., 6 C. B. (N. S.) 639..... 397
Gartside v. East St. Louis, 43 Ill. 47 ..... 168
Gastineau v. Commonwealth, 22 Ky. L. Rep. 157, 56 S. W. 705, 49 L. R. A. 111..... 703
Gatlin v. Walton, 60 N. C. 325 566
Gaylord v. Sanitary District of Chicago, 204 Ill. 576, 68 N. E. 522 ..... 412
Geebrick v. State, 5 Iowa 491 217
Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. Rep. 600..417, 420
George v. People of State of Illinois, 167 Ill. 447, 47 N. E. 741 ..... 105
Gibbons v. Ogden, 9 Wheat. 1. .....2, 69, 72, 136
Gibson v. United States, 166 U. S. 269, 17 Sup. Ct. Rep. 578 ..... 114, 408
Gifford Drainage District v. Shroer, 145 Ind. 572, 44 N. E. 636 ..... 442
Giles' Case, 2 Stra. 881..... 654
Giles v. Walker, L. R. 24 Q. B. D. 656 ..... 616
Gillespie v. People, 188 Ill. 176, 58 N. E. 1007.....326, 735
Gilman v. Philadelphia, 3 Wall. 713 ..... 72
Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464, 52 Am. Rep. 41 ..... 369
Gilpin v. Williams, 25 Oh. St. 283 ..... 591
Gilpin Overseers v. Parks Overseers, 118 Pa. St. 84, 11 Atl. 791 ..... 271
Gladson v. Minnesota, 166 U. S. 427, 17 Sup. Ct. Rep. 627.. 73
Glennon v. Britton, 155 Ill. 232, 40 N. E. 594..... 526
Gloucester Ferry Company v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826...117, 717, 718
Gloucester Isinglass and Glue Co. v. Russia Cement Co., 154 Mass. 92, 27 N. E. 1005..... 347
Glover v. Powell, 10 N. J. Eq. 211 ..... 576
Godbout v. St. Paul Union Depot R. Co., 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532.. 396
Godcharles v. Wigeman, 113 Pa. St. 431, 6 Atl. 354...320, 735
Goddard v. Chicago & Northwestern Railway Co., 202 Ill. 362, 66 N. E. 1066 ..... 493
Goddard, Petitioner, 16 Pick. 504, 28 Am. Dec. 259..... 620
Goodin, Ex Parte, 67 Mo. 637. 566

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Gordon v. Hutchinson, 1 W. & S. 285, 37 Am. Dec. 464..... 388
Gordon v. State, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749 ..... 217
Gordon v. Winchester Bldg. etc., Association, 12 Bush 110, 23 Am. Rep. 713 ..... 304
Gould v. Hudson River R. Co., 6 N. Y. 522 ..... 408
Governor, etc., of British Cast Plate Manufactures v. Meredith, 4 T. R. 794 ..... 507
Graded School District v. Trustees of Bracken Academy, 95 Ky. 436, 26 S. W. 8 .....362, 599
Graff v. Evans, L. R. 8 Q. B. Div. 373 ..... 456
Grand Junction Canal Co. v. Shugar, L. R. 6 Chan. App. 483 ..... 425
Grand Lodge v. New Orleans, 166 U. S. 143, 17 Sup. Ct. Rep. 523 ..... 362, 568
Grand Rapids, City of v. Braudy, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472 ..... 93
Grand Rapids v. De Vries, 123 Mich. 570, 82 N. W. 269.... 670
Grand Rapids v. Williams, 112 Mich. 247, 70 N. W. 547, 36 L. R. A. 137, 67 Am. St. Rep. 396 ..... 168
Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308...408, 409, 508
Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006 .....727, 735
Granger Cases, 94 U. S. 113, 155, 164, 179, 180, 181, 183.. 376
Grant v. Davenport, 18 Ia. 179.. 408
Graves v. Shattuck, 35 N. H. 257, 69 Am. Dec. 536 ..... 168
Gray v. Connecticut, 159 U. S. 74, 15 Sup. Ct. Rep. 985..... 222
Gray v. State, 4 Oh. 353..... 700
Great Western R. Co. v. Sutton, L. R. 4 H. L. 226..... 389
Green v. Savannah, 6 Ga. 1... 127
Green v. State, 58 Ala. 190, 29 Am. Rep. 739 ..... 696
Green v. Swift, 47 Cal. 536. ..... 114, 409
Greene, Re, 52 Fed. Rep. 104.. 346
Greensboro, City of v. Ehrenreich, 80 Ala. 579, 60 Am. Rep. 130 ..... 62
Greenville v. Kemmis, 58 S. C. 427, 50 L. R. A. 725 .....190, 453
Greenwood v. Union Freight R. Co., 105 U. S. 13 .....362, 363
Greer v. Downey (Ariz.), 71 Pac. 900, 61 L. R. A. 408.... 168
Greers v. Hangabook, 47 Ga. 282 ..... 668
Gregory's Executrix v. Trustees of Shelby College, 2 Metc. (Ky.) 589 .....556, 563
Gregory, Ex parte, 20 Tex. App. 210, 54 Am. Rep. 516 n. ..... 168
Gregg v. Granby Mining and Smelting Company, 164 Mo. 616, 65 S. W. 312 ..... 363
Grice, Re, 79 Fed. Rep. 627... 356
Gridley v. Bloomington, 88 Ill. 554, 30 Am. Rep. 566 ..... 620
Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. Rep. 470 ..... 236, 453
Grisell v. Noel Brothers, etc., Co., 9 Ind. App. 251, 36 N. E. 452 ..... 316
Grissell v. Housatonic R. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. Rep. 138 ...629, 630, 634
Griswold v. Webb, 16 R. I. 649, 19 Atl. 143, 7 L. R. A. 302... 396
Groesch v. State, 42 Ind. 547. 217
Gross' License, 161 Pa. St. 344, 29 Atl. 25 ..... 209, 654
Gulf, C. and S. F. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. Rep. 255....610, 714, 715, 727, 735
Gulf, C. and S. F. Ry. Co. v.

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[REFERENCES ARE TO SECTIONS.]

Ellis (Tex.), 18 S. W. 723, 17 L. R. A. 286..... 727
Gundling v. Chicago, 177 U. S. 183, 20 Sup. Ct. Rep. 633.... 655
Gunn v. Barry, 15 Wall. 610.. 557
Gushee v. New York, 42 App. Div. 37, 57 N. Y. Supp. 967.. 670
Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305..... 171
Guy v. Cumberland Co. Commissioners, 122 N. C. 471, 29 S. E. 771 ..... 667
Hagerstown v. Witmer, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649 ..... 156, 421
Haggart v. Stehlin, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577 ..... 178
Haile v. State, 38 Ark. 564, 42 Am. Rep. 3 ..... 90
Hall, Re, 50 Conn. 131, 47 Am. Rep. 625 ..... 702
Hall v. De Cuir, 95 U. S. 485. ..... 73, 694
Hall v. Mayor of Bristol, L. R. 2 C. P. 322..... 510
Haller v. Sheridan, 27 Ind. 494 421
Hamilton Gas Light and Coke Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. Rep. 90..... 677
Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 16 Am. St. Rep. 396 .....320, 735
Haney v. Compton, 36 N. J. L. 507 ..... 527, 712
Hankins v. State (Tex.), 72 S. W. 191 ..... 190
Hannah v. People, 198 Ill. 77, 64 N. E. 776..... 297
Hannibal and St. Joseph Railroad Company v. Husen, 95 U. S. 465.....71, 77, 83, 101, 138
Hanson v. Webb, 3 Cal. 236... 668
Hanscom v. Lowell, 165 Mass. 419, 43 N. E. 196 ..... 429
Harbaugh v. People, 40 Ill. 294 ..... 192
Harbison v. Knoxville Iron Co., 103 Tenn. 421, 53 S. W. 955, 56 L. R. A. 316..... 320
Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838 ..... 11, 404
Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189..... 353
Harding v. People, 160 Ill. 459, 43 N. E. 624, 32 L. R. A. 445, 52 Am. St. Rep. 344..394, 502, 735
Harding v. Goodlett, 3 Yerg. 41, 24 Am. Dec. 546..... 412
Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698..... 177
Harmon v. State, 66 Oh. St. 249, 64 N. E. 117, 58 L. R. A. 618..... 493, 496, 649, 684
Harney v. State, 8 Lea. 113... 722
Harrington v. Providence, 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305 ..... 542
Harris v. White, 81 N. Y. 532. ..... 192, 194
Harrison v. Brophy, 59 Kans. 1, 40 L. R. A. 721, 51 Pac. 883 369
Harrison v. Ely, 120 Ill. 83, 11 N. E. 334 ..... 226
Harrison v. Glucose Sugar Refining Co., 116 Fed. 304, 58 L. R. A. 915 ..... 348
Harrison v. Mayor of Baltimore, 1 Gill (Md.) 264...123, 446
Harrison v. People, 101 Ill. App. 224 .....212, 644
Harrison v. People ex rel. Boetter, 195 Ill. 466, 63 N. E. 191 .....212, 652
Harrison v. Wisdom, 7 Heisk. (Tenn.) 99 ..... 537
Hart v. Boston, etc., R. Co., 121 Mass. 510 ..... 626
Hart v. Mayor of Albany, 3 Paige 213 ..... 170
Hart v. Western Railroad Co., 13 Metc. 99 ..... 630
Hartnett v. Plumbers' Supply Association of New England,

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194 ..... 301
Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159 ..... 200
Haskell, Ex Parte, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527 ..... 58, p. 53
Hatwood v. State, 18 Ind. 492. ..... 488, 691
Hauenstein v. Lynham, 100 U. S. 483 ..... 706
Hawker v. People of State of New York, 170 U. S. 189, 18 Sup. Ct. Rep. 573.....26, 110, 545
Hawkins, Ex Parte, 61 Ark. 321, 33 S. W. 106, 30 L. R. A. 736, 54 Am. St. Rep. 209.... 104
Hawkins, Re, 165 N. Y. 188, 58 N. E. 884..... 683
Hawkins v. Sanders, 45 Mich. 491, 8 N. W. 98 ..... 162
Hawkins Point Lighthouse Case, 39 Fed. 77..... 404
Hawthorn et al. v. The People of the State of Illinois, 109 Ill. 302, 50 Am. Rep. 610..40, 297
Hayden v. State (Miss.), 33 So. 653 ..... 133
Hayes, Ex Parte, 98 Cal, 555, 33 Pac. 337, 20 L. R. A. 701.. 703
Haverty v. Bass, 66 Me. 71.... 123
Head v. Amoskeag Mfg. Co., 113 U. S. 9, 5 Sup. Ct. Rep. 441 ..... 410, 411
Health Department v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579 ..... 150, 549
Hechinger v. Maysville, 22 Ky. L. Rep. 486, 57 S. W. 619, 49 L. R. A. 114.....158, 457
Heilbron, Ex Parte, 65 Cal. 609. 141
Helphenstine v. Hartig, 5 Griffiths (Ind. App.) 172..... 316
Heilbron, Ex Parte, 65 Cal. 609, 4 Pac. 648 ..... 530
Henderson et al. v. Mayor of the City of New York et al., 92 U. S. 259..... .....71, 79, 101, 271, 486, 705
Henderson Bldg. Loan Association v. Johnson, 88 Ky. 191, 10 S. W. 787, 3 L. R. A. 289.. 304
Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. Rep. 1086. ..... 73, 159
Hepburn v. Griswold, 8 Wall. 603 ..... 558
Hewitt v. Charier, 16 Pick. 353 ..... 153, 673
Hewitt v. Story, 64 Fed. 510, 30 L. R. A. 265..... 416
Hewitt v. Watkins, 11 Barb. 409 . ..... 444
Hibbard, Spencer, Bartlett & Co. v. Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621 ... 163
Hibbard v. People, 4 Mich. 125 526
Hibbard v. State, 65 Oh. St. 574, 64 N. E. 109, 58 L. R. A. 654 ..... 436
Hibblewhite v. McMorine, 5 M. & W. 462 ..... 200
Hilo Sugar Mfg. Co. v. Mioshi, 8 Haw. Rep. 201 ..... 450
Hine v. New Haven, 40 Conn. 478 ..... 528, 644
Hiner v. Fond du Lac, 71 Wis. 74, 36 N. W. 632 ..... 620
Hirn v. State, 1 Oh. St. 15... 564
Hisey v. Mexico, 61 Mo. App. 248 ..... 163
Hobbs, Re, 1 Woods 537 ..... 697
Hoboken, City of v. Goodman (N. J.), 51 Atl. 1092..... 703
Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201. 376
Hocking Valley Coal Co. v. Rosser, 53 Oh. St. 12, 41 N. E. 263, 29 L. R. A. 386, 53 Am. St. Rep. 622.....714, 735
Hodges, Ex parte, 87 Cal. 162, 25 Pac. 277 ..... 618
Hodges v. Perine, 24 Hun 516. 409
Hoeffer v. Clogan, 171 Ill. 462,

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

40 L. R. A. 730, 63 Am. St. Rep. 241 ..... 369
Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383..... .....131, 155, 317, 501, 735
Holladay v. Marsh, 3 Wend. 142, 20 Am. Dec. 678 ..... 444
Holland v. Allcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420 ..... 369
Hollister v. Union Co., 9 Conn. 436, 25 Am. Dec. 36.... 409
Holmes v. Jennison, 14 Peters 540 ..... ..... 5
Holmes v. Smythe, 100 Ill. 413. 304
Holst v. Roe, 39 Oh. St. 340, 48 Am. Rep. 459 ..... 434
Holyoke Water Power Co. v. Lyman, 15 Wall. 500 ....407, 418
Home Insurance Co. v. Morse, 20 Wall. 445 ..... 716
Homer Ramsdell Transportation Co. v. Compagnie Generale Transatlantique, 182 U. S. 406. 626
Hooker v. Town of Greenville, 130 N. C. 472, 42 S. E. 141.. 700
Hooker v. Vandewater, 4 Den. 349, 47 Am. Dec. 258 ..... 347
Hooper v. California, 155 U. S. 648, 15 Sup. Ct. Rep. 207.. 715
Hooper v. Emery et al., 14 Me. 375 ..... 23
Hopkins v. United States, 171 U. S. 578, 19 Sup. Ct. Rep. 40 ..... 341, 351, 354
Hopson's Appeal, 65 Conn. 140, 31 Atl. 531 ..... 209
Horan v. Byrnes (N. H.), 54 Atl. 945..... 426
Horn Silver Mining Co. v. New York, 143 U. S. 305, 12 Sup. Ct. Rep. 403 .... . 359
Horner v. United States, 147 U. S. 449, 13 Sup. Ct. Rep. 409 ..... 196, 198
Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, 68 N. E. 938..... 298
House of Refuge v. Ryan, 37 Oh. St. 197 ..... 262
Hovelman v. Kansas City Horse R. Co., 79 Mo. 632..... 576
Howes v. Maxwell, 157 Mass. 333, 32 N. E. 152 ..... 626
Hronek v. People, 134 Ill. 139, 24 N. E. 861, 8 L. R. A. 837, 23 Am. St. Rep. 652 ..... 461
Hubbard v. Callahan, 42 Conn. 524, 19 Am. Rep. 564..... 555
Huber v. Merkel (Wis.), 94 N. W. 354 ..... 425
Hudelson v. State, 94 Ind. 426, 48 Am. Rep. 171 ..... 198
Hudson v. Thorne, 7 Paige 261. 141
Hughes v. Recorder's Court of Detroit, 75 Mich. 574, 42 N. W. 984, 4 L. R. A. 863, 13 Am. St. Rep. 475 ..... 667
Humpeler v. People, 92 Ill. 400. 635
Hunt v. Coggin, 66 N. H. 140. 426
Hunt v. Searcy, 167 Mo. 158, 67 S. W. 206..... 253
Hurley v. Eddingfield, 56 Ind. 416, 59 N. E. 1058, 53 L. R. A. 135 ..... 386, 650
Hussey v. Crickett, 3 Camph. 168 ..... 195
Hyde v. County of Middlesex. 2 Gray 267 ..... 162
Ieck v. Anderson, 57 Cal. 251, 40 Am. Rep. 115 ..... 527
Iler v. Ross (Neb.), 90 N. W. 869, 57 L. R. A. 895..... 670
Illinois Central R. Co. v. Bloomington, 76 Ill. 447 .... 631
Illinois Central R. Co. v. Commonwealth, 23 Ky. L. Rep. 1159, 64 S. W. 975..... 392
Illinois Central R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618 .....629, 727
Illinois Central R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. Rep. 110 ..... 408, 574, 661
Illinois Central Railroad Com-

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

pany v. Illinois, 163 U. S. 142, 16 Sup. Ct. Rep. 1096..73, 395, 408
Illinois State Board of Dental Examiners v. People ex rel. Cooper, 123 Ill. 227, 13 N. E. 201..... 153, 647
Indiana, State of, v. Woram, 6 Hill (N. Y.) 33 ..... 22
Indianapolis & Cincinnati R. Co. v. Kercheval, 16 Ind. 84. 362
Indianapolis Cable Street R. Co. v. Citizens Street R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539. ..... 660, 675
Indianapolis Union R. Co. v. Dohn, 153 Ind. 10, 53 N. E. 937, 45 L. R. A. 427, 74 Am. St. Rep. 274 ..... 396
Ingersoll v. Sargent, 1 Whart. 337 ..... 370
Ingram v. The State, 39 Ala. 247, 84 Am. Dec. 782 ..... .....58, p. 53, 516
Intendant v. Sorrell, 1 Jones Law (N. C.) 49 ..... 274
Intendant and Council of Town of Marion v. Chandler, 6 Ala. 899..... 216
International Text Book Company v. Weissinger (Ind.), 65 N. E. 521 ..... 319
Inter Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184 ..... 386
Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144, 18 Sup. Ct. Rep. 45 ..... 381, 392
Interstate Commerce Commission v. Baltimore & Ohio R. Co., 145 U. S. 263, 12 Sup. Ct. Rep. 844 ..... 391
Interstate Commerce Commission v. Cincinnati, N. O. and T. P. Ry. Co., 167 U. S. 479, 17 Sup. Ct. Rep. 896 ..... 375
Iowa Savings & Loan Association v. Heidt, 107 Ia. 297, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. Rep. 197 ..... 304
Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113 ..... 415
Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. Rep. 160 ..... 200
Isenhour v. The State, 157 Ind. 517, 62 N. E. 40..... 34
Jackson, Ex parte, 96 U. S. 727 ..... 48, 236
Jackson v. Phillips, 14 Allen 539 ..... 599
Jackson v. Rogers, 2 Shower 327 ..... 387
Jackson v. Shawl, 29 Cal. 267. ..... 303, 733
Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 23 L. R. A. 588 ..... 345
Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558 ..... 667
Jacobs, In re, 98 N. Y. 98.... 151
Jamieson v. Indiana Natural Gas and Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652. 556
Jamison v. Burton, 43 Ind. 282 635
Janes, Re, 30 How. Pr. (N. Y.) 446 ..... 227
Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808, 20 Am. St. Rep. 123 404
Jannin v. State (Texas), 51 S. W. 1126, 53 L. R. A. 349. ..... 61, 291, 298
Janvrin, Re, 174 Mass. 514, 55 N. E. 381 ..... 385
Jeffries v. Ankeny, 11 Oh. 372. 700
Jeffreys v. Boosey, L. R. 4 H. L. Cas. 815 ..... 663
Jencks v. Coleman, 2 Sumn. 221 ..... 386
Jenkins v. Ballantyne, 8 Utah 245, 30 Pac. 760, 16 L. R. A. 689 ..... 421

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Jenks v. Turpin, L. R. 13 Q. B. D. 505 ..... 190, 191
Jensen v. Union Pacific R. Co., 6 Utah 253, 21 Pac. 994, 4 L. R. A. 724 ..... 629
Jentzsch, Ex parte, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664 ..... 735
John D. Park & Sons Co. v. National Wholesale Druggists Assoc'n, 175 N. Y. 1, 67 N. E. 136 ..... 346
John Spry Lumber Co. v. Sault Savings Bank, Loan and Trust Co., 77 Mich. 199, 43 N. W. 788, 18 Am. St. Rep. 396. 626
Johnson v. Chicago, Milwaukee and St. Paul R. Co., 29 Minn. 425, 13 N. W. 673 ..... 727
Johnson v. Fall, 6 Cal. 359, 65 Am. Dec. 518 ..... 195
Johnson v. Goodyear Mining Company, 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17.....320, 715
Johnson v. Midland R. R. Co., 4 Exch. 367 ..... 388
Johnson v. Oregon Short Line Co. (Idaho), 63 Pac. 112, 53 L. R. A. 744..... 629
Johnson v. Pensacola &c. R. Co. 16 Fla. 623, 26 Am. Rep. 731.. 389
Jones v. Brim, 165 U. S. 180, 17 Sup. Ct. Rep. 253..... 632
Jones v. Galena, etc., R. Co., 16 Iowa 6..... 629
Jones v. People, 14 Ill. 196... 214
Jones v. Perry, 50 N. H. 134.. 444
Jordan, In re, 90 Mich. 3, 50 N. W. 1087 ..... 99
Jordan v. Overseers of Dayton, 4 Oh. 295 ..... 135
Jordan v. Woodward, 40 Me. 317 ..... 411
Joseph v. Randolph, 71 Ala. 499, 46 Am. Rep. 347 ..... 489
Joseph v. Bidwell, 28 La. An. 382 ..... 694
Journeymen Tailors, Case of, Carson Criminal Conspiracies, 53 ..... 132
Joyce v. East St. Louis, 77 Ill. 156 ..... 168
Juniata Limestone Co. v. Fagley, 187 Pa. 193, 40 Atl. 977, 42 L. R. A. 442, 67 Am. St. Rep. 579 ..... 706
Judson v. Reardon, 16 Minn. 431 ..... 614
Justice v. Commonwealth, 81 Va. 209 ..... 563
Kalamazoo Hack Co. v. Sootsma, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. Rep. 693 ..... 396
Kansas Central R. Co. v. County of Jackson Commissioners, 45 Kans. 716, 26 Pac. 394 ... 631
Kansas Pacific R. R. Co. v. Mower, 16 Kan. 573 ..... 727
Karasek v. Peier, 22 Wash. 419, 61 Pac. 33 ..... 426
Kates v. Atlanta Baggage & Cab Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431 ..... 396
Kean v. Driggs Drainage Co., 45 N. J. L. 91 ..... 442
Keller v. Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613.... 534
Kellogg v. Howes, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588 .. 626
Kellum v. State, 66 Ind. 588.. 563
Kelly v. Minneapolis, 57 Minn. 294, 59 N. W. 304..... 631
Kelly v. Pittsburg, 104 U. S. 78 ..... 688
Kennebec Water District v. Waterville, 97 Me. 185..... 552
Kennedy's Case, 135 Mass. 48. 107
Kentucky Club v. Louisville, 92 Ky. 309, 17 S. W. 743 .... 456
Keppel v. Bailey, 2 Myl. & K. 517 ..... 590
Kerr v. Simmons, 82 Mo. 269.. 670
Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6.....76, 79, 231

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Kimmish v. Ball, 129 U. S. 217, 9 Sup. Ct. Rep. 277...77, 136, 138
King v. Davenport, 98 Ill. 305, 38 Am. Rep. 89 ..... 528
King v. Dean of St. Asaph, 3 T. R. 428, note ..... 471
King v. Hayes, 80 Me. 206, 13 Atl. 882 ..... 249, 523
King v. Parish of Ampthill, 2 B. & C. 847 ..... 271
King v. People, 83 N. Y. 587.. 245
King v. State, 58 Miss. 737, 38 Am. Rep. 344..... 223
King v. Thompson, 87 Pa. St. 365, 30 Am. Rep. 364 ..... 162
Kinney, Ex parte, 3 Hughes 9. 697
Kinnie v. Bare, 68 Mich. 625, 36 N. W. 672 ..... 442
Kingsbury v. Kirwan, 77 N. Y. 612 ..... 200
Kirtland v. Mayor of Macon, 66 Ga. 385..... 161
Klein v. Livingston Club, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717 .. 456
Knauer v. Louisville, 20 Ky. L. Rep. 193, 45 S. W. 510, 41 L. R. A. 219..... 522
Kneedler v. Lane, 45 Pa. 238. ..... 448, 614
Knowack, Re, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699. 263
Knoxville v. Bird, 12 Lea. 121 ..... 556
Knoxville v. King, 7 Lea. 441. 156
Knoxville Iron Co. v. Harbison, 183 U. S. 13.....320, 501, 735
Knoxville Water Co. v. Knoxville, 189 U. S. 434..... 571
Koch v. Delaware, Lackawanna R. Co., 53 N. J. L. 256, 21 Atl. 284 ..... 409, 619
Kochersperger v. Drake, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321..... 367
Koehler and Lange v. Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609..... 214
Kohn v. Koehler, 96 N. Y. 362, 48 Am. Rep. 628 ..... 198
Kohn v. Melcher, 29 Fed. 433. 710
Kolff v. St. Paul Fuel Exchange, 48 Minn. 215, 50 N. W. 1036 ..... 344
Kurtz v. Clausen, 77 N. Y. Supp. 97 ..... 670
La Croix v. County Commissioners of Fairfield County, 50 Conn. 321, 47 Am. Rep. 648 564
Ladd v. Holmes, 40 Oregon 167, 66 Pac. 714..... 483
Laing v. Americus, 86 Ga. 756, 13 S. E. 107..... 162
Lake Roland Elec. R. Co. v. Baltimore, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126..... 579
Lake Shore and Michigan Southern Railway Company v. Smith, 173 U. S. 684, 19 Sup. Ct. Rep. 565 ..... ..... 63, p. 60, 363, 393, 715
Lake Shore and Michigan Southern R. Co. v. Spangler, 44 Ohio St. 471, 8 N. E. 467, 55 Am. Rep. 833 ..... 322
Lake Shore and Michigan Southern Railway Company v. State of Ohio ex rel. Lawrence, 173 U. S. 285, 19 Sup. Ct. Rep. 465 .....73, 395, 398
Lake View, Town of v. Letz, 44 Ill. 81 .....33, 141, 178
Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71 ..... 530
Lambert, Re, 134 Cal. 626, 66 Pac. 851, 55 L. R. A. 856, 23 L. R. A. 737, 86 Am. St. Rep. 296 ..... 252, 253
Lamon v. Richard, The Gordon Hotels, Limited, L. R. 1897 1 Q. B. 541 ..... 386
Lamson et al. v. Boyden et al., 160 Ill. 613, 43 N. E. 781.... 54
Lancaster v. McKinley (Ind. App.), 67 N. E. 947..... 200

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Lane v. Baker, 12 Oh. 237.... 700
Lanfear v. Mayor, 4 La. 97, 23 Am. Dec. 477 ..... 522
Langdon v. Mayor of New York, 93 N. Y. 129.....406, 576
Lansburgh v. The District of Columbia, 11 App. D. C. 512. ..... 60, 293
Lansing v. Smith, 8 Cow. 146.. 408
Lansing v. Smith, 4 Wend. 9.509, 510
Lapsley v. Brashears, 4 Littell 47 ..... 557
Larche v. Jackson, 9 Mart (O. S.) 724 ..... 443
Lasher v. People, 183 Ill. 226, 55 N. E. 663, 47 L. R. A. 802, 75 Am. St. Rep. 103 ..... .....297, 493, 673
Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U. S. 1, 10 Sup. Ct. Rep. 792.. ..... 596, 598
Laugel v. Bushnell, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266 .....33, 158
Launder v. The City of Chicago, 111 Ill. 291, 53 Am. Rep. 625 ..... 43, 93
Lavery v. Hannegan, 20 J. & S. 463 ..... 162
Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 477.... 527
Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813 .... 527
Leach v. Elwood, 3 Ill. App. 453 ..... 421
Leader v. Moxton, 3 Wils. 461.. 507
Le Donne, Re, 173 Mass. 550, 54 N. E. 244 ..... 255
Lee v. McClelland, 157 Ind. 84, 60 N. E. 692 ..... 261
Leep v. St. Louis, I. M. & S. R. Co., 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109.....320, 715
Lee Sing, In re, 43 Fed. 359.491, 705
Lees v. United States, 150 U. S. 476, 14 Sup. Ct. Rep. 163.. 329
Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. Rep. 895 .... 698
Legal Tender Cases, 12 Wall. 457 ..... 558
Leighton v. Maury, 76 Va. 865 ..... 209
Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681..... .....76, 81, 85, 232, 295, 710
Lemly v. State, 69 Miss. 628, 12 So. 559..... 221
Lem Moon Sing v. United States, 158 U. S. 538, 15 Sup. Ct. Rep. 871..... 704
Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456 ..... 348
Levy, Ex parte, 43 Ark. 42, 51 Am. Rep. 550 ..... 211, 672
Lewis v. Fermor, L. R. 18 Q. B. Div. 532 ..... 249
Lewis v. Portland, 25 Ore. 133, 35 Pac. 256, 22 L. R. A. 736, 42 Am. St. Rep. 772.....406, 576
L'Hote v. New Orleans, 51 La. Ann. 93, 20 So. 608, 44 L. R. A. 90 ..... 179, 244, 689
L'Hote v. New Orleans, 177 U. S. 587, 20 Sup. Ct. Rep. 788.. ..... 179, 249, 689
Libbey v. Downey, 5 Allen 299 275
Libels, Case of, 5 Rep. 125.... 472
License Cases, 5 How. 504.... .....2, 76, 80, 81, 83, 84, 231
License Tax Cases, 5 Wall. 462 37
Lincoln v. Janesch, 63 Neb. 707, 89 N. W. 280, 56 L. R. A. 762 ..... 620
Lincoln v. Smith, 27 Vt. 328.. ..... 214, 526
Lindsey v. Anniston, 104 Ala. 257, 27 L. R. A. 436, 16 So. 545 ..... 396
Lippman v. People, 175 Ill. 101, 51 N. E. 872..... 298

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Liftle v. Bowers, 17 Vroom. (N. J.) 300 ..... 568
Little v. State, 60 Neb. 749, 84 N. W. 248, 51 L. R. A. 717... 133
Little Rock and Ft. Smith R. Co. v. Oppenheimer, 64 Ark. 271, 43 S. W. 145, 44 L. R. A. 353 ..... 690
Little Rock, etc., R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55 ..... 628
Loan Association v. Topeka, 20 Wallace 655 ..... 23
Lobrano v. Nelligan, 9 Wall. 295 ..... 257
Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716..... 217
Lockwood, In re, 154 U. S. 116, 14 Sup. Ct. Rep. 1082..... 702
Loesch v. Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682.....249, 523
Lohman v. State, 81 Ind. 15.. 198
Lonas v. State, 3 Heisk. 287.. 697
Looker v. Maynard, 179 U. S. 46, 21 Sup. Ct. Rep. 21....363, 579
Lord v. Langdon, 91 Me. 221, 39 Atl. 552 ..... 426
Lord v. Litchfield, 36 Conn. 116, 4 Am. Rep. 41 ..... 568
Lord v. Steamship Company, 102 U. S. 541 ..... 66
Lott v. Sweet, 33 Mich. 308.. 252
Lottery Case (Champion v. Ames), 188 U. S. 321..... .....58, 65, 66, 198, 236
Lough et. al. v. Outerbridge et al., 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712 ..... 348, 389
Loughbridge v. Harris, 42 Ga. 500 ..... 412
Louisiana v. Texas, 176 U. S. 1, 20 Sup. Ct. Rep. 251..... .....71, 82, 139, 488
Louisiana State Board of Health v. Standard Oil Co., 107 La. 713, 31 So. 1015..... 622
Louisville and Nashville R. Co. v. Baldwin, 85 Ala. 619, 7 L. R. A. 266, 5 Sou. 311..... 622
Louisville and Nashville Railroad Company v. Commonwealth, 99 Ky. 132, 25 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457 ..... 28, 384
Louisville & Nashville R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. Rep. 523..... .....342, 362, 363, 717
Louisville and Nashville R. Co. v. Kentucky, 183 U. S. 503.... 73
Louisville, E. and St. L. Consol. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105 ..... 389
Louisville, New Orleans and Texas Railway Company v. Mississippi, 133 U. S. 587, 10 Sup. Ct. Rep. 348 ..... 73, 699
Louisville City Railway Co. v. Louisville, 71 Ky. 415..... 658
Love v. Judge of Recorder's Court of Detroit, 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618 ..... 644
Lovell v. Seeback, 45 Minn. 465, 48 N. W. 23, 11 L. R. A. 667 ..... 271, 491
Low v. Rees Printing Company, 41 Neb. 127, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670.....30, 316, 317, 735
Lowe v. Conroy (Wis.), 97 N. W. 942 ..... 521
Lowe, In re, 54 Kans. 757, 39 Pac. 710, 27 L. R. A. 545..641, 670
Lowell et al. v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39.....23, 268, 412
Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420 ..... 526
Luck v. Sears, 29 Oreg. 421, 44 Pac. 693, 54 Am. St. Rep. 804 ..... 455

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Lyman v. Boston and Worcester R. Co., 4 Cush. 288 ..... 630
Lynch v. Hubbard, 101 Mich. 43, 59 N. W. 443 ..... 620
Lynch, Re, 5 Paige (N. Y.) 120.. 227
Lynn v. State, 33 Tex. Cr. 153, 25 S. W. 779 ..... 421
McAllister v. Haden, 2 Campb. 438 ..... 195
McAllister v. State, 72 Md. 390, 20 Atl. 143 ..... 284
McCall v. California, 136 U. S. 104, 10 Sup. Ct. Rep. 881... ..... 73, p. 70, 74, 79, 295, 717
McCann v. Commonwealth, 198 Pa. St. 509, 48 Atl. 470..... 284
McCarthy, Ex parte, 72 Cal. 384, 14 Pac. 96..... 99
McCarthy v. Chicago, 53 Ill. 38 172
McCarthy v. Syracuse, 46 N. Y. 194 ..... 161
McCarver, Ex parte, 39 Tex. Cr. App. 448, 46 S. W. 936, 42 L. R. A. 587, 73 Am. St. Rep. 947 .....158, 259
McCloskey v. Kreling, 76 Cal. 511 ..... 644
McCombs v. Akron, 15 Oh. 475 509
McConico v. Singleton, 2 Mills (S. C.) 244 ..... 418
McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15 ..... 396
McCormick v. Tate, 20 Ill. 334 444
McCready v. Virginia, 94 U. S. 391 ..... 712
McCreary v. State, 73 Ala. 480 232
McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410 ..... 219, 666
McDaniels v. J. J. Connelly Shoe Co. (Wash.), 71 Pac. 37.. 287
McDermott v. Union Credit Co., 76 Minn. 84, 78 N. W. 967, 79 N. W. 673..... 301
McDonald v. City of Red Wing, 13 Minn. 38..... 534
McDuffee v. Portland & R. Co., 52 N. H. 430, 13 Am. Rep. 72 ..... 389, 395
McGann v. People, 194 Ill. 526, 62 N. E. 941.....162, 427
McGowan v. Stark, 1 Nott & McC. 387, 9 Am. Dec. 712.... 668
McGrew v. City Produce Exchange, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771..... 201
McGuire v. State, 42 Ohio St. 530 ..... 232
McHugh v. McCole, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724, 65 Am. St. Rep. 106n. 369
McIntyre v. Weinert, 195 Pa. 52, 45 Atl. 666..... 301
McKenna, Ex parte, 126 Cal. 429, 58 Pac. 916.....58, p. 53
McKeon v. New York, New Haven, etc. R. Co. (Conn.), 53 Atl. 656 ..... 518
McKinney v. Salem, 77 Ind. 213 ..... 564
McLaren v. Pennington, 1 Paige 101 ..... 363
McLaughlin v. Citizens Bldg. Loan Association, 62 Ind. 264 ..... 304
McLean, County of v. Humphreys, 104 Ill. 378.....262, 263
McRee v. Wilmington etc. R. Co., 47 N. C. 186..... 681
McReynolds v. Smallhouse, 71 Ky. 447..... 661
McRoberts v. Washburne, 10 Minn. 23..... 668
McVey v. Barker, 92 Mo. App. 498 ..... 635
Macon etc. R. Co. v. Vaughn, 48 Ga. 464..... 628
Maddox, Re, 93 Md. 727, 50 Atl. 487, 55 L. R. A. 298..... 702
Madison, City of, v. Mayers, 97 Wis. 399 ..... 408
Magee v. Augusta, 5 Ga. 546. 168
Mager v. Grima, 8 How. 490.. 706
Magner v. People, 97 Ill. 320.. 419

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Maguire, Re, 57 Cal. 604, 40 Am. Rep. 125..... 703
Maier, Ex parte, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129 .....419, 420
Maize v. State, 4 Ind. 342.... 217
Malloy v. La Crosse Abattoir Co., 80 Wis. 170, 49 N. W. 1071 ..... 626
Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. Rep. 559 ..... 420
Mangan v. State, 76 Ala. 60.. 93
Manufacturers' Gas & Oil Co. v. Indiana Gas & Oil Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768..... 422
Mapstrick v. Ramge, 9 Neb. 390, 2 N. W. 739, 31 Am. Rep. 415 .....333, 335
Marchant v. Pennsylvania R. Co., 153 U. S. 380, 14 Sup. Ct. Rep. 894 ..... 510
Marks, Ex parte, 64 Cal. 29, 28 Pac. 109, 49 Am. Rep. 684... 104
Marmont v. State, 48 Ind. 21.. 456
Marquis, Re, 85 Mo. 615..... 255
Martin v. Board of Education, 42 W. Va. 514, 26 S. E. 348.. 698
Martin v. State, 59 Ala. 34... 456
Massachusetts National Bank v. Shinn, 163 N. Y. 360, 57 N. E. 611..... 371
Master Stevedores Association v. Walsh, 2 Daly 1..... 331
Mather v. Chapman, 40 Conn. 382 ..... 408
Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741..... 345
May v. New Orleans, 178 U. S. 496, 20 Sup. Ct. Rep. 976.. 81
Mayor v. Lord, 17 Wend. 285. 534
Mayor of Hudson v. Thorne, 7 Paige (N. Y.) 261..... 643
Mayor of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075..... 571
Mayor of Monroe v. Hoffman, 29 La. Ann. 651..... 141
Mayor of New Iberia v. Fontelieu, 108 La. 460, 32 Sou. 369.. 620
Mayor of New York v. Cunard S. S. Co., 61 Hun 346, 15 N. Y. Supp. 904..... 163
Mayor, Aldermen and Commonalty of City of New York v. Miln, 11 Peters 102..... .....2, 45, 271, 705
Mayor &c. v. Starin, 106 N. Y. 1, 12 N. E. 631..... 668
Meadowcroft v. People, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176, 54 Am. St. Rep. 447..... 731
Meeker v. Van Rensselaer, 15 Wend. 397..... 520
Meffert v. State Board of Medical Registration (Kans.), 72 Pac. 247..... 546
Meister v. Moore, 96 U. S. 76. 241
Melton v. Mayor of Moultrie, 114 Ga. 462, 40 S. E. 302.... 564
Memphis v. Winfield, 27 Tenn. 707 ..... 691
Mercein v. People, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653.. 260
Meredith v. New Jersey Zinc & Iron Co., 55 N. J. Eq. 211, 37 Atl. 539..... 353
Merritt v. People, 169 Ill. 218, 48 N. E. 325..... 420
Messenger v. State, 25 Neb. 674, 41 N. W. 638.....389, 695
Metropolitan Board of Excise v. Barrie, 34 N. Y. 657..... 564
Mette v. McGuckin, 18 Neb. 323, 25 N. W. 338..... 710
Mette v. McGuckin, U. S. Rep. L. Ed. Bk. 37, p. 934 (not officially reported) ..... 710
Meyer v. Teutopolis, 131 Ill. 552, 23 N. E. 651..... 166
Meyer v. Richmond, 172 U. S. 82, 19 Sup. Ct. Rep. 106..... 510
Meyers v. Baker, 120 Ill. 567,

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

12 N. E. 79, 60 Am. Rep. 580 .....175, 336, 464
Michigan Sugar Co. v. Dix, 124 Mich. 674, 56 L. R. A. 329, 83 Am. St. Rep. 354..... 428
Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314..... 576
Millar v. Taylor, 4 Burr 2303.. 664
Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. Rep. 884.... 205
Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242..... 525
Miller v. Craig, 11 N. J. Eq., 175 ..... 576
Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850.... 521
Miller v. Post, 1 Allen 434.... 275
Miller v. New York, 15 Wall. 478.....362, 363, 599
Miller v. State, 3 Oh. St. 475.. 635
Miller v. State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109.... 105
Miller v. Troost, 14 Minn. 365. 412
Millett v. The People of the State of Illinois, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869 .....44, 275, 394, 611
Millikan v. Weatherford, 54 Tex. 388, 38 Am. Rep. 629.... 245
Mills v. County of St. Clair, 8 How. 569.....668, 701
Mills v. County of St. Clair, 4 Ill. 53 .....668, 701
Mills v. County of St. Clair, 7 Ill. 197..... 587
Mills v. United States, 46 Fed. 738, 12 L. R. A. 673..... 409
Milne v. Davidson, 5 Mort (N. S.) 409 ..... 141
Milwaukee v. Gross, 21 Wis. 241, 91 Am. Dec. 472..... 667
Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702..... 261
Milwaukee Masons and B. Association v. Niezerowski, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St. Rep. 97. 344
Minneapolis Mill Co. v. Board of Water Commissioners, 56 Minn. 485, 58 N. W. 33..... 408
Minneapolis and St. Louis R. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. Rep. 207....637, 727
Minneapolis and St. Louis R. Co. v. Emmons, 149 U. S. 364, 13 Sup. Ct. Rep. 870..... 727
Minneapolis & St. Louis R. Co. v. Minnesota, 186 U. S. 257.. ..... 394, 551
Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. Rep. 862...77, 138
Minturn v. Larue, 23 How. 435. 678
Mississippi Society of Arts etc. v. Musgrove, 44 Miss. 820, 7 Am. Rep. 723..... 579
Missouri v. Illinois, 180 U. S. 208 ..... 139
Missouri (Bowman) v. Lewis, 101 U. S. 22.....497, 688
Missouri, Kansas and Texas Railway Company v. Haber, 169 U. S. 613, 18 Sup. Ct. Rep. 488 .....77, 136, 138, 634
Missouri ex rel. Laclede Gaslight Co. v. Murphy, 170 U. S. 78, 18 Sup. Ct. Rep. 505..... 362
Missouri Pacific R. Co. v. Harrelson, 44 Kans. 253, 24 Pac. 465..... 629
Missouri Pacific R. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. Rep. 110.298, 621, 629, 637, 727
Missouri Pacific R. R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. Rep. 1161.....501, 727
Missouri Pacific R. Co. v. Nebraska, 164 U. S. 403, 17 Sup. Ct. Rep. 130..... 397
Mitchel v. Reynolds, 1 P. W. 181 .....343, 348
Mobile, the City of, 116 Fed. 212 ..... 451

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441..... 275
Mobile etc. R. Co. v. Williams, 53 Ala. 595..... 628
Mobile & Ohio R. R. Co. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556.... 395
Mogul Steamship Company v. McGregor, Gow & Company, L. R. 1892 App. Cas. 25..... 345
Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. Rep. 622..... 506
Montana Union R. Co. v. Langlois, 9 Mont. 419, 18 Am. St. Rep. 745..... 396
Monterey Co. v. Cushing, 83 Cal. 507, 23 Pac. 700..... 427
Montgomery v. Hutchinson, 13 Ala. 573..... 520
Moody v. McClelland, 39 Ala. 45, 84 Am. Dec. 770..... 424
Moor v. Veazie, 32 Me. 343, 52 Am. Dec. 655..... 661
Moore v. Indianapolis, 120 Ind. 483, 22 N. E. 424..... 564
Moore v. State, 48 Miss. 147, 12 Am. Rep. 367..... 563
Moore v. Monroe, 64 Ia. 367, 20 N. W. 475, 52 Am. Rep. 44 ..... 463
Moran v. Moran, 104 Ia. 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443..... 369
Morford et al. v. Board of Health of Asbury Park, 61 N. J. L. 386, 39 Atl. 706..... 34
Morgan, In re Application for Writ of Habeas Corpus, 26 Col. 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269.. ....30, 131, 144, 146, 155, 317, 500
Morgan v. King, 35 N. Y. 454, 91 Am. Rep. 58..... 404
Morgan's Steamship Company v. Louisiana Board of Health et al., 118 U. S. 455, 6 Sup. Ct. Rep. 1114.....71, 135, 705
Morgan, Superintendent of Cincinnati Workhouse v. Nolte, 37 Ohio St. 23, 41 Am. Rep. 485..... 96
Morley v. Lake Shore and Michigan Southern R. Co., 146 U. S. 162, 13 Sup. Ct. Rep. 54 ..... 555
Mormon Church v. United States, 136 U. S. 1, 10 Sup. Ct. Rep. 792.....596, 598
Morris et al. v. City of Columbus, 102 Ga. 792, 30 S. E. 850, 42 L. R. A. 175, 66 Am. St. Rep. 243....63, p. 59, 144, 447
Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159..... 347
Moses v. United States, 16 App. D. C. 428, 50 L. R. A. 532 ..... 177
Mosler et al., Ex parte, 8 Oh. C. C. 324.....40, 292
Mt. Pleasant v. Clutch, 6 Iowa 546 ..... 288
Mt. Vernon Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. Rep. 185 ..... 538
Mouse Case, 12 Rep. 63..... 534
Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115..... 301
Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273.... .....134, 213, 455, 540, 564
Mullen v. Peck, 49 Oh. St. 447, 31 N. E. 1077..... 626
Muller v. Buncombe County, 89 N. C. 171..... 652
Munger v. Tonawanda etc. R. Co., 4 N. Y. 349, 53 Am. Dec. 384 n..... 629
Municipal Fuel Plants, In re (Mass), 66 N. E. 25.....23, 666
Munn v. Illinois, 94 U. S. 113 .. 63, p. 58, 372, 379, 384, 417, 688

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Munro v. Watson, 51 J. P. 660, 57 L. T. 366..... 643
Murdock v. Stickney, 8 Cush. 113 .....411, 412, 508
Murphy v. Commonwealth, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266 ..... 105
Murphy v. Leggett, 164 N. Y. 121, 58 N. E. 42.....162, 172
Murphy v. Rogers, 151 Mass. 118, 24 N. E. 35..... 192
Murray v. Menefee, 20 Ark. 561 ..... 668
Musgrove v. St. Louis Church, 10 La. Ann. 431..... 178
Myers v. Field, 146 Ill. 50, 34 N. E. 424..... 567
Myrick v. Battle, 5 Fla. 345.. 555
Myrick v. Brawley, 33 Minn. 377, 23 N. W. 549..... 363
Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490..... 390
Nashville and Chattanooga R. R. Co. v. Peacock, 25 Ala. 229 ..... 628
Nashville, Chattanooga and St. Louis Railway v. Alabama, 128 U. S. 96, 9 Sup. Ct. Rep. 28.....73, 622
Natal v. Louisiana, 139 U. S. 621, 11 Sup. Ct. Rep. 636.... 667
Nathan v. State of Louisiana, 8 How. 73.....74, 79
National Protective Association of Steam Fitters v. Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648..333, 334
Nebraska Telegraph Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113..... 385
Nelson v. Godfrey, 12 Ill. 20.. 162
Nelson v. People, 33 Ill. 390 .....488. 691
Nelson v. State Board Health, 22 Ky. L. Rep. 438, 57 S. W. 501, 50 L. R. A. 383.... ..... 133, 153, 647
Nesbit v. Trumbo, 39 Ill. 110, 89 Am. Dec. 290..... 427
Nester v. Continental Brewing Co., 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894..... 344
Nettles v. Sommervell, 6 Tex. Civ. App. 627, 25 S. W. 658.. 301
Newark &c. Ry. Co. v. Hunt, 50 N. J. L. 308, 12 Atl. 697.. 521
New Castle v. Cutler, 15 Pa. Super. Ct. 612, 625.....288, 732
Newcomb v. Smith, 2 Pinn. (Wis.) 131..... 412
New England Trout etc. Club v. Mather, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569..... 518
New England Express Co. v. Maine Central R. Co., 57 Me. 188 ..... 395
Newman, Ex parte, 9 Cal. 502. 185
New Jersey v. Wilson, 7 Cranch 164.....561, 568
New Jersey v. Yard, 95 U. S. 104 ..... 568
New Orleans v. Faber, 105 La. 208, 53 L. R. A. 165, 83 Am. St. Rep. 232.....530, 565, 667, 670
New Orleans v. Gt. Southern Telephone and Telegraph Co., 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502..... 576
New Orleans v. St. Louis Church, 11 La. Ann. 244..178, 565
New Orleans v. Kee, 107 La. 762, 31 Sou. 1014 ..... 622
New Orleans v. Stafford, 27 La. Ann. 417, 21 Am. Rep. 563... 565
New Orleans Gas Company v. Louisiana Light Company, 115 U. S. 650, 6 Sup. Ct. Rep. 252 .....22, 363, 577, 669, 679
New Orleans Water Works Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. Rep. 273..... 679
Newport etc. Bridge Co. v. United States, 105 U. S. 470 .....406, 576

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

New York, see also Mayor.
New York, In re City of, 168 N. Y. 134, 61 N. E. 158.... 408
New York v. Herdje, 68 App. Div. 374, 74 N. Y. Supp. 104. 556
New York v. Miln, 11 Peters 102 .....2, 45, 271, 705
New York & Chicago Grain & Stock Exchange v. Chicago Board of Trade, 127 Ill. 153, 19 N. E. 855, 48 L. R. A. 568, 11 Am. St. Rep. 107..... 386
New York Board of Underwriters v. Whipple, 37 N. Y. Suppl. 712..... 615
New York & New England R. Co. v. Board R. R. Commissioners. 162 Mass. 81, 38 N. E. 27 ..... 427
New York and New England R. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. Rep. 437... .....548, 556, 631
New York and New England R. Co. v. Waterbury, 60 Conn. 1, 22 Atl. 439..... 631
New York, Lake Erie and Western R. Co. v. Pennsylvania, 153 U. S. 628, 14 Sup. Ct. Rep. 952..... 576
New York, New Haven and Hartford Railroad Company v. New York, 165 U. S. 628, 17 Sup. Ct. Rep. 418..... .....73, 134, 135, 727
New York, New Haven and Hartford R. Co. v. Scovill, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159 ..... 396
New York Sanitary Utilisation Co. v. Department of Public Health, 61 App. Div. 106, 70 N. Y. Suppl. 510..... 530
Newson v. Galveston, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797 ..... 667
Newton v. Belger, 143 Mass. 598, 10 N. E. 464.....643, 644
Nickerson v. Boston, 131 Mass. 306 ..... 617
Nightingale, Re, 11 Pick. 168.. 173
Nixson v. Reed, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315. 668
Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238..149, 643, 650
Nordenfeldt v. Maxim-Nordenfeldt Co., L. R. 1894 App. Cas. 535 ..... 348
Norfolk, Duke, Case of, 3 Ch. Cas. 1 ..... 367
Norris v. Farmers' Teamsters Co., 6 Cal. 590, 65 Am. Dec. 535 ..... 668
North v. Board of Trustees of University of Illinois, 137 Ill. 296, 27 N. E. 54..... 463
North v. The People of State of Illinois, 139 Ill. 81, 28 N. E. 966.....87, 90
North Chicago R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788..... 158
North Dakota v. Nelson County, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609..... 268
North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214.. 677
Northern Central R. Co. v. Baltimore R. Co., 46 Md. 425. 631
Northern Pacific R. Co. v. Washington, 142 U. S. 492... 395
Northrup, Ex Parte, 41 Or. 489, 69 Pac. 445 ..... 735
Northwestern Fertilizing Company v. Hyde Park, 97 U. S. 659 .....24, 565
Northwestern Telephone Exchange Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175... 575
Norwalk Street Railway Company's Appeal, 69 Conn. 576,

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794..... 385
Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19 ..... 574
Nott's Case, 11 Me. 208....98, 244
Northern Pacific R. Co. v. Washington, 142 U. S. 492, 12 Sup. Ct. Rep. 283..... 395
Nunes v. State of Georgia, 1 Ga. 243..... 90
Nutting v. Massachusetts, 183 U. S. 553..... 716
Oakdale Manufacturing Co. v. Garst, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784.....353, 716
O'Connor v. Pittsburgh, 18 Pa. 187 ..... 510
Officer v. Young, 5 Yerger (Tenn.) 320, 26 Am. Dec. 268. 20
Ogden v. Saunders, 12 Wheat. 213.....306, 378, 558
O'Leary, Ex parte, 65 Miss. 80, 3 So. 144, 7 Am. St. Rep. 640. 33
O'Neil v. Behanna, 182 Pa. 236, 37 Atl. 843, 38 L. R. A. 382, 61 Am. St. Rep. 702..... 333
Ohio v. Neff, 52 Oh. St. 375, 40 N. E. 720.....362, 599
Ohio v. Thomas, 173 U. S. 276.. 67
Ohio and Mississippi R. Co. v. Lackey, 78 Ill. 55, 20 Am. Rep. 259 ..... 612
Ohio & Mobile R. Co. v. People, 120 Ill. 200, 11 N. E. 347..... 395
Ohio Life Insurance and Trust Co. v. Diebolt, 16 How. 416.. 676
Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576.. 422
Olcott v. The Supervisors, 16 Wallace 678..... 23
Old Colony R. Co. v. Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am St. Rep. 661.....
Olive v. Van Patten, 7 Civ. 630, 25 S. W. 428.
Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221..... 412
Olympia, City of v. Mann, 1 Wash. 389, 12 L. R. A. 150....141
Opinion of Justices, 21 Col. 27, 39 Pac. 431..... 275
Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809.....23, 666
Opinion of Justices, 163 Mass. 589, 40 N. E. 713..... 735
Opinion of Justices, 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350 ..... 701
Oregon R. and N. Co. v. Smalley, 1 Wash. St. 206, 23 Pac. 1008, 22 Am. St. Rep. 143.... 629
Oren, Attorney General, v. Abbott, 121 Mich. 540, 80 N. W. 372, 47 L. R. A. 92..... 701
Orient Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281 .....400, 501
Osborn v. Knife Falls Boom Corporation, 32 Minn. 412, 21 N. W. 704, 50 Am. Rep. 590. 408
Osborn v. Hart, 24 Wis. 89, 1 Am. Rep. 161..... 427
Otis v. Parker, 187 U. S. 606..59, 201
Oviatt v. Pond, 29 Conn. 479.. 526
Owensboro and N. R. Co. v. Todd, 91 Ky. 175, 15 S. W. 56, 11 L. R. A. 285..... 629
Pace v. Alabama, 106 U. S. 583, 1 Sup. Ct. Rep. 637..... 697
Pacific Mail S. S. Co. v. Jolife, 2 Wall. 450 ..... 117
Packard v. Ryder, 144 Mass. 440, 11 N. E. 578, 5[illegible] Rep. 101 .....
P[illegible] v. Wel[illegible]
.....
t [illegible]
67
45

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Palmer v. Way, 6 Col. 106.... 620
Paris, Trustees of Town of v. Berry, 25 Ky. 483..... 620
Park and Sons Co. v. National Wholesale Druggists Ass., 175 N. Y. 1, 67 N. E. 136..... 346
Parker et al. v. Commonwealth, 178 Mass. 199, 59 N. E. 634.....23, 180, 514
Parker v. Commonwealth, 6 Pa. St. 507, 47 Am. Dec. 480. 217
Parker v. Kaughman, 34 Ga. 136 ..... 614
Parker v. Metropolitan R. R. Co., 109 Mass. 506..... 363
Parker v. People, 111 Ill. 581, 53 Am. Dec. 643.....407, 418
Parker v. Otis and Gassman, 130 Cal. 322, 62 Pac. 571..59, 201
Parks v. State (Ind.), 64 N. E. 862 .....133, 711
Parrott, Re, 1 Fed. 481..... 706
Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. Rep. 521..... 620
Parsons v. Trask, 7 Gray 473, 66 Am. Dec. 502..... 449
Passenger Cases (Smith v. Turner), 7 Howard 283..... ....2, 45, 66, 71, 101, 271, 486, 705
Patapsco Guano Company v. North Carolina Board of Agriculture, 171 U. S. 345, 18 Sup. Ct. Rep. 862.....75, 277
Patterson v. The Eudora, 190 U. S. 169.....329, 501
Patterson v. Kentucky, 97 U. S. 501 ..... 135
Patterson v. Wollman, 608, 67 N. W. 1040, A. 536..... 368
Paul v. Virginia, [illegible] 716
[illegible] 596
[illegible] 518
[illegible] 200
Pearsall v. Great Northern R. Co., 161 U. S. 646, 16 Sup. Ct. Rep. 705.....354, 362
Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113 ..... 521
Peart v. Meeker, 45 La. Ann. 421, 12 Sou. 490..... 409
Pedrick v. Bailey, 12 Gray 161.. 163
Peel Splint Coal Co. v. State, 36 W. Va. 802.....320, 735
Peik v. Chicago and Northwestern Railway Co., 94 U. S. 164.....73, 379
Pembina Con. Silver Mining and Milling Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. Rep. 737..... 716
Pendleton v. State, 6 Ark. 509 .....488, 691
Pennsylvania College Cases, 13 Wall. 190..... 597
Pennsylvania R. Co. v. Riblet, 66 Pa. St. 164, 5 Am. Rep. 360 ..... 629
Pennsylvania v. Standard Oil Co., 101 Pa. St. 119..... 717
Penrice v. Wallace, 37 Miss. 172 ..... 114
Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S. 1..... 79
People v. Adelphi Club, 149 N. Y. 5, 43 N. E. 410, 31 L. R. A. 510, 52 Am. St. Rep. 700..... 456
People v. Alton, 159 Ill. 615, 54 N. E. 421..... 698
People v. Andrews, 115 N. Y. 427, 22 N. E. 128, 6 L. R. A. 128 ..... 456
People v. Arensberg, 105 N. Y. 123, 11 N. E. 277, 57 Am. Rep. 483 .....49, 284
People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578..158, 164
People v. Bellet, 99 Mich. 151,

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794..... 385
Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19 ..... 574
Nott's Case, 11 Me. 208....98, 244
Northern Pacific R. Co. v. Washington, 142 U. S. 492, 12 Sup. Ct. Rep. 283..... 395
Nunes v. State of Georgia, 1 Ga. 243..... 90
Nutting v. Massachusetts, 183 U. S. 553..... 716
Oakdale Manufacturing Co. v. Garst, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784.....353, 716
O'Connor v. Pittsburgh, 18 Pa. 187 ..... 510
Officer v. Young, 5 Yerger (Tenn.) 320, 26 Am. Dec. 268. 20
Ogden v. Saunders, 12 Wheat. 213.....306, 378, 558
O'Leary, Ex parte, 65 Miss. 80, 3 So. 144, 7 Am. St. Rep. 640. 33
O'Neil v. Behanna, 182 Pa. 236, 37 Atl. 843, 38 L. R. A. 382, 61 Am. St. Rep. 702..... 333
Ohio v. Neff, 52 Oh. St. 375, 40 N. E. 720.....362, 599
Ohio v. Thomas, 173 U. S. 276.. 67
Ohio and Mississippi R. Co. v. Lackey, 78 Ill. 55, 20 Am. Rep. 259 ..... 612
Ohio & Mobile R. Co. v. People, 120 Ill. 200, 11 N. E. 347..... 395
Ohio Life Insurance and Trust Co. v. Diebolt, 16 How. 416.. 676
Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576.. 422
Olcott v. The Supervisors, 16 Wallace 678..... 23
Old Colony R. Co. v. Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661..... 396
Olive v. Van Patten, 7 Tex. Civ. 630, 25 S. W. 428..... 345
Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221..... 412
Olympia, City of v. Mann, 1 Wash. 389, 12 L. R. A. 150....141
Opinion of Justices, 21 Col. 27, 39 Pac. 431..... 275
Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809..... .....23, 666
Opinion of Justices, 163 Mass. 589, 40 N. E. 713..... 735
Opinion of Justices, 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350 ..... 701
Oregon R. and N. Co. v. Smalley, 1 Wash. St. 206, 23 Pac. 1008, 22 Am. St. Rep. 143.... 629
Oren, Attorney General, v. Abbott, 121 Mich. 540, 80 N. W. 372, 47 L. R. A. 92..... 701
Orient Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281 .....400, 501
Osborn v. Knife Falls Boom Corporation, 32 Minn. 412, 21 N. W. 704, 50 Am. Rep. 590. 408
Osborn v. Hart, 24 Wis. 89, 1 Am. Rep. 161..... 427
Otis v. Parker, 187 U. S. 606..59, 201
Oviatt v. Pond, 29 Conn. 479.. 526
Owensboro and N. R. Co. v. Todd, 91 Ky. 175, 15 S. W. 56, 11 L. R. A. 285..... 629
Pace v. Alabama, 106 U. S. 583, 1 Sup. Ct. Rep. 637..... 697
Pacific Mail S. S. Co. v. Jolife, 2 Wall. 450 ..... 117
Packard v. Ryder, 144 Mass. 440, 11 N. E. 578, 59 Am. Rep. 101 ..... 405
Packer v. Welsted, 2 Sid. 39, 111 ..... 427
Packett Company v. Catlettsburg, 105 U. S. 559..... 72
Palairet's Appeal, 67 Pa. St. 479, 5 Am. Rep. 450.... 370, 589
Palmer v. Tingle, 55 Oh. St. 423, 45 N. E. 313..... 626

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Palmer v. Way, 6 Col. 106.... 620
Paris, Trustees of Town of v. Berry, 25 Ky. 483..... 620
Park and Sons Co. v. National Wholesale Druggists Ass., 175 N. Y. 1, 67 N. E. 136..... 346
Parker et al. v. Commonwealth, 178 Mass. 199, 59 N. E. 634.....23, 180, 514
Parker v. Commonwealth, 6 Pa. St. 507, 47 Am. Dec. 480. 217
Parker v. Kaughman, 34 Ga. 136 ..... 614
Parker v. Metropolitan R. R. Co., 109 Mass. 506..... 363
Parker v. People, 111 Ill. 581, 53 Am. Dec. 643.....407, 418
Parker v. Otis and Gassman, 130 Cal. 322, 62 Pac. 571..59, 201
Parks v. State (Ind.), 64 N. E. 862 .....133, 711
Parrott, Re, 1 Fed. 481..... 706
Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. Rep. 521..... 620
Parsons v. Trask, 7 Gray 473, 66 Am. Dec. 502..... 449
Passenger Cases (Smith v. Turner), 7 Howard 283..... ....2, 45, 66, 71, 101, 271, 486, 705
Patapsco Guano Company v. North Carolina Board of Agriculture, 171 U. S. 345, 18 Sup. Ct. Rep. 862.....75, 277
Patterson v. The Eudora, 190 U. S. 169.....329, 501
Patterson v. Kentucky, 97 U. S. 501 ..... 135
Patterson v. Wollman, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536..... 668
Paul v. Virginia, 8 Wallace 168.....79, 342, 716
Pawlet v. Clark, 9 Cranch 292. 596
Payne v. Gould, 74 Vt. 208, 52 Atl. 421..... 518
Pearce v. Rice, 142 U. S. 28, 12 Sup. Ct. Rep. 130..... 200
Pearsall v. Great Northern R. Co., 161 U. S. 646, 16 Sup. Ct. Rep. 705.....354, 362
Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113 ..... 521
Peart v. Meeker, 45 La. Ann. 421, 12 Sou. 490..... 409
Pedrick v. Bailey, 12 Gray 161.. 163
Peel Splint Coal Co. v. State, 36 W. Va. 802.....320, 735
Peik v. Chicago and Northwestern Railway Co., 94 U. S. 164.....73, 379
Pembina Con. Silver Mining and Milling Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. Rep. 737..... 716
Pendleton v. State, 6 Ark. 509 .....488, 691
Pennsylvania College Cases, 13 Wall. 190..... 597
Pennsylvania R. Co. v. Riblet, 66 Pa. St. 164, 5 Am. Rep. 360 ..... 629
Pennsylvania v. Standard Oil Co., 101 Pa. St. 119..... 717
Penrice v. Wallace, 37 Miss. 172 ..... 114
Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S. 1..... 79
People v. Adelphi Club, 149 N. Y. 5, 43 N. E. 410, 31 L. R. A. 510, 52 Am. St. Rep. 700..... 456
People v. Alton, 159 Ill. 615, 54 N. E. 421..... 698
People v. Andrews, 115 N. Y. 427, 22 N. E. 128, 6 L. R. A. 128 ..... 456
People v. Arensberg, 105 N. Y. 123, 11 N. E. 277, 57 Am. Rep. 483 .....49, 284
People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578..158, 164
People v. Bellet, 99 Mich. 151,

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

22 L. R. A. 696, 57 N. W. 1094, 41 Am. St. Rep. 589.... 735
People v. Biesecker, 169 N. Y. 53, 61 N. E. 990, 57 L. R. A. 178, 88 Am. St. Rep. 534..... 32
People v. Blocki, 203 Ill. 363, 67 N. E. 809.....162, 576
People v. Board of Assessors of Brooklyn, 85 N. Y. 610..... 568
People v. Board of Railroad Commissioners, 160 N. Y. 202, 54 N. E. 697.....401, 659
People v. Brady, 40 Cal. 198, 6 Am. St. Rep. 604..... 693
People v. Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684 ..... 419
People v. Brown, 54 Mich. 15.. 108
People v. Budd, 153 U. S. 391.. 378
People v. Budd, 117 N. Y. 1, 22 N. E. 670, 5 L. R. A. 559, 2 Am. St. Rep. 639..... 378
People v. Buffalo Fish Co., 164 N. Y. 93, 58 N. E. 34, 52 L. R. A. 803, 79 Am. St. Rep. 622 ..... 420
People v. Canal Appraisers, 33 N. Y. 461..... 408
People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668 ..... 298
People v. Carpenter, 1 Mich. 273 ..... 161
People v. Chicago & Alton R. Co., 130 Ill. 175, 22 N. E. 857 ..... 395
People v. Cipperly, 101 N. Y. 634, 4 N. E. 107..... 147
People v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605..... 310
People v. Collison, 85 Mich. 105, 48 N. W. 292..... 419
People v. Compagnie Generale Transatlantique, 107 U. S. 59 ..... 486, 705
People v. Croswell, 3 Johns. Cas. (N. Y.) 337..... 472
People v. Cummings, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285 ..... 105
People v. Dennin, 35 Hun 327.. 186
People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722...176, 529, 531
People v. Doris, 14 Appl. Div. N. Y. 117, 43 N. Y. Supp. 571 ..... 251
People v. Duke, 19 Miscel. (N. Y.) 292, 44 N. Y. Suppl. 336.. ..... 346, 352
People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794... 259
People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501.....331, 356
People v. Forbes, 4 Park. Cr. Cas. 611..... 98
People v. Gallagher, 93 N. Y. 438 ..... 698
People v. Gastro, 75 Mich. 127, 42 N. W. 937..... 245
People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465 .....198, 293
People v. Girard, 145 N. Y. 105, 39 N. E. 823, 45 Am. St. Rep. 595 ..... 32
People v. Gordon, 194 Ill. 560, 62 N. E. 858..... 133
People v. Harper, 91 Ill. 357 .....278, 622
People v. Hasbrouck, 11 Utah 291 ..... 711
People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689 ..... 735
People v. Hawker, 152 N. Y. 234, 46 N. E. 607..... 545
People v. Hawkins, 157 N. Y. 1, 42 L. R. A. 490..... 50
People v. Hawley, 3 Mich. 330. 556
People v. Hill, 163 Ill. 186, 46 N. E. 796 ..... 270
People v. Jenkins, 1 Hill, 469.. 72
People v. Jennings (Mich.), 94 N. W. 216 .....32, 280

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389..389, 694, 695
People v. Lake Shore and Michigan Southern R. Co., 52 Mich. 277, 17 N. W. 841.....631
People v. Lewis, 86 Mich. 273, 49 N. W. 140..... 177
People v. Lochner, 76 N. Y. Suppl. 396, 73 App. Div. 120, affd. 69 N. E. 373....317, 735
People v. Lowndes, 130 N. Y. 455, 29 N. E. 751..... 712
People v. McCoy, 125 Ill. 289, 17 N. E. 786..... 546
People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34 .....62, 147, 283
People v. Melvin, 2 Wheeler Cr. C. 262 ..... 331
People v. Milk Exchange, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609 .....347, 355
People v. Miller, 38 Hun 82.. 157
People v. Moses, 65 Hun 161, 20 N. Y. Supp. 9..... 186
People v. Most, 128 N. Y. 108, 27 N. E. 970, 26 Am. St. Rep. 458 .....477, 480
People v. Most, 171 N. Y. 423, 64 N. E. 175..... 477
People v. Muller, 96 N. Y. 408, 48 Am. Rep. 635..... 237
People v. Naglee, 1 Cal. 232, 52 Am. Dec. 312..... 706
People v. New York Central and Hudson River Railroad Company, 28 Hun 543.....63, 452
People v. New York, Lake Erie & Western R. R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484 .....387, 395
People v. North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 384, 9 L. R. A. 386, 18 Am. St. Rep. 843..... 350
People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684..... 362
People v. Phippin, 70 Mich. 6, 37 N. W. 888.....543, 711
People v. Phyfe, 136 N. Y. 554, 32 N. E. 978, 19 L. R. A. 141. 316
People v. Pierson (N. Y.), 68 N. E. 243 .....260, 468
People v. Potter, 1 Park Cr. R. 47 ..... 104
People v. Pratt, 129 N. Y. 68, 29 N. E. 7 ..... 141
People v. Reetz, 127 Mich. 87, 86 N. W. 396.....543
People v. Rochester, 45 Hun. (N. Y.) 102 ..... 274
People v. Roper, 35 N. Y. 629.. 568
People v. Rosenberg, 138 N. Y. 410, 34 N. E. 285 ..... 158
People v. Ruggles, 8 Johns. 290, 5 Am. Dec. 335 ..... 465
People v. Russell, 49 Mich. 617, 14 N. W. 568, 43 Am. Rep. 478 ..... 288
People v. Sheldon, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690... 347
People v. Shurly (Mich.), 91 N. W. 139 ..... 52
People v. Smith, 108 Mich. 527, 32 L. R. A. 853..... 144
People v. Soule, 74 Mich. 250, 4 N. W. 908, 2 L. R. A. 494.. 456
People v. Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287. 248
People v. Thurber, 13 Ill. 554.. 38
People v. Todd, 51 Hun. 466, 4 N. Y. Supp. 25..... 202
People v. Trequier, 1 Wh. Cr. C. 142 ..... 331
People v. Turner, 55 Ill. 280, 8 Am. Rep. 645 ..... 260
People v. Vandecarr, 175 N. Y. 440, 67 N. E. 913..... 652
People v. Vanderbilt, 38 Barb. 282 ..... 163
People v. Van Pelt, 90 N. W. 424 ..... 419

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

People v. Wagener, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141..... 275
People v. Walbridge, 6 Cow. 512 725
People v. Weissenbach, 60 N. Y. 385 ..... 263
People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452 ..... 635
People ex rel. Smith v. Allen, 155 Ill. 61, 39 N. E. 568, 41 L. R. A 473..... 108
People ex rel. Boenert v. Barrett (Ill.), 67 N. E. 23..... 108
People ex rel. Linton v. Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788..... 395
People ex rel. Akin v. Butler Street Foundry and Iron Company, 201 Ill. 236, 66 N. E. 349 .....55, 356
People ex rel. Fleischman v. Caldwell, 64 App. Div. 46, 71 N. Y. Suppl. 654, affirmed 61 N. E. 1132, 168 N. Y. 671..61, 291
People ex rel. Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319..349, 360
People ex rel. Valentine v. Coolidge, Barien Circuit Judge, 124 Mich. 664, 50 L. R. A. 493, 83 N. W. 594, 83 Am. St. Rep. 352 ..... 297
People ex rel. Forsyth v. Court of Sessions of Monroe County, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856..... 108
People ex rel. Coffey v. Democratic General Committee, 164 N. Y. 335, 58 N. E. 124, 51 L. R. A. 674 ..... 483
People ex rel. Madden v. Dycker, 72 App. Div. (N. Y.) 308, 76 N. Y. Suppl. 111.....60, 293
People ex rel. Ricks v. Elk River Co., 107 Cal. 214, 40 Pac. 531 .....418, 419
People ex rel Lawrence v. Fallon, 152 N. Y. 12, 46 N. E. 296, 37 L. R. A. 227, 57 Am. St. Rep. 492.....194, 195
People ex rel. Healey v. Forbes, 52 Hun. 30, 4 N. Y. Supp. 757 .....192, 193
People ex rel. St. Board of Health v. Gorden, 194 Ill. 560, 62 N. E. 858..... 151
People ex rel. Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964.. 652
People ex rel. Postal Tel Co. v. Hudson River Telephone Co., 19 Abb. N. C. 466.....389, 395
People ex rel. State Board of Health v. Lehr, 196 Ill. 361, 63 N. E. 725 ..... 133
People ex rel. Hackley v. Kelly, 24 N. Y. 74..... 54
People ex rel. John Hoy v. Mills, 91 Hun 144, 36 N. Y. Supp. 371..... 210
People ex rel. Einsfeld v. Murray, 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344 .....37, 39
People ex rel Lewinsohn v. O'Brien, 176 N. Y. —, 68 N. E. 353..... 54
People ex rel. Cartwell v. Rochester, 44 Hun. 166 ..... 468
People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656 ..... 395
People ex rel. Cisco v. School Board, 161 N. Y. 598, 56 N. E. 81 ..... 698
People ex rel. New York, etc., Co. v. Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, S. C. 145 U. S. 175.....575, 622
People ex rel. Bradley v. Superintendent Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76 ..... 105
People ex rel. Nechamcus v. Warden of City Prison, 144 N. Y.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

529, 39 N. E. 686, 27 L. R. A. 718 ..... 646
People of State of New York ex rel. Tyroler v. Warden of the City Prison of City of New York, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763.....61, 291, 673
People ex rel. Sullivan v. Wendel, 33 Miscel. (N. Y.) 496, 68 N. Y. Suppl. 948..... 253
People ex rel. City of Chicago v. West Chicago Street R. Co., 203 Ill. 551, 68 N. E. 78...406, 576
People ex rel. Cairo Telegraph Co. v. Western Union Telegraph Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637..... 395
People ex rel. Copcutt v. Yonkers Board of Health, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522.. 521
People's Building Loan Association of Saginaw Co. v. Billing, 104 Mich. 186, 62 N. W. 373.. 304
Peoria, etc., R. R. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619 ..... 727
Perkins v. St. Louis and Iron Mountain R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426. 727
Perrine v. Chesapeake & Delaware Canal Co., 9 How. 172... 375
Pervear v. Commonwealth of Massachusetts, 5 Wall. 475... 81
Petit v. Minnesota, 177 U. S. 164 ..... 735
Pettis v. Johnson, 56 Ind. 139. ..... 162, 163
Phalen v. Virginia, 8 How. 163 ..... 563, 579
Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140 ..... 419, 516
Philadelphia v. Brabender, 201 Pa. 574, 51 Atl. 374, 58 L. R. A. 220..... 164
Philadelphia and Southern Mail S. S. Co. v. Pennsylvania, 122 U. S. 326 ..... 717
Philadelphia Fire Association v. New York, 119 U. S. 110..... 716
Philadelphia, W. & B. R. Co. v. Bowers, 4 Houst. 506.....571, 572
Phoenix Insurance Co. v. Levy, 12 Tex. Civ. App. 45, 33 S. W. 992 ..... 501
Phoenix Insurance Co. v. Tennessee, 161 U. S. 174..... 568
Pickering v. Cease, 79 Ill. 328.. 200
Pickford v. Grand Junction R. Co., 10 M. & W. 399..... 395
Piedmont Club v. Commonwealth, 87 Va. 540, 12 S. E. 963 ..... 456
Pierce v. Whittlesey, 58 Conn. 104 ..... 323
Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. 579, 7 L. R. A. 507, 18 Am. St. Rep. 473..... 99
Piqua Branch of State Bank v. Knoop, 16 How. 369..... 363
Pitts v. Lancaster Mills, 13 Metc. 156 ..... 425
Pittsburg and Southern Coal Company v. Louisiana, 156 U. S. 590 .....75, 274
Pittsburg, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 300 ..... 715
Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330 .....333, 336
Platte and D. Canal & Milling Co. v. Dowell, 17 Col. 376, 30 Pac. 68 ..... 362
Plessy v. Ferguson, 163 U. S. 537 .....63, p. 59, 610, 697, 699
Pleuler v. State, 11 Neb. 547, 10 N. W. 481 ..... 564
Plumb v. Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181.. ..... 218, 667
Plumley, Re, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839.. 284

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Plumley v. Massachusetts, 155 U. S. 461 ..... .....49, 62, 77, 84, 271, 284, 295
Pocopson Road, 16 Pa. St. 15.. 427
Polak v. San Francisco Orphan Asylum, 48 Cal. 490 ..... 166
Pollard's Appeal, 127 Pa. St. 507, 17 Atl. 1087 ..... 209
Polly Gray v. State, 4 Oh. 353.. 700
Pond v. The People, 8 Mich. 150 ..... 88
Pooling Freights, In Re, 115 Fed. 588 ..... 55
Porter v. Ritch, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353.. 252
Portland v. Bangor, 65 Me. 120, 20 Am. Rep. 681 .....98, 244
Portland & R. R. Co. v. Deering, 78 Me. 61, 2 Atl. 670, 57 Am. Rep. 784 ..... 631
Port Royal Mining Co. v. Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841 ..... 644
Post v. Weil, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809 ..... 590
Potter v. Collins, 156 N. Y. 16, 50 N. E. 413 ..... 576
Potts v. Breen, 167 Ill. 67, 47 N. E. 81, 59 Am. St. Rep. 262. ..... 141, 447
Pound v. Turck, 95 U. S. 459... 72
Powell v. Commonwealth, 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350 .....62, 147, 283, 541
Powell v. Pennsylvania, 127 U. S. 678..62, 69, 84, 134, 137, 283, 541
Powell v. State, 69 Ala. 10.... 564
Powers v. Commonwealth, 90 Ky. 167, 13 S. W. 450 ..... 454
Pratt v. Hutchinson, 15 East 511 ..... 481
Pratt v. Tefft, 14 Mich. 191.... 709
Prerogative, Case of the, 12 Rep. 12 ..... 534
Presby v. Klickitat Co., 5 Wash. 329, 31 Pac. 876 ..... 613
Prescott v. State, 19 Ohio St. 184, 2 Am. Rep. 388 ..... 261
Presser v. Illinois, 116 U. S. 252 ..... 91
Preston, Re, 63 Oh. St. 428, 59 N. E. 101, 52 L. R. A. 588.378, 394
Preston v. Drew, 33 Me. 558, 54 Am. Dec. 639 ..... 539
Price v. People, 193 Ill. 114, 61 N. E. 844, 55 L. R. A. 588, 86 Am. St. Rep. 306 .....287, 328
Priewe v. Wisconsin State Land & Impl. Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645..... 408
Prohibitory Amendment Cases, 24 Kan. 700 ..... 214
Proprietors of Bridges v. Hoboken Land & Improvement Co., 1 Wall. 116 ..... 362
Proprietors of Mills v. Braintree Water Supply Co., 149 Mass. 478, 21 N. E. 761, 4 L. R. A. 272 ..... 425
Proprietors of Mount Hope Cemetery v. Boston, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515 ..... 512
Prosser v. Wapello Co., 18 Ia. 327 ..... 668
Provident Saving Life Association Society v. Cutting, 181 Mass. 261, 63 N. E. 433 ..... 716
Pryor, Re, 55 Kan. 724, 41 Pac. 958, 29 L. R. A. 398, 49 Am. St. Rep. 280 ..... 374
Puitt v. County Commissioners, 94 N. C. 709, 55 Am. Rep. 638 698
Pullman Palace Car Co. v. Missouri Pacific R. Co., 115 U. S. 587 ..... 395
Purdy v. Erie R. Co., 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669 ..... 393
Pumpelly v. Green Bay, etc., Co., 13 Wall. 166.....409, 410, 508
Pye v. Peterson, 41 Tex. 312... 141
Quackenbush v. Wisconsin, etc., R. Co., 62 Wis. 411, 22 N. W.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

519; same case, 71 Wis. 472, 37 N. W. 384 ..... 629
Quartimas v. State, 48 Ala. 269. 240
Queen Insurance Co. v. State, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483..... 340
Quincy v. Bull, 106 Ill. 337.... 576
Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860 ..... 644
Quinn v. Leathem, L. R. 1901 A. C. 495 ..... 334
Quintini v. Bay St. Louis, 64 Miss. 483, 1 So. 625 ..... 178
Rabe v. State, 39 Ark. 204..... 221
Ragan & Buffet v. Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684. 392
Rahrer, Petitioner, In re, 140 U. S. 545 ..... 76
Railroad Commission Cases, 116 U. S. 307 .....63, p. 60, 363, 380
Railroad Commissioners v. Portland, 63 Me. 269, 18 Am. Rep. 208 ..... 363, 395
Railroad Co. v. Iowa, 94 U. S. 155 ..... 362
Railway Co. v. Sharpe, 38 Oh. St. 150 ..... 629
Ramsdale v. Foote, 55 Wis. 557, 13 N. W. 557 ..... 413
Ramsey v. People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853. 394
Randolph v. Builder's, etc., Supply Co., 106 Ala. 501, 17 Son. 731 ..... 727
Rapier, In re, 143 U. S. 110.... 198
Raritan, etc., R. Co. v. Delaware, etc., Canal Co., 18 N. J. Eq. 546 ..... 660
Rasmussen v. Idaho, 181 U. S. 198 .....77, 136, 138
Raudenbusch, Re., 120 Pa. St. 328, 14 Atl. 148 .....210, 651
Reade v. Conquest, 9 C. B. (N. S.) 755 ..... 663
Reagan v. Farmers' Loan and Trust Company, 154 U. S. 362. .....63, p. 60, 383, 384, 611, 612
Reed's Appeal, 114 Pa. St. 452, 6 Atl. 910 ..... 651
Reetz v. Michigan, 188 U. S. 505 ..... 543, 647
Reg. v. Ashton, 1 E. & B. 286.. 189
Reg. v. Downes, 13 Cox C. C. 111 ..... 468
Reg. v. Hicklin, 11 Cox Crim. Cases, 19 ..... 237
Reg. v. Most, L. R. 7 Q. B. D. 244 ..... 477
Reg. v. Tolson, L. R. 23 Q. B. Div. 168 ..... 635
Reg. v. Tuchin, Holt, 424..... 475
Reg. v. Walsall Justices, 3 C. L. R. 100, 3 Wkly. Rep. 69..... ..... 208, 210, 672
Regents, etc., v. Williams, 9 G. & J. (Md.) 365, 31 Am. Dec. 72 361
Reid v. Colorado, 187 U. S. 137 ..... 77, 136, 138
Reining v. New York, Lake Erie & Western R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133 ..... 510
Reinken v. Fuehring, 130 Ind. 382, 30 N. E. 414, 15 L. R. A. 624, 30 Am. St. Rep. 247..... 620
Republic Iron & Steel Co. v. State (Ind.), 66 N. E. 1005... 320
Respublica v. Dennie, 4 Yeates 267, 2 Am. Dec. 402 .....471, 474
Respublica v. Duquet, 2 Yeates (Pa.) 483 ..... 141
Respublica v. Sparhawk, 1 Dall. 357 ..... 518, 534, 536
Revell v People, 177 Ill. 468, 52 N. E. 1052, 43 L. R. A. 790, 69 Am. St. Rep. 257 ..... 408
Rex v. Carlile, 6 C. & P. 636.... 168
Rex v. Dean of Asaph, 3 T. R. 428 ..... 471
Rex v. Pasmore, 3 T. R. 199.. 361
Rex v. Webb, 14 East. 406.... 481
Rex v. Young and Pitts, 1 Burr. 556 ..... 654
Reynolds v. Plumbers' Material Protective Association, 30

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Miscel. (N. Y.) 709, 63 N. Y. Suppl. 303 ..... 301
Reynolds v. State, 73 Ala. 3.... 454
Reynolds v. United States, 98 U. S. 145 .....460, 467, 468
Rhodes v. Iowa, 170 U. S. 412. ..... 76, 81, 232
Rice v. Foster, 4 Harrington (Del.) 479 ..... 217
Rice v. Winslow, 180 Mass. 500, 62 N. E. 1057 ..... 201
Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457 ..... 353
Richmond, City of, v. Dudley, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, 28 Am. St. Rep. 180 ..... 643
Richmond v. Foss, 77 Me. 590, 1 Atl. 830 ..... 274
Richmond and Alleghany Railroad Company v. Patterson Tobacco Co., 169 U. S. 311.... .....73, p. 69, 73, p. 70
Rickart v. People, 79 Ill. 85.... 456
Rideout v. Knox et al., 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560 ..... 63, p. 59, 182, 426
Rider v. United States, 178 U. S. 251 ..... 407, 549
Rigney v. Chicago, 102 Ill. 64. 508
Rippe v. Becker, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857. 666
Ritchie v. The People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315..... ..... 30, 313, 735
River Rendering Co. v. Behr, 77 Mo. 91, 46 Am. Rep. 6 ..... 522
Robbins v. Shelby County Taxing District, 120 U. S. 489.. ..... 74, 79, 294, 295, 718
Roberson v. State, 42 Fla. 233, 28 Sou. 424, 52 L. R. A. 751.. 90
Robert v. Powell, 168 N. Y. 411, 61 N. E. 699, 55 L. R. A. 775, 85 Am. St. Rep. 673..... 162
Roberts v. Boston, 5 Cush. 198. 610
Robertson v. Baldwin, 165 U. S. 275 ..... 329, 451
Robertson v. Commonwealth, 101 Ky. 285, 40 S. W. 920 ..... 170
Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239 ..... 702
Robinson, Clerk, v. Hamilton, 60 Ia. 134, 46 Am. Rep. 63..44, 613
Robinson v. Mayor and Aldermen of Franklin, 1 Humph. (Tenn.) 156, 34 Am. Dec. 625. 37
Robison v. Miner, 68 Mich. 549 ..... 210, 651
Roby v. Smith, 131 Ind. 342, 30 N. E. 1093, 15 L. R. A. 792, 31 Am. St. Rep. 439 .....706, 709
Rochester v. West, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659... ..... 118, 147, 182
Rockwell v. Nearing, 35 N. Y. 302 ..... 168
Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 493 ..... 712
Rogers Park Water Co. v. Fergus, 178 Ill. 571, 53 N. E. 363. 571
Rogers Park Water Co. v. Fergus, 180 U. S. 624 ..... 571
Rohan v. Sawin, 5 Cush. 281... 87
Rosedale, Town of v. Hanner, 157 Ind. 390, 61 N. E. 792.. 168
Rosenbaum v. Newbern, 118 N. C. 83, 32 L. R. A. 123..... 130
Rosenbloom v. State of Nebraska, 57 L. R. A. 922, 89 N. W. 1053 .....37, 289, 732
Rossmiller v. State, 114 Wis. 169, 89 N. W. 839, 58 L. R. A. 93 ..... 417
Rowe v. Yuba Co., 17 Cal. 61. 613
Rowland v. City of Greencastle, 157 Ind. 707, 62 N. E. 474, 58 N. E. 1031..... 33
Roxbury v. Boston & Maine R. Co., 6 Cush. 424 ..... 363
Ruch v. New Orleans, 43 La. Ann. 275, 9 So. 473 ..... 409

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Rucker v. State, 67 Miss. 328, 7 So. 223 ..... 186
Ruggles v. Illinois, 108 U. S. 526 ..... 362, 363, 379, 570
Ruggles v. Nantucket, 11 Cush. 433 ..... 534
Ruhstrat v. People of State of Illinois, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30....63, p. 59, 183, 729
Rumsey v. New York & N. E. R. Co., 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600 ..... 408
Rundle v. Delaware & Raritan Canal Co., 14 How. 80 ..... 576
Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321 ..... 372
Russell v. New York, 2 Den. 461 534
Rust v. Low, 6 Mass. 90..... 444
Ruth, Re, 32 Iowa 250..... 651
Ryall v. State, 78 Ala. 410.... 221
Ryers, Re, 72 N. Y. 1, 28 Am. Rep. 88 ..... 442
Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564 ..... 412
Sacramento, City and County, v. Crocker, 16 Cal. 119 ..... 38
Sadler v. Langham, 34 Ala. 311 427
Sage v. Mayor of New York, 154 N. Y. 61, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592 ..... 408
Salem v. Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650.. 521
St. Anna's Asylum v. New Orleans, 105 U. S. 362 ..... 568
St. Joseph v. Harris, 59 Mo. App. 122 ..... 225
St. Joseph, City of, v. Levin, 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577 .....43, 53
St. Louis v. Bell Telephone Co., 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370 ..... 374
St. Louis v. Dorr et al., 145 Mo. 466, 41 S. W. 1094, 42 L. R. A. 686, 68 Am. St. Rep. 575.23, 181
St. Louis v. Fischer, 167 Mo. 654, 67 S. W. 872 ..... 644
St. Louis v. Heitzeberg Packing & Provision Co., 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551, 64 Am. St. Rep. 516 ..... 177
St. Louis, City of, v. Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226.....23, 34, 181, 514, 613
St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo. 560..... 654
St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721 ..... 645
St. Louis v. Webber, 44 Mo. 547 641
St. Louis v. Western Union Tel. Co., 148 U. S. 92 ..... 165
St. Louis & San Francisco R. Co. v. Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452.... 384
St. Louis and S. F. R. v. Gill, 156 U. S. 649 ..... 551
St. Louis and San Francisco R. Co. v. James, 161 U. S. 545.. 718
St. Louis and San Francisco R. Co. v. Mathews, 165 U. S. 1... ..... 630, 727
St. Paul v. Gilfillan, 36 Minn. 298, 31 N. W. 49 ..... 177
St. Tammany Water Works Co. v. New Orleans Water Works Co., 120 U. S. 64 ..... 679
Salem v. Manyes, 123 Mass. 372 556
Salt Co. v. East Saginaw, 13 Wall. 373 ..... 568
Samuels v. County of Dubuque, 13 Iowa 536 ..... 613
Sanborn v. Benedict, 78 Ill. 309 199
San Diego Land &c. Co. v. National City, 174 U. S. 739.... 552
San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261 ..... 382, 553
Sands v. Manistee River Improvement Co., 123 U. S. 288.. 661

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Sanford v. Catawassa, 24 Pa. St. 278 ..... 395
Santo v. State, 2 Iowa 165, 63 Am. Dec. 487 ..... 214
Sarris v. Commonwealth, 83 Ky. 327 ..... 59, 222, 223
Savannah v. Mulligan, 95 Ga. 323, 22 S. E. 621, 29 L. R. A. 303, 51 Am. St. Rep. 86.... 521
Savannah and Ogeechee Canal Co. v. Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43. .....63, p. 61
Schaezlin et al. v. Cabaniss, Judge, 135 Cal. 466, 67 Pac. 755, 87 Am. St. Rep. 122..... 34
Schehr v. Detroit, 45 Mich. 626, 7 N. W. 799 ..... 427
Schenck v. Union Pacific Co., 5 Wyo. 430, 40 Pac. 840 ..... 629
Schlaudecker v. Marshall, 72 Pa. St. 200 ..... 209
Schoen Brothers v. City of Atlanta, 97 Ga. 697, 25 S. E. 380, 33 L. R. A. 804 .....34, 522
Scholle v. State, 90 Md. 729, 50 L. R. A. 411, 46 Atl. 326..... 673
Schollenberger v. Pennsylvania, 171 U. S. 1..... ...62, 69, 77, 84, 137, 145, 147, 283
School Trustees v. Tatman, 13 Ill. 27 ..... 668
Schultz v. Byers, 53 N. J. Law 442, 22 Atl. 514, 13 L. R. A. 569, 26 Am. St. Rep. 435..... 424
Schumacher et al. v. The City of New York, 166 N. Y. 103, 59 N. E. 773 ..... 47
Schwuchow v. Chicago, 68 Ill. 444 ..... 582
Scott v. Donald, 165 U. S. 58... ..... 76, 82, 233
Scott v. Lunt, 7 Pet. 596..... 370
Scott v. State, 39 Ga. 321..... 697
Scranton, Re, 74 Ill. 161 ..... 566
Scranton v. Wheeler, 179 U. S. 141 .....404, 408, 509
Scrip Bill, Re, 23 Colo. 504, 48 Pac. 512 ..... 320
Sears v. Cottrell, 5 Mich. 251.. 20
Sears v. Gallatin County, 20 Mont. 462, 52 Pac. 204, 40 L. R. 405 ..... 614
Seidenbender v. Charles, 4 S. & R. 151, 8 Am. Dec. 682 ..... 197
Selden v. Overseers, 11 Leigh. 132 ..... 594
Selectmen v. Murray, 16 Pick. 121 ..... 141
Senate of Happy Home Club v. Alpena Co., 99 Mich. 117, 57 N. W. 1101, 32 L. R. A. 144.. 227
Sentell v. New Orleans & C. R. Co., 166 U. S. 698 ..... 421, 526
Sessions v. Crunkleton, 20 Oh. St. 349 ..... 442
Shaffer v. Union Mining Co., 55 Md. 74 ..... 320
Shanley v. Wells, 71 Ill. 78.... 99
Shepperd v. Sumpter County Commissioners, 59 Ga. 535, 27 Am. Rep. 394 ..... 328
Sherlock v. Stuart, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580. ..... 210, 651
Sherman v. Baker, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717 ... 369
Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577 ..... 427
Sherman v. Sherman, 18 R. I. 504, 30 Atl. 459 ..... 576
Sherman v. Smith, 1 Black, 587. 567
Shields v. Ohio, 95 U. S. 319.. ..... 362, 363
Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318 ... 616
Shipman v. State Live Stock Commissioners, 115 Mich. 488, 73 N. W. 817..... 521
Shirk v. La Fayette, 52 Fed. 857 706
Shively v. Bowlby, 152 U. S. 1. 403
Shobert, ex parte, 70 Cal. 632, 11 Pac. 786, 59 Am. Rep. 432.. 198
Short v. Bullion, etc., Co., 20

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Utah 20, 57 Pac. 720, 45 L. R. A. 603 .....155, 316
Shreveport v. Levy, 26 La. Ann. 671, 21 Am. Rep. 553 ..... 470
Shrieve v. Stokes, 8 B. Mon. (47 Ky.) 453, 48 Am. Dec. 401 ... 424
Shriver v. Stephens, 20 Pa. St. 138 ..... 444
Shuman v. City of Ft. Wayne, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378 ..... 38
Siebold, Ex Parte, 100 U. S. 371 ..... 65
Sifers v. Johnson, 7 Idaho 798, 65 Pac. 709, 54 L. R. A. 785.. 171
Sigel v. Jebb, 3 Stark. 1 ..... 192
Simon v. Craft, 182 U. S. 427... 252
Simon's Executors v. Gratz, 2 Pa. 412 ..... 469
Sinclair v. State, 69 N. C. 47.. 710
Sing Lee, Ex Parte, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218 ..... 645
Singer v. Maryland, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551.. 646
Singer Mfg. Co. v. Fleming, 39 Neb. 679, 58 N. W. 226, 23 L. R. A. 210 ..... 301
Sinking Fund Cases, 99 U. S. 727 ..... 363
Sinnot v. Davenport, et als., Commissioners of Pilotage of Bay and Harbor of Mobile, 22 How. 227 ..... 41
Sinsheimer v. United Garment Workers, 77 Hun. 215, 28 N. Y. Supp. 321 ..... 326
Sioux Falls v. Kirby, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621. 643
Skaneateles, etc., Water Company v. Skaneateles, 161 N. Y. 154, 46 L. R. A. 687, 55 N. E. 562 ..... 677, 701
Skaneateles, etc., Water Company v. Skaneateles, 184 U. S. 354 ..... 677, 701
Slaughter House Cases, 16 Wall. 36 ....219, 577, 609, 669, 671, 680
Slosser v. Salt River Valley Canal Co. (Ariz.), 65 Pac. 332 ..... 417
Smiley v. McDonald, 42 Neb. 5, 60 N. W. 355, 27 L. R. A. 540, 47 Am. St. Rep. 691 ..... 670
Smith, Ex Parte, 38 Cal. 702, ..... 244, 703
Smith, Ex Parte, 135 Mo. 223, 68 S. W. 628, 33 L. R. A. 606, 58 Am. St. Rep. 576 ..... 457
Smith, Re, 146 N. Y. 68, 40 N. E. 497, 28 L. R. A. 820, 48 Am. St. Rep. 769 ..... 446
Smith v. Alabama, 124 U. S. 465 ..... 73, 116
Smith v. Arnold, 106 Mass. 269. 274
Smith v. Brooklyn, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664 ..... 425
Smith v. Chamberlain, 38 S. C. 529, 17 S. E. 371, 19 L. R. A. 710 ..... 695
Smith v. Johnson, 76 Pa. St. 191 444
Smith v. Lane, 24 Hun 632... 133
Smith v. Maryland, 18 How. 71. 525
Smith v. People, 65 Ill. 375.... 252
Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393 ..... 408
Smith v. St. Louis and Southwestern Railway Co., 181 U. S. 284 .....77, 136, 138
Smith v. State, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404.516, 635
Smith v. State, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432.. 699
Smith v. Turner (Passenger Cases), 7 How. 283.....2, 45, 271
Smyth v. Ames, 169 U. S. 466.. ..... 73, 384, 550, 553, 554, 611
Snell, In re, 58 Vt. 207..... 193
Snell v. Cincinnati Street R. R. Co., 60 Oh. St. 256, 54 N. E. 270 ..... 714
Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723 ..... 425
Soby v. People, 31 Ill. App. 242 202

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Society for the Prop. of the Gospel v. New Haven, 8 Wh. 464.. 595
Soon Hing v. Crowley, 113 U. S. 703 ..... 723, 736
Soper v. Harvard College, 1 Pick. 177, 11 Am. Dec. 159 .. 267
Soules v. Robinson, 158 Ind. 97, 60 N. E. 726, 62 N. E. 999.. 252
South Covington &c. Street Car Co. v. Berry, 93 Ky. 43, 15 L. R. A. 604..... 116
South and North Alabama R. Co. v. Morris, 65 Ala. 193 .... 727
South Eastern Ry. Co. v. Railway Commissioners, L. R. 6 Q. B. Div. 586 ..... 395
Sparf v. United States, 156 U. S. 129 ..... 473
Specht v. Commonwealth, 8 Pa. St. 312, 49 Am. Dec. 518 ..185, 470
Spencer, Town of v. Andrew, 82 Ia. 14, 47 N. W. 1007, 12 L. R. A. 115.....163, 581
Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320 ..... 476, 477
Spiller v. Woburn, 12 Allen, 127 463
Spinney, Ex Parte, 10 Nev. 323. ..... 646, 684, 711
Spraigue et als. v. Thompson, 118 U. S. 90.....72, 117, 135
Spring v. Hyde Park, 137 Mass. 554, 50 Am. Rep. 334 .508, 511, 512
Spring Valley Water Works v. Schottler, 110 U. S. 347..... 376
Springfield, City of, v. Jacobs, 73 S. W. 1097 ..... 292
Springfield v. Springfield Street R. Co., 182 Mass. 41, 64 N. E. 577 ..... 576
Springfield R. Co. v. Springfield, 85 Mo. 647 ..... 576
Stanley v. Colt, 5 Wall. 119.... 590
Stanley v. Stanley, 26 Me. 191. 567
Stanton v. Allen, 5 Denio (N. Y.) 434, 49 Am. Dec. 282..347, 354
Stark v. Miller, 3 Mo. 470.... 668
State v. Adams, 44 Mo. 570.597, 599
State v. Addington, 2 Bailey L. 516, 23 Am. Dec. 150 ..... 104
State v. Addington, 77 Mo. 110. ..... 284, 541
State v. Addy, 14 Vroom 113, 39 Am. St. Rep. 547 ..... 108
State v. Allmond, 2 Houst. (Del.) 612.....214, 515, 539
State v. Ambs, 20 Mo. 214 .... 470
State v. Armstrong, 106 Mo. 395, 16 S. W. 604, 13 L. R. A. 419, 27 Am. St. Rep. 361 ..... 301
State v. Austin Club, 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500.. 456
State v. Bailey, 157 Ind. 324, 61 N. E. 730 ..... 264
State v. Barge, 82 Minn. 256, 84 N. W. 911, 53 L. R. A. 428.... ..... 244, 526, 542
State v. Barnes, 32 S. C. 14, 10 S. E. 611, 6 L. R. A. 743, 17 Am. St. Rep. 832 ..... 104
State v. Beardsley, 108 Ia. 396, 79 N. W. 138 ..... 407
State v. Benadom, 79 Ia. 90, 44 N. W. 218 ..... 223
State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117 ..... 162
State v. Berlin, 21 S. C. 292, 52 Am. Rep. 677 ..... 688
State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26 ..... 96
State v. Billings, 55 Minn. 467, 57 N. W. 794, 43 Am. St. Rep. 525 ..... 254
State v. Board of Commissioners of Polk County, 87 Minn. 325. 441
State v. Board of Health of St. Louis, 16 Mo. App. 8 .....176, 529
State v. Bogardus, 4 Mo. App. 215 ..... 249
State v. Bohemier, 96 Me. 257, 52 Atl. 643 ..... 711
State v. Bonner, 2 Head. 135.. 722
State v. Boston Club, 45 La. Ann. 585, 12 So. 895, 20 L. R. A. 185 ..... 456

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

State v. Botkin, 71 Iowa 87, 32 N. W. 185, 60 Am. Rep. 780. ..... 246, 722
Steele v. Brannan, 41 L. J. M. C. 85 ..... 237
State v. Brennan's Liquors, 25 Conn. 278 ..... 218
State v. Brown, 31 Me. 522..... 223
State v. Brunell, 29 Wis. 435.. 245
State v. Burgdoerfer, 107 Mo. 1, 17 S. W. 646, 14 L. R. A. 846. 729
State v. Burgoyne, 75 Tenn. 173, 40 Am. Rep. 60 ..... 564
State v. Buswell, 40 Neb. 158, 58 N. W. 728, 24 L. R. A. 68 ..... 133, 468
State v. Cadigan, 73 Vt. 245, 50 Atl. 1079, 57 L. R. A. 666, 87 Am. St. Rep. 714..... 720
State v. Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419 ..... 32
State v. Carey, 4 Wash. 424, 30 Pac. 729 ..... 152
State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765 ..... 623
State v. Cate, 58 N. H. 240..175, 464
State v. Certain Intoxicating Liquors and Cummings, Claimant, 76 Ia. 243, 41 N. W. 6, 2 L. R. A. 408 ..... 32
State v. Chandler, 2 Harr. 533. 465
State v. Chandler, 5 La. Ann. 489, 52 Am. Dec. 599 ..... 90
State v. Chicago, Milwaukee & Saint Paul R. Co., 68 Minn. 381, 71 N. W. 400, 38 L. R. A. 672, 64 Am. St. Rep. 482..... 397
State v. Cincinnati, 19 Oh. 178. 698
State v. City of New Orleans, 27 La. Ann. 521..... 123
State v. Claiborne, 19 Tenn. 331 691
State v. Clarke, 54 Mo. 117.... 245
State v. Conlon, 65 Conn. 478, 33 Atl. 519, 31 L. R. A. 55, 48 Am. St. Rep. 227 ..... 653
State v. Consadine, 16 Wash. 358, 47 Pac. 755 ..... 703
State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498. ..... 61, 291
State v. Corrigan Cons. St. R. Co., 85 Mo. 263, 55 Am. St. Rep. 361 ..... 576
State v. Corson, 67 N. J. L. 178, 50 Atl. 780 ..... 712
State v. Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 300 ..... 684, 711
State v. Creeden, 78 Ia. 556, 43 N. W. 673, 7 L. R. A. 295.... 231
State v. Crescent Creamery Company, 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. Rep. 464 ..... 32
State v. Cullins, 53 Kans. 100, 36 Pac. 56, 24 L. R. A. 212.... 722
State v. Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818 ..... 60, 198, 293
State v. Davis, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640 53
State v. Divine, 98 N. C. 778, 4 S. E. 477.....637, 688
State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649 ..... 331
State v. Donaldson, 41 Minn. 74, 42 N. W. 781 ..... 149, 650
State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713 ..... 698
State v. Dupaquier, 46 La. Ann. 577, 15 So. 375, 26 L. R. A. 162, 49 Am. St. Rep. 334..... 519
State v. Easton Social Club, 73 Md. 97, 20 Atl. 783, 10 L. R. A. 64 ..... 456
State v. Edens, 85 N. C. 522..33, 168
State v. Edwards, 86 Me. 102, 29 Atl. 947, 25 L. R. A. 505, 41 Am. St. Rep. 528 .....376, 378
State v. Essex Club, 53 N. J. L. 99, 20 Atl. 769 ..... 456
State v. Fagan, 22 La. Ann. 545 669
State v. Fairfield, 37 Me. 517.. 539
State v. Fire Creek Coal & Coke Co., 33 W. Va. 188..320, 735

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

State v. Fiske, 9 R. I. 94..... 643
State v. Fleming, 32 Kans. 588, 5 Pac. 19 ..... 223
State v. Forcier, 65 N. H. 42, 17 Atl. 577 ..... 646
State v. Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339..58, p. 53
State v. Foster, 21 R. I. 251, 43 Atl. 66, 50 L. R. A. 339 ..... 292
State v. Frederick, 45 Ark. 347, 55 Am. Rep. 555 ..... 735
State v. Fulker, 43 Kan. 237, 22 Pac. 1020, 7 L. R. A. 183 .... 231
State v. Gallagher, 4 Mich. 244. 214
State v. Garbroski, 111 Ia. 496, 56 L. R. A. 570, 82 Am. St. Rep. 524 ..... 497, 732
State v. Gardner, 58 Oh. St. 599, 41 L. R. A. 689, 51 N. E. 136, 65 Am. St. Rep. 785 ..... ..... 493, 497, 646, 732
State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.. 52
State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42 ..... 697
State v. Gilliland, 51 W. Va. 278, 41 S. E. 131, 57 L. R. A. 426, 90 Am. St. Rep. 793.... 109
State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863...320, 735
State v. Gravett, 65 Ohio State 289, 62 N. E. 325, 55 L. R. A. 791, 87 Am. St. Rep. 605...152, 546
State v. Green, 112 Ind. 462, 14 N. E. 352 ..... 711
State v. Gregory, 83 Mo. 123, 53 Am. Rep. 565 ..... 647
State v. Gritzner, 134 Mo. 512, 36 S. W. 39 ..... 201
State v. Guinness, 16 R. I. 401, 16 Atl. 910 ..... 32
State v. Gurney, 37 Me. 156, 58 Am. Dec. 782 ..... 214
State v. Haberle, 72 Iowa 138, 33 N. W. 461 ..... 245
State v. Haines, 30 Me. 45..... 193
State v. Hairston, 63 N. C. 451. 697
State v. Hall, 32 N. J. L. 158.. ..... 192, 193
State of Vermont v. Harrington, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100 ..... .....39, 40, 58, p. 53, 292, 653
State v. Hartfiel, 24 Wis. 60.... 635
State v. Hartford, New Haven R. Co., 29 Conn. 538 ..... 395
State v. Hathaway, 115 Mo. 36, 21 S. W. 1081 ..... 683
State v. Haun, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369.... ..... 320, 724, 735
State v. Hawley, 3 Mich. 330.. 214
State v. Hawthorn, 9 Mo. 389.. 556
State v. Hay, 126 N. C. 999, 49 L. R. A. 588, 35 S. E. 459, 78 Am. St. Rep. 691 ..... 447
State v. Hennepin County District Court, 42 Minn. 247, 44 N. W. 7, 7 L. R. A. 121 ..... 631
State v. Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446.. 163
State v. Hill, 126 N. C. 1139, 36 S. E. 326, 50 L. R. A. 473..641, 670
State v. Hinman, 65 N. H. 103, 18 Atl. 194, 23 Am. St. Rep. 22 684
State v. Hipp, 38 Oh. St. 199.. 37
State v. Hoboken, 33 N. J. L. 280 ..... 162
State v. Hogan, 63 Oh. St. 202, 58 N. E. 572, 52 L. R. A. 863, 81 Am. St. Rep. 626.... ..... 90, 99, 491, 702
State v. Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504.. 721
State v. Holcomb, 68 Ia. 107.. 141
State v. Holden, 14 Utah 71, 37 L. R. A. 103..... 131
State v. Holmes, 38 N. H. 225. 564
State v. Horacek, 41 Kans. 87, 21 Pac. 204, 3 L. R. A. 587... 456
State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, 59 Am. St. Rep. 515 ..... 701
State v. Hughes, 72 N. C. 25.. 174
State v. Hunt, 129 N. C. 686, 40

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

S. E. 216, 85 Am. St. Rep. 758. ..... 38, 328, 489
State v. Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529.158, 168
State v. Inhabitants of Freeport, 43 Me. 198 ..... 163
State v. Inhabitants of Trenton, 53 N. J. L. 132, 11 L. R. A. 410..... 116
State v. Interstate Savings Investment Co., 64 Oh. St. 283, 60 N. E. 220, 52 L. R. A. 530, 83 Am. St. Rep. 754 ..... 198
State v. Jackman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438 .. 620
State v. Jackson, 80 Mo. 175, 50 Am. Rep. 499 ..... 697
State v. Johnson, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662. 385
State v. Jones, 39 Vt. 370..... 454
State v. Judge of Circuit Court, 50 N. J. L. 585, 1 L. R. A. 86. 217
State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443 ..... 326, 735
State v. Justus, 85 Minn. 279, 88 N. W. 759, 89 Am. St. Rep. 550 327
State v. Kalb, 14 Ind. 403..... 635
State v. Karstendiek, 49 La. Ann. 1621, 22 So. 845, 39 L. R. A. 520 ..... 249
State v. Kean, 69 N. H. 122, 45 Atl. 256, 48 L. R. A. 102..... 162
State v. Kenilworth (N. J.), 54 Atl. 244 ..... 59
State v. Kingsley, 108 Mo. 135, 18 S. W. 994 ..... 731
State v. Kreuzberg, 114 Wis. 530, 90 N. W. 1098 ..... 326
State v. Laffer, 38 Iowa 422 ... 221
State v. Lancaster, 63 N. H. 267 710
State v. Larrimore, 19 Mo. 391. 223
State v. Layton, 160 Mo. 474, 61 S. W. 171, 83 Am. St. Rep. 487 ..... 32
State v. Lewis, 134 Ind. 250, 33 N. E. 1024, 20 L. R. A. 52 ... 527
State v. Loeffring, 61 Oh. St. 39, 46 L. R. A. 168..... 133
State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789.. ..... 320, 611, 735
State v. Ludington, 33 Wis. 107 626
State v. McCann, 21 Ohio St. 198 ..... 698
State v. McKee, 73 Conn. 18, 46 Atl. 409, 49 L. R. A. 542, 84 Am. St. Rep. 124 ..... 248, 472
State v. MacKnight (N. C.), 42 S. E. 580 ..... 133
State v. McMahon, 65 Minn. 453, 68 N. W. 77..... 727
State v. Madden, 81 Mo. 421 ... 613
State v. Mahner, 43 La. Ann. 496, 9 Sou. 480 ..... 643
State v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30 ..... 144, 520
State v. Manual, 4 Dev. (N. C.) 20 ..... 691
State v. Marsh, 37 Ark. 356 .... 232
State v. Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 61.... ..... 49, 58, p. 53, 284
State v. Martin, 34 Ark. 340... 221
State v. Marvin, 12 Iowa 499.. 240
State v. Medbury, 3 R. I. 138.. 712
State v. Miller, 50 Mo. 129.... 556
State v. Mitchell, 3 Blackf. (Ind.) 229 ..... 90
State v. Mitchell, 97 Me. 66, 53 Atl. 887 ..... 724
State v. Montgomery, 92 Me. 433, 43 Atl. 13 .....288, 289
State v. Moore, 104 N. C. 714.. 93
State v. Moore, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472.. .....38, 58, 328, 489
State v. Morris, 47 La. Ann. 1660, 18 So. 710 ..... 521
State v. Morris, 77 N. C. 512.. 563
State v. Mugler, 29 Kans. 256. 541
State v. Muncey, 28 W. Va. 494 221
State v. Myers, 42 W. Va. 822, 26 S. E. 539, 35 L. R. A. 844,

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

57 Am. St. Rep. 887.....
.....49, 58, p. 53, 284
State v. Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428..133, 468
State v. Napier, 63 S. C. 60, 41 S. E. 13 ..... 328, 489
State v. Nash, 97 N. C. 514, 2 S. E. 645 ..... 232
State v. Neidt (N. J. Ch.), 19 Atl. 318 ..... 176
State v. Neis, 108 N. C. 787, 13 S. E. 225, 12 L. R. A. 412.. 456
State v. Nelson, 52 Oh. St. 88, 39 N. E. 22, 26 L. R. A. 317.. 735
State v. Newark, 3 Dutch. (N. J.), 185 ..... 441
State v. New Orleans, C. and L. R. Co., 49 La. Ann. 1571, 22 So. 839, 39 L. R. A. 618..... 613
State v. Noyes, 47 Me. 189..363, 397
State v. Noyes, 30 N. H. 279... 193
State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627 ..... 422
State v. Olympic Club, 46 La. 935, 15 So. 190, 24 L. R. A. 452 248
State v. Orr, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279...522, 670
State v. Paul, 5 R. I. 185.....
..... 214, 515, 539
State v. Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000..
..... 502, 735
State v. Pennoyer, 65 N. H. 113, 18 Atl. 878, 5 L. R. A. 709..133, 684
State v. Peters, 43 Ohio St. 629, 4 N. E. 81 ..... 105
State v. Petit, 74 Minn. 376, 77 N. W. 225 ..... 735
State v. Porter, 112 N. C. 887, 16 S. E. 915 ..... 249
State v. Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854. 185
State v. Rand, 51 N. H. 361, 12 Am. Rep. 127 ..... 722
State v. Randolph, 23 Oregon 74, 31 Pac. 201, 17 L. R. A. 470, 37 Am. St. Rep. 655 ..... 684
State v. Ray, 63 N. H. 406, 56 Am. Rep. 529 ..... 261
State v. Ray, 131 N. C. 814, 42 S. E. 960 ..... 186
State v. Read, 12 R. I. 137..175, 464
State v. Reid, 1 Ala. 612, 35 Am. Dec. 44 ..... 90
State v. Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438.. 526
State v. Rodman, 58 Minn. 393, 59 N .W. 1098 ..... 419, 422, 516
State v. Rohart, 83 Minn. 257, 54 L. R. A. 947 ..... 168
State v. Ryan, 70 Wis. 676, 36 N. W. 823 ..... 227
State of Iowa v. Santee, 111 Ia. 1, 53 L. R. A. 763, 82 Am. St. Rep. 489 ..... 34, 673
State v. Sargent, 45 Conn. 358.
..... 406, 576
State v. Sarradat, 46 La. Ann. 700, 15 So. 87, 24 L. R. A. 584.
..... 641, 667
State v. Schlemmera, 42 La. Ann. 1166, 10 L. R. A. 135... 127
State v. Schlenker, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. Rep. 360.. 32
State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756 .....219, 364, 401
State v. Sharpless (Wash.), 71 Pac. 737 ..... 494
State v. Sherod, 80 Minn. 446, 83 N. W. 417, 50 L. R. A. 660, 81 Am. St. Rep. 268 ..... 41
State v. Sinks, 42 Oh. St. 345..37, 207
State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344 ..... 280
State v. Snow, 81 Ia. 642, 47 N. W. 777, 11 L. R. A. 355.. 41
State v. Standish, 37 Kans. 643, 16 Pac. 66 ..... 454
State v. S. S. Constitution, 42 Cal. 578, 10 Am. Rep. 303.... 705
State v. Steele, 106 N. C. 766, 11 S. E. 478, 8 L. R. A. 516... 386

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

State v. Stovall, 103 N. C. 416, 8 S. E. 900 ..... 175, 464
State v. Stucker, 58 Iowa 496.. 232
State v. Taft, 118 N. C. 1190, 32 L. R. A. 122..... 130
State v. Taylor, 55 Oh. St. 61, 44 N. E. 513 ..... 360
State v. Tenant, 110 N. C. 609, 14 S. E. 387, 15 L. R. A. 423, 28 Am. St. Rep. 715 ..... 643
State v. Thompson, 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950, 83 Am. St. Rep. 468...195, 651, 730
State v. Topeka, 36 Kans. 76, 12 Pac. 310, 59 Am. Rep. 529.. 421
State v. Travelers' Insurance Company, 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138 ..... 707
State v. Tutty, 41 Fed. 753, 7 L. R. A. 50 ..... 697
State v. Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119 ..... 133, 684
State v. Vankirk, 27 Ind. 121.. 89
State v. Van Doran, 109 N. C. 864, 14 S. E. 32.....133, 711
State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627 ..... 248, 472
State v. Vineland, 56 N. J. L. 474, 23 L. R. A. 685..... 160
State v. Walker, 36 Kan. 297, 13 Pac. 279, 59 Am. Rep. 556 ... 241
State v. Walruff, 26 Fed. 178... 540
State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L. R. A. 231. ..... 195, 730
State v. Ward, 41 Fed. 753, 7 L. R. A. 50 ..... 697
State v. Weir, 33 Iowa 134, 11 Am. Rep. 115 ..... 217
State v. Wheeler, 25 Conn. 290.. 214
State v. White, 64 N. H. 48, 5 Atl. 828 ..... 468
State v. Wiggin, 64 N. H. 508, 15 Atl. 128, 1 L. R. A. 56 .... 710
State v. Williams, 30 N. J. L. 102 ..... 245, 626
State v. Williams, 32 S. C. 123, 10 S. E. 876 ..... 451
State v. Wilson, 61 Kans. 32, 60 Pac. 1054, 47 L. R. A. 71..44, 394
State v. Wilson, 43 N. H. 415, 82 Am. Dec. 163 ..... 176, 529
State v. Woodman, 26 Mont. 348, 67 Pac. 1118 ..... 722
State v. Woodward, 89 Ind. 110 563
State of Indiana v. Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378 ..... 22
State v. Wordin, 56 Conn. 216, 14 Atl. 801 ..... 613
State v. Workman, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600 95
State v. Wray, 72 N. C. 253.... 223
State v. Zeno, 79 Minn. 80, 81 N. W. 748, 48 L. R. A. 88, 79 Am. St. Rep. 422.....494, 646
State ex rel. Monnett v. Adams, 58 Oh. St. 612, 51 N. E. 135, 41 L. R. A. 727, 65 Am. St. Rep. 792 ..... 701
State ex rel. George v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345 ..... 218, 666
State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765 ..... 494, 611
State ex rel. Star Publishing Co. v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368 ..... 386
State ex rel. Chapman v. Board of Medical Examiners, 34 Minn. 387, 26 N. W. 123 ..... 546
State ex rel. Auburn School District v. Boyd, 63 Neb. 829, 89 N. W. 417, 58 L. R. A. 108.. 37
State ex rel. Curtis v. Brown and Sharpe Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 826.. ..... 320, 715
State ex rel. Monnett v. Buck-

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

eye Pipe Line Co., 61 Oh. St. 520, 56 N. E. 464 ..... 355
State ex rel. Adams v. Burdge, 95 Wis. 390, 70 N. W. 347, 37 L. R. A, 157, 60 Am. St. Rep. 123 ..... 447
State ex rel. Ossenkop v. Cass County Commissioners, 12 Neb. 54, 10 N. W. 571..... 651
State ex rel. Corcoran v. Chapel, 64 Minn. 130, 66 N. W. 205.. 419
State ex rel. Tompkins v. Chicago, St. P., M. & O. R. Co., 12 S. D. 305, 81 N. W. 503, 47 L. R. A. 569 ..... 395
State ex rel. Coffey v. Chittenden, 112 Wis. 569, 88 N. W. 587 ..... 647
State ex rel. Bruns v. Clausmeier et al., 154 Ind. 599, 57 N. E. 541, 50 L. R. A. 73, 77 Am. St. Rep. 511 ..... 103
State ex rel. Wood v. Consumers Gas Trust Co., 157 Ind. 345, 61 N. E. 674..... 387
State ex rel. Alwater v. Delaware, Lackawanna and Western R. Co., 48 N. J. L. 55, 2 Atl. 803, 57 Am. Rep. 543... 387
State ex rel. Garrabad v. Dering, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 943.....468, 643, 729
State ex rel. Weiss v. District Board, 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 733, 20 Am. St. Rep. 41 ..... 463
State ex rel. Alexander v. Elizabeth, 56 N. J. L. 71, 28 Atl. 51, 23 L. R. A. 525 ..... 687
State ex rel. Witter v. Forkner, 94 Iowa 1, 62 N. W. 772, 28 L. R. A. 206 ..... 217
State ex rel. Att'y Gen'l v. Guilbert, 56 Oh. St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756..... 435
State ex rel. Weideman v. Horgan, 55 Minn. 183, 56 N. W. 688 ..... 284
State ex rel. Corwin v. Indiana & Ohio Oil Gas Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579 ..... 420
State ex rel. Ives v. Kansas Central R. R. Co., 47 Kans. 497, 28 Pac. 208 ..... 387, 395
State ex rel. Bethell v. Kilvington, 100 Tenn. 227, 41 L. R. A. 284, 45 S. W. 579 ..... 262
State ex rel. Johnson v. Lutz, 136 Mo. 633, 38 S. W. 323 ... 647
State ex rel. Graham v. McMahon, 65 Minn. 453, 68 N. W. 77 ..... 727
State ex rel. Columbia Club v. McMaster, 35 S. C. 1, 14 S. E. 290, 28 Am. St. Rep. 826..... 456
State ex rel. Remley v. Meek, 112 Ia. 338, 84 N. W. 3, 51 L. R. A. 414, 89 Am. St. Rep. 342 ..... 407, 418
State ex rel. Childs v. Minnetonka, 57 Minn. 526, 59 N. W. 315, 25 L. R. A. 755 ..... 688
State ex rel. St. Louis Underground Service Co. v. Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515 678
State ex rel. Field v. City of New Orleans, 27 La. Ann. 521. 446
State ex rel. Bayles v. Newton, 50 N. J. L. 549, 18 Atl. 77.... 284
State ex rel. Waterbury v. Newton, 50 N. J. L. 534, 14 Atl. 604 ..... 284
State ex rel. Attorney General v. Peters, 43 Ohio St. 629, 4 N. E. 81 ..... 105
State ex rel. Walker v. Orleans, Judge, 39 La. Ann. 132, 1 So. 437..... 185
State ex rel. Marion v. Reynolds, 14 Mont. 383, 36 Pac. 449 ..... 703

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

State ex rel. Duensing v. Roby, 142 Ind. 268, 41 N. E. 145, 33 L. R. A. 213 ..... 194
State ex rel. Jennison v. Rogers, 87 Minn. 130, 58 L. R. A. 663 ..... 436
State ex rel. Bell v. St. Louis Club, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573 ..... 546
State ex rel. Freeman v. Scheve (Neb.), 93 N. W. 169..... 463
State of Minnesota ex rel. Minces v. Schoenig, 72 Minn. 528, 75 N. W. 711.....39, 58, 292
State ex rel. Attorney General v. Schweichardt, 109 Mo. 496, 19 S. W. 47 ..... 670
State ex rel. Attorney General v. The Simmons Hardware Company, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676 ..... 53
State ex rel. Board of Transp. v. Sioux City, O. and W. R. Co., 46 Neb. 682, 65 N. W. 766, 31 L. R. A. 47 ..... 394
State ex rel. Watson v. Standard Oil Company, 49 Oh. St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541..... 350
State ex rel. Bishop v. State Board of Corrections, 16 Utah 478, 52 Pac. 1090 ..... 105
State, ex rel. Luria, v. Wagener, 69 Minn. 206, 72 N. W. 67, 38 L. R. A. 677.....289, 497, 732
State ex rel. Atty. Gen. v. Waters-Pierce Oil Co. (Tex.), 67 S. W. 1057 .....356, 734
State ex rel. Burroughs v. Webster, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212 ..... 543
State ex rel. O'Connor v. Wolfer, 53 Minn. 135, 54 N. W. 1065, 19 L. R. A. 783, 39 Am. St. Rep. 582 ..... 107
State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420...219, 364, 401
State on Complaint of Zehner v. Vankirk, 27 Ind. 121 ..... 89
State ex rel. Freeman v. Zimmerman, 86 Minn. 353, 90 N. W. 783, 58 L. R. A. 78..... 447
State to the use of the School Fund of Gentry County v. The Wabash, St. Louis and Pacific R. Co., 83 Mo. 144... 395
Stearns v. Minnesota, 179 U. S. 223 .....568, 579
Steele v. Brannan, 41 L. J. M. C. 85 ..... 237
Stegenga, In re (Mich.), 94 N. W. 385..... 99
Stein v. Bienville Water Supply Co., 141 U. S. 67..... 675
Stephen v. Reynolds, 6 N. Y. 454 371
Stevens v. Patterson & Newark R. Co., 34 N. J. Law 532, 3 Am. Rep. 269 ..... 408
Stevens v. State, 2 Ark. 291, 35 Am. Dec. 72 ..... 193
Stewart v. Salamon, 94 U. S. 434 560
Stickrod v. Commonwealth, 86 Ky. 285, 5 S. W. 580..516, 539, 687
Stimson Mill Co. v. Braun, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116.. 626
Stockton v. City of Newark, 42 N. J. Eq. 531, 9 Atl. 203.... 565
Stokes & Gilbert v. Corporation of New York, 14 Wend. 87.. 274
Stone v. Farmers' Loan & Trust Co. (Railroad Commission Cases), 116 U. S. 307..63, 380, 570
Stone v. Graves, 145 Mass. 353, 13 N. E. 906 ..... 735
Stone v. Mayor, 25 Wend. 157. 534
Stone v. Mississippi, 101 U. S. 814.....24, 362, 563, 674
Stone v. Wisconsin, 94 U. S. 181 ..... 379, 572
Story v. New York Elevated R. Co., 90 N. Y. 122, 43 Am. Rep. 146 ..... 510
Stoutenburgh v. Frazier, 16

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

App. Cas. D. C. 229, 48 L. R. A. 220 ..... 95
Stoutenburgh v. Hennick, 129 U. S. 141 ..... 295
Strauder v. West Virginia, 100 U. S. 303 ..... 691
Street v. Varney Electrical Supply Co. (Ind.), 66 N. E. 895.. 310
Stuart, City of, v. Cunningham, 88 Ia. 191, 55 N. W. 311, 20 L. R. A. 430 ..... 288
Sturges v. Crowinshield, 4 Wheat. 122 ..... 306, 555, 557
Sullivan v. Lafayette Co. Supervisors, 58 Miss. 790 ..... 668
Sullivan v. Oneida, 61 Ill. 242.. ..... 526, 528
Sullivan v. Oregon R. and N. Co., 19 Oregon 319, 24 Pac. 408 ... 629
Summerville v. Pressley, 33 S. C. 56, 8 L. R. A. 845..... 127
Surocco v. Geary, 3 Cal. 69, 58 Am. Dec. 385 ..... 534
Susquehanna Canal Co. v. Wright, 9 W. & S. 9, 42 Am. Dec. 312 ..... 576
Sutton v. Clarke, 6 Taunt. 29.. 507
Swearingen v. United States, 161 U. S. 446..... 636
Sweeny v. Hunter, 145 Pa. St. 363, 22 Atl. 653, 14 L. R. A. 594 ..... 301
Sweet v. Ballentine (Idaho), 69 Pac. 995..... 171
Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276 ..... 425
Swift v. Calnan, 102 Iowa 206, 71 N. W. 233, 37 L. R. A. 462, 63 Am. St. Rep. 443 ..... 443
Swift v. People ex rel. Ferris Wheel Co., 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470... ..... 212, 645, 652
Swigart v. People, 154 Ill. 284, 40 N. E. 432 ..... 195, 730
Tacoma v. Krech, 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68.. 735
Talbot v. Blacklege, 22 Ia. 572. 444
Tanner v. Albion, 5 Hill 121, 40 Am. Dec. 337 ..... 193
Tate v. Davidson, 143 Mass. 590, 10 N. E. 492 ..... 226
Tatman v. Strader, 23 Ill. 493. 194
Taunton v. Taylor, 116 Mass. 254 ..... 531
Taylor, Ex Parte, 87 Cal. 91, 25 Pac. 154 ..... 163
Taylor, Re, 48 Md. 28, 30 Am. Rep. 451 ..... 692
Taylor v. Plymouth, 8 Metc. 462 534
Taylor v. Porter, 4 Hill 140, 40 Am. Dec. 274 ..... 427
Taylor v. The State, 49 Ala. 19 99
Templar v. Michigan State Board of Examiners, 90 N. W. 1058 ..... 706
Ten Hour Law for Street Railway Corporations (R. I.), 54 Atl. 602.....316, 556, 683
Tenney, Chairman, etc., v. Lenz, 16 Wis. 566 ..... 39, 434
Terre Haute v. Kersey (Ind.), 64 N. E. 469..... 168
Terrett v. Taylor, 9 Cranch. 43. ..... 460, 594
Territory v. Ah Lim, 1 Wash. 156, 9 L. R. A. 395 ..... 455
Texas Central R. Co. v. Childress, 64 Tex. 346 ..... 629
Texas & Pacific Coal Co. v. Lawson, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919 ..... 354
Thorington v. Smith, 8 Wall. 1. 560
Thorpe v. Rutland and Burlington Railroad Company, 27 Vt. 140, 62 Am. Dec. 625..... ..... 24, 362, 565, 629
Thrift v. Elizabeth City, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427 ..... 574, 681
Thurber v. Martin, 2 Gray 394, 61 Am. Dec. 468 ..... 425
Thurlow v. Massachusetts (License Cases), 5 Howard 504..2, 76
Thurston v. Whitney, 2 Cush. 104 ..... 461

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Tide Water Co. v. Costar, 3 C. E. Green (N. J.) 54 ..... 441
Tiernan v. Rinker, 102 U. S. 123 ..... 76, 82, 232
Tierney v. New York Central & Hudson River R. R. Co., 76 N. Y. 305 ..... 387
Tilley v. St. Louis and S. F. Ry. Co., 49 Ark. 535, 6 S. W. 8 ... 628
Timm v. Harrison, 109 Ill. 593. 38
Todd v. Clapp, 118 Mass. 495.. 702
Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730 .....450, 452
Toledo, Wabash and Western Railway Company v. City of Jacksonville, 67 Ill. 37, 16 Am. Rep. 611.....63, p. 59, 145, 150
Toll Bridge Co. v. Flowers, 110 N. C. 381, 14 S. E. 918 ..... 668
Tomlinson v. City of Indianapolis, 144 Ind. 142, 43 N. E. 9, 36 L. R. A. 413 ..... 38, 168
Tomlinson v. Jessup, 15 Wall. 454 ..... 363, 568
Topeka v. Zufall, 40 Kansas 47, 19 Pac. 359, 1 L. R. A. 387.... 32
Tourne v. Lee, 8 Mart. (N. S.) 548, 20 Am. Dec. 260 ..... 170
Town of, see name of town.
Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 Am. St. Rep. 477 ..... 422
Trade Mark Cases, 100 U. S. 82 664
Traer v. State Board of Medical Examiners, 106 Ia. 559, 76 N. W. 833 ..... 546
Trageser v. Gray, 73 Md. 250, 20 Atl. 905, 9 L. R. A. 780, 25 Am. St. Rep. 587 ..... 706
Train et als. v. Boston Disinfecting Company, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113..31, 521
Transportation Co. v. Chicago, 99 U. S. 635 ..... 508
Trebilcock v. Wilson, 12 Wall. 687 ..... 559
Tredway v. Sioux City, etc., R. Co., 43 Ia. 527 ..... 637
Trent v. Cartersville Bridge Co., 11 Leigh 544..... 668
Trenton Potteries Co. v. Oliphant et al., 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78. Am. St. Rep. 612 ..... 349
Trenton Water Power Co. v. Raff, 36 N. J. L. 335..... 410
Trout v. Marvin, 62 Oh. St. 132, 56 N. E. 655 ..... 190, 626
Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561 ..... 162
Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365 ..... 590
Trustees of Dartmouth College v. Woodward, 4 Wheat. 518.. .....24, 361, 363, 561, 597
Trustees of Town of Paris v. Berry, 25 Ky. 483..... 620
Tucker v. Ferguson, 22 Wall. 527 ..... 568
Tugman v. Chicago, 78 Ill. 405. 687
Tullis v. Lake Erie and Western R. Co., 175 U. S. 348..... 715
Turner v. Maryland, 107 U. S. 38 .....75, 276, 277
Turner v. Nye, 154 Mass. 579, 28 N. E. 1048..... 413
Turpin v. Locket, 6 Call. 113.. ..... 460, 594
Tuthill, Re, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781..427, 442
Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398 ..... 412
Underwood v. Green, 42 N. Y. 140 ..... 522
Ungericht v. State, 119 Ind. 379, 21 N. E. 1082, 12 Am. St. Rep. 419 ..... 735
Union Central Life Insurance Co. v. Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504. ..... 637, 714, 727
Union Pacific R. Co. v. Porter, 38 Neb. 226, 56 N. W. 808 ... 632

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346.... 348
United States v. Bellingham Bay Boom Co., 176 U. S. 211..... 407
United States v. Bennett, 16 Blatch. 338 ..... 237
United States v. Buntin, 10 Fed. 730 ..... 698
United States v. Cassidy, 67 Fed. 698 ..... 341, 356
United States v. Clarke, 38 Fed. Rep. 732 ..... 237
United States v. Chesman, 19 Fed. 497 .....237, 238
United States v. Cruikshank, 92 U. S. 542 ..... 480, 611
United States v. Dewitt, 9 Wall. 41 ..... 135
United States v. E. C. Knight Company, 156 U. S. 1..... .....69, 79, 341, 342
United States v. Forty-three Gallons of Whiskey, 93 U. S. 188 ..... 67
United States v. Gettysburg Electric Railway Company, 160 U. S. 668 ..... 13, 183
United States v. Greenhut, 51 Fed. 205, 213 .....346, 353
United States v. Harmon, 45 Fed. 414 ..... 237
United States v. Harris, 106 U. S. 629 ..... 693
United States v. Holliday, 3 Wall. 407 ..... 67
United States v. Kirby, 7 Wall. 482 ..... 158
United States v. Joint Traffic Association, 171 U. S. 505..355, 502
United States v. Jones, 109 U. S. 513 ..... 506
United States v. Lamkin, 73 Fed. 459 .....237, 453
United States v. Lynah, 188 U. S. 445 ..... 409
United States v. Martin, 50 Fed. 918 .....237, 453
United States v. Moline, 82 Fed. 592 .....403, 406
United States v. Northern Securities Co., 120 Fed. 721..... 351
United States v. Pacific Railroad Co. 120 U. S. 227 ..... 536
United States v. Perkins, 163 U. S. 625 .....22, 269, 367
United States v. Realty Co., 163 U. S. 427 ..... 428
United States v. Russell, 13 Wall. 623 ..... 536
United States v. Smith, 45 Fed. 476 ..... 237
United States v. Stowell, 133 U. S. 1 ..... 627
United States v. Trans-Missouri Freight Association, 166 U. S. 290 ..... 354, 355
United States v. Waddell, 112 U. S. 76 ..... 693
United States v. Wightman, 29 Fed. 636 ..... 236
United States v. Wilson, 46 Fed. 748 ..... 108
United States v. Wong Kim Ark, 169 U. S. 649..... 691
United States v. Workingmen's Amalgamated Council, 54 Fed. 994 ..... 341, 356
United States v. Zucker, 161 U. S. 475 ..... 526
United States ex rel. Roop v. Douglass, 19 D. C. 99.....209, 654
University v. People, 99 U. S. 309 ..... 568
Updegraph v. Commonwealth, 11 S. & R. 394 ..... 465
Vance v. Vandercook Co., 170 U. S. 438 ..... 233
Vanderbilt v. Adams, 7 Cowen 349 ..... 175
Vanderhurst v. Tholcke, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267..... 158
Vanderpool v. Gorman, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. Rep. 601.. 716

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Van Deusen v. Newcomer, 40 Mich. 90 ..... 252
Vandine, Re, 6 Pick. 187, 17 Am. Dec. 351 ..... 168, 641
Van Horn v. People, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 159 ..... 434
Van Wormer v. The Mayor, etc., of Albany, 15 Wend. 262 ..... 521
Veazie Bank v. Fenno, 8 Wall. 533 ..... 58, p. 53
Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443.... 333
Vermont Loan and Trust Association v. Whithed, 2 N. D. 82, 49 N. W. 318 ..... 304
Village of Des Plaines v. Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524 ..... 250
Villavaso v. Barthet, 39 La. Ann. 247, 1 Southern 599 ..... 565
Virginia, Ex parte, 100 U. S. 339 ..... 693
Vise v. Hamilton Co., 19 Ill. 78. 613
Vogel v. Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491..... ..... 314, 321, 502, 735, 736
Voight v. Wright, 141 U. S. 62. .....77, 82, 138, 277
W. W. Cargill Co. v. Minnesota, 180 U. S. 452.....297, 493
Wabash, St. Louis and Pacific Railway Company v. Illinois, 118 U. S. 557 .....73, 79
Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188....141, 538, 685
Wadsworth v. Union Pacific R. Co., 18 Col. 600, 33 Pac. 515, 23 L. R. A. 812, 36 Am. St. Rep. 309 .....629, 637
Wahll, Re, 42 Fed. 822..... 236
Walker v. Cronin, 107 Mass. 555 333
Walker et als. v. The City of New Orleans, 31 La. Ann. 828.. 41
Wall, Ex parte, 48 Cal. 279, 17 Am. Rep. 425 ..... 217
Walla Walla v. Walla Walla Water Co., 172 U. S. 1 ..... 678
Wallace v. Georgia, Carolina & Northern R. Co., 94 Ga. 732, 22 S. E. 579..... 327
Wallace v. Richmond, 94 Va. 204, 26 S. E. 586, 36 L. R. A. 554 ..... 537
Wallace v. Western N. C. R. Co., 104 N. C. 442, 10 S. E. 552... 628
Walling v. Michigan, 116 U. S. 446 ..... 76, 82, 232
Wallis v. Day, 2 M. & W. 273.. 449
Walsh v. Dwight, 58 N. Y. S. 91, 40 App. Div. 513..... 346
Walters v. Pfeil, Moo. & Mal. 362 ..... 424
Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405 ..... 698
Ward v. State, 17 Oh. St. 32.... 192
Warren v. Tanner, 21 Ky. L. Rep. 1678, 56 S. W. 167, 49 L. R. A. 248 ..... 668
Washington Bridge Co. v. State, 18 Conn. 53 ..... 576
Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196... 418
Washington, etc., Toll Bridge Co. v. Commissioners of Beaufort, 81 N. C. 491 ..... 682
Waterhouse v. Comer, 55 Fed. 149 ..... 341
Waters v. People, 23 Colo. 33, 46 Pac. 112, 33 L. R. A. 836, 58 Am. St. Rep. 215 ..... 249
Waters v. Wolf, 162 Pa. St. 153, 29 Atl. 646, 42 Am. St. Rep. 815 ..... 626
Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936 ..... 356, 734
Watuppa Reservoir Co. v. Fall River, 147 Mass. 548, 18 N. E. 465, 1 L. R. A. 466 ..... 408, 576
Watuppa Reservoir Co. v. Fall River, 154 Mass. 305, 28 N. E. 257, 13 L. R. A. 255 ..... 408, 576

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Watuppa Reservoir Company v. Mackenzie, 132 Mass. 71 ..... 34
Way, In re, 41 Mich. 299, 1 N. W. 1021 ..... 99
Waye v. Thompson, L. R. 15 Q. B. D. 342 ..... 521
Weaver v. People, 33 Mich. 296.. 108
Webb v. Baird, 6 Ind. 13 ..... 613
Webber v. Harding, 55 Ind. 408 244
Webster v. Cambridge Female Seminary, 78 Md. 193, 28 Atl. 25 ..... 362, 599
Webster v. Sughrow, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100 ..... 369
Weise v. Smith, 3 Ore. 445, 8 Am. Rep. 621 ..... 409
Welch v. Cook, 97 U. S. 541.... 568
Welch v. Phelps and Bigelow Wind Mill Co., 89 Tex. 653... 346
Welch v. Stowell, 2 Dougl. (Mich.) 332 ..... 245, 250, 525
Weller v. Snover, 42 N. J. L. 341 527
Weller v. The State, 53 Ohio State 77, 40 N. E. 1001 ..... 32
Wellington, etc., R. Co. v. King, 91 U. S. 3 ..... 560
Wells, Ex parte, 18 How. 307.. 104
Welsh v. State, 126 Ind. 71, 9 L. R. A. 664 ..... 710
Welsh v. Wilson, 101 N. Y. 254, 4 N. E. 633, 54 Am. Rep. 698.. 172
Welton v. State of Missouri, 91 U. S. 275 ..... 74, 82, 294
Wenham v. State (Neb.), 91 N. W. 421, 58 L. R. A. 825.. .....312, 314, 317, 735
West v. Carter, 129 Ill. 249, 21 N. E. 782..... 192
West v. Emanuel, 198 Pa. 180, 47 Atl. 965, 53 L. R. A. 329 ..... 149
West Chicago Masonic Association v. Cohn, 192 Ill. 210, 61 N. E. 439, 55 L. R. A. 235.. 162
West River Bridge Co. v. Dix, 6 How. 507 ..... 587
West Wisconsin R. Co. v. Supervisors of Trempealeau County, 93 U. S. 595 ..... 568
Westchester, etc., R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744 695
Westerfield, Ex parte, 55 Cal. 550, 36 Am. Rep. 47.....317, 735
Western Granite Co. v. Knickerbocker, 103 Cal. 111, 37 Pac. 192 ..... 426
Western Union Telegraph Co. v. Call Publishing Co., 44 Neb. 326, 62 N. W. 506, 27 L. R. A. 622, 48 Am. St. Rep. 729 .... 389
Western Union Telegraph Company v. Call Publishing Company, 181 U. S. 92 ..... 73, 79
Western Union Telegraph Co. v. Pensacola, etc., Co., 96 U. S. 1 .....79, 719
Western Union Telegraph Co. v. Texas, 105 U. S. 460 ..... 717
Westervelt, executor, etc. v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160 ..... 20
Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731.... 422
Weston v. Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612 ..... 301
Weston v. Sampson, 8 Cush. 347, 54 Am. Dec. 764 ..... 405
Wetmore v. State, 55 Ala. 198.. 192
Wheaton v. Peters, 8 Pet. 590... 663
Wheeling and B. Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287 ..... 675
Wheeler v. Northern Colorado Irrigating Co., 10 Col. 582, 17 Pac. 487, 3 Am. St. Rep. 603.. 416
White v. City Council of Charleston, 2 Hill (S. C.) 571 ..... 534
White v. Godfrey, 97 Mass. 472 163
White v. Kent, 11 Ohio State 550 ..... 173
White Deer Creek Improvement Co. v. Sassaman, 67 Pa. St. 415 409

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

Whitebreast Fuel Co. v. People, 175 Ill. 51, 51 N. E. 853 ..... 394
Whittenton Mills v. Upton et als., 10 Gray (Mass.) 582, 71 Am. Dec. 681 ..... 350
Whitwell, Ex parte, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152 ..... 256
Wight v. United States, 167 U. S. 512 ..... 392
Wiggins v. The City of Chicago, 68 Ill. 372 ..... 40
Wilder v. Chicago and W. M. R. Co., 70 Mich. 382, 38 N. W. 289 727
Wilkins v. Jewett, 139 Mass. 29, 29 N. E. 214 ..... 443
Wilkinson v. Board of Children's Guardians, 158 Ind. 1, 62 N. E. 481..... 262
Wilkinson v. Rahrer, 140 U. S. 545 ..... 232
Wilkinson v. Stitt, 175 Mass. 581, 56 N. E. 830..... 192
Wilkinson v. Tousley, 16 Minn. 263 ..... 194
Williams v. Citizens' Enterprise Co., 25 Ind. App. 351, 57 N. E. 581 ..... 360
Williams v. Fears, 179 U. S. 270 ..... 74, 79, 328, 489
Williams v. Fears, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685... 489
Williams v. Mayor, etc., of New York, 105 N. Y. 419, 11 N. E. 829 ..... 406, 576
Williams v. Nelson, 23 Pick. 141, 34 Am. Dec. 45 ..... 412
Williams v. Parker, 188 U. S. 491 ..... 180
Williams v. People, 121 Ill. 84, 11 N. E. 881 .....133, 684
Williams v. State, 44 Ala. 41... 87
Williams v. Wingo, 177 U. S. 601 ..... 675
Williamson v. Price, 4 Mart. (N. S.) 399..... 625
Williamsport Passenger R. Co. v. Williamsport, 120 Pa. St. 1, 13 Atl. 496..... 576
Willow River Club v. Wade, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305 ..... 404, 417, 418
Wilmington & Weldon R. Co. v. King, 91 U. S. 3..... 560
Wilson et als. v. Blackbird Creek Marsh Company, 2 Pet. 245 ..... 72
Wilson v. Board of Trustees of Sanitary District of Chicago et al., 133 Ill. 443, 27 N. E. 203. 22
Wilson v. Eureka City, 173 U. S. 32 .....168, 644, 655
Wilson v. Iseminger, 185 U. S. 55 ..... 370
Wilson v. United Traction Co., 72 App. Div. 233, 76 N. Y. Suppl. 203 ..... 613
Wilson, Town of v. Weston, Town of, 48 Conn. 325..... 434
Winchester, etc., L. Turnpike Road Co. v. Croxton, 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177 ..... 362, 363, 570
Windisch-Muhlhauser Brewing Co. v. Bacom, 21 Ky. L. Rep. 928, 53 S. W. 520..... 301
Winget v. Quincy B. & H. Association, 128 Ill. 67, 21 N. E. 12 ..... 304
Winn v. State, 43 Ark. 151.... 221
Winona & St. Paul R. Co. v. Blake, 94 U. S. 180 ..... 379
Winslow v. Gifford, 6 Cush. 327. 518
Wisconsin, Minnesota and Pacific Railroad v. Jacobson, 179 U. S. 287 ..... 63, p. 59, 397
Witham v. Osborn, 4 Ore. 318, 18 Am. Rep. 287 ..... 427
Woh Lee, Re, 26 Fed. 471 ..... 643
Wong Wing v. United States, 163 U. S. 228 ..... 704
Wood v. Whitehead Brothers Co., 165 N. Y. 545, 59 N. E. 357 ..... 348

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[REFERENCES ARE TO SECTIONS.]

Wooden v. Shotwell, 23 N. J. L. 465 ..... 197
Woodruff v. Catlin, 54 Conn. 277, 6 Atl. 849 ..... 548, 631
Woodruff v. Kellyville Coal Co., 182 Ill. 480, 55 N. E. 550 .... 638
Woodruff v. Mississippi, 162 U. S. 291 ..... 309
Woodruff v. Parham, 8 Wall. 123 .....74, 81, 295
Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380 ..... 590
Woodson v. State, 69 Ark. 521, 65 S. W. 465 ..... 394
World v. State of Maryland, 50 Md. 49 ..... 96
Worthington Company, Matter of the, 62 N. Y. S. R. 115, 30 N. Y. Suppl. 361, 24 L. R. A. 110..... 237
Wreford v. The People, 14 Mich. 41 ..... 33, 141
Wright v. Cudahy, 168 Ill. 86, 48 N. E. 39 ..... 200
Wright v. Nagle, 101 U. S. 791 . 678
Wright v. Noell, 16 Kan. 601... 701
Wright v. People, 101 Ill. 126. ..... 222, 223
Wright v. The State of Maryland, 88 Md. 436, 41 Atl. 795. ..... 62, 147, 283
Wurts v. Hoagland, 114 U. S. 606 ..... 441
Wynehamer v. People, 13 N. Y. 378 ..... 214, 539
Yamataya v. Fisher, 189 U. S. 86 ..... 704
Yarbrough, Ex parte, 110 U. S. 651 ..... 693
Yates v. Brown, 8 Pick. 23..... 625
Yates v. Milwaukee, 12 Wis. 673 274
Yates v. Milwaukee, 10 Wall. 497 ..... 406, 576
Yeager, Ex parte, 11 Gratt. 655 ..... 209, 654
Yeomans v. Contra Costa, etc., Co., 44 Cal. 71 ..... 628
Yick Wo v. Hopkins, 118 U. S. 356 ..... 63, 134 610, 643, 655, 690, 700, 705, 706
Young v. Commonwealth (Va.), 45 S. E. 327.....60, 293
Young v. Harrison, 6 Ga. 130. 668
Youngblood v. Birmingham Trust and Savings Co., 95 Ala. 521, 12 So. 579, 20 L. R. A. 58, 36 Am. St. Rep. 245 .... 733
Youngblood et als. v. Sexton, 32 Mich. 406, 20 Am. Rep. 654.. 37
Younger v. Judah, 111 Mo. 303, 19 S. W. 1109, 16 L. R. A. 558, 33 Am. St. Rep. 527 .... 695
Zabriskie v. Hackensack &c. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.....395, 397
Zanone v. Mound City, 103 Ill. 552 .....209, 654
Zeigler v. South and North Alabama Railroad Company, 58 Ala. 594 ..... 20, 629

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# FIRST PART.

## NATURE AND GENERAL SCOPE OF THE POLICE POWER.

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CHAPTER

I. GOVERNMENTAL POWERS AND PUBLIC POLICY.

II. METHODS OF THE POLICE POWER.

III. THE FEDERAL GOVERNMENT AND THE POLICE POWER.

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# THE POLICE POWER.

## FIRST PART.

### NATURE AND GENERAL SCOPE OF THE POLICE POWER.

### CHAPTER I.

#### GOVERNMENTAL POWERS AND PUBLIC POLICY.

§ 1. **Division of governmental powers.**—Governmental powers are commonly distinguished according to the departments of government by which they are exercised, as legislative, executive, and judicial. This division is closely connected with the development of modern constitutional government, and has been distinctly recognised and made part of the fundamental law in nearly all American constitutions. It is a division of an administrative character based on principles of organisation, and has no logical or legal relation to different subject-matters or objects of government. The three departments set a check upon one another, and thus upon the government as a whole, and the separation of powers has therefore always been looked upon as a valuable safeguard of free institutions; but the division does not necessarily limit the substance of governmental powers and does not indicate the nature of such limitations as it may eventually bring about.

We recognise on the other hand that government consists of a number of powers differing from each other in object and content. There has never been an exhaustive classification of these powers, and only those have distinctive names which have been conspicuously the subject of constitutional contention or discussion. Thus there is no brief or comprehensive word to designate the power to make laws for the regulation of private rights, the power to define and punish crimes, or the power to enact codes of procedure; but the military power,



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the taxing power, the police power, the power of eminent domain, have become familiar terms in our constitutional law. Of these, the police power is the most comprehensive, and therefore necessarily the vaguest.

§ 2. **The term "police."**—The term police has never been clearly circumscribed. It means at the same time a power and function of government, a system of rules, and an administrative organisation and force. Blackstone couples public police and economy which he defines as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious and inoffensive in their respective stations."[1] He treats under this head of clandestine marriages, of bigamy, of wandering soldiers, of gypsies, of common nuisances (including disorderly houses, inns, plays and shows, lotteries, fireworks, eavesdroppers, common scolds), idleness, luxury, gaming, and the game laws. Offenses against public trade and against public health are treated separately from police. The influence of Blackstone's arrangement is noticeable in the legislation of those states which have made police one of the principal divisions of their statutory revisions.[2] An arrangement of this kind is simply a matter of convenience and has no legal significance. It would be impossible to discover any principle upon which these particular matters are brought together and separated from others. In the decisions of the courts we find the term police coupled with internal commerce and domestic trade; health and safety measures are commonly ascribed to it; but it is also made to include the establishment of courts of justice and the punishment of offenses, and the general tendency is to identify it with the whole of internal government and sovereignty, and to regard it as an undefined mass of legislation.[3]

[1] Blackstone IV. 162-175.

[2] The term police appears first as a division of legislation in the Revised Statutes of New York in 1829, Massachusetts adopted it in the Revision of 1836, it is now also found in Delaware, Iowa, New Hampshire, Ohio, Rhode Island, Washington, and Wisconsin.

[3] Gibbons v. Ogden, 9 Wh. 1, 204; License Cases, 5 How. 504, 583; New York v. Miln, 11 Pet. 102, 139; Passenger Cases, 7 How. 283, 424.

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§ 3. **The term "police power."**—It has been inferred from this vagueness of the term police, that the idea of the police power must be equally undefined, and a recent author has gone so far as to deny its existence, treating it as a fiction, and holding it equivalent to indefinite supremacy.[4] The inference is, however, unwarranted. As soon as the idea of the police became the centre and foundation of a governmental power, the exercise of which had to justify itself in the face of constitutional limitations, the courts were bound to use the term with greater care, and to attempt to define it. From the mass of decisions, in which the nature of the power has been discussed, and its application either conceded or denied, it is possible to evolve at least two main attributes or characteristics which differentiate the police power: it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion. It will be necessary to offer a few general observations upon these two points, bearing in mind that it is not by general statements, but only by a detailed examination of statutes and decisions that the power can be fully understood and defined. Such an examination will show what has been done and what has been approved by experience, what has been attempted and has failed, what has been surrendered, and what is aimed at and in process of being accomplished. It will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i. e., capable of development.

### A. THE POLICE POWER AS A MEANS OF FURTHERING THE PUBLIC WELFARE. § 4—21.

§ 4. In order to understand the police power with reference to its purpose, it is necessary to distinguish the great objects of government: the maintenance of national existence; the maintenance of right, or justice; and the public welfare.

§ 5. **Maintenance of national existence.**—The maintenance of national existence, including the relation to other states and the expansion of national power, involves the creation of an adequate governmental organisation, the management of for-

[4] **W. G. Hastings,** Development of Law as illustrated by the decisions relating to the Police Power of the state. Proceedings of the American Philosophical Society, Sept. 1900.

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eign relations through diplomatic intercourse, treaties, and legislation affecting foreign interests, the conduct of war, and the protection of the state against internal revolt and insurrection. The organising power is largely exercised by the constitution directly and otherwise forms part of the general legislative power, while appointment and removal of officers are regarded generally as executive functions. The international power is under the federal constitution reserved to the national government,[5] and is divided between the legislative and executive departments. The conduct of war and the suppression of insurrection call into play the military power of the government, vested largely in the executive. In the exercise of its international and military power the state is freed from many of the restraints under which it must conduct the peaceful government of its own citizens.[6]

§ 6. **Supply of ways and means.** — Closely associated with the maintenance of state existence is the supply of ways and means. In all its functions the government needs persons, funds, and material equipment. To obtain these, the state may under circumstances resort to the exaction of services, and to the taking of property for compensation. Most important, however, is the supply of financial ways and means, the collection and expenditure of revenue, which in every state forms one of the main departments of the government. It involves the management of public property with a view to income, the power to incur indebtedness, the appropriation of funds, and above all the taxing power, i. e., the power to impose pecuniary burdens according to some principle of apportionment and for public purposes.

§ 7. **The maintenance of right and the redress of wrong. — Civil and criminal justice.** — The fundamental canons of justice result from the common sense of right and wrong, of moral responsibility and the faith of obligations. They are applied to, and in their turn are affected by, established social and economic conditions, and the institutions of government, fami-

[5] Holmes v. Jennison, 14 Pet. 540.

[6] Federalist, Letter 31: "As the duties of superintending the national defence and of securing the public peace against force or domestic violence involves a provision for casualties and dangers to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community."

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ly, property, and individual liberty. The precise boundaries between different rights, and the meaning and effect of legal acts, are evolved from their nature and purpose by reason and logic. These, and the just remedies for the violation of rights, constitute the common law.

The normal operation of the rules of justice consists in their voluntary observance in the conflict of human interests. Their application in cases of doubt and controversy, and their enforcement in case of violation, calls, however, for authority and compulsion, and constitutes one of the chief functions of the state. This function is called the administration of civil and criminal justice.

The state may and often does formulate and enact rules and principles of justice in the form of statutes, and legislative activity may also be called for to remedy defects of the common law. Positive rules and regulations, which could not be evolved by reasoning, may, moreover, be required for the better ascertainment and protection of rights and the more perfect administration of justice, so in the matter of authenticating or recording legal acts. The great characteristic, however, of the principles of civil and criminal justice, is, that they do not appear as the dictates of government, but as the dictates of reason, and that their growth and development is, on the whole, free from the fluctuations and conflicts of policy which distinguish governmental activity of the class next to be considered.

§ 8. **Public welfare or internal public policy.**—The care of the public welfare, or internal public policy, has for its object the improvement of social and economic conditions affecting the community at large and collectively, with a view to bringing about "the greatest good of the greatest number." The organised activity of the community is based upon the fact or belief that certain conditions essential or favorable to all alike cannot be obtained at all or without great waste and difficulty by private effort, and also that in certain respects individual activity is anti-social, i. e., accomplishes its ends by sacrificing the interests of the mass or of great portions of the community. The state supplies the former defect by collective communal action, and meets the latter by restraint and compulsion exercised over individuals.

In so far as the prosperity of the community rests upon the

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efforts which each individual makes for himself, and in so far as without security of rights, free, fair and peaceful individual activity is impossible, justice is one of the chief elements of public welfare. Criminal justice moreover directly protects public or collective interests in important respects. Custom and a sense of propriety demand of the individual that he subordinate and adapt the exercise of his rights to manifest social interests and requirements, and the disregard of this obligation appears as a wrong. Thus most of the self-evident limitations upon liberty and property in the interest of peace, safety, health, order and morals are punishable at common law as nuisances. It is with reference to these obvious restraints that the maxim has been proclaimed: *sic utere tuo ut alienum non laedas.*

But no community confines its care of the public welfare to the enforcement of the principles of the common law. The state places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds; *and it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskilful, careless or unscrupulous.*[7]

[7] Formerly the distinction between justice (maintenance of private right) and policy (promotion of the public welfare) nearly coincided with the division of judicial or legislative and executive power. The following is quoted from Chief Baron Fleming's argument in Bates' case (1606): "The king's power is double, ordinary and absolute, and they have several laws and ends. That of the ordinary is for the profit of particular subjects, for the execution of civil justice, the determining of *meum;* and this is exercised by equity and justice in ordinary courts, and by the civilians is nominated *jus privatum,* and with us common law; and these laws cannot be changed without parliament; and although that their form and course may be changed and interrupted, yet they can never be changed in substance. The absolute power of the king is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is ap-

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**§ 9. Scope of internal public policy and welfare.**—The public welfare embraces a variety of interests, calling in different degrees for public care and control. They may be classified as follows: the primary social interests of safety, order, and morals; economic interests; and non-material and political interests.

**§ 10. The primary social interests: safety, order, and morals.**—In order that social life may exist, that human faculties may be developed, and the progress of civilisation be made possible, a certain minimum of physical well-being is necessary. This minimum varies in different periods, and rises with advancing civilisation until it includes a certain standard of comfort. Closely connected with physical well-being is a recognition of elementary moral standards, and a repression of at least the outward manifestations of vice and immorality. In so far as the maintenance of these physical and moral standards depends upon conditions affecting a considerable number of people alike, the government attempts to secure them to the public and to the individual. Criminal justice, the proprietary action of the state, and the police power, are equally enlisted for this purpose.

The exercise of the police power for the protection of safety, order, and morals, constitutes the police in the primary or narrower sense of the term. It is a power so vital to the community that it is often conceded to local authorities of limited powers. It is the police power in this narrower sense of the term which the Supreme Court of the United States concedes on principle to the states, even where its exercise affects interstate and foreign commerce.

**§ 11. Care and control of dependents.**—It will be convenient to treat in connection with these primary social interests, the care and control of dependent classes, especially of minors. While not greatly developed until recent times, the power is generally felt to belong to the state in the fullest measure, and is conceded by the courts without question.

plied to the general benefit of the people, and is *salus populi;* as the people is the body, and the king the head; and this power is not guided by the rules which direct only at the common law, and is most properly named policy and government, and as the constitution of this body varieth with the time, so varieth this absolute law, according to the wisdom of the king, for the common good; and these being general rules, and true as they are, all things done within these rules are lawful." (Prothero Statutes and Constitutional Documents, p. 341.)

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§ 12. **Economic interests.**—That the organized community should afford its members protection against physical danger and moral scandal, is generally admitted, and only the question to what extent this protection should go, is controverted. It is otherwise as to economic interests. Wealth is almost as essential to our civilisation as safety, order, and morals; but while these can be secured to a substantial degree by restraint, the acquisition of wealth is based on active efforts; and while systematic restraint proceeds naturally from government, active effort must be chiefly individual. Our economic system is essentially individualistic, and, more than that, is based upon peaceful struggle and conflict. An absolute governmental control over economic interests, similar to that over the interests of order, peace and security, would be possible only if with regard to the former as well as with regard to the latter, equality were a desirable or practicable end, i. e., if the state were socialistic. Under existing conditions, governmental activity in the care and control of economic interests must operate largely as interference and disturbance, as favoritism or oppression.

There are important exceptions to this rule, and especially in providing facilities of communication, the necessity and the utility of governmental action—action chiefly of a corporate or proprietary character—has generally been conceded, and this is also a case where the benefit bestowed is tolerably equal for all. As the avowed purpose of legislation dealing with economic interests is generally aid and encouragement to commerce and industry, the governmental power next largely called into play after the proprietary power, and indeed involved in the latter, is that of taxation, principally in the form of protection against foreign competition, in which it may at least be plausibly argued that there is an equal benefit to the whole community.

Powers of compulsion and restraint are very much less easily justified on the ground of equal benefit. Equality of benefit may be claimed for the suppression of fraud, and a tendency towards equality underlies the regulations to prevent oppression. But much of the restrictive economic legislation of former ages has been class legislation, based upon the supposed necessity of maintaining the established order of society. And even to-day there may be found instances of police legislation not only against fraud and oppression, but against disorder,

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disease and accident, which is in reality legislation favoring certain economic interests against injurious competition. Much of this legislation, it is true, is also class legislation in a modern and benevolent sense, based on the theory that the power of the state should come to the aid of those who are economically and socially weak, and should temper the natural inequalities in the struggle of life.

The exercise of the police power over economic interests may be divided as follows: 1. protection against fraud; 2. protection against oppression and the promotion of economic liberty; 3. public convenience and advantage; 4. compulsory benefits.

**§ 13. Non-material or ideal interests.**—The cultivation of moral, intellectual and aesthetic forces and interests which advance civilisation and benefit the community in innumerable ways, cannot be a matter of indifference to the state. This domain was formerly left to the church, and the church regarded it as her right and duty to keep movements and aspirations of this character under her control. The church, having lost her political authority, has become one of the numerous voluntary associations pursuing ideal interests. To some extent the functions of the church have been assumed by the state, so especially the important tasks of education and poor relief, which, as dealing with dependent classes, may properly be regarded as primary social interests. The state moreover in many other ways supports and encourages the higher and less urgent social interests: by granting facilities and exemptions to private enterprise, by disseminating information, by organising scientific work of its own, by maintaining institutions, museums, etc. All this the state can do without compulsion or restraint. The exercise of the police power might conceivably serve the purpose of guiding and checking intellectual movements so as to further the ideas of the government of what is beneficial to society or state. Such a purpose is however disclaimed by liberal governments, and the guaranty of freedom of religion and of speech and press removes the pursuit of ideal interests on the whole from the operations of the police power.

**§ 14. Political interests.**—Political interests as distinguished from those which are moral and intellectual include the efficient operation of the governmental machinery, and the maintenance and strengthening of the institutions, traditions

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and sentiments which constitute what we call nationality. The latter purpose justifies the exercise of the power of eminent domain, but not a material impairment of private rights without compensation.[8] As for the well-working of the governmental machinery, it may depend on or involve two entirely different sets of conditions: The standard of performance of public functions, and the good will, approval and acquiescence of the people at large. The control of public functions belongs to the corporate powers of the government. In prescribing the duties of officers and of municipal corporations, or disposing of their official rights and powers, the legislature is not bound by all the limitations on its power created in behalf of private liberty.[9] The same is probably true where the legislature regulates the conduct of elections. The right of suffrage is indeed conferred by the constitution, and cannot therefore be circumscribed by arbitrary legislative conditions; but it is nevertheless a public function, the efficient exercise of which requires a large amount of administrative machinery; the citizen therefore cannot claim the same liberty in voting as in the conduct of his private affairs, and election regulations may be regarded as conditions annexed to the enjoyment of a privilege.

So far as the attitude of the people toward the government can be controlled by governmental restraints, such restraints would fall under the domain of the police power. In former times the state aimed steadily to influence political sentiment by prohibiting the expression and dissemination of disaffection, and by enforcing at least outward tranquillity and acquiescence in the existing order of things; and the idea of "good order" included governmental stability based on such restraint.

It is however regarded as contrary to constitutional liberty in a free state to exercise compulsory control over public opinion and agitation, which refrains from the practice or incitement of violence and from injury to private rights, and the constitutions attempt in part at least to secure this liberty by special guaranties. The constitutional provisions bearing upon

[8] The government of the United States may condemn private property for the purpose of preserving a historical battleground. United States v. Gettysburg Electric R. R. Co., 160 U. S. 668. Under foreign laws, monuments of history or art may be required to be preserved, upon payment of compensation, if they are private property. French law March 30, 1887, Ducrocq Droit Administratrif, § 1313. As to flag legislation see § 183 and 266, infra.

[9] See § 310, infra.

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this subject are those securing freedom of speech and press, and the right of assembly and petition. These guaranties create another sphere of interests which is on principle withdrawn from the police power.

**§ 15. Relative attitude of the government toward the three classes of interests.**—Broadly speaking, there are therefore three spheres of activities, conditions and interests which are to be considered with reference to the police power; a conceded sphere affecting safety, order and morals, covered by an ever increasing amount of restrictive legislation; a debatable sphere, that of the proper production and distribution of wealth, in which legislation is still in an experimental stage, and an exempt sphere, that of moral, intellectual and political movements, in which our constitutions proclaim the principle of individual liberty. This threefold division will form the basis for the analysis of legislation which is to follow. The division has reference to the exercise of restraint and compulsion by the state; its corporate powers and resources are freely used for the furtherance of economic, non-material and political interests, which the police power would not attempt to control.

These spheres may overlap and a reconciliation should then be effected between the principles of control and liberty. Thus conditions affecting health and morality are primarily subject to the police power, but all restrictive legislation should have the utmost regard for the freedom of science, art and literature, which may be jeopardised by discrimination against schools of medicine, by the prohibition of vivisection, by the establishment of false standards of purity, etc. On the other hand religion and speech and press are primarily free, but that does not prevent them from being subjected to restraints in the interest of good order or morality. Very little difficulty has so far been encountered in the mutual adjustment of these interests.

**§ 16. Private right and public welfare.**—Public policy assumes the superiority of social over individual interests. The highest conception of the state however repudiates the absolute and unquestioning subordination of the individual to society and insists upon the preservation of individual liberty as an essential factor in civilisation and as one which will ultimately lead to a more perfect social welfare though it may

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produce temporary disturbances or delays in the accomplishment of what is believed to be the public good. This conception of the state is endorsed by our constitutions, and the idea of a public welfare bought at the cost of suppressing individual liberty and right is therefore in our system of government inadmissible.

It may be true that ultimately there can be no conflict between the highest individual and the highest social interest, and the harmony of all interests is an ideal which every legislative measure professes to contemplate and to further. But until the conditions of that harmony are discovered, it must happen that genuine individual interests are made to yield not only to genuine social interests, but also to interests which while being put forward as social are not such in reality. The question then arises whether a measure of that character is justified as an exercise of a power which is conceded only as a means of promoting the public welfare.

The relation of private right to public welfare receives a peculiar importance in our system of constitutional law through the power of the courts to declare laws null and void, if deemed contrary to the constitution.

§ 17. **The constitution as judicially enforceable law.**—In Great Britain the constitution is the sum of principles which are observed in the exercise of the powers of government, and which are embodied either in acts of Parliament or in unwritten traditions and understandings. But both the law and the custom of the constitution, having no higher formal sanction than ordinary statutes or the common law, yield to any act that Parliament may pass, however contrary to accepted and fundamental principles of government. A statute is therefore legally superior to the constitution.

A constitution which is embodied in a distinct written instrument is generally acknowledged to be legally binding upon ordinary legislation, but its authority may have no other sanction than the oath and conscience of the legislative factors of the government. The Swiss constitution expressly provides that the laws and general resolutions enacted by the Federal Assembly and the treaties ratified by it shall be binding upon the federal courts.[10] In the German states (in the Empire the problem does not exist since the constitution is changeable

[10] Swiss Federal Constitution, Art. 113.

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in the forms of statutory legislation) it is understood that a statute enacted in due form cannot be questioned by the courts.[11] The German view is that the power to make laws under the constitution necessarily implies the power to interpret the constitution, and that the department called upon to interpret in the first instance must be presumed to have been given power to make its interpretation conclusive. The American view is that the power to apply and enforce the law necessarily involves the power to choose between two conflicting laws and to give effect to that having superior force, ignoring that of inferior authority. This view is also conformable to the theory, which is accepted almost as axiomatic in our jurisprudence, that the interpretation of the law is a judicial and not a legislative function, whereas the German view expresses perhaps more truly the idea of the co-ordination of the legislative with the judicial power. The question is one of fundamental constitutional policy, and in America has been settled from the beginning of independent government in favor of the courts. The judicial power to declare laws unconstitutional has been approved by experience as one of the most valuable features of American government; it is acquiesced in by the legislative power, and it has in some instances been recognised by the constitutions themselves.[12]

**§ 18. Specific limitations upon police legislation.**—The constitutional limitations upon police legislation are partly specific and partly general. The principal specific limitations are directed against legislation establishing a religion or forbidding its free exercise, abridging the freedom of speech and press, and assembly, restraining the right to keep and bear arms, and authorising unseasonable searches and seizures. Retroactive legislation is restrained by the prohibition of ex-post facto laws and of laws impairing the obligation of contracts, and the power of eminent domain is restrained by the requirement of compensation.

It is clear that a vast field of legislative power is not within these restraints. If the constitutions were narrowly construed they would furnish no safeguard against laws restraining the freedom of occupation, and of migration and settlement

[11] Georg Meyer Staatsrecht, p. 519.

[12] Constitution of California, I, § 22; Constitution of Ohio, IV, § 2.

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within the state, prohibiting organised associations, or limiting the power of individuals to acquire or dispose of property or to make contracts.

**§ 19. General limitations.**—To prevent oppressive legislation of this kind the courts must rely upon the general clauses of the constitution.

Of these the duty of the equal protection of the laws enjoined upon the states by the federal constitution is perhaps the greatest safeguard of justice. The effect of the principle of equality upon the police power will be fully discussed in a subsequent portion of this treatise. It is necessary here to say a few words regarding another general principle which the fourteenth amendment couples with that of equality, namely, the principle of due process of law.

**§ 20. Due process of law.**—The guaranty that no person shall be deprived of life, liberty or property without due process of law may be traced to the Great Charter and was originally intended as a safeguard against the arbitrary and despotic exercise of executive power, and not against legislation. The same meaning was probably attached to it by the framers of our first constitutions. Not that arbitrary acts depriving an individual of life, liberty or property had never taken the form of statutes; Parliament on the contrary had frequently been made the instrument of despotism; but these abuses were guarded against by special constitutional prohibitions: the prohibition of acts of attainder, the provision that private property must not be taken for public use without compensation, and that the obligation of contracts must not be impaired. An act of legislation taking life, liberty or property and not covered by either of these clauses was probably not thought of when the first constitutions were framed.

At the present time however the idea of due process is freely applied to legislation, and means with regard to it "conformity to the settled maxims of free government."[13] Where an act of government is based upon the especial circumstances of a

[13] Bertholf v. O'Reilly, 74 N. Y. 509, 519. Johnson, J., in Bank of Columbia v. Okely, 4 Wh. 235, 1819: "As to the words from Magna Charta [*per legem terræ*, which is usually identified with due process], incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has

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particular case, these maxims require that the individual affected have an opportunity to be heard; this hearing affords him some assurance that the act will not be entirely arbitrary or without cause. Where an act of government applies to an indefinite number of people alike and thus establishes a general principle, notice to every individual affected thereby is impossible and unnecessary and the generality of the principle is supposed to be a guaranty against its being arbitrary and unreasonable. This is the fundamental distinction between administration and legislation; the former requires notice and hearing which with regard to it constitutes due process, while the latter does not. But it does not follow that every act of legislation is due process or the law of the land; an arbitrary statute is neither.[14] Notice and hearing even in administration would be without value if it did not assure a just cause for proceeding against the individual; the essence of due process then is just cause, and this must underlie every act of legislation.

The just cause of legislation is the performance of some legitimate function of government. A statute not supported by such cause is not due process and it does not make any difference whether the statute strikes at one individual only or a whole class at the same time.

It thus becomes a requirement of the constitution that every statute should be the exercise of some recognised power justified by the reason and purpose of government. In order to ascertain whether legislation is constitutional or not, we must analyse the powers of government and define the nature of each. Each governmental power has its inherent law, and this law which the due process of the constitution implies and supports stands above legislation and the legislature, and is enforced by the courts in the ordinary administration of justice.

There has never been a civilised government which has not

at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

[14] Davidson v. New Orleans, 96 U. S. 97; Zeigler v. S. & N. Ala. R. R. Co., 58 Ala. 594, 598; Sears v. Cottrell, 5 Mich. 251, 254; Clark v. Mitchell, 64 Mo. 564, 578; Westervelt v. Gregg, 12 N. Y. 202, 209; Officer v. Young, 5 Yerg. (Tenn.) 320; Beyman v. Black, 47 Tex. 558.

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recognised, and practically acted upon, the existence of limitations of the nature here indicated. For all governments profess to apply or to make law, and the nature of law implies the idea of restraint according to intelligible principles of reason. The peculiarity of American jurisprudence and government lies in the possibility of subjecting legislation to judicial control with a view to enforcing these principles and limitations. In one view of the matter, it is still the government, and only a different department of it, which conclusively determines whether a given act is within the principle of reason or not. But the great advantage of the American system is that the power of conclusive determination is withdrawn from a body accustomed to follow considerations of expediency and interest, and vested in organs which by virtue of their constitution, methods of procedure, and traditions, are peculiarly qualified and apt to give effect to the claims of reason and justice.

§ 21. **Justice and judicial policy.**—The guaranty of due process is thus a guaranty against any abuse of governmental power under the plea of public policy, but it cannot be as readily construed into a guaranty of a certain system or theory of government. Our constitutions, however, contain other general clauses. Thus they state the principle of the Declaration of Independence that life, liberty and the pursuit of happiness are the inalienable rights of man, that governments are instituted to secure these rights, and that the enumeration of certain rights in the constitution shall not be construed to impair other rights retained by the people. If these clauses can be regarded as binding upon the legislature and as embodying a definite theory of government, then it follows that the policy of the legislature can be met by the policy of the constitution, and consequently be overriden by the courts under the plea of justice.

The conflict between justice and policy becomes here in reality nothing more than a conflict between different policies, and the judicial control over legislation assumes a doubtful aspect. What is meant by liberty depends very much upon economic and social ideas; should then the precise content of liberty be held to be fixed by the constitution, or to be variable in accordance with changing ideas as to the proper scope of government? If the fundamental law is to fulfil its purpose, it should

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be flexible and yield to the changing conditions of society. A number of state courts have enforced their views of liberty against legislation enacted for the protection of laborers. Much of this legislation, while perhaps unwise or premature, represents an effort of the legislature to realise a new ideal of social justice, consisting in the neutralisation of natural inequality by the power of the state. Even conceding that the older principles of justice are more conformable to the spirit of the founders of our constitutions, it does not follow that their unexpressed ideals should absolutely control the progress of the law. It is true that popular opinion acquiesces in the judicial decisions, conceding to the courts as it were a suspensive veto. But under democratic institutions the courts cannot be permanently at variance with the matured and deliberate popular will. Practically the present system of judicial control over legislation has meant in many cases that unless all three departments of the government are convinced of the justice and reasonableness of a radical change in social or economic policy it cannot become embodied in principles of law.

## B. THE POLICE POWER AS A POWER OF RESTRAINT AND COMPULSION. § 22-26.

**§ 22. Corporate and moral capacity of the state.**— The police power restrains and regulates, for the promotion of the public welfare, the natural or common liberty of the citizen in the use of his personal faculties and of his property.

The state may also promote the public welfare through the use of what we may call its corporate capacity. This capacity belongs to the sovereign state as a matter of course, so that it may hold and dispose of property, make contracts, employ agents or servants, and sue;[15] and it may be bestowed by it upon subordinate political divisions like counties, cities, school districts, etc. The political community, moreover, wields a great moral influence as the center and depository of national and popular interests, traditions and aspirations. These corporate and moral capacities may be placed by the state in the service of any of the great objects of government, and none can be pursued without their aid. In the matter of the internal public welfare it becomes therefore important to hold apart

[15] Indiana v. Worum, 6 Hill (N. Y.) 33; United States v. Perkins, 163 U. S. 625.



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state activity which restrains and commands from that which renders aid and service: sanitary and building regulations, compulsory school attendance, regulation of traffic, on the one side; drainage, hospitals, fire service, schools and public roads, on the other. Both classes of activity serve the public welfare, but for the sake of clearness the term police power should preferably be confined to the power which operates by restraint and compulsion.[16]

**§ 23. Corporate powers of state and individual rights.**[17] — In the exercise of its corporate powers the state does not infringe directly upon individual liberty or the use of private property. It is true that its resources are obtained chiefly through the exercise of the taxing power, and that property is frequently acquired by the power of eminent domain, and in so far as that is the case, the state may not expend its funds for purely private objects, and the courts determine what objects are sufficiently public to justify the expenditure of public funds.[18] But objects may be pursued through the corporate activity of the state, for which the police power may not be exercised: so public moneys may be expended for the embellishment of public grounds and buildings, and generally for the support of art and science, while it would be unconstitutional to require an owner to arrange his property with a view to aesthetic effects.[19] Individual liberty is regarded as more important than the advancement of interests which, while admittedly public, are not urgent or primary; but the issue of liberty

[16] If we comprehend under the term police power the corporate power of the state exercised for the public welfare, we sacrifice the advantage of a more definite terminology; there is, however, authority for the wider use. So in New Orleans Gas Co. v. Louisiana Light &c. Co., 115 U. S. 650. "We may not improperly refer to that power [police power] the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance and control of public highways, turnpike roads, canals, wharves, ferries and telegraph lines, and the draining of swamps." So also Wilson v. Board of Trustees, 133 Ill. 443.

[17] See also §§ 357-364, 573-582.

[18] Olcott v. Supervisors, 16 Wall. 678; Loan Association v. Topeka, 20 Wall. 655; Lowell v. Boston, 111 Mass. 454. As to money not raised by taxation, see Hooper v. Emery, 14 Me. 375 and note on p. 1211, Thayer's Cases on Constitutional Law.

[19] St. Louis v. Hill, 116 Mo. 527; St. Louis v. Dorr, 145 Mo. 466; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77; Parker v. Commonwealth, 178 Mass. 199, 59 N. E. 634; Dillon Munic. Corporations, § 599. See § 181, infra.

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is not regarded as primarily involved in the expenditure of public funds.

Individual liberty may suffer indirectly through excessive growth of state enterprise where it discourages private initiative. The Supreme Court of Massachusetts has held that the legislature cannot authorise a city to engage in the business of supplying fuel to its inhabitants.[20] State activity may also prejudice private interests through discrimination; therefore it is commonly provided that the state may not in its institutions give preference to any one form of religious belief, and that it may not make donations for sectarian purposes. There is generally a tendency to secure the principle of equality in the distribution of the advantages which are at the disposal of the public.[21] The principle of equality of benefits being secured, the fact that they must be ultimately paid for by taxation is too remote to make the exercise of corporate powers felt as a burden. The result is that the range of the internal police is wider than that of the police power.

§ 24. **Power over licenses and privileges.**—The police power is the power to restrain common rights of liberty or property. When it is sought to exercise rights which are not common or fundamental, still more when special privileges are asked, the state may grant the required permit or license upon such conditions as it pleases, without observing the limitations which otherwise hedge about the exercise of the police power. The restrictions upon the exercise of corporate rights afford the most conspicuous illustration of this; others are found in fish and game laws, and others in cases of qualified property. When the state grants a bounty it may determine the conditions upon which it is to be obtained with the like freedom; so the United States may regulate everything pertaining to the payment and receipt of pensions, including the compensation of pension attorneys.[22]

[20] Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809, 1892. More recently the justices of the Supreme court of Massachusetts have expressed the opinion that in case of a scarcity falling short of a famine, but yet so great as to create widespread and general distress in the community which cannot be met by private enterprise, the government might constitute itself an agent for the relief of the community, so that money expended for the purpose would be money expended for public use. In re Municipal Fuel Plants (Mass.), 66 N. E. 25, 1903.

[21] So especially in the Civil Service Laws.

[22] Frisbie v. United States, 157 U. S. 160.

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The doctrine promulgated in the Dartmouth College case[23] that a corporate charter is a contract, raises the question to what extent the state may become bound by and to the conditions which it annexes to the grant of a license or franchise. It is obvious that if a grant is protected by the federal constitution from impairment, the state instead of having a greater, has really less power over holders of franchises than over other property holders, after it has once made a grant without reservation. To a certain extent this result follows from the doctrine of the Dartmouth College case; in many respects, however, and especially as far as the primary social interests of safety, order and morals are concerned, it has been counteracted by the development of the principle that the police power cannot be bargained away, and that therefore any attempt of any one legislature to bind the right of subsequent legislatures to guard the safety and morals of the people by appropriate measures must be null and void and cannot constitute a valid contract.[24]

The application of this principle will be discussed in connection with the subject of corporate charters and of vested rights under the police power. A number of state constitutions[25] expressly provide that the police power shall never be so abridged as to permit corporations to conduct their business so as to infringe rights of individuals or the general well-being of the state.

**§ 25. The police power and other restraining powers.**[26]— The police power differs from other governmental powers which restrain and compel, both in the manner of its operation and its objects.

Thus it differs from the criminal law in the conventional character of its restraints; from the disciplinary powers exercised in institutions and over officers in the fact that it restrains citizens at large, who have not forfeited part of their liberty, or surrendered it by their voluntary act; from the power of territorial sovereignty, in that it is exercised over members of the community for whose benefit the government

[23] Trustees of Dartmouth College v. Woodward, 4 Wheaton, 518.

[24] Thorpe v. Rutland &c. R. Co., 27 Vt. 140; Northwestern Fertilizing Company v. Hyde Park, 97 U. S. 659; Boston Beer Co. v. Massachusetts, 97 U. S. 25; Stone v. Mississippi, 101 U. S. 814.

[25] California, Mississippi, Missouri, Montana, Louisiana, Pennsylvania.

[26] See also §§ 721-723.

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is established, and who have an absolute right to remain within its boundaries; from the taxing power, in that it impairs liberty otherwise than by the mere exaction of a sum of money. The police power differs in its objects again from the taxing power, in that the latter aims primarily to provide ways and means for the carrying on of the government, no matter for what specific purpose. The collection of the revenue may require very considerable impairment of the freedom of individual action, in order to guard against an evasion of the tax. It is sufficient to mention the irksome restraints incident to the collection of customs and internal revenue, the right of search, the regulations regarding the manufacture of alcoholic products—restraints and regulations which do not claim to promote the public welfare.[27] It is true, however, that the taxing power may be exercised to favor or discourage economic or social tendencies. Conspicuous illustrations are afforded by the taxation of liquor and oleomargarine, above all by the protective tariff. The power is still ostensibly based upon the need of revenue and upon this plea the aid of the federal government may be enlisted in favor of or against industries and practices with which by virtue of its general governmental powers it would have no concern.

**§ 26. Police legislation and the criminal law.**—The sanction of a law passed in the exercise of the police power is usually a penalty, and the violation of the law constitutes technically a crime. For many constitutional purposes therefore police legislation is criminal legislation, especially in the matter of protection against self-crimination, the guaranty of a jury trial, and the prohibition of ex post facto laws. With regard to this last prohibition it should, however, be noted that a police restraint is not in itself a penalty, and may therefore be imposed for a fact antecedent to a statute as, e. g., where a law should forbid the granting of liquor licenses to ex-convicts.[28]

There is however a difference between police legislation and criminal legislation which is popularly well understood and which is not without legal and constitutional significance. The peculiar province of the criminal law is the punishment of acts intrinsically vicious, evil, and condemned by social sentiment; the province of the police power is the enforcement of

[27] Felsenheld v. United States, 186 U. S. 126, regulation of method of putting up packages of cigarettes.

[28] See Hawker v. New York, 170 U. S. 189, and discussion of this case, § 545, infra.

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merely conventional restraints, so that in the absence of positive legislative action, there would be no possible offense.[29] The difference here referred to roughly corresponds to that between misdemeanors and felonies or infamous crimes, or perhaps still more to that between mala prohibita and mala in se, sometimes deprecated as unscientific, but valuable from the point of view of legislative policy, especially in the matter of punishment. It has been the common practice of legislation to punish police offenses as misdemeanors, i. e., by fine or commitment to the jail, and to reserve imprisonment in the penitentiary for infamous crimes, which thereby become technically felonies. There are however some exceptions to this rule, and in connection with them it must be asked whether, conceding the legislature may forbid and punish, there are no limits to the degree of punishment it may impose. Thus in a number of states it has been made a felony to be a party to a trust. In Illinois marriages between first cousins are declared incestuous so that parties to them are punishable by imprisonment in the penitentiary for a term not exceeding ten years. If it be conceded that trusts and marriages between first cousins may be constitutionally forbidden, yet they are distinctly mala prohibita and not mala in se; the legislature condemns what is done in most civilised communities with impunity, and what may honestly be regarded as harmless. Can it be that the legislature has power to further any policy it may deem wise by visiting upon offenders the extreme penalties of the law? Not, it would seem, in states which, like Illinois, have constitutional provisions to the effect that all penalties shall be proportioned to the nature of the offense; nor, it is conceived, in other states in which the constitution is silent on this point, so long as implied limitations upon the legislative power of any sort are recognised. Laws of this nature are not enforced, and their enforcement would shock the common sense of fitness and justice. The recognition of a principle to the effect that violations of positive regulations not involving any moral turpitude cannot constitutionally be treated as infamous crimes might well be justified by the intrinsic difference of purpose between the police power and the criminal law.

[29] The distinction it seems to be recognised by Montesquieu when he says: "In the exercise of police, it is rather the magistrate who punishes than the law; in the judgment of crimes, it is rather the law which punishes than the magistrate." (Spirit of the Laws, XXVI, 24.)

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## CHAPTER II.

### METHODS OF THE POLICE POWER.

§ 27. **Outline.**—The police power like other powers of government may be subjected to limitations both from the point of view of its purposes and from the point of view of its means and methods. An analysis of the various interests which may or may not be controlled by the exercise of compulsion, will reveal the limitations of the first class; those of the second class will appear from an examination of the rights upon which the police power acts and the particular manner and degree in which the free exercise and enjoyment of these rights is impaired.

As to the rights acted upon, they are comprised under the two great heads of liberty and property. Liberty has various gradations: we may distinguish the liberty and integrity of the body, the liberty of private conduct, liberty of social intercourse, liberty of opinion, and the liberty of assuming legal relations with other persons, which we may designate as civil liberty. Civil liberty is the chief means of acquiring property, and many forms of property can be enjoyed only through acts of disposition with regard to them, so that bare undisturbed possession is of no value. The restraint of civil liberty may under circumstances virtually result in the taking of property. As both rights are coupled together in the constitutional protection, a rigorous distinction is often immaterial.

As to the manner of its operation, there are two fundamental problems which will require extended discussion: how and to what extent does the principle of equality control and modify the exercise of the police power? and: may the police power go so far as to take away or destroy a person's property, and if so under what conditions? The latter problem involves an inquiry into the sanctity of vested rights and the legitimacy of retroactive legislation.

From the absolute taking of property we can in most cases distinguish measures of restraint and regulation, which determine the conditions under which a right is to be enjoyed or exercised. As these are the normal methods of the police



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power, a preliminary examination of their various forms will further illustrate and explain the general nature of the power itself.

**§ 28. Restraint as distinguished from regulation and prohibition.**—The term restraint may be used to designate the forbidding and punishing of the excess or abuse of liberty or property to the inconvenience or injury of the community; regulation differs from restraint either by defining by a precise line the limit beyond which rights may not be exercised, or by creating positive duties which without the statute would have no existence; by prohibition is meant the forbidding of acts in themselves harmless because they may be carried to excess.

Restraints in the sense here indicated are covered by the common law of misdemeanors, especially the law of nuisance, conspiracy against trade, and seditious libel. The general rule that "when a thing is done to the injury of the whole community, and sufficient in magnitude for the tribunals to notice, it is cognizable criminally,"[30] which is also embodied in the offense of a common nuisance,[31] makes it possible to prosecute and punish many forms of evil or excess not otherwise defined. The policy of the law in allowing such prosecutions differs radically from that pursued with regard to graver crimes, all of which are defined with very considerable minuteness. The offense of an injury to the public is vague not only because the elements constituting it are not specified, but because no definite right or duty is violated by it. Fraud and libel involve falsehood which is a distinct wrong, but conspiracy against trade and seditious libel (if true) violate only a prevailing conception of public interest. The punishment of acts of the latter class is therefore not a matter of justice, but of policy, and falls under the head of the police power. The criminality of such acts is moreover entirely a matter of degree; it has never been attempted to define with exactness, at which point the emission of smoke, the pollution of a river, or the obstruction of a street, begins to be a public offense.

Police legislation which contents itself with restraining excess without defining precisely the line which may not be overstepped, has the advantage of simplicity, but is liable to

[30] Bishop's New Criminal Law, I, Sec. 235.

[31] Blackstone IV, 166.

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unequal and perhaps arbitrary administration. In view of the difficulty of enforcing penal legislation, prosecution is apt to be confined to extreme cases; but on principle the question whether such legislation is constitutionally admissible, is important. The question has received hardly any consideration, and the validity of the law of common nuisance and conspiracy, being part of the common law, is generally assumed.

It has been held in Kentucky that a law which makes it an offense to charge an unreasonable price is unconstitutional as leaving the criminality of the act to the view of the jury in each particular case of what is reasonable.[32] The principle of the decision would also defeat the legislation against unreasonable restraint of trade. It cannot be maintained that this principle is part of the general American constitutional law; but it seems to be in accordance with sound legislative policy, that the exercise of a right intrinsically useful and indispensable should not become criminal by overstepping a line which the law refuses to define and which is not defined by custom. The same policy is, however, unobjectionable where the conduct which is carried to excess rests merely on license, and is not in its moderate form socially or economically indispensable, or where custom assigns a limit to the exercise of a right. This observation applies to many forms of nuisance, disorderly conduct, and indecency, in which the act tolerated either is not a matter of right or serves no useful purpose, and in which therefore the peril of going beyond the proper limits may justly be thrown upon the individual.

## POSITIVE STANDARDS AND LIMITATIONS. § 29-34.

**§ 29. General principle.**—The common law of nuisance deals with nearly all the more serious or flagrant violations of the interests which the police power protects, but it deals with evils only after they have come into existence, and it leaves the determination of what is evil very largely to the particular circumstances of each case.

The police power endeavors to prevent evil by checking the tendency toward it, and it seeks to place a margin of safety between that which is permitted and that which is sure to lead to injury or loss. This can be accomplished to some ex-

[32] Louisville & N. R. R. Co. v. Commonwealth, 99 Ky. 132, 33 L. R. A. 209.

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tent by establishing positive standards and limitations which must be observed, although to step beyond them would not necessarily create a nuisance at common law.

This policy finds expression in standards of purity of food and of other commodities, in building regulations, safety and health requirements for factories, ships and mines, in the creation of districts for offensive establishments, in the limitation of hours of labor, and in tariffs of charges.[33]

The certainty which this system produces is in many respects a benefit, for it eliminates disputes as to intrinsically doubtful facts, as e. g., whether an establishment is unwholesome, or whether charges are unreasonable; but on the other hand it necessarily involves some degree of arbitrariness, and must not be carried to unreasonable lengths.

**§ 30. Imposed standards as compared with customary standards.**—Often, however, the positive limitations set by law remain well within the customary business or social standards. So the limit of the lawful rate of interest is always above the market rate, railroad passenger tariffs set by law do not fall below the usual charges, the hours of labor for women limited by law are rarely exceeded in states where no such laws exist, and it has been shown that the required purity of milk is below the average of the commercial standard.[34] Where the legislative limitation trenched upon prevailing usage the courts have not always felt bound by it; so in the case of reduction of hours to eight[35] and charges reduced below the point of profitableness are treated as a taking of property.

**§ 31. Regulations applied to innocuous conditions.**—The positive character of police regulations is shown in many other things besides standards and limitations. Wherever the character of a measure is precautionary it operates on persons, things or conditions no matter whether in every individual case the precaution is necessary or not. The principle is that where a measure could not be enforced without uniformity,

[33] The power to establish boundary lines of lands which have become uncertain is analogous; here the definition must of course vary with each particular case, therefore, notice and hearing is required. Davis v. St. Louis County Commissioners, 65 Minn. 310; 33 L. R. A. 432.

[34] Chapin Municipal Sanitation, p. 371.

[35] Low v. Rees Printing Co., 41 Neb. 127; Ritchie v. People, 155 Ill. 98; Re Morgan, 26 Col. 415.

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the individual interest must yield to this requirement. Thus in case of vaccination it would not be possible to inquire or discover whether each child vaccinated was predisposed toward small-pox. Where a board of health required that certain articles should be disinfected at the expense of the owner, it was not competent for an owner to show that his goods did not require disinfection. The danger being general a measure would be defeated in its beneficial effect, if the question of its necessity could be raised in each particular case.[36]

**§ 32. Standards of articles of consumption.**[37]—Some courts have said that the legislative determination that some substance or mixture is intoxicating or unwholesome is conclusive.[38] But such a statement cannot be accepted without qualification. Alcohol is as a matter of fact intoxicating if taken in sufficient quantity. To cut off controversies as to the intoxicating quality of different kinds of drinks,[39] the legislature may define as intoxicating all liquors containing a certain percentage of alcohol. If such liquors when consumed to excess produce in normal cases intoxication, they are very properly described as intoxicating, although they may not have that effect in each particular case. Where the alcohol is so much diluted as to be harmless, a legislative fiat will not make it intoxicating. But if the legislature for the purpose of preventing evasion or in order that an appetite for stronger liquors may not be fostered,[40] deems it wise or necessary to forbid any alcoholic admixture, it may do so since it thereby interferes at most with the gratification of a pleasure. So the standard of pure milk may be so fixed as to exclude the addition of water or coloring matter[41] and it may be forbidden to sell cream as such which contains less than 20 per cent fat.[42] If a considerable admixture of boracic acid to milk tends to

[36] Train v. Boston Disinfecting Company, 144 Mass. 523; 11 N. E. 929, 1887. Compagnie Francaise v. Louisiana State Board of Health, 186 U. S. 380.

[37] See also §§ 274-286.

[38] State v. Intoxicating Liquors, 76 Ia. 243; 2 L. R. A. 408, 1888; State v. Campbell, 64 N. H. 402, 13 Atl. 585.

[39] The question whether some drink is intoxicating is ordinarily a question of fact. Topeka v. Zufall, 40 Kan. 47; 1 L. R. A. 387.

[40] State v. Guinness, 16 R. I. 401.

[41] Commw. v. Wetherbee, 153 Mass. 159; 26 N. E. 414; Commw. v. Schaffner, 146 Mass. 512; 16 N. E. 280.

[42] State v. Crescent Creamery Co., 83 Minn. 284; 54 L. R. A. 466.

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injure health, it is legitimate for the legislature to determine the quantity that may be added, but if a slight admixture is not only perfectly harmless but positively useful in keeping milk from spoiling, the absolute prohibition should be regarded as exceeding the just limits of the police power. This is the view taken in New York.[43] In Massachusetts where the absolute prohibition was upheld, this point was not noted,[44] while in Iowa the legislative power in this respect was held to be absolute.[45] In Missouri the prohibition against the use of alum in baking powder was sustained, the court refusing, in the face of conflicting testimony, to take judicial notice of the fact that alum is innocuous.[46] The regulation of food stuffs or other articles of consumption has for its object the protection of health or the prevention of fraud. The latter purpose requires a wider power than the former, and the courts go very far in supporting the principle of positive regulation. That direct imitation may be forbidden has been conceded in all decisions on oleomargarine legislation. The Court of Appeals of New York has moreover held that the legislature may not only prohibit the coloring of distilled vinegar in imitation of cider vinegar but may forbid the addition of any foreign coloring matter whatever.[47] So long as the coloring serves no useful purpose such a regulation remains within the bounds of what is legitimate, for, as the New York court points out, it tends to eliminate difficult questions of fact by a general rule. In Ohio it has, however, been held that coloring matter may not even be added, though it gives aroma and flavor.[48] In New Jersey it had been held that the prohibition of coloring matter in oleomargarine does not exclude the use of a substantial ingredient like cotton seed oil, though it does color;[49] and the Ohio court makes a distinction between ingredients which are substantial and those which are not; it would perhaps be better to say that nothing of intrinsic value may be

[43] People v. Biesecker, 169 N. Y. 53; 61 N. E. 990; 57 L. R. A. 178.

[44] Commw. v. Gordon, 159 Mass. 8; 33 N. E. 709.

[45] State v. Schlenker, 112 Iowa 642; 51 L. R. A. 347.

[46] State v. Layton, 160 Mo. 474; 61 S. W. 171.

[47] People v. Girard, 145 N. Y. 105; 39 N. E. 823. That coloring which does not deteriorate or conceal deterioration is not in itself adulteration, see People v. Jennings (Mich.), 94 N. W. 216.

[48] Weller v. State, 53 Oh. St. 77; 40 N. E. 1001.

[49] Ammon v. Newton, 59 N. J. L. 543.

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forbidden unless the primary purpose is to imitate and defraud.[50] In the Ohio case the foreign substance had as a matter of fact been added in order to give a misleading color.

Upon principle the power of regulation should allow the setting of positive standards and limitations, provided they are not carried beyond what is reasonably calculated to prevent evasions and to avoid difficult controversies as to facts, and provided they are not so fixed as to prohibit practices which are both clearly harmless and positively useful.

**§ 33. Regulation by municipal authority.**—It is generally held that a positive limitation by municipal authority is not conclusive, but may be shown to be unreasonable. The courts have especially refused to recognise in a number of cases territorial limitations for offensive establishments and employments.[51] A strict view of the power of municipal corporations is also taken in England.[52] Where the indictment is under the general criminal law, proof of actual nuisance is properly insisted upon.[53]

On the other hand so far reaching a limitation by municipal ordinance as the establishment of fire limits within which wooden buildings may not be erected, has been upheld in the majority of jurisdictions.[54]

Where the law authorises cities to confine the places where sales of intoxicating liquor may be made to the business portion of the city, the city may by ordinance declare what shall constitute the business portion of the city, bounding it by designated streets and avenues. Such declaration is at least prima facie binding, although evidence may be admissible to the effect that the declaration is wrong as a matter of fact.[55]

The Supreme Court of Illinois has laid down a three-fold

[50] People v. Biesecker, 169 N. Y. 53; 61 N. E. 990; 57 L. R. A. 178.

[51] As to hospitals, Bessonies v. Indianapolis, 71 Ind. 189; as to cemeteries, Lake View v. Letz, 44 Ill. 81; as to keeping animals, Arkadelphia v. Clark, 52 Ark. 23; ex parte O'Leary, 65 Miss. 80; as to slaughter houses, Wreford v. People, 14 Mich. 41. See as to this §§ 177-179, infra.

[52] Addison on Torts, 54.

[53] State v. Edens, 85 N. C. 522.

[54] See § 141, infra.

[55] Rowland v. Greencastle, 157 Ind. 707; 62 N. E. 474, modifying on rehearing an earlier decision in the same case in which it had been held that the city had to prove in every case that the place was located in the residence portion. See 58 N. E. 1031.

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classification of nuisances for the purpose of determining the extent of municipal power to declare nuisances: 1. those which are nuisances *per se*, denounced as such by common law or statute; 2. those which in their nature are not nuisances but may become such by reason of locality or management; 3. those which in their nature may be nuisances but as to which there may be honest differences of opinion in impartial minds. As to 1 and 3 the municipal declaration is conclusive, but as to 2 the municipal power is confined to such as are nuisances in fact.[56]

**§ 34. Choice between measures of equal efficiency.**—Assuming that several measures are equally efficient to avert danger to health or safety, it would still seem to be within the legislative power to select one method and require its adoption, for it is easier to enforce uniform police regulations than a great variety of measures, the efficiency of each of which would be a question of fact in each particular case.[57] The limit of legislative power in this respect is that it may not prescribe the use of a method or article which can be procured only from one source of supplies, since this would create a monopoly.[58] A certain quality may be prescribed, but it must not be assumed that only one producer or manufacturer satisfies the required standard. Where a regulation proceeds from an administrative board, however, the power delegated to it often does not extend to prescribing one particular method, but it is sufficient if the object which the board is to secure is accomplished by the individual owner in some way.[59] Compliance with the regulation then protects the owner from prosecution; if he selects

[56] Laugel v. Bushnell, 197 Ill. 20; 63 N. E. 1086; 58 L. R. A. 266.

[57] Where this consideration does not enter, it is difficult to say whether the legislature may particularize its measures so as to prejudice or needlessly injure private rights. Perhaps the courts might control the requirement if it could be made to appear that the particular choice subserved ulterior purposes. So the law may prohibit that the building lot be covered with buildings to more than four-fifths of its area; but if the one-fifth or part of it is required to be left vacant in the front part of the lot, the measure evidently also serves the purpose of widening the public street without expense. Perhaps this may be sustained where private rights are not materially prejudiced, as a regulation of the use of the property, but see St. Louis v. Hill, 116 Mo. 527.

[58] State v. Santee, 111 Io. 1; 53 L. R. A. 763.

[59] Morford v. Board of Health, 61 N. J. L. 386, 1898; Watuppa Reservoir Co. v. Mackenzie, 132 Mass. 71; Schoen v. Atlanta, 97 Ga. 697; 33 L. R. A. 804, (applied to ordinance).

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his own method he takes the risk of creating or continuing a nuisance, but the mere departure from the official plan is no offense.

It cannot be left to an administrative officer to determine conclusively the existence of a danger and the choice of measures to be taken against it, since that would involve an unconstitutional delegation of legislative power.[60] It seems, however, that this objection may be avoided by interpreting the delegation of power as vesting the administrative officer merely with a discretion in requiring usual and appropriate safeguards against a danger, subject to judicial control as to the existence of the danger and the reasonableness of the relief. Such delegation of powers is certainly in accordance with legislative practice, so especially in dealing with a danger of epidemic disease.[61]

REGULATIONS TO INSURE COMPLIANCE WITH LAW. §§ 35-57.

§ 35. **Prevention through publicity.**—Among the positive requirements of the police power the measures securing publicity and notice in matters subject to restraint or regulation, deserve special mention. The power of police regulation finds its sanction generally in a penalty affixed to every violation, which penalty consists in fine or imprisonment or both. The infliction of the penalty belongs to the criminal courts, and concerns the police power mainly as an indirect means of securing compliance. The object of the police power is, however, emphatically prevention of mischief and danger, and hence prevention of violations of its rules, and it will therefore naturally resort to such subsidiary means of control and restraint as will tend to insure compliance with the regulation in the first instance. These subsidiary means are therefore common features of police legislation. The principal forms are: license and security, notices and signs, and reports and registration. In their turn they can be enforced only by resorting to criminal, civil or administrative proceedings; but if properly selected, compli-

[60] Schaezlein v. Cabaniss, 135 Cal. 466; 67 Pac. 755.

[61] So also in the matter of fire escapes to be placed on tenement houses. Arms v. Ayer, 192 Ill. 601; 61 N. E. 851. The delegation to the State Board of Health of the power to fix standards of purity of food is upheld in Isenhour v. State, 157 Ind. 517; 62 N. E. 40. The general subject of the validity of delegation of legislative powers is not within the scope of this treatise.

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ance with them is more easily secured than the accomplishment of the ultimate object without them, and their operation will in many instances determine the success or failure of regulative legislation.

Measures securing publicity are especially valuable and may often be relied upon to bring about the desired standard of private action without prescribing that standard in positive terms. Many practices cannot stand the light of publicity, and will be abandoned voluntarily, or under the stress of public opinion, if secrecy is impossible. The requirement of publicity is now generally advocated as the most effectual means of dealing with the abuses of monopolies, both restraint and regulation having proved unsuccessful. Under such policy compulsion may still be necessary to secure information through reports or testimony, but otherwise administrative action will consist largely in supervision, advice, and the collection and publication of statistics. The history of the Massachusetts Railroad Commission is often pointed to as an example of a successful policy of this kind.[62] About one-half of the states having railroad commissions confine their powers to supervision without regulation.[63]

LICENSES. § 36-39.

**§ 36.** Licenses or permits are administrative acts authorizing the doing of a thing which is subject to police regulation or restraint. The license or permit is given if the proper authority is satisfied that the imposed regulations have been or will be complied with. The steps to be taken before the license is issued are prescribed by statute or ordinance. A typical case is that of a building permit, which is issued after the builder has filed plans showing that the building regulations will be complied with. The preparation of the plans gives prima facie assurance that they will be carried out, and the construction of a building without a permit is clearly an illegal act and can be stopped at once. Where no element of personal discrimination enters into the regulations, and the license is issued as a matter of course upon performance of the prescribed steps, and upon payment of a fee sufficient to cover nec-

[62] Hadley Railroad Transportation, p. 136.

[63] Stimson American Statute Law II, 8572, 8576, 8833.

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essary administrative expenses, there can be hardly any question as to the legality of this form of control.[64] If the regulations involve considerations of personal qualification, the principle of equality comes into play, and licenses of this nature will be discussed later on.[65]

**§ 37. License or occupation tax.**—Often, however, the license bears no relation to regulation or supervision, and is imposed as a source of revenue, being in reality a tax called license or occupation tax. For the purpose of determining whether certain constitutional provisions regarding taxation are applicable, or whether a municipal corporation under its charter may impose license fees, it becomes in many cases important to distinguish the license as a police measure from the license as a revenue measure.[66] That a revenue is produced above the expenses of supervision, and that this result was contemplated,

[64] Com. v. Plaisted, 148 Mass. 375.

[65] See §§ 639-655, infra.

[66] The distinction between a license and a tax is illustrated by the liquor legislation of Ohio. The constitution of 1851 provides that "no license to traffic in intoxicating liquors shall hereafter be granted in this state, but the General Assembly may, by law, provide gainst the evils resulting therefrom." The earlier license laws were expressly repealed in 1854, and under very considerable restrictions any one had the right to engage in the traffic. By act passed in 1882 (Pond law) the right to sell liquor was made dependent upon the payment of a tax and the execution of a bond; default in payment of the tax was to forfeit the bond, and to engage in the traffic without the bond was made a misdemeanor. This law was held to be a stringent prohibitory law as to those failing to comply with its terms, hence as to those complying with the act a license law in the sense of the constitution and therefore unconstitutional. (State v. Hipp, 38 Oh. St. 199.) Another act (Scott law) was thereupon passed in 1883, which likewise imposed a tax upon the business. The tax was made a lien upon the real property on which the business was carried on, and it was made a misdemeanor to engage in the business without the consent of the owner of the property. This latter feature was held to vest in the owner of the property the power to license or forbid the traffic, and hence obnoxious to the constitutional provision,—a somewhat remarkable interpretation of the act, or of the term license. The whole act was in consequence declared unconstitutional (State v. Sinks, 42 Oh. St. 345.) This decision led to the enactment of the Dow law of 1886, which imposed a tax and makes it a lien upon the real property on and in which the business is conducted, but omits the provision requiring as a matter of law the consent of the owner, although of course in view of the lien clause his consent will as a matter of fact be indispensable. This act was upheld, the difficulty which a



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or even that it is called a license tax, does not make it necessarily a tax if in reality its primary purpose is to restrain and control a dangerous business.[67] The revenue may be a means of meeting governmental charges created or increased by the business which is placed under license.[68] On the other hand it has been held that there may be a tax, although the payment is a condition precedent to the right to carry on a business, whereas this feature is normally characteristic of a police license.[69] It has been held that where licenses in reality are taxes imposed by a municipality, the right or license to carry on the occupation being derived from a state law, a penalty cannot be imposed for a sale without a license.[70] In the case of many occupation licenses, it is impossible or unnecessary to distinguish between the regulative and the financial character

person not owning real property would experience being held to be merely an extraneous impediment. (Adler v. Whitbeck, 44 Oh. St. 539; Anderson v. Brewster, 44 Oh. St. 576). While it is perhaps not easy to reconcile the decision under the Dow law with the decision under the Scott law, yet the distinction between a tax and a license is quite clear under the Dow law. This law does not require an administrative act of any kind to entitle a person to engage in the business, nor does the non-payment of the tax make the business illegal. In these respects it differs from the New York liquor tax law. The distinguishing feature of the license is that it operates as a condition precedent to the right to carry on the business; hence where the tax is not a condition to the exercise of the right, it is not a license. This was also held the essential point in a Michigan statute imposing a tax under a since abolished no-license clause in the constitution similar to that of Ohio. (Youngblood v. Sexton, 32 Mich. 406, 1875.)

[67] People v. Murray, 149 N. Y. 367, 1896.

[68] Baker v. Cincinnati, 11 Oh. St. 534.

[69] Banta v. Chicago, 172 Ill. 204. "The occupation may be lawful in itself and not subject to prohibition or regulation by the state, yet it may be prohibited in order to compel the taking out of a license if the purpose is to raise revenue by means of license fees;" citing Cooley Taxation, p. 597; also State ex rel Auburn School District v. Boyd, 63 Neb. 829; 58 L. R. A. 108; but in Ohio and Michigan where under the constitution the licensing of liquor business was forbidden, it was held that the tax was distinguished from the license by the fact that its non-payment does not render the business illegal, and that it does not require a preliminary administrative act to allow a person to engage in it. (See note 66.)

[70] Robinson v. Mayor of Franklin, 1 Humph. (Tenn.) 156. A statute may punish non-payment by a fine, though the license is regarded as a tax. Rosenbloom v. State (Neb.) 89 N. W. 1053, 57 L. R. A. 922, 1902.

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of the measure.[71] The license may also be a form of controlling the payment of the tax, being merely incidental to the revenue system, and furnishing no positive authority to carry on the business.[72]

**§ 38. License as a police measure.**—The license as a police measure is properly only an incident to restraint or regulation and should, therefore, not be upheld where there is no power to restrain.[73] Upon this principle an ordinance imposing a license fee upon the owners of bicycles was declared illegal in Illinois, the court holding that the use of streets for private vehicles is as much a matter of common right as their use for walking on foot, and that the charter power to regulate the use of streets cannot be made the foundation for a restraint upon the exercise of common rights except for specific purposes of order or safety. The ordinary use of the wheel was held to justify no restraint upon this principle, and upon this theory the decision seems sound; for it would not be maintained that a license might be required for walking on the streets.[74] It would have been different had there been a charter power to impose license taxes upon all vehicles.[75] A license has also been held to be invalid as a police measure, where there was no attempt to regulate the business which was made subject to the license.[76]

Discriminative licenses may be justified by the conditions of a business; thus it has been held that a municipal corporation may impose a license fee on meat shops kept outside of the public market, since they require special supervision;[77] and licenses may be graded according to the amount of business done.[78]

**§ 39. High license as a method of restriction.**—A license may also serve the purpose of restraint by fixing the fees so high as to reduce the number of those engaged in the licensed

[71] Boston v. Schaffer, 9 Pick. 415.

[72] License tax cases, 5 Wall. 462.

[73] Bessonies v. Indianapolis, 71 Ind. 1899. See also Shuman v. Ft. Wayne, 127 Ind. 109; 11 L. R. A. 378.

[74] Chicago v. Collins, 175 Ill. 445; 51 N. E. 907, 1898.

[75] Tomlinson v. Indianapolis, 144 Ind. 142; 36 L. R. A. 413; Ft. Smith v. Scruggs (Ark.); 58 L. R. A. 921.

[76] State v. Moore, 113 N. C. 697, but in that case the license was prohibitive, and it seems that as to the point of the license being invalid as a police regulation the case is overruled by State v. Hunt, 129 N. C. 686, 40 S. E. 216.

[77] Ash v. the People, 11 Mich. 347.

[78] People v. Thurber, 13 Ill. 554. Timm v. Harrison, 109 Ill. 593; Sacramento v. Crocker, 16 Cal. 119.

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business. The restraint of the liquor business by high license is conspicuous as an illustration of this. Even a municipal corporation may fix licenses with that end in view.[79] High license affords a convenient method of restricting numbers without discriminating between persons; this is the policy of the present excise law of the state of New York.[80]

Where business is of such a character as to induce or facilitate fraud, high licenses have been upheld though admittedly oppressive in their operation; so a license required of itinerant merchants, of $25.00 a month in each town in which the business is carried on;[81] but a license of similar amount was held void, because unreasonable, where it was imposed by a municipality.[82]

Licenses of a prohibitive amount should be treated as a prohibition of the business affected, and will be discussed under that head.

**§ 40. Bonds and deposits.**—Somewhat related to the requirement of a license is that of a bond or deposit to secure the faithful compliance with police regulations, and the satisfaction of liabilities that may arise from their violation, or to serve as an indemnity fund for persons who have suffered by the fraudulent conduct of the business. As a subsidiary measure of police control it appears to be permissible wherever a license may be required, but it is resorted to less frequently. A bond is required not uncommonly of liquor sellers and of auctioneers; deposits are sometimes required of peddlers, itinerant merchants, of persons advertising bankrupt sales, above all of persons or corporations engaged in the quasi-public business of banking, insurance, or warehousing.[83]

### NOTICES, MARKS AND SIGNS.

**§ 41.** Certain forms of notice and publicity directly promote public order and convenience, and may be therefore required without ulterior purpose; so the affixing of street numbers to houses. Such a regulation is unquestioned, except

[79] Dennehy v. Chicago, 120 Ill. 627; Duluth v. Krupp, 46 Minn. 435; Tenney v. Lenz, 16 Wis. 566.

[80] People ex rel Einsfeld v. Murray, 149 N. Y. 367, 1896.

[81] State v. Harrington, 68 Vt. 622.

[82] State ex rel Minces v. Schoenig, 72 Minn. 528; 75 N. W. 711, 1898.

[83] Wiggins v. Chicago, 68 Ill. 372; Hawthorn v. People, 109 Ill. 302; State v. Harrington, 68 Vt. 622; ex parte Mosler, 8 Oh. C. C. 324.

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where it involves a disproportionate expense.[84] As a rule, notices and signs serve as aids to other regulations, so where, as is the case in many European cities, numbers are required for bicycles, in order to hold the owner to a stricter observance of the rules regarding their use. It is a matter of common experience, that violations of the law are committed secretly rather than openly, and the facility of concealment encourages illegality. Much is therefore gained by obtaining publicity and by providing some means of information by which violations can be readily detected.

Notices may also be required in order to advise the parties intended to be benefited by a regulation, of its existence, and thus to prevent frauds, misunderstandings, and disputes. Thus the Massachusetts law for the protection of women and minor employes requires that every employer shall post in a conspicuous place in every room where such persons are employed, a printed notice stating the number of hours' work required of them on each day of the week, the hours of commencing and stopping such work, and the hours when the time of rest allowed for dinner or for other meals begins or ends.[85] The state may also insist upon notice as a protection where it does not otherwise regulate; so, in New York, emigrants' boarding houses must have their rates posted; in Illinois, employers, who during a strike wish to induce workmen to come from other places, must advertise the fact that there is a strike.[86] The requirement that railroad companies shall post their rates is therefore not a regulation of interstate commerce, and is valid as to rates of traffic between several states.[87] In Germany, where the regulation of the price of bread has been abandoned, it may still be required that prices be posted, and that bread be sold in loaves of prescribed weight. For the

[84] Walker v. New Orleans, 31 La. Ann. 828. The wearing of license numbers can probably be required only where customary. Atlantic City v. Turner, 67 N. J. L. 520, 51 Atl. 651.

[85] Acts of 1894 ch. 508, § 11 Rev. Laws, ch. 106, § 23.

[86] Law of April 24, 1899.

[87] C. & N. W. R. Co. v. Fuller, 17 Wall. 560. Yet the requirement of the registration of names of vessels and of their owners was held to be a regulation of commerce and therefore invalid with regard to vessels sailing for ports of other states; Sinnot v. Davenport, 22 How. 227, 1859. The court referred to the fact that enrollment was required under federal legislation without however regarding this fact as controlling.

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prevention of fraud and oppression, publicity and notice is as a rule the best and most adequate method of police regulation.

A very common form of notice consists in marks, signs, labels, or stamps, which are required to be affixed to articles of commerce in order to advise the public of their true nature. The purpose may be either protection against danger or prevention of fraud. Sometimes provisions requiring separate places of sale are added. The principal articles thus controlled are poisons, drugs, and food preparations, especially compounds and imitations. Both the omission to mark and false marking are then made offenses. The validity of such requirements, as long as they are reasonable and appropriate, cannot be questioned.[88]

A Texas statute making the mixture of any articles of food without indicating on a label the component ingredients, a penal offense, was held to be unconstitutional because the act was regarded as too general in its terms and hence oppressive; it was recognised that the requirement with regard to specific articles would be valid.[89] It cannot be admitted that this distinction embodies a fixed constitutional principle.

### REPORTS AND REGISTRATION. § 42-46.

§ 42. **In general.**—While the chief use of notices and signs is to advise the purchasing public of the character of merchandise offered for sale, reports and registration serve the purpose of giving information to public authorities to enable them to take measures for the protection and furtherance of the public welfare. In many cases both purposes are combined: so reports made by corporations enable the state to supervise their action and place creditors and others in a position to judge of the company's financial condition. We speak of reports where information is given periodically or whenever demanded; registration is very often in the nature of a preliminary notice, a declaration advising the authorities of the existence of some fact, such as the establishment of some business, giving location, name of owner and other particulars.[90]

[88] State v. Snow, 81 Ia. 642; 11 L. R. A. 355; State v. Sherod, 80 Minn. 446; 50 L. R. A. 660.

[89] Dorsey v. State, 38 Tex. Crim. App. 527; 40 L. R. A. 201.

[90] In Germany the opening of any place of business requires such notice.

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A license regularly serves at the same time the purpose of registration, but where it may be refused or is connected with the payment of a fee, it becomes a substantial restraint or burden. The freedom of assembly was recognised in France by a law which substituted for the requirement of a license that of a preliminary notice to the police.[91]

**§ 43. As applied to business.**—Reports are required chiefly of corporations engaged in a business affected with a public interest: railroad, insurance and banking companies; to a less degree of other corporations. They are further required where some condition imminently dangerous to life or property calls for measures of protection; thus sanitary authorities must be notified at once of cases of contagious disease, and certain diseases of animals must be brought to the notice of veterinary surgeons. A number of states have recently enacted statutes requiring notice of the inflammation of the eyes of new-born infants. Reports are also required of businesses placed under supervision because facilitating the commission of crime or affecting public morals. In many cases registration of dealings, in books kept by the dealer, which are open to inspection, is sufficient. The courts have gone far in sustaining such requirements. Thus the Supreme Court of Illinois upheld an ordinance of the city of Chicago which provided that every pawnbroker should deliver daily to the superintendent of police a book showing every article pledged and the name and residence of the pledger, etc.[92] The court relied upon the fact that the business was carried on under revocable license, and that the city had charter power to suppress it altogether; the conditions under which it should be allowed to be conducted were therefore held to be entirely within the discretion of the city council. A similar decision was made in Missouri.[93] But in an earlier Illinois case an ordinance requirement that druggists should report by affidavit all sales of liquor made by them was held unreasonable and void.[94] The court spoke of the sanctity of private business and of the constitutional prohibition of unreasonable searches; however, it was sufficient that the requirement was regarded as oppressive, and, as was intimated in the Launder case, the business was one which could not be

[91] Law of June 30, 1881.

[92] Launder v. Chicago, 111 Ill. 291.

[93] St. Joseph v. Levin, 128 Mo. 588; 31 S. W. 101.

[94] Clinton v. Phillips, 58 Ill. 102.

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prohibited. Provisions requiring druggists to keep records of sales of liquor or poison, and imposing a similar duty upon dealers in weapons, are not uncommon.

§ 44. **Statistical information.**—As a rule the requirement of reports and registration refers to matters which are subject to regulation, and the same considerations which justify the exercise of regulative power, also justify subsidiary means. In some cases, however, the requirement does not serve the purpose of regulation, but is merely intended generally to inform the state of the condition of the people, their industries and other interests. This is analogous to the power exercised in taking the census which is justified primarily by the need of electoral apportionment, but in the second place also by the necessity of giving the state such information as will make intelligent legislation possible. Hence the law may require under penalty that the questions put by enumerators be answered,[1] excepting probably such questions as have no conceivable reference to legislation, as for instance questions concerning religious belief. The requirement of reports of vital statistics (births and deaths),[2] has been upheld.[3] In sustaining a coal weighing act the Supreme Court of Kansas relied in part upon its benefit in securing information regarding an important industry of the state;[4] but the Supreme Court of Illinois has held that coal weighing acts, if otherwise unconstitutional, cannot be sustained merely on the ground that the records of the weighing give valuable statistical information: "We deny that the burden can be imposed on any corporation or individual not acting under a license, or by virtue of a franchise, buying property or hiring labor, merely to furnish statistics, unless upon due compensation to be made therefor."[5] A requirement for mere statistical purposes must be reasonable and not burdensome or unequal; a liberal interpretation of the constitutional guaranty against unreasonable searches would sustain an ample judicial control.[6]

§ 45. **Passports and registration of strangers.**—The Chinese exclusion act of 1892 requires of Chinese laborers certificates

[1] United States Rev. Stat. § 2191.

[2] See Chapin, Municipal Sanitation, ch. 2.

[3] Robinson v. Hamilton, 60 Iowa 134.

[4] State v. Wilson, 61 Kan. 32; 47 L. R. A. 71.

[5] Millett v. People, 117 Ill. 294, 305.

[6] Boyd v. U. S., 116 U. S. 616.

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of residence without which their being in the country is deemed unlawful. Perhaps this is at present the only instance in this country (except in the case of convicts on parole), where registration is made a condition of residence. A law of New York formerly required all immigrants to register their names and this act was upheld by the federal Supreme Court.[7] It was also said in the Passenger Cases[8] that every state has an unquestioned right to require the register of the names of the persons who come within it to reside temporarily or permanently. This right is exercised in Germany, and formerly passports were required to travel from place to place, and no one was allowed to stay in a city for more than a few days without a permit—a system first introduced in Paris in 1792. That requirements of this nature are burdensome is undeniable, and is proved by the fact that most European states have abolished them. They may, however, be valuable aids in tracing criminals, and it would be difficult to point out a constitutional principle with which a general requirement of this nature could be said to be in conflict.

§ 46. **Registration and equality.**—But it would not be consistent with the principle of equality to require registration only of specified classes unless these classes are aliens not enjoying full constitutional rights. A statute of Illinois required that keepers of lodging-houses should keep registers of their lodgers accessible without charge to any person asking to see the same, and should file with the County Clerk sworn statements giving particulars as to the house and the number of guests.[9] The act was held unconstitutional as class legislation since it applied to lodging houses only and not to boarding houses or inns.[10] The act was thereupon amended so as to apply to all lodging houses, inns and boarding houses, establishing a full and comprehensive system of registration with regard to all strangers not stopping at private houses, and any persons not strangers who may happen to use hotels and boarding houses.[11] If the measure were purely and simply one of registration of strangers it might be objected that it discriminates in favor of those visiting privately, but such discrimination

[7] New York v. Miln, 11 Pet. 102, 1837.

[8] 7 How 283, 404.

[9] Act April 21, 1899.

[10] Bailey v. People, 190 Ill. 28; 60 N. E. 98.

[11] Act May 10, 1901.

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is common in European cities and cannot be regarded as unreasonable; the measure, however, is in reality one for the regulation of the business of lodging persons for hire, and such regulation cannot be beyond the power of the state. The act provides for a more extensive plan of registration than has been previously attempted under our system of government; but no attempt is made to enforce the law.[12]

INSPECTION. § 47-48.

**§ 47. Inspection and search.**—The power of inspection is exercised as an incident to regulations for the prevention of disease, accident or fraud. It operates almost exclusively on buildings and machinery or other apparatus, and on articles exposed for sale. The power of inspection is distinguishable from the power to search: the latter is exercised to look for property which is concealed; the former to look at property which is exposed to public view if offered for sale, and in nearly all cases accessible without violation of privacy. Hence inspection does not require affidavit, probable cause or judicial warrant. The right to inspect may be reserved as a condition in granting a license.[13]

The constitutional aspect of inspection is, however, different

[12] *Objections to registration.*— Where the requirement of registration conflicts with custom or sentiment, it is apt to be regarded as extremely odious. No difficulty is felt in insisting upon licenses or ceremonies in the formation of the marriage relation because such publicity is traditional. When, however, a German law recently required as a condition of the validity of dealings in futures that the parties should be entered in an exchange register, there was an almost universal protest, and few persons or firms were found to be willing to comply with the requirement, preferring to take their chances as to the performance of contracts. The demand for the abrogation of this provision is so urgent that the government will probably be unable to resist it. In an ideal state of society, publicity might be no objection, but the police power in such a state would be superfluous. Yet there is nothing in our constitutional law which would prevent the enactment of a similar measure in this country, just as we have laws requiring reports from all corporations. Public sentiment must be relied upon to prevent such legislation or its enforcement. A government cannot be said to be free and liberal in which there is not a considerable margin between the practice of legislation and constitutional limitations; for a government must have powers to exercise in time of emergency which it would be tyranny to use without such necessity.

[13] Schumacher v. New York, 166 N. Y. 103; 59 N. E. 773.

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where it is extended to interior arrangements of private houses, or personal property kept therein in private custody. It appears that health authorities often claim the right to enter private houses, to inspect sanitary arrangements, in some cases by express legal authority.[14] So in Chicago the health commissioner is given power to inspect the plumbing and other sanitary arrangements in all houses, while the power of the commissioner of buildings to enter buildings to verify the compliance with the building regulations does not extend to houses used as residences for one or two families, or for less than 25 persons.[15] This power does not seem to have been affirmed or denied by judicial decision; but on principle it would seem that administrative officers cannot be vested with general power to enter private premises at any time, except to abate actually existing public nuisances, and that every such inspection against the will of the owner should be based on judicial authority complying with the constitutional requirements with regard to searches. The English law requires, in case of refusal of admission, an order of a Justice after reasonable notice to the person having the custody of the house to be inspected.[16] Massachusetts likewise in such case requires a warrant but does not provide for notice,[17] but the English act gives a general power of entry in cases of epidemic disease.[18]

§ **48. Secrecy of letters.**—The power of inspection cannot be exercised with regard to closed letters, for the purpose of discovering obscene matter, lottery tickets, etc. The acts of Congress forbidding the use of the mails for sending such matter expressly prohibit the opening of first class mail matter.[19] In former times it seems to have been regarded as a prerogative of the government to look into private correspondence in order to detect any danger to the state. So we find in 1406 an order of the Privy Council[20] that Lombards conducting exchange of moneys should write their letters in intelligible language and not in ciphers, and the ordinance of 1656 establishing a regular post office stated such an institution to be the best means for

[14] Chapin Municipal Sanitation, p. 112.

[15] Rev. Code 1897, §§ 845, 251.

[16] 38 & 39 Vict., ch. 55, § 108.

[17] Chapin, p. 113; Rev. L. ch. 75, § 74.

[18] Sec. 137 of Act.

[19] Rev. St. §§ 3929 and 4041, I. Suppl. 803.

[20] Nicolas Proceedings I, 289.

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discovering and preventing many dangerous and wicked designs against the Commonwealth.[21] Strange to say, in England the law to the present day sanctions the opening of letters in obedience to an express warrant in writing under the hand of one of the principal Secretaries of State.[22] But the principle of secrecy is recognised in the constitutions of many other European states, and is included in the guaranty against unreasonable searches and seizures. "No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the constitution."[23]

NOTICE OF A PREJUDICIAL CHARACTER. § 49-52.

**§ 49. Offensive coloring.**[24]—It is an abuse of the police power to require notice, not for the purpose of showing the true character of an article, but in order to impair its value. In People v. Arensberg,[25] the Court of Appeals of New York raised without answering the question whether the legislature could compel the artificial coloring of oleomargarine, if in reality its color was like that of butter. In several states the statutes did require oleomargarine to be colored pink or some other unnatural color on the plea of making deception impossible. These statutes were upheld in New Hampshire and West Virginia on the ground that the legislature must determine in its discretion what measures are necessary to prevent fraud.[26] But to require such a preparation of an article as to render it unsaleable is in reality not regulation, but prohibition, and should be judged as such. This has been recognised by the decision of the United States Supreme Court declaring the New Hampshire statute to be void in so far as it interfered with interstate commerce, while a legitimate measure for the prevention of fraud had been upheld as against the freedom of interstate commerce.[27]

[21] Broom Constitutional Law, p. 616.

[22] 7 Will IV 1 Vict., ch. 36, § 25.

[23] Ex parte Jackson, 96 U. S. 727, 1878.

[24] See also § 58.

[25] 105 N. Y. 123.

[26] State v. Marshall, 64 N. H. 549; State v. Myers, 42 W. Va. 822.

[27] Collins v. New Hampshire, 171 U. S. 30; Plumley v. Massachusetts, 155 U. S. 461.

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**§ 50. Goods marked "convict-made."**—The decision in the Collins case establishes for purposes of interstate commerce the principle which ought to be recognised for all purposes that the power to require the marking of goods may be exercised only so as to reveal their true character, and not so as to impress upon them a character which they have not in reality. The Court of Appeals of New York has gone one step further, and decided that it may not even be required that the goods shall be marked so as to show their true origin or manufacture, when there is no real fraud to be prevented, merely for the purpose of making the goods distasteful and hinder their sale. It was therefore held that the legislature may not require goods manufactured in prisons (not controlled by the state itself, the act applying only to prisons of other states) to be marked "convict-made."[28]

**§ 51. Goods marked "tenement made."**—Perhaps the same objection applies to the requirement of marking goods "tenement made,"[29] unless it can be shown that such notice serves a valuable purpose, and the same principle should be generally applied to all notices where the requirement plainly indicates an intent to harm a lawful business. The state should certainly not require notice to be given of certain facts, merely because these facts are prejudicial, when their concealment involves no element of deception or other danger, and when their knowledge will not aid some legitimate purpose. And if it is urged that the law may insist upon the statement of the truth regarding any matter, because the knowledge of the truth is generally beneficial, and may serve valuable legitimate purposes in the assertion of civil rights, it must be answered that the requirement must operate equally upon all, and not single out special classes of goods or persons. That only the principle of equality could save such a requirement, is distinctly recognised in the Hawkins case.

Perhaps it should be said that even where the possibility of deception exists, the requirement of particular forms of notice is not legitimate, when others are adequate, and those insisted upon are plainly intended to prejudice. This would do away with such an unenforceable requirement as that the innkeeper

[28] People v. Hawkins, 157 N. Y. 1, 1898.

[29] Mass Rev. Laws, ch. 106, § 58.

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should orally inform his guests that he sells oleomargarine—a requirement found in a number of states.

§ 52. **Resulting injury.**—Where, on the other hand, the primary purpose is legitimate, the fact that the nature of the business makes publicity odious, does not invalidate the requirement. Thus it is provided in a number of states, that rooms where intoxicating liquors are sold shall be situated on the ground floor of the building, fronting on the street, so arranged with windows and glass doors that the interior may be on view from the street, that no screens, blinds, or other obstructions be placed so as to prevent the entire view of the room from the street. It is obvious that such an arrangement allows a policeman to perform his duty in supervising the conduct of the business without leaving the street. But a requirement which deprives the patrons of substantial comforts, as by forbidding the use of shades against the sun, is oppressive, and can be upheld only where the business may be altogether prohibited. It is, therefore, regularly not within the scope of municipal ordinance powers,[30] but has been upheld when imposed by statute.[31]

Upon the same principle the law may require notice to be given of cases of infectious or contagious disease dangerous to the public health, although such notice may be prejudicial to the person affected by the disease.[32]

NOTICE OF AN INCRIMINATING CHARACTER. § 53-55.

§ 53. **Requiring statement as to lawful conduct of business.**—Wherever a report is required in connection with a business demanding police supervision, the requirement serves not only the purpose of enabling the state to discover the need of additional measures of protection, but is also intended to induce compliance with the law. In view of the possibility that the law has not been complied with, a truthful report may reveal punishable acts or conduct.

Is then a requirement having possibly this effect consistent with the constitutional protection against self-crimination? A provision in the anti-trust act of Missouri requiring of every

[30] Champer v. Greencastle, 138 Ind. 339; 24 L. R. A. 768; Bennett v. Pulaski (Tenn.), 52 S. W. 913; 47 L. R. A. 278.

[31] State v. Gerhardt, 145 Ind. 439; 44 N. E. 469.

[32] People v. Shurly (Mich.), 91 N. W. 139.

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corporation an annual affidavit to the effect that it had not entered into any trust or other unlawful combination was held unconstitutional.[33] In an analogous case, however, where a druggist refused to produce before a grand jury prescriptions filled by him during the previous year on the ground that they were incriminating, it was held that the production might be compelled, since it was a condition upon which the druggist's license was granted, and because the prescriptions were not private but public papers of which the druggist was merely the custodian.[34]

In a case upholding the requirement of pawnbrokers' reports, the Supreme Court of Missouri intimated that the information thus obtained could not be used for the purpose of a criminal prosecution of the person making the report.[35] It is clear that if a person were first compelled to report, and then prosecuted for the things he reported, the constitutional guaranty would be violated. Can it be said that the constitutional provision is saved by reading into the statutory duty to report a protection which the legislature has not expressed? What the constitution promises is not immunity from prosecution, but immunity from self-incrimination. How then if the statute demanding the report should at the same time promise immunity from prosecution? It may then be urged that there is no longer any possible criminal case as to which the person reporting could be said to be a witness against himself.

**§ 54. Immunity from prosecution.**—Upon this point the United States Supreme Court has rendered two notable decisions. Section 9 of the Interstate Commerce Act provided: "the claim that any testimony or evidence may tend to criminate the party giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial in any criminal proceeding." It was held in Counselman v. Hitchcock[36] that this was not an adequate protection since it would not prevent the use of the testimony to search out other testimony on which a prosecution and conviction might be based.[37] The statute

[33] State v. Simmons Hardware Co., 109 Mo. 118.

[34] State v. Davis, 108 Mo. 666.

[35] St. Joseph v. Levin, 31 S. W. 101; 128 Mo. 588.

[36] 142 U. S. 547.

[37] So also Emery's case 107 Mass. 172. See on the other hand People v. Kelly, 24 N. Y. 74: "Neither the law nor the constitution is so sedulous to screen the guilty as the argument supposes. If a person can-

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was thereupon amended as follows: "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before such commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."[38]

In Brown v. Walker[39] it was held that with this protection the witness might be compelled to testify. Four Justices dissented on the ground that the witness was still exposed to disgrace and to the possibility of having to defend himself against the prosecution brought notwithstanding the statute. When we consider that the constitution provides merely that no one shall be compelled in any criminal case to be a witness against himself, the purpose seems clear to protect from punishment, and absolute security from punishment should perhaps be regarded as sufficient to overcome a privilege which, too liberally construed, might greatly hamper the discovery of truth in administrative proceedings.

**§ 55. Obligation to report subject to claim of privilege.**— The analogy between compulsory testimony and compulsory reports is obvious. The constitutional protection against self-crimination would not ordinarily render invalid a statute imposing an obligation to report; for the presumption is that the report called for will not reveal illegal conduct. If a party required to report fears that his report will make him liable to prosecution, it will be incumbent upon him to claim his constitutional privilege, and he alone will be relieved.

May the law require a report merely to the effect that its provisions have or have not been violated, promising at the

not give evidence upon the trial of another person without disclosing other circumstances which will make his own guilt apparent, or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition, and not any want of humanity in the law. However, the Court of Appeals of New York has recently reversed its position and adopted the view more favorable to the witness. People v. O'Brien, 68 N. E. 353. Counselman v. Hitchcock has been followed in Illinois, Lamson v. Boyden, 160 Ill. 613; 43 N. E. 781. The authority of the U. S. Supreme Court is not binding upon the states in this matter, since the Fifth Amendment has no application to the states.

[38] Act Feb. 11, 1893, 2d Suppl. 80. See Foot v. Buchanan, 113 Fed. 156.

[39] 161 U. S. 591, 1896.

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same time immunity from prosecution by reason of anything disclosed by the report? It may be contended with great force that the spirit of the constitutional clause forbids examinations the sole object of which is to compel the admission of illegal conduct. Yet such a requirement has been sustained in Illinois, where the anti-trust law requires of corporations statements under oath as to whether they are parties to trusts, giving at the same time the necessary guaranty against prosecution.[40] The effect of such a law would be that every corporation may violate the law with impunity, provided it is willing to disclose such violation. The prohibition of the law would thus practically be confined to secret and undisclosed combinations.

An act requiring all printed articles which are libelous to be signed with the true name of the writer,[41] but containing no provision giving immunity from prosecution, is probably unconstitutional in accordance with the principles above set forth, while an act requiring all articles to be signed would be unobjectionable.[42]

[40] People v. Butler Street Foundry and Iron Co. (Ill.), 201 Ill. 236, 66 N. E. 349.

[41] California Penal Code, § 259.

[42] May an officer or shareholder of a corporation be compelled to testify or report, and the corporation be fined on account of matters thus discovered? As the shareholder pays part of the fine, it seems that it would be unconstitutional to fine the corporation. It would also seem inadmissible to treat officer and corporation for this purpose as distinct. If a corporation is subject to criminal prosecution, it must have the constitutional protection against self-crimination, this however it can have only in the persons of its members and officers; the incriminating testimony must therefore be gathered from persons not connected with the corporation in either capacity. However, see In Re Pooling Freights, 115 Fed. Rep. 588, *contra:* "You are also instructed that this act of February 11, 1893, does not grant immunity from indictment and prosecution to a corporation even though its officers or agents have been compelled to appear before the grand jury and testify to facts which would lead to incriminate it, or produce books and papers of the corporation bearing upon the offense of which it is charged. The immunity of the statute is confined to the witness who gives his testimony, belongs only to him personally, and cannot, in the nature of the thing, be extended to include the corporation he represents. There is no vicarious immunity provided for by the statute, and therefore the corporation carrier cannot become immune through the grace of the statutory pardon."



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COMPULSORY ASSOCIATION.[43] § 56-57.

**§ 56. Legislation using it as a means of control.**—Compulsory association is a characteristic of the political community, the state and its subdivisions. It is also resorted to as a measure of police legislation in the case of certain improvements (drainage and irrigation) where the relative position of several pieces of land makes joint action necessary or beneficial.[44] As a means of police control compulsory association may be used to secure the better supervision of the conduct of certain forms of business which are subjected to regulation in the public interest. It is practically immaterial whether all the persons engaged in the business are forced to join the association or are made members of it by act of law, or whether an association which they have a right to join is given power over them, for in the latter case they are members at all events for the purpose of being bound, and it is merely optional with them whether they will participate in the exercise of the association's power.

The policy of compulsory association is not a common one in this country, and is practically confined to the professions that have to do with the public health (medicine and surgery, dentistry, pharmacy, etc). At an early date the laws of New York provided that every physician and surgeon, upon pain of forfeiting his license, should join the county medical society which had examining powers and also had authority to bring charges of misconduct and to suspend a physician from practice pending their determination by a court.[45] Under the present law a similar policy is applied conspicuously to the business of pharmacists.[46] The licensed pharmacists in different sections of the state elect a state board of pharmacy. The state board has power to regulate the practice of pharmacy, to regulate the sale of poisons, to regulate and control the character and standard of drugs, to regulate the number of hours constituting a day's work of employees in a drug store, to employ inspectors and inspect pharmacies, etc., to examine applicants for license and issue licenses for engaging in the business of druggist or pharmacist (subject to legal requirements regarding apprenticeship or equivalent experience), to require registration of pharmacies and drug stores, and to revoke licenses

[43] See also §§ 364, 440-444.
[44] See §§ 440-444, infra.
[45] 1 Rev. Statutes, p. 452.
[46] Article XI, Public Health Law of New York.

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for cause. It thus appears that the control of the business is vested in an extraordinary degree in the persons engaged in that business and their representatives.

§ 57. **Principles applicable.**—The following observations suggest themselves with reference to this kind of legislation:

The duties of membership, especially the duty to submit to the authority of the association, depend upon the participation in its rights; i. e., every duly qualified pharmacist must have the right to vote for the members of the state board. From this it follows that the qualification to vote should not be determined by the state board itself. This, however, is practically the case if exclusive examining and licensing powers are granted to the state board. In the professions of medicine and dentistry the boards which examine or license are appointed by the state regents, and the respective societies have merely a right to make nominations. This is certainly more in conformity to constitutional principle.

There are strong reasons of constitutional policy against allowing the police power of the state in the matter of restricting the right to pursue callings, to be exercised through professional associations, since the danger of the abuse of the power for the promotion of class interests is thereby increased. The delegation of power to these associations should therefore be kept within the strictest limits, and should on the whole be confined to measures of administration and the initiation of legal proceedings for the enforcement of the law. The right to practice a profession and the regulations under which it may be practiced are matters of state policy to be determined by the legislature itself, since they affect the public at large. From this point of view the powers of the New York state board of pharmacy cannot be regarded otherwise than as excessive.

It is significant that in New York the powers of medical and dental societies have gradually been reduced until practically every compulsory power is exercised under official responsibility and subject to the control of the state regents. This is all the more noteworthy as New York enlists the aid of private corporations for the performance of public functions to a greater extent than many other states.

The adoption of compulsory association as a means of police control seems to demand the observance of the following principles:

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The association should be organised in such a way that all those who may come under its control have rights of active membership in it.

The power to determine the necessary qualification for admission to membership should not be vested in the association itself or in its representatives.

The association should not be vested with legislative powers beyond the making of by-laws for the management of its own affairs.

The powers of the association should be strictly confined to the administrative management of those interests of the business in which joint and uniform action is a legitimate public concern.

The policy of compulsory association should not be applied to callings, the pursuit of which is a common right and not dependent upon license.[47]

## PROHIBITION.[48] § 58-62.

**§ 58. Meaning of prohibition.**—By prohibition is understood that legislative policy which renders illegal some entire sphere of action or business, and not merely some particular mode or form of it, or merely its exercise at a particular time or in a particular place, so that it would still be possible to engage in the same pursuit by an accommodation to legal requirements. With reference to any particular subject-matter therefore partial prohibition constitutes regulation.[49] Prohibition is of special constitutional interest only where it is not confined to acts intrinsically evil or harmful, but extends to practices which in the case of moderate or careful exercise may be innocent or harmless, and are forbidden on account of a supposed tendency toward abuse and injury.

Prohibition acts upon civil liberty, but may indirectly make property less valuable by diminishing opportunities for its

[47] See § 493, 494.

[48] See also §§ 141, 163, 177, 213-217, 283, 539-546.

[49] The decision in the Lottery Case (Champion v. Ames), 188 U. S. 321, seems to hold that regulation includes prohibition. Under the power to regulate commerce the transportation of lottery tickets was prohibited. But the regulation of all commerce involves the prohibition of certain forms or kinds of commerce. If a power were given to regulate the sale of lottery tickets it could not be contended that the power could be exercised by prohibiting the sale.

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profitable use. Where prohibition renders illegal the use of property already acquired, and that property is adapted primarily or exclusively to the use so forbidden, there is a practical deprivation of property.[50]

In the application of constitutional principles the courts should regard substance and not form, and it is therefore necessary and proper to consider the natural and intended effect of restrictive measures in order to determine whether they constitute regulation or prohibition. To allow some activity or business only under conditions so burdensome that it will be inevitably surrendered or abandoned, is virtually to prohibit it.

Such a virtual prohibition may result from excessive taxation or license fees.[51] That the number of dealers will be reduced by shutting out those who are irresponsible will not make the regulation prohibitive; but if the exaction is so large as to be clearly inconsistent with the profitable carrying on of the business in question in any form, it constitutes prohibition.

Prohibition can also be accomplished by burdensome regulations of other than a financial character. The clearest illustration of this is given by the statutes requiring oleomargarine to be colored pink. If courts say that the legislature is the sole judge of the propriety of a regulation of this character, they simply surrender their power to control the validity of legislation.[52] The United States Supreme Court sufficiently characterises such regulation when it says "to color the substance as provided for in the statute naturally excites and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. Although

[50] To prohibit the use of grain for distillation into liquor is upon this principle mere regulation as far as the owner of the grain is concerned. Ingram v. State, 39 Ala. 247; 84 Am. Dec. 782.

[51] See Veazie Bank v. Fenno, 8 Wall 533; State v. Moore, 113 N. C. 697; State ex rel Minces v. Schoenig, 72 Minn. 528; 75 N. W., 711; ex parte McKenna, 126 Cal. 429, but see State v. Harrington, 68 Vt. 622; State v. Foster, 22 R. I. 163; 50 L. R. A. 339; ex parte Haskell, 112 Cal. 412.

[52] State v. Marshall, 64 N. H. 549; State v. Myers, 42 W. Va. 822; 35 L. R. A. 844.

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under the wording of the statute the importer is permitted to sell oleomargarine freely and to any extent provided he colors it pink, yet the permission to sell when accompanied by the imposition of a condition which if complied with will effectually prevent any sale amounts in law to a prohibition."[53]

**§ 59. What kinds of business may be prohibited.—Lotteries, speculation, liquor.**—The various instances of prohibitory legislation will be discussed fully in their proper places.[54] The correct constitutional principle seems to be that a business serving valuable economic or social purposes may not be entirely prohibited, because it is attended with danger or liable to abuse, but that the policy of prohibition may be sustained, if the business exists only for the gratification of pleasure, or has otherwise no legitimate function.[55]

Thus the prohibition of lotteries is not questioned, and the constitutionality of prohibitory liquor legislation is now generally conceded, there being only one case in which it was directly denied.[56]

But dealings in stocks and produce, even for future delivery, though extensively used for gambling purposes, are allowed since they are of great economic value and importance. The prohibition of bucket shops is directed exclusively against fictitious transactions.[57] The provision of the constitution of California apparently directed against all transactions in stock to be delivered at a future day has been interpreted by the courts so as not to affect legitimate transactions.[58] It is true that a statute of Illinois has been sustained forbidding all contracts securing options in any kind of commodities;[59] but the legitimate uses of this form of dealing are rare and insignificant in number as compared with the cases in which it constitutes a form of gambling, and they might possibly be saved by a restrictive interpretation of the act.

The prohibitory liquor legislation uniformly makes exceptions in favor of medicinal, sacramental and mechanical uses,

[53] Collins v. New Hampshire, 171 U. S. 30, 1898.

[54] See §§ 196-198, 199-203, 213-217.

[55] Of course also where it is intrinsically immoral or fraudulent, so as to palmistry, State v. Kenilworth (N. J.), 54 Atl. 244.

[56] Beebe v. State, 6 Ind. 501, 1855.

[57] Illinois Act June 6, 1887; Cr. C. 137a; see § 202, infra.

[58] Parker v. Otis, 130 Cal. 322; 62 Pac. 571; Otis v. Parker, 187 U. S. 606.

[59] Booth v. People, 186 Ill. 43; Booth v. Illinois, 184 U. S. 425.

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and there is no doubt that these exceptions are constitutionally required.[60]

**§ 60. Trading Stamp Business.**[61]—The prohibition of the trading stamp business has been declared unconstitutional in several states,[62] but has been sustained in the District of Columbia as involving an element of gambling,[63] and in Massachusetts in so far as it appeals to the gambling instinct, but not otherwise.[64] It is difficult to see how the business can be treated as a form of gambling, but it may be conceded that it serves no useful purpose; and if it is conducted so as to defraud the public, the policy of prohibition must be placed upon that basis. The argument against the validity of its prohibition proceeds upon the ground that the business furnishes a legitimate device to attract custom, and that the hostile legislation is merely protection against competition—a purpose for which the police power cannot be exercised.

**§ 61. Ticket Brokerage.**[65]—The prohibition of ticket brokerage (anti-scalper's legislation) has been upheld in Illinois, Indiana, Pennsylvania, and Minnesota, and has been declared unconstitutional in New York and Texas.[66] The legislation was undoubtedly intended as a protection against fraud; but none of the decisions can be taken as a clear adjudication either that the danger of fraud may, or that it may not, be met by the absolute prohibition of the business. In Illinois the prohibition was sustained on the ground that the sale of tickets was merely an incident to a business affected with a public interest, and therefore subject to the like ample legislative control as the latter. In New York the earlier statute was held invalid because it in effect granted a monopoly, in Texas, be-

[60] Sarrls v. Commonwealth, 83 Ky. 327; Commonwealth v. Fowler, 96 Ky. 166. See § 222-224, infra.

[61] See § 293.

[62] State v. Dalton, 22 Rh. I. 77; 48 L. R. A. 775; Young v. Com. (Va.), 45 S. E. 327; People v. Dycker, 72 App. Div. (N. Y.), 308; 76 N. Y. Suppl. 111.

[63] Lansburgh v. District of Columbia, 11 App. D. C. 512.

[64] Commonwealth v. Emerson, 165 Mass. 146; 42 N. E. 559; Commonwealth v. Sisson, 178 Mass. 578; 60 N. E. 385.

[65] See § 291.

[66] Burdick v. People, 149 Ill. 600; State v. Corbett, 57 Minn. 345; Fry v. State, 63 Ind. 552; Commonwealth v. Keary, 198 Pa. 500; People ex rel Tyroler v. Warden, 157 N. Y. 116; 51 N. E. 1006; People ex rel Fleischman v. Caldwell, 64 App. Div. 46; 71 N. Y. Suppl. 654; affirmed 61 N. E. 1132; 168 N. Y. 671; Jannin v. State, 51 S. W. 1126 (Tex.).

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cause it vested the railroad companies with dispensing powers.[67] The Texas court seems to regard prohibition in this matter otherwise as lawful; the Indiana court quotes "without in any wise endorsing" from counsel's brief to the effect that the legislature may strike at a business giving rise to extensive frauds by prohibiting it altogether; on the other hand the New York court says that while stringent rules may be enacted to punish those who are guilty of dishonest practices, it is beyond the legislative power to cut up, root and branch, a business that may be honestly conducted to the convenience of the public and the profit of the persons engaged in it.

**§ 62. Oleomargarine legislation.**[68]—The most conspicuous instance of the prohibition of a useful industry is to be found in the legislation against oleomargarine. Statutes forbidding the manufacture and sale of any article made of oleaginous substance or compound other than milk or cream, designed to take the place of butter, have been upheld in several states, including Pennsylvania,[69] Maryland,[70] and Minnesota,[71] and the Pennsylvania decision has been confirmed by the Supreme Court of the United States.[72] But the Supreme Court in subsequently declaring the prohibition invalid for purposes of interstate commerce[73] has cast considerable doubt upon the soundness of its earlier ruling, and the statutes in question having been repealed, no state at present adheres to the policy of prohibition. The development of the law has thus vindicated the position assumed by the Court of Appeals of New York, which in declaring the prohibition invalid, said: "Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race?"[74]

It was assumed that fraudulent imitations of butter were satisfactorily guarded against by other legislation. The pro-

[67] As to this see also Allardt v. People, 197 Ill. 501; 64 N. E. 533.

[68] See § 283.

[69] Powell v. Commonwealth, 114 Pa. St. 265.

[70] Wright v. State, 88 Md. 436; 41 Atl. 795.

[71] Butler v. Chambers, 36 Minn. 69.

[72] Powell v. Pennsylvania, 127 U. S. 678.

[73] Schollenberger v. Pennsylvania 171 U. S. 1.

[74] People v. Marx, 99 N. Y. 377, 1885.

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hibition of the manufacture of oleomargarine in semblance of yellow butter is uniformly upheld and is conceded by the Supreme Court of the United States to be a legitimate police measure though affecting interstate commerce.[75] This prohibition, it will be observed, leaves the industry intact, and strikes merely at a practice not essential to it.

Since the repeal of the prohibitory oleomargarine legislation the preponderance of legal opinion and practice seems to be against the prohibition of useful forms of industry and business simply because there is a liability to the perpetration of fraud. The doubts concerning the validity of this kind of prohibitory legislation are strengthened by the fact that it is generally used for the protection of rival industries.

Even the danger to health or safety should not justify the absolute prohibition of a useful industry or practice where the danger can be dealt with by regulation, and this principle has been enforced against the exercise of municipal ordinance power.[76]

### THE PRINCIPLE OF REASONABLENESS.[77]

**§ 63.** It is a well established principle that municipal police ordinances, like all other municipal ordinances, must be reasonable in order to be lawful.[78] The Supreme Court of the United States has declared it to be an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of the bye-laws of inferior municipal bodies,[79] the "inferior municipal body" in the case cited being the Board of Supervisors of the County of San Francisco. It is possible to say that there is implied in every delegation of power to a municipal corporation a condition that the power must be exercised reasonably, and that therefore every unreasonable ordinance is ultra vires, and the court, in treating it as null and void, merely enforces the legislative will and principles of policy embodied in it.

If the courts undertake to declare a statute void on the ground that it is unreasonable, they must assume the existence

[75] Plumley v. Massachusetts, 155 U. S. 461, 1894.

[76] Greensboro v. Ehrenreich, 80 Ala. 579, second hand clothing; Commonwealth v. Parks, 155 Mass. 531, blasting of rocks.

[77] See also §§ 142, 150, 178, 316, 379-386, 397, 449, 516, 550-554.

[78] Dillon Municipal Corporations, § 319.

[79] Yick Wo v. Hopkins, 118 U. S. 356, 1886.

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of a standard of reasonableness which is above legislative policy. Do our constitutions embody such a standard of reasonableness?

In discussing this question we may safely discard all arguments drawn from the assumption that unreasonable means absurd or plainly arbitrary; statutes which deserve that designation are not much more apt to occur than judicial decisions of the like character.[80]

If on the other hand reasonable is understood to mean well adapted to the end in view, there is practically no judicial claim to control the judgment of the legislature of what is reasonable. The courts are certainly emphatic in their assertion that they have nothing to do with the wisdom or expediency of legislative measures.

The question of judicial power practically confines itself to a third meaning of reasonableness, namely moderation and proportionateness of means to ends. The earlier attitude of the courts seems to have been that if it was acknowledged that a condition consisted for legislative action, the legislature was sole and conclusive judge (under specific constitutional limitations) to what degree its power should be exercised. So it was said in Brown v. Maryland:[81] "Questions of power do not depend upon the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." This decision related to the taxing power; but similar expressions are used with reference to the police power. So in the matter of the regulation of charges: "We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not to the courts."[82] And in the same case the court says: "It is insisted . . . that what is reasonable is a judicial, and not a legislative question. As has already been shown, the practice has been otherwise." Again, in a recent case: "No law which infringes any of the natural rights of man, can long be enforced. Under our system of government, the remedy of the people, in that class of cases where the courts are not authorized to interfere, is in the ballot-box. Any law which violates reason, and is contrary to the popular conception of right and

[80] That statutes and ordinances should be so construed as to avoid absurd consequences, see § 158.

[81] 12 Wh. 419.

[82] Munn v. Illinois, 94 U. S. 113.

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justice, will not remain in operation for any length of time; but courts have no authority to declare it void merely because it does not measure up to their ideas of abstract justice."[83]

As a rule, however, at the present day, an unlimited extent of legislative power in this direction is assumed only for purposes of argument, a moderate exercise of power being held void on the ground that if conceded it might be carried to excessive lengths. So in the case in which the flag legislation of Illinois was declared unconstitutional, one of the arguments relied upon by the court was that if the legislature might prohibit the use of the flag for one purpose, it might forbid it for all purposes,[84] an argument which loses all force if the courts control the degree to which a power may be exercised.

The Supreme Court of Illinois had asserted the right to control the proportionateness of means to ends very strongly, when in annulling an ordinance requiring railroad companies to keep flagmen at every railroad crossing, it said that it would treat the question as if the city had all the powers which the state has for the welfare of the people, implying that a similar statute would have been declared void for unreasonableness.[85] Other leading courts have stated very distinctly that reasonableness is one of the inherent limitations of the police power; so the Supreme Court of Massachusetts: "Difference of degree is one of the distinctions by which the right of the legislature to exercise the police power must be determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil. Larger ones could not be without the exercise of the right of eminent domain,"[86] and the Supreme Court of the United States: "A statute or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved, and in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action,"[87] and in Plessy v. Ferguson,[88] in answer to the conten-

[83] Morris v. Columbus, 102 Ga. 792; 42 L. R. A. 175.

[84] Ruhstrat v. People, 185 Ill. 133; 49 L. R. A. 181; 57 N. E. 41.

[85] Toledo &c. R. Co. v. Jacksonville, 67 Ill. 37.

[86] Rideout v. Knox, 148 Mass. 368.

[87] Wisconsin M. & P. R. R. Co. v. Jacobson, 179 U. S. 287, 1900.

[88] 163 U. S. 537.

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tion that the principle of separation might be carried to the length of assigning to black and white different quarters of the city for living or different sides of the street for walking, the Supreme Court said: "The reply to all this is, that every exercise of the police power must be reasonable." And in the matter of the regulation of charges, the Supreme Court has entirely abandoned the attitude expressed in Munn v. Illinois that the remedy for an abuse of the power must be sought at the polls and not in the courts. After declaring in the Railroad Commission cases,[89] that the power to regulate is not a power to destroy, the court, in Reagan v. Farmer's Loan & Trust Co.[90] said distinctly: "There can be no doubt of the power and duty [of the courts] to inquire whether a body of rates imposed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction of rights of property, and if found so to be, to restrain its operation." In Covington &c. Turnpike Road v. Sandford,[91] the power of the court to inquire into the reasonableness of a legislative rate was regarded as established beyond question, and in Lake Shore and Michigan Southern R. R. Co. v. Smith[92] a rate fixed by statute was held to be unconstitutional.

Effective judicial limitations of the police power would be impossible, if the legislature were the sole judge of the necessity of the measures it enacted. The only question a court could then ask in dealing with police legislation, would be: does a condition exist which justifies any legislative action? But the maintenance of private rights under the requirements of the public welfare is a question of proportionateness of measures entirely. Liberty and property yield to the police power, but not to the point of destruction. While an excessive degree of impairment would as a rule be contrary to legislative as well as to constitutional policy, the history of the regulation of railroad charges has shown that the question of the indirect and perhaps unintended destruction of private right may become an important and extremely difficult issue for determination. In reserving the conclusive determination of this issue to themselves, the courts have firmly established the principle that the duty of the reasonable exercise of the police power is a constitutional limitation upon the legislature. There are few

[89] 116 U. S. 307.
[90] 154 U. S. 362.
[91] 164 U. S. 578.
[92] 173 U. S. 684.

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forms of control that cannot become unreasonable by an excess of degree; and there are many cases where no other principle of limitation is discoverable than that of reasonableness, so in legislation fixing hours of labor, or requiring improvements or arrangements for public convenience on the part of public service companies.[93]

The question of reasonableness usually resolves itself into this: is regulation carried to the point where it becomes prohibition, destruction, or confiscation? The effect of carrying police legislation to that point will be discussed in connection with the particular cases in which the question has practically arisen.

[93] Common law as well as statutory obligations are subject to this condition of reasonableness. Thus, if a public service company is required to maintain its service, it should be enabled by the state to do so on terms not ruinous to its business. It has been said "the duties imposed must be discharged at whatever cost." People v. N. Y. Central & H. R. R. Co., 28 Hun 543; see also Savannah &c. Canal Co. v. Shuman, 91 Ga. 400. But the law cannot require a corporation to keep its charges at figures which are permanently unprofitable; see §§ 548-554, infra.

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## CHAPTER III.

### THE FEDERAL GOVERNMENT AND THE POLICE POWER.

§ **64. Police power in a federal state.**—In the distribution of governmental powers under the federal constitution, the bulk of the police power remains with the states. The framers of the constitution of the United States proceeded upon the principle that the restrictive control and care of social and economic interests should be left with the member states except where diversity of regulation would be an impediment to national development. In Germany and Switzerland, the greater compactness of territory and the closer connection between the different parts of the federation at the time of the adoption of their respective constitutions required and justified greater consolidation and control. Thus in Germany the empire has power to legislate in matters of trade and has enacted an elaborate trade code establishing the principle of the fredom of trade and containing a considerable amount of protective labor legislation, and the Swiss constitution guarantees the most important social and political rights (freedom of religion, of speech and press, of associations, right of settlement, right to free and non-sectarian education, secrecy of the mails, exemption from imprisonment for debt and from corporal punishment) against the action of the cantons, while the United States protects similar rights and immunities only against federal legislation, leaving the states free.

The federal control of legislation concerning the internal public welfare is twofold, consisting either in the enactment of positive measures or in the prevention of restrictive state laws. Positive federal legislation also operates as a restraint upon the states, since federal statutes override state laws conflicting with them; but the restraint upon the states may be unaccompanied by positive federal measures, the result being absence of regulation and consequently liberty.

#### A. POSITIVE POLICE LEGISLATION OF THE FEDERAL GOVERNMENT. § 65-67.

§ **65.** The federal exercise of the police power through positive legislation rests upon the enumerated powers of Congress under the constitution. The principal power looking to the



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promotion of the internal public welfare is that of regulating commerce with foreign nations and among the states. The power to regulate commerce includes the power to prohibit and suppress objectionable forms of traffic.[1] Under this power Congress has also legislated regarding shipping and navigation, interstate common carriers, and combinations in restraint of trade. A combination of the power over foreign commerce and the taxing power is found in the tariff legislation of the United States, while the contract labor law of 1885, the immigration law of 1903, and the legislation excluding vessels built abroad or owned by non-residents from American registry and from the coasting trade,[2] should be assigned to the power of territorial sovereignty.

The power over coinage and over weights and measures has been expressly conferred, but the latter has not been exercised. In a sense the power to legislate regarding bankruptcies, and patents and copyrights, may be assigned to the internal police. Certain forms of business are dealt with in the exercise of the taxing power so the sale of liquor and of oleomargarine. The control of post offices and post roads, intrinsically a corporate power, is used for the suppression of lotteries and of obscene and fraudulent matter. By virtue of its general sovereignty the United States may take such measures as are necessary to insure peace and order in the performance of any of its functions.[3]

§ 66. **Commerce and Navigation.**[4]—In view of all this legislation, it is impossible to deny that the federal government exercises a considerable police power of its own. This police power rests chiefly upon the constitutional power to regulate commerce among the states and with foreign nations, but not exclusively so. Thus the control over navigation is based upon the grant of admiralty and maritime jurisdiction and applies to vessels sailing between two ports of the same state.[5] It has been said that a ship sailing from San Francisco to San Diego enters upon a navigation, and therefore upon a commerce, necessarily connected with other nations; "she was navigating with them [the vessels of other nations], and consequently with them was engaged in commerce."[6] But while thus strain-

[1] Lottery Case, 188 U. S. 321.
[2] Rev. Stat. Title 48.
[3] Ex parte Siebold, 100 U. S. 371; In re Debs, 158 U. S. 564.
[4] See §§ 341, 342, 407.
[5] In re Garnett, 141 U. S. 1.
[6] Lord v. Steamship Co., 102 U. S. 541.

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ing the sense of the commerce clause, the decision clearly intimates that navigation of the high seas must be subject to federal law because it is national or international in character, and we may say, according to the language of Justice Woodbury in the Passenger Cases, that "the police of the ocean belong to Congress."[7] It must now also be regarded as firmly established that the power over commerce, while primarily intended to be exercised in behalf of economic interests, may be used for the protection of safety, order and morals.[8] This seems to have been doubted formerly, for it is said that when the general government prohibited the import of obscene prints in the tariff of 1842, it was a novelty, and was considered by some more properly to be left to the states.[9]

§ 67. **Indians and territories.**—The United States has exercised an ample police power over Indians partly under the commerce clause of the constitution,[10] partly under the power to make regulations for the government of territories, partly under reservation of national control of Indian lands contained in the acts enabling territories to become states. The United States is vested by the constitution with the fullest police power over territories, and with regard to Alaska this power has been exercised to a considerable extent. With regard to other organized territories, the policy of the government has always been to leave the internal police entirely to the territorial legislatures, the only notable exception being the legislation for the suppression of polygamy. In the District of Columbia, Congress performs all functions of state and local legislation. In the control of public places and buildings acquired for federal purposes a cession of jurisdiction by the state would oust its police power; it has also been held that where Congress had ceded the jurisdiction over grounds occupied by a Soldiers' Home back to the state, yet the oleomargarine laws of the state cannot control the managing powers of the federal governor of the house acting under authority of Congress, not at least to the extent of arresting or punishing him, since the act of retrocession saved the corporate powers of the board of managers.[11]

[7] 7 How. 523.

[8] Champion v. Ames, 188 U. S. 321 (Lottery Case).

[9] 5 How. 630.

[10] United States v. Holliday, 3 Wall. 407; Same v. 43 Gallons of Whiskey, 93 U. S. 188.

[11] Ohio v. Thomas, 173 U. S. 276.

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## B. CONTROL OVER STATE POLICE POWER. § 68-85.

**§ 68.** The purely restrictive or negative influence of the federal constitution upon the police power of the states is more important than the positive police legislation of Congress. A deliberate purpose to place the state police power under federal control can hardly be attributed to the framers of the constitution. The prohibitions upon state legislation contained in the original constitution are directed against invasions of vested rights by retroactive statutes;[12] the first ten amendments apply only to the federal government itself; the thirteenth amendment interfered vitally with the police power of the states, but only as to the specific institution of slavery. The fourteenth amendment and the commerce clause are at present chiefly relied upon as checks upon the police power of the states.

### 1. THE FOURTEENTH AMENDMENT.

**§ 69.**—The fourteenth amendment, guaranteeing due process of law and the equal protection of the laws, is capable of an interpretation subjecting all state legislation to a federal control nearly equal in scope to that now exercised by the state courts, and, of course, superior to the latter. The view expressed in the Slaughter House Cases that the chief application of this clause would be found in the protection of the negro, has practically been abandoned. In the various railroad rate cases the Supreme Court has used the fourteenth amendment to control the police power of the state, if not as to the subjects of its exercise, yet as to the extent of permissible restraint; in several other cases the equality clause has been made the ground for declaring legislation, discriminating against classes of corporations or of business, to be unconstitutional. It is moreover a most significant fact that there is hardly any important police legislation which is not questioned in the Supreme Court as violating the Fourteenth Amendment, and the Supreme Court entertains such jurisdiction and examines the merits of the claim. It is true that the Supreme Court has generally, in cases coming from the state courts, upheld the statutes attacked, and has taken on the whole the position that the judgment of the state legislature as to the

[12] Legal tender of inferior currency, ex post facto laws, laws impairing the obligation of contracts.



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requirements of the public welfare will be taken as conclusive against the claim of liberty, property or equality. In this its attitude differs not only from that of the state courts, but also from its own attitude toward state legislation where it is impeached on the ground of its interfering with the freedom of commerce. The same legislation has been upheld as an exercise of the domestic police power which has been condemned as interfering with the freedom of commerce.[13] The commerce clause is therefore now used as the principal check upon the police power of the states. Its operation is of such importance, as to require a separate examination. It will, however, be noted that it is framed as a power of positive legislation, and not as a restraint upon the states, specific restraints upon the states being found in the prohibition of duties upon exports and imports. By interpreting the federal power as exclusive,[14] the Supreme Court has made it possible to annul state legislation relating to commerce, and has established freedom of commerce throughout the Union without the aid of congressional legislation to that effect. "The constitution does not provide that interstate commerce shall be free, but by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints."[15] The result is in accordance with the principle of federal government which brings about an enlargement of liberty with a consolidation of political power over formerly distinct communities.

### 2. THE COMMERCE CLAUSE. § 70-85.

**§ 70. Different subjects of legislation.**—It is a fundamental principle of the relation between the commerce clause and the police power of the states that any legislation enacted by Congress under the power to regulate commerce supersedes any legislation inconsistent with it enacted by a state in the exercise of the police power.[16] Questions of validity of state statutes have arisen chiefly where there was no federal legislation. The state legislation which has been questioned as in-

[13] Compare Powell v. Pennsylvania 127 U. S. 678, with Schollenberger v. Pennsylvania, 171 U. S. 1.

[14] Gibbons v. Ogden, 9 Wh. 1.

[15] United States v. E. C. Knight Co., 156 U. S. 1, 11. Of other federal constitutions those of Australia and of Switzerland guarantee freedom of commerce among the states or within the federal territory in express terms (Australia, § 92; Switzerland, Art. 31).

[16] U. S. Constn. VI 2.

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consistent with the freedom of commerce or with the federal power of regulating commerce, may be divided into two classes: measures of revenue and measures of police. Some of the subtlest distinctions have been made by the Supreme Court with regard to the former class, and they will be referred to only incidentally in this connection, since questions of the taxing power are distinct from those of the police power. As for measures of police, the following are the principal subjects, which have come before the Supreme Court: immigration, navigation, navigable waters and bridges, railroads, certain forms of licensed business, especially peddlers, auctioneers and brokers; exports, foodstuffs, and intoxicating liquors.

§ 71. **Immigration and quarantine.**[17]—It is admitted and has been recognised by congressional legislation that a state may establish necessary quarantine measures, although they in fact regulate commerce;[18] but the state may not place burdens on immigrants generally, irrespective of specific dangers to health, safety or morals, nor may burdens be imposed according to the arbitrary discretion of an administrative officer.[19] Even valid state regulations are liable to be superseded by federal legislation, and immigration is now regulated by act of Congress,[20] still, however, subject to state quarantine laws.[21] Cases involving the exclusion of persons coming from other states have not come before the Supreme Court, but it has been intimated that a state may protect itself from an influx of paupers, criminals, or persons affected with contagious disease.[22]

§ 72. **Navigation and navigable waters.**[23]—The Supreme Court has held that a state cannot grant an exclusive right to run steamboats on its navigable waters, when these boats are used as instruments of interstate and foreign commerce,[24] for the principle of the freedom of navigation is a

[17] See §§ 101, 123, 271, 486-490.

[18] Morgan &c. Co. v. Louisiana Bd. of Health, 118 U. S. 455; Louisiana v. Texas, 176 U. S. 1; Compagnie Francaise v. Louisiana State Board of Health, 186 U. S. 380.

[19] Passenger Cases, 7 How. 283; Henderson v. Mayor, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275.

[20] Act March 3, 1903, 32 Stat. at L. p. 1213.

[21] Compagnie Francaise v. Louisiana St. Bd. Health, 186 U. S. 380.

[22] Hannibal &c. R. R. Co. v. Husen, 95 U. S. 465.

[23] See §§ 159, 407.

[24] Gibbons v. Ogden, 9 Wheaton 1, 1824.

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matter exclusively of national concern. A state may establish pilotage and other harbor regulations,[25] this being a subject of local character, and Congress having recognised the state laws in this matter as early as 1789.[26] But the state laws are liable to be superseded by acts of Congress.[27] Until Congress has acted,[28] states may authorise the building of bridges or dams across navigable rivers,[29] although navigation may thereby be interfered with, and local regulations regarding the opening and closing of bridges are valid, though they necessarily affect and temporarily hinder the passage of ships.[30] The Supreme Court has held that such regulations, being local and not national in character, are not encroachments upon the domain reserved to the exclusive action of the federal government.[31]

**§ 73. Railroads and common carriers.**[32]—It is conceded that states may enact measures necessary to safeguard the security of passengers though such measures are applicable to trains running between different states. Laws have accordingly been upheld which require the licensing of railroad engineers and exclude those affected with color blindness from pursuing that business,[33] or which require a special system of heating on railroad cars.[34] A state may also prohibit and

[25] Appointing places for landing, Packet Co. v. Catlettsburg, 105 U. S. 559, 1882. Rate of speed for steamers leaving wharves at Albany, People v. Jenkins, 1 Hill 469, 1841. A federal prohibition against building beyond certain lines is not necessarily authority to build up to them; local regulations restraining the erection of structures in navigable waters wholly within the limits of states remain in force. Cummings v. Chicago, 188 U. S. 410; see also Cobb v. Commissioners of Lincoln Park, 202 Ill. 427, 67 N. E. 5.

[26] Cooley v. Board of Wardens, 12 How. 298, 1851.

[27] Spraigue v. Thompson, 118 U. S. 90, 1856.

[28] And Congress has provided for adequate federal control in this matter: Act of Sept. 19, 1890.

[29] Wilson v. Black Bird Creek Marsh Co., 2 Pet. 245; Pound v. Turck, 95 U. S. 459; Gilman v. Philadelphia, 3 Wall. 713; Cardwell v. American River Bridge Co., 113 U. S. 205.

[30] Escanaba &c. Co. v. Chicago, 107 U. S. 678.

[31] As to ferries see Prentice & Egan, Commerce Clause, p. 157-161. The earlier law must be regarded as unsettled by Covington and Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204.—Canada places interprovincial ferries under federal jurisdiction.

[32] See §§ 383, 551.

[33] Smith v. Alabama, 124 U. S. 465; Nashville, Chatt. & St. Louis R. Co. v. Alabama, 128 U. S. 96.

[34] N. Y., N. H. & Hartford R. Co. v. New York, 165 U. S. 628, 1897.

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make void contracts by which a carrier undertakes to relieve himself from common law liability for accident happening within the state, although the transportation is from state to state,[35] or may require a special form of contract for exemption from liability in connection with shipments beyond the line of the carrier receiving the goods.[36] Such legislation is regarded as being in aid of commerce, and is valid until superseded by federal statute.

A state may also forbid the running of freight trains on Sundays, this being a measure for the protection of health and morals of the people of the state, a police regulation and not a regulation of commerce. If such a regulation appears prejudicial to the interests of commerce, Congress may interpose.[37]

The state may even within its boundaries prescribe rules for railroads doing interstate business which consult merely the convenience of its inhabitants: so it may require trains to stop at county seats.[38] It may also require such companies to provide separate coaches for black and white passengers while within the state and for transportation from place to place within the state;[39] but it cannot require a train carrying the mail to run out of its way to accommodate the people of a county seat,[40] and it cannot either require or forbid the separation of the races where the law will necessarily extend its operation to that part of the transportation which lies beyond the state limits.[41]

As for the purely economic aspect of railroad transportation: it was held in the original Granger cases[42] that the state regulation of charges bearing primarily upon business done in the state may affect interstate business; but this decision was later on practically overruled in Wabash &c. R. Co. against Illinois[43] by holding that a state statute forbidding discrimination

[35] C. M. & St. P. R. R. Co. v. Solan, 169 U. S. 133, 1898.

[36] R. & A. R. Co. v. Patterson Tobacco Co., 169 U. S. 311.

[37] Hennington v. Georgia, 163 U. S. 299.

[38] Gladson v. Minnesota, 166 U. S. 427; L. S. & M. S. R. Co. v. Ohio, 173 U. S. 285, 1899.

[39] L., N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 1890; Ches. & O. R. Co. v. Kentucky, 179 U. S. 388, 1900.

[40] I. C. R. Co. v. Illinois, 163 U. S. 142; obviously the distinction between this and the Ohio case is merely one of degree.

[41] Hall v. De Cuir, 95 U. S. 485, 1878.

[42] Peik v. C. & N. W. R. Co., 94 U. S. 164, 1876.

[43] 118 U. S. 557, 1886.

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by railroad companies in their rates could have no application to interstate business, not even as to that part of the transportation which was within the state.[44] Yet it has been held recently that the common law rule against discrimination applies to interstate business.[45]

While the power to regulate rates does not extend to transportation reaching beyond the state, yet railroad companies may be required to post their rates,[46] and rules of evidence may be enacted with regard to contracts of shipment beyond the state.[47]

A state cannot require a license of a railroad agent soliciting patronage for a railroad of another state[48] nor can it require a license of an agent of an express company for doing interstate business.[49]

§ 74. **Peddlers, auctioneers, brokers and drummers.**[50]—The cases last cited[51] find a parallel in the decision declaring unconstitutional a state law imposing a license tax upon drummers.[52] On the other hand a license tax imposed upon an emigrant agent, i. e., a person hiring laborers for service out of the state, is valid,[53] and so is a license tax imposed upon a broker dealing in foreign bills of exchange,[54] the reason being in each case that the business cannot be said to be directly concerned with interstate commerce, the transportation of workmen being only incidental to employment in another state, and the exchange broker merely supplying an instrument of commerce. A non-discriminating license tax upon all peddlers is valid as to those who sell goods brought from other states,[55] while a license fee discriminating against products of other states is void.[56] As regards auctioneers' licenses it was inti-

[44] See also Smyth v. Ames, 169 U. S., 466; L. & N. R. Co. v. Kentucky, 183 U. S. 503.

[45] W. U. Tel. Co. v. Call Pub. Co., 181 U. S. 92, 1901.

[46] C. & N. W. R. Co. v. Fuller, 17 Wall. 560.

[47] R. & A. R. Co. v. Patterson Tobacco Co., 169 U. S. 315.

[48] McCall v. California, 136 U. S. 104, 1890.

[49] Crutcher v. Kentucky, 141 U. S. 47, 1891.

[50] See § 294.

[51] McCall v. California, Crutcher v. Kentucky.

[52] Robbins v. Shelby County Taxing District, 120 U. S. 489.

[53] Williams v. Fears, 179 U. S. 270, 1900.

[54] Nathan v. Louisiana, 8 How. 73, 1850.

[55] Emert v. Missouri, 156 U. S. 296, 1895.

[56] Welton v. Missouri, 91 U. S. 275, 1876.

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mated in Brown v. Maryland,[57] that such licenses are valid even though the auctioneer sell foreign goods, and a non-discriminative license tax upon auctioneers selling goods coming from other states has been upheld,[58] it is true upon a distinction between imports from other states and imports from foreign countries, which has since been discountenanced.[59] Canada allows the provincial governments to impose trade license taxes in order to raise revenue for provincial, local, or municipal purposes.[60]

§ 75. **Inspection laws.**[61]—Statutes requiring goods to be packed and marked in certain ways, before they are exported from a state, are undoubtedly regulations of commerce. They are upheld largely because the federal constitution recognises and sanctions their existence subject to the power of Congress to disapprove them.[62] If non-discriminative, they are also upheld as to imports from other states,[63] and so as to provision for gauging boatloads of coal or coke before their sale is permitted.[64]

§ 76. **Liquor.**[65]—The status of state statutes regarding intoxicating liquors under the federal constitution has been the subject of repeated and not always harmonious adjudications. In the License Cases[66] statutes were sustained which required licenses for the retail sale of liquors imported from abroad, and for the sale, in original packages, of liquors brought from other states. In Bowman v. C. & N. W. R. Co.[67] it was held that a state cannot prohibit the bringing of liquor into the state since it is a lawful article of commerce, and in Leisy v. Hardin,[68] that the state cannot prohibit the sale by the importer in original packages. Leisy v. Hardin overruled Pierce v. New Hampshire, one of the license cases, although the decision in that case, while arguing for the power to prohibit, actually upheld only a license. The question would there-

[57] 12 Wh. 419, 443.
[58] Woodruff v. Parham, 8 Wall. 123.
[59] Bowman v. C. & N. W. R. Co., 125 U. S. 465.
[60] British North America Act, 1867, § 92.
[61] See §§ 276-278.
[62] U. S. Constitution, 1, 10, 2; Turner v. Maryland, 107 U. S. 38, 1883.
[63] Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345.
[64] Pittsburg, &c. Coal Co. v. Louisiana, 156 U. S. 590.
[65] See §§ 228-233.
[66] 5 How. 504, 1847.
[67] 125 U. S. 465, 1888.
[68] 135 U. S. 100, 1890.

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fore arise whether a state could not even require a license of dealers in liquor, where the liquor comes from other states and is sold in original packages, a power which if exercised without discrimination seems to be conceded in Walling v. Michigan;[69] but the question is now without practical importance since Congress has interposed and has subjected liquor in the hands of the importer to the operation of state laws.[70]

The right to manufacture liquor may be forbidden, though the liquor be intended for export, since manufacturing is not itself a transaction of commerce.[71]

In requiring licenses of dealers in liquor no discrimination may be made either against dealers of other states[72] nor against products of other states,[73] and provisions in a law establishing a state monopoly, by which a legal preference is given to domestic products of the state, are invalid.[74]

Switzerland[75] and Australia[76] make exceptions from the principle of federal freedom of commerce in favor of local control of intoxicating liquors.

§ 77. **Foodstuffs and live stock.**[77]—It has been held that a state may not absolutely forbid the bringing of Texas cattle into the state during the greater part of the year,[78] since this was at the time regarded as more than was absolutely necessary as a measure of protection for the state. But laws creating the strictest rules of liability for infection spread by Texas cattle have been upheld,[79] and in Kimmish v. Ball the Supreme Court said with reference to the Husen case: "No attempt was made to show that all Texas, Mexican or Indian cattle coming from the malarial districts during the months mentioned, were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given a different question would have been presented for the

[69] 116 U. S. 446, 460. In Downham v. Alexandria Council, 10 Wall. 173, the question was raised but not discussed since the record did not present it.

[70] Wilson Act of 1890, In re Rahrer, 140 U. S. 545, and see Rhodes v. Iowa, 170 U. S. 412.

[71] Kidd v. Pearson, 128 U. S. 1, 1888.

[72] Walling v. Michigan, 116 U. S. 446, 1886.

[73] Tiernan v. Rinker, 102 U. S. 123, 1880.

[74] Scott v. Donald, 165 U. S. 58.

[75] Constitution Art. 31, 32 bis.

[76] Commonwealth Act, § 113.

[77] See § 138.

[78] Hannibal, etc., R. R. Co. v. Husen, 95 U. S. 465, 1878.

[79] Kimmish v. Ball, 129 U. S. 217; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613.

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consideration of the court." Quarantine measures against animals have since been upheld, although some federal legislation exists regarding the same matter.[80]

Measures requiring the inspection of animals, meat or flour have been declared invalid because either directly or by their necessary operation they discriminated against the products of other states, so a law forbidding the sale of fresh meat unless the animal had within twenty-four hours before it was slaughtered been inspected within the state, and a law requiring the inspection of all meat slaughtered more than one hundred miles away from the place where it was offered for sale.[81]

A state statute forbidding the sale of oleomargarine made in semblance or imitation of butter, has been sustained in its operation on oleomargarine brought from other states;[82] but statutes have been held void as to oleomargarine so imported, which prohibited its sale altogether, or allowed it only if colored pink,[83] the difference being that oleomargarine was a lawful article of commerce, but oleomargarine so prepared as to deceive was not.

## PRINCIPLES UNDERLYING THE DECISIONS OF THE SUPREME COURT. §§ 78-85.

**§ 78.** We can trace in the decisions of the Supreme Court upon the validity of state statutes under the commerce clause of the constitution, a number of distinctions, not all of which are marked by great clearness, and certainly not all of which have been easy of application.

**§ 79. Business which is commerce and business which is not commerce.**—There is in the first place the distinction between what is commerce and what is not commerce. Not only the transportation of goods is commerce, but also the transporta-

[80] Rasmussen v. Idaho, 181 U. S. 198; Smith v. St. Louis & S. W. R. Co., 181 U. S. 248; Reid v. Colorado, 187 U. S. 137; Act May 29, 1884, 1st Suppl. U. S. R. St. 436.

[81] Minnesota v. Barber, 136 U. S. 313, 1890; Brimmer v. Rebman, 138 U. S. 78, 1891; Voight v. Wright, 141 U. S. 62, 1891.

[82] Plumley v. Massachusetts, 154 U. S. 461, 1894.

[83] Schollenberger v. Pennsylvania, 171 U. S. 1; Collins v. New Hampshire, 171 U. S. 30. Congress, by act of May 9, 1902, has since subjected oleomargarine imported into a state to the laws of that state enacted in the exercise of its police powers.

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tion of persons and the conveyance of intelligence.[1] On the other hand a contract of insurance with a foreign company is not commerce.[2] As to manufacture, it is within the control of the state because not commerce, although the product or part of it may be intended to be exported,[3] but a contract of sale made with persons in other states to which the goods are to be sent, is within the control of the United States, although the goods are first to be manufactured.[4] While manufacture, the product of which is intended for export, is conceded to be subject to state control, in the absence of federal legislation, the question whether such manufacture is also subject to federal control has not yet been passed upon judicially. It is true that the Supreme Court has disclaimed for the United States any control over manufacturing, mining and agriculture in the states,[5] but it has had no occasion to make any binding decision to that effect. The case of United States v. E. C. Knight Co.[6] merely holds that a particular statute intended to apply to interstate commerce had no application to the organisation of a manufacturing company, which is very far from holding that manufacturing for a national or foreign market can under no circumstances fall under the commerce power. The first step in this direction has been taken by Congress in connection with the beef industry. The Act of March 3, 1891 (amended March 2, 1895),[7] provides for the inspection of all live cattle the meat of which is intended for exportation, and of all cattle, sheep and hogs which are subject to interstate commerce and which are about to be slaughtered at slaughter-houses and the carcasses or products of which are to be transported to and sold for human consumption in any other state. A bill introduced in the 57th Congress for the control of combinations purported to apply to all corporations, &c., which manufacture or produce any article which in the course of business is habitually sold and delivered beyond the state in which it is manufactured. The force of circumstances will

[1] Henderson v. Mayor, 92 U. S. 259; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1.

[2] Paul v. Virginia, 8 Wall. 168, 1868.

[3] Kidd v. Pearson, 128 U. S. 1.

[4] United States v. E. C. Knight Co., 156 U. S. 1, 1895.

[5] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 1899; Kidd v. Pearson, 128 U. S. 1.

[6] 156 U. S. 1.

[7] I Suppl Rev. Stat., p. 938, II Suppl. 404.

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require an interpretation of the constitution, by which federal control will be extended over every business which is, and in so far as it is, conducted with a view to interstate or foreign commerce, and such interpretation, it is submitted, is logically sound.

Of forms of business incidental and auxiliary to commerce between the states and with foreign nations, some have been held to be beyond the control of the states and others within it. So the soliciting of orders for goods to be brought from other states, and the soliciting and negotiating of business for interstate railroads are forms of business so closely connected with commerce that the necessary agents cannot be taxed;[8] but the employment of workmen to work in another state has no direct relation to commerce.[9] Dealing in foreign bills of exchange is not commerce,[10] and the states have always had full control of the whole law relating to such bills; yet it can hardly be denied that this law is sufficiently closely connected with commerce that the United States could assume to regulate it. The law regulating the liability of common carriers engaged in interstate commerce for accidents happening within the state is within the control of the state,[11] but not the law regulating their charges,[12] though this matter is subject to the common law which is state law.[13]

**§ 80. Local and national aspect of commerce.**—A further distinction is based upon a difference between the local and the national aspect of commerce first stated by Justice Woodbury in the License Cases,[14] and which was distinctly recognised in Cooley v. Board of Wardens.[15] With respect to this Justice Field in his concurring opinion in Bowman v. C. & N. W. R. R. Co.[16] says: "The doctrine now firmly established is that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, or improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erec-

[8] Robbins v. Shelby County Taxing District, 120 U. S. 489; McCall v. California, 136 U. S. 104.

[9] Williams v. Fears, 179 U. S. 270.

[10] Nathan v. Louisiana, 8 How. 73.

[11] Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133.

[12] Wabash etc. R. Co. v. Illinois, 118 U. S. 557.

[13] W. U. Tel. Co. v. Call Pub. Co., 181 U. S. 92.

[14] 5 How. 504.

[15] 12 How. 298.

[16] 125 U. S. 465.

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tion of wharfs, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free."

As a matter of fact the recognition of state control has been determined in many cases by the fact that in the absence of Congressional regulation some regulation by some authority was necessary. That the control of navigable waters should be national is clear where these waters belong to several states in common; and Congress has recognised this by placing navigable waters of the United States under federal jurisdiction and forbidding the erection of bridges without the consent of the Secretary of War.[17] Congress has also legislated in a measure with regard to pilotage. Quarantine regulations in order to be effective should be national and not local; local regulations have been recognised because some regulation was absolutely required. So, in the absence of federal legislation, state laws are upheld requiring safety arrangements on trains and prescribing rules of qualification for engineers, or forbidding the running of trains on Sundays. Yet nothing is clearer than that with reference to interstate trains the operation of such rules should be national and uniform. If it has been said on the other hand that the right to import goods and sell the imports is national, and that the non-action of Congress is equivalent to its declaration that such rights shall be free and unrestricted, the latter argument is not always in accordance with the facts, for when the doctrine was applied to intoxicating liquors Congress answered immediately by the passage of an act declaring that liquor should be subject to the state laws after it had been imported, and it was generally understood that this action did not mean a reversal of previous legislative policy, but rather a nullification of the decision of Leisy v. Hardin.

[17] Act Sept. 19, 1890.

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**§ 81. Point at which commerce ceases to be interstate or foreign commerce; original package doctrine.**—The decision in Brown v. Maryland[18] established with regard to taxation of foreign imports the doctrine that the federal freedom of commerce continues while an imported article remains in the original package in the hands of the importer, and until he has sold it in such package, and that therefore the state cannot restrain the right to make such sale.[19] If the importer sells in the original package, the purchaser becomes subject to state law.[20] The reason underlying this doctrine has perhaps been best explained by Chief Justice Taney, in the License Cases:[21] "The immense amount of foreign products used and consumed in this country are imported, landed and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the state in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the state, but by citizens of other states, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu*, and on their way to the distant cities, villages, and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for state purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through the state. A tax in any shape upon imports is a tax upon the consumer by enhancing the price of the commodity, and if a state is permitted to levy it in any form, it will put it in the power of a maritime

[18] 12 Wh. 419, 1827.

[19] The act of Maryland taxing importers (ch. 246 of 1821) was an amendment of an earlier act (ch. 184 of 1819) taxing retailers of goods except such as are sold by the importers thereof in the original cask, case, box or package wherein the same shall have been imported. The exemption of the original package from state taxation thus appears to have been recognised by state legislation before it was insisted on by the Supreme Court. It would be interesting to ascertain in what statute the exemption of the original package first occurs.

[20] Pervear v. Massachusetts, 5 Wall. 475.

[21] 5 How. 575.

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importing state to raise a revenue for the support of its own government from citizens of other states, as certainly and effectually as if the tax was laid openly and without disguise as a duty upon imports. Such a power in a state would defeat one of the principal objects of framing and adopting the Constitution. It cannot be done directly in the shape of a duty on imports for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the Constitution which would enable a state to accomplish precisely the same thing under another name and in a different form." It was formerly strongly doubted whether the doctrine applied to imports from one state to another,[22] but it was so applied in the case of Leisy v. Hardin,[23] with reference to an exercise of the police power.

Since the decision in Leisy v. Hardin the doctrine has been modified in two directions: Congress by the so-called Wilson Act of 1890 provided that intoxicating liquors transported into a state should upon their arrival there become subject to the police power of such state, and not be exempt by reason of being introduced in original packages;[24] and the Supreme Court by two decisions[25] restricted the protection accorded to original packages to such as were suitable for wholesale importations, leaving the state laws free to deal with small packages intended for retail sales, especially where these small packages are brought in in larger enclosures or receptacles.

Under the Wilson act the federal immunity of commerce ceases only when the liquor has reached the consignee,[26] so that the consumer is still free to import. But under the decision of Austin v. Tennessee it is doubtful whether a person may freely import retail packages for his own use. The opinion speaks of "minute packages, that may at once go into the hands of retail dealers and consumers, and thus bid defiance to the laws of the state against their importation and sale." The court thus seems to be of opinion that the importing of retail packages may be forbidden as well as the sale of retail imports; but as the case involved only the right to sell, and

[22] Woodruff v. Parham, 8 Wall. 123; Brown v. Houston, 114 U. S. 622.

[23] 135 U. S. 100.

[24] A similar concession has been made to state police power by the oleomargarine act of May 9, 1902.

[25] May v. New Orleans, 178 U. S. 496, and Austin v. Tennessee, 179 U. S. 343.

[26] Rhodes v. Iowa, 170 U. S. 412, 1898.

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the decision was by a bare majority, the question as to the right to import cannot perhaps be regarded as settled.

**§ 82. The principle of non-discrimination.**—It was said by Justice Field in his concurring opinion in Bowman v. C. & N. W. R. Co.:[27] "It is evident that the value of the importation will be materially affected if the article imported ceases to be under the protection of the commercial power upon its sale by the importer. There will be little inducement for one to purchase from the importer, if immediately afterwards he can be restrained from selling the article imported; and yet the power of the state must attach when the imported article has become mingled with the general property within its limits, or its entire independence in the regulation of its internal affairs must be abandoned. The difficulty and embarrassment which may follow must be met as each case arises." It is however clear that in one respect the freedom of commerce must accompany imported goods through all stages subsequent to the breaking of the original package, namely to protect them from discrimination by reason of their foreign origin. A state may under no circumstances treat imported goods less favorably than domestic goods. This has been recognised repeatedly by the Supreme Court,[28] and while it was said in one case[29] that it would be an error to lay any stress upon the fact of discrimination, yet this element has been absolutely controlling in a number of important decisions.[30]

The principle of non-discrimination suffers an apparent exception in the case of quarantine laws. Measures of quarantine may affect commerce from other states or countries, or from particular foreign localities, while leaving domestic commerce free. Since the source of disease is local, the preventive measure has likewise a particular local bearing, and there is in reality no discrimination, as the term is commonly understood. Such cases as Louisiana v. Texas,[31] and Compagnie

[27] 125 U. S. 465.

[28] Welton v. Missouri, 91 U. S. 275; Tiernan v. Rinker, 102 U. S. 123.

[29] Bowman v. C. & N. W. R. Co., 125 U. S. 465.

[30] Walling v. Michigan, 116 U. S. 446; Voight v. Wright, 141 U. S. 62; Scott v. Donald, 165 U. S. 58. The license exacted of importers by the law of Maryland which was declared unconstitutional in Brown v. Maryland was $50 a year, while other retailers of dry goods paid only $8; compare chap. 184 laws of 1819 with chap. 246 laws of 1821.

[31] 176 U. S. 1.

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Francaise v. State Board of Health of Louisiana,[32] however, clearly show the possibility of abuse of state power and the desirability of federal control, and it is merely a question of time when the whole matter of interstate and foreign quarantine will be covered by legislation of Congress to the exclusion of state law.

**§ 83. Things which are lawful articles of commerce and things which are not—State power of exclusion.**—Whatever just doubts there may be as to the right to sell imported goods, it is clear that the freedom of commerce involves the freedom of importation. The question then remains to be answered: to what extent and under what conditions does the right to import yield to state legislation? In answer to this question the distinction has been evolved between things which are lawful and proper articles of commerce and things which are not. "If the thing," says Justice Catron in the License Cases, "from its nature does not belong to commerce, or if its condition from putrescence or other cause is such, when it is about to enter the state, that it no longer belongs to commerce, or in other words is not a commercial article, then the state power may exclude its introduction. * * * That which does not belong to commerce is within the jurisdiction of the police power of the states; and that which does belong to commerce is within the jurisdiction of the United States."[33]

It has been admitted by the Supreme Court of the United States that a state may exclude from its limits persons and animals suffering from contagious or infectious diseases, as well as convicts, paupers, idiots, or lunatics, or other persons liable to become a public charge,[34] and Congress has by statute placed the transportation of nitro-glycerine entirely within state control.[35] But not even for the purpose of accomplishing an object otherwise legitimate can the state exclude what is a lawful article of commerce, for by doing so it would assume control over interstate and foreign commerce.

This doctrine was applied to the attempted exclusion of intoxicating liquors by a statute of Iowa and the law was held to be unconstitutional. "It is not an inspection law; it is not a quarantine or sanitary law. It is essentially a regulation of

[32] 186 U. S. 380.
[33] 5 How. 504, 600.
[34] Hannibal, etc., R. Co. v. Husen, 95 U. S. 465.
[35] Rev. St., Sec. 4280.

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commerce among the states within any definition heretofore given of that term, or which can be given; and although its motive and purpose are to perfect the policy of the state of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit the introduction into the state from foreign countries of all importations of intoxicating liquors produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the states."[36]

**§ 84. Conflict between state policy and freedom of commerce.**—There is thus an apparent conflict between the commerce power and the police power in which the police power must yield. Upon the contrary theory "the power to regulate commerce instead of being paramount over the subject would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subject of commerce, and thus to circumscribe its scope and operation, is in effect the controlling one. The police power would not only be a formidable rival but in its struggle must necessarily triumph over the commercial power as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated."[37]

In a majority of cases such a conflict will not arise since the power of exclusion is not apt to be exercised except against persons and articles manifestly dangerous and not recognised as within the protection of legitimate commerce.

The statutes in connection with which the Supreme Court has had occasion to apply the idea of lawful articles of commerce, have prohibited the sale and not the importation of the article, but as the right to sell in the original package is regarded as inseparable from the right to import, they may be treated as if they had prohibited the importation itself.

There are three cases which illustrate the operation of the doctrine: Plumley v. Massachusetts,[38] Schollenberger v. Pennsylvania,[39] and Austin v. Tennessee.[40] The Supreme Court

[36] Bowman v. C. & N. W. R. Co., 125 U. S. 465.

[37] Justice Catron in the License Cases, 5 How. 504, 600.

[38] 155 U. S. 461.

[39] 171 U. S. 1.

[40] 179 U. S. 343.



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has held that the prohibition of oleomargarine made in imitation or semblance of butter prevails over the freedom of commerce, but that the freedom of commerce prevails over the prohibition of oleomargarine not fraudulently made, and that it will also prevail over the prohibition of cigarettes. The Supreme Court has in other words sustained the exercise of state police power except when the state overstepped the just limitations of its power by extreme measures of prohibition. The adjudications regarding the right to sell oleomargarine[41] reveal this peculiar difference: the federal power may protect oleomargarine as an article of commerce, but does not protect it as property;[42] for once a part of the mass of property in the state its sale may be entirely prohibited, and it may be made useless in the hands of the owner. The theory is evidently this: the police power rests with the states and the 14th Amendment can be relied upon to check only a flagrant abuse of that power; the state determines what is injurious to the people and in case of doubt as to what is a proper business, the United States yields to the state as far as domestic business is concerned. Commerce, however, is entrusted to the regulative power of the federal government, and its judgment as to what is an article of commerce is formed independently of state legislation, and in the absence of congressional legislation this judgment must be exercised by the Supreme Court.

It is quite conceivable that the Supreme Court will eventually protect property as it now protects commerce, and will develop and enforce just limitations of the police power under the Fourteenth Amendment: in that event it will not allow an absolute prohibition to sell where it disallows an absolute prohibition to import.

**§ 85. Summary of principles.**—The state may enact measures for the protection of safety, order and morals, though affecting foreign and interstate commerce, subject to the following principles:

1. Every measure of state legislation, however legitimate in itself, yields to positive regulation of interstate or foreign commerce by Act of Congress, inconsistent with such measure or intended fully to cover the same matter.

[41] Schollenberger v. Pennsylvania, 171 U. S. 1, and Powell v. Pennsylvania, 127 U. S. 678.

[42] The United States now yields to the states the control over imported oleomargarine; Act May 9, 1902.

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2. Every state measure is void which in any way discriminates against interstate or foreign commerce, or against the products of other states or countries by reason of their foreign origin, unless the local conditions of the place of origin involve a peculiar danger of disease or other harm.

3. It is within the province of federal jurisdiction to determine whether some article is a lawful article of commerce or not; a determination by the state is not conclusive. A state may not prohibit or restrain the importation of lawful articles of commerce, nor their sale, as long as they retain the character of imports.

The decision in Leisy v. Hardin[43] has shown how much the last one of these three principles interferes with the enforcement by the state of its domestic policy. That this result is not always desirable Congress itself has recognised by the enactment of the Wilson law nullifying this decision with particular reference to intoxicating liquors. The necessary effect of hampering the state police power to an undue extent will be the demand for federal instead of state regulation. The efficiency of federal administration is on the whole superior to that of the states, and in so far as police restraint is beneficial its uniform operation throughout the country is an additional benefit. In so far, however, as police restraint means interference with the legitimate exercise of individual liberty, its centralisation can hardly be viewed with favor. An overstraining of the original package doctrine would have hastened this process of centralisation, and its partial relaxation in Plumley v. Massachusetts and Austin v. Tennessee must be welcomed as securing to the states a power which they were intended to retain, the unwise exercise of which will find its natural corrective in the more liberal policy of other states, and the arbitrary exercise of which ought to be checked under the Fourteenth Amendment.

[43] 135 U. S. 100.

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# SECOND PART.

# THE PUBLIC WELFARE.

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FIRST: THE PRIMARY SOCIAL INTERESTS: SAFETY, ORDER AND MORALS.

CHAPTER

IV. PEACE AND SECURITY FROM CRIME.

V. SAFETY AND HEALTH.

VI. PUBLIC ORDER AND COMFORT.

VII. PUBLIC MORALS: GAMBLING.

VIII. PUBLIC MORALS: INTOXICATING LIQUORS.

IX. PUBLIC MORALS: VICE AND BRUTALITY.

X. CONTROL OF DEPENDENTS.

SECOND: ECONOMIC INTERESTS.

XI. PROTECTION AGAINST FRAUD.

XII. PROTECTION OF DEBTORS.

XIII. PROTECTION OF LABORERS.

XIV. COMBINATIONS OF LABORERS.

XV. COMBINATIONS OF CAPITAL: RESTRAINT OF TRADE, MANIPULATION OF PRICES, AND TRUSTS AND MONOPOLIES.

XVI. CORPORATIONS.

XVII. FREEDOM OF PROPERTY. PERPETUITIES.

XVIII. BUSINESS AFFECTED WITH A PUBLIC INTEREST.

XIX. QUALIFIED PROPERTY.

XX. COMPULSORY BENEFITS.



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# SECOND PART.

# THE PUBLIC WELFARE

## FIRST. THE PRIMARY SOCIAL INTERESTS: SAFETY, ORDER AND MORALS.

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## CHAPTER IV.

### PEACE AND SECURITY FROM CRIME.

**§ 86. Police patrol and general vigilance.**—The first and most essential requirement of life in a civilised community is protection from crime and open force and violence. The criminal law deals with offenses after they have been committed, the police power aims to prevent them. The activity of the police for the prevention of crime is partly such as needs no special legal authority: so the patrolling of streets, the general supervision of known criminals, or suspected persons or resorts, by watching them, keeping track of movements, etc., in so far as all this can be done without infringing upon personal liberty.[1] Among proprietary functions the lighting of streets furnishes protection against crime.[2]

[1] See Rules and Regulations of Chicago Police Department, Duties of Patrolmen; 149: chief duty to prevent crime; to examine every part of his post; vigilantly watch every description of person passing his way; 151: to prevent commission of any assault or breach of peace; 152: to render by his vigilance commission of crime extremely difficult; 153: to acquire knowledge of inhabitants in his post; 154: to inspect carefully every part of his post; 156: to examine in night time doors and low windows; 157: to fix in his mind persons he frequently meets at night, and endeavor to ascertain their names and residences; 158: to strictly watch the conduct of all persons of known bad character; 159: to report policy dealers, gamblers, receivers of stolen property and houses of bad repute, and also suspicions as to such; 162: to carefully watch disorderly houses and observe by whom they are frequented; 163: to notice suspicious vehicles at night; 165: to report lamps not lit; 169: to constantly patrol his post; 171: to pay attention to public houses and drinking places, and report violation of ordinances; 172: if he observes in the street anything likely to produce danger or public inconvenience, or anything peculiar or offensive, to report and if possible to remove the same.

[2] See statute of Winchester 1285,



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Leaving aside these forms of prevention, the police power either represses directly crime or violation of peace attempted to be committed or in the course of commission, or it deals by restrictive measures with conditions which tend to favor the commission of crime, or to render its detection difficult.

## COERCIVE MEASURES TO PREVENT IMMINENT OFFENSES. §§ 87-89.

§ 87. **Arrest.**—The power to deal with the present or imminent commission of felony or breach of the peace is so manifestly necessary as to be a matter of common law. Public authority is for this purpose vested not merely in every peace officer, but in every private individual.[3] From the nature of the case, an arrest under such circumstances must be made without warrant, and such an arrest is legal. The constitutions do not forbid arrest without warrant. They merely prescribe special safeguards for the issue of warrants in order to do away with the former practice of general warrants.[4]

There is authority for saying that private persons may arrest to prevent any misdemeanor committed in their presence,[5] but it is probably safer to confine the common law right to felonies and breaches of the peace. By statute the right has been extended, so in England a person doing malicious injury to property may be arrested by the owner or any person authorised by him,[6] and any one may arrest any person found committing an indictable offense between 9 p. m. and 6 a. m.[7] There are American statutes authorising every private person to make arrests for any crime or criminal offense committed in his presence,[8] but they probably apply only to such misdemeanors as cannot be stopped or redressed except by immediate arrest.[9] Where the offense is merely some contravention to public policy, a power of arrest vested in any private person would probably be unconstitutional under the prohibition of unreasonable seizures.[10]

ch. 5, as to enlarging highways and removing bushes where men may lurk.

[3] Bishop New Criminal Procedure, I, §§ 166-183.

[4] Williams v. State, 44 Ala. 41; Rohan v. Sawin, 5 Cush. 281; North v. People, 139 Ill. 81.

[5] Bishop New Crim. Proc., I, §§ 169-170, especially Note 3.

[6] 24 and 25 Vic., ch. 97, § 61.

[7] 14 and 15 Vic., ch. 19, § 11.

[8] N. Y. Code Crim. Proc., § 183; Ill. Crim. Code, § 342.

[9] North v. People, 139 Ill. 81.

[10] North v. People, 139 Ill. 81.

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**§ 88. Suppression of riot.**—Special powers of summary repression are given by statute in case of unlawful assemblies and riots.[11] The statute of Illinois makes killing in the suppression of a riot justifiable, as follows:[12] "If in the efforts made as aforesaid to suppress such assembly and to arrest and secure the persons composing it, who refuse to disperse, though the number remaining is less than twelve, any such persons, or any persons present as spectators, or otherwise, are killed or wounded, said magistrates and officers, and persons acting with them by their order, shall be held guiltless and justified in law." The law in Massachusetts is practically the same.[13] The common law rule is more cautiously expressed by Mr. Bishop as follows: "If rioters and other like offenders stand their ground, and only by killing them can the disorder be suppressed, they who do it are justified."[14] The law in New York provides: "Every endeavor must be used, both by the magistrates and civil officers, and by the officer commanding the troops, which can be made consistently with the preservation of life to induce or force the rioters to disperse, before an attack is made upon them by which their lives may be endangered."[15]

**§ 89. Security of the peace.**—Where a person threatens to commit a crime or breach of the peace, he may be required to give security of the peace. The law as stated by Blackstone[16] may be traced back to the creation of the office of justice of the peace and is substantially in force at the present time, being embodied in the criminal codes of many states.[17] The proceeding generally falls within the jurisdiction of any judge or justice of the peace, and may be instituted by him ex officio, if the threat is made in his presence, otherwise upon the sworn application of the person threatened showing the danger of the crime (articles of the peace). A warrant is thereupon issued and the accused apprehended and examined;

[11] Stephen Hist. Crim. Law, I, 200-206; Blackstone, IV, 142-143.

[12] Criminal Code, 255.

[13] Rev. Laws, ch. 211, § 6. Massachusetts also authorises municipal authorities to forbid the sale of liquor in cases of riot or great public excitement for a period not exceeding three days at any one time (Laws 1887, ch. 765, Revised Laws, ch. 100, § 39).

[14] New Criminal Law, II, 655, 4; Pond v. People, 8 Mich. 150 (dictum).

[15] Code Crim. Proc., § 114.

[16] IV, 251-255.

[17] Mass. Rev. Laws, ch. 216; New York Code Crim. Proc., §§ 84-99; Illinois Crim. Code, Div. V.

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if there appears to be danger of his committing the crime, he is required to enter into a recognizance, with sufficient surety, to keep the peace either generally or towards the person threatened, for a time specified in the recognizance; and upon his violating the stipulation the undertaking may be enforced. While the proceeding for this purpose is had before a judge or justice of the peace, it is not in the nature of a criminal prosecution, the machinery of the courts being here used for the purpose of police restraint; therefore the rule against double jeopardy does not apply.[18]

§ 90. **Concealed weapons.**—Of the conditions tending to facilitate the commission of crime, the carrying of weapons should first be mentioned. As it is not customary in civilised communities to carry weapons about the person, the habit of doing so may be regarded to some extent as an indication of lawlessness.[19] The police power is here however confronted by a constitutional right. The Second Amendment of the Federal Constitution says: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Provisions of the same import are found in most state constitutions, the purpose of self-defence being in some cases added to that of the common defence. This constitutional guaranty has not prevented the very general enactment of statutes forbidding the carrying of concealed weapons, and the possession or use of certain deadly weapons not generally used for legitimate purposes, such as metallic knuckles or dynamite bombs,[20] or

[18] State v. Vankirk, 27 Ind. 121.

[19] See North v. People, 139 Ill. 81. It has, however, been held in Florida that carrying concealed weapons in a "quiet and peaceable manner" does not tend toward a breach of the peace so as to justify an arrest without warrant, and this although the weapon had just been used for an assault. It was therefore held that the act of the person arrested in killing the officer did not constitute murder (Roberson v. State, 42 Fla. 233, 28 Sou. 424, 52 L. R. A. 751). In Massachusetts, on the other hand, the power to prevent breaches of the peace is held to justify the prohibition of parades with arms, although the arms are so fixed that they cannot discharge a missile. "The men who carried these weapons could not actually fire them, but it would be generally supposed that they could. With the exception of being actually shot down, all the evils which the statute intended to remedy still exist in the parade in which the defendant took part." Commonwealth v. Murphy, 166 Mass. 171.

[20] Illinois Crim. Code, §§ 54a, 54d; N. Y. Penal Code, § 410.

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the carrying of arms in a threatening manner.[21] The constitutionality of this legislation has been upheld from an early date in the states in which it has been questioned.[22] In Kentucky it was declared unconstitutional,[23] but expressly authorised by subsequent constitutional amendment.[24] We find here an application of the general principle that constitutional rights must if possible be so interpreted as not to conflict with the requirements of peace, order and security, and that regulations manifestly demanded by these requirements are valid, provided they do not nullify the constitutional right or materially embarrass its exercise.

§ 91. **Military organisations.**—In a number of states the law forbids any body of men, other than the regularly organised militia and the United States troops, to associate themselves together as a military company or organisation, or to drill or parade with arms, without the license of the governor.[25] This provision has been upheld in Illinois[26] and in Massachusetts,[27] while the Supreme Court of the United States has held that the federal constitution applies in this matter only to federal legislation and therefore does not control the action of the states.[28] The existence of uncontrolled military organisations, while perhaps not an encouragement to the commission of crime, may yet constitute a serious menace to the public peace and an obstacle to the orderly and effectual enforcement of the law. As such it would afford a very legitimate ground for

[21] State v. Hogan, 63 Ohio St. 202, 58 N. E. 572.

[22] State v. Mitchell, 3 Blackf. Ind. 229; State v. Reid, 1 Ala. 612, 1840; Nunes v. State, 1 Ga. 243, 1846; State v. Chandler, 5 La. Ann. 489, 1860; Haile v. State, 38 Ark. 564, 1882.

[23] Bliss v. Commonwealth, 2 Littell (Ky.) 90.

[24] Const. 1891, § 1, No. 7, enumerating among the inalienable rights: the right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons.

[25] Illinois Military and Naval Code 1899, XI, § 2. "It shall not be lawful for any body of men whatever other than the regular organised militia * * * to associate themselves together as a military company or organisation or to drill or parade with arms in this state except that permission may be granted by the governor, etc." Mass. Rev. Laws, ch. 16, § 147; N. Y. Military Code, § 177.

[26] Dunne v. People, 94 Ill. 120, 1879.

[27] Commonwealth v. Murphy, 166 Mass. 171, 32 L. R. A. 606.

[28] Presser v. Illinois, 116 U. S. 252, 1886.

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restrictive police regulation, in the absence of any positive constitutional right, and since in Illinois the constitution is silent as to the right to bear arms, the decision rendered in that state can be questioned only on the ground that contrary to the doctrine prevailing in the same jurisdiction, it sanctions the delegation of a discretion unregulated by law to an executive officer, and thus violates the principle of equality.[29] The Supreme Court of Illinois has however also expressed the opinion that the right to bear arms is not even remotely involved in the question of the validity of police regulations regarding military companies,[30] and the United States Supreme Court has expressed itself to the same effect.[31] And the same view was necessary to support the decision in Massachusetts, where the right to bear arms is recognised by the constitution. The court says that the right to keep and bear arms for the common defence does not include the right to associate together as a military organisation or to drill and parade in cities and towns. This may be conceded to be true as far as parading on the streets is concerned; but the principle is stated in a broader form, as applying to military organisation in general. The constitutional right is thus recognised merely as an individual right.

The prevailing doctrine seems to be that the constitutional recognition of the militia implies a limitation upon the right of military association in other and more irregular forms. It is clear that if the state pays in whole or in part the expense of arming and drilling the militia, and of erecting armories, it must have power to control its size, and this again implies some power of selection. There cannot in other words be an indiscriminate right to join the militia. As a matter of fact the statutory maximum number of the state militias will generally be found to accommodate only a small fraction of the male adult population. But this necessary power of selection may still be controlled by law and should be so exercised as

[29] § 643 infra.

[30] "This section [forbidding organisation and drilling without license] has no bearing whatever on that right, whatever it may be, and we will enter upon no discussion of that question. Whether bodies of men with military organisation or otherwise under no discipline or command by the United States or state shall be permitted to parade with arms in populous communities is a matter within the regulation and subject to the police power of the state." Dunne v. People, 94 Ill. 120.

[31] Presser v. Illinois, 116 U. S. 252.

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to make arbitrary discrimination impossible.[32] Is the "security of the free state" consistent with the absolute power of the executive to control the constitution of the militia? It would seem to be far more consonant with the principle of equality to allow the right of military association to all, subject to such regulations as to prevent danger to public peace and order, and to secure the uniformity and efficiency required for public service. The claim that a body of men cannot be safely entrusted with the privilege of military organisation[33] should be established in accordance with definite principles of law.

§ 92. **Bodies of armed men (Pinkerton men).**[34]—A somewhat peculiar form of military organisation is presented by the existence of bodies of armed men used for the protection of property in times of disorder and especially during labor troubles. Legislation has been enacted in a number of states directed against the practice of letting out and employing such armed forces. Thus Wisconsin forbids the employment of bodies of armed men to act as militiamen, policemen or peace officers who are not duly authorised as such under the laws of the state.[35] Illinois forbids private detectives to assume to act as officers of the law.[36] Minnesota forbids the keeping of private detective offices for the purpose of letting out armed men for hire.[37] Massachusetts,[38] Texas,[39] and West Virginia[40] forbid the employment of non-residents for that purpose, and New York,[41] Pennsylvania[42] and Illinois[43] provide that no non-residents shall be employed for police duty by the sheriff. The constitution of Idaho[44] provides "No armed police force, or detective agency, or armed body of men, shall ever be brought into this state for the suppression of domestic violence except upon application of the legislature, or the executive when the legislature cannot be convened."

There is no doubt that the state may exclude non-residents from being vested with official powers under its laws. The

[32] The Supreme Court of Massachusetts states expressly that discrimination in this matter is not open to constitutional objections.

[33] In Illinois the license was refused as anarchist association.

[34] Industrial Commission Report, V. 142-147.

[35] Laws 1893, ch. 163.

[36] Criminal Code, § 256q.

[37] General St. 1894, § 6960.

[38] Rev. Laws, ch. 108, § 11.

[39] Laws 1893, ch. 104.

[40] Laws 1893, ch. 42.

[41] Laws 1892, ch. 272.

[42] Purdon's Digest, 1895, p. 169.

[43] Act June 19, 1893.

[44] Art. 14, § 6.

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discrimination against non-residents in the employment of armed bodies of men not vested with any official authority, might conceivably raise a federal question which, however, has not as yet been passed upon by the courts.[45] Apart from such discrimination it seems clear that the state may prohibit the use of organised bodies for the protection of property; for the natural right of self-defence must not be extended to sanction private warfare, or to supersede the proper and exclusive functions of the regularly constituted public authorities. A precedent for this legislation may be found in the English statutes of liveries directed against the maintenance of bodies of armed retainers by the lords and barons.[46]

**§ 93. Restraints upon business and upon particular dealings.**—Certain classes of business may be placed under special control because they furnish facilities for the commission of crimes or for their concealment. Crimes may to some extent be prevented by properly restricting the sale of weapons, poisons or explosives; and their detection may be facilitated by a strict supervision of these trades. The law may, therefore, forbid the sale of poisons except upon responsible prescriptions; and it may require the keeping of registers showing every sale of weapons, with the name of the purchaser.[47] As stolen goods usually find their way into the hands of pawnbrokers or dealers in second-hand goods, these trades may be kept under control by the requirement of a license, by demanding reports and authorising inspection.[48]

The prevention or detection of crime may also justify restraints upon transactions apart from regular trades. The great facility with which the theft of cotton in the seed may be concealed led the legislature of North Carolina to make it a misdemeanor, first, to sell small quantities of such cotton between sunset and sunrise; then to make any such sale without writing and without docketing the receipt for the purchase price with the justice of the peace. The statute was upheld

[45] See Report of Industrial Commission, V, p. 144; § 710, infra.

[46] Stephen Hist. Crim. Law, III, 226-228.

[47] Illinois Crim. Code, § 54 b, c, h—n., 63.

[48] Grand Rapids v. Brandy, 105 Mich. 670; Launder v. Chicago, 111 Ill. 291, 1884. In France, under Art. 1547 of the Forest Code, establishments for the working of wood may not be carried on within 500 meters of a forest without special administrative permit, the purpose being to reduce the danger of thefts of wood.

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as a legitimate police regulation.[49] Such regulations for the prevention of theft are to be found in the old Anglo-Saxon laws.[50]

§ 94. **Criminal character.**—The attitude of modern social science toward the graver crimes against person and property is that their commission is in most cases attributable to hereditary causes or social conditions which produce degeneracy and criminality. The attitude of the law is that the commission of each offense involves a distinct moral responsibility of the individual, which demands and justifies the infliction of punishment. The law must deal primarily with acts and not with dispositions, and its restrictive measures for the protection against crime must apply to all persons alike. In the absence of a well defined mental disease it cannot stamp character as criminal irrespective of the commission of specific acts, and place persons affected with such character under special control or disability.

§ 95. **Reputation.**—The same must be true of character in the sense of reputation. Blackstone[1] refers to a statute of Edward III, empowering justices of the peace to bind over to the good behavior towards the King and his people, all them that be not of good fame; and these include not only persons guilty of distinct acts of disorderly conduct, but also such as keep suspicious company, or are reported to be pilferous or robbers, such as sleep in the day and wake in the night, the putative fathers of bastards "and other persons whose misbehavior may reasonably bring them within the general words of the statute as persons not of good fame: an expression, it must be owned, of so great latitude as to leave much to be determined by the discretion of the magistrate himself.'[2]

This does not appear to be the common law in this country,

[49] State v. Moore, 104 N. C. 714, 1889; also Davis v. State, 68 Ala. 58, 1880, cited with approval in Budd v. New York, 143 U. S. 517. Alabama forbids the sale of cotton in the seed in certain counties altogether, except on legal process or under mortgages or in payment of rent, cotton in that form being held not to be in a vendible condition. Mangan v. State, 76 Ala. 60.

[50] Stubbs' Select Charters, p. 72, ch. 6.

[1] IV, p. 256.

[2] Gneist Self-Government, § 46, says of this legislation that if administered by other officers than English justices of the peace it might be abused for an alarming exercise of arbitrary power.

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but some of the states have adopted similar legislation. Congress by act of July 29, 1892, amended July 8, 1898, applying to the District of Columbia, authorised the punishment by a fine or the binding over to good behavior, of specific categories of persons, including "suspicious persons." The Court of Appeals of the District of Columbia declared the conviction of a person merely on the ground that he was a suspicious person to be void, the provision of the act in this respect violating the Fourth and Eighth Amendments of the federal constitution. "Mere suspicion is no evidence of crime of any particular kind, and it forms no element in the constitution of a crime." A charge of general suspicion is incapable of being met. Even if reputation could be regarded as an element in the legitimate offense, it would not justify the government in treating the party having such reputation as a criminal. The prisoner was therefore discharged on *habeas corpus*.[3]

§ 96. **Known thieves.**—Some states, however, recognise the power of punishing "known thieves," by which must be understood persons having the character or reputation of thieves. While the character may be proved by showing specific acts, the punishment is not for these acts but for the general conduct which they indicate, and a conviction may under the provisions of some statutes be based on evidence of reputation.[4] The Supreme Court of Ohio said in a case upholding this power: "It is a mistake to suppose that offenses must be confined to specific acts of commission or omission. A general course of conduct or mode of life which is prejudicial to the public welfare may likewise be prohibited and punished as an offense. * * * The offense consists not in particular acts but in the mode of life, the habits and practices of the accused in respect to the character or traits which it is the object of the statute creating the offense to suppress."[5] The better doctrine is that a con-

[3] Stoutenburgh v. Frazier, 16 App. D. C. 229, 48 L. R. A. 220. In England under the Prevention of Crimes Act, 1871, § 15, suspected persons frequenting public places with intent to commit felony may be punished, and the intent to commit the felony need not be proved by evidence of specific acts, but may be made to appear to the court from the known character of the person. For peculiar interpretation of a statute discriminating apparently upon the basis of reputation, see State v. Workman, 35 W. Va. 367, 14 L. R. A. 600.

[4] World v. State, 50 Md. 49, 1878.

[5] Morgan v. Nolte, 37 Ohio St. 23, 1878.

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viction can be based only on the proof of specific acts[6] and that notoriety cannot create a presumption of guilt.[7]

§ 97. **Vagrancy, vagabondage, and criminal idleness.**—A remarkable case of an apparent recognition of a condition of criminality is presented by the legislation against vagrancy, vagabondage, and criminal idleness. This legislation, in England, goes back to the time of Edward III., and was firmly established at the beginning of our government. Vagrancy and vagabondage include many distinctly illegal acts violating public order or morality; especially begging on the streets, and night walking on the part of prostitutes, may be regarded clearly as offensive and disorderly conduct in public places. But the statutes also punish acts which in themselves appear innocent, as loitering about public places, etc., when done by persons of a certain description. So the Illinois statute declares to be vagabonds all persons * * * "who are habitually neglectful of their employment or their calling, and do not lawfully provide for themselves, or for the support of their families; and all persons who are idle and dissolute and who neglect all lawful business, and who habitually mis-spend their time by frequenting houses of ill-fame, gaming houses or tippling shops; all persons lodging in or found in the night-time in out-houses, sheds, barns or unoccupied buildings or lodging in the open air, and not giving a good account of themselves; and all persons who are known to be thieves, burglars or pickpockets, either by their own confession or otherwise, or by having been convicted of larceny, burglary, or other crime against the laws of the state, punishable by imprisonment in the state prison, or in a house of correction of any city, and having no lawful means of support, are habitually found prowling around any steamboat landing, railroad depot, banking institution, broker's office, place of public amusement, auction room, store, shop or crowded thoroughfare, car or omnibus, or at any public gathering or assembly, or lounging about

[6] So a person cannot be convicted as a common gambler without proof of acts of gambling; Com. v. Hopkins, 2 Dana, 418; in Pennsylvania it was said that the offense consists in frequenting places for unlawful purposes, not in being a reputed or professional thief; Byers v. Com. 42 Pa. St. 89.

[7] State v. Beswick, 13 R. I. 211, a leading case upon the subject. See also: Buell v. State, 45 Ark. 336, "any person whose known character is that of a prostitute."

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any court room, private dwelling houses or out-houses, or are found in any house of ill-fame, gambling house, or tippling shop."[8] The offense of criminal idleness is very similar in character.[9]

**§ 98. Vagrancy not a status of dependence.**—A peculiar view of the law of vagrancy was taken in some earlier cases. A statute of Maine authorised any two or more overseers to commit to the workhouse * * * "All persons able of body to work, and not having estate or means otherwise to maintain themselves who refuse or neglect so to do, living a dissolute or vagrant life and exercising no lawful calling or business sufficient to gain an honest livelihood." A prostitute was committed under this authority and applied for *habeas corpus*. The court admitted that the overseers had no criminal jurisdiction, and had no right to act on the petitioner as an offender; the commitment was, however, upheld as a police measure.[10] The argument is somewhat confused, but justifies the commitment upon three grounds: that it was for the woman's own benefit, that it was a sort of quarantine to protect the community from contamination, and that the petitioner's dissolute habits were leading her to indigence, so that she might be treated as an indigent although she had not yet received alms. All three arguments are palpably unsound: there exists no authority to deprive sane adults of their liberty simply as a means of improvement; the quarantine of those affected by contagious disease is justified and limited by the strictest necessity of physical protection, and the commitment of paupers is merely a condition annexed to their claim to public alms, and not a power to be exercised by force. A summary administrative commitment of prostitutes as a police measure might logically lead to indefinitely prolonged deprivation of liberty since the vicious disposition which justifies the original detention would also justify its continuance. The decision shows the danger of ignoring the boundary line between police measures and criminal punishment. It was later on overruled as inconsistent with the Fourteenth Amendment.[11] It was also

[8] Criminal Code, § 270.

[9] Com. v. Tay, 170 Mass. 192, 48 N. E. 1086.

[10] Adeline G. Nott's case, 11 Me. 208, 1834.

[11] Portland v. Bangor, 65 Me. 120

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said in a New York case[12] that a person may be convicted for vagrancy whether his condition is his misfortune or his fault, since his individual liberty must yield to the public necessity or the public good.

**§ 99. Vagrancy a criminal offense.**—But the sound doctrine is undoubtedly that vagrancy and criminal idleness do not constitute in the eye of the law a social status to be dealt with by police control, but criminal acts to be punished by the criminal courts. It is necessary, therefore, to determine where the gist of the offense lies. It seems that the criminality rests upon a combination of three circumstances: the absence of lawful means of support, the neglect to seek employment, and the offensive public exhibition of such condition. The lack of means of support imposes the obligation to work since otherwise the burden of support falls upon the public; the provisions of the law are "possibly designed to protect the public from expense quite as much as from disorder."[13] "He who being able to work and not able otherwise to support himself, deliberately plans to exist by the labor of others is an enemy to society and to the commonwealth."[14] Therefore there can be no conviction if there are independent means of support;[15] but the lack of such means may be inferred by the jury from the fact of prostitution.[16] The neglect to seek employment seems essential since without it mere misfortune would be punishable.[17] The third requirement, which is perhaps not essential, adds to the element of public danger that of offensiveness and disorder, and needs the aggravation of the other two circumstances.[18] In California it has been held that idle wandering and roaming about the streets at late and unusual hours of the night, may be punishable without proof of lack of means of support;[19] but this must be regarded as doubtful unless there is also disorderly conduct. In Michigan it was held that the mere suspicion that a woman walking on the street at night is

[12] People v. Forbes, 4 Park. Cr. Cas. 611, 1860.

[13] Sarah Way's case, 41 Mich. 299.

[14] State v. Hogan, 63 Oh. St. 202, 58 N. E. 572.

[15] Shanley v. Wells, 71 Ill. 78; Taylor v. State, 49 Ala. 19.

[16] Commonwealth v. Doherty, 137 Mass. 245.

[17] In re Jordan, 90 Mich. 3, 1892.

[18] It may also constitute a form of disorderly conduct. In re Stegenga, (Mich.), 94 N. W. 385.

[19] Ex parte McCarthy, 72 Cal. 384, 1887.



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a prostitute, will not justify an arrest in the absence of any act on her part showing that her purpose is illegal.[20]

**§ 100. Vagrancy as a means of dealing with suspects.**—But while it should be insisted that the commission of specific criminal acts is essential to constitute vagrancy, and that it must be treated as a crime and not as a status, there is no doubt that the comprehensive definition of the offense affords the means of dealing with the criminal elements of the population and keeping them temporarily under restraint in cases of emergency. The New York City Magistrates' Report of 1897 says: "Many persons are arrested under suspicious circumstances, such as well known criminals mysteriously loitering about the streets at night, or frequenting crowded places, or persons having property in their possession for which they can give no good account, nor of themselves. Frequently such arrest is the first step in the detection of some crime which is investigated, the proper complainant found, a formal complaint taken, and the prisoner held for trial. In many instances such arrest prevents the commission of crime. During the year the total number of such cases amounted to 1897, of which 1885 were discharged, and 12 cases are pending." The disposition of the cases shows that the charge of vagrancy serves simply to justify an arrest made for other purposes for which, however, an arrest cannot legally be made. The practice of our police authorities thus sanctions a form of preventive arrest which has no warrant in our law, but which is recognised in Germany as within the inherent powers of the police.[21] This mere precautionary arrest is lawful under our law only in order to prevent an offense which is imminent or in course of being committed.[22]

**§ 101. Control over immigration.**—In the exercise of its power of territorial sovereignty the government of the United States has enacted laws excluding immigrants belonging to the criminal and other objectionable classes.[23] Such control over foreigners does not involve any question of domestic government or of civil rights under the constitution. It is an

[20] Pinkerton v. Verberg, 78 Mich. 573; but see Braddy v. Milledgeville, 74 Ga. 516, 58 Am. Rep. 443, punishing street-walkers of disreputable character.

[21] Meyer Verwaltungsrecht, p. 162.

[22] § 87, supra.

[23] Act of March 3, 1903; 32 Statutes at Large, 1213, consolidating the previous legislation.

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altogether different question how far a state may keep out of its borders convicted criminals, vagrants, paupers, lewd women or dependent persons. Prior to the passage of the federal immigration act a number of states had enacted statutes, under which immigrants were taxed or bonds required as security against their becoming a charge upon the public. The United States Supreme Court has held with reference to these acts that any burden placed on immigrants generally, or according to the arbitrary discretion of an administrative officer, is an unconstitutional restriction of foreign commerce, but has also recognised that protective measures carefully limited to immigrants dangerous to the safety or good order of the state may be upheld as a legitimate exercise of the police power.[24] Little occasion exists at present for state control of foreign immigration, since the matter is adequately covered by Federal legislation. But the same question might arise in connection with interstate migration. The *dicta* of the Supreme Court seem to recognise the right of the states to protect their people from dangerous immigrants, no matter from where they come,[25] but no such case has been directly passed upon, and especially the guaranty of equal rights to the citizens of the several states, has not yet been considered in this connection.

§ 102. **Control over criminals after conviction.**—While the law does not deal with criminality apart from the commission of specific criminal acts, the punishment of actual crime may be made and is made the means of treating criminality as such. This is done partly through measures adopted during imprisonment, partly through substitution of control and supervision outside of the prison, for imprisonment, partly through restraints imposed upon a person who has been convicted and suffered punishment.

§ 103. **Measures during imprisonment.**—Modern systems of prison legislation are based upon the theory that punishment should be made as far as possible the means of reformation, and that the prisoner should be treated in a manner calculated to restore him to society as a more useful member than he was before. The prison management and discipline through which

[24] Passenger Cases, 7 How. 283, especially with reference to § 2 of the act of Massachusetts before the court in the case of Norris v. Boston. Henderson v. Mayor, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275.

[25] Hannibal, etc., R. Co. v. Husen, 95 U. S. 465.

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this end is sought to be accomplished, is not part of the police power of the state; but is partly an incident to the power of criminal punishment (which belongs to the judicial power), and partly rests upon the rights and powers inseparable from the government of any institution having the special custody of persons. This allows the regulation of the routine of the life down to the smallest details, and of course also the prohibition of the use of liquor, tobacco, etc.

Measures which in their effect reach beyond the term of imprisonment are often specially authorised by statute. This is especially true of processes serving the purpose of identification: the taking of measurements and photographs, copies of which are distributed among other penal institutions and police offices. Since these are appropriate means of making escape more difficult, and of facilitating the recapture of an escaped convict, they may perhaps be regarded as implied in the ordinary powers of management; in a considerable number of states they have, however, in recent years, been made the subject of special statutory enactment.[26]

There is no warrant for adopting compulsory measures of this kind with regard to persons who have not been adjudged guilty of any offense, except perhaps where authorised by statute as a means of securing the presence of the accused at the trial. In Indiana a person arrested was photographed by the sheriff against his wish, and his photograph sent to a number of police offices. An action upon the sheriff's bond was dismissed, the court saying: "It would seem, if in the discretion of the sheriff he should deem it necessary to the safe keeping of a prisoner, or to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, etc., as was done in this case, he could lawfully do so." As for sending the photograph abroad the court held that if this constituted a libel, the sheriff, in committing it, had not acted by virtue of his office, and could therefore not be held liable upon his bond.[27]

It is certainly better to deny the power of photographing in

[26] So New York, 1896, California, 1897, Virginia, 1898, &c.; see Mass. Rev. Laws, ch. 225, §§ 18-21.

[27] State ex rel. Bruns v. Clausmeier, 154 Ind. 599, 57 N. E. 541. Authority granted by statute as to persons held on charge of felony. Iowa Laws, 1902, ch. 385.

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such cases, except under authority of a statute restricting it to its proper purpose and providing safeguards against its abuse. Where a suspected criminal is arrested but must be discharged for lack of evidence, there seems to be no constitutional warrant for compulsory photographing or measurement, desirable as some such measure of identification may be for practical purposes.

**§ 104. Conditional pardon.**—It is recognised that the pardoning power may be exercised by annexing conditions to the pardon.[28] Some times the conditional pardon is expressly provided for in the constitution[29] or by statute.[30] The condition must not be impossible, criminal or illegal; but there can be no valid objection to the requirement that the pardoned offender shall remain within a certain locality, report to the police, not engage in certain pursuits, etc.; in other words, the power of conditional pardon may be used to establish a very effective supervision, to continue until the expiration of the original term of imprisonment. It is also held that the condition may be that the offender shall leave the country or the state;[31] even, it seems where banishment as a punishment is forbidden;[32] on principle the legality of this condition may well be doubted; for what right has a state to force an offender upon another community?

**§ 105. Indeterminate sentence laws and parole.**—Akin to the conditional pardon is the parole (under English laws ticket of leave) under which a convict is provisionally discharged from prison, and which is authorised in a rapidly increasing number of states, generally in connection with a system of sentences of imprisonment of indeterminate duration within a minimum and maximum term fixed by law. Under regulations to be established by the prison authorities, or by a state board of pardon, the convict may be allowed to depart from the penitentiary on condition of good behavior, and liable to be returned to prison without a new conviction until his term expires

[28] Ex parte Wells, 18 How. 307.

[29] State v. Barnes, 32 S. C. 14, Constitution S. C. IV, § 11.

[30] Fuller v. State, 122 Ala. 32, 45 L. R. A. 502.

[31] People v. Potter, 1 Park Cr. R. 47; Commonwealth v. Haggerty, 4 Brewst. 326, 1869; State v. Addington, 2 Bail. L. 516, 23 Am. Dec. 150, 1831; ex parte Marks, 64 Cal. 29, 1883.

[32] Ex parte Hawkins, 61 Ark. 321, 30 L. R. A. 736.

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or until he is sooner finally discharged. The legality of these laws has been contested partly upon the ground that they are encroachments upon the executive pardoning power, partly upon the ground that they vest judicial powers in the prison authorities, the punishment depending upon their discretion instead of upon the sentence of the court. Upon one or both of these grounds they have been held to be unconstitutional in several states.[33] In other states, however, these acts have been sustained, though in some cases by a divided court.[34] The Illinois act seeks to avoid the constitutional difficulties by making the discharge of the prisoner dependent upon an order of the court and the approval of the governor. The Supreme Court of Massachusetts sustains the act upon the theory that its effect is to inflict the maximum of punishment for the offense subject to reduction.[35] The same view has been taken in Illinois.[36] This view, however, encounters some difficulty where the law provides that after a breach of the parole the convict is to serve out the whole of the unexpired maximum term of imprisonment, not counting the time he was out on parole. If during this time the convict is still in legal custody —and that is his status under the law of Illinois—the effect of this provision is to deprive him of his liberty for a fixed maximum term plus the parole time. To remove this difficulty the person on parole must be held to be free subject to conditions by the breach of which he forfeits his freedom and to which he voluntarily submits by accepting the parole. Such a status of liberty is certainly most anomalous; but it seems to be sanctioned by the established practice and constitutional recognition of conditional pardons.[37]

§ 106. **Question of delegation of judicial powers.**—Where discharge and recommitment depend upon the order of the

[33] People v. Cummings, 88 Mich. 249, 14 L. R. A. 285, 1891; State ex rel. Bishop v. State Board of Corrections, 16 Utah 478, 52 Pac. 1090; Re Conditional Discharge of Convicts, 73 Vt. 414, 56 L. R. A. 658. In Michigan a constitutional amendment sanctioning the legislation was adopted in 1902.

[34] State v. Peters, 43 Ohio St. 629, 4 N. E. 81; Commonwealth v. Brown, 167 Mass. 144, 45 N. E. 1; George v. People, 167 Ill. 447, 47 N. E. 741; Miller v. State, 149 Ind. 607, 49 N. E. 894.

[35] Murphy v. Commonwealth, 172 Mass. 264, 43 L. R. A. 154.

[36] People ex rel. Bradley v. Superintendent Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76.

[37] Arthur v. Craig, 48 Ia. 264.

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prison authorities, the question arises whether it is consistent with constitutional principles to leave the admeasurement of punishment within a minimum and a maximum term to administrative officers. That the judiciary cannot claim admeasurement of penalties as a matter of constitutional right, appears from the fact that there are some offenses in which no discretion as to penalty exists,[38] others in which discretion is very much circumscribed. It is also coming to be recognised more and more that an approximation to perfect justice to the criminal can be better accomplished by watching the conduct of the criminal after conviction, than by the traditional methods of due process of law, which, it must be confessed, have resulted in a very crude realisation of the ideal demands of justice in the matter of punishment. It would therefore be better to regard the scope of the judicial power which under the constitution may not be committed to the other departments of the government, as restricted to the determination of the question of guilt, and to hold the matter of admeasurement of punishment to be within the legitimate province of legislation and administration.

The discretion of prison authorities should be controlled by legislation. The law should not only fix methods of punishment, but also determine its maximum. Indefinite terms of imprisonment can be justified only where the offense is sufficiently grave to deserve a life term, or where the offender is treated as a person deficient in moral responsibility, who is to be guarded rather than punished. Moreover, considering that the parole system creates a new status of diminished liberty, the precise character of that status should be determined by law, and to leave the conditions under which the prisoner is out on parole to be fixed by the prison authorities, is a delegation of legislative power hardly sustainable on principle.

**§ 107. Parole conditions a form of police supervision.**—The conditions of the parole, assuming them to be framed by competent authority, may be made to constitute a very effective police supervision over the convict. The practice is to put them in the form of rules and regulations accepted by the prisoner and termed a parole agreement, but their binding character certainly does not rest upon contractual principles.

[38] Murder in the first degree—death penalty, N. Y. Penal Code, § 186.

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The main conditions of the parole are: consent of the Board of Managers to a change of employment or residence; monthly reports by mail, abstention from intoxicating liquors and from frequenting saloons.[39] The Indiana State Reformatory requires in the monthly report a statement, among other things, of the earnings and expenditures of the paroled, whether he attends church, whether he uses tobacco, what books he has read, whether he has attended public meetings, dances, picnics, and if so, when and where. These questions are put to juvenile offenders.

A breach of any of the conditions subjects the offender to recommitment without judicial proceedings, if the liability to summary retaking is one of the conditions of his qualified release.[40] This is constitutional since he remains technically a prisoner.[41] Supervision and recommitment are not acts of the police power, but part of the punishment inflicted for crime.

§ 108. **Suspension of sentence and probation.**—In a number of states courts have exercised the power, without distinct warrant of law, of suspending sentence after conviction for an indefinite time, with the understanding that, if the offender behaves well, the sentence will never be pronounced. The practice seems also to have existed in England,[42] and to have been well established as a power of respite or reprieve in capital cases.[43] Practically this amounts to an exercise of a conditional pardoning power, and may be used for the purpose of controlling the conduct of an offender while leaving him at large. The practice was in some cases noticed by the courts but passed unchallenged.[44] In Massachusetts (where it had been recognised by statute), in New York (overruling the lower courts, whose decisions led the legislature to legalise the practice), and New Jersey, the power to suspend sentence has been sustained;[45] in Michigan, Illinois and the federal courts

[39] See Rules and Parole Agreements, American Bar Association Report, 1898, p. 477-484.

[40] State ex rel. O'Connor v. Wolfer, 53 Minn. 135, 19 L. R. A. 783.

[41] Fuller v. State, 122 Ala. 32, 45 L. R. A. 502; Kennedy's Case, 135 Mass. 48.

[42] 2 Hale P. C., ch. 58, p. 412.

[43] Bishop New Crim. Proc., I, § 1299.

[44] Weaver v. People, 33 Mich. 296.

[45] Commonwealth v. Dowdican, 115 Mass. 133; People v. Court of Sessions, 141 N. Y. 288; State v. Addy, 14 Vroom 113.

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its legality has been denied.[46] Indiana seems to regard the power as inconsistent with the governor's constitutional prerogative of pardon,[47] a view which will hardly find favor elsewhere. The tendency is to sanction the practice by statute, (the first step to that effect having been taken in Massachusetts[48]), applying it to first offenders who are to be saved from the contamination of prison life.[49] Similar legislation exists in England,[50] France,[51] Belgium,[52] some other European states, and a number of English colonies. The system of France and Belgium differs from that of England and America in that under the former the conditional liberty is forfeited only by the commission of another crime of which the offender is convicted, while under the English and American laws the enforcement of the sentence is at any time within the power of the court, which may exercise it when satisfied of the misconduct of the offender.

§ 109. **Security of good behavior.**—While indefinite suspension of sentence is of doubtful validity without statutory sanction, it is a principle of the common law that the court may require as part of the sentence in cases of misdemeanor that the defendant give bonds to keep the peace and be of good behavior.[53] In New York this authority is confirmed by statute.[54]

§ 110. **Disabilities of ex-convicts.**—Where the right to pursue a calling may be restricted in the public interest, persons having been convicted of a crime may be excluded by law from such pursuit. Thus liquor licenses may be refused to ex-convicts. In New York persons convicted of infamous

[46] People v. Brown, 54 Mich 15; People v. Allen, 155 Ill. 61, 39 N. E. 568; People ex rel. Boenert v. Barrett, 67 N. E. 23; United States v. Wilson, 46 Fed. Rep. 748.

[47] Butler v. State, 97 Ind. 373.

[48] The creation of a probation officer for the county of Suffolk by act of 1878.

[49] See New Jersey Probation Law in Report Am. Bar Ass'n, 1900, p. 465.

[50] Probation of First Offenders' act, 1887, 50 & 51 Vict. ch. 25.

[51] Loi Berenger, March 26, 1891.

[52] May 31, 1888.

[53] Bishop Cr. L., I., Sec. 945.

[54] 2 R. St. 737, Sec. 1. In West Virginia the practice is recognised only in case of gross common law misdemeanor, punishment for which is not prescribed by statute. State v. Gillilan (W. Va.), 51 W. Va. 278, 41 S. E. 131, 57 L. R. A. 426; so in Tennessee, Estes v. State, 2 Humph. 496.

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crimes are excluded from the practice of medicine. Where the restriction operates only prospectively, its legality is undoubted, whether regarded as a police regulation or as part of the criminal punishment; its retroactive operation has been upheld as an exercise of the police power, when the commission of the crime showed unfitness of the calling. This point will be discussed in another connection.[55]

Police supervision as an addition to the regular punishment for crime, seems to be unknown in this country, but is recognised in European systems. In Germany it may be made part of the sentence in a number of offenses specified by statute.[56] In France where it was introduced in 1810, it was abolished by an act of 1885, which substituted a prohibition against living in designated cities. In England police supervision was introduced by the Habitual Offenders' Act 1869, and is now regulated by the Prevention of Crimes Act 1871. The court upon the second conviction of an offender is authorised to add to any other punishment police supervision for a period of seven years: the person under supervision must notify the police of every change of residence and report himself once a month.

[55] Hawker v. New York, 170 U. S. 189; see § 545, infra.

[56] Riot, counterfeiting, procuring immorality, larceny and embezzlement, receiving stolen goods, robbery, offenses against game laws, arson, injury to property with danger to life.

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## CHAPTER V.

### SAFETY AND HEALTH.

§ 111. **Growth of legislation.**—The protection of persons and property from the elements, from mechanical forces pressed into human service, and from disease, calls in many respects for the combined action of society, and the urgent need of this protection makes it impossible to wait for, or to rely entirely upon, voluntary combination. A large amount of state activity is thus called into play. The government provides for the preservation of life, health and property by preventive and other arrangements, which it manages in a proprietary capacity and places at the service of the public; but in addition it regulates, compels and restrains private action for the like purpose. A vast amount of police legislation is justified on this ground, and the state is readily conceded more incisive powers than despotic governments would have dared to claim in former times.[1]

The earlier history of legislation shows comparatively little care for the prevention of accident or disease. The XII Tables contain what appears to be a sanitary regulation, viz: the prohibition of burials in the city. The Roman praetor entertained popular actions for damages and penalties in case of injury done by matter carelessly thrown or poured from houses upon public highways, or dangerously placed thereon;[2] the protection was thus confined strictly to public places. Apparently the earliest English sanitary legislation is an act regarding nuisances in towns of the 12th Richard II, chapter 13; commissions of sewers were first created by 8 Henry VI, chapter 2; slaughtering of animals in walled towns was prohibited by 4 Henry VII, chapter 3. Building regulations were established for London after the great fire of 1666. The need of public measures for health and safety would naturally first be felt in cities, and it was through autonomous municipal legislation

[1] Thus sanitary measures against the plague have been resented in India as interfering with the sanctity of private life by a population which tolerated for centuries the grossest forms of governmental oppression and spoliation.

[2] Dig. 9, 3.



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that on the continent of Europe during the latter part of the Middle Ages this branch of internal police was first called into existence.[3] Since the last century health and safety have become prominent objects of the so-called social legislation—that is to say, legislation for the benefit of wage earners, covering chiefly the following subjects: factories, mines, ships, and tenements.

**§ 112. Principal subjects of legislation.**—The legislation in the interest of safety and health is so extensive that it is not possible to do more than indicate its principal subjects and the measures adopted for dealing with them. This will at the same time serve to define the scope of these two interests for the purposes of the police power.

SAFETY LEGISLATION. §§ 113-121.

**§ 113.** In the legislation which seeks to afford protection from injury or destruction due to mechanical causes, the following principal agencies or dangers are guarded against: water, fire, explosion, the power of moving bodies, structural defects, and the action of animals. According to subjects regulated or dealt with we may distinguish: lands subject to floods; mines; railroads; ships and navigation; buildings; machinery; explosive and combustible materials and poisons; dangerous animals and destructive vermin and other pests.

**§ 114. Protection against overflow and inundation.**[4]—The action of the state is chiefly proprietary, by improvements of the channels of rivers, the erection and maintenance of dikes and levees, and the drainage of surface waters.[5] Under early legislation of Louisiana, the duty to erect embankments was laid upon the riparian proprietor; in other states such an obligation does not exist, and probably cannot be constitutionally imposed, under the principle of equality;[6] but where a number of pieces of land forming a large tract are similarly exposed, an owner may be compelled to join with others in common measures of protection,[7] and there is authority for holding that the riparian proprietor may be forbidden to deal with his

[3] Gierke Genossenschaftsrecht, II, 729.

[4] See §§ 616-619.

[5] As to riparian rights, see §§ 403-409, infra; Green v. Swift, 47 Cal. 536; Gibson v. United States, 166 U. S. 269; Eldridge v. Trezevant, 160 U. S. 452.

[6] See § 409, infra.

[7] See §§ 441, 442, infra, compulsory joint improvements.

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land in such a manner as to weaken the natural protection afforded by it against the inroads of the water.[8] Under the law of necessity, without statutory authority, all able-bodied persons may be required to assist in warding off a present and immediate danger of inundation.[9]

**§ 115. Mines.**[10]—Legislation for the safety of miners exists in all states in which mining operations are carried on. For a recent revision and codification of the laws regarding bituminous coal mines see Illinois Act of April, 1899; regarding anthracite coal mines, the act of Pennsylvania in Brightly and Purdon's Digest, 1895, p. 1342. The provisions relate to maps and surveys, the construction of shafts, the observance of proper partitions, the operation of hoisting engines and other machinery, the storage and use of explosives, ventilation and lighting, and signal codes. The state exercises supervision over mines through inspectors, and requires certificates of competency granted upon examination of those employed as managers or foremen, hoisting engineers, and mine examiners, at the same time frequently compelling such employment.[11] For question arising as to statutory liability in case of such compulsory employment, see § 624, *infra*.

**§ 116. Railroads.**[12]—The police power is exercised by statutory legislation and by municipal ordinances in the interest of the public at large using highways at railroad crossings, of passengers, of railroad employees, and of the owners of property liable to be injured or destroyed by the operation of railroad trains. Regulations, restraints, and requirements relate to the following matters: the rate of speed of trains in cities; warning sign boards, gates, and flagmen at crossings; grade elevation or depression;[13] switches, brakes, couplers, signals; the use of stoves in cars; fences and cattle guards; employment of sufficient numbers of men and of men properly qualified, and testing such qualification by examination;[14] provisions against overwork of train operators; supervision, sometimes at the expense of the railroad company; strict responsibility for in-

[8] Commw. v. Tewksbury, 11 Metc. 55, § 409, *infra*.

[9] Penrice v. Wallis, 37 Miss. 172.

[10] See § 638.

[11] Illinois Act, §§ 7, 8, 16, 17, 18.

[12] See §§ 622, 623, 628-634, 637.

[13] § 631, infra.

[14] South Covington &c. Street Car Co. v. Berry, 93 Ky. 43, 15 L. R. A. 604; State v. Inhabitants of Trenton, 53 N. J. L. 132, 11 L. R. A. 410; Smith v. Alabama, 124 U. S. 465.

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juries to persons or property. Constitutional questions arising with regard to some of these requirements will be discussed in their proper places; it is sufficient here to say that the amplest exercise of the police power is sustained by the courts in this field of legislation.

**§ 117. Ships and navigation.**[15]—The great bulk of legislation in this matter is federal, enacted under the constitutional power of the United States over commerce. But the regulation of port pilotage is left to the states,[16] and state laws contain other provisions regarding the safety of navigation within their limit.[17] Local municipal authority also frequently extends to the enactment of harbor regulations.[18] As regards federal legislation, the establishment and maintenance of lighthouses and life saving stations belongs to the proprietary powers of the government; the following provisions fall within the province of the police power: laws for the prevention of collisions at sea, in harbors, rivers, and inland waters, and on the great lakes, by prescribing lights, fog signals, and sailing and steering rules;[19] relating to the transportation of nitroglycerine,[20] gunpowder,[21] and other inflammable or dangerous materials;[22] steam boilers and their inspection;[23] licensing of captains, chief mates, engineers, and steamer pilots;[24] safeguards for the prevention and extinguishment of fire, and for the saving of lives in emergencies.[25] Many of these safeguards are also required of foreign vessels carrying passengers from ports of the United States to other places and countries,[26] such vessels being clearly within the police power of the United States, while they are in an American port engaged in taking passengers.

[15] See § 625.

[16] U. S. Rev. Stat. 4235, 4444.

[17] See 1 N. Y. Rev. Stat., p. 683.

[18] Illinois City Act V, § 1, Nos. 33, 34, 35, 38, 39; Chicago Rev. Code, 1897, Title Harbors; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

[19] U. S. Rev. Stat., §§ 4233, 4412, Act Aug. 19, 1890, 1 Suppl. 781; Act Feby. 8, 1895, 11 Suppl. 370; Act. Feby. 19, 1895, 11 Suppl. 381.

[20] U. S. Rev. Stat., 4278-4280.

[21] U. S. Rev. Stat., § 4422.

[22] U. S. Rev. Stat., §§ 4288, 4472-4476.

[23] U. S. Rev. Stat., §§ 4428-4438.

[24] U. S. Rev. Stat., §§ 4439-4442; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450; Spraigue v. Thompson, 118 U. S. 90.

[25] U. S. Rev. Stat., §§ 4471, 4477, 4478, 4479, 4482, 4484, 4488.

[26] Act Aug. 7, 1882, 1 Suppl., p. 383.

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§ 118. **Buildings and structures.**—The legislation dealing with this matter is generally local whether enacted by state or by municipal authority.[27] Provisions relate to the mode of construction and materials used, as prescribed by elaborate building regulations; the establishment of fire limits, prohibiting within cities or designated portions thereof the erection of frame houses, and the repair of those damaged or decayed to more than a specified proportion of their value;[28] the limitation of height of buildings; the requirement, in case of hotels and lodging houses, tenements, office buildings, factories, theatres and public halls, of precautions and arrangements against fires and for escape, and for the protection of stairs and hatchways; analogous provisions for other structures, such as stands and platforms, or the scaffolding of buildings; even the limitation of the height of billboards to six feet has been upheld as a proper safety measure;[29] provisions for building permits and inspection to control the carrying out of these laws; in recent times the control of the qualification of architects by examination and certificate.[30] In dealing with actual fires the community primarily renders service and assistance; but under the pressure of extreme necessity the police power may be carried to extraordinary lengths: buildings may be torn down to check the spread of a conflagration, and persons present may be required to render services in obedience to the instructions of proper authorities.[31] In the interest of common safety, owners may also be forbidden to set fire to their own buildings, woods or prairies.[32]

§ 119. **Dangerous machinery, inflammable materials, explosives, poisons, etc.**—A great many police regulations fall under these heads, covering among others the following subjects: machinery in factories (belting, gearing, shafting, cleaning while in operation, employment of children upon it); construction and inspection of boilers and elevators, and examination and licensing of engineers; testing and inspection of oils and labelling packages; insulation of electric wires, placing them underground, etc.; sale of poisons in properly labeled packages;

[27] See Mass. Rev. Laws, chap. 104.
[28] See § 537, *infra*.
[29] Rochester v. West, 164 N. Y. 510, 58 N. E. 673.
[30] Illinois Act June 3, 1897
[31] See §§ 534, 614, infra.
[32] Illinois Crim. Code, §§ 17, 18.

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manufacture, transportation and storage of gunpowder, nitroglycerine, and dynamite; fire works; precautions in blasting.

§ 120. **Dangerous sports.**—The common provisions against fast riding and driving fall under this head, and laws exist in some states requiring precautions in acrobatic or aeronautic exhibitions, or forbidding certain forms of dangerous exhibitions altogether;[33] recent legislation requires keepers of bathing establishments to maintain safety lines and life boats.

§ 121. **Destructive animals and vermin, noxious weeds, and other pests.**—The police power is exercised by authorising the shooting of fierce dogs not properly guarded.[34] The statute books of recent years are full of provisions against agencies destructive of the products of the soil. In some cases it is attempted to lay upon the owner of land a duty of extermination.[35] An act of Illinois of 1899 requires the State Entomologist to inspect tree nurseries, and to issue certificates of soundness; if stock is infected the owner may be required to take measures, and may be forbidden to remove any stock, and provision is made for treatment, partly at the expense of the owner, partly at the expense of the state, and for the destruction of the stock which cannot be saved.[36]

## SANITARY LEGISLATION. §§ 122-133.[37]

§ 122. There is a large amount of corporate public action in the interest of public health which will not be discussed in this treatise: the maintenance of hospitals, provision of pure water, establishment of parks, sewer systems and drainage, cleaning of streets, also the furnishing of information and advice tending to reduce disease and promote health. The police power operates on persons; land, structures and establishments; obnoxious things; and on business, trades, employments and professions.

§ 123. **Persons—Immigration and quarantine.**[38]—Restraints are placed upon persons to guard against the introduction or

[33] New York Penal Code, § 427.

[34] See § 421, infra.

[35] Illinois Crim. Code, §§ 40, 41; New York Laws, 1878, ch. 49; § 618, infra.

[36] See also New York Agricultural Law, § 83.

[37] A very full account of American sanitary legislation will be found in a recent work by Charles V. Chapin, Municipal Sanitation of the United States, Providence, 1901.

[38] See §§ 446, 447.

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the spread of contagious or infectious disease.[39] The United States formerly left it altogether to the states to take measures of protection against the importation of disease from abroad, and even after the establishment of national quarantine regulations[40] their enforcement was left to local authorities. The act of March 3, 1903, excludes from immigration persons affected with loathsome or dangerous contagious diseases, and subjects immigrants to medical examination.[41] An act of February 15, 1893, gives to the Secretary of the Treasury wide discretionary power to prevent the introduction of disease, by inspection, disinfection, and isolation, and the President is given authority temporarily to suspend immigration altogether,[42] but quarantine is still chiefly a matter of local legislation and administration. In the states there is generally an ample delegation of power to administrative boards of health,[43] to deal with contagious and infectious disease. The powers exercised by these boards are large and frequently not specified or enumerated by statute; the New York law gives them "control of all persons and things arriving from infected places or which from any cause are liable to communicate contagion," and requires especially the isolation of persons and things infected or exposed.[44] The health officer of the port of New York is required "in the presence of immediate danger of which he shall be the judge, to take the responsibility of applying such additional measures as may be deemed indispensable for the protection of the public health."[45] The statutes of Illinois provide that the State Board of Health "shall have charge of all matters pertaining to quarantine, and shall have authority to make such rules and regulations, and such sanitary investigations as they may from time to time deem necessary for the preservation or improvement of public health;"[46] cities are simply authorised "to appoint a board of health and prescribe its powers and duties,"[47] while town boards of health "on the breaking out of any contagious disease, shall have power to make and enforce any rules and regulations tending

[39] Chapin, p. 630-664.

[40] Under act of April 29, 1878.

[41] 32 Stat. at Large, p. 1213.

[42] II Suppl. Rev. Stat., p. 82.

[43] Formerly local, now also state boards with concurrent or supervisory powers.

[44] Public Health Law, § 24.

[45] Public Health Law, § 101.

[46] Rev. Stat., State Board of Health, § 2.

[47] City act V, § 1, No. 76.



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to check the spreading of such disease;" to shut up houses or places in which infected persons are, and remove the latter to a pest house within the limits of the town.[48] Measures directly affecting the person in his bodily liberty or integrity, represent the most incisive exercise of the police power. Only the emergency of present danger therefore can justify quarantine, isolation or removal to hospital and compulsory treatment, and it is at least doubtful whether vaccination can be made compulsory apart from such necessity, certainly not under a mere general delegation of authority to administrative bodies; but such general delegation is sufficient to cover the most ample powers in case of an emergency.[49]

§ 124. **Marriage.**[50]—Restrictions upon the right to marry based on disease may rely for their justification upon one of two grounds: either the marriage may be a wrong to the other party by exposing him or her to the risk of bodily harm; a law of Michigan[1] which makes persons affected with syphilis or gonorrhoea incapable of contracting marriage, and the contracting of such marriage a felony, is of this character; or the law may have in view the physical well-being of future generations by preventing marriages the offspring of which is liable to be tainted by hereditary disease; of this character is a law of Connecticut[2] forbidding epileptics, imbeciles, or feeble-minded persons to marry, where the woman is under forty-five years of age. This age limitation clearly indicates that the purpose of the act is to prevent the transmission of the defect to offspring.

Legislation forbidding the marriage of persons afflicted with disease, which is liable to hereditary transmission, should be conceded, as a matter of principle, to be within the police power of the state; for the health of unborn generations is a matter of profound concern to the community which may justly assume the guardianship of their interests. As a matter of practical legislation, however, restrictions upon the right

[48] Rev. Stat. Township Organisation, XIV, § 1.

[49] Harrison v. Mayor of Baltimore, 1 Gill. (Md.) 264, 1843; State v. City of New Orleans, 27 La. Ann. 521; Haverty v. Bass, 66 Me. 71, and see §§ 446, 447.

[50] See § 697.

[1] Laws 1899, p. 247.

[2] Act of July 4th, 1895, amended July 9th, 1895; also Laws of Minnesota, 1901, ch. 234, and Laws of Kansas, 1903, ch. 220.

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to marry resting upon scientific theories which are not absolutely clear in their operation, and upon facts which are not easily ascertainable, must meet with insuperable difficulties of enforcement. Provisions merely penalising marriages contracted in contravention to the law would remain dead letters, while to vest the licensing official with power to refuse marriage licenses to applicants whom he knows to be afflicted with inheritable disease,[3] or to make the right to marry dependent upon a physician's certificate, would make the enjoyment of an essential right subject to the exercise of a discretion which the courts might well deem unreasonable, because uncontrollable as to its responsible and impartial execution.

The prohibition of marriages between uncle and niece, or aunt and nephew, or between first cousins, is different in nature, since it creates merely a relative and not an absolute impediment. The validity of the prohibition is not questioned in the states in which it exists, although it rests upon a theory which is not supported by any respectable evidence.[4]

**§ 125. Burials and cemeteries.**[5]—The state may exercise the fullest control over the disposition of dead bodies with a view to protecting the public health. Under the laws of many states permits for burial and for transportation of corpses may be required.[6] The practice of embalming has been regulated in recent years in a number of states by a system of examination and licensing. The control of cemeteries is only a further application of the control over the disposition of dead bodies. This control is often delegated to local authorities, with power to prohibit, remove and vacate,[7] and in some states statutes directly prohibit the establishment of new burial grounds in built-up portions of cities, or on lands draining into a source of water supply.[8] Dead animals do not at once cease to be property, if they were property while alive, but if not imme-

[3] Act of Minnesota, § 2.

[4] Huth, The Marriage of Near Kin, London, 1887.

[5] See § 565.

[6] See Mass. Rev. Laws, ch. 78, § 38. Also Chapin, p. 58. Such permits serve also the purpose of furnishing information as to deaths.

[7] Illinois City Act, Art. V, § 1, No. 79; Act of May 29, 1879, Sec. 1.

[8] Pennsylvania Acts of June 24, 1895, April 20, 1899; Tennessee March 28, 1899.

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diately cared for and disposed of by the owner, they may be treated as nuisances.[9]

§ 126. **Dead bodies.**—The legal status of dead human bodies is quite anomalous. They have ceased to be persons without becoming a definite species of property. Relatives have a qualified right of disposal for purposes of interment, which cannot be regarded as property. A medical institution may acquire a body for dissection; thereby it loses its peculiar and distinctive character and becomes property like any other inanimate object. But this transformation into property requires legal authority, and is generally regulated by statute.[10]

Aside from this use, the normal destination of the body after death is its decent disposal, and this seems to be altogether within the control of the law, saving legitimate religious usages not contrary to health or safety or the accepted standards of morals. The police power may control the manner of disposition of dead bodies for the purpose of preventing the concealment of crimes, or to guard against the communication of disease, or to prevent the desecration of remains, or to prevent disorder in funeral processions or exercises. In this country regulations exist for the first two purposes; so the time during which bodies may remain unburied is limited in a number of states, and burials at night are forbidden in Boston.[11]

Probably the courts would control legislative discretion were it exercised in an unreasonable manner. Thus a legislative prohibition of cremation on the ground that it is contrary to good morals, would not be likely to be acquiesced in by the courts; and as a measure to prevent the concealment of crime, it might be held to go beyond the reasonable requirements of that purpose.

§ 127. **Land, structures and buildings.**—With regard to land irrespective of buildings the police power is sparingly exercised. In some states local authorities may require low lots to be filled in so as to prevent water from standing, and from becoming a nuisance or injurious to health;[12] more important are the drainage statutes under which a majority of owners

[9] See § 522, *infra*.

[10] So e. g. Illinois Rev. Stat., Title Medicine, No. 1-4; Mass. Rev. Laws, ch. 77; New York Public Health Law, §§ 217, 217a.

[11] Chapin, p. 100. Disinterment of bodies made dependent on permit: Re Wong Yung Quy, 2 Fed. Rep. 624.

[12] Chapin, p. 196.

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may compel a minority to join in improvements for sanitary as well as for agricultural purposes, the constitutional aspect of which will be discussed further on.[13] It has been held in Georgia and South Carolina that in urban communities the cultivation of rice may be forbidden for sanitary reasons,[14] and in some southern cities the upturning of the soil is forbidden in the summer months.[15] Neglecting land and allowing offal, filth or noisome substances like garbage to accumulate on it, and the pollution of water, especially such as is used for drinking, may be treated as a nuisance;[16] where water is impure, wells may be required to be filled up.[17]

§ 128. **Buildings and other establishments.**[18]—The following regulations rest upon the sanitary power: forbidding more than a certain proportion of a lot to be covered by buildings; requiring light and air shafts and other means of ventilation; requiring water supply, plumbing and privy arrangements; forbidding the use of cellars for dwelling purposes, and the keeping of animals in houses. These requirements are of particular importance with regard to tenement houses. Their owners may be required to keep them in a clean condition so far as necessary for the public health, to provide garbage boxes, to whitewash walls and ceilings periodically, etc. Overcrowding of tenements may be prevented by requiring a minimum amount of air space to each occupant. The use of tenements for unwholesome occupations may be prohibited, and the manufacture of clothing in living rooms has especially been made the subject of restrictive legislation in the interest of the public at large.[19] To aid in the enforcement of these provisions, powers of inspection are given to proper authorities, and in New York the names of the owners of tenement houses must be publicly registered.[20]

§ 129. **Foodstuffs, etc.**[21]—The sanitary power is exercised

[13] See § 441, 442, *infra*.

[14] Green v. Savannah, 6 Ga. 1, 1849; Summerville v. Pressley, 33 S. C. 56, 8 L. R. A. 854.

[15] Chapin, p. 158.

[16] Illinois Criminal Code, Sec. 221.

[17] State v. Schlemmer, 42 La. Ann. 1166, 10 L. R. A. 135.

[18] Chapin, pp. 149-155, 822-831; Mass. Rev. Laws, ch. 104.

[19] Mass. Rev. Laws, ch. 106, Sec. 56-61.

[20] See the Tenement House Act of New York, Laws, 1901, ch. 334, regulating fully the whole subject.

[21] See also §§ 274-286; also Chapin, pp. 306-424.

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to prevent adulteration with noxious ingredients, while innocuous adulterations are dealt with under the power to prevent fraud. The laws punish adulteration of food or liquor with poisonous or injurious substances, the sale of putrid meat, or of milk drawn from diseased cows, and the keeping of cows in an unhealthy condition. In many states offices have been created to watch over the purity of dairy products by regulations regarding dairies and the inspection of cows and of milk offered for sale.

Formerly the legislation against oleomargarine claimed to be an exercise of the sanitary power, but this plea had to be abandoned and it now justifies itself as a means of preventing fraud. For the more effectual control of the food supply, municipalities are given power over markets and slaughterhouses, which is exercised by regulation, inspection and the requirement of licenses, sometimes—under express authority—by the establishment of municipal markets and slaughterhouses and the prohibition of slaughtering or of the sale of fresh meat outside of their limits.

Contagious diseases of animals are dealt with under state authority, by destruction of infected or exposed stock,[22] by measures of quarantine and temporary suspension of traffic or importation, and by imposing upon owners the duty to report every case of such disease.[23] The United States has legislated for the prevention and suppression of animal disease, so far as interstate and foreign commerce is concerned.[24]

§ 130. **Other articles of consumption.**—Regulations similar to those affecting foodstuffs exist with regard to other articles of consumption, so especially drugs and medicines, and candies and confections. Tennessee has gone so far as to prohibit the sale of cigarettes;[25] in this prohibition, however, as in that of

[22] § 524, infra.

[23] Ill. Act of April 20, 1887; Mass. Rev. Laws, ch. 90, § 11.

[24] U. S. Rev. St., 2493-2496 regarding importation of cattle; act May 29, 1881, I Suppl. 435, establishing Bureau of Animal Industry in the Department of Agriculture; Act Aug. 30, 1890, I Suppl. 794, for inspection of animals the meat of which is intended for export, and against importation of diseased cattle and unwholesome food; also act of March 3, 1891, I Suppl. 937, amended by act of March 2, 1895, II Suppl. 403, for inspection of cattle, hogs, carcasses and products thereof which are the subjects of interstate and foreign commerce.

[25] Austin v. State, 101 Tenn. 563, 50 L. R. A. 478.

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the sale of liquor, other than purely sanitary considerations come into play. In Massachusetts the prohibition of the use of injurious ingredients is extended to the manufacture of toys.[26]

The trade in second hand articles, especially second hand clothing, may also be subjected to sanitary restrictions, and is not uncommonly left to municipal regulation.[27]

**§ 131. Employment.**[28]—The first impulse to mining and factory regulation was given by the wretched sanitary conditions under which mining and manufacturing operations were carried on, and a large part of this legislation is now of a sanitary character. As far as requirements for the arrangements in mines and factories are concerned, this is clear, but in the regulation of conditions of employment, especially as to time of labor, there may be considerable doubt whether the object of legislation is sanitary or social and economic. In view of the very ample legislative power over children, the restrictions upon their work need not be carefully scrutinised as to their character. The restrictions upon the employment of women in underground or night work are generally accepted as sanitary regulations, or regulations in the interest of morals and decency. As to male adults, restrictions upon hours of labor are infrequent; an 11 hours' maximum day for operatives in cotton and woolen manufactories in Georgia and South Carolina has not been questioned judicially; an eight-hour day for miners has been upheld in Utah,[29] and for Utah also by the Supreme Court of the United States,[30] but declared invalid in Colorado.[31]

**§ 132. Qualifications for the exercise of callings affecting health.**[32]—The right to pursue the following callings is regulated under the plea of protection of health: medicine and surgery, midwifery, pharmacy, dentistry, veterinary medicine;

[26] Rev. Laws, ch. 213, § 6.

[27] State v. Taft, 118 N. C. 1190, 32 L. R. A. 122; Rosenbaum v. Newbern, 118 N. C. 83, 32 L. R. A. 123; Chapin, p. 209.

[28] See §§ 310-317, infra.

[29] State v. Holden, 14 Utah 71, 96, 37 L. R. A. 103, 108.

[30] Holden v. Hardy, 169 U. S. 366, 1898.

[31] Re Morgan, 26 Col. 415, 47 L. R. A. 52. The legislation thus declared unconstitutional has since been expressly authorised by constitutional amendment adopted Nov., 1902.

[32] See also §§ 152-154, 544, 545, 646, 650.

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under recent legislation also the vocations of plumbers, undertakers and embalmers, and in a few states also of barbers.

§ 133. **Practice of medicine.**—The right to practice as physician or surgeon was restricted to members of the corporation of that profession by statutes of Henry VIII, and in New York admission to the profession was regulated by colonial legislation as early as 1684. At present there are no states in which the right to practice is not regulated by statute.

A license to practice medicine is granted upon evidence of qualification according to requirements which vary in different states, the following being the usual systems: admission upon presentation of a diploma from a reputable medical school or college; admission upon examination by official boards of examiners; and a combination of the diploma and examination system either so that either one will be sufficient, or so that both are required, or so that an applicant for examination must show a specified number of years' study.[33]

Generally the statutes require proof of qualification only of those who shall in the future desire to begin the practice of medicine; the law may, however, apply to existing practitioners tests of fitness to continue in the practice of their profession,[34] and it has been held that where a license fee is imposed, existing practitioners cannot be constitutionally exempted from it.[35] On the other hand, the law may accept the fact that the applicant has practiced for a number of years as sufficient evidence of qualification, and in lieu of either diploma or examination.[36] Exceptions are frequently made in favor of medical practitioners residing in other states and called in for consultation or treatment in special cases.[37]

Where a license is required, the practice of medicine without it is forbidden and punished, and it becomes important to determine what is meant by practice of medicine. The question may arise in connection with the administration of domestic remedies, emergency services, the recommendation of medicines kept

[33] A full synopsis of the legislation of the different states is given in the Review of Legislation, 1901, published by the New York State Library, pp. 101-107.

[34] Dent v. West Virginia, 129 U. S. 114.

[35] State v. Pennoyer, 65 N. H. 113, 5 L. R. A. 709.

[36] Williams v. People, 121 Ill. 84; State v. Vandersluis, 42 Minn. 129.

[37] State v. Van Doran, 109 N. C. 864; Parks v. State (Ind.), 64 N. E. 862.

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for sale,[38] treatment by massage, nursing without the use of medicine or operative surgery, and mental or spiritual treatment. In some states the law has been held to apply to Christian Science and to osteopathy,[39] and the services of a clairvoyant physician have been held to be medical services;[40] in other states methods of healing not using medicine or surgery are regarded as not within the spirit of the law.[41] The law of Illinois[42] defines practice of medicine as treating, or proposing to treat, operating on or prescribing for any physical ailment or any physical injury to or deformity of another, but excludes from the operation of the act the administration of domestic or family remedies in cases of emergency[43] and treatment by mental or spiritual means, without the use of any drug or material remedy. The phrasing of a particular statute may be conclusive as to its application to certain methods of treatment, and the decision may turn in part upon the interpretation given to such terms as "appliance" or "agency;"[44] the provisions of the law regarding study and examination may also be relied upon to show that they were intended to apply only to particular schools of medicine.[45] Massachusetts provides that the act for the registration of physicians and surgeons shall not apply to osteopathists, clairvoyants or persons practicing hypnotism, magnetic healing, mind cure, massage, Christian Science or cosmopathic methods of healing, if they do not hold themselves out as practitioners of medicine, or practice, or attempt to practice medicine in any of its branches.[46] In Germany it is only the assumption of the title or designation "doctor,"

[38] People ex rel. St. Bd. Health v. Lehr, 196 Ill. 361, 63 N. E. 725.

[39] State v. Buswell, 40 Nebr. 158, 24 L. R. A. 68; Little v. State, 60 Neb. 749, 84 N. W. 248, 51 L. R. A. 717; People v. Gordon, 194 Ill. 560, 62 N. E. 858; Bragg v. State, 134 Ala. 165, 58 L. R. A. 925, 32 So. 767.

[40] Bibber v. Simpson, 59 Me. 181.

[41] Smith v. Lane, 24 Hun. 632; State v. Mylod, 20 Rh. I. 632, 41 L. R. A. 428; Nelson v. State Bd. of Health, 22 Ky. Law Rep. 438, 50 L. R. A. 383; State v. Loeffring, 61 Oh. St. 39, 46 L. R. A. 168.

[42] Illinois Act, Apr. 24, 1899, § 7.

[43] The law formerly excluded both administration of domestic remedies and emergency services; the change making only an exception in favor of the conjoint application of the two is said to have been due to inadvertence in drafting the act.

[44] Hayden v. State (Miss.), 33 So. 653.

[45] State v. MacKnight (N. C.), 42 S. E. 580.

[46] Rev. Laws, ch. 76, Sec. 9.

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"physician," etc., which is forbidden without proper license.[47] All the American states go further than this, covering at least the traditional methods of professional treatment irrespective of the use of title or designation indicating professional standing. It is probable that private treatment, not for money, and not as a matter of profession, cannot be entirely prohibited, but the neglect of parents or others to call in medical aid for those who are in their custody may be made an offense, and has been made an offense by statute.[48]

## LIMITATIONS OF THE FEDERAL CONSTITUTION UPON THE POLICE POWER FOR THE PROTECTION OF SAFETY AND HEALTH. §§ 134-139.

**§ 134. Fourteenth amendment and commerce clause.**[1] — The United States has power to control state legislation regarding safety and health under the 14th Amendment, and under its power over commerce.

Under the Fourteenth Amendment the United States is competent to protect individual liberty and property against arbitrary or unequal state legislation enacted under color of protection of safety and health, but having in reality no such justification, even where interstate or foreign commerce is not involved. Thus the United States Supreme Court has annulled an ordinance regarding laundry establishments because it appeared that it was in reality a measure discriminating against one race;[2] but so far no case has arisen in which the judgment of the state that a restraint was required in the interest of health or safety, operative exclusively upon internal interests, and respecting the principle of equality, has been overruled by the United States Supreme Court. The extreme limit of tolerance must be found in the sanction given to the absolute prohibition of the domestic manufacture and sale of oleomargarine.[3] The prohibition of the manufacture and sale of liquor,[4] and of cigarettes[5] has likewise been held to be legitimate under the police power. It may, therefore, be said that

[47] Meyer Verwaltungsrecht, § 79.

[48] People v. Pierson (N.Y.) 68 N. E. 243; Reg. v. Downes, 13 Cox C.C. 111.

[1] See also §§ 727, 728.

[2] Yick Wo v. Hopkins, 118 U. S. 356.

[3] Powell v. Pennsylvania, 127 U. S. 678.

[4] Mugler v. Kansas, 123 U. S. 623.

[5] Austin v. Tennessee, 179 U. S. 343.

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purely internal legislation in the interest of safety and health has so far been left unimpaired and uncontrolled with the states.

The power to regulate commerce with foreign nations and among the several states, was intended chiefly to be exercised for economic purposes, but being undefined in its scope and objects it is necessarily plenary and may be applied to the protection of safety and health. Reference has been made to the provisions of the United States Revised Statutes for safety in navigation, and an act of Congress requires common carriers engaged in interstate commerce by railroad to adopt certain precautions for the safety of employees and travelers.[6]

**§ 135. Safety legislation affecting commerce.**—In the absence of Congressional legislation safety on railroads may be secured by state legislation within the territory of the state, although the regulations may affect trains in interstate traffic; so it has been held that a state statute forbidding the heating of passenger cars by stoves or furnaces kept inside the cars is valid although it controls in some degree the conduct of those engaged in interstate commerce. "Persons travelling on interstate trains are as much entitled while within a state, to the protection of that state, as those who travel on domestic trains;" and "the mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not, without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives and the safety of their people."[7]

In the matter of navigation, the first Congress of the United States adopted the state pilot laws,[8] and it was held later on that the regulation of pilotage was so far local that it was not within the exclusive legislation of Congress, but that the states might be authorised to establish systems of their own, and had been so authorised by Congress;[9] but state provisions may at any time be superseded by federal legislation.[10] A prohibition under the law of New York against the racing of steamboats[11]

[6] Act of Mar. 2, 1893, II Suppl. Rev. Stat., p. 102.

[7] New York, N. H. & H. R. Co. v. New York, 165 U. S. 628.

[8] I Statutes at Large, pp. 55, 131.

[9] Cooley v. Board of Wardens, 12 How. 299, 1851.

[10] R. St. 4237, 4401, 4444, Spraigue v. Thompson, 118 U. S. 90, 1886.

[11] L. 1839, ch. 175.

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would be valid, the matter not being covered by federal statute; but provisions regarding lights, signals, lifeboats or fire extinguishing apparatus might be held to yield to federal rules of the same character, especially if the operation of two sets of rules would result in conflicts.

The fact that the United States has granted a patent for an invention does not protect the use of that invention within the state, if condemned by state legislation as dangerous to public safety. This rule was applied to oil found by state inspection to be unsafe for illuminating purposes.[12]

The United States has no power to prohibit the manufacture of inflammable material[13] within the states not affecting interstate or foreign commerce.[14]

**§ 136. Federal power not exclusive of protective state legislation.**—The legislation of the United States in matters of interstate and foreign commerce undertakes by no means to afford protection against all the dangers to public health which unrestricted commerce might involve, and, of course, the inaction of Congress must not be construed as meaning that dangers do not exist or may not be guarded against. Even where Congress has legislated, as in granting to the federal authorities extended quarantine powers, it recognises existing state and local regulations, and directs federal co-operation in their execution and enforcement;[15] state quarantine is therefore valid though affecting commerce.[16] The federal legislation providing for inspection of animals attempts to guard only against the export of diseased meat, and does not prevent the importation of infected live stock into a state. Hence such danger must be dealt with by state legislation, and this has been recognised by the Supreme Court of the United States.[17] "The same bale of goods, the same cask of provisions, or the

[12] Patterson v. Kentucky, 97 U. S. 501, 1879, citing with approval an analogous decision regarding the conflict between a state law regulating the practice of medicine and the claim to sell a medicine for which a federal patent had been issued, Jordan v. Overseers of Dayton, 4 Oh. 295.

[13] Mixture of naphtha with illuminating oils.

[14] United States v. DeWitt, 9 Wall. 41, 1870.

[15] Sec. 3 of Act of Feb. 15, 1893, II Suppl. 84.

[16] Morgan's &c. S. S. Co. v. Louisiana St. Board of Health, 118 U. S. 455, and Compagnie Francaise v. State Board of Health, 186 U. S. 380.

[17] Kimmish v. Ball, 129 U. S. 217; Asamussen v. Idaho, 181 U. S. 198;

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same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and, while frankly exercised, they can produce no serious collision."[18]

**§ 137. Exercise of state police power not conclusive.**—Yet it is the purpose of the federal power over commerce to preserve its freedom, and an unrestricted power of the states for the alleged protection of health might easily be abused to impede commerce and protect domestic industries. Therefore the federal courts do not accept as conclusive the judgment of the state legislature that a measure restraining commerce is called for by the interest of public health, but inquire in every case whether there is a legitimate exercise of the police power. Thus where a state forbids the manufacture and sale of an article as injurious to health, which article is generally recognised as a legitimate subject of commerce, the United States will protect its importation and sale, while in the original package. This principle was applied to the legislation prohibiting the sale of oleomargarine, which had previously been upheld as a purely domestic measure.[19] So the prohibition of the sale of cigarettes, recognised as valid where commerce is not affected, was held inapplicable to imported cigarettes in the original package, although the court refused to recognise small packages for retail sale as original packages for the purpose of withdrawing them from the power of the state.[20]

**§ 138. Discriminative legislation under color of sanitary power.**—The federal courts moreover will not allow a measure to stand which upon the plea of health discriminates against foreign products, the discrimination being in reality not

Smith v. St. Louis & S. W. R. Co., 181 U. S. 248; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613; Reid v. Colorado, 187 U. S. 137.

[18] Johnson J. in Gibbons v. Ogden, 9 Wh. at p. 235.

[19] Schollenberger v. Pennsylvania, 171 U. S. 1; Powell v. Pennsylvania, 127 U. S. 678.

[20] Austin v. Tennessee, 179 U. S. 343.

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against the disease, but against the locality from which the import comes.

In Minnesota a statute prohibited the sale of fresh beef, veal, etc., except from animals inspected by local officers in the state within twenty-four hours before their slaughter; in Virginia a statute allowed the sale of fresh meat at a distance of one hundred miles or more from the place of slaughter only after inspection by local officers for which the owner had to pay one cent per pound. The Supreme Court declared both statutes unconstitutional, the Minnesota Act, because it made the importation of fresh meat from other states practically impossible,[21] the Virginia Act because it burdened this importation by an onerous tax having practically the same effect as an absolute prohibition.[22] Another Virginia act was declared unconstitutional which required the inspection of all flour brought into the state and payment of a fee therefor, while it did not require the inspection of flour made within the state.[23] In these cases it was clear that the statute expressly or by necessary operation made a difference between the state in which it was enacted and other states, which did not correspond to a similar difference of sanitary conditions.

Even where the disease guarded against is local the protection of the freedom of commerce will warrant an inquiry whether the danger justifies the degree of the restraint imposed. So a Missouri statute forbidding the importation of Texas cattle during eight months of the year, was declared unconstitutional.[24] The court took the view that since no discrimination was made between sound and infected cattle, the statute went beyond the necessities of the case. But in the later case of Kimmish v. Ball[25] the court said, referring to Railroad Company v. Husen: "No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the

[21] Minnesota v. Barber, 136 U. S. 313, 1890.

[22] Brimmer v. Rebman, 138 U. S. 78, 1891.

[23] Voight v. Wright, 141 U. S. 62, 1891.

[24] Hannibal &c. R. Co. v. Husen, 95 U. S. 465, 1878.

[25] 129 U. S. 217, 1889.

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court." This statement, confirmed in a subsequent case,[26] indicates that a proper quarantine measure will be upheld though operating against importation from other states where it can be shown that the source of disease is local, and this principle has since been liberally applied by the Supreme Court.[27]

§ 139. **Louisiana v. Texas.**—The conflict between state police power and the freedom of interstate commerce was presented in a peculiar form in the case of Louisiana v. Texas.[28] The health authorities of the state of Texas had declared a rigid quarantine and embargo on goods coming from New Orleans, where cases of yellow fever had appeared, virtually prohibiting all commerce from that city into Texas, to the great detriment of the business interests of New Orleans, and, as was alleged, to the great advantage of rival commercial centres in Texas. The state of Louisiana, alleging that such absolute prohibition was unnecessary—as was demonstrated by the very different treatment on the part of Texas of fever infected parts of Mexico and the West Indies—and that her citizens were thereby impoverished, the value of her taxable property and public lands reduced, her revenues diminished, and immigration into the state retarded, asked for an injunction against the state of Texas, her governor and health officers, restraining them from carrying into effect such regulations and from applying to New Orleans other regulations than those established against other foreign ports infected with yellow fever. The Supreme Court refused the injunction on the ground that it had no jurisdiction over a grievance of that character which did not constitute a controversy between two states within the meaning of the second section of the third article of the constitution. The court held on the one hand that inasmuch as the vindication of the freedom of interstate commerce is not committed to the state of Louisiana, and that state is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the state of Louisiana or any special injury to her property, but as asserting that the state is entitled to seek relief in this way because the matters complained of affect her citizens at large,

[26] Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 1898.

[27] Rasmussen v. Idaho, 181 U. S. 198; Smith v. St. Louis & S. W. R. Co., 181 U. S. 248; Reid v. Colorado, 187 U. S. 137.

[28] 176 U. S. 1, 1900.

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which is obnoxious to the principle that the Eleventh Amendment must not be evaded by a state assuming the prosecution of claims of her citizens against another state; it held on the other hand that "a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state."[29] Whether the action of the Texas health officer was justified by the statutes of Texas or whether it was valid or invalid under the Federal Constitution, the court does not determine, but some of the concurring opinions strongly intimate that if a case were properly brought before the federal courts, the Texas regulations might be declared void as violating the freedom of interstate commerce, if their character appeared to be as alleged. The case shows very clearly the possible abuses of the sanitary power of the states, and points to the remedy suggested by the court, namely, that "Congress could by affirmative action, displace the local laws, substitute laws of its own, and thus correct any unjustifiable and oppressive exercise of power by state legislation."

## LOCAL POWERS FOR THE PROTECTION OF SAFETY AND HEALTH. §§ 140-142.

**§ 140. Delegated ordinance powers.**—The exercise of the police power for safety and health is of the greatest importance in closely populated districts. This part of the police power has therefore chiefly grown up in cities, and there to-day finds its most extensive application. This fact is recognised by an ample delegation of powers of local legislation in this field by the state to incorporated municipalities. This delegation—found in special charters or in general acts under which cities are organised—consists partly in the enumeration of specific powers indicating the subjects upon which, and the measures by which local legislation may operate, partly in grants of power, couched in more general terms, to declare what shall be a nuisance, and to abate the same; to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease; or generally to provide for the safety, welfare, and good government of the community (general welfare clause).

[29] See on the point of jurisdiction, Missouri v. Illinois, 180 U. S. 208.

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Comparing the list of subjects of ordinance power to be found in most American city charters with the classification of safety and sanitary legislation above given, it will be found that it covers almost the whole of the police power in this matter, so far as its operation can be locally restricted to the territory of a city. The notable exceptions are regulations concerning the practice of professions and the field of factory legislation, which are usually left to state statutes, the former having no specific reference to density of population, and the latter having a considerable influence upon conditions of production and being therefore inseparable from economic interests generally reserved to state legislation. The principle of delegation seems to be to make the municipal police power co-extensive with local dangers arising from the close aggregation and contact of persons and property in a limited space or territory.

§ 141. **Principle of construction.**—This principle of delegation may be fitly recognised as a principle of construction of charter powers, which should, if consistent with their wording, be given an effect adequate to meet local dangers by appropriate and customary measures of restraint or requirement. In case of an epidemic disease local authorities are allowed to exercise incisive powers over person and property[30] which in the absence of immediate danger would not be sustained under a delegation couched in general terms.[31] Under a power to take measures for the prevention of fires, or even under the general welfare clause, cities may, according to the predominant judicial opinion, establish fire limits, within which the erection of frame houses is prohibited;[32] a power in some jurisdictions denied in the absence of a specific grant,[33] but supported by the long established practice of legislation.[34]

As regards establishments or arrangements which affect health only very remotely, and are dangerous chiefly when not properly kept, or when existing in excessive numbers, or when

[30] Mayor of Baltimore v. Harrison, 1 Gill. (Md.) 264.

[31] Potts v. Breen, 167 Ill. 67, 47 N E. 81.

[32] Wadleigh v. Gilman, 12 Me. 403; Alexander v. Greenville, 54 Miss. 659; Ford v. Thralkill, 84 Ga. 169; Mayor of Monroe v. Hoffman, 29 La. Ann. 651; City of Olympia v. Mann, 1 Wash. 389, 12 L. R. A. 150.

[33] Hudson v. Thorne, 7 Paige 261; Pye v. Peterson, 45 Tex. 312.

[34] Massachusetts Colonial Acts of 1679, 1692; Resp. v. Duquet, 2 Yeates (Pa.) 483, 1799.



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located in built-up portions of a city, we may distinguish two tendencies in the judicial interpretation of municipal charters: the one, to sustain their prohibition only where the particular establishment can be shown to be a nuisance in fact; the other, to allow a total prohibition within the city limits, provided the prohibition is not altogether unreasonable or oppressive. So as to cemeteries,[35] hospitals,[36] keeping animals,[37] and slaughter houses.[38] Where the power is only to declare and abate nuisances, it is properly restricted to nuisances in fact; where a power is given over a subject-matter that may tend to give rise to nuisances, the charter will usually express whether it is a power to regulate or to suppress. In the absence of such expression it would seem that the city should have power to forestall the nuisance by keeping the danger altogether away from its territory, provided such course is in accordance with the customary practice of municipalities; and provided that regulation is not equally efficient, for then prohibition would be oppressive and unreasonable.

**§ 142.[39] Judicial control as to reasonableness.**—The municipal police power is subject to a strong judicial control as to the mode of its exercise. The courts assume a general function of supervision regarding the adjustment of means to ends in the protection of public interests. While they profess to regard the state legislature as a co-ordinate power, they frankly treat the municipal authorities as subordinate. Through this attitude the courts have avoided the laying down of absolute limitations, but have been satisfied to judge each ordinance on its own merits. This process has however resulted in developing principles of limitation which can with great advantage be applied to state legislation. As the power of judicial control

[35] Wider power: City Council v. Baptist Church, 4 Strob. S. C. 306, 1850; People v. Pratt, 129 N. Y. 68, 29 N. E. 7.

Narrower: Lake View v. Letz, 44 Ill. 81.

[36] Wider power: Milne v. Davidson, 5 Mart. N. S. 409, 1827; perhaps to be explained by local sanitary conditions in New Orleans.

Narrower: Selectmen v. Murray, 16 Pick. 121; Bessonies v. Indianapolis, 71 Ind. 189, 1886.

[37] Wider power: Darlington v. Ward, 48 S. C. 570, 38 L. R. A. 326, 1897; State v. Holcomb, 68 Ia. 107.

Narrower: Ex parte O'Leary, 65 Miss. 80; Arkadelphia v. Clark, 52 Ark. 23.

[38] Wider power: Ex parte Heilbron, 65 Cal. 609; Beiling v. Evansville, 144 Ind. 644; 35 L. R. A. 272.

Narrower: Wreford v. People, 14 Mich. 41.

[39] Administrative orders, see Fire Dept. v. Gilmour, 149 N. Y. 453.

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over statutory legislation is more and more distinctly assumed, and the theory of the necessity of express limitations is abandoned, the adjudications on ordinances will become more valuable as precedents to indicate the measure of legislative power in the interest of health and safety. Even applying some of the essential limitations of the municipal ordinance power to state legislation, others will remain peculiar to the former. Under the principle of local self-government, local authorities cannot be vested with powers necessarily exceeding their territorial jurisdiction; those matters therefore, which equally affect the people of the state at large, and cannot be confined locally, must be reserved to the state legislature; so the operation of railroads apart from local traffic and the safety of the streets of the city. Moreover, the inauguration of a novel policy in matters of safety and health, the prohibition of articles of consumption possibly but not undoubtedly injurious to health, the establishment of monopolies, the restriction of the right to pursue established avocations, may under circumstances be conceded to the legislature of the state, but cannot be introduced by local authorities under mere general grants of power.

## LIMITATIONS OF HEALTH AND SAFETY POWERS WITH REFERENCE TO CONDITIONS AND MEASURES. §§ 143-155.

**§ 143. The problems involved.**—The peculiar difficulty of safety and health legislation is that the possible causes of injury to person and property are extremely numerous and practically ubiquitous, that there is hardly any industry in which they may not be found if sought for, and that while the danger is often slight and remote, the measure devised to combat it may profoundly affect economic interests, favoring one set of interests and prejudicing another.

The questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed measure tend to remove it? is the restraint or requirement in proportion to the danger? is it possible to secure the object sought without impairing essential rights and principles? does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?

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**§ 144. Inconclusiveness of legislative judgment.**—All these are questions of fact rather than questions of law, and if there is any serious doubt as to the danger or remedy, the legislature has better facilities for resolving it than a court of justice, which must rely upon the testimony of parties in a particular case, which may be collusive, and in different cases may be conflicting.[1]

Yet if the passage of a statute were conclusive evidence of the existence of the danger and of the necessity of the remedy, the power of the legislature in the most important field of the police power would be practically unrestricted. Whatever may have been or may be in some cases now, the profession of the courts as to deference to the judgment of the legislature and unquestioning confidence in its good faith, yet as a matter of fact the courts do not surrender their control as to the necessity or appropriateness of a safety or health measure. It has been said that "it is for the legislature to determine the exigency (that is, the occasion) for the exercise of the power, but it is clearly within the jurisdiction of the courts to determine what are the subjects upon which the power is to be exercised and the reasonableness of that exercise."[2] Yet the exigency or occasion generally consists entirely in the relation of the measure proposed to the subject acted upon: the health of miners forms the subject, the regulation of employment is the

[1] "There is a manifest absurdity in allowing any tribunal, either court or jury, to determine from testimony in the case the question of the constitutionality of the law. * * * The first case presented might show by the opinions of many witnesses that the use of the dry emery wheel is almost necessarily fatal to the operative, while the next might show exactly the opposite state of facts. * * * Courts of last resort * * * would have no means of ascertaining whether it was a collusive case or not, or whether the weight of evidence was in accord with the truth. * * * The legislature in determining upon the passage of the law may make investigations which the court cannot." (People v. Smith, 108 Mich. 527, 32 L. R. A. 853, 1896.) The conclusiveness of the legislative judgment as to the necessity or wisdom of a sanitary measure is strongly insisted upon in the matter of compulsory vaccination by the Supreme Court of Georgia, Morris v. Columbus, 102 Ga. 792, 42 L. R. A. 175: "With the wisdom or policy of vaccination, we have nothing to do. * * * The legislature has seen fit to adopt the opinion of those scientists who insist that it is efficacious, and this is conclusive upon us." See also observations on legislative power to determine existence of public danger in State v. Main, 69 Conn. 123, 135.

[2] Re Morgan, 26 Col. 415, 47 L. R. A. 52.

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measure proposed, the effect of time of labor upon health is the exigency or occasion; and it is difficult upon that basis to distribute the functions of courts and legislatures.

**§ 145. Judicial notice of established scientific laws and general conditions.**—There is, however, sufficient authority for saying that while the courts will not enter into controverted questions of fact, they will take judicial notice of established sanitary and mechanical laws and conditions, of the quality of articles of consumption, etc. Thus the Supreme Court of Illinois has taken notice of a degree of danger in holding that safety regulations required in densely populated districts or countries are unnecessary in a more sparsely settled country;[3] the United States Supreme Court has recognised that while the wholesomeness of a novel article of consumption may be a doubtful question to be resolved by the legislature, it may in course of time become so well known and established that its wholesomeness will be judicially noticed.[4] The judicial notice may also be of a negative character; i. e., the court may refuse to accept legislative condemnation, because it knows that the detrimental character of an article is not established. So in the matter of cigarettes.[5]

**§ 146. Sanitary purpose need not be expressed.**—A legislative declaration that a danger to health or safety exists is therefore not conclusive. If the danger exists an express legislative declaration of the fact is not necessary; it is sufficient that it appears from the provisions. Even where the subject-matter of a law must be stated in its title, an express reference in it to health or safety is not necessary.[6] When the act proclaims itself expressly as a safety or health measure, while in fact it subserves another interest, a question under constitutional provisions as to title may arise, although the precise point does not appear to have been adjudicated; but where the subject-matter is otherwise sufficiently indicated in the title, an additional untenable reference to safety or health should not be fatal, if not deceptive or misleading. Thus it is conceived that a title "an act to regulate the manufacture and

[3] Toledo &c. R. Co. v. Jacksonville, 67 Ill. 37.

[4] Schollenberger v. Pennsylvania, 171 U. S. 1.

[5] *Dictum* in Austin v. Tennessee, 179 U. S. 343.

[6] Re Morgan, 26 Col. 415, 47 L. R. A. 52, recognising this with some hesitation.

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sale of oleomargarine, and for the better protection of the public health" (leaving out the words "and for the prevention of fraud" which are found in the law of New York), would not be fatal, although oleomargarine legislation can be justified only on the ground of prevention of fraud.

§ 147. **Difference of objects as justifying different measures.**—The distinction between different objects of legislation is important, because a measure may be appropriate and admissible for one object, but not for another. The sale of oleomargarine may be subjected to stringent regulations, to protect the public against fraud; it can, according to the better doctrine, be absolutely prohibited only if the article is unwholesome, and the probability that the article may be so adulterated as to become unwholesome does not furnish a justification for an absolute prohibition.[7] The difference of objects may also become relevant if the enactment proceeds from a subordinate authority having power only to protect health and safety. It may thus be questionable whether a prohibition against spitting in public conveyances is within the power of a board of health; or whether the prohibition of bill boards could be justified merely as a regulation for safety.[8] If watered milk is not unwholesome, its sale may be forbidden as a measure against fraud only if it is sold as milk, on the ground that an article sold under that name may be required to have standard ingredients prescribed by law; the statute could probably not condemn it as unwholesome, and on that ground prohibit its sale absolutely no matter how truthfully the admixture were indicated to the purchaser.[9]

§ 148. **Measure must tend to remove danger.**—That the measure proposed should at least have a tendency to remove or reduce the danger against which it purports to be directed, is a principle which does not need much argument to support it. The case of Chicago v. Netcher[10] furnishes an example of an enactment—in this case an ordinance—based upon the sani-

[7] Schollenberger v. Pennsylvania, 171 U. S. 1; People v. Marx, 99 N. Y. 377; *contra*, Powell v. Commonwealth, 114 Pa. St. 265; Wright v. State, 88 Md. 436, 41 Atl. 795.

[8] Upheld on that ground, Rochester v. West, 164 N. Y. 510, 58 N. E. 673.

[9] People v. Cipperly, 101 N. Y. 634, apparently to the contrary, but the statute condemned watered milk as adulterated, not as unwholesome.

[10] 183 Ill. 104, 55 N. E. 707.

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tary power, yet having no ascertainable relation to the public health. The ordinance made it unlawful for any person selling dry goods, clothing, jewelry, and drugs, to have exposed for sale, or sell, any meats, fish, butter, cheese, lard, vegetables or other provisions. The city of Chicago has power to regulate the sale of these provisions, and to provide for place and manner of selling the same. This power is granted for the public health, but the mere prohibition of their sale by persons who also happen to sell other goods without reference to place or manner of sale, has evidently not the slightest tendency to promote the public health. The ordinance was therefore declared to be invalid. There can be no doubt that a statute containing the like enactment would not have fared differently.

§ 149. **Measure need not be the most adequate conceivable.** —On the other hand a statute in providing against some particular danger need not cut off all possible ways of incurring it, provided the measure adopted greatly reduces its likelihood. In sustaining the act forbidding women to be employed in any manufacturing establishment more than ten hours in any one day, the Supreme Court of Massachusetts remarked[11] that this prohibition did not prevent any woman from laboring in any occupation as many hours as she pleased, provided she did not labor in the same service. This possibility, so far from removing, might on the contrary be held to be an objection to the constitutionality of the act, if it in reality frustrated its object, for a restraint serving no purpose has no justification. But practically the control of the number of hours of labor of one person in one employment, will have the effect that such person will not work beyond the number, for he is not apt to seek or obtain employment in another occupation or establishment for additional hours of the same day, and the legislature may take cognisance of that fact in order to avoid a needless complication of laws.

In connection with the statement that it is sufficient if the restrictive measure tend to reduce the danger, though not all means of providing against it are exhausted, mention should be made of the cases holding it unconstitutional to forbid any person to sell patent and proprietary medicines and domestic remedies at retail unless such person is a registered pharma-

[11] Commonwealth v. Hamilton Manufacturing Co., 120 Mass. 383.

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cist.[12] These cases hold that since these medicines are prepared ready for immediate use the fact that the seller is a pharmacist, of itself, furnishes no protection to the public * * * "without some further regulation as to inspection or analysis that would tend to exclude from sale those that might be injurious to health or something requiring pharmacists to exercise their skill and science in determining the quality and properties of such as they sold." Such a provision would undoubtedly add very much to the efficiency of the measure, especially as the duty to examine the medicine sold or a warranty of its soundness is not implied,[13] and yet it is true that the skilled pharmacist is more apt to recognise and to exclude from sale compounds which are positively harmful. It is therefore perhaps too much to say that the public health is not protected in any manner.

§ 150. **Measure proportionate to danger.**—The restraint must not be disproportionate to the danger. This is simply an application of the principle that every exercise of the police power must be reasonable, a principle long since enforced as against municipal corporations, but also beginning to be recognised as binding on the legislature. Thus in Toledo &c. R. Co. v. Jacksonville[14] an ordinance was set aside requiring a railroad company to keep a flagman at every street crossing, even where traffic was very light. The court said it would treat the measure as if the city had all the powers of the state legislature. Compulsory vaccination is as a rule allowed only where an epidemic of smallpox exists or is threatening.[15] And with regard to sanitary requirements in houses the Court of Appeals of New York said: "Exactions in the interest of health and safety are legal as long as their cost does not exceed what may be termed one of the conditions upon which individual property is held."[16]

[12] State v. Donaldson, 41 Minn. 74; Noel v. People, 187 Ill. 587, 58 N. E. 616. The act of Illinois allowed the issue by the State Board of Pharmacy of permits for the sale of patent medicines to any dealer under such restrictions as they might deem proper; but the court held the power to be invalid because the law did not regulate or control the discretion of the Board.

[13] West v. Emanuel, 198 Pa. 180, 55 L. R. A. 329.

[14] 67 Ill. 37.

[15] See Sec. 447, *infra*.

[16] Health Department v. Trinity Church, 145 N. Y. 32, 27 L. R. A. 710.

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**§ 151. Interference with established economic or social conditions.**[17]—Where the proposed measure strongly affects economic interests, especially by interfering with established conditions of labor, and these conditions portend no immediate danger, the courts will not readily acquiesce in the plea of safety or health. Perhaps the strongest illustration of this tendency is to be found in the case of Matter of Jacobs.[18] An act "to improve the public health" prohibited the "manufacture of cigars or preparations of tobacco in any form, on any floor, or in any part of any floor in any tenement house" (in cities over 500,000 inhabitants), "if such floor or any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein," defining a building occupied by more than three families as a tenement house. The act was declared unconstitutional, the court saying, "it is plain that this is not a health law, and that it has no relation whatever to the public health." Assuming the sanitary object to have been colorable, there was no valid ground to support the act, and the chief interest of the case must be found in the fact that the court undertook to override the legislative judgment, which conceivably might have been based upon sufficient evidence.

**§ 152. The practice of medicine and freedom of science.**[19]—The regulation of the practice of medicine assumes the existence of a medical science, yet the freedom of science would be inconsistent with the total exclusion of one school of medicine from the right to practice. In so far as all medicine is based upon a knowledge of established natural laws and facts, at least the knowledge of these facts may be demanded of the practitioner, and those not having such knowledge cannot claim that according to their principles it is unnecessary, for a principle based upon ignorance is entitled to no respect. The practice of American legislation gives equal credit to reputable medical colleges to whatever school they may belong, and does not undertake to control the methods of the licensed practitioner. It would not be competent for the legislature to determine a question of medicine against the preponderance of medical opinion, as for instance by excluding alcoholic liquors

[17] §§ 311-317.

[18] 98 N. Y. 98, 1895.

[19] §§ 222, 223, 249.

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from use as medicine. The fact that no such legislation has been attempted, notwithstanding the insistence of prohibitionists that alcohol is not necessary for medical purposes, strongly indicates the recognition of the constitutional limitation.[20] The Supreme Court of Ohio has declared unconstitutional a statute requiring for the practice of osteopathy a longer course of study than for the practice of other forms of medicine, and denies the power of the legislature to establish scientific conclusions adverse to any school of medicine.[21]

**§ 153.** It has, however, been held that the fact that one school of medicine is not recognised in forming boards of examiners does not in itself constitute discrimination, unless it can be shown that applications for admission are improperly rejected.[22] Some discretion must in the nature of things be left to the state in selecting examiners, and some discretion must be exercised by the examiner in passing upon qualifications. But the discretion must be a fair one in either case, and the courts must have power to control its abuse.[23] In excluding the eclectic school from the right to have its representatives act as examiners under any circumstances, the Louisiana statute went to the verge of fair discretion if not beyond it. The Supreme Court of Massachusetts in an earlier case[24] upheld an act requiring a license from either the State Medical Society or from the University, but intimated that the vesting of the power in the medical society exclusively might be of doubtful validity. Even the recognition of two bodies to the exclusion of all others would now, in many states, be regarded as creating an unconstitutional privilege or monopoly.

**§ 154.** Conceding the regulation of the practice of medicine to be within the police power, there should be no doubt of the constitutional competence of the legislature to regulate any

[20] "When intelligent and educated men differ in their theories the legislature has no power to condemn the one or approve the other." State v. Carey, 4 Wash. 424, 30 Pac. 729.

[21] State v. Gravett, 65 Oh. St. 289, 62 N. E. 325, 55 L. R. A. 791; People ex rel. State Bd. Health v. Gordon, 194 Ill. 560, 62 N. E. 858.

[22] Allopathic State Board &c. v. Fowler, 50 La. Ann. 1358, 24 So. 809.

[23] "In a case where it was clear from the evidence that a discrimination had been made against a system of medicine, we should not hesitate to hold that the board had exceeded its power." Nelson v. State Board of Health, 22 Ky. L. Rep. 438, 50 L. R. A. 383; State Board of Dental Examiners v. People, 123 Ill. 227.

[24] Hewitt v. Charier, 16 Pick. 353, 1835.

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professional treatment of the sick, though not "medical," by a system of examination and licensing not amounting to prohibition, whether such treatment consist in simple nursing, or in manipulation of the body, or in influences brought to bear upon the mind. And since the terms medicine, physician, doctor, M. D., etc., have a well established meaning, the law may clearly prevent their fraudulent use to indicate the possession of qualifications which as a matter of fact do not exist. Nor is there any decision which denies such power. Cases in which it is held that a statute, properly interpreted, does not extend to a certain method of treatment, furnish no basis for the contention that a system of regulation expressly including that method would be unconstitutional.

**§ 155. Measures restraining a class for its own protection.**— The Supreme Court of Colorado, in the decision by which it annulled the miners' eight hour law,[25] asserts the principle that while the sanitary power extends to the protection of the health of the community at large, and even of the health of portions and classes of the community, yet it may not be exercised so as to protect these classes from their own acts. "The reason for the existence of the power rests upon the theory that one must so use its own as not to injure others, and so as not to interfere with or injure the public health, safety, morals or the general welfare. How can one be said injuriously to affect others, or interfere with these great objects, by doing an act which confessedly visits its consequences on himself alone? and how can an alleged law that purports to be the result of an exercise of the police power, be such in reality, when it has for its only object, not the protection of others or the public health, safety, morals or general welfare, but the welfare of him whose act is prohibited, when, if committed, it will injure him who commits it and him only?"

It is true that the police power does not undertake to protect the individual against his own acts, partly because that would involve an inquisitorial control over private life and conduct both intolerable and unenforceable,[26] partly because the police power ought not and is not intended to be a substitute for individual self-control and responsibility, but finds its proper sphere in guarding against evils and dangers beyond the con-

[25] Re Morgan, 26 Col. 415, 47 L. R. A. 52.

[26] See Sec. 453-455, *infra*, Liberty of Private Conduct.

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trol of him whom they threaten. The right to choose one course of action even to the extent of incurring risks, where others are not concerned, is a part of individual liberty. This principle can be traced through the whole of our police legislation, which, e. g., would not assume to prescribe for the individual affected with a disease which is not contagious a specific course of medical treatment. If individuals are forbidden to do acts primarily dangerous to themselves on railroads, in sports, etc., it is either because even an individual accident may disturb or endanger the general traffic, or because—in the case of sports—the exhibition of dangerous feats may amount to a public nuisance.

It is, however, a fallacy to transfer this argument from the individual to a particular class, and to say that the police power has no business to protect the class against its own acts. It is conceded by the Supreme Court of Colorado that the interest of a class may constitute a public interest, that is to say, an interest of sufficient magnitude to make itself felt throughout the community. If then the health of the class is impaired by long hours of work under unsanitary conditions, a public interest exists which may set the police power in motion. If the employer had absolute power, he might be constrained for the benefit of the class, as he may be and is constrained to adopt sanitary and safety arrangements in mine or factory, and it is noteworthy that the Supreme Court of the United States recognises in the limitation of hours of labor primarily a restraint upon the employer: "The proprietors lay down the rules and the laborers are practically constrained to obey them."[27] However even if we regard the restraint as being laid upon the employee, it is not true that each employee is protected against his own acts.[28] In reality the law imposes the restriction upon any one member on behalf of all others, it being well understood that if a portion of a class are willing to accept unsanitary conditions competition will force others to do the like, and that this portion must be restrained for the benefit of the class as a whole. Of course such legislation must find its support in the requirements of health, not in the inconveniences of legitimate competition.

[27] Holden v. Hardy, 169 U. S. 366, 397.

[28] This also appears from the fact that he may not waive the benefit of the act. Short v. Bullion &c. Co. (Utah), 57 Pac. 720.

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The same apparent restraint upon each one for his own benefit, which is in reality a restraint for the benefit of others, underlies the legislation forbidding gainful occupation on Sunday.[27]

[27] The futility of stretching the right of individual liberty and narrowing the scope of legislative power by such decisions as that in the Morgan case is shown by the facility with which they may be overridden by constitutional amendment. Undoubtedly in consequence of that decision, the legislature of Colorado by resolution of March 14, 1901, submitted an amendment to the constitution permitting the legislature to establish a compulsory eight-hour day in any branch of industry or labor that the general assembly may consider injurious or dangerous to health, life or limb. This amendment was adopted in 1902.

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## CHAPTER VI.

### PUBLIC ORDER AND COMFORT.

AUTHORITY EXERCISING THE POWER. §§ 156-159.[1]

**§ 156. Municipal ordinance power.**—This field is almost altogether covered by municipal and other local regulations under delegation from the state. The limitations on the police power and the limitations on the municipal ordinance power are therefore not always clearly distinguished. A power might be denied to the inferior authority and yet be conceded to the state. The power may be denied because it is not delegated, or because superseded by the exercise of state power or because exercised in an unreasonable and oppressive manner. A reasonable and customary regulation, though not within any of the specific clauses of the municipal charter, will generally be supported under the general welfare clause, where the charter contains one, or under the power to abate nuisances, which is hardly ever wanting; yet it has been held in Ohio that only a specific power will justify an ordinance prohibiting the running at large of animals,[2]—contrary perhaps to the prevailing doctrine.[3]

**§ 157. Concurrence of local and state authority.**—The same act may be punishable under state law and municipal ordinance, and a great many forms of nuisance and disorderly conduct specifically defined by ordinance, are covered by the rule of the common or statutory criminal law making a common nuisance, disorderly conduct, or breach of the peace, a public offense. The same act may be punished in its more general aspect, as an offense against state policy, by the state, in its more local aspect, as an immediate nuisance, by local authority; so the statutory crime of prostitution or of keeping a house of ill fame may by municipal ordinance be declared to be disor-

[1] See Horr & Bemis Municipal Police Ordinances, 1887.

[2] Collins v. Hatch, 18 Ohio 523.

[3] Commonwealth v. Bean, 14 Gray 52; Commonwealth v. Curtis, 9 Allen 266; Knoxville v. King, 7 Lea (Tenn.) 441; Cochrane v. Frostburg, 81 Md. 54; Hagerstown v. Witmer, 86 Md. 293, 39 L. R. A. 649.



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derly conduct.[4] A positive regulation by the state will bar conflicting, but not necessarily, unless intended to be exclusive, additional, regulations by the city; each may be directed against a different evil or danger. Thus a state license for peddling does not contemplate the occupation of a street for a temporary stand from which to sell goods, and this may be prohibited notwithstanding the state license.[5]

**§ 158. Reasonableness.**—The requirement of reasonableness is so general in its nature that it allows the courts to exercise a very efficient control over ordinances, without being under the necessity of formulating in each case a principle which would be a guide for other cases. The views of courts as to what is reasonable and what is oppressive naturally differ, and while it has been said that in doubtful cases the judgment of the municipal authorities will be conclusive upon the courts,[6] yet doubts are in reality often resolved against the validity of the exercise of the power, so where it has been held that the prohibition of the distribution of handbills on the streets is unreasonable.[7] It is manifestly impossible to mark with precision the point at which acts and conditions begin to be disorderly and offensive, and many acts which are under normal circumstances objectionable, may in an emergency be proper or necessary, and ordinances are not always penned with such skill and learning as to make provision for the emergency. Ordinances have been declared illegal because their language allowed an interpretation which would cover harmless acts, or which failed to make exceptions that might under circumstances become necessary.[8] It seems that in such cases it would often be possible to save an ordinance by reading into it a limitation or exception conformable to its real spirit and intent.[9]

[4] People v. Miller, 38 Hun 82.

[5] Commonwealth v. Ellis, 158 Mass. 555; Commonwealth v. Lagorio, 141 Mass. 81; Commonwealth v. Fenton, 139 Mass. 195.

[6] Laugel v. Bushnell, 197 Ill. 20, 63 N. E. 1086; Vanderhurst v. Tholeke, 113 Cal. 147; North Chicago R. Co. v. Lake View, 105 Ill. 207.

[7] People v. Armstrong, 73 Mich. 288, 2 L. R. A. 721.

[8] Ex parte McCarver, 39 Texas Crim. App. 448, 42 L. R. A. 587, curfew ordinance; Hechinger v. Maysville, 22 Ky. L. Rep. 486, 49 L. R. A. 114, prohibiting conversation with prostitutes; State v. Hunter, 106 N. C. 796, 8 L. R. A. 529, three or more persons on the street to move on whenever so ordered.

[9] People v. Rosenberg, 138 N. Y. 410, 34 N. E. 285; Commonwealth v. Plaisted, 148 Mass. 375, 2 L. R. A.

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§ 159. **Order and freedom of commerce.**—A power exercised in good faith for public order and comfort will be recognised by the United States though it may bear on agencies of commerce. Thus an ordinance of the city of Chicago was upheld which provided that bridges across the Chicago River, a navigable water of the United States, should not be opened for passage of vessels during one hour in the morning and one hour in the evening, and that during the daytime it should be opened for not longer than ten minutes at a time, and then to be closed for fully ten minutes to allow passengers to cross. "The local authority can better direct the manner in which they shall be used and regulated than a government at a distance. It is, therefore, a matter of good sense and practical wisdom to leave their control and management with the state. Congress having the power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce."[10] So a state law was sustained forbidding the moving of freight trains on Sundays.[11]

POWER OVER ENCROACHMENTS ON STREETS. §§ 160-164.

§ 160. **Fee and easement.**—Streets and other public places are real estate and as such subject to proprietary rights. The public right in the street may be acquired by reservation, purchase, dedication or condemnation, and it may be either an easement or a fee. Where the fee remains in the adjoining owner, he may retain certain rights in the soil unaffected by street uses, and he may be entitled to additional compensation

142, an order of a board of police forbidding persons to sing or play or perform in the streets or public places, etc.; the court said "Nor is the reasonableness of the rules to be tested by their possible application to extreme cases as for instance singing or playing (in a low tone not intended to be heard by others) for a short time in the street or place not occupied with dwellings. No police rules or regulations are to be tested in this manner; and if such case were to present itself perhaps the rule might by construction not be deemed to include it." The same rule should be applied to statutes: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law should, in such cases, prevail over its letter." United States v. Kirby, 7 Wall. 482.

[10] Escanaba &c. Co. v. Chicago, 107 U. S. 678, 1883; Chicago Rev. Code 1897, Secs. 199-208.

[11] Hennington v. Georgia, 163 U. S. 399.

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for an increase in the public easement by novel and burdensome public uses.[12] It has also been intimated that the original owner may dedicate a highway *cum onere*, i. e., subject to an existing encroachment, as for instance trees.[13] But at least as far as city streets are concerned, the public easement is necessarily so comprehensive, if it is to be adequate to the complex uses of soil and surface for improvements deemed essential to modern municipalities, that the difference between fee and easement has become more and more technical and insubstantial, and the city's rights against the abutter are for most purposes the same whether the fee is in the city or in the abutter. "On the general question as to the rights of the public in a city street we cannot see any material difference in the principle with regard to the extent of those rights, whether the fee is in the public or in the adjacent land owner, or in some third person."[14]

§ 161. **Control of public use.**—In placing a structure upon or under or over the street, the adjoining owner, therefore, although he may have a technical legal title to the soil, is necessarily subject to any restraint required by public street uses.[15] The city controls the street in trust for the public, and has no inherent right to surrender or impair that trust. The legislature of the state which represents the public at large and controls the trust upon which streets are held (subject to private easements of light, air and access), may either grant directly the right to occupy part of the street, as for instance for door-steps,[16] or may authorise the city to grant to the adjoining owners rights in the streets; but an express grant of such power is unusual.[17]

[12] See as to these rights Dillon Munic. Corp., Secs. 687-704a; also §§ 509, 510, infra.

[13] State v. Vineland, 56 N. J. Law, 474, 23 L. R. A. 685.

[14] Barney v. Keokuk, 94 U. S. 324, 1877; Dillon, Secs. 689-699.

[15] Allen v. Boston, 159 Mass. 324; McCarthy v. Syracuse, 46 N. Y. 194.

[16] Cushing v. Boston, 122 Mass. 173, 124 Mass. 434, 128 Mass. 330. The remarks in People v. Carpenter, 1 Mich. 273, to the effect that under the constitution the legislature cannot grant the exclusive use of a street to an individual must be understood with reference to a grant which makes the street useless to the abutters, and not as forbidding the grant of reasonable privileges; the decision seems to anticipate the doctrine of the New York Elevated R. Co. cases. Dillon, Sec. 660, refers to it as an extreme view.

[17] Instance of power to grant encroachments expressly given to city:



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**§ 162. Customary encroachments.**—What then is the legal status of the encroachments so commonly found in city streets: signs, awnings, posts, porches, stands? If they obstruct the street, diminish the space available for walking, or impede traffic, they are nuisances subject to indictment and abatement,[18] and it is not necessary that the comfortable enjoyment of the highway should be interfered with materially.[19] Some decisions require for criminal prosecution more than a technical encroachment. A liberty pole erected in the street,[20] a vault,[21] an opening in the sidewalk in front of a cellar window for light and ventilation, usual and customary in the city,[22] a platform with steps for approach to a building within the area generally used for that purpose,[23] stepping stones for carriages,[24] and a wooden awning over a sidewalk[25] have been held not to be nuisances *per se*. Perhaps in these cases a license from the city could have been implied from custom.[26]

**§ 163. Power to prohibit and regulate.**—Where the city, as is usually the case, has power to regulate the use of the streets, or to declare and abate nuisances, or to prevent and remove encroachments and obstructions, it may by ordinance prohibit all structures in any way impairing the public easement; and an express power to prohibit may be interpreted as requiring

Kirtland v. Mayor of Macon, 66 Ga. 385; Daly v. Georgia &c. R. R. Co., 80 Ga. 793.

[18] Projecting steps, Hyde v. County of Middlesex, 2 Gray 267, 1854; Cmw. v. Blaisdell, 107 Mass. 234, 1871; Pettis v. Johnson, 56 Ind. 139, 1877; bay windows, State v. Kean, 69 N. H. 122; stalls and cases for merchandise, Lavery v. Hannigan, 20 J. & S. 463, 1885; Cmw. v. Wentworth, Brightly (Pa.) 318, 1823; Laing v. Americus, 86 Ga. 756, 1891.

[19] State v. Berdetta, 73 Ind. 185.

[20] Alleghany v. Zimmerman, 95 Pa. State, 287, 1880.

[21] Dillon, Sec. 699, State v. Hoboken, 33 N. J. L. 280; West Chicago Masonic Association v. Cohn, 192 Ill. 210; Deshong v. New York, 68 N. E. 880.

[22] King v. Thompson, 87 Pa. State 365, 1878.

[23] Murphy v. Leggett, 164 N. Y. 121, 58 N. E. 42.

[24] Robert v. Powell, 168 New York 411, 61 N. E. 699.

[25] Hawkins v. Sanders, 45 Mich. 491.

[26] Nelson v. Godfrey, 12 Ill. 20. Switch tracks connecting a railroad with a factory or warehouse, though paid for by the owner of the latter, are in Illinois held to be part of the public road, and justified on that theory. Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561; Chicago Dock Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; McGann v. People, 194 Ill. 526, 62 N. E. 941; People v. Blocki, 203 Ill. 363, 67 N. E. 809.

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positive action by the city before the encroachment can be dealt with as illegal, so in the matter of trees;[27] but where the charter recognises the customary existence of technical encroachments such as awnings, and gives power to regulate them, an absolute prohibition may be held to be unreasonable.[28] But the city may, under the power to regulate the use of streets and sometimes under express power to regulate the use of sidewalks and structures thereunder, or to regulate their use for signs, posts, awnings, etc., authorise customary encroachments, and such authority will then remove the indictability of the structure.[29] Such authority may be made to depend upon compliance with prescribed conditions, and the disregard of such conditions may then make the structure a nuisance,[30] but the city cannot authorise a structure that would materially incommode public traffic;[31] and above all, under its ordinary powers of regulation the city cannot part with proprietary rights, and the authority which it gives is in the nature of a license subject to revocation.[32] But it has also been held that the revocation of a license, if not called for by some public need, will be treated as oppressive and therefore illegal, before the licensee by the use of the structure for a reasonable time has been reimbursed for his outlay in erecting the same;[33] after twenty years enjoyment a full return for the outlay may be presumed to have been obtained.[34] A grant of more than a license, so the grant of a franchise to occupy the street with tracks, poles, etc., requires express legislative authority.[35]

The power over encroachments on water, such as piers and bridges, is governed by the same principles as that over street encroachments.[36]

[27] White v. Godfrey, 97 Mass. 472, 1867; Bliss v. Ball, 99 Mass. 597, 1868; Cross v. Morristown, 18 N. J. Eq. 305, 1867.

[28] Hisey v. Mexico, 61 Mo. App. 248, 1894; see also State v. Higgs, 126 N. C. 1014, 48 L. R. A. 446.

[29] Everett v. Marquette, 53 Mich. 450, 1884; ex parte Taylor, 87 Cal. 91, 1890; Dillon, Secs. 732-734.

[30] Pedrick v. Bailey, 12 Gray 161, 1858.

[31] Pettis v. Johnson, 56 Ind. 139.

[32] Council of Reading v. Commonwealth, 11 Pa. State 196, 1849; in this case a legislative license was held to be revocable; ex parte Taylor, 87 Cal. 91, 1890; Hibbard v. Chicago, 173 Ill. 91, 1898.

[33] Town of Spener v. Andrew, 82 Ia. 14, 12 L. R. A. 115.

[34] Augusta v. Burum, 93 Ga. 68, 26 L. R. A. 340.

[35] See Sec. 658, infra.

[36] Mayor of New York v. Cunard S. S. Co., 61 Hun 346; State

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**§ 164. Protection of streets from injury, etc.**—In protecting streets and public grounds from injury and defilement the city does not act in its capacity as a corporate owner of the fee of the street, but in the exercise of the delegated power to regulate the public use, the regulation here consisting in such measures as will maintain public use and enjoyment to the utmost extent; therefore the city may protect trees from injury, even as against the acts of the adjoining owner who owns the fee of the street and therefore the tree itself.[37] The city should also have power to prevent the distribution of handbills if it is matter of experience that the handbills will be thrown away and the street will thereby become littered with paper; it has, however, been held otherwise in Michigan.[38]

THE COMMON RIGHT TO USE PUBLIC PLACES. §§ 165-170.

**§ 165. Nature of common use.**[39]—The adjoining owner who encroaches upon the street, however slight the encroachment may be, is at best a licensee, and the limitations or conditions qualifying the license cannot be regarded as impairing any right of property or liberty protected by the constitution. The common use of the streets is, however, far more than a license. This use is of the essence of the purpose for which the street exists, for which it has been dedicated, or for which the power of eminent domain has been exercised, and it enters therefore into the very nature of the public highway, and the use is so essential to the functions of social and economic life that the full enjoyment of individual liberty and property cannot be conceived without it. It must, therefore, be looked upon as one of the constitutional rights of the individual, in so far as the individual is part of the general mass of the people which is designated as the public.

**§ 166. Power to vacate highway.**—This right attaches to the highway while it is a highway, and is not inconsistent with

v. Inhabitants of Freeport, 43 Me. 198, 1857; People v. Vanderbilt, 38 Barb. 282, 1882. See §§ 403-408, *infra*.

[37] Baker v. Normal, 81 Ill. 108.

[38] People v. Armstrong, 73 Mich. 288, 2 L. R. A. 721. See ex parte Casinello, 62 Cal. 538. The city may forbid the throwing of handbills, etc., into the vestibules of private houses, if they are likely to be taken up by the wind and scattered in the streets. Philadelphia v. Brabender, 201 Pa. 574, 58 L. R. A. 220, 51 Atl. 374.

[39] Distinction between common use and exclusive possession pointed out in St. Louis v. W. U. Tel. Co., 148 U. S. 92, pp. 98-99.

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the right of the organised community to vacate or discontinue a street. For such vacation proceeds upon the theory that one particular highway is no longer required for public use, and so long as sufficient other accommodation of traffic and passage exists, the right to the common use of streets remains practically unimpaired. It is another question—which need not be further discussed here—whether the delegated power of a municipality is sufficient to vacate a street, and in how far the special easement of an abutter qualifies the exercise of the public right.[40]

**§ 167. Power over use of street not absolute.**[41]—The Supreme Court of Massachusetts has said that the right to put an end to the dedication to public use includes the lesser step of limiting the public uses to certain purposes, and it has likened the power of the public over the highway to that of the owner over the private house.[42] The case before the court was one, not of common, but of special use of a public park (public speaking on the Boston Commons); and with regard to the common use of streets the statement cannot be accepted as correct; for the power to abolish the public use altogether is one which in the nature of things cannot be exercised with regard to all streets alike; hence it has in reality no existence in the same sense as the asserted right to limit public uses, and the argument from the greater to the lesser is therefore unwarranted; the right of the private owner to control the use of his house is unlimited, and to concede the like power to the legislature would be equivalent to the recognition of a despotic power over every act which may be done in the public streets without regard even to the requirement of due process or of equality. It is obvious that such power cannot be claimed under our system of government.

The sound principle is that every restraint upon the common use of streets must be justifiable upon established principles of government, and cannot be referred simply to the uncontrolled exercise of proprietary discretion.[43] This follows from the fact that the highway was, and could have been, acquired

[40] Dillon, Sec. 666, Chicago v. Bureky, 158 Ill. 103, 42 N. E. 178; Meyer v. Teutopolis, 131 Ill. 552; Polak v. San Francisco Orphan Asylum, 48 Cal. 490. Case of removal of bridge, Coster v. Albany, 43 N. Y. 399.

[41] See §§ 641-644.

[42] Commonwealth v. Davis, 162 Mass. 510.

[43] See § 174 and §§ 641-644, *infra*.

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by the public only for its use as such, and that the proprietary right of the organised community is therefore qualified by an easement of use in favor of the unorganised public of which every individual is a representative.

§ 168. **Extent of common use.**—The extent of public power is therefore determined by the nature of the right of common use, and by the obvious conditions which publicity imposes on the acts of the individual.

The common use of the street consists in passing along the street for purpose of business or pleasure, on foot or by vehicles. It does not include the use of the street as a playground,[44] or as a place on which animals may stray.[45]

It is especially to be noticed that the use of private vehicles constitutes a common right, not subject to police restriction except for cause. A license may be exacted for vehicles as a revenue measure, where there is no constitutional limitation of the taxing power in this respect, and may be imposed by local authority, where the power has been duly delegated;[46] or as a police measure where the vehicle is by reason of weight apt to injure the roadbed;[47] but except for purposes of safety the mere power to regulate the use of the streets will not authorise a restriction by the imposition of a license fee upon the use of the bicycle,[48] or of other private vehicles.[49]

[44] Illinois City Act V., Sec. 1, No. 92.

[45] See note 39 L. R. A. 647. Where animals are found running at large the law may authorise their seizure, and, upon proper notice, their sale. Lack of notice was held fatal in New York, Rockwell v. Nearing, 35 N. Y. 302, but the defect in the law was subsequently cured and the act then upheld. Campbell v. Evans, 45 N. Y. 356; Cook v. Gregg, 46 N. Y. 439, where it is said that it is immaterial whether the seizure is for a public or private wrong. In Michigan it was specially said that the straying of animals constituted a public grievance. Campau v. Langley, 39 Mich. 451, 33 Am. Rep. 414. Compare Donovan v. Vicksburg, 29 Miss. 247, 1855, with Anderson v. Locke, 64 Miss. 283, and see Greer v. Downey (Ariz.), 61 L. R. A. 408.

[46] Tomlinson v. Indianapolis, 144 Ind. 142, 36 L. R. A. 413; Terre Haute v. Kersey, 159 Ind. 300, 64 N. E. 469; Ft. Smith v. Scruggs, 70 Ark. 549, 58 L. R. A. 921, 69 S. W. 679.

[47] 1629 19 Rymer's Foedera, 130, provision against excessive weight of carriages on public roads. Gartside v. East St. Louis, 43 Ill. 47, 1867; Nagle v. Augusta, 5 Ga. 546; Re Vandine, 6 Pick. 187, 1828; such ordinances must not impose unduly burdensome requirements, State v. Rohart, 83 Minn. 257, 54 L. R. A. 947.

[48] Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408.

[49] Brooklyn v. Nodine, 26 Hun

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The right to pass includes the right to carry goods; but while the removing of a house through the street without unnecessary obstruction and delay has been held not to be a nuisance *per se*,[50] this cannot be claimed as a common right; for it amounts, for the time being, to an exclusive occupation of the street.[51]

**§ 169. Obstruction and disorderly conduct.**—The enjoyment of the common public use of streets requires freedom from obstruction, and abstaining from obstructing others is therefore a limitation upon every one's right. An actual obstruction is a common nuisance, and in order to support an indictment, it must be charged and shown that traffic was impeded.[52] If the power of municipal regulation is to have any additional value, it must extend to the prohibition of those things that have a tendency to create obstruction, especially the stopping of vehicles, or of numbers of persons, for an undue length of time. Thus while the stopping of a cart for an hour may not be a nuisance in every case, it might be prohibited by ordinance.[53] The power must be reasonably exercised, and it has been held that one person cannot be forbidden to stop on the sidewalk for a reasonable length of time.[54] The reasonable exercise of the power is of special importance because there are many customary practices which have a slight tendency to obstruct, as, e. g., by attracting crowds, which yet serve valuable business and social interests. Thus while an effigy in a window causing the collection of great crowds was held to be a common nuisance,[55] an ordinance forbidding the common display of goods in store windows would be unreasonable. The German Imperial Court while holding that picketing was not criminal intimated that it could be dealt with as a form of obstruction under the common police power for the protection of public order, and in England book-making on the streets is likewise sought to be

512; Ex parte Gregory, 20 Tex. App. 210; Joyce v. East St. Louis, 77 Ill. 156.

[50] Graves v. Shattuck, 35 N. H. 257, 1857.

[51] Wilson v. Eureka City, 173 U. S. 32, 1899.

[52] State v. Edens, 85 N. C. 522.

[53] State v. Edens, 85 N. C. 522. So where the statute punishes the obstruction of highways, a municipal ordinance may forbid the construction or continued use of gates opening or swinging out upon the street or sidewalk. Town of Rosedale v. Hanner, 157 Ind. 390, 61 N. E. 792.

[54] State v. Hunter, 106 N. C. 796, 8 L. R. A. 529.

[55] R. v. Carlisle, 6 C. & P. 636, 1834.

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restrained on the ground of obstruction.[56] To constitute a common law offense, it seems there must be actual obstruction amounting to a nuisance, while under the police power within reasonable limits practices may be forbidden which merely tend to cause obstruction. The Supreme Court of Massachusetts has held that the municipality may forbid persons with placards on their backs to parade the streets.[57] This practice rarely constitutes an actual obstruction and the tendency to attract a crowd is slight; yet the use of the street for the purpose of attracting attention cannot be said to be a common right; and its prohibition to be invalid must be shown to be an unreasonable exercise of municipal discretion.

The common right to use the streets is subject to manifold restrictions in the interest of good order, upon the principle that publicity imposes greater restraints upon individual conduct than privacy, and that the ordinary standards of public conduct require some regard for other persons' feelings. It is unnecessary to enumerate the various possible acts of indecency, breach of the peace and quiet, and molestation, that are thus prohibited either by ordinance or by the general criminal law.[58] The practice of begging may be prohibited on this principle.

**§ 170. Use of rivers.**—Principles very similar to those governing the use of streets apply to rivers. The right to pass on the river by boat is a common right, but the anchoring or mooring of vessels is an incident to it only while not carried to an excessive length of time, and the time may be limited by ordinance.[59] There is no right to use the river for floating warehouses,[60] and a license may be exacted for residing or transacting business on boats. "When one takes up his home on a highway his very right of occupancy rests on the will of the sovereignty, and his being there at all except as he may use it in common with the public and in pursuit of the purposes of its dedication depends on the will of the government."[61]

[56] Report of Special Commission of House of Lords on Betting, July, 1902.

[57] Commonwealth v. McCafferty, 145 Mass. 384.

[58] See Act of Congress for District of Columbia July 29, 1892, 11 Suppl. 56; Grand Rapids v. Williams, 112 Mich. 247, 36 L. R. A. 137.

[59] Tourne v. Lee, 8 Mart. N. S. 548.

[60] Hart v. Mayor of Albany, 3 Paige 213.

[61] Robertson v. Commonwealth, 101 Ky. 285, 40 S. W. 920.

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**§ 171. Right to use parks,[62] public buildings, etc.**—Parks are established not for traffic or communication, but for recreation of such kind as may be determined by the proper authorities. Hence the right to use parks is subject to greater restriction than the right to use the streets, and the conduct of the individual while in the park may be subjected to rules which reasonably tend to its better preservation for the purposes for which it is established. Upon this principle it has been held that vehicles for conveying merchandise may be excluded from a boulevard,[63] the reasonableness of such a rule according to the circumstances of each case being matter of judicial control.

Public buildings erected for business, recreation, or instruction are subject to such proprietary control as is not inconsistent with the constitutional right of the citizen to participate in the enjoyment of institutions supported by public taxation.[64]

## SPECIAL STREET USES. §§ 172-174.

**§ 172. Special uses by abutters.**—Custom concedes to the business and domestic requirements of the abutting owner certain uses of the street in addition to the mere right of passage and access: he may have a carriage wait in front of his house, he may load and unload goods on the sidewalk, and he may be permitted while building to deposit a pile of brick in the street.[1] These slight and temporary technical obstructions are to be distinguished from encroachments which involve a proprietary occupation of the street.[2] They are convenient and sometimes necessary and where they do not incommode the public materially an ordinance prohibiting them might well be declared

[62] Chicago Revised Code 1897, § 1373 and following.

[63] Brodbine v. Inhabitants of Revere (Mass.), 66 N. E. 607; Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305.

[64] A statute of Idaho (Revised Statutes 1887, § 1210) forbidding the grazing or herding of sheep within two miles of a dwelling house seems to have been intended to apply to the public domain, and might have been sustained without difficulty if the use of public lands of the United States were subject to state regulation. The act was upheld as a police regulation upon the ground that the proximity of large herds of sheep was offensive to the senses. Sifers v. Johnson, 65 Pac. 709, 54 L. R. A. 785; Sweet v. Ballentine, 69 Pac. 995. The act has, however, since been modified so as to forbid grazing, etc., only on the land and possessory claims of others. Revision 1901, § 689.

[1] Dillon, Section 730.

[2] §§ 162, 163, *supra*.

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unreasonable. As a matter of fact such practices are universally allowed.[3] They become obstructions only when carried to unreasonable lengths and may then be treated as nuisances, so where a bridge is stretched from a wagon to a house, and remains there for hours.[4] The power to regulate the use of streets should be held to authorise the enactment of ordinances defining the manner in which such special privileges are to be exercised, and to require, if deemed expedient, a permit for temporary exceptional uses, such as piling brick on the street,[5] and it would seem reasonable to prohibit loading and unloading on the street entirely, where an alley exists that can be used for that purpose.

**§ 173. Use for profit.**—It is not one of the purposes for which streets are established, to afford a convenient place on which to expose merchandise for sale. Auction sales as well as peddling on the streets may, therefore, be made dependent on license[6] or entirely prohibited.[7] But in the absence of special prohibition such practices must be actual nuisances or obstructions to be unlawful.

The carrying of goods and persons for hire likewise involves a profitable use of highways. Such use is conformable to the general purposes of the street, and is advantageous and necessary to the community; yet it is in a sense a special use and, therefore, cannot be claimed as a matter of absolute right, where the business requires an exclusive privilege like the laying of tracks, or where it carries with it an occupation of street space which may tend toward obstruction, as in the case of cab stands. It is, however, also not uncommon that other common carriers for hire asking no special privileges, like omnibus drivers and draymen, are required to take out a license as a prerequisite to the right to do business. The validity of such requirement is generally accepted, and it may be justified on the ground that these occupations subject the street to special wear and tear, and may tend to obstruction of traffic or accidents when carried on by incompetent persons.

[3] Commonwealth v. Passmore, 1 S. & R. 217; skids from truck to steps, Welsh v. Wilson, 101 N. Y. 254, platform for unloading, Murphy v. Leggett, 164 N. Y. 121, 58 N. E. 42.

[4] Callanan v. Gilman, 107 N. Y. 360.

[5] McCarthy v. Chicago, 53 Ill. 38.

[6] Re Nightingale, 11 Pick. 168.

[7] Commonwealth v. Fenton, 139 Mass. 195; White v. Kent, 11 Oh. St. 550.

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**§ 174. Use for parades, processions, public addresses and meetings.**—There are four classes of decisions bearing upon this subject: first, those which hold that an orderly address or parade, not in fact obstructing traffic, is not a nuisance;[8] this seems to be the general doctrine and means that the use of streets for this purpose, though subject to the police power, is not intrinsically unlawful; second, those which hold an obstructive or noisy gathering to be a nuisance;[9] third, those which hold that the right to hold a meeting or parade cannot be made to depend upon an unregulated official discretion;[10] and fourth, those which hold that it may be made to depend upon such discretion.[11]

The Supreme Court of Massachusetts admits the legality of an unrestricted discretion in allowing or disallowing public parades and addresses on the ground that it is within the power of the state to prohibit them entirely, and hence also to permit them on such terms as it chooses. On the other hand the decisions holding an unrestricted discretion to be illegal, do not by necessary implication support an unqualified right to use public places for gatherings or demonstrations. To hold that a particular gathering is not a nuisance is not inconsistent with the recognition of the power of regulation, and to hold that it is, is not inconsistent with the denial of the power of absolute prohibition.

It cannot be conceded that the state controls streets as the private owner controls his house. Yet parading and holding meetings are not common street uses, nor are they uses for which a park is established. The entire prohibition of public meetings in parks seems to be open to no constitutional objection. The question of the power to prohibit parades on streets entirely is not apt to arise. The practical question is whether parades are subject to restraint and regulation, and considering the fact that, indiscriminately allowed and uncontrolled, they may easily lead to confusion and breaches of the peace, it can hardly be denied that they are so subject. The law upon

[8] State v. Hughes, 72 N. C. 25; Fairbanks v. Kerr, 70 Pa. 86.

[9] Chariton v. Summons, 87 Ia. 226.

[10] Re Frazee, 63 Mich. 396; Anderson v. Wellington, 40 Kan. 173; Chicago v. Trotter, 136 Ill. 430.

[11] Commonwealth v. Davis, 162 Mass. 510; Davis v. Massachusetts, 167 U. S. 43; Commonwealth v. Plaisted, 148 Mass. 375; Re Flaherty, 105 Cal. 558.

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this subject will be fully discussed in connection with the principle of equality.[12]

### POWER OVER PLACES OF PUBLIC RESORT IN PRIVATE OWNERSHIP.

**§ 175.**—Places to which people come in numbers and indiscriminately by invitation or license of the owner and generally for his profit: such as public conveyances, railroad depots, wharves, inns, restaurants and theatres, may be said to be affected with a public interest. The police power is usually exercised only for safety and health; but sometimes also for public comfort, so in directing the heating of cars or depots, restricting the number of passengers to be carried in a car, regulating the landing of vessels at wharves;[13] and—an extreme instance—requiring women attending theatrical performances to remove their hats.[14] The protection of meetings, especially religious meetings, from disturbance, which goes to the extent of prohibiting peddling within a prescribed distance from grounds where camp meetings are being held, falls under this head.[15]

### OFFENSIVENESS AS A SUBJECT OF POLICE CONTROL. §§ 176-179.

**§ 176. Offensiveness as a nuisance.**—The law relating to nuisances does not always make a sharp distinction between that which is offensive and that which is unwholesome. The two terms are commonly coupled in indictments and others of like import, such as noxious, nauseous, etc., added. Unwholesomeness regularly includes offensiveness, but the converse is not true. In the case of offensive trades and industries, however, disturbing noises and foul vapors may, without being directly the cause of disease, deprive of sleep or fresh air, and

[12] §§ 641-644, *infra*.

[13] Vanderbilt v. Adams, 7 Cowen 349.

[14] Chicago Revised Code, Secs. 1251-1258, and statutes of several states.

[15] Commonwealth v. Bearse, 132 Mass. 542, 42 Am. Rep. 450; State v. Cate, 58 N. H. 240; State v. Read, 12 R. I. 137; Myers v. Baker, 120 Ill. 567; State v. Stovall, 103 N. C. 416, 8 S. E. 900. It must be doubted whether the decisions in so far as they sustain the power given to the managers of the meetings to license peddling within the otherwise forbidden distance, are sound in principle. Held unconstitutional because not excepting owners of lands in the neighborhood of the camp meeting, in Comw. v. Bacon, 13 Bush. 210.

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on that ground be regarded as detrimental to health.[16] Proof of danger to health may be required where statutory authority is confined to guarding against such danger,[17] but boards of health are frequently given authority over offensive conditions in general, and the common law idea of a nuisance is satisfied by mere offensiveness.[18]

Where the offensive condition affects the community at large, or a portion of it, it becomes indictable as a common or public nuisance and may be abated as such.[19] The offense of public nuisance is recognised in our criminal codes, and the general law is not necessarily superseded by special statutes dealing with certain aspects of dangerous industries and regulating them.[20] It is no defense to the charge of a nuisance that the offensive industry is useful, or conducted with great care,[21] or that it is located in a convenient or appropriate place, or that it was established when the neighborhood was unsettled, and that the complaining public "has come to the nuisance."[22]

The status of established industries will be discussed in connection with the subject of vested rights.[23]

**§ 177. Municipal power over offensive establishments.**— The public comfort being thus placed under the strong protection of the criminal law, positive police regulations are generally left to local legislation. Municipal charters frequently give power to prohibit noxious establishments in cities altogether, or to direct their location or to regulate them.

In Massachusetts the law allows boards of health to forbid offensive trades within the limits of a town, or particular portions thereof, or to assign places for their exercise, and such assignments may be revoked.[24] Provision is also made for

[16] People v. Detroit White Lead Works, 82 Mich. 471.

[17] State v. Neidt (N. J. Ch.), 19 Atl. 318.

[18] Commonwealth v. Perry, 139 Mass. 198; Bishop Auckland Local Board v. Bishop Auckland Iron and Steel Co. Ltd., 10 Q. B. D. 138.

[19] Bishop New Crim. Law § 1138-1143, § 1079-1082.

[20] Commonwealth v. Kidder, 107 Mass. 188, 1871; Commonwealth v. Rumford Chemical Works, 16 Gray 231.

[21] State v. Wilson, 43 N. H. 415.

[22] Commonwealth v. Upton, 6 Gray 473; People v. Detroit White Lead Works, 82 Mich. 471; Ashbrook v. Commonwealth, 1 Bush. Ky. 139; State v. Board of Health of St. Louis, 16 Mo. App. 8.

[23] §§ 529-533, 565, *infra*.

[24] Rev. L. ch. 75, Sec. 91.

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revocation by judicial proceedings where upon complaint it is found that the place so assigned has become a nuisance.[25] The order of prohibition of the board of health is subject to appeal to the Superior Court for a jury.[26] The consent of municipal or local authorities is necessary to the erection of slaughtering or rendering establishments, or noxious or offensive trades or occupations.[27] Licenses run for only one year.[28]

Like other municipal powers, that over nuisances must be reasonably exercised, and courts have frequently annulled oppressive ordinances. In Missouri an ordinance of the City of St. Louis declaring the emission, for however brief a period and however unavoidable, of dense smoke, to be a nuisance, was held to be unreasonable and void,[29] but similar smoke ordinances have been upheld in Illinois, Michigan, and Minnesota.[30] In Moses v. United States[31] the prohibition was declared by an act of Congress, and the defendant was not allowed to prove that he had used the best known smoke consuming appliances, the court holding that Congress may have contemplated the use of smokeless fuel. In many parts of the country, the requirement, whether municipal or statutory, to use smokeless fuel, would be plainly unreasonable.

**§ 178. Reasonableness of standards.**—The offensiveness must as a rule consist in actual physical discomfort, or in a violation of the sense of decency; mere undesirableness by reason of social or other prejudices is not sufficient, not even if it leads to a depreciation of property.[32] Thus a cemetery cannot without aggravating circumstances be declared a nuisance.[33]

[25] Sec. 92.

[26] Sec. 95.

[27] Sec. 99.

[28] Sec. 100.

[29] St. Louis v. Packing & Provision Co., 141 Mo. 375, 39 L. R. A. 551.

[30] Harmon v. Chicago, 110 Ill. 400; Field v. Chicago, 44 Ill. App. 410; St. Paul v. Gilfillan, 36 Minn. 298; People v. Lewis, 86 Mich. 273, two justices dissenting.

[31] 16 App. Cas. D. C. 428, 50 L. R. A. 532.

[32] The same principle generally applies to a nuisance considered as an actionable wrong; in Indiana, however, it has been held that a saloon in a residence district, although licensed and although not conducted in a disorderly manner, may constitute an actionable nuisance. Haggart v. Stehlin, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577. The location of a smallpox hospital of a city has been held not to be an actionable wrong to adjoining owners. Frazer v. Chicago, 186 Ill. 480, 57 N. E. 1055.

[33] Lake View v. Letz, 44 Ill. 81; Musgrove v. St. Louis Church, 10 La. Ann. 431; New Orleans v. St. Louis Church, 11 La. Ann. 244.

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It is certain, moreover, that in defining nuisances no standards may be established which discriminate against the poor. The City of Bay St. Louis in Mississippi, much frequented as a seaside resort, desired to protect the owners of residences fronting on a shell road which was separated from the sea by a narrow strip of land, against cheap structures on that strip. Under special statutory authority an ordinance was therefore enacted forbidding the erection of shanties, etc., which would obstruct the view of the sea, and intercept the sea breezes. The statute and the ordinance described these erections as nuisances; but it was held that the prohibition of a use of property adapted to the needs of the poorer classes was an unconstitutional taking of property.[34]

§ 179. **Assignment to specified districts.**[35]—The assignment of noxious establishments to designated limits is closely related to their exclusion from specified districts, and would be derived from the power to regulate and direct their location. It is, however, not the practice to exercise the power in this form: the closest approximation to it is found in excluding them from all parts of the city excepting some particular portion. This may leave their status in that portion to the common law. In the most notable case bearing upon this subject,[36] an ordinance of the City of New Orleans prohibited lewd women from living anywhere without the limits of two particularly described districts, but added that this should not be held to authorise such a woman to live in any portion of the city. The Supreme Court, however, in upholding the ordinance as not violating any federal right broadly sanctions this kind of discrimination: "The power to prescribe a limitation carries with it the power to discriminate against one citizen and in favor of another. Some must suffer by the establishment of any territorial boundaries." "If the power to prescribe territorial limits exists, the courts cannot say that the limits shall be other than those the legislative body prescribes. If these limits hurt the present plaintiffs in error, other limits would hurt others. But clearly the inquiry as to the reasonableness or propriety of the limits is a matter for legislative consideration, and cannot become the basis of judicial action.

[34] Quintini v. Bay St. Louis, 64 Miss. 483.

[35] See also, §§ 245, 689.

[36] L'Hote v. New Orleans, 51 La. Ann. 93, 177 U. S. 587.

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The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors. Because the legislative body is unable to protect all, must it be denied the power to protect any?"[37]

This statement will hardly command general assent, and not being called for by the circumstances of the case, need not be accepted as authoritative. It is sufficient that in the case before the court the owners in the district were not deprived of any remedy civil or criminal which they had before; and the ordinance expressly disclaimed being a license. On general principles an ordinance must not be partial or oppressive, and it is difficult to imagine greater possibilities of partiality and oppressiveness than in the exercise of an uncontrolled power to determine districts for noxious establishments. Moreover it is well established that a nuisance cannot be legalised which is a violation of a private right except through the power of eminent domain.[38] An ordinance withdrawing merely the liability to prosecution, might be legally and practically unobjectionable.[39] So far as private rights are concerned, it would leave owners to their remedy by damages and injunction, if injury could be shown; but in the case of the selection of a district already given over to offensive establishments there would as a rule be no ground for private complaint, an injunction could be refused,[40] and the damages would be nominal. An ordinance assigning limits might thus practically accomplish its purpose without injustice or violation of legal rights.

UNSIGHTLINESS. §§ 180-183.

**§ 180. Limiting the height of buildings on public parks.**— The various forms of offensiveness over which the police power is exercised do not as yet include unsightly objects. In prohibiting the exhibition of persons whose deformity attracts public curiosity[41] the state places a check upon an indecent and scandalous practice. The question whether mere ugliness not involving any consideration of decency can be placed under police restraint has hardly advanced beyond the range of tentative discussion.

[37] 177 U. S. 597.

[38] See §§ 507-510, *infra*.

[39] Commonwealth v. Rumford Chemical Works, 16 Gray, 231.

[40] High, Injunctions, §§ 742, 752.

[41] Illinois Act April 22, 1899.

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The case of Attorney General v. Williams[42] deals with this question, although not directly from the point of view of the police power. An act of Massachusetts of 1898 limited buildings in the neighborhood of Copley Square, Boston, to a certain height, providing at the same time for the payment of compensation to those property owners who should suffer by the limitation. The act was upheld as an exercise of the power of eminent domain, and the principal question discussed by the court was whether the use could be regarded as public. "It is argued by the defendants that the legislature in passing the statute was seeking to preserve the architectural symmetry of Copley Square. If this is a fact, and if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land against the will of the owner. But if the legislature for the benefit of the public was seeking to promote the beauty and attractiveness of a public park in the capital of the commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the law-making power might not determine that this was a matter of such public interest as to call for an expenditure of public money, and to justify the taking of private property." The court, however, also suggests another theory for the exercise of such a power. "In view of the kind of buildings erected on the streets about Copley Square, and the use to which some of these buildings are put, it would be hard to say that this statute might not have been passed in the exercise of the police power, as other statutes regulating the erection of buildings in cities are commonly passed."

A later statute of Massachusetts[43] limited the height of buildings on a small tract west of the State House to 70 feet and allowed petitions for the assessment of damages in so far as the act or proceedings to enforce it might deprive the petitioners of rights existing under the constitution. It was contended on the part of the commonwealth that the act was an exercise of the police power, and in so far as the limitation was reasonable no rights under the constitution were impaired. The court however held that without express statutory pro-

[42] 174 Mass. 476, 55 N. E. 77, 1899; Williams v. Parker, 188 U. S. 491, 1903.

[43] 1899 ch. 457.



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vision to that effect it could not be assumed to have been the legislative will and judgment that property rights should be restricted without compensation. "The objection to the interpretation is that it supposes the legislature without clear words to have used the police power in one of its extreme manifestations for a purpose which although conceded to be public is a purpose which may be described as a luxury rather than necessity. * * * So that to sustain the restriction to its whole extent under the police power would be a startling advance upon anything heretofore done."[44] This decision shows after all considerable hesitation and doubt as to whether the police power can be validly exercised without compensation for mere aesthetic interests.[45]

**§ 181. Building regulations not for purely aesthetic purposes.**—General municipal building regulations in this country are enacted exclusively in the interest of health or safety. An ordinance of the City of Baltimore providing for the refusal of building permits unless the size, general character and appearance of the building or buildings to be erected will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved and unimproved property, was held void as not authorised by the city's charter powers, the court leaving the question open whether such power can be conferred upon a city at all.[46] In America buildings have never been controlled by law with a view to securing beauty or symmetry, whereas such regulations are not unknown in European cities. It may be conceded that the restrictions imposed rarely inflict actual damage, nevertheless they constitute a substantial impairment of the right of property, and the maintenance of an official standard of beauty would not easily be recognised under our theory of constitutional law as a sufficient warrant for the exercise of the police power. The statute of Massachusetts may be regarded as authorising the condemnation of air space for the purpose of securing additional light for a public park, or a public building, a purpose closely related to these public improvements and hence sufficient to justify the exercise of the power of eminent domain.

[44] Parker v. Com., 178 Mass. 199, 59 N. E. 634.

[45] See § 514, *infra*.

[46] Bostock v. Sams, 95 Md. 400, 52 Atl. 665.

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The purpose of making a parkway attractive does not justify a requirement that owners place their houses forty feet back of the line of the boulevard,[47] nor the prohibition of business avocations on property fronting thereon.[48] Such requirement and prohibition might be sustained upon payment of compensation, for space and quiet may be regarded as auxiliary to the sanitary purposes of a park system which justify the exercise of the power of eminent domain. But if the purpose were purely aesthetic, the impairment of property rights, even upon payment of compensation, would not pass unchallenged. The city of Bridgeport in Connecticut attempted to prohibit the erection of buildings on either side of a new bridge, that might mar the sightliness of the structure. The purpose was proposed to be accomplished by the establishment of harbor lines, without payment of compensation, a measure which the supreme court of the state held to be both in violation of vested rights and in contravention of the city charter. The court, however, also took occasion to condemn the purpose as one "which no one would claim to be a public one within the meaning of the constitution."[49] The point received no further discussion, and, as will be noted, it was not essential to the decision of the case. It is therefore not necessary to accept this view as final and conclusive.[50]

**§ 182. Unsightly advertisements.**—Municipal ordinances against bill boards used for advertising purposes, are usually placed on grounds of public safety, and are therefore restricted to boards exceeding a certain height and placed within a certain distance from the sidewalk. Whether they are upheld

[47] St. Louis v. Hill, 116 Mo. 527.

[48] St. Louis v. Dorr, 145 Mo. 466.

[49] Farist Steel Co. v. Bridgeport, 60 Conn. 278, 1891.

[50] The Prussian Code (1, 8 § 66) provides that no building shall be erected or altered so as to prejudice or endanger the public or so as to disfigure cities and public places. Where a building permit was refused in order to save the view of a public monument from obstruction, the state as owner of the monument was held liable to make compensation. (Imperial Court Jan. 9, 1882. Gruchot, Vol. 26, p. 935.) Regulations intended to maintain the suburban character of certain localities have been upheld in Prussia, in the absence of statute, as sanitary measures within the jurisdiction of the police authorities. (Kamptz Oberverwaltungsgericht IV., 1, p. 388. Decision of Jan. 13, 1894.) In other German states they are authorized by law.

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as safety measures,[1] or held to be unreasonable and void as not being called for by any real danger,[2] they do not claim to restrain on the ground of unsightliness, and no attempt has been made to deal with unsightly advertisements placed on houses or on conspicuous natural objects or monuments.[3]

It is generally assumed that the prohibition of unsightly advertisements (provided they are not indecent), is entirely beyond the police power, and an unconstitutional interference with the rights of property. Probably, however, this is not true. It is conceded that the police power is adequate to restrain offensive noises and odors. A similar protection to the eye, it is conceived, would not establish a new principle, but carry a recognised principle to further applications. In the matter of offensiveness, the line between a constitutional and an unconstitutional exercise of the police power must necessarily be determined by differences of degree.[4] It is true that ugliness is not as offensive as noise or stench. But on the other hand offensive manufactures are useful, and the offense unintentional and inevitable, whereas in the case of an advertisement the owner claims the right to obtrude upon the public an offensive sight which they do not want, and which but for this undesired obtrusion would not be of the slightest value to him.[5]

[1] Rochester v. West, 164 N. Y. 510, 58 N. E. 673.

[2] Crawford v. Topeka, 51 Kan. 756, 20 L. R. A. 692.

[3] In Germany a police ordinance against covering roofs with advertisements was sustained on the ground that such advertisements, by causing people to stop, disturb traffic.

[4] Rideout v. Knox, 148 Mass. 368.

[5] However, even if the power to restrain unsightly signs be conceded, the manner of its exercise would give rise to constitutional difficulties. A Prussian statute of 1902 provides that the competent police authorities shall have power, in order to prevent the disfigurement of places distinguished in point of scenery, to make regulations forbidding outside of cities and villages advertising signs or other inscriptions and pictures which mar the landscape. Under our governmental system these regulations would have to proceed from the legislative authority of either state or locality. Such regulations would have to define what signs are prohibited, and some test would have to be discovered by which to discriminate that which is merely unaesthetic from that which is so offensive as to fall under the police power, since the prohibition of all advertising signs would be out of the question. Under the principle of equality, moreover, a use of property conceded to one person could not be denied to another simply because he lives in more attractive surroundings; especially

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§ 183. **Flag legislation.**—After the Spanish war, during which some popular feeling had been aroused by the indiscriminate use of the national flag for commercial purposes, which was believed to cheapen and degrade it, a number of the states enacted laws restraining such use. In Illinois, an act of April 22d, 1899, made it unlawful to use or display the national flag or emblem or any likeness of it, for advertising purposes; the act not to affect exhibitions of art, or to restrict in any way the use of the flag for patriotic purposes. This act was declared unconstitutional by the Supreme Court of Illinois.[6] The decision was based on three different grounds. The act was held to be unduly discriminating and partial in its character, in that it exempted from its operation the use of the flag for exhibitions of art. "The legislature clearly has no power to deny to plaintiff in error the right to use the national flag to advertise his business, or, in other words, to deny to all persons following particular occupations the right to use the national flag, and at the same time to permit artists or art exhibitors to use the same." This point does not however seem to be very strongly relied upon, and a fuller consideration might have convinced the court that the exception in favor of art was well justified by the nature and purpose of the statute. The court argues in the second place, that since the state of Illinois had never adopted a flag emblematic of its sovereignty, and the flag is the flag of the United States as a sovereignty, the right to use it would seem to be a privilege of a citizen of the United States, subject to restraint only by act of Congress. The point thus made is a novel one, and capable of final adjudication only by the Supreme Court of the United States. The court, however, also holds that apart from the other objections, the act is invalid, as not being within the police power of the state. We must therefore assume that the decision would have been the same, if the flag had been that of Illinois, and no discrimination had been made in the prohibition. This view seems to be based upon an unduly narrow conception of the scope of the police power. The court says of the prohibited use: "It may violate the ideas which some people have of sentiment and taste, but the propriety of an act considered merely from

where the offensiveness consists chiefly or entirely in the impairment of natural beauty.

[6] Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41.

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the standpoint of sentiment and taste, may be a matter about which men of equal honesty and patriotism may differ." The court appears to ignore the difference between aesthetic sentiment with which the state has no concern except in the exercise of its proprietary powers, and a sentiment which the community has a legitimate interest in having honored and respected. If by a reasonable regulation the state can prevent the flag from being cheapened and degraded, such regulation would seem to be within the scope of the police power, as a measure for the protection of the public sense of what is fit and decent.[7] If it is a legitimate consideration against the validity of a statute that men of equal honesty and patriotism may differ about it, but few statutes could be regarded as constitutional.

SUNDAY REST. §§ 184-186.

§ **184. Legislation.**—The protection of Sunday as a day of rest has a clear relation to public order and comfort. It is probable that at common law only conduct creating a public nuisance was punishable.[9] A number of statutes were enacted in England since the middle of the fifteenth century restricting business or pleasure on Sunday, and the act of 29 Charles II prohibited all worldly business, labor or work of one's ordinary calling, works of necessity or charity only excepted. This statute has become the foundation of Sunday legislation in many American states. So in Massachusetts it is forbidden to keep open any shop, warehouse or workhouse, to do any manner of labor, business or work except works of necessity or charity, to take part in any game, sport or play, to be present at any dancing or public diversion, show, game, or entertainment, to travel, to entertain other than travellers, strangers or lodgers, to discharge firearms, or to attempt to take fish.[10] The majority of states forbid all common or ordinary labor (works of necessity and charity, and sometimes other stated kinds of business, excepted), and all game, sport or play. Employment of others is specially forbidden in a num-

[7] The stimulation of national and patriotic sentiment is an object for which the power of eminent domain may be exercised. See United States v. Gettysburg Electric R. Co., 160 U. S. 668, 1896.

[8] As to religious equality see Sec. 470, *infra*.

[9] Bishop New Criminal Law, I, § 499.

[10] Mass. Rev. Laws, ch. 98.

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ber of states.[11] Some states forbid only the keeping open of shops, stores and places of business,[12] or only public amusements.[13] Colorado and Illinois forbid the disturbing of the peace and good order of society by labor or amusement, and New Hampshire likewise forbids only work to the disturbance of others. California, Idaho and Arizona have no Sunday legislation.

**§ 185. Protection of customary quiet.**—It is well established that the character of Sunday legislation is secular and not religious, and under the principle of separation of church and state it could not be otherwise.[14] The enforced abstention from work has been held to be justified by the experience, that periods of rest from ordinary pursuits are requisite to the moral and physical well-being of the people.[15] This argument logically implies a recognition of the legislative power over periods of work and of rest in general—a power which many courts would perhaps be unwilling to concede.[16]

When we look however upon Sunday rest as an established social institution, the legislation regarding it may be explained upon a different principle. It may then be looked upon as a measure for the protection of the good order and comfort of the community established and recognised by common custom and convention. As under natural conditions public order has a different meaning in the night time and in the day time, so it has under social conventions a different meaning on Sundays and weekdays.

[11] Alabama, Arkansas, District of Columbia, Kansas, Kentucky, Mississippi, Missouri, Rhode Island, Tennessee, Texas, Virginia and West Virginia.

[12] Alabama, Louisiana, Oregon, Washington, Wyoming.

[13] Colorado, Mississippi, Montana, Nevada, Texas, Utah and Washington.

[14] State v. Orleans Judge, 39 La. Ann. 132; Specht v. Commonwealth, 8 Pa. St. 312.

[15] State v. Powell, 58 Ohio St. 324, 1896. In an early California case (ex parte Newman, 9 Cal. 502) Sunday laws were held to be unconstitutional. This decision was subsequently overruled (ex parte Andrews, 18 Cal. 678), but in 1883 the Sunday legislation of California was repealed.

[16] An analogous exercise of power would especially be found in the requirement of closing places of business at and after a stated hour of the evening. As such requirements where they exist proceed as a rule from municipal authorities and not from the legislature, their validity depends in part also upon the extent of delegation of power to the municipality.

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**§ 186. Prohibition of business.**—The question then arises how far the enforcement of Sunday rest, as a measure of protection of customary peace and quiet, may go. The common law was adequate to deal with disturbances which amounted to nuisances, and the laws of Illinois and Colorado remain within the like narrow compass. Noisy trades and amusements would fall especially under the ban of these laws. The prohibition of keeping open stores and shops, and places of public amusement goes one step further, but may also be justified as removing a constant invitation and temptation to the public to be drawn into the common traffic and activities of work days.

The prohibition of avocations and business not soliciting public patronage can be justified only by the consideration that the prevention of competition is necessary to secure cessation of work to those desiring to rest, that such cessation cannot be maintained unless it is uniform.[17] The argument applies with special strength to the protection of employees. Where the business does not require the services of others, its prohibition must be regarded as an extreme measure. It is hardly enforceable with regard to purely private and individual labor, but the state can and does withhold remedies upon contracts entered into on Sunday.[18] As in doing so it does not exercise any compulsion, this policy is perhaps not open to constitutional objection, but it can accomplish its purpose only by encouraging breach of faith and gross injustice. The prohibition of private recreation by games or other amusements not disturbing the public is not only practically beyond the power of the state, but cannot be justified upon any legitimate consideration of public interest. If, under the New York law, it has been held that fishing on Sunday even on private grounds is unlawful, this decision can be maintained only upon the principle that the taking of fish is entirely and absolutely within legis-

A closing ordinance was held illegal in North Carolina, State v. Ray, 42 S. E. 960. Provisions for closing places where liquor is sold involve different considerations.

[17] That the danger of competition justifies restraint, appears most clearly from the German practice of forbidding on Sundays the operation of automatic slot machines furnishing goods.

[18] The rule of the Massachusetts courts (also adopted in Maine) that a person travelling on Sunday cannot recover for injury sustained while travelling, has been abrogated by statute.

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lative control.[19] Sunday laws should certainly wherever possible be so construed as not to affect any pursuit which is neither competitive nor carried on in public.[20]

[19] People v. Moses, 65 Hun. 161.

[20] People v. Dennin, 35 Hun 327; Rucker v. People, 67 Miss. 328.

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## CHAPTER VII.

### PUBLIC MORALS.

§ 187. **In general.**—The exercise of the police power for the protection of public morals proceeds upon a number of grounds: that vice is intrinsically evil and has no right to existence or toleration; that it impairs the strength of the community; that its practice is of evil example and tends to corrupt others; and that its manifestation is offensive to the public and violates the implied conditions of community life whereby each is bound not to outrage in an offensive manner prevailing public sentiment. These grounds are less urgent than those underlying the measures for the protection of the physical welfare of the community, and the exercise of the police power in this direction means a greater assertion of governmental authority than the protection of peace, safety and order. The interference of the state is made more plausible and acceptable by taking the view that acts and conditions which primarily violate only morality, are apt, in their more remote and indirect consequences, to produce physical disorder and crime, and thus to endanger the public safety.

The practices with which legislation is chiefly concerned are: gambling, drink, and sexual immorality. Brutality is legislated against to some extent. The subject of public amusements is closely connected with public morals in its various aspects, and in this country is hardly treated or considered apart from specific forms of immorality.[1]

[1] Legislation for the protection of morals strongly reflects public sentiment and prejudice. It is the tribute which the organised community pays to virtue, and the tribute is willingly paid so long as it involves nothing more than the enactment of a statute. The statute books frequently represent a standard of morality far in advance of actual practice and even of practical sentiment, and sometimes they set impossible standards. A strong sense of civil liberty affords no guaranty of tolerance for practices conceived to be immoral, especially where the immorality bears on social as distinguished from business and political relations; on the contrary, the enlightened democratic community is apt to be more intolerant than that which is despotically governed. Moreover a government with weak executive authority may be very radi-



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### A. GAMBLING.

**§ 188. Justification of exercise of police power.**—The evils of gambling lie partly in the possibility of impoverishment through wasteful and unprofitable expenditure, partly in the demoralising effect of gain made without effort, and in the habit, which it fosters, of relying upon chance instead of upon labor for acquiring wealth. Its great attractiveness makes the evil a matter of public concern. The constitutionality of measures against gambling is as a matter of principle not questioned; yet those who assert that all forms of paternalism are contrary to American constitutional liberty must admit that anti-gambling legislation is paternal legislation, protecting the individual from temptation and restraining him from acts, which, while hurtful to him, are not immediately offensive to others, and while of evil example, do not in any way affect any one else's liberty of action.

**§ 189. Games for pastime and recreation.**—The usual objections to gambling have hardly any application where the object is not gain, but recreation and pastime, and where there are no valuable stakes. It has been said that such playing is not gaming at all in the legal sense of the term.[2] American statutes invariably speak of gaming or playing for money or other property or valuable things, and do not concern themselves with gaming for mere pastime.[3]

### GAMES OF CHANCE. §§ 190-191.

**§ 190. Legislation.**—At common law, the mere playing of a game of chance, of whatever kind, was not regarded as an offense.[4] The playing of servants and artificers was restricted by stat. 33 H. VIII. ch. 9. Deceitful gaming, which is a species of fraud rather than of gambling, was punished by stat. 16

cal in its legislative measures which remain dead letters, while a government accustomed to a strict enforcement of police laws will undertake to deal with immorality by measures tending to regulate and diminish it, recognising the impossibility of total suppression. Foreign legislation in this sphere of internal police is, therefore, full of interest and instruction.

[2] Reg. v. Ashton, 1 E. & B. 286.

[3] Except in connection with Sunday legislation, Mass. Rev. Laws, ch. 98, § 2.

[4] Jenks v. Turpin, 13 Q. B. D. 505, 1884.

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Car. II. ch. 7, which also subjected the winner of more than £100 at one sitting to an action of recovery and forfeiture. The latter policy was extended to winnings exceeding £10 by stat. 9 Anne ch. 14, and the same statute made provision for requiring persons supporting themselves by gambling to find sureties for their good behavior. A number of specified games of hazard were forbidden by statutes of George II.[5] The statute of 8 and 9 Vict. ch. 109 makes all wagering contracts void.

The rule that all wagering and gambling contracts are void has been established by statute in most American states.[6] Following the statute of Anne, winnings exceeding a specified amount at one sitting, sometimes winnings irrespective of amount, are made recoverable by the loser, in some states with an additional forfeiture. The odious provision of the English statute[7] allowing a treble recovery by any informer if the loser does not bring action, has been adopted in a number of states.[8] Not uncommonly, moreover, recovery of losses is also allowed against the owner, tenant or occupant of the premises, who knowingly allows them to be used for gambling, even in favor of the informer.[9] A public prosecution of persons who play for money without aggravating circumstances is allowed in Illinois,[10] but not in Massachusetts or New York.[11] Texas prohibits the playing at a game of cards at any place but a private residence occupied by a family.[12]

**§ 191. Aggravating circumstances.**—The following aggravating conditions in connection with gambling have become the subject of legislation:

(a) Common gamblers.—The statute of Anne provided measures against persons supporting themselves by gambling, and the Revised Statutes of New York[13] declare them to be

[5] 12 Geo. II. ch. 28, 13 Geo. II. ch. 19, 18 Geo. II. ch. 34; the forbidden games were hazard, ace of hearts, faro, basset, roulet, and all games with dice except backgammon.

[6] Stimson American Statute Law, § 4132.

[7] Also found in Justinian's Code, 3, 43, 1.

[8] Stimson, § 4132B.

[9] Trout v. Marvin, 62 Oh. St. 132, 56 N. E. 655, 1900.

[10] Crim. Code, § 126.

[11] As to ordinance punishing gaming for money in private places see Greenville v. Kemmis, 58 S. C. 427, 50 L. R. A. 725.

[12] Penal Code Act, 379, as amended 1901, Hankins v. State, 72 S. W. 191.

[13] 1 Rev. Stat. 638, also Code Crim. Proc., § 899.

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disorderly persons, and under most criminal codes such persons would fall under the definition of vagrants and vagabonds, or would be guilty of criminal idleness.[14] In Indiana and Kentucky, being a common gambler is made a specific offense.[15]

(b) Gambling in public places.—The act of gambling, if not otherwise made punishable, may be prohibited in stated places, especially: public conveyances, public inns or taverns, or places where liquor is licensed to be sold, buildings devoted to public or quasi-public purposes, and at or near places where public meetings are held.[16]

(c) Keeping places for gambling.—The law especially provides against those who make a profit out of the gambling of others, since their interest is to encourage the practice, and they do actually encourage it, by providing special facilities. It is characteristic of the methods of the police power that it attacks the evil at a stage previous to its actual appearance, and by measures directed against those who are not themselves affected by its influence; for the keeper of a gambling house need not to be a gambler himself[17] and his business is as far as his own profits are concerned less speculative than many others.

The keeping of a common gaming house was an indictable nuisance at common law[18] and was also dealt with by the Star Chamber,[19] and is specially prohibited by the statute of 8 and 9 Victoria ch. 109. On the continent of Europe public gambling houses were, in former times, often kept under special authority in watering places; in Germany they have all been suppressed, and in Belgium legislation for the same purpose was enacted in 1901. The principality of Monaco still derives its revenues from such an establishment. American statutes generally forbid the keeping or letting of rooms or other places for the purposes of gambling; but we also find prohibited the keeping, for gain or hire, of any apparatus commonly used for any game of chance. The statutes of Illinois and Massachusetts contain provisions against tavern keepers "or other persons"

[14] See § 97, supra; Mass. Rev. Laws, ch. 212, § 46, ch. 214, § 2.

[15] Bowe v. State, 25 Ind. 415; Com. v. Hopkins, 2 Dana, 418.

[16] N. Y. Penal Code, § 336; Mass. Rev. Laws, ch. 212, § 31.

[17] But in New York he is designated as a common gambler, Penal Code, § 344.

[18] Jenks v. Turpin, 13 Q. B. D. 505.

[19] Hudson's Treatise, p. 110.

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keeping such apparatus for the purpose of having the same used for gaming for money.[20]

Recent statutes have provided in many cases against novel devices for gambling as e. g., against slot machines upon which money is staked or hazarded.[21] These do not establish any new principle.

GAMES OF SKILL AND CONTESTS. §§ 192-195.

**§ 192. Playing for money.**—Games of skill, in addition to serving the purpose of recreation and entertainment, are valuable in exercising various faculties, and hence are often treated differently from games of chance.[22] The statute of George II forbidding games with dice excepted backgammon, and a similar exception has been recognised in Alabama,[23] and sometimes statutes confine their provisions to games of chance.[24] But generally measures against playing for money apply to games of skill, such as chess, billiards and bowling.[25] A question may then arise as to what playing for money is, and there is a conflict of authority on this point, where the agreement is that the loser is to pay for the use of the billiard table. Among others the courts of Massachusetts[26] and Ohio[27] hold that this is playing for money. The courts of New York,[28] New Jersey[29] and Illinois[30] hold that it is not. The latter opinion seems to be in accordance with the spirit of the law, which can serve no legitimate object in discouraging playing where the element of profit does not enter into the attraction of the game. Upon a similar principle it is held not to be gaming where the stake is a prize which is sought, not for its pecuniary value, but for the honor which it bestows, as e. g., a racing cup.[31] Competing even for a money prize, purse, or premium, is not gambling where the prize is offered by a third party, and the mere payment of entrance fees which go to the associa-

[20] Mass. Rev. L., ch. 214, § 3; Ill. Crim. Code, § 128.

[21] Illinois Act of 1895; N. Y. Laws, 1899, ch. 655.

[22] So also in the Roman Law, Dig. 11, 5, 2, 3.

[23] Wetmore v. State, 55 Ala. 198.

[24] N. Y. Penal Code, § 336, 340.

[25] Sigel v. Jebb, 3 Stark. 1, 1820.

[26] Murphy v. Rogers, 151 Mass. 118.

[27] Ward v. State, 17 Oh. St. 32.

[28] People v. Forbes, 52 Hun 30.

[29] State v. Hall, 32 N. J. L. 158.

[30] Harbaugh v. People, 40 Ill. 294.

[31] Wilkinson v. Stitt, 175 Mass. 581, 56 N. E. 830; West v. Carter, 129 Ill. 249.

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tion offering the prize, does not make these fees stakes put up by the competitors unless the prize is made up entirely of such fees.[32] The statute of 8 and 9 Victoria making void all wagering contracts expressly excepts subscriptions to contribute towards a prize for the winner of any game, sport, pastime or exercise.[33]

§ 193. **Billiard tables and bowling alleys.**—Since the keeping, for hire, of gaming apparatus, is only prohibited if the same is intended to be used for playing for money, there is usually no difference made between games of chance and games of skill. The statute of 33 H. VIII. ch. 9 prohibited the keeping of places for bowling, but this was repealed by 8 and 9 Victoria ch. 109. In this country it has been strongly questioned whether the keeping of bowling alleys would constitute a nuisance *per se* at common law.[34] A New York statute prohibiting billiard tables in houses kept as inns or taverns,[35] though re-printed in the latest revisions, seems to have fallen into disuse.[36] In Illinois, while the power of cities over gaming and gaming houses and lotteries is simply one of suppression, they are authorised to license and regulate, as well as to prohibit and suppress, billiard tables and bowling alleys.[37] A power to suppress and restrain gaming has been interpreted to authorise the licensing of billiard tables.[38] The legislative power to suppress the keeping of such places for hire, does not appear to be subject to doubt.[39]

§ 194. **Horse races.**—Horse racing has become the subject of legislation chiefly on account of the fraudulent and gambling practices connected with it. Racing, in itself, is tolerated or legalised as a means of improving the breed of horses, while a race run for a prize or premium set by some third party

[32] Harris v. White, 81 N. Y. 532; Dudley v. Flushing Jockey Club, 14 Misc. N. Y. 58.

[33] § 18 of act.

[34] State v. Hall, 32 N. J. L. 158; *contra:* Tanner v. Albion, 5 Hill 121; State v. Haines, 30 Me. 65.

[35] 1 Rev. Stat. 661, § 6.

[36] People v. Forbes, 52 Hun 30.

[37] City Act V. 1, No. 44, 45.

[38] Re Snell, 58 Vt. 207.

[39] State v. Noyes, 30 N. H. 279; State v. Hall, 32 N. J. L. 158; Com. v Goding, 3 Mete. 130. Otherwise as to "keeping billiard tables," which would include private ownership. It has been held that this cannot be made to depend upon the payment of a heavy license fee. Stevens v. State, 2 Ark. 291, 35 Am. Dec. 72.



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does not constitute gambling.[40] A race is held to be a game within the statutes forbidding or avoiding bets on games.[41] Early New York statutes declared all races not expressly authorised by law to be public nuisances.[42] This provision was repealed by a general repealing act of 1886, leaving the subject without regulation. A comprehensive regulation was undertaken in 1895.[43] The formation of corporations for the raising, improving and breeding of horses is authorised, and such corporations, the owners of horses and others who are not participants in the race, may contribute towards the making up of purses, prizes, etc., to be contested for by the owners of horses. These corporations may hold races upon obtaining a license from the state racing commission, created by the act; the races being subject to specified rules. All races not authorised by the act, for stakes or rewards, are declared public nuisances. Betting upon the result of any race is prohibited, and any money or property staked is forfeited to the other party or to the depositor. The act does not make betting on the race a penal offense, but the keeping of a betting place is contrary to the act, and, moreover, covered by the provisions of the Penal Code.[44]

Many special provisions regarding races, especially prohibiting fraudulent entries, are to be found in the Session Laws of the various states in recent years. New Jersey enacted elaborate legislation in 1893, and repealed it in 1894. Indiana in 1895 imposed considerable limitations regarding the period of the year and the length of time during which races should be allowed to be held.[45]

§ 195. **Betting.**—A bet or wager is the act of two or more persons, by which each stakes something of value upon the correctness of an assertion, opposite to that of the other party, or parties, the truth being objectively or subjectively uncertain at the time the bet is made. The assertion may involve calculation and judgment, in which case the bet resembles a contest

[40] People ex rel. Sturgis v. Fallon, 152 N. Y. 12, 46 N. E. 296; Harris v. White, 81 N. Y. 532.

[41] Blaxton v. Pye, 2 Wils. 309, 1766; Ellis v. Beale, 18 Me. 337; Cheesom v. State, 8 Black 332; Tatman v. Strader, 23 Ill. 493; Wilkinson v. Tousley, 16 Minn. 263.

[42] 1 Rev. Stat., 672, § 55.

[43] Chap. 570, Laws 1895.

[44] Penal Code, § 343.

[45] State v. Roby, 142 Ind. 268, 33 L. R. A. 213.

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of skill, or the correctness or incorrectness of the assertion may be matter of chance.

Bets or wagers, unless in some special manner violating order or decency, were in England regarded as enforceable by civil action,[46] and the same rule was adopted in American states, though sometimes with expressions of regret.[47]

Bets on games are uniformly treated by statute like gambling, and in many states all betting and wagering contracts are made unenforceable.[48] Statute 8 and 9 Victoria ch. 109 makes the keeping of betting places unlawful, and not merely the keeping of, but the presence for the purpose of betting at, places for registering bets on games, contests, etc., is made an offense in Massachusetts.[49]

Betting has received special legislative attention in connection with horse races. As before stated, a horse race is a game within the provisions of the law forbidding betting on games, and a statute against keeping betting places will apply to bets on horse races.[50] Many states have enacted statutes against betting, book-making or pool-selling on races.[51] In some cases, however, an exception is made in favor of the inclosures of track or fair associations.[52] In Illinois it has been held that such an exception leaves the bet made on the race track to the prohibition of the general statutes.[53] Otherwise such an exception would present the constitutional problem of a legislative sanction given to one form of gambling, if carried on at specified times and places.[54] In New York, where the constitution forbids the authorising or allowing of any pool-selling, book-making, or other kinds of gambling within the state, the making and recording of bets upon a race-course, and at a race authorised by law, is visited with the exceptionally mild

[46] Bulling v. Frost, 1 Esp. 235, 1795; McAllister v. Haden, 2 Campb. 438, 1810; Hussey v. Crickett, 3 Campb. 168, 1811.

[47] Dewees v. Miller, 5 Harr. 347; Johnson v. Fall, 6 Cal. 359; Beadles v. Bless, 27 Ill. 320.

[48] Stimson, § 4132.

[49] Mass. Rev. L., ch. 214, § 5, 23.

[50] Swigart v. People, 154 Ill. 284, 40 N. E. 432.

[51] So Illinois by Act of 1887.

[52] Tennessee, 1891; Missouri, 1895, held unconstitutional in State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L. R. A. 231; a similar act of 1897, however, was upheld on the ground that by that act a license was required for the legalised betting. State v. Thompson, 160 Mo. 333, 54 L. R. A. 950.

[53] Swigart v. People, 154 Ill. 284, 40 N. E. 432, 1895.

[54] See § 730, *infra*.

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penalty of the forfeiture of the stake, while book-making and pool-selling in general, are made felonies. This has been held constitutional upon the ground that the courts cannot control the legislative discretion as to the effectiveness of any measure, which in any degree tends to counteract the evil dealt with.[55] It was the obvious purpose of the New York legislature to give a covert sanction to betting on race tracks, and it is interesting to note in this connection that a select committee of the British House of Lords upon the subject of betting has recently made a report in which it expresses its conviction that it is impossible altogether to suppress betting, and its belief that the best method of reducing the practice is to localise it, as far as possible, on race courses, in definite inclosures and other places where sport is carried on. The same report also shows that the suppression of betting places has only resulted in driving the book-makers to the streets, thereby greatly extending the evil.[56]

LOTTERIES. §§ 196-198.[1]

**§ 196. Authorised lotteries.**—Lotteries have been distinguished from other forms of gambling by the fact that they were in former times universally used as sources of public revenue, and were also under public authority resorted to for the purpose of raising funds for benevolent and otherwise laudable enterprises. If used as sources of public revenue they might either be set on foot by the state directly or the privilege to arrange a lottery might be granted for a consideration to an individual or a private company. Thus we find in 1721 an act of the Province of New York prohibiting the raffling of goods with an exception in favor of one William Lake, who holds a license from the government, and in 1740, an act establishing a lottery to raise £2,250 for the founding of a college. A long list of lotteries authorised in Virginia is given in Jefferson's works, Vol. 10, p. 365, and under an act of congress of May 4, 1812, the city of Washington had power to authorise the drawing of lotteries to effect improvements in the city.[2] As long as lotteries existed under governmental

[55] People ex rel. Sturgis v. Fallon, 152 N. Y. 1, 46 N. E. 302. Laws 1895, ch. 570, § 17.

[56] London Times (weekly edn.), July 11, 1902.

[1] See John L. Thomas, Lotteries, Frauds and Obscenity in the Mails, 1900.

See, also, § 563 *infra*.

[2] Clark v. Washington, 12 Wh. 40.

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auspices the law distinguished between authorised and unauthorised or illegal lotteries, the latter being declared nuisances, and the sale of tickets, the publication of accounts, etc., being forbidden with regard to the same; a license was required for selling the tickets of authorised lotteries.[3] This system now exists in many European states, even in so enlightened a community as Prussia. The argument for the continuation of public lotteries is, that since the gambling instinct is ineradicable it had better be controlled by the state and the profits from it applied to public uses. The state attempts to a certain extent to reduce the evils of gambling by prohibiting the solicitation of custom and denying a right of action for tickets sold on credit. England abolished state lotteries in 1826, but later on allowed lotteries in favor of art unions under Order in Council.[4] In America lotteries are now prohibited in all states, generally by the constitution, the last states to abolish lotteries having been Kentucky and Louisiana.

**§ 197. Definition of a lottery.**—A lottery is defined by the penal code of New York as a scheme for the distribution of property by chance among persons who have paid, or agree to pay, a valuable consideration for the chance.[5] The Supreme Court of the United States, in a leading case[6] cites other definitions from standard dictionaries which have in common the element of distribution of prizes; where, however, only one object is to be raffled, it is not possible to speak of a distribution of property, and yet the scheme is in all essential respects a lottery. The Century Dictionary speaks of "a scheme for raising money by selling chances."

Every lottery should combine at least the two elements of chance and possible gain. Where tenants in common agree to divide property by lot and the shares are of equal value, or very nearly so, there is no lottery.[7] Otherwise where there is an allotment of lands of unequal value.[8]

**§ 198. Gifts to attract custom[9]—question, whether chance paid for or not.**—Where, upon making a purchase, the pur-

[3] N. Y. Rev. Stat. I, p. 664-672.
[4] 9 & 10 Vict. ch. 48.
[5] § 323.
[6] Horner v. United States, 147 U. S. 449.
[7] Elder v. Chapman, 176 Ill. 142.
[8] Wooden v. Shotwell, 23 N. J. L. 465; Seidenbender v. Charles, 4 S. & R. 151.
[9] See, also, § 293.

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chaser receives together with the object bought a ticket, check or stamp, which entitles him to select some other articles, the transaction is without any element of chance, but simply a form of attracting custom.[10] Otherwise where the additional gift is awarded by chance. In the latter case there is a gift enterprise, which the constitutions generally prohibit in connection with the prohibition of lotteries. In Massachusetts it is held that, although the additional gift does not depend upon chance, the gift sale appeals to the gambling instinct and may therefore be prohibited, if the nature of the prize is not known at the time of making the purchase.[11]

Where the winner is determined solely by merit there is no lottery; so in most competitions for prizes; but if skill merely narrows down the number of competitors between whom chance will finally determine the award of the prize, the scheme will be a lottery; so in the missing-word contest.[12]

The definition of the New York penal code also includes as an essential element that the chance should be paid for. It has been held that the giving away of a prize for successful guess, merely as an advertising scheme, is not a lottery.[13] So the disposition by lot of public lands of the United States on the Kiowa-Comanche reservation on July 29, 1901, was not a lottery.

In many cases the prize is apparently, but not in reality, given away: namely, where the chance goes with an article purchased,[14] or with an entrance ticket to a concert or art or other exhibition, or with a government or corporate bond (premium loans). Such schemes are generally held to be within the statutory prohibition,[15] New York and California taking a contrary view with regard to premium loans.[16] The courts seem to decide this question as if the prize were really given

[10] People v. Gillson, 109 N. Y. 389; State v. Dalton, 22 R. I. 77, 46 Atl. 234.

[11] Commonwealth v. Emerson, 165 Mass. 146, 42 N. E. 559; Commonwealth v. Sisson, 178 Mass. 578, 60 N. E. 385.

[12] Barclay v. Pearson, L. R. '93, 2 Ch. 154.

[13] Cross v. People, 18 Col. 321, 36 Am. St. Rep. 292; see, *contra*, Thomas, op. cit. p. 21-35.

[14] Lohman v. State, 81 Ind. 15; Hudelson v. State, 94 Ind. 426.

[15] See Horner v. United States, 147 U. S. 449, and authorities here cited; State ex rel. Att'y Gen'l v. Interstate Savings Investment Co., 64 Oh. St. 283, 60 N. E. 220, 52 L. R. A. 530.

[16] Kohn v. Koehler, 96 N. Y. 362; ex p. Shobert, 70 Cal. 632.

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without consideration, the participators in the chance receiving full value for their money irrespective of the chance. Therefore such a scheme is held to be only "in the nature of a lottery"[17] or "a similar enterprise offering prizes depending upon lot or chance."[18] In order to come under the statute of New York, payment for the chance is essential, but there can be no doubt that the purchaser of an article, ticket, or bond, in reality pays for the chance by an increased price, a reduced rate of interest, or diminished security.

The statutes against lotteries prohibit and punish not only the arranging of lotteries, but the selling of tickets, and all advertisements relating thereto.[19] Purchasers of tickets are punishable only where the possession of a ticket is made an offense.[20]

The United States has legislated against "lotteries, gift concerts, and similar enterprises" by prohibiting the importation from abroad, the carrying from state to state, and the mailing, of tickets, lists of drawings, advertisements, or newspapers containing advertisements concerning the same.[21] The constitutionality of this legislation, as far as importation is concerned, is unquestioned; as regards interstate traffic it has been upheld on the ground that such prohibition is regulation of commerce,[22] and as regards exclusion from the mails, has been sustained in analogy to the exclusion of obscene matter.[23]

## SPECULATION. §§ 199-203.

**§ 199. Legitimate speculation.**—The element of uncertainty of gain or loss enters into most business transactions, but the uncertainty or chance is not the controlling feature of ordinary transactions. Where it is the principal motive we speak of speculative business or speculation. It differs from gambling by the fact that it is an incident to an otherwise legitimate form of dealing, namely, the purchase and sale of property, and that the profit, if any, is received in return for a full equivalent given.

The circumstance that payment is primarily dependent upon

[17] Ballock v. State, 73 Md. 1, 8 L. R. A. 671.

[18] Federal Act Sept. 19, 1890.

[19] N. Y. Penal Code, §§ 326, 327.

[20] Ford v. State, 85 Md. 465.

[21] U. S. Rev. Stat. § 3894, Act Sept. 19, 1890, I. Suppl. 803, Act Mch. 2, 1895, II. Suppl. 435.

[22] Champion v. Ames, 188 U. S. 321. (The Lottery Case.)

[23] In re Rapier, 143 U. S. 110.

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an uncertain future event characterises two kinds of business transactions, bottomry or respondentia loans, and insurance or indemnity contracts. The bottomry loan is sanctioned by the custom of maritime laws. In an insurance contract the insured is not expected to make a profit, but merely to be reimbursed for his loss,[24] while on the part of the insurer the large number of chances goes far toward eliminating the element of uncertainty in accordance with the doctrine of probabilities. Respondentia and insurance serving highly useful economic ends, are universally excepted from the prohibitions of gambling, expresssly or by implication;[25] but the special control which the state exercises over the insurance business may in part at least be justified by the fact that it may become gambling, unless conducted on a sufficient scale and upon scientific principles.

The purchase and sale of growing corn is likewise a legitimate though speculative transaction, and cannot be regarded as gambling,[26] but it was formerly looked upon as a transaction by which the peasant was apt to be oppressed or overreached, and was forbidden, or regulated as to price, in Germany and France. This legislation, however, has been abrogated.[27]

**§ 200. Stock and produce speculation.**—The speculative nature of dealings in commodities assumes an aspect of especial interest where values are subject to considerable fluctuations, and the methods of dealings are so organised as to facilitate transactions to the utmost. This is the case of the business done at stock and produce exchanges and boards of trade, in stocks and bonds, metals and exchange, and produce of different kinds. Speculation of this kind is not without its economic benefits, since the concentration of supply and demand has the effect of making market prices throughout the community uniform and easily ascertainable, and the price fixed by active bidding and asking is apt to correspond to the true value of the commodity; but various phases of it lend themselves easily to the purpose of gambling.

[24] Eagle Insurance Co. v. Lafayette Insurance Co., 9 Ind. 443.

[25] New York Penal Code Sec. 343, Ill. Crim. Code Sec. 134. Statute 19 Geo. II, cap. 37, prohibited all contracts of assurance by way of gaming or wagering.

[26] Sanborn v. Benedict, 78 Ill. 309.

[27] French Law July 9, 1889; in Germany by local statutes.

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Buying and selling for future delivery has been regarded with suspicion where the seller at the time of making the contract did not own what he sold, but a decision holding such contracts to be void[28] was later on disapproved, and their legality established.[29]

Such dealing in futures may, however, be used for a manipulation of prices which would answer the description of engrossing or forestalling, declared illegal by a series of older statutes.[30] Where the buyer contracts for more than the seller can possibly procure in the open market, accumulating the available supply in his own hands, and thus forcing the seller to buy from him at an inflated price in order to perform his contract, we speak of a corner in the market.[31]

A contract by which a person secures the privilege to buy or not to buy, or to sell or not to sell, at a future time, is termed an option. It is commonly used for purposes of speculation, but may serve legitimate purposes, so where the proposed buyer desires the property only upon a contingency, and wishes to insure himself against a rise of a price until the contingency is determined.

An option contract as well as a contract for future delivery may be made without any intent to perform at any time, or without reference to actual commodities, for the sole purpose of awaiting the day set for purchase or sale, and then settling the difference between contract and market price.[32] Since the only amount in reality involved is the amount of possible fluctuation in values, dealings of great magnitude are frequently carried on through the interposition of brokers upon an investment representing simply the possible margin of loss.

While it is frequently difficult to determine whether a dealing in futures is or is not a bona fide sale or purchase—a difficulty increased by the fact that such dealings are regularly made through brokers who make actual purchases and sales, but settle with their principals upon the basis of dif-

[28] Bryan v. Lewis, Ry. & M. 386, 1826.

[29] Hibblewhite v. McMorine, 5 M. & W. 462, 1839.

[30] See Sec. 338, 339, *infra*.

[31] Wright v. Cudahy, 168 Ill. 86, 48 N. E. 39.

[32] Such fictitious transactions should be carefully distinguished from the setting off of a number of purchases and sales against each other, leaving a balance for actual delivery.

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ferences in value[33]—it is well established that if there is no intention to buy or sell, but only to pay or receive differences in value, the transaction is simply betting on the rise or fall of market prices, and hence illegal and void.[34]

**§ 201. Legislation restraining "dealings in futures" and options.**—The legislation regarding gambling transactions in stock and produce may be divided into three classes:

1. Statutes directed against fictitious transactions where there is no intent of actual purchase or sale. These are void as wagering contracts, and legislation may provide for recovery of moneys paid on account of them, or make them punishable. Statutes to either effect exist in a number of states.[35] Upon the theory that these statutes suppress gambling, their constitutionality is unquestioned.[36] It is true that some difficulty has been felt whether they can be regarded as bets or wagers where only one of the parties to the transaction uses it for gambling purposes. X employs for his speculations a broker A, who deals with him on margin, and does not expect him to receive or deliver any stock. A makes an actual transaction with broker B, who acts for his principal Y. X takes the entire risk of loss and has the entire chance of gain, without any interest in the stock bought or sold as an actual commodity; Y may act in the like manner, or he may be a bona fide purchaser or seller. Assuming that Y is a bona fide purchaser or seller, it has been asked how there can be a wager or bet; X deals only with A, who does not bet; A deals in good faith with B, and B acts for a principal who likewise deals in good faith. This may not be sufficient to constitute a bet at common law, but there is no doubt that a statute may treat it as a betting or gambling transaction on the part of X. X and Y are the possible winners or losers, and X gambles though Y does not; this is possible because the legitimate and

[33] See Harvey v. Merrill, 150 Mass. 1.

[34] Kingsbury v. Kirwan, 77 N. Y. 612; Brua's Appeal, 55 Pa. 294; Flagg v. Baldwin, 38 N. J. Eq. 219; Pickering v. Cease, 79 Ill. 328; Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646; Irwin v. Williar, 110 U. S. 499; Pearce v. Rice, 142 U. S. 28; Clews v. Jamieson, 182 U. S. 461. That it is not betting "on a game" see Lancaster v. McKinley (Ind. App.), 67 N. E. 947.

[35] Massachusetts Rev. Laws ch. 99, Sec. 4; also Ohio, Missouri, Mississippi, Tennessee, Texas, South Carolina, Michigan, Iowa.

[36] State v. Gritzner, 134 Mo. 512; Crendall v. White, 164 Mass. 54, 41 N. E. 204.

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the gambling elements of a transaction are severable by the interposition of a broker, who buys or sells, without possible gain or loss, while the principal wins or loses, without buying or selling. If one party is in good faith, the contract ought not to be void because the other is not,[37] although some statutes make it void;[38] but there is no good reason why the law should not nullify the transaction between the gambling principal and the broker, who while not gambling himself aids and abets gambling. The law of Massachusetts, however, does not allow recovery of payments made to the broker, where the other party to the contract, or the person employed to buy or sell, makes an actual purchase or sale or a valid contract therefor.[39]

2. Statutes forbidding contracts for the sale of stocks or bonds not owned by the seller. This prohibition was a feature of the English statute of 1737[40] "to prevent the infamous practice of stock jobbing." It was adopted for New York by a law of 1812, embodied in the Revised Statutes.[41] But such contracts were again legalised in New York in 1858,[42] and do not seem to be forbidden now by statute anywhere.

3. Statutes forbidding, irrespective of gambling intent, option contracts or dealings in futures. Illinois[43] makes it a misdemeanor for anyone to contract "to have or give himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold." By this prohibition the legislature undoubtedly strikes at transactions of a possibly legitimate character, but the Supreme Court of Illinois has held that notwithstanding this they may be entirely forbidden, since they are so commonly used as covers for gambling pure and simple,[44] and this view has been affirmed by the Supreme Court of the United States.[45]

In California the constitution itself provides that all contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future

[37] Bibb v. Allen, 149 U. S. 481.

[38] Connor v. Black, 119 Mo. 126; McGrew v. City Produce Exchange, 85 Tenn. 572, 4 S. W. 38.

[39] Rev. Laws ch. 99, § 4. See Rice v. Winslow, 180 Mass. 500, 62 N. E. 1057.

[40] 10 George II ch. 8.

[41] 1 Revised Statutes 710, Sec. 6-8.

[42] Laws 1858, ch. 134.

[43] Criminal Code, Sec. 130.

[44] Booth v. People, 186 Ill. 43.

[45] Booth v. Illinois, 184 U. S. 425.

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day, shall be void.[46] It was contended that this provision was contrary to the fourteenth amendment of the federal constitution, but the Supreme Court of California disposed of the objection by saying: "If the provision in question on its face fails to distinguish between bona fide contracts and gambling contracts, as is urged, it is none the less a proper police regulation, for the question remains to be determined in each case whether the transaction is in contravention of the constitution. The courts will always see that legitimate business transactions are not brought under the ban."[47]

So in Arkansas a statutory provision to the effect that "the buying or selling, or otherwise dealing in futures, either in cotton, grain, or anything whatsoever, with a view to profit, is hereby declared gambling,"[48] was interpreted as applying only to fictitious transactions.[49]

A statute which should undertake to prohibit without qualification all buying or selling for future delivery, of any commodity, or even of stocks or produce only, would be unreasonable, and the courts are evidently not inclined to give to loosely worded legislative provisions such prohibitive effect.

**§ 202. Places facilitating speculation.**—Legislation has been directed against places exclusively devoted to fictitious transactions. In New York a statute making it a misdemeanor to keep a room, etc., for making wagers or bets to depend on any lot, chance, casualty or unknown or contingent event, was interpreted as not including bets upon the market,[50] and the statute was subsequently amended by adding: "or on the

[46] Art. IV, Sec. 26.

[47] Parker v. Otis, 130 Cal. 322, 62 Pac. 571, affirmed by U. S. Supreme Court; Otis v. Parker, 187 U. S. 606.

The Supreme Court of the U. S. sustains the statute even on the theory that it strikes at margin contracts which are not gambling transactions; but the opinion does not refer to the prohibition of sales for future delivery, and it does not appear whether this prohibition is sanctioned or not. Would not a delivery on the day after the sale be a sale of stock to be delivered at a future day? and would not such a prohibition make the sale of stock impossible? This would amount to an abrogation of transferable shares, the retroactive operation of which upon existing companies and their shareholders would surely violate the Fourteenth Amendment.

[48] Mansf. Dig. 1848, 1849.

[49] Fortenbury v. State, 47 Ark. 188.

[50] People v. Todd, 51 Hun 446.

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future price of commodities."[51] In Illinois it is made unlawful to keep a bucket shop, office, store or other place, wherein is conducted or permitted the pretended buying and selling of shares of stock, etc., either on margin or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold.[52] In Missouri a statute was enacted in 1887 prohibiting the keeping of a bucket shop, defining it as "a place—other than a duly incorporated mercantile exchange—wherein are posted or published from information received, as the same occur, the fluctuating prices of stock, bonds, etc., in trades made or offered to be made in regular and lawful boards of exchange, and wherein the person carrying on the bucket shop either as principal or agent pretends to buy or sell or goes through the form of buying and selling any one of said commodities, but wherein neither party actually buys such commodity and neither party actually sells the same." By amendment of 1889 the words "other than a duly incorporated mercantile exchange" were dropped.[53] Congress in 1901 imposed a tax upon every person engaging in the business of making contracts regarding the purchase and sale of grain, provisions, cotton, stocks and bonds wherein it is contemplated that the contract be closed according to public market quotations of prices made on any board of trade or exchange and without a bona fide transaction on such board or exchange, and upon every person conducting what is commonly known as a bucket shop. The tax was repealed in 1902.

It is very clear that these provisions were not intended to apply to regular boards of trade or exchanges. These, although they may also be used for fictitious transactions, primarily serve legitimate purposes, and this purpose excludes the policy of outright suppression which is quite justifiable where no bona fide business is done at all. Where, however, it is not the place, but the class of transactions, which is legislated against, an exception in favor of transactions on regular exchanges is similar to the legislation of bets on the enclosures of race tracks, and is of doubtful constitutional validity. A law of Ohio of 1885, making an exception of this kind, was repealed in 1889.[54]

[51] Penal Code, Sec. 343.

[52] Act June 6, 1887, Soby v. People, 31 Ill. App. 242.

[53] Connor v. Black, 119 Mo. 126.

[54] Laws of Ohio 1885, p. 254, 1889, p. 12.

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Regular boards of trade or stock exchanges, in which legitimate business is done, have remained free from restrictive legislation. The constitution of California[55] directs the legislature to "pass laws to regulate and prohibit the buying and selling of the shares of capital stock of corporations in any stock board, stock exchange or stock market under the control of any association;" but no legislation has been enacted in pursuance of the provision. The Fourteenth Amendment would probably not stand in the way of legislation thus constitutionally sanctioned.

§ 203. **Foreign legislation regarding exchanges.**—The difficulty of distinguishing between legitimate and illegitimate speculation has also been experienced in other countries.

The English statute of 1737 was repealed in 1860 and there is now no legislation upon the subject of stock speculation in England.

The provisions of the French Penal Code were quite comprehensive in the matter of gambling transactions in stocks: it forbade all machinations to bring prices above or below what they would be in case of free competition;[56] all bets on the rise or fall of public securities,[57] and all agreements for the sale and delivery of public securities where the seller could not prove that he had them at his disposal at the time of the agreement, or would have had them at the time set for delivery.[58]

An act of March 28, 1885, however, recognises as legal all time contracts regarding public or other securities, or goods or merchandise, and provides that no one may escape the resulting obligations by setting up the defense of wager or gambling, even though the settlement should be by payment of differences. The act repeals articles 421 and 422 of the Penal Code above referred to. Every broker is made responsible for the delivery and payment of his sales and purchases, and the terms of the performance of time contracts by brokers are to be fixed by administrative ordinance.

In France as well as in Germany and other continental states, the establishment of exchanges has long been dependent upon governmental consent, and the government also to a considerable extent supervises their management and rules.

[55] IV 26.
[56] Sec. 419.
[57] Sec. 421.
[58] Sec. 422.

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This supervision is based partly on the ground that the quotations fixed by the exchange are for legal purposes accepted as determining the market price of the commodities to which they refer. It is, however, clear that control over exchanges is claimed irrespective of that fact. In 1896 a stringent law was enacted in Germany for the purpose of regulating dealings in futures of the character usual in stock and produce exchanges, requiring among other things that in order to make contracts of that kind enforceable the parties thereto should be entered in exchange registers; whereupon the defense that the contract was a gambling transaction should be excluded. A great opposition arose to this requirement of registration, to which most bankers and brokers refused to submit. A number of produce dealers in Berlin undertook to form a free exchange association, foregoing the privilege of officially recognised quotations and hoping thereby to escape the provisions of the statute. It has, however, been held that such an exchange is as much subject to the law as any other, and it appears from this that the method of business pursued in exchange transactions and the facilities offered for gambling furnish the true ground of government control. This control is sought to be accomplished in Germany in two ways: by an extensive regulation of exchanges regarding establishment, membership (exclusion of women, of bankrupts, etc.) and methods of fixing quotations, and by special restraints on dealing in futures, which are altogether prohibited in mining and industrial shares and grain and flour and other specified securities, and made dependent upon the requirement of registration in the securities in which they are allowed. Excepting the provision excluding women, legislation like that enacted in Germany does not seem to be beyond the constitutional power of American states.

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## CHAPTER VIII.

### PUBLIC MORALS (CONTINUED).

### INTOXICATING LIQUORS.

**§ 204. Constitutional basis of control.**—The evils and dangers attending the immoderate use of intoxicating liquors are universally recognised. To what extent the state should undertake to guard against them is a question which has been greatly controverted both from the point of view of right and of expediency. In so far as the liquor traffic may be accompanied by open disturbances of public peace, order or decency, the police power in its narrowest sense is competent to deal with it on principles before discussed; the state, however, attempts to combat more remote and insidious consequences: the wastefulness of excessive consumption of liquor and the gradual undermining of the physical and moral constitution of many individuals through its habitual abuse. These are evils which primarily affect only the individual addicted to the immoderate use of intoxicants, and against which under the constitutional view of individual liberty, he can guard by self-control. In that respect the danger from liquor is very different from unsanitary or unsafe conditions which threaten the public without the possibility of adequate individual self-protection. As in the case of gambling, the police power affords protection from temptation, i. e., from the weakness of the will. If this were the sole justification for the control of the liquor traffic, there would be great force in the objection that it runs counter to fundamental principles of individual liberty; strong reliance is therefore placed upon the ulterior dangers to the community at large from the existence of intemperance in its midst. "It is urged that as the liquors are used as beverages, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sales should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly a matter for legislation. There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries



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are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But as it leads to neglect of business, and waste of property, and general demoralisation, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilised and Christian community, there are few sources of crime and misery to society equal to the dram-shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislation."[1]

It is certainly the more conservative view to look upon the control of the liquor traffic as a means of protecting the community from crime and the financial burdens of pauperism, but it is also clear that the police power, resting upon this incontestable ground, in reality is turned into a power to protect the weak individual from his own weakness, into a power to prevent the wasteful expenditure of money and time, and finally into a power to impose upon the minority the sentiments or prejudices of the majority of the community, as to what is morally right and good.

The manner in which the evils of drink are dealt with is characteristic of the general methods of the police power; it addresses itself primarily to the more or less public conditions incident to the evil and which encourage and increase it, and seeks to diminish intemperance by controlling and restraining these conditions. Hence the great object of the police power is the control of the traffic in liquor. The individual act of consumption—the direct cause of the evil—is taken cognisance of only where it becomes intoxication or alcoholism.[2]

[1] Crowley v. Christensen, 137 U. S. 86, 1890.

[2] The history and present operation of liquor legislation reveals also very clearly the practical limitations of the police power; the futility of extreme measures antagonising the habits of many people and the demoralisation incident to the administration of unenforceable laws.

There is hardly any other branch of law in which there has been so much shifting and reversing of poli-



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**§ 205. Principal points of legislation and policy.**—In the matter of the control of the traffic we should distinguish the policy of regulation from the policy of prohibition. Under both policies a different treatment is accorded to intoxicants according to whether they are used as beverages or not. Not unusually a stricter policy is pursued with regard to spirituous or distilled liquors—brandy and whisky—than with regard to malt or vinous or fermented liquors.

The fundamental differences of the policy of regulation relate to the question of individual right or administrative discretion. The law may recognise the right to sell liquor without a license, or—which is not very different—require a license which is obtainable as a matter of right subject to legally defined qualifications or conditions to be complied with by the applicant; or it may provide for licenses to be issued as a matter of judicial discretion; or it may absolutely limit the number of licenses to be issued; or it may leave the granting or withholding of licenses to the free discretion of those who are vested with the requisite authority.

In all four cases alike the manner of conducting the traffic may be subjected to restrictive regulations. These regulations differ according to:

1. The kind or quantity of liquor sold; much of the liquor legislation applies only to retail dealings (from one pint in Maryland to ten gallons in Missouri; see definition of "trafficking" in § 2 of the New York Liquor Tax Law); a municipal charter power to regulate the selling of liquor has been interpreted as covering the wholesale trade.[3]

2. The place and occasion of the sale; so peddling may be prohibited; sales may be forbidden in groceries, or in dry goods or provision stores, etc.;[4] restrictions may on the other

cies. All forms and methods of governmental power have been tried, and have as a rule been found successful in the inverse order of their incisiveness. Prohibition is the least efficient policy; restrictive regulation with discretionary powers is less efficient than restrictive regulation without discretionary powers; governmental regulation is not as efficient as social pressure, social pressure is not as efficient as the slow education of public sentiment, and nothing is so efficient as the supplanting of the attractions of drink and of the saloon by providing other sources and forms of rational pleasure.

[3] Dennehy v. Chicago, 120 Ill. 627, 12 N. E. 227; Miller v. Ammon, 145 U. S. 421.

[4] New York Liquor Tax Law § 22.

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hand be relaxed in favor of clubs,[5] or where liquor is served with a meal in a hotel or a restaurant.[6]

3. The place of consumption, the license fee being generally lower for sales of liquor not to be drank on the premises where they are sold.

The regulations relate to:

1. The place of sale, the location being made dependent upon the consent of adjoining owners,[7] or being forbidden in the neighborhood of institutions serving higher interests,[8] or being altogether forbidden in dwelling houses;[9] elaborate provision being also made under some laws regarding the arrangement of the place.[10]

2. The time of sale, the restrictions relating chiefly to closing hours, and to sales on Sundays and election days.

3. The persons to whom the liquor is sold, restrictions being found in probably all states with regard to sales to minors and to habitual drunkards,[11] and sometimes also to paupers.[12]

4. Incidental attractions, as music,[13] or women;[14] and

5. Incidental disabilities and burdens, so by refusing a cause of action to recover the purchase price of liquor sold,[15] or by creating special liabilities.[16]

In the policy of prohibition we distinguish absolute prohibition from public monopoly. Either policy may be "state wide" or local.

In the matter of individual consumption the laws deal specially with intoxication and with habitual intemperance.

As other subjects of the police power, so the control of intoxicating liquors is complicated by questions arising under the federal constitution: the rights of federal citizenship, the right of property, and the freedom of commerce.

REGULATION OF THE LIQUOR TRAFFIC. §§ 206-212.

**§ 206. Right to sell without license or issue of license as a matter of right—Exclusion of administrative discretion.[17]—**

[5] See § 456 *infra*.

[6] New York Act, § 31; Mass. Rev. L. ch. 100, § 17; Commw. v. Regan, 182 Mass. 22, 64 N. E. 407.

[7] Mass. Rev. L. ch. 100 § 15; New York Act, § 17, No. 8.

[8] New York Act, § 24.

[9] Mass. Rev. L. ch. 100, §§ 36, 37.

[10] See § 52 *supra*.

[11] See § 226 *infra*.

[12] Mass. Rev. L. ch. 100, § 17.

[13] See § 250 *infra*.

[14] See § 703 *infra*.

[15] New York Act, § 32.

[16] Civil Damage Acts, see § 626 *infra*.

[17] See, also, § 652.

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The essential feature of this system of regulation is that it excludes all administrative discretion, and at the same time recognises it as a principle that a person may engage in the traffic in intoxicating liquors. It does not exclude restrictions upon the method of carrying on the business, nor even restrictions by reason of personal disqualification, provided that restrictions are clearly defined by law and operate equally without individual discrimination. It is not inconsistent with this system to require a license, this license being in the nature of a certificate of compliance with all the conditions prescribed by law, and being obtainable as a matter of right upon proof of such compliance.

This system of granting licenses as a matter of right is the one embodied in the Liquor Tax Law of New York.[18] The act does not speak of a license, but assesses a tax upon the business of trafficking in liquors, upon payment of which a liquor tax certificate is issued; the certificate, however, is not issued to every one paying the tax, but is given only to applicants giving bonds, showing certain consents, and making the statements required by law.[19] Specified classes of persons may not be granted the certificate;[20] upon violation of the law the certificate may be forfeited and no other certificate may be issued for a specified period;[21] and the trafficking without a certificate may be enjoined and is punishable.[22] In all essential respects the certificate is therefore a license.[23]

By making the license fee or tax sufficiently high, even the system of granting licenses as a matter of right may be used as a means of restricting the liquor traffic.

The system of licensing which excludes discretion appears to be regarded with growing favor; it was adopted in Germany by the Trade Code of 1869,[24] and for France by a law of July 17, 1880.

**§ 207. Right to sell subject to statutory disqualifications and conditions.**—The recognition of a general right to engage in the liquor traffic as distinguished from a right dependent upon the exercise of administrative discretion in each case, is not inconsistent with either of the following safeguards:

[18] Act March 23, 1896, Gen. Laws, ch. 29.
[19] Sec. 17, 18.
[20] Section 23.
[21] Sec. 34.
[22] Sec. 29, 34.
[23] See § 37, *supra*.
[24] Sec. 33.

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1. The exclusion of specified classes of persons; so under the law of New York persons convicted of felony, minors, aliens and non-residents, foreign corporations, persons who under former laws had their licenses revoked and persons convicted of a violation of the present law (these are disqualified for a period of five years).[25] Such exclusion operates without individual discrimination.

2. The requirement of a bond with sureties for the compliance with statutory regulations,—a very common feature of liquor legislation.

3. The requirement of the consent of the landlord of the premises in which the traffic is to be carried on: this is a provision in the interest of private rights only, and does not give the person whose consent is required a licensing power.[26] To require on the other hand the consent of all or of the majority of the inhabitants of a specified district, is to make the liberty to engage in the business practically dependent upon a discretionary license, the power to license being delegated to the people instead of being vested in administrative authorities. If the consent of a majority can overcome the dissent of a minority, the consent becomes a public function and trust, and may therefore not be made the subject-matter of a bargain between the applicant and the required number of owners.[27]

**§ 208. Requirement of a license to be issued as a matter of judicial discretion.**[28]—This system, which is not inconsistent with absolute exclusion for stated disqualifications, is the one which was adopted in England by the first licensing act, of 5 and 6 Edward VI, chapter 25, and is embodied in the present English legislation, which provides that it shall be lawful for the justices of the peace assembled at the general annual licensing meeting for the county to grant licenses for the sale of liquor "to such persons as they, the said justices, shall in the execution of the powers herein contained and in the exercise of their discretion, deem fit and proper."[29] The

[25] Sec. 23 of Act.

[26] See, however, State v. Sinks, 42 Ohio St. 345.

[27] Doane v. Chicago City R. Co., 160 Ill. 22, 45 N. E. 507.

[28] See, also, § 651-655.

[29] 9 George IV, ch. 61, Sec. 1, 1828.

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judicial character of the discretion is secured both by the requirement of hearing applications, so that where an application was refused without hearing in pursuance of a general resolution to grant no more licenses, mandamus would lie to hear, although not to grant,[30] and by provision for appeal from a refusal to grant to the Quarter Sessions.[31] This system of discretionary licenses has been common in this country from the colonial times, and is even now found in the majority of states. The statutes say that "it shall be lawful for" the licensing authorities to grant, or that they "may" grant licenses often adding "to suitable persons," or "if they think the applicant a fit person," or "if deemed expedient" or like words, or that they may refuse the license if they deem the applicant unfit. Words of discretion are also used: that they may grant or reject, or approve or disapprove, "at their discretion," "as they think proper," etc.

§ 209. **Judicial control.**—It must be regarded as firmly established that this discretion is judicial in its character, and does not mean arbitrary power.[32] Statutes often provide for a hearing in express terms, and in a number of states for the hearing of objections and remonstrances as well as for a hearing on behalf of the application. Courts have repeatedly refused to review the discretion of the licensing authority, but this was nearly always done on the theory that the discretion had been honestly exercised. Mandamus will, therefore, not lie to dictate the exercise of the discretion one way or another, unless it appears clearly that there is no ground for refusal,[33] or that the ground of refusal is one not recognised by statute.[34] In Virginia it had been held that the discretion of the licensing authority could not be reviewed though it was admitted that it could not be an arbitrary discretion;[35] thereupon an appeal was given by statute to the circuit court.[36] Such statutory appeals are found in other states, and the appellate court then

[30] Reg. v. Walsall Justices 3 C. L. R. 100.

[31] Sec. 27 of Act.

[32] Schlaudecker v. Marshall, 72 Pa. St. 200; United States ex rel. Roop v. Douglass, 19 D. C. 99.

[33] Zanone v. Mound City, 103 Ill. 552. This case may also be understood to construe the municipal ordinance as excluding discretion.

[34] Pollard's Appeal, 127 Pa. St. 507.

[35] Ex parte Yeager, 11 Gratt. 655.

[36] Leighton v. Maury, 76 Va. 865; Allstock v. Page, 77 Va. 386.

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exercises its own discretion in the matter.[37] Where there is no such statutory appeal the relation of the courts to the discretion of the licensing authorities is based upon the principle that there must be a hearing, the refusal must be for a legal reason, and where these two points appear the court will not assume to discuss the correctness of the result reached.[38] In Massachusetts it is expressly provided that nothing in the act is to be construed as compelling the granting of licenses.[39]

**§ 210. Considerations guiding discretion.**—The points to be taken into consideration in exercising discretion are mainly three: the suitability of the person, the suitability of the place, and the number of places in relation to the number of people and their reasonable accommodation. With regard to place there are numerous specific restraining provisions in the statutes, which however are not necessarily exhaustive. With regard to number of places, it has been held in England that an absolute limitation is inconsistent with the right of each individual to the exercise of judicial discretion in his particular case;[40] but in New York (under the law before 1896), and Pennsylvania, excessive number is a good ground for refusal.[41] The Pennsylvania (Brooks) law of 1887 makes the public need a controlling factor; the court is to refuse the license whenever, in its opinion, it is not necessary for the accommodation of the public and entertainment of the traveler.

The suitability of the person is an element of consideration wherever there is any discretion, and in theory it seems plausible and perhaps indispensable to insist upon it. Yet the abuses of favoritism, etc., inseparable from it, deprive even this form of discretion of most of its value. The requirement of a certificate of character to be given by a specified number of reputable citizens is of even more doubtful utility, and was abandoned in England in 1828 as vexatious and unreliable. The Supreme Court of Michigan has gone so far as to declare that under the constitution all disqualifications debarring from the right to engage in a lawful business must be specific, and

[37] Hopson's Appeal, 65 Conn. 140.
[38] Gross' License, 161 Pa. St. 344.
[39] Rev. Laws, ch. 100, § 16.
[40] Reg. v. Walsall Justices, 3 C. L. R. 100.
[41] People ex rel. Hoy v. Mills, 91 Hun 144; Re Raudenbusch, 120 Pa. St. 328.

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that the charge of bad character is so vague that an applicant cannot meet it, thus holding the requirement of good character in a general way to be unconstitutional;[42] but it has since receded from that position,[43] and the contrary view has met with the approval of the United States Supreme Court.[44]

**§ 211. Absolute limitation as to numbers.**[45]—The law of Massachusetts is conspicuous for a provision by which the number of licenses to be granted is restricted to a definite proportion of the population.[46] Such an absolute limitation may be looked upon as giving to the license holders a monopoly, but it is also true that the monopoly is merely the incidental effect of defining by a fixed and comprehensive rule what according to the legislative judgment is a reasonable restriction upon a business which, carried on to an excessive extent, is harmful to the community. Such a monopoly is a legitimate form of police restraint, if the principle of equality in the selection of the licensees is not violated. It must be admitted that it is not easily reconcilable with the constitutional provision that no privilege shall be granted which shall not on the same terms be open to all others, and it was on this ground held inadmissible in Arkansas.[47] While not absolutely inconsistent with the policy of granting licenses as a matter of right, yet the limitation of numbers is not easily administered under such a policy, and therefore not in practice found in connection with it. High license fees are generally relied upon to keep the number of places within reasonable limits.

**§ 212. The right to sell depending upon uncontrolled discretion.**[48]—A power of uncontrolled and arbitrary discretion in the granting or withholding of licenses differs from a power of prohibition in this, that the former is administrative, the latter legislative. In case of prohibition the authority to which the matter is committed determines that no licenses shall be granted to anybody; no particular reasons are or can be given in such a case, which represents an exercise of

[42] Robison v. Miner, 68 Mich. 549.

[43] Sherlock v. Stuart, 96 Mich. 193, 21 L. R. A. 580.

[44] Crowley v. Christensen, 137 U. S. 86.

[45] See, also, § 672.

[46] One license to 1,000 inhabitants outside of Boston, one to 500 in Boston; Rev. Laws, ch. 100, Sec. 13.

[47] Ex parte Levy, 43 Ark. 42; Decie v. Brown, 167 Mass. 290. See § 672, *infra*.

[48] See, also, § 654, 655.

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legislative judgment upon a general question of policy. Power of uncontrolled discretion would mean that the licensing authority might grant a license to A, and withhold it from B, without any reason for the discrimination. Such a power is not, and on sound constitutional principles cannot be, vested in administrative authorities.[49]

But it is regarded as in accordance with the principles of popular government, that the people themselves may judge in each case whether a license should be granted or not. Necessarily the reasons or motives guiding the action or determination of a considerable number of people, whether expressed by ballot or by petition, consent or remonstrance, are legally uncontrollable, and such popular decision therefore represents a form of absolutely free discretion. The law may require a positive expression of opinion in favor of each license, or it may be satisfied with giving a right to veto by remonstrance,[50] the former being of course the more stringent provision. The power of decision usually rests with the inhabitants of a smaller district than a county: a town, or election precinct, or the neighborhood of a church or school, or a district within a specified radius from the proposed house, or a block or square.[51] Where the district is very small unanimous consent may be required. This comes then very close to the provision for the consent of adjacent property owners. In one form or other the right to a license is thus made to depend upon the will of private citizens by the statutes of a considerable number of states,[52] and undoubtedly under local regulations in many counties, towns or cities in other states. The constitutionality of this method of licensing has been sustained.[53]

## PROHIBITION. §§ 213-217.[54]

**§ 213. Constitutionality.**—The name "prohibition" explains the principle of this legislative policy. It aims at the entire suppression of the traffic in intoxicating beverages, either because even moderate consumption is regarded as an evil, or

[49] § 651-655, *infra*.

[50] Indiana Nicholson Act of 1895.

[51] Harrison v. People ex rel. Boetter, 195 Ill. 466, 63 N. E. 191.

[52] Arkansas, Florida, Iowa, Indiana, Illinois, Kentucky, Mississippi, Missouri, Oregon, Rhode Island.

[53] Crowley v. Christensen, 137 U. S. 86; Swift v. People ex rel. Ferris Wheel Co., 162 Ill. 534, 44 N. E. 528.

[54] See, also, § 538-542, 564.

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because it is believed that any method of regulation is inadequate to prevent excess and abuse. The constitutionality of prohibition is firmly established.[55] The one decision in which it was squarely denied[56] has since been ignored by the court which rendered it. In sanctioning prohibition, the courts do not necessarily accept the view that all use of intoxicants is wrongful, but simply apply the principle that a business which ministers merely to the gratification of pleasure, and does not serve any valuable social or economic end, may be suppressed, if attended with evil to the community.

**§ 214. State wide prohibition.**—There are sixteen states which either at some time have had, or which now have, prohibitory legislation covering the entire state.

The periods of prohibition in those states in which it has disappeared are as follows:

Connecticut, 1853 to 1872. Sustained, State v. Wheeler, 25 Conn. 290, 1856.

Delaware, 1855-1857. Upheld as constitutional in State v. Allmond, 2 Houst. 612, 1856.

Illinois, 1851-1853. Upheld as constitutional, Jones v. People, 14 Ill. 196, 1852.

Indiana, 1855-1858. Declared unconstitutional in Beebe v. State, 6 Ind. 501, 1855.

Iowa, partial from 1851-1884; total from 1884-1894. Upheld in Santo v. State, 2 Iowa, 165, 1855.

Massachusetts, 1838-1840, 1852-1868, 1869-1875, upheld Com. v. Kendall, 12 Cush. 414, 1853.

Michigan, 1855-1858. Upheld in State v. Hawley, 3 Mich. 330, 1854, and State v. Gallagher, 4 Mich. 244, 1856.

Nebraska, 1855-1858.

New Hampshire, 1855-1903.

New York, 1855. Declared unconstitutional on account of particular provisions, Wynehamer v. People, 13 N. Y. 378, 1856.

Rhode Island, 1852-1863, 1874-1875, 1886-1889. Upheld in State v. Paul, 5 R. I. 185, 1858.

South Dakota, 1889-1896.

Vermont, 1850-1903. Upheld in Lincoln v. Smith, 27 Vt. 328, 1855.

[55] Mugler v. Kansas, 123 U. S. 623.

[56] Beebe v. State, 6 Ind. 501.

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Of these states two, Rhode Island[57] and South Dakota,[58] had the principle embodied in constitutional provisions which were afterwards repealed. In Iowa a constitutional amendment was adopted by popular vote in 1882, but the adoption of the amendment was declared void on account of an irregularity in the proceedings in the legislature prior to its submission to the popular vote.[59]

Prohibition prevails at present in the following states:

Maine, since 1846. The famous "Maine Law" was enacted 1851. Sustained in State v. Gurney, 37 Me. 156, 58 Am. Dec. 782, 1853. There was a period of license from 1856 to 1858. In 1884 prohibition was embodied in a constitutional amendment.

Kansas, since 1880, when the following constitutional amendment was adopted: "The manufacture and sale of intoxicating liquors shall be forever prohibited in this state, except for medicinal, scientific and mechanical purposes."[60]

North Dakota, since the adoption of the first constitution of 1889, which contains a prohibitory clause.

**§ 215. Scope of prohibition.**—The constitutional provisions of Kansas and North Dakota cover all intoxicating beverages; that of Maine allows legislative exceptions in favor of cider, and the law in Maine permits the sale of cider by the manufacturer. It may also be noted that Maine added wine and beer to the prohibited list only in 1872. Iowa did not reach thoroughgoing prohibition until 1884. At first only dramshops and retailing by the glass were prohibited;[61] the prohibitory law of 1855 excepted wholesale dealing in domestic wine and cider; in 1856 the manufacture of cider, wine, ale and beer was authorised, and in 1858 intoxicating liquor was defined so as to exempt beer and native wine. In a number of laws an exception is found in favor of native wine or cider. This discrimination is in conflict with the commerce clause of the federal constitution and with the provisions of the Wilson Act of 1890, and is therefore invalid.[62]

New Hampshire, while it was a prohibition state, forbade only sale and allowed manufacture. None of the present prohibition states discriminates between wholesale and retail sales.

[57] 1886-1896.

[58] 1889-1896.

[59] Koehler and Lange v. Hill, 60 Iowa, 543, 1883.

[60] Prohibitory Amendment Cases, 24 Kan. 700, 1882.

[61] 1850.

[62] See as to this § 232.

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Kentucky excludes manufacturers and wholesalers from the prohibition by local option. Whether in any state local option for "license" or "no license" affects wholesale dealers, must depend upon the status of the wholesale trade under the liquor legislation of the state. In Illinois the local power of prohibition extends to wholesale traffic.[63]

None of the prohibition laws undertakes to control private possession and consumption, and while "giving away" may be prohibited equally with selling (in order to prevent evasions), Vermont provides expressly that the words "give away" do not apply to the giving away of liquor by a person in his own private dwelling, unless given to a minor other than a member of his own private family or to a habitual drunkard, or unless such dwelling becomes a place of public resort.[1]

§ 216. **Local power of prohibition.**—The policy of local power of prohibition indicates the sentiment of the legislature that the suppression of the liquor traffic is a legitimate method of dealing with it, and that the legislature is not on principle opposed to it. The question is left to be settled by the people of a local district for that district.

In some states we find special local acts passed by the legislature, establishing prohibition in some locality.[2] Practically this is not very different from a local power of prohibition, since such local acts are not apt to be imposed upon the locality against its will.

In a number of states the powers of legislation vested in local authorities extend to the suppression of the liquor traffic. Thus in Illinois the city council of every city has power to license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquors;[3] and in California the provision of the constitution that "any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws,"[4] has been held to place dramshops and bar rooms entirely within local control, even to the extent of prohibition.[5]

[63] Dennehy v. Chicago, 120 Ill. 621.

[1] Statutes 1894, § 4462. See § 454, *infra*.

[2] So in Alabama.

[3] City Act V, Sec. 1, No. 46.

[4] Act XI, Sec. 11.

[5] Ex parte Campbell, 74 Cal. 20. In Alabama a power to restrain has been held to be a power to prohibit. Intendant, &c., of Town of Marion v. Chandler, 6 Ala. 899.

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**§ 217. Local option.**—The most common form of local power of prohibition is that of local option, which is found in about half of the states of the Union. Legislative provision is made for the expression by vote of the wishes of the people (of the county, or of a town), whether licenses are to be granted or not, such vote to be repeated periodically or upon the petition of voters.

In a number of earlier cases the principle of local option was declared unconstitutional as an undue delegation of legislative power by the legislature to the people.[6] It is not within the scope of this treatise to discuss the validity of processes of legislation, but it seems clear that where the local power does not merely consist in the ratification of some legislative measure which is then withdrawn from local control and can be altered only by another exercise of state legislative power, but is continuing so that the people of the district can both adopt and afterward repeal, or adopt at any time,[7]—that then the delegation is undistinguishable from the immemorial grant of local powers of government. The validity of local option is now generally recognised; and even in the states in which it was formerly held unconstitutional, the position of the courts has been reversed or materially modified.[8] In Texas the constitution directs the legislature to provide for local option.[9]

## PUBLIC MONOPOLY. §§ 218-219.[10]

**§ 218. South Carolina Dispensary Law.**—The exclusive reservation to persons duly appointed and acting under official authority, of the right to sell liquor, was a feature of the Maine Prohibition law of 1851, and was applied to sales for medicinal and mechanical purposes. It was followed in other states and sustained judicially.[11] The extension of the policy to the sale

[6] Rice v. Foster, 4 Harrington (Del.) 479; Parker v. Commonwealth, 6 Pa. St. 507; Ex parte Wall, 48 Cal. 279; Maize v. State, 4 Ind. 342; Geebrick v. State, 5 Iowa 491, declaring local option law of 1857 unconstitutional.

[7] Such was the nature of the delegation in State v. Weir, 33 Iowa 134, held unconstitutional.

[8] Locke's Appeal, 72 Pa. St. 491; Groesch v. State, 42 Ind. 547; State ex rel. Witter v. Forkner, 94 Iowa, 1; Gordon v. State, 46 Ohio St. 607, 6 L. R. A. 749; State v. Judge of Circuit Court, 50 N. J. L. 585, 1 L. R. A. 86; Feek v. Township Board of Bloomingdale, 82 Mich. 393, 10 L. R. A. 69.

[9] Art. XVI, Sec. 20.

[10] See, also, § 666, 667.

[11] State v. Brennan's Liquors, 25

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of liquor for consumption as a beverage was first undertaken in this country by a local statute enacted for the city of Athens in Georgia. Governor Tillman of South Carolina in his annual message to the legislature in 1892 called attention to this law. A bill embodying the principle was passed for South Carolina on December 24th of that year, to go into effect July 1, 1893. It has become known as the South Carolina Dispensary Law, and having been amended in important particulars from time to time, in part to meet constitutional objections, is in force at the present time. In 1898 the system was adopted in South Dakota by constitutional amendment. In 1899 Alabama authorised the establishment of local dispensaries.

A brief analysis of the South Carolina law will explain the system. The dispensary system applies to all liquor containing alcohol and used as a beverage.[12] All manufacturers and distillers must obtain a license, except that any one may make wine for his own use from grapes or other fruit.[13] Manufacturers and distillers may sell to no one in the state except to the state commissioner,[14] who may also contract for supplies with responsible grape growers in the state.[15] The state commissioner furnishes liquor to county dispensers[16] who are appointed, salaried and under oath, and who are themselves not addicted to the use of intoxicating liquors. They may not buy from any one but the state commissioner.[17] No dispensary can be established in any township without the approval of a majority of the township voters.[18] The state commissioner furnishes the liquor in packages containing from one-half pint to five gallons, to which his certificate is attached.[19] The dispenser may sell only in these packages and they must not be broken by the purchaser on the premises where they are sold.[20] No sales are made except on written and signed requests, showing for whose use the liquor is wanted, and provision is made against selling to minors and persons addicted to the excessive use of intoxicating liquors.[21]

Except as provided in the act the manufacture, sale, ex-

Conn. 278; *contra*, Beebe v. State, 6 Ind. 501, which is, however, probably no longer authority.

[12] Sec. 1.

[13] Sec. 15.

[14] Sec. 15.

[15] Sec. 23.

[16] Sec. 3.

[17] Sec. 14.

[18] Sec. 8.

[19] Sec. 3, 5.

[20] Sec. 5.

[21] Sec. 11.

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change, and transportation of alcoholic liquor for any purpose is forbidden in the state.[22]

The act of 1892 was remodeled in 1893, the main principle of the statute being preserved. In April, 1894, the Supreme Court of the state (one of the judges dissenting) declared the law to be unconstitutional upon the broad ground that the state could not in the exercise of its police power engage in a commercial enterprise.[23]

For a time, therefore, the dispensaries were closed. A change in the Supreme Court was, however, shortly expected, and the governor declared that since the court had passed only on the act of 1892, and not upon the act of 1893, the latter was in effect and would be enforced. In place of the retiring judge the legislature elected one known to be in sympathy with the law. The act of 1893 came before the newly constituted court and was declared constitutional, against the dissent of the judge who in the earlier case had pronounced against the validity of the law of 1892. The court held that it was not within the power of the state to engage in ordinary commercial enterprises; but that liquor was not on the same footing with other commercial commodities, and being an article dangerous to the community, the assumption of the traffic by the state was simply a form of controlling the danger, as legitimate, if deemed expedient by the legislature, as regulation or prohibition. With regard, at least, to an article dangerous to the morals, good order, health, or safety of the people, a state monopoly is thus declared a proper instrument of the police power.[24]

A county monopoly has since been upheld in Georgia.[25]

**§ 219. Gotenburg system.**—It is only another form of monopoly, if the state instead of assuming the liquor traffic or delegating it to its administrative subdivisions, entrusts it to a private corporation, to which it grants an exclusive franchise. Provided that the terms of the franchise show that the purpose of the monopoly is more efficient restriction and control, it would fall within the principle of the Slaughter

[22] Sec. 1, 15.

[23] McCullough v. Brown, 41 S. C. 220, 23 L. R. A. 410.

[24] State ex rel. George v. Aiken, 42 S. C. 222, 1894; 26 L. R. A. 345.

[25] Plumb v. Christie, 103 Ga. 686, 42 L. R. A. 181.

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House Cases,[26] and not be obnoxious to the federal constitution. Under the provisions of many state constitutions, forbidding the grant of special or exclusive privileges to corporations, this form of monopoly would be impossible. The so-called Gotenburg system existing in a number of Swedish cities, embodies this form of control, committing the whole of the liquor traffic to a company which pays all the net profits into the city treasury and is subject to strict regulations in the conduct of its business.

There would be no constitutional objection to a system authorising the formation of corporations under general law, subject to similar restrictions as to profits and conduct of business, and confining the liquor traffic to such corporations exclusively. The principle of the organisation of such corporations would be the same as that adopted by recent statutes for pawners' societies.[27] The principle of confining the liquor business to licensed corporations would find support in judicial decisions upholding similar legislation with regard to the business of banking[28] and insurance.[29]

## LIQUOR NOT USED AS A BEVERAGE. §§ 220-224.

**§ 220. Subject to control.**—Alcoholic liquor is the subject of restrictive legislation in consequence of the harmful effects of its consumption as a beverage. Where it is not intended to be used for drink, different rules become applicable.

The principal uses, to which alcoholic liquor not intended for beverage may be put, are: in the mechanic arts and chemical industries, in which pure alcohol is variously and extensively employed; and for medicinal purposes. Wine is also used for sacramental purposes, and alcoholic liquors enter into the preparation of preserves and condiments.

Liquor legislation is nowhere entirely confined to beverages. Upon well recognised principles, the danger and probability that the unrestricted freedom of legitimate employment may be abused to evade the laws made to restrain the use of liquor as a beverage, justifies regulation even where there is bona fide

[26] 16 Wall. 36, 1872.

[27] Ill. Act, Mch. 29, 1899; Hurd's Rev. Stat. chap. 32, No. 176 seq.

[28] State ex rel. Goodsill v. Woodmanse, 1 N. D. 246, 11 L. R. A. 420; *contra*, State v. Scougal, 3 S. D. 55, 15 L. R. A. 477.

[29] Commonwealth v. Vrooman, 164 Pa. 306, 25 L. R. A. 250.

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intention of using the article legitimately. The policy of the law in such a case is prevention of evasion rather than restraint for its own sake.

**§ 221. Liquor unsuitable for drink.**—Where alcoholic liquor exists in a form in which it is not commonly used, and is not attractive as a beverage, it should be held not to be within the restrictive or prohibitory legislation. So it was said in Iowa, "so long as the liquors retain their character as intoxicating liquors capable of being used as a beverage, notwithstanding other ingredients may have been mixed therewith, they fall under the ban of the law; but where they are so compounded with other substances as to lose the distinctive character of intoxicating liquors, and are no longer desirable for use as a stimulating beverage, and are in fact medicine, then their sale is not prohibited."[30] And in Massachusetts: "In order to determine whether the statute applies to a sale the true test is to inquire whether the article sold is, in reality, an intoxicating liquor; if it is, the sale is illegal although it is sold to be used as a medicine, or it is attempted to disguise it under the name of a medicine, or it is a mixture of liquor and other ingredients. But if the article sold cannot be used as an intoxicating drink it is not within the prohibition of the statute, although it contains as one of its ingredients some spirituous liquor."[31]

The sale of pure alcohol is sometimes in express terms exempted from the provisions of the liquor laws, where it is intended to be used for medicinal, mechanical or chemical purposes;[32] in some states the right to make such sale is confined to druggists;[33] but where, as in most states, no express provision is to be found it seems reasonable to regard pure alcohol as not within the statute, unless knowingly sold as drink.[34] It was held in West Virginia by a divided court that the sale of essence of cinnamon for cooking purposes, which, however, was drunk, made the seller liable.[35] In Virginia by statute the sale of fruits preserved in spirits requires a license; whether a preparation of that kind is spirituous liquor or not, may be a

[30] State v. Laffer, 38 Iowa, 422.

[31] Commonwealth v. Ramsdell, 130 Mass. 68.

[32] New York Liquor Tax Law, Sec. 11.

[33] Georgia, 1884, No. 182, Sec. 8.

[34] Lemly v. State, 69 Miss. 628; State v. Martin, 34 Ark. 340; Winn v. State, 43 Ark. 151.

[35] State v. Muncey, 28 W. Va. 494; see, also, Carl v. State, 87 Ala. 17, 4 L. R. A. 380.



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question of fact;[36] if put in good faith, it would seem, that upon general principles of interpretation it should be exempt from the operation of the statutory restraint.

**§ 222. Liquor suitable but not intended as a beverage.[37]—Under the system of restrictive regulation of the liquor traffic.**—The inclusion in the regulative system, of liquors intended for medicinal purposes, is justified by the consideration that without it "the effort to restrain at all the use of intoxicants would be rendered entirely futile."[38] The common method of regulation is to give the exclusive right of sale for such purposes to druggists, physicians or other licensees, excluding sometimes keepers of hotels and eating houses, and to provide that such liquor must not be drunk upon the premises where it is sold. The same reasons that justify the restriction of the sale of the beverage, justify precautions of a similar nature against the abuse of the sale of the useful article. The general principle has been sustained in the states,[39] and by the United States Supreme Court.[40] Sales by druggists are commonly relieved from some of the restrictions upon the sale of intoxicants, especially as to time of sale and as to location of place, and license fees are greatly reduced or nominal;[41] on the other hand druggists may be required to keep a record of their sales and may even be forbidden to sell without a physician's prescription.[42]

**§ 223. The same; under the system of prohibition.**—All prohibitory laws make an exception in favor of sales for medical purposes. This is not a legislative indulgence but a constitutional necessity, since the state could not validly prohibit the use of valuable curative agencies on account of a remote possibility of abuse. "The power of the legislature to prohibit the prescription and sale of liquor to be used as medicine does not

[36] Ryall v. State, 78 Ala. 410, held to be; Rabe v. State, 39 Ark. 204, held not to be.

[37] See, also, § 152-154.

[38] Commonwealth v. Fowler, 96 Ky. 166, 33 L. R. A. 839.

[39] Wright v. People, 101 Ill. 126; Sarrls v. Commonwealth, 83 Ky. 327.

[40] Gray v. Connecticut, 159 U. S. 74.

[41] Chicago Rev. Code, 1897, Sec. 2511; Mass. Rev. Laws, ch. 100 Sec. 19; New York Liquor Tax Law, § 11, subd. 3; the exemption of druggists from license fees is not unconstitutional discrimination. Demoville v. Davidson Co., 87 Tenn. 214, 10 S. W. 353.

[42] New York Liquor Tax Law, § 11, 31.

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exist, and its exercise would be as purely arbitrary as the prohibition of its sale for religious purposes."[43]

In the prohibition states of New England we find state commissioners who furnish the liquor to local official and salaried agents who sell for public account. There is in other words a public monopoly of the same character as was later on adopted for liquors as beverages by the South Carolina dispensary system.

In Kansas, and in local option districts in other states, the right to sell is reserved to licensed druggists, much as under the system of restrictive regulation.

Where adequate provision exists for the supply of medicines, there is no right to furnish liquor for medicinal purposes in contravention to these provisions.[44] Not even physicians may sell liquor without the permit provided for by law.[45] The South Carolina dispensary law makes provision for the furnishing by county dispensaries to licensed druggists and manufacturers of proprietary medicines, and of intoxicating (not malt) liquors for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage. This excludes altogether wine, whiskey or brandy other than such as can be obtained from the county dispenser, and where there is no county dispenser these liquors would seem to be unobtainable for medical purposes.

It has been held in Maine in a case where upon a physician's order a child was rubbed with rum which was privately obtained, there being no licensed druggist in the place, that the statutory penalty was incurred, although the court admitted that it was indiscreet to prosecute.[46] This decision is unsatisfactory. The right to an adequate supply of medicines cannot be cut off by the legislature, and when legal provisions would have such effect they must to that extent be inoperative. The plea of necessity should be accepted as a sufficient defense to a

[43] Sarrls v. Commonwealth, 83 Ky. 327.

[44] Com. v. Kimball, 24 Pick. 366.

[45] Carson v. State, 69 Ala. 235; Commonwealth v. Hallett, 103 Mass. 452; Wright v. People, 101 Ill. 126; State v. Fleming, 32 Kans. 588; State v. Benadom, 79 Ia. 90. However by construction of law, and especially if there is no special provision for sales for medicinal purposes, a physician may be held not to be within the spirit of the act. State v. Larrimore, 19 Mo. 391.

[46] State v. Brown, 31 Me. 522.

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criminal charge under such circumstances. Courts have repeatedly intimated that statutory prohibitions must not be pressed to extreme and unreasonable applications within the letter but not within the spirit of the statute. This view was taken in North Carolina,[47] and Mississippi,[48] even without proof that the necessity could not have been provided for without a violation of the letter of the law.

**§ 224. Sale of wine for sacramental purposes.**[49]—The sale of wine for sacramental purposes is in some states expressly provided for, and treated like the sale for medicinal and mechanical purposes; the laws of many states, however, fail to provide expressly for this use. Where liquor can be sold under a general license system, the fact that the license may raise the price of the wine, or that the wine can only be obtained at a limited number of places, or cannot be obtained at certain hours, would of course not furnish sufficient ground for holding that an obstacle was placed upon the free exercise of religion. Where the sale of liquor is entirely prohibited, or allowed only for mechanical or medicinal purposes, or upon a physician's prescription, it may still be freely imported for sacramental use. The liberty of religion perhaps does not impose upon the state the duty of furnishing a market where the necessary accessories to worship may be procured. The prohibition of the sale of an article suitable only for religious purposes would of course be unconstitutional.

## THE EXCESSIVE USE OF INTOXICATING LIQUORS. §§ 225-227.

**§ 225. Intoxication.**[50]—There can hardly be any occasion for dealing with simple intoxication except where it disturbs and annoys third parties; so the Criminal Code of Illinois punishes only an "intoxicated person found in any street, highway, or other public place disturbing the peace of the public, or of his own or any other family in any private building or place."[1] Voluntary intoxication not thus aggravated may however be made an offense,[2] for it can hardly be conceded that, as one court has intimated, getting drunk is one of the inalienable

[47] State v. Wray, 72 N. C. 253.
[48] King v. State, 58 Miss. 737.
[49] See, also, § 468.
[50] See, also, § 454.

[1] Criminal Code, § 64.
[2] Mass. Rev. Laws, ch. 112, § 39; Com. v. Conlin, 68 N. E. 207.

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rights of man.[3] Special provision is made in a number of states for the punishment of common or habitual drunkards.[4]

**§ 226. Habitual intemperance.**—The police power deals with the habit of excessive drinking by preventive and restrictive measures.

The statutory provisions prohibiting under penalty the furnishing of intoxicating liquors to intemperate persons, and allowing relatives of such persons to give to the seller warnings to that effect, address themselves primarily to the seller of liquor, but operate in effect upon the drunkard as a deprivation of liberty.[5] It must of course be open to the person thus interdicted to show that he is not a drunkard, and it has been held that the notice given to the seller puts him upon his inquiry as to the habits of the individual he is warned not to sell to, but that it must be proved in court what the habits of the individual actually were.[6] It would hardly be within the power of the legislature to give the wife an absolute right to forbid the furnishing of liquor to her husband, and thus deprive him of rights enjoyed by other citizens, unless his particular status or condition made him a proper object of restraint.

Prohibitions against the employment of persons habitually using intoxicating liquor to excess, as engineers, conductors, etc., in the service of railroad companies, are justified on the grounds of public safety. In the exercise of its administrative power the state may exclude intemperates from employment in the public service, and provisions to that effect are found in the civil service acts.[7]

**§ 227. Compulsory commitment to asylums and institutions for the cure of inebriates.**—A considerable amount of legislation has been enacted in recent years having in view the treatment and cure of inebriates. Where the drink habit has progressed so far as to become a disease, it may be a proper subject for treatment in an asylum. Compulsory commitment, however, as in other cases of mental unsoundness, re-

[3] St. Joseph v. Harris, 59 Mo. App. p. 122.

[4] Commonwealth v. Whitney, 5 Gray, 85.

[5] Massachusetts Rev. Laws, ch. 100, sec. 63.

[6] Tate v. Davidson, 143 Mass. 590, 10 N. E. 492; Harrison v. Ely, 120 Ill. 83.

[7] United States Civil Service Act, Sec. 8; Mass. Rev. Laws, ch. 19, sec. 16.

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quires notice and hearing to comply with the constitutional guaranty of due process.[8] The power of a court of chancery, under statute, to take charge of the person as well as the estate of a habitual drunkard was recognised early in New York,[9] but a commitment to an inebriate asylum without notice was held to be unconstitutional.[10] In Wisconsin, it was held that when the commitment was penal (the inebriate being imprisoned for a definite time), the law, in the absence of the usual safeguards to an accused, was unconstitutional.[11]

The statutes of some states authorise compulsory commitment, or, which amounts to the same thing, the acceptance of a bond from the inebriate that he will take treatment, in case of conviction for drunkenness.[12] In the absence of statutory authorisation such bond has been held to be unenforceable.[13] The fact of conviction, it would seem, can add nothing to the power of the state which it would possess upon any other form of determination; for treatment can hardly be inflicted as punishment when the condition of the offender does not require it, the asylum not being established as a place of imprisonment for offenders who are not inebriates, and when the condition is such as to call for treatment, not only is a conviction not necessary, but it would seem inappropriate if the person was not in reality responsible for the act or condition. It is held in Michigan that the court cannot be authorised to take upon conviction a recognizance that treatment will be taken, with the provision that a certificate from the managers of the institution that the offender has complied with its rules, will entitle him to his final discharge by the court. "This in effect permits unofficial persons to prescribe rules which will acquit persons charged with crime."[14]

## THE LIQUOR TRAFFIC AND THE FEDERAL CONSTITUTION. §§ 228-233.

**§ 228.** In connection with the police legislation of the states regarding the liquor traffic, the following

[8] Mass. Rev. Laws, ch. 87, Sec. 59.

[9] Re Lynch, 5 Paige 120.

[10] Re Janes, 30 How. Pr. (N. Y.) 446.

[11] State v. Ryan, 70 Wis. 676.

[12] Michigan, Laws of 1893, No. 207; Pennsylvania, 1895, June 26, P. L. 377, § 10.

[13] Re Baker, 29 How. Pr. 486.

[14] Senate of Happy Home Club v. Alpena Co., 99 Mich. 117, 23 L. R. A. 144.

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provisions of the federal constitution require consideration: 1, those bearing on citizenship and equality;[15] 2, the protection of the right of property;[16] 3, the clause securing to the United States the right to regulate commerce with foreign nations and among the states and with the Indian tribes.[17]

It will be sufficient here to treat of the right of citizenship and the freedom of commerce, the principle of equality and the protection of property being fully discussed in subsequent chapters.[18]

**§ 229. Right of citizenship.**[19]—The exercise of the power to control the right to sell liquor by prescribing personal qualifications or by prohibition does not abridge the privileges and immunities of citizens of the United States. "It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. . . . The police power of the state is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But

[15] IV, 2, 1 and Fourteenth Amendment.

[16] Fourteenth Amendment.

[17] Constitution I, 8, 2.

[18] § 539, 542, 564, 655, infra.

[19] See, also, § 702, 703, 707, 709, 710.

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that is a matter which does not affect the authority of the state, or one which can be brought under the cognizance of the courts of the United States."[20]

§ 230. **The freedom of commerce.**—In 1827 the decision in Brown v. Maryland[21] established the principle, that an importer of goods from foreign countries had the right to sell them in their original packages, free from any restraint or burden imposed by state laws, and that the power of the state attached only after the original packages in the hands of the importer had been broken and the goods had become mingled with the general mass of property within the state. It was at the same time recognised that the state could exercise its police power over infectious and similarly dangerous articles, on the ground that they were not subjects of commerce and hence not protected by the federal constitution.

§ 231. **License cases.**—In 1847, a number of cases collectively known as the License Cases[22] were decided without an official court opinion, each of the judges stating his personal reasons. The decision upheld statutes of Massachusetts requiring a license for the retail sale (in less than undivided lots of 28 gallons) of wines and spirituous liquors, notwithstanding the fact that such liquors might be imported from abroad, since the state law acted upon the article after it had passed the line of foreign commerce, and became a part of the mass of property in the state. "Although a state is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorises to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importations, or diminish the profits of the importer, or lessen the revenue of the general government."[23]

The decision also upheld a statute of New Hampshire requiring a license for the sale by the importer in the original package of spirituous liquor imported from Massachusetts. Chief Justice Taney and Justice Catron, with whom Justice

[20] Crowley v. Christensen, 137 U. S. 86.

[21] 12 Wh. 419.

[22] 5 How. 504.

[23] Chief Justice Taney, p. 577.

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Nelson concurred, upheld the act on the ground that the state had a power subordinate to that of Congress to legislate in matters of commerce for the protection of local interests, and that this power might be exercised in the absence of any federal regulation;—Justice McLean on the ground that the principle of Brown v. Maryland applied only to imports from foreign countries and not to imports from another state. Justice Daniel questioned altogether the soundness of the principle laid down in Brown v. Maryland, and Justice Woodbury insisted that regulation of sale after import was not inconsistent with the freedom of commerce.

In 1888 in Kidd v. Pearson[24] the Supreme Court held that the power to regulate commerce did not extend to manufacture, though the manufactured article was intended to be exported, and that it was therefore within the power of a state to prohibit the manufacture of liquor without any exception in favor of intended exports.

Earlier in the same year, 1888, the Supreme Court had held, in Bowman v. Chicago & N. W. R. Co.,[25] that a state could not prohibit the transportation of liquor from one state into another, the question whether it could prohibit the sale after importation being left open.[26]

**§ 232. Leisy v. Hardin and the Wilson act.**—In 1890, in Leisy v. Hardin,[27] this latter point was determined against the power of the states, and it seems that under this decision a license required of an importer of liquor for sales in original packages would have been unconstitutional. In Walling v. Michigan[28] a discriminative license was held invalid, but the case strongly intimated that a non-discriminative license required of all liquor sellers alike would be valid as to those selling imported liquor. So also it is very probable that it was competent to the states to forbid the sale of liquor in original packages to intemperates.[29]

Shortly after the decision in Leisy v. Hardin, in the same

[24] 128 U. S. 1.

[25] 125 U. S. 465.

[26] Before the decision in Leisy v. Hardin some state courts held that the decision in the Bowman Case did not affect the prohibition of sales. State v. Fulker, 43 Kan. 237, 7 L. R. A. 183; State v. Creeden, 78 Iowa 556, 7 L. R. A. 295.

[27] 135 U. S. 100.

[28] 116 U. S. 446.

[29] Commonwealth v. Zelt, 138 Pa. 615, 11 L. R. A. 602.

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year, Congress passed a statute[30] providing that "all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner, as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise." The constitutionality of this act was upheld in Wilkinson v. Rahrer.[31]

In Rhodes v. Iowa[32] it was held that the power of the states under the Wilson Act did not attach until the goods imported had reached the consignee.

It had been held in Tiernan v. Rinker,[33] that a state in its liquor legislation may not discriminate in favor of the product of that state as against the products of other states, and in Walling v. Michigan,[34] that wholesale dealers of other states may not be discriminated against.

**§ 233. The South Carolina law.**—The South Carolina dispensary law passed upon in Scott v. Donald[35] (which was enacted subsequent to the passage of the Wilson Act) provided that the state commissioner should in his purchases give preference to the brewers and distillers of the state,[36] and that he should have power to contract with grape growers in the state for the sale of their product through the dispensary, charging not more than 10 per cent. profit for handling their wine;[37] it also prohibited all importation into the state except as provided in the act, thus making it impossible for the consumer to import for his own use. These provisions were declared unconstitutional as discriminating against

[30] Known as the Wilson Act, August 8, 1890, I Supp. Rev. Stat. 779.

[31] 140 U. S. 545.

[32] 170 U. S. 412.

[33] 102 U. S. 123, 1880. See, also, State v. Stucker, 58 Iowa, 496; McCreary v. State, 73 Ala. 480; State v. Marsh, 37 Ark. 356; State v. Nash, 97 N. C. 514; McGuire v. State, 42 Ohio St. 530, "perhaps void;" special provisions in favor of native wines or cider seem not unusual, so Massachusetts R. L. ch. 100, sec. 1, held unconstitutional. Comw. v. Petranich, 66 N. E. 807.

[34] 116 U. S. 446.

[35] 165 U. S. 58.

[36] Sec. 15.

[37] Sec. 23.

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products of other states while recognising liquor as a legitimate article of commerce.

The provisions condemned in Scott v. Donald were therefore eliminated from the law. It was held in Vance v. Vandercook Co.[38] that under the Wilson Act the state in the exercise of the police power might reserve to itself the exclusive right to sell liquor after its arrival in the state, so long as any citizen was allowed to import for his own use, but that the latter right could not be qualified by a condition that a sample should first be submitted for approval to the state commissioner, since the inspection of the sample was not an inspection of the imported goods and the restriction therefore untenable as an inspection law. With this exception, however, the act was upheld as consistent with the commerce clause of the constitution.

[38] 170 U. S. 438.

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## CHAPTER IX.

### PUBLIC MORALS (CONTINUED).

### VICE AND BRUTALITY.

SEXUAL VICE. §§ 234-246.

**§ 234. Purpose and scope of police control.**—The problems presented by sexual immorality differ considerably from those with which the police power has to deal in case of gambling and drink. The gambling instinct and the desire for drink are not recognised as useful or necessary in the economy of civilised life, although a moderate indulgence in them is regarded by the majority of people as harmless and unobjectionable, and as a source of rational pleasure. On the other hand the sexual instinct is essential to the perpetuation of the human race, and the stimulation of sexual attraction cannot be condemned; but custom, the universal sense of decency, and the subserviency to its natural purpose, set bounds to the indulgence of sexual passion, which is immoral only in so far as society derives no benefit from it.

According as the element of sexual intercourse is directly or indirectly involved in immoral practices, we may distinguish lasciviousness and obscenity from fornication and prostitution.

LASCIVIOUSNESS AND OBSCENITY. §§ 235-239.

**§ 235. Lewd and lascivious conduct.**—Words, gestures or acts suggestive of impure thoughts or passions, if indulged in in private, are beyond the cognizance of the police power; if in public, they are apt to constitute disorderly conduct or a nuisance.[1] The offence of lewd and lascivious carriage or behavior, open and gross lewdness,[2] or open lewdness,[3] if not amounting to fornication or prostitution, can therefore have only a limited scope. It has been held that acts of indecency committed in the presence of another person without his or her consent, are open lewdness,[4] while in the presence of a consenting party they would undoubtedly be considered as private. Such acts, if they stop short of touching the person,

[1] N. Y. Penal Code, Sec. 385.
[2] Mass. ch. 212, Sec. 12.
[3] Illinois Crim. Code, Sec. 55.
[4] Commonwealth v. Wardell, 128 Mass. 52; Fowler v. State, 5 Day (Conn.) 81.



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and therefore do not amount to indecent assault which is punishable at common law[5] would not be punishable without the statutory provision against lewdness,[6] which therefore serve a useful purpose.

**§ 236. Obscene performances and publications.**—Both obscene publications and obscene performances are punishable at common law, and the former are frequently prohibited by statute, more rarely also the latter.[7] The statutes are primarily directed against those who are active in procuring or circulating publications, which include all sorts of books, writings, prints or other pictorial representations, figures or images, or even instruments or articles; but sometimes the mere possession, even without intent to sell or give away, is made an offense.[8]

Federal legislation prohibits the mailing or importation or sending from state to state of any obscene, lewd, or lascivious book, writing, print, drawing, or representation or publication of an indecent character or article of an immoral nature, or of any notice giving information where such matter can be obtained.[9] The prohibition extends to private sealed letters.[10] The terms obscene, lewd, lascivious, indecent, and immoral are used indiscriminately and with exclusive reference to sexual impurity.[11] The legislation rests partly upon the control of the post office[12] and partly upon the power over commerce.[13]

**§ 237. Tests of obscenity.**—A clear understanding of what is criminally obscene, lewd, or lascivious is important to mark the line between what is allowable in the interest of science, art and literature, and what is punishable. Serious doubts regarding the legitimacy of the purpose of the publication have arisen in comparatively few cases, and especially in the cases decided by the federal courts regarding obscene matter

[5] Bishop II, Sec. 28.

[6] Bishop I, 1129, 1130.

[7] Mass. Rev. Laws, ch. 212, Sec. 23; Bishop New Crim. Law I, Sec. 500, 504, and II, 943.

[8] Illinois Crim. Code, Sec. 223.

[9] United States Rev. Stat. 2491, 3893; Act Sept. 26, 1888, I Suppl. 621; Febr. 8, 1897, II Suppl. 547; July 24, 1897, II Suppl. 708.

[10] Re Wahll, 42 Fed. 822; Grimm v. United States, 156 U. S. 604; Andrews v. United States, 162 U. S. 420.

[11] United States v. Wightman, 29 Fed. 636; Swearingen v. United States, 161 U. S. 446.

[12] Ex parte Jackson, 96 U. S. 727.

[13] Lottery Case (Champion v. Ames), 188 U. S. 321.

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in the mails the immorality of the purpose has generally been clear.[14] The leading English case is Reg. v. Hicklin.[15] A body called the Protestant Electoral Union was formed "to maintain the Protestantism of the Bible and the liberty of England, to expose the deceptive machinations of the Jesuits," etc. A member of this body in the furtherance of the purposes of the union, published a pamphlet called "The Confessional Unmasked, showing the depravity of the Romish priesthood, the iniquity of the confessional and the questions put to females in confession." The pamphlet consisted of extracts in translations from works of theologians and casuists, about one-half of the pamphlet being obscene in fact as relating to impure and filthy acts, words and ideas. The pamphlet was circulated at street corners and sold at the price of one shilling. Proceedings were instituted for the seizure and destruction of these pamphlets, and upon appeal to the Quarter Sessions the Recorder held that the publication was not within the provisions of the statute against obscene books, in view of the absence of any purpose to corrupt the public morals. This decision was reversed by the Court of Queen's Bench, the Justices holding that the test of the obscenity must be found, not in the ulterior object or motive of the publication, but in its tendency to deprave and corrupt those whose minds are open to immoral influences and into whose hands publications of that kind may fall, and that it went far beyond anything which was necessary and legitimate for the purpose of attacking the confessional.[16]

[14] Perhaps the only case in which good faith was denied with some plausibility is United States v. Harmon, 45 Fed. 414. The indiscriminate and unsolicited dissemination of so-called medical information is properly held not to be legitimate. United States v. Chesman, 19 Fed. 497; United States v. Clarke, 38 Fed. 732; United States v. Smith, 45 Fed. 476; Commw. v. Landis, 8 Phila. 453. See, also, United States v. Martin, 50 Fed. 918, and United States v. Lamkin, 73 Fed. 459; Dunlop v. United States, 165 U. S. 486, and John H. Thomas, Lotteries, Fraud and Obscenity in the Mails, § 241-246.

[15] 11 Cox Crim. Cases, 19, 1868.

[16] It was held later on, in Steele v. Brannan, 41 L. J. M. C. 85, that the pamphlet condemned in Reg. v. Hicklin could not be published as part of a report of the judicial proceedings in which the pamphlet was part of the record. Regard for decency is even allowed to control the fullness of pleadings. United States v. Bennett, 16 Blatch. 338: "It is the doctrine of our American courts

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In People v. Muller[17] a dealer was indicted for placing on sale photographs of pictures which had been exhibited at the Paris Salon and in American cities. The jury found the pictures obscene and indecent, and the conviction was sustained by the Court of Appeals. It was held to be no defense that the picture was of distinguished merit, nor that it was sold to a person whom it could not injure; also that the testimony of a professional artist was properly excluded, the question not being whether the picture was indecent in the opinion of a particular class, but whether it was indecent in fact, and that this was matter of judgment within the knowledge of ordinary jurymen.

In the Matter of the Worthington Company,[18] a receiver applied to the court for leave to sell a number of costly books, containing well-known works by Rabelais, Boccaccio and others, the contents of which were immoral. The court allowed the sale on the ground that the books in question had a recognised standing in literature, and that the particular copies in question would appeal chiefly to book lovers and that evil effects were therefore not to be apprehended.

These decisions concur in finding the test of obscenity in the effect rather than the purpose of the publication, but the case last cited looks to the effect in particular instances instead of to the general effect. On principle, and apart from the facts of that case, the general effect should be controlling, since it is impossible to foresee into what particular hands a publication may get, and a most serious and legitimate treatment of sexual relations may have for some persons only a morbid interest. The general effect is, however, in reality undistinguishable from the purpose, since every one must be presumed to contemplate the natural and probable consequences of his acts.

**§ 238. Legitimate purposes: science, social reform, etc.**— The purpose of arousing impure emotions is generally ex-

that a libel too obscene to appear with decency on the record may be described in a more general way, and then an averment of the too great obscenity of its words will be accepted instead of their tenor." Bishop New Criminal Procedure II, Sec. 790. This seems a needless concession since the obscene matter must appear in the evidence. In England the concession is not made. Bradlaugh v. Reg. 3 Q. B. D. 607.

[17] 96 N. Y. 408.

[18] 30 N. Y. Suppl. 361, 24 L. R. A. 110.

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cluded by serious scientific purpose, and the legitimate pursuit of science is therefore safe from the charge of criminal obscenity or lasciviousness.

The investigation and publication of truth for the promotion of human knowledge is of the essence of science, and must be beyond the interference of the police power. Truth and science are, however, not convertible terms, and it cannot be admitted that every true fact is a contribution to science. Whether the statement of a fact is a contribution to science or not must depend chiefly upon the form and circumstances of the statement, and commonly accepted canons will generally furnish the safest guidance. It is obvious that if truth were a complete justification the prohibition of obscenity would be entirely futile.

The interest of public decency demands that even in the legitimate pursuit of truth the channels selected for the spreading of truth be those least harmful to the community, and the traditions of science have accepted this condition, which cannot be regarded as a limitation of true liberty.[19]

§ 239. **Art and literature.**[20]—Here, too, the purpose should be regarded as controlling, since as a rule it will determine the general effect. An author may depict immorality for a moral purpose, and if he does it in such a way as to impress its evil character upon his readers there can be no danger to public morals;[21] but if he makes vice alluring, it is just to hold that he must have contemplated the probable consequences of his work, and the avowal of a moral purpose need not be accepted as conclusive.

A high degree of artistic beauty is inconsistent with the idea of obscenity to which grossness is essential. The suggestiveness found in classical works of art and literature is generally excused on this ground; but even where they have not this saving element, it is rightly held that their continued publication is justified by their historical or cultural interest, provided that the legitimacy of the purpose appears in the forms and channels of publication. Custom is the best criterion

[19] Commw. v. Landis, 8 Phila. 453; United States v. Chesman, 19 Fed. 497.

[20] See, also, § 251.

[21] A decision of the highest administrative court of Saxony setting aside an order forbidding the performance of Tolstoi's Powers of Darkness is instructive on this point. (July 17, 1900.)

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of decency, and in the absence of positive enactment established conventions should be regarded as part of the law. Upon this ground the nude in art is free from objection. There is, however, much in art and literature that is merely tolerated, although in grossness or suggestiveness it goes beyond the canons of firmly established tradition; with regard to productions of that kind not even a long-continued policy of non-interference will necessarily constitute a legal sanction. These tests may be applied to judge what is obscene or indecent under statutes or as a matter of common law. The constitutional power of the legislature undoubtedly extends to the prohibition of publications which are immoral without being obscene; but it seems that where the word immoral occurs in statutes, it is used rather in the sense of obscene.

## ILLICIT SEXUAL INTERCOURSE. §§ 240-246.

**§ 240. Notorious cohabitation.**—Sexual intercourse outside of marriage was a matter with which the common law did not concern itself, but it was an ecclesiastical offense. In some states fornication, without the aggravating element of adultery, has been made criminal, as a rule, however, only where the illicit relation is open, public and notorious.[22]

The mischief against which the law is directed is the scandal arising from a disregard of the established standards of propriety. This test should be applied to determine whether a relation is to be held open and public within the statute. Living together in the same house may be a necessary ingredient to the offense, where the statute speaks of living together;[23] but it has been held that evidence tending to show occasional acts of intimacy between a master and his servant will not establish the offense, since their living in the same house is not in itself scandalous.[24] Generally speaking, the relation must be known to others, and must be such that the fact of intimacy may be inferred.[25]

**§ 241. Autonomistic marriage.**—A peculiar form of unlawful cohabitation exists where parties live together in a relation which they conceive to be as moral as marriage, but which is

[22] Ill. Crim. Code, Sec. 11; Mass. Rev. Laws, ch. 212, Sec. 14, without this ingredient; N. Y. without provision.

[23] Quartemas v. State, 48 Ala. 269.

[24] State v. Marvin, 12 Iowa, 499.

[25] Crane v. People, 168 Ill. 395.



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not recognised as a marriage by the law, so where the forms prescribed by law are not observed in forming the relation. By the common law as understood in most of the states, the compliance with statutory forms is not essential,[25] though their non-observance may be visited by penalties, the cohabitation not being made unlawful thereby. But the statute may make even such cohabitation unlawful, punishing the disregard of provisions embodying an important statutory policy; it would not, however, be "lewd and lascivious" cohabitation.[26] In Kansas parties to a so-called "autonomistic" marriage were punished because they did not observe the civil ceremonies prescribed by statute, the words "living together as husband and wife without being married" being interpreted as meaning "without having been married as prescribed by law." The law dispensed with the presence of a minister or civil magistrate in the case of Quaker marriages, and it must appear questionable whether a privilege may be accorded to one sect and denied to another. However, it seems, that the autonomistic marriage was regarded by the parties as freely dissoluble, so that it did not in reality constitute a marriage in accordance with the institutions of the state.[27]

**§ 242. Prostitution—Scope and ground of state control.**—While unlawful or lewd and lascivious cohabitation is generally treated as a joint offense, prostitution is a species of sexual vice peculiar to women. For the purposes of the police power prostitution may be defined as the promiscuous admission of men to intercourse for gain and as a means of livelihood.

Prostitution is a subject legitimately falling under the police power, on a variety of grounds: if it is not checked it is apt to become a public nuisance in its outward manifestations; its existence is antagonistic to marriage, and tends to demoralise the community; prostitutes are apt to become a burden to the public when they are no longer able to ply their trade; the haunts of vice are also apt to be the haunts of crime; and the venereal diseases which are spread chiefly by prostitutes endanger the health of innocent women and children.

The outward manifestations of the social evil, street walk-

[25] Bishop, Marriage and Divorce, § 449; Meister v. Moore, 96 U. S. 76.

[26] Commonwealth v. Munson, 127 Mass. 459.

[27] State v. Walker, 36 Kan. 297.

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ing, solicitation on the streets or from windows, etc., are nuisances at common law and generally fall within the province of the municipal ordinance power.

**§ 243. Systems of legislation.**—Prostitution is a social evil from which no civilised country is free, and its practice goes back to very early periods of history. In the mediaeval city the brothel was a recognised municipal institution, and its freedom was accorded by the authorities to visiting princes and other honored guests; no stigma appears to have attached to intercourse with prostitutes. From the end of the 15th century these licensed and semi-official houses gradually disappeared, largely as a consequence of the ravages of venereal diseases which spread through Europe about that time in their most virulent form.

In England brothels were licensed until the time of Henry VIII, so it was enacted by 14 Richard II that no such houses should be kept in Southwark, but in the common places therefor appointed. Prostitutes were freely dealt with by executive authority.[28]

At present the status of prostitution is in most countries abnormal owing to the fact that it is admitted to be ineradicable, while yet the law does not dare to sanction it. From this results an administrative practice which is directly contrary to the law.

In Germany the penal code forbids the keeping of disorderly houses, yet in many cities they are tolerated and supervised by the police.

In France there is no legislation touching prostitution, except that a statute of 1791 authorises municipal police officers to enter at any time places notoriously given up to debauchery. Otherwise the whole matter is left to the mayor, who acts under his power to take all measures that may be necessary for public order and morality. In Paris (and the Paris regulations have largely been adopted by other cities) prostitutes must cause themselves to be registered at the police office. This registration may take place on their own motion or by official order. It is cancelled only if the police is satisfied that the course of life of the woman will be changed. Registered prostitutes are subject to police regulations, the principal

[28] See instances given by Coke in III Inst. 205.

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liability being that to periodical physical examination. There are, however, many other rules as to conduct on the streets, etc., violations of which are punishable by imprisonment. Houses of ill-fame exist under permits, and are subject to control as to inmates and as to the way in which they are conducted. They may be closed temporarily or permanently. The mayor may forbid the letting of lodgings to prostitutes and bad characters, by virtue of the general police powers given by the municipal law of 1884. It has been contended that registration without the consent of the woman by mere administrative order is not due process of law;[29] but the existing practice is firmly established.

In England legislation exists for a number of places (ports and garrison cities) permitting prostitutes to be placed under police control by order of a justice of the peace, and to be subjected to periodical physical examinations. The legislation is sanitary in its character, the statutes being known as contagious diseases acts. Outside of these places prostitution exists merely by sufferance.

In America the policy of regulation, implying a legalisation of prostitution within defined limits, is almost everywhere repudiated, and the police power operates entirely by measures of repression and restraint. As an exception it may be noted that Idaho gives power to municipalities to regulate as well as to suppress houses of ill-fame.[30]

The measures of restraint are directed either against prostitutes or against places of prostitution.

**§ 244. Measures against prostitutes.**—A common prostitute as a rule answers the description of a vagrant, for she is without legitimate means of support and is apt to manifest her illegitimate livelihood in an offensive manner.[31] She may thus be dealt with under the laws against vagrancy, vagabondage

[29] See Judgment of Magistrate of Rheims, reprinted in Amos State Regulation of Vice, p. 292.

[30] Laws 1899, p. 295.

In Illinois a statute was specially enacted to make it unlawful for municipal authorities to grant licenses for the keeping of houses of prostitution or to provide for medical inspection, suppression being the only method indicated by the city act for dealing with this matter. City Act V, 1, No. 45; Act March 27, 1874.

[31] Commonwealth v. Doherty, 137 Mass. 245; Commonwealth v. Brown, 141 Mass. 78; New York Tenement House Act, 1901, § 141.

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and criminal idleness, which are to be found in all the states. Prostitution may also be made a distinct offense, and living in a house of ill-fame may be punished as prostitution.[32] The prostitute being subject to the penalties of crime is entitled to the safeguards of criminal procedure. She may be arrested and punished by fine or imprisonment, and there is authority for holding that upon conviction she may be required to give surety or recognizance for good behavior.[33] But it would not be possible to exercise this power in such a way as to allow her to ply her trade upon prescribed conditions of submission to control, for since the main part of the understanding, namely, that she should continue her offense, would be illegal, all conditions annexed to it would be void. The punishment inflicted upon her must be in conformity with the law of the land, which does not know licensed illegality conditioned upon the acceptance of a diminished status of personal liberty. In Maine it was formerly held that a prostitute might be confined in a workhouse by administrative process, not by way of punishment, but as a measure for her own benefit and for the protection of the community.[34] This view, which would sweep away all the safeguards of due process of law, was later on declared to be inconsistent with the Fourteenth Amendment, and the decision was overruled.[35]

Measures for the repression of prostitution short of punishing the act or occupation itself may be directed against all women or only against prostitutes.

Thus women may be forbidden to serve as waitresses in saloons or dance halls, and a provision has been sustained prohibiting them from frequenting saloons after midnight.[36] The anti-wineroom ordinances forbidding the serving of liquor in private apartments of saloons or restaurants to less than four persons, unless they are of the same sex, or forbidding the maintenance of such apartments, belong to this class.[37]

Measures directed only against prostitutes may encounter the difficulty of proving the fact that a person is a prostitute; if, however, that is proved or not denied, the further difficulty

[32] Webber v. Harding, 155 Ind. 408, 58 N. E. 533.

[33] Bishop I, § 945.

[34] Adeline G. Nott's Case, 11 Me. 208, 1834.

[35] Portland v. Bangor, 65 Me. 120.

[36] Ex parte Smith, 38 Cal. 702.

[37] State v. Barge, 82 Minn. 256, 53 L. R. A. 428; Chicago ordinance Dec. 9, 1901.

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arises of recognising and thereby in a manner legalising the status. An ordinance forbidding prostitutes from being on the street between 7 P. M. and 4 A. M. would seem free from the latter difficulty;[38] an ordinance requiring them to live in certain districts would present it very strongly.[39] The same objection would apply still more to physical examination.

It has been suggested that prostitutes might be subjected to a stringent medical control under appropriate grants of power to health authorities. The theory would be that a general power to quarantine, etc., for the prevention of contagious disease might be used for this purpose. But our courts have uniformly held that an interference with the liberty of the person and body under the sanitary power is justified only in cases of imminent danger, as e. g. in epidemic diseases, and the danger of contagion from prostitutes is certainly not of that character. The prevention of the spread of venereal disease would fall within the province of the police power, but it would require such specific regulations as would practically amount to a legal recognition of prostitution—the very thing which our legislative policy will not concede.[40]

As a matter of fact the police exercises a considerable control over prostitutes. A woman, who is without legitimate means of support, still more a woman who walks the streets and solicits, is liable to be arrested at any time upon the charge of vagrancy. This power of arrest is a weapon which may be used to enforce the observance of such rules as the police deems essential to public morals or decency. It is clear that this result is accomplished by suspending the enforcement of the law,—an extra-legal condition, which can be applied only within narrow limits and cannot take the place of avowed regulation.

§ 245. **Houses of prostitution.**—Houses of prostitution are nuisances at common law,[41] no matter how quietly they are

[38] Dunn v. Com. for use of Cattlettsburg, 20 Ky. L. Rep. 1649, 43 L. R. A. 701, 49 S. W. 813.

[39] L'Hote v. New Orleans, 51 La. Ann. 93.

[40] Under military authority such a system was adopted in Manila; Commissioner Taft, in a telegram to the Secretary of War, admitted that since November, 1900, to check the spread of venereal disease, known prostitutes were subjected to certified examination.

[41] 3 Inst. 205.

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kept;[42] in this respect they are like gaming houses and differ from places where liquor is sold which become disorderly only by the manner in which they are kept.[43] The nuisance character arises not only from the scandal which attaches to the house, but also from the temptation which it offers to indulge in practices which corrupt morals.[44]

The statute may require that in order to constitute a house of ill-fame it must be shown to be of evil repute as well as to be used for immoral practices in fact,[45] but reputation alone can neither be made the gist of the offense, nor conclusive evidence of the offense; it may even be questioned whether the fact may be found from the evidence of reputation alone, although dicta to that effect may be found.[46]

The keeping of a house of ill-fame is generally a criminal offense.[47] A person who has let a place to one who uses it for prostitution does not become a keeper of a bawdy house by failing to give her notice to leave,[48] although a statute making him liable for such default would probably be constitutional.[49] A person cannot be made liable for renting a place to a reported prostitute if he had no reason to believe that she would use the place for illicit purposes; for an absolute prohibition against letting to prostitutes would render them homeless and deprive them of shelter.[50]

As a nuisance a house of ill-fame may be closed and suppressed; but the house itself may not be destroyed, since it is capable of serving a lawful purpose.[51]

A house of ill-fame would cease to be a criminal nuisance

[42] Bishop, New Crim. Law I, § 1087.

[43] Commonwealth v. McDonough, 13 Allen, 581.

[44] Commonwealth v. Lambert, 12 Allen, 177; King v. People, 83 N. Y. 587; Commonwealth v. Cobb, 120 Mass. 356.

[45] Cadwell v. State, 17 Conn. 467.

[46] State v. Brunell, 29 Wis. 435; Drake v. State, 14 Neb. 535; Betts v State, 93 Ind. 375; People v. Gastro, 75 Mich. 127; State v. Haberle, 72 Iowa, 138. Under the New York Tenement House Act, § 145, corroborative evidence is required.

[47] Massachusetts Rev. Laws, ch. 212, § 19; Illinois Crim. Code, § 57; New York Penal Code, § 322.

[48] State v. Williams, 30 N. J. L. 102.

[49] In New York he must remove the tenant within 5 days after receiving notice from the board of health. Tenement House Act, 1901, § 144.

[50] Millikan v. Weatherford, 54 Tex. 388.

[51] Ely v. Niagara Co. Supervisors, 36 N. Y. 297; Welsh v. Stowell, 2 Dougl. (Mich.) 332.

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if it were licensed. Laws and ordinances go to the extent of forbidding such houses in designated places, perhaps even forbidding them outside of certain places; this, however, does not necessarily legalise them in the places not specially prohibited. In L'Hote v. New Orleans[52] the ordinance expressly provided that its provisions should not be construed as sanctioning or authorising houses of ill-fame in the district, outside of which they were specially prohibited. While practically this operates as an assignment of limits, it does not so in law. A regulation of houses of ill-fame by license would, however, not be unconstitutional.[53]

§ 246. **Practices in aid of prostitution.**—As regards practices incidental or subservient to prostitution, the law may punish persons who procure or furnish the occasion for illegal intercourse, especially if they do so for gain. This is done by the German Penal Code, while our laws are generally silent with regard to procurers and procuresses. In many states their practices fall under the definition of abduction. Recently a statute of New York has declared male persons who live on the earnings of prostitutes to be vagrants.[54]

The frequenting of houses of ill-fame may be punished as well as the keeping of them,[55] though not covered by the common law; for it can hardly be denied that he who resorts to a prostitute aids and abets prostitution. However, as is usual in the analogous cases of drinking and gambling, the police power confines its restraints to the person who acts for gain and as a matter of business.

The prohibition against advertising or selling means, instruments, etc., to prevent conception is sometimes classed with provisions against obscenity; more properly it should be regarded as a measure to remove inducements to illicit inter-

[52] 177 U. S. 587. See, also, § 179, 689.

[53] State v. Clarke, 54 Mo. 17. It is stated by Chapin, Municipal Sanitation in the United States, that there are nine cities which attempt by licenses or fines to restrict the number of houses of prostitution, and that three cities confine such houses to particular districts. In St. Louis, medical inspection existed from 1870 to 1874. In San Antonio houses were licensed in 1889 and prostitutes were examined; after 10 months this method of regulation was abandoned. It is also stated that the ordinances of Denver provide that the health commissioner may examine prostitutes, but that this is not done.

[54] Act April 5, 1900.

[55] State v. Botkin, 71 Iowa, 87.

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course.[56] The advertising on the part of prostitutes in covered terms was held to be an obscene publication under the federal legislation relating to sending obscene matter through the mails.[57]

## BRUTALITY AND INHUMANITY. §§ 247-249.

**§ 247.** Upon this subject there is little legislation, and that of recent date. At a time when physical suffering of others was regarded with callousness, when the penalties inflicted by the law were cruel and barbarous and were made public spectacles, when children were universally subjected to severe corporal punishment, brutality was not regarded as a matter of public concern. Now that cruel punishments have been abrogated and made unconstitutional, that the standards of refinement have been raised enormously in all classes of the population, and the barbarous instincts which find pleasure in the horrible, have to a great extent been repressed, if they have not disappeared,—brutality cannot be said to be a public evil of considerable magnitude, and the law is chiefly directed against practices which in former times would hardly have met with moral reprobation. Brutal sports and entertainments, and cruelty to animals, form the principal subjects of police legislation in this field.

**§ 248. Brutal sports and entertainments.**—The principal legislation is against prize fights. These are criminal assaults at common law, as serving no useful purpose and tending to breaches of the peace, and the consent of one party to receiving violent injury at the hands of the other being unlawful and void. The common law, however, recognises as lawful, manly sports calculated to give bodily strength, skill and activity, and "to fit people for defense, public as well as personal, in time of need." Playing at cudgels or foils, or wrestling by consent, there being no motive to do bodily harm on either side, are mentioned among these.[1] With regard to sparring or boxing matches, where gloves are used, legislative policy is not uniform. They are sometimes expressly author-

[56] New York Penal Code, Sec. 318; Illinois Crim. Code, § 4, 5, 6; Massachusetts Rev. Laws, ch. 212, Sec. 26.

[57] Dunlop v. United States, 165 U. S. 486.

[1] Commonwealth v. Collberg, 119 Mass. 350.

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ised, especially if arranged by responsible organisations;[2] sometimes they are held not to be within the meaning of a prize fight to which the expectation of reward and the intent to inflict some degree of bodily harm are deemed essential;[3] sometimes they are expressly forbidden, especially when they take the form of exhibitions for which an admission fee is charged.[4] Even the witnessing of such exhibitions may be made unlawful.[5]

With regard to prize fights, statutes now commonly punish what at common law would be merely acts of preparation: training, advertisements, etc.;[6] we also find legislation prohibiting the exhibition of pictorial reproductions.[7]

Nevada is the only state which licenses prize fights, providing certain restraints and safeguards: examination by physicians, prohibition of sale of liquor, etc.[8]

Besides prize fights, other brutal sports are or may be prohibited: dog, cock and bull fights, long continued bicycle racing, etc.[9]

Many sports are allowed, which while not involving intentional violent injury, are connected with danger of bodily harm, and in which a considerable amount of roughness may be displayed. It is, however, conceived that the legislature has absolute control over all sports which are publicly exhibited, and its judgment that a given form of sport is brutal should be accepted as conclusive by the courts. A municipal ordinance may on well established principles be controlled by the courts as to its reasonableness.

The public exhibition of deformed persons is clearly an appeal to brutal instincts or to morbid curiosity, and has been forbidden in some states.[10]

The same is true of the exhibition of persons who have become conspicuous or notorious through some criminal act, the

[2] State v. Olympic Club, 46 La. Ann. 935, 24 L. R. A. 452.

[3] People v. Taylor, 96 Mich. 576, 21 L. R. A. 287.

[4] New York Penal Code, § 458; Illinois Crim. Code, § 235.

[5] Illinois Crim. Code, § 235.

[6] Illinois Crim. Code, § 231-234.

[7] Made a felony in Maine by Act of 1897.

[8] Act January 29, 1897.

[9] Massachusetts Rev. Laws, ch. 212, Sec. 79-86; Illinois Crim. Code, Sec. 52.

[10] Illinois Act of 1899; Massachusetts Rev. Laws, ch. 212, Sec. 24, if the deformed persons are minors and insane, or if deformity is artificially produced.

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glorification of crime being both brutal and scandalous. It is forbidden by the statute of Illinois last cited.

The statutes of some states forbid the publication of the lives of criminals,[11] or the sale to minors of publications devoted to criminal deeds.[12]

There are descriptions of tortures and horrors which are not better than obscene publications and appeal to very similar instincts; but as they do not fall under the definition of the obscene, they would require special statutory provision. Newspapers which are largely given over to scandalous matter have in some states been declared to be criminal publications.[13]

**§ 249. Cruelty to animals—Vivisection.**[14]—Animals are not protected against maltreatment by their owners at common law, except that excessive cruelty committed in public may be indictable as a nuisance, offending public decency.[15]

Actual cruelty is now forbidden in probably all the states, a peculiar feature of this legislation being the partial reliance upon voluntary associations for the enforcement of the law.[16]

Where the law forbids cruel ill-treatment, abuse and torture (as in England) without further specification, it is necessary to determine what is cruel. There are practices which while they inflict great pain upon the animal, render it more useful or valuable. It has been held in England that a painful operation making the animal more fit for food (spaying sows) is not cruel.[17] On the other hand, there is a conflict of authority as to the dishorning of cattle which increases their marketable value.[18] The decision in the Callaghan case which sustained the practice, laid stress upon the omission of the word "wanton" which was found in a former statute. A higher marketable value does not necessarily indicate greater usefulness, as the price may be dictated by fancy; the docking of tails of horses is expressly forbidden by some of our statutes.[19]

[11] Alabama, 1894.

[12] Massachusetts Rev. Laws, ch. 212, Sec. 21.

[13] State v. McKee, 73 Conn. 18, 49 L. R. A. 542; State v. VanWye, 136 Mo. 227.

[14] See, also, § 152-154.

[15] Bishop New Crim. Law I, Sec. 597; State v. Karstendiek, 49 La. Ann. 1621, 39 L. R. A. 520.

[16] Massachusetts Rev. Laws, ch. 212, Sec. 70-77; Illinois Crim. Code, Sec. 50, 57.

[17] Lewis v. Fermor, 18 Q. B. Div. 532.

[18] Brady v. McArgle, 14 L. R. (Ireland), 174; Callaghan v. Society Prev. Cruelty to Animals, 16 L. R. (Ireland), 325.

[19] Illinois, 1891, Massachusetts, 1894, etc.

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We should not speak of "wanton" cruelty where the owner merely tries to save expense and is callous to the suffering which he inflicts upon the animal. Our statutes, however, expressly prohibit practices of that character, and prescribe positive regulations as to the care of cattle in stockyards or while in course of transportation on railroad cars.[20]

It is also now frequently forbidden to abandon disabled animals, and animals found abandoned and disabled beyond recovery for any useful purpose, may be killed.[21] Provision is generally made for compensation of the owner, if the animal has any value. The owner may, however, not be deprived of the property in the animal or its carcass without judicial process, unless his neglect of the animal amounts to abandonment of ownership.[22]

Legislative provisions may ordinarily extend to the regulation of methods of killing animals. Where, however, a particular method of killing is prescribed by the ceremonial law of some religion, the question whether it is cruel or not can probably not be determined arbitrarily by the legislature so as to conclude the courts. In Switzerland the slaughtering of animals without previous stunning (in accordance with the Mosaic Law) was prohibited by constitutional amendment.[23]

Vivisection for scientific investigation is not within the spirit or intent of the laws forbidding cruelty to animals, unless needless suffering is inflicted. As a possible subject of police legislation, vivisection presents the problem of two conflicting claims of humanity: the freedom of scientific research, and the protection of sentient beings from suffering and torture. If possible, both must be reconciled; hence the prohibition of vivisection practiced without suffering (by use of anaesthetics) would be unreasonable. Where the torture inflicted is undoubted and extreme, the considerations are closely balanced, and the decision should be with the legislature. The consensus of civilised nations is in favor of allowing the practice,

[20] Illinois Crim. Code, Sec. 50; Mass. ch. 212, Sec. 73; United States Rev. Statutes, 4386-4390.

[21] Massachusetts Rev. Laws, ch. 95, Sec. 13. The provision of the Massachusetts statute according to which exclusive power to kill the animal is given to the officers and agents of a private society, is questionable.

[22] Loesch v. Koehler, 144 Ind. 278, 35 L. R. A. 682; King v. Hayes, 80 Me. 206.

[23] Art. 25bis of Swiss Federal Constitution.

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though, if possible, under regulations mitigating its evils. In England domestic animals may be experimented upon only under a permit from a Secretary of State.[24] In Germany regulations have been issued for vivisection at universities, which are without exception under state control. They allow vivisection for serious research and where important for purposes of instruction. Its practice in lecture rooms is specially restricted, and it must be conducted by instructors or under their responsibility. Where lower animals are equally available for purposes of demonstration, higher animals may not be used. Anaesthetics must be used when not inconsistent with the nature of the experiment.[25]

The cruel treatment of animals for sport has already been referred to. Wild animals not being property, the legislature controls the right to hunt absolutely and may forbid hunting if deemed cruel. In Massachusetts, letting loose a fox to be chased and mangled by dogs has been held to be indictable cruelty.[26] The using of pigeons or other tame birds as targets for purpose of amusement or as a test of skill in marksmanship has been held to be within the statutes against cruelty in North Carolina,[27] and Colorado, [28] while in Pennsylvania[29] and Missouri[30] the courts, under the circumstances of the cases, reached a contrary conclusion. But the practice may undoubtedly be prohibited by statute as wanton and serving no useful purpose that could not be otherwise accomplished.[31] The prohibition against the killing of song birds falls under this head.[32]

PUBLIC AMUSEMENTS. §§ 250-251.

**§ 250. Ground and scope of police control.**—Public amusements have engaged the attention of the police power to a limited extent, chiefly in so far as they are conducted in public

[24] Act of 1876.

[25] Similar restrictions are advocated in the United States, and a bill to regulate vivisection in the District of Columbia has been introduced into the Senate. See copy of this Bill in Albert Leffingwell, The Vivisection Question, New Haven, 1901.

[26] Commonwealth v. Turner, 145 Mass. 296, 14 N. E. 130.

[27] State v. Porter, 112 N. C. 887.

[28] Waters v. People, 23 Colo. 33, 33 L. R. A. 836.

[29] Commonwealth v. Lewis, 140 Pa. St. 261, 11 L. R. A. 522.

[30] State v. Bogardus, 4 Mo. App. 215.

[31] Massachusetts Rev. Laws, ch. 212, Sec. 78.

[32] New York Forest, Fish and Game Law, § 33.

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places, assume the form of gambling, are connected with drinking, encourage sexual vice, or are obscene or brutal. Provisions involving either of these elements have been noticed before.

It is recognised in a general way that there is a possible tendency toward abuse or disorder inherent in public amusements,[33] and upon this ground the power very generally vested in municipal corporations to license them is justified.[34] Their tendency to encourage idleness has also been relied upon as a ground of restraint, and an old law of New York, still on the statute books, entirely forbids the exhibition or performance for gain or profit, of any puppet show, wire or rope dance, or any other side shows, acts or feats which common showmen, mountebanks or jugglers usually produce or perform.[35]

Amusements are public where admission is promiscuous and not based upon personal selection. A private dancing school has been held in England not to be a place kept for public dancing, although run for hire and gain.[36] Under a municipal power to license, regulate and prohibit amusements, it has been held in Illinois, that picnics arranged by private societies may not be interdicted as nuisances irrespective of the way in which they are conducted.[37]

As a rule it does not make any difference for the purpose of the police power, whether the entertainment is provided by the public themselves (gaming, dancing, etc.) or furnished to them in the form of exhibitions. As public dance halls easily become centers of vice, they are sometimes made the subject of special provisions, and masked balls to which admission is obtained upon payment of money, etc., may be entirely forbidden.[38] The German law distinguishes between entertain-

[33] Welch v. Stowell, 2 Dougl. (Mich.), 332, 1846; "Thousands of young men are lured to our public theatres, in consequence of their being the resort, nightly, of the profligate and abandoned; this is a nuisance."

[34] Illinois Rev. St. Cities V, § 1, No. 41, 44; Mass. Rev. Laws, ch. 102, Sec. 168-180; Boston v. Shaffer, 9 Pick. 415; Baker v. Cincinnati, 11 Ohio St. 534.

[35] 1 R. St. 660, Sec. 1.

[36] Billis v. Burghall, 2 Esp. 722.

[37] Desplaines v. Poyer, 123 Ill. 348.

[38] Mass. ch. 103, Sec. 175. Entertainments in places where liquor is sold are subject to absolute control, and some states forbid entirely the sale of liquor at theatrical performances. California Penal Code, Sec. 303.

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ments of an artistic character, and those which do not serve superior ends. Of the former class the most important is the theatre.

**§ 251. Control over theatres—Stage censorship.**[39]—In European countries the theatre is in a special manner subject to police control.

In England, when the stage lost its connection with the church, companies of players were attached to the court or noblemen, as whose servants they were designated and under whose license they acted. So in 1583 a number of selected actors were enrolled under the Master of the Revels as the Queen's company of players. The municipal authorities also claimed the right to control plays and actors within their jurisdiction, and in 1575 all players were expelled by them from the city of London. The provinces of state and municipal control were not clearly marked from each other, and we find the Privy Council and the London city authorities partly in conflict, partly in friendly communication with each other, regarding the subject.[40] Statutes of Elizabeth[41] punished common players of interludes or minstrels "not belonging to any baron of this realm or to any other honorable person of greater degree," and down to 1824 unauthorised players were treated as vagrants—since 1737, it is true, only if they played where they had no legal settlement. By Walpole's Theatre Act of that year[42] letters patent or the license of the Lord Chamberlain (who succeeded to the function of the Master of the Revels) were required for the performance of any interlude, tragedy, comedy, opera, play, farce or other entertainment of the stage, for hire or gain. Moreover, no new play, act, or scene was to be put upon the stage without first sending a copy to the Lord Chamberlain, who was given power to prohibit its performance as he should think fit. The same act prohibited the issue of licenses for provincial cities, and this metropolitan monopoly was only gradually abandoned by special acts of Parliament allowing the establishment of theatres in cities outside of London.[43] The present theatre

[39] See, also, § 239.

[40] Ordish, Early English Theatres p. 58-61; as to action of the Privy Council see Dasent Acts, 1543, p. 109.

[41] Especially 39 Eliz. ch. 4.

[42] 10 George II, ch. 28.

[43] 8 George III, ch. 10; 11 George III, ch. 16.

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act of 1843[44] requires justices' licenses in the provinces, and a license from the Lord Chamberlain in London, and retains the provision that new plays must be submitted to the Lord Chamberlain, who may prohibit them absolutely or for a time, for the preservation of good manners, decorum, or the public peace. The English law thus retains the censorship for the stage.

In France, by administrative usage, confirmed by decrees of December 30, 1852, and January 6, 1864, theatrical performances require previous authorisation, given in Paris by the minister, in the provinces by the prefect of the department, and the permit may be revoked at any time. However, the establishment of a theatre requires only notice to the authorities, and no license.

In Germany theatrical managers require a license, which may be refused only if the authorities are satisfied that the applicant does not possess the necessary moral, financial or artistic qualifications. Actors do not require a license. Censorship is recognised even without specific statutory authority as a measure for the prevention of vice or disorder, with this qualification, however, that plays may, but need not be, examined before they are performed.

In America theatres are generally classed with other kinds of shows and exhibitions in making them subject to the power of municipal license. License fees are not uncommonly graded according to the character of the entertainment, so that dramatic or operatic performances require a smaller fee than circuses or menageries.[45] The license is required with reference to the place or the kind of entertainments to be given, not with reference to the pursuit of the profession of actor, or manager, or with regard to a particular performance. The license appears to be in many cases a tax rather than a means of control, in others, however, it may be refused if the place can be shown to be disorderly or disreputable,[46] and in Massachusetts the license is revocable at pleasure.[47] The criminal law is generally adequate for dealing with obscene plays or

[44] 6 & 7 Vict. ch. 68.

[45] Chicago Rev. Code, 1897, Sec. 99.

[46] Armstrong v. Murphy, 65 N. Y. App. Div. N. Y. 123, 72 N. Y. Suppl. 473.

[47] Rev. Laws, ch. 102, Sec. 172.

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shows.[48] Censorship does not exist in America, and may be regarded as prohibited by the spirit of the constitution.[49] Legislation has been enacted with regard to places of public entertainment in the interest of public safety, to compel equal treatment of the races in the matter of admission,[50] and to secure public convenience, notably by requiring the removal of hats.[51]

[48] People v. Doris, 14 Appl. Div. N. Y. 117.

[49] Dailey v. Superior Court, 112 Cal. 94.

[50] See section 694, *infra*.

[51] So in Chicago by ordinance and by statute in Ohio, West Virginia, Louisiana, Wyoming and Utah.



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# CHAPTER X.

## CONTROL OF DEPENDENTS.

### INSANITY. §§ 252-256.

**§ 252. Restraints placed on the insane.**—Where a person is mentally so deranged, that he is dangerous to himself or others, if permitted to be at large, it is clear that he may be given into proper custody; but the statutes generally allow also the commitment of the insane, where the restraint is for his benefit, or where he is a fit subject of care, treatment or custody.[1] The commitment may be either to an asylum, public or private, or to the custody of friends or relatives,[2] the statutory provisions being generally confined to the former. Provisionally and until his case can be properly disposed of according to law, the insane may be placed under restraint without judicial process,[3] but some statutes set a limit of time to such temporary detention,[4] and in the absence of statutory provision the person imposing the restraint acts at his peril.[5] A more than provisional confinement in an asylum can be ordered only by a court, and upon notice to the alleged insane,[6] unless the condition of the patient makes a hearing dangerous or prejudicial to his health.[7] In Illinois there is ordinarily a trial by jury, and it is provided that the rights of the person whose mental condition is inquired into shall be the same as those of any defendant in a civil suit.[8] Under the same statute

[1] Massachusetts Rev. Laws, ch. 87, Sec. 83; Illinois Rev. St. ch. 85, Sec. 1; Re Dowdell, 169 Mass. 387, 47 N. E. 1033; Porter v. Ritch, 70 Conn. 235, 39 L. R. A. 353.

[2] Ill. Rev. Statutes, ch. 85, Sec. 11; New York Insanity Law, § 62.

[3] Colby v. Jackson, 12 N. H. 526; Lott v. Sweet, 33 Mich. 308; Denny v. Tyler, 3 Allen, 225.

[4] Massachusetts Rev. Laws, ch. 87, Sec. 52; Illinois Rev. St. ch. 85, Sec. 2.

[5] Van Deusen v. Newcomer, 40 Mich. 90.

[6] Chase v. Hathaway, 14 Mass. 222, as to appointment of guardian; Smith v. People, 65 Ill. 375; Gannon v. Doyle, 16 R. I. 726, 5 L. R. A. 359; Soules v. Robinson (Ind.), 60 N. E. 726, 62 N. E. 999; Re Blewitt, 131 N. Y. 541, 30 N. E. 587; Re Lambert, 134 Cal. 626, 66 Pac. 851, 55 L. R. A. 856; see collection of authorities in note 23 L. R. A. 737.

[7] Chavannes v. Priestly, 80 Ia. 316, 9 L. R. A. 193.

[8] Rev. St. ch. 85, Sec. 67.



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the trial by jury may be dispensed with where for any reason it would be inexpedient or improper; but in that case the judge must appoint a commission of qualified physicians to be chosen by himself, who shall make a personal examination of the patient and report thereon.[9] In Massachusetts the summoning of a jury is in the discretion of the judge,[10] but the judge must either see and examine the alleged insane person, or state in his final order the reason why it was not considered necessary or advisable so to do;[11] a certificate of two physicians is required, who must not be connected with the place to which an insane person may be committed.[12] The Supreme Court of the United States has sustained the provisions of the law of Alabama which required the sheriff to take the body of the alleged lunatic, and, if consistent with his health or safety, to have him present at the place of trial, although no provision is made for independent examination by the court if the lunatic does not appear at the trial.[13] The court held that the power was given to the sheriff for the purpose of securing the attendance of the alleged lunatic before the court, and that it would not be presumed that he exercised it for the purpose of preventing such attendance.

**§ 253. Provisions held defective.**—The law of California[14] provides that two authorised medical examiners must give a certificate showing that the person to be committed is insane so as to require care and treatment in a hospital, and showing the facts and circumstances upon which their opinion is based. An application for commitment accompanied by this certificate is presented to a judge by some friend of the alleged insane, or by some designated official; if by an official, notice must be given to designated relatives. The judge thereupon determines the question of insanity and makes an order of commitment, and the sheriff makes provision for the transfer of the insane to the hospital. Upon the demand of any relative or near friend in behalf of such alleged insane person, the judge shall, or he may upon his own motion, order a hearing of the application. If the person committed or some friend on his behalf is dissatisfied with the order of commitment, he may within five days demand a jury trial giving security for costs,

[9] Sec. 6.
[10] Rev. Laws, ch. 87, Sec. 42.
[11] Sec. 34.
[12] Sec. 34, 35.
[13] Simon v. Craft, 182 U. S. 427.
[14] Insanity Law, March 31, 1897.

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unless he is a poor person. The law provides that the committed insane shall be allowed to correspond without restriction with the Superior Judge and district attorney of the county from which he is committed.

These provisions were held unconstitutional as depriving the alleged insane of his liberty without due process of law.[15]

The law of New York provides for notice to the alleged insane before commitment, which, however, may be dispensed with for reasons to be stated by the judge, in which case substituted service must be directed on some designated person.[16] This substituted notice was held, by a lower court, to be insufficient to satisfy the constitutional requirement of due process,[17] but the decision contains no thorough examination of the question involved. In Missouri, a law was held unconstitutional which provided that "the alleged insane person must be notified of the proceeding, unless the probate court order such person to be brought before the court, or spread upon the records of proceedings the reason why such notice or attendance was not required;" but the law contained no substitutionary safeguards.[18]

**§ 254. Constitutional requirements.**—If in any case notice of application for an order of commitment is injurious to the insane, such notice should not be held to be a constitutional requirement; for while as a rule notice and hearing is of the essence of due process of law, this is so simply because in nearly all conceivable cases it is a requirement of justice which can do no harm, whereas in this case it would result in harm to the person intended to be benefited. The constitutional requirement should be held to be satisfied if there is substituted for actual previous notice every other safeguard which is possible under the circumstances. The following seem to be proper safeguards: examination by physicians who are free from suspicion and who should be appointed by a judge, statement of the reasons why notice would be injurious, and full freedom and opportunity to the alleged insane after commitment to correspond with officials and friends with a

[15] Re Lambert, 134 Cal. 626, 66 Pac. 851, 55 L. R. A. 856.

[16] Insanity Law, § 62.

[17] People ex rel. Sullivan v. Wendel, 68 N. Y. Suppl. 948.

[18] Rev. Stat. Missouri, ch. 39, § 3652; Hunt v. Searcy, 167 M. 158, 67 S. W. 206.

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view to obtaining a judicial hearing if he so desires. If such provision is made, the commitment is in reality only provisional; but at the same time the person receiving the alleged insane is protected from liability for false imprisonment. In so far as the law complies with these requirements it should be held to be constitutional. The California law seems defective in not providing for impartial examiners, and in dispensing with notice without showing good reason therefor.[19]

§ 255. **Right to discharge.**—It is also proper that statutory provision be made for the discharge of the person confined or restrained, when he has recovered sufficiently to be able to be at large again;[20] but even without such provision it is within the power of a court of general jurisdiction to order such discharge in a proper case upon *habeas corpus* or other appropriate proceedings.[21] The right to apply at any time for discharge has been held to reconcile even the absence of hearing in the first instance with the constitutional requirement of due process, and if upon such proceeding the petitioner is found to be insane his detention may be continued.[22]

§ 256. **Control of private asylums.**—While the statutes apparently require judicial authority for all cases of more than temporary restraint and commitment of insane persons, the interests of the insane or of the alleged insane also require that the provisions for judicial process before commitment should be supplemented by a systematic control of all asylums, public and private. The control of asylums would have to cover the following points: proper qualification of owners and managers, and adequate arrangements in the asylum for receiving and treating patients; the compliance with the prescribed conditions to be controlled by the requirement of a license; and constant supervision by public authorities, through requirement of reports, and periodical visitations. In several states,

[19] See, also, State v. Billings, 55 Minn. 467, 57 N. W. 794, 43 Am. St. Rep. 525, holding proceedings unconstitutional because physicians' examination not required to be under oath, and because no judicial safeguard prescribed for the hearing by the probate judge or court commissioner. The view taken by the court seems to be excessively strict.

[20] Illinois Rev. Statutes, ch. 85, sec. 23, 24; New York Insanity Law, § 74.

[21] Re Marquis, 85 Mo. 615.

[22] Re Dowdell, 169 Mass. 387, 47 N. E. 1033; Re Le Donne, 173 Mass. 550, 54 N. E. 244.

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the powers given to commissioners of charity or lunacy are wide enough to allow a control in all these points.[23] Such control belongs clearly to the police power for the protection of safety, health, and comfort. In California, a county ordinance prescribing arbitrary and oppressive regulations for asylums was declared unreasonable and void;[24] but the power to control the professional care of the insane by reasonable rules, and by the requirement of licenses, was fully recognised by the court.

MINORS. §§ 257-267.

§ 257. **In general.**—The natural dependence of infancy and youth finds its natural remedy in the institution of the family. The state generally leaves the care and protection of children to their parents, recognising a corresponding right of control, restraint and discipline. The law also provides through the institution of guardianship a substitute for lacking parental power. The constitutional protection of property rights undoubtedly also applies to persons under age, so that they cannot be deprived of the ultimate beneficial interest in their property, but its management may be given to others in trust for them, and they may be placed under disabilities, operating for their benefit, with regard to acts of obligation and disposition.[25]

The police power which is exercised for the benefit of minors operates partly on them exclusively, partly by restraints on parents or guardians or on other adults dealing with minors; in either case the liberty of minors is equally restricted. There is no doubt that if the law can prohibit minors from buying it can also prohibit adults from selling to them. As minors do not enjoy full constitutional liberty of action, so the normal liberty of adults applies only to their relations to each other, and the prohibition of the law is generally addressed to the adult only.

§ 258. **Restrictive legislation.**—The restraints placed upon adults in their dealings with minors relate chiefly to the contracts of sale and employment, and to the admission of children

[23] New York Laws, 1889, ch. 283; Insanity Law Act, 1; Illinois Rev. St. ch. 85, Sec. 33; Massachusetts Rev. Laws, ch. 87, Sec. 6, 36.

[24] Ex parte Whitwell, 98 Cal. 73, 19 L. R. A. 727.

[25] Lobrano v. Nelligan, 9 Wall. 295.

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to places of public amusement. The articles prohibited to be sold are deadly weapons, poisons, intoxicants, tobacco, and sometimes corrupting books; the prohibition as to tobacco does not as a rule apply to minors above a specified age;[26] and exceptions are made in some cases in favor of a minor producing a written order from his parent. The laws of several states[27] forbid the employment of children under fourteen or sixteen in any theatrical or similar exhibition. Nearly all states regulate the employment of minors in mines and factories, and sometimes in other industrial and mercantile establishments; often forbidding the employment of young children altogether, and providing limitations regarding the various grades of age. Perhaps the most systematic and elaborate regulation of this matter is contained in the Massachusetts Labor Laws of 1894.[28] The limitations relate chiefly to hours of labor, employment on dangerous machinery or unhealthful occupations, and to certificates of school attendance.

§ 259. **Constitutionality.**—The constitutionality of legislation for the protection of children or minors is rarely questioned; and the legislature is conceded a wide discretion in creating restraints. It was held in one notable case that it may forbid the employment of children for acting, singing or otherwise performing in public, merely because it believes such prohibition to be for their best interest, although the performance does not involve a direct danger to morals, decency, or of life or limb.[29] Courts would probably not hesitate to set aside restraints which would appear as perfectly unreasonable either in the matter of age or otherwise; this power is undoubted with regard to ordinances, and has been applied to a curfew ordinance forbidding minors to be alone on the streets after nine o'clock in the evening.[30] The power over children is one of reasonable regulation, and in its exercise arbitrary discrimination should be held no more constitutional than in the case of adults. But even the courts which take a very liberal view of individual liberty and are inclined to condemn paternal legislation would concede that such paternal

[26] New York Penal Code, § 290.

[27] So Massachusetts Rev. Laws, ch. 106, § 45; New York Penal Code, § 292, etc.

[28] Rev. Laws, ch. 106, Sec. 19-44.

[29] People v. Ewer, 141 N. Y. 129.

[30] Ex parte McCarver, 39 Tex. Cr. 448, 42 L. R. A. 587.

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control may be exercised over children, so especially in the choice of occupations, hours of labor, payment of wages, and everything pertaining to education, and in these matters a wide and constantly expanding legislative activity is exercised. While different grades in the age of minority have not been constitutionally fixed, it is a reasonable principle which in practice is observed, that the exercise of control must decrease as the age advances.

**§ 260. Parental right of custody and commitment to reform institutions.**—The restraints upon the employment of children are at the same time restraints upon the parental right of control. Our constitutions are silent upon family rights and relations, and we should have to regard the parental power not only as a natural right, but as a natural right above the power of the state, to declare its legislative restraint to be unconstitutional. It has, however, been held that the right of parental control is a natural, but not an inalienable one;[31] that there is no parental authority independent of the supreme power of the state;[32] that in other words the parental right is no vested right.[33] There is indeed a tendency to treat this right altogether as a power in trust, which may not only be checked in the case of manifest abuse, but the exercise of which may be directed by such rules as the legislature may establish as best calculated to promote the welfare of the child.

The principle of supreme state control has received strong expression in the statutes providing for the commitment of neglected or destitute children to reform or industrial schools, such as, within a comparatively recent period, have been established in most of the states.[34] We are here confronted with the question: Is it competent for the state to inflict upon a child such deprivation of liberty as is inseparable from commitment to an institution, where the child has committed no offense? An act of Illinois of 1867 provided that when a child

[31] Ex parte Crouse, 4 Whart. (Pa.) 9.

[32] Mercein v. People, 25 Wend. (N. Y.) 64. See People v. Pierson (N. Y.), 68 N. E. 243, as to duty under statute to furnish medical attendance.

[33] Bennett v. Bennett, 13 N. J. Eq. 114.

[34] Massachusetts Rev. Laws, ch. 83, Sec. 37-39; Illinois Rev. Statutes, Title Schools; New York Penal Code, § 291.

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between six and sixteen should be brought before a police magistrate who should have reason to believe him a vagrant or destitute of proper parental care or growing up in mendicancy, ignorance, idleness or vice, he should cause him to be brought before a judge of a higher court. The parent was then to be summoned to show cause why the child was not to be committed, and if the judge believed that the child's moral welfare and the good of society required it, he was to order him to be sent to the reform school for safe keeping, education, employment and reformation, where he was to be kept until the age of twenty-one years. The act was held to be unconstitutional, as depriving the child of his liberty, not for any offense, but for misfortune only, the confinement in the reformatory being regarded as virtual imprisonment.[35] An act of the same state of 1879 provides that any female infant who frequents streets for the purpose of begging, who having no permanent place of abode, proper parental care, or sufficient means of subsistence, is a wanderer, or who consorts with vicious persons, or is found in a house of ill-fame, may, on petition to the proper court, on notice to the parent, hearing of counsel, and the verdict of a jury, be committed to an industrial school, which is to provide a home and proper training school. This act was upheld, the court reconciling the decision with that in the Turner case on the ground that the reform school in the Turner case was looked upon as a prison, while here there was only such restraint as was essential to proper education.[36] In 1883 an act similar to that of 1879 was passed for the reformation of boys.

**§ 261. Dependence or delinquency.**—The prevailing judicial opinion is that commitment to a reform institution is not punishment. "This is not a penal statute, and the commitment to the public officers is not in the nature of punishment. * * * It does not punish the infant by confinement, nor deprive him of his liberty; it only recognises and regulates, as in providing for guardianship and apprenticeship, the parental custody, which is an incident of infancy."[37] "We cannot understand that the detention of the child at one of these schools should be considered as imprisonment any more than its detention in

[35] People v. Turner, 55 Ill. 280.
[36] Ex parte Ferrier, 103 Ill. 367.
[37] Farnham v. Pierce, 141 Mass. 203.

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the poorhouse, any more than the detention of any child at any boarding school, standing for the time in loco parentis to the child. * * * When the state, as *parens patriae*, is compelled by the misfortune of the child to assume for it parental duty, and to charge itself with its nurture, it is compelled also to assume parental authority over it."[38] But it seems to follow from the distinction thus recognised, that where the child is charged with the commission of a crime and by the commitment the fact of his having done the act is established, he has the right to have this question tried with the usual constitutional safeguards to the accused although the punishment be only commitment to the reformatory.[39]

If the state chooses to regard the delinquent child as dependent or defective and to commit it not by reason of any particular offense, but on account of its general destitution, the delinquent child is not subjected to any hardship, and, therefore, cannot complain, although incidentally such treatment may cut off the right to jury trial. Great harm, however, may be done to children who are merely destitute by placing them in the same institutions with other children who are vicious and morally depraved. Separate provision is, therefore, generally made for destitute and neglected children and for juvenile offenders.

§ 262. **Notice to parent.**—As regards the effect of the commitment upon the parent, it seems that if control and custody of the child are rights of the parent, they cannot be taken away from a parent in any particular case without due process of law. Hence the parent, unless he has relinquished his right by abandoning the child, is entitled to notice and to an opportunity to be heard. In some states commitment without notice to the parent has been upheld, upon the ground that it does not conclude the rights of the parent, who may question the legality of the commitment upon *habeas corpus* proceedings.[40] In Tennessee where a judge in committing the child ignored the statutory requirements of a proceeding in open court and acted upon his personal knowledge, the court refused to interfere by *habeas corpus* because it appeared that the detention

[38] Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328.

[39] State v. Ray, 63 N. H. 406; Prescott v. State, 19 Oh. St. 184; see Lee v. McClelland, 157 Ind. 84, 60 N. E. 692.

[40] House of Refuge v. Ryan, 37 Oh. St. 197.

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[42] Penal Code, Sec. 291. Service of process upon the child itself has been held to be unnecessary. Wilkinson v. Board of Children's Guardians, 158 Ind. 1, 62 N. E. 481.

[43] County of McLean v. Humphreys, 104 Ill. 378.

[44] 55 Illinois, 280.

[45] Act June 23, 1885.

[46] Farnham v. Pierce, 141 Mass. 403.

[47] Re Knowack, 158 N. Y. 482, 53 N. E. 676.

[48] County of McLean v. Humphreys, 104 Ill. 378.

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control may be exercised over children, so especially in the choice of occupations, hours of labor, payment of wages, and everything pertaining to education, and in these matters a wide and constantly expanding legislative activity is exercised. While different grades in the age of minority have not been constitutionally fixed, it is a reasonable principle which in practice is observed, that the exercise of control must decrease as the age advances.

§ 260. **Parental right of custody and commitment to reform institutions.**—The restraints upon the employment of children are at the same time restraints upon the parental right of control. Our constitutions are silent upon family rights and relations, and we should have to regard the parental power not only as a natural right, but as a natural right above the power of the state, to declare its legislative restraint to be unconstitutional. It has, however, been held that the right of parental control is a natural, but not an inalienable one;[31] that there is no parental authority independent of the supreme power of the state;[32] that in other words the parental right is no vested right.[33] There is indeed a tendency to treat this right altogether as a power in trust, which may not only be checked in the case of manifest abuse, but the exercise of which may be directed by such rules as the legislature may establish as best calculated to promote the welfare of the child.

The principle of supreme state control has received strong expression in the statutes providing for the commitment of neglected or destitute children to reform or industrial schools, such as, within a comparatively recent period, have been established in most of the states.[34] We are here confronted with the question: Is it competent for the state to inflict upon a child such deprivation of liberty as is inseparable from commitment to an institution, where the child has committed no offense? An act of Illinois of 1867 provided that when a child

[31] Ex parte Crouse, 4 Whart. (Pa.) 9.

[32] Mercein v. People, 25 Wend. (N. Y.) 64. See People v. Pierson (N. Y.), 68 N. E. 243, as to duty under statute to furnish medical attendance.

[33] Bennett v. Bennett, 13 N. J. Eq. 114.

[34] Massachusetts Rev. Laws, ch. 83, Sec. 37-39; Illinois Rev. Statutes, Title Schools; New York Penal Code, § 291.

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between six and sixteen should be brought before a police magistrate who should have reason to believe him a vagrant or destitute of proper parental care or growing up in mendicancy, ignorance, idleness or vice, he should cause him to be brought before a judge of a higher court. The parent was then to be summoned to show cause why the child was not to be committed, and if the judge believed that the child's moral welfare and the good of society required it, he was to order him to be sent to the reform school for safe keeping, education, employment and reformation, where he was to be kept until the age of twenty-one years. The act was held to be unconstitutional, as depriving the child of his liberty, not for any offense, but for misfortune only, the confinement in the reformatory being regarded as virtual imprisonment.[35] An act of the same state of 1879 provides that any female infant who frequents streets for the purpose of begging, who having no permanent place of abode, proper parental care, or sufficient means of subsistence, is a wanderer, or who consorts with vicious persons, or is found in a house of ill-fame, may, on petition to the proper court, on notice to the parent, hearing of counsel, and the verdict of a jury, be committed to an industrial school, which is to provide a home and proper training school. This act was upheld, the court reconciling the decision with that in the Turner case on the ground that the reform school in the Turner case was looked upon as a prison, while here there was only such restraint as was essential to proper education.[36] In 1883 an act similar to that of 1879 was passed for the reformation of boys.

**§ 261. Dependence or delinquency.**—The prevailing judicial opinion is that commitment to a reform institution is not punishment. "This is not a penal statute, and the commitment to the public officers is not in the nature of punishment. * * * It does not punish the infant by confinement, nor deprive him of his liberty; it only recognises and regulates, as in providing for guardianship and apprenticeship, the parental custody, which is an incident of infancy."[37] "We cannot understand that the detention of the child at one of these schools should be considered as imprisonment any more than its detention in

[35] People v. Turner, 55 Ill. 280.
[36] Ex parte Ferrier, 103 Ill. 367.
[37] Farnham v. Pierce, 141 Mass. 203.

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the poorhouse, any more than the detention of any child at any boarding school, standing for the time in loco parentis to the child. * * * When the state, as *parens patriae*, is compelled by the misfortune of the child to assume for it parental duty, and to charge itself with its nurture, it is compelled also to assume parental authority over it."[38] But it seems to follow from the distinction thus recognised, that where the child is charged with the commission of a crime and by the commitment the fact of his having done the act is established, he has the right to have this question tried with the usual constitutional safeguards to the accused although the punishment be only commitment to the reformatory.[39]

If the state chooses to regard the delinquent child as dependent or defective and to commit it not by reason of any particular offense, but on account of its general destitution, the delinquent child is not subjected to any hardship, and, therefore, cannot complain, although incidentally such treatment may cut off the right to jury trial. Great harm, however, may be done to children who are merely destitute by placing them in the same institutions with other children who are vicious and morally depraved. Separate provision is, therefore, generally made for destitute and neglected children and for juvenile offenders.

§ 262. **Notice to parent.**—As regards the effect of the commitment upon the parent, it seems that if control and custody of the child are rights of the parent, they cannot be taken away from a parent in any particular case without due process of law. Hence the parent, unless he has relinquished his right by abandoning the child, is entitled to notice and to an opportunity to be heard. In some states commitment without notice to the parent has been upheld, upon the ground that it does not conclude the rights of the parent, who may question the legality of the commitment upon *habeas corpus* proceedings.[40] In Tennessee where a judge in committing the child ignored the statutory requirements of a proceeding in open court and acted upon his personal knowledge, the court refused to interfere by *habeas corpus* because it appeared that the detention

[38] Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328.

[39] State v. Ray, 63 N. H. 406; Prescott v. State, 19 Oh. St. 184; see Lee v. McClelland, 157 Ind. 84, 60 N. E. 692.

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of a private institution is clearly analogous to the practice of appointing private individuals as guardians. There is no doubt that the state may exercise the fullest control over all private institutions for the care of children.[49] Statutes may also provide that the authorities having control of children shall have the same right as parents and guardians to bind out a child as an apprentice.[50] This appears to be now one of the chief applications of the custom of apprenticing minors which has largely fallen into disuse. Apprenticeship is in most of the states regulated by statute, and the constitutionality of the institution is not questioned.

**§ 264. Compulsory education.**—One of the most important of parental rights is that of directing the education of the child. While the legislative practice in the United States has for a long time left this right free and unregulated, it is certainly not beyond the exercise of the police power. Compulsory education laws have been enacted in a large number of states, and their constitutionality has been sustained where drawn in question.[1] They proceed upon the theory that the parent has no right to leave the child uneducated; and they fix the age up to which education is required. In some states the same object is also sought to be reached by forbidding employment of children except on proof of attendance at school for a prescribed period.[2]

**§ 265. Truant schools.**—A peculiar exercise of the power of compulsory education is to be found in the establishment of so-called truant or parental schools.[3] Under the law of Illinois, children who are habitual truants or persistently violate school regulations and prove uncontrollable by the ordinary school discipline, may be committed to an institution where they are kept for at least four weeks, after which time they may be discharged provisionally on parole. The institution is primarily

[49] Laws of New York, 1884, ch. 438; Massachusetts Rev. Laws, ch. 83, licenses for boarding houses for infants under two years; legislation has been enacted in recent years restraining the placing out of children from other states by charitable societies.

[50] Laws of New York, 1884, ch. 438, Sec. 5; Illinois Act June 18, 1883, Sec. 11; People v. Weissenbach, 60 N. Y. 385.

[1] State v. Bailey, 157 Ind. 324, 61 N. E. 730.

[2] Massachusetts Rev. Laws, ch. 106, Sec. 28-35.

[3] Illinois Act of 1899; Mass. Rev. Laws, ch. 46.

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a school, and no child can be committed to it who has ever been convicted of any offense punishable by confinement in any penal institution. Before committing the child, notice is given to his parent or guardian who may resist the commitment. It is not, however, necessary that the parent should be chargeable with any fault; the commitment is a measure taken against the child on account of the child's misconduct, and that the parent is deprived of custody, is an inevitable incident to such measure, the parent bearing the consequences of his child's misconduct, just as a child may be deprived of parental care, where the parent is imprisoned. Notice to the parent is necessary to charge him with the child's support at the truant school; if indeed the duty of such support can be thrown upon the parent.[4]

§ 266. **Power over private education.**[5]—The law does not interfere with the freedom of private education. The compulsory school laws recognise public and private schools as equal, and are satisfied with competent private instruction otherwise than in a school.[6] Even this, however, implies that the state must have power to judge what is competent instruction, and it may consequently insist that certain branches of knowledge be taught.[7] Most states do not forbid private schools in which instruction is conducted in another than the English language, but in Massachusetts the compulsory school law is satisfied only by attendance at a private school where the instruction in all the studies required by law is in the English language.[8] For the purpose of fostering national spirit the state may require the observance of holidays, or other appropriate practices; an act of Illinois of 1895 required that the national flag be displayed on all buildings used for educational purposes; in 1897 the act was amended so as to apply only to public buildings; but the regulation can hardly be regarded as invalid even as applied to private institutions. The requirement of a license to conduct a private school, and its visitation by public authorities, would certainly be legitimate. In

[4] Illinois Act, § 7.

[5] See, also, § 698.

[6] Illinois Act, June 11, 1897, Sec. 1; Massachusetts Rev. Laws, ch. 44, Sec. 1; New York Laws, 1894, ch. 671.

[7] So English grammar, N. Y. Laws 1894, ch. 671, § 3; Massachusetts Rev. Laws, ch. 42, Sec. 1.

[8] Rev. Laws, ch. 44, Sec. 2.

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Illinois all universities, colleges, seminaries, and academies, or other literary institutions may be required by the State Superintendent of Public Instruction to report to him.[9] In one respect, however, education must be constitutionally free, namely in so far as it is essential to the freedom of religion; for the free exercise of religion implies teaching as well as worship. The state could certainly not prescribe the religious education of children, in so far as it would thereby establish a religion, or discriminate in favor of one; nor could it suppress all private schools, since religious denominations would thereby be prevented from inculcating their doctrines in the most effectual way.

**§ 267. Power over graduate instruction.**—If regulation of education is based upon the power over minors, the same principles would not extend to graduate schools teaching persons of full age. The statement to be found in a Massachusetts case that all youths associated at a college for education are properly regarded as minors whether of 21 years of age or under, can hardly be regarded as sound.[10] In New York the power to incorporate higher institutions of learning is vested in the State Board of Regents, which may prescribe appropriate conditions; but this power applies only to institutions conferring degrees, and probably only to such as desire incorporation, or propose to assume the name of university or college.[11] That conditions may be annexed to the grant of corporate privileges is clear, and the restriction of the right to confer degrees or to use misleading designations can be sustained as an exercise of the police power to prevent fraud upon the public.

## PAUPERISM AND CHARITY. §§ 268-271.

**§ 268. General attitude of the state.**—During the Middle Ages the relief of the poor was mainly left to the Church. The earlier English legislation dealt with pauperism only through the punishment of vagabonds. Paupers who cannot be treated as criminals begin to be the object of legislation from the end of the fifteenth century. It was provided in 1531[12] that beggars not able to work should procure letters

[9] Rev. Stat. ch. 122, Sec. 5.

[10] Soper v. Harvard College, 1 Pick. 177.

[11] University Law, § 27-33.

[12] 22 Henry VIII, ch. 12.

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of license to beg. Five years later[13] open begging was prohibited, and it was provided that voluntary alms were to be gathered and distributed by the clergy; in 1552 a collector of alms was directed to be appointed by the inhabitants of the parish, who were exhorted and admonished to contribute, and since 1563 those obstinately refusing to give might be taxed by the justices of the peace. Finally, in 1601,[14] a regular system of public poor relief based on taxation was instituted, which has become the basis of our law on the subject.[15]

At present, the activity of the state for the relief of poverty and suffering consists mainly in the management of funds and institutions, i. e., in the exercise of proprietary powers. All such relief, however, also involves the taxing power, and under this head constitutional questions have arisen as to what kind of distress is relievable by the public, which need not be discussed in this connection.[16]

The police power may be called into play in this matter, first, in the relation of the state to private charity; second, in the imposition of the duty of support upon designated persons; and third, in the adoption of restrictive measures against paupers.

§ 269. **The state and private charity.**—The state recognises and encourages the relief of suffering through private agencies, and its relation towards private charity is therefore mainly one of furtherance and aid, by granting facilities for incorporation, exemption from taxation, etc. The excessive accumulation of wealth in the hands of private charitable institutions is, however, regarded as being contrary to public policy, and has given rise to restrictive legislation. This legislation consists partly in the limitation of the right to bequeath or devise, partly in a limitation of the power of the charitable institution to acquire real or other property. The right of testamentary disposition being purely statutory, its regulation or limitation is freely conceded to the legislative power.[17] The same is true of the control which the state exercises over the creation of trusts, and its power to grant

[13] 27 Henry VIII, ch. 25.

[14] By 43 Elizabeth, ch. 2.

[15] See Farnam, Poor Laws, Pol. Sc. Quarterly III, 282.

[16] Lowell v. Boston, 111 Mass. 454; North Dakota v. Nelson County, 1 N. D. 88.

[17] United States v. Perkins, 163 U. S. 625.

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or withhold corporate privileges includes the power to determine how much property a corporation shall be allowed to hold.

Apart from the matter of excessive wealth, the management of charitable funds and institutions may give rise to mischief or public scandal, and therefore call for state control. Without statutory provision, a court of equity, either as the representative of the *parens patriae*, or in the exercise of its general jurisdiction over trusts, or, perhaps, under the powers created in England by 43 Eliz. ch. 4 (if these are regarded as part of the common law in this country) may inquire into the management of an eleemosynary corporation, and redress abuses.[18] This power would be adequate to deal with perversions of the original trust, or other plain cases of mismanagement, but would hardly extend to dealing with a policy believed to be dangerous in its tendencies or consequences.

Police legislation regarding charitable institutions in the interest of safety, health, morals, and comfort would be clearly authorised on general principles; and legislation for the enforcement of prescribed principles and policy of management would in most cases be justified under the reserved power to alter and amend corporate charters.

**§ 270. Compulsory support by relatives.**—The statute of Elizabeth cast the duty of supporting impotent poor in the first place upon father and grandfather, mother and grandmother, and children.[19] The duty has been further extended by American statutes. Thus it is provided in Illinois: "That every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers or sisters of such poor person, if they, or either of them, be of sufficient ability: Provided, that when any persons become paupers from intemperance, or other bad conduct, they shall not be entitled to support from any relation, except parent or child."[20] The constitutionality of the requirement as applied to a brother was upheld by the Supreme Court of Illi-

[18] Story, Equity Jurisprudence, Sec. 1136, et seq.
1 Blackstone, 448, 454.

[20] Rev. St. ch. 107, Sec. 1; Mass. Rev. Laws, ch. 81, § 10.

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nois.[21] The court recognised the existence of a moral and natural duty on the part of the brother, and argued that the state might protect the public from loss occasioned by the neglect of that duty, by transforming the imperfect natural duty into a statutory legal obligation. The statute, it was said, did not extend to such distant collateral relatives as that the courts could pronounce it unreasonable and void. From this last remark it may be inferred that the duty cannot be indefinitely extended, and that the test of the validity of the statute must probably be found in the previous existence of a natural duty. In some of the German states, the master is required to bear the expense of the treatment of a domestic servant during illness, if neither the servant nor his relatives are able to assume the burden;[22] it must be extremely doubtful whether our courts would regard such an obligation as the enforcement of a natural duty.

§ 271. **Restrictive measures against paupers.**[23]—American statutes commonly authorise local authorities to provide for poor relief in poorhouses established for that purpose. They assume that the pauper can be induced to enter the institution, and make provision for the case that he cannot be conveniently removed on account of infirmity or sickness.[24] They do not provide for compulsory removal, and it should be noted that the English poor laws, even with the strongest desire to restrict outdoor relief, only indirectly enforced the entering into a poorhouse, by making the refusal to enter it a bar against relief. Further than this, it seems the state cannot go. Should the pauper refuse to enter, and also refuse to work where work is possible, he can be dealt with on the charge of criminal idleness, and confined by way of punishment. New York also provides that an inmate of a state almshouse who leaves the same without being discharged, is punishable for soliciting aid within a year thereafter;[25] and the solicitation of aid from the public or from strangers may probably be entirely forbidden if public relief is offered in an asylum.

On the other hand, the compulsory removal of a pauper

[21] People v. Hill, 163 Ill. 186, 46 N. E. 796.

[22] Prussian Law, November 8, 1810, Sec. 68.

[23] See, also, § 431, 491.

[24] New York Poor Law, § 20, 23.

[25] New York Poor Law, § 93.



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to the locality in which he has a settlement is not uncommonly provided for. The policy of removal was introduced in England by 13 and 14 Car. II, c. 12, made permanent by 12 Anne st. I c. 18.[26] The statutes treat this removal as a matter in which the conflicting interests of different local districts are primarily if not exclusively concerned. The removal operates of course also as a restraint upon the pauper, and is a virtual deprivation of liberty which if illegal would give a cause of action for false imprisonment. The power has so long been exercised in England and in this country, that the established practice has been held equivalent to express constitutional sanction. Upon this ground compulsory removal has been sustained in Minnesota.[27] If the exercise of the power is confined to those who apply for or accept public relief, their own act might well be held to estop them from insisting upon the free choice of a district, which they do not simply use as a place of residence, but upon which they propose to inflict themselves as a burden. The English law, however, allowed the removal of persons likely to become chargeable, a provision copied in American states and retained to the present day in Pennsylvania.[28] Such a power, in addition to being liable to the grossest abuse,[29] is so inconsistent with the freedom of migration in pursuit of livelihood, that it can probably not be maintained under our constitutional limitations. The earlier law of Massachusetts applied only to persons likely to become chargeable by reason of age, infirmity, idleness, or dissoluteness. At present the person to be removed must have become actually chargeable,[30] a change in the law which was made in England in 1795.[31] In Maine a statute requiring a common carrier bringing a person not being entitled to a settlement in the state, into the state, to remove him, if within one year he becomes chargeable to the public for support, was held to be unconstitutional as being contrary to the federal power to regulate interstate commerce. But the power of removal from place to place within the state was not denied. It appears that under the statute a person at the time of being brought into

[26] As to the original purpose of this statute see Nichols History of the English Poor Law, p. 281.

[27] Lovell v. Seeback, 45 Minn. 465, 11 L. R. A. 667.

[28] Under an act of June 13, 1836. Gilpin Overseers v. Parks Overseers, 118 Pa. St. 84.

[29] See case last cited.

[30] Revised Laws, ch. 81, § 32.

[31] 35 Geo. III, ch. 101. See King v. Parish of Ampthill, 2 B & C. 847.

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the state need not necessarily have been a pauper. That a state may exclude from its territory paupers coming from other states or from abroad, has been repeatedly intimated, though not directly decided, by the Supreme Court of the United States,[32] but the conditions under which a person may be regarded and treated as a pauper, have not been determined. The exclusion of paupers from immigration into the United States by act of Congress[33] rests upon the sovereign international power of the United States, which stands above and outside of the police power. It may therefore undoubtedly be applied to persons likely to become chargeable.

[32] New York v. Miln, 11 Pet. 101; Passenger Cases, 7 How. 282; Henderson v. New York, 92 U. S. 259; Plumley v. Massachusetts, 155 U. S. 461, 478.

[33] March 3d, 1902.

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## SECOND: ECONOMIC INTERESTS. PROTECTION AGAINST FRAUD AND OPPRESSION. PUBLIC CONVENIENCE AND ADVANTAGE.

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## CHAPTER XI.

### PROTECTION AGAINST FRAUD.

**§ 272. Preventive measures against fraud.**—The private and the criminal law as well as the police power undertake to afford protection against fraud. They deal, however, with fraudulent practices only by remedial relief, treating a transaction as void or setting it aside, giving a claim for damages or inflicting a penalty after the fraud has been committed. In either case the element of fraudulent intent is essential. The police power attempts to give an ampler protection both by adopting precautionary measures and by forbidding certain practices irrespective of an actual intent to defraud. It does not in the first instance punish fraud, but prescribes regulations and punishes their violation. The intervention of the law proceeds upon the theory that every one who invites the confidence of the public may be compelled to submit to such regulations as will guard the public as far as possible against misapprehension. Where the confidence of the public is invited to an exceptional degree, the regulations may be made specially stringent, on the ground that the business is affected with a public interest, so in banking and insurance. A great field for statutory protection against fraud is also offered in legislation regarding the organisation of corporations; but the legislative control over corporations and incorporation is based on peculiar principles, different from those governing the police power over individuals, and will be examined separately.

The field of legislation here to be examined may be divided conveniently as follows:

A. Weights, measures and packages.
B. Inspection laws.
C. Substitutes, imitations, adulterations.
D. Forms of business liable to abuse.
E. Fidelity of agents, depositaries, and trustees.



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## WEIGHTS, MEASURES AND PACKAGES. §§ 273-275.

**§ 273.** The earliest legislation for the prevention of fraud relates to weights and measures. It goes back to Anglo-Saxon times, and forms part of Magna Carta.[1] The constitution of the United States provides for uniformity of weights and measures by giving Congress power to fix their standard;[2] but Congress has enacted no compulsory legislation in execution of this power. It merely has passed an act authorising the use of the metric system;[3] and the federal government supplies the several states with certain standard weights and measures as a matter of favor and accommodation under a resolution of Congress of June 14, 1836.[4] Until superseded by act of Congress the regulation of weights and measures therefore devolves upon the states, and is provided for by state legislation.[5]

**§ 274. Determination and verification of standards.**—The statutes of the states generally fix standards to which the standards of like denomination used in trade must, under penalty, conform.[6] There are official sealers, who, upon request, or irrespective of request, try and mark weights and measures, or test them upon complaint.[7]

Statutes not unfrequently prescribe that certain common forms of package, etc., shall contain a fixed amount by weight and measure, and also that the enclosure itself shall not contain more than a prescribed weight and content, so e. g. that no baled hay shall be offered for sale with more than 10 per cent of the weight thereof in wood to the bale,[8] or that the weight of the package be stamped thereon.[9] Such provisions are found with regard to fish, fruit, hoops and staves,

[1] Cap. 25; una mensura vini per totum regnum nostrum, etc.

[2] I, 8, 5.

[3] Act July 28, 1866; Rev. Stat. Sec. 3569, 3570.

[4] V. Stat. at L. p. 133. See Ill. Rev. Stat. ch. 147, Sec. 1.

[5] Mass. Rev. L. ch. 62, New York Domestic Commerce Law, Art. 1; Ill. Rev. St. ch. 147.

[6] Mass. Rev. L. ch. 62, Sec. 31; N. Y. Penal Code, § 580-583; Ill. h. St. ch. 147, Sec. 14.

[7] Mass. Rev. L. ch. 62, Sec. 21, 37, Chic. Rev. Code, Sec. 2018; Smith v Arnold, 106 Mass. 269; Bisbee v. McAllen, 39 Minn. 143; People v. Rochester, 45 Hun (N. Y.) 102.

[8] Laws of New Jersey, 1890, ch. 236.

[9] Chic. Rev. Code, Sec. 1240.

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etc.[10] They are justified by the danger of fraud in the absence of uniformity.

Similar in character are the laws which require the weighing or measuring of articles by public authority,[11] or the keeping of scales to enable the purchaser to verify his purchase.[12] The common provision that mine companies paying the miners by weight must keep scales and must allow their employees to have a weigher of their own, is analogous. In England, every clerk or toll collector of any public market may at all reasonable times weigh or measure all goods sold, offered or exposed for sale in such market.[13] For the better enforcement of this control certain classes of goods are even required to be sold at a place set apart for that purpose.[14] Regulations of this character have been upheld in several cases.[15] They apply only to dealing by weight or measure, and do not necessarily prohibit other modes of dealing.[16]

**§ 275. Compelling certain modes of dealing.**—In a number of cases statutes prescribe that certain commodities shall be sold by a given weight or measure or in a certain package, and not otherwise; as, that bread shall be sold in loaves of two pounds or in half, three quarter or quarter loaves;[17] that coal when sold in quantities of 500 pounds or more, except by the cargo, shall be sold by weight;[18] that milk shall be sold in wine measures;[19] or that in all contracts for the sale and delivery of oats and meal, the same shall be bargained for and sold by the bushel.[20] Such laws have been sustained without much questioning. But the requirement that coal miners shall be paid by weight has been declared unconstitu-

[10] Massachusetts Rev. Laws, ch. 56, 57.

[11] Pittsburg, etc., Coal Co. v. Louisiana, 156 U. S. 590.

[12] Massachusetts Rev. Laws, ch. 57, Sec. 44-46, as to ice wagons.

[13] 41 and 42 Vict. ch. 49, Sec. 64.

[14] Chic. Rev. Code, Sec. 1245.

[15] Stokes & Gilbert v. Corporation of New York, 14 Wend. 87, 1835; Intendant v. Sorrell, 1 Jones Law (N. C.) 49, 1853; Gaines v. Coates, 51 Miss. 335; Yates v. Milwaukee, 12 Wis. 673.

[16] Richmond v. Foss, 77 Me. 590.

[17] Massachusetts Rev. Laws, ch. 57, Sec. 3; Mobile v. Yuille, 3 Ala. 137; Buffalo v. Collins, etc., Co., 57 N. Y. Suppl. 347; People v. Wagener, 86 Mich. 594; Chicago Rev. Code, Sec. 187.

[18] Libbey v. Downey, 5 Allen, 299.

[19] Miller v. Post, 1 Allen, 434.

[20] Eaton v. Kegan, 114 Mass. 433. 1874. Federal legislation contains analogous provisions for the enforcement of the internal revenue laws. See Felsenheld v. United States, 186 U. S. 126.

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tional in Illinois, the court holding that the General Assembly has no power to deny to persons in one kind of business the privilege to contract for labor and to sell their products without regard to weight, while allowing this privilege to persons in all other kinds of business.[21] Upon this principle most of the laws above mentioned would be invalid.

## INSPECTION LAWS. §§ 276-278.

**§ 276. Scope of legislation.**—In the earlier periods of their history a considerable number of states enacted so-called inspection laws, which to some extent are found on the statute books to the present day. A note in the case of Turner v. Maryland[22] gives a long list of such statutes. These acts generally applied to a limited number of articles, those in New York being: flour and meal, beef and pork, pot and pearl ashes, fish, fish and liver oil, lumber, staves or heading, flax seed, sole leather, hoops, distilled spirits, and leaf tobacco. They sometimes contained provisions regarding the treatment of the commodity to keep it from spoiling; they very often specified different grades of quality, each to be known by a certain designation and to be branded on the goods or their package; they always prescribed the manner of packing the goods (material of packing and size of package), and required that goods or packages or both before being marketed should be weighed, or weighed and inspected, and marked by official inspectors, who were entitled to a fee for their services.

The object of the inspection laws, as stated in an early New York case, is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets.[23] With regard to a number of articles the inspection laws confined themselves to packages intended for export; in other cases they applied to goods intended for the domestic market as well; and in a few cases they applied only to articles coming from other states.

**§ 277. Validity under federal constitution.**[24]—The United

[21] Millett v. People, 117 Ill. 294. So Opinion of Justices, 21 Col. 27, 39 Pac. 431.

[22] 107 U. S. 38.

[23] Clintsman v. Northrup, 8 Cow. (N. Y.) 46.

[24] See, also, § 75.

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States Supreme Court in a recent case has said "Inspection laws are not in themselves regulations of commerce;"[25] but this can only mean that it is not necessarily their sole purpose to control foreign or interstate commerce; that they do affect and therefore regulate such commerce where they apply to imports and exports cannot be denied.

The federal constitution has, however, made express provision for them,[26] by forbidding the states without the consent of Congress to lay any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, all such laws to be subject to the revision and control of Congress.

It has been said that the term imports and exports relates only to foreign countries,[27] but the case in which this statement was made upheld an inspection law operating upon products of other states.

No case appears to have arisen under any statute, nor does any statute seem to exist, requiring inspection before sending goods to another state. But the validity of inspection laws applying to exports to foreign countries has been fully recognised by the Supreme Court,[28] and it has been held that the inspection need not extend to the goods themselves, but that it is sufficient if the package is weighed and its brands are inspected. The identification of the producer by marks clearly tends toward good quality.

In so far as inspection laws apply exclusively to goods coming from other states, they have been held to be unconstitutional.[29] In the decision of the case last cited considerable doubt was cast upon the validity of all inspection laws applying to imports. But in Patapsco Guano Co. v. Board of Agriculture,[30] the Supreme Court upheld an act for the inspection of fertilisers which applied to imports from other states without discriminating against them, since it covered fertilisers manufactured in the state as well.[31] In this case the general principle was recognised that the states may inspect for the prevention of fraud and that this power prevails

[25] Patapsco &c. Company v. Board of Agriculture, 171 U. S. 345, 354.

[26] Art. I, sec. 10, No. 2.

[27] 171 U. S. 350.

[28] Turner v. Maryland, 107 U. S. 38.

[29] Voight v. Wright, 141 U. S. 62.

[30] 171 U. S. 345.

[31] As to South Carolina Dispensary law see *supra*, Sec. 233.

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over the freedom of commerce, subject to the power of Congress to annul such laws, especially on account of the excessiveness of inspection charges.

**§ 278. Restrictions under state constitutions.**—The license under the federal constitution does not, of course, remove any objection to the enactment of inspection laws that may arise under state constitutions.

The constitution of New York of 1846 abolished and forbade the future creation of all offices for the weighing, gauging, measuring, culling or inspecting of any merchandise, produce, manufacture or commodity, saving offices for the protection of the public health, for the supplying of correct standards of weights and measures, and for the protection of the state in its revenues and purchases.[32]

By this provision the old inspection laws were abrogated. They were felt to be oppressive because inspection was made a condition precedent for the marketing of the commodity to which it applied, and being accompanied by the exaction of a fee, operated virtually as a tax. The remedy has, however, gone further than the evil, and New York appears to have surrendered the power to inspect for the prevention of fraud altogether. So New York could probably not enact such legislation as exists in Illinois for the inspection of grain in warehouses, and which in Illinois has been held to be constitutional,[33] and the inspection provided for in New York under the dairy laws of that state, though undoubtedly intended in part at least to prevent the fraudulent substitution of oleomargarine for butter, can be upheld only as a sanitary measure.

Evidently the older New York laws were intended not merely to prevent the perpetration of frauds, but also to enforce a certain standard of quality, i. e. to prevent inferior grades of manufacture. The two objects are by no means identical. New York might have abandoned the policy of enforcing quality without sacrificing the power to inspect for the detection of fraud; by abolishing inspection it has not even abrogated all legislation for the securing of quality, and the present revision of the statutes retains the provisions

[32] Art. V, Sec. 8.

[33] People v. Harper, 91 Ill. 357.

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regarding the making of barrels for packing beef and pork, which are independent of powers of inspection.[34]

SUBSTITUTES, IMITATIONS, ADULTERATIONS. §§ 279-286.

**§ 279. Poor quality without deception.**—Poor quality which is visible to the eye so that there is no danger of deception, may be dealt with in the interest of public health and safety, so in the case of rotten fruit, or putrid meat. Where the injurious quality is not visible, the protection of health concurs with the prevention of fraud, and increased penalties are sometimes provided for selling unwholesome provisions without making their condition known to the buyer.[35] Where visibly poor quality affects neither health nor safety the police power does not interfere.

The trade regulations of the mediaeval guilds claimed to have for their principal object the maintenance and improvement of the quality of the goods manufactured, and under the Tudors a very large amount of legislation was enacted for the like purpose, often entitled acts for the "true making" of specified merchandise. These statutes regulated the making of worsted, dyed wool, cloth, linen, featherbeds, leather, wax, tiles, malt, oil, etc., and the work of silk throwsters, upholsterers, plasterers, painters, etc. The colonial legislation of Massachusetts regulated in similar manner the trades of bakers, brewers, coopers, and acts of like import are found in colonial New York, but on the whole this legislation has been abandoned.

**§ 280. Deceptive practices—Adulteration.**—The public is apt to be misled where inferior and superior articles naturally look alike, and where an inferior article is so treated as to look like the superior article; in the latter case we speak of imitation. Adulteration is a term applied to articles of consumption (food and drugs) and means properly the admixture of inferior or other than the usual or legally allowed ingredients, but is used in statutes so as to include substitutes and imitations, and sometimes even naturally bad quality.[36] The definition given by the laws of Massachusetts has in substance

[34] Domestic Commerce Law, § 90-92; also as to flour and meal, Article V of same law.

[35] Massachusetts Rev. Laws, ch. 56, Sec. 73.

[36] State v. Smyth, 14 R. I. 100,

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been adopted in many other states,[37] and is therefore given here in full, in so far as it relates to food:[38]

"Food shall be deemed to be adulterated: 1. If any substance has been mixed with it so as to reduce, depreciate or injuriously affect its quality, strength or purity. 2. If an inferior or cheaper substance has been substituted for it wholly or in part. 3. If any valuable or necessary constituents or ingredients have been wholly or in part taken from it. 4. If it is in imitation of or is sold under the name of another article. 5. If it consists wholly or in part of a diseased, decomposed, putrid, tainted or rotten animal or vegetable substance or article, whether manufactured or not, or in case of milk, if it is produced by a diseased animal. 6. If it is colored, coated, polished or powdered in such a manner as to conceal its damaged or inferior condition, or if by any means it is made to appear better or of greater value than it is. 7. If it contains any added substance or ingredient which is poisonous or injurious to health. 8. If it contains any added antiseptic or preservative substance, except common table salt, saltpetre, cane sugar, alcohol, vinegar, spices, or, in smoked food, the natural products of the smoking process; but the provisions of this definition shall not apply to any such article if it bears a label on which the presence and the percentage of every such antiseptic or preservative substance are clearly indicated, nor shall it apply to such portions of suitable preservative substances as are used as a surface application for preserving dried fish or meat, or as exist in animal or vegetable tissues as a natural component thereof, but it shall apply to additional quantities. * * * The provisions of this and the two preceding sections relative to food shall not apply to mixtures or compounds not injurious to health and which are recognised as ordinary articles or ingredients of articles of food, if every package sold or offered for sale is distinctly labelled as a mixture or compound with the name and per cent of each ingredient therein."

**§ 281. Commodities to which legislation applies; gold and**

51 Am. Rep. 344. Coloring which does not deteriorate or conceal deterioration held not to be adulteration. People v. Jennings (Mich.), 94 N. W. 216.

[37] Chapin, p. 325, 326; N. Y. Gen. L. ch. 25, Sec. 41; Ill. Act Apl. 24, 1899, § 14.

[38] Mass. Rev. Laws, ch. 75, § 18.

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**silver.**—Legislative provisions for the prevention of deceptive practices in the quality of articles are in the main confined to foodstuffs, drugs, confectionery, distilled and refined products, and fertilisers.

The working of gold and silver has in Europe for a long time been subject to similar legislation. We find in England a number of statutes relating to the alloy of gold and silver, the quality and marks of silver work, etc.[39] The possible methods of controlling the quality of gold and silver ware are either to require it to be proved and stamped by public authority; or to require it to be marked according to its quality by the manufacturer; or to forbid the stamping of inferior goods as gold and silver. Even where the state does not require such measures, it may provide for public marking at the request of the manufacturer. England and France require public stamping, while Germany requires the manufacturer's stamp indicating the grade of fineness. In America no legislative provisions existed in this matter until recently,[40] but statutes have been enacted in Massachusetts and New York in 1894, in Pennsylvania in 1897 and in Illinois in 1901, requiring gold and silver marked sterling to come up to a prescribed standard.

**§ 282. Oleomargarine legislation.**—The operation of the police power upon food products, where it is intended to prevent deception, is best illustrated by the legislation regarding oleomargarine, which exists in most American states, and in a number of foreign countries.[41] Oleomargarine is produced from animal fats or vegetable oils and contains the same ingredients as dairy butter, but a smaller proportion of butterine, and is therefore inferior in flavor to the best butter, and differs from dairy butter in color. It is wholesome and nutritious and cheaper than dairy butter. The hostility of the dairy interests has led to a considerable amount of restrictive legislation, which was formerly sought to be justified

[39] 29 Ed. III, ch. 20, 1354; 37 Ed. III, ch. 7, 1363; 5 H. IV, ch. 13, 1404; 18 Eliz. ch. 5, 1581.

[40] N. Y. Weekly Post, Feb. 19, 1902. "Mr. Tiffany was the first man in this country to adopt the English sterling standard of .925 fineness. It has always been a point of pride in the firm that the precedent has been sufficient to keep up in America a standard that an official 'hall mark' was required to enforce in the mother country."

[41] France, Germany, Denmark, etc.

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upon the ground that the manufacture of oleomargarine lent itself easily, and without the possibility of effective control, to unwholesome adulteration, and is now generally based upon the plea of protection against fraud. We may distinguish the following forms of legislative restraint: prohibiting the manufacture, out of any oleaginous substance other than that produced from milk or cream, of any article designed to take the place of cheese or butter;—prohibiting the manufacture from such substance of any article in imitation or semblance of butter;—prohibiting the addition of any coloring matter to make oleomargarine resemble butter;—requiring the labeling of oleomargarine so as to indicate its true character, with additional provisions as to forms of package, place of sale, etc.;—and requiring oleomargarine to be distinctively and artificially colored, or to be designated by some prejudicial name, as "adulterated butter." Federal legislation has, moreover, been enacted in the United States for the taxation of oleomargarine, a form of restraint with which we are not at present concerned.

§ 283. **Absolute prohibition.**[42]—The absolute prohibition of the manufacture and sale of oleomargarine was sustained as a legitimate exercise of the police power in Pennsylvania[43] and by the Federal Supreme Court, on the ground that it is for the legislature to determine "whether the manufacture of oleomargarine is or may be conducted in such a manner, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients." The same view has been taken in Minnesota,[44] and in Maryland.[45] The Court of Appeals of New York, however, declared a similar prohibitory statute unconstitutional, it appearing that the article was wholesome and nutritious, and that fraudulent imitations of

[42] See, also, § 62, 540.

[43] Powell v. Commonwealth, 114 Pa. State, 265; confirmed by the Supreme Court of the United States in Powell v. Pennsylvania, 127 U. S. 678.

[44] Butler v. Chambers, 36 Minn. 69.

[45] Wright v. State, 88 Md. 436, 41 Atl. 795.

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butter were covered by another act, so that there remained as the sole reason for the prohibition of the industry that it competed with another industry and reduced the price of an article of food.[46] And the Supreme Court of the United States held in a later case that while the legislative policy was conclusive as to domestic manufacture and sale, it could not extend to interstate commerce, and that the absolute prohibition of the Pennsylvania statute could not prevent the importation of pure oleomargarine into the state or its sale there in original packages.[47]

The acts of Pennsylvania and Maryland forbidding the manufacture of substitutes for butter were repealed in 1899 and 1900 respectively, and this legislation is no longer to be found in American statute books.

§ 284. **Prohibition of imitation.**—The prohibition of the manufacture of oleomargarine in imitation and semblance of yellow butter, by addition of ingredients changing its natural color, is found in many states and has been generally upheld.[48] This qualified prohibition is recognised as valid by the Supreme Court of the United States even as to oleomargarine imported from other states and sold in original packages, on the ground that the object of the statute is only to suppress false pretenses, and that the freedom of commerce among the states does not demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country.[49]

[46] People v. Marx, 99 N. Y. 377.

[47] Schollenberger v. Pennsylvania, 171 U. S. 1. The effect of this decision has been nullified by the act of Congress of May 9, 1902, which subjects oleomargarine upon arrival in a state to the laws of that state passed in the exercise of its police powers; but the decision ceased to be of judicial importance when Pennsylvania repealed the prohibitory oleomargarine legislation.

[48] People v. Arensberg, 105 N. Y. 123; McAllister v. State, 72 Md. 390; State ex rel. Waterbury v. Newton, 50 N. J. L. 534; State v. Addington, 77 Mo. 110; Ex parte Plumley, 156 Mass. 236; McCann v. Commonwealth, 198 Pa. 509; Beha v. State (Neb.), 93 N. W. 155. New York Laws, 1902, ch. 385, again prohibits the manufacture and sale of oleomargarine or any product from animal fat or vegetable oil in imitation or semblance of butter. The statute seems capable of being interpreted as absolute prohibition; but such effect would be contrary to the judgment in People v. Marx.

[49] Plumley v. Massachusetts, 155 U. S. 461.

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The validity of provisions requiring oleomargarine to be distinctly labeled as such, to be sold in prescribed forms of packages, or in rooms separate from those in which butter is sold, or that the purchaser be expressly informed of the nature of the article, is, in principle, not questioned.[50] Such provisions, which do not forbid imitation, are found in a number of states. The requirement of some laws that oleomargarine be given a color or a name calculated to prejudice purchasers and to make the article odious, is evidently of a different character; it has been upheld in several cases as an exercise of legislative discretion beyond the control of the courts, but the Supreme Court of the United States treats prejudicial requirements as virtual prohibition, and holds them to be invalid as far as interstate commerce is concerned.[51]

**§ 285. Principles governing regulation and prohibition.**— The constitutional principles regarding regulation and prohibition have been fully discussed before, and may be summarised as follows:

1. Provisions requiring labeling and marking are valid, provided their primary purpose be not to make a useful article odious.

2. The legislature may fix the standard of an article of commerce known by a certain name, and forbid the selling of an inferior article by that name.

3. The legislature may forbid imitations, subject probably to this modification, that where imitation products have come to be recognised as legitimate substitutes, the power of prohibition should not be exercised to the destruction of valuable industries.

4. The legislature should not, and probably may not, prohibit the use of harmless ingredients, which increase the intrinsic value and usefulness of the article, especially of antiseptics and preservatives.

5. The legislature should not, and probably may not, prohibit harmless and useful substitutes and compounds.

[50] State ex rel. Bayles v. Newton, 50 N. J. L. 549.

[51] State v. Marshall, 64 N. H. 549; State v. Myers, 42 W. Va. 822, 35 L. R. A. 844; State ex rel. Weideman v. Horgan, 55 Minn. 183, 56 N. W. 688; Collins v. New Hampshire, 171 U. S. 30; see § 49, 58 *supra*. Since the act of May 9, 1902, the state legislation would again be valid.

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While statutory provisions contrary to the two principles last stated have in some instances been sustained by the courts, the practice of legislation itself shows an unmistakable tendency to conform to them, as may be seen from the latter portion of the statute of Massachusetts relative to adulteration, above quoted.

**§ 286. Ordinances.**—The courts may apply even stricter limitations to ordinances, and may take cognizance of the fact that certain practices are so common as to be no longer deceptive. Thus all dealers seek to make their wares as attractive as possible, and for this purpose use appropriate methods of packing, or display. A city ordinance of Chicago undertook to prohibit the use of colored netting to cover fruit, on the ground that the reflection of the color on the fruit gave it a deceptive appearance of freshness and good quality. This ordinance was declared to be unreasonable and void,[1] yet it cannot be said that such legislation is in principle beyond the police power. The court in the case cited relied upon the recognised power of judicial tribunals to prevent an oppressive exercise of the municipal ordinance power.

FORMS OF BUSINESS LIABLE TO ABUSE. §§ 287-295.

**§ 287. Nature of danger or evil.**—A considerable amount of legislation has been enacted in restraint of certain avocations or forms of business which lend themselves easily to practices of deception either on account of the irresponsible character of the dealer, or by reason of the inducements he employs to attract customers, or by reason of the ignorance or helplessness of the parties with whom he deals. This questionable status attaches notably to peddling, auction sales, ticket brokerage, and to fire, bankrupt, gift or trade stamp sales; also to collection, employment,[2] and emigrant agencies. All these forms of business (with the exception perhaps of the trade stamp business) may under circumstances serve valuable and necessary economic purposes. The problem of the police power is therefore to suppress the illegitimate while saving the legitimate business. The object is generally sought to be accomplished by a system of licenses and securities; questions

[1] Frost v. Chicago, 178 Ill. 250, 52 N. E. 869.

[2] Price v. People, 193 Ill. 114, 61 N. E. 844.

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have arisen as to the power to prohibit these forms of business and as to their relation to the freedom of interstate and foreign commerce.[3]

**§ 288. Peddlers.**[4]—Peddling or hawking is that form of trade which is carried on by moving about from place to place with merchandise which is offered for sale with immediate delivery, the seller having no fixed place of business. It therefore does not include the soliciting of orders by commercial travellers or book canvassers,[5] or the delivering of goods previously ordered;[6] it is doubtful whether it should include, as it has been held to do, the business of a milk dealer selling milk at the door, but who has his regular daily rounds and customers.[7] Massachusetts designates as itinerant vendors those who engage in a temporary or transient business, but occupy at every place a building for the exhibition and sale of their goods.[8] The German law also restrains itinerant brokers and physicians, and the soliciting of orders by personal calls on others than merchants.[9]

The peddler is apt to be irresponsible because he has no fixed place of business, and therefore no standing in the community, and because he cannot easily be reached by legal process. For the same reason he can more easily than a settled merchant engage in illicit transactions.[10] Peddlers can also do their business at less expense than established shopkeepers, but the protection of the latter from the inconvenience of a competition which cannot be justly designated as unfair,[11] is no legitimate ground of police restraint, though mentioned

[3] For another illustration of police legislation against fraud see McDaniels v. J. J. Connelly Shoe Co., (Wash.) 71 Pac. 37; provision that purchaser of stock of merchandise in bulk must demand of the vendor a written statement of the names of his creditors and the amount of his indebtedness.

[4] See, also, § 731.

[5] Emmons v. Lewiston, 132 Ill. 380, 24 N. E. 58, 8 L. R. A. 328; New Castle v. Cutler, 15 Pa. Super. Ct. 612, 625.

[6] Stuart v. Cunningham, 88 Ia. 191, 20 L. R. A. 430.

[7] Chicago v. Bartee, 100 Ill. 57.

[8] Rev. Laws, ch. 65, Sec. 1.

[9] Trade Code, § 44.

[10] People v. Russell, 49 Mich. 617.

[11] It is very doubtful whether it is possible to give a legal definition of unfair competition which is distinguishable from fraud. The German law for the prevention of unfair competition, adopted May 27, 1896, after protracted public discussion of the matter, strikes only at practices which involve fraudulent representation regarding quality or prices of goods, sources of supply, misleading trade names,



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as such in an English case,[12] which was quoted with approval by an American court.[13] However, the license imposed upon the peddler may be justified as an attempt to equalise taxation.[14] There is less justification for peddling in the city than in the country; in the city the soliciting of custom at private residences may be as much of a nuisance as begging, and may perhaps on that ground be prohibited. Thus under an act of 1799 able-bodied persons were prohibited from peddling in Philadelphia.[15]

**§ 289. Scope of legislation.**—Legislation for the restraint or control of peddling has been a common feature of American policy since the colonial times. The history of the legislation in Massachusetts is briefly reviewed by Justice Gray in Emert v. Missouri.[16] In New York a license tax was imposed upon peddlers as early as 1714, and from 1766 to 1770 that state prohibited peddling entirely. At present the law of New York requires licenses only of peddlers in articles of the manufacture of foreign countries.[17] The requirement of a license is the usual form of regulation, sometimes with exceptions in favor of those peddling product of their own labor (they are then apt to have a settled residence),[18] or other enumerated articles; on the other hand, certain classes of goods (jewelry, wines, liquors, cards) may be excluded from peddling.[19] The German Trade Code[20] contains a full regulation of peddling upon the principle that a license is as a rule issued as a matter of right, that certain classes of persons, especially ex-convicts, are entirely excluded from it, and that under circumstances specified by the law, the license may be refused;

etc. The revealing or illegitimate use of trade secrets by employees is perhaps the only distinctive form of competition dealt with by the act which does not come under the head of misrepresentation.

[12] Attorney General v. Tongue, 12 Price, 51.

[13] State v. Montgomery, 92 Me. 433, 43 Atl. 13.

[14] Mt. Pleasant v. Clutch, 6 Iowa, 546.

[15] Commonwealth v. Brinton, 132 Pa. St. 69.

[16] 156 U. S. 296.

[17] Laws 1880, ch. 72; *quaere* as to validity of this. See § 294 *infra*.

[18] This should justify the different treatment (State v. Montgomery, 92 Me. 433, 43 Atl. 13), but the exception in favor of farmers peddling their own products was held to be unconstitutional discrimination in Minnesota (State v. Wagener, 69 Minn. 206, 38 L. R. A. 677). See Rosenbloom v. State, 89 N. W. 1053 (Neb.).

[19] Mass. Rev. Laws, ch. 65, § 14, 15.

[20] German Trade Code, § 55-63.

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certain articles are entirely forbidden, notably intoxicating liquors, second-hand clothing and bedding, gold and silver, cards, lottery tickets, shares and bonds, obscene writings, explosives and inflammables, weapons, poisons and drugs. The German restraints on peddling therefore seem to belong rather to the prevention of crime than to the prevention of fraud, and they represent the most liberal and advanced legislation on the subject.

§ 290. **Auctioneers.**—The characteristic feature of auction sales is the soliciting of competitive bids for the property to be sold, the property going (as a rule) to the highest bidder. The regulation is usually by the requirement of licenses and bonds. The law of New York confines auctioneers to one place of business, and requires of them bonds and periodical accounts; formerly auction sales were also subject to the payment of duties. In Massachusetts the license may contain conditions relative to the place of selling.[21] England seems to have no legislation restraining auction sales. France prohibits auction sales at retail of new articles of commerce, specifying a number of exceptions.[22] The German Trade Code[23] declares the business to be free, but allows the several states to provide for the appointment of auctioneers to be placed under oath.

§ 291. **Ticket brokerage.**[24]—The abuses of this business have been sought to be met in some states by legislation forbidding the sale of passage tickets by persons not having purchased the same for their own use who are not specially authorised agents of transportation companies.[25] These acts have been upheld as valid exercises of the police power in Illinois, Indiana, Minnesota and Pennsylvania.[26] The opinion in the Illinois case states the theory upon which this legislation may be sustained, viz: that transportation is a business affected with the public interest, that the sale of tickets is an incident thereto, that such business is subject to an ample legislative control, and may be directed to be conducted entirely by

[21] Rev. Laws, ch. 64, Sec. 91.
[22] Law June 25, 1841.
[23] Sec. 36.
[24] See, also, § 61.
[25] Illinois Act, April 19, 1875; New York Penal Code, Sec. 615.
[26] Burdick v. People, 149 Ill. 600; Fry v. State, 63 Ind. 552; State v. Corbett, 57 Minn. 345, 24 L. R. A. 498; Commonwealth v. Keary, 198 Pa. 500.

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transportation companies or their agents, if such policy is deemed to serve the interests of the public. Similar legislation was declared unconstitutional in New York and Texas for special reasons; in New York on the ground that the acts made the right to engage in the ticket brokerage business dependent upon the designation and appointment by transportation companies, the appointee of any one company having the right to sell tickets generally, whereby the business of independent ticket brokerage instead of being suppressed was merely monopolised at the option of any company;[27] in Texas, where the court recognised the validity of such legislation generally, on the ground that the act applied only to tickets upon which a warning was stamped, thus leaving its enforcement entirely optional with the railroad companies.[28]

**§ 292. Bankrupt and fire sales.**—The objection to these is that they are not what they pretend to be and that the public is fraudulently led to believe that superior goods can be obtained by a special chance while as a matter of fact inferior goods are offered at their full value. They are often conducted by itinerant vendors as defined by the Massachusetts statute. They are subject to the police power on the same principles as peddlers.[29] Questions have chiefly arisen with regard to the license fees. It has been said that under a municipal ordinance power they cannot be made prohibitive.[30] But in Vermont and Rhode Island the courts have considered the act of the legislature in fixing licenses for itinerant vendors to be conclusive, though admitted to be oppressive.[31] Massachusetts requires a statement under oath regarding the facts represented in the advertisements, which statement is copied in the state license.[32]

[27] People ex rel. Tyroler v. Warden of City Prison, 157 N. Y. 116, 51 N. E. 1006; a new act omitting the particular objectionable feature has since been declared unconstitutional on the ground that the state cannot totally forbid a business of this character; People v. Caldwell, 71 N. Y. Suppl. 654, affirmed without opinion, 168 N. Y. 671, 61 N. E. 1132.

[28] Jannin v. State (Texas), 51 S. W. 1126, 1899, 53 L. R. A. 349.

[29] Commonwealth v. Crowell, 156 Mass. 215, 30 N. E. 1015.

[30] State ex rel. Minces v. Schoenig, 72 Minn. 528, 75 N. W. 711; Ex parte Mosler, 8 Ohio Circuit Court, 324; City of Springfield v. Jacobs (Mo. App.), 73 S. W. 1097.

[31] State v. Harrington, 68 Vt. 622, 34 L. R. A. 100; State v. Foster, 21 R. I. 251, 43 Atl. 66, 50 L. R. A. 339.

[32] Rev. Laws, ch. 65, Sec. 8.

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**§ 293. Gift sales and trade stamps.**[33]—Gift sales were defined by a statute of New York[34] as selling or offering for sale "upon any representation, advertisement, notice, or inducement, that anything other than that which is specifically stated to be the subject of the sale or exchange is or is to be delivered or received or in any way connected with or a part of the transaction as a gift prize, premium or reward to the purchaser." The inducement now generally takes the form of a coupon exchangeable for articles to be selected by the purchaser, and these coupons are called trade or trading stamps. The policy of legislation with regard to gift sales and to the business of selling trade stamps is absolute prohibition.

In several jurisdictions the prohibition of gift sales and of trading stamps has been declared to be unconstitutional.[35] The conclusion is based upon the ground that such sales have no element of chance in it, and can therefore not be treated as forms of gambling, and that it is no function of the police power to protect the public from the temptation to extravagant or unnecessary expenditure offered by special inducements, or to protect conservative dealers from enterprising competition, and that the offering of a premium for a sale is not intrinsically fraudulent. The practice of making small gifts to purchasers or of distributing souvenirs at theatre performances is indeed entirely harmless.

The selling of trade stamps to merchants and the furnishing of premiums may, however, also be organised as a separate business, and it is against this business that trade stamp legislation is directed. The business has been so well described by the Court of Appeals of the District of Columbia, that the words of the court should be quoted at some length: "The Washington Trading Stamp Company and its agents are not merchants engaged in business as that term is commonly understood. They are not dealers in ordinary merchandise engaged in a legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to the trade. Their business is the exploitation of nothing more nor less

[33] See, also, § 60.

[34] Penal Code, 335a.

[35] People v. Gillson, 109 N. Y. 389; People v. Dycker, 76 N. Y. Suppl. 111; State v. Dalton, 22 Rh. I. 77, 48 L. R. A. 775; Young v. Com. (Va.), 45 S. E. 327.

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than a cunning device. With no stock in trade but that device, and the necessary books and stamps and so-called premiums with which to operate it successfully, they have intervened in the legitimate business carried on in the District of Columbia between seller and buyer, not for the advantage of either, but to prey upon both. They sell nothing to the person to whom they furnish the premiums. They pretend simply to act for his benefit and advantage by forcing their stamps upon a perhaps unwilling merchant who pays them in cash at the rate of $5.00 per thousand. The merchant who yields to their persuasion does so partly in the hope of obtaining the customers of another, and partly through fear of losing his own if he declines. Again, a limited number only (an apparently necessary feature of the scheme), are included in the list for the distribution of the stamps, and other merchants and dealers who cannot enter must run the risk of losing their trade or else devise some scheme to counteract the adverse agency. The stamps are sold at the rate of 50 cents per hundred to the contracting merchants, and yet purport to be redeemable with premium gifts at the assumed value of $1.00 per hundred. Unless, therefore, the so-called premiums to be distributed among the diligent collectors of stamps are grossly overvalued the scheme cannot maintain itself, for in addition to the actual cost of the premiums it has to bear the cost of the books and stamps, and the maintenance of its office and exhibition room. If its premiums should have any fair value, then the stamp company must inevitably rely upon the failure of the presentation of tickets for redemption by reason of its requirement that not less than 990 tickets—representing cash purchases of $99.00—shall be pasted in a book and produced at one time to entitle the holder to his premium. In this event the company, if it actually contemplates making good its contracts, is relying upon a lottery, i. e. the chances and advantages of its game for its expectations of profit or gain."[36]

The concluding statement that the business constitutes a lottery cannot be conceded to be correct; for the purchaser may, if he wants to, secure his premium, and the outcome is entirely within his control; and if the company's calculations are justified by the doctrine of probabilities, it does not take any chances, and it is not engaged in gambling. It is

[36] Lansburgh v. District of Columbia, 11 App. D. C. 512.

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not even an ordinary case of exploitation of public credulity, since there is no actual fraud, or misrepresentation. The legislation is in reality for the protection of the merchants who do not want the trade stamps, but are not strong enough to refuse them for fear that they may lose business to a competitor who does take them. It is therefore a case of protection from competition with which the state should have no concern. At the same time it must be admitted that the trading stamp business serves no useful purpose, and the essential constitutional question is whether a useless business may be prohibited. The question cannot be regarded as settled in point of authority.

**§ 294. Peddling, etc., and the freedom of commerce.**—The restraint on peddling and auction sales may raise a federal question when it is applied to goods imported into the state. It is clear that the products of other states cannot be discriminated against, and a statute requiring a license only of those who peddle such products has therefore been held unconstitutional.[37] The same principle would apply to products of foreign countries, for "if a tax assessed by a state injuriously discriminating against the products of a state of the union is forbidden by the constitution, a similar tax against goods imported from a foreign state is equally forbidden."[38] There would thus seem to be a fatal objection to the statute of New York which applies only to the peddling of foreign products.[39] But where there is no discrimination against foreign products it is no objection to the requirement of a license of an auctioneer or peddler that he also sells goods from other states,[40] at least where these goods have become part of the general

[37] Welton v. Missouri, 91 U. S. 275.

[38] Cook v. Pennsylvania, 97 U. S. 566.

[39] Domestic Commerce Law, Sec. 60; the legislation of Pennsylvania shows acts discriminating in favor of goods the product or manufacture of the state, but the federal question has not been passed upon by the courts; Commonwealth v. Brinton, 132 Pa. State 69; see, also, Commonwealth v. Gardner, 133 Pa. State, 284, 7 L. R. A. 666 (selling soapine manufactured in Rhode Island).

[40] Emert v. Missouri, 156 U. S. 296. In Texas it is held that a license cannot be required from one who travels around selling organs imported from other states and carrying one in his wagon which he disposes of if opportunity offers; French v. State (Texas Cr. App.), 58 S. W. 1015, 52 L. R. A. 160.

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mass of property of the state. A non-discriminating tax upon drummers is regarded as more directly a burden upon interstate transactions and hence void.[41] It should also be noted that the license paid by the drummer is purely a tax, and not, as the license required of peddlers and auctioneers, primarily a measure of police regulation.

§ 295. **Non-discriminative license fee.**—Can a non-discriminative license fee be validly imposed upon a peddler or auctioneer selling goods brought from other states in original packages? It was decided in Woodruff v. Parham[42] that a tax imposed alike on all auction sales was valid even as to auction sales of goods brought from other states in original packages, but the decision proceeds upon a distinction between imports from other states, and imports from abroad which the Supreme Court in later cases has practically ignored.[43] In Cook v. Pennsylvania[44] a tax on auction sales was declared invalid as to imported goods in original packages; in that case the statute discriminated against imports, although the decision does not rely primarily upon this discrimination, and there was a tax on sales to be collected by the auctioneer from the importer, and not a license fee exacted from the auctioneer. Under Ficklen v. The Taxing District of Shelby County[45] it would seem that a fee might be exacted of a peddler or auctioneer even if measured by his sales, although he sold in part imported goods in original packages, provided the peddler or auctioneer were a resident of the state; but the authority of that case would not support the exaction of a license fee from a non-resident coming into the state with goods to be sold at auction or by peddling in original packages, though the same fee should be required of residents.

It was held in McCall v. California[46] that the imposition of a license tax upon railroad agents was invalid as to an agent of a railroad company doing business in other states. This decision is not necessarily conclusive against the validity of a police regulation restraining ticket brokerage, though such regulation may affect sales of tickets for transportation to another state. But there is no adjudication upon this point.

[41] Robbins v. Taxing District of Shelby County, 120 U. S. 489.

[42] 8 Wall. 123.

[43] Leisy v. Hardin, 135 U. S. 100.

[44] 97 U. S. 566.

[45] 145 U. S. 1.

[46] 136 U. S. 104.

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The cases of Brown v. Maryland,[47] Robbins v. Taxing District of Shelby County,[48] Asher v. Texas,[49] Stoutenburgh v. Hennick,[50] and McCall v. California[51] are authority against the taxation, though non-discriminating, of businesses or transactions directly representing interstate commerce, but a distinction might perhaps be recognised under the authority of Plumley v. Massachusetts, between measures of taxation and the exaction of a license from peddlers and auctioneers not for the purpose of revenue but as a matter of police restraint for the prevention of fraud.

Under the decision in Austin v. Tennessee[52] it may perhaps also be held that the packages in which a peddler is apt to sell are too small to constitute original packages.

FIDELITY OF AGENTS, DEPOSITARIES, AND TRUSTEES.
§§ 296-297.

**§ 296.** The special opportunities for fraud which the position of these classes of persons carries with it, have given rise to restrictive police regulations. A considerable part of this legislation applies to corporations, and to banking and insurance, and therefore rests upon special titles of state control to be treated of later on.[53]

**§ 297. Warehousemen and commission merchants.**—Attention should here be called to the statutes regarding warehousemen and commission merchants. For the former the very elaborate regulations of Illinois may be referred to.[54] These regulations apply chiefly to warehouses of grain in which the grain of different owners is mixed together. The owner or manager of such warehouse must take out a license and give a bond;[55] the grain he receives must before being stored be inspected and graded by an official inspector and must be stored with grain of similar grade received at the same time, the grain may be inspected at any time, and the warehouse commissioners have power to examine books and owners. The warehouseman must make out and post weekly statements

[47] 12 Wheaton, 419.
[48] 120 U. S. 489.
[49] 128 U. S. 129.
[50] 129 U. S. 141.
[51] 136 U. S. 104.
[52] 179 U. S. 343.
[53] §§ 399-401, *infra*.
[54] Acts of April 13 and April 25, 1871; Rev. Stat. Title Railroads and Warehouses.
[55] The power to make this requirement was sustained by the United States Supreme Court in W. W. Cargill Co. v. Minnesota, 180 U. S. 452.

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of the amounts of each grade of grain stored. It was held that it was inconsistent with the fiduciary position of these warehousemen that they should store grain of their own because this would give them an advantage over other grain dealers;[56] before the decision of the lower court was affirmed, a statute was enacted relieving them from this disability under special inspection and regulations to be framed by the warehouse commissioners;[57] but this statute was declared to be contrary to the constitutional policy regarding warehouses and therefore void.[58] Warehousemen must also receive grain for storage without discrimination and at rates fixed by law, but this duty has no relation to the prevention of fraud, but rests on the ground that the business is one affected by a public interest.[59]

Statutes regulating the business of commission merchants have been enacted in a number of states within the last ten years.[60] These acts, applying chiefly to the consignees of farm products, provide for the taking out of licenses, the rendering of accounts and in some cases for the giving of bond by the commission merchant. The principle of such regulation was sustained in Illinois in the analogous case of butter and cheese factories on the co-operative or dividend plan,[61] and the Illinois statute has been upheld with the exception of certain administrative provisions not regarded as essential to the main purpose of the act.[62]

**§ 298. Public interest in prevention of fraud.**—There is some authority for holding that the exercise of the police power for the prevention of fraud will not be maintained if it appears that the law intends to afford protection to private parties and not to the public.

A number of states have enacted so-called bottling acts,

[56] Central Elevator Company v. People, 174 Ill. 203, 51 N. E. 254.

[57] Act May 26, 1897.

[58] Hannah v. People, 198 Ill. 77, 64 N. E. 776.

[59] Sec. 373, *infra*.

[60] West Virginia, 1891, California 1895, Washington 1895, North Dakota 1897, Illinois, Michigan, Minnesota 1899.

[61] Hawthorn v. People, 109 Ill. 302.

[62] Lasher v. People, 183 Ill. 226, 55 N. E. 663. The Michigan act, however, has been held unconstitutional as class legislation not justified by police power; People ex rel. Valentine v. Coolidge, Barien Circuit Judge, 124 Mich. 664, 50 L. R. A. 493, 83 N. W. 594.

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by which persons engaged in manufacturing, bottling or selling specified beverages in casks, barrels, kegs, bottles or cases, with marks of ownership stamped thereon, may register such marks, whereupon it is made unlawful without the consent of the owner, to fill with any beverages, or to traffic in, or to destroy, any such barrels, bottles, etc.[63] The act of Illinois was declared unconstitutional partly as being class legislation, partly because it authorised unreasonable searches, and partly because it protected bottlers, but not the public. "It is for a mere private benefit, having no relation to the police power or the protection of the public against frauds or injurious preparations; since, if the brewer or dealer consents, the bottles or kegs may be refilled with any sort of drink different from the marks, and it will be no offense under the acts, however injurious to the public."[64] Yet the provision forbidding the refilling of bottles only without the written consent of the owner was retained in the re-enactment of the statute eliminating the other features that had been declared unconstitutional.[65]

The statute of Texas forbidding the sale of railroad tickets by others than authorised agents of railroad companies was held to be unconstitutional solely for the reason that it required as a condition for its operation that the railroad company using the ticket should stamp a warning on it. It was held that there was no absolute requirement to so stamp tickets, and that the enforcement of the act was therefore left entirely optional with the railroad company.[66]

In both cases the reasoning is somewhat strained. In both measures there was some public interest, though not to the same extent as that of the private parties more immediately concerned; and the legislature might well rely upon the interest of the private parties to see to the enforcement of the act, and thus to protect the public from fraud. In other words, where a public interest coincides with a stronger private interest, it would seem to be no fatal defect to leave the

[63] Illinois Act of 1873; New York Laws 1887, ch. 339, and 1896, ch. 174; Mass. Rev. Laws, ch. 72, § 15. The New York Act was sustained in People v. Cannon, 139 N. Y. 32.

[64] Lippman v. People, 175 Ill. 101, 51 N. E. 872, 1898.

[65] Act May 11, 1901. See 205 Ill. 497.

[66] Jannin v. State, 54 S. W. 1126.

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protection of the public to private action. Practically nearly all legislation for the prevention of fraud operates in this way.

"The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion."[67]

[67] Missouri Pacific R. Co. v. Humes, 115 U. S. 512.

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## CHAPTER XII.

### PROTECTION OF DEBTORS.

§ 299. **Protection against oppression in general.**—Where the police power seeks to afford protection to peace, security or order, or against fraud and dishonesty, it may justify its interference on the ground, that its ultimate aim and effect is the prevention of distinctly illegal acts, violating specific and well-established rights. We now enter upon a field somewhat different in character. Our whole economic system is based upon a very wide liberty of dealing and contract, and it is deemed perfectly legitimate to use this liberty for the purpose of securing special advantages over others. The resulting disparity of economic conditions is not, on the whole, regarded as inconsistent with the welfare of society. Yet a different view seems to be taken of this liberty of dealing, where economic superiority is used to dictate oppressive terms, or where a degree of economic power is aimed at that is liable to result in such oppression. The theory of legislative interference seems to be in some cases, that oppression is in itself, like fraud, immoral and a wrong either against the individual affected thereby or against the public at large; in other cases, that the excessive dependence of whole classes of the community threatens, though perhaps only remotely, the social fabric with grave disturbance or ultimate subversion and ruin.

COLLECTION OF DEBTS. §§ 300-301.

§ 300. **Scope of legislation.**—The collection of debts is the maintenance of the creditor's right and therefore a function of the administration of justice. Provisions which merely tend to facilitate the enforcement of claims, by the creation of liens or other appropriate means, do not belong to the police power, unless the debt arises out of a duty which in a special manner concerns the public welfare, and special rights are given to the creditor to secure a more efficient performance of the duty.[1] There is on the other hand a considerable amount of legislation which does not tend to aid the collection of debts,

[1] Atchison, T. & St. F R. Co. v. Matthews, 174 U. S. 96.



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but restrains the creditor for the purpose of protecting debtors as a class from undue oppression. Partly this legislation aims to inhibit annoying practices, and partly it aims to give the debtor protection against an excessive burden of debt. In legislation of the latter class (usury laws, bankruptcy laws, legal tender laws) the constitutional aspect is very different according as it operates upon existing contracts or as it only affects contracts to be entered into after the enactment of the law. The operation upon existing contracts will be considered in connection with the general problem of the taking of property under the police power. In legislation of the class first mentioned the difference between existing and future contracts is immaterial.

**§ 301. Annoying practices in the collection of debts.**— Where one person charges another untruthfully with refusing to pay a just debt, and the charge is made in writing, it constitutes a libel, unless the communication is privileged, which in some jurisdictions is held to be the case where it appears that the communication is made merely for the purpose of mutual protection.[2] The idea of mutual protection may be negatived where the avowed purpose is to coerce payment, all the more so where the debt is outlawed or more is claimed than is actually due.[3] The actual existence of a debt is no justification where there is a counterclaim, or where the debtor is charged with a general habit of not paying his debts, or with being generally unworthy of credit;[4] perhaps also where the publication amounts to a boycott or conspiracy to ruin the debtor.[5] A sufficient publication is constituted by the sending of envelopes marked "Bad debt collecting agency" or in a similar way.[6]

The decisions cited having been rendered under the common law, the validity of statutes affixing a penalty to the same

[2] Windisch-Muhlhauser Brewing Co. v. Bacom, 21 Ky. L. Rep. 928, 53 S. W. 520; McDermott v. Union Credit Co., 76 Minn. 84, 78 N. W. 967, 79 N. W. 673; Reynolds v. Plumbers' Material Protective Association, 63 N. Y. Suppl. 303.

[3] State v. Armstrong, 106 Mo. 395, 13 L. R. A. 419; Muetze v. Tuteur, 77 Wis. 236, 9 L. R. A. 86.

[4] Weston v. Barnicoat, 175 Mass. 454, 49 L. R. A. 612, 56 N. E. 619; Nettles v. Sommervell, 6 Tex. Civ. App. 627, 25 S. W. 658.

[5] McIntyre v. Weinert, 195 Pa. 52, 45 Atl. 666.

[6] State v. Armstrong, 106 Mo. 395, 13 L. R. A. 419, Muetze v. Tuteur 77 Wis. 236.

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acts would not be questioned. A somewhat different question would be presented by legislation absolutely forbidding collection practices of an annoying character. A statute of Maine forbids the public advertisement for sale of debts, demands or judgments,[7] a statute of Massachusetts makes it unlawful for debt collectors to wear striking costumes.[8] Laws of this character go beyond the protection against libel, for they apply to just as well as unjust claims, they benefit the dishonest debtor as well as one who is harassed without good cause. Two arguments may be used to justify such legislation: first, that since it is almost inevitable that now and then injustice will be done by these forms of collection, the law may forbid them altogether, on the ground that measures for the prevention of an abuse may strike at the whole practice liable to abuse, unless such practice is essential to the enjoyment of valuable social and economic rights; second, that the enforcement of even a just debt must avoid methods which are humiliating or create a public scandal. On both these grounds the statute of Massachusetts is easily justified.

If the Maine law is to be upheld it must be on the ground that the advertisement of lists of debts for sale is merely a colorable device for harassing debtors. If advertising demands for sale is not a necessary or usual means of disposing of them, the legislature may take notice of the real purpose of the practice. It is therefore not necessary to hold that the assignment of choses in action, not being recognised by the common law, is within the absolute control of the legislature. If the law may forbid advertisement of debts for sales, it may also forbid the publication of lists of debtors, since that is the true intent of the former practice. To sustain such prohibition, the practice must be regarded as going beyond what is necessary or fair for the protection of creditors' interests: the coercion of the debtor must not assume the form of an appeal to public obloquy and a provocation of public disgrace. But a creditor must be allowed some means of moral coercion, and the circulation of lists among the trade for the purpose of warning others and cutting off credit should be held to be a legitimate and a constitutional right.[9]

[7] Laws 1899, ch. 112.

[8] Laws 1899, ch. 238, Rev. Laws ch. 212, § 88.

[9] In Hartnett v. Plumbers' Supply Association of New England, 169 Mass. 229, 47 N. E. 1002, 38

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USURY LAWS. §§ 302-304.

**§ 302. History of legislation.**—Legislation against the exaction of excessive rates of interest for the use of money loaned is of ancient date. The history of the Roman law shows many and varying provisions upon this subject; as the law was finally settled by Justinian, interest above a certain rate could not be legally stipulated, and, if paid, could be recovered, and professional usury made infamous.[10] The Canon law, which in this matter became the common law of Christianity, prohibited Christians from taking any interest whatever, so that the loaning of money would have become a monopoly of the Jews. The principle was unenforceable and was either directly ignored or circumvented by various devices: purchase of rents and annuities, partnership with stipulated and guaranteed profits, charges for bills of exchange, and compensation for risk of loss and for loss of opportunity of profitable investment of the money.[11]

In England usury was an ecclesiastical offense, and was also

L. R. A. 194, it was held that the application of such methods was beyond the corporate powers of an association formed for other purposes; but that a right is not enjoyed by some corporation, does not prove that it is not a common or even a constitutional right.

*Note.*—As to prohibition of assignment of claims against wage-earners, or of garnishment of their wages, see Singer Mfg. Co. v. Fleming, 39 Neb. 679, 58 N. W. 226. The right to assign choses in action and to garnishee claims is not a common law right and is therefore within the power of the legislature, subject to the principles of equality. Laws are not uncommon (Illinois, Indiana, Iowa, Minnesota, Nebraska, Ohio, Pennsylvania, South Dakota, Wisconsin) forbidding the sending out of the state by assignment or otherwise of claims for debt against residents in order to have the same collected by attachment proceedings in the courts of another state. This prohibition has been upheld in the Nebraska case last cited, also in Sweeny v. Hunter, 145 Pa. St. 363. The prohibition was held to be contrary to the principle of equality in Re Flukes, 157 Mo. 125, 51 L. R. A. 176.

[10] Digest 12, 6: 26 pr.; Code 2, 11: 20.

[11] Endemann, Romanistisch-Kanonistiche Wirtschaftslehre. Roscher I. 574, quotes the following form of evidence of indebtedness: I acknowledge having accepted from Titius 1000 gold pieces to expend them in legitimate business; and in place of an uncertain higher profit that might accrue to him from such business, I promise to pay him annually six per centum, and to guarantee him against the risk of the loss of said sum.

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dealt with by several statutes.[12] "The legal effect of these provisions seems to have been to declare all taking of interest for money to be illegal, and a detestable sin, but not punishable otherwise than by a forfeiture of the interest taken unless it exceeded ten per cent, in which case it was both a temporal and a spiritual offense."[13] Under the influence of economic doctrines, showing the futility or harmfulness of the customary usury legislation, the whole legislation was repealed in 1854, but extortionate practices of professional money lenders have again been dealt with by legislation enacted in 1900. In Germany the law likewise confines itself to restraining aggravated forms of usury, i. e. cases in which the lender takes an unconscionable advantage of the necessities or of the improvidence of the borrower in order to charge a plainly exorbitant rate of interest.[14] Austria punishes the stipulation of terms, which by reason of the excessive advantages conceded to the lender tend to induce the economic ruin of the borrower, where the latter through mental weakness, inexperience, or excitement fails to realise the true character of the transaction.[15]

§ 303. **American legislation.**—In America, a minority of states[16] allows contractual stipulation for any rate of interest, fixing a legal rate only for cases in which the parties do not otherwise provide. In most of the states, however, a maximum rate, varying from six to twelve per cent, is fixed by law, and all contracts stipulating for a higher rate are declared usurious. Either the excess of interest, or the whole of the interest, or even the principal, is then forfeited as a penalty.[17]

The operation of general usury laws is modified or taken away by statutory provisions varying in different states and applicable chiefly to corporations, banks, pawnbrokers, and building and loan associations.[18] Corporations as borrowers are sometimes forbidden to interpose the defense of the usury

[12] Especially 37 Henry VIII, c. 9, and 13 Eliz. c. 8.

[13] Stephen, History of the Criminal Law, III, p. 198.

[14] Penal Code, Sec. 302, a-d. The laws of the several states regarding pawnbrokers are not affected by this legislation.

[15] Law May 28, 1881.

[16] Stimson Am. Stat. Law, Sec. 4812, enumerates nine.

[17] Stimson, § 4832.

[18] Stimson, § 4813-4819.



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laws.[19] In New York the penalties for usury are reduced in favor of banks and bankers, in order to place them on an equality in that respect with national banks.[20] Moreover any rate of interest may be stipulated for in that state on call loans on $5,000 and upwards secured by negotiable collateral.[21] In a number of states a higher than the otherwise maximum legal rate of interest may be charged by pawnbrokers;[22] on the other hand the taking of excessive interest by pawnbrokers is sometimes made a misdemeanor.[23] In Illinois incorporated pawners' societies may charge twice the legal rate of interest, but may not distribute more than 6 per cent dividends annually.[24] Massachusetts fixes a maximum rate of interest only for loans secured by pledge of personal property.[25] The premiums bid for loans by building and loan associations to their members are commonly declared to be not usurious.[26]

**§ 304. Question of constitutionality.**[27]—Usury legislation is undeniably a species of regulation of charges, and, upon principle, open to the constitutional doubts which have been felt with regard to this form of legislative control in general. Loaning money (unless by banks or pawnbrokers) is neither a business affected with a public interest, nor one particularly concerning safety or morals. That the legislation originated as a relief from absolute prohibition, and was in the beginning in the nature of a license, is an inadequate theoretical justification, since antiquated and exploded theories should not be allowed to control constitutional principles. But the legislation is so firmly established that if regulation of charges is regarded as a valid form of exercise of the police power subject to the principle of equality, the singling out of that particular class of charges may at least be justified on the ground of historical tradition.

As the maximum legal rate of interest is always above the ruling commercial rate, there can be no question of confiscatory regulation.

[19] Ill. Rev. Stat. ch. 74, § 11; N. Y. L. 1850, ch. 172; Stimson, § 4835.

[20] New York Banking Law, § 55.

[21] Laws of 1882, ch. 237.

[22] So in Illinois and California; sustained Jackson v. Shawl, 29 Cal. 267.

[23] New York Laws, 1895, ch. 75; Ill. Rev. Stat. ch. 107a, § 2.

[24] Act March 29, 1899, § 5, 10.

[25] Rev. Laws, ch. 102, § 47-68.

[26] So New York Banking Law, § 178; Illinois Homestead Loan Ass'n Act, § 61.

[27] See, also, § 555.

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Arbitrary discriminations in depriving of the benefit or relieving of the restraint of the usury laws might be held to violate the principle of equality, but the singling out of the special classes of loans above mentioned has not been and cannot properly be held arbitrary. If corporations are forbidden to interpose the defence of usury, this may be justified on the ground that they exist merely by legislative authority and that their limited liability increases the risk of the lender. Some question has been made with regard to laws sanctioning the payment of premiums in addition to the highest rate of interest on loans made by building associations, and in Kentucky they have been condemned as conferring special privileges upon a particular class of corporations,[28] but it is generally recognised that the co-operative character of this plan of loaning money makes the general considerations underlying usury legislation inapplicable.[29]

BANKRUPTCY LEGISLATION. §§ 305-307.

**§ 305. Power to relieve insolvents.**—Legislation regarding insolvent debtors or bankrupts rests upon considerations of policy which by common consent modify the application of strict justice. The judicial enforcement of obligations is essential to the maintenance of private right; but as the law need not recognise every obligation assumed as valid, so it may set limits and bounds to the compulsory processes which give effect to valid obligations. It does so by the enactment of statutes of limitations. It may restrict the creditor's remedy in point of substance as well as in point of time. Thus all modern systems of law have abandoned imprisonment as a normal method of collecting debts; the common law did not allow lands to be sold on execution for simple debts. Just as the liberty of contract does not mean that a man may be allowed to bind himself to servitude for life, so the enforce-

[28] Gordon v. Winchester Bldg. etc. Assoc'n, 12 Bush, 110; Henderson Bldg. Loan Assoc'n v. Johnson, 88 Ky. 191.

[29] McLaughlin v. Citizens Bldg. Loan Assoc'n, 62 Ind. 264, 274; Holmes v. Smythe, 100 Ill. 413; Winget v. Quincy B. & H. Assoc'n, 128 Ill. 67, 21 N. E. 12; People's Bldg. Loan Assoc'n of Saginaw Co. v. Billing, 104 Mich. 186; Iowa Savings & Loan Assoc'n v. Heidt, 107 Ia. 297, 43 L. R. A. 689; Archer v. Baltimore B. & L. Assoc'n, 45 W. Va. 37; Vermont Loan & Trust Assoc'n v. Whithed, 2 N. D. 82; Endlich, Law of Bldg. Associations, § 342-366.

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ment of contracts and obligations does not require that a debtor should be stripped of all his substance or of the bare means of existence to satisfy his creditor. Considerable variations of policy are possible in the extent of exemption allowed to the debtor; but as long as such laws are general and apply only to debts to be contracted in the future, no constitutional question arises with regard to them.

**§ 306. Prospective state insolvency laws.**—Insolvency and bankruptcy acts belong to the same general order of legislation. Those insolvent laws which give relief only from imprisonment, are in reality mere exemption laws, the distinguishing feature of bankruptcy legislation being the discharge of the debtor from the obligation of his debts, so that his after-acquired property is entirely free.[30] Bankruptcy laws may thus be said to operate upon the obligation of contracts and not merely upon the remedy. This was the point insisted upon by Chief Justice Marshall in his dissent in the case of Ogden v. Saunders.[31] The Supreme Court had held in Sturges v. Crowninshield[32] that a state insolvent law discharging a debtor from debts contracted before the enactment of the law was unconstitutional as impairing the obligation of contracts, but held in Ogden v. Saunders that a similar law operating upon debts contracted in the future was not within the prohibition, since the existing law modified the obligation of the contract *ab initio*. Even such a law, however, was refused any extra-territorial effect upon the rights of non-resident creditors; hence the discharge of the debtor has never become a conspicuous feature of state insolvent laws.

There was considerable ground for the contention so strongly urged by Marshall that the prohibition of state legislation impairing the obligation of contracts, in connection with the power given to Congress to enact uniform bankruptcy laws, was intended to remove the power of bankruptcy legislation from the states; but the contemporaneous construction of the constitution was otherwise,[33] and the Supreme Court in adopting it as its own, and confining the constitutional prohibition to bankruptcy legislation of retrospective operation, conceded to the states a power which is everywhere regarded as incidental to the legislation concerning the relation of creditor and

[30] Ogden v. Saunders, 12 Wheat. 213, 263, 264.

[31] 12 Wheat. 213.

[32] 4 Wheat. 122.

[33] 12 Wheat. 278.

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debtor, and which has been exercised by all the states except during the brief periods in which the United States has assumed its exercise by the enactment of national bankruptcy laws.

**§ 307. Retrospective bankruptcy legislation.**[34]—Retrospective bankruptcy legislation undoubtedly impairs the obligation of contracts, and under the Federal Constitution, is therefore beyond the power of the states. It is a power which can be used for the arbitrary spoliation of creditors, but a reasonable bankruptcy law does not cease to be reasonable because it operates upon existing contracts. This is therefore a species of retrospective legislation which is sanctioned by custom, and should not be regarded as taking property without due process of law. The Bankruptcy acts of the United States have always, without question, been conceded retroactive operation although Congress is forbidden to take property without due process of law. The grant of the power of bankruptcy legislation contains an implied exception from the general limitation of the fifth amendment.

## LEGISLATION AGAINST CONTRACTS PAYABLE IN GOLD. §§ 308-309.

**§ 308. Statutory provisions.**—In recent years several states (South Dakota, Colorado, Kansas, Washington, and for a time Idaho), have enacted measures which bear upon the subject of legal tender. South Dakota[35] provides that it shall be unlawful for any owner of any kind of evidence of indebtedness to require that principal or interest shall be paid in any certain kind of lawful money, and that the debt shall be deemed paid when the specified amount, with legal interest, is tendered in any money that is full legal tender for public or private debts. Kansas[36] provides that after the passage of the act all obligations of debt, judgments and executions stated in terms of dollars and to be paid in money, if not dischargeable in United States legal tender notes shall be payable in either the standard silver or gold coin authorised by the Congress of the United States, all stipulations in the contract to the contrary notwithstanding. There is hardly any doubt that the Kansas statute cannot be sustained with regard to contracts payable in gold remaining undischarged at the time of its enactment.[37]

[34] See, also, § 557.

[35] L. 1891, ch. 85.

[36] L. 1893, ch. 99.

[37] Bronson v. Rodes, 7 Wall. 229.

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§ 309. **Constitutionality.**—As applied to future contracts, this legislation has been held to be unconstitutional on the ground that the subject is one upon which a state cannot legislate, but which belongs exclusively to the general government.[38] For this view some reliance seems to be placed upon the case of Woodruff v. Mississippi.[39] In that case the Supreme Court held that where a municipality had power to borrow money and issued its bonds declaring itself to be indebted in a certain sum in gold coin, which sum it promised to pay (without adding again: in gold coin), a ruling of the state court that the issue of such bonds was ultra vires and void, raised a federal question, and the Supreme Court, construing the obligations as being payable in currency, held them to be valid. Justice Field, in a concurring opinion, declared that an obligation cannot be held to be invalid simply because it is payable in a specific kind of lawful money of the United States. However, the question of the power of the state legislature to forbid at least the municipalities of the state to contract other than currency obligations is expressly left open in the principal opinion.

In the absence of conflicting federal rights it would be within the police power of the state to forbid parties to enter into contracts of debt depriving the debtor of the right to pay whatever may be legal tender at the time of payment, for if the stipulation may reasonably be regarded as likely to work oppression, such an impairment of the freedom of contract would be justifiable.

However, the United States, by declaring gold coin to be money, must be deemed to have conferred upon individuals not only the right to use it as such, but also the right to secure its future possession by contracts which are in other respects lawful. And this right Congress has recognised by the act of 1878 making silver dollars legal tender "except where otherwise expressly stipulated in the contract."[40]

[38] Dennis v. Moses, 18 Wash. 537, 40 L. R. A. 302, 52 Pac. 333. This was not the main ground of the decision.

[39] Woodruff v. Mississippi, 162 U. S. 291.

[40] First Suppl. Rev. Stat. p. 152.

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## CHAPTER XIII.

### PROTECTION OF LABORERS.[1]

**§ 310. In general.**—The very large amount of legislation which exists in all the states for the protection of labor[2] represents different phases of governmental power and of the police power.

The establishment of bureaus of labor statistics[3] does not involve any compulsory action of the state. Boards of conciliation and arbitration having no judicial powers (except perhaps the power to issue subpoenas, administer oaths and call for and examine books and papers), exercise merely a moral influence unless labor disputes are voluntarily submitted to their decision. The regulation of convict labor in state prisons,[4] and of free labor employed by the state itself,[5] is an exercise of the proprietary power, and the control which the state exercises over its municipal subdivisions may be used to some extent to prescribe terms of employment of labor on public works.[6]

Legislation for the protection of labor which restrains individual liberty and property rights falls under the police power, but the object is not necessarily an economic one. The great mass of labor legislation is enacted in the interest of health

[1] See, also, § 437, 448-452, 498-503, 735.

[2] Down to 1896 the statutes have been collected in a special report of the United States Commissioner of Labor entitled Labor Laws of the United States; see also Industrial Commission Report 1900, Vol. 5.

[3] In nearly all states, Industrial Comm. Rep. V, p. 162.

[4] This forms the subject of a separate volume of the Report of the Industrial Commission of 1900, Vol. III.

[5] Industrial Comm. Rep. V, p. 25.

[6] Idaho Constitution article 13, Sec. 21; "Not more than 8 hours actual work shall constitute a lawful day's work on all state and municipal work;" prohibition of employment of aliens, Illinois Rev. St. ch. 6, Sec. 12-17. The constitutional questions as to the power of the state over municipal corporations in dictating terms upon which they or the contractors undertaking public improvements may employ labor do not fall within the scope of this treatise; see the somewhat novel doctrine advanced in People v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605, followed in City of Cleveland v. Clements Bros. Construction Co. (Ohio), 65 N. E. 885, and Street v. Varney Electrical Supply Co. (Ind.), 66 N. E. 895. But see Atkin v. Kansas, 191 U. S. —.



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and safety, and in factory and mining regulations we find, especially where women and young persons are concerned, provisions to promote decency and comfort. Laws of this character rest upon a clear and undisputed title of public power.

The control of the labor of children likewise falls under a special head of the police power, as has been shown before.

§ 311. **Restriction of hours of labor of females.**—Special provisions also exist for women. In addition to those which look toward comfort and decency,[7] prohibitions are found in some of the most important mining states against the employment of women in mines,[8] and the principal manufacturing states[9] restrict the hours of labor of women in manufacturing establishments or workshops, usually to sixty hours per week, or ten hours per day with such increase as to make a shorter day for Saturday.[10] New York also forbids night labor of women in factories.

§ 312. **Commonwealth v. Hamilton Mfg. Co.**—The restriction of woman labor in factories to sixty hours per week was upheld by the Supreme Court of Massachusetts in Commonwealth v. Hamilton Manufacturing Company,[11] perhaps the earliest decision dealing with the question of the validity of labor legislation, but assuming the validity almost as a matter of course, without extended discussion or citation of authorities. "It does not forbid any person, firm or corporation from employing as many persons, or as much labor, as such person, firm or corporation may desire; nor does it forbid any person to work as many hours a day, or a week, as he chooses. It merely provides that in an employment which the legislature has evidently deemed to some extent dangerous to health, no person shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legis-

[7] Seats for female employees, separate toilet rooms, etc.

[8] Pennsylvania, Indiana, Washington, Wyoming, West Virginia.

[9] Massachusetts, Rhode Island, Connecticut, New Hampshire, New Jersey, New York, Pennsylvania, Nebraska, Michigan, Virginia, South Carolina, Georgia, Louisiana.

[10] Industrial Comm. Rep. V, p. 30-31.

[11] 120 Mass. 383, 1876. A law limiting the hours of labor of women in manufacturing, mechanical and mercantile establishments to sixty hours per week has been sustained in Nebraska. Wenham v. State, 91 N. W. 421, 58 L. R. A. 825.

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lation may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources of power. This principle has been so frequently recognised in this commonwealth that reference to the decisions is unnecessary. It is also said that the law violates the right of Mary Shirley to labor in accordance with her own judgment as to the number of hours she shall work. The obvious and conclusive reply to this is that the law does not limit her right to labor as many hours per day or per week as she may desire; it does not in terms forbid her laboring in any particular business or occupation as many hours per day or per week as she may desire; it merely prohibits her being employed continuously in the same service more than a certain number of hours per day or week, which is so clearly within the power of the legislature that it becomes unnecessary to inquire whether it is a matter of grievance of which the defendant has a right to complain." The passage quoted points to the distinction between direct restraint of the laborer, and indirect restraint operating through prohibitions placed upon the employer. As a matter of policy the latter method is more easily enforced, and therefore preferred; but as a matter of power both methods must be valid alike; since the legislature may not do indirectly what it may not do directly. It must be assumed that women were to be limited with regard to the time of their work in factories, and it would be strange if the law allowed an unlimited number of hours provided it were distributed between different factories. The decision should, therefore, be interpreted as meaning that the legislation was intended to be confined to factory work, leaving the question open whether the legislative power extends to the restriction of private work or occupation. Such a restriction would raise the problem of the power to interfere with private conduct.

§ 313. **Ritchie v. People.**—In Illinois a statute was enacted in 1893 providing that "no female shall be employed in any factory or workshop more than 8 hours in any one day, or 48 hours in any one week." The provision was declared unconstitutional partly upon the ground that there was an arbitrary discrimination between manufacturers and merchants, partly on the ground that there was such discrimination against women, partly on the ground that the right of contracting was

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both liberty and property under the constitution, and that the right to labor and employ labor and make contracts in respect thereto, upon such terms as may be agreed upon between the parties, is included in the constitutional guaranty that no person shall be deprived of life, liberty or property without due process of law, that the limitation upon this right must in every case be based upon some special condition, and not on the absolute right of control, and that there is no reasonable ground for fixing upon eight hours a day as the limit within which woman can work without injury to her physique and beyond which if she work injury will necessarily follow.[12] The case of Commonwealth v. Hamilton Manufacturing Company was said not to be in line with the current of authority.

The opinion in Ritchie v. People can hardly command unqualified assent either in the light of reason or authority. The statement that the Massachusetts decision is not in line with the current of authority is unwarranted, for the right to restrict the labor of women in factories had not been passed upon by other courts of last resort, and the precedent of Massachusetts has on the contrary furnished the authority for similar legislation in a number of other states. The limitation of the law to factories is not in itself unconstitutional discrimination; the law of Illinois forbids women labor in mines, and the work in factories and workshops is as different from that in mercantile establishments or in domestic service as that in mines is from either;[13] all civilised manufacturing states have factory legislation and thus recognise the existence of special conditions of labor in factories. Still less is the singling out of women in the matter of factory work an arbitrary discrimination. It is not by the assertion of vague principles of liberty, or by the unqualified denunciation of class legislation, that the limits of the police power can be determined.

**§ 314. Question whether measure sanitary or social.**—If we look upon limitation of hours of labor in factories as a measure of physical protection, a discrimination between men and women cannot be condemned as arbitrary. And if an exces-

[12] Ritchie v. People, 155 Ill. 98.

[13] Factory labor is distinguished from mercantile and domestic labor by the monotonous character of the employment which makes long hours specially detrimental; see Wells, Recent Economic Changes, p. 94.

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sive number of hours is regarded as detrimental to women, it may be forbidden, although the labor of men remain unregulated; for there may be practically no need for legislative limitation of men's labor to (say) 11 or 12 hours if that number is not as a rule exceeded; and it would be fatal to all police legislation to hold that it must deal with all evils though requiring different remedies or with none.[14] But if we look upon limitation of hours of labor as a measure of economic and social advancement, and if that principle of limitation be conceded as legitimate, the discrimination between men and women can no longer be based upon considerations of physical strength, but must be justified by specific economic and social conditions of employment as affected by difference of sex.

It is clear that some special provisions regarding women's labor are justified by their greater physical weakness. Their labor in mines is interdicted largely on that ground, and the prohibition of night labor in factories may be explained in like manner. The German Trade Code[15] prohibits factory work on the part of mothers for the period of four weeks after the birth of a child, and the Federal Council may prohibit any woman's factory labor found specially detrimental to health. A cutting down of an unreasonable number of hours, or the provision for intervals of rest, falls within the same principle. But it may well be conceded that the control of hours of labor is not absolute, and that the courts are not bound to accept the plea of physical necessity as conclusive. If, however, the limitation of hours is merely a measure of social advancement, a separate rule for all women for all purposes hardly represents a reasonable classification, for in the effort to make a living men and women have a right to the greatest possible equality before the law. The German Trade Code[16] provides that women who attend to the household are entitled to an extra half hour for the midday meal, unless an hour and a half is given for the latter; here we have a social measure justified by the special duties of women, and it is perhaps possible that other cases (apart from provisions for decency and morality) may arise in which all women as distinguished from all men are entitled to distinct consideration or vice

[14] Vogel v. Pekoc, 157 Ill. 339, 30 L. R. A. 491.

[15] Sec. 137.

[16] Sec. 137.

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versa; so the law may require time to be given to men to vote, a respite from work in which women do not participate; but to establish a Saturday half holiday for men only, or for women only, would be clearly unequal legislation.

Applying these considerations to the existing statutes, there seems to be a general consensus of opinion that ten hours factory labor, or sixty hours per week, is a reasonable maximum for women, and that the observance of that limitation is required by the care for their physical welfare.[17] From this it does not follow that the same is true of eight hours, or that the choice of hours is entirely within the discretion of the legislature. This is one of the cases in which reasonableness is a matter of degree, to be determined in the last resort by the courts. Conceding that eight hours is not an unreasonably short day, yet it is generally recognised that the eight hour day is not a requirement of the public health, but is desired as a measure to raise the social and economic standard of the working classes.[18] In that aspect women are not entitled to a preference over men. This last consideration seems sufficient to support the decision of the Supreme Court of Illinois, without an endorsement of all that was said with reference to the constitutional right to contract and legislative control over it.

§ 315. **Legislation for adult laborers.**—In turning to the legislation for the protection of adult laborers irrespective of sex, we may classify it as relating to the following subjects: hours of labor, rates of wages, time of payment, form of pay, imposed conditions and penalties, coercion, discharge and clearance cards, black-listing, and employment brokerage or intelligence offices.

§ 316. **Hours of labor.**[19]—Where the law fixes upon a certain number of hours as a day's work, but allows special contracts for additional work, there is simply a rule of interpretation and not a police regulation. Where the law allows overwork for an extra compensation by agreement[20] the courts imply very readily an agreement on the part of the laborer to work for the usual time, if that is more than the legal time.

[17] A 60-hour limit for women is sustained in Nebraska. Wenham v. State, 91 N. W. 421, 58 L. R. A. 825.

[18] Wells Recent Economic Changes, p. 438.

[19] Report of Industrial Comm. V, 26-30.

[20] Indiana Statutes 1894, Sec. 7052; New York Laws, 1892, ch. 711.

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and to accept the stipulated wages as including the extra compensation.[21] A police regulation exists if there is an obligation to pay for work overtime special compensation perhaps at a special rate,[22] or where the law establishes an absolute limitation, the violation of which is punishable and which cannot be waived by the employee so that he cannot recover for overtime.[23] The cases in which such limitation has been created so as to apply to adults are as yet exceptional, and they relate chiefly to occupations of a special character. Some of these laws can be justified on the ground of public safety, so the rule found in many states that railroad employees operating trains or cars shall not work more than a stated number of hours,[24] especially where the prohibition is directed against overwork which may incapacitate the employee and result in disaster; so in New York and Michigan where eight hours of rest is prescribed after twenty-four hours of work. Considerations of public safety may also support the provision of a maximum number of hours for pharmacists and drug clerks.[25] But where the time for all street railroad employees is fixed at ten hours per day, with right to work overtime for special compensation,[26] the justification on the ground of public safety evidently fails. If safety or health really forbid excessive work, special compensation does not remove the objection, and the fact that it is allowed indicates that the restriction rests on economic grounds.

Hours of labor have besides been limited for persons employed in a number of other special occupations, notably for miners,[27] for operatives in cotton and woolen mills,[28] em-

[21] Helphenstine v. Hartig, 5 Griffiths Ind. App. 172; Gisell v. Noel Brothers, etc., Co., 9 Ind. App. 251, 36 N. E. 452; Bartlett v. Grand Rapids Street R. Co., 82 Mich. 658; People v. Phyfe, 136 N. Y. 554; Christian County v. Merrigan, 191 Ill. 484, 61 N. E. 479.

[22] Low v. Rees Printing Co., 41 Neb. 127.

[23] Short v. Bullion, etc., Co., 20 Utah, 20, 57 Pac. 720, 45 L. R. A. 603; see also Re Ten Hour Law (Op. Just. R. I.), 54 Atl. 602.

[24] In England it took many years before a limitation of twelve hours in the railway service was secured, and the prevention of accidents was the controlling consideration which induced the result; Roscher III, 923.

[25] New York Laws, 1900, ch. 453.

[26] New York, Ohio, Pennsylvania.

[27] In Utah and Colorado eight hours per day.

[28] Georgia, South Carolina, 66 hours per week; Maryland, restricted to manufacturing corporations or companies.

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ployees on brick yards,[29] and bakers.[30] In Nebraska an eight-hour day[31] was established for all classes of mechanics, servants and laborers, excepting those engaged in farm or domestic labor, but was declared unconstitutional.[32]

**§ 317. Question of constitutionality.**—If these limitations can be regarded as sanitary measures required by the physical well-being of those employed in the occupations specified, they belong to a well established head of the police power, but even a legislative statement of the purpose of protecting health would not be conclusive of their character. But the laws as a rule do not state the purpose of the limitation. The provision for an eight-hour's day in mines and smelting works by the legislation of Utah has been upheld by the Supreme Court of the United States as an exercise of the police power for the health of miners,[33] while the Supreme Court of Colorado has declared a similar statute to be unconstitutional, even if intended for the benefit of health.[34]

The Supreme Court of the United States declined to discuss the question whether the legislature had the power to fix hours of labor in other employments than those detrimental to health, and intimated that the authorities holding state statutes restricting the hours of labor to be unconstitutional, had no application to cases where the legislature had adjudged that a limitation was necessary for the preservation of the health of employees.

There is no decision of a court of last resort upon the validity of the statutes restricting the hours of labor of adult cotton or wool operatives or brick yard employees. It is also difficult to say whether their purpose is sanitary or social or economic. As to bakers the statutory limitation has been upheld in New York,[35] while in California an ordinance requiring the cessation of labor from Saturday evening to Sunday morning was held to be unconstitutional discrimination, the court taking judicial notice of the fact that the conditions

[29] New York, 10 hours.

[30] New York, New Jersey, Pennsylvania and Missouri.

[31] With right to increased compensation for overwork.

[32] Laws 1891, ch. 54; Low v. Rees Printing Co., 41 Neb. 127.

[33] Holden v. Hardy, 169 U. S. 366.

[34] Re Morgan, 26 Colo. 415, 47 L. R. A. 52. Also in Re Eight Hour Bill, 21 Colo. 29, 39 Pac. 328.

[35] People v. Lochner, 76 N. Y. Supp. 396, 73 App. Div. 120. Affirmed, 69 N. E. 373.

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of work in bakeries were not specially unsanitary.[36] The Nebraska law, which was more general in its scope than any other, was declared unconstitutional, partly as making an unjustifiable discrimination between different classes of labor (by the exception of farm and domestic labor), partly as taking property and liberty without due process of law.[37] It seems very clear that the Nebraska law was not necessary for the public health, but was purely and simply a measure of an economic and social character. From its sweeping condemnation it may be inferred that the Supreme Court of Nebraska regards the limitation of hours of labor, unless required by safety or health, as in the case of women,[38] as inconsistent with personal liberty and, therefore, as beyond legislative power. The whole question of hours of labor must, from the point of view of authority, be regarded as still unsettled, but in principle a limitation which is neither unreasonable nor discriminative should be held to be a legitimate exercise of the police power.

§ 318. **Rate of wages.**—The power to regulate the rate of wages, while freely exercised in former times,[39] has not been claimed by any American state. The constitution of Louisiana provides expressly,[40] "no law shall be passed fixing the price of manual labor." In principle it would make no difference whether the rate fixed by law were intended to be a minimum or a maximum rate. Considerations of health and safety which complicate the question of hours of labor do not enter into the question of rates. The regulation would be purely of an economic character. It would be closely analogous to the regulation of the price of other commodities or services. The power to regulate charges in general will be discussed in another connection; the power to regulate wages of labor, even if it can be exercised with due regard for the principle of equality, would undoubtedly be resisted by a strong current

[36] Yet a writer on hygiene says, "That the labor in bakehouses is very damaging to health and shortens life is well known to the trade." J. T. Arlidge, Hygiene, Diseases and Mortality of Occupations, London, 1892.

[37] Low v. Rees Printing Company, 41 Neb. 127.

[38] Wenham v. State, 91 N. W. 421, 58 L. R. A. 825.

[39] Under 5 Elizabeth, ch. 4, justices of the peace were empowered to fix the wages of laborers; this law after long disuse was abrogated by 53 George III, ch. 40.

[40] Sec. 49.

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of judicial opinion; but the question need not be discussed in the absence of legislation raising it.

**§ 319. Payment of wages.**—Two classes of provisions relating to the payment of wages may be distinguished: the one requiring payment at stated times or intervals, weekly, monthly or semi-monthly; the other, requiring the payment of wages in cash.

The object of the former class of statutes is to enable the workman to pay cash for his supplies and to protect him from the disadvantages of purchasing on credit. They apply either to all employers,[41] or to all corporations or business corporations,[42] or to all corporations with specified exceptions,[43] or to specified classes of corporations or employers,[44] or to miners and manufacturers,[45] or to coal mining companies only.[46] Legislation of this kind seems to be uncommon in other countries.[47]

Statutes of the second class, often known as store order or truck acts, are directed against the evils of the so-called truck system, under which the employing firm or company, being interested in a store which it desires its employees to patronise, pays them their wages in the form of orders or checks good for merchandise upon which the employer makes a profit. The truck system is old,[48] and was dealt with by earlier English statutes consolidated in 1831.[49] In England an exception from the prohibition of truck is made in payment of medical services, fuel, meals at the place of employment, and benefit assessments. The German Trade Code[50] forbids truck payment with similar exceptions; it also prohibits payment in places where

[41] Ohio, Indiana; in Massachusetts to all employers of 25 or more.

[42] Connecticut, California, Kansas, New Hampshire, Rhode Island.

[43] New York.

[44] Illinois, Maine.

[45] West Virginia, New Jersey.

[46] Iowa, Wyoming.

[47] Somewhat related to this legislation are the statutes requiring the payment of the accrued wages of a discharged laborer, at the time of his discharge without abatement, and giving to the delayed laborer who has to sue for his wages an attorney's fee and an additional sum by way of penalty against the employer; (Massachusetts, Arkansas, South Carolina); also the legislation prohibiting the assignment of future wages which was sustained in Indiana in International Text Book Company v. Weissinger, 65 N. E. 521.

[48] It was prohibited in England for cloth makers in 1464; in German mining districts in 1500.

[49] 1 and 2 William IV, ch. 37.

[50] Sec. 115.

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liquor is sold, a provision also found in England, but not in American statutes.

The statutes found in many of the American states either forbid the employer to be interested in a truck store, or to control any scheme for the furnishing of supplies, tools, clothing, provisions or groceries to his employees, or they forbid deductions from wages for goods furnished, or they prohibit the issue, in payment of wages, of any check, card or other paper not redeemable at its face value in lawful money of the United States. Acting contrary to the prohibition is punished by fine. Sometimes the provisions also cover coercion of the employee to buy at a company store;[1] sometimes they are restricted to stores in which the employer has an interest.[2] In their application the acts vary much the same as the weekly payment laws; in Colorado, Kansas, Louisiana, Missouri, New Jersey, Ohio, and West Virginia they apply to all employers, or the statutes are at least capable of receiving that construction. In Kentucky the constitution[3] prescribes the payment of wages in lawful money, but the provision is held not to apply to the issue of checks payable in merchandise upon the application of the employee, provided the employer pays at reasonable intervals so that the employee is not forced to apply for advances.[4]

**§ 320. Judicial decisions.**—Both classes of statutes have been passed upon by the courts, and have been made the subject of much constitutional argument. The Justices of the Supreme Court of Massachusetts advised the legislature that a weekly payment law applying to all manufacturers would be constitutional.[5] In Rhode Island and Arkansas acts regarding the time of payment of wages were held valid in so far as they applied to corporations, on the ground that the control over corporate charters extended to such requirement,[6] while in California it was held unconstitutional to single out corporations for that purpose.[7] In Illinois an act requiring

[1] Indiana, Iowa, Kansas, Tennessee.

[2] Louisiana, Ohio, Kansas.

[3] Sec. 244.

[4] Avent-Beattyville Coal Company v. Commonwealth, 16 Ky. Law Rep. 414, 28 S. W. 502.

[5] 163 Mass. 589.

[6] State v. Brown, etc., Mfg. Co., 18 R. I. 16, 17 L. R. A. 856; Leep v. St. Louis, etc., R. Co., 58 Ark. 407. So, also, a truck act in Maryland, Shaffer v. Union Mining Co., 55 Md. 74.

[7] Johnson v. Goodyear Mining Company, 127 Cal. 4, 59 Pac. 304.



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weekly payment of wages by every manufacturing, mining, quarrying, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone and municipal corporation, and every incorporated express company and water company, was declared unconstitutional, as being an arbitrary discrimination between these and other corporations.[8] Likewise in chief reliance upon the element of unlawful discrimination the Supreme Court of Illinois had set aside a store order act applying to all mines and manufactories,[9] while in Indiana an act applying to the same employments was upheld, mainly upon the ground that it was within the power of the legislature to protect the lawful medium of payment.[10] In Pennsylvania and West Virginia, statutes forbidding miners and manufacturers of coal or iron or steel and other minerals, and any other kind of manufacturers, to pay wages in orders not redeemable for face value in lawful money, were declared unconstitutional.[11] Another act of West Virginia forbidding persons and corporations engaged in mining and manufacturing, and interested in selling merchandise and supplies, from selling to their employees at a greater percentage of profit than to others not employed by them, was likewise declared void.[12] But in the same state in 1892 a store order act which applied to all persons engaged in trade and business was upheld, the objectionable discriminating feature having been eliminated from this act.[13] In Missouri a statute forbidding corporations, persons or firms engaged in manufacturing or mining to issue for the payment of wages any order, etc., payable otherwise than in lawful money, unless the same should be negotiable and redeemable at face value and without discount in cash or in goods, wares, merchandise and supplies, and requiring the redemption of such order, etc., at the option of the holder in cash, was first upheld by one division of the Supreme Court, but on being transferred to the court in banc was there declared to be unconstitutional and void.

[8] Braceville Coal Company v. People, 147 Ill. 66, 1893.

[9] Frorer v. People, 141 Ill. 171, 1892.

[10] Hancock v. Yaden, 121 Ind. 366, 1890.

[11] Godcharles v. Wigeman, 113 Pa. St. 431, 1886; State v. Goodwill, 33 W. Va. 179, 1889.

[12] State v. Fire Creek, etc., Co., 33 W. Va. 188, 1889.

[13] Peel Splint Coal Co. v. State, 36 W. Va. 802, 1892.

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as arbitrary and partial legislation.[14] A new act was thereupon passed in 1895 applying to all persons, firms and corporations, and this later act does not appear to have been passed upon. A weekly payment act without discriminating features was, however, held unconstitutional in Indiana.[15] The Justices of the Supreme Court of Colorado intimated to the legislature that a truck act applying to all employees would be constitutional,[16] and such an act was held constitutional in Tennessee,[17] the decision being affirmed by the Supreme Court of the United States.[18] In Kansas a store order act was held unconstitutional which was restricted to corporations and to trusts employing ten or more persons.[19]

§ 321. **Constitutional principle.**—It appears from these decisions that the store order or weekly payment acts which have been declared unconstitutional (excepting only the Indiana weekly payment act) have been marked by some feature of discrimination. It is true that the courts of Pennsylvania, Illinois and Kansas have been emphatic in their denunciation of the general principle of this legislation.[20] The Supreme Court of Pennsylvania speaks of an insulting attempt to put the laborer under legislative tutelage; the Illinois court dwells on the possible detriment of such measures to the workmen—a consideration manifestly inconclusive, for there is hardly any police legislation, which will operate beneficially under all circumstances, and the question of wisdom or unwisdom must, within the limits of reasonableness, be matter of legislative determination; the Kansas court says that the laborer by such legislation is in respect

[14] State v. Loomis, 115 Mo. 307, 1893.

[15] Republic Iron & Steel Co. v. State, 66 N. E. 1005. The court, however, says: "We do not assert that the Legislature is powerless to regulate the payment of wages when the same are paid at unreasonable periods, or that a community composed largely of workingmen may not be injuriously affected by unduly delayed payments, for these questions are not before us." Does not this concede the principle of the legislation? and is not the wisdom of the particular method of relief a question for the legislature?

[16] Re Scrip. Bill, 23 Colorado, 504.

[17] Harbison v. Knoxville Iron Co., 103 Tenn. 421, 56 L. R. A. 316.

[18] Knoxville Iron Co. v. Harbison, 183 U. S. 13.

[19] State v. Haun, 61 Kan. 146, 47 L. R. A. 369, 1899.

[20] See especially remarks in Vogel v. Pekoc, 157 Ill. 339, that the element of discrimination is not controlling.

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to freedom of contract classed with the idiot, the lunatic and the felon in the penitentiary, and asks what right the legislature has to assume that one class has the need of protection against another. These courts, therefore, hold that the statute destroys the constitutional liberty of the individual. As an ideal theory of government this view may commend itself to some minds, but as a matter of constitutional law it is difficult to see the difference in principle between truck and usury legislation. If we do recognise the legitimacy of the exercise of the police power for the prevention of oppression, this legislation, especially store order acts, sanctioned by the practice of most civilised countries, is within the province of governmental power. There is undoubtedly an interference with the liberty of contract, but the question is whether such interference does not serve a reasonable object; to set up liberty of contract as an absolute right is to deny the police power almost altogether. The prompt payment of wages in lawful money is a reasonable incident to the contract of employment; if then the legislature believes that employees are apt to lose this benefit by conditions of employment which are imposed upon them, and which they accept without choice, it may make this reasonable incident necessary and conclusive and enforce compliance with it. The legislature thereby does not force an unsought-for contractual relation upon unwilling parties, but carries out the obligation which it believes to be expressive of the true spirit of the contract into which the parties have entered voluntarily. Legislation of this character, if general and not arbitrarily discriminating, should, therefore, be regarded as constitutional. There is no reason to assume that the decision of the Federal Supreme Court in the matter of truck legislation will not be followed if a weekly payment act should come before that tribunal, so that the Fourteenth Amendment will present no obstacle to legislation of this character.

**§ 322. Imposed conditions and penalties.**—The statutes of several states[21] make it unlawful for an employer to exempt himself by special contract with an employee from any liability he may be under to such employee for injuries suffered by him in his employment, resulting from the employer's own

[21] Georgia, Massachusetts, Montana, Wyoming.

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negligence or from the negligence of other persons in his employ, or to require from an employee such a contract or agreement as condition of employment or otherwise. Colorado,[22] Montana[23] and Wyoming[24] embody this principle in their constitutions. Where no penalty is imposed for making or requiring such contract, the provision seems to add nothing to what would be lawful without it; for the courts will treat such an agreement as contrary to public policy and void.[25] The contract being unlawful a prohibition against making it, enforced by penalties, affords an additional protection to the employee, and thus may be looked upon as a legitimate police measure.

§ 323. **Penalty for leaving without notice.**—Agreements between employer and employee, by which the former undertakes to protect himself, by a stipulation of penalties, from injury he may suffer by the act of the latter, stand on a different footing. They are not unlawful at common law, and it has been held that a railroad company may stipulate for a penalty of $15.00 to be incurred by a conductor for violation of a rule against receiving fares from passengers.[26] The question is, are these agreements beyond the reach of the police power as essential to the constitutional liberty of contract? The most common stipulation of this kind seems to be that by which the employee is required to give notice of his intention to leave under penalty of the forfeiture of a stated amount of his wages. Stipulations of this kind are forbidden in Connecticut, and it is provided in Massachusetts, Rhode Island, New Jersey and Pennsylvania that in case of such a stipulation the employer shall be subject to a penalty of a corresponding amount if he discharges the employee without giving him like notice, unless[27] such discharge is justified by a general suspension of work on the part of other employees. It has been held in Connecticut that this prohibition does not apply where the agreement is mutual,[28] and the question is left open whether the prohibition of mutual

[22] Art. 15, § 15.

[23] Art. 15, § 16.

[24] Art. 19, § 1.,

[25] Lake Shore, etc., R. Co. v. Spengler, 44 Ohio St. 471. 9 A. and E. Cycl. of Law, 1st edition, p. 913.

[26] Birdsall v. Twenty-third St. R. Co., 8 Daly (N. Y.) 419.

[27] New Jersey and Pennsylvania.

[28] Pierce v. Whittlesey, 58 Conn. 104.

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stipulations of that kind would be constitutional. This question does not arise under the statutes of the other states mentioned, for they, on the contrary, insist on the mutuality of the stipulation. In doing so they undoubtedly interfere with the liberty of contract, for they add a stipulation which the parties have not made, and thereby in effect prohibit or annul one-sided stipulations. Such legislation, however, is justifiable on the principle above explained that for the prevention of oppression the obligations of a contract may be defined by absolute and unyielding statutory provision.

**§ 324. Fines for imperfect work.**—A law of Massachusetts[29] provided: "No employer shall impose a fine upon or withhold the wages, or any part of the wages, of an employee engaged in weaving, for imperfections that may arise during the process of weaving;" violation punishable by fine. The act was declared unconstitutional,[30] on the ground that it compelled payment under a contract of the price for good work where only inferior work is done, and was, therefore, an interference with the constitutional right to make reasonable and proper contracts. Justice Holmes dissented on the ground that if operatives were often cheated out of a part of their wages under a false pretense of imperfections of the work, the legislature had power to deprive employers of an honest tool liable to be used for a dishonest purpose, and leave them to an action for damages. Perhaps the safest ground upon which to uphold the decision is, that the act compelled, under a penalty, the employer to perform his part of the contract when the employee had not performed his. A's refusal to perform a contract with B cannot be declared wrongful without reference to the question whether B is entitled to performance, and that is a judicial question which the legislature may not prejudge. It would have been different if the effect of the statute had been merely to prohibit the fining of the employee, and the prevailing opinion intimates that in that case the statute would have been constitutional: for in imposing a fine the employer assumes to act as a judge where he is a party. In consequence of the decision in Commonwealth v. Perry the law was changed so as to provide that imperfections in work must be exhibited

[29] Laws 1891, ch. 125.

[30] Commonwealth v. Perry, 155 Mass. 117.

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and pointed out to the weaver, and the amount of fines be agreed upon by him and the employer; the fine is under these conditions no longer a fine and the provision seems unobjectionable.[31]

**§ 325. Coercion to influence or prevent the exercise of political rights.**—The law of Massachusetts[32] punishes by imprisonment any one who by threatening to discharge a person from his employment or to reduce his wages, or by promising to give him employment at higher wages, attempts to influence a voter to give or to withhold his vote at an election, or any one who "because of the giving or withholding of a vote at an election discharges a person from his employment or reduces his wages." Provisions having the same object in view exist in a majority of states,[33] but some statutes are more specific; so New Jersey requires, in order to make the act illegal, duress, constraint, or improper influence, or fraudulent or improper devices, contrivances, or schemes. New York, Montana, Utah, Tennessee, California, Missouri, Connecticut, South Dakota and some other states forbid the use of pay envelopes with political devices containing threats, express or implied, and also forbid, within ninety days of a general election, the exhibition, in an industrial establishment, of hand bills or placards containing any threat, notice or information of the character prohibited in the Massachusetts statute.[34]

The constitutionality of these statutes does not appear to have been passed upon by a court of last resort. The free exercise of the electoral franchise is undoubtedly of supreme political interest, and may be protected by proper restraints. At the same time, principles of equal value protect the liberty of the employer from impairment in certain directions. Thus the employer cannot be forbidden to discharge employees not under time contracts, and his liberty in that respect is not consistent with an inquiry into motives. Moreover, the employer must have the privilege of a citizen to make his political opinions known and to work for their success. But this does not imply unrestricted liberty as to conditions and means. While he is owner of his establishment, his property

[31] Rev. Laws, ch. 106, Sec. 64.
[32] Rev. Laws, ch. 11, § 414.
[33] Rep. Indust. Comm. V, 90.
[34] See N. Y. Penal Code, § 41a.

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in it is affected with the interest of his employees, and it should be within the power of the law to protect employees from an offensive use of the common workshop, or of the employer's position during actual employment, for the purpose of political propaganda and agitation. The provisions of the New York law should be justified on this ground. And while the right to discharge cannot be taken away, a threat of discharge may be looked upon in a different light, since in most cases it is clearly distinguishable as an act of intimidation, or at least of interference, and, where so distinguishable, it is by no means necessary to the right of discharge. The practical effect of the law would be a prohibition of offensive methods of electioneering by an abuse of the relation between employer and employee, and such prohibition should be within the legislative power.

§ 326. **Coercion against membership in trade unions.**—The labor law of Massachusetts provides[35] that "no person shall himself or by his agent coerce or compel a person into a written or verbal agreement not to join or become a member of a labor organisation, as a condition of his securing employment or continuing in the employment of such person." Similar provisions are found in New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Missouri, Wisconsin, Minnesota, Colorado and California. The acts of Missouri, Illinois and Wisconsin have been declared unconstitutional.[36] In these decisions the law is treated as punishing the employer for discharging his employee, and if this is its necessary meaning, it cannot be upheld, for the law cannot force upon the employer the continuance of a relation freely terminable according to its terms, with an undesirable employee, who would himself be free to end it at any time. But again it must be asked, whether the law may not respect the right to discharge, and yet protect the laborer's right of association from interference on the part of the employer. Although membership in a union has a strong influence upon the relation of the employee to his employer, it is not part and parcel of it, and the attempt to break up labor unions may there-

[35] Laws 1894, ch. 508, Sec. 3; Rev. Laws, ch. 106, § 12.

[36] State v. Julow, 129 Mo. 163, 29 L. R. A. 257; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007; State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098.

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fore be treated as unlawful interference, if the means used for that purpose do not constitute the exercise of a recognised right. A threat of discharge intended as intimidation may or may not be justifiable according to the object sought to be accomplished; it cannot be said to stand on the same footing as the discharge itself. While the employer cannot be forbidden to protect himself against a hostile union, an attempt on his part to coeree the laborer to keep away or withdraw from "any union," if understood as meaning "any union whatsoever," may be treated as exceeding the measure of legitimate self-defence. Gross forms of intimidation may of course be absolutely forbidden. It would seem then to follow that the statutes in question are capable of an interpretation under which they may be sustained, without infringing upon constitutional rights, saving to the employer all proper power of defending his own interests, and the right to select his employees, but preventing him from using his position to attack and suppress rights of laborers which the law deems essential to their welfare and advancement. The sound principle of the distinction is not destroyed by the difficulty of its application, which is perhaps not greater than the difficulty of distinguishing between lawful persuasion and unlawful intimidation.

As long as laborers enjoy the right to combine for the purpose of practically coercing employers to accede to their demands, the latter cannot be constitutionally forbidden to protect themselves against the pressure of such demands by counter-combinations of their own. The Supreme Court of New York has thus recognised the right of manufacturers to lock out all operatives connected with an association of employees, because of demands of such association which it considered unjust, notwithstanding the existence of a statute for the protection of labor unions against coercion or intimidation of their members, which statute, it is true, is not referred to by the court;[37] and it has been held in Pennsylvania that a combination of employers to resist an advance in wages determined upon by an association of employees, by refusing to sell to any person who concedes such advance, is not an unlawful conspiracy, since the passage of the Pennsylvania statute making it lawful for employees to combine to raise

[37] Sinsheimer v. United Garment Workers, 77 Hun 215.

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wages and to persuade by all lawful means others from working for a less sum.[38]

§ 327. **Blacklisting and clearance cards.**—The practice of blacklisting, i. e. marking a discharged employee as unfit to be given employment elsewhere, is made punishable by the statutes of a number of states,[39] either as the individual act of a person or corporation, or in the aggravated form of a concerted system of a number of employers. The constitutionality of these provisions has not been drawn in question. In New York a civil action for conspiracy was maintained for an agreement not to employ one not a member of a certain organisation.[40] A blacklisting combination has some of the elements of the boycott, while the individual act may constitute unlawful interference. A notice sent by one employer to another regarding the cause of an employee's discharge, especially if in response to an inquiry, may, however, be free from the objection of either oppression or interference, and in that case must, if truthful, be beyond the police power. It is, therefore, provided in most of these statutes that the provision is not to be construed as prohibiting any person from giving in writing to any other person to whom the discharged person has applied for employment, a truthful statement of the reasons for such discharge, if thereunto requested: and the word "blacklist" (especially where prohibited by constitutional provision, as in Montana and Utah) should be interpreted as not covering legitimate information corresponding to a privileged communication in the law of libel.[41] The statute of Missouri forbids especially the use of fictitious names, or marks or signs for blacklisting purposes, and the German Trade Code[42] prohibits only the marking of certificates so as to designate the employee in a manner concealed from him.

The statutes of some states[43] also provide that the dis-

[38] Cote v. Murphy, 159 Pa. St. 420.

[39] Report of Indus. Comm. V, 141.

[40] Curran v. Galen, 152 N. Y. 33, 37 L. R. A. 802. A case involving an agreement not to employ laborers on strike came before the courts of Pennsylvania but was decided upon a point not touching the agreement; Bradley v. Pierson, 24 Atl. 65, 148 Pa. St. 502.

[41] So held in State v. Justus, 85 Minn. 279, 88 N. W. 759.

[42] German Trade Code, § 113.

[43] Florida, Georgia, Indiana, Montana, Colorado, Kansas.

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charged employee must upon his request be furnished with a statement of the reason of his discharge. It is not easy to see what reasonable objection there can be to such a requirement, yet it has been held unconstitutional in Georgia on the ground that the public has no interest in a correspondence between discharged employees and their late employers designed for private information, and that such requirement violates the liberty of silence which is correlative to the liberty of speech secured by the constitution. It should be said that the excessive fine of $5,000 imposed by the statute of Georgia made it an unreasonable exercise of the police power.[44] A provision such as existed under a former English law[45] to the effect that no one should be allowed to employ a servant who could not produce a clearance card from a former master would be inconsistent with the constitutional right of liberty.

§ 328. **Employment brokerage.**—Employment agencies or intelligence offices are regulated by statute in a number of states,[46] The person engaged in the business is required to take out a license and often also to give a bond; he must keep a register of his transactions, and he is forbidden to take pay where no employment is procured; in New Jersey municipalities are also authorised to fix the rates to be charged. In Illinois the constitutionality of this legislation has been sustained;[47] the purpose of preventing fraud is a sufficient justification for the exercise of the police power; the fixing of rates of commissions can perhaps be upheld only if the charges forbidden are plainly extortionate.

North Carolina, South Carolina and Georgia have also enacted statutes exacting license fees from emigrant agents who are defined in the statutes as persons engaged in hiring laborers in the state to be employed beyond its limits. The earlier act of North Carolina was declared unconstitutional on the ground that as a tax law it was not uniform in operation, and that as a police measure it was invalid on account

[44] Wallace v. Georgia, etc., R. Co., 94 Ga. 732.

[45] 5 Elizabeth, ch. 4. The German Trade Code makes provision for clearance books (Arbeitsbuecher) but prohibits employment without such only in case of minors (§ 107).

[46] Maine, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Ohio, Wisconsin, Minnesota, Missouri, Colorado and Louisiana.

[47] Price v. People, 193 Ill. 114, 61 N. E. 844.

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of the unreasonableness of the license fee, there being no regulation or supervision involving any expense, and the business not being so harmful that it could be prohibited altogether.[48] The statutes of South Carolina and Georgia and the later act of North Carolina were held to be constitutional.[49] The validity of the Georgia act was also contested on the ground that it was contrary to rights secured by the federal constitution. The Supreme Court of the United States held that the question whether the license fee was prohibitive was not properly before it, and considered the act as a measure of taxation. It held that the act did not restrain the individual laborer's liberty of movement, that the business was a proper subject of regulation, and that since the business was confined to the hiring of laborers for employment outside of the state, the regulation could be equally confined without unlawful discrimination. It also held that labor contracts were not subjects of interstate traffic, therefore the emigrant agent was not engaged in interstate commerce, and the tax not a burden on such commerce.[50]

**§ 329. Federal legislation for the protection of labor.**—The power of Congress to enact protective labor legislation is limited under the constitution to measures incidental to the exercise of admiralty jurisdiction, to the regulation of interstate and foreign commerce, to the power of territorial sovereignty, and to the prohibition of slavery.

In execution of these powers Congress has enacted laws forbidding peonage,[1] and the coolie trade;[2] laws regulating the employment of seamen,[3] and laws excluding foreign laborers.[4]

The legislation for the exclusion of foreign labor rests upon the sovereign power of the national government to deal with foreign affairs and foreign commerce, and its validity is, therefore, beyond question, quite irrespective of any limitations upon the police power. "Given in Congress the absolute power to exclude aliens, it may exclude some and admit

[48] State v. Moore, 113 N. C. 697.

[49] Shepperd v. Sumpter County Commissioners, 59 Ga. 535; State v. Napier, 63 S. C. 60, 41 S. E. 13; State v. Hunt, 129 N. C. 686, 40 S. E. 216.

[50] Williams v. Fears, 179 U. S. 270.

[1] U. S. Rev. St. 1990, 5526, 5527.

[2] U. S. Rev. St. 2158, 2161, act March 3, 1875, 1 Suppl. p. 86.

[3] Title 53 U. S. Rev. St.

[4] Contract Labor Act, February 26, 1885; Chinese Exclusion Act of May 5, 1892.

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others, and the reasons for its discrimination are not open to challenge in the courts.'"[5]

The legislation regarding seamen, however, affects American citizens and is an exercise of the federal police power. The contract of employment as a sailor is subject to various restrictions, partly for the restraint of sailors,[6] partly for the restraint of the master and others dealing with the sailor. Provisions of the latter character are: prescribing under penalty the form of agreements or shipping articles and their execution before a shipping commissioner;[7] requiring the payment of wages within two days from discharge,[8] and, if in the United States, in the presence of a commissioner,[9] and prohibiting the payment of advance wages, and the payment of any remuneration for shipment to any but an authorised officer.[10] While the law does not undertake to fix rates of compensation, or hours of labor, and in general rather prescribes what points the shipping articles must provide for than in what manner they must be settled, yet there is undoubtedly such an interference with the liberty of contract as has been condemned by some state courts as unconstitutional. As the Supreme Court of the United States has declared sailors to be a dependent class not enjoying the fulness of civil status in their relations to the master,[11] the argument of the liberty of contract would have no force as against the needs of protection as understood by the legislature; but apart from this consideration, none of the provisions mentioned impairs the liberty of contract beyond the legitimate exercise of the police power for the prevention of fraud or oppression. The argument of equality, so strongly relied upon by the state courts in dealing with the labor laws, which cover only special classes of labor, is hardly available against congressional legislation regarding seamen, since Congress deals with no other class of laborers.

[5] Lees v. United States, 150 U. S. 476.

[6] Mainly U. S. Rev. St. Sec. 4596, 4598, to be treated of further on.

[7] United States Rev. St. Sec. 4511, 4515.

[8] Sec. 4529.

[9] Sec. 4549.

[10] Act. Dec. 21, 1898; Patterson v. The Eudora, 190 U. S. 169.

[11] Robertson v. Baldwin, 165 U. S. 275.

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## CHAPTER XIV.

### COMBINATIONS OF LABORERS.

**§ 330. Combinations under the English law.**[1]—Combinations of workmen for an advance of wages, besides being contrary to the early statutes of laborers passed in the time of the reign of Edward III,[2] were forbidden by a series of acts of Parliament in the succeeding centuries, partly general in their character,[3] partly directed against special trades.[4] A general statute against laborers' combinations was again enacted in 1800,[5] and expired by limitation in 1824. In 1824 an act was passed declaring that workmen combining for an advance in their wages, or for shorter hours, should not be liable to prosecution for conspiracy, but making violence, threat or intimidation against employers or other employees or workmen, punishable.[6] In 1825 this was replaced by another act which punished all violence, threats, intimidation, molestation or obstruction directed against employees, laborers, or employers, to force the abandonment of work, or prevent the acceptance of work or employment, or to force or induce compliance with trade union rules, or any alteration in the management of a business, but which allowed meetings and agreements for the purpose of consulting upon and determining the rate of wages, or hours of labor, both on the part of employees and employers.[7] By an act of 1859 it was, in addition, made lawful peaceably to persuade others to abstain from work in order to influence the rate of wages or hours of labor.[8] In 1871 the acts of 1825 and of 1859 were repealed, and two acts substituted, one of which declared that trade unions should not be held to be illegal by reason of the fact

[1] Stephen, History of the Criminal Law III, p. 203-227.

[2] 23 Ed. III, c. 1, 1350.

[3] So 1548, 2 and 3 Edward VI, c. 15, forbidding all conspiracies and covenants of workmen not to make or do their work but at a certain price or rate.

[4] 1424, 3 Henry VI, c. 1, against masons; 1720, 7 George I Statute 1, c. 13, against journeymen tailors, etc.; see Stephen Hist. of the Crim. Law III, 206.

[5] 40 Geo. III, c. 60.

[6] 5 Geo. IV, c. 95.

[7] 6 Geo. IV, c. 129.

[8] 22 Vict. c. 34.



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that they were in restraint of trade, while the other made punishable any coercion for trade purposes by personal violence, threats, or molestation or obstruction, by personally following about or watching another, or hiding his tools.[9] This latter act was again replaced by another of 1875, which distinctly declared that a combination to do an act in furtherance of a trade dispute should not be punishable, if the act, if committed by one person, would not be a crime, but made punishable any violence or intimidation to compel another, and also wilful breaches of contract liable to cause serious harm to persons or property.[10]

The matter of combinations thus being constantly affected by statutes, some of them very general in their terms, it was extremely difficult to ascertain what was the common law upon the subject, and the opinions of judges and writers varied considerably,[11] but there was undoubtedly at all times a strong current of opinion to the effect that a strike constituted a form of indictable conspiracy irrespective of statute. This view in the course of the last century gradually gave way to a distinction between peaceable combinations and such as were attended by force, threats, intimidation and obstruction.

**§ 331. Earlier American cases and statutes.**—Some very early American cases are reported in which the legality of laborers' combinations was considered.

In 1806 in Philadelphia a number of shoemakers were convicted for combining to compel other shoemakers to quit work to force an increase in wages. The indictment charged threats and other injuries, so that it seems that it was a case of coercion, but the court dwelt principally upon the wrongfulness of strikes as an "artificial" means of raising wages.[12]

In 1810 a conviction was obtained in a similar case in New York. The court left the question open whether a simple agreement not to work except for certain wages was a conspiracy. The defendants were regarded as having acted in ignorance of the law, and a nominal fine was imposed.[13]

In 1815 in Pittsburg it was held that a conspiracy to coerce an employer to have only a certain description of persons

[9] 34 and 35 Vict. c. 31 § 32.

[10] 38 and 39 Vict. c. 86.

[11] See Stephen Hist. of the Crim. Law III, p. 209-227.

[12] Carson Crim. Conspiracies, p. 145.

[13] People v. Melvin, 2 Wheeler Cr. C. 262.

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in his employ, to prevent men from freely exercising their trade, and to compel them to become members of a society of workmen, and contribute towards it, was unlawful.[14]

In 1821 in Philadelphia (at Nisi Prius) Justice Gibson held that a conspiracy artificially to depress or raise wages was unlawful, but that a combination to resist a combination might be lawful if its purpose was merely to give labor its due value.[15]

In 1823 in New York a conviction was obtained against journeymen hatters for inducing, by threatening to leave their work, a master hatter to discharge an employee who was not a member of the society of journeymen hatters, and who worked for "knocked down" wages. The facts of the case show that this workman had been subjected to a considerable amount of molestation.[16]

In 1827 in Philadelphia twenty-four journeymen tailors were indicted for a conspiracy to increase their wages and lessen the profits of tailors, by quitting work, assembling in the streets, obstructing workmen who continued at work, and, by threats, intimidation and violence, trying to induce them to quit work. The Recorder charged that the action constituted conspiracy.[17]

The New York Revisers in 1829 in codifying the law of conspiracy included in their definition, conspiracies "to commit any act injurious to public health, to public morals, or to trade or commerce."[18]

This was held to cover the action of a club of journeymen shoemakers in establishing a by-law imposing a fine upon any journeyman who should make a pair of shoes for less than the fixed price, and agreeing not to work for any master employing such offending journeymen.[19] The court took occasion to say "A conspiracy to raise wages of journeymen shoemakers is a matter of public concern in which the public have

[14] Cordwainer's case, Carson, Crim. Conspiracies, p. 150.

[15] Com. ex rel. Chew v. Carlisle, Brightly (Pa.) p. 36. A conviction for a conspiracy to coerce by the simultaneous quitting of work an employer to reinstate an incompetent workman was obtained in Pennsylvania in 1869. Commw. v. Curren, 3 Pittsb. 143.

[16] People v. Trequier, 1 Wh. Cr. C. 142.

[17] Case of Journeymen Tailors, Carson, op. cit. p. 153.

[18] 2 Rev. St. p. 692.

[19] People v. Fisher, 14 Wend. 9.

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a deep interest, and is indictable at common law. Journeymen may singly refuse to work unless their wages are advanced, but if they do so by preconcert or association, it becomes a conspiracy." A similar combination was made the subject of an indictment in Massachusetts, and a conviction was obtained in the lower court.[20] The Supreme Court said that the manifest intent of the association was to induce all engaged in the like work to join it, that such a purpose was lawful or unlawful according to the purpose for which the power of the association was intended to be used, and that the indictment was defective in failing to charge an unlawful purpose.[21] It was said that the agreement of the members of a temperance society not to work for any one employing a non-member might be laudable.

In New Jersey in 1867 it was held that a statutory prohibition of conspiracies to injure trade did not apply to a threat on the part of a number of employees to leave unless another employee was dismissed, but that such a combination was coercion or oppression punishable at common law irrespective of statute.[22] In the same year in New York it was stated, as the result of an examination of the American authorities, that it is lawful for any number of journeymen to agree that they will not work below certain rates, but that any association or combination for the purpose of compelling journeymen or employers to conform to any rule, regulation or agreement fixing the rate of wages, to which they are not parties, by the imposition of penalties, by agreeing to quit the service of any employer who employs a journeyman below certain rates unless the journeyman pays the penalty imposed by the combination, or by menaces, threats or intimidation, violence or other unlawful means, is a conspiracy for which the parties entering into it may be indicted.[23]

These are the principal of the earlier American decisions made before the era of strikes of enormous proportions which assumed national importance, and they bear out the conclusion in the case last cited.

**§ 332. Question of the legality of a strike.**—There is no

[20] Commonwealth v. Hunt, Thatcher Cr. C. p. 609.

[21] Commonwealth v. Hunt, 4 Metc. 111.

[22] State v. Donaldson, 32 N. J. L. 151.

[23] Master Stevedores Association v. Walsh, 2 Daly 1.



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American decision in which a simple strike has been punished as a conspiracy. The statement in People v. Fisher above quoted was a dictum not called for by the facts of the case. The Supreme Court of Pennsylvania pointed out that English decisions should not be taken to conclude the American law in this matter: "There are indeed a variety of British precedents of indictments against journeymen for combining to raise their wages; but it has been thought sound policy in England to put this class of the community under restrictions so severe, by statutes that were never extended to this country, that we ought to pause before we adopt their law of conspiracy, as respects artisans, which may be said to have in some measure indirectly received its form from the pressure of positive enactment, and which, therefore, may be entirely unfitted to the conditions and habits of the same class here."[24] The principle of the liberty of strikes has indeed become so firmly established through custom and public sentiment that it is no longer questioned by any American court.

In New York it was in 1870 confirmed by a statute which declared that "the orderly and peaceable assembling or cooperation of persons employed in any calling, trade or handicraft, for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not a conspiracy."[25] Similar declarations are to be found in the statutes of other states.[26]

**§ 333. Intimidation and coercion.**—The general principle of the legality of strikes does not cover those forms which are marked or aggravated by special conditions of wrongfulness. It is not necessary to point out that the commission of actual violence or crime is not excused by the fact that it happened in the course of a strike. But it is to be noted that a number of states[27] have made it a misdemeanor for railroad engineers or conductors, in furtherance of a strike to abandon their locomotives or trains elsewhere than at the place of destination. The general right to quit work, where there is no contract for a fixed time, should not be construed to justify

[24] Com. ex rel. Chew v. Carlisle Brightly (Pa.) 36, 1821.

[25] Penal Code, Sec. 170.

[26] Industr. Comm. Rep. V, p. 131 (Minnesota, Montana, North Dakota).

[27] Rep. Ind. Comm. V, 132; Connecticut, Delaware, Kansas, Illinois, Maine, Mississippi, New Jersey, Pennsylvania.

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the refusal to carry out a special piece of work or job which has been undertaken, since the entering upon the work implies a contract to finish it.[28] Apart from this consideration the abandonment of a locomotive involves great public danger and inconvenience, and may be made punishable for that reason, as pointed out before. In New York, following the English statute of 1875, this principle is applied to all breaches of contract, the probable consequence of which is to endanger human life, or to cause grievous bodily injury, to to expose valuable property to destruction or serious injury.[29]

The most important check upon the right of combination is, however, to be found in the prohibition of its use for the purpose of coercion. The New York Penal Code of 1881[30] added to the objects of a criminal conspiracy, defined in the Revised Statutes, the following: "To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements or property belonging to or used by another, or with the use or employment thereof." The English legislation of 1875 seems to have been of influence in bringing about this statutory change.

Coercion is generally directed against other laborers or employees, with the object of making them join the combination and quit work in furtherance of its purposes. It is unlawful at common law to entice or induce a servant to leave his employment, and in a number of Southern states[31] this is made punishable by fine. The unlawfulness of the act does not depend upon coercion, but is often said to require malice.[32] To constitute a criminal combination, however, coercion as distinguished from persuasion is generally required, and in New Jersey persuasion to join a combination was expressly legalised.[33] Force, violence, threat, menace and intimidation are some of the words commonly used to express the idea of coercion; so Pennsylvania provides[34] that the legalisation of combinations shall not prevent the punishment of the use of

[28] Mapstrick v. Ramge, 9 Nebr. 390, 2 N. W. 739.

[29] Penal Code, Sec. 673.

[30] Sec. 168.

[31] Rep. Ind. Comm. V, p. 74, Alabama, Arkansas, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee.

[32] Bowen v. Hall, 1881, 6 Q. B. D. 333; Walker v. Cronin, 107 Mass. 555.

[33] Laws 1883, ch. 28.

[34] Act June 16, 1891.

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force, threats or menace of harm to person or property to hinder any persons who desire to labor for their employers from so doing; and the display of force, following about, and the use of opprobrious epithets is regarded as actionable.[35] Intimidation has a somewhat vague meaning. A "request" to stay away from a shop, with an assurance that compliance would command the protection of the employees, "but in no case are you to consider this as an intimidation," was held to be, under the circumstances, a direct threat and intimidation and punishable as such.[36] Some statutes specify molestation,[37] or persistently following,[38] as punishable acts. The well-known custom of "picketing" has been declared unlawful in Massachusetts,[39] and so more recently the threat of a strike directed against an employer to induce him to discharge employees refusing to join the association in whose behalf the threat was made.[40] The threat of direct violence or of plain forms of illegality is, therefore, not necessary to make a case of intimidation; the question is whether social pressure resulting from numbers is sufficient for that purpose. If so it would be almost impossible to distinguish between coercion and organised persuasion such as comes from a combination of workingmen. It seems that in Massachusetts where the question has received the fullest discussion, mere organised persuasion is not unlawful,[41] but that holding forth the prospect of a strike with incident "trouble," will be regarded as intimidation.[42] The New Jersey statute legalising "persuasion" to join a combination likewise referred to organised persuasion. The safer rule would seem to be to require that to constitute intimidation the methods of coercion must be such as will suggest, and as are evidently intended to suggest, something different from and in addition to the mere exercise of a legal right or mere moral disapprobation. Co-

[35] O'Neil v. Behanna, 182 Pa. 236, 38 L. R. A. 382.

[36] Re Doolittle et al. 23 Fed. 544.

[37] Delaware Rev. Code, 1893, ch. 127.

[38] Connecticut Gen. St. 1888, ch. 99, Sec. 1517.

[39] Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 1896; see also Beck v. Railway Teamsters Protective Union, 118 Mich. 497, 42 L. R. A. 407.

[40] Plant v. Woods, 176 Mass. 492, 57 N. E. 1011; contra: National Protective Association of Steam Fitters v. Cumming, 170 N. Y. 315, 63 N. E. 369.

[41] Commonwealth v. Hunt, 4 Mete. 111.

[42] Plant v. Woods, *supra*.

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ercion such as is used in labor troubles, whether against employers or against other employees, is very commonly accompanied by this sort of illegal intimidation.

§ 334. **Malicious interference.**—Perhaps it is necessary to distinguish from this coercion the use of the power of combination for the purpose of unlawful or malicious interference. There is undoubtedly a current of opinion which holds it to be unlawful to maliciously injure another, especially in the pursuit of his livelihood. The cases of malicious injury will nearly all be found to be cases in which one person interferes with the relation between two other persons, without being justified by the protection of some legitimate interest of his own. A full discussion and review of the law upon this subject is found in the case of Allen v. Flood, decided by the House of Lords in 1898,[43] which reveals a marked difference of opinion upon the subject. It was settled in that case for England that malice by itself does not constitute a cause of action. Much of the very sound objection to the recognition of malice as an actionable wrong, would disappear if the idea of interference were substituted for that of malice. But the court expressly left the question open whether a combination of the same character would not be actionable, and in a later case it did hold actionable an interference in which the elements of combination and threat were discoverable.[44] If it is recognised that a combination for unjustifiable interference is wrongful, it is necessary to determine what interests will justify interference, and thus make it lawful. Applied to labor disputes the question would be: is a trade union justified for the purpose of strengthening its organisation to demand or insist upon the discharge or non-employment of non-union men? In Commonwealth v. Hunt[45] such action was deemed justifiable, provided the object of the society were lawful, and the same view is strongly, and as it seems, justly asserted by a recent decision of the New York Court of Appeals.[46]

§ 335. **Constitutional power over strikes.**—Approaching the

[43] L. R. 1898, A. C. p. 1. See XI Harvard Law Review, 449.

[44] Quinn v. Leathem, L. R. 1901, A. C. p. 495.

[45] 4 Mete. 111.

[46] National Protective Association of Steam Fitters v. Cumming, 170 N. Y. 315, 63 N. E. 369, 1902.

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question of constitutional power, it should be noted that it has received hardly any consideration on the part of the courts. Few mooted points of law have been so elaborately argued and discussed as the question of the legality of strikes and incidental questions, but the contention has all been upon the common law or perhaps the interpretation of statutes, and not upon the limits of legislative power, which in the cases not arising under statutes, but at common law—and they are the great majority,—was not involved. There is a general consensus of opinion that coercion is unlawful, and the validity of those statutes which punish coercion in general terms has never been questioned. Even those who hold that such forms of pressure as picketing are not unlawful, do not intimate that they regard picketing as one of the constitutional liberties of the citizen beyond legislative control. But the strike divested of aggravated features has come to be regarded by many, rightly or wrongly, as a legitimate and indispensable weapon in the struggle of labor against capital, and is now recognised as such by courts, the legislatures and by public sentiment. The question then suggests itself whether the right thus secured should be treated as part of the constitutional liberty of the workman. This question does not easily admit of an affirmative answer. The essence of the strike is not the quitting of the employment, which, where the employed is not under contract to serve for a fixed time, or to complete a certain job,[47] must be his constitutional right, but the agreement or combination to quit simultaneously for the purpose of obtaining an ulterior object. It is well recognised that an act, lawful if done by one, may become unlawful if done by many, in pursuance of a preconcerted plan jointly or through an organisation. The principle of the English act of 1875, adopted in Maryland by a statutory provision to the effect that "an agreement or combination by two or more persons to do or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as an offense,"[48] is therefore a special rule not in conformity with the common law. Whether the joint act is different in its

[47] Mapstrick v. Ramge, 9 Neb. 390, 2 N. W. 739.

[48] Code 1888, Art. 27, Sec. 31.

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nature from the individual act, and whether, if so, it should be treated as unlawful, must depend upon circumstances, and may be determined by considerations of policy within the control of the legislature.

The element of coercion and oppression in particular may depend entirely upon numbers. The whole common law of conspiracy is based upon the theory that the combination of several or many creates a danger not necessarily belonging to the act of one, so where a conspiracy to cheat is treated as a crime. From that point of view alone, the right to quit an employment does not of necessity imply that the agreement of many to quit simultaneously may not be unlawful or may not be made so by the legislature.

**§ 336. Strike as a source of disorder.**—Conceding that the right to agree to quit work, and to carry out that agreement by concerted action is not an absolute constitutional right, its prohibition might be defended under the principles of the police power on the ground that the strike, even if intrinsically free from acts of illegality, yet has a natural and almost inevitable tendency to lead to acts of coercion if not to acts of violence. So it has been held that the right to trade near a camp meeting ground may be prohibited merely because it tends to produce disturbances.[49] To a large proportion of strikes may be applied the words used by the Supreme Court of Massachusetts in a recent case: "It is well to see what is the meaning of this threat to strike, when taken in connection with the intimation that the employer may 'expect trouble in his business.' It means more than that the strikers will cease to work. That is only the preliminary skirmish. It means that those who have ceased to work will by strong, persistent, and organised persuasion and social pressure of every description do all they can to prevent the employer from procuring workmen to take their places. It means much more. It means that, if these peaceful measures fail, the employer may reasonably expect that unlawful physical injury may be done to his property; that attempts in all the ways practiced by organised labor will be made to injure him in his business, even to his ruin, if possible; and that by the use of vile and opprobrious epithets and other annoying conduct,

[49] Commonwealth v. Bearse, 132 Mass. 542; Meyers v. Baker, 120 Ill. 567, 12 N. E. 79.

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and actual and threatened personal violence, attempts will be made to intimidate those who enter or desire to enter his employ; and that whether or not all this be done by the strikers or only by their sympathisers, or with the open sanction and approval of the former, he will have no help from them in his efforts to protect himself. However mild the language or suave the manner in which the threat to strike is made under such circumstances as are disclosed in this case, the employer knows that he is in danger of passing through such an ordeal as that above described, and those who make the threat know that as well as he does. Even if the intent of the strikers, so far as respects their own conduct and influence, be to discountenance all actual or threatened injury to person or property or business except that which is the direct necessary result of the interruption of the work, and even if their connection with the injurious and violent conduct of the turbulent among them or of their sympathisers be not such as to make them liable criminally, or even answerable civilly in damages to those who suffer, still, with full knowledge of what is to be expected, they give the signal, and in so doing must be held to avail themselves of the degree of fear and dread which the knowledge of such consequences will cause in the mind of those—whether their employer or fellow workmen—against whom the strike is directed; and the measure of coercion and intimidation imposed upon those against whom the strike is threatened or directed is not fully realised until all those probable consequences are considered. Such is the nature of the threat, and such the degree of coercion and intimidation involved in it."[50]

§ 337. **Strikes and trusts.**—If it be argued—and this argument should be controlling—that the danger of abuse does not justify the entire denial or abrogation of an important economic right, but allows at most its regulation by reasonable restrictions, still the prohibition of strikes cannot be regarded as exceeding the limits of legislative power, as long as the anti-trust acts are upheld as constitutional. It is impossible to say that there is such difference between the price of labor and the price of other commodities, that agreements to raise the former are beyond the legislative power of prohibition, while agreements to raise the latter are subject to it. Both

[50] Plant v. Woods, 176 Mass. 492, 57 N. E. 1011.

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are equally in restraint of trade as understood in our law; that is to say in restraint of free competition. It would be going too far to say that the exemption of labor makes the anti-trust acts unconstitutional as class legislation; but since the validity of anti-trust legislation is upheld, the most that can be said in favor of strikes is that it is within the limits of legislative policy to discriminate in favor of wages; but labor cannot claim, as a matter of constitutional right, that it is exempt from a power of the state, which extends to all other contracts and commodities. The discrimination between employers and employees in this respect was adverted to, but an expression of opinion declined by the Supreme Court of Pennsylvania,[51] and it has been sustained as legitimate classification in Nebraska.[52]

[51] Cote v. Murphy, 159 Pa. St. 420.

[52] Cleland v. Anderson, (Neb.), 92 N. W. 306.

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## CHAPTER XV.

### COMBINATIONS OF CAPITAL.

### RESTRAINT OF TRADE, MANIPULATION OF PRICES, AND TRUSTS AND MONOPOLIES.

§ 338. **English legislation.**—The English statutes and law books mention three kinds of practices calculated to make necessaries of life and other commodities expensive: forestalling, regrating, and engrossing. Forestalling is the buying of merchandise or dead victual coming in the way of market, dissuading persons from bringing goods there, or inducing them to enhance the price. Regrating is the buying of corn or dead victual and selling it in the same market, thus making the purchaser pay a double profit. Engrossing is the buying wholesale in the domestic market and selling again wholesale.[1] The earliest provision against practices of this kind seems to be the Judicium pilloriae of 51 Henry III (1266) "de forestallariis qui ante horam debitam et in villa statutam aliquid emant contra statutum villae et mercati."[2] In the Statutes of the Realm, acts against regrators, forestallers, and engrossers, either generally or in specified commodities, are found in 27 Ed. III stat. 1, in 2 and 3 Ed. VI c. 15, 3 and 4 Ed. VI c. 9, 19, and 21, and above all a very full act in 5 and 6 Ed. VI, c. 14, 1552. These statutes were repealed in 1772,[3] and as the practices continued to be held punishable at common law, the common law offenses were abolished in 1844 by 7 and 8 Vict. ch. 24. Combinations having a like tendency or purpose were not separately dealt with by English statutory legislation, but were punishable either under the acts before mentioned, or as criminal conspiracies at common law.

§ 339. **American legislation.**—Under the colonial and earlier state laws, regrating, forestalling and engrossing were as a rule not dealt with specifically, but seem to have been regarded as matters of local concern.[4] Municipal charters gave author-

[1] Blackstone's Comm. IV, 158; Coke's 3d Inst. p. 195.

[2] Stephen, Hist. Crim. Law, III, p. 200.

[3] 12 Geo. III, ch. 71.

[4] As to the common law in America see Bishop's New Criminal Law I, Sec. 518-529.



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ity to enact ordinances against these practices, so the first city charter of Chicago of 1837, and the present City Act of Illinois.[5] But the city of Chicago has enacted no ordinances in pursuance of this power. Where the criminal law has been codified, the definition of conspiracy includes among the unlawful objects, acts injurious to the public trade.[6]

There is a marked contrast between this sparse and in a manner perfunctory legislation until about ten or fifteen years ago, and the recent legislative activity upon the subject of manipulation of prices. The attempt to raise and maintain prices will naturally tend toward the form most effectual for the purpose, which is the creation of a practical monopoly, and this will be undertaken as a rule only by a combination of persons. Combinations of this kind have come to be known as trusts, in consequence of the peculiar form of organisation adopted in some of the most conspicuous cases. The tide of legislation against trusts covers the period from 1889 to 1899, during which there were enacted in twenty-seven states and territories, and by the United States, about seventy statutes for their suppression and punishment.

A few typical examples will illustrate the statutory definitions of trusts: The Illinois statute of 1893 defined a trust as follows: A combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them, for either, any or all of the following purposes: 1. To create or carry out restrictions in trade. 2. To limit or reduce the production or increase or reduce the price of merchandise or commodities. 3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. 4. To fix at any standard or figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in the state. * * * 5. To make or enter into, or execute or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article

[5] Art. V, Sec. 1, No. 51, "to prevent and punish forestalling and regrating."

[6] Ill. Cr. Code, Sec. 46; N. Y. Penal Code, Sec. 168.

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of trade, use, merchandise, commerce or consumption below a common standard figure, or card or list price, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected. All such combinations are made misdemeanors.[7] Substantially the same definition is to be found in the statutes of Louisiana, Texas, Kansas and Nebraska.

The Michigan act is directed against all contracts, agreements, understandings and combinations made, entered into, or knowingly assented to * * * the purpose or object or intent of which shall be to limit, control, or in any manner to restrict or regulate the amount of production or the quantity of any article or commodity to be raised or produced by mining, manufacture, agriculture or any other branch of business or labor, or to enhance, control or regulate the market price thereof, or in any manner to prevent or restrict free competition in the production or sale of any article or commodity.[8]

The New York act of May 7, 1897, declares unlawful "every contract, agreement, arrangement or combination, whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity the free pursuit in

[7] Act of June 20, 1893; declared unconstitutional on account of an exception contained in another section. Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

[8] Act of July 1, 1889.

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this state of any lawful business, trade or occupation, is or may be restricted or prevented."

**§ 340. Analysis of provisions.**—An analysis and comparison of the several acts shows the following main points:

In a number of states the law singles out special branches of business, and in some cases is confined to them. Thus Alabama in 1883, and the United States in 1887, prohibited the pooling of freights by competing railroads; and transportation is expressly mentioned in Texas and Utah; the first anti-trust act of Kansas of 1887 was directed against grain dealers; combinations between insurance companies are specially provided against in Alabama, Nebraska, Arkansas, Missouri, South Carolina, South Dakota and Utah;[9] fees for professional services are included in Kansas and Utah; rates of interest in Kansas and South Dakota; in Maine the trust to be illegal must relate to articles which enter into general use and consumption by the people, and New York likewise speaks of articles and commodities of common use.

As a rule, however, the laws apply to all commodities. In a number of states specific exceptions are made, the effect of which will have to be considered separately.

The laws forbid agreements of whatever form, using the terms: pool, trust, agreement, combination, understanding, arrangement, and contract.

They forbid agreements made by parties of whatever character, whether individuals, firms, associations or corporations, except that Wisconsin applies only to corporations, and that Indiana requires that the parties who combine must control the output of the article in question.

The agreement must be directed to one or more or all of the following objects: restraint of trade; regulating, controlling, enhancing, or reducing prices; limiting production or fixing amount or quality of articles; lessening, restricting or preventing competition, and (in Missouri) engrossing or forestalling a commodity.

Acts other than combinations are covered by the prohibition of all attempts at monopoly, to be found in the acts of the United States, New York, and New Mexico; by the statutes

[9] Insurance is not included under commodities. Queen Insurance Co. v. State, 86 Tex. 250, 24 S. W. 397; Aetna Insurance Co. v. Commonwealth, 21 Ky. Law Rep. 503, 45 L. R. A. 355.

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against corners on the market enacted in Illinois and Tennessee; and by a provision of the statute of North Carolina forbidding the selling at less than cost to break competition.

Omitting the last mentioned provision, all the acts or practices condemned may be brought under the head of either combinations in restraint of trade, or monopolies.

§ **341. Federal anti-trust legislation.**—The federal legislation against trusts rests upon the power given to Congress "to regulate commerce with foreign nations, and among the several states." Of the principal acts dealing with combinations, that of 1887, the Interstate Commerce Act,[10] forbids the pooling of freights by competing interstate railroads, that of 1894 forbids combinations by importers,[11] and that of 1890 (the Sherman anti-trust act)[12] declares to be illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce between the states or with foreign nations, and makes it a misdemeanor for any person to make such contract or engage in such combination, or to monopolise, or to attempt to monopolise, or to combine with any other person to monopolise, any part of such trade or commerce. As the federal power of legislation is confined to interstate and foreign commerce, it has become necessary to determine what combinations belong to this category. The Supreme Court has decided that the attempt to buy up the plants of the four most important independent sugar refineries in the country is not within the act of 1890, since manufacture is not commerce. "Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy."[13] It would seem immaterial whether the combining manufacturers reside in the same state or in different states. But a combination between different pipe manufacturers not to bid

[10] I Suppl. Rev. Stat. p. 529.

[11] Act Aug. 27, 1894, § 73, II Suppl. p. 333.

[12] I Suppl. Rev. Stat. p. 762.

[13] United States v. E. C. Knight Co., 156 U. S. 1, 16.

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against each other on contracts to supply pipes to other states, is within the act, for it "directly restrains not alone the manufacture, but the purchase, sale and exchange of the manufactured commodity among the several states."[14] An agreement between members of a live stock exchange to charge certain commissions for sales of cattle effected at certain stock yards is not violative of the federal act, though the cattle come from other states and are articles of interstate commerce, for the transaction to which the restrictive agreement relates, is a sale between parties at the same place, and the effect on interstate commerce is only remote and incidental; nor is an agreement between yard traders not to trade with any but members of the exchange contrary to the act.[15] A strike of men employed on an interstate railroad is not in restraint of trade between the states, if it is confined to the contract of employment; but if, as a means of making the strike more effective, the strikers seek to obstruct the movement of trains from state to state, they become amenable to the provisions of the federal act.[16]

**§ 342. Division of control between states and the United States.**—The control over trusts extending their operations over a number of states is thus divided between state and federal legislation as follows:

A combination formed for the purpose of engaging in interstate or foreign commerce is subject to the power of Congress, and withdrawn from the power of the states. The state can merely refuse to such combination its own charter of incorporation, and may deprive a domestic corporation engaged in interstate commerce of the power to consolidate with other corporations under its own laws.[17]

A combination formed for the purpose of engaging in the business of manufacturing or insurance is subject to state law, and a state may prevent a combination formed in another state from engaging in such business in its territory.[18] There is authority for saying that Congress cannot prevent the

[14] Addyston Pipe and Steel Co. v. United States, 175 U. S. 211.

[15] Hopkins v. United States, 171 U. S. 578; Anderson v. United States, 171 U. S. 604.

[16] United States v. Workingmen's Amalgamated Council, 54 Fed. 994; United States v. Cassidy, 67 Fed. 698; Waterhouse v. Comer, 55 Fed. 149.

[17] Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 703.

[18] Paul v. Virginia, 8 Wall. 168.

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formation of such a combination, though concerns belonging to different states be parties to it.[19] A state cannot prevent a commercial trust of another state from entering its territory for the purpose of interstate business;[20] nor can it prevent an industrial trust organised in another state from coming into its territory for the purpose of selling its products to be sent from the state where they are manufactured. Probably a state cannot even prevent its own citizens from combining in its own territory to restrain free competition in the importation of goods from outside of the state, although prohibitions to that effect are found in the anti-trust laws of several states.[21]

But all that the state cannot do, Congress may do, and while Congress cannot prevent the organisation of an industrial monopoly, it can probably forbid the sale of its products to other states, after it has been organised.[22]

There are some passages in the opinion in United States v. E. C. Knight Co. that lend some support to the contention that an industrial monopoly is beyond the power of Congress even as to the sale of its manufactures, such sales being merely incidental and collateral to manufacturing; but this evidently cannot be. The sale of the manufactured product from one state to another not being within the control of any one state, must be under federal control. The transaction passed upon by the court was a sale of corporate stock and not a sale of sugar, and while an intent to monopolise the sale of sugar to other states was charged, it came before the court merely as an ulterior purpose, and not as the subject matter of any transaction which was directly involved in the case.

**§ 343. Restraint of trade at common law.**—In order to

[19] U. S. v. E. C. Knight Co., 156 U. S. 1.

[20] Crutcher v. Kentucky, 141 U. S. 47.

[21] Arkansas, Minnesota, Montana, Tennessee, and Utah.

[22] Nor, it seems, can the power of Congress be evaded by passing title within the state of manufacture; for Congress must have constitutional authority to treat a transaction according to its real nature, whatever forms may be adopted. For constitutional purposes the controlling question is whether the sale is for shipment to another state, and this purpose may be gathered either from the fact that the purchaser transports an article in its original package to another state, or that the manufacturer or such intermediary as he may employ receives payment by remittance from another state.

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understand the modern anti-trust legislation, it is necessary to advert briefly to common law principles. That the spirit of the common law strongly favored free competition in trade is well established. But this general policy did not prevent practices and institutions sanctioned by authority which ran contrary to the principle. Monopolies were granted by Royal Letters Patent until the courts and Parliament declared the practice to be illegal;[23] but monopolies could of course at any time thereafter be authorised or created by Parliament itself. Immemorial custom sanctioned also the privileges of guilds and regulated companies which were expressly saved by the Statute of Monopolies, and with reference to which it was said, that bye-laws in restraint of trade might lawfully be made, not to restrain or cramp trade generally, but only for its better government and regulation, or for the benefit of the place and to avoid public inconvenience, or for the improvement of the commodity.[24] The status of monopolies sanctioned by authority will be discussed in connection with the constitutional principle of equality.

Restraint of trade resting upon private arrangements has this in common with a privileged monopoly, that it lessens or suppresses competition, and this indeed is the chief meaning and essence of restraint of trade. Practically it always takes the form of an agreement, and the question of legality or illegality arises in two different ways; either: shall the agreement be enforced or not? or, can the agreement be treated as a tort or crime or cause of forfeiture? Illegal may mean both void and wrongful, or it may mean simply unenforceable.

The usual forms of arrangements tending toward restraint of trade are as follows:

**§ 344. Associations with restrictive bye-laws.**—1. An association of persons engaged in the same trade, the bye-laws of which restrict the members in the conduct of their business, binding them to charge certain prices, or not to sell certain articles. Such bye-laws are void, and the making of them is not within the charter power of a corporation organised to promote the common trade interests of its members.[25]

[23] Sec. 656, *infra*.

[24] Mitchel v. Reynolds, 1 P. W. 181.

[25] Kolff v. St. Paul Fuel Exchange, 48 Minn. 215; Nester v. Continental Brewing Co., 161 Pa.

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**§ 345. Agreements not to deal with persons acting contrary to agreement.**—2. The formation or maintenance of associations, the members of which bind themselves, or try to induce their customers, not to deal with persons who refuse to abide by their rules or refuse to join them, or who are not members. The chief question is then, are they liable in damages to the person whose trade they cut off? The leading case upon the subject is Mogul Steamship Company v. McGregor Gow & Company.[26] The defendants had formed a combination of steamship companies engaged in the China trade from which the plaintiff, competing carriers, were excluded. The defendants gave notice to the China merchants that any shipment by plaintiff's vessels would debar them from the benefit of certain rebates which they otherwise granted to shippers dealing exclusively with them; at the same time they began to charge low and ruinous rates of shipment in order to underbid plaintiff and drive it out of trade. It was held that there was no actionable conspiracy, and that the acts charged would not constitute a crime. The decision was chiefly based upon the argument that competition in trade is sufficient justification for injury inflicted upon another, provided it does not descend to fraud, intimidation, obstruction, molestation, oppression, or the intentional procurement of the violation of individual rights, and that it does not make any difference whether the action is individual or concerted, since combination in trade is the only means of equalising conditions, wealth and economic power, and to discountenance the combination of capital would be to discriminate against the poor in favor of the wealthy. That the combination was in restraint of trade was held not to be sufficient to stamp it as a conspiracy; it was, however, intimated that it might make the agreement and combination void and unenforceable. The effect of the decision for England is that a combination to suppress competition is neither a crime nor a tort, but the rule that an agreement in restraint of trade will not be enforced, is not disturbed. Combinations of this character have come before American courts in actions for damages or for

473; Bailey v. Master Plumbers Association of Memphis, 103 Tenn. 99, 46 L. R. A. 561; Milwaukee Masons & B. Association v. Niezerowski, 95 Wis. 129, 37 L. R. A. 127; Boutwell v Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803. As against third parties such an association constitutes an actionable conspiracy.

[26] 1892 App. Cas. 25.

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injunctions, and the relief asked for has been denied in a number of cases. In Illinois the court refused to compel admission to membership in a live stock exchange or to enjoin the exchange from notifying its members not to deal with complainant.[27] The bye-laws of the association even if void were held not to be actionable, on the authority of the Mogul Steamship Company case. In Matthews v. Associated Press,[28] a bye-law of the Associated Press forbidding its members to receive and publish the dispatches of another association was sustained, the court evidently inclining strongly against the doctrine of restraint of trade, and doubting whether the collection and distribution of news came under the head of trade. In Minnesota the court refused to interfere with the agreement of an association of retail lumber dealers to the effect that they would not deal with any manufacturer or wholesale dealer who should sell directly to consumers at any point where a retail yard was carried on, upholding the right of association in strong terms,[29] but a contrary view was taken of similar agreements in Indiana and Texas,[30] and an injunction against carrying such an agreement into effect was granted in Georgia.[31] None of these cases arose under an anti-trust statute. An agreement similar to the one passed upon in the Chicago Live Stock Exchange case was held not to be illegal under the federal anti-trust act, since it had no direct relation to interstate commerce.[32] The court also seems to regard an association which admits any one willing to abide by its terms to membership as not being in restraint of trade, but if the object of the bye-laws is to maintain prices, it can hardly be doubted that it would be covered by the provisions of most anti-trust statutes.

§ 346. **Exclusive selling arrangements—Rebates.**—3. Sales with provisions for maintaining prices or for the exclusive handling of goods. Arrangements of this kind are especially

[27] American Live Stock Commission Co. v. Chicago Live Stock Exchange, 143 Ill. 210, 18 L. R. A. 190.

[28] 136 N. Y. 333, 32 N. E. 981.

[29] Bohn Manufacturing Co. v. W. G. Hollis, 54 Minn. 223.

[30] Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345; Olive v. Van Patten, 7 Tex. Civ. 630, 25 S. W. 428.

[31] Brown & Allen v. Jacobs Pharmacy Co., 115 Ga. 429, 57 L. R. A. 547.

[32] Anderson v. United States, 171 U. S. 604.

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common between manufacturers and dealers. Where a manufacturer employs a selling agent, he may undoubtedly stipulate that the agent shall not sell below a stated price or that he shall not handle goods of rival manufacturers.[33] This is true even where he employs many selling agents, for the sales are still his own, and while competition between the agents as to prices is prevented, it must be remembered that such competition would be possible only by violating the duty of the agent to carry out his principal's instructions. The manufacturer may also sell to the dealer and either promise that he will not sell to others, or stipulate that the dealer will not handle rival goods or will not sell below a stated price. Frequently this latter agreement is made in this form that the dealer, if he lives up to his agreement, becomes entitled to a rebate from the selling price. In the absence of anti-trust acts, and in the case of goods manufactured by secret processes (patent medicines) such arrangements have been held not to violate the common law rule against restraint of trade.[34] In Texas the arrangement under which the dealer purchases of the manufacturer is treated differently from that under which he acts merely as an agent, and is held to fall under the prohibition of the anti-trust act,[35] but in New York an agreement to grant a rebate for not selling below the manufacturer's price is held lawful notwithstanding the statute.[36] On the other hand, the refusal of a monopolistic corporation to sell to those handling rival products has in New York been treated as a conspiracy.[37]

In the case of John D. Parks & Sons Co. v. National Wholesale Druggists Association,[38] the defendant association, representing 90 per cent of the wholesale trade, had required the manufacturers of patent medicines in the United States to compel the purchasers of their goods to accept a contract

[33] Welch v. Phelps, etc., Co., 89 Tex. 653, Mass. Rev. Laws, ch. 56, § 1.

[34] Fowle v. Park, 131 U. S. 88; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; see also Re Greene, 52 Fed. 104; United States v. Greenhut, 51 Fed. 213; Dueber Watch Case Co. v. Howard Watch Co., 66 Fed. 637.

[35] Columbia Carriage Co. v. Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288.

[36] Walsh v. Dwight, 58 N. Y. S. 91, 40 App. Div. 513; John D. Parks & Sons Co. v. Nat'l W. Druggists Ass'n, 67 N. E. 136.

[37] People v. Duke, 44 N. Y. Suppl. 336.

[38] 67 N. E. 136.

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whereby they became bound to sell at the prices fixed by the manufacturer, purchasers violating such contract to lose[39] the rebate otherwise granted them on the selling price. The plaintiffs charged that manufacturers who were willing to sell to them on other terms were coerced into refusing to sell to them, through the fear of losing the trade of the association, and the truth of this charge was admitted. The action of the association was, by a divided court, held not to be illegal or in restraint of trade.

Part of the plan was the prevention of secret rebates, a purpose which is undoubtedly lawful, for both at common law and under the anti-trust acts it is perfectly competent for a number of parties to agree that they will not buy of a seller unless he will sell to them as cheaply as to anyone else, such agreement aiming at equality of treatment, and having nothing to do with restraint of competition. Another part of the plan, however, was a combination to prevent any dealer from sacrificing any part of his regular rebate or commission as a means of underselling his competitors. The combination, while looking primarily to the maintenance of commissions, sought to accomplish this object by the maintenance of prices as a necessary means thereto; and the prevailing opinion concedes that "it does away with competition among dealers as to prices," but a strong plea is made in favor of the right of smaller dealers to protect themselves by arrangements like that before the court against the underselling by stronger competitors, and the anti-trust act is ignored.[40]

The issue of rebate certificates is forbidden by statute in

[39] The plan of the association speaks of the purchasers as selling agents, but in reality they seem to be purchasers and not agents, since the goods are billed to them at the selling price, upon which they receive a rebate of 10 per cent.

[40] The dissenting opinion of Cullen, J., says: "I agree * * * that the combination between the jobbers to force the manufacturers to sell to each of their number at exactly the same price and upon the same terms, and to sell to no one else on any better terms, was entirely legal, and that it was within their rights to accomplish this result by refusing to deal with or handle the goods of any manufacturer who would not comply with their demands. If the object of the combination ceased here, it would not be subject to criticism. But the scheme adopted goes further. It requires not only the manufacturer to sell at the same price to each jobber, but to compel each jobber to sell to the consumer at the same price, by refusing to sell goods to any one who would not comply with

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Louisiana.[41] Massachusetts since 1901 provides[42] that a person shall not make it a condition of the sale of goods that the purchaser shall not sell or deal in the goods of any other person, this provision, however, not to prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of goods.

**§ 347. Agreements to fix prices, limit supplies, or divide business.**—4. Agreements between several distinct competing concerns looking toward the removal of competition, or of its injurious effects, by fixing prices, limiting supplies, or by distribution of business. Such agreements have come before the courts in a few cases on proceedings for conspiracy,[43] or in Quo Warranto,[44] or usually in actions arising out of the original agreement or out of contracts entered into in furtherance of it. As early as 1847 and 1848, the Supreme Court of New York held certain agreements between a number of proprietors of transportation lines on the state canals for the regulation of rates to be illegal, and refused to enforce agreements made in connection therewith.[45] Agreements in connection with the formation of combinations for the control of the coal supply in certain markets have been held to be illegal in Pennsylvania and New York,[46] a combination for the control of the supply and sale of salt in Ohio.[47] In Massachusetts a contract for the division of the business in fish skins (used for the manufacture of glue) was sustained on the ground that fish glue is not a necessary of life,[48] but in New York agreements looking toward the control of the supply of bluestone and of envelopes have been declared unenforceable, since these articles, though not of prime necessity, were useful, the court leaving it undetermined whether articles of luxury could fall under the common law rule against restraint of trade.[49]

these requirements. It is in this respect that the agreement is vicious and operates in restraint of trade, for it destroys competition among the jobbers."

[41] Act 176, 1894.

[42] Rev. Laws, ch. 56, § 1.

[43] People v. Sheldon, 139 N. Y. 251.

[44] People v. Milk Exchange, 145 N. Y. 267.

[45] Hooker v. Vandewater, 4 Den. 349; Stanton v. Allen, 5 Den. 434.

[46] Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 558.

[47] Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666.

[48] Gloucester, etc., Co. v. Russia Cement Co., 154 Mass. 92.

[49] Cummings v. Union Bluestone

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**§ 348. Covenants by vendor of business.**—5. Covenants made by a vendor of a business not to engage in the same business. As these covenants may be necessary to protect the purchaser against what would be unfair competition, the common law relaxes the general rule against restraint of trade, and makes a distinction between total or general and partial restraint. A partial restraint, limited by place, time, or circumstance, and based upon a valuable consideration, will be enforced by the courts.[50] In England the idea of reasonable restraint has been given a liberal interpretation in the case of Nordenfeldt v. Maxim-Nordenfeldt Co.,[51] where, upon a covenant made by a patentee and manufacturer of guns and ammunition of war in transferring his patent to a company, whereby he bound himself not to engage in that business for a term of twenty-five years, it was held that owing to the nature of the business, and the limited number of customers to whom sales might be made (confined mainly to governments), the restraint imposed was not larger than was necessary for the protection of the covenantee, and not injurious to the public interest. The same, and even a more liberal view, was taken in New York, in Diamond Match Company v. Roeber,[52] where the court sustained a covenant of a match manufacturer upon selling his business not to engage in the same business at any time within 99 years anywhere within the United States, with the exception of the states of Nevada and Montana. The court intimated that the doctrine of the common law had been weakened and modified, but chose to place its decision upon the ground that the restraint was partial, refusing to regard the exception of two remote states as merely colorable. This position cannot be accepted as satisfactory, and the case must be taken as an abandonment or at least a strong modification of the common law doctrine. The latter is strongly upheld in Illinois, where a covenant by a vendor not to engage in the same business for a term of twenty-five years was held unenforceable even as to the state of Illinois—a position in its way perhaps as extreme as that of the New York court.[1]

Co., 164 N. Y. 401, 58 N. E. 525; Cohen v. Berlin & Jones Envelope Co., 166 N. Y. 292, 59 N. E. 906.

[50] Mitchel v. Reynolds, 1 P. Will. 181, 1711.

[51] 1894 App. Cas. 535.

[52] 106 N. Y. 473.

[1] Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N. E. 1038.

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It should be noted that in the Roeber case the purchaser was already engaged in the match business; the very object of the whole transaction was therefore removal of competition. But this in New York is no objection. "We suppose a party may legally purchase the trade or business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties."[2] A man may even be paid to go out of business, though he has no stock or good will to deliver.[3] New York apparently regards the common law as prohibiting only combinations between distinct concerns for enhancing of prices, limiting of production, or pooling of profits.[4]

**§ 349. Consolidation of different concerns.**—6. The consolidation of several concerns into one differs from the buying out of competitors in the fact that the former does not involve a covenant not to engage in the same business. In both cases competition is met, not by agreements regarding the management of distinct concerns, but by removing the source of rivalry and competition. Disregarding in the case of buying out a competitor the possible covenant not to engage in the same business, the two cases constitute transactions which in the absence of complicating circumstances are undoubtedly valid at common law: namely, the sale of a business, or the formation of a partnership.

A complication arises where either of the competing parties is a corporation. A corporation would not ordinarily be prevented from buying or (unless it be a public service corporation with a franchise) selling a plant from or to a competitor, but if a merger is attempted in other ways certain difficulties will arise. Thus if one corporation should desire to acquire the controlling interest in the stock of another competing corporation, the corporate power to own such stock must be inquired into. A synopsis of the statutory provisions in question is found in the Report of the Industrial Com-

[2] Diamond Match Co. v. Roeber, 106 N. Y. 473; also Leslie v. Lorillard, 110 N. Y. 519, 1 L. R. A. 456. So also Harrison v. Glucose Sugar Refining Co., 116 Fed. 304, 58 L. R. A. 915.

[3] Wood v. Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357.

[4] Lough v. Outerbridge, 143 N. Y. 271, 25 L. R. A. 674.

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mission II, p. 288 and 289. In New Jersey and Delaware there is affirmative authority to buy the stock of other corporations, and it has been held that one corporation may buy the controlling interest in the stock of the majority of its rivals.[5] But it has been held in Illinois that a corporation which is engaged in the business of manufacturing and supplying gas cannot make it one of its charter objects to buy the stock of other gas corporations,[6] and the same restriction was enforced with reference to a manufacturing corporation under the laws of New York.[7] This form of consolidated control is therefore not open in all the states.

**§ 350. Trusts.**—A greater difficulty was encountered in that form of organisation which has given the name of trusts to monopolistic combinations. When these combinations first assumed the gigantic proportions which attracted public notice, the uniting concerns, which naturally were, as a rule, corporations, tried to preserve their distinct legal existence, and merely placed their shares in trust with a managing board which was to control the business of all jointly. It was held that the action of the constituent corporations was illegal and ultra vires, because corporations cannot form partnerships,[8] or otherwise surrender the control of the management of their affairs. "It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of the franchise by placing them in trust; to accept from the state the gift of corporate life only to disregard the condition upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control."[9] In the case just cited the Sugar Trust, and in Ohio the Standard Oil Trust, was consequently declared illegal upon quo warranto proceedings.[10]

**§ 351. Consolidation of corporations.**—In consequence of these decisions the trust form of joint management has been

[5] Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L. R. A. 255.

[6] People ex rel. Peabody v. Chicago Gas Trust Co., 130 Ill. 268.

[7] De La Vergne Refrigerating Machine Co. v. German Savings Institution, 175 U. S. 40.

[8] Whittenton Mills v. Upton, 10 Gray 582.

[9] People v. North River Sugar Refining Co., 121 N. Y. 582.

[10] State ex rel. Watson v. Standard Oil Co., 49 Oh. St. 137, 15 L. R. A. 145.

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gradually abandoned, and the regular way of organising a trust (for the name has become fixed and familiar in popular language) is to form a new corporation, have it buy the plants of the concerns sought to be united, and to pay for them in stock or bonds of the new corporation to be issued to the shareholders of the concerns bought out. This is practically a consolidation of corporations and requires statutory authority, but the authority to consolidate is often given to corporations engaged in the same general line of business.[11] Where there is no power to consolidate, or a doubt with regard to it, the difficulty has been sought to be avoided by the formation of a corporation the object of which is to acquire a controlling interest in the stock of the corporations which are to be subjected to harmonious management. As a matter of form the individuality and separate management of each constituent corporation is preserved, and the objection to the trust form is thus avoided. The status of the security holding corporation is certainly not better than that of the amalgamated corporation organised under a power to consolidate, and if the latter be held illegal as an instrument of monopoly, so is the former.

§ 352. **Monopolistic corporation.**—If an organisation resulting from the union of formerly competing concerns is illegal notwithstanding a general power to consolidate, it must be because it pursues an illegal object, and the illegal object must be the monopolising of some branch of business. A monopoly, in other words, is not saved from illegality by assuming corporate form. "The defendant contends that the change in organisation from an unincorporated association to a corporation, and the change in the mode of holding the

[11] Industrial Report Commission II 286, 287. Can an authorisation to consolidate or to organise a security holding corporation, given by a state, avail, if sought to be applied to interstate or foreign commerce, against the federal prohibition of combinations in restraint of such commerce? In United States v. Northern Securities Co., 120 Fed. 721, an arrangement serving the purpose of consolidation was held illegal though authorised by state law; but there the purpose of restraining competition was regarded as plain. The federal anti-trust act cannot be held to forbid every consolidation or formation of partnership, under state laws, between previously distinct and competing concerns, simply because these concerns are engaged in interstate or foreign commerce. See quotation below, § 354, from Hopkins v. United States, 171 U. S. 578.

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distillery properties of the various corporations formerly belonging to the trust, by surrendering the stock of the corporations, by means of which the control of these properties was formerly maintained, and having the properties themselves transferred and conveyed directly to the defendant corporation, have purged the combination of its illegality. * * * That corporation succeeds to the trust, and its operations are to be carried on in the same way, for the same purpose, and by the same agencies as before. The trust then being repugnant to public policy and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country—over production and prices—and the virtual monopoly formerly held by the trust, are in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organisation of the corporation. There is no magic in a corporate organisation which can purge the trust scheme of its illegality, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence."[12]

§ 353. **When is the point of monopoly reached?**—The decision in the Whisky Trust case was rendered under the anti-trust laws of the state, but in Illinois and many other jurisdictions it is assumed that a monopoly is illegal as a matter of common law.[13] Yet it is probably also true that the question of monopoly has always been treated as incidental to and inseparable from agreements in restraint of trade. An agreement is invalid as in restraint of trade as soon as it tends to hamper the liberty of action of two competing concerns, although the two together may be far from monopolising the market; but in the case of buying out or consolidation the mere removal of a particular competitor is not sufficient; there must be the creation of a practical monopoly. When is that point reached? The Diamond Match Company

[12] Distilling and Cattle Feeding Co. v. People, 156 Ill. 448, 490. So in New York the action of a monopolistic corporation (the American Tobacco Company) has been treated as a conspiracy between the members of the corporation; People v. Duke, 44 N. Y. Suppl. 336.

[13] Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577; Bishop v. American Preservers' Co., 157 Ill. 284.

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is a very conspicuous case of a practical monopoly; yet a purchase made to perfect its organisation was upheld in New York.[14] It is true that in the New York case the point was not made that the purchase was in aid of a monopoly, restraint of trade merely being relied upon, but the court also took occasion to say "The business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies." If the point of monopoly is not reached as long as there is a possibility of starting rival enterprises, most of the recent consolidations known as trusts are legal.

Again it must be asked: is a consolidation saved from the charge of monopoly by the fact that it does not embrace all rival concerns? Not apparently in Illinois, and the Court of Appeals of New York has spoken of arrangements covering 90 per cent or 95 per cent of the business as practical monopolies.[15] But the federal courts have held the Whisky Trust not to be a monopoly, because it embraced only three-fourths of the product in the United States, and because the vendors of distilleries were not under obligation not to build others,[16] and in Rhode Island it was not held to be a monopoly for three out of four manufacturing concerns in New England to consolidate with a new corporation since the fourth concern was left free to compete.[17]

If we then reach the result that a monopolistic combination is illegal at common law, whatever form it may assume, it is yet impossible to say when the point of practical monopoly is reached and the permissible limits of mere magnitude of consolidation are overstepped. The line between the two eludes judicial definition, although economic writers have indicated the percentage of the total business which secures a monopolistic control. There may of course be cases where it is clear that the point of monopoly has not been reached.[18]

[14] Diamond Match Co. v. Roeber, 106 N. Y. 473. *Contra* in Michigan: Richardson v. Buhl, 77 Mich. 632.

[15] Cummings v. Union Bluestone Co., 164 N. Y. 401; Cohen v. Berlin & Jones Envelope Co., 166 N. Y. 292.

[16] United States v. Greenhut, 51 Fed. 205.

[17] Oakdale Manufacturing Co. v. Garst, 18 Rh. I. 484, 23 L. R. A. 639.

[18] See e. g. Meredith v. New Jersey Zinc & Iron Co., 55 N. J. Eq. 211.

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Assuming that the point of practical monopoly is reached when a business "by reason of ownership or control of lands growing timber or other vegetable products, or containing coal, oil, iron, or other minerals or metals used in the manufacture of such articles, or by reason of ownership or control of the instrumentalities of manufacture, production or sale shall have the power to control or affect, in whole or in part, the prices of said articles throughout the United States, so as to prevent, forestall, stifle, destroy, or hinder competition therein," can such a business reasonably be declared to be illegal? There may be only one mine containing a certain mineral (so e. g. turquoise) in the United States: can it be illegal to own, or to attempt to acquire, that mine? Certainly not; and how if there are two or three mines? The anti-trust bill introduced (but not passed) in the 57th Congress, from which the above words are quoted, adds that the business, to be illegal, must be "so conducted in whole or in part so as to prevent, forestall, stifle, destroy or hinder such competition," and this seems to contemplate some illegal practice besides the taking advantage of the control of more or less exclusive natural or economic resources; but if so, it would have seemed unnecessary to make an express exception, as the bill does, in favor of a business founded on a secret process. In fact, after a business has obtained a monopoly, it seems superfluous to require that it shall not be so conducted as to hinder competition, for competition will be hindered without any particular machinations on its part. The prohibition of the law should be directed against combinations preceding the monopoly and having for their object its formation. And if the term monopoly covers the control of resources enabling a concern to exercise a sensible effect upon the supply or the price of an article throughout the United States, it is clear that hardly any consolidation of great corporations can be lawful, and that there is a repugnancy between the laws allowing such consolidation, and the prohibition of monopolies.

§ 354. **Interpretation of anti-trust acts.**—Having examined the doctrines of the common law regarding restraint of trade and monopoly, we should ask whether they have been substantially altered or whether their uncertainties have been removed by the statutory legislation of recent years.

If it could be urged successfully that the common law con-

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demns only those combinations which relate to articles of prime necessity, the anti-trust acts would constitute an extension of the doctrine in that respect, for in many states they undoubtedly cover all commodities. Thus they have been enforced in Texas with regard to combinations limiting the sale of intoxicating liquor.[19] But in most states the courts would not recognise in this respect any difference between statute and common law, since they regard the common law doctrine as extending to convenient and useful articles, barring at most luxuries.[20]

It has been held by the Supreme Court of the United States that the federal anti-trust act forbids any agreement in restraint of trade, no matter whether the purpose be to prevent merely ruinous competition or to oppress the public.[21] The dissenting judges were of the opinion that the federal act should be interpreted as applying only to agreements in unreasonable restraint of trade. But it would be very difficult to prove that the common law made any such distinction as to arrangements regarding prices; the only forms of restraint of trade which were recognised as reasonable were the vendor's covenant not to engage in the same business, limited as to time and place,[22] and the bye-laws of regulated companies. So it was held in New York in a case decided on common law principles that the monopolistic agreement remained illegal though it be conceded that one of its purposes was to enable the parties to obtain reasonable prices, since it gave them the power to fix arbitrary and unreasonable prices. "The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity."[23] In this respect, then, the anti-trust law makes no innovation.

The anti-trust acts admit on their face of an interpretation making every partnership and corporation illegal, since every partnership and corporation necessarily involves an agreement between persons regarding supplies and prices. But the obvious answer to such a suggestion is that every statute

[19] Texas & Pacific Coal Co. v. Lawson, 89 Tex. 394.

[20] Cummings v. Union Bluestone Co., 164 N. Y. 401, 58 N. E. 525.

[21] United States v. Trans-Missouri Freight Association, 166 U. S. 290.

[22] The continuing validity of such an agreement under the anti-trust laws is conceded by the Supreme Court (Hopkins v. United States, 171 U. S. 578).

[23] Cummings v. Union Bluestone Co., 164 N. Y. 401.

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must receive a reasonable construction and that it was manifestly not intended to touch business associations of the usual kind. The United States Supreme Court approves the same general principle. "The Act of Congress must have a reasonable construction, or else there would be scarcely an agreement or contract among business men that could not be said to have, directly or remotely, some bearing upon interstate commerce, and possibly restrain it."[24] A distinction between partnerships and combinations has been recognised repeatedly. So in Stanton v. Allen:[25] "No one can be deceived by any supposed analogy between the principle of uniformity of prices among the members of an ordinary business firm, and the same thing in a confederation formed for no other purpose or use than to bring it about." But it will not save the illegal combination that it assumes the form of articles of co-partnership, if the combining concerns retain in reality their former distinctness and individuality.[26]

The anti-trust acts being primarily directed against combinations of concerns being and remaining otherwise distinct and separate, they cannot be held to have repealed by implication the statutes allowing the consolidation of corporations engaged in the same general line of business, which will in many cases be competing corporations. But the spirit of the law is violated where the consolidation is formed for the purpose of creating a monopoly, since monopolising a branch of industry is an illegal object at common law, and no corporation may be formed for an illegal object. Therefore where a business according to its nature tends toward a monopoly, a consolidation of competing concerns may be absolutely forbidden, so in the case of competing railroads,[27] and such consolidation may be held illegal at common law.

The great difficulty in the case of consolidation of industrial corporations is to determine when it becomes monopolistic, and unless we confine the term monopoly to a combination which suppresses or absorbs all rivals and perhaps even shuts out opportunities for forming new rival concerns, the difference between legality and illegality will be one of degree, i. e.

[24] Hopkins v. United States, 171 U. S. 578.

[25] 5 Denio (N. Y.) 434.

[26] Fairbank v. Leary, 40 Wis. 637; Craft v. McConoughy, 79 Ill. 346.

[27] Minnesota legislation, see Pearsall v. Great Northern R. Co., 161 U. S. 646.

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every consolidation of exceptional magnitude, especially one reaching out toward different parts of the country, will fall under the ban of the anti-trust laws. In this respect, too, the anti-trust legislation adheres to the common law, and, it is true, does nothing to make it more definite.

**§ 355. Constitutionality of anti-trust legislation.**[28]—The status of restraint of trade at common law has an important bearing upon the question of the constitutionality of the anti-trust statutes. For if contracts in restraint of trade are generally regarded as void and unenforceable, it may be argued that the right to make them cannot be included in the liberty guaranteed by the bills of rights. As a matter of fact, the validity of these statutes has generally been accepted without question.[29] It is, however, necessary to consider a few points, which may seem to present constitutional questions.

It can hardly be denied that the anti-trust acts create offenses out of acts, which in themselves and directly are not necessarily harmful and may even be beneficial, merely because they involve a tendency to develop ultimately oppression of the public, if they are allowed to go unchecked. This aspect has caused the constitutionality of the federal act to be drawn in question on the ground that it deprives of liberty and property without due process of law. It was urged in United States v. Joint-Traffic Association,[30] that it was not within the power of Congress to prohibit all contracts in restraint of trade, since not all such contracts are prejudicial to the security or welfare of society. The court, however, took the view that restraint of trade is necessarily injurious to the public in maintaining prices, and that the power to regulate commerce must include the power to prohibit contracts which shut out the operation of the general law of competition. It was therefore held irrelevant that the combination merely intended to establish reasonable rates and to prevent ruinous and reckless competition. It has also been held that it is no answer to the charge of illegal combination to show that its immediate object or effect is to reduce prices to the consumer.[31] In United States v. Trans-Missouri Freight Association,[32]

[28] See, also, § 734.

[29] State ex rel. Monnett v. Buckeye Pipe Line Co., 61 Oh. St. 520, 56 N. E. 464.

[30] 171 U. S. 505.

[31] People v. Milk Exchange, 145 N. Y. 267, 27 L. R. A. 437.

[32] 166 U. S. 290.

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the dissenting judges were of the opinion, that the federal act should be interpreted as applying only to agreements in unreasonable restraint of trade. In the case of the Joint-Traffic Association, where it was urged that the constitutional power of the government extended only to the prevention of unreasonable restraints, the same judges dissented, but without filing an opinion; it is therefore impossible to say whether they agreed with that contention, or whether they simply adhered to their original interpretation of the act.

It might aid the proper solution of the constitutional problem, if the distinction between the unenforceability of an agreement and the civil or criminal liability for the act of entering into it were recognised. It should be within the power of the state to refuse its aid in the compulsory enforcement of an arrangement which it believes to have a tendency unfavorable to the highest interests of the community. But the state does not ordinarily, and, it seems, cannot, require that individuals should in all their dealings pursue standards of conduct dictated by a complete subordination of private to public interest; hence that a contract may be refused judicial enforcement does not necessarily mean that it may be made the subject of penal legislation. When economic conditions make mutual understandings between managers of industrial enterprises as to mode and policy of management advantageous, and the policy adopted by each is such that it could not constitutionally be made a crime, it is not only futile, but beyond the proper scope of the police power to attempt to punish such an understanding, especially by treating it as a felony. The effect of the constitutional view here suggested would leave the common law doctrine of restraint of trade undisturbed, and would merely narrow the scope of the common law of conspiracy which was always vague and undefined, and in its extreme application may well be pronounced to be inconsistent with principles of constitutional liberty.

**§ 356. Discrimination between combinations for different purposes.**—Another argument against the constitutionality of anti-trust acts, which does not apply to the principle of the legislation, but to particular forms of enactment, is that of arbitrary discrimination. Several of the statutes contain exceptions of various kinds. Some of these simply remove from



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the operation of the law cases which are not within its general principle. Thus Michigan and Texas except contracts for the good-will of a trade or business recognised as valid at common law or in equity. North Carolina provides that buyers for their own use may combine to protect themselves from imposition in cost or purchase price, a form of combination which has no tendency to reduce competition. Wisconsin excepts organisations intended to legitimately promote the interests of trade, commerce or manufacturing, probably meaning thereby the usual associations of persons engaged in the same business for periodical reunion, for diffusion of information, and the procurement of beneficial legislation.

But in a number of states (Arkansas, Georgia, Illinois, Indiana, Louisiana, Michigan, Missouri, Montana, North Carolina, Tennessee and Texas) the acts are not to apply to agricultural products or live stock while in the hands of the producer or raiser. In Texas this exception was held legitimate,[33] on the ground that it is not within the evil sought to be remedied, since agricultural producers must dispose of their stock quickly and have no facilities for combination; but the federal courts took a different view,[34] and the Supreme Court has declared the exception to be an arbitrary discrimination contrary to the principle of the equal protection of the laws, and fatal to the whole statute in which it is contained.[35] In the states having this proviso, the illegality of trusts must therefore rest upon the common law.

In view of this decision doubts may be entertained even with regard to those statutes which cover all articles of merchandise, for why should an exception be admitted for other charges? A few states condemn agreements regarding rates of insurance and of transportation; only one state (Washington) includes the price of professional services. Perhaps it may be said that in other states the illegality of agreements relating to such charges is left to the common law, and that the unconstitutionality arises only from an express exception contained in the statute.

But there remains the question of laborers' agreements hav-

[33] Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936.

[34] Re Grice, 79 Fed. Rep. 627.

[35] Connolly v. Union Sewer Pipe Co., 184 U. S. 540; followed in Texas, State v. Waters-Pierce Oil Co., 67 S. W. 1057.

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ing for their object the increase of wages. A number of states (Louisiana, Michigan, Missouri, Montana, Nebraska, South Dakota, Texas, Wisconsin) make express exceptions in favor of these; Illinois provides that where the cost of articles is mainly made up of wages it shall not be unlawful to enter into joint arrangements, the principal object or effect of which is to maintain or increase wages;[36] in some states strikes have been excepted from the operation of the laws against conspiracy;[37] in other states they have long been legalised by custom. Is such a discrimination between labor and capital justifiable? The common law made no distinction in its condemnation of combinations injurious to trade and commerce, and combinations of workmen were in some early American cases, held to be within the law of conspiracy.[38] Under the federal anti-trust act, combinations of workmen have been declared illegal, where their object was to obstruct interstate traffic.[39] The Supreme Court of Pennsylvania has declined to pass upon the constitutional aspect of such discrimination;[40] in Nebraska it has been sustained as a legitimate classification.[41] A special legislative treatment of strikes must justify itself by special conditions which apply only to manual labor as a commodity: either that wage earners need special protection, or that a high price paid for labor cannot be considered as an injury to the public in the community. It is believed that most states would sustain the different treatment of labor and capital in this respect, but it is not easy to reconcile such discrimination with the doctrine asserted by some courts that with regard to his contract of employment, the laborer cannot be constitutionally controlled on the ground that he is economically weak and dependent.

[36] This provision, introduced into the act of 1891 by an amendment of 1897, has been declared unconstitutional. People v. Butler Street Foundry and Iron Co., 201 Ill. 236, 66 N. E. 349.

[37] N. Y. Penal Code § 170.

[38] People v. Fisher, 14 Wend. 9; Com. v. Hunt, 4 Metc. 111.

[39] United States v. Workingmen's Amalgamated Council, 54 Fed. 994; United States v. Cassidy, 67 Fed. 698.

[40] Cote v. Murphy, 159 Pa. St. 420.

[41] Cleland v. Anderson (Neb.), 92 N. W. 306.

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## CHAPTER XVI.

### CORPORATIONS.[1]

**§ 357. Association and incorporation.**—The American law recognises the right of association for economic purposes in principle, and only the abuse of the right for oppression and restraint of trade is dealt with by the police power. The right of association does not, however, include the right of incorporation, which requires some positive governmental authorisation. A corporation is regularly an association,[2] but it is an association invested with legal personality. The attribute of legal personality means that the corporation may hold property in its corporate name, as if the aggregate body were a unit distinct from its members. Corporate rights may then be disposed of, corporate obligations may be assumed, and corporate controversies may be litigated without the actual concurrence of all the members, and a change in the persons of the members does not affect the title to corporate property. Moreover, the liability for corporate obligations is according to the theory of our law limited to corporate property. The right to associate does not carry with it the right to hold property in a corporate capacity. Without this right, however, an association may be seriously handicapped. If the members of the association are numerous, it is inconvenient and practically impossible for them to hold property as joint tenants or tenants in common; especially in the case of real estate, the changes of title consequent upon death or other changes in membership would lead to intolerable complications. To some extent these inconveniences may be obviated by placing the property in the hands of a few members or others as trustees for all and by other contractual stipulations between the members, and devices of this nature have been largely resorted to in the formation of joint-stock companies; yet in some respects the status of such unincorporated companies and societies is uncertain and unsatisfactory, and the

[1] See, also, § 713-720.

[2] The corporation sole is not unknown in the United States—so the Catholic Bishop of Chicago is a corporation sole—but it is of little practical importance.



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benefit of limited liability cannot be secured without incorporation.

**§ 358. The right to incorporate as a franchise or license.**— The right to act as a corporation depends upon positive legal authority granted by the sovereign. This principle of law is firmly established, though its historical origin is obscure. By the earliest common law it appears that the right to be a *communa* or association depended upon royal license, but the difference between incorporated and unincorporated associations or communities was unknown. All recognised and lawful communities acted, sued and were sued under a common name, and acquired rights and assumed obligations by the acts of their representatives, while the benefit of limited liability did not yet exist.[3]

The idea of the corpus or corporation as a distinct and fictitious person was developed only about the end of the fourteenth and the beginning of the fifteenth century, under the influence of the speculations of canonical jurists. About the same time (1392) the old statutes of mortmain, forbidding religious societies to purchase land without royal license, were extended to municipal and other secular communities, since these were "as perpetual as men of religion."[4] A considerable number of charters of municipal incorporation follow each other in rapid succession during the reign of Henry VI, beginning with the charter of Kingston-on-Hull (1439), in all of which we find the express grant of corporate capacity in the form used to the present day, coupled with the license in mortmain, which according to one of the earliest petitions for incorporation, that of the men of Plymouth, of 1411, was the principal purpose for which the charter was desired.[5] The statutory provision forbidding the acquisition of land without the license of the king thus co-operated with the theory that the corporate personality was a fiction and a special attribute depending upon the gift of the sovereign, to make a royal charter a requisite for every legal incorporation, and this theory became part of the American common law, the legislature succeeding to the prerogative of the king.

**§ 359. Special charters and general incorporation laws.**—

[3] See Maddox, Firma Burgi, passim.

[4] 15 Ric. II, cap. 5.

[5] Gross, The Guild Merchant I, p. 94.

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The right to form a corporation thus depends in all the states upon the consent and action of the legislature. The practice was formerly for the legislature, in its discretion, to grant special charters to any association applying therefor, while now nearly everywhere general statutes exist, under which a number of persons, by complying with certain conditions, may become a corporation for one of the purposes specified by the statute, the law in some states allowing incorporation for all lawful objects (with stated exceptions), while in others it enumerates the various classes of purposes for which corporations may be constituted.

But whether incorporation takes place by special charter or under general statute, it can only be obtained upon following the requirements prescribed by the legislature, which in this respect enjoys the fullest power and discretion.[6] As to all corporations, therefore, the legislature has a wide and almost unlimited power of initial regulation. This appears legally, however, as a condition annexed to a license, and therefore operative only by the voluntary acceptance of those to be bound thereby; practically this power of regulation serves the purposes of an enlarged police power, the operation of which property holding associations can hardly escape. Incorporation can indeed be hardly regarded any longer as a special privilege and franchise; under the operation of the general statutes it has become almost like a common right, exercised, as nearly all common rights are, under restrictions imposed by law for the common benefit.

§ 360. **Restrictions on corporate capacity.**—The restrictions peculiar to the exercise of corporate powers rest partly upon the common law, and partly upon statute. The most important common law restriction is that which is imposed by what is known as the doctrine of ultra vires; by which each corporation is confined to those powers which are necessary to the accomplishment of its charter rights and objects, so that it cannot make contracts nor assume obligations or acquire property not required for those purposes. There is some

[6] "The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the Legislature may deem most suitable to the public interests and policy." Horn Silver Mining Co. v. New York, 143 U. S. 305.

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authority even for holding that no corporation may be organised for a number of distinct objects, but must restrict itself to some branch of business which can reasonably be regarded as a unit.[7] While individual action can expand in all directions, corporate action is intrinsically limited.[8]

The restrictions imposed by statute are manifold, and cover the following principal matters: the objects for which corporations may be organised; conditions as to minimum number of organisers, and sometimes as to their residence; conditions as to denomination of shares and their transferability; manner of organisation, name, subscription and payment of capital, and preliminary contracts; regarding officers and members' rights, including general meetings, right to vote, qualification and number of directors, their election, term of office, and removal, the power to make and alter bye-laws; the management of corporate business, including payment of dividends, acquisition and disposition of real estate, and the contracting of loans; liability and power to assess; increase and reduction of capital; change of name and purposes; duration, extension, liquidation, consolidation; registration of officers and shareholders; and requirement of accounts and reports.

Corporations may be subjected to regulations which could be imposed upon individuals, if at all, only for one of the recognised objects of the police power. The majority, perhaps all, of the statutory provisions regarding corporations might, it is true, also be justified on the ground of the prevention of fraud and oppression; for in the relation of the corporation to outsiders a special danger of fraud arises in connection with the principle of limited liability, and the danger of oppression may be considered to be inseparable from the power of associated capital; and the regulation of the internal cor-

[7] People v. Chicago Gas Trust Co., 130 Ill. 268; State v. Taylor, 55 Oh. St. 61, 44 N. E. 513; Williams v. Citizens' Enterprise Co., 25 Ind. Ap. 351, 57 N. E. 581.

[8] In some cases there is express provision against the carrying on of several distinct undertakings by the same corporation. The Constitution of Pennsylvania (Art. 17, § 5) provides that no incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works, nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold, or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business.

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porate life may be placed upon the ground that all corporate management is government by a majority, and that the state has the right and duty to protect the minority shareholders from possible fraud and oppression on the part of a corporate majority. But the restrictions placed on corporate action are not generally referred to these grounds, which would equally apply to all associations; but are simply regarded as legislative qualifications of corporate capacity. Corporations as such are not persons having a natural and inalienable right to existence and happiness; but they exist by legislative sufferance subject to legislative conditions.

**§ 361. The charter as a contract and reservation of legislative power.**[9]—Upon the theory that incorporation is a special privilege which may be qualified *ad libitum*, a peculiar modification has been engrafted by the Supreme Court of the United States in the Dartmouth College Case,[10] decided in 1819. According to the doctrine of this case every charter of a private corporation constitutes a contract between the state and the corporators which the federal constitution protects from impairment by subsequent legislation.[11] The franchise once bestowed and accepted together with the conditions annexed is placed beyond legislative control. The doctrine is confined to private corporations, but is applicable to these whether created by special charter or by general statute.[12] The legislative power may therefore under the unqualified operation of the doctrine be designated as one of initial regulation: it would cease or at least become greatly diminished as to each corporation after the same has once been constituted, during the whole of the legal life of that corporation, and can be fully exercised only as to corporations to be created in the future. Thus if the special charter, or the general law at the time

[9] See, also, § 569-572, 597, 599.

[10] Trustees of Dartmouth College v. Woodward, 4 Wheaton 518. See, also, Regents, etc., v. Williams, 9 G. & J. (Md.) 365; Brown v. Hummel, 6 Pa. St. 86.

[11] The contract theory had been propounded in England in Rex v. Pasmore, 3 T. R. 199, 246, when Buller, J., said: "I do not know how to reason on this point better than in the manner urged by one of the relator's counsel who considered the grant of incorporation to be a compact between the Crown and a certain number of the subjects, the latter of whom undertake in consideration of the privileges which are bestowed to exert themselves for the good government of the place."

[12] Dodge v. Woolsey, 18 How. 331.

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of the formation of the corporation, vested the control of the affairs of the corporation in a board of nine trustees or directors, this form of management could not be subsequently changed without the consent of the corporation. This peculiar doctrine, although it has been acquiesced in as a principle of constitutional law, at once aroused considerable alarm. An escape from its operation was, however, suggested in the opinion of one of the justices concurring in the decision: namely, the insertion in the original grant of a reservation of power to change or modify its terms or to repeal the grant altogether.[13] Many states have availed themselves of this suggestion, and have inserted in their general incorporation laws clauses to the effect that they may be subsequently changed as to corporations formed under the original act. This reservation of power is also found in a number of state constitutions.[14] It appears then that, while all states exercise a power over corporations to be created in the future which is extremely wide and not subject to all ordinary constitutional limitations in favor of individuals, as to corporations in existence we must distinguish whether the power to alter and repeal has been reserved or not. The difference would at first blush seem to be radical; it might be inferred from the doctrine of the Dartmouth College Case that existing corporations without the reserved power are practically placed beyond all subsequent legislative control; and from the reservation of power, that corporations subject to it have no rights secured as against the legislature. The course of judicial decisions has, however, shown that this radical difference does not exist, and has indeed done much to temper if not to obliterate the effect of the doctrine as originally propounded.

**§ 362. Modifications of the doctrine of the Dartmouth College Case.**—It has been held that the doctrine that a charter is a contract does not prevent the operation of the police power in so far as it is exercised to protect peace, safety, health and

[13] For earlier acts of incorporation reserving legislative power, see Mass. Act, March 3, 1809, § 7 (manufg. corporations), and N. Y. Laws, 1813, ch. 59, §§ 8 and 9 (College of Physicians and Surgeons), with a saving for vested interests.

[14] Florida and Minnesota appear to have no reservation of power. Kentucky and Missouri merely reserve the exercise of the police power and provide that corporate powers shall be exercised subject to law.

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morals. The constitutions of several states (California, Mississippi, Missouri, Louisiana, Montana, Pennsylvania), express this principle in another form by providing that the police power shall never be so abridged as to permit corporations to conduct their business so as to infringe the rights of individuals or the general well-being of the state. A railroad company cannot therefore set up its charter to escape the operation of a law compelling it to adopt certain safeguards calculated to prevent accidents,[15] and the charter right of an electric company to place its wires under the streets of a city is subject to reasonable municipal regulations as to the method of exercising that right;[16] the charter of a lottery or a brewing company does not prevent subsequent legislation to suppress lotteries or the manufacture of intoxicating liquors.[17] For as the government cannot part with its power to guard against disorder, disease, or the corruption of morals, a contract purporting to do this is void *ab initio*, and it is impossible to speak of the impairment of the obligation of a contract where the contract is illegal. Corporations are therefore fully subject to the operation of the police power in the narrower sense of the term, and must submit to such regulations and restraints as are called for by the safety, health, or morals of the community, notwithstanding any charter provisions. It has even been intimated by the United States Supreme Court that there is implied in the charter of every corporation 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 the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created; a life insurance company would thus not be protected by its charter from a subsequent requirement of sworn statements and submission to examinations.[18] In the case before the court, however, the

[15] Thorpe v. Rutland, etc., R. Co., 27 Vt. 140; Indianapolis, etc., R. Co. v. Kercheval, 16 Ind. 84.

[16] Missouri ex rel. Laclede Gaslight Co. v. Murphy, 170 U. S. 78; Amer. Rapid Tel. Co. v. Hess, 125 N. Y. 641, 13 L. R. A. 454; see also Platte, etc., Co. v. Dowell, 17 Col. 376.

[17] Stone v. Mississippi, 101 U. S. 814; Boston Beer Co. v. Massachusetts, 97 U. S. 25.

[18] Chicago Life Ins. Co. v. Needles, 113 U. S. 574; Eagle Ins. Co. v. Ohio, 153 U. S. 446.

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charter of the company contained a clause that the act should not exempt the company from the operation of general laws thereafter to be enacted on the subject of life insurance. And so in the later case of Pearsall v. Great Northern R. Co.,[19] where the same doctrine is expressed, a power of amendment had been reserved in the charter of the railroad company. But in Louisville & Nashville R. Co. v. Kentucky,[20] the state was held to have power to forbid the consolidation of competing corporations, though the right to consolidate should be held to be given by the charter, and though the charter contained no reservation of power. The Court of Appeals of Kentucky holds that where the property of a corporation is affected by a public use, a power of alteration is implied, "unless in unmistakably clear language the state has indicated a deliberate purpose not to interfere in all time to come."[21] It is not clear how far such an implied power of subsequent regulation might go without violating the charter contract; not, it seems, to the extent to which its exercise had been attempted in the Dartmouth College Case, of which it was said in the Pearsall case: "It was not the case of an amendment in an unimportant particular,—the taking away of a non-essential feature of the charter, but a radical and destructive change of the governing body;—a transfer of its power to the executive of the state, and virtually a reincorporation upon a wholly different basis."[22]

There is, moreover, a tendency to place upon the scope of the contractual effect of the charter, and consequently upon its constitutional protection, a narrow construction; the charter privileges will, if possible, be so construed as not to be exclusive or irrevocable,[23] and a contract will be recognised only where there is a consideration: so an exclusive right to maintain a bridge does not prevent the subsequent authorisa-

[19] 161 U. S. 646.

[20] 161 U. S. 677.

[21] Winchester, etc., Turnpike Road Co. v. Croxton, 98 Ky. 739, 33 L. R. A. 177.

[22] That a reservation of power does not justify a substantial change in an educational trust, held in Webster v. Cambridge Female Seminary, 78 Md. 193 (changing female into mixed school); Ohio v. Neff, 52 Oh. St. 375, 40 N. E. 720 (transfer of Cincinnati College to Cincinnati University), and Graded School District v. Trustees 95 Ky. 436 (changing seminary to common school, but there the charter granted a perpetual appropriation of the trust to seminaries).

[23] Under many constitutions no irrevocable grant of special privileges or immunities may be made, so Illinois II, 14.

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tion of a railroad viaduct;[24] a charter right to charge reasonable rates or to establish rates by bye-laws does not prevent subsequent legislation regulating rates;[25] and an exemption from taxation where the corporation renders no equivalent in the nature of a consideration, will be treated as a revocable license.[26]

While thus the charter contract theory is weakened, first, by the refusal, if possible, to recognise a contract or vested right, second, by the subjection of the contract to the operation of the inalienable police power in the interest of safety, order and morals, and, third, by the implied reservation of a continuing power of non-destructive regulation, the Supreme Court has on the other hand in a number of cases expressed its opinion strongly to the effect that even the reserved power to alter and repeal charters cannot be so exercised as to destroy substantial property rights which are independent of special privilege or corporate capacity, or to divert them from their original purpose, since that would amount to depriving the members of the corporation or its beneficiaries of property without due process of law. Thus it was said in Greenwood v. Union Freight R. C.:[27] "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal, and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power." In that case it was held that the railroad company retained its rolling stock, horses, stables, the debts due to it, and the funds on hand, but lost the right to cumber the streets with tracks which it had no longer the right to use. Similar expressions are to be found in other cases;[28] and it should be

[24] Proprietors of Bridges v. Hoboken Land & Improvement Co., 1 Wall. 116.

[25] Railroad Co. v. Iowa, 94 U. S. 155; Ruggles v. Illinois, 108 U. S. 526.

[26] Grand Lodge v. New Orleans, 166 U. S. 143.

[27] 105 U. S. 13.

[28] Shields v. Ohio, 95 U. S. 319; Miller v. New York, 15 Wall 478; Commonwealth v. Essex Co., 13 Gray 239: "Where under power in a charter rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

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observed that many of the statutes and charters reserving the power of amendment and repeal make an express exception in favor of vested rights.[29]

The Court of Appeals of New York has even said: "An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law."[30] If this is sound law—and it seems to be sound in principle—it would follow that the giving effect to express reservations over charter powers such as were involved in the Dartmouth College Case, can only be justified upon the consideration that such powers should never have been treated as vested rights or as resting in contract.

§ 363. **Present effect of Dartmouth College decision.**—The courts have thus modified both the original doctrine in so far as it might be used to hamper legitimate state control, and its attempted nullification through the reserved power over charters, in so far as the latter might be used to destroy vested rights, with the result of leaving the law very much where it would be if there were no Dartmouth College Case. This view is in accordance with the statement made by Justice Bradley in a dissenting opinion delivered in the Sinking Fund Cases,[31] to the effect that the reservation of the power to repeal, etc., merely places the state back upon the platform which it would always have occupied, had the doctrine of the Dartmouth College Case never been propounded; and the same opinion is expressed by Judge Cooley in Detroit v. Plank Road Co.[32]

Still some difference remains: Under the reserved power the corporate existence may be terminated,[33] or the governing body be changed,[34] which could not be done under the contract theory;[35] without a reservation the grant

[29] See Stimson § 443, Arkansas Const. 12 § 6, Colorado Const. 15 § 3: "provided that no injustice shall be done to the corporators."

[30] People v. O'Brien, 111 N. Y. 1 p. 51; see also to same effect dissenting opinion in Miller v. New York, 15 Wall 478.

[31] 99 U. S. 727.

[32] 43 Mich. 140.

[33] Greenwood v. Freight Co., 105 U. S. 13.

[34] Miller v. New York, 15 Wall 478; Atty. Gen. ex rel. Dusenbury v. Looker, 111 Mich. 498, 56 L. R. A. 947; Looker v. Maynard, 179 U. S. 46; Gregg v. Granby Mining & Smelting Company, 161 Mo. 616, 65 S. W. 312.

[35] Dartmouth College Case, 4 Wh. 518.

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of a monopoly is irrevocable,[36] and the same is true of exemption from taxation;[37] while under the reservation the exemption may be revoked.[38] The court in these cases availed itself of the theory of reserved powers in order to allow the abrogation of a class of rights which is contrary to public policy. Under the reserved power rates may be regulated from time to time,[39] while it has been intimated that a charter right to charge certain rates is in the absence of a reservation irrevocable; for the legislative power over rates is only recognised "unless restrained by charter;"[40] or "unless in unmistakably clear language the state has indicated a deliberate purpose not to interfere in all times to come."[41] It would thus appear that while the state cannot contract away the police power for the protection of safety, health and morals, it can contract away the power to protect the people from rates which in course of time may become oppressive (except by the exercise of the power of eminent domain); but as a matter of fact, it has nearly always been held that the state did not contract away the power.[42] And as the power to amend is now almost universally reserved, the principle of continuing control with due regard for vested rights has for practical purposes well-nigh superseded the doctrine of the Dartmouth College Case.

As a result of this development there is now little constitutional difference between corporations and individuals, except in so far as the general law under which the corporation is organised imposes special restraints or methods of control as conditions precedent to the right to incorporate. The corporation, once it is organised, and subject to the existing corporation laws, enjoys ample constitutional protection. "It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprива-

[36] The Binghamton Bridge, 3 Wall 51; N. O. Gas Light Co. v. Louisiana Light & Heat Co., 115 U. S. 650.

[37] Piqua Branch of State Bank v. Kroop, 16 How. 369.

[38] Tomlinson v. Jessup, 15 Wall 454.

[39] Shields v. Ohio, 95 U. S. 319; Parker v. Metropolitan R. R. Co., 109 Mass. 506.

[40] Ruggles v. Illinois, 108 U. S. 526; Railroad Commission Cases, 116 U. S. 307.

[41] Winchester &c. Turnpike Co. v. Croxton, 98 Ky. 739, 33 L. R. A. 177.

[42] See, however, Detroit v. Citizens' Street Railway Company, 184 U. S. 368.

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tion of property without due process of law, as well as a denial of the equal protection of the laws."[43] In hardly any of the cases in which the United States Supreme Court has nullified state legislation affecting railroad companies: regulating rates, or imposing special liabilities, or compelling the issuing of mileage tickets, has the corporate character of the railroad company had any controlling effect upon the decision; and the court discusses the question of constitutional right and power, as if the authority of the state were hardly affected either by the existence of the charter contract or by the reserved power to alter or amend the charter. The court looks through the corporation to the individual shareholders who have invested their money in a business affected with a public interest, but who have not otherwise by accepting a corporate character forfeited the constitutional protection of their interests. "The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to amend or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation, or indirectly by other means."[44] And with regard to public service corporations: "Under its police power the people, in their sovereign capacity, or the legislature as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health, and safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired. In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not."[45]

The chief value of the decision in the Dartmouth College Case lies in the affirmation of the principle that the fact of incorporation does not place property or contracts of corporations at the mercy of the government;[46] but it should also be

[43] Covington &c. Turnpike Co. v. Sandford, 164 U. S. 578.

[44] Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 698.

[45] Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 695.

[46] See especially pp. 635-638 of opinion.

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noted that no such power was contended for on behalf of New Hampshire: see the argument on page 602: "It is not necessary to contend that it [the legislature] had the right of wholly diverting the fund from the original objects of its pious and benevolent founders." The mischief of the decision was the color it gave to the contention (through the application of the principle to legislation touching merely organisation, and by treating organisation as a vested right) that the fact of incorporation withdraws the corporation from the exercise of legislative power which, if exercised over individuals, would generally be conceded to be constitutional. the contention, in other words, that the charter of incorporation is a charter of exemption from powers of government recognised as legitimate in the case of individuals. It is this last contention which has been gradually overcome by the progress of adjudication.[47]

§ 364. **Compulsory incorporation.**[48]—In view of the special legislative power over corporations, it may be asked whether the law may require that some business shall not be conducted otherwise than by corporations. The question was answered in the affirmative in Pennsylvania, where this requirement was created with regard to the insurance business.[49] The court bases its decision upon the ground that a fair measure of

[47] It may well be admitted that corporate charters should not be subjected to special acts of interference by the legislature; but the logical prerequisite would be that charters should not be granted by special acts. This is now recognised as a general principle of constitutional policy. The prohibition of special legislation removes the danger of meddlesome interference with charters to a great extent; and the recognition of the power of alteration by general act merely saves a legitimate continuing control of the state over corporations in accordance with the progress of general legislative policy. The Supreme Court in the Dartmouth College Case had no occasion to consider this distinction between special and general legislation, since it was beyond federal cognisance. As to distinction between legislative and judicial power in dealing with corporate charters compare Railroad Commissioners v. Portland, &c., R. Co., 63 Me. 269, and State v. Noyes, 47 Me. 189, with Roxbury v. Boston, etc., R. Co., 6 Cush. 424, and Commonwealth v. Eastern R. Co., 103 Mass. 254. Also as to legislative power to declare forfeiture without judicial proceedings under a reserved power to repeal: McLaren v. Pennington, 1 Pai. 101; Erie, &c., R. Co. v. Casey, 26 Pa. St. 287; Crease v. Babcock, 23 Pick. 334; Myrick v. Brawley, 33 Minn. 377.

[48] See, also, § 440-444.

[49] Commonwealth v. Vrooman, 164 Pa. 306, 25 L. R. A. 250.

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fidelity can be compelled only when the business is in the hands of corporations, since private individuals cannot be compelled to disclose their business, financial condition, etc. But if incorporation allows a larger than the ordinarily admissible measure of state control, it does so on the theory of a special license to which conditions are annexed. To say "You must ask for special privileges; then by reason of these special privileges you must submit to special regulations," is equivalent to saying: "You must submit to special regulations." The real question must therefore be: does the business admit of special regulation? If it does, the regulations may be imposed on individuals, associations and corporations alike. The state may, however, also compel incorporation, if that is the most convenient form of control, provided that facilities for incorporation are extended to all, including single individuals. Compulsory incorporation is a consequence of the special control, not vice versa. If, however, the requirement of incorporation has the effect of excluding any one from the business, it can be sustained only, if the nature of the business is such that it may be restricted to select persons, or be made a monopoly. This fact was recognised in two cases arising under statutes of North Dakota and South Dakota, restricting the business of banking to corporations. The Supreme Court of North Dakota in a brief opinion upheld the law, because private banking might be prohibited altogether.[50] The South Dakota court in an elaborate opinion held that the statute could not prohibit any citizen from entering upon a business not injurious to the community, though affected by a public interest, and was therefore unconstitutional.[51]

[50] State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L. R. A. 420.

[51] State v. Scougal, 3 S. D. 55, 15 L. R. A. 477.



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## CHAPTER XVII.

### FREEDOM OF PROPERTY.—PERPETUITIES.

**§ 365. Legal policy.**—The freedom of property from conventional restraints and burdens is of considerable political as well as economic importance. The imposition of restraints upon the alienation of lands or other property is a common device for keeping acquired wealth in the family of the founder, and the perpetuation of wealth in the same families tends to produce an aristocracy. All burdens and restraints on property moreover prevent its free circulation and its being put to the most productive uses, especially where such uses are attended with risk to the owner, and exclude or retard the process by which property gets into the hands of those most competent to manage it.

The natural desire of the owner to retain over his property a control of the longest possible duration, however much in accordance with class interest, has therefore generally been felt to be contrary to public policy. As a question of the right of ownership it is clear that the fullest recognition of the claims of the owner would enable him to bind the property in the hands of others, while the permanent exemption of property from burdens and restraints can be attained only by restraining his power of control. The claim of freedom of ownership may thus be taken in two opposite senses, and the most individualistic conception of right may here as in other cases logically lead to the destruction or impairment of individual liberty. Here as elsewhere the most perfect realisation of liberty rests upon its reasonable restraints.

The establishment of the policy of freedom through limitations of the owner's power of controlling property in the hands of his donees or grantees, has been due partly to the courts and partly to the legislature. In England the courts have generally inclined towards free circulation of property, and the necessary rules for the purpose have become embodied in the common law; to some extent legislation has confirmed or emphasised the policy. Legislation being in accordance with the spirit of the common law, the question of constitutional power has been hardly discussed, it being assumed as a matter of course



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that the traditional limitations of ownership cannot be contrary to the constitutional guaranties of liberty or property.

It will be sufficient here to mention very briefly the principal rules of the common law bearing upon the matter—an extended discussion of their complicated details being beyond the scope of this treatise[1]—and to set forth the most notable statutory enactments in aid of the same policy, together with their constitutional aspects.

**§366. Devices for tying up property—Civil law.**—There is a distinction between restraints on alienation, which attempt to make impossible or void the sale of an interest by its holder, and perpetuities, which are settlements of estates by executory limitations preventing or unduly postponing the vesting of an interest.[2] For our purposes, perpetuity may be used as a convenient term to designate devices for tying up land or other property in the hands of its holders for one or more generations or perpetually.

In the Roman law this object was accomplished in varying degrees by the usufructus, the pupillary substitution, and above all the fideicommissum or trust.[3] Justinian provided that property bequeathed upon trust that it should remain in the family, should become free in the fourth generation.[4] In France the creation of future interests, known as substitutions, was in the ante-revolutionary times regulated by royal ordinances, especially that of 1747; but substitutions were prohibited in 1792 as contrary to the spirit of the new constitution,[5] and the prohibition (subject to certain exceptions in favor of grandchildren, nephews and nieces, and also to exceptions subsequently abrogated in favor of noble families), was embodied in the Code civil.[6] The French law of substitutions has been adopted in Louisiana.[7] In Germany entailed family settlements are provided for by the laws of the several states, and generally require special authority, sometimes from the sovereign. In Austria they require a special enabling act of the legislature. These state laws, in

[1] See Gray, Restraints on Alienation; Rule against Perpetuities.

[2] Gray, Rule against Perpetuities, Sec. 2.

[3] Dig. 31, l 67 § 5, l 69 § 3.

[4] Novel 159.

[5] Laws of Oct. 25 and Nov. 14, 1792.

[6] § 896, 897, 1048 and 1074.

[7] Louisiana Revised Code § 1520; see Gray Perpetuities § 766-772.

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Germany, are left in force by the civil code of 1900,[8] which otherwise provides as a general rule that a remainder cannot be limited to take effect at a time later than thirty years after the testator's death, unless it is limited upon an event happening to a particular tenant or remainderman who is living at the death of the testator.[9]

**§ 367. Common law—The rule against perpetuities.**[10]— In the English law the policy against perpetuities has been developed by the courts, without assistance from the legislature. Parliament attempted to sanction perpetual settlements by the statute of Westminster II,[11] the act under which estates in fee tail have been created. It is not certain how long the statute was given full effect in making estates inalienable; in 1472 or 1473[12] we find the proceeding of common recovery fully established, through which the tenant in tail by the aid of curious fictions was enabled to convey a fee simple.[13]

Contingent remainders, being destructible by the tortious termination of the particular estate before the contingent remainderman was ascertained or came into existence, could not be effectually used for tying up property.[14] The development of equitable estates made it possible to create future interests through shifting uses and executory devises, which were not liable to such destruction, and the form of settlement of estates commonly arranged for in contemplation of marriage, is said to have been invented in the time of the Protectorate.[15] It was shortly thereafter that the so-called rule against perpetuities began to assume its present form.[16] and in the Duke of Norfolk's case, 1685, the test of lives in being was definitely established. The rule was finally settled in Cadell v. Palmer[17] as follows: No limitation of a contingent future interest upon a prior interest is valid, unless such future interest must vest at a time not later than the expiration of any number of specified lives in being at the time the interest is created, or within twenty-one years thereafter, to

[8] Introductory Act, Art. 59.
[9] Civil Code § 2109.
[10] See, also, § 591.
[11] 1285 Statute de Donis conditionalibus.
[12] 12 Ed. IV, Taltarum's case.
[13] Blackstone II 357-9.
[14] Gray, Rule against Perpetuities 134, 285.
[15] Pollock Land Laws, p. 111.
[16] Gray, Sec. 159-170.
[17] 1 Cl. & F. 372, 1833.

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which period (in case of a minority) the time of the gestation of an infant may be added. Professor Gray states the rule as follows:[18] "no interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." The rule against perpetuities has been adopted in the United States as part of the common law.[19] In some states it has been attempted to give the rule statutory expression, without any radical change.[20] In New York the period for which property may be tied up is two lives in being at the creation of the estate, with provision for minority.[21] This change of the rule, with regard to real property, has been adopted in Michigan, Wisconsin, and Minnesota;[22] Alabama makes the term three lives plus ten years.[23] In New York the tying up is called suspension of the power of alienation, and means that there are no persons in being by whom an absolute fee in possession can be conveyed.[24]

Estates tail were likewise introduced from England to America. In many states they have been changed into estates in fee simple,[25] in others (e. g. Illinois) into life estates in the first taker with remainder in fee simple to those next entitled to take. As the tenant in tail can convey a fee simple, the estate tail does not create a perpetuity, and the changes effected in the various states have not been of a radical nature.

Closely connected with the question of perpetuities is that

[18] See. 201.

[19] Gray, Sec. 200; Chilcott v. Hart, 23 Col. 40, 35 L. R. A. 41.

[20] Gray, Sec. 735-746: Georgia, Iowa, Kentucky, Connecticut, Ohio, Indiana, Mississippi.

[21] R. St. II 1, 2 Sec. 15, 16; Real Property Law § 32; Gray, Sec. 747-50.

[22] Gray § 751.

[23] Gray, § 742.

[24] Real Property Law § 32. So also Michigan, Wisconsin, Minnesota; Gray § 751. See Gray § 728-752 on American legislation. As to distinction between suspension of power of alienation and remoteness of vesting, see Gray § 140 and chap. VII. There does seem to be a tendency in this country to regard the inalienability rather than remoteness of vesting as the test of a perpetuity. This appears especially in the validity of remote rights of entry for condition broken and possibilities of reverter. Gray § 299-313.

[25] See Stimson Sec. 1313. The earliest statute abolishing estates tail is that of the Province of South Carolina of April 9, 1733 (Statutes III, p. 341), providing that "nothing herein is to make the statute de donis in force in this province or to make estates which were or are fee simple conditional at the common law estates in tail in this province."

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of accumulations, which relates to income and has therefore no direct bearing upon real estate. The English Thellusson Act of 1800 made directions for accumulation for a longer period than the lives of the settlers, or for longer than twenty-one years after their death, or than any minority, void.[26] Some American states, notably New York and Pennsylvania, have adopted similar provisions against accumulations.[27]

No constitutional question has been raised with regard to laws against perpetuities. The prohibition of a perpetuity invariably acts upon the devolution of property after death which is subject to a very ample, if not absolute, legislative control.[28] The laws against perpetuities in other words do not take property, nor do they even regulate its use in the hands of the owner. If statutory legislation in this matter be regarded as falling under the police power, such exercise of the police power is in perfect conformity to the spirit of the common law.

§ 368. **Mortmain legislation in England.**[29]—The term mortmain was originally confined to the holdings of the church, and was later on extended to other corporations. A corporation may be perpetual, and its purposes are fixed; therefore its property is virtually held in perpetuity; for though it may convey this or that particular piece of property, yet its estate, as an entirety and disregarding changes of form, is tied to permanent purposes. The same is true of charitable trusts.[30]

As the corporation is free of the incidents of physical personality, feudal holdings which fell into corporate hands were disadvantageous to the lord who lost the valuable profits incidental to marriage, infancy and death. This was the occasion for the enactment of statutes of mortmain, forbidding the alienation of lands to religious houses and other corporations the first of which dates of 6 Edward I 1278, and is the earliest of the English statutes still regarded as of practical utility.

[26] Gray, Sec. 686.

[27] Gray, Sec. 715; New York Real Property Law, § 51.

[28] United States v. Perkins, 163 U. S. 625; Kochersperger v. Drake, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321.

[29] See, also, § 592-593.

[30] Property held by corporations, not upon specific trusts, is alienable; property held upon specific charitable trusts, whether by corporations or trustees, is alienable by order of a court (Lewin Trusts, p. 539), unless the gift is by its terms subject to condition subsequent or determinable upon cesser of the particular use.

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Under Richard II these statutes, originally confined to the church, were extended to lay corporations.[31] Being passed primarily for the benefit of the King, the King had power to relieve from their operation, and this was done by so-called licenses in mortmain. When corporations came to receive formal and technical charters of incorporation (from the time of Henry VI), a license in mortmain became a regular feature of such a charter, and upon this license rests the right of corporations in England, to hold land free from the right of the lord or King to enter. The power to take or hold personal property was never limited.

Trusts for charities not vested in corporations as trustees, though likewise perpetual, were not included in the statutes of mortmain, and were favored in equity. It was only in 1736 that gifts of lands (not personal property) to charitable uses were subjected to formal restrictions.[32]

§ 369. **Mortmain legislation in America.**[33]—In America the power of corporations to hold real property is regulated by statute, the usual provision being that they may hold what is necessary for their corporate purposes. This limitation is inherent in the nature of corporate capacity, and can hardly be said to represent a distinct mortmain policy, which, indeed, is entirely unsuited to many classes of business corporations. Railroad corporations are, next to the United States and state governments, the largest landholders in the country.

With regard to corporations organised for religious and benevolent purposes, the laws of the different states show a distinct policy to prevent an undue accumulation of property and especially of land. Thus a number of states limit the power to take by will; the constitution of Mississippi forbids devises of land or interests therein for religious or charitable purposes entirely;[34] Pennsylvania has re-enacted in substance the provisions of the English statute of 1736 extending it to personal property.[35] New York limits the amount that may be taken under the will of a testator leaving a wife or child or parent, relatively to his estate.[36] Moreover, a number of states limit absolutely the total amount which a religious society may hold, either by fixing a maximum acreage of land

[31] 15 Ric. II, cap. 5, 1392.
[32] Stat. 9 Geo. II, ch. 26.
[33] See, also, § 594-601.
[34] Sec. 269.
[35] Act April 26, 1855.
[36] Laws 1860, ch. 360 § 1.

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(so in Illinois), or a maximum value of property, real or personal, or of the income therefrom. In New York the tendency has been to increase the amount allowed to be held (\$12000 income in 1875; \$250000 income or \$3000000 principal in 1889; \$500000 income and \$3000000 principal at present);[37] and in Pennsylvania the amount allowed to be held may be increased according to its purposes by order of a court.[38]

Gifts to charitable uses are treated by the American courts with the same liberality as they were in England, and of course the prohibition of gifts to superstitious uses as understood by the statute of Henry VIII has disappeared; although even now some courts find themselves unable to sustain bequests for masses on the ground that no beneficiary is ascertainable.[39] In New York it was held that under the reconstruction of the law of trusts effected by the Revised Statutes of 1828, the English law of charitable uses had been entirely done away with, and that charitable gifts in trust could be made only to corporations existing for that purpose;[40] but by an act of 1893[41] the legislature reversed this policy and legalised trusts notwithstanding the indefiniteness of beneficiaries.[42]

The history of the law in New York shows that the whole matter of gifts to charities is absolutely within the legislative power, unless controlled by specific constitutional provisions: and the same is true of the corporate capacity to take and hold lands. This legislative power is not in any way affected by claims of religious liberty. The acknowledged power of restraint is, however, exercised with great moderation, and the policy of the legislature and of courts has on the whole been to encourage gifts for charitable and benevolent purposes.

[37] General Corporation Law, § 12, as amended Laws 1892, ch. 687, 1894, ch. 400.

[38] Laws 1893, June 6.

[39] McHugh v. McCole, 97 Wis. 166, 40 L. R. A. 724; Festorazzi v. St. Joseph's Catholic Church, 104 Ala. 327, 25 L. R. A. 360; Story Equity Jurisprudence, 1161; *contra* Moran v. Moran, 104 Io. 216, 39 L. R. A. 204; Sherman v. Baker, 20 R. I. 446, 40 L. R. A. 717; Webster v. Sughrow, 69 N. H. 380, 48 L. R. A. 100; Hoeffer v. Clogan, 171 Ill. 462, 40 L. R. A. 730; in New York upheld as contract, Gilman v. McArdle, 99 N. Y. 451; in Kansas as gift to priest, Harrison v. Brophy, 59 Kans. 1, 40 L. R. A. 721.

[40] Holland v. Alcock, 108 N. Y. 312.

[41] Ch. 701.

[42] Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568.

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**§ 370. Perpetual rents.**[43]—Rents are at common law incorporeal hereditaments and as such interests in real estate. They are either incidents to feudal tenure (rents service), or may be created irrespective of such tenure (rents charge or rents seek). The difference between the two kinds of rents is that a right to distrain inheres in the rent service, and had to be expressly reserved in the other class. Rents service in England could not be reserved on grants in fee after 1290, in consequence of the Statute Quia Emptores. Feudal tenures have disappeared in America (they are expressly abolished by the constitutions of New York, Arkansas, Minnesota, Wisconsin), and, except in Pennsylvania,[44] rents service issuing out of estates in fee simple have become impossible. Perpetual rents charge can, however, be created in nearly all states, although they are most unusual.[45] In Pennsylvania where such rents occur, the legislature in 1869 attempted to provide for the compulsory redemption of existing irredeemable rents at the option of the owner of the land, but the act was declared unconstitutional.[46] The court admitted that it would have been within the power of the legislature to forbid the future creation of perpetual rents; but this the statute failed to do, operating only on existing rents, and apparently assuming that new rents were not apt to be created. In Maryland ground rents are redeemable after fifteen years. The absence of provisions in other states is probably to be ascribed likewise to the fact that such rents are not as a matter of fact created; in France and Germany all rents are necessarily redeemable after thirty years,[47] in Germany with a reservation in favor of territorial laws.

**§ 371. Long leases.**—The constitution of New York, while saving rents created prior to 1846, prohibits leases or grants of agricultural land, for a longer period than twelve years, in which shall be reserved any rent or service of any kind.[48]

[43] See, also, § 589.

[44] Ingersoll v. Sergeant, 1 Whart. 337; see Gray Perpetuities, § 26.

[45] See Scott v. Lunt, 7 Pet. 596. Leases in fee are recognised in New York by statute. Real Property Law, § 193, Laws 1805, ch. 98.

[46] Palairet's appeal, 67 Pa. St. 479; see Sec. 589, *infra*. As to an act of Pennsylvania of 1855 declaring ground rents to be extinguished where no payment or demand for payment had been made for 21 years, see Wilson v. Isemenger, 185 U. S. 55.

[47] C. C. 530, B. G. B. 1202.

[48] Constn. 1, 14.

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The same provision is found in Michigan,[49] and, with a change of the maximum term, in Iowa,[50] Minnesota,[51] and Wisconsin.[52] Alabama provides by statute that no leasehold estate can be created for a longer term than twenty years. California, Nevada, and Dakota limit leases of town lots and buildings to twenty years, of agricultural lands to ten years.

With reference to the prohibition contained in the constitution of New York the Court of Appeals of that state says: "The theory of the convention which prepared the provision was that long leases of agricultural lands for agricultural purposes were detrimental to the interests of agriculture, because the tenants had no desire to improve by the best method of cultivation, an inheritance which was liable to pass from them and their descendants without a compensation."[53] This reasoning seems very peculiar; for the longer the leasehold, the more will the tenant be apt to make improvements, and it is upon this theory that long or perpetual leases are favored by economists. In short leases there will be no inducement to the tenant to make permanent improvements, unless the law secures him compensation therefor upon the expiration of his lease; and in England and Ireland such right has been in part secured by legislation.[54] In the United States such laws seem to be unknown. The natural effect of the prohibition of long agricultural leases would seem to be that land will not be leased for cultivation, but that the owner will cultivate it through hired labor. This system will tend to produce small peasant proprietors, and to prevent the development of a class of great landlords and socially and politically dependent farmers. In this light the prohibition of long leases appears primarily as a measure of a political character. Incidentally it may, like the abolition of primogeniture and of entails, prevent the accumulation of landed holdings in a few hands. It is, however, to be noted that in most of the states there is nothing to prevent the formation of large corporations for agricultural purposes. It seems also that irrigation companies by obtaining control of the sources of water supply,

[49] 18, 2.
[50] 1, 24; 20 years.
[51] 1, 15; 21 years.
[52] 1, 14; 15 years.
[53] Stephen v. Reynolds, 6 N. Y. 454. Debates Constl. Convention 1846, 1052, 1053, 1063; Mass. Nat'l Bk. v. Shinn, 163 N. Y. 360, 57 N. E. 611.
[54] Fawcett Manual Pol. Econ. ch. VII.

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could in the absence of regulative legislation, reduce landholders to a condition of absolute dependence, and make them to all intents and purposes rent paying tenants; in the western arid states water rights have therefore become the object of considerable legislative solicitude.[55] A system of perpetual rents and leases may, however, also have its beneficial results. While at the beginning of the last century, the consideration of political and social dependence was controlling, and legislation was therefore inimical to permanent tenures of that kind, an opposite tendency has set in in recent years, and rent paying estates (Rentengueter) have been encouraged by statute in Prussia. They are intended to be used for the purpose of transforming agricultural laborers into farmers on their own account. The German civil code, while declaring rents in general to be redeemable, has made a saving in behalf of the rent paying estates created under state legislation.[56]

[55] See §§ 414-417, *infra*.

[56] Introductory act to Civil Code, Art. 62.

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## CHAPTER XVIII.

### BUSINESS AFFECTED WITH A PUBLIC INTEREST.

**§ 372. Statement of the doctrine.**—The doctrine of property affected with a public interest was definitely formulated in this country in the case of Munn v. Illinois.[1] The court laid down the principle that "when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created." The business affected by the case before the court was that of the storage of grain in elevators in the city of Chicago; the public control exercised consisted in the regulation of charges. A number of other cases decided at the same time (all these cases being known as the Granger cases) sustained similar control exercised over railroads. In support of the doctrine enunciated by the court the following passage from Lord Hale's treatise De Portibus Maris is quoted: "If the king or subject have a public wharf unto which all persons that come to that port must come as for the purpose to unlade or lade their goods, because they are the wharfs only licensed by the queen, according to the statute of 1 Eliz. cap. 11, or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case there cannot be taken arbitrary and excessive duties or cranage, wharfage, pesage, &c.; neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected with a public interest." The illustration last given is not a happy one. The setting out of a street is the familiar case of dedication which grants to the public an easement of right of way. No such dedication can be imputed to the builder of a wharf. He certainly invites public

[1] 94 U. S. 113, 1877.



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patronage and therefore public interest; but this is far from saying that he grants to the public an interest in the sense of a right. By making property valuable to the public, the owner is guided by considerations of self-interest, and he expects to derive from the public patronage a profit commensurate to the public use. There is no purpose, actual or implied, to part with his proprietary control in the least degree, such as is undoubtedly involved in the dedication of a public highway.[2] The supposed grant to the public is therefore a pure fiction of law, which, far from aiding, merely confuses the understanding of the problem. In making his property valuable to the public and offering it to the service of the public, the owner does merely what every business man does who invites indiscriminate public patronage.

**§ 373. Kinds of business and forms of control.**—If a greater than the ordinary control is claimed, it should be justified by the peculiar conditions of the business affected.

Omitting those kinds of business which are subjected to a special control in the interest of peace, safety, health and morals, and which involve only the police power in the narrower sense of the term, the following have been classed from time to time as in a special sense public occupations or classes of business: at common law, the business of the carrier, innkeeper, ferryman, wharfinger, miller; the character is frequently indicated by the term public or common carrier, etc.; by modern statutes, and in addition to the common law, the business of railroads[3] and the telegraph and telephone; also the management of turnpikes and canals; storage of grain and tobacco, and the business of stockyards; the supply of water, gas, light, heat, and power, through pipes and wires; and banking and insurance; under recent judicial decisions, also the gathering and distribution of news and market quotations.[4]

[2] See remarks of Fry, L. J., in Austerberry v. Corp'n of Oldham, 29 Ch. D. 750, on p. 784.

[3] The doctrine that a railroad is affected with a public use is laid down with especial clearness in Olcott v. Supervisors, 16 Wall 678. In foreign countries railroads are also regarded as semi-public property if they are not altogether owned and managed by the state, and are subject to governmental control regarding charges, discrimination, etc. In Austria controversies as to interpretation of railroad charters are assigned to the administrative courts, the regular civil jurisdiction being excluded. (Roscher Nationaloekonomie III. 496.)

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[4] In Germany mining is also treated as a business affected with

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While it may be said that the various classes of business mentioned have to do with either transportation, or finance, or the necessaries of life, or the staple products of the community, it does not appear that they have one common characteristic which could explain the special public interest.

Turning to the special control exercised over them, we find that it assumes one or more of the following forms: the regulation of charges; the requirement of equal service; requirements in the interest of public convenience; and requirements and restraints in the interest of financial security.

It is then necessary to inquire, to what classes of business each of these requirements applies, and how it is justified by the nature of the business to which it applies.

### REGULATION OF CHARGES. §§ 374-385.[5]

**§ 374. English legislation.**—The English Statutes of the Realm show only few parliamentary enactments regarding charges or prices. Of the time of Edward II there is an assise of bread and ale, and an act fixing toll at mills, and the prices of victuals form the subject of a statute of Henry VIII.[6] The legislation regarding the rate of interest on money has already been referred to; closely allied to it is the legislation as to profits on exchange of money, of which an example is found in 25 Ed. III st. 5, c. 12. Reference has also been made to the Statutes of Laborers providing for the fixing of maximum rates of wages. Of the time of the Tudors we find statutes fixing prices or rates for long bows,[7] fares of Thames Water-

a public interest. Notice must be given of the beginning and the suspension of operations; if deemed necessary in the public interest, operations must be conducted, on pain of forfeiture. On the other hand, land may be condemned in order to allow the opening of mines. (Georg Meyer, Verwaltungsrecht, § 118, Prussian law of June 24, 1865.) This privilege is also recognised in France (Ducrocq Droit Administratrif, § 710).

[5] In case of regulation by municipal authority the question is not only whether the power can be constitutionally exercised, but whether the state has delegated it to the municipality. This latter aspect will not be here discussed. See St. Louis v. Bell Telephone Co., 96 Mo. 623, 2 L. R. A. 278; Re Pryor, 55 Kan. 724, 29 L. R. A. 398; Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 15 L. R. A. 321; Chicago Union Traction Co. v. Chicago, 199 Ill. 484 and 579, 65 N. E 451 and 470.

[6] 25 Henry VIII, cap. 2. As to the difficulties of a just assise of bread see Roscher Nationaloekonomie III, 798, 800.

[7] 3 Henry VII, 13.

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men,[8] books,[9] and beer barrels.[10] The price of coal in London is fixed by 16 and 17 Car. II c. 2; and by 3 P. and M. c. 12, § 24, the justices of the peace are authorised to assess the prices of land carriage for all goods. These statutes probably do not represent the whole of authoritative regulation of charges in England, which should include rates made by local authorities, under charter authority or prescriptive right. If we ask on what principle the power to regulate was claimed, different considerations will be found to apply to different subjects: the price of bread has been from an early time the object of governmental solicitude in all countries; maximum wages were fixed as a means of restraining the laboring classes; the regulation of the rate of interest was regarded as a license rather than as a restriction. But generally the doctrine of the later Middle Ages, enunciated especially in the writings of the canonical jurists, was that every commodity had its just and true price, and that determination by public authority was not only a legitimate, but in many cases the best method of getting at this price.[11] The doctrine has been abandoned in England, and the old statutes are no longer in force; but the

[8] 6 Henry VIII, cap. 7; 2 and 3 P. & M. cap. 16.

[9] 25 Henry VIII, cap. 15.

[10] 35 H. VIII, c. 8.

[11] Cunningham, Growth of English Commerce II, 232, and especially Endemann, Studien zur Romanistisch-Kanonistischen Wirtschaftslehre II, 38.

Rogers, Six Centuries of Work and Wages, p. 140: "No police of the middle ages would allow a producer of the necessaries of life to fix his charges by the needs of the individual, or in economical language, to allow supplies to be absolutely determined by demand. The law did not fix the price of the raw material, wheat or barley. It allowed this to be determined by scarcity or plenty; interpreted, not by the individual's needs, but by the range of the whole market. But it fixed the value of the labour which must be expended on wheat and barley in order to make them into bread and ale. Not to do this would have been to the mind of the thirteenth century, and for many a century afterwards, to surrender the price of food to a combination of bakers and brewers, or to allow a rapacious dealer to starve the public. They thought that whenever the value or part of the value of a necessary commodity was wholly determinable by human agencies, it was possible to appraise these agencies, and that it was just and necessary to do so. That we have tacitly relinquished the practice of our forefathers is, I repeat, the result of the experience that competition is sufficient for the protection of the consumer. But I am disposed to believe that, if a contrary experience were to become sensible, we should discredit our present practice and revive, it may be, the past, at least in some directions."

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earlier practice of legislation has not perhaps been without influence upon the doctrines of American courts.

**§ 375. American legislation regarding prices and charges.**— Legislation in the colonies seems to have confined itself to the following of English precedents: the Revised Laws of Massachusetts of 1649 show regulations of prices or rates in the following matters: interest on money; wages; bread; ferriage; mill tolls; and wharfage. Massachusetts also provided for punishing those taking excessive wages or unreasonable prices for merchandise, and in 1777 enacted for the City of Boston an elaborate tariff of charges for labor and merchandise, which, however, was repealed in the same year.[12] The earliest legislation of the Colony of New York in this matter relates to wharfage rates.[13] A statute of the State of New York of 1786 provided for the furnishing of books by authors at reasonable prices.[14]

The regulation of wages has been abandoned in all states, and is forbidden by the constitution of Louisiana;[15] the majority of states regulate the rate of interest on money; many states provide for authoritative determination of mill tolls, ferry and wharfage rates, and pilot fees. Turnpike corporations and canal companies were first formed by special acts, which often fixed the tolls;[16] where turnpikes are now established under general acts, local authorities are often given power to regulate tolls, so in Illinois.[17] The early railroad charters likewise regularly contained provisions regarding rates; and in the first general railroad act, that of New York of 1848, the legislature reserved the right to reduce rates, so that the annual profits should not fall below ten per cent. A number, although not a majority, of states, now undertake or give power to railroad commissions, to limit or regulate railroad rates, oftener with regard to passenger than freight rates.[18] In 1871, Illinois added to the list of state regulated charges the warehousing of grain, and this legislation has been followed in a number of the Western states; and some

[12] Dane's Abridgement VII, p. 39.
[13] Act of June 22, 1734.
[14] Greenleaf Laws, p. 275.
[15] § 49.
[16] Perrine v. Chesapeake & Del. Canal Co., 9 How. 172.
[17] Rev. Stat., Tollroads, § 9.
[18] Stimson Am. Stat. Law II, 435-441, 445-452; also Interst. Com. Comm'n v. Cincinnati, &c., R. Co., 167 U. S. 479, 495-499.

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of the tobacco producing states regulate the charges for warehousing tobacco, so North Carolina by act of 1895. The legislation of the last decade has added to the list of regulated charges: telephone rates,[19] insurance rates,[20] the price of gas,[21] and the price of water,[22] and the charges made by stock yard companies.[23]

Mention should also be made of the power contained in city charters to regulate the compensation of hackmen,[24] draymen, omnibus drivers, porters, expressmen, and others pursuing a like occupation.[25]

**§ 376. Attitude of the courts.**—Local regulations have not, in the past, been subjected to serious judicial scrutiny as to the question of their constitutionality.[26] The fixing of maximum rates of interest has always been upheld without questioning, the long established historical usage being regarded as a sufficient justification. The regulation of grist mill tolls has been sustained in Maine upon the ground, that from the early colonial times mills have always been aided by legislation in the public interest.[27] The constitutionality of the legislation regulating railroad charges was upheld, upon the fullest consideration, in the Granger Cases,[28] which at the same time sustained the regulation of warehouse rates. The principal opinion was written in the warehouse case (Munn v. Illinois), and the court relied most strongly upon the fact that the business of grain elevators in the city of Chicago, a "gateway of commerce," constituted a virtual monopoly. The same justification applies still more strongly to railroads; for the business of a railroad, which calls for extraordinary legal privileges in the exercise of eminent domain, has some of the fea-

[19] Indiana, Maryland, 1896.

[20] New Hampshire, 1899.

[21] New York General Laws, ch. 40, § 70.

[22] Illinois Act of 1891.

[23] Nebraska and Kansas, 1897. The act of Kansas was declared unconstitutional on account of its unreasonableness and inequality; see Cotting v. Kansas City Stock Yards Co., 183 U. S. 79.

[24] As to regulation of hackney coaches see Anderson, Origin of Commerce, 1635, 1637, 1654; Rymer's Foedera XIX 721, XX 159.

[25] Illinois City Law, V, § 1, No. 42.

[26] Sustained in Commonwealth v. Duane, 98 Mass. 1; Commonwealth v. Gage, 114 Mass. 328; also Chicago Union Traction Company v. Chicago, 199 Ill. 484 and 579, 65 N. E. 451 and 470, case of a street railroad company.

[27] State v. Edwards, 86 Me. 102, 25 L. R. A. 504.

[28] 94 U. S. 113, 155, 164, 179, 180, 181, 183.



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tures of a de jure, as well as of a de facto monopoly. Notwithstanding some more general expressions, the Granger Cases might have been construed as making the power to regulate charges dependent upon the monopolistic character of a business; and the same view may be taken of the decisions in Budd v. New York,[29] sustaining the New York statute fixing elevator charges in the cities of New York and Buffalo, in which the court likewise dwelled upon the virtual monopoly enjoyed by the business, and in Spring Valley Water Works v. Schottler,[30] where it is recognised that the state may regulate the price of water if the supply is monopolised. But the requirement of a monopoly, legal or actual, as a justification for the legislative regulation of charges, was abandoned in Brass v. North Dakota, where the regulation was upheld, although the grain elevator business in that state did not present any feature of monopoly.[31] "When it is once admitted * * * that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances." The expressions in the earlier cases concerning the monopolistic character of the business were now declared to have gone only to the question of the propriety, and not of the power of such legislation. The decision was rendered by a bare majority of the court, and the dissenting opinion again emphasised the view that only a practical monopoly justifies the regulation of charges.

The regulation of tobacco warehouse charges would be similar in principle to the regulation of grain elevator charges. The regulation of telephone rates has been upheld upon the same grounds as that of railroad rates.[32] The regulation of insurance rates has not yet been passed upon judicially.[33]

**§ 377. Justification by legal or virtual monopoly.**—When

[29] 143 U. S. 517.

[30] 110 U. S. 347.

[31] 153 U. S. 391.

[32] Hockett v. State, 105 Ind. 250; Central Union Tel. Co. v. Bradbury, 106 Ind. 1.

[33] In Germany the regulation of charges has generally been abandoned, and in some cases (bakers, innkeepers, &c.), a requirement to post rates has been substituted. Charges of porters, keepers of public conveyances, chimney sweeps and druggists may still be fixed by authority. Trade Code § 72-78.

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the constitutional power to regulate prices and charges is examined on principle, little difficulty will be found in sustaining it with reference to all classes of business claiming special privileges at the hands of the community. In nearly all cases the privilege is of such a character that it cannot be indiscriminately given, and therefore the business constitutes a de jure monopoly; and in all cases the enjoyment of special privileges removes the business from a condition of equality with purely private enterprises. The enjoyment of special rights and powers demands and justifies the exercise of special control. This consideration applies to all enterprises, in behalf of which the power of eminent domain is exercised, or which use public highways in a special and exclusive manner: railroads, canals, bridges, turnpikes, telegraph, telephone, water, gas, and electric conduits. The right to keep a ferry being treated as a franchise, falls under the same principle. A mill which uses water power, is very commonly granted special privileges with regard to overflow.[34] The keepers of cabs and hacks enjoy special rights, if they have permanent stands on city streets.

It has been shown that the opinions delivered in the earlier grain elevator cases strongly relied upon the monopolistic character of the business. The monopoly in these cases was not a legal one, but it was held to exist virtually and de facto. The argument of special privilege does not avail in such a case to justify the regulation of charges; but since the common regulating factor, competition, is absent, a condition is presented which calls for the exercise of the police power for the prevention of oppression.[35] The police power is exercised for the prevention of monopolies, where they rest upon preventable machinations; it follows that where a monopoly is

[34] See §§ 410-413, *infra*.

[35] An instance of regulation of prices in case of a monopoly is found in Dasent, Acts of the Privy Council, 1545, p. 192; on complaint made by the whole company of bowyers that one Peter van Helden, of the Steelyard, having in his hands the whole trade of bringing in of bowstaves into the realm, demanded such excessive prices as they were not able to live upon the gain that should rest unto them, giving so excessively for the same, it was ordained that he should not demand above £7 sh. 10 for the band.—In the leading English case, Allnut v. Inglis, 12 East 527, the power to prevent unreasonable charges was based upon the special privileges enjoyed by the dock company.

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inevitable by reason of natural conditions, the power must exist to minimise its detrimental effects. Wherever physical conditions are naturally limited for carrying on some business, a case arises for special control; and this will often be true of mill and wharf rights; but it is also possible that economic conditions will tend to make a business a monopoly; so the business of an exchange cannot be advantageously carried on except by a co-operation and concentration of all interests. The regulation of charges would seem as justifiable here as in the grain elevator cases.

**§ 378. Constitutionality in other cases.**—Where there is neither legal nor actual monopoly, the question of the power to regulate charges presents great difficulties. It seems impossible to deny the constitutional power in the face of such a decision as Brass v. North Dakota[36] and of the well-established limitation of rates of interest, and there seems, moreover, to be no case in which a reasonable regulation of charges has been declared unconstitutional on the ground that the legislature does not possess such power. On the other hand, it is true that popular, legislative, and judicial sentiment alike are opposed to the recognition of an indiscriminate power to regulate charges. The Court of Appeals of New York, in the Budd case, said that no general power resided in the legislature to regulate private business, prescribe the conditions under which it should be conducted, fix the price of commodities or services, or interfere with the freedom of contract, and that the merchant, manufacturer, artisan, and laborer, under our system of government, are left to pursue their way, untrammeled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty.[37] Similar expressions were used by the Supreme Court of Maine, while upholding the legislative regulation of mill tolls.[38] A general power to regulate charges would also include the power to fix minimum or maximum rates of wages, which would be contrary to a strong current of judicial decisions in the matter of labor legislation.[39]

[36] 153 U. S. 391.

[37] People v. Budd, 117 N. Y. 1.—Justice Washington, in Ogden v. Saunders, 12 Wheat. 213, p. 259, refers to "laws which limit the fees of professional men," as though they were a common species of legislation.

[38] State v. Edwards, 86 Me. 102.

[39] Re Preston, 63 Oh. St. 428, 59

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A possible solution of the difficulty may be found in the application of the principle of equality. Conceding that it is within the general scope of the police power to prevent unreasonable charges as constituting a form of economic oppression and, as a means of prevention, to fix rates, yet it is clear that a systematic regulation of charges of all commodities and services is not within the range of practical legislative policy. All such legislation will necessarily apply to particular classes of business. Under the principle of equality the classes so singled out should have some special relation to the possibility of oppression. The justification for regulating charges in some particular business would usually be that it constitutes a de jure or a de facto monopoly or enjoys special privileges; but it may also be that the commodity selected is a necessary of life, or that it is essential to the industrial welfare of the community, or that it has been immemorially the subject of regulation. Upon this theory it is possible to account for existing legislation without conceding legislative power with regard to any and all commodities which it may choose to select, and on the other hand to allow for new applications of this power, while subjecting them to an efficient judicial control which will undoubtedly be claimed and exercised. There will thus be an adequate safeguard against arbitrary class legislation in the matter of regulation of charges. All legislation in this matter will, moreover, be subject to the principle of reasonableness of the rate fixed,—a principle which has become established in a series of important decisions.

**§ 379. Earlier doctrine that reasonableness a legislative question.**—In the case of Munn v. Illinois,[40] in which the power to regulate charges was first elaborately discussed and recognised, it was urged that the owner is entitled to a reasonable compensation, and that what is reasonable is a judicial and not a legislative question. This was denied by the Supreme Court. The court said that the practice had been otherwise; that in private contracts, what is reasonable must be ascertained judicially, because the legislature has no control over such a contract, and so in matters of public interest, where no statutory regulation exists, the courts must

N. E. 101: "Counsel for the state expressly disclaim any authority in the legislature to determine the price to be paid for mining coal."

[40] 94 U. S. 113.

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determine what is reasonable; that to fix a maximum beyond which a charge would be unreasonable is only to substitute statutory for common law regulation, and does not establish a new principle. That the power may be abused, the court continued, is no argument against its existence; for protection against abuses by legislatures the people must resort to the polls, not to the courts. Even the dissenting opinion of Justice Field assumes that if it be admitted that the legislature has any control over the compensation, the extent of that compensation becomes a mere matter of legislative discretion.

The principle of Munn v. Illinois, laid down in that case with reference to grain elevators, was applied to railroad charges in a number of other cases decided at the same time.[41] No further light is thrown by these cases upon the question of reasonableness.

**§ 380. Regulation not confiscation.**[42]—The proposition that the discretion of the legislature in determining what shall be a maximum reasonable rate, is uncontrollable by the courts, was first questioned in the so-called Railroad Commission Cases[43] decided in 1886. It was now said that the power of limitation or regulation is not itself without limit; that the power to regulate is not a power to destroy, and limitation not equivalent to confiscation. That under pretense of regulating fares and freights the state cannot require a railroad corporation to carry persons or property without reward, for that would amount to taking property for public use without just compensation, or without due process of law. The court, however, had no occasion in the case before it to apply the judicial power thus asserted, for no tariff had yet been established, and the statute expressly provided that in all trials of cases brought for any violation of any tariff of charges as fixed by the commission, it might be shown in defence that such tariff was unjust. In Dow v. Beidelman,[44] arising under a law of Arkansas, fixing the rate of passenger fares, it was held that without any proof of the original cost of the road

[41] Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155; Peik v. Chicago & N. W. R. Co., 94 U. S. 164; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179; Winona & St. P. R. Co. v. Blake, 94 U. S. 180; Stone v. Wisconsin, 94 U. S. 181; see also Ruggles v. Illinois, 108 U. S. 526.

[42] See, also, § 550-554.

[43] Stone v. Farmers L. & Tr. Co., 116 U. S. 307.

[44] 125 U. S. 680.

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the court had no means, if under any circumstances it would have the power, of determining that the legislative rate was unreasonable. In other words, legislative rates are presumptively reasonable, and the burden of showing that they are not, lies on the railroad company.

**§ 381. Rates fixed by commission and due process.**—The next following cases show a difference of judicial attitude toward rates according as they are fixed by the legislature directly or by a commission. That the legislative power may be exercised through commissions has never been questioned by the United States Supreme Court, and was tacitly admitted in the Railroad Commission Cases; and the Supreme Court of Illinois has held expressly that the power to regulate must include reasonable means, and that the fixing of rates according to varying circumstances requires the employment of administrative agencies.[45]

The delegation of the power to fix rates to a commission engaged the attention of the Supreme Court in the case of Chicago, Milwaukee & St. Paul R. R. Co. v. Minnesota,[46] decided in 1890. An act of Minnesota (the act is printed with the report of the case), provided that if the State Railroad Commission should find that railroad tariffs were unequal or unreasonable, it might compel changes and the adoption of such rates as the Commission should declare to be equal and reasonable. To which end the Commission should inform the carrier in what respect the charges were unequal or unreasonable, and recommend what tariffs should be substituted therefor.[47] If the carrier for ten days after the notice should refuse to substitute such tariff the Commission should immediately publish the same, and thereafter it should be unlawful for the carrier to charge a higher or lower rate.[48] The Commission was directed to enforce compliance with such tariff through mandamus to be issued by the Supreme Court.[49]

[45] Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361.—Congress has not bestowed upon the Interstate Commerce Commission the power to prescribe rates, nor even to obtain from the courts peremptory orders that in the future the railroad companies should follow the rates which it had determined to have been in the past reasonable and just. Interstate Commerce Commission v. Alabama Midland R. R. Co., 168 U. S. 144.

[46] 134 U. S. 418.

[47] Sec. 8e, of Act.

[48] Sec. 8f.

[49] Sec. 8g.

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It was further provided that the Commission should conduct its proceedings in such manner as would best conduce to the proper dispatch of business and the ends of justice. That it might make general orders for the conduct of proceedings "including forms of notices and service thereof which shall conform as nearly as may be to those in use in the courts of this state. Any party may appear before the Commission and be heard in person or by attorney." Its proceedings were to be public if required, and any member was authorised to administer oaths and affirmations.[50] The Commission was also vested with power to require attendance of witnesses and the production of books, and to that end was given leave to invoke the aid of the courts.[51]

In this case it was sought to enforce a tariff which the Commission had established after complaint made as to certain rates, the railroad company having appeared and been heard by the commission before the making of the tariff. Mandamus proceedings were instituted, and the Company applied for a reference to take testimony on the issue raised by the allegations, and as to whether the rate fixed by the Commission was reasonable, fair and just. The court denied the application for a reference and rendered judgment that a peremptory writ of mandamus should issue, the only question in issue being the violation of the law, and not the reasonableness of the rates which was conclusively established by the finding of the Commission.

The United States Supreme Court held that the Act did not satisfy the principle that the reasonableness of rates can be established conclusively only by due process of law, since there was no power in the courts to stay the hands of the Commission if it chose to establish unequal and unreasonable rates; that under the construction placed by the state court upon the powers of the Commission, it could not be regarded as clothed with judicial functions or possessing the machinery of courts of justice; that the Commission might declare rates without previous hearing, summons or notice to the company or without opportunity on its part to produce witnesses or indeed anything having the semblance of due process of law: that although the company here appeared, there was nothing to show what the character of the investigation was or how

[50] Sec. 9f. [51] Sec. 13b.

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the result was arrived at. The provisions of section 9f and 13b above set forth were considered either as not mandatory upon the Commission, or as not applicable to the process of finding the just rates, or as not satisfying what the Supreme Court deems essential to a judicial investigation, and upon this theory the act undertook to grant a power to conclude a constitutional right without due process of law, and thereby contravened the Constitution of the United States. This case, then, establishes the principle, that the legislature in regulating charges cannot leave the conclusive determination of the question of reasonableness to administrative authorities not proceeding under the same safeguards to private rights as courts of justice. Moreover, it is intimated that the mere failure to provide expressly for judicial review violates the requirement of due process of law.

§ **382. Rates fixed by legislature.**—As regards rates fixed by the legislature directly, it has never been held that the statute itself must provide for judicial revision, and while provision for an appeal to the courts is not infrequently made where the power to fix rates is delegated to local legislative bodies,[1] no statute determining charges directly contains a provision to that effect. When the case of Budd v. New York[2] came before the Supreme Court, this being a case in which charges for elevating grain had been fixed directly by statute, it was contended among other things, relying upon the Minnesota case, that the question of reasonableness must be reserved for judicial investigation. But the court now drew a distinction between rates fixed by the legislature directly and rates which were left to an administrative commission, and held that as to the latter due process must be secured by the statute, while as to the former that is not necessary.[3] The records in the case of Budd v. New York not showing that the charges fixed by the statute were unreasonable, the court could not inquire into the question of reasonableness, "even

[1] So Illinois Act June 6, 1891, with regard to water rates, see Hurd's Rev. Stat. 1899, Cities No. 267f.

[2] 143 U. S. 517, 1892.

[3] A rate made by a local governing authority for a particular company should be regarded as administrative and not as legislative. In California a determination by a local legislative council without hearing was held not to constitute due process of law. San Diego Water Company v. San Diego, 118 Cal. 556, 38 L. R. A. 460.

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if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable." It appears that even the power to question legislative rate is here drawn in doubt.

§ 383. **Jurisdiction of federal courts.**—The competency of the judicial power to inquire into the reasonableness of rates was again strongly insisted upon in Reagan v. Farmers Loan & Trust Company.[4] While the case arose under rates established by a railroad commission, the court distinctly says that there is no doubt of the power and duty of courts to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction of rights of property, and if found so to be, to restrain its operation. In this case a Texas statute had provided that rates should be established by a commission, but only upon notice to the railroad company to be affected, which should be heard and have process for attendance of witnesses; the rates thus established to be conclusive until finally found otherwise in a direct action brought for that purpose in a court of competent jurisdiction in Travis County, Texas, in which the burden of proof should rest upon the plaintiff. A suit in equity was brought by the plaintiffs, citizens of New York, in the United States Circuit Court, a court holding sessions in said Travis County, against the Texas Railroad Commission to restrain it from enforcing the rates established by it. The United States Supreme Court upheld the jurisdiction of the Circuit Court for that purpose upon the ground that whenever a citizen of a state can go into the state courts to defend his property rights against the illegal acts of state officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defence, and that no legislation of a state as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the federal courts sitting as courts of equity.

§ 384. **Difficulties of judicial control.**—It is clear that the determination of a just rate depends upon close and complicated calculations in each case, and the question naturally suggests itself: is this a proper function for the courts to per-

[4] 154 U. S. 362, 1894.

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form? One danger is adverted to in Chicago &c. R. Co. v. Wellman,[5] namely, that of collusion between the railroad company and a person suing for a penalty on account of a charge exceeding the legal rate, such action being brought in order to establish the unreasonableness of this rate. The question can be fairly concluded only if the public are properly represented, and the United States Supreme Court suggests for this purpose a bill in equity against the railroad commission or other board, which is possible only if the fixing or administration of rates is entrusted to a board.[6] This course was adopted in Reagan v. Farmers' Loan & Trust Company with regard to the legislation of Texas.[7]

As the Supreme Court has pointed out,[8] the question of the reasonableness of rates would be more easily determined by a commission composed of persons whose special skill, observation and experience would qualify them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. In the Reagan case the court had said that the formation of a tariff of charges for transportation is a legislative or administrative rather than a judicial function, and that it is not the province of the courts to enter upon the merely administrative duty of framing such a tariff. The courts merely restrain what is unreasonable. The states have attempted to provide the administrative machinery, but since the question of reasonableness is a judicial one, the work of commissions must always be open to revision by the courts and to possible destruction without the substitution of something better. It should, moreover, be noted that a statute imposing simply a penalty for charging more than a just and reasonable compensation, without fixing any standard to determine what is just and reasonable, has been held unconstitutional because it leaves the criminality of the carrier's act to depend upon the jury's view of the reasonableness of the rate.[9] This view would not extend to a statute giving or withholding

[5] 143 U. S. 339.

[6] So also St. Louis & S. F. R. Co. v. Gill, 54 Ark. 101, 11 L. R. A. 452.

[7] 154 U. S. 362.

[8] Smyth v. Ames, 169 U. S. 466.

[9] Louisville & Nashville R. Co. v. Commonwealth, 99 Ky. 132, 33 L. R. A. 209. See § 28 supra.

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merely civil remedies in case of unreasonable charges, for it was said in Munn v. Illinois:[10] "In matters which affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable." But an act should not be made penal without being defined to a common certainty.

**§ 385. Judicial regulation.**—In order to satisfy the principle that the question of reasonableness can be determined only by due process of law, the legislature of the state of Kansas, convened in special session for that purpose, created a Court of Visitation for the establishment of railroad rates. This court was vested with full common law and equity powers, and its final decrees were made reviewable by the Supreme Court on petition in error. The court was vested with jurisdiction to try and determine all questions as to what are reasonable freight rates for the transportation of property between points in the state, to apportion charges between connecting roads, to classify freight, to require the construction and maintenance of facilities for public convenience, to compel reasonable and impartial tram and car service for all patrons of the railroad, to regulate crossings and prescribe rules for safety, and to restrict railroad corporations to operations within their charter powers. Proceedings were to be instituted in this court in the name of the state by the State Solicitor upon complaint of unreasonable charges, or discrimination, or violation of law or neglect of duty, the decree of the court to adjudge what are reasonable rates for each and every charge and service at issue in the case, and perpetually enjoining the defendant from demanding, charging or receiving any other or different rates or charges than those determined by the decree to be reasonable. The burden of proof upon any first determination as to what was reasonable was imposed upon the railroad company; upon seeking any change from this first determination, the complainant was to prove that it had become unreasonable.[11]

The Supreme Court of Kansas held that the court of visitation was a court for the determination of controversies, and was at the same time vested with legislative functions by being given power to establish general schedules of rates;

[10] 94 U. S. 113.

[11] Act of January 3, 1899.

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that this confusion of judicial and legislative functions violated the principle of the separation of powers and that the act was therefore unconstitutional.[12]

A statute of Massachusetts regulating the water supply of certain towns and cities provided: "The selectmen of a town or any persons deeming themselves aggrieved by the price charged for water by any company may in the year 1898 and every fifth year thereafter apply by petition to the supreme judicial court, asking to have the rate fixed at a reasonable sum, * * * and two or more judges of said court after hearing the parties shall establish such maximum rates as said court shall deem proper; and said maximum rates shall be binding upon said water company until the same shall be revised and altered by said court pursuant to this act."

It was urged that the provision was unconstitutional as transferring to the court legislative powers, thereby violating the principle of the separation of powers. The court admitted the plausibility of the contention, but preferred to interpret the act in such a manner as to sustain its validity. It therefore held that the judgment of the court was binding only upon the parties before it, and that the legislature only secondarily adopts the rate thus fixed between the parties as a general rate for all. "If this is so, the question whether such a legislative consequence can be attached to the decision, is not before us."[13]

## REQUIREMENT OF EQUAL SERVICE. §§ 386-394.

**§ 386. To what kinds of business applicable.**—By the common law the obligation to render to all alike, at the customary rates, the ordinary services for which the business is established,[14] to the extent of its available resources, is imposed

[12] State v. Johnson, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662. See, also, as to illegality of delegation of legislative power to courts, Nebraska Tel. Co. v. State, 55 Neb. 627; Norwalk Street R. Co.'s Appeal, 69 Conn. 576.

[13] Re Janvrin, 174 Mass. 514, 55 N. E. 381.

[14] The ordinary service of the common carrier is transportation, he is therefore not bound to carry one whose business is not travel, but to do business with the travellers, soliciting their patronage, &c. Jencks v. Coleman, 2 Sumn. 221, 1835. The D. R. Martin, 11 Blatch. 233; State v. Steele, 106 N. C. 766. So the business of the innkeeper is to entertain travellers, not to keep permanent boarders. Lamond v. The Gordon Hotel, Limited, 1897, 1 Q. B. 541.

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upon the common carrier and the innkeeper, the common farrier, and the owner of a public mill. There is at present some tendency to enforce a similar duty against some other kinds of business on the ground that they are affected with a public interest. So it was held in Illinois, that where the Chicago Board of Trade had voluntarily engaged for years in compiling market quotations and of furnishing the same for a consideration by telegraph to all members of the public who desired to obtain them, whereby the business of buying and selling agricultural products throughout the country had been brought under the control of market prices fixed and determined by the board, the board had by its own act so far impressed on these quotations a public interest, that it should be required to furnish them to all without discrimination.[15] Again, in a later case, it was held by the same court, that the Associated Press having sold its news reports to various newspapers who became members, and the publication of such news having become of vast importance to the public, it had so used its franchise as to charge its business with a public interest, and that therefore all newspaper publishers desiring to purchase such news for publication were entitled to purchase the same without discrimination against them.[16] But in a similar case this view has been repudiated by the Supreme Court of Missouri.[17]

**§ 387. Equal and sufficient service.**—The same duty is, moreover, recognised and enforced with regard to those classes of business in connection with which special powers and privileges are exercised, so with regard to railroad companies which are vested with the power of consistent domain, and others using streets and highways in a special manner, for tracks, pipes, poles and wires. Some of these being common carriers, are subject to the common law duty above stated;

[15] New York & Chicago Grain & Stock Exchange v. Chicago Bd. of Trade, 127 Ill. 153, 48 L. R. A. 568.

[16] Inter Ocean Publishing Co. v. Associated Press, 184 Ill. 438.

[17] State ex rel. Star Publishing Co. v. Associated Press, 159 Mo. 410, 51 L. R. A. 151.

An obligation to render services was formerly, in Germany, imposed upon physicians, but was abolished by imperial legislation, Georg Meyer Verwaltungsrecht, p. 221. No such obligation rests upon physicians in American states either by common law or by statute. Hurley v. Eddingfield, 156 Ind. 416, 59 N. E. 1058, 53 L. R. A. 135.

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and all of them operating as a rule under corporate charters and under specific public grants, have assumed certain obligations toward the public. The extent of this obligation is not easy to define, but seems to exceed that of the common law. The question is chiefly as to the extent of the service to be rendered. At common law the carrier and innkeeper were bound to render service only to the extent of their available accommodation,[18] but this it seems is not the whole measure of duty of a public service company, which as a rule by the terms of its charter is bound to maintain a service sufficient to meet the public demand, so far as it can be done in the nature of things, and in accordance with the ordinary conditions of business.[19] Inevitable inadequacy of service, however, does not excuse arbitrary or prejudicial discrimination,[20] and such discrimination gives rise to a private cause of action, as well as the refusal to render a service which the public service company is able to provide.[21]

**§ 388. Grounds of requirement.**—Where a business enjoys special privileges as to the use of public streets, or otherwise exclusive rights (as in the case of a ferry franchise), the duty of equal service is easily justified as a condition necessary to render the special grant consistent with the public interest. So in the Board of Trade and Associated Press cases, the element of a de facto monopoly clearly entered into the consideration of the court. But this element is conspicuously absent in the case of the innkeeper, and does not necessarily belong

[18] Jackson v. Rogers, 2 Shower 327 (Eng. K. B.), 1683, action for refusing to carry goods. "It was alleged and proved that he had convenience to carry the same."

[19] Ballentine v. North Missouri R. R. Co., 40 Mo. 491. The terms of charter or statute must be scrutinised in every case in order to determine whether there is a duty or a discretionary power. See People v. New York, L. E. & W. R. R. Co., 104 N. Y. 58; State v. Kansas Central R. R. Co., 47 Kans. 497. See § 395, *infra*, and note 43 L. R. A. 225.

[20] See State ex rel. Wood v. Consumers' Gas Trust Co., 157 Ind. 345, where an insufficient supply of natural gas was held not to excuse the refusal to serve one particular person. Quaere, whether in such a case priority of application should not be held to satisfy the demands of equality. As to preference of perishable over non-perishable freight see Tierney v. New York Central & H. R. R. Co., 76 N. Y. 205.

[21] Ayres v. Chicago & N. W. R. R. Co., 71 Wis. 372, 37 N. W. 432; Chicago & A. R. R. Co. v. Erickson, 91 Ill. 613. See, also, State ex rel. Atwater v. Del. L. & W. R. Co., 48 N. J. L. 55, 2 Atl. 803.

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to the business of the common carrier. The obligation of the innkeeper, the common carrier and the common farrier is perhaps most satisfactorily explained as due to the policy of the law to give special protection to strangers and travellers, their entertainment being regarded in earlier stages of civilisation as a semi-public duty.[22] Blackstone explains the obligation of the innkeeper by saying that if he hangs out a sign and opens his house for travellers, it is an implied obligation to entertain all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages if he, without good reason, refuses to admit a traveller.[23] This theory might be applied to any business in which services or goods are offered indiscriminately to the public and in which no special arrangements are required with each person who is to be served or supplied. It would only be necessary to provide that the customer's expression of his willingness to take shall be construed as an acceptance of the offer implied in the bid for public patronage, which would thus ripen into a contract at the option of any person who is willing to pay at the rates at which the services or goods are offered to all. But upon this theory the legal provision would not prevent anybody from setting up in business and giving notice at the same time that he reserves the right not to deal with particular persons or with certain classes of persons.[24] At common law a person may carry another person or his goods by special contract without becoming thereby a common carrier,[25] and a man may offer to carry for hire only incidentally to another business and as occasion may serve;[26] in either case there would be no obligation to carry without a special contract to that effect; a person may also hold himself out as a common carrier for certain kinds of goods or transportation only;[27] but it is a very different question whether a reservation of the character indicated, whereby particular persons or particular classes of persons are excluded,

[22] See peculiar provisions reflecting this view in Lex Visigothorum VI, 4, 4; IX, 1, 6, 8, 21; XII, 3, 20, Lex Burgundionum 38, 1.

[23] Blackstone III, 166.

[24] See Bowlin v. Lyon, 67 Ia. 536, 25 N. W. 766, 56 Am. Rep. 355.

[25] Allen v. Sackrider, 37 N. Y. 341.

[26] Gordon v. Hutchinson, 1 W. & S. 285.

[27] Johnson v. Midland R. R. Co., 4 Exch. 367.

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would be valid, and it seems that such a reservation cannot be made.[28]

**§ 389. Objects of discrimination.**—The question whether the law may require equal service becomes important in the following classes of cases:

First, where the owner of the business excludes certain classes of persons by reason of social prejudice. It is against discrimination of this kind that the so-called civil rights statutes are directed. These statutes will be referred to again in connection with the subject of race; their constitutionality has been recognised.[29] It seems that such discrimination may be forbidden, wherever the offer of services is otherwise general. However, the civil rights acts are commonly confined to classes of business held to be affected with a public interest, and to places of public amusement, and the courts seem inclined to interpret their provisions strictly.[30]

Second, where the discrimination is a means employed toward monopolising some branch of business, as where the seller makes it a condition of selling, that the buyer shall not deal with a competitor, or where the facilities of a business are refused to one who competes with the owner of the business or with one whom the latter wishes to favor. A statute forbidding such discrimination would virtually be a statute for the prevention of a monopoly, and would be valid even though without the statute the practice were not illegal.[31] This was recognised in the case of stock yard companies withholding their facilities on the grounds indicated. The Supreme Court of Illinois, while refusing to enforce the admission of a member to the Chicago Live Stock Exchange intimated that the character of a public market could be established by statute, and it was said in New Jersey in a case declaring

[28] Bennett v. Dutton, 10 N. H. 481, 1839.

[29] See § 694, *infra;* People v. King, 110 N. Y. 418, 1 L. R. A. 293; Baylies v. Curry, 128 Ill. 287; Ferguson v. Gies, 82 Mich. 358; Messenger v. State, 25 Nebr. 674, 41 N. W. 638.

[30] Commonwealth v. Sylvester, 13 Allen 247; Cecil v. Green, 161 Ill. 265, 43 N. E. 1105.

[31] In the case of railroad companies the practice is illegal without a special statutory provision, Chicago & N. W. R. R. Co. v. People, 56 Ill. 365; so also with regard to telegraph and telephone business. Chesapeake, &c., Telephone Co. v. Baltimore, &c., Tel. Co., 66 Md. 399; see also People ex rel. Postal Tel. Co. v. Hudson River Tel. Co., 19 Abb. N. C. 466.



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that a stock yards company would not be compelled to receive cattle shipped by a railroad company, that public authority must first intervene by regulations declaring the public use and control.[32]

It seems, therefore, that where the refusal to serve is based upon some ground contrary to public policy which otherwise affords a legitimate occasion for the exercise of the police power, such refusal as well as the exaction of unreasonable discriminating terms may be made illegal.

Third, discrimination also assumes the form of showing special favors to some party whose patronage is especially valuable to the business. It is this kind of discrimination with which railroad companies have been especially charged. Where large and regular shipments permit economies not otherwise possible, the lower rate to the larger shipper is not in reality unequal treatment; and the common law does not forbid such, if indeed it forbids any discrimination not involving unreasonable charges or a refusal to serve.[33] A statutory prohibition of unjust discrimination is maintainable to the same extent that business may be required to be done on reasonable terms. In the case of railroad companies the practice is perhaps illegal without special legal provision, on account of the monopolistic character of the business and the special privileges which it enjoys.[34]

**§ 390. Legislation against discrimination.**—Legislation of an economic character, (as distinguished from the civil rights legislation) requiring service without discrimination has been enacted in America chiefly with regard to railroad companies.[35] Statutes based upon the same principle exist with regard to warehouses of grain,[36] and tobacco,[37] telegraph and

[32] American Live Stock Commission Co v. Chicago Live Stock Exchange, 143 Ill. 210; Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co., 45 N. J. Eq. 50.

[33] Great Western R. Co. v. Sutton, L. R. 4 H. L. 226, 237; Cowden v. Pacific Coast S. S. Co., 94 Cal. 470; Lough v. Outerbridge, 143 N. Y. 271.

[34] McDuffee v. Portland, &c. R. R. Co., 52 N. H. 430; Louisville, &c., R. Co. v. Wilson, 132 Ind. 517; Western Union Tel. Co. v. Call Publ'g Co., 44 Neb. 326; *contra*, see Fitchburg R. Co. v. Gage, 12 Gray 393; Johnson v. Pensacola, &c., R. Co., 16 Fla. 623. See note, 18 L. R. A. 105.

[35] Stimson Am. Stat. Law II, 8837.

[36] Illinois Act April 25, 1871, Sec. 6.

[37] Nash v. Page, 80 Ky. 539. Laws § 4813.

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telephone corporations,[38] and news agencies.[39] Life insurance companies have been prohibited from discriminating between individuals of the same class or the same expectation of life, or between white and colored persons.[40] In Kansas and Nebraska, in 1897, stock yards doing a stated amount of business were declared by statute to be public markets.[41]

**§ 391. What constitutes unjust discrimination.**—With regard to railroad companies attempts have been made to formulate, with some fullness, what constitutes unjust or illegal discrimination. So the Interstate Commerce Act makes it unlawful directly or indirectly to charge any person a greater or less compensation for any service in transportation than it charges any other person for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions;[42] also to give any undue or unreasonable preference or advantage to any person, locality or particular kind of traffic, or to subject the same to any undue or unreasonable prejudice or disadvantage;[43] also to charge or receive any greater compensation in the aggregate for transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance.[44]

By speaking of "substantially similar circumstances and conditions" the act makes it clear that no mechanical rule of equality was intended to be enforced. The Supreme Court adopting the language of the lower court, says:

"In respect to passenger traffic, the positions of the respective parties or classes between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other.

[38] New York Gen. Laws, ch. 40, § 103.

[39] Tennessee, 1899.

[40] New York Gen. Laws, chap. 38, §§ 89, 90; Commonwealth v. Morningstar, 144 Pa. St. 103.

[41] Nebraska Gen'l Laws 1897, ch. 8; Kansas Laws, Sec. 7458-7465.

See Cotting v. Kansas City St. Y. Co., 183 U. S. 79.

[42] Sec. 2 of Act; also an additional act against rebates of Feb. 19, 1903, 32 Stat. at L. 847.

[43] Sec. 3 of Act.

[44] Sec. 4 of Act.

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in order to constitute unjust discrimination."[45] Hence it was held that a railroad company may charge reduced rates for excursions, for large parties, for commutation tickets, etc. Results may have to be taken into consideration in order to determine the legitimacy of the discrimination. In the case of passengers, differences in rates may be made between those using the road to a greater or less extent; but in the case of merchandise "even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business and enable the larger one to drive them out of the market."[46]

**§ 392. Circumstances justifying discrimination.**—The difficulty of determining what are substantially similar circumstances and conditions appears from the radically different interpretation placed upon these words, as used in Section 2, and as used in Section 4 of the act. Under Section 2 it was held that a railroad company may not charge for transporting beer from Cincinnati to Pittsburg a smaller rate to A than to B, because A's warehouse is directly upon the line of another road, by the use of which he would save the expense of cartage; in other words, that under this section competition does not create dissimilarity of conditions justifying discrimination.[47]

Under Section 4 of the same act it was held that a railroad company may charge a greater rate of freight from the East to Chattanooga than it charges for the longer distance to Nashville, because in its Nashville business it has to meet the competition of roads running from the North.[48] In this case, then, competition does create dissimilarity of condition justifying discrimination. This principle had before been recognised and the different treatment of competition under Section 2 and Section 4 of the Act explained as resulting from the difference of the purposes of the two sections, although it was not stated wherein that difference of purpose lay.[49] In the East Ten-

[45] Interstate Commerce Commission v. Baltimore & Ohio R. Co., 145 U. S. 263.

[46] Interstate Commerce Commission v. Baltimore & Ohio R. Co., 145 U. S. 263.

[47] Wight v. United States, 167 U. S. 512; *contra*, Ragan & Buffet v. Aiken, 9 Lea (Tenn.) 609.

[48] East Tennessee, Va. & Ga. R. Co. v. Interstate Commerce Commission, 181 U. S. 1.

[49] Interstate Commerce Commission v. Alabama Midland R. R. Co., 168 U. S. 144.

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nessee case the Supreme Court, in answer to the argument that the principle adopted "would be placing Congress in the absurd position of laying down a rule, and then providing that the rule should not be enforced in the only cases in which violations of the rule were known to exist," said: "In substance this reasoning only amounts to the assertion that the settled construction of the statute by which it has been held that real and substantial competition gives rise to the dissimilarity of circumstances and conditions pointed out in the fourth section, is wrong and should be overruled." The court now formulates the principle that "competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstances and conditions provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it." It adds: "That, as indicated in the previous opinions of this court, there may be cases where the carrier cannot be allowed to avail of the competitive condition because of the public interests and the other provisions of the statute, is of course clear. * * * Take a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places."[50]

[50] 181 U. S. 1, 19, 20.—In Kentucky the railroad commission may in special cases authorise a railroad company to charge less for a longer than for a shorter distance (Ky. Stat. § 820, 821). This is a dispensing power vested in an administrative body, but unobjectionable because expressly authorised by the constitution (§ 218). See Illinois Central R. R. Co. v. Commonwealth, 23 Ky. Law Rep. 1159, 64 S. W. 975.

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**§ 393. Discrimination allowed or prescribed by law.**—It is here only necessary to advert to the constitutional aspect of the legislation determining conditions of equality. There are three questions which may arise in this connection: first, may the legislature conclusively determine that certain discriminations are allowable? second, may it prescribe certain discriminations? and third, may it require that certain differences be ignored in making charges for services?

Upon the first question there seems to be no judicial authority. A claim on the part of the courts to control and eventually to disallow a discrimination sanctioned by statute would have to rest on the theory that there is a constitutional right to equal service, that in other words the business rendering the service is purely a public agency, and that for the state to allow it unjustly to discriminate is a deprivation of the equal protection of the law.

As for the second question, it would seem that if the legislature may prescribe equality, and if equality is not inconsistent with but involves proper discrimination, it may not only allow, but may insist upon discriminations calculated to carry out the principle of equality with greater perfection and accuracy. When the validity of state regulation of railroad rates was first upheld by the Supreme Court, it was also recognised that railroads might be classified for the purpose of establishing different rates,[1] and it was held later on that if the classification made by the legislature operates uniformly, the courts cannot decide whether it was the best that could have been made.[2] Logically, the same principle should apply to different kinds of traffic upon the same road, and it is indeed inconceivable how a railroad tariff could be framed otherwise. Yet the Supreme Court of the United States has held that a statute of Michigan requiring the sale of mileage tickets at a reduced rate was arbitrary and unequal class legislation and hence unconstitutional.[3] It was not contended that the reduced rate was unreasonable; in fact, the company had voluntarily sold mileage tickets at reduced rates; but the mere fact that the legislature has established general maximum rates, is held sufficient to condemn a law compelling a lower rate in

[1] Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155.

[2] Dow v. Beidelman, 125 U. S. 680.

[3] Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684.

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favor of those who happen to use the road more than others. "The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members thereof at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof." Yet the court admits that the legislature may establish certain hours of the day during which trains shall be run for a less charge than during the other hours. This is said to be a rate for the whole public during those hours, and not a discrimination in favor of certain persons. The court does not say whether compulsory reduced rates for excursion or commutation tickets would be constitutional or not. If constitutional, what ground can be adduced for stopping the legislative power at mileage rates? If mileage ticket holders are a class, why not commuters? and why not that part of the public which is in the habit of riding at certain hours of the day? If the mileage ticket holders are a class in a different sense, and the classification obnoxious to the constitution, why should the railroad company be allowed to discriminate in their favor? The soundness of the distinction made by the Supreme Court, as well as the soundness of the whole decision, from which the Chief Justice and two associate justices dissented, may well be doubted. It might well be argued that since the requirement of equal service is essential to reconcile the existence of a monopoly with the equal protection of the law, all monopolies ought to be required to give equal service; if then, any discrimination is tolerated, it is because it does not violate, but carries out the principle of equality; it would thus follow that any discriminations which may be tolerated, may also be required.

The decision in the Smith case was necessarily followed by the Court of Appeals of New York,[4] but the requirement of reduced rates for mileage tickets was held valid as applied to corporations created after the passage of the act.[5]

**§ 394. Discrimination forbidden though circumstances dissimilar.**—Third: may the legislature forbid discrimination where circumstances are dissimilar? May it especially re-

[4] Beardsley v. New York, L. E. & W. R. C., 162 N. Y. 230, 56 N. E. 488.

[5] Purdy v. Erie R. Co., 162 N. Y. 42, 56 N. E. 508.

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quire that services or commodities of different values be given and paid for at the same rates? This question enters into the determination of the validity of the coal-weighing acts enacted by a number of states. The merchantable quality of coal being determined by the size of the pieces, the coal delivered by the miner is put through a screen which sifts the comparatively worthless small or slack coal from the valuable lump coal. The lump coal is then weighed, and the miner paid accordingly. The object of the coal-weighing acts is to compel weighing before screening so that the miner may be paid for all the coal mined by him. In so far as the effect of this would be to make the operators pay the same price for superior and inferior coal or for work of superior and inferior skill and care, it would compel equal payment for unequal returns. Upon this ground the coal-weighing act of Ohio was declared unconstitutional.[6]

It may also be contended that reasonable discrimination is forbidden, where the law requires that incidental services be rendered free of charge. In Kansas a statute was declared unconstitutional which required that where a carload of live stock was shipped the usual price charged therefor should include transportation of the shipper. The court said: "We do not mean to say that the legislature is powerless to declare

[6] Re Preston, 63 Oh. St. 428, 59 N. E. 101. In Arkansas this objection seems to be obviated by permitting the operator to deduct the weight of impurities contained in the car and not discoverable until after the car has been weighed. Woodson v. State, 69 Ark. 521, 65 S. W. 465.

The same legislation was held in Illinois to impair the liberty of contract. Millet v. People, 117 Ill. 294; Ramsey v. People, 142 Ill. 380; Harding v. People, 160 Ill. 459, 43 N. E. 624. It would seem that the law could require that the operators should pay for all coal they used, though at rates agreed upon with the miner, in other words that the operators could be forbidden to make a contract by which they would get something in return for nothing. The Illinois statute of 1897 which apparently was enacted for that purpose, was, however, interpreted as leaving the freedom of contract unimpaired, and was thus rendered meaningless; Whitebreast Fuel Co. v. People, 175 Ill. 51, 51 N. E. 853. A coal weighing act of Kansas was sustained as requiring weighing merely for the purpose of securing information and as having no effect upon the rate of payment. State v. Wilson, 61 Kan. 32, 47 L. R. A. 71. That the law may not require railroad companies to make the same charges for a longer as for a shorter haul see State v. Sioux City, &c., R. R. Co., 46 Neb. 682, 65 N. W. 766.

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circumstances or prescribe conditions under which railroad companies may be required to furnish transportation to shippers of live stock or other merchandise over their lines. However, those circumstances or conditions if declared or prescribed must exist in the form of considerations or equivalents for the transportation furnished. It may be that railroad companies can be compelled to carry patrons of their lines for some other consideration than cash fares. To illustrate, but only to illustrate, not to decide, it may be that a legislative enactment which imposed upon shippers of live stock the obligation to care for their stock en route, and by that extent to relieve the trainmen of the burden of its care, and which required the company to transport the shipper free, as an equivalent for his relief of the train employees in the way stated, would be constitutionally valid. * * * But the enactment in question does not provide for the equivalent of labor performed for transportation furnished."[7]

This case thus seems to hold that no service can be required but for an equivalent. Where incidental services, however, are absolutely or practically necessary, their inclusion in a legislative regulation of charges is not open to the objection of inequality. So it was held in Budd v. New York[8] that a statute regulating grain elevator charges might contain a provision to the effect that nothing beyond the actual cost should be charged for the service of trimming and shovelling the grain to the leg of the elevator, since the purpose of the act might be easily evaded if separate charges could be made for incidental services. It may be noted that the dissenting opinion dwells especially upon this feature of the act which is said to compel service without compensation. So it appears from the decision in Brass v. North Dakota[9] that the owner of the warehouse had under the statute to insure the grain at his own cost. In all these cases the service is practically the same for all, and it cannot be said that unequal services are exacted at the same rate.[10] It is otherwise where railroad companies are required to carry baggage free or to

[7] Atchison, T. & St. Fe R. R. Co. v. Campbell, 61 Kan. 439, 48 L. R. A. 251. The act was interpreted as leaving it open to the shipper to accompany his stock or to ride in another train, and this although the shipping contract expressly stipulated that the shipper should accompany his stock and care for it.

[8] 143 U. S. 517.

[9] 153 U. S. 391.

[10] Provision that gas company

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carry bicycles as baggage.[11] If the legal rate in such a case is fair to the railroad company, it is apt to be so at the expense of the passengers who carry little or no baggage. So there appears to be inequality, if a street railroad company is required to carry passengers any distance within a city at the uniform rate of five cents. It has been shown for large cities that if every passenger rode the longest distance, the fare would not cover the cost of carrying. But the voluntary adoption of units of charges ignoring slight differences in reliance upon the equalisation of averages shows that upon a reasonable view of the business as a whole the prohibition of certain discriminations which might be technically justifiable, may be just and maintainable without a violation of the principle of equality. The usages of business must determine whether the fair measure of equalisation has been overstepped.[12]

shall not charge for meter upheld, Buffalo v. Buffalo Gas Co., 80 N. Y. Suppl. 1093.

[11] See the Session laws of many states of 1896 and 1897.

[12] As to requiring transfer of car load lots from one road to another without expense to the shipper, see Burlington, &c., R. Co. v. Dey, 82 Ia. 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436. The Supreme Court of the United States has intimated that a rate fixed by a commission is not necessarily unreasonable, because at a similar rate for all freight the company would not be able to pay operating expenses, as long as the existing rates on other merchandise earn large profits for the company. Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257. There is undoubtedly inequality in such a case, but it constitutes a grievance of the class of shippers paying higher charges, and not of the railroad company, and there is no *constitutional* principle requiring public service companies to serve all its patrons on equal terms. It is believed that a public service company cannot be required to render services (other than such as are incidental to other services) on terms which mean a positive loss to the company, not even though it may recoup that loss on other services; but the legislature may take the fact into consideration that in view of the inevitable operating expenses of the business taken as a whole certain services can be rendered without a loss, which could not be rendered without a loss if operating facilities had to be provided to meet them.

While the ignoring of slight differences is not fatal to the validity of regulation of charges, it has been pointed out that the inability or failure of the public authorities to do justice to the finer shades of difference in the value of services is one of the serious objections to state regulated charges. They have the tendency to deteriorate the grade of services and goods. Roscher Political Economy III. p.

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REQUIREMENT OF PARTICULAR ARRANGEMENTS IN THE INTEREST OF PUBLIC CONVENIENCE. §§ 395-398.[13]

**§ 395. Particular arrangements not within the common law duty of equal service.**—As has been seen before,[14] the common carrier or innkeeper at common law was under obligation to render services only to the extent of his available accommodation, which was left to his discretion. The modern public service company enjoying special powers and privileges acts under a franchise which determines the scope of its service, and thereby the extent and measure of its duty, beyond which it need not go, so that e. g. a railroad company cannot be compelled to construct a line between different points than those contemplated by its charter.[15] Within the scope defined by the charter the business must be provided with facilities adequate to render the service offered to the public and which may be expected to be called for under ordinary conditions, though not sufficient to cope with an unusual pressure or emergency;[16] but the determination of the plan and manner of equipment, the location of depots, the arrangement of time schedules, etc., so as to adjust the service to a reasonable public demand without sacrificing the right to profits, is a problem of such difficulty that it is primarily and sometimes absolutely committed to the judgment of the board of directors. Thus while in a few cases courts have held that the establishment of stations and the operation of trains may be compelled by mandamus,[17] as a rule this remedy is withheld on the ground that the charter confers an authority without imposing a duty or that in the nature of things such a duty requires the exercise of discretion and is not merely ministerial.[18] The Supreme Court of the United States has intimated that the abuse of such discretion is more appropriately dealt with by the legislature or by administrative boards, than

801, states that he was assured by a farmer living near two cities, one of which regulated the price of meat while the other did not, that the best beef was invariably reserved for the latter city.

[13] See, also, § 699.

[14] See § 387, *supra*.

[15] Zabriskie v. Hackensack, &c., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

[16] Dawson v. Chicago & Alton R. R. Co., 79 Mo. 296.

[17] People v. Chicago & Alton R. R. Co., 130 Ill. 175, 22 N. E. 857; People ex rel. Cantrell v. St. Louis, &c., R. Co., 176 Ill. 512; State v. Hartford & N. H. R. Co., 29 Conn. 538; Concord & Montreal R. R. Co. v. Boston & M. R. R. Co., 67 N. H. 464.

[18] Com. v. Fitchburg R. Co., 12

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by the ordinary judicial tribunals.[19] The power of the legislature to require the maintenance of a station, or to forbid its discontinuance without the consent of designated authorities,[20] or to require the stopping of trains at county seats,[21] is recognised.

The obligation of the public service company to provide adequate facilities, moreover, relates only to the ordinary and uniform services for which the business is prepared and which can be rendered on terms fixed in advance by general rule under proper classification. It does not cover services or the furnishing of facilities which according to their nature must be matter of special bargaining, and which could not be rendered indiscriminately to all members of the public alike. The fact that special services or facilities are provided for one party, does not give another party a right to the like accommodation. In accordance with this view it has been held that railroad or steamboat companies are not under a common law obligation to give facilities requiring special contractual arrangements to all express companies alike.[22] The same principle applies to the accommodation of sleeping car

Gray 180; People v. New York, L. E. & W. R. Co., 104 N. Y. 58; State v. Kansas Central R. Co., 47 Kan. 497; Ohio & M. R. Co. v. People, 120 Ill. 200; Mobile & Ohio R. Co. v. People, 132 Ill. 559, 24 N. E. 643; Chicago & A. R. Co. v. People, 152 Ill. 230; Northern Pac. R. Co. v. Washington, 142 U. S. 492.

[19] Northern Pac. R. Co. v. Washington, 142 U. S. 492. For the history of the legislation of New York on the subject see People ex rel. Linton v. Brooklyn Heights R. Co., 172 N. Y. 90, 64 N. E. 788. The English Railway and Canal Traffic Act 1854 (17 and 18 Vict. c. 31 § 2) provides that the companies shall according to their powers afford all reasonable facilities; the enforcement of this provision was subsequently entrusted to the Railway Commissioners: South Eastern Ry. Co. v. Railway Commrs., 6 Q. B. Div. 586, 1881. As to American legislation, which has few specific duties regarding operation and traffic facilities, see Stimson Am. Stat. Law II, 8802-8803.

[20] Commonwealth v. Eastern R. Co., 103 Mass. 54; Railroad Commissioners v. Portland, &c., R. Co., 63 Me. 269; State v. W. St. L. & T. R. R. Co., 83 Mo. 144; State v. Chicago, M. & St. P. R. Co., 12 S. D. 305, 47 L. R. A. 569.

[21] This requirement must not interfere unduly with the freedom of interstate commerce. See Illinois Cent. R. Co. v. Illinois, 163 U. S. 142, and C. C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, holding the requirement to be void; and Lake Shore & M. S. R. R. Co. v. Ohio, 173 U. S. 285, sustaining it, according to its different operation in different cases.

[22] Express Cases, 117 U. S. 1; Barney v. Oyster Bay, etc., Co., 67 N. Y. 301. As to duty to deliver goods at warehouses, see Chicago & N. W. R. Co. v. People, 56 Ill. 365.

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companies which likewise must be matter of special contract;[23] and to arrangements between telegraph and telephone companies regarding transmission of messages.[24]

In the Express Cases the Supreme Court points out that "as the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is "express," it implies access to the train for loading at the latest, and for unloading at the earliest convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers." While in similar cases some state courts have arrived at different conclusions, it did not appear in these cases that the express companies which had been refused accommodation, had claimed special privileges of the character indicated.[25]

**§ 396. Cab and other privileges granted by railroad companies.**—It is a somewhat different question whether railroad companies are under obligation to afford in their depot grounds equal access and accommodation to all owners of cabs or omnibuses desiring to solicit the patronage of arriving passengers; for in this case no special contracts are required, but mere sufferance on the part of the railroad company. The courts are divided on this question, the validity of the grant of an exclusive privilege for that purpose being affirmed in New York,[26] Massachusetts,[27] Rhode Island,[28] Connecticut,[29] Georgia,[30] and Minnesota;[31] and denied in Alabama,[32] In-

[23] Pullman Pal. Car Co. v. Missouri Pac. R. Co., 115 U. S. 587.

[24] People v. Western Union Tel. Co., 166 Ill. 15, 46 N. E. 731; People ex rel. Postal Tel. Co. v. Hudson River Telephone Co., 19 Abb. N. C. 466.

[25] Sanford v. Catawassa, etc., R. Co., 24 Pa. St. 378; New England Express Co. v. Maine C. R. R. Co., 57 Me. 188; McDuffee v. Portland, &c., R. R. Co., 52 N. H. 430; Pickford v. Grand Junction R. Co., 10 M. & W. 399.

[26] Brown v. New York Cent. & H. R. R. Co., 75 Hun 355.

[27] Old Colony R. Co. v. Tripp, 147 Mass. 35; Boston & A. R. Co. v. Brown, 177 Mass. 65, 52 L. R. A. 418.

[28] Griswold v. Webb, 16 R. I. 649.

[29] New York, N. H. & H. R. Co. v. Scovill, 71 Conn. 136.

[30] Kates v. Atlanta Baggage Cal. Co., 107 Ga. 636, 46 L. R. A. 431.

[31] Godbout v. St. Paul Union Depot R. Co., 79 Minn. 188, 47 L. R. A. 532.

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diana,[33] Kentucky,[34] Michigan,[35] Missouri,[36] and Montana.[37] The argument against the validity of the privilege is that, since depot grounds may be acquired by eminent domain, and are, in any event, an essential appurtenance to the railroad business, they are, like the latter, affected with a public interest, and that therefore their use may not be restricted by a monopoly. On the other hand, it is argued that limitations of space, and the requirement of orderly and efficient service, demand some restriction and discrimination, and that the railroad company performs its duty to the public, if it provides for their accommodation by reasonable regulations. It is plain that in some matters the grant of exclusive privileges is inevitable, so in the grant of restaurant or news-stand privileges.[38]

§ 397. **Legislative requirements.**[39]—But the denial of a common law obligation is not equivalent to the assertion of a constitutional immunity. It is within the power of the legislature to require that adequate accommodation be furnished by a business affected with a public interest for the satisfaction of the public needs, and that, if necessary, special arrangements be entered into with that purpose in view. "The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it come at all, from Congress, and to what extent it may come from the states, are questions we do not undertake to decide; but that it must come, when it does come, from the source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed, it will, if necessary, be enforced by the courts; but, unless a duty has been created either by usage, or by contract, or by statute, the courts cannot be called upon to give it effect."[40] It follows from the recognition of the legislative power that it may be exercised by requiring that if special facilities are afforded to one party they shall also be afforded

[32] Lindsey v. Anniston, 104 Ala. 257, 27 L. R. A. 436.

[33] Indianapolis Union R. R. Co. v. Dohn, 153 Ind. 10, 45 L. R. A. 427.

[34] McConnell v. Pedigo, 92 Ky. 465.

[35] Kalamazoo Hack Co. v. Sootsma, 84 Mich. 194.

[36] Cravens v. Rodgers, 101 Mo. 247.

[37] Montana Union R. Co. v. Langlois, 9 Mont. 419.

[38] Fluker v. Georgia R. & Banking Co., 81 Ga. 461.

[39] See, also, §§ 548, 549.

[40] Express Cases, 117 U. S. 1.

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to others, subject to the condition that the duplication of the service impose no unreasonable burden upon the business.

This power is exercised especially by requiring railroads to do connecting business with each other, or to allow connections between tracks.[41] Where one common carrier is forced to enter into special relations with another for the accommodation of the latter, the intended ultimate beneficiary is the public, and the public benefit alone furnishes the justification for the requirement. It has therefore been held that a railroad company cannot be compelled to surrender its property to allow the erection of a private elevator, since that would be taking of private property for private use.[42] The requirement must also keep substantially within the scope of the business upon which it is imposed. Thus a railroad company cannot be compelled to construct a line between different points than those contemplated by the charter.[43]

A somewhat narrow view of the legislative power in this respect is taken in Massachusetts. A statute of that state required railroad companies to issue mileage tickets and to receive those issued by other companies or parts of such tickets in payment of their fares, subject to the conditions of the issuing company. The requirement was held to be unconstitutional upon the ground, among others, that to compel a railroad company

[41] Fitchburg R. Co. v. Grand Junction R. Co., 4 Allen 198; State v. Noyes, 47 Me. 189, denying power as inconsistent with charter rights, criticised in Boston & M. R. R. Co. v. County Commrs., 79 Me. 386. The obligation to allow physical connection does not involve the duty to enter into arrangements for connecting business. Atchison, T. & St. Fe R. Co. v. Denver & N. O. Co., 110 U. S. 667. Principle of such requirements sustained in Wisconsin, etc., R. Co. v. Jacobson, 179 U. S. 287.

[42] Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403. Nor can the power to require services be used for the purpose of forcing upon the public accommodations which they do not want, and for which they would have to pay, to the profit of the party rendering the service. Thus in Minnesota a statute was passed prohibiting any one from carrying on the warehousing business who was not specially licensed therefor, and requiring transportation companies to deliver all unclaimed goods after twenty days to a licensed warehouseman. This was held to be an unconstitutional requirement, since it conferred apparently no benefit upon any one but the licensed warehouseman whose business might be thereby increased. State v. Chicago, M. & St. P. R. Co., 68 Minn. 381, 38 L. R. A. 672. See, also, Garton v. B. & E. R. Co., 6 C. B. (N. S.), 639, 1859.

[43] Zabriskie v. Hackensack, &c., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.

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to carry passengers on the credit of another company, receiving in return merely a cause of action against the other company without providing for redemption funds or giving liens on tangible property, was taking property for public use without making provision for compensation.[44] Two of the justices dissented upon the ground that the chance of loss was infinitesimal, and that any risk arising from insolvency or abuse in the issue of mileage tickets could be provided against by the power given to the railroad commissioners to exempt or exclude railroads from the operation of the act. The dissenting opinion makes a strong plea for the doctrine that the constitutionality of a statute should be judged by actual conditions and practically certain results, and not by remote theoretical or speculative possibilities.

**§ 398. Public convenience not ordinarily a ground of police control.**—The Supreme Court of the United States, in discussing the nature of the power to impose requirements of the class here discussed[45] recognises distinctly that it has no reference to health, morals or safety, but simply to public convenience; but while questioning the propriety of ranging it under the police power, it seems inclined to regard it as a general governmental object to provide for the public convenience by compulsory measures. The nature of the requirement seems to mark it clearly as an exercise of the police power; but it would be unwarranted to conclude that this power can always be set in motion, simply to subserve the convenience of the public. It would be a novel doctrine to assert that the state could prescribe what kinds of goods a dry goods merchant shall keep, how many salesmen he shall employ, how the goods shall be exhibited to buyers, or how long his store shall be kept open. The public interest of convenience is not as urgent as that of health or safety, and hence does not justify similar interference with private rights. Where the public determines standard and quality of service, it assumes a function which properly falls within the discretion of the manager of a business; and such power, it seems, can be claimed only in return for special privileges, or to check the tendencies inherent in a virtual monopoly, against which a remedy cannot be otherwise provided. This is the theory on which actual

[44] Attorney General v. Old Colony R. Co., 160 Mass. 62.

[45] Lake Shore & M. S. R. R. Co. v. Ohio, 173 U. S. 285, 297.

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legislation proceeds; for it will be found that requirements for convenience are confined mainly to railroad companies, with now and then a similar provision affecting a telegraph, telephone, gas, electric, or water company.[46] It may thus be concluded that the police power for the public convenience may be exercised only with regard to a business affected with a public interest, and that for this purpose again a business affected with a public interest is one which enjoys either special privileges or a virtual monopoly.

## REQUIREMENTS AND RESTRICTIONS IN THE INTEREST OF FINANCIAL SECURITY. §§ 399-401.

**§ 399. Banking and insurance.**—Banking and insurance are treated very generally by the statutes of the American states as affected with a public interest, and are subjected to elaborate regulative and restrictive legislation of a kind not normally applied to other classes of business.

The modern legislation regarding banks is of a different character from the older English legislation affecting bankers: the latter regulated and restrained the dealing in coins, and bills of exchange, and the loaning of money on interest. At present, with the exception of the interest legislation, these branches of business are left free. The issue of bills of credit to circulate as money, which has attained great importance only since the eighteenth century, was always regarded as a proper subject of restrictive regulation. The Revised Laws of New York of 1813, and the Revised Statutes of that state of 1828,[47] required special authority of law for the issue of notes or other evidences of debt to be loaned or put in circulation as money; and prohibited the keeping of any office for the purpose of receiving deposits, or discounting notes or bills without such authority, which was explained by later legislation as a prohibition of the keeping of offices designated by the corporate name of a "Bank."[48] The General Banking Law of 1838, enacted after the crisis of 1837, and which may be regarded as the beginning of systematic legislation on banks

[46] So, requiring a telephone company to provide messengers in connection with its toll service. Central Union Teleph. Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035.

[47] 1 Rev. Stat. p. 712.

[48] See Gen. Laws 1892, ch. 39, § 92.



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in America, added to the older restrictions the requirement of a minimum capital, and of periodical reports and published statements regarding the financial condition of the bank. The present banking legislation, enacted by the states for state banks of deposit, and by Congress for national banks of deposit and issue, places these banks under systematic official supervision, requires a permit for organisation, which is granted only after ascertaining that all preliminary conditions regarding payment of capital, etc., have been complied with, limits the amounts of individual loans that may be made, and provides for periodical official examination of the bank. The laws of some states contain additional restrictive regulations regarding trust companies and savings banks; so it is provided in New York that the business of a bank and of a savings bank must not be carried on in the same or in communicating rooms, and directions are given respecting the kinds of business a savings bank may do, and the securities in which it may invest its funds.[49]

The regulation of the business of insurance is of more recent date than that of banks. The Revised Statutes of New York of 1828 contain only a few provisions in restraint of foreign insurance companies. There is, however, a very large amount of special legislation for the organisation of insurance companies, and through this system of special acts the legislature had it in its power to impose such conditions upon the business as it chose. The first general legislation for the organisation of marine, fire, and life insurance companies was enacted in New York in 1849. At present most states have elaborate statutes regulating the various kinds of insurance, marine, fire, life, inland navigation and transportation, hail and tornado, accident, title, fidelity, etc., with special provisions for fraternal beneficiary societies.

The restrictions imposed upon the business of insurance resemble in important respects those imposed on banking. There must be a permit to organise and a minimum amount of capital; there is full provision for reports, published statements, and examinations. The amount of individual risks in proportion to the capital is limited; the manner of investment of capital is prescribed; capital impaired must be made good, or if losses exceed a certain amount, no new business

[49] New York Banking Law (ch. 37 of Gen'l Laws) §§ 25, 116, 122.

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may be done; some kinds of companies are required to keep a reserve or emergency fund; and foreign insurance companies must generally deposit securities; it is provided under what conditions dividends may be declared; and with regard to fire insurance, a standard form of insurance is sometimes prescribed, etc.[1]

§ 400. **Grounds of control.**—When we examine the nature of the restrictions on the business of banking and insurance, we find that they nearly all aim at the same object: the protection of depositors and insured from losses resulting from insolvency of the bank or insurance company. This loss is to be averted by insisting upon some guaranty of financial stability. Provisions of this character are not absolutely confined to banking and insurance; in some states railroad or other public service corporations may not issue securities without complying with prescribed conditions, or without the consent of designated authorities;[2] and the power of corporations to borrow may be generally limited.[3] But in the case of banking and insurance they are not necessarily confined to corporations, and by far exceed the financial regulations imposed upon any other kind of business. While all the provisions furnish protection against fraud, they do not pretend to be limited to guarding against that danger, but plainly seek to prevent mere improvidence or inadequacy of resources.

The justification for this must be found in the peculiar nature of the business regulated; both banks and insurance companies deal in their own credit, while they receive cash; and, in addition, banks and life insurance companies are the depositaries of a large proportion of the savings of the people, so that the management of each institution affects a considerable part of the public. These conditions create a special public danger, requiring a more incisive exercise of the police power than is called for in an ordinary business. These considerations do not explain some provisions regarding fire insurance that have nothing to do with the solvency of the company; as where a standard form of policy is prescribed, or

[1] New York General Laws, 1892, ch. 38, § 9, 12, 16, 24, 39, 41, 120, 205.

[2] Massachusetts Rev. Laws, ch. 109, §§ 24, 25, 26.

[3] New York Stock Corporation Law, § 2.

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certain stipulations in a policy are declared void. But the contract of insurance, regarded as an individual transaction, is of the nature of a wagering contract; it becomes a legitimate business only, where it is undertaken on a large scale by organised capital, or by organised associations; then, however, the conditions of the contract are virtually imposed by the insurer, and it is illusory to speak of a liberty of contract. Reasonable regulations for the purpose of producing equitable rights and obligations between the parties have therefore been upheld by the courts.[4]

**§ 401. Restriction of right to carry on business.**—Banking and insurance being peculiarly affected with a public interest, it follows that the right to carry on either business may be made to depend upon the compliance with certain conditions; and a license may be required as evidence of compliance. In New York, in the case of savings banks and trust companies, the authorisation is only given upon ascertaining that the general fitness of the organisers for the discharge of the duties appertaining to the trust is such as to command the confidence of the community, and that the public convenience and advantage will be promoted by such establishment.[5] This requirement has not yet been passed upon by the courts, but an analogous provision making the construction of a railroad dependent upon an administrative determination that public convenience and necessity require it, has been upheld.[6] The requirement of fitness cannot be regarded as prohibitive; but the provision as to public convenience would seem to tend toward the monopolising of the business.

In a less extreme form, the latter objection might be urged against statutes which confine the business of banking or insurance to corporations. In Pennsylvania, such a restriction was held to be constitutional with regard to insurance.[7] The state may indeed require corporate organisation of associations of persons engaged in a business which is subject to special control, as a method of exercising such control. But as long as corporate organisation is limited to associations

[4] Orient Insurance Co. v. Daggs, 172 U. S. 557. See § 714, *infra*.

[5] New York Banking Law, § 103, 153.

[6] Railroad Law, § 59; People v. Board of Railroad Commissioners, 160 N. Y. 202, 54 N. E. 697.

[7] Commonwealth v. Vrooman, 164 Pa. 306, 25 L. R. A. 250.

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of persons, it is clear that this requirement must have the effect of excluding from the business any individual acting by himself, and is to that extent prohibitive. This fact was recognised in two cases arising under statutes of North Dakota and South Dakota, restricting the business of banking to corporations. The Supreme Court of North Dakota upheld the law, because private banking might be prohibited altogether.[8] The South Dakota court held that the statute could not prohibit any citizen from entering upon any business not injurious to the community, though affected by a public interest, and was therefore unconstitutional.[9]

New York regulates this matter so as to obviate this question by allowing the organisation of a bank by an "individual banker," subject in all respects to the provisions of the Banking Law.[10] The law also recognises the "private banker," who may carry on his business without license and without supervision, but who is forbidden to use for his business any artificial or corporate name or any words indicating that his business is a bank.[11]

[8] State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L. R. A. 420.

[9] State v. Scougal, 3 S. D. 55, 15 L. R. A. 477.

[10] The original Banking Act had not applied to individual bankers acting alone. Bristol v. Barker, 14 Johns. 205.

[11] Banking Law, § 2, 92.

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## CHAPTER XIX.

### QUALIFIED PROPERTY.

§ 402. **In general.**—In the case of a business affected with a public interest it is the act of the owner which by devoting certain property to the public service creates that interest. There are other cases in which property rights are modified irrespective of the act of the owner, by superior public rights or easements, or by the interdependence of several properties upon each other. These may be designated as cases of qualified property. The restrictions generally exist by common law, but the legislature sometimes defines them and sometimes adds to them, and questions of the law of property then become mingled with questions of constitutional power.

NAVIGABLE WATERS AND RIPARIAN RIGHTS. §§ 403-409.

§ 403. **Title and easement of navigation.**—In the law of navigable waters and their shores or banks, property rights are qualified by public easements existing chiefly in the interest of navigation. The treatment of this very important branch of the law of property does not fall within the scope of a treatise on the police power, and will be very briefly dealt with only for the purpose of discussing some constitutional questions that have arisen regarding the extent of public power over riparian rights. The rights of the public are fully represented by the federal government where interests of interstate or foreign commerce are concerned. It has been held that a reservation in a water grant in favor of the state enures to the benefit of the United States.[1]

The title of the riparian owner may extend to high or low water mark or to the thread of the stream. Title to high water mark is the rule in the case of tidal waters and the Great Lakes, unless altered by special grants; in the case of non-tidal navigable rivers the rule varies in different states, and the United States recognises in each state the rule adopted

[1] United States v. Moline, 82 Fed. 592.



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by that state, even for grants made of lands belonging to the public domain.[2]

It will be convenient to treat, first, of the land covered by water and of improvements there constructed; second, of the easements of the riparian owner; and third, of the riparian land.

**§ 404. The land covered by water.**—The title to this may be in the riparian owner under the common law rule regarding non-tidal waters as recognised in a number of states. This title, in the case of navigable waters, is subject to the public easement of navigation which is co-extensive with the public needs. "Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable river, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with, or demanded by, the public right of navigation."[3] The right of the state or of the United States to establish harbor lines, or erect light-houses, is therefore probably the same whether the title to the bed of the stream is in the riparian owner or in the state, these being in aid of navigation; but where the bed of the stream is privately owned, the owner has been held to be entitled to compensation where bridge piers are placed upon submerged lands.[4] Since the public right of navigation qualifies the riparian owner's rights to a considerable extent, he is entitled to compensation where a non-navigable stream is made navigable.[5]

[2] Shively v. Bowlby, 152 U. S. 1. See, however, Hardin v. Jordan, 140 U. S. 371.

[3] Scranton v. Wheeler, 179 U. S. 141, 163. In Wisconsin the title is held to be subject to all kinds of public uses, including the public right to fish. Willow River Club v. Wade, 100 Wis. 86, 42 L. R. A. 305.

[4] Ballance v. Peoria, 180 Ill. 29, 54 N. E. 428; Hawkins' Point Light House case, 39 Fed. Rep. 77; Eisenbach v. Hatfield, 2 Wash. 236. See also Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, a case of special legislation condemned as arbitrary and unequal and as a legislative adjudication of a nuisance.

[5] Morgan v. King, 35 N. Y. 454.

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§ 405. **Special grants—Commonwealth v. Alger.**—The title to submerged lands may be in the riparian owner under special grants and therefore affected by the power under which such grant was made and by its terms. A colonial ordinance of Massachusetts of 1641 had given the riparian proprietors on certain navigable waters the property to low water mark, provided they did not hinder the passage of boats and other vessels. An Act of the Legislature of 1837 established harbor lines along the shores of one of these waters beyond which any kind of building was forbidden. This line was drawn above low water mark. Defendants erected a wharf, part of which was, subsequent to the passage of the act of 1837, extended beyond this line but remaining above low water mark and without making any hindrance or injury to navigation. In an action brought against them the constitutionality of the act was maintained and the wharf declared to be an unlawful erection.[6] The court held that all grants of water land are impliedly subject to restraints for public use, and that wherever private property is thus qualified by public interest, the legislature may prescribe a precise practical rule, and that it must be relied upon to save private property rights as much as possible. That the wharf created no actual impediment to navigation was held to be no defense, since it was impracticable to leave the decision of this question to each individual case.

The court treated the proviso in the grant "that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks, or coves, to other men's houses or lands," as reserving to the public all rights incident to the easement of navigation, as these rights have been exercised in England under the Royal Prerogative.[7] A full account of the relation between private and public right in harbors is given in Hale's Treatise de Portibus Maris, but nothing is said about the establishment of definite harbor lines. The public right is said to consist in the preservation of the harbor from nuisances, one form of nuisance being "the straightening of the port by building too far into the water, where ships or vessels might

[6] Commonwealth v. Alger, 7 Cush. 53, 1851. Weston v. Sampson, 8 Cush. 347; Packard v. Ryder, 144 Mass. 440.

[7] Including the right to take fish.

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have formerly ridden; for it is to be observed, that nuisance or no nuisance in such case is a question of fact."[8] As the title below high water mark was usually in the King, and as the King had to license every public wharf, the establishment of a line below which wharves should not be extended would have met with no legal difficulty in England. In the Massachusetts case the fact that the title was in the riparian proprietor, and that his erection was admittedly not a nuisance, presented a novel question. In support of its ruling, the court relied partly upon the easement of navigation, and partly upon the general police power upon the operation of which the court enlarged at some length. As this was one of the first judicial discussions of the police power, the case is generally treated as one of the leading cases upon the subject, but the definition of the police power ("*sic utere tuo ut alienum non lacdas*,"[9] etc.) is very vague, and its application to the case in hand, if we leave out of consideration the easement of navigation, is based upon no intelligible principle. The proposition that property rights must be exercised in subordination to the public welfare is a commonplace unless the conditions of such subordination are defined. If the court in this case found any justification for the exercise of the police power, beside the public right of navigation, it failed to point out with clearness such additional ground.

**§ 406. Establishment of harbor lines—Effect on existing wharves.**—In two respects, however, the court applies important principles of the police power. It recognises in the first place the fact that police regulations need not confine themselves to a restraint of actual evil or mischief, but may within reasonable limits establish definite lines which in a certain sense must be arbitrary, so as to leave a margin of safety and cut off controversies in each case as to whether nuisance or no nuisance.[10] But it does not yet recognise that in its judgment as to what is reasonable the legislature is controllable by the courts.

The second important point is the distinction between the prospective and retroactive operation of the regulation. Only that part of the erection was condemned which was made subsequent to the restraining act. With regard to a wall pre-

[8] Hargrave's Law Tracts, p. 85.

[9] As to this phrase see 9 Harvard Law Review, p. 14-17.

[10] See §§ 28, 29, *supra*.

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viously built it was held that the act could have no effect if it was not a nuisance in fact. Where some improvement has been constructed below high water mark by private persons or corporations under statutory authority, they cannot be deprived of it for the benefit of public navigation without compensation.[11] This principle was recognised in New York in favor of valuable dock rights, where water grants had been made by the state with covenants for the enjoyment of wharfage.[12] Where in condemning an erection made under statutory authority compensation has been refused it will be found that there existed some reservation, express or implied, in favor of the public right.[13] But some courts recognise a right to compensation also in cases where the improvement was constructed merely under license, and the United States Supreme Court has taken the same position as against a municipal ordinance declaring such an erection to be a nuisance.[14]

§ 407. **Obstructions under Act of Sept. 19, 1890.**—The federal act of September 19, 1890, requires affirmative authority of law for any obstruction, not erected for business purposes, created prior to the passage of the act, and the consent of the Secretary of War for any work obstructing navigation in a navigable water of the United States to be established after said date.[15] The act of March 3, 1899, requires the affirmative authority of Congress for the erection of any obstruction to the navigable capacity of any of the navigable waters of the United States.[16] These acts also authorise the Secretary of War to direct the alteration of any bridge which he has reason to believe is an unreasonable obstruction to the free navigation of any such navigable water, without making provision for compensation. The question whether this legislation is constitutional as to bridges previously constructed

[11] See on this subject §§ 573-578, *infra*.

[12] Langdon v. Mayor, &c., of New York, 93 N. Y. 129; Williams v. Mayor, &c., of New York, 105 N. Y. 419, 11 N. E. 829.

[13] Newport, &c., Bridge Co., v. United States, 105 U. S. 470; United States v. Moline, 82 Fed. Rep. 592; Classen v. Chesapeake Guano Co., 81 Md. 258. People ex rel. City of Chicago v. West Chicago St. R. Co., 203 Ill. 551, 68 N. E. 78.

[14] State v. Sargent, 45 Conn. 358; Lewis v. Portland, 25 Ore. 133, 35 Pac. 256; Yates v. Milwaukee, 10 Wall. 497.

[15] United States v. Bellingham Bay Boom Co., 176 U. S. 211.

[16] 11 Suppl. Rev. Stat. p. 996.

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by authority of law has so far been left undecided by the Supreme Court,[17] but should, it seems, be decided in favor of the right to compensation.[18]

It has also been held that water grants by the state are impliedly subject to the right of the legislature to direct fishways to be built to allow the passage of fish from one part of the stream to another.[19]

**§ 408. The easements of the riparian owner.**—The relation of the riparian easements or advantages with respect to navigable waters, to the rights of the public in the same, presents questions upon which there is some difference of opinion.

If we regard the position of the riparian owner as analogous to that of an owner of property abutting upon a public highway,[20] there is undoubtedly a strong equity in favor of an easement which would at least preserve to him the natural advantages of his location; that is to say, the right of access to the river and the right to have the river continue to flow by his land. It was held in an earlier case in New York[21] that an owner of lands on the Hudson River who had no property on the shore between high and low water mark was not entitled to compensation from a railroad company which in pursuance of a grant from the legislature constructed a railroad along the shore below high water mark so as to cut off all communications between the land and the river otherwise than across the railroad. A doctrine similarly adverse to riparian

[17] Rider v. United States, 178 U. S. 251, 1900.

[18] The Act of March 3, 1899, seems to leave the question of compensation deliberately in abeyance for settlement by the Supreme Court, for the removal of obstructions from sunken raft is directed expressly without liability for damages. Compare § 18 and § 19 of Act.

[19] Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446; Holyoke Water Power Co. v. Lyman, 15 Wall 500; *Parker* v. People, 111 Ill. 581; State v. Beardsley, 108 Ia. 396, 79 N. W. 138; State ex rel. Remley v. Meek, 112 Ia. 338, 51 L. R. A. 414. In Pennsylvania, however, this is regarded as an exercise of the power of eminent domain, Commonwealth v. Pennsylvania Canal Co., 66 Pa. 41, 5 Am. Rep. 329; and in Massachusetts it is held that where in compliance with a charter a fishway is maintained, different fishways cannot be required, Commonwealth v. Essex Co., 13 Gray 239.

[20] The easements of the owner of land abutting on a highway, however, rest very commonly upon qualifications of the original act of dedication or condemnation, which are not applicable to the natural highway of a river.

[21] Gould v. Hudson River R. Co., 6 N. Y. 522.

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rights has been put forward in New Jersey.[22] After the decisions in the elevated railroad cases had recognised abutters' easements as constitutional rights in New York, the Gould case was overruled as inconsistent with the doctrine established in those cases.[23] An owner has therefore been held to be entitled to compensation where an embankment or driveway is constructed along the bank of a river in front of his land depriving him of access and riparian advantages.[24] The same doctrine has been recognised in England.[25]

But it is held in New York that easements of access and other water rights are subordinate to the public right of navigation, and to everything incidental to it, and that therefore a riparian owner is not entitled to compensation where his right of access is cut off by a public improvement undertaken for the benefit of navigation.[26] The same principle is recognised by the Supreme Court of the United States. Therefore where the United States built a dike on the Ohio River for the improvement of its navigation, a riparian owner who thereby lost valuable landing facilities was not entitled to compensation.[27] This principle was reaffirmed in Scranton v. Wheeler.[28] "If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a taking of private property for public use, but only a consequential injury to a right which must be enjoyed as was said in the Yates case, 'in due subjection to the rights of the public'—an injury resulting incidentally from the exercise of governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner. The

[22] Stevens v. Paterson & Newark R. Co., 34 N. J. L. 532.

[23] Rumsey v. New York & N. E. R. Co., 133 N. Y. 79, 30 N. E. 654. So, also, Delaplaine v. Chicago & N. W. R. Co., 42 Wis. 214.

[24] In re City of New York, 168 N. Y. 134, 61 N. E. 158.

[25] Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 H. L. 418.

[26] Sage v. Mayor of New York, 154 N. Y. 61, 47 N. E. 1096, 38 L. R. A. 606. So as to destruction of water power, Canal Appraisers v. People, 17 Wend. 571; People v. Canal Appraisers, 33 N. Y. 461.

[27] Gibson v. United States, 166 U. S. 269.

[28] 179 U. S. 141, 164.

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riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection, under competent authority, of structures on the submerged lands in front of his property for the purpose of improving navigation."

Where the public right of navigation is surrendered by legislative authority either in favor of the use of the water for another purpose, or in favor of another work of public improvement (especially in favor of a bridge), there is authority for holding that the loss to riparian owners, though more sensible to them than to the public at large, does not constitute a special legal injury; but the question does not appear to have been fully considered in its analogy to abutters' rights in case of vacation of a street, nor in connection with the provision of many constitutions that private property shall not be damaged for public use.[29] Where waters are held in private ownership subject to the public easement of navigation, they cannot be diverted for other public purposes, e. g. for municipal water works, without compensation.[30] But such diversion has been held legitimate where the water is owned by the state in trust for public uses, so that mill owners whose water supply is impaired, are left without remedy.[31] There would, however, be great reason for holding that public, as well as private, ownership is subject to the right of the lower riparian proprietor to a practically unimpaired flow of water by his land.

Statements may be found in some cases to the effect that the riparian owner as such (i. e. without title to land under water) has a right to erect wharves provided he does not interfere with navigation,[32] but the more correct doctrine is that the riparian owner has merely a passive or implied license revocable before execution, which can ripen into a right only

[29] See Blackwell v. Old Colony R. Co., 122 Mass. 1; Frost v. Washington Co. R. Co., 96 Me. 76; Lansing v. Smith, 8 Cow. 146; Bell v. Quebec, L. R. 5 App. C. 84.

[30] Smith v. Rochester, 92 N. Y. 463. They cannot be diverted at all for private speculative purposes. Priewe v. Wisconsin State Land & Impl. Co., 93 Wis. 534, 33 L. R. A. 645.

[31] Minneapolis Mill Co. v. Board of Water Commissioners, 56 Minn. 485; Watuppa Reservoir Co. v. Fall River, 147 Mass. 548; see, however, same case 154 Mass. 305.

[32] Dutton v. Strong, 1 Black. 23; Mather v. Chapman, 40 Conn. 382; City of Madison v. Mayers, 97 Wis. 399; Grant v. Davenport, 18 Ia. 179, 192; assumed without discussion in Illinois C. R. Co. v. Illinois, 146 U. S. 387, 464.

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by statutory recognition.[33] Nor has the riparian owner a right to place booms in front of his land for the purpose of floating logs. Such right may be given to a quasi-public corporation acting for the benefit of all who may have occasion to use the stream for that purpose, although the owner may be thereby excluded from direct access to the water, such improvement being in aid of the navigation of the stream.[34]

§ 409. **Riparian land.**—It has been held in some cases that where, in consequence of a river improvement for the purpose of navigation, the current of the stream is changed and gradually undermines and washes away the land of a riparian owner, that this is *damnum absque injuria*, and that compensation is therefore not due.[35] Probably the same is true where through the raising of the level of the river the riparian owner loses facilities for drainage.[36] But where water is cast upon riparian land, flooding it and rendering it useless for agricultural purposes, there is a taking of property which cannot be constitutionally authorised without compensation.[37]

An interference with a riparian upland may also be required for protection from flood and inundation. Is such upland subject to an easement in that behalf so that the owner must yield to the public requirements without compensation? The Supreme Court of Massachusetts in Commonwealth v. Tewksbury[38] held that the legislature to protect the harbor of Boston might prohibit the owners of any beach in the town of Chelsea, from removing stones, gravel and sand from such beach, and the same court, commenting upon that case in the later case of Commonwealth v. Alger[39] said: "That when land is so sit-

[33] Stevens v. Paterson and Newark R. Co., 34 N. J. Law 532; Cohn v. Wausaw Boom Co., 47 Wis. 314; Revell v. People, 177 Ill. 468. See note 40 L. R. A. 635.

[34] Cohn v. Wausaw Boom Co., 47 Wis. 314; Osborn v. Boom Corporation, 32 Minn. 412; Grand Rapids Boom Co. v. Jarvis, 30 Mich. 308.

[35] Hollister v. Union Co., 9 Conn. 436, 1833; Green v. Swift, 47 Cal. 536; Brooks v. Cedar Brooks Improvement Co., 82 Maine 17, 19 Atl. 87.

[36] Mills v. United States, 46 Fed. 738, 12 L. R. A. 673, and see dissenting opinion in United States v. Lynah, 188 U. S. 445.

[37] Grand Rapids Boom Co. v. Jarvis, 30 Mich. 308; White Deer Creek Improvement Co. v. Sassaman, 67 Pa. St. 415; Arimond v. Green Bay, &c., Co., 31 Wis. 316; Pumpelly v. Green Bay, etc., Co., 13 Wall. 166; United States v. Lynah, 188 U. S. 445; New York Navigation Law, § 72.

[38] 11 Metc. 55, 1846, followed in Hodges v. Perine, 24 Hun. 516.

[39] 7 Cushing 53.

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uated that it forms a natural barrier to rivers or tidal water courses, the owner cannot justifiably remove it to such an extent as to permit the waters to desert their natural channels and overflow and perhaps inundate fields and villages." But if in accordance with this doctrine the riparian owner may be prohibited from weakening natural embankments, it does not follow necessarily, that, as the Massachusetts court intimates, he may be compelled to construct or even repair embankments for the public benefit at his private expense.[40] Such a duty seems to have been imposed upon riparian owners under early Louisiana statutes,[41] but is unknown in other states.[42]

In Louisiana it is certainly settled that embankments may be built at public expense without paying to the riparian proprietor compensation for his land which is appropriated for that purpose. The Supreme Court of Louisiana has justified this as an exercise of the police power,[43] but the United States Supreme Court has upheld such appropriation as an exercise of the public easement for making and repairing levees, roads and other common or public works to which by the civil code of that state[44] riparian lands are subject, so that the burden qualifies the right of property *ab initio*.[45] The peculiar juris-

[40] "Take the case of the River Mississippi, where large tracts of country with cities and villages depend for their protection upon the natural river bank which is private property. Perhaps under such circumstances it might not be too much to say, not only that the owner cannot do any positive act towards removing the embankment, but that he may properly be held responsible for the permissive waste of it by negligence and inattention." Commonwealth v. Alger, 7 Cush. 53.

[41] Act of 1829, cited in Counsel's Brief in Eldridge v. Trezevant, 160 U. S. 452.

[42] An act of Illinois of 1873 which in an indefinite way recognised the duty of riparian owners to maintain dikes in order to prevent disastrous floods, was repealed in 1899. In New Jersey an act was declared unconstitutional which undertook to make it unlawful for a railroad company to make any opening in its causeway through which tidewater from the meadows beyond might be discharged upon a certain tract of land. Koch v. Delaware, etc., R. Co., 53 N. J. L. 256.

[43] Bass v. The State, 34 La. Ann. 494; Ruch v. New Orleans, 43 La. Ann. 275; Peart v. Meeker, 45 La. Ann. 421, 12 Sou. 490; Egan v. Hart, 45 La. Ann. 1358, 14 Sou. 244.

[44] Sec. 661.

[45] Eldridge v. Trezevant, 160 U. S. 452. At common law the public right of navigation does not include any right to use the banks for purposes in aid of navigation. Ball v. Herbert, 3 Term Rep. 253; Ensminger v. People, 47 Ill. 384. In Oregon an easement of necessity is recognised. Weise v. Smith, 3 Ore. 445.

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prudence of Louisiana adopted from the French civil code cannot, of course, conclude the same question for other states.[46]

MILL DAM PRIVILEGES. §§ 410-413.

**§ 410. Legislation.**—The legislation of a number of states regarding the construction of mill dams presents a peculiar and perhaps anomalous qualification of property rights. A list of these acts and a full discussion of their nature will be found in the case of Head v. Amoskeag Manufacturing Co.[47] The legislation of Massachusetts inaugurated one type of this legislation, that of Virginia another.[48] The statute of Massachusetts[49] authorises any person to erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream not navigable, provided he does not thereby interfere with another mill already lawfully existing on the same stream. If the dam cause the water to flow back and overflow the lands of other owners on the stream, the statute gives to such owners a right of action for damages, at their option either in gross or by annual compensation. The states following Virginia provide for proceedings prior to the erection of the dam to adjust conflicting interests, and also for the protection of residences, gardens, etc.[50] Under both systems alike the law expressly sanctions the use of property which involves the invasion of other property, compelling the owner of the latter property to accept compensation in lieu of other remedies which might protect or restore his original rights. Since the owner of the flooded land does not share directly in the benefit of the mill, the case lacks that community of interest which is characteristic of compulsory drainage.[51] It is also clear that the damage done the flooded land cannot be regarded as consequential merely, i. e. as a loss of benefits incident to conditions to the maintenance or continuance of which the owner had no right; for the throw-

[46] The French law recognises a number of servitudes qualifying the ownership of land which result from its location, so in favor of highways, railroads, cemeteries, mineral springs, and public improvements. French Civil Code § 650, Ducrocq Droit administratif, § 1290-1316.

[47] 113 U. S. 9.

[48] Mass. Prov. Laws 1713-14, ch. 15; Virginia Act of 1785, 12 Henning's Statutes, p. 187.

[49] Rev. Laws, ch. 196.

[50] Gould Waters § 607, 609-617, 621, 622.

[51] §§ 441, 442, *infra*.

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ing of water upon land by artificial arrangements is properly held to be an invasion or taking of property, and a statute authorising it without compensation is unconstitutional.[1]

**§ 411. Theory of Massachusetts courts.**—The courts of Massachusetts—and their doctrine has been adopted by the United States Supreme Court—regard the mill owner's privilege as due simply to the recognition by law of the fact that through the laws of nature the full enjoyment of his water rights requires the modifications of the rights of others, it being the object of the statute "to provide for the most useful and beneficial occupation and enjoyment of natural streams and watercourses, where the absolute right of each proprietor to use his own land and water privileges, at his own pleasure, cannot be fully enjoyed, and one must of necessity, in some degree, yield to the other,"[2] and the United States Supreme Court speaks of a "just and reasonable exercise of the power of the legislature having regard to the public good in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams which without some such regulation could not be beneficially used."[3]

How is this legislative authorisation to one owner to invade the property of another to be reconciled with the constitutional security of property rights? That some difficulty exists is not disputed. Chief Justice Shaw in 1851[4] said "Whether, if this were an original question this legislation would be considered as trenching too closely upon the great principle which gives security to private rights, it seems now too late to inquire, such legislation having been in full operation in this state a century and a half." And similar doubts have been expressed in other states.[5]

**§ 412. Taking for public use.**—The grant of the right to flood the lands of others is most satisfactorily accounted for as a taking for public use, if the erection of the dam can be

[1] Pumpelly v. Green Bay Co., 13 Wall 166; Carlson v. St. Louis River Dam, etc., Co., 73 Minn. 128, 41 L. R. A. 371; Trenton Water Power Co. v. Raff, 36 N. J. L. 335.

[2] Fiske v. Framington Manufacturing Co., 12 Pick. 68.

[3] Head v. Amoskeag Manufacturing Co., 113 U. S. 9.

[4] Murdock v. Stickney, 8 Cush. 113.

[5] Jordan v. Woodward, 40 Me. 317; Fisher v. Horicon Co., 10 Wis. 351.



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said to constitute a public use. In a few states this has been denied, and the legislation in consequence been declared unconstitutional,[6] while in others the public use has been conceded only for grist mills, which must grind for everybody, at legal tolls, but not for manufacturing mills.[7] Upon a more liberal view, however, the encouragement of manufactures and the development of the natural resources of the state is held to be of sufficient public interest to justify the taking of private property.[8] Some statutes by confining their provisions to public mills (Ill. Rev. Stat. Ch. 92 § 1) seem to leave the question of public use in every case to judicial determination. The decision of the Supreme Court in Head v. Amoskeag Co. does not make it quite clear whether the court would sustain the exercise of the power for the exclusive private advantage of the land of the mill owner, but if such a case should arise many courts would undoubtedly hold it to be an unjustifiable taking for private use. The difficulty presented by the laws of the Massachusetts type is that there is no provision for securing the application of the water power to a use even remotely public. The Supreme Court of Massachusetts recognises this and seeks to avoid the objection arising on this ground by contending that the flowage does not constitute the taking of private property or right, but is merely a mode of regulating common rights[9]—a view to which it is difficult to assent. For the law of joint ownership presents no analogous case of granting to one of the parties exclusive advantages to the prejudice of the others, remitting the latter to a cause of action for damages. Assuming that there is a taking of private property for private use, it can be justified, if at all, only upon the theory, that where two pieces of property are so situated with reference to each other that one cannot be enjoyed to the fullest advantage without a comparatively slight impairment of the

[6] Tyler v. Beacher, 44 Vt. 648, 1871, grist mill owners in Vermont not being compelled to receive grain for grinding; Loughbridge v. Harris, 42 Ga. 500, 1871; Ryerson v. Brown, 35 Mich. 333, 1877; Gaylord v. Sanitary District of Chicago, 204 Ill. 576, 68 N. E. 522.

[7] Harding v. Goodlett, 3 Yerg. 41; Bottoms v. Brewer, 54 Ala. 288. The Virginia Act of 1785 applied to grist mills only.

[8] Boston &c. Mill Corp'n v. Newman, 12 Pick. 467; Olmstead v. Camp, 33 Conn. 532; Miller v. Troost, 14 Minn. 365; Newcomb v. Smith, 2 Pinn. (Wis.) 131; Burnham v. Thompson, 35 Ia. 421.

[9] Lowell v. Boston, 111 Mass. 454, 466.

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rights of the other, a burden may be imposed upon the other upon payment of compensation. This theory underlies the establishment of private roads and private drains, discussed in another connection.

There is sufficient truth in the view of the mill acts as a method of regulating rights, which should perhaps be described as interdependent rather than as common, to differentiate the legislative power exercised in them from the power of eminent domain.

It seems to be assumed that the flooding of other lands may be a necessary incident to the maintenance of a mill dam. It is somewhat inconsistent with this view, that the owner of the land to be flooded has, as it seems, the right to protect it by embankments.[10] But the great cost of dikes or other protecting works as compared with the slight damage caused by flooding may render the right to overflow a practical necessity.

Both in France and Germany the flooding of other lands is forbidden, and an administrative license is required for every dam.[11]

**§ 413. Other legislation authorising the flooding of land.**— To what extent the analogy of the mill acts may be carried can only be determined by further adjudication. The courts will probably require in all cases either something like a natural servitude, or some degree of public interest in the adequate utilisation of natural resources, or both. Thus lands may be flooded through the operation of booms or similar works for floating lumber, on payment of compensation.[12] In Massachusetts the flooding of lands is permitted in the interest of cranberry culture;[13] the Supreme Court of Wisconsin has left the question of the constitutionality of similar legislation undetermined.[14] An extreme case was presented in Turner v. Nye[15] where an act allowed the owner of land to erect dams to raise a pond for the cultivation of useful fishes, and to flood other lands for that purpose, the owner of the latter land to

[10] Williams v. Nelson, 23 Pick. 141; Murdock v. Stickney, 8 Cush. 113.

[11] Block, Dictionnaire, Cours d'eau non-navigables 16; German Trade Code § 16; Prussian Law Febr. 28, 1843, § 13.

[12] New York Navigation Law, § 72, and cases cited note 37, § 409, *supra*.

[13] Rev. Laws, ch. 196, § 39.

[14] Ramsdale v. Foote, 55 Wis. 557.

[15] 154 Mass. 579.

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be allowed damages unless he chose to embank his land and stop the flowage. The act was upheld on the ground that though the object of the person erecting the dam was his own pleasure and profit, the public would be benefited by the introduction of a new and profitable industry.

In New York a statute authorised any person desirous of floating logs, etc., down a river recognised as a public highway, to construct a chute in any dam across it, and to construct such piers or booms as might be necessary for the passage of logs, paying to the owner of lands floated thereby the damages that he might sustain. The act was held unconstitutional partly because the provision for compensation was not sufficiently certain or secure, but partly also on the ground that it could not be deemed to be an appropriation for public use, if each person was allowed to invade private property of another for his own purposes, indemnifying for each particular use, instead of making an appropriation for the public benefit once for all, the result being in reality a taking for private use. The court likens this to a statute which instead of condemning ground for a public common should allow any person to go on it for recreation, paying compensation for his particular use to the owner.[16] The difficulty is substantially the same as in the mill dam cases, and the New York court has adopted the stricter view. The court recognises that the power of eminent domain may be exercised for the permanent conversion of a brook into a public highway and that the use for floating logs makes it a public highway.[17]

NATURAL WATER AS QUALIFIED PROPERTY. §§ 414-417.

**§ 414. Common law easements.**—In connection with the subject of qualified property reference should be made to the development of the law of water and watercourses in the arid states of the West.

At common law the right of the riparian proprietor to the water of the stream running by or through his land is qualified by easements in favor of other riparian proprietors. "By the common law, the riparian owner on a stream not navigable, takes the land to the center of the stream, and such owner has the right to the use of the water flowing over the land as an

[16] Brewster v. J. & J. Rogers Co., 169 N. Y. 73, 62 N. E. 164.

[17] Re Burns, 155 N. Y. 23, 49 N. E. 246.

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incident to his estate. And as all such owners on the stream have an equality of right to the use of the water, as it naturally flows, in quality, and without diminution in quantity, except so far as such diminution may be created by the reasonable use of the water for certain domestic, agricultural or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him."[18]

**§ 415. Doctrine of prior appropriation.**—In consequence of the scarcity of water in the Pacific states, and the demand for it in mining operations, a custom sprang up materially altering the common law, which is known as the doctrine of prior appropriation. To quote again from the case last cited: "This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor." The court then quotes from an early California case[19] as follows: "If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some, which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of res judicata. Among these the most important are the rights of miners to be protected in

[18] Atchison v. Peterson, 20 Wall. 507.

[19] Irwin v. Phillips, 5 Cal. 140, 1855.

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their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold diggers and without which the most important interests of the mineral region would remain without development. So fully recognised have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various Acts of the Legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law makers."

In 1866 the doctrine was recognised by legislation of Congress, now § 2339 and 2340 of the Revised Statutes: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognised and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same. * * * All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognised by the preceding section."

§ 416. **Subordination of right to beneficial purpose.**—The right of prior appropriation, applied first to mining, has assumed increased importance with the growth of agricultural interests. Where the successful cultivation of the land depends upon irrigation, the control of water means the control of land, and the whole surrounding country could be made tributary to and absolutely dependent upon a few riparian owners, if the doctrine of prior appropriation were abused or misapplied. To avoid this, the doctrine had to be developed so as to become an instrument to serve rather than to control the public interest. This was done by interpreting the right as limited in its existence by its beneficial exercise. "The appropriation must be for some useful or beneficial purpose, and when the appropriator and his successors in interest cease to use it for such a purpose, the right ceases."[20] The appro-

[20] Civil Code of California, § 1411.

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priator cannot claim more than the amount which he actually diverts, and which he can use beneficially for the purpose for which he has diverted it. "The rights acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community and measured in their extent by the actual needs of the particular purpose for which the appropriation is made and not for the purpose of obtaining a monopoly of the water so as to prevent its use for a beneficial purpose by other persons; the diversion of the water ripens into a valid appropriation only where it is utilised by the appropriator for a beneficial use."[21] It follows from this that he cannot hold his right for speculative purposes. This view becomes of special importance in its application to irrigation companies. "Undoubtedly, those who, by labor or by the payment of money, actually construct an irrigating ditch, may thereby acquire a prior right to the water which may be diverted therein, provided they apply the same to a beneficial use within a reasonable time after such diversion. * * * Those who construct ditches and divert water for general purposes of irrigation must, within a reasonable time, apply the water to a beneficial use, or else, upon proper application and for proper consideration, they must dispose of the same to those who are ready to make a beneficial use of it. If ditch companies are unwilling to be charged with such duties and responsibilities, they must leave the water in the natural stream."[22] Such a company "must be regarded merely as an intermediate agency, existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners."[23]

**§ 417. Constitutional recognition of doctrine.**—This view has been embodied in the organic laws of most of the arid states. So in California, Constitution Art. XIV.: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law." Colorado,

[21] Hewitt v. Story, 64 Fed. Rep. 510, 30 L. R. A. 265.

[22] Combs v. Agric. Ditch Co., 17 Colo. 146.

[23] Wheeler v. Northern Colo. Irrig. Co., 10 Colo. 582, 17 Pac. 487.

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Art. XVI. § 5: "The water of every natural stream, not heretofore appropriated within the state of Colorado, is hereby declared the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." Wyoming, Art. I. § 31: "Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved." Art. VIII. § 1: "The waters of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state." § 2. "There shall be constituted a board of control * * * which shall * * * have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various offices connected therewith. Its decisions to be subject to review by the courts of the state." § 3. "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests." Under the provisions of its constitution, Wyoming has enacted comprehensive legislation, by which all water rights have been placed under effective state control.[24] Water has thus practically become property held in trust for the benefit of the community, the owner being allowed a fair profit and compensation for his expenditure and labor. Like the owner of a railroad, he must submit to have his charges regulated by law, and is under obligation to render his services to consumers on equal terms.[25] And this on the ground, not that he has devoted his property to a public use, but that it is a virtual monopoly, and that he is therefore allowed to acquire only a qualified property in it. This is perhaps the most important application to which the doctrine of property affected with a public interest has yet been carried. It would seem to be immaterial to the validity of state legislation enforcing equal service on reasonable terms whether the first appropriation of the water right affected took place on government or on private land, or before or after the enactment of constitutional provisions declaring the public use. Such declaration is

[24] Farm Investment Co. v. Carpenter, 9 Wyo. 110, 50 L. R. A. 747.

[25] Slosser v. Salt River Valley Canal Co. (Ariz.), 65 Pac. 332.

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expressive of what is believed to be the law, and does not intend to make new law. So, in Illinois, warehouses were declared to be affected by a public interest only by the constitution of 1870, but the validity of the new restrictive legislation was upheld in Munn v. Illinois, as to warehouses established before the enactment of the constitution.[26]

## GAME AND FISH. §§ 418-421.

**§ 418. Common law and legislation.**[27]—The Roman law regarded animals *ferae naturae* as *res nullius*, which became the property of the first occupant.[28] By the common law of England there is no private right of property in wild animals while alive; but there are exclusive rights to appropriate them by reduction to possession either *ratione soli* (when such right belongs to the owner of the land where the animals happen

[26] The constitutional status of natural waters has been made the subject of judicial discussion in Wisconsin (Rossmiller v. State, 114 Wis. 169, 89 N. W. 839, 58 L. R. A. 93). A statute imposed a tax of ten cents per ton upon all ice cut from any meandered lake of the state and shipped out of the state. The court holds that ice formed on public waters, as the water itself (Willow River Club v. Wade, 100 Wis. 86), is held by the state as trustee for the public and not in a proprietary capacity, and that the legislature cannot treat it as the beneficial property of the state. There is thus an indestructible common right to take ice and since it may be taken for the purpose of selling, as well as for domestic and personal use, the state cannot claim compensation from those who desire to sell it. The tax is therefore unconstitutional. The court admits that the enjoyment of the common right is subject to police regulation.—It is difficult to see why the common and natural right of occupancy should be above the power of the law. If the natural waters, and ice,—and the same is true of game and fish—are the common heritage of all the people, why should they not be made a source of revenue for the people? If only a limited number have access to this heritage, they enjoy an advantage from which others are excluded, and a payment to the state for what is appropriated is a method of equalising benefits, if the difference between the payment and the value is sufficient to compensate for the labor expended in reducing the commodity into possession. In holding an export tax to be unconstitutional, the court, however, gives effect to what seems in theory a sound principle, namely, that when a commodity is recognised as an article of commerce, it should be such for purposes of interstate as well as of domestic commerce. See, however, Geer v. Connecticut, 161 U. S. 519.

[27] See, also, § 635, 636, 712.

[28] Inst. Bk. II, Title 1.

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to be), or *ratione privilegii*, by royal prerogative or grant or by prescription, in forests, chases, parks, warrens and manors.[29] The rights *ratione privilegii* have never had any existence in America, and early legislation[30] and perhaps custom[31] has in some cases extended the common right of hunting to all wild and uninclosed lands. As a general rule the right to hunt exists in this country *ratione soli*, or by express or implied license from the owner of the soil. The right to fish, in England, is in tidal or navigable waters a common public right,[32] while in non-tidal or non-navigable waters it belongs presumptively to the owner of the adjacent soil.[33] With regard to tidal waters and non-navigable waters the rule in America is the same as in England;[34] where non-tidal navigable waters are held to be in public ownership, the right to fish is likewise common,[35] while there is some difference of opinion and perhaps uncertainty with regard to non-tidal navigable waters in states where they are held to be privately owned. Massachusetts and New Jersey hold that the right to fish in these waters belongs to the adjoining owner, and that others can fish there by license only,[36] while in Wisconsin a public right to fish is recognised either on the theory that the right of navigation carries with it the right of fishing, or on the theory that the riparian title to the navigable stream is subject to all public rights including the right to fish, the state being unable to surrender these public rights to individuals.[37]

From an early period legislation has been enacted in the public interest, limiting the right to take game and fish. The earliest statute of this character seems to have been one for the preservation of salmon, passed in 1285.[38] The statutes for the preservation of fish are especially numerous, and occur in almost every reign. From the time of Henry VIII there

[29] Encyclopedia of Laws of England, Title Game Laws; Blades v. Higgs, 11 H. L. C. 621.

[30] See § 518, *infra*.

[31] McConico v. Singleton, 2 Mills (S. C.) 244; Broughton v. Singleton, 2 Nott & McCord (S. C.) 338.

[32] Hale de Jure Maris, ch. 4.

[33] Hale de Jure Maris, ch. 1; Blount v. Layard, 1891, 2 Ch. 681, note.

[34] Century Digest, Title Fish, § 3.

[35] Carson v. Blazer, 2 Binn. (Pa.) 475.

[36] Commonwealth v. Chapin, 5 Pick. 199; Albright v. Cortright, 64 N. J. L. 330, 48 L. R. A. 616. See also Washington Ice Co. v. Shortall, 101 Ill. 46.

[37] Willow River Club v. Wade, 100 Wis. 86, 42 L. R. A. 305.

[38] 13 Ed. I, c. 47.

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occurs also legislation for the preservation of game, forbidding its taking at certain seasons or in certain ways.

Similar legislation has existed in America since the colonial times. An act of Massachusetts of 1698 establishes a close time for deer, and makes the possession of the skin sufficient evidence for conviction. A similar statute was passed for New York in 1705. At present elaborate laws exist everywhere, establishing close seasons during which the hunting, killing, carrying, selling, and even the possession of killed game and fish is made unlawful, prohibiting certain modes of hunting and fishing altogether, and forbidding the pollution of waters by which fish are apt to be destroyed,[39] or the obstruction of waters by which their free passage is prevented.[40]

**§ 419. Constitutionality.**—The constitutionality of game and fish laws may be supported upon several distinct and partly concurrent theories.

The one most commonly relied upon is that game and fish are owned by the sovereign state in trust for the people; and while a right of occupancy is recognised with regard to them, this is in the nature of a license or privilege, which the state may circumscribe as it sees fit, or at all events, in a very much more incisive manner than other property rights which under the constitution are purely private.[41] The power of the state may be exercised by depriving dead game of the character of an article of commerce, so by forbidding its consignment through a common carrier to a commission merchant or sale market.[42] The power of the state extends to the protection of fish and game on private property, over which they may pass or in which they may transiently dwell, since such temporary and accidental control does not give absolute

[39] People v. Elk River Co., 107 Cal. 214.

[40] Cottrill v. Myrick, 12 Me. 222, 1835. See as to requirement to build fishways for the passage of fish, qualifying previous water grants, Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446; Holyoke Water Co. v. Lyman, 15 Wall. 500; Parker v. People, 111 Ill. 581; State ex rel. Remley v. Meek, 112 Ia. 338, 51 L. R. A. 414.

[41] Magner v. People, 97 Ill. 320; State v. Rodman, 58 Minn. 393, 59 N. W. 1098; Ex parte Maier, 103 Cal. 476, 37 Pac. 402.

[42] State v. Chapel, 64 Minn. 130, 66 N. W. 205; American Exp. Co. v. People, 133 Ill. 649, 24 N. E. 758, 23 Am. St. Rep. 641, 9 L. R. A. 138; People v. Van Pelt, 90 N. W. 424.

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property; and it is sufficient that waters in private ownership are connected with other waters at certain periods at which fish may pass into them.[43]

Where fish are bred or raised by the owner, the state can claim no proprietary interest; if then the state may forbid the killing of such fish during certain seasons,[44] we must fall back on one of two grounds: that the state has the right to enforce measures for the preservation of a valuable food supply—a ground strongly relied upon in support of fish or game laws in general,[45]—or that an owner may be required to conform to a regulation of his right of property which is necessary to prevent or make more difficult evasions of the law by others; and this latter theory may also be used in support of the prohibition of the sale of game imported from other states, which will be referred to presently.

The protection of song or other wild birds from slaughter[46] may be placed upon the ground—likewise available for game and fish—that living creatures may be saved by the power of the state from reckless or wasteful sacrifice. Probably, however, an owner cannot be forbidden to destroy a noxious animal when necessary for the protection of his property.[47]

The question whether game and fish laws proceed upon the theory of sovereign ownership or of restraint of private property for the public welfare, would become important, if states like Massachusetts or New Jersey should undertake to throw the right to fish in non-tidal navigable waters open to the public, the prevailing doctrine in these states conceding this right to the riparian owner.[48] If the right of several fishery is a vested right of property,[49] it is still subject to the police power which may forbid the taking at certain seasons and pre-

[43] People v. Elk River Co., 107 Cal. 214; People v. Collison, 85 Mich. 105, 48 N. W. 292; People v. Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684; Commonwealth v. Look, 108 Mass. 452.

[44] Commonwealth v. Gilbert, 160 Mass. 157.

[45] Phelps v. Racey, 60 N. Y. 10; People v. Bridges, 142 Ill. 30.

[46] New York Forest, Fish and Game Law, § 33.

[47] Aldrich v. Wright, 53 N. H. 398.

[48] Com. v. Chapin, 5 Pick. 199; Albright v. Cortright, 64 N. J. L. 330, 48 L. R. A. 616.

[49] There is authority to the effect that the owner of a private fishery was regarded at common law as having property in the fish. See 15 Juridical Review, p. 151.

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scribe strict regulations in the interest of the preservation of a valuable food supply; but the right cannot be transferred from the individual to the public at large except under the right of eminent domain and therefore upon payment of compensation.[50] If, however, the fish belong to the state and the private owner has merely a license to take it, then this license, not being a vested right, is revocable, and may be transferred to the public at large. Since the latter is the prevailing theory, the change, it seems, can be effected without compensation.

**§ 420. Game and fish laws and freedom of commerce.**[51] — The question has also arisen, how far the game laws can be upheld as against the freedom of interstate commerce. A statute of Connecticut provided: "No person shall at any time kill any woodcock * * * for the purpose of conveying the same beyond the limits of the state; or shall transport, or have in possession, with intention to procure the transportation beyond said limits, of any such birds within this state." The Supreme Court of the United States upheld the constitutionality of this statute in a case, where the bird had been lawfully killed, and only its unlawful possession for the purpose of transportation out of the state was charged.[1] It was thus recognised that a state has power to regulate the killing of game within her borders so as to confine its use to the limits of the state and forbid its transportation outside of the state. The state may follow property in game into whatever hands it may come to with the conditions and restrictions deemed necessary for the public interest. From this decision it must of course follow that transportation out of the state may be made unlawful, if the prohibition is simply part of the general prohibition against killing or possession within the state. But the latter proposition, without which game laws would be ineffectual, does not necessarily require assent to the doctrine laid down in Geer v. Connecticut. Upon principle, it must be extremely doubtful whether a state may allow game to become property for commerce within the state, but not for commerce among the states, whether, in other words, a state,

[50] See § 511, 512, *infra*.

[51] As to discrimination against non-residents see § 712, *infra*.

[1] Geer v. Connecticut, 161 U. S. 519. Under the sanction of this decision nearly all states have placed restrictions upon the exportation of game.

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when recognising property for every other purpose, may annex a condition the sole purpose of which is to exclude a federal right.[2] Two justices dissented from the decision of the court, while two others took no part in it.[3]

Another question is whether the prohibition against sale or possession applies to game or fish imported from outside of the state. The statute was so applied in Illinois,[4] and California,[5] while the Court of Appeals of New York has declared such application to be unconstitutional, as impairing the freedom of commerce.[6] This case differs from the Connecticut case, in that the law here acts not merely upon commerce, but upon things over which the state can claim no special proprietary rights, and the preservation of which serves no interest of the state's. It may, however, be urged that such a prohibition may be an effective means of preventing evasions of the law prohibiting the killing of game or fish within the state. It has also been held that the power of the state over fish is not affected by the fact that the waters over which the state has territorial jurisdiction are also navigable waters of the United States.[7]

§ 421. **Property in dogs.**—The property in dogs is regarded as not entitled to the same protection as property in other domestic animals. At common law, while an action would lie for their conversion or injury,[8] they were not the subject of larceny. "They have no intrinsic value, by which we understand a value common to all dogs as such, and independent of

[2] The Supreme Court says in support of its position that the common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. "The qualification which forbids its removal from the state necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale and exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce."

[3] That the interest which the state has in preserving valuable resources will not justify restrictions upon export, so long as domestic commerce is allowed, has been held in Indiana with regard to natural gas. State v. Indiana & Ohio Oil Gas Co., 129 Ind. 575, 6 L. R. A. 579.

[4] Merritt v. People, 169 Ill. 218, 48 N. E. 325.

[5] Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129.

[6] People v. Buffalo Fish Co., 164 N. Y. 93, 58 N. E. 34.

[7] Manchester v. Massachusetts, 139 U. S. 240.

[8] Chambers v. Warkhouse, 3 Salk. 140.

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the particular breed or individual. * * * As it is practically impossible by statute to distinguish between the different breeds, or between the valuable and the worthless, such legislation as has been enacted upon the subject, though nominally including the whole canine race, is really directed against the latter class, and is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulations designated to distinguish him from the common herd. Acting upon the principle that there is but a qualified property in them, and that, while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police powers of the several states."[9] Upon this ground it is held that the keeping of dogs may be conditioned upon a license, and upon compliance with other strict regulations intended to prevent them from becoming a nuisance; and non-compliance with such regulations may be followed by the entire withdrawal of the legal protection of the property, so that they may be killed without further legal process, and without giving to the owner a right of action for damages.[10]

WASTE OF NATURAL WEALTH. §§ 422-423.

**§ 422. Game and fish—Natural gas.**—While the constitutionality of the game and fish laws is maintained on the ground that the state is the real and ultimate proprietor of animals *ferae naturae*, it is also recognised that in their enactment the state exercises a police power for the public welfare in preserving a species of natural wealth which without special protection would be liable to extermination. "The ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor (beneficial owner), but in its

[9] Sentell v. New Orleans, &c., R. R. Co., 166 U. S. 698.

[10] Haller v. Sheridan, 27 Ind. 494; Hagerstown v. Witmer, 86 Md. 293, 39 L. R. A. 649; Leach v. Elwood, 3 Ill. App. 453; State v. Topeka, 36 Kans. 76, 12 Pac. 310, 59 Am. Rep. 529; Jenkins v. Ballantyne, 8 Utah. 245, 30 Pac. 760, 16 L. R. A. 689. *Contra:* Lynn v. State, 33 Tex. Cr. 153, 25 S. W. 779, but there the ordinance provided a method of killing (shooting unmuzzled dogs in the streets), which was contrary to the general law of the state.

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sovereign capacity as the representative and for the benefit of all its people in common. The preservation of such animals as are adapted to consumption as food or to any other useful purpose is a matter of public interest; and it is within the police power of the state as the representative of the people * * * to enact such laws as will best preserve such game and secure its beneficial use in the future to the citizens."[11] Where game and fish is imported, or bred through the expenditure of private capital, restrictive laws can be justified only upon this ground of the police power.[12]

The question to what extent property which is liable to extermination may be protected by restraints upon the owner's power of disposition, has otherwise called for little discussion. Two Indiana cases have maintained the constitutionality of legislation, by which the owner of land on which there are natural gas wells, is forbidden to use them in a wasteful manner, by burning "flambeau" lights or by permitting a flow of gas to escape into the open air.[13] The court speaks of natural gas as a mineral *ferae naturae*,[14] and the first decision relies largely upon the analogy of game and fish laws; the theory being that the title to natural gas does not vest in any private owner until it is reduced to actual possession. But the court also argues that after the gas has been drawn into wells or tanks, its waste may be treated as a nuisance. "The object and policy of that inhibition is to prevent, if possible, the exhaustion of the storehouse of nature, wherein is deposited an element of nature that ministers * * * to the comfort, happiness and well-being of society. * * * It [the company] may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. * * * The injury—the exhaustion of natural gas—is not only an irreparable one, but it will be a great public calamity." The Supreme Court of the United States, in affirming the decision in the case of the Ohio Oil Company as not violating the Fourteenth Amendment, adopts a somewhat different reasoning from that followed by the Indiana court. Gas and oil are re-

[11] State v. Rodman, 58 Minn. 393.

[12] Com. v. Gilbert, 160 Mass. 157.

[13] Townsend v. State, 147 Ind. 624, 47 N. E. 19; State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627.

[14] See Westmoreland &c. Gas Company v. De Witt, 130 Pa. St. 235.

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garded as substances, individual ownership in which is perfected only by appropriation and reduction to possession. Until such appropriation, and while occupying their natural reservoirs beneath the surface of the earth, gas and oil belong in common to all the surface owners, passing as they do freely and without control from the domain of one to that of the other. There is thus a common fund and the legislative power is exerted "for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste."[15] The question whether the state may prevent the waste of property, which has become completely vested in an individual, is thus left unanswered. The view of the federal supreme court has since been adopted in Indiana.[16]

§ 423. **Forest preservation.**—In a country which has a great abundance of natural resources, legislation to prevent their wasteful and unscientific exploitation is apt to be little needed, and is generally contrary to public sentiment. But even in the older countries, such legislation seems to be avoided. In the sixteenth century, a number of statutes were enacted in England for the preservation of forests, forbidding the felling of timber to be made into coal, and restraining the erection of iron mills to prevent the excessive consumption of fuel.[17] At present there is no legislation regarding forestry in England. In France and in Prussia, the policy of preserving forests as an element of national wealth by controlling the management of private property has been abandoned; as the ownership of forests is largely vested in the state and the communes, the same object can be accomplished by the exercise of proprietary powers on the part of the state. In this country it would probably be a strong consideration against legislation prescribing the observance of principles of forestry in the management of private forests, that there is no analogy or precedent for it, unless it could be shown that the supply of forest land was limited and in danger of exhaustion, and

[15] Ohio Oil Co. v. Indiana, 177 U. S. 190.

[16] Manufacturers' Gas & Oil Co. v. Indiana Gas & Oil Co., 155 Ind. 461, 57 N. E. 912. See § 425, *infra*.

[17] 35 H. VII, c. 17; 1 Eliz., c. 15; 23 Eliz., c. 5; 27 Eliz., c. 19.



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that the regulation was not destructive of the value of the land to the owner.

Restrictive legislation for the preservation of forests, where the denudation of the soil endangers neighboring land or the country at large, exists both in France and in Germany. The state requires the maintenance of forests, where they are necessary for the protection of mountain sides or dunes, or for the existence of springs and streams, or for the prevention of erosion or floods, or for the public health. The Prussian law adds that the restraint upon the owner must not be disproportionate to the public danger to be averted.[18] Similar legislation in this country would, it seems, be justified upon the principle laid down in Commonwealth v. Tewksbury,[19] where the owners of shorelands constituting a natural barrier against the inroads of the sea were prohibited from removing gravel and stone. The two cases would seem to be precisely analogous. Forests which are essential to the physical protection of the country may be regarded as subject to a natural easement for that purpose, and the person who acquires them takes them *cum onere*.

## RESTRICTIONS UPON PROPERTY IN THE INTEREST OF OTHER OWNERS. §§ 424-427.

**§ 424. Easement of support.**—The nature of real estate as a subject of property makes it impossible that the ownership of it should be as absolute as that of many kinds of personal property. The enjoyment of land is in many respects dependent upon the condition of other and especially neighboring estates. The common law recognises in consequence of this dependence certain natural rights which land owners have against each other, relating to the purity of the air, to lateral and subjacent support, and to the benefit of natural waters. The interests which justify the existence of these common law rights must also justify their modification by the legislature, if necessary for the purpose of accomplishing more perfect justice. These interests are indeed more private than public, and it may therefore be questioned whether modifying statutes fall under the police power, and should not rather be ascribed to the power of civil legislation. But the

[18] Law of July 6, 1875.

[19] 11 Metc. 55; § 409, *supra*.

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classification of such statutes is of minor consequence as long as their validity is recognised.

There is comparatively little legislation upon this subject. While the common law confines the duty of mutual support to soil in its natural state, and recognises with regard to buildings merely a duty of care in excavating the adjacent soil[20] or perhaps a duty to give notice to the owner of the building,[21] a statute applying to the City of New York provides that where a wall is endangered by excavations upon the neighboring lot going to a depth of more than ten feet below the curb, the person causing the excavation to be made, if afforded the necessary license to enter the adjoining land shall at his own expense preserve such wall from injury,[22]—a reasonable regulation the validity of which has not been questioned.

**§ 425. Natural waters.**—The correlative rights and duties of riparian proprietors have to some extent been affected by the mill acts which have been considered before,[23] but on the whole the common law principle, that the right to impair or affect the quantity or quality of water or the strength of the current must be determined by what is under all the circumstances a reasonable use, has been left to judicial application and enforcement,[24] and has not been made, as well it might be, the subject of statutory and administrative regulation. The determination of priorities and amounts of appropriation of natural waters under the water act of Wyoming[25] seems, however, practically to amount to such regulation, and has in principle been upheld by the supreme court of that state, with respect to rights acquired prior as well as subsequent to the act and the constitution of the state.[26]

In this connection a decision of the Supreme Court of Wis-

[20] Walters v. Pfeil, Moo. & Mal. 362; Moody v. McClelland, 39 Ala. 45, 84 Am. Dec. 770; Charless v. Rankin, 22 Mo. 566; 66 Am. Dec. 642; Shrieve v. Stokes, 8 B. Mon. (47 Ky.) 453, 48 Am. Dec. 401.

[21] Schultz v. Byers, 53 N. J. Law, 442, 26 Am. St. Rep. 435.

[22] N. Y. Laws 1882, Chapter 410, Sec. 474; and see also Jones, Easements, Sec. 587.

[23] §§ 410-413.

[24] Pitts v. Lancaster Mills, 13 Mete. 156; Thurber v. Martin, 2 Gray, 394; Snow v. Parsons, 28 Vt. 459.

[25] Laws 1890-91, Chapter 8, especially Sec. 20, 24, 25, 26; Revised Statutes 1899, Sec. 867, 871, 872, 873.

[26] Farm Investment Company v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747.

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consin should be noticed. A law of that state[27] provided that "any person who shall needlessly allow or permit any artesian well owned or operated by him to discharge greater quantities of water than is reasonably necessary for the use of such person, so as to materially diminish the flow of water in any other artesian well in the same vicinity, shall be liable for all damages which the owner of any such other well may sustain." This act was declared unconstitutional on the ground that percolating waters are the absolute property of the owner of the soil, and that the limitation attempted to be imposed upon the owner by the act not being dictated by any public interest does not fall within the police power.[28] This, it is submitted, is an unduly narrow view of the powers of the state. True, it has been held that underground waters flowing in no definite channel may be dealt with by the owner of the soil without regard to the interests of other owners whose water supply he may intercept;[29] but this right does not go to the extent of draining water from definite watercourses,[30] and there is authority for the doctrine that the interception of underground waters is justified only by the reasonable use of the land.[31] If so, the right ought to be subject to a legislative determination of the consequences of an unreasonable use, and the legislation of Wisconsin does not appear to have exceeded this scope. It ought therefore to have been sustained as legitimate exercise of legislative power. It is not easy to understand why the decisions in the gas and oil cases,[32] which seem to be closely analogous, should have been rejected by the court as inapplicable to percolating waters.

**§ 426. Malicious erections and private nuisances.**—Statutes prohibiting malicious erections may be referred to this branch of legislative power. Unless the power to abuse property rights is included in the constitutional protection of property, a restraint upon the malicious exercise of a right should be

[27] Laws 1901, Chapter 354.

[28] Huber v. Merkel (Wis.), 94 N. W. 354.

[29] Acton v. Blundell, 12 M. & W. 324; Chasemore v. Richards, 7 H. L. C. 349; Chatfield v. Wilson, 28 Vt. 49.

[30] Grand Junction Canal Company v. Shugar, L. R. 6 Ch. App. 483; Proprietors of Mills v. Braintree Water Supply Company, 149 Mass. 478; Smith v. Brooklyn, 160 N. Y. 357, 54 N. E. 787.

[31] Swett v. Cutts, 50 N. H. 439.

[32] Section 422, *supra*.

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regarded as a regulation and not as an impairment. Upon this principle statutes have been sustained which forbid the erection of fences exceeding a certain height, if the purpose is to annoy the neighbor.[33]

Upon the question whether the law may require positive measures to prevent private nuisances, there is little authority. Upon principle this question should be answered in the affirmative. The case of Chicago & E. R. Co. v. Keith[34] is an authority to the contrary. A statute was declared unconstitutional which required railroad companies to maintain ditches or drains to conduct to some proper outlet water accumulating along the sides of the roadbed from the construction or operation of such road. The statute authorised, in case the railroad neglected to construct such ditch, its construction by public authority, and the assessment of the cost upon the railroad company. It was held that no proper provision for notice was made in connection with such assessment, an objection, which, if well founded, was sufficient to invalidate the act. The court also held that the power of assessment can be enforced only in the interest of the public, and not to redress a private wrong. But if an obligation may be validly imposed upon the owner of property to make some improvement, the making of such improvement upon his default by public authority at his expense is not an exercise of the power of taxation. The question must, therefore, be: was the obligation validly imposed? And it seems to be an unduly narrow view of the legislative power to hold that private nuisances can be dealt with only according to the established principles of common law and equity, and not by the legislative requirement of positive measures of relief.

§ **427. Private roads.**—Where the legislature authorises the laying out of a private road for the convenience of one owner of land over the land of another, without the consent of the latter, who is forced to yield an easement in return for a compensation, it may be said that private property is taken

[33] Rideout v. Knox, 148 Mass. 368; Hunt v. Coggin, 66 N. H. 140; Lord v. Langdon, 91 Me. 221, 39 Atl. 552; Gallagher v. Dodge, 48 Conn. 387; Western Granite Co. v. Knickerbocker, 103 Cal. 111; Karasek v. Peier, 22 Wash. 419, 50 L. R. A. 345; Horan v. Byrnes (N. H.), 54 Atl. 945.

[34] 67 Oh. 279, 65 N. E. 1020.

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for private use, and the question arises whether this is constitutional.

The courts have given different answers to this question. In Massachusetts and California the power has been sustained on the ground that the road although called private is subject to public use.[35] Pennsylvania, and Michigan hold that clear practical necessity justifies the exercise of the power.[36] In Alabama, Illinois, Missouri, New York, Oregon, Tennessee, and Wisconsin the power has been denied on the ground that express authority for taking for public use by implication excludes taking for private use;[37] but in most of these and some other states (Alabama, Colorado, Illinois, New York, Michigan, Mississippi, Missouri, New York, South Carolina, Washington, Wyoming) it has been sanctioned by express constitutional provision.

The constitution of Illinois also provides for the construction of drains, ditches and levees for agricultural, sanitary, and mining purposes, across the lands of others,[38] and a similar clause was placed in the New York constitution of 1894. It was intimated in a decision of the Court of Appeals of New York (but all other justices concurred in the decision only upon another ground), that this constitutional pro-

[35] Denham v. Bristol, 108 Mass. 202; Sherman v. Buick, 32 Cal. 241; Monterey Co. v. Cushing, 83 Cal. 507. A similar view is taken of switch tracks, or spurs, to private factories; McGann v. People, 194 Ill. 526, 62 N. E. 941, also Chicago & N. W. R. Co. v. Morehouse, 112 Wis. 1. The duty of a railroad company to maintain a crossing in order to give access to private property from which the owner has been cut off by the road (Mass. Rev. L. ch. 111, § 144) has been held to be a regulation of a previously existing right of necessity; New York and N. E. R. Co. v. Board of R. R. Com'ers, 162 Mass. 81, 38 N. E. 27. See Packer v. Welsted, 2 Sid. 39, 111, 1658 (Gray's Cases, III, 467): "It is not only a private inconvenience, but it is also to the prejudice of the public need that land should lie fresh and unoccupied."

[36] Pocopson Road, 16 Pa. St. 15; Ayres v. Richards, 38 Mich. 214, but method of procedure in this case held unconstitutional, see Schehr v. Detroit, 45 Mich. 626.

[37] Sadler v. Langham, 34 Ala. 311; Nesbit v. Trumbo, 39 Ill. 110; Dickey v. Tennison, 27 Mo. 373; Taylor v. Porter, 4 Hill 140; Witham v. Osborn, 4 Or. 318; Clack v. White, 2 Swan (Tenn.), 540; Osborn v. Hart, 24 Wis. 89.

[38] Constitution, Art. IV, § 31. A provision for private drains was held unconstitutional in Iowa, the law prescribing no conditions or judicial inquiry for the exercise of the right. Fleming v. Hull, 73 Ia. 598.

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vision violated the federal constitution, since the taking of property for private use was taking without due process of law,[39] but this certainly cannot be true. The contention that property can under no circumstances be condemned for private use rests chiefly upon the fact that the constitutions provide expressly only for the taking for public use; the expression of one is supposed to be the negation of the other. The objection on this ground disappears where the constitution makes positive provision for the taking for private use. It ought to be within the power of the legislature to provide for the adequate enjoyment of land, where it can be secured by compelling another owner to make slight concessions which can be easily offset by the payment of pecuniary compensation. In the case of the mill acts, such power has been recognised without express constitutional provision.

[39] Re Tuthill, 163 N. Y. 133, 57 N. E. 303.

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## CHAPTER XX.

### COMPULSORY BENEFITS.

§ 428. **Protection and bounties.**—The encouragement of trade and industry is everywhere regarded as a legitimate function of government. Most modern states protect their citizens to a greater or less degree from foreign competition, and while this function is not within the province of the commonwealth governments of the United States, it is exercised very freely by the national government, and the constitutionality of the tariff laws established for that purpose is generally acquiesced in. Protection against domestic competition has a very different aspect, for it can aid one class only at the expense of another, and the national wealth is diminished instead of being increased by interfering with the natural play of economic forces. Even the exemption of some industry from taxation is justly regarded as an objectionable form of governmental protection, since it increases the burdens of other tax payers, and is therefore forbidden by many state constitutions.[1] The same objection applies still more forcibly against a system of bounties. Bounties to sugar producers were provided for by the tariff act of 1890,[2] but repealed by the act of 1894.[3] The Supreme Court of the United States has not passed directly upon the validity of this legislation,[4] but a similar bounty law of Michigan has been declared unconstitutional.[5]

§ 429. **Scope of police power.**—While the government may in other ways aid and encourage industry, especially through information and education,[6] very little, if anything, can be accomplished by measures of compulsion in the way of stimulating the production of wealth, and legislation of this character has practically been abandoned, in so far as the control of purely individual activity is concerned. The pos-

[1] Stimson Am. Statute Law, § 332.
[2] Sec. 235-236.
[3] Sec. 2, No. 186.
[4] United States v. Realty Co., 163 U. S. 427, 1896.
[5] Michigan Sugar Co. v. Dix, 124 Mich. 674, 56 L. R. A. 329.
[6] Hanscom v. Lowell, 165 Mass. 419, 43 N. E. 196.



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sible range of such legislation would cover on the one hand measures designed to check individual improvidence, on the other, measures the object of which would be to direct individual economic activity into such channels as are believed to confer the greatest benefit upon the community as a whole. In both cases we may speak of compulsory benefits; we may designate the two classes respectively as compulsory measures against improvidence, and compulsory industry and improvement.

COMPULSORY MEASURES AGAINST IMPROVIDENCE. §§ 430-437.

**§ 430. Sumptuary laws.**—In former times the state attempted to check improvidence and extravagance through so-called sumptuary laws, of which we find a considerable number in the English statute books. They prescribe the apparel and diet proper for the different classes of the people, and were doubtless also intended to maintain class distinctions, which to the mediaeval mind appeared as part of the order of nature. Statute 13 Ric. II c. 13 forbids men of low degree or station in life to keep dogs to hunt, and 33 H. VIII c. 5 prescribes how many trotting horses each man may keep for his degree; 14 and 15 H. VIII c. 7 allows men of £100 annual income to use cross-bows. Laborers were forbidden to indulge in such games as tennis, bowling, ball and dice. Sir Edward Coke[7] informs us that the common law gave no way to matters of pleasure (wherein most men do exceed), for that they brought no profit to the commonwealth.

The Revised Laws of Massachusetts of 1649 likewise contained provisions on apparel.

It is needless to say that there is no such legislation at present. All sumptuary legislation of the old type is plainly contrary to the principle of equality. Apart from this objection, statutes of this kind are notoriously futile, and an attempt to enforce them would involve inquisitorial methods and a control of private conduct intolerable to a free people. Therefore the old sumptuary laws have everywhere been abrogated or have fallen into disuse.[8] They are also repugnant to the

[7] 2 Inst. 199.

[8] The last sumptuary law in Great Britain is said to have been that for Scotland of 1621; in Prussia funerals were regulated in 1777; in Germany even now restraints are placed upon weddings to which every one who contributes some gift has access.

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spirit of a free government, and it may be contended that the right to the pursuit of happiness which our constitutions guarantee means the right of each person to obtain what is beneficial to him in his own manner, and to take risks affecting him alone according to his choice. Upon such a view the conclusion may be reached that all legislation to check improvidence or extravagance is unconstitutional. Still, it can be shown that this conclusion goes too far, and that the limit of the police power should be found, not in the object to be attained, but in the measures of control attempted.

The opposition to extravagance and improvidence is certainly not foreign to our governmental policy. While our law leaves the private conduct of the individual free, it forbids public practices which are calculated to tempt him. Legislation against gambling is generally placed under the head of public morals, but the immorality of gambling lies in its improvidence and the tendency it has to destroy industry and thrift. So we find in the Revised Statutes of New York of 1828,[9] a prohibition of all idle shows and exhibitions: "No person shall exhibit or perform for gain or profit any puppet show, any wire or rope dance, or any other idle shows, acts or feats which common showmen, mountebanks or jugglers usually practice or perform." A law prohibiting attendance at such shows would be only a step further in the same policy, and would be a sumptuary law. It would be as valid as the law forbidding the show, and would only be more difficult to enforce.

§ **431. Spendthrifts.**—Moreover, individual extravagance is held to justify restraint where there is danger that it may result in making the person a burden to others or to the public. So in some states, in conformity to the practice of the civil law, habitual spendthrifts may be deprived of the care and management of their estates, but only where the spendthrift wastes or lessens his estate so "as to expose himself or his family to want or suffering, or any county, town or incorporated city or village to any charge or expense for the support of himself or his family."[10] The spendthrift appears to be treated as a person not in full possession of his mental powers. It is true that the common law did not restrain

[9] 1 Rev. Stat. p. 660, § 1.

[10] Illinois Revised Statutes, ch. 86, Sec. 1.

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extravagance in this manner, and Blackstone regards the practice as questionable:[11] "It was doubtless an excellent method of benefiting the individual and of preserving estates in families, but it hardly seems calculated for the genius of a free nation who claim and exercise the liberty of using their own property as they please. *'Sic utere tuo ut alienum non laedas'* is the only restriction our laws have given with regard to economical prudence, and the frequent circulation and transfer of lands, and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed constitution in its due health and vigor." If this was the policy of the common law, the policy of Parliament did not always accord with it.[12]

§ 432. **Compulsory insurance.**—The most important form of governmental provision against improvidence is compulsory insurance. In Germany the law requires insurance against fire, and in the case of wage earners, against accident, disease, disability and old age; compulsory fire insurance is matter of state law and of older date;[13] workmen's insurance rests upon imperial statutes passed in the years from 1884 to 1891.

Under the workmen's insurance laws the right to relief is not confined to persons who have no other means of support, and whose maintenance would otherwise fall on the public; the system cannot therefore be said to be simply a form of poor relief, but is designed to advance the economic and social condition of a large class of the population by compelling its members to make certain savings.

Moreover, contributions are made by the state and are

[11] I, p. 306.

[12] There are circumstances under which sumptuary laws might even now serve a valuable purpose. In India, custom decrees a ruinous extravagance in the celebration of weddings and funerals, which is a heavy burden on the poorer classes, but which they are incapable of shaking off. It is a well known fact that a custom may be universally recognised as michievous, and yet be too strong for voluntary resistance; where people are ignorant, custom is far beyond the power of the individual. A statutory prohibition may then be welcomed as an excuse for non-compliance. If the state does not interfere it is probably because it feels its impotence; but legislation for such a purpose is within the legitimate functions of government, if it can be carried into effect.

[13] The justification of the compulsion was found in the interest which the state had in the continued payment of the land tax. (Roscher Nationaloekonomie, Sec. 237 c).

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levied on employers even in cases in which the latter can in no wise be held responsible for the condition provided against, as e. g. old age. To this extent there is not so much insurance (for the contributing employer cannot in any event be a beneficiary) as taxation.

**§ 433. Its constitutional aspect.**—What would be the constitutional aspect of compulsory insurance or indemnity funds in this country?

The levying of an assessment upon employers to insure employees against sickness or old age being in reality a form of taxation, would have to be judged by the constitutional provisions of each state regarding taxation. In most states it would probably violate the rules regarding uniformity of taxation. There would probably be also a strong feeling that the purpose is not a public one; but conceding that the purpose is novel, it is impossible to assert that public sentiment will never come to regard the securing of a reasonable competence to the economically weak and dependent classes as a proper function of the state. It would be a form of paternal government, but if all functions which may properly be designated as paternal were necessarily unconstitutional, a large amount of well established legislation could not stand.

Should the law undertake to create an indemnity fund from compulsory contributions of all those whose business or property occasions the loss to be provided against, there would be something analogous to an employers' liability insurance. The objection to such a system would be that an individual would be forced to share in making good a loss with which in a particular case he had no connection, and although he took the utmost precaution to avoid such loss so far as the management of his own property was concerned. But the objection is not conclusive. The controlling consideration is the existence of a risk or danger, which the police power may seek to minimise; and it is reasonable that those who create or maintain the risk or danger for their own benefit should consent to the most effectual means of obviating its harmful consequences; and collective responsibility is a wise and conservative method of meeting the risk, and its imposition should be allowed as a valid condition of the right of keeping a dangerous instrument.

**§ 434. American legislation providing insurance.**—Upon

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these principles indemnity is provided under the laws of several states[14] for the loss of sheep killed by dogs. A tax is levied for the keeping of every dog upon its owner, and the amount thus collected is constituted a fund for the payment of damages resulting from such loss.[15] If the purpose for which the tax is collected were necessarily unconstitutional, it could not be excused on the ground that the keeping of dogs is under the absolute control of the legislature, and that the right may be conditioned upon the payment of a license, —an argument deemed sufficient in Wisconsin.[16] In Michigan and Ohio the legislation has been upheld as an exercise of the police power as distinguished from the taxing power. The protection of an important industry (the raising of sheep and production of wool) is held to be a legitimate object of legislative action, and the legislature judges what means are best calculated to accomplish the object.[17] The creation of a collective liability fund is thus by implication sanctioned.

Where the law levies contributions from one class to make up an indemnity fund in favor of another, without any connection between the business of those assessed and the loss to be provided against, the compulsion is without justification. If the assessment might in itself be justified upon principles of taxation or of the police power, yet the purpose to which it is applied must render its validity doubtful. So where half pilotage is collected from ships refusing the services of a pilot, and the amount goes to a fund for the relief of distressed or decayed pilots, their widows and children.[18]

Cases of insurance proper, in which a risk of loss is met by distributing the loss among all those similarly exposed to the risk, may be found in the legislation regarding damage done by dogs to sheep, in so far as the owners of dogs are also owners of sheep, and in the law under which the government of the United States formerly collected from every sailor a monthly tax of 40 cents for the support of the

[14] New York 1 Rev. Stat. p. 703, Illinois Act of 1879, Ohio Laws § 2861, 4215; also laws of Michigan and Indiana.

[15] In Connecticut the damages can be collected from the town, which has its recourse against the owner of the dog. Town of Wilton v. Town of Weston, 48 Conn. 325. The town is supposed to pay out of the fund collected from dog licenses.

[16] Tenney v. Lenz, 16 Wis. 566.

[17] Van Horn v. People, 46 Mich. 183; Holst v. Roe, 39 Oh. St. 340.

[18] Cooley v. Board of Wardens, 12 How. 299, p. 313.

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Marine Hospital,[19] which tax was abolished by act of June 26, 1884.[20] The plan was constitutionally objectionable in that it did not give to all contributing sailors a definite legal right to relief.

**§ 435. Insurance in connection with registration of titles.**— Compulsory insurance is also found in connection with the registration of land titles. The law of Ohio, following the precedent of the Australian Torrens Act, directed the collection, upon registration of every title, of a fee, to go towards the making up of an insurance fund out of which to indemnify persons who should be deprived of their titles through the operation of the provisions making registration conclusive upon the question of title. This provision was held unconstitutional. The Supreme Court said: "These lands by the terms of the act are subjected to a charge or contribution payable through the recorder to the treasurer of the county. That is, to the extent of such assessments this property is to be taken by public authority and without the consent of the owner. For what public purpose? Primarily the purpose is to indemnify private persons whose lands have been wrongfully taken from them under the provisions of the act. If the act were otherwise constitutional, the ultimate benefit would accrue to those who as the result of registration (which gives conclusive effect to mistake, fraud or forgery) have acquired lands which belong to others. That this is in no sense a public purpose, seems clear. Considering the purpose for which government is instituted, and the high conception of individual right which prevailed at the time of the adoption of the constitution, it would be strange if authority had been conferred upon the state to carry on the business of an insurer of private titles."[21]

It is true that compulsory insurance is not an individualistic institution, but the whole development of the police power has been a modification of the extreme liberty of the individual which was characteristic of the state government of fifty or

[19] Revised Statutes, 4585, 4803.

[20] I Suppl. 443. A very similar measure was introduced in England by Royal Proclamation in 1638; see Rymer's Foldera, vol. 20, p. 278, "according to the voluntary offer and suit of a great number of the principal mariners and seamen of the Kingdom."

[21] State v. Guilbert, 56 Oh. St. 575, 47 N. E. 551, 38 L. R. A. 519.

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seventy-five years ago. The purpose of the Ohio law was no less public than that of the law indemnifying owners of sheep; on the contrary, it was a great deal more public since the risk of loss sprang from the exercise of a public function. If it is competent for the state to make titles conclusive, the indemnification for losses the risk of which inevitably results from the system, becomes part of the requirements for the successful operation of that system, and ceases to be a purely private benefit. The system being responsible for the loss, why should it not be constitutional to distribute the loss among the beneficiaries of the system? The provision for the indemnity fund is found in similar laws of other states[22] and has not been judicially questioned.

**§ 436. Teachers' pension fund.**—The Supreme Court of Ohio has adhered to its condemnation of compulsory insurance in the case concerning the legality of a teachers' pension fund, made up of deductions from salaries.[23] It was held that the scheme did not merely involve a reduction of future salaries (so that the tax payers would be the real contributors to the fund), but a deduction from salaries already earned, or contracted for, and hence was the taking of private property from one citizen for the benefit of another. "A teacher's salary is his property. He has a right under the constitution, to use that salary for his own benefit or for the benefit of others, as he may see fit. If he thinks it best to provide for old age, he may do so; but, if he prefers to spend his money as he earns it, it is his right, under the constitution, to do that." The act was also held to be void because not operating uniformly throughout the state. The objections held fatal to the law would have had no force, if it had been general, and had directed the pension fund to be made up of deductions from salaries, the right to which had not become vested.

**§ 437. Compulsory insurance of workmen.**—In the compulsory insurance of workmen the public interest is more remote than in the insurance of land titles in connection with a system of registration. In a large sense, the community is

[22] Illinois Act, Sec. 99, 100; Mass. Rev. Laws, ch. 128, Sec. 93 to 102.

[23] Hibbard v. State, 65 Oh. St. 574, 64 N. E. 109, 58 L. R. A. 654. So in Minnesota on the ground of invalid delegation of power to the Board of Education, State ex rel. Jennison v. Rogers, 87 Minn. 130, 58 L. R. A. 663.

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certainly interested in averting sudden and unexpected losses as well as the destitution following from sickness and disease, and the distribution of these losses over large numbers through insurance is a legitimate end of governmental policy. There is no warrant for denying the state the power to adopt compulsory measures for the purpose; whether such measures should be adopted where public sentiment is averse to such policy, and the same objects are adequately attained by voluntary co-operation, is a question of policy and not of law. It may, however, be safely asserted that compulsory insurance requires that either the state itself becomes the insurer, or that it exercise an efficient control over private or semi-public associations which the individual is compelled to join; for this alone eliminates from the problem the difficulty that the state would force the individual to enter into contract relations with other private parties without substantially guaranteeing performance to the individual who is required to part with his money.

COMPULSORY INDUSTRY AND IMPROVEMENT. §§ 438-439.

**§ 438. Former English and colonial legislation.**—English legislation of the sixteenth century furnishes a number of illustrations of governmental efforts to control individual economic activity with a view to directing it into channels believed to be most productive and most beneficial to the commonwealth. The conversion of tillage land into pasture especially seemed to the legislature detrimental to the national interests, and a number of statutes were passed to forbid such conversion and to check the decaying of houses of husbandry.[1] A similar policy appears in acts forbidding any man to keep more than two thousand sheep,[2] or requiring the keeping of one cow for every sixty sheep.[3] In order to maintain and improve the breed of horses, the owner of every park was to keep two mares,[4] and horses below a certain size were not to be allowed to pasture on any commons.[5] To encourage hemp growing, it was required that one rood out of every sixty acres of tillage should be set apart for that purpose;[6] to protect

[1] 6 H. VIII, c. 5; 27 H. VIII, c. 22; 5 and 6 Ed. VI, c. 5; 2 and 3 P. & M. 2; 29 Eliz. c. 5.

[2] 25 H. VIII, c. 13.

[3] 2 and 3 P. & M. c. 3.

[4] 27 H. VIII, c. 6.

[5] 32 H. VIII, c. 13.

[6] 24 H. VIII, c. 4.

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the interest of the colonies, the growing of tobacco in England was forbidden.[7] In order to prevent the diversion of people from agriculture to manufactures, it was made unlawful to apprentice children of persons having less than 20 sh. annual rent to a trade;[8] to encourage English manufactures, the people were required to wear English made caps.[9] Statutes restraining importation and certain exports to protect domestic industries, are mentioned in Blackstone IV 154, 160. A colonial act of Massachusetts which is found in the Revised Laws of 1649 requiring every family to spin an amount to be assessed from year to year, belongs to the same category.

**§ 439. Constitutional aspect of such legislation.**—Restrictive or compulsory legislation of this character is not at present to be found on our statute books. It has, moreover, been abandoned by nearly all civilised states. One of the last conspicuous applications of the policy was found in the compulsory culture system pursued by the Netherlands in their East Indian colonies; but the policy has been given up as unjust and oppressive. It should be mentioned that Germany still attempts to maintain the quality of the breed of animals by regulating the standard of males to be admitted to the service of females,[10]—legislation similar in principle to the English statutes before mentioned.

It cannot be denied that the state has a very great interest in the improvement of private land, in the breeds of live stock, and in the distribution and quality of industries and manufactures. The non-exercise of the police power on behalf of that interest must therefore be due to countervailing considerations. The consensus of opinion is that on the one hand the self-interest of individuals may be relied upon to seek the most productive channels of private enterprise, and that inevitable mistakes would not be diminished but multiplied by governmental interference; and that on the other hand compulsion would not only be burdensome, but so difficult of enforcement as to result almost certainly in gross inequality of operation. The latter consideration is probably of controlling effect. The exercise of individual discretion may be manifestly contrary to the public interest: thus where large tracts

[7] 12 Car. II, c. 34.
[8] 7 H. IV, c. 17.
[9] 13 Eliz. c. 19.
[10] Meyer, Verwaltungerecht, Sec. 112.



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of land are kept waste and unimproved either for sport or for speculation; and the taxing power may in the absence of constitutional restrictions be exercised with a view to making this form of holding of property burdensome to the owner;[11] but to compel him to improve would throw upon the state the function of determining the kind of improvements to be made, or would result in undesirable improvements. There has been little occasion for judicial discussion of the constitutional aspects of such legislation; but at least one court has expressed itself strongly to the effect that land cannot be forfeited for failure to make improvements. "I am unwilling to concede that the legislature can, under pretext of promoting the interest of the state, control and direct the citizen in the use he shall make of his private property. I subscribe to the maxim, '*sic utere tuo ut alienum non laedas*,' and I admit the power to punish for an injury done to individuals or the public. But I deny that the legislature can constitutionally prescribe, under color of preventing public or private mischief, the quantity of labor the citizen shall perform on his farm, the kind of improvements he shall make and the time within which they must be constructed. The toleration of such power on the part of the government would be conceding to it the right of controlling every man, and directing the road he shall travel in the 'pursuit of happiness.' Thus the freedom of the citizen would be lost in the despotic will of the government, and under the semblance of liberty we should have the essence of tyranny."[12]

It is true that a corporation may have the duty imposed

[11] In Rome imperial constitutions provided that any one bringing deserted lands under cultivation should obtain title, unless the owner reclaimed them within two years; (Codex XI, 58, 8).

[12] Gaines v. Buford, 31 Ky. 481, 1833.—That a railroad company cannot be compelled to provide outlets for water accumulating by the side of its right of way, if no public nuisance is thereby created, see Chicago & E. R. R. Co. v. Keith, 67 Ohio 279, 65 N. E. 1020. It might have been different if it could have been shown that the water weakened the roadbed and thus endangered the safety of the travelling public.—After the great fire in London owners of houses burned or pulled down were required to rebuild within three years; in case of neglect to do so the value of the ground was to be assessed, and the mayor was directed to sell the ground at the estimated value, the proceeds to be paid to the owner. Stat. 19 Car. II, c. 3, § 15 (1667).

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upon it by statute (if it is not implied from the object of its charter[13]), to exercise its corporate powers for the purpose for which it was created,[14] but a corporate franchise is not a common right, and must be taken subject to such conditions as the legislature may choose to annex to it. To impose an analogous duty upon the individual owner of property, would be to treat such property as affected with a public interest. It is not impossible that with regard to some forms of property and especially with regard to land, the courts may come to recognise such an exercise of the police power, if practical methods can be devised of enforcing such a duty; but no such power is at present claimed by any state.[15]

COMPULSORY JOINT IMPROVEMENTS. §§440-444.

**§ 440. Difference from cases before considered.**—While in general a person will not be compelled to improve his land in a particular manner, the principle suffers some modification where the improvement (without being strictly or directly public, though perhaps remotely and indirectly so) is common to several adjoining estates. In one aspect the compulsion is exercised in favor of other persons, and thus resembles the legislation allowing the construction of private ways, drains, and ditches across the lands of others, which in some states is expressly authorised by constitutional provision.[16] But in the cases to be now considered the owner whose land is affected by the exercise of the power shares in the benefit of the improvement to which he is made to contribute, and because he does so share he may be compelled to bear a part of the cost of the joint enterprise.

**§ 441. Drainage and irrigation.**—The drainage and irrigation laws of the several states provide that where a number of pieces of land are so situated that either the improvement can be undertaken only jointly, or that the joint improvement will be more effective or more economical than individual works, a stated number or proportion, usually a majority in interest or area, of owners may petition the proper authorities for the creation of a drainage or irrigation district, which may

[13] Morawetz Private Corporations, 2d Ed., Sec. 1018, 1019, 1025.

[14] Stimson Amer. Stat. Law II, 8341.

[15] The same would be true of patent rights; see *infra*, Monopolies, § 665.

[16] See Sec. 427, *supra*.

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include the lands of non-consenting owners. After notice and hearing which is constitutionally indispensable,[17] if a proper case is made out, the district is made a quasi-public corporation, commissioners are elected or appointed for the management of the work, and the expense is assessed upon the owners according to the benefit received by each.

Laws of this character exist in many states without express constitutional provision; in other states, e. g. Illinois,[18] they are expressly authorised by the constitution. It has been shown that in New Jersey they go back to the year 1783.[19] As a rule the statutes refer to a public interest subserved by the improvement in addition to that of the owners concerned. The legislation of New Jersey—which recognised the requirement of the public interest—was sustained by the United States Supreme Court against the contention that it violated the Fourteenth Amendment.[20] The legislation of Massachusetts has been sustained although it speaks only of the general advantage of the proprietors.[21]

**§ 442. Constitutional justification.**—In a number of states it has been held, that the mere economic advantage of the owners concerned will not justify the exercise of the power, but that some distinct public benefit must be shown. Hence such acts have been sustained solely as sanitary measures,[22] and have been declared unconstitutional when they proceeded upon economic grounds or where no provision was made for determining whether the public health would be benefited.[23]

It would be difficult to show an exercise of sanitary power in the case of compulsory irrigation, and the predominance of the private interest in the case of drainage generally appears in the provision that the improvement is undertaken only upon a petition of a majority of owners. Were the sanitary purpose controlling, private owners would not be given power

[17] Fallbrook Irrigation District v. Bradley, 164 U. S. 112.

[18] Constitutional Amendment of 1878.

[19] 114 U. S. 610.

[20] Wurts v. Hoagland, 114 U. S. 606, 1885; see, also, State v. Newark, 3 Dutch. (N. J.) 185; Tide Water Co. v. Costar, 3 C. E. Green (N. J.) 54.

[21] Massachusetts Rev. Laws 195, Sec. 3; Coomes v. Burt, 22 Pick. 422. See, also, State v. Board of Commissioners of Polk Co., 87 Minn. 325, 92 N. W. 216.

[22] Re Ryers, 72 N. Y. 1; Donnelly v. Decker, 58 Wis. 461; Kinnie v. Bare, 68 Mich. 625.

[23] Re Tuthill, 163 N. Y. 133, 57 N. E. 303; Gifford Drainage District v. Shroer, 145 Ind. 572, 44 N. E. 636.

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to resist measures required by it. The public interest (barring the general interest in the profitable employment of all property) is therefore in many cases rather a specious plea than a reality.[24]

Placing the power on purely economic grounds there is still a preponderance of argument in its favor. It is true that ordinarily an owner will not be forced to improve his land merely to increase the general prosperity of the country;[25] nor will one party be forced into a partnership with another, because the interests of both can be better served by joint than by individual action. But lands may be so situated toward each other as to create a mutual dependence and a natural community. The exercise of the police power then consists in applying to this community the same principle of majority rule which is recognised, as a matter of course, for local purposes in larger neighborhoods constituting political subdivisions. Taking this view, compulsory drainage and irrigation is more easily justified than the mill-dam legislation, which lacks the element of joint benefit. The public interest is, in both classes of legislation, about the same, except that the drainage of wet lands may in some cases substantially improve the sanitary condition of some district.[26]

The fact that express constitutional provision has been made in some states for compulsory drainage or irrigation, is an additional argument in favor of the inherent power of the

[24] In Ohio the legislation was declared unconstitutional, the joint interest of the owners not being regarded as satisfying the requirement of benefit to public health, convenience or welfare (Reeves v. Treasurer of Wood Co., 8 Oh. St. 333, 1858); later on the provision in the statute and the finding by the local authorities that in their opinion the improvement was demanded by or would be conducive to the public health, convenience or welfare, were held to satisfy the constitution. (Sessions v. Crunkilton, 20 Oh. St. 349, 1870.)

[25] As to sanitary improvements see § 617, *infra*.

[26] In Kean v. Driggs Drainage Co., 45 N. J. L. 91, an act was held unconstitutional, by which a corporation was authorised to reclaim the marshlands of a certain district without the consent of the owners. The expense was directed to be fixed by contract with officially appointed commissioners, and to be assessed by them upon the lands reclaimed. The court treated the scheme as a private venture for private emolument. (See § 397, note 42.) Had the improvement been regarded as called for by the public health, the act would still have been objectionable because it left the selection of the lands to be reclaimed to the discretion of the company.

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legislature; for the implied limitations of the constitution should embody permanent and unalterable principles of justice; and the fact that a power is expressly bestowed by the legislature tends to show that in denying it the courts had misunderstood or unduly strained the inherent limitations of the legislative power. Compulsory drainage is fully recognised by European continental legislation.[27] Compulsory association of land owners has also been resorted to to facilitate measures of common safety, especially the erection of dikes and levees as a protection from inundation.[28]

§ 443. **Party-walls.**—The principle of joint improvements is applied in some states to party-walls.[29] The statute authorises an owner when erecting a building to place one half of the wall upon his neighbor's land, and requires the adjoining owner upon using the wall in building on his own land, to pay his share of the cost. A provision of this kind was made by the provincial laws of Massachusetts as early as 1692. The party-wall statute of Iowa has been upheld as a reasonable regulation of rights of property, and on account of long-continued acquiescence.[30] It is said that such a law is a valid exercise of the police power because it prevents disputes and unseemly contentions between neighbors; but it does not appear how the law tends towards that end. In Massachusetts the colonial law has been held to be abrogated by the constitution of the state, because repugnant to the latter.[31] Where party-wall rights have always been recognised, they constitute original limitations or servitudes upon the right of property, and as such are not liable to constitutional objection. This seems to be the law of France under Sections 660 and 661 of the Civil Code, which has become also the law of Louisiana.[32] Under such a law the presumption is, that in all recent transfers the property has been acquired *cum onere*. Yet a French jurist calls this legislation "one of the most formidable impairments of the principle of the inviolability of property rights

[27] Prussian Law April 18, 1879, French Law June 21, 1865.

[28] See Act of Illinois June 27, 1885, Sec. 75; Act June 30, 1885, Sec. 2.

[29] Iowa, South Carolina, Mississippi, Louisiana; Stimson, Art. 217.

[30] Swift v. Calnan, 102 Iowa, 206, 37 L. R. A. 462.

[31] Wilkins v. Jewett, 139 Mass. 29, 29 N. E. 214.

[32] Larche v. Jackson, 9 Mart. O. S. 724, 1821.

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which can be imagined. The age of the institution does not alleviate its exorbitant character."[33]

§ **444. Division fences.**—The obligation to contribute to the expense of partition or division fences is very much more common than the obligation to join in the erection of a party wall.[34] As the fence is a common measure of protection to both the neighboring owners from the trespass of each other's cattle, the obligation of common contribution to its expense may be regarded as a legitimate police regulation. An owner moreover inevitably gets the benefit of his neighbor's fence, while the wall of his neighbor's house affords him no advantage unless he uses it for building his own house. The justice of the contribution is therefore evident, especially since the law does not require it where an owner chooses to let his land lie open.[35] There is a strong equity that he who has let his land lie open until the adjoining owner has constructed the entire division fence should be compelled, when he encloses his lot and receives the benefit of the fence erected by his neighbor to make satisfaction for the just proportion which he ought to have built.[36] The obligation seems, however, to rest in part also upon the consideration of mutual economy, for the owner cannot evade his obligation by building a few feet from the line, unless he desires to dedicate the strip left unenclosed as a road.[37] In the case last cited, the court said that it would assume the validity of the legislation, and the question of constitutionality does not appear to have been seriously raised in any case.[38]

[33] Ducrocq Droit Administratif, Sec. 1347.

[34] Stimson Am. Stat. Law, 2182.

[35] Jones v. Perry, 50 N. H. 134. "It is not the policy of the law to compel a party to maintain a fence for which in consequence of laying his land or part of it in common in good faith he has not any longer the slightest occasion."—Castner v. Riegel, 54 N. J. L. 498; Smith v. Johnson, 76 Pa. St. 191.

[36] Hewitt v. Watkins, 11 Barb. 409.

[37] Talbot v. Blacklege, 22 Ia. 572.

[38] See McCormick v. Tate, 20 Ill. 334; Rust v. Low, 6 Mass. 90; Holladay v. Marsh, 3 Wend. 142; Shriver v. Stephens, 20 Pa. St. 138 (legislation going back to 1700). As to legislation providing for common fences enclosing the lands of a number of proprietors for protection against stock, in the place of many fences for particular tracts, the cost being assessed upon the owners benefited, see Busbee v. Commissioners Wake County, 93 N. C. 143, 1885.

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# THIRD PART.

# FUNDAMENTAL RIGHTS UNDER THE POLICE POWER.

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FIRST: LIBERTY.

CHAPTER
XXI. PERSONAL LIBERTY.

XXII. CIVIL LIBERTY: RELIGIOUS AND POLITICAL.

XXIII. CIVIL LIBERTY: ECONOMIC.

SECOND: PROPERTY. VESTED RIGHTS UNDER THE POLICE POWER.

XXIV. APPROPRIATION, INJURY, AND DESTRUCTION.

XXV. CONFISCATORY LEGISLATION.

XXVI. PUBLIC GRANTS AND LICENSES.

XXVII. SOCIAL AND ECONOMIC REFORMS.

THIRD: EQUALITY.

XXVIII. EQUALITY AS A POLITICAL PRINCIPLE.

XXIX. PARTICULAR BURDENS.

XXX. SPECIAL PRIVILEGES.

XXXI. CLASSIFICATION AND DISCRIMINATION.



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# THIRD PART.

# FUNDAMENTAL RIGHTS UNDER THE POLICE POWER.

## FIRST. LIBERTY.

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## CHAPTER XXI.

### PERSONAL LIBERTY.

**§ 445. Different aspects of liberty.**—The Fourteenth Amendment has given to liberty, property, and equality the highest protection of which rights are capable under our system of government, and has thus stamped them as the fundamental rights of the individual.[1]

Of these the right of liberty is necessarily the vaguest in content, since it is quite clear that liberty must be understood as being subject to restraint, and the mode and quantum of restraint is the question at issue. We can form a tolerably definite conception of personal liberty in the narrowest sense,

[1] The right to life.—It is almost a matter of course that the police power does not extend to the taking of human life. Not even the most imminent danger of contagion would justify the killing of a man, whereas it justifies the killing of animals. An exception from this elementary principle is however apparently presented in the case of justifiable homicide by an officer of the peace. The homicide may occur either for the purpose of preventing or stopping a crime, or for the purpose of preventing an escape. The execution of a sentence of death need not be here considered, as it belongs to criminal justice, and not to the police power. The most conspicuous case of justifiable homicide for the prevention or stopping of crime is that committed in the suppression of a riot. The laws of Massachusetts and of Illinois provide that if in the efforts made to suppress an unlawful assembly, and to arrest and secure the persons composing it, who refuse to disperse, any such persons, or any persons present as spectators or otherwise, are killed or wounded, the magistrates and officers and persons acting with them by their order, shall be held guiltless and justified in law. (Mass. Rev. Laws, ch. 211, § 6; Ill. Crim. Code, § 255; see, also, Calif. Penal Code, § 731, New York Code Crim. Proc. § 114, Bishop's New Criminal Law I, § 849, No. 5; II, § 655, No. 4.) The state is



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i. e. the liberty of the body, and exemption from servitude; and this will be the first form of liberty that will be considered.

The liberty of private conduct is next in order of importance to the individual, and may be regarded as practically enjoying the same immunity from restrictive legislation as the liberty of the body. The freedom of purely social intercourse, which leaves the legal relations of the parties to each other unaffected, is in some respects part of the liberty of private conduct, and even where not carried on strictly in private, is, on principle, a matter of no concern to the state, and therefore on the whole exempt from the police power.

Civil liberty is the freedom of entering into legal relations with others, and of appealing in any manner to public opinion or sentiment. This liberty must be subject to manifold restraints in behalf of the public welfare, and as a constitutional right has no specific content. To say that the police power must respect liberty is therefore an unmeaning phrase. But

here confronted with a menace to the most elementary condition of its existence, namely, the preservation of common peace and security, and does what is necessary to avert immediate destruction of life and property. The police power is then merged in the higher power of the state to defend its own existence. Where the crime to be prevented is not directed against public peace, but otherwise a felony, the justifiable homicide will in most cases be closely analogous to self-defence; if not, homicide, it seems, should be justified only upon the principle to be explained in connection with the case of killing a fleeing offender. Bishop, in his Criminal Law, states the right to kill to resist felony as accepted doctrine, but intimates that the reason for the rule does not appear (I § 849, No. 3).

Killing for the prevention of an escape will in many cases be justified by self-defence, where the offender resists arrest or attempts to break away from it, and force is necessary to overcome force. Otherwise where the offender flees from arrest. The established rule seems to be that he may be killed in the pursuit, if the crime committed has been a felony. (Bishop Cr. L. II, § 648; Brown v. Weaver, 76 Miss. 7, 42 L. R. A. 423.) The law is stated by courts and writers upon the authority of the older books which do not give any reasons for it. If sound, it can hardly be explained otherwise than as an act of summary justice. But it would perhaps be more reasonable to deny the rule altogether, and to regard as justifiable only such acts as are necessary to prevent the escape. The officer may therefore use his weapon in order to disable the escaping felon; and if the fugitive is thereby killed the homicide should be regarded as excusable. But an officer who deliberately kills, when it is in his power to disable merely, should not be held to be justified.

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certain spheres of liberty may be singled out as withdrawn from the exercise of the police power in this sense, that the pursuit of certain objects, or certain forms of activity, cannot, in themselves, be regarded as elements of public danger. Such special recognition is given by our constitutions to the freedom of religion, of speech and press, and of assembly, and by foreign constitutions and laws to the freedom of migration, of occupation, and of association. These spheres of liberty should therefore be specially considered, and the liberty of contract, which is not uncommonly insisted on by our courts, should likewise be discussed briefly. For most purposes the best definition of liberty under the police power is to be found in an analysis of the conditions of public welfare which justify restraint by law, such as has been undertaken in the foregoing part of this treatise.

LIBERTY OF THE BODY. §§446-452.

**§ 446. Cases of deprivation of personal liberty.**—Deprivation of personal liberty is the extreme measure of the police power. While commitment and detention under the police power differ in character and consequences radically from imprisonment by way of punishment, yet so incisive an impairment of personal right will be resorted to only in the exercise of abnormal power, or under the pressure of great public danger. The commitment of lunatics to asylums, and of children to reformatories, are cases of exercise of the supreme guardianship of the state over those who are dependent or not in possession of normal faculties.[2] The detention of persons affected with or suspected of contagious disease in quarantine presents one of the cases where the police power is literally the law of self-protection and paramount necessity.[3] In a case where no present danger of contagion existed, the mere fact that a person was not vaccinated was not recognised as a reason why he should be subjected to quarantine.[4]

**§ 447. Compulsory vaccination.**—The reluctance of the police power to interfere with the liberty of the body appears in a marked degree in the matter of compulsory vaccination.

[2] See §§ 252-255, 260-263, *supra*.

[3] Harrison v. Mayor of Baltimore, 1 Gill 264 (Md.), 1843; State v. City of New Orleans, 27 La. Ann. 521.

[4] Re Smith, 146 N. Y. 68.

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The cases upon which the courts have passed turn generally upon the right to make vaccination a condition of attendance at public schools. The power is then claimed only over minors, and only as a condition annexed to the exercise of a right or privilege. Upon this ground compulsory vaccination has been upheld in several states.[5] The exercise of the power by school or health authorities has been denied in the absence of clear delegation,[6] except in cases of imminent danger.[7] The power to compel adults to submit to vaccination has in recent times been claimed and sustained in Georgia, North Carolina and Massachusetts.[8] If the protection of public health allows quarantine, it is difficult to see why it should not justify compulsory vaccination. The difficulty of enforcing measures of personal compulsion is a strong and, generally speaking, an adequate safeguard against an abuse of legislative power in this direction.

§ 448. **Compulsory service and labor contracts.**[9]—The English statutes of labourers of 1349 and 1350, occasioned by the depopulation of the country through the great plague, required able-bodied persons not having means of their own to accept service when offered, on pain of imprisonment, and to take the customary wages, or, under later statutes, wages fixed by justices of the peace. It was sought to offset the limitation of wages by a corresponding limitation of the prices of necessaries of life. A number of similar restrictive acts concerning laborers were enacted in the succeeding two hundred years. The essential features of these statutes were re-enacted in 1562 by statute 5 Eliz. cap. 24, which also required yearly contracts of service, and punished breach by either party without good reason. The main provisions of these laws gradually fell into disuse, but the statutes were finally repealed only in 1875. The object of this legislation was partly the suppression of

[5] Bissell v. Davison, 65 Conn. 183; Abeel v. Clark, 84 Cal. 226; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64; in the latter case compulsion could be avoided by staying away from school.

[6] Potts v. Breen, 167 Ill. 67; State ex rel. Adams v. Burdge, 95 Wis. 390, 37 L. R. A. 157.

[7] Duffield v. Williamsport School District, 162 Pa. St. 476; State ex rel. Freeman v. Zimmerman, 86 Minn. 353, 58 L. R. A. 78, 90 N. W. 783.

[8] Morris v. Columbus, 102 Ga. 792, 42 L. R. A. 175; State v. Hay, 126 N. C. 999, 49 L. R. A. 588; Com. v. Pear (Mass.), 66 N. E. 719.

[9] See, also, § 584-586.

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vagrancy, but it was also generally considered a proper function of the police power to secure, if necessary, by compulsory measures, to agriculture and industry an adequate and steady supply of labor. The policy of the English legislation did not extend to domestic service, which in Germany was held to be subject to similar measures in the interest of property and security.[10] At the present day it is only necessary to refer to this kind of labor legislation in order to point out its unconstitutionality. The requirement to serve would beyond any doubt be involuntary service forbidden by the Thirteenth Amendment of the federal constitution, and a statutory minimum term for labor contracts is an indirect form of compulsory service. Compulsory public service, civil or military, stands of course on a different footing.[11] The practical question at the present time is whether the constitutional freedom of the laborer should be interpreted to mean, not only that he cannot be compelled to enter a service against his will, but that he cannot even be forced to continue in a service which he has voluntarily entered under a contract to remain for a stated period of time.

§ 449. **Unreasonable contracts to serve.**—A relation of service may rest on voluntary contract, and yet be contrary to public policy. This may be so for the reason that the conditions of the contract subject the servant to an arbitrary discretion. So it was held that a contract absolutely indefinite except as to time, leaving the master to determine what the service should be, and the place where, and the person to whom it should be rendered, was contrary to the principle of liberty as declared in the Massachusetts Declaration of Rights.[12] Or it may be that the contract is for an unreasonable length of time. In England there is authority for sustaining contracts to serve for life,[13] but this is hardly the law in America. In Indiana a woman who had bound herself by indenture to serve as a housemaid for the term of twenty years was set free on *habeas corpus*,[14] it being held that the enforcement of personal service under such a contract would be "pro-

[10] Roscher Nationaloekonomie, § 76.

[11] Mechem Public Officers, § 241-243; Knecdler v. Lane, 45 Pa. 238.

[12] Parsons v. Trask, 7 Gray 473.

[13] Wallis v. Day, 2 M. & W. 273; Broom's Constitutional Law, p. 115.

[14] Matter of Mary Clark, 1 Blackf. 122, 1821.

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ductive of a state of feeling more discordant and irritating than slavery itself." The civil codes of California, Montana, North Dakota and South Dakota[15] provide that contracts for personal services are not enforceable against the employee for longer than two years. The German Civil Code provides that if a contract of service is entered into for life or for a period longer than five years, it may, after the expiration of five years, be terminated upon six months' notice.[16] In the absence of a statutory provision the courts must determine what is an unreasonable contract of service. Such a contract being voidable, non-performance or abandonment would not give rise to a cause of action for damages.

§ 450. **Contract labor laws.**—The breach of a contract to serve which is reasonable in its terms, like the breach of any other contract, gives a common law right of action for damages. As against a common laborer, this remedy is as a rule practically of no value. A court of equity will not, however, enforce a contract to serve specifically. "The rule, we think, is without exception, that equity will not compel the actual, affirmative performance by an employee of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. * * * Relief of that character has always been regarded as impracticable."[17]

The question whether the legislature is competent to provide the relief which equity denies, or to punish criminally the breach of a contract to serve, is one of considerable importance. Legislation of this character has been known for a long time in British colonies, and exists, under elaborate safeguards for the rights of the laborer, to the present day.[18] Could similar legislation be introduced into American tropical posses-

[15] Cal. § 1980, Mont. § 2675, N. D. § 4103, S. D. § 3760.

[16] § 624.

[17] Arthur v. Oakes, 63 Fed. 310; Toledo &c. R. Co. v. Pennsylvania Co., 54 Fed. 730, 743.

[18] See Alleyne Ireland, Tropical Colonization, chap. V. The Indentured Labor System in the British Colonies.—For indentured labor in the American Colonies see the Servant Act of Virginia of 1705, Hening's Statutes III, p. 447, and Bruce Economic History of Virginia, chap. 10. In several German states under recent statutes a wilful breach of rural labor contracts is punished; under older laws, specific enforcement and criminal pun-

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sions without creating "involuntary servitude?" The Penal Code of Hawaii[19] enforced contracts to serve for not exceeding a maximum term of years fixed by statute, by criminal punishment of the delinquent laborer and by his forcible restoration to the service which he had left. The Hawaiian constitution contained a provision similar to the Thirteenth Amendment, but this provision was held not to be violated by the statute, since a contract lawful and constitutional in its inception cannot become illegal or unconstitutional at the option of one of the parties.[20]

**§ 451. American legislation.**—In South Carolina, Alabama, and Louisiana, the abandonment of certain contracts for service is made a misdemeanor.[21] It was held in South Carolina that the liability to criminal punishment did not constitute involuntary servitude, and that the legislature had power to make the violation of a particular species of civil contracts a criminal offense. "Every one who undertakes to serve another in any capacity parts for a time with that absolute liberty which it is claimed the constitution secures for all."[22] The Revised Statutes of the United States contain provisions under which a deserting sailor may be apprehended and placed by force on the vessel to which he belongs, and may be punished for refusal to work.[23] The constitutionality of these provisions was upheld on the ground that sailors are a dependent class not enjoying the full discretion of free adult citizens, that their service is of an exceptional character, and that the statutes in question are sanctioned by the old established legislative practice of all nations.[24] The court at the same time admitted that the coolie trade would be as obnoxious to the Thirteenth Amendment as actual slavery. The generally prevailing sentiment against the compulsory enforcement of labor contracts found expression in a vigorous dissenting opinion by Justice Harlan. It is also to be noted that after the annexa-

ishment is also applied to wilful violations of contracts of domestic service.

[19] § 1382-1385.

[20] Hilo Sugar Mfg. Co. v. Mioshi, 5 Haw. Rep. 201, 1891.

[21] Report Industrial Commission 1900, vol. V, p. 68, 120.

[22] State v. Williams, 32 S. C. 123, 1889. The penalties must be the same for breach by either party.

[23] §§ 4596, 4598, 4599.

[24] Robertson v. Baldwin, 165 U. S. 275. See The Mobile, 116 Fed. Rep. 212, and cases there cited, as to right of master to inflict personal chastisement on sailor.



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tion of Hawaii to the United States, Congress, in giving to the Islands a territorial form of government subject to the American Constitution, abrogated the provisions of the Penal Code above referred to.

**§ 452. Specific enforcement and criminal punishment.**—In view of this state of the authorities it is not easy to determine the status of contract labor legislation. On principle, however, it seems that a distinction should be made between specific enforcement and criminal punishment. Specific enforcement would hardly be practicable without giving the master despotic powers over the servant which would virtually create the condition which the Constitution sought to make impossible. The conditions on board a ship are in this respect widely different from those prevailing on land. The imposition of a fine or even imprisonment for a wilful breach of contract, however, while impolitic and probably impracticable, can hardly be said to violate any well-defined principle of constitutional law. The law of New York, following an English statute,[25] punishes the wilful and malicious breach of a contract of service or hiring where the probable consequence will be to endanger human life, or to cause grievous bodily harm, or to expose valuable property to destruction or to serious injury.[26] The law of New Jersey punishes the wilful or negligent disregard of any rule of a railroad company regarding the running of trains, by any officer or employee of the company, undoubtedly for the protection of similar interests.[27] In several states the abandonment of locomotives is criminally punished.[28] If these acts are valid—and their validity has not been questioned—it appears that a direct public interest in the performance of a labor contract justifies the punishment of a breach of such contract. Suppose then, that a corporation is required by law to carry on its operations, and in order to be able to fulfil this obligation it makes binding contracts with its employees, why should the state be powerless to punish the non-performance of the obligation on the part of the employee, when it may punish non-performance by the corporation, and

[25] Conspiracy and Protection to Property Act 1875, 38 and 39 Vict. ch. 86.

[26] Penal Code, § 673.

[27] Gen. Stat. 1895, p. 2668.

[28] Minn. Gen. Stat. 1894, § 6638; Conn. Act 1895, ch. 87; Del. Rev. Code 1893, ch. 127, p. 928; N. J. Gen'l Stat. 1895, p. 2696; Pennsylvania Act Meh. 22, 1877, P. L. 14, § 1.

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performance by the corporation depends upon performance by the employee?[29] The cases in which specific enforcement of labor contracts was refused by courts of equity, leave this question open, for in those cases it did not appear that the laborers were under contract, and it was distinctly recognised, that there might be liability to criminal punishment, even if there could be no equitable relief.[30] We may then conclude that in a business affected with a public interest the violation of a contract of service which is essential to the carrying on of the business, may, as a matter of constitutional power, be punished.

## LIBERTY OF PRIVATE CONDUCT. §§ 453-457.

**§ 453. Legislative policy.**—The conduct of the individual in the privacy of his home, not involving or affecting his legal relations to other persons, is generally exempt from the operation of the police power. This sphere of life is not regarded as a legitimate subject of public regulation, and it is recognised that regulation would in most cases be unenforceable. Non-interference with purely private acts is therefore a firmly established principle of legislative policy. This is especially apparent in the legislation against vice.[31] Although gambling for money involves the transfer of property and is therefore not strictly private conduct, it is as a rule forbidden and punished only if carried on in public or quasi-public places.[32]

[29] See People v. N. Y. Central &c. R. Co., 28 Hun 543, holding that a strike does not excuse a railroad company from performing its duties to the public. However, this must be regarded as an open question.

[30] Toledo &c. R. Co. v. Pennsylvania Co., 54 Fed. Rep. 730; Arthur v. Oakes, 63 Fed. Rep. 310.

[31] As to sexual vice see § 235, 240, *supra*. The law deals with "open lewdness," "open and notorious" state of adultery, etc. Conduct in the presence of another non-consenting party cannot claim to be private. Fowler v. State, 5 Day (Conn.) 81. And so the sending of a sealed letter of an obscene character to a non-consenting party may be made an offense, as may be the mailing to a consenting party if it is a matter of business. Grimm v. United States, 156 U. S. 604; Andrews v. United States, 162 U. S. 420. But when the law attempts to punish the carrying on of purely private correspondence though of an immoral character (arranging for an assignation, etc.), it probably oversteps the proper sphere of the police power. See United States v. Martin, 50 Fed. Rep. 918; United States v. Lamkin, 73 Fed. Rep. 459.

[32] For prohibition of gambling in private places see Greenville v. Kemmis, 58 S. C. 427, 50 L. R. A. 725.

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The policy of prohibitory liquor legislation is questioned chiefly on the ground that it interferes in its effects with the freedom of private consumption. Even the advocates of prohibition concede that the state has no concern with the private use of liquor. "The opponents of prohibition misstate the case by saying that the state has no right to declare what a man shall eat or drink. The state does not venture to make any such declaration. A man may debauch himself in private and the state will not interfere, unless the debauchery creates a public nuisance or disturbs the public peace. * * * It is not the private appetite or home customs of the citizen that the state undertakes to manage, but the liquor traffic. * * * This is the ground of Prohibition. * * * If by abolishing the saloon the state makes it difficult for men to gratify their private appetites, there is no just reason for complaint."[33]

**§ 454. Private consumption of liquor.**—It is therefore significant that the policy of prohibition stops short of dealing with the private act of consumption. Where the sale or giving away of intoxicating liquors is prohibited either absolutely or under stated conditions, the statutes either expressly except the giving away at private houses as an act of hospitality or to members of the family or household, or such an exception is implied by the courts.[34] In Pennsylvania a statute prohibiting the furnishing of liquor to a person already visibly affected by its use was held not to apply to a farmer who treated a number of friends and farmhands in his barn. The court said: "The provisions of the act of 1887 are not directed against the use of liquor by the individual citizen, and they do not interfere with his right to supply his table with them to his family or his guest." But the act of collecting friends already under the influence of liquor was looked upon as one affecting not only the individual, but his neighbors and the public as well. There was also proof that the price of the liquors furnished was charged up against the wages of the men who drank it, which made the transaction a sale.[35] It was said in a later

[33] Article on Personal Liberty in Cyclopaedia of Temperance and Prohibition; see, also, § 225.

[34] State v. Jones, 39 Vt. 370; Powers v. Com., 90 Ky. 167; Reynolds v. State, 73 Ala. 3; State v. Standish, 37 Kans. 643; Austin v. State, 22 Ind. App. 221, 53 N. E. 481; Albrecht v. People, 78 Ill. 510.

[35] Altenburg v. Com., 126 Pa. St. 602.

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case that a person must be allowed to prove the circumstances under which he dispensed liquor, in order to show the private nature of the act.[36] In Maryland an act making it a misdemeanor for any person to give away intoxicating liquor on election day, was applied to one who treated in his own house; but here the private house, by the promiscuous admission of strangers, was, for the time being, converted into a semi-public place.[37]

**§ 455. Question of constitutional right.**—On the other hand a statute of Oregon making the possession of opium without a medical prescription a misdemeanor was upheld on the ground that an inherently dangerous article may be altogether forbidden by law, and in Washington it was held that the law may punish the mere private act of smoking or inhaling opium.[38] While the private act of consuming liquor is always left free, the Supreme Court of the United States has held that the state may absolutely prohibit the manufacture of liquor for drinking purposes, even for private use.[39] Perhaps the facts before the court did not call for this ruling, for the claim that all the beer manufactured in a large brewery was for the private use of the brewer was manifestly absurd. But a statute undertaking to prohibit the grower of fruit or grapes from manufacturing brandy, cider, or wine for his own use, may be regarded as a measure intended, not primarily to prevent private use, but to render more difficult the evasion of the prohibition of the manufacture for purposes of sale. Moreover a statute which may prohibit selling or giving away, may undoubtedly also prohibit purchase or acceptance, although regularly only the selling or giving away is forbidden. Assuming that the law were to forbid purchase or acceptance, it would be in accordance with recognised principles, which are applied in the legislation against lotteries and for the protection of game, to make the possession of liquor prima facie evidence of the act of purchase or acceptance. Thus the act of private consumption, without being directly forbidden, might be made

[36] Com. v. Carey, 151 Pa. St. 368.

[37] Cearfoss v. State, 42 Md. 403.

[38] Luck v. Sears, 29 Ore. 421; Territory v. Ah Lim, 1 Wash. 156, 9 L. R. A. 395. The federal court declared an ordinance of the city of Portland forbidding the smoking of opium, to be illegal, because not within the charter powers of the city. Ex parte Ah Lit, 26 Fed. 512.

[39] Mugler v. Kansas, 123 U. S. 623.

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presumptive evidence of either the illegal act of purchasing or accepting, or of the illegal act of manufacturing, and if it were not for the liberty of importing from other states, private consumption, while not wrongful in itself, would be conclusive evidence of a wrongful act. Under these circumstances it seems impossible to speak of a constitutional right of private consumption. There seems to be no direct judicial authority for declaring private acts exempt from the police power, and the universal tolerance with regard to them should be ascribed to policy. Like any other exercise of the police power, control of private conduct would have to justify itself on grounds of the public welfare. Aside from this, the practical difficulties of enforcement, coupled with the constitutional prohibition of unreasonable searches, will in general be an adequate protection against an abuse of legislative power in this domain.

**§ 456. Principle of statutory construction—Liquor in clubs.** —The exemption of private conduct from police regulation, while not a matter of absolute constitutional right, is of importance as a principle of statutory construction. Thus, as above shown, a prohibition against the giving away of liquor is interpreted as not including the giving away within the household or family. The principle may in many cases be extended so as to protect conditions and relations, which, while not strictly private or domestic, are yet not in any sense public or promiscuous. So where statutes regulating the use of oleomargarine place boarding houses on the same footing with inns and hotels, this can hardly apply to cases where a family has a small number of private boarders. A special difficulty arises in connection with clubs where intoxicating liquor is served to members for pay. There is a conflict of judicial opinion upon the question whether such furnishing of liquor constitutes an unlawful selling within the meaning of the law. Eliminating the cases in which the answer was made to depend upon the character of the club, so that the statutory penalties were applied to fraudulent devices to evade the provisions of the law,[40] the question turns either upon the meaning of a sale or upon the presumable intent of the legislature. The courts of England, New York, Pennsylvania, Massachusetts, Virginia,

[40] Rickart v. People, 79 Ill. 85; Com. v. Smith, 102 Mass. 144; Com. v. Ewig, 145 Mass. 119; People v. Andrews, 115 N. Y. 427, 22 N. E. 128; State v. Horacek, 41 Kans. 87, 3 L. R. A. 587.

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South Carolina, Missouri, Texas, and Montana hold that a bona fide club is not within the statute; the courts of Maryland, North Carolina, Alabama, Louisiana, Indiana, Michigan, New Jersey, and Kentucky, hold that it is.[41] While it is difficult to deny that the furnishing of liquor for pay, even without profit, is a sale, yet there is great force in the argument that the statutory provisions regarding dramshops or other places where liquor is sold are often totally unsuited to social clubs, making it practically impossible for them to obtain a license. From this it may be inferred that sales at a club are not within the intent of the statute. The most satisfactory method of dealing with the question is to make special provision for social clubs. In Massachusetts special licenses are granted to clubs, which are deemed proper organisations, for dispensing liquor to members only, free from certain regulations applicable to other places where liquor is sold.[42] The New York law distinctly refers to corporations or associations trafficking in liquors solely with members thereof,[43] and likewise contains a few special provisions in their favor.

§ 457. **Freedom of social intercourse.**—The narrowest conception of personal liberty must include the right to enter into relations which do not affect the legal rights of the parties, which do not directly endanger public safety, health, order or morality, and which are not intrinsically wrongful or vicious according to generally accepted standards of morals or decency. Relations of such a character are not legitimately subject to the police power, and we may speak of a right of social intercourse as a part of constitutional liberty. Therefore the law cannot forbid free citizens to speak or walk or visit with each other. It has been held in Missouri that persons cannot

[41] Graff v. Evans, L. R. 8 Q. B. Div. 373; People v. Adelphi Club, 149 N. Y. 5, 31 L. R. A. 510; Klein v. Livingston Club, 177 Pa. 224, 34 L. R. A. 94; Com. v. Smith, 102 Mass. 144; Piedmont Club v. Com., 87 Va. 540; State ex rel. Columbia Club v. McMaster, 35 S. C. 1; State v. St. Louis Club, 125 Mo. 308, 26 L. R. A. 573; State v. Austin Club, 89 Tex. 20, 30 L. R. A. 500; Barden v. Montana Club, 10 Mont. 330, 11 L. R. A. 593; State v. Easton Social Club, 73 Md. 97, 10 L. R. A. 64; State v. Neis, 108 N. C. 787; Martin v. State, 59 Ala. 34; State v. Boston Club, 45 La. Ann. 585, 20 L. R. A. 185; Marmont v. State, 48 Ind. 21; People v. Soule, 74 Mich. 250, 2 L. R. A. 494; State v. Essex Club, 53 N. J. L. 99; Kentucky Club v. Louisville, 92 Ky. 309.

[42] Rev. Laws, ch. 100, § 88.

[43] Liquor Tax Law, § 24.

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be forbidden knowingly to associate with other persons having the reputation of thieves,[44] and in Kentucky, that persons other than male relatives cannot be forbidden to speak to a prostitute on a street.[45] Such measures would result in a social isolation, which can only be inflicted as criminal punishment by due process of law. It is conceived that it would be entirely beyond the power of the state to forbid mere social intercourse between white persons and persons of color.

The freedom of social intercourse must also include the right to use any language which the parties may choose. In countries in which the policy of the government is to substitute the language of the predominant nation of the state for that of other nationalities inhabiting provinces or districts of the state, measures to that end do not extend to the control of purely social relations.

In distinction from the liberty of private conduct at home, this right of social intercourse includes many acts which are public and are susceptible of proof without unconstitutional searches or other intrusion into privacy. The denial of the power of the state follows from the consideration that there must be an intimate social sphere in which the use and development of individual faculties is absolutely inconsistent with the exercise of compulsion, and especially that association with other persons is part of the enjoyment of life, and that the entire separation of different classes, in the absence of specific and individual elements of danger, to be established by due process of law, cannot be regarded as necessary to the public welfare, where the theory of equality of rights prevails.

[44] Ex parte Smith, 135 Mo. 223, 33 L. R. A. 606.

[45] Hechinger v. Maysville, 22 Ky. Law Rep. 486, 49 L. R. A. 114.

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## CHAPTER XXII.

### CIVIL LIBERTY: RELIGIOUS AND POLITICAL.

FREEDOM OF RELIGION. §§ 458-470.

**§ 458. The constitutional guaranty.**—An express guaranty of the freedom of religion is found in every American constitution. Congress is forbidden to make any law respecting an establishment of religion, or prohibiting the free exercise thereof,[1] and in substance the same limitation of power restrains every state legislature. The provision of the constitution of Illinois may be quoted as comprehensive and typical: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."[2] The effect of this constitutional guaranty will appear from a consideration of the various kinds of possible legislation regarding religion.

**§ 459. Repressive sectarian legislation.**—The law may conceivably undertake to punish or restrain expressions of sentiment having reference to religion, which are contrary to some particular religion, faith or doctrine. Sectarian legislation of this character, in addition to the common law punishment of heresy under the writ *de haeretico comburendo*, began in England in the fifteenth century,[3] and was particularly active during the reigns of the Tudors and Stuarts. Blackstone[4] discusses a considerable number of these laws which were in force at his time; they have all since been repealed. Of the American colonies, Massachusetts and Virginia, in the

[1] U. S. Constitution, First Amendment.

[2] Art. II, § 3.

[3] 2 H. IV, cap. 15.

[4] Book 4, ch. 4.



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course of the seventeenth century, enacted laws for the repression of Catholics and Quakers, but these laws disappeared in the course of the eighteenth century. The absence of all repressive sectarian laws constitutes the principle of toleration, first proclaimed in Rhode Island's charter of 1663. This principle is amply secured by the constitutional guaranty of freedom of religion.

§ 460. **Support of church out of public funds.**—The state may conceivably, without restraining dissenters, support one religion out of the public funds. This is the principle of the established religion or church. It involves at least the taxation of individuals in behalf of a religion which they do not acknowledge. In Massachusetts, the town was at the same time a parish, and was under legal obligation to maintain places of worship and ministers. In the seventeenth century, the law was modified so that every Protestant could demand that his contribution should go toward the support of his own denomination, and in this form the principle was carried into the constitution of Massachusetts of 1780, and was retained until 1835, when it was superseded by the eleventh amendment to the state constitution.[5] There is now no American state in which the power of taxation is exercised for the support of one religion, or a number of religions, and all legislation to that effect would be contrary to a provision, that "no person shall be required to attend or support any ministry or place of worship against his consent." The abandonment of such public support and the emancipation of the civil status from the requirement of religious sanction or recognition, are the main points in the establishment of the principle of the separation of church and state.

§ 461. **Religious disqualifications.**—Freedom of religion is impaired by the requirement of religious profession of some sort for the exercise of public functions. This was the policy of the English Corporation and Test Acts. The first constitutions of New Hampshire and of North and South Carolina excluded non-Protestants from all or from the highest offices; New Jersey and Vermont provided only that no Protestants

[5] The history of legislation in Virginia was complicated by the confiscation of glebe lands. See Turpin v. Locket, 6 Call. 113; Terret v. Taylor, 9 Cranch. 43; also account of legislation of 1784 in Reynolds v. United States, 98 U. S. 145.

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should be excluded; in Massachusetts, Delaware, and Maryland the oath required of all officers, in Pennsylvania and Vermont the oath required of members of the legislature, was such that it could be taken by Christians only. Provisions of this nature, while they do not impair personal liberty or affect rights of property, discriminate on account of religion. The constitution of the United States provides that no religious test shall ever be required as a qualification to any office or public trust under the United States.[6] The disqualification of non-Christians has disappeared everywhere; and it is inconsistent with a provision that "no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions." In the absence of such a provision, it was held in Massachusetts and Illinois, that an atheist may be disqualified from acting as a witness,[7] but the insertion of the provision in the Illinois constitution of 1870 was held to abrogate the former rule.[8] In Maryland, North Carolina, Tennessee, Mississippi, and Arkansas, atheists are excluded from office by constitutional provisions; and this is conclusive, since the federal constitution does not protect the right to hold office under the states. If the provision were not constitutional, but statutory, there can be no doubt that a discrimination against atheists with reference to the right to hold office, would be, under probably every state constitution, an invalid discrimination on account of religious opinion.

**§ 462. Recognition of religion.**—The state avails itself of the existence of religious sentiment among the people, or acknowledges those sentiments in official utterances, in the following matters: the reference to the divine power in the constitutions; the proclamation of thanksgiving days; the use of the religious sanction for the oath, leaving a right of affirmation where the oath is objected to; and the recognition of the religious celebration of marriages. In these cases the state neither compels nor restrains, and its relation to religion may be described as purely moral; hence these practices are not regarded as objectionable on constitutional grounds. The employment of chaplains in penitentiaries, in the U. S. army and navy, in state militias, in Congress, and sometimes in legisla-

[6] U. S. Constitution, Art. VI, § 3.
[7] Thurston v. Whitney, 2 Cush. 104; Central Military Tract v. Rockafellow, 17 Ill. 541.
[8] Hronek v. People, 134 Ill. 139.

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tive assemblies of the states, is sanctioned by long acquiescence, although the abandonment of the practice in the majority of state legislatures indicates some doubt as to its propriety; it does not involve any question of the police power.

**§ 463. The Bible in public schools.**—The use of the Bible in the public schools presents a constitutional question especially in those cases in which the child is required to attend during the reading from the Bible. Religious liberty would seem to require that pupils at the request of their parents, or otherwise for good cause, must be excused from attendance, and this is recognised by the practice of many states.[9] In Maine, however, a different view was taken: where a Catholic child was expelled for refusing to read the Protestant version of the Bible, it was held that the parent had no cause of action;[10] and in an action by the child it was further held that the adoption of the Protestant Bible as a reading book in the public schools is an act of the school authorities which the courts cannot control, and that the liberty of religion and the equality of denominations is not thereby violated.[11] The reading from the Bible where attendance is not compulsory raises no question of the police power; it has, however, been questioned on the ground that the taxpayer is thereby compelled to support religious worship. This contention has been sustained in Wisconsin,[12] and the Supreme Court of Ohio has at least intimated a like opinion.[13] In Nebraska it is said that "whether it is prudent or politic to permit Bible reading in the public schools is a question for the school authorities to determine, but whether the practice of Bible reading has taken the form of sectarian instruction in a particular case is a question for the courts to determine upon evidence."[14] It is hardly possible to contend that reading from the Bible unless carefully restricted to purely historical passages, is not a religious exercise, whether sectarian or not. A liberal interpretation of the constitution might allow such non-sectarian religious instruc-

[9] North v. Board of Trustees, 137 Ill. 296; Moore v. Monroe, 64 Ia. 367; Spiller v. Woburn, 94 Mass. 127.

[10] Donahoe v. Richards, 38 Me. 376.

[11] Donahoe v. Richards, 38 Me. 379.

[12] State ex rel. Weiss v. District Board, 76 Wis. 177.

[13] Board of Education v. Minor, 23 Oh. St. 211.

[14] State v. Scheve, 93 N. W. 169.

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tion in the public schools as is implied in reading from the Bible without comment, provided no special funds are expended for that purpose; but would not allow the forcing of such instruction upon children against the wishes of their parents; and this is the view taken in most of the states. In the state of Washington the use of the Bible in the public schools is expressly prohibited; Mississippi, on the other hand, provides that the Bible shall not be excluded from the public schools.

**§ 464. Protective and restrictive legislation**—a. Special protection of religion.—Under this head should be mentioned: exemption of the property of religious societies from taxation; the protection of religious meetings; and the laws against blasphemy. Of these, the exemptions from taxation do not fall under the police power; the protection of religious meetings from disturbance by disorderly conduct or by the peddling of goods is regarded as a regulation in the interest of peace and order in public places, and is upheld, as a like regulation for the protection of any kind of secular gathering would be upheld;[15] the provisions against blasphemy will be considered presently.

b. Restraint of religious activity in behalf of the public welfare.—There are two kinds of legislation that would fall under this head: measures for the repression of practices deemed disorderly or dangerous; and the regulation of religious societies, chiefly with reference to their property rights. This legislation will also be considered separately.

The essence and value of the constitutional guaranty lies in two points: first, that religious belief as such, and its peaceful and orderly manifestation in worship and precept, may not be treated as a menace to the peace and welfare of the community, or as a possible cause of disorder; and second, that whatever restraint is placed upon religious activity, through rules of property or otherwise, must be applied to all denominations alike, in order to avoid the preference and discrimination which the constitutions forbid.

**§ 465. Blasphemy.**—Blasphemy, according to Blackstone,[16]

[15] Meyers v. Baker, 120 Ill. 567; Com. v. Bearse, 132 Mass. 542; State v. Cate, 58 N. H. 240; State v. Read, 12 Rh. I. 137; State v. Stovall, 103 N. C. 416, 8 S. E. 900; see, also, Com. v. Bacon, 13 Bush (Ky.) 210.

[16] Book IV, p. 59.

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consists in denying the being or providence of God, in contemelious reproaches of Jesus Christ, in profane scoffing at the holy scriptures, or exposing them to contempt and ridicule. It is an offense at common law, but the courts could and should regard the common law rule as abrogated, if or in so far as it is inconsistent with the constitution. In America, some notable cases have been decided under the common law or under earlier statutes, in New York, People v. Ruggles,[17] in 1811; in Pennsylvania, Updegraph v. Com.,[18] in 1822; in Delaware, State v. Chandler,[19] in 1837; and in Massachusetts, Com. v. Kneeland,[20] in 1838. In these cases the opinion was expressed, that a wilful and malicious denial of God, or a similar attack upon Christianity, was sufficient to constitute the offense, one of the arguments relied upon being that Christianity is part of the law of the land. In Massachusetts, the following words were held to be blasphemous: "Universalists believe in a god, which I do not; but believe that their god, with all his moral attributes (aside from nature itself), is nothing more than a mere chimera of their own imagination." The court admitted that a person might simply and sincerely avow his disbelief on proper and suitable occasions, but held that it was not necessary, in order to constitute blasphemy, as was contended for by a dissenting judge, that the denial should involve calumny, detraction or abusive language. In all the other cases the language used was abusive and indecent. The Massachusetts decision is not consistent with present ideas of freedom of conscience and its expression, nor is it conceivable that the Kneeland case would be decided in Massachusetts to-day as it was decided sixty years ago. Public sentiment and long continued practice of toleration must be regarded as conclusive upon the true interpretation of the constitutional freedom of religion, which cannot be irrevocably fixed by one decision rendered by a divided court, and never since acted upon. The decisions in the other cases can be sustained without subscribing to all that was said by the courts in support of them. The freedom of religion demands the freedom of attack; but the right of attack and public propaganda does not justify the violation of public order and common decency. The offense of blasphemy, to be consistent with the constitution, should not be held to be com-

[17] 8 Johns. 290.
[18] 11 S. & R. 394.
[19] 2 Harr. 553.
[20] 20 Pick. 206.

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plete without calumny, detraction or abusive language; it should in other words be treated like profaneness, upon principles applicable to all nuisances.

§ 466. **Regulative legislation.**—The statutes of the different states show a considerable amount of regulative legislation regarding matters of religion.[21] The bulk of it deals with the property rights of religious societies. The exercise of religion practically requires the use of property, but it does not follow that its free exercise involves uncontrolled property relations. Where property is placed in the service of religion, it is done almost universally through the machinery of organised association; property devoted to religious purposes is regularly property belonging to some society. The holding of such property practically requires either a trust or incorporation. Trusts as well as corporations are subject to legislative control, with this difference, that trusts are free, unless specially restrained, while corporations require positive legislative sanction. The statutes of all the states have made provision for the formation of religious societies as property holding bodies. They are not always called corporations; in some states a distinction between incorporated and unincorporated societies is recognised, and in one state, Virginia, the grant of corporate charters to churches is forbidden. But practically the societies formed under statutory provisions enjoy facilities for exercising property rights which give them substantially a corporate character. In providing for their formation, the statutes to a great extent regulate the organisation of the societies, requiring a minimum number of members, specifying the number of trustees, providing for their election, &c. Such regulation operates practically as a restraint, but is hardly felt as such; for the statutes are generally framed for the convenience and accommodation of the societies, and not for their control. Often the plan of organisation peculiar to the church is adopted or sanctioned by the statute.[22] Moreover societies may generally organise themselves irrespective of the statutory provisions, placing their property in the hands of trustees subject to the

[21] See W. H. Roberts, Laws relating to religious corporations, Philadelphia, 1896.

[22] See the statutes of New York applicable to different denominations.

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general rules of equity and waiving the possible advantages of corporate capacity.[23]

There are, however, statutory provisions evincing a clear legislative policy to control or restrain the holding of property by religious organisations. The strongest provision of this character is probably to be found in § 26 of the Act of Congress of March 3d, 1887, requiring that lands of the Mormon church should be held by trustees appointed, on the nomination of church authorities, by the probate court of the territory. Such a provision, applied to only one denomination, is not consistent with religious equality. In all states a maximum amount of property is fixed, beyond which acquisitions are forbidden; often also the power to take by devise or bequest is limited; in Mississippi the Constitution prohibits all devises of real property to religious corporations and associations. These provisions are derived historically from the English statutes of mortmain, and are to the present day frequently designated by that name. Sometimes they are confined to corporations, so that the limitation can be escaped by avoiding corporate organisation.[24] Whether they are regarded as manifestations of the police power or as rules of property, or, in so far as they affect corporations, as conditions annexed to the grant of corporate capacity, their constitutionality has never been questioned; and it may therefore be safely stated that religious liberty does not preclude the regulation or restraint of the right to hold property for religious purposes, and does not impair the well understood and historically established power of the state over the corporate holding of property or the holding of property upon charitable and eleemosynary trusts.[25] Whether freedom of religion requires freedom of association

[23] See Alden v. St. Peter's Parish Church, 158 Ill. 631.

[24] Alden v. St. Peter's Parish Church, 158 Ill. 631.

[25] Under the statutes of New York, prior to the general provision made by chap. 35, General Laws, § 12, different limits were fixed to the amount of property which incorporated churches of different denominations were allowed to hold. Probably such limitations had been fixed with the consent of the churches affected. Differences of limitation of property capacity imposed by the legislature would seem to constitute a discrimination in favor of the churches having a larger capacity, inconsistent with constitutional equality. The first general statute of New York for the holding of property by churches (Act April 6, 1784, chap. 18) recited the "illiberal and partial distribution of charters of incorporation to religious societies."

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for religious purposes, apart from the holding of property, is a question upon which the courts have not passed. The right of association is enjoyed and exercised to the fullest extent without any attempt at legislative restraint or interference. It may be safely asserted that legislative restraint on the right of association for religious purposes, which would in any material respect hamper the free exercise of religion, or favor one denomination against the other, or make the right to associate dependent upon the arbitrary discretion of administrative officers, would be unconstitutional.

**§ 467. Limits of religious freedom.**—The constitutional guaranty of religious liberty covers above all the two cardinal points of worship and doctrine, the two forms in which the uncontrollable facts of faith and opinion find their principal outward expression; it includes secondarily also customs, practices and ceremonies, which, even where they do not form directly a part of worship, are prescribed by religion. That this liberty does not altogether supersede the operation of the police power is recognised by the constitutional proviso found in many states[26] that it shall not excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state, a proviso which may be implied where it is not expressed.[27] Thus acts of cruelty or debauchery would be properly repressed under the police power, though demanded by some religion as a form of worship. In the United States, legislation punishing polygamy was upheld, though the Mormons conscientiously believed that their religion sanctioned and commended the practice. The Supreme Court emphasised the distinction between opinion and precept on the one hand, and practices affecting social order on the other. Quoting with approval Jefferson's words "that it is time enough for the rightful purposes of civil government to interfere when principles break out into overt acts against peace and good order," it held that Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.[28]

**§ 468. Practices and doctrines in conflict with public safety**

[26] Stimson American Statute Law 1, § 41.

[27] Reynold v. United States, 98 U. S. 145.

[28] Reynolds v. United States, 98 U. S. 145.



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**and order.**—The principles which govern the exercise of the police power for the protection of public safety, morals and good order, must determine the extent of possible state interference with religious practices.

Thus it would seem that religious freedom should not prevent the ordinary exercise of the police power over assemblies in public places in the interest of peace and order.[29] In a number of cases, municipal ordinances have been declared invalid which regulated street parades in such a manner as to interfere with the processions and exercises of the salvation army.[30] All these cases, however, were distinguished either by some element of discrimination, or by the vesting of arbitrary discretion in administrative officials, which would have vitiated the ordinances if no question of religious liberty had entered into them. It has, however, been recognised that processions attended with noise or serious disturbance of traffic may be prohibited.[31] Such regulations should be framed in terms wide enough to cover other than religious parades or processions, and under no circumstances should the religious character of the assembly be treated as a cause of disturbance.

Another question arises in connection with the practice of Christian Science; it has been held that under the power to protect the public health the professional practice of faith cure without a license may be prohibited;[32] but also that prayer and encouragement and direction of the thoughts of the patient without recommending or administering any drug or medicine, or giving any course of physical treatment, is not covered by the statutes regulating the practice of medicine.[33] The private non-professional application of faith cure is probably protected by the guaranty of religious freedom. In England and New York the neglect to call in medical aid is under certain circumstances made a criminal offense.[34] A statute of this kind, especially if exception is made for the case of

[29] § 174, *supra*.

[30] Re Frazee, 63 Mich. 396; State v. Dering, 84 Wis. 585, 19 L. R. A. 858; Anderson v. Wellington, 40 Kans. 173, 2 L. R. A. 110, 1888; Chicago v. Trotter, 136 Ill. 430. And see Com. v. Plaisted, 148 Mass. 375, 2 L. R. A. 142.

[31] State v. White, 64 N. H. 48; People ex rel. Cartmill v. Rochester, 44 Hun 166.

[32] State v. Buswell, 40 Neb. 158, 24 L. R. A. 68.

[33] State v. Mylod, 20 R. I. 632, 41 L. R. A. 428. See § 133, *supra*.

[34] 31 and 32 Vict. ch. 122, § 37; Regina v. Downes, 13 Cox C. C. 111, N. Y. Penal Code, § 288; People v. Pierson, 68 N. E. 243.

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the patient himself objecting to medical treatment, may be sustained either on the ground that the obligation to call in medical aid is not inconsistent with the right to resort to other modes of healing, or on the ground that the state may protect the patient against the religious prejudices of those having charge of him.

Some difficulty in assigning the proper limits to religious freedom may be experienced in dealing with incitements to illegal acts by ministers or church officers. The distinction recognised in Reynolds v. United States,[35] between opinion and precept on the one hand, and practice on the other, becomes somewhat unsatisfactory, since the direct procurement of crime is generally regarded as equivalent to the act itself. The acts of Congress against polygamy, however, carefully refrained from dealing with doctrine or preaching. Perhaps the constitutional aspect is this: the doctrine is free as long as it confines itself to general precepts or inculcations of duty, but becomes subject to the criminal law where it aims to bring about individually contemplated acts on the part of the persons addressed, and is followed by such acts as a direct consequence of the words or influence used; the closeness of the connection between exhortation and crime would thus be the determining test.[36]

**§ 469. Conflict between civic and religious duties.**—Another difficulty arises in connection with the question in how far the performance of civic duties may be refused on the plea of religious prohibition. The constitutions provide that religious freedom shall not excuse practices inconsistent with the peace or safety of the state; but such a provision does not cover cases where the peace and safety of the state are not concerned, and where the conduct complained of is not a positive practice, but an omission to act. Two cases will illustrate the difficulty.

In Ferriter v. Tyler[37] a number of Catholic parents had asked a school committee to excuse their children from attendance at school on Catholic holidays. The request was refused,

[35] 98 U. S. 145.

[36] The German Criminal Code (§ 130a) punishes a minister of religion, who in the exercise of his calling discusses political affairs or publishes political writings in such a manner as to endanger the public peace. The French Penal Code (§ 201-203) even forbids the criticism or censure of the government or of governmental acts.

[37] 48 Vt. 444.

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and when the children stayed away on Corpus Christi day, they were expelled, and reinstatement refused, except upon condition of a promise, that the rules of the school should be complied with in future. Thereupon the parents brought an action, which however was dismissed. In sustaining this decree, the Supreme Court said: "Article III. [of the constitution, guaranteeing religious freedom] was not designed to subjugate the residue of the constitution and the important institutions and appliances of the government provided by the enacted laws for serving the highest interests of the public as involved in personal condition and social relations, to the peculiar faith, personal judgment, individual will or wish of any one in respect to religion, however his conscience might demand or protest. In that respect it is implied that while the individual may hold the utmost of his religious faith, and all his ideas, notions and preferences as to religious worship and practice, he holds them in reasonable subserviency to the equal rights of others and to the paramount interests of the public as depending on and to be served by general laws and uniform administration."

In Simon's Executors v. Gratz[38] the plaintiff asked for a continuance of his case on the ground that he had scruples of conscience against appearing in court or attending to any secular business on Saturday. The continuance was not granted, and in sustaining this decision the Supreme Court said: "The religious scruples of persons concerned with the administration of justice will receive all due indulgence that is compatible with the business of the government; and had circumstances permitted it, this cause would not have been ordered for trial on the Jewish Sabbath. But when a continuance for conscience' sake is claimed as a right and at the expense of a Term's delay, the matter assumes a different aspect."

Conflicts such as those mentioned can as a rule be avoided by a proper administration of existing laws, and it would seem to be the constitutional duty of public authorities to reconcile, as far as their discretion allows, civic and religious obligation. A reasonable regard should be paid in the requirement of public service to religious scruples, but no religious

[38] 2 Pa. 412.

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sect should be allowed to claim absolute exemption from a general civic duty. Freedom of religion being a constitutional right, it would seem to be the proper function of the courts to determine what is reasonable on either side. This principle is not inconsistent with anything that was said either in the Vermont or in the Pennsylvania case, but it may be doubted whether it was correctly applied in Vermont; for the absence of a limited number of children for six days in the year (which was all that was claimed) can hardly be said to disarrange the public school system. Conscientious scruples against the bearing of arms cannot relieve from general military duty; some, but not all, states excuse from service in the militia on that ground, but only upon payment of a proper equivalent,[39] and it is not claimed that the exemption is a matter of constitutional right. The constitution of Tennessee provides: "No person shall, in time of peace, be required to perform any service to the public on any day set apart by his religion as a day of rest."[40]

§ 470. **Sunday laws.**—It has been shown before that the enforcement of Sunday rest is regarded as a measure of purely secular and civil character, and as such its constitutionality is firmly established.[41] It is however obvious that the institution of the Sabbath rests historically upon religious injunction, and the connection of the secular law with the law of Christianity has been judicially recognised.[42] In Minnesota and Dakota the acts forbidden are described in the statute as serious interruptions of the repose and religious liberty of the community; it seems to be thereby implied that religious liberty involves a claim to have others respect one's religious feelings and practices. The argument of religious liberty and equality has, on the other hand, been urged against the Sunday laws on behalf of those who observe another day as a day of rest. It has been replied to this argument that the law does not interfere with the religious observance of any other day.[43] A stronger argument may be found in the necessity of uniformity of the day of rest, if peace and quiet is to be secured. If one day is to be

[39] New York 1 Rev. Stat. p. 93, § 5.

[40] Constitution, Art. XI, § 15.

[41] §§ 184-186, *supra*.

[42] State v. Ambs, 20 Mo. 214.

[43] Specht v. Com., 8 Pa. St. 312.

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selected, it is a recommendation rather than an objection, that the day chosen conforms to the voluntary practice of the vast majority of the people, since the choice should cause as little inconvenience as possible. Where, however, the pursuit is not carried on in public, the reason for the uniformity fails, and the claims of those who observe another day are entitled to consideration. In a number of states persons keeping the seventh day as a day of rest (Jews and Sabbatarians) may work on Sundays provided their work do not disturb others.[44] An exemption of this kind in favor of Jews was held unconstitutional in Louisiana as granting special privileges to a class of the community.[45] But when we consider that the prohibition of work carried on in private is justifiable only on the ground of protection against an unfair advantage over those who rest, it is clear that there is no valid reason for the prohibition where another day is observed, and that on the contrary such prohibition creates a special burden. All laws should scrupulously respect the principle of religious equality, and as experience shows that the exemption within the bounds indicated is quite feasible, it should be recognised as a constitutional right.

## FREEDOM OF SPEECH AND PRESS. §§ 471-479.

**§ 471. The constitutional guaranty and censorship.**—The first amendment of the federal constitution provides that Congress shall make no law abridging the freedom of speech or of the press, and an analogous provision is found in the constitution of every state. Freedom of speech and press are thus generally treated together as virtually one and the same right. Viewed from the standpoint of the police power, however, it is clear that speech, unless in a public assembly, could never be controlled in the same manner as the press. The printing press, on the other hand, was in former times, as a matter of course, subjected to the most ample police control. The history of this control is set forth in a note to IV. Blackst. 152 as follows: "The art of printing, soon after its introduction, was looked upon (as well in England

[44] Arkansas, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Jersey, New York, Ohio, Rhode Island, Virginia, West Virginia.

[45] Shreveport v. Levy, 26 La. Ann. 671.

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as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privileges and of license, and finally by the decrees of the court of star-chamber, which limited the number of printers and of presses which each should employ, and prohibited new publications, unless previously approved by proper licensers.[46] On the demolition of this odious jurisdiction, in 1641, the long parliament of Charles I., after their rupture with that prince, assumed the same powers as the star-chamber exercised with respect to the licensing of books, and in 1643, 1647, 1649 and 1652 issued their ordinances for that purpose, founded principally on the star-chamber decree of 1637. In 1662 was passed the statute 13 & 14 Car. II. c. 33, which (with some few alterations) was copied from the parliamentary ordinances.[47] This act expired in 1679, but was revived by statute 1 Jac. II. c. 17, and continued until 1692. It was then continued for two years longer by statute 4 Will. & M. c. 24; but though frequent attempts were made by the government to revive it, in the subsequent part of the reign, yet the parliament resisted it so strongly that it finally expired; and the press became properly free in 1694, and has ever since so continued." Blackstone thus holds, and also makes the statement in the text, that the liberty of the press consists in laying no previous restraints upon publications, and this is in accord-

[46] Hudson, Treatise of the Court of Star Chamber II, § III: "Here also is settled by precise and direct orders what is to be observed for printings of books by the company of stationers, whereby the inconveniences that might arise in the state are more strictly curbed and governed than the abuses of any other trade in the kingdom, for if any of that company transgress the rule and order which in the reign of Queen Mary was, then, by the decree of this court, settled and prescribed unto them, any that will complain maketh oath thereof, and thereupon an attachment is awarded, and he apprehended thereupon, is committed until there be a reformation and satisfaction of the wrong, by which means long and tedious suits are avoided, and present redress ministered, and a well established order honorably sustained." See, also, Dasent, Acts of the Privy Council, 1543, p. 120.

[47] This statute required law books to be licensed by the Lord Chancellor and Chief Justice, books on history and politics by the Secretary of State, and all other books by the Archbishop of Canterbury, or the Bishop of London, or the Chancellor of one of the two universities.

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ance with the statement made by Chief Justice Mansfield in The King v. Dean of St. Asaph:[48] "The liberty of the press consists in printing without any previous license, subject to the consequences of law." This view is also endorsed by American courts, and freedom of the press means therefore primarily the unconstitutionality of censorship.[49]

The abolition of censorship is not inconsistent with the exercise of a certain police control over the press. Germany, which

[48] 3 T. R. 428, note.

[49] Com. v. Blanding, 3 Pick. 304, 1825; Respublica v. Dennie, 4 Yeates, 267, 1805.

During the war with Spain in 1898, a censorship was exercised over cable dispatches, and the Chief Signal Officer for that purpose took constructive possession of the cables in New York. In his report to the President he states that "the authority under which the Chief Signal Officer exercised censorship rests on that proviso of law which vests in the chief Signal Officer of the Army the control and operation of military telegraph lines, and as soon as these cables were militarily occupied by the United States, it fell within his province to fix the order of business and to decline such messages as were prejudicial to the military interests of the United States." It appears, however, from the statutes, that the term "Military Telegraph Lines" refers invariably to certain lines on the Indian and Mexican frontiers for the connection of military posts and stations, constructed, owned and operated by the Government in time of peace as well as war. (Rev. Stat. Title 65, embodying the act of July 24, 1866, and 18 Stat. at Large 388, and 20 St. at L. p. 219, and Army Regulations 1759, 1760.) Neither in the statutes nor in the army regulations is there any provision for the control or possession of private telegraph lines in time of war. It appears from the Chief Signal Officer's Report that the Government proceeded in the matter with the consent of the cable companies, that the Government's possession was merely constructive, and that the actual supervision of dispatches was entrusted to the superintendents of the companies. The companies themselves, however, would have to show some lawful authority to justify the retention of dispatches against the will of the sender or without his knowledge. The whole question is one of the war power, and not of the police power; it is therefore sufficient, in this connection, to raise the question, whether under the decision in ex parte Milligan 4 Wall. 1, the war power of the president, unaided by statutory authority, extends to the control of private rights in places which are not the actual theatre of war.

What unconstitutional control of the press would mean, can be best understood from a brief summary of the Russian law. Books of a certain size are submitted to the censor only after being printed, and are either permitted or forbidden as a whole. The prohibition is subject to a right of appeal to a committee of ministers. The issue of a periodical publication requires a license, the grant or refusal of which rests in the free discretion of the au-

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recognises the principle of the freedom of the press, has the following regulations: Every printed publication must show the name of the printer and publisher, periodical publications also the name of a responsible editor. The sale of publications in public places (streets, conveyances, depots, restaurants) requires a license, which may be refused only for reasons specified by law. Publications which are calculated to give offense in moral or religious respects may not be sold in this manner, and a list of the publications kept for sale must be submitted to the authorities. The publisher of a periodical publication must send a copy of each number to the police of the place where it is published. Subject, perhaps, to an obligation of payment in the case last mentioned, all these regulations seem to be sustainable under our constitutions. A recent statute of Pennsylvania requires every issue of a newspaper to show the name of the owner or publisher, and editor.

thorities. A responsible editor must be confirmed by the government, and can be removed by the publisher only for cause. The sale or assignment of the rights of the publisher requires the consent of the government. The application for a license is accompanied by a programme of the scope of the publication of the paper, which is frequently limited in such a way that political discussions are altogether excluded. The license is either free from censorship or subject to it. Only licenses of the latter class are granted in the provinces. They mean that every issue of the paper must be submitted to the censor and approved by him, before it is published. Papers free from censorship are limited in various ways. Telegrams, local assembly reports, and court news are even here subject to censorship. News regarding domestic troubles, army movements, governmental measures, appointments and promotions may be taken only from official sources. Some matters are altogether excluded, so information regarding the internal condition of educational institutions, religious movements, strikes, anarchists, even reports of suicides. Questions regarding time and wages of labor, and its relation to the employers, may not be discussed. Special topics may at any time be placed on the prohibited list by special administrative order. A paper is always subject to a warning, and after three warnings it may be temporarily or permanently suppressed. The suppression is decreed by a committee of ministers, and forfeits the license of the editor and publisher permanently. Less extreme administrative punishments consist in the prohibition of street sales or of the right to publish advertisements. (See article the Berlin "Nation," 1901-1902, No. 45.) Any one of this long list of restraints violates the principle of the freedom of the press.

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**§ 472. Freedom of speech and press and the law of libel.**[50] That freedom of speech and press does not mean freedom from responsibility for the abuse of that freedom, appears not only from the history of the right, but from express constitutional provisions to that effect. Above all, the constitutions do not legalise libel and slander of other persons, against which the remedies provided for by the common law may be applied. So, also, there is no doubt that speech and press may not be used to corrupt public morals, and obscene or profane utterances by word of mouth, in writing or in print may be made punishable offenses. In Missouri and Kansas, statutes have been upheld punishing the sale of newspapers largely devoted to the publication of scandal, lechery and immoral conduct.[1]

From the point of view of political liberty it therefore becomes an important question, whether libels upon the government are or can be made punishable. The older common law is very clear. Blackstone[2] says, libels are malicious defamations against any person, and especially against a magistrate. And Coke says: "If it be against a magistrate or other public person it is a greater offense, for it concerns not only the breach of the peace but also the scandal of the government."[3] Libel of the government is at common law designated as seditious libel, and a similar offense may be committed verbally by seditious words. Seditious intent may be defined as the intent to vilify or degrade the government in the esteem of the citizens, or to create discontent or disaffection, or to bring the government or constitution into hatred or contempt, or to incite the people to tumult, violence or disorder.[4] It is indifferent at common law whether the seditious utterance is true or false, since the essence of the offense is the provocation to a breach of the peace; but in America the constitutions commonly provide that the truth may be given in evidence. With the exception of one state—Indiana—the truth is, however,

[50] See Stephen, History of the Criminal Law of England, ch. XXIV.

[1] State v. Van Wye, 136 Mo. 227; Re Banks, 56 Kans. 242; see, also, State v. McKee, 73 Conn. 18, 49 L. R. A. 542.

[2] Book IV, p. 150.

[3] 5 Rep. 125.

[4] Act of Congress of July 14, 1798.

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not an absolute justification, especially not when the utterance is malicious. So the constitution of Illinois[5] provides: "In all trials for libel, both civil and criminal, the truth when published with good motives and for justifiable ends will be a sufficient defence." The constitutions therefore do not seem to prevent directly the punishment of malicious attacks upon the government tending to degrade it or to create dissatisfaction.[6]

**§ 473. Fox's Libel Act.**—At the very time of the American revolution, government prosecutions for libel in England gave rise to memorable constitutional struggles, which turned, however, entirely upon the respective provinces of court and jury in determining the libelous character of a publication, the criminality of libels not being questioned. The courts had uniformly ruled that the jury had to pass on the fact of publication, and that it was for the court to determine whether the character of the publication was libelous, while it was vigorously contended by those opposed to the government that the question of intent, and thereby the whole question of criminality of the libel, should be left to the jury. The latter contention finally prevailed in the passage of Fox's Libel Act

[5] Art. II, § 4.

[6] On the defence of truth the following note to the report of the case People v. Croswell, 3 Johns. Cas. N. Y. 337, 1804, is instructive:

"On the last day of the session of the Legislature in April, 1804, a bill entitled 'An Act relative to libels' was delivered to the council of revision, and at the next session of the legislature was sent back with the objections of the council. The principal objection is understood to have been, because the second section of the bill which allowed the truth to be given in evidence as a defence to an indictment for a libel upon any person holding an office of honor profit of trust, or being a candidate for any such office, made no discrimination in respect to the nature, tendency, or intent of the libel, and would therefore authorise not only charges which were fit and proper for public information, but every delineation of private vices, defects or misfortunes, however indecent or offensive, and made no distinction between libels circulated from good motives and for justifiable ends, and such as were circulated for seditious and wicked purposes or to gratify individual malice or revenge. On February 12, 1805, the House of Assembly took into consideration the objections of the Council of Revision to the bill concerning libels, and, the question being put, it was lost by a large majority.

A new act of April 6, 1805, allowed the truth to be given in evidence, if published from good motives and for justifiable ends.

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in 1792, which provided that in trials for libel the jury should give a general verdict of guilty or not guilty upon the whole matter put in issue, and should not be required to find the defendant guilty merely on the proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same in the indictment or information.[7]

The principle thus affirmed by Parliament in England had, as early as 1790, been embodied in the Constitution of Pennsylvania, in a clause providing that "in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." The same principle has found its way into many, if not most, of the American constitutions.

§ 474. **Prosecutions for seditious libel in America.**—It thus appears that freedom of political discussion and criticism was sought to be secured, not by altering the substantive law of libel, but by providing for a popular control of its administration. That the principle of freedom of the press was not believed to be contrary to the punishment of seditious libel, was shown by the enactment by Congress, in 1798, of a sedition act punishing false, scandalous and malicious writings against the government of the United States with intent to defame it, to bring it into contempt and disrepute, to excite the hatred of the people, stir up sedition, or to create unlawful combinations. The accused was allowed by the provisions of the act to give evidence in his defence of the truth of the matter, and the jury were to determine law and fact. Several convictions were obtained under the act, but it was allowed to expire in 1801.[8] In 1805, in Pennsylvania, a prosecution for libel was instituted against a person who had published: "Democracy is scarcely tolerable at any period. It is impossible not to discover the futility of this Government. * * * It is on its trial here, and its issue will be civil war, desolation, and anarchy." The indictment charged the accused with bringing into contempt and hatred the independence of the United States, the constitution of the commonwealth and of the United States, with intent to excite popular discontent and dissatisfaction against the scheme of policy instituted and on trial in the United States * * * , to subvert republican

[7] See Sparf v. United States, 156 U. S. 51, pp. 129-141.

[8] See Wharton, State Trials.

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institutions and free governments, to involve the United States and the Commonwealth in civil war, desolation, and anarchy, to procure by art and force a radical change in the principles and form of government without the free will, wish and concurrence of the people. The court charged the jury, that it was no infraction of the law to publish temperate investigations of the nature and forms of government, and that they must decide whether the defendant as a factious and seditious person with the criminal intentions imputed to him in order to accomplish the objects stated in the indictment, did make and publish the writing in question. The jury rendered a verdict of not guilty.[9] This was probably the last prosecution for seditious libel instituted in this country, and the offense may be said to be practically obsolete.

Custom and public sentiment have come to sanction the widest latitude of criticism of the government, although in most cases it must be impossible to make out, by legal proof, the truth of general charges against a statesman or official or his administration. Where the criminal law is codified, the definition of libel often fails to cover sedition and comprehends only the defamation of individuals.[10] The most ample freedom of discussion of public affairs is now generally understood to be guaranteed by the freedom of speech and of the press, and the long continued practice of toleration may be accepted as sufficient warrant for modifying the interpretation of the express constitutional guaranty to that effect.

**§ 475. Attacks upon government in general—Anarchism.**—A proposition to forbid and punish the teaching or the propagation of the doctrine of anarchism, i. e., the doctrine or belief that all established government is wrongful and pernicious and should be destroyed, is inconsistent with the freedom of speech and press, unless carefully confined to cases of solicitation of crime, which will be discussed presently. As the freedom of religion would have no meaning without the liberty of attacking all religion, so the freedom of political discussion is merely a phrase if it must stop short of questioning the fundamental ideas of politics, law and government.

[9] Respublica v. Dennie, 4 Yeates, 267, 1805.

[10] Illinois Criminal Code, § 177, New York Penal Code, § 242.

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Otherwise every government is justified in drawing the line of free discussion at those principles or institutions, which it deems essential to its perpetuation,—a view to which the Russian government would subscribe.[11] It is of the essence of political liberty that it may create disaffection or other inconvenience to the existing government, otherwise there would be no merit in tolerating it. This toleration, however, like all toleration, is based not upon generosity, but on sound policy; on the consideration, namely, that ideas are not suppressed by suppressing their free and public discussion, and that such discussion alone can render them harmless and remove the excuse for illegality by giving hope of their realisation by lawful means.

**§ 476. Incitement to crime and violence.**—Freedom of speech finds, however, its limit in incitement to crime and violence. By the principles of the common law, the procurement of crime is in itself a criminal act,[12] and a conspiracy to commit a crime is criminal though the end is never accomplished or even undertaken.[13] The prohibition of acts punishable at common law is of course within the constitutional power of the state governments. Therefore a statute may validly forbid all speaking and writing the object of which is to incite directly to the commission of violence and crime. Such was found to be the character of the utterances of the anarchist leaders in Chicago, who were convicted in 1887.[14]

In the anarchistic propaganda it is not easy to draw the

[11] Lord Holt expressed the principle of intolerance when he said: "If people should not be called to account for possessing the people with an ill opinion of the government no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavor to produce animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe without it is punished." Rex v. Tutchin, Holt, p. 424, Bishop I, Sec. 456. Compare, also, 2d Inst. 53: "Against those that attempt to subvert, and enervate the King's Laws, there lieth a writ to the sheriff in nature of a commission * * * and this is *lex terrae*, by process of law, to take a man without answer, or summons in this case; and the reason is, *merito beneficium legis amittit, qui legem ipsam subvertere intendit.*"

[12] Bishop's New Criminal Law I, § 604.

[13] Ibid, I, § 432.

[14] Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320.

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line between discussion or agitation that must or should be tolerated and methods that are or may be made criminal. It is generally conceded that the state may forbid incitement to crime, and incitement not addressed to a specific person nor aimed against a specific person may be brought within the prohibition of the law; and the law may go so far as to treat the glorification of crimes that have been committed as contrary to public order and decency; but the doctrine that crime may under given conditions become justifiable or that it may have a tendency to arouse the public conscience should not in itself be held to constitute a crime. It is clear that an exposition of social wrong or injustice must be allowed, nor can the necessary liberty of agitation be said to be overstepped by appeals to sentiment rather than to reason; and if it is said that appeal to sentiment is appeal to passion and may lead to disorder and violence, it must be answered that this was always the plea upon which political agitation was formerly suppressed. Not even the fact that an adherent of the doctrine commits a crime is conclusive that the teaching of the doctrine amounts to incitement;[15] for the crime may as well have been induced by a morbid brooding over conditions which are the cause of social discontent, and some of the most notable of recent anarchist crimes must probably be accounted for on the latter theory.

§ 477. **Anarchists' cases.**—While thus far the anarchist propaganda has not yet been judicially examined with reference to constitutional liberty of speech, yet the range of necessary toleration above set forth has uniformly been respected in adjudication as well as (until the statutes of 1902 below set forth) legislation. In the Chicago anarchists' case,[16] the Supreme Court of Illinois naturally required proof of actual incitement, for that was a case of prosecution for conspiracy to murder; the legislation which followed undertook to punish speeches or publications advising, encouraging or inciting the destruction of lawful power or authority,[17] but the act was repealed in 1891 without having received authoritative interpretation, and it is therefore left to con-

[15] Stephen Hist. Criminal Law II, 360. "It is one thing to write with a distinct intention to produce disturbances, and another to write violently and recklessly matter likely to produce disturbances."

[16] Spies v. People, 122 Ill. 1, 1887.

[17] Act June 16, 1887.

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jecture what kind of agitation would have been held to be covered by the act. In England a general commendation of the assassination of sovereigns, published in an anarchist paper after the murder of Alexander II. of Russia, was held punishable under statute,[18] and a eulogy in the same paper upon the murder of Cavendish and Burke in 1882 was treated as a libel. An incendiary speech by Most led to his conviction on a charge of unlawful assembly in New York;[19] he had said, "See that you are ready to resist and kill those hirelings of capitalists," and had uttered other threats which while not contemplating immediate action were held to tend toward a breach of the peace. Yet the address considered as an individual act appears to have been deemed insufficient to support a criminal prosecution; hence the charge of unlawful assembly which required proof of the act of three or more; and the acclamation and applause of the audience (who were shown to be anarchists) was held to make out a case of participation in the threats.

Most was again prosecuted for an article in which he denounced government as "murder dominion," advocated the murder of the "murderers," and declared that to spare them was a crime. The publication of the article was held to be a violation of Section 675 of the Penal Code, which makes it a misdemeanor to wilfully and wrongfully commit any act which seriously disturbs or endangers the public peace, for which no other punishment is expressly prescribed.[20]

§ 478. **Legislation.**—A statute was enacted by Congress in 1903 which provides that persons who disbelieve in or who are opposed to all organised government, shall be forbidden to enter the country or to become naturalised. Such a prohibition is not subject to constitutional limitations. No attempt is made by the act to restrain the freedom of speech of anarchists residing in the country.

A statute enacted by the legislature of the state of New York in 1902[21] defines criminal anarchy as the doctrine that organised government should be overthrown by force or violence, and punishes the advocacy, advising or teaching of

[18] Regina v. Most, 7 Q. B. D. 244, Times May 26, 1881, Bishop Cr. L. I, § 768a.

[19] People v. Most, 128 N. Y. 108.

[20] People v. Most, 171 N. Y. 423, 64 N. E. 175, 1902.

[21] Laws 1902, chap. 371; Penal Code § 468 a-c.

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the duty, necessity or propriety of overthrowing or overturning organised government by force or violence, the publication of anarchistic sentiments, the participation in assemblages of anarchists, and the permission of the use of rooms for such assemblages. An act of New Jersey of the same year (chap. 133) punishes the advocacy of the subversion and destruction by force of any and all government, and the incitement, promotion, or encouragement of hostility or opposition to any and all government, also the membership in any organisation formed for that purpose, and the introduction and circulation of pamphlets with the like purpose.

In accordance with the principles above set forth the constitutional guaranty of freedom of speech and press and assembly demands the right to oppose all government and to argue that the overthrow of government cannot be accomplished otherwise than by force; and the statutes referred to, in so far as they deny these rights, should consequently be considered as unconstitutional.

It is probably true to say that to the extent that anarchist agitation exceeds the bounds of free speech it is punishable under the principles of the common law, and that it is impossible to strike at anarchism as a doctrine without jeopardising valuable constitutional rights.[22]

**§ 479. Freedom of culture.**—Freedom in the pursuit of art, literature and science is, as a matter of history, bound up with the freedom of religion and of speech and press, for it has practically never been opposed for other than religious or political motives. To-day this freedom is established to the fullest extent. The points where it comes in contact with

[22] The most conspicuous attempt to suppress revolutionary doctrine and agitation was made in Germany with respect to the Social Democracy. This party likewise advocates the doctrine that the existing capitalistic society must be overthrown by forcible revolution. After the two attempts upon the life of Emperor William in May and June, 1878, a law was enacted absolutely prohibiting the propagation of social-democratic teachings and sanctioning the severest administrative measures. The party thrived and prospered under the law as never before. The law was twice renewed, but was allowed to lapse in 1890, having demonstrated its absolute futility.—The German Penal Code (Sec. 130) prohibits the public incitement of different classes of the population to violence against each other, and, both the German and the French law forbid public ministers of religion to discuss political matters in a manner dangerous to the peace of the state.



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the police power have been touched upon before, and a brief recapitulation will suffice.

The freedom of medical science requires that under the sanitary power no exclusive standards of medical treatment be established, as long as there is respectable scientific dissent from the correctness of the theories which the state might seek to establish.[23] In the matter of vivisection the state should be conceded full power of control, but this power should be exercised with proper regard for investigations for the advance of science.[24] Bona fide scientific or scholarly treatment of offensive subjects should never fall under the ban of the criminally obscene; but the state must have power (to be exercised very sparingly) to control the license of art and literature in the matter of indecency and immorality.[25] The state has power to control the education of minors, and in doing so may further the interests of nationality, but where minors are not concerned, the pursuit of truth and learning must be absolutely free. These principles are so fully recognised by the practice of legislation that they stand unquestioned, even if lacking express judicial confirmation.

### FREEDOM OF ASSEMBLY AND ASSOCIATION. §§ 480-484.

**§ 480. The right of assembly.**—The constitutions secure the right of the people to assemble to consult for the common good, often in conjunction with the right to petition the government for a redress of grievances. Many constitutions speak expressly of peaceably assembling, and the common law and statutory prohibitions of riots and unlawful assemblies disturbing public order or for the purpose of committing unlawful acts, and the powers of officers of the peace to break them up by immediate executive action without judicial process, are not affected by the guaranty.[26] What the constitutions forbid is the restraint or punishment of the mere act of meeting for the purpose of debate, discussion or co-operation;[27] but the acts and objects of the persons assembled

[23] § 152.

[24] § 249.

[25] § 238, 239.

[26] Bishop New Criminal Procedure I, § 183.

[27] So an English statute (13 Car. II, cap. 5) prohibited the repairing of more than ten persons at one time to the King or to either of the Houses of Parliament upon pretence of presenting any petition or address. The same act required every petition signed by more than twenty persons to be approved by three

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may, if unlawful, impress at any time upon the meeting itself an unlawful character.[28] The right to meet peaceably for consultation in respect to public affairs has been declared by the Supreme Court of the United States to be implied in the very idea of a government republican in form.[29]

The constitutional right of assembly, however, does not include the right to use for that purpose the streets and other places owned and controlled by state or municipality, but presupposes that those who assemble have a right to control the place where they meet. If this were not so, the right of assembly would constitute a serious disturbance of the rights of others. Streets and public places are devoted to the use of the whole public for purpose of traffic, intercourse, and exercise, and the use must be enjoyed so that the rights of all are observed. An assembly, however, always interferes with the general public use, and a number of meetings at the same time may cause disorder and conflict. Under proper regulations this effect may perhaps be avoided, but plainly the use for this purpose cannot be claimed as a matter of common right. It must be subject to a police power of regulation, and may be restrained as to time and place, and number and duration of meetings. Since this power of regulation is commonly delegated to municipalities, the courts control it as to its reasonable exercise, and an absolute prohibition of meetings in public places would, as has been intimated, be held to be unreasonable.[30] On the other hand, the absolute authority of the legislature to control the use of public places has been upheld by the Supreme Court of Massachusetts, and confirmed by the United States Supreme Court,[31] on the ground that the power over public places is of a proprietary character.

The question of the right to use public places has been chiefly discussed in connection with parades and processions, which may be regarded as a form of assembly. Municipal regulations were attacked in the courts which restrained

justices of the peace or by the majority of the grand jury. Provisions of this nature would violate the American constitutional guaranties.

[28] People v. Most, 128 N. Y. 108.

[29] United States v. Cruikshank, 92 U. S. 542.

[30] Anderson v. Wellington, 40 Kans. 173, 2 L. R. A. 110; Chicago v. Trotter, 136 Ill. 430. See § 174, *supra*.

[31] Com. v. Davis, 162 Mass. 510; Davis v. Massachusetts, 167 U. S. 43.

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parades and processions attended with music, by requiring special permits and licenses. In several cases these regulations were aimed particularly at the Salvation Army, and exceptions were made in favor of specified kinds of parades. Such a regulation was upheld in Massachusetts,[32] but declared unreasonable and void in other states.[33] The adverse decisions can, however, be used only as authority for the principle that municipal regulations must not be oppressive or partial, and that arbitrary discretion to discriminate must not be vested in executive officers. The question whether the legislature itself may violate the principle of equality in the regulation of the right to parade, has not been distinctly raised or discussed; it would, in any event, present a different issue from the right of assembly.

The right of public assembly is probably not inconsistent with reasonable regulations, even where public grounds are not used. The French law of June 30, 1881, proclaiming the liberty of public assembly, nevertheless requires for the holding of a public meeting preliminary notice to the police which has the right to detail an officer to attend the meeting; it requires that the meeting be organised with a responsible committee, and it forbids the holding of meetings later than eleven o'clock at night. Provisions of this character can hardly be regarded as substantial impairments of the constitutional right.

**§ 481. History of the right of association.**—It is somewhat remarkable that while our constitutions through their bills of rights protect the right of assembly, they should be silent as to the right of association, whereas on the continent of Europe, in the struggle for political liberty, equal stress has been and is laid upon both. The difference between assembly and association is obvious: assembly is the physical act of the meeting of many in one place, with or without organisation: association presupposes organisation, and implies a relation of some permanence between a number of persons. The right of assembly does not necessarily include that of association, or vice versa, although both are mutually supplementary, and each a valuable aid to the other. For the maintenance of political liberty, the right of association is fully as important

[32] Com. v. Plaisted, 148 Mass. 375, 2 L. R. A. 142.

[33] See § 643, 644, 729.

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as the right of assembly, and it is therefore of interest to inquire how far it is, in America, a constitutional right.

We should eliminate from this inquiry associations with an economic or commercial object. So far as these are in restraint of trade, they have been treated of before. Joint stock companies have always been entirely free in America, while in England they were at one time restrained by the so-called Bubble Act,[34] which was, however, not applied to co-operative associations the shares of which were not freely transferable,[35] and at present are entirely regulated by statute.

Associations in general were not until the end of the eighteenth century made the subject of restrictive statutory legislation in England. It is said that under the early common law it was a punishable offense to maintain an organised association, a *communa* or a gild, without the king's license, and the royal exchequer was enriched by fines levied periodically upon "*gildae adulterinae;*"[36] but this prohibition appears not to have been enforced in later times.[37] Unlawful associations were covered by the law of conspiracy and treated as crimes; any object injurious to the public was held sufficient to stamp the association pursuing it as a conspiracy; but the chief forms of conspiracy were those to indict another falsely, and those in restraint of trade. The latter have already been treated of. Hudson, in his treatise on the Star Chamber,[38] speaks only of conspiracies to falsely indict, i. e., for malicious prosecution, and it is in the Star Chamber, if anywhere, that we should expect to find repressive proceedings against unlawful associations of a social or political character. Stephen, in his History of the Criminal Law, in speaking of seditious conspiracy, says[39]: "It would be difficult to say precisely at what period the use of completely organised voluntary associations for the purpose of obtaining political objects first became a marked feature of English political life, but

[34] 6 Geo. I, ch. 18.

[35] Rex v. Webb, 14 East. 406; Pratt v. Hutchinson, 15 East. 511.

[36] See Maddox Firma Burgi, *passim*.

[37] Parliament, by acts passed in 1437 (15 H. VI, cap. 6) and 1503 (19 H. VII, cap. 7) required ordinances of gilds to be approved by justices of the peace; but these ordinances were virtually regulations of trade binding in the locality.

[38] Collectanea Juridica II, 104-107.

[39] II, 377.

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it is certain that it received a great accession of importance, to say the least, when associations began to be formed for the purpose of procuring changes in the constitution of Parliament and the other institutions of the country by constitutional means. In earlier times the great questions which agitated the country hardly admitted of such associations. A voluntary association of the religious kind under the Tudors or Stuarts would have rendered its members liable to severe penalties under the Act of Uniformity. An association for the purpose of dethroning James II. or for reinstating James III. would have been high treason. It was not until the public at large, or considerable sections of it, began to agitate for changes in the constitution to be effected by Act of Parliament, that the formation of societies openly and avowedly intended for that purpose, became possible."

A political association agitating against the government could at any time have been dealt with as a conspiracy to stir up sedition. However, in 1799, an act was passed,[40] revived and made perpetual in 1817,[41] which made illegal all associations requiring of their members an oath, among other things, to obey the commands of a committee or other person not having authority by law for that purpose,[42] or not to inform or give evidence against any associate; also all associations whose members subscribe or assent to any test not required by law or approved by justices of the peace, or which keep the names of their members, or of their governing committees or other officers, secret; also all associations composed of different divisions or branches with distinct organisation, or communicating by delegates with other societies; making exceptions in favor of religious and charitable societies, and of Free Masons. Parliament thus, it is true, under the stress of great political excitement, undertook to restrain the right of political association, not only by forbidding clubs whose constitution encouraged or facilitated lawlessness through the requirement of secrecy and implicit obedience, but by striking at all combination and co-operation of political societies,—a most serious check upon political agitation.

§ 482. **Constitutional power in America.**—In America noth-

[40] 39 Geo. III, cap. 79.

[41] 57 Geo. III, cap. 19.

[42] Such associations are also forbidden in Germany, Penal Code, § 128.

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ing similar has ever been attempted by legislation. There has been and is the most absolute toleration of all political associations. This, however, does not necessarily mean lack of constitutional power of regulation. Is there any good reason why the legislature should not have power to prohibit secret societies or societies whose members should bind themselves by oath to obey implicitly the orders of superiors? Such a prohibition would seem to be within the legitimate scope of the police power for the prevention of crime and disorder; for the possibility of abuse of such organisation for criminal purposes is apparent, and it certainly impedes the efficient administration of justice. For support of this view reliance may be placed upon the analogy of the prohibition of unauthorised military organisations, which has been upheld as a measure for the public peace, although the right to bear arms is guaranteed by the constitutions.[43] On the other hand, the co-operation of different political societies may be quite essential for their greater efficiency, and is an invaluable aid to legitimate political agitation. Not having any plausible relation to disorder or disturbance of the peace, it seems that such co-operation could not be validly prohibited. The right of association should then be treated as subject to regulation and restraint on the general principles of the police power for the maintenance of peace and order, and these principles afford to all interests concerned the needed protection.

**§ 483. Political parties and primary election laws.**—The primary election laws enacted in recent years in many states undertake to regulate the action of political parties in important particulars, substituting in some respects absolutely binding rules imposed by the legislature for the former power of autonomous management. Thus presiding officers at primary elections may be required to take the oath of election inspectors, or may even be appointed by civil authorities; the right to vote and the disposition of challenges is provided for; the appointment of watchers is required; and the whole conduct of the primary election is placed under a control regulated by law. Moreover, in New York, the election and term of office of the members of the general committee of the party is determined by law, so that the attempted removal

[43] § 91, *supra*.

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from office by the committee of one of its members has been held to be illegal.[44] Upon what principle can such incisive control of party action be reconciled with the principle of freedom of political association?

A certain amount of regulation may be justified on the ground that an individual member or a minority is entitled to protection against the abuse of majority powers. It is well established that a member of a club may have a judicial remedy against unwarranted expulsion; but in granting it the courts merely enforce the fair application of the existing rules of the association, and no attempts are made to supersede its autonomy. The plea of minority protection can certainly not justify the compulsory admission of individuals to the right to vote at primary elections.

It may also be urged that in primary elections the party exercises a public function essential to the legally established machinery of filling offices, and that upon that ground their action is under public control.[45] The recognition by our public law of the legal status of the party as an agency in the making up of our government is, indeed, a development of marked interest.[46] But it is to be noticed that for the purpose of controlling primary elections the whole party machinery is virtually brought under state regulation, and the question must arise whether this is consistent with political liberty. A strict enforcement of the principle of equality as between different parties would prevent flagrant abuses of the powers of the state; but if the principle of public control is recognised without qualification, independence of political agitation may be seriously impaired.

It is, however, possible to explain the power of control over party machinery without resorting to the police power at all. This control, as has been said, is only exercised in connection with the conduct of primary elections; the primary election laws, again, are an outgrowth of the so-called Australian ballot system, one of the principal features of which is the printing of ballots at public expense. An examination of the laws will show that the compliance with

[44] People ex rel. Coffey v. Democratic General Committee, 164 N. Y. 335, 58 N. E. 124.

[45] This view is taken strongly in Oregon. Ladd v. Holmes, 66 Pac. 714.

[46] See F. J. Goodnow, Politics and Administration, New York, 1899.

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primary election laws and the submission to the control established by them is simply a condition precedent to having the party recognised as such on the ballot, and to having the names of its members printed thereon at the public expense: in other words, it is the price voluntarily paid for the enjoyment of a privilege so valuable that a party will not easily forego it. A political organisation not claiming similar privileges may avail itself of the provisions made by law for independent nominations, and thereby escape the legal control over its machinery. A party preferring to make use of the privileges conferred by the primary election laws, ceases to be *privati juris* and consents to become an instrument for securing fair elections; otherwise the expense of the primary election could not be charged to the public. Ceasing to be *privati juris*, it cannot claim the rights of private liberty or the application of the ordinary limitations of the police power.

**§ 484. Conclusions reached.**—The foregoing considerations lead to the following conclusions: the right of association may be placed under restraint in the interest of peace, order and security; it may be subjected to uniform, impartial and reasonable regulations for the protection of the members of the association and of the public dealing with it; but an impairment of the right not called for by the interests mentioned would be unconstitutional as inconsistent with the principles of liberty essential to the existence of a republican government. In other words, the general principles of the police power are adequate to protect this right, as they are adequate to protect other rights, and as they would be adequate to protect freedom of speech, press and assembly, without express clauses in the constitutions. Associations for social purposes (including literary, artistic and scientific societies) stand on the same footing of liberty.

The principle may perhaps be formulated in this way: political and social discussion and agitation, whether through speech or press or assembly or association, not resorting or inciting to violence or crime or the legal injury of private rights, is subject to the police power only for the purpose of reasonable regulation tending to subserve its legitimate purpose, but not for the purpose of substantial impairment or suppression.[47]

[47] Social control.—May the right of association be freely used for the purpose of influencing and controlling, through organised social pres-

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sure, standards of individual conduct? Would, in other words, a boycott for social purposes be lawful? The boycotts with which the courts have had to deal have had for their object the control of business relations, and no boycott has been declared illegal which scrupulously avoided threats and intimidation and libelous or abusive language. As a matter of fact, social control has not yet assumed the form of a boycott. The most incisive forms of organised social proceeding against an individual are expulsion from societies and excommunication from the church; but in these cases the individual by joining the organisation has voluntarily subjected himself to its jurisdiction. On principle, a political community which assigns to state compulsion the narrowest possible limits invites social self-protection and depends upon it. It should therefore allow the widest scope to voluntary organised and associated action, insisting at the same time upon the most scrupulous respect of individual rights of person and property, and enforcing the strictest liability for violence, fraud and defamation.

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# CHAPTER XXIII.

## CIVIL LIBERTY: ECONOMIC.

FREEDOM OF MIGRATION AND SETTLEMENT. §§ 485-491.

**§ 485. Considerations of public welfare.**—The character, the density and the distribution of the population are of supreme interest to the state from the political as well as the economic point of view. A state may deem it necessary or expedient to keep undesirable elements out of its borders, or, if within the territory, to segregate or confine them to certain districts, or to prevent the emigration of its people, or to check the movement from one portion of the territory to another, or from country to city, or to encourage it. The exercise of state authority, however, in this direction is open to the objection that artificial restraints on the movement of population lead to individual hardship and distress, tax and elude the vigilance of the authorities, run counter to economic laws, and fail to produce the desired result. Except within well defined limits, the police power therefore yields to the principle of liberty of migration and settlement.

**§ 486. Movement from and to foreign countries.**—In the control of immigration we should distinguish measures which aim to protect the territory and the people from disease and crime, and those which have an economic or political object. Measures of the former character were enacted by the states until Congress acted; but since federal legislation now gives adequate protection by excluding idiots and insane, paupers or persons likely to become public charges, persons suffering from a loathsome or dangerous contagious disease, persons convicted of crimes, and polygamists, state legislation is now practically confined to quarantine measures.[1] Measures going beyond the absolute need of protection are regarded as regulations of commerce, and hence beyond the power of the state.[2] But immigration is within the absolute control

[1] Act of March 3, 1891, I Suppl. 934. March 3, 1903, 32 Stat. at L. 1213; under this act also anarchists.

[2] Passenger cases, 7 How. 282; Henderson v. Mayor, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275; People v. Compagnie Generale Transatlantique, 107 U. S. 59; Compagnie Francaise v. State Board of Health, 186 U. S. 380.



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of the federal government by virtue of the power of territorial sovereignty,[3] and Congress has in its measures gone beyond the protection of safety, order and morals; it has excluded laborers under contract,[4] and Chinese laborers,[5] and bills of more stringent character have been repeatedly considered by Congress, but have hitherto failed to become laws. The power to prohibit immigration includes the power of strict supervision over all immigration to enforce existing prohibitions.[6]

§ 487. **Emigration and expatriation.**—By statute of July 27, 1868,[7] Congress enacted as follows: "Whereas the right of expatriation is a natural and inherent right of all people indispensable to the enjoyment of the rights of life, liberty and of pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: therefore any declaration, instruction, opinion, order or decision of any officer of the United States which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic."

This is as strong a declaration of governmental principle and policy as it is possible for the legislature to make; at the same time if the principle is not one of constitutional law, succeeding legislatures are not bound by the declaration.[8] As a matter of general public law, the power to restrain emigration belongs to the territorial sovereignty of every nation,[9] and its exercise may be necessary to enforce the performance

[3] Fong Yue Ting v. United States, 149 U. S. 698.

[4] Act of February 26, 1885, I Suppl. 479.

[5] Act of May 5, 1892, II Suppl. 13. As to anarchists, see § 478, *supra*.

[6] See Act March 3, 1903, 32 Stat. at L. 1213.

[7] Revised Statutes § 1999.

[8] Fong Yue Ting v. United States, 149 U. S. 698.

[9] Phillimore International Law I. 444. A Royal proclamation requiring the license of the Commissioners of Plantations for emigration to America was issued in 1637 (XX Rymer's Foedera 143). See Frank-

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of certain duties, as, e. g., of military service; but it is not a violation of any international obligation for one state to receive a person whose emigration was prohibited by his sovereign, and this is plainly implied in the act of Congress above quoted, and has been constantly affirmed by the American government.[10]

Most nations have abandoned the policy of restraining emigration by force, and the United States has never had occasion to adopt such policy. The right to leave the country would not necessarily draw with it the right of expatriation, i. e., the right to throw off allegiance and citizenship; but the right of expatriation, recognised as inherent by Congress, cannot be conceived without a right of emigration. The constitution is silent upon any such right, and the question is whether a limitation of governmental powers is to be implied. The arguments in favor of such implication are: the fact that the United States has been founded upon emigration and grown by expatriation, the constant assertion of the liberty of emigration as against other nations; and the practice of our legislation. The latter argument is of relatively little strength, as governmental inaction which is fully explained by the absence of any need of action cannot be interpreted as a confession of lack of power; moreover in restraining immigration the United States has shown that it does not interpret the inherent right to emigrate as including the right to be received by other nations, and yet perfect freedom of migration demands leave to come as well as leave to go. The implication on the other hand is strongly negatived by the general principle that the right of territorial sovereignty should as a matter of law remain unimpaired, since an imperative necessity for its exercise may arise. The traditions of the policy constantly advocated by the American government are sufficiently strong to make it extremely improbable that Congress will attempt to restrain emigration; if, however, it should do so, directly or indirectly, it is just as improbable that the Supreme Court would deny its power to act.

lin's Works IV, 458, against the policy and justice of restraints on emigration in connection with a proposed act of Parliament.

[10] Wharton, Digest of International Law, § 171-172a.

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It is, however, very clear that the states have no power to prevent emigration to foreign countries, since that would amount to a regulation of foreign commerce or of international relations.

**§ 488. Right to come into a state.**—The power of each state to keep from its borders persons dangerous to health or safety has been discussed before.[11] It may apply to persons coming from other states as well as from abroad; and as Congress has not legislated upon interstate migration as it has upon immigration, the power of the states may still be called into play. Legislation is practically confined to the enforcement of quarantine in case of epidemic disease; in that emergency powers of exclusion are exercised and sustained.[12]

Apart from measures necessary for self-protection of this kind, it has been held that the states cannot restrain persons generally from leaving the state or passing through the state, since such leaving or passing may be necessary for the exercise of privileges of citizenship of the United States, such as going to the capital or going to the courts of the United States.[13] The case last cited was decided before the Fourteenth Amendment became law, but recognised in substance one of the principles secured by that amendment; for the right to travel throughout the country is clearly one of the privileges and immunities of national citizenship.

The right of the citizen of one state to come into another state and settle there is guaranteed by Article IV, Section 2, of the Constitution, granting to the citizens of each state the privileges of the citizens of the several states.

Before the Fourteenth Amendment was added to the Constitution, a number of states prohibited the immigration of free negroes and other persons of color from other states. A provision of that character, though now of no effect, remains in the constitution of Oregon.[14] A negro at that time not being a citizen, Article IV, Section 2, of the Constitution, did not apply. Laws of Southern states, however, excluding colored seamen from their ports were held to be unconstitutional as restraints upon commerce.[15] The exclusion of free

[11] See § 101, *supra*.

[12] Louisiana v. Texas, 176 U. S. 1; Compagnie Francaise v. State Board of Health, 186 U. S. 380.

[13] Crandall v. Nevada, 6 Wall 35.

[14] Art 1, Sec. 35.

[15] 1 Op. Att. Gen. 659; The Cynosure, 1 Sprague 88, Fed. Cases No. 3529.

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negroes from settlement was sustained in the state courts;[16] and it is not unlikely that the Supreme Court of the United States would have treated them as being on the same footing with convicts or paupers, i. e., as elements dangerous to the peace if not to the morals of the community. The matter has now at most an historical interest.

The exclusion of aliens must be beyond the power of the several states. The protection of foreigners rests with the government of the United States, which is internationally responsible for their treatment; a state law which should deny them a privilege generally conceded by international comity would therefore be an unwarranted interference with the prerogatives of national sovereignty. It cannot make any difference that the alien comes from another state, and not directly from abroad.

§ 489. **Emigration from a state.**—If the right to travel throughout the country is a privilege of United States citizenship, a state cannot prevent its citizens from visiting other states; and since the motive of those leaving the state cannot be inquired into, it cannot prevent emigration. In some states (Indiana, Kentucky, Oregon, Pennsylvania) the right to emigrate is guaranteed by the constitution. A few of the Southern states (Alabama, North Carolina, South Carolina, Georgia), have enacted legislation imposing heavy license taxes upon persons engaged in the business of hiring laborers in the state to be employed beyond the limits of that state. Except where the license fee was prohibitive,[17] these laws have been upheld by the state courts,[18] and also by the United States Supreme Court, on the ground that they are simply measures of taxation, and that the business of the emigrant agent, not being interstate commerce, is liable to state taxation.[19] The Supreme Court says that if the freedom of egress from the state is affected, it is only incidentally and remotely; but it also admits that the state can properly discriminate in its police and fiscal legislation between occupations which

[16] Nelson v. People, 33 Ill. 390; Hatwood v. State, 18 Ind. 492; Pendleton v. State, 6 Ark. 509.

[17] Joseph v. Randolph, 71 Ala. 499, 46 Am. Rep. 347; State v. Moore, 113 N. C. 697.

[18] Williams v. Fears, 110 Ga. 584, 35 S. E. 699; State v. Hunt, 129 N. C. 686, 40 S. E. 216; State v. Napier, 63 S. C. 60, 41 S. E. 13.

[19] Williams v. Fears, 179 U. S. 270.

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tend to induce the laboring population to leave and those which tend to induce that population to remain. In view of the decision in Crandall v. Nevada[20] it must, however, be assumed that no direct burden or restraint could be laid upon persons desiring to migrate from state to state.

**§ 490. Movement from and to United States territories.**— The right to migrate within the United States is protected against adverse state legislation, because it is one of the privileges and immunities of a citizen of the United States: if so, it ought to protect against federal as well as state legislation, although the Fourteenth Amendment speaks only of the latter; for the privileges secured by the Fourteenth Amendment are fundamental, and fundamental rights under our theory of government cannot be abridged by legislation. No attempt has hitherto been made to control by act of Congress the right of citizens to move from place to place or to settle in any place within the United States. The prohibition of settlements on lands granted to Indian tribes[21] is directed against infringements of proprietary rights, and the status of Indian tribes as dependent nations places the lands occupied by them outside of the territory to which the common rights of citizens apply.

The acquisition of foreign possessions is apt to raise new questions as to the power of Congress over migration and settlement: Are United States citizens as free to settle in these possessions as in other territories? Will the inhabitants of these possessions be free to come to the United States, as a matter of constitutional right? The cases so far decided by the Supreme Court do not answer these questions directly, nor do they admit of any clear inference. But there is reason to suppose that the desire to keep Congress unrestrained by constitutional limitations, which is manifest in the opinions of the majority of the judges in the Insular Cases,[22] was influenced by the consideration that if the constitution were fully extended to the tropical possessions, Congress would be powerless to inhibit the influx of undesirable elements into the population of the United States. The distinction between incorporated and appurtenant territory, emphasised by Jus-

[20] 6 Wall. 35.

[21] United States Rev. Stat., Sec. 2118.

[22] Downes v. Bidwell, 182 U. S. 244.

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tices White, Shiras and McKenna, points in that direction. If it is held that the new possessions are not part of the United States, persons born within them since the annexation would not fall within the definition of citizenship contained in the Fourteenth Amendment, and while it might still be contended with great force that by the common law, which the Fourteenth Amendment did not intend to impair, there is no difference between citizen and subject, but only one status of allegiance, yet the law of citizenship, if not bound by the letter of the constitution, could be altered by Congress. It seems that the right of free migration is the only incident of citizenship, to the grant of which to the inhabitants of the new possessions there is strong opposition; and it seems to be assumed that citizenship carries the right of migration and settlement with it as a matter of course. The unity of the nation and of the territory is in no respect marked more strongly than in the freedom of movement throughout its extent, and the restriction of that freedom with regard to any part of that territory is the clearest evidence that that part is to be treated as dependent and in a manner foreign.

**§ 491. Migration and settlement within a state.**—If it is a privilege of a citizen of the United States to move freely within the whole country, the power of the state to control the migration and settlement of its own people within its own territory must logically be denied, for the whole country includes the state. But apart from the federal constitution, the right of each individual to travel about and to choose his residence must be regarded as an essential part of the liberty which every state constitution guarantees. Experience has shown that governmental interference with the natural movement of population is unwise, oppressive and futile. There is nothing in modern legislation to parallel the various royal proclamations issued in England toward the end of the sixteenth and beginning of the seventeenth century, prohibiting the building of houses in the London suburbs, because with such multitudes many must live by begging or worse means,[23] or directing noblemen, knights, and gentlemen having houses in the country to abide there until the end of the summer, and attend to their duties.[24] It would not be difficult to

[23] 1602; 3d Inst. 204, XVI Rymer's Foedera 448.

[24] 1617 and 1622; XVII Rymer's Foedera, 147.



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find plausible arguments in favor of a policy restraining migration; so where depopulation would increase to those remaining the burden of municipal indebtedness, or where country districts are deserted to the prejudice of agricultural interests, or where the excessive growth of cities seems to produce misgovernment;[25] but all such considerations are outweighed by the great advantage which the individual and indirectly the state gains from absolute liberty of movement. The recognition of these advantages has led in nearly all civilised countries to the abandonment of the policy of restraint. The state may offer inducements to direct migration, and may use the proprietary control which it exercises over public lands for that purpose; but individual liberty is not thereby impaired.

If legitimate purposes do not justify the impairment of the general liberty of migration and settlement, measures for the separation of classes must be still more obnoxious to the constitution. While the United States Supreme Court has sanctioned compulsory separation of white and colored persons in public conveyances, it has intimated that the assignment of separate residence districts on the basis of color, creed or nationality would not be tolerated, and it has been held that Chinese persons cannot be compelled to live in one portion of a city.[26] A compulsion of this character will almost invariably be contrary to the equal protection of the laws.

However, as has been shown before,[27] liberty of settlement cannot be claimed by those who cannot support themselves, for their taking up a residence in a district means the imposition of a pecuniary burden upon the community. Hence paupers, i. e., persons actually chargeable upon the public, not merely likely to become chargeable, may be compelled to remain where they have their domicile and may be removed to it,[28] and a vagrant may be punished more severely

[25] In Germany the establishment of a new "colony," i. e., an urban community outside of existing towns or cities, is regulated by law for the purpose of securing proper provision for schools, etc.

[26] In re Lee Sing, 43 Fed. Rep. 359. See §§ 699-700, *infra*.

[27] § 271, *supra*.

[28] Lovell v. Seeback, 45 Minn. 465, 11 L. R. A. 667.

The restraint upon persons likely

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if he is found outside the county of his residence.[29] In these cases the restraint of liberty is justified by the condition of the person restrained, and does not rely upon considerations of public welfare for which he is not responsible. Convicts on parole being technically prisoners may be confined to designated districts.

## FREEDOM OF PURSUIT OF LIVELIHOOD. §§ 492-497.

**§ 492. Restriction on right to pursue business as distinguished from regulation.**—The freedom of engaging in a business or vocation is not inconsistent with regulations regarding the manner of its conduct imposed upon one of the recognised grounds of the police power. This freedom is, however, impaired not merely where the right to engage in a business is absolutely denied, but also where it is made to depend upon conditions precedent of a burdensome or discriminating character. The following restrictions illustrate a policy of legislation which has on the whole been superseded: those making a distinction between city and country, confining certain pursuits to one or the other;[30] those based on difference of sex; the requirement of local citizenship or membership in a corporation, exclusive trading privileges, and the prohibition against the pursuit of several trades by the same person.[31] The last mentioned form of restraint was not uncommon in the early English legislation,[32] and is found in the colonial laws of Massachusetts.[33] At the present day restraints consist either in the requirement of a license, sometimes coupled with the exaction of a bond, or in the requirement of proper qualification, generally tested by examination; in a few cases

to become chargeable is inconsistent with constitutional rights, and has been abandoned in England and most American states. Where it is still retained, as in Pennsylvania, its effect has hardly been properly considered by the courts; see § 271, *supra;* it may, however, be applied to immigrants; see Act of March 3, 1903, 32 Stat. at Large, p. 1213.

[29] State v. Hogan, 63 Ohio St. 202, 58 N. E. 572.

[30] So 1 & 2 P. & M. cap. 7, persons living in the country not to sell at retail in the city.

[31] All these were abolished by the German Trade Code, which established the principle of the freedom of occupation.

[32] 13 Ric. II St. 1, c. 12, tanners not to be shoemakers; 22 H. VIII, cap. 6, butchers not to keep tan houses; 23 H. VIII, cap. 4, brewers not to be coopers.

[33] Revised Laws 1649, butchers not to tan leather.

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(railroads and insurance) the conduct of a business is by some laws confined to corporations.

**§ 493. Classes of business requiring license.**—An examination of the statutes of New York, Massachusetts and Illinois shows that in either one or more of these states the following occupations are not free in the sense just indicated: the business of architects, auctioneers, chiropodists, dentists, druggists, engineers of stationary engines, employment business or intelligence offices, embalmers, horseshoers, innkeepers, infants' boarding houses, private insane asylums, insurance and insurance brokerage, junk and second-hand dealers, mine managers, examiners and hoisting engineers, masters, pilots and engineers of vessels operated by machinery, liquor dealers, keepers of places of amusement, pawnbrokers, peddlers, plumbers, lawyers, physicians, surgeons and veterinary surgeons, railroads and warehouses. To this list should be added from other states barbers, commission merchants, and opticians. Legislation in all states has been very active in recent years in filling up the list, in which no account is taken of trades creating nuisances and trades using highways in a special manner or asking special privileges.[34]

It is instructive to compare this list with the list of trades and vocations excepted by the German trade code from the principle of freedom of occupation. This includes: useful but offensive industries, managing steam boilers, keeping of private hospitals and asylums, the business of druggists, horseshoers, pilots and naval engineers, managers of plays, exhibitions and amusements, innkeepers, common victuallers and liquor sellers, pawnbrokers, junk and second-hand dealers, scavengers, dealers in explosives, dealers in lottery tickets, auctioneers, different kinds of brokers, peddlers, surveyors, assayers, weighers (who may also be placed under oath), teachers of dancing, swimming and gymnastics, emigrant agents, and the business of education, insurance, railroads, navigation and mining.

A comparison between the two lists shows a marked

[34] A business which requires special privileges, which cannot be indiscriminately bestowed, can of course not be free, so the operation of street railroads. Goddard v. Chicago & N. W. Ry. Co., 202 Ill. 362, 66 N. E. 1066.

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similarity, and it is natural to ask whether it is possible to discover fixed principles underlying the restrained trades, and thus establish a definite scope of constitutional liberty of pursuit of livelihood. The restrictions thus far imposed have been uniformly sustained by the courts except in cases where there was some element of unconstitutionality not going to the root of the matter, but touching merely particular provisions of the statutes,[35] and the Supreme Court of the United States has held that they are not contrary to the guaranties of the Fourteenth Amendment.[36]

**§ 494. Legitimate grounds of restraint and protection from competition.**—In an earlier portion of this treatise the attempt has been made to assign the various restrictions to the several heads of the police power, and it has been shown that they may be reduced to the following classification: prevention of crime or of its concealment (pawnbrokers, junk dealers), protection of morals and order (liquor selling, public amusements), prevention of fraud (peddlers, auctioneers, employment offices, insurance, warehousing), and protection of health and safety (the great mass of other restrictions).

It may be said that where none of these public interests come into play, there is no warrant for the exercise of the police power, but it must be asked whether this limitation gives adequate protection to the principle of liberty. There are few trades that cannot be so exercised as to endanger in a remote degree health and safety, or so as to expose the public to fraud. There are very few cases indeed in which restrictions will be avowedly based upon the desirability of restraining competition, and it is generally conceded that the danger of competition on the part of free citizens (the competition of convicts and of foreigners is met by legislation) is no legitimate ground of state interference, for the greatest and most successful exertion of industry and genius by legitimate methods cannot be regarded as detrimental to the public welfare. Thus no attempt at legislation against de-

[35] State v. Gardner, 58 Oh. St. 599, 51 N. E. 136; Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; Harmon v. State, 66 Oh. St. 249, 64 N. E. 117, 58 L. R. A. 618; Lasher v. People, 183 Ill. 226, 55 N. E. 663.

[36] Dent v. West Virginia, 129 U. S. 114; Crowley v. Christensen, 137 U. S. 86; W. W. Cargill Co. v. Minnesota, 180 U. S. 452.

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partment stores has been successful.[37] To prevent an abuse of the police power for the alleged protection of health or safety or the alleged prevention of fraud, the courts must be allowed to judge whether restrictive measures have really these ends in view. A remote and slight danger should not be recognised as a sufficient ground of restriction, and the provisions of the law should be scrutinised in order to see whether they in reality tend to effectuate their object. To illustrate: a law of Minnesota requires three years' apprenticeship or three years attendance at a barbers' school and an examination of every person who wishes to pursue the avocation of a barber, the person must be free from infectious or contagious disease, must have the requisite skill, and a knowledge of the common diseases of the face or skin. The law is sustained by the supreme court of the state.[38] Yet it is clear that the chief danger to the barbers' customers arises from uncleanliness in the care of the instruments; the law has no provision guarding against that danger, while its requirements are either needlessly strict or without guaranties of fulfilment. Such a law should not be held to be constitutional. The mediaeval requirement of apprenticeship to all ordinary trades had for its avowed object the securing of competent workmanship, better service to the public, and "the improvement of the commodity." By general consent the police power at present does not interfere for these purposes. Even for the prevention of fraud only those forms of business are restrained which present exceptional facilities for imposition upon the public, or which invite the public confidence in an extraordinary degree. So for the protection of morals as a rule only those pursuits are controlled which have a notorious connection with vice or disorder.

As the danger of fraud and immorality depends upon the character of the person, the method of restraint is usually the requirement of a license to be granted in the free or judicial discretion of administrative authorities. The constitutional aspect of such discretion will be discussed in connection with

[37] State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L. R. A. 265; Chicago v. Netcher, 183 Ill. 104, 48 L. R. A. 261.

[38] State v. Zeno, 79 Minn. 80, 48 L. R. A. 88. State v. Sharpless (Wash.), 71 Pac. 737, likewise upholds the requirement of a license for barbers.

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the principle of equality, but it may be remarked at this point that there has been a noteworthy tendency toward substituting for administrative discretion specific grounds of exclusion, and guaranties by bonds, etc., against the misuse of the business for wrongful ends. While this tendency is not uniform, and cannot be said to have ripened into a constitutional principle, it represents an advance towards a better recognition of constitutional equality than the system of administrative discretion.

§ 495. **Certification in place of license.**—As for trades and professions affecting health and safety, the prevailing opinion seems to be that tests of qualification are wise and necessary. This would be most readily conceded with regard to the practice of medicine. The German law substitutes the principle that only the designation as physician or doctor is reserved to those who have complied with the proper tests of qualification; without the use of a title indicating professional standing, any one may practice medicine. In recent years a similar policy has been adopted in several American states with regard to the business of accountants. Those passing the prescribed tests may call themselves certified public accountants, but the business of accountant remains free as heretofore.[39] So the restrictions upon the business of banking apply as a rule only to those who wish to do business under the designation of bank, indicating an institution rather than a mere private business. It is difficult to see why this policy does not afford all the guaranties to which the public is entitled or which it needs. It has the advantage that it cannot be used for the restriction of competition. It would certainly strengthen the principle of constitutional liberty, if in all cases where a business is liable to abuse, the license based on administrative discretion were superseded by a license issuable as a matter of right upon compliance with definite legal requirements, and if at least in all cases in which the public at large is not exposed to the consequences of incompetency, a right to public certification were substituted for the requirement of a license.

§ 496. **Delegation of legislative power.**—Our courts being committed to a less liberal theory regarding the freedom

[39] New York Laws, 1896, ch. 312. Illinois, Act May 15, 1903.

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of pursuit of livelihood than the one here advocated, it remains to inquire whether the legislature is subject to any constitutional limitations in requiring licenses. These limitations would have to be found either in the principle that legislative powers must not be delegated, or in the principle of equality. It has been held in Ohio that a law which provides for a license if the examining officer finds the applicant trustworthy and competent, without further specification, is invalid because it delegates to an administrative officer a legislative power.[40] A great many of the licensing laws on the statute books would probably not be able to stand such a rigid test; at the same time it is easily satisfied by the specification of some requirements of training or knowledge.

§ 497. **Principle of equality.**—The principle of equality may be involved in licensing laws in various ways. The requirement of professional qualification may shut out corporations, a point which has been noticed in Germany, but not, it appears, in this country. To a great extent corporations may overcome this disability by employing officers or agents duly qualified; even where this is not possible, corporations cannot in this respect claim equality with individuals. Some of the laws requiring tests of qualification apply only to cities. While this would not violate the Fourteenth Amendment[41] it may constitute unconstitutional special or local legislation under provisions of state constitutions; on this ground the horseshoers' act of Illinois was condemned.[42] Discriminations may occur against or in favor of non-residents, those already engaged in the business, or those carrying on the business in a particular manner, or special classes of persons; these will be noticed hereafter; they rarely affect essential features of the legislative policy.[43] The most important discrimination is undoubtedly that between different callings, leaving some free, while imposing restraints upon others; but such a singling out of special classes for regulation has not hitherto been questioned on constitutional grounds.

[40] Harmon v. State, 64 N. E. 117, 66 Oh. St. 249.

[41] Missouri (Bowman) v. Lewis, 101 U. S. 22; Budd v. New York, 143 U. S. 517.

[42] Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558.

[43] State v. Gardner, 58 Oh. St. 599, 41 L. R. A. 689, 51 N. E. 136; State v. Wagener, 69 Minn. 206, 38 L. R. A. 677; State v. Garbroski, 111 Ia. 496, 56 L. R. A. 570.

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## FREEDOM OF CONTRACT. §§ 498-503.

**§ 498. Contract essential to property.**—The right to make contracts is in some respects essential to the enjoyment of property. The constitutional guaranty of property rights would be deprived of much of its value if the legislature had absolute power to inhibit acts of disposition or alienation (which are generally contractual acts), or to annex to them arbitrary or unreasonable conditions of consequences. The right to contract is therefore not subject to legislative power to the same extent or in the same sense, as the right to transmit property by last will.

**§ 499. Contract part of civil liberty.**—But the liberty of contract, like all other civil liberty, is subject to restraint and regulation on behalf of the public welfare, and to speak of a constitutional liberty of contract without careful qualification is a vague and meaningless phrase. The liberty of contract yields readily to any of the acknowledged purposes of the police power, and it differs from fundamental constitutional rights, from the liberty of the body or person, from the right of property (including the obligation of existing contracts), from the right of equality, and from political liberty, in that it is neither a vested right, nor a right of definite content, nor a right protected by specific constitutional guaranties.

**§ 500. Freedom of contract and oppression.**—A constitutional right of freedom of contract has been most strongly asserted, and has received some recognition on the part of the courts, in connection with protective labor legislation. While it is conceded that contracts may be forbidden which in their effects tend to injure or to demoralise the public at large (gambling contracts, the sale of liquor, etc.), it is insisted that where the restraint is for the benefit of one party of the contract, it is illegitimate, since the fact of agreement shows that the party to be protected freely consents to the supposed injury, and that the state has no business to force a benefit upon him against his will. It has been pointed out before[44] that this argument is fallacious in the case of wage contracts where the voluntary assumption of a burden by one may, through

[44] See § 155, in connection with the case Re Morgan, 26 Col. 415, 47 L. R. A. 52.

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the stress of competition, force others to assume the same burden against their will.

However, even if the restraint is looked upon as protecting the party to the contract from his own acts, and not from the act of others, it is maintainable, as long as prevention of oppression is recognised as one of the legitimate grounds for the exercise of the police power. Economic oppression regularly proceeds with the apparent consent of the oppressed whose weakness compels him to accede to onerous terms, and such oppression cannot be dealt with otherwise than by restraining the freedom of contract. To emphasise this freedom in the face of oppression, is to deny the legitimacy of the police power for the protection of economic liberty; whatever may be the theoretical strength of this position, it does not constitute a principle of constitutional law.

**§ 501. Legislation and United States Supreme Court.**—Legislation has interfered with the freedom of contract for the protection of one of the parties thereto, chiefly in the following matters: rate of interest on money loans, limitation of liability for negligence, insurance, and payment of wages and hours of labor. Usury laws have never been questioned. The Supreme Court of the United States has recognised that the law may forbid and declare invalid any stipulation whereby a liability imposed on grounds of public policy is sought to be evaded;[45] it has also maintained a statute requiring insurance companies, in case of total loss by fire, to pay the full amount of the policy, less depreciation, notwithstanding a provision in a policy that only the cash value of the property destroyed should be paid;[46] and it has sustained the protective labor laws that have been brought before it.[47]

**§ 502. Decisions of state courts.**—The decisions of state courts declaring protective labor legislation unconstitutional have been considered before. It has been seen that the stat-

[45] Missouri Pacific R. R. Co. v. Mackey, 127 U. S. 205.

[46] Orient Insurance Company v. Daggs, 172 U. S. 557; see, also, Dugger v. Mechan. & Traders' Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796; Phoenix Ins. Co. v. Levy, 12 Tex. Civ. App. 45, 33 S. W. 992.

[47] Holden v. Hardy, 169 U. S. 366, especially on p. 397; Knoxville Iron Co. v. Harbison, 183 U. S. 13; also an act of Congress for the protection of sailors, Patterson v. The Endora, 190 U. S. 169.

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utes have generally contained elements of discrimination which the courts took into consideration in arriving at their decision, but the Supreme Court of Illinois has also said that chief stress should be laid upon the violation of the constitutional liberty of contract.[48] The same court has, however, used other arguments in denial of the legislative power. Thus in declaring a weekly payment law unconstitutional it points out that the waiver of weekly payments may under circumstances be beneficial to the employees;[49] again, in annulling the coal weighing act of 1887 it dwells upon the fact that the non-compliance with the statute was perfectly satisfactory to the employees, who would have been prejudiced by its enforcement.[50] Such considerations cannot be conclusive against the validity of police regulations, which can rarely be framed in such a manner as to work beneficially in all cases; the same arguments might be used against the usury laws with greater force, and a similar plea was held untenable by the Supreme Court of the United States in the case of the Joint Traffic Association.[51] The power of regulation in such cases includes a power of unwise regulation; the state does not act upon the assumption of superior wisdom, but upon the conviction that the laborer is generally not in a position to exercise free judgment, and that "where the number of employees is such that specific contracts with each laborer would be improbable, if not impossible, in general contracts justice shall prevail."[52]

**§ 503. Formulation of principle.**—The general principle of police regulation of the liberty of contract may, perhaps, be formulated as follows: Where a contractual relation is voluntarily entered into, rights and obligations, which are conformable to the nature of the relation, may be defined by the law and made conclusive upon the parties irrespective of stipulations attempting to set them aside, especially where such stipulations involve the waiver of valuable personal rights, or where they are virtually imposed by one party without power of choice on the part of the other.

[48] Vogel v. Pekoc, 157 Ill. 339, 30 L. R. A. 491.

[49] Braceville Coal Co. v. People, 147 Ill. 66.

[50] Harding v. People, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624.

[51] United States v. Joint Traffic Association, 171 U. S. 505.

[52] State v. Peel Splint Coal Co., 36 W. Va. 802.

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# FUNDAMENTAL RIGHTS.

## SECOND: PROPERTY.

## VESTED RIGHTS UNDER THE POLICE POWER.

## CHAPTER XXIV.

### APPROPRIATION, INJURY, AND DESTRUCTION.

A. TAKING FOR PUBLIC USE. APPROPRIATION. §§ 504-506.

**§ 504. Principle of law of nature.**—It is a settled principle of public law that private property may be taken when the public welfare requires it. The mediaeval jurists who were far from admitting that the power of the state over private property was absolute, yet recognised that it might be taken for just cause, and public necessity constituted a sufficient cause. Where, however, the private was thus made to yield to the public interest, a duty of compensation was urged on principles of natural equity.[1] The principle received its definite formulation under the doctrines of the law of nature. Grotius expresses it as follows:[2] "This also is to be noted that a right, even when it has been acquired by subjects, may be taken away by the King in two modes; either as a penalty, or by force of eminent domain. But to do this by the force of eminent domain, there is required in the first place, public utility; and next, that if possible, compensation be made to him who has lost what was his, at the common expense; and as this holds with regard to other matters, so does it with regard to rights which are acquired by promise or contract."

**§ 505. Doctrine of English law.**—In England the principle of compensation was established at an early date with regard to the king's right of purveyance for the royal household which was in analogy to the taking for public use.[3] Later on it became the rule that every taking of property required the sanction of an act of Parliament, and Parliament regularly

[1] Gierke, Genossenschaftsrecht, III, 617, 618.

[2] *De jure belli et pacis*, II, 14, 7.

[3] Magna Charta, c. 28, 2 Inst. 541, 4 Inst. 166, Blackstone I 287, 288, Broom's Const. Law 393-396.



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provided for compensation. Blackstone speaks of the right of eminent domain as follows:[4] "So great moreover is the regard of the law for private property that it will not authorise the least violation of it; no, not even for the general good of the whole community. If a new road for instance were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or not. Besides the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform."

**§ 506. American constitutions and Fourteenth Amendment.** —In America the right to compensation is secured by the federal and most state constitutions. It has been said that the right to take for public use is inherent in sovereignty, and the constitutional provision for compensation merely a positive limitation upon the right;[5] but as a matter of fact the taking for public use without compensation has never in any civilised country been regarded as a legitimate exercise of state power, and the payment of compensation is therefore correctly held to be a requirement of due process under the Fourteenth Amendment. "Due process of law as applied to judicial proceedings instituted for the taking of private property for pub-

[4] Commentaries, I, 139.

[5] Boom Company v. Patterson, 98 U. S. 403; United States v. Jones, 109 U. S. 513.

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lic use means such process as recognises the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."[6] Compensation is indeed a logical outgrowth of the principle of equality which demands that no burden be imposed upon a person from which others are free unless there is some causal connection between him or his property and the condition which the burden imposed upon him is intended to relieve; "it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a just and full equivalent shall be returned to him."[7]

INJURY. §§ 507-510.

**§ 507. Property injuriously affected under acts of Parliament.**—On principle there can be no difference between appropriation for public use and injury done to private property in the course of a public undertaking. An injury to property is practically a partial taking of it. In England where the right to compensation always rests upon the act of Parliament which authorises the taking, the failure of the act to make provision for injury done, must defeat the right. The generally accepted doctrine is that injury to private property occasioned by the careful prosecution of some enterprise authorised by act of Parliament gives no cause of action for damages, where no provision is made for compensation to those "injuriously affected,"[8] since Parliament in legalising the object has legalised the necessary means. In this doctrine the legal omnipotence of Parliament operates to the detriment of private property rights.[9] But the provision for compensation to those injuriously affected is a common one and has been embodied in the Lands Clauses Consolidation Act of 1845, which has in a manner codified the English law of condemnation.

[6] Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226.

[7] Monongahela Navigation Co. v. United States, 148 U. S. 312.

[8] Pollock, Torts, 126, 127.

[9] Sutton v. Clarke, 6 Taunt 29; Governor &c. of British Cast Plate Manufacturers v. Meredith, 4 T. R. 794. See, however, Leader v. Moxton, 3 Wils. 461.

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**§ 508. Physical invasion.**—In America the English rule has sometimes been stated to be a rule of the common law applicable in this country;[10] but the constitutional principle which forbids taking must also forbid injury without compensation.[11] The principle has been enforced with regard to direct encroachments upon and physical invasions of property.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasions of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."[12]

The rule has been applied to the overflowing of land by the erection of dams, or booms,[13] to the dredging of flats,[14] and to the temporary occupation of land for a militia encampment,[15] or for a hospital.[16]

**§ 509. Doctrine of consequential damages.**—Cases in which compensation has been denied will be found to go on the theory that there has been no invasion of any right, and hence

[10] Rigney v. Chicago, 102 Ill. 64, 71; Transportation Company v. Chicago, 99 U. S. 635, 641.

[11] Eaton v. Boston, Concord, etc., R. R. Co., 51 N. H. 504.

[12] Pumpelly v. Green Bay &c. Co., 13 Wall. 166; Eaton v. Boston, Concord &c. R. Co., 51 N. H. 504.

[13] Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308, § 409, *supra*; Murdock v. Stickney, 8 Cush. 113, doubting whether it should be called taking or not.

[14] Bent v. Emery, 173 Mass. 495, 53 N. E. 910.

[15] Brigham v. Edmands, 7 Gray. 359.

[16] Spring v. Hyde Park, 137 M 554.

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no legal injury. Thus where property is subject to an easement or servitude in favor of the public, what would otherwise be an invasion or a taking, has been held to be the exercise of a public right, so that no compensation is due: so in the case of improvements made on navigable waters in the interest of navigation,[17] or under laws recognising a public servitude over riparian lands for the construction of public works.[18]

The denial of any liability to compensation in the case of what are called consequential damages, likewise rests on the theory that there is no legal right taken or injured in the prosecution of the public work or enterprise. It was held at a comparatively early date that there is no cause of action for digging down the street by the plaintiff's dwelling house and taking away the earth so as to lay bare the foundation walls of the house, causing a danger of its falling, this damage being regarded as consequential;[19] and this doctrine has been accepted in all the states except in Ohio.[20] The prevailing doctrine denies to the owner of property abutting on a street a right or easement to have that street continued in a condition as favorable to him as it happens to be or to have been when he made his improvements; whatever rights he may have are subject to the superior right of the public to make further improvements for street purposes.[21]

**§ 510. Modifications of doctrine.**—This doctrine was modified or further defined by the New York elevated railroad cases to the effect that the adjoining owner has a right, which is a property right, to have the street kept unimpaired as a public street with the incidental benefits of light, air and access, and that while this right is subject to the power to control the public uses of the street, the power does not include the authorisation of a structure which is subversive of and repugnant to the uses of the street as an open public street.[22] Even

[17] Scranton v. Wheeler, 179 U. S. 141. See §§ 403-408, *supra*.

[18] Eldridge v. Trezevant, 160 U. S. 452; see § 409, *supra*.

[19] Callender v. Marsh, 1 Pick. 417, 1823.

[20] McCombs v. Akron, 15 Oh. 475, 1846.

[21] Dillon Municipal Corporations, §§ 987-995c.

The same principle was applied to other undertakings of a public character impairing the value of existing improvements, as a pier and basin constructed under legislative authority which impeded access to a wharf. Lansing v. Smith, 4 Wend. 9.

[22] Story v. New York Elevated R. Co., 90 N. Y. 122, Dillon §§ 723a-727, 656a-656c.

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a change of street grade cannot be made for railroad purposes so as practically to exclude the abutting owner from the part of the street occupied by the railroad, without compensating him for the injury suffered.[23]

In Massachusetts a statutory right to damages for injury done by change of grade was created in pursuance of a suggestion made by the court in Callender v. Marsh,[24] and similar provision is made in other states, including the state of New York under special city charters.[25]

In Illinois and a number of other states the Constitution has been so changed as to provide that private property shall not be taken or damaged for public use without compensation, and it has been held, in view of the reason for the adoption of the amendment, that this change means the creation of a liability for consequential damages, especially for those resulting from a change of street grade.[26]

The constitutional change like the statutory remedy may also be regarded as carrying the doctrine of the elevated railroad cases to the point of recognising that an owner of property adjoining a public highway, who has been practically invited to adjust his improvements to that highway, has so strong an equity to have the highway substantially preserved in the condition necessary to the continued enjoyment of the improvements, that such equity should be given the effect of a right of property. It is therefore not every inconvenience or depreciation of value caused by a public improvement for which the constitutional or statutory provisions in question give a right to compensation,[27] but only the impairment of some benefit which is so directly inherent to the property that it can be recognised as part of the legal right or as in the nature of an appurtenant easement, the impairment thus constituting a legal injury.[28] The doctrine of non-liability for

[23] Reining v. New York, L. E. & W. R. Co., 128 N. Y. 157.

[24] Massachusetts Rev. Laws, ch. 48, § 14.

[25] Fuller v. Mt. Vernon, 171 N. Y. 247, 63 N. E. 964; Coster v. Albany, 43 N. Y. 399, 417 (statutory provision in consequence of decision in Lansing v. Smith, 4 Wend. 9). So Pennsylvania Constitution, Art. XVI, § 8, in consequence of decision in O'Connor v. Pittsburgh, 18 Pa. 187.

[26] Chicago v. Taylor, 125 U. S. 161; *contra*, see Austin v. Augusta Terminal R. Co., 108 Ga. 671, 47 L. R. A. 755.

[27] Aldrich v. Metropolitan W. S. El. R. Co., 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237; Frazer v. Chicago, 186 Ill. 480, 57 N. E. 1055.

[28] The same view has been taken



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consequential damages remains therefore, in principle, undisturbed, and does not contravene the constitutional protection of property rights, either under the state constitutions or under the Fourteenth Amendment.[29]

B. TAKING TO WARD OFF PUBLIC INJURY. §§ 511-517.

**§ 511. Difference between police power and eminent domain, and principle of compensation.**—The constitutional prohibition against taking property for public use without compensation, applies to injury and destruction as well as to appropriation, and it applies no matter for what purpose the property is taken. If it is recognised that a change of grade entitles to damages, the right cannot be denied on the ground that the change was demanded by considerations of public safety. The rule "has never been qualified or limited by the object or purpose which the municipality had in view in ordering the change."[30] Thus while the effect of erecting a smallpox hospital upon the value of surrounding property is consequential *damnum absque injuria*,[31] private property cannot be appropriated as a hospital without compensation.[32]

If we differentiate eminent domain and police power as distinct powers of government, the difference lies neither in the form nor in the purpose of taking, but in the relation which the property affected bears to the danger or evil which is to be provided against.

Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public,

of the statutory compensation for damage done in the execution of the English Public Health Act; Hall v. Mayor of Bristol, L. R. 2 C. P. 322. The principle has been well put by saying that a person who sustains injury from the execution of works authorised by statute is not, generally speaking, entitled to compensation under the compensation clauses of the statute, unless the injury sustained is such as, had the works not been authorised by the statute, would have given the claimant a right of action.

[29] Meyer v. Richmond, 172 U. S. 82; also Marchant v. Pennsylvania Railroad Company, 153 U. S. 380.

[30] City of Chicago v. Jackson, 196 Ill. 496, 63 N. E. 1013.

[31] Frazer v. Chicago, 186 Ill. 480, 57 N. E. 1055.

[32] Spring v. Hyde Park, 137 Mass. 554.

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and under the police power because it is harmful, or as Justice Bradley put it, because "the property itself is the cause of the public detriment."[33]

From this results the difference between the power of eminent domain and the police power, that the former recognises a right to compensation, while the latter on principle does not.

**§ 512. Appropriation generally outside of the police power.** —The exercise of the police power can hardly result in appropriation of property by the public, unless it be by way of confiscation as a penalty or for the purpose of destruction; for if the property is dangerous, it is dangerous in the hands of the public as well as of the private owner, and if the danger can be met by regulation, such regulation is possible while the property is left to the owner; appropriation can be necessary only where possession is of positive value to the public; and if so, there is really a case of eminent domain.[34] Thus if a person affected with a contagious disease, dangerous to the public health, is in such a condition that he cannot be removed, the house in which he is may be considered as a hospital, and persons residing there may be subjected to regulations of the board of health; this is merely regulation; but the house cannot be seised or taken possession of by the health authorities without compensation.[35]

**§ 513. Prejudicial regulation without compensation.**—The normal form of impairment of property rights under the police power is restraint or regulation which leaves the property physically intact, and merely compels the owner to exercise his right over it in a certain manner. In so far as the regulated exercise results in changes which diminish value or profits, the practical effect, although not the legal aspect, is that of injury to the property. Where no fault is imputable to the owner, a compensation for his loss may be equitable; so the English Public Health Act of 1875 provides that where any person sustains any damage by reason of the exercise of any of the powers of the act, in relation to any matter as to which

[33] Davidson v. New Orleans, 96 U. S. 97.

[34] "That power [the police power] does not extend so far as to include a right to require the transfer of property to another person without compensation." Proprietors of Mt. Hope Cemetery v. Boston, 158 Mass. 509.

[35] Spring v. Hyde Park, 137 Mass. 554.

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he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers;[36] but in the absence of such provision it is sufficient that the owner has the benefit of the property or occupation which is the occasion of the danger, and that where the prevention of the danger requires a burden, the burden should accompany the benefit. Restrictive regulation is therefore regularly imposed without compensation.

**§ 514. Justification of such regulation.**—The absence of compensation, however, makes the police power much more incisive in operation than the power of eminent domain, and hence subject to stricter limitations. A public object may justify impairment of property with compensation, when it could not without it, so the object of public pleasure or recreation and the embellishment of public grounds. The state may require in the interest of health and safety, that a portion of a lot should not be built upon, but not for the purpose of widening a boulevard.[37] And so as to the limitation of the height of buildings to add to the beauty of a public square.[38] In Massachusetts it was intimated that such a limitation might be sustained as an exercise of the police power, so that compensation would not be claimable as a matter of right.[39] But when another act creating a similar limitation provided for payment of damages for the deprivation of rights existing under the constitution, and it was contended on behalf of the commonwealth that as an exercise of the police power the restriction did not impair constitutional rights, the court refused to accede to this view and held that without express statutory provision the intent to deny compensation would not be assumed.[40] It would be correct to say that such denial would be unconstitutional.[41]

**§ 515. Regulation of property rights.**—Since regulation is

[36] 38 and 39 Vict., ch. 55, § 308; an application of this is to be found in §§ 23, 24 of the act; if there is an insufficient drain, the owner must make a sufficient drain at his expense; if the drain is sufficient, but not adapted to the general sewerage system of the district, the change is made at the expense of the local authority.

[37] St. Louis v. Hill, 116 Mo. 527.

[38] See Dillon Municipal Corporation, § 599, as to the exercise of the power of eminent domain for the embellishment of cities.

[39] Attorney General v. Williams, 174 Mass. 476.

[40] Parker v. Commonwealth, 178 Mass. 199, 59 N. E. 634.

[41] As to ordering houses to be set

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the normal form of operation of the police power, and as a rule requires no compensation, it becomes important to distinguish regulation from the taking of property. In the strictest sense it may be said that property is not taken if it is left physically intact in the owner's possession with the right of enjoyment and perhaps consumption; and this view has been taken of prohibitory liquor legislation forbidding the sale of liquor on hand at the time of the enactment of the statute.[42] But the constitutional protection of property rights cannot in reason be satisfied by leaving the bare possession stripped of its economic value, and a prohibition of profitable use is to all intents and purposes a taking of property. This view is in accordance with the doctrine of the common law that the right to alien is so essential to property that a condition annexed to a grant of absolute property against its alienation is void as repugnant to the nature of the right granted.[43] It is also clear that if this view were not taken, the scope of vested rights would be materially narrowed, since limitations which could not be constitutionally imposed upon the holder of property, might be made conditions upon his right to sell, so that every purchaser would take the property with the new limitation attached to it.

**§ 516. Illustrations of regulation not amounting to taking.** —Regulation then must mean that the owner is required to exercise his rights in conformity with the demands of public welfare, while at the same time he is left in the substantial enjoyment of his property with its essential incidents. The difference between regulation and taking must therefore in many cases be one of degree. That a liquor seller is forbidden to sell to minors or drunkards is regulation and not taking, since a substantial right of alienation remains. If aliens are made incapable of acquiring lands, owners cannot give them an indefeasible title, and may be thus deprived of an opportunity of selling; yet this is not a taking. Again, while an alien may be prohibited from acquiring land, yet if the title is lawfully vested in him under a former law allowing purchase,

back or forward when the front is taken down for purpose of rebuilding, see English Pub. Health Act, § 155 (compensation granted).

[42] State v. Allmond, 2 Houst. (Del.) 612; State v. Paul, 5 R. I. 185.

[43] See Gray, Restraints on Alienation, *passim*.

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he cannot subsequently be required to sell within five or six years, since this would unduly limit his right of alienation, and no such requirement will, it is believed, be found in any statute; the Illinois Act of 1887 allowed aliens holding at the time of its enactment to sell at any time during life.[44] Where, however, the law may prohibit or limit the future acquisition of property, it may allow it also upon condition only that it must be sold or disposed of within a short time. So aliens or corporations may be required to dispose of lands they may acquire under foreclosure of liens, &c., within a stated number of years.[45] The possession of game lawfully killed may be made unlawful after the lapse of two months after the same has been killed,[46] or at any time during the close season, the consequence then being that toward the end of the open season game may be killed only for immediate consumption.[47]

That the law restricts the exercise of rights of property to uses and modes of disposition less profitable than those previously allowed, does not amount to a taking of property, if other profitable methods of disposition remain lawful. Thus it is mere regulation to prohibit retail sales of liquor to be drunk on the premises, or to prohibit the distillation of grain into liquor, and such prohibition is therefore constitutional without compensation with regard to liquor or grain owned at the time of the enactment of the statute.[48]

**§ 517. Cases of destruction or abrogation of property rights.**—The absolute destruction or abrogation of property rights—including confiscatory regulation leaving no reasonable profit to the owner—is an extreme exercise of the police power. Where it is proposed to exercise such an authority, the constitutional right of private property must be weighed against the demands of the public welfare, and it is obvious that a public interest which is strong enough to justify regulation may not be strong enough to justify destruction or confiscation without compensation. Submission to regulation may

[44] § 8 of Act June 16, 1887, since repealed. That there is no vested right to transmit by descent to non-resident aliens see Donaldson v. State (Ind.), 67 N. E. 1029.

[45] Stimson Am. Stat. Law I, 6013, II, 8205.

[46] Phelps v. Racey, 60 N. Y. 10.

[47] Smith v. State, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404; State v. Rodman, 58 Minn. 393, 59 N. W. 1098.

[48] Stickrod v. Commonwealth, 86 Ky. 285, 5 S. W. 580; Ingram v. State, 39 Ala. 247, 84 Am. Dec. 782.

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be said to be one of the conditions upon which all property is held in the community; but total sacrifice negatives altogether the right of property. The conditions justifying the demand of such sacrifice must therefore be carefully examined. The following classes of cases will be considered:

those in which the property proposed to be taken is insignificant in value (§§ 518-519);

those in which the property is imminently dangerous, as against those in which it is unlawfully used (§§ 520-528);

those in which property is offensive and at the same time useful (§§ 529-533);

those in which property is sacrificed to avoid a great calamity (§§ 534-537);

those in which property is made unlawful by a change of legislative policy; these will include:

confiscatory regulation and the impairment of the obligation of contracts (§§ 538-560); the taking of rights sanctioned by affirmative act of the state (§§ 561-582); the abrogation of certain forms of property which are contrary to modern economic or social ideas (§§ 583-603).

### INSUBSTANTIAL INVASION OR DESTRUCTION. §§ 518-519.

**§ 518. Transitory disturbance of possession.**—There is authority for holding that a very slight interference with property rights may be permitted by law without compensation. Justice Holmes speaks of the power to exact relatively small sacrifices from the individual for the public good.[1] An ordinance of Massachusetts of 1641, in granting the right to fish in ponds, gave the right to pass and repass on foot through any man's property for that end, so they trespass not on any man's corn or meadow. In Maine this ordinance is still recognised as law,[2] while in Vermont a similar enactment of recent date has been declared to be beyond the power of the legisla-

[1] Bent v. Emery, 173 Mass. 495, 53 N. E. 910. For a number of illustrations, not all of which perhaps can stand the test of rigid scrutiny, see Respublica v. Sparhawk, 1 Dall. 357. As to right of deviation from public highway, see Tiffany, Real Property, § 365.

[2] Barrows v. McDermott, 73 Me. 441. See also Maine Statutes, ch. 42, § 8, right of owner of timber which has been lodged by freshets on the land of another person to enter upon such land for purpose of removal, tendering damages.

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ture.[3] But in Vermont, the constitution itself gives the inhabitants the liberty in seasonable times to hunt and fowl on the lands they hold, and on other lands not inclosed.[4] Provisions of this character may, it seems, be justified by the consideration that an owner who does nothing to improve or protect his lands cannot insist upon the fullest legal protection of his right of property, but must at least tolerate customary trespasses.

Property may, also, be entered for the performance of a public duty. It has been held in Massachusetts that for the purpose of locating boundary lines entry upon private lands may be justified,[5] and the court refers to the familiar instance of selectmen perambulating the lines of towns, legislative committees exploring the routes of proposed railroads or canals, or county commissioners securing the location of a proposed highway.[6] It seems only reasonable that in such cases an action of trespass should not be entertained, and it may perhaps be said that every owner must suffer a brief and momentary occupation not amounting to dispossession, when required for public purposes, as one of the conditions upon which all property in the community is held. Even temporary dispossession may be legitimate when necessarily incidental to a police regulation, so for the purpose of disinfecting property or exterminating vermin or weeds or making sanitary improvements.[7]

**§ 519. Property taken of slight value.—1.** Taking samples for inspection.—The dairy or pure food laws of a number of states require that the seller allow the inspecting authorities to take samples without making provision for compensation. It has been held that this, in view of the legitimacy of the purpose, and of the very trifling amount involved, does not violate the spirit of the constitution.[8] While the contrary

[3] New England Trout &c. Club v. Mather, 68 Vt. 338, 33 L. R. A. 569.

[4] Constn. chap. 2, § 40, Payne v. Gould, 74 Vt. 208, 52 Atl. 422.

[5] Winslow v. Gifford, 6 Cush. 327.

[6] See New Jersey Pub. Laws, 1887, p. 212, as to authority of surveyors to enter lands when required for public improvements.

[7] See Ill. Rev. St., title Canada Thistles; Bancroft v. Cambridge, 126 Mass. 438.

These remarks do not of course apply to "temporary" occupation extending over weeks or months; such occupation gives a constitutional right to compensation. McKeon v. New York, N. H., &c., R. Co. (Conn.), 53 Atl. 656.

[8] Commonwealth v. Carter, 132 Mass. 12; State v. Duparquier, 46 La. Ann. 577, 26 L. R. A. 162.

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view may be technical, it is to be noted that in a larger number of states[9] the value of the sample must be tendered when taken, or compensation made if the article is found unadulterated. As this practice involves no serious inconvenience and respects the principle of the constitution, it is to be preferred.

2. Placing signs and monuments.—There are perhaps other cases in which a slight though permanent occupation of private property for public purposes is tolerated, as where signs with street names are affixed to private houses; but even this invasion need not, it seems, be tolerated by the owner without compensation. Boundary monuments may, it seems, be placed on lands not only without compensation, but at the expense of the owners,[10] upon the principle that compulsory powers may be exercised over neighboring land owners for their joint benefit.[11]

3. Right to dig for saltpetre.—In England the former royal prerogative to dig for saltpetre was attempted to be reconciled with the inviolability of private property by asserting that it did not take the subject's inheritance, since the officers were required to dig with the least inconvenience to the owner, were not allowed to undermine walls or dig the floors of any dwelling house, and had to repair the place in as good a plight as it was before. The idea was evidently that if the prerogative was exercised with sufficient care and consideration, the violation of property rights was insubstantial. Upon the same ground of no value a proclamation appears to have proceeded which required the preservation of human and animal urine after notice from the King's patentees, for the making of saltpetre.[12] The act of Parliament of 1640 which threw open the right to import and make saltpetre and gunpowder, seems to have disposed of this whole branch of the prerogative. In France the law allows, to the present day, the taking of material suitable for saltpetre, on condition of replacement by an equal quantity of other material.[13]

[9] Michigan, Kentucky, Kansas, Iowa, New Jersey, Pennsylvania, Illinois,—also Germany.

[10] Davis v. St. Louis Co. Commrs., 65 Minn. 310, 33 L. R. A. 432, where the act was held unconstitutional, but only because it did not provide for notice and hearing.

[11] See Illinois Session Laws, 1901, p. 307.

[12] 1627, 18 Rymer's Foedera, 813.

[13] Law March 10, 1819, Ducrocq Droit Administratif, § 1282.

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NUISANCES. §§ 520-528.

§ 520. **Property imminently dangerous.**—Where the condition of a thing is such that is is imminently dangerous to the safety, or offensive to the morals, of the community, and is incapable of being put to any lawful use by the owner, it may be treated as a nuisance *per se*. Actual physical destruction is in such cases not only legitimate, but sometimes the only legitimate course to be pursued. Rotten or decayed food or meat, infected bedding or clothing, mad dogs, animals affected with contagious diseases, obscene publications, counterfeit coin, and imminently dangerous structures, are the most conspicuous instances of nuisances *per se*. The power is chiefly exercised where the preservation of the public health or security of life or limb demands it; the extreme limit to which it may go in that direction was illustrated where a tenement house in a filthy and unsanitary condition was pulled down during the prevalence of an epidemic disease.[14] But it may also be resorted to for the protection of property, and is applied to trees or animals where destructive vermin or contagious diseases threaten the ruin to other property of the like character.[15]

§ 521. **Summary abatement.**—Since a nuisance *per se* is a source of present and continuing danger, its destruction does not require previous notice to the owner.

The rightfulness of the destruction presupposes however that the condition of the property is as a matter of fact harmful or objectionable, and the *ex parte* finding of the authorities does not determine this fact conclusively against the owner. If he cannot get his hearing in advance, he must get it afterward; i. e. he has a right to bring an action for the destruction of his property, and the authorities who are sued must justify

[14] Meeker v. Van Rensselaer, 15 Wendell 397; see also Ferguson v. Selma, 43 Ala. 398, case of a filthy and worthless house affected with the smallpox; Montgomery v. Hutchinson, 13 Ala. 573, a dilapidated building endangering a sidewalk; Anderson Origin of Commerce, 1535 and 1541, acts directing ruined houses in certain cities filled with nastiness to be rebuilt by owners, otherwise property to go to the lord of the manor or to the community. Ordering a house to be vacated is a common method of dealing with nuisances of this kind: Chapin Municipal Sanitation, p. 138, Eng. Public Health Act, § 97.

[15] State v. Main, 69 Conn. 123, 36 L. R. A. 623.

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their act.[16] If the property proves to have been sound and harmless, the owner is entitled to compensation.[17] Since officers thus must act at their peril, they are not apt to exercise their power of abatement, and this has been urged as a reason why their determination should be held to be conclusive; but the Supreme Court of Massachusetts, in sustaining their liability, practically held that a destruction of sound property without compensation would be unconstitutional.[18]

The court referred to the decision in Train v. Boston Disinfecting Company,[19] in which it had been held that all imported rags might be required to be subjected to a disinfecting process at the expense of the owner, whether in reality infected or not. It was pointed out that there the statute expressly applied to all imported rags, while in the case before the court the authority to kill was confined to infected horses, and some stress was laid upon the trifling values involved in the former case. A more satisfactory distinction between the two cases might be found in the difference between regulation and taking of property. In enacting regulative measures the law need not restrict itself to conditions actually harmful, but may require precautions within the whole range of possible danger; while the taking or destruction of property, being an extreme measure, is justified only within the narrowest limits of actual necessity,—unless indeed the state chooses to pay compensation.[20]

[16] Savannah v. Mulligan, 95 Ga. 323, 29 L. R. A. 303; People ex rel. Copcutt v. Yonkers, 140 N. Y. 1, 23 L. R. A. 481; Newark &c. R. Co. v. Hunt, 50 N. J. L. 308.

[17] Miller v. Horton, 152 Mass. 540; Pearson v. Zehr, 138 Ill. 48.

[18] Miller v. Horton, *supra*.

[19] 144 Mass. 523.

[20] In Van Wormer v. Mayor &c. of Albany, 15 Wend. 262 (1836), the board of health, in time of a cholera epidemic, had, without formal notice to the plaintiff, adjudged property owned by him to be a nuisance, and it was thereupon destroyed by order of the defendants. Suing for trespass, plaintiff was not allowed to prove that the property had not in fact been a nuisance, the board's adjudication being held conclusive. But the plaintiff had previously appeared before the board with reference to the condition of his property, and it was considered that he had had substantial notice, and that he could not set up technical irregularities except on certiorari. As to non-conclusiveness of *ex parte* condemnations of property, see also Salem v. Eastern R. Co., 98 Mass. 431; Shipman v. State Live Stock Comm'rs, 115 Mich. 488; Lowe v. Conroy (Wis.), 97 N. W. 942; Wayo v. Thompson, L. R. 15 Q. B. D. 342.

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§ 522. **Carcasses, garbage, &c.**—As long as property is not imminently dangerous or offensive it cannot be treated as a nuisance *per se*. Thus an ordinance cannot authorise the destruction of property left on a levee because it encumbers the same, where every legitimate purpose would be accomplished by its removal.[21] This principle is well illustrated by the law regarding the disposal of carcasses of dead animals. They are liable to become nuisances, and if not cared for may be treated as such; but the owner of an animal does not lose his property in it as soon as it dies; he must be given an opportunity to dispose of it since he may realise something from its sale; and to give offal contractors immediately an exclusive control of all dead animals, or even to require their deposit at a designated place is taking property without due process of law.[22] Under the statute of Louisiana which was upheld in the Slaughter-house Cases, the slaughter-house company was allowed to take the entrails, etc., of all animals slaughtered; this provision was not passed upon by the Supreme Court, but seems clearly unconstitutional. So it has been intimated that an exclusive privilege to collect and convey garbage cannot be made to apply to such refuse matter as the owner may desire to use or sell, and which is innocuous and capable of being put to useful purposes.[23] Under a statute of the United States,[24] sunken water craft are not treated as derelict or abandoned until the owner has been given an opportunity to remove the same.

§ 523. **Abandoned animals.**—In a number of states, following a statute of Massachusetts of 1881,[25] legislation has been enacted to the effect that where an animal is found abandoned or neglected, which appears to be diseased or disabled beyond recovery for any useful purpose, such animal if found to be worth not to exceed five dollars may be killed by agents of societies for the prevention of cruelty

[21] Lanfear v. Mayor, 4 La. 97, 1832.

[22] Underwood v. Green, 42 New York 140; River Rendering Company v. Behr, 77 Mo. 91; State v. Morris, 47 La. Ann. 1660; Schoen Bros. v. Atlanta, 97 Ga. 697, 33 L. R. A. 804; Knauer v. Louisville, 20 Ky. L. Rep. 193, 41 L. R. A. 219; Campbell v. District of Columbia, 19 App. D. C. 131.

[23] State v. Orr, 68 Conn. 101, 34 L. R. A. 279.

[24] Act June 14, 1880, I Suppl. 296.

[25] Rev. Laws, ch. 95, § 13.

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to animals; the society then to be indebted to the owner for the value of the animal, unless the killing was rendered necessary by the owner's cruelty. Acts of this character have been held unconstitutional because failing to provide for notice to the owner,[26] it being assumed that there is no such urgent necessity for killing the animal that there would be no time for some kind of a proceeding in which the owner can be heard. If it is found upon such a proceeding that the dictates of humanity require the killing of the animal, there would seem to be no reason why the owner should be compensated.

§ 524. **Infected cattle.**—Most states have enacted legislation, under which cattle infected with or exposed to contagious disease may be killed by designated authorities. In nearly all these states some compensation is made for the animals so slaughtered. Only one state (Minnesota) expressly restricts compensation to cases where the animal is found entirely free from disease; in most cases the appraised value is paid, sometimes with a statutory maximum limit, and in a number of states one-half or three-fourths of the value is paid if the animal is found to be affected. The purpose is probably to allow the slaughter of animals as a measure of precaution where their condition is not so imminently dangerous as to deprive them of all value or constitute them a nuisance *per se*. The same principle of compensation is recognised in France,[27] and Germany.[28]

§ 525. **Property unlawfully used, and forfeiture.**—The power of summary abatement does not extend to property in itself harmless and which may be lawfully used, but which is actually put to unlawful use or is otherwise kept in a condition contrary to law. So if a certain kind of transportation is a nuisance this does not justify the tearing up of railroad tracks.[29] A house of ill-fame may not be torn down summarily;[30] a building where liquor is kept unlawfully for sale may not be

[26] Loesch v. Koehler, 144 Ind. 278, 35 L. R. A. 682; King v. Hayes, 80 Me. 206; Carter v. Colby, 71 N. H. 230, 51 Atl. 904.

[27] Law of July 21, 1881.

[28] Law of June 23, 1880.

[29] Chicago v. Union Stock Yards Co., 164 Ill. 224.

[30] Welsh v. Stowell, 2 Doug. (Mich.) 332; Ely v. Supervisors of Niagara County, 36 N. Y. 297.

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destroyed,[31] and a canal may not be destroyed because not kept in a clean condition.[32]

The unlawful use may, however, be punished, and the punishment may include a forfeiture of the property used to commit the unlawful act. While in many cases this would be an extreme measure, it is subject to no express constitutional restraint except where the constitution provides that every penalty must be proportionate to the offense. The forfeiture of a vessel engaged in unlawful oyster fishing has been upheld by the Supreme Court of the United States.[33] The federal anti-trust act of 1890 goes so far as to provide that any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof), mentioned in Section 1 of the act, and being in the course of transportation from one state to another or to a foreign country, shall be forfeited to the United States.

§ 526. **Judicial safeguards.**—Such forfeiture is not an exercise of the police power, but of the judicial power, i. e. the taking of the property does not directly subserve the public welfare, but is intended as punishment for an unlawful act. Hence forfeiture requires judicial proceedings, either personal notice to the owner, or at least a proceeding *in rem* with notice by publication.[34]

There is perhaps in some cases some confusion between the police power and the judicial power owing to the fact that property unlawfully used may tend to assume the character of a nuisance *per se*. Animals running at large are not infrequently impounded and sold upon notice to the owner; but dogs may, if kept in an unlawful manner, be destroyed summarily, because they are at best qualified property.[35] As long as intoxicating liquor may be used as medicine, or as a lawful article of export, it is not a nuisance *per se*, and cannot be summarily destroyed.[36] And while the law may provide

[31] Earp v. Lee, 71 Ill. 193.

[32] Babcock v. Buffalo, 56 N. Y. 268; so as to a livery stable, Miller v. Burch, 32 Texas 208; where an engine is a nuisance only on account of its location, the proper remedy is its removal, Brightman v. Bristol, 65 Me. 426, 20 Am. Rep. 711.

[33] Smith v. Maryland, 18 How. 71.

[34] Coffey v. United States, 116 U. S. 427; United States v. Zucker, 161 U. S. 475.

[35] Campau v. Langley, 39 Mich. 451; Sentell v. New Orleans &c. R. R. Co., 166 U. S. 698; Blair v. Forehand, 100 Mass. 136.

[36] Brown v. Perkins, 12 Gray 89.

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for its seizure and forfeiture where it is kept unlawfully, it may do so only under proper safeguards, and the constitutional guaranties against unreasonable searches and seizures have in some cases been insisted upon with great strictness.[37]

In Connecticut it has, however, been held that where liquor is kept for sale contrary to law, its value for consumption or export will not be considered as that would tend to nullify the statute.[38] It has also been held that implements and apparatus used for gambling, but which may be used for different objects, (as for instance a gaming table), or which may serve the purpose of innocent and harmless amusement, cannot be destroyed without notice to the owner.[39]

Where liquor can serve no lawful use it may be destroyed summarily.[40] Where as a matter of notoriety certain arrangements in liquor saloons are used for illegal and immoral purposes, their removal may be directed, and unless so removed they may be treated as nuisances. The order of removal should be regarded as a regulation and not as the taking of property; it is, therefore, valid, though applied to existing arrangements, which, having been declared illegal, can serve no further lawful purpose.[41]

**§ 527. Lawton v. Steele.**—The principles which should govern the forfeiture of property were departed from in the decisions of the New York Court of Appeals and the United States Supreme Court in the case of Lawton v. Steele,[42] upholding a New York statute authorising the summary seizure and destruction of nets used for unlawful fishing, without any judicial process. The chief argument relied on was the trifling value of the property taken (nets worth $15.00 a piece),

[37] Fisher v. McGirr, 1 Gray 1; Hibbard v. People, 4 Mich. 125; Sullivan v. Oneida, 61 Ill. 242, where it is pointed out that the direction to sell the liquor recognises it as property and is inconsistent with its treatment as a nuisance *per se*. Darst v. People, 51 Ill. 286; for a less strict view see Lincoln v. Smith, 27 Vt. 328.

[38] Oviatt v. Pond, 29 Conn. 479.

[39] Lowry v. Rainwater, 70 Mo. 152; State v. Robbins, 124 Ind. 308, 8 L. R. A. 438; otherwise as to those clearly intended for unlawful use exclusively; Glennon v. Britton, 155 Ill. 232, 40 N. E. 594; Frost v. People, 193 Ill. 635, 61 N. E. 1054; Board of Police Commissioners v. Wagner, 93 Md. 182, 48 Atl. 455 (slot machines). See also Garland Novelty Co. v. State (Ark.), 71 S. W. 257.

[40] United States Rev. Stat. 2140, 2141, liquor in the Indian country.

[41] State v. Barge, 82 Minn. 256, 53 L. R. A. 428, 84 N. W. 911.

[42] 119 N. Y. 226, 152 U. S. 133.

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and the disproportionate cost of condemnation proceedings,—an inadmissible argument where constitutional rights are involved. The dissenting opinion of Chief Justice Fuller, in which Justices Field and Brewer concurred, will appeal to many minds as embodying the sounder doctrine. In accordance with the view of the dissenting justices a statute of Ohio allowing the confiscation of nets used in illegal fishing without legal proceedings was held unconstitutional.[43]

In a subsequent case the Court of Appeals of New York held that a statute making it a misdemeanor to disturb oyster beds, and providing for the forfeiture of any vessel used in violating the act, by proceedings before a justice of the peace, was unconstitutional as violating the guaranty of jury trial, as being oppressive, and constituting an unauthorised confiscation of property for the protection of merely private rights.[44] This decision certainly goes far toward weakening the authority of Lawton v. Steele. Dogs used for unlawful hunting may be killed, since property in dogs is of a qualified nature.[45]

**§ 528. Property created or acquired in violation of law.**[46] —Where the law prohibits the creation or acquisition of certain property, and thereafter in manifest contravention to it such property is created or acquired, it is perhaps not strictly speaking a nuisance *per se*, since it is not imminently dangerous, but it is evidently less entitled to consideration than property which is merely unlawfully used, since the status of the whole property is illegal *ab initio*. It has thus been held that a frame building erected in violation of law may be torn down summarily, preserving the material to the owner.[47] But it has been said in Pennsylvania that a wooden house under such circumstances is not a nuisance *per se*.[48]

[43] Edson v. Crangle, 62 Oh. St. 49, 56 N. E. 647. So also Ieck v. Anderson, 57 Cal. 251, 40 Am. Rep. 115. A preliminary seizure is valid, Haney v. Compton, 36 N. J. L. 507. Where a net is adapted only for unlawful fishing it may be destroyed, State v. Lewis, 134 Ind. 250, 20 L. R. A. 52, but in that case merely a fine was imposed. A fish basket constructed in violation of law may also be destroyed, *quaere* whether the materials must not be saved, Weller v. Snover, 42 N. J. L. 341.

[44] Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302.

[45] New York Forest Game and Fish Law, § 8.

[46] See also §§ 565, 176-179.

[47] Eichenlaub v. St. Joseph, 113 Mo. 395, 18 L. R. A. 590; King v. Davenport, 98 Ill. 305; Hine v. New Haven, 40 Conn. 478.

[48] Fields v. Stokley, 99 Pa. St. 306.

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Game unlawfully killed may be destroyed summarily, since no property in it can be acquired while the law prohibits its taking. In this case there is no forfeiture since there is no property right. Statutes however provide for judicial proceedings for confiscation and sale where game is possessed unlawfully.[49]

It may perhaps be said that wherever the forfeited property is sold, judicial proceedings are required, for it is then clear that it is not treated as a nuisance *per se*.[50] The only proper method of dealing with a nuisance *per se* is to destroy it.

USEFUL BUT OFFENSIVE INDUSTRIES. §§ 529-533.

**§ 529. Status of noxious establishments.**—An industrial establishment which is offensive to the senses and the operation of which is attended with noxious effluvia is not a nuisance *per se*, not at least if it is located in an appropriate place.[1] But it may become so when the character of the neighborhood changes, and it is in that case no defence either that it is conducted with great care,[2] or that the complaining public "has come to the nuisance."[3] The theory is that no one can by prior occupancy establish for himself a right to annoy or incommode the public, or, as it has been put, that "the right of habitancy is superior to the exigencies of trade."[4]

**§ 530. Exercise of municipal power.**—Municipal corporations are frequently given power to prohibit and suppress noxious establishments within their limits. This power has been allowed to be exercised with regard to existing establishments,[5] and it may cover the whole city.[6] It is obvious that property of great value may thus have a very insecure legal status, but practically the power of the courts is sufficient to prevent an abuse of municipal authority. It is well established that municipal ordinances must not be oppressive, and it would be difficult to find a more striking illustration of op-

[49] Illinois Game Law, April 24, 1899, §§ 21, 22.

[50] Sullivan v. Oneida, 61 Ill. 242.

[1] 16 Cyclop. Law 1st Ed. pp. 937, 938.

[2] State v. Wilson, 43 N. H. 415.

[3] Commonwealth v. Upton, 6 Gray 473; People v. Detroit White Lead Works, 82 Mich. 471; Ashbrook v. Commonwealth, 1 Bush Ky, 139; State v. Board of Health of St. Louis, 16 Mo. App. 8.

[4] Greenleaf on Evidence II, § 473.

[5] Mass. Rev. Laws ch. 75; Cronin v. People, 82 N. Y. 318; New Orleans v. Faber, 105 La. 208, 53 L. R. A. 165.

[6] Beiling v. Evansville, 144 Ind. 644; ex parte Heilbron, 65 Cal. 609.



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pressiveness than the attempted suppression of a great industrial establishment or other useful undertaking. The prohibition of cemeteries in a sparsely settled district has been declared invalid in Illinois,[7] the retroactive prohibition of renderies in New York.[8]

**§ 531. Judicial safeguards.**—The question whether nuisance or not cannot be concluded by the passage of an ordinance, still less by an administrative order, althongh the verdict of a jury on an appeal from the order of a board of health may be final.[9] The degree of discomfort required for a conviction, and still more for an abatement, will be measured by all the surrounding circumstances so that an establishment which would be a nuisance in a residence district, will not be so regarded in a neighborhood devoted to business and factories, in which life has adjusted itself to the inevitable annoyances of manufacturing industry. In Commonwealth v. Miller,[10] a conviction was reversed because the jury had not been allowed to receive evidence as to the location of the business, the length of time for which it had been carried on, its importance to the community, and the amount of capital invested; all of which, it was held, should have been taken into consideration in determining the question of nuisance. In People v. Detroit White Lead Works[11] it was intimated that the proof upon which the judgment imposing the fine was based would not be considered as binding in a proceeding for abating the business, in which weight would be given to all equities in favor of the establishment.

**§ 532. Status of offensive industries under foreign laws.**—With all these judicial safeguards, however, it would seem that the law itself should recognise some limitation of the power over offensive establishments. Such limitations are found to a greater extent in foreign than in American laws.

In England, under the Public Health Act,[12] the defendant in case of a trade nuisance may show that he has used the best practicable means for abating the nuisance or preventing or counteracting effluvia.

[7] Lake View v. Rose Hill Cemetery, 70 Ill. 191.

[8] New York Sanitary Utilisation Company v. Department of Public Health, 70 N. Y. Suppl. 510, 61 App. Div. 106.

[9] Taunton v. Taylor, 116 Mass. 254.

[10] 139 Pa. St. 77.

[11] 82 Mich. 471.

[12] 38 and 39 Viet. ch. 55, § 114.

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The French law concerning dangerous and offensive establishments (decree of October 15, 1810), provides that it shall have no retroactive effect; hence establishments existing at the time of its enactment were allowed to continue in operation, subject to liability for damages to adjoining proprietors. An exception is admitted with regard to establishments which, under the decree, must in the future be located away from residences; if these are gravely prejudicial to public health or other public interests, they may be suppressed; other establishments cannot be suppressed without paying compensation.[13]

Under the German law provision is likewise made for compensation, where the continued operation of an establishment is prohibited,[14] and no distinction is made between unsanitary and merely offensive trades.

**§ 533. Massachusetts law.**—In Massachusetts on the other hand assignments of places for the exercise of offensive trades are subject to revocation, and while the consent of mayor and aldermen is required for the establishment of offensive and noxious occupations, yet the state board of health may forbid their being further carried on if public health or public comfort and convenience so require. The order of a town board of health forbidding an offensive trade within the limits of a town is subject to appeal to the superior court for a jury.[15]

## DESTRUCTION TO AVOID CALAMITY. §§ 534-537.

**§ 534. Destruction of property to check the spread of fire.**—It is common to cite as an illustration of the right to take property under the police power, that in case of a conflagration a building may be demolished, if necessary to stop the course of the fire, without any obligation to compensate the owner. If it is true that during the great fire in London the mayor of the city refused to order the destruction of buildings for fear that he might be held liable in damages,[16] the principle cannot have been firmly settled in the seventeenth century; but the

[13] Block, Dictionnaire, Etablissements dangereux 18, 30.

[14] Trade Code, §§ 51, 52.

[15] Rev. Laws, ch. 75, §§ 91, 92, 95, 99, 100, 108, 109.

[16] See Respublica v. Sparhawk, 1 Dall. 357.

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older authorities use it to illustrate the law of necessity and the overriding claims of the public welfare;[17] and at the present day courts and writers treat it as established beyond question.

The decisions denying the right to compensation may be divided into two classes, those in which the action was brought against the municipality, and those in which it was brought against the person who ordered the destruction.

Decisions of the former class throw no light upon the problem; for even if the destruction were illegal or unconstitutional, the political community, whether city or state, would, on general principles, not be liable for the unauthorized exercise of governmental powers by its officers or agents.[18] If a statutory remedy is created against the city, it must be strictly pursued, and must fail in cases not covered by the terms of the law.[19]

On the other hand, the decisions denying relief against the person or officer ordering the destruction of the property, are based on the theory that overriding and urgent necessity justifies the act of destruction.[20] The Roman law takes the same view.[21] The decisions make it clear that only the strictest necessity will excuse the officer. They do not hold that there is an exercise of lawful governmental authority; necessity simply operates to relieve from liability for an act otherwise tortious. In justice, the duty of compensation should fall upon the community; but such a duty can be called into existence by legislation only. It is not surprising that the ordinary principles of the common law should not afford an adequate remedy in cases of sudden and extraordinary emergency; but a defect of the common law is not necessarily a principle of constitutional government. Where prop-

[17] Case of Prerogative, 12 Rep. 12; Mouse's Case, 12 Rep. 63.

[18] Field v. Des Moines, 39 Io. 575; McDonald v. City of Red Wing, 13 Minn. 38; White v. City Council of Charleston, 2 Hill (S. C.) 571; Taylor v. Plymouth, 8 Metc. 462; Dillon, § 957.

[19] Bowditch v. Boston, 101 U. S. 16; Mayor v. Lord, 17 Wend. 285; Stone v. Mayor, 25 Wend. 157; Coffin v. Nantucket, 5 Cush. 269; Keller v. Corpus Christi, 50 Tex. 614; Russell v. New York, 2 Den. 461; Ruggles v. Nantucket, 11 Cush. 433.

[20] Amer. Print Works v. Lawrence, 3 Zabr. (N. J. L.) 590, 57 Am. Dec. 420; Surocco v. Geary, 3 Cal. 69; Pollock, Torts, IV, 11.

[21] Dig. 43, 24: 7, 4; 47, 9: 3, 7.

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erty is destroyed in order to save other property of greater value, a provision for indemnity is a plain dictate of justice and of the principle of equality. It may be doubted whether the legislature has power to positively authorise and regulate such destruction without making provision for compensation.

§ 535. **Statutory compensation.**—As a matter of fact, legislatures do not assume such power. Statutory regulation of the power is always accompanied by statutory duty of compensation. As early as 1692, provision was made in Massachusetts for indemnifying owners whose property should be destroyed, if the destruction was the occasion of stopping the fire, or if the fire stopped before coming to the property.[22] Similar statutes have been passed in many other states.[23] The principles of the police power are very much more truly expressed in this statutory legislation than in the so-called law of necessity. Of course there can be no constitutional or moral duty of compensation, where the property destroyed could not have been saved in any event. The just rule of law in this matter has been formulated by the Code of Georgia as follows: "Analogous to the right eminent domain, is the power from necessity vested in corporate authorities of cities and towns and counties to interfere with and sometimes to destroy the private property of the citizens for the public good, such as the destruction of houses to prevent the spread of a conflagration, or the taking possession of buildings to prevent the spread of contagious disease. In all such cases any damages accruing to the owner from such acts, and which would not otherwise have been sustained, must be paid by such corporation."[24]

§ 536. **Destruction for military purposes.**—The assertion of the power to destroy, without compensation, property under the stress of great and overruling necessity, finds some support in the analogy of the military power. The example of justifiable destruction usually cited, the raising of bulwarks on private land, clearly falls under that category. Military necessity has produced from times immemorial and still produces, con-

[22] Massachusetts Provincial Laws 1692-3, ch. 13; Rev. Laws, ch. 32, §§ 11, 13.

[23] So in Maine, New York, Virginia, Georgia, Louisiana, Texas, and Indiana.

[24] Code § 2200.

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stitutional anomalies. Of earlier English practices, now fallen into disuse, may be mentioned the right to impress seamen for the navy,[25] the arresting of ships to be used as transports in time of war,[26] and the prerogative of digging for saltpetre.[27] Even now it is recognised that if for the purpose of weakening the enemy, checking his movements or resisting his advance, provisions and other supplies, houses, bridges or other material, are destroyed, the owners though loyal are not entitled to compensation.[28] Perhaps the consideration that there can be no compensation for loss of lives sacrificed by war, and that property can claim no greater protection than life, may explain and justify the principle, which, however, is too anomalous to be readily extended to civil affairs. Even in time of war, however, compensation is granted for property actually appropriated: supplies, war material, or means of transportation.[29]

**§ 537. Where not ordered by responsible military authority.** —It is questionable whether the immunity from liability for destruction of property due to the necessities of war extends to acts of destruction not ordered by responsible military authority. In several cases during the Civil War, stores of liquor were destroyed prior to the surrender of cities to the Federal troops, in order to avoid disorder and excesses. In one of the cases it was held that no municipal liability arose out of such destruction, and that the pledge of the city to indemnify created no binding obligation;[30] in another case it was held that the imperative necessity of the case was a sufficient defense to an action brought by the owner of the liquor against the persons directly responsible for its destruction; the case was treated as similar in principle to the destruction of property to check the spread of fire; but there was evidence in the case tending to show that the owner consented to the destruction in reliance upon the assurance that an assessment would be levied to grant him compensation.[31]

[25] Broom Constitutional Law, 116-119.

[26] Nicolas Proceedings of the Privy Council V, p. 114, Rymer Foedera XI, 21, 22.

[27] Coke's Third Institutes 83, 84, 12 Rep. 12. See § 519, *supra*.

[28] Respublica v. Sparhawk, 1 Dall. 357; United States v. Pacific Railroad Co., 120 U. S. 227.

[29] United States v. Russell, 13 Wall. 623.

[30] Wallace v. Richmond, 94 Va 204, 36 L. R. A. 554.

[31] Harrison v. Wisdom, 7 Heisk (Tenn.), 99, 1872.

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# CHAPTER XXV.

## CONFISCATORY LEGISLATION.

### A. RETROACTIVE PROHIBITION. §§ 538-547.

**§ 538. In general.—Principle of non-retroactive operation.**—A problem of peculiar difficulty is presented by retroactive police legislation which substantially destroys vested property rights to accommodate a change of surrounding circumstances, or of public sentiment, while the condition of the property itself remains what it was before.

Most police legislation, even for the protection of safety and health is precautionary in its nature, i. e. it does not deal with danger which is imminent to such degree that loss or injury may be expected almost as a certainty, but with conditions under which those who are accustomed to them can live without a sense of injury or even of discomfort.

Therefore the general rule is that such legislation operates only prospectively, and does not demand the sacrifice of existing physical property. So the prohibition of wooden buildings within designated "fire limits" applies only to buildings to be erected in the future. A law which would require all frame buildings to be taken down, or prohibit their occupation, would undoubtedly be regarded as unconstitutional.[1] It would also seem that ordinary repairs to frame houses cannot be prohibited,[2] but repairs may be directed to be made with fire proof material, and repairs may be prohibited where the property has been damaged or depreciated below a stated proportion of its value so that repairs would be substantially a new erection.[3] No one would contend that the power to prescribe the height of buildings could be exercised by requiring existing buildings to be reduced to that height, or that in introducing new building regulations for tenement houses, existing tenements could be ordered to be destroyed or abandoned in order to have all houses in the city come up to the new stand-

[1] As to ordinance, Wadleigh v. Gilman, 12 Me. 403; Buffalo v. Chadeayne, 134 N. Y. 163.

[2] Mt. Vernon Bank v. Sarlls, 129 Ind. 201.

[3] Illinois City Act V, § 1, No. 62.



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ard. The New York Tenement House Law of 1901 contains throughout separate provisions applicable to existing houses and others applicable to houses to be erected in the future.

§ 539. **Prohibition against the use of property.**—The rule of prospective operation is invariably observed where its disregard would involve the physical destruction of property, not however where retroactive operation only means that property is rendered practically useless and worthless. The latter is the effect of prohibitory liquor legislation in so far as it may destroy the entire value of breweries or of supplies of liquor on hand which the owner cannot personally consume and which he may not dispose of to others. It is true that the technical status of the property as such is not lost, and therefore the owner retains his remedies for recovery, etc.;[4] but it can hardly be denied that for every practical purpose the owner is deprived of his property.[5] The courts of Delaware and Rhode Island have taken the view that the prohibition of profitable use merely lessens the value of the property.[6] On the other hand, a statute of New York which made the possession of liquor to be used for sale as a beverage a criminal offense, and authorised its destruction as a public nuisance, was declared unconstitutional in its operation on liquor owned at the time when the statute was enacted.[7] In contesting the validity of the Iowa prohibition law of 1860 before the United States Supreme Court, it was contended that a glass of whisky for the sale of which the defendant was tried, was owned by him when the law was enacted. The court regarded the ownership as not proved, and treated the act of 1860 as a mere continuation by reenactment of an earlier law;[8] it is, however, significant that Justice Bradley in a concurring opinon endorsed by two other justices, expressed himself to the effect that a prohibition law cannot interfere with vested rights, and that such rights cannot be removed except by awarding com-

[4] Preston v. Drew, 33 Me. 558.

[5] The Supreme Court of Maine noticed the constitutional question but apparently did not deem it worth serious consideration, State v. Fairfield, 37 Me. 517. A law forbidding only sales in very small quantities, as, e. g., by the glass, constitutes regulation and not prohibition. Stickrod v. Commonwealth, 86 Ky. 285, 5 S. W. 580.

[6] State v. Allmond, 2 Houst. (Del.) 612; State v. Paul, 5 R. I. 185, 1858.

[7] Wynehamer v. People, 13 N. Y. 378.

[8] Bartemeyer v. Iowa, 18 Wall 129.

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pensation to the owner. The same view was later on taken by Justice Brewer in a lower federal court.[9]

**§ 540. Mugler v. Kansas.**—The question was again presented in Mugler v. Kansas.[10] The defendants contended that their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose (i. e. not only for medicinal purposes), that such establishments would become of no value as property or at least would be materially diminished in value if not employed in the manufacture of beer for every purpose, and that the prohibition upon their being so employed was in effect a taking of property for public use without compensation, depriving the citizen of his property without due process of law; they contended in other words that (as the court puts it) prohibitory legislation cannot be enforced against those who at the time happen to own property the chief value of which consists in its fitness for such manufacturing purposes unless compensation is first made for the diminution in the value of their property resulting from such prohibitory enactment.

This contention the Supreme Court declares to be inadmissible. It says that the prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any just sense be deemed a taking or an appropriation of property for the public benefit; that the power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the people, is not, and consistently with the existence and safety of organised society, cannot be burdened with the condition that the state must compensate such individual owners for the pecuniary losses they may sustain by reason of their not being permitted by a noxious use of their property to inflict injury upon the community; that the state by allowing the manufacture of liquors when the breweries were purchased or erected did not give any assurance or come under any obligation that its legislation upon the subject would remain unchanged.

**§ 541. Powell v. Pennsylvania.**—The legislation prohibiting the manufacture and sale of oleomargarine affected existing property in the same manner as prohibitory liquor legislation.

[9] State v. Walruff, 26 Fed. 178. [10] 123 U. S. 623, 1887.

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In the decisions of the state courts sustaining prohibition[11] this effect upon existing property was not considered. In Powell v. Pennsylvania[12] the defendant offered to prove that the article sold by him was part of a large and valuable quantity manufactured prior to the 21st of May, 1885, in accordance with the laws of the Commonwealth relating to the manufacture and sale of such article so sold by him: that for the purpose of prosecuting that business large investments were made by him in the purchase of suitable real estate, in the erection of proper buildings, and in the purchase of the necessary machinery and ingredients; that in his traffic in said article he made large profits; and if prevented from continuing it, the value of his property employed therein would be entirely lost, and he be deprived of the means of livelihood. This aspect of the legislation is not discussed in the opinion of the Supreme Court, but perhaps its closing remark refers to it: "It is also contended that the act of May 21, 1885, is in conflict with the Fourteenth Amendment in that it deprives the defendant of his property without that compensation required by law. This contention is without merit, as was held in Mugler v. Kansas."

Thus the doctrine pronounced with regard to intoxicating liquor was without hesitation applied to oleomargarine. The court did not take into consideration the very important fact that in the Kansas case the prohibition to which the destruction of values was incident, was a reserved right, since the manufacture of liquor had been carried on under temporary licenses which had expired.[13] Notwithstanding this fact, the Supreme Court had admitted that in destroying the value of property invested in the manufacture of liquor, the legislature had probably gone to the utmost verge of constitutional authority. It was certainly carrying the exercise of state power one step further to destroy values invested in an article and a business intrinsically harmless and having an unquestioned legal status; and a retroactive prohibition having this effect ought not to have been allowed.

[11] Powell v. Commonwealth, 114 Pa. St. 265; State v. Addington, 77 Mo. 110.

[12] 127 U. S. 678.

[13] This fact was very clearly pointed out in State v. Mugler, 29 Kan. 252, where it was said that both the issuing and the renewal of the license under which Mugler's brewery was operated depended entirely upon the temper and disposition of the community.

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**§ 542. Regulation involving partial prohibition.**—But the sound principle that police legislation should not forbid the only profitable use of which property is capable and to which it has been put under the sanction of the law, must not be stretched to unreasonable lengths. Legitimate police regulation may involve the improvement and alteration of property, and this may result in rendering parts of the property to be improved or altered useless and perhaps in destroying their value as property. This should not be regarded as the taking of property, but as a necessary incident to regulation, for as the minor part has value only as serving the purposes of the principal property, it must necessarily yield to the requirements of the latter. Thus where the law requires a house to be supplied with running water and sewerage connections, wells or cisterns or privy vaults may be rendered useless or even be required to be abated, though not imminently dangerous to health. Such a requirement is not open to objection as taking property without due process of law.[14]

**§ 543. Prohibition operating upon an established business or practice of profession.**—An established business or profession is in essential respects like a right of property. The experience gained in pursuing it, the connections formed through it, the confidence and custom of patrons and clients, are valuable and profitable assets, which the law, under the name of good-will, recognises as a species of property, and as, to a certain extent, transferable. The claim to protection grows with the amount of capital invested or with the study and preparation required for the successful practice of a profession.[15]

An established business or profession, like any other vested right, is subject to the continuing power of the legislature to prescribe regulations by which its pursuit is brought into conformity with the requirements of the public welfare. So with regard to professional qualifications, the Supreme Court has said that the same reasons which control in imposing con-

[14] Harrington v. Providence, 20 R. I 233, 38 L. R. A. 305; Commonwealth v. Roberts, 155 Mass. 281, 16 L. R. A. 400; State v. Barge, 82 Minn. 256, 53 L. R. A. 428.

[15] Dent v. West Virginia, 129 U. S. 114. "The right to continue their prosecution is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken."

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ditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions, as new modes of treating disease are discovered, and that therefore a knowledge of the new acquisitions of the profession may be required for continuance in its practice.[16] The statement is, however, qualified by adding that the condition imposed must be one that can be readily met by any one with reasonable effort and application. The statute of West Virginia required, as a condition for being allowed to practice or to continue to practice medicine, either a continuous previous practice for the period of ten years, or the possession of a diploma from a reputable college, or the passing of an examination. The defendant had practiced for only six years, and the diploma he held was from a college not recognised as reputable. It was held that he might be required to submit to an examination—undoubtedly a condition of considerable hardship to a bona fide established practitioner, but one which may be perfectly legitimate with regard to one who has just set up in business in anticipation of the new requirement and in the hope of escaping it. The requirement of a diploma, without the possibility of proving competence by examination, would be an unreasonable condition, since it would be manifestly impossible for practitioners to resume study at a college for a number of years. A statute making this latter requirement of all who had not practiced in the state for five years was sustained in Michigan against the strong dissent of two justices, and contrary to sound principle.[17] The application of the new law requiring some proof of qualification to existing practitioners occurs in a number of states in the case of medicine and some other avocations;[18] never, it seems, in the requirements for admission to the practice of the law. If possible a statute should be interpreted as not applying to existing practitioners.[19]

[16] Dent v. West Virginia, 129 U. S. 114; Reetz v. Michigan, 188 U. S. 505. Also State ex rel. Burroughs v. Webster, 150 Ind. 607, and cases cited there.

[17] People v. Phippin, 70 Mich. 6. See Mich. Gen. Laws, § 5280; also People v. Reetz, 127 Mich. 87, 86 N. W. 396. This case treats the question as concluded by earlier decisions. Affirmed Reetz v. Michigan, 188 U. S. 505.

[18] In case of plumbers, Laws of Illinois, 1897, p. 279.

[19] *In Re* Applications to admission to practice, 14 S. D. 429, 85 N. W. 992.

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**§ 544. The test oath cases.**—The question whether conditions may be imposed for the right to continue in a business or profession which it may be absolutely impossible for one already engaged in it to comply with, has been presented to the United States Supreme Court in some notable cases. The clause of the federal constitution invoked was that forbidding the enactment of ex post facto laws which before the addition of the Fourteenth Amendment was perhaps the only one applicable.

The Constitution of Missouri of 1865 prescribed an oath to be taken by persons holding certain offices and trusts and following certain pursuits, by which they were required to deny that they had done certain things or had manifested by act or word certain desires or sympathies, the purpose being to prove loyalty to the union during the time of the rebellion. No person was allowed, without taking the oath, to practice as an attorney or counselor at law, or, as a bishop, priest or clergyman of any religious persuasion, to teach or preach or solemnise marriages. Congress by act of July 2, 1862, required a similar oath as a condition for being allowed to appear as attorney or counselor in any of the courts of the United States. These laws were held to be ex post facto and therefore unconstitutional, since the exclusion from the profession was in the nature of a penalty; it was not recognised as a police regulation for the reason that the past conduct as to which the oath was exacted related to matters which had no connection with the practice of these professions.[20]

**§ 545. Hawker v. New York.**—A different view was taken of the effect of a past conviction for crime upon the practice of medicine. A statute of New York of 1893 provided that no person should, after conviction of felony, attempt to practice medicine, on penalty of fine and imprisonment. The defendant at the time of the passage of the act was engaged in the practice of medicine, but had been convicted of felony in 1878. In 1896 he was indicted and convicted for practicing illegally under the statute of 1893 and the conviction was sustained by the highest state court.[21] The case was carried to

[20] Cummings v. Missouri, 4 Wall. 277; ex parte Garland, 4 Wall. 333; four justices dissenting in each case.

[21] People v. Hawker, 152 N. Y. 234.

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the federal supreme court on the ground that the act as thus retroactively construed was an ex post facto law. The Supreme Court upheld the act as a valid exercise of the police power, three justices dissenting.[22] It was held that the state must have continuing power to prescribe the conditions under which the practice of medicine may be safely carried on; that character is essential to safe practice, and that the state may infer from previous conviction of felony the lack of proper character qualification. "Whatever is ordinarily connected with bad character or indicative of it, may be prescribed by the legislature as conclusive evidence thereof." That the rule may work hardly or the test fail in particular cases, can be no objection, for all tests of character are liable to failure.

**§ 546. Criticism of Hawker v. New York.**—The decision is open to serious question. It may be conceded that the state may pass a law under which licenses to practice medicine may be refused to those who have been convicted of felony before the enactment of the law. The previous conviction makes a presumption of bad character, and as there can be no conclusive evidence of bad character, a strong presumption may be sufficient to exclude from entrance upon a pursuit to which the applicant has no vested right, and as to which the burden of proving qualification may be thrown upon him. But conditions are altered after he has become established in the business.[23] He has now acquired a right, still subject to regulation, still subject to proof of qualification, but the proof must not be made impossible. He may, perhaps, after previous conviction, be required to overthrow the presumption of bad character by proof of unblemished life and good reputation; but under this statute he is absolutely debarred from showing, what may be the fact, that he has reformed.[24] The statute is not a proper police regulation

[22] Hawker v. New York, 170 U. S. 189.

[23] This is denied by the Supreme Court of Ohio: "The distinction between the right to establish a practice and the right to pursue a practice already established seems to be inadmissible. By what process of reasoning could it be maintained that the right to enjoy property should be esteemed more sacred than the right to make contracts by which property might be acquired!" State v. Gravett, 65 Oh. St. 289, 62 N. E. 325, 55 L. R. A. 791. Does the Supreme Court of Ohio mean to deny the peculiar sanctity of vested rights?

[24] In this respect the statute in question differs from one which ex-

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since it establishes a conclusive presumption of fact the necessary effect of which to take away an acquired right; it cannot be maintained as establishing a cause of forfeiture, since in making the conviction of a felony conclusive evidence of bad character when it was not so before, it adds to the punishment after the offence has been expiated, and is therefore an ex post facto law.

The decision in Hawker v. New York seems to be without a parallel; the case of Foster v. Police Commissioners,[25] cited by the Supreme Court, was not, as stated by it, one of an ordinance revoking a liquor ordinance for past acts, but in that case the license had expired and its renewal was applied for and refused. There was no vested right to such renewal.[26]

**§ 547. Prohibition of oleomargarine business.**—In sustaining the prohibitory oleomargarine legislation of Pennsylvania, the Supreme Court sanctioned not only the constructive taking of valuable property by making its profitable use impossible, but also the destruction of an established business. It has already been shown that the analogy of the liquor business relied upon by the court was fallacious, since the latter was carried on under revocable license. If Powell v. Pennsylvania

tablishes a disqualification of continuing operation, e. g., excluding one affected with a contagious disease from practicing, or forbidding railroad engineers affected with color blindness to continue in their employment.

[25] 102 Cal. 483.

[26] The revocation of a license for cause occurring or operating during continuance in practice may be provided for so as to apply to those already established in the profession as well as to future practitioners, for this is an exercise of the continuing power of regulation. The serious question in this connection is whether the power of revocation may be conclusively vested in an administrative board, without right of appeal to the courts. The preponderance of opinion seems to be that the power may be so vested, apparently on the theory, that under the police power the question of qualification may be raised continually de novo. State ex rel. Chapman v. Board of Medical Examiners, 34 Minn. 387, 26 N. W. 123; Traer v. State Board of Medical Examiners, 106 Ia. 559; Meffert v. State Board of Medical Registration (Kans.), 72 Pac. 247. See also People v. McCoy, 125 Ill. 289. If the right to practice a profession after license once granted is to be regarded as an acquired or vested right—and it seems it should be so considered—then the final adjudication of a cause of forfeiture should belong to the courts. The question is one of the doctrine of separation of powers and as such does not properly fall within the scope of this treatise.

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is to be accepted as sound constitutional law, an established business can be destroyed to further a new legislative policy for the promotion of health or the suppression of fraud, although the business destroyed is neither unsanitary or fraudulent. Such destruction would be impossible under the traditions and understandings which bind the practice of European governments. The present state of the authorities in America cannot be regarded as satisfactory.

### B. EXPENSIVE ALTERATIONS AND IMPROVEMENTS.
§§ 548-549.

**§ 548. What is an excessive requirement.**—Regulation will amount to confiscation, although the owner retains possession, use, and power to dispose of his property, where he is required either to make such expensive alterations or improvements, or to accept such low remuneration in return for the use of his property, that the property ceases to be profitable.

If, notwithstanding the imposed expenditure or the reduced compensation, the business or property continues to yield a reasonable profit, there is no more than regulation, for in that case the requirement may be looked upon as merely the enforcement of conservative, economic management, under which the owner simply foregoes a profit which he could make only by the sacrifice of legitimate public interests; but if the requirement is entirely disproportionate to the value and the possible returns of the property, the practical effect is the same as if the property were actually taken.

The question of the constitutionality of excessive requirements in the way of improvements and alterations has received comparatively little discussion. The most conspicuous instance is that of the abolition of railroad grade crossings. The requirement has been upheld in the state courts and by the United States Supreme Court.[27] This legislation shows that the absolute amount of the expenditure affords no criterion of the validity of the requirement; for while in some cases millions had to be expended, the profitableness of the railroad was in no case destroyed. It is, however, a significant fact, due, perhaps, to the peculiar problems of responsibility in these cases,[28] that the burden of the improvement has in a number of states been divided between the railroad companies and

[27] New York and New England R. Co. v. Bristol, 151 U. S. 556.

[28] As to these, see below, § 631.

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the municipalities or state, either under statutory requirement or by voluntary agreement.[29]

**§ 549. Limit of constitutional power.**—The power to require alterations, even in the interest of public safety, is not without limit. What has been said with reference to sanitary improvements is true of all similar requirements, namely, that within proper limits the courts must judge whether the amount required to be expended is reasonable or not, and that the compulsion of such improvements must be regarded as legal as long as their cost does not exceed what may be termed one of the conditions upon which individual property is held.[30]

Perhaps it is also true that what would be a reasonable requirement for the protection of public safety would be excessive where the public interest was less urgent. The question may arise where alterations are demanded to remove obstructions to navigation, such as the lowering of tunnels or the heightening of bridges. The Federal law of September 19, 1890, authorises the Secretary of War to require alterations in structures interfering with navigation; but it has not yet been decided whether compensation must be paid or not.[31]

### C. REDUCTION OF CHARGES. §§ 550-554.

**§ 550. Reasonableness and judicial control.**—The power to regulate charges is one of a purely economic character. It has never been pretended that for the furtherance of economic interests of the public an owner can be absolutely deprived of his property without being awarded full compensation, and the legislature in fixing rates has ever claimed to exercise merely a power of reasonable regulation for the prevention of oppression.

It has been shown that after some hesitation the courts have asserted and now freely exercise the power to control the legislative determination that a rate is reasonable.[32] It has therefore become incumbent upon the courts to lay down the principles by which the question of reasonableness must be

[29] Massachusetts Rev. Laws, ch. 112, § 131; Laws 1890, ch. 428; Woodruff v. Catlin, 54 Conn. 277; Argentine v. Atchison &c. R. Co., 55 Kan. 730, 30 L. R. A. 255; Brooks v Philadelphia, 162 Pa. 123, 24 L. R. A. 781.

[30] Health Department v. Trinity Church, 145 N. Y. 32.

[31] Rider v. United States, 178 U. S. 251, 1900.—As to rights qualified by easement of navigation, see § 576, *infra*.

[32] §§ 379-383, *supra*.



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judged, and the federal supreme court alone can conclusively establish these principles in an affirmative manner. However, this important problem has not yet been finally solved.

**§ 551. Basis of calculation the whole business within the state.**—Two secondary questions applying specially to railroad rates may be regarded as settled: first, the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier or to the profits derived from it, so that the state cannot justify unreasonably low rates for domestic transportation on the ground that the carrier is earning large profits on its interstate business over which the state has no control, nor the carrier justify unreasonably high rates on domestic business on the ground that he will not be able otherwise to meet losses on interstate business;[33] second, within the state the test of reasonableness must be applied on the basis of that business done on the whole line, and not on any particular portion of it.[34]

The first rule rests upon jurisdictional limitations, and if these were removed would be contrary to the spirit of the second. If rates were prescribed by Congress the first rule would clearly not apply.

The second rule is justified by the fact that a railroad company requires the sanction of the state as an entirety and may therefore be treated as an entirety. It is true that under it unequal returns may be received for equal services, or equal returns for unequal services, but if the return on the whole business is fair, it must be that a too small return on some part of it is offset by a more than normal return on some other part; if then there is ground for complaint, it is on the part of a portion of the public and not on the part of the railroad company.[35]

**§ 552. Value of particular service.**—It has been said that in a business not claiming special privileges the test of reasonableness must be found in the value of each particular service,[36] but it must be questioned whether this is a practicable

[33] Smyth v. Ames, 169 U. S. 466.
[34] St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649.
[35] See Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257.
[36] Cotting v. Kan. City Stock Yds. Co., 183 U. S. 79. See also Can. S. R. Co. v. Internatl. Bridge Co., L. R. 8 App. Cas. 723.

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rule. It is characteristic of all organized industry that it supplies many demands at the same time, and our whole economic life is adjusted to that fact. How much some particular service, as e. g. carrying a letter from America to Europe, would be worth apart from the general transportation of the mails, is wholly undeterminable, or at least such a consideration cannot be the basis of legislation. The statement must be understood in connection with the circumstances of the case in which it was made, and then means that if a business by the industry of the owner, without privileges from the state, has attained exceptional magnitude, the owner must not be deprived of the advantage thereby gained, and has still the right to the same returns as the smaller competitor. In other words, the principle of equality demands that one man be not discriminated against by law simply because by his own exertions he has gained an advantage over another.

§ 553. **Value of property.**—Barring this question of equality, the obvious test of the reasonableness of a rate is whether it allows a fair return upon the value of the property invested in the business, after paying for expenses of operation and management. This is the test laid down by the Supreme Court in Smyth v. Ames.[37] The application of the test, however, requires a determination of what is a fair return and what is the value of the property invested in the business.

As to the value of the property, the Supreme Court says: "The original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."[38] Three of these items deserve particular consideration because in most cases it will be necessary to make a choice between them: capitalisation, cost of reproduction, and actual cost. It is well known that capitalisation in many cases represents hopes of future earning capacity rather than actual money invested, and even the market value

[37] 169 U. S. 466; also San Diego &c. Co. v. Nat'l City, 174 U. S. 739, 757.

[38] 169 U. S. 466, 547. As to valuation where waterworks are taken over by public, see Kennebec Water District v. Waterville, 97 Me. 185, and cases there cited.

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of stocks and bonds is not a safe criterion, since it is based on earning capacity, and the reasonableness of earnings is the point at issue. The cost of reproduction, as has been pointed out,[39] may not be fair, where a pioneer enterprise by its existence has cheapened the cost of future similar works. The actual cost, understanding thereby the actual necessary cost and not extravagant expenditures, would, in most cases, be the fairest basis of estimating returns; at least for a reasonable period after the enterprise has gone into operation. The Supreme Court has, however, intimated that original cost need not be considered where the present owners acquired the property at a reduced price.[40] It can certainly not be said that the Supreme Court has committed itself to a definite principle of valuation.

§ 554. **Fair return.**—The question what is a fair return is still more unsettled. In Covington & Lexington Turnpike Co. v. Sandford[41] the Supreme Court said: "It cannot be said that a corporation is entitled as of right, and without reference to the interests of the public, to realise a given per cent upon its capital stock." This statement seems to be made without reference to possible excessive or fictitious capitalisation; and it receives additional significance from the remarks made by Brewer, J., in Cotting v. Kansas City Stock Yards Company[42] with reference to a business discharging a public service. "[The owner] expresses his willingness to do the work of the state, aware that the state in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a larger public interest. At any rate, it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the state, may it not be urged that he, in a measure, subjects himself to the same rules of action, and that if the body which expresses the judgment of the state believes the particular services should be rendered without profit.

[39] San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L. R. A. 460.

[40] Dow v. Beidelman, 125 U. S. 680.

[41] 164 U. S. 578.

[42] 183 U. S. 79.

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he is not at liberty to complain? While we have said again and again that one volunteering to do such service cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the state may do the work without profit, if he voluntarily undertakes to act for the state he must submit to a like determination as to the paramount interests of the public?" A tentative suggestion of this character must not, of course, be taken as authoritative, and it is also important to note that the part of the opinion dealing with the question of reasonableness of rates does not represent the opinion of the court, as six of the justices concurred in the decision only upon another ground.[43]

Moreover in contrast to the statement made in the Sandford case that the corporation is not entitled as a matter of right to realise a given per cent upon its capital stock, should be placed other statements to be found in the case of Smyth v. Ames, to the effect that "the corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it,"[44] and that "what the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."[45] These statements were made with reference to a public service company and of course outweigh the *obiter dictum* of an individual judge. It remains to be determined whether or not anything short of the current rate of interest can be regarded as a fair return. There is no doubt that the settlement of the problem of fair value and fair return would be greatly aided by legislation controlling the capitalisation and the accounting systems of public service companies.[46]

[43] *Note.*—As to public emergencies, see Art. 46 of the German Constitution: "In cases of distress, especially in case of scarcity of the necessaries of life, the railroad companies are held to make a specially low temporary tariff corresponding to the needs of the emergency, to be fixed by the Emperor upon suggestion of the proper committee of the Federal Council, for carrying grain, flour, and potatoes, which, however, may not be lower than the lowest tariff of the road for carrying raw material."

[44] 169 U. S. 466, 546.

[45] 169 U. S. 466, 547.

[46] The Street Railroad Act of

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## D. IMPAIRMENT OF THE OBLIGATION OF CONTRACTS. §§ 555-560.

**§ 555. Police power restricted with reference to existing contracts.**—The right springing from the obligation of a lawful contract has received a special protection through the prohibition contained in the federal constitution and reiterated in many state constitutions, of laws impairing the obligation of contracts.

The extent to which this clause restricts the operation of the police power has never been precisely formulated. That it does restrict it can easily be shown by a simple illustration:

The rate of interest may be generally reduced from seven to six per cent, but existing contractual obligations[47] at the higher rate, however long they may have to run, remain in force until discharged.[48]

So there can also be no reasonable doubt that while a railroad corporation is liable to have its traffic rates reduced by the legislature in the interest of the public who have occasion to use its facilities, yet if the railroad company has made a contract with a shipper at rates which, according to the tariff standard, are exorbitant, the legislature can afford no relief.

Thus it appears that the earning power of capital may or may not be validly impaired, according as it has not or has been fixed by entering into definite contracts. The legislature may operate upon future contracts but not upon those already in existence.

This difference is a matter of constitutional policy: a contract is, as a rule, of limited duration, and in course of time the debtor will be discharged from its operation. His hard-

Illinois of 1903, in giving cities the power to fix rates and charges, adds, "but such rates and charges shall be high enough to produce a revenue sufficient to bear all costs of maintenance and operation and to meet interest charges on all bonds or certificates issued on account of such railways, and to permit the accumulation of a surplus or sinking fund that shall be sufficient to meet all such outstanding bonds or certificates at maturity." No provision is made for dividends on stock; it is apparently assumed that the whole cost or value of the plant will be represented by bonds.

[47] Not judgments; see Morley v. Lake Shore & M. S. R. Co., 146 U. S. 162.

[48] Hubbard v. Callahan, 42 Conn. 524; Myrick v. Battle, 5 Fla. 345; Sturges v. Crowninshield, 4 Wheat. 122, 207; *contra*, Justinian's Codex 6. 32: 27; Lasalle, System der erworbenen Rechte, I 230, 233.

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ship is temporary, and as he has undergone it voluntarily it is deemed better (provided the contract is not immoral or in its inception contrary to public policy) that he should suffer, than that the faith in the security of promises should be shaken.

**§ 556. Impairment forbidden only if in interest of party obligated.**[49]—It seems, however, that the constitutional prohibition applies only to laws impairing the obligation of the contract for the benefit of the party obligated. It is not an objection to an otherwise valid police regulation that it makes the performance of a contract valid in its inception impossible. Thus the power of the state to regulate railroad rates is not defeated by the fact that the railroad company has made a contract with another railroad company that it will not charge less than the rate fixed by an existing statute,[50] or that the railroad company has incurred indebtedness upon the basis of an earning capacity calculated on higher rates,[51] and the mere fact that a high rate of interest on bonds cannot be paid under a proposed tariff, would not make that tariff unreasonable.

The regulation by the legislature of the pressure of natural gas in pipes was held valid although it affected existing contracts,[1] and it has been held that the operation of an ordinance establishing fire limits is not affected by an existing contract to erect a frame house on premises covered by the ordinance, although lumber has been bought on the faith of the contract.[2] So the validity of an act requiring a railroad company to elevate or depress its tracks would not be affected by the existence of contracts with adjoining owners for track connections.[3]

Contrary to this doctrine, it was formerly held in Missouri and Kentucky that the power of the state to prohibit or revoke

[49] See, also, §§ 584-586.

[50] Buffalo East Side Street R. Co. v. Buffalo Street R. Co., 111 N. Y. 132, 2 L. R. A. 384.

[51] Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155; this point was made in New York and New England R. R. Co. v. Bristol, 151 U. S. 556, but not considered by the court.

[1] Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind. 555, 12 L. R. A. 652.

[2] Salem v. Manyes, 123 Mass. 372; Knoxville v. Bird, 12 Lea (Tenn.) 121. See, also, New York v. Herdje, 68 App. Div. 370, 74 N. Y. Suppl. 104.

[3] See Branson v. Philadelphia, 47 Pa. St. 329.

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lottery grants could not be so exercised as to defeat rights of purchasers or lenders upon the faith of the franchise, especially when the sale of the franchise had been expressly authorised;[4] but the United States Supreme Court has held that the abrogation of monopolies is valid notwithstanding such contracts.[5] If, indeed, the grantees of a lottery franchise can be deprived of rights for which they have paid, it follows logically that those claiming under them must be equally unprotected.

Undoubtedly in all these cases the obligation of a contract is impaired, but it is not impaired in order to confer a benefit upon the obligor or debtor. The principle is that a person cannot, by entering into a contract, impair the power which the state must have for the protection of peace, safety, health and morals. If this were not so, an owner of property who apprehended that a police regulation would be passed affecting his property, would have it in his power to nullify its effect in advance, by making contracts inconsistent with its enforcement.[6] That the relief from the contractual obligation individually benefits the party previously bound by it, is no objection to the validity of the statute, provided such relief is not the primary object of the law. For this purpose laws which impair existing contracts as being prejudicial to public safety and morals should be treated as not enacted for the primary benefit of the party bound. Upon this theory a law limiting hours of labor in the interest of safety or health may apply to existing contracts, although it is within the legislative power to exempt existing contracts from its operation.[7] Strong considerations of public policy require the exemption of existing contracts, and this policy is raised into a principle of constitutional law when the object of the statute is relief from pecuniary or economic burdens.

**§ 557. Legislation for the relief of debtors.**—The federal constitution renders impossible many of the devices formerly

[4] State v. Hawthorn, 9 Mo. 389, 1845; State v. Miller, 50 Mo. 129, 1872; Gregory's Executrix v. Trustees of Shelby College, 2 Met. (Ky.) 589, 1859.

[5] Douglas v. Kentucky, 168 U. S. 488.

[6] This was pointed out in People v. Hawley, 3 Mich. 330.

[7] Re Ten Hour Law for Street Railroad Corporations (R. I.), 54 Atl. 602.

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resorted to by the sovereign power to relieve debtors from existing obligations, such as the annulment of existing debts, the retroactive reduction of the rate of interest on loans,[8] all stay and respite laws,[9] and the retroactive operation of homestead and exemption laws.[10] Nor is it within the power of the states to enact insolvent laws operating on debts previously incurred.[11] But in the absence of a specific prohibition the relief of debtors by bankruptcy legislation is commonly regarded as a legitimate exercise of sovereign power, and the retroactive operation of the federal bankruptcy acts has not been questioned.[12]

**§ 558. Retrospective legal tender laws.**—Another device of relieving debtors consists in legislation which allows existing obligations to be discharged in a currency inferior to that which was legal tender at the time the obligations were incurred. It has been maintained by the United States Supreme Court in the Legal Tender Cases[13] that such legislation does not impair the obligation of contracts, since parties are supposed to contract with reference to the continuing power of Congress to determine what shall be money. But the very idea of a law impairing the obligation of contracts presupposes that parties do not contract subject to the expectation of any and every change in governmental regulations. "If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract and be one of its conditions. Thus, one of the most important

[8] See § 555, *supra*.

[9] Barnes v. Barnes, 8 Jones L. (N. C.) 366, 1861; Billmeyer v. Evans, 40 Pa. St. 321, 1861, as to *lettres de repit* and *moratoria* see Rescher I 286; Just. Cod. 1, 19: 2.

[10] Gunn v. Barry, 15 Wall. 610. For another illustration of devices to aid debtors see the relief legislation of Kentucky of 1818, the judicial condemnation of which was sought to be nullified by legislative action; Blair v. Williams, 4 Littell 34; Lapsley v. Brashear, 4 Littell 47.

[11] Sturges v. Crowninshield, 4 Wh. 122, 1819.

[12] The Constitution of the Confederate States (VIII, 4), however, provided, in giving power to establish uniform laws on the subject of bankruptcies: "but no law of Congress shall discharge any debt contracted before the passage of the same."

[13] 12 Wall. 457.

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features in the constitution of the United States, one which the state of the times most urgently required, one on which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens, would lie prostrate, and be construed into an inanimate, inoperative, unmeaning clause."[14]

It is a technical and specious argument to say that contracts for the payment of money are engagements to pay with lawful money of the United States, that Congress is empowered to regulate that money, and that therefore every change in money is within the contemplation of the parties. The controlling factor is that a retrospective legal tender act directly alters the substance of contractual obligations, giving to the same words a different content. The dissenting judges in Hepburn v. Griswold,[15] whose opinions later on prevailed in the Legal Tender Cases, frankly recognised this, Justice Miller saying: "Undoubtedly it is a law impairing the obligation of contracts made before its passage. But while the Constitution forbids the States to pass such laws it does not forbid Congress." It is therefore impossible to accede to the statement made in the Legal Tender Cases that "there is no well founded distinction to be made between the constitutional validity of an act of Congress declaring Treasury notes a legal tender for the payment of debts contracted after its passage, and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment."[16]

**§ 559. Contracts to pay in specific kind of money.**—In arguing that retrospective legal tender acts did not impair the obligation of contracts, Justice Strong was careful to add: "We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money." Contracts of the latter kind have been held to be enforceable according to their terms, and not intended to be covered by the legal tender acts.[17] Should a legal tender act undertake to operate upon contracts of that kind existing at the time of its

[14] Marshall, Ch. J., in Ogden v. Saunders, 12 Wh. 213, 339.

[15] 8 Wall. 603.

[16] 12 Wall. 457, 530.

[17] Bronson v. Rodes, 7 Wall. 229; Trebilcock v. Wilson, 12 Wall. 687. As to legislation of California and Nevada expressly legalising specie contracts, see S. P. Breckinridge, Legal Tender, p. 156.

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enactment, it would beyond any doubt impair the obligation of such contracts.

§ 560. **Scaling laws.**—After the downfall of the Confederacy, statutes were enacted in the Southern states providing that in actions to enforce contracts entered into during the war, evidence might be given as to the understanding of the parties regarding the currency in which they were to be performed, and judgment should be given only for the true value of the treasury notes at the time of the contract, as measured by lawful money of the United States. These statutes were upheld by the United States Supreme Court.[18] But it was held that an alternative provision to the effect that judgment might be given for the true value of the property sold or the fair rent or hire of it, was invalid, as substituting for the stipulations of the parties a new and different contract never made by them.[19]

[18] Effinger v. Kenney, 115 U. S. 566. See, also, Cook v. Lillo, 103 U. S. 793; Stewart v. Salamon, 94 U. S. 434; Thorington v. Smith, 8 Wall. 1. For an early scaling law of Virginia see Faw v. Marsteller, 2 Cr. 10.

[19] Wilmington &c. R. Co. v. King, 91 U. S. 3.

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## CHAPTER XXVI.

### PUBLIC GRANTS AND LICENSES.

§ 561. **In general.**—The clause of the federal constitution forbidding states to pass laws impairing the obligation of contracts applies to contracts made by the state itself. In the first case in which legislation was annulled as impairing such a contract, the contract was in reality an executed grant.[1] A right of this character would perhaps now be more aptly protected under the Fourteenth Amendment. In the case of New Jersey v. Wilson,[2] a statutory exemption from taxation, and in Trustees of Dartmouth College v. Woodward[3] the charter of a corporation, was held to be a contract. In order to invoke federal protection against state legislation not of a penal character, the aggrieved parties had before the Fourteenth Amendment to show that the alleged right which was menaced by the state, was in the nature of a contract, and hence the doctrine of vested rights has become closely associated with the theory of contracts.

Wherever then a claim is made that a right has been granted by positive statute or ordinance, and legislation is passed which is hostile to the claim, the question must be: is the subject-matter (franchise, license, privilege, or exemption) of such a nature that the state can bind itself with regard to it by a contract? and if it is held that the state can make a binding contract with regard to it, the further question may be: has it made such a contract? which may be a question of intent, or of consideration. In the case of municipal action it must also be asked whether power to make a contract was delegated by statute.

The following are the principal classes of rights resting upon positive grant: Licenses to pursue a business prejudicial to safety or morals; useful but offensive undertakings carried on under license; exemptions from personal services, from liability for debts, and from taxation; corporate powers and privileges; and licenses to use public property (street and other franchises).

[1] Fletcher v. Peck, 6 Cranch 87.
[2] 7 Cranch 164.
[3] 4 Wheat. 518.



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## LICENSE TO PURSUE A BUSINESS PREJUDICIAL TO SAFETY OR MORALS. §§ 562-564.

**§ 562. Statement of principle.**—It has been shown before that the establishment or continuance of a business may be prohibited, if it is prejudicial to safety or morals. A business of this kind may be tolerated, because it meets a demand so strong that it cannot be effectually suppressed, and because the state may desire to minimise the evil effects of the business by placing it under control, and issuing permits or licenses for its conduct.

How does such charter or license affect the power to prohibit? While it is in force, the business, if properly conducted, cannot be an indictable nuisance; but does the license constitute a contract or a vested right that cannot be impaired by subsequent legislation?

The preponderance of opinion is that such a license is not constitutionally protected.

**§ 563. Lotteries.**—This principle has perhaps been laid down most unequivocally with regard to lotteries. A lottery license not yet acted upon had been declared revocable in Missouri in 1844.[4] In 1850 the Supreme Court of the United States held that subsequent legislation might place a time limit upon a lottery privilege previously granted, especially as the first grant had been without consideration and had probably become inoperative by non-user.[5] In Alabama a statute establishing a lottery was at one time held to be a contract, but was later on held to be unconstitutional.[6] Lottery privileges were held to be revocable in North Carolina[7] and in Mississippi, in the latter state although a bonus had been paid which was not returned, the court admitting the bad faith, but stating that it had no concern with this.[8] The doctrine was confirmed by the United States Supreme Court in 1879.[9] A charter had been granted authorising a company to conduct

[4] Freleigh v. State, 8 Mo. 606.

[5] Phalen v. Virginia, 8 How. 163.

[6] See Boyd v. State, 46 Ala. 329; Boyd v. Alabama, 94 U. S. 645, 1877.

[7] State v. Morris, 77 N. C. 512, 1877.

[8] Moore v. State, 48 Miss. 147. In Mississippi Society of Arts &c. v. Musgrove, 44 Miss. 820, 7 Am. Rep. 723, the bonus had been tendered but refused, and it was therefore held that no rights had vested under the statutory grant.

[9] Stone v. Mississippi, 101 U. S. 814.

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a lottery in the state for twenty-five years, in return for which the company had paid a lump sum and had agreed to make annual payments, a number of which the state had received. Notwithstanding this, the prohibition of the sale of lottery tickets, without compensation to the company, was upheld. But it also appeared that for forty-five years prior to the grant of the charter the conducting of lotteries had been prohibited in the state and punished as gambling. A year after the grant of the charter the people by a new constitution reinstated the prohibition. Under these circumstances, the court was of the opinion that it was not within the power of the legislature to bargain away the moral interests of the people, and the charter was held not to be a contract. "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 at any time when the public good shall require, and this whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has, in legal effect, nothing more than a license to continue on the terms named for the specified time, unless sooner abrogated by the sovereign power of the state. It is a permit, good as against existing laws, but subject to future legislative or constitutional control or withdrawal."

This decision has been accepted as settling the principle that a lottery grant cannot constitute a contract or a vested right under the federal constitution, irrespective of any particular equities, and notwithstanding the fact that there have been dealings upon the faith of the grant.[10] Stone v. Mississippi has been followed in Virginia,[11] and in Indiana has led to the reversal of earlier decisions protecting rights under lottery grants.[12]

The English act of 1698 for the suppression of private lotteries assumed that they were public nuisances, and that the licenses under which they were conducted were void.[13]

[10] Douglas v. Kentucky, 168 U. S. 488, overruling earlier Kentucky doctrine enunciated in Gregory's Extrx. v. Trustees of Shelby College, 2 Met. 589.

[11] Justice v. Commonwealth, 81 Va. 209.

[12] Kellum v. State, 66 Ind. 588, comp. w. State v. Woodward, 89 Ind. 110.

[13] 10 and 11 William III, cap. 17.

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§ 564. **Liquor licenses.**—A license to sell liquor is held not to be a contract, and may therefore, though unexpired, be revoked by prohibitory legislation. In 1852 the Supreme Court of Ohio refused to interpret a statute as revoking unexpired licenses for which payment had been made, intimating that such revocation, though not beyond the legislative power, would be an act of bad faith.[14] In 1853 it was said in a New Hampshire case that the revocation of an unexpired license would be unconstitutional,[15] but the determination of the question was not essential to the disposition of the case. In 1856, however, it was held in Massachusetts that a license to sell liquor did not create a contract, but that its effect is only to permit a person to carry on the trade under certain regulations, and to exempt him from the penalties provided for unlawful sales.[16]

This doctrine has since been accepted in all states in which the question has arisen, even in New Hampshire, where the contrary opinion had been formerly expressed.[17] The Supreme Court of the United States would probably take the same position, although the precise question has not come before it.[18]

The doctrine represents an extreme application of the theory that the state cannot by any act of its own hamper or burden the future exercise of the police power. As the law now stands, every license to sell liquor is revocable by subsequent law, whether so stated in terms or not, and the legislature has no constitutional power to make the license a vested right. "If the act of 1857 had declared that licenses under it should be irrevocable the legislatures of subsequent years would not have been held by the declaration."[19] It is, however, to be

[14] Hirn v. State, 1 Oh. St. 15.

[15] Adams v. Hackett, 27 N. H. 289.

[16] Calder v. Kurby, 5 Gray 597.

[17] State v. Holmes, 38 N. H. 225; McKinney v. Salem, 77 Ind. 213; Moore v. Indianapolis, 120 Ind. 483; Fell v. State, 42 Md. 71; Columbus City v. Cutcomp, 64 Iowa 672; Powell v. State, 69 Ala. 10; Brown v. State, 82 Ga. 224; Melton v. Mayor of Moultrie, 114 Ga. 462, 40 S. E. 302; Pleuler v. State, 11 Neb. 547, 575. Also Metropol. Bd. of Excise v. Barrie, 34 N. Y. 657, and La Croix v. County Commissioners of Fairfield County, 50 Conn. 321, where however the licenses were by their terms revocable.

[18] See Beer Co. v. Massachusetts, 97 U. S. 25; Mugler v. Kansas, 123 U. S. 623.

[19] Metropolitan Board of Excise v. Barrie, 34 N. Y. 657.

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noted that the New York liquor tax law of 1896 contains an express saving of existing licenses.[20]

Where holders of licenses are exempted from the operation of the new act for a certain period, they cannot, under the prevailing doctrine, complain that the period was too short to enable them to dispose of the stock on hand.[21]

### USEFUL BUT OFFENSIVE UNDERTAKINGS CARRIED ON UNDER LICENSE.[22]

**§ 565. Cemeteries, markets, etc.**—The same view has been taken of licenses and other acts claimed as sanctioning establishments, undertakings and arrangements prejudicial to public health and comfort. Thus the theory that a charter of a corporation is protected as a contract is inapplicable to new regulations or restrictions imposed in the interest of public health or safety.[23] A deed of a city conveying land for a cemetery with covenant of quiet enjoyment does not prevent the subsequent enactment of an ordinance prohibiting the interment of the dead within the city limits;[24] but here the first conveyance was hardly in the nature of a license. So it was held in Virginia that the city might direct the removal of a powder magazine after it had conveyed the ground for that express purpose.[25] In Massachusetts a license from the board of aldermen to maintain a slaughter house is no protection against an order of the board of health prohibiting the carrying on of the business.[26] And in Louisiana[27] a market legally established may be suppressed at any time, if it is deemed expedient to confine the sale of meats to public markets. The same has been held in that state with regard to slaughter houses.[28]

[20] Chap. 29 of General Laws, § 4.

[21] So held with regard to the business of selling pistols in State v. Burgoyne, 7 Lea (75 Tenn.) 173, 40 Am. Rep. 60.

[22] See, also, §§ 176-179, 529-533.

[23] Thorpe v. Rutland &c. R. Co., 27 Vt. 140; Northwestern Fertilising Company v. Hyde Park, 97 U. S. 659.

[24] Brick Presbyterian Church v. Mayor, 5 Cow. 538; Coates v. Mayor, 7 Cow. 585.

However, a trust accepted by a city to hold property for cemetery purposes cannot be destroyed by legislative authority, where there is no pretense of sanitary necessity. Stockton v. City of Newark, 42 N. J. Eq. 531, 9 Atl. 203.

[25] Davenport v. Richmond City, 81 Va. 636.

[26] Cambridge v. Trelegan, 181 Mass. 565, 64 N. E. 204.

[27] New Orleans v. Stafford, 27 La. Ann. 417; New Orleans v. Faber, 105 La. 208, 53 L. R. A. 165.

[28] Villavaso v. Barthet, 39 La. Ann. 247, 1 So. 599.

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The cases in which ordinances attempting to suppress existing establishments were declared invalid rested on special circumstances. So it was held in Louisiana that a municipality having given its consent to the location of a cemetery established under statutory authority could not shortly thereafter prohibit cemeteries as nuisances;[29] and in New York a license to erect a frame building was declared irrepealable after construction commenced; but the repealing ordinance was held not to be within the delegated power of the city, nor to have been enacted in the exercise of the police power.[30]

In the case of trade nuisances, as in the case of the liquor or lottery business, the theory is that a license cannot bind or prejudice the subsequent exercise of the police power. It cannot be denied that this theory may result in practical injustice to private interests. Note in contrast the provision of the German Trade Code[31] which allows the suppression of licensed establishments only on payment of compensation.

EXEMPTIONS. §§ 566-568.

**§ 566. From personal services.**—It is generally held that the state cannot bargain away its power to call for the services of its citizens when needed for the public welfare, and that therefore an exemption cannot constitute an irrevocable right. Not even the full performance of the equivalent for which the exemption was granted will protect the citizen from its revocation,[32] only two states treating the exemption in such a case as a vested right,[33] while in Georgia the statute was interpreted as making by implication an exception in favor of those who had earned their exemption.[34] It has been admitted that the revocation, though valid, may constitute a breach of public faith.

**§ 567. Exemptions from liability for debts.**—This matter

[29] New Orleans v. St. Louis Church, 11 La. Ann. 244.

[30] Buffalo v. Chadeayne, 134 N. Y. 163. In California a permit for the location of gas works, although work had been commenced, was held to yield to a subsequent ordinance forbidding the erection and maintenance of such works. Dobbins v. Los Angeles, 72 Pac. 970.

[31] § 57.

[32] Commonwealth v. Bird, 12 Mass. 443, military service; Re Scranton, 74 Ill. 161, jury service; Bragg v. People, 78 Ill. 328; Dunlap v. State, 76 Ala. 460, jury service; Gatlin v. Walton, 60 N. C. 325, military service.

[33] Ex parte Goodin, 67 Mo. 637, jury service; Zimmer v. State, 30 Ark. 677.

[34] Bloom v. State, 20 Ga. 443.



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does not touch the police power directly. It has been held that the legislature may withdraw the privilege of limited liability from corporations as regards debts to be incurred in the future, one of the arguments used being that it is free to the stockholders to cease incurring debts.[35] This argument is hardly satisfactory, and it may be urged that the incident of limited liability affects so vitally the value of corporate shares as to constitute an integral element in that class of property.[36] Under a reserved power of alteration the privilege may be withdrawn.[37]

The non-liability of a married woman's separate property for family expenses is very clearly only a rule of law without any of the elements of a vested right, and such liability for debts subsequently incurred may be imposed at any time.[38] The same is held with regard to homestead exemptions.[39]

**§ 568. Exemptions from taxation.**—The Supreme Court of the United States held at an early date that such exemption may constitute an irrevocable contract.[40] The doctrine has been resisted by some of the state courts,[41] and has been to a considerable extent interpreted away by subsequent decisions of the Supreme Court, so that now there is a strong presumption against its application.[42] It is believed that the following rules fairly summarise the present status of the doctrine:

1. An exemption contained in a special charter may constitute a contract, if clearly expressed, and the contractual exemption may be perpetual, and extend to all future acquisitions, even such as are made subsequent to the repealing act.[43]

2. The exemption requires a consideration in order to be

[35] Stanley v. Stanley, 26 Me. 191.

[36] Morawetz on Corporations, § 1078.

[37] Sherman v. Smith, 1 Black 587; Gardner v. Hope Insurance Co., 9 R. I. 194; Bissell v. Heath, 98 Mich. 472.

[38] Myers v. Field, 146 Ill. 50.

[39] See Century Digest Constitutional Law, § 205.

[40] New Jersey v. Wilson, 7 Cranch 164, 1812.

[41] Brewster v. Hough, 10 N. H. 138; Little v. Bowers, 17 Vroom N. J. 300.

[42] Phoenix &c. Co. v. Tennessee, 161 U. S. 174: "It cannot be denied that the decisions of this court are somewhat involved in relation to this question of exemption."

[43] St. Anna's Asylum v. New Orleans, 105 U. S. 362. An exemption from taxation was denied as to stock issued subsequent to the prohibition of exemption by a new constitutional provision. Bank of Commerce v. Tennessee, 163 U. S. 416.

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binding as a contract, and may therefore be revoked, if granted to a corporation with regard to property which it already holds.[44] So also where corporate land exempt from taxation is authorised to be conveyed, and the conveyance is made, the exemption is lost.[45]

3. Where the state has reserved the power to alter, amend or revoke corporate charters, the exemption from taxation may be taken away in the exercise of such reserved power[46] unless the reservation of power is by statute only and the subsequent act shows clearly the intent to make a contract unaffected by the right to repeal.[47] But if another payment is made in lieu of taxes, the exemption cannot be revoked and the continuance of payments be demanded at the same time.[48]

4. A general law granting exemption will be regarded as a legislative gratuity or bounty, freely revocable at any time.[49] This view was even taken where the exemption was in consideration of public services rendered, some stress being laid upon the fact that the service was compellable, and hence perhaps not a sufficient consideration for the exemption.[50]

CORPORATE POWERS AND PRIVILEGES. §§ 569-572.

**§ 569. Dartmouth College doctrine.**—The doctrine that a corporate charter is a contract, together with its modifications, has been considered before.[1] In so far as it makes corporate powers irrevocable grants, it operates as an exemption of the corporation from legislative regulation ordinarily held to be within the police power; and this is especially true where the exemption is claimed for powers and privileges not

[44] Christ Church v. Philadelphia County, 24 How. 300; University v. People, 99 U. S. 309; Tucker v. Ferguson, 22 Wall. 527; West Wisconsin R. Co. v. Supervisors of Trempealeau Co., 93 U. S. 595; Grand Lodge v. New Orleans, 166 U. S. 143.

[45] Armstrong v. Treasurer of Athens Co., 16 Pet. 281, distinguishing New Jersey v. Wilson, 7 Cranch 164; Lord v. Litchfield, 36 Conn. 116, overruling earlier cases.

[46] Tomlinson v. Jessup, 15 Wall. 454.

[47] New Jersey v. Yard, 95 U. S. 104.

[48] Stearns v. Minnesota, 179 U. S. 223.

[49] Salt Company v. East Saginaw, 13 Wall. 373; Welch v. Cook, 97 U. S. 541; People v. Roper, 35 N. Y. 629; People v. Board of Assessors of Brooklyn, 84 N. Y. 610.

[50] People v. Roper, 35 N. Y. 629. For other authorities see Century Digest Constitutional Law, §§ 206, 303, 237, 304.

[1] §§ 361-363, *supra*.

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peculiar to corporate capacity, but merely relating to the business of the corporation. It is sufficient here to consider how the legislative power to regulate charges of public service companies is affected by charter or other special provisions granting power to make rates.

**§ 570. Question whether contract or not.**—The United States Supreme Court recognises that a contract may be made between state or municipality and a corporation, giving the latter an irrevocable right to charge certain rates. Thus where a statute provided that the rates of fare to be charged by a street railroad company should be established by agreement between the company and the municipal authorities, and should not be increased without the consent of such authorities, an ordinance reading "the rate of fare for any distance shall not exceed five cents in any one car, etc.," was held to be an irrevocable contract, leaving no power with the city to reduce the fare without the consent of the company, and this notwithstanding the fact that the ordinance reserved to the city the right to make such further rules, orders or regulations as might from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the city and public.[2] But in other cases the Supreme Court has shown a strong disposition to deny the existence of a contract. So a power to fix rates by bye-law has been held not to exclude legislative regulation of rates where it is also provided that the bye-laws must not be repugnant to the laws of the state,[3] and it has been said by a state court that in order to constitute a contract there must be an indication by unmistakably clear language of a deliberate purpose not to interfere in all times to come.[4]

**§ 571. Illinois Water Rate Cases.**—To what lengths the courts will go in denying that the city has a power to make a contract, or that it has as a matter of fact made a contract, by which its power of regulation would be impaired, is well illustrated by a number of recent decisions, which, however, should be contrasted with the still later decision in the Detroit

[2] Detroit v. Detroit Citizens' Street Railway Co., 184 U. S. 368.

[3] Ruggles v. Illinois, 108 U. S. 526; also Stone v. Farmers' Loan & Trust Co., 116 U. S. 307; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418.

[4] Winchester & Lexington Turnpike Road Co. v. Croxton, 98 Ky. 739, 33 L. R. A. 177.

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Street Railway Company case just cited. A statute of Illinois[5] gives power to cities and villages to authorise any person or private corporation to construct and maintain waterworks at such rates as may be fixed by ordinance, and for a period not exceeding thirty years. The village of Rogers Park authorised the construction of water works and provided by ordinance: "The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise. * * *" The Supreme Court of the United States (four justices dissenting) held, affirming the unanimous decision of the Illinois Supreme Court, that this was the language of command, not of contract, of limitation of power, not a bargain giving power; hence the rates were during the existence of the franchise subject to change by or under legislative authority.[6] Another statute of Illinois gave power to municipal authorities to contract with water companies for a supply of water for public use for a period not exceeding thirty years.[7] The ordinance by which the city of Danville agreed to pay a specified rent for a number of hydrants for the term of thirty years was designated as a contract, but the Supreme Court of Illinois held (three justices dissenting) that the authority given by statute did not necessarily imply that the price of the supply should be fixed for the entire period, especially if read in connection with the other statute under which water works were to be maintained at such rates as might be fixed by ordinance, and for a period not exceeding thirty years; that the city had power to contract for a supply of water for the entire term, but that the price was to be determined from time to time, and the rates to be settled by the rules of the common law.[8] On the other hand, however, the Supreme Court of Delaware has held that the charter right to operate a railroad includes the right to determine the tariff of charges, and that the latter right is therefore protected by

[5] City Act, X, § 1.

[6] Rogers Park Water Co. v. Fergus, 178 Ill. 571, 53 N. E. 363; 180 U. S. 624. See also Mayor of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075; Knoxville Water Co. v. Knoxville, 189 U. S. 434.

[7] Hurd's Rev. Stat., Cities, 266.

[8] City of Danville v. Danville Water Co., 178 Ill. 299, 53 N. E. 118; Danville Water Co. v. Danville, 180 U. S. 619; to the same effect Freeport Water Co. v. Freeport, 186 Ill. 179, 57 N. E. 862, affirmed (four justices dissenting), 180 U. S. 587.

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the federal constitution, and cannot be controlled by the legislature, that the limit of the right is only to be found in the common law offense of making extortionate charges which must be established by judicial proceedings.[9] This case is an extreme application of the charter contract theory.

**§ 572. Reservation of power to alter and repeal.**—A reserved power to alter or repeal corporate charters may be exercised so as to reduce rates charged in conformity with the original charter.[10] It should be noted that the Supreme Court has never decided that the legislature can either directly sanction an unreasonable or oppressive rate so as to make it unalterable by subsequent legislatures, or confer upon the company an irrevocable power to establish such rates as it, the company, may deem reasonable, and which may be unreasonable in fact.[11] If an alleged contract is void in its inception for unreasonableness, it produces no obligation which the federal constitution will protect.

A number of state constitutions[12] provide expressly that the police power shall never be so abridged as to permit corporations to conduct their business so as to infringe rights of individuals or the general well being of the state.

## LICENSES TO USE PUBLIC PROPERTY. STREET FRANCHISES. §§ 573-577.

**§ 573. Public utilities.**[13]—The most important public grants have in modern times been those relating to the special use of streets for tracks, pipes, poles and wires, and other structures of public service corporations. Grants of rights to make erections on and in public rivers also belong to the same general category, while the building of a steam railroad upon a right of way acquired for that purpose requires legislative authority chiefly on account of the exercise of corporate powers and of the necessity of condemning property by eminent domain proceedings.

In the case of street rights, the question whether special property rights of abutters are taken or not, has been greatly

[9] Philadelphia, W. & B. R. Co. v. Bowers, 4 Houst. 506, 1873.

[10] Stone v. Wisconsin, 94 U. S. 181.

[11] See as to latter Philadelphia &c. R. Co. v. Bowers, 4 Houst. (Del.) 506.

[12] So California, Louisiana, Mississippi, Missouri, Montana, Pennsylvania.

[13] See, also, §§ 674-681.

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discussed by the courts; this question has been briefly touched upon before,[14] and need not be considered in this connection.

**§ 574. Question of municipal power.**—The question has also arisen whether without specific delegation the grant of street rights is within the power of municipal authorities. This was denied in New York in the leading case of Davis v. Mayor[15] with reference to an exclusive grant for a term of years, and the power to dispose of street rights is now regularly granted to cities in express terms and under certain restrictions. The power of the legislature to make grants of this character or to delegate the authority to make them to municipalities, is not questioned, except that in some states the power to grant monopolies is denied,[16] and except that a state has been denied the power to part with the whole of an important harbor to a private company.[17]

**§ 575. Question of surrender of police power.**—The doctrine that municipalities cannot make such grants under their common power to regulate the use of streets, is largely based upon the view that they involve a surrender of the delegated trust to exercise a continuing control over streets for the benefit of the public, since the possession of special rights limits the general public use. In so far, however, as such control consists in regulation merely, and is demanded by considerations of public health or safety, it is now well understood, that a grant does not involve such surrender, since it is impliedly subject to such reasonable safety regulations as may be imposed from time to time.[18] The grant may surrender to some extent the previous liberty of common use of the public property, but it does so only for the purpose of substituting other and presumably more valuable public facilities.

**§ 576. License a contract or a right of property.**—In order to meet the objection that there is a surrender, even to this extent, it has been contended that the act allowing the special

[14] §§ 509-510, *supra*.

[15] 14 N. Y. 506, 1856. See Booth, Street Railways, § 15.

[16] Norwich Gas Light Co. v. Norwich City Gas Company, 25 Conn. 19; Thrift v. Elizabeth City, 122 N. C. 31, 44 L. R. A. 427.

[17] Illinois C. R. Co. v. Illinois, 146 U. S. 387.

[18] People ex rel. New York &c. Co. v. Squire, 107 N. Y. 593, S. C. 145 U. S. 175; Elliott, Roads and Streets, §§ 818-819. As to unreasonable requirement see N. W. Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175.

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use of the public property is merely in the nature of a license. Massachusetts, however, is the only state which treats track licenses on public streets as revocable.[19] The Supreme Court of Illinois, while holding that a municipal grant of a track right is in the nature of a license, as distinguished from a franchise,[20] also holds that the license, if granted for a valuable consideration or if acted upon by the licensee, becomes a contract, and hence irrevocable.[21] The license has been held irrevocable in other states in which the question has arisen,[22] and New York regards a track right as inherently exclusive and necessarily extending at least over a term of years.[23] The Supreme Court of the United States holds that a state cannot withdraw the assent which it has given upon a valuable consideration, to the construction of a railroad within its limits.[24]

With regard to improvements constructed under express public license in rivers and streams held in public ownership or subject to a public easement of navigation, Pennsylvania treats mill rights as revocable;[25] Massachusetts has held certain grants to be subject to an implied reservation in favor of the paramount public uses of the great ponds of that state, which were declared before the grant was made,[26] but has in other cases protected improvements made upon the faith of public grants.[27] Where the Supreme Court of the United States has held structures in public waters to be subject to

[19] Springfield v. Springfield Street R. Co., 182 Mass. 41, 64 N. E. 577. See § 582, *infra*.

[20] Chicago City R. Co. v. People, 73 Ill. 541, 1874. The same view is taken in Massachusetts Attorney General v. Metropolitan R. R. Co., 125 Mass. 515.

[21] Quincy v. Bull, 106 Ill. 337; Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616; People v. Blocki, 203 Ill. 363, 67 N. E. 809.

[22] Springfield R. Co. v. Springfield, 85 Mo. 674; Hovelman v. Kansas City Horse R. Co., 79 Mo. 632; State v. Corrigan St. R. Co., 85 Mo. 263; Electric R. Co. v. Grand Rapids, 84 Mich. 257; Burlington v. Burlington Street R. Co., 49 Iowa 144; Williamsport Passenger R. Co. v. Williamsport, 120 Pa. St. 1; New Orleans v. Gt. Southern Telephone &c. Co., 40 La. Ann. 41.

[23] Milhau v. Sharp, 27 N. Y. 611; Potter v. Collis, 156 N. Y. 16, 50 N. E. 413.

[24] New York, L. E. & Western R. Co. v. Pennsylvania, 153 U. S. 628, 643.

[25] Susquehanna Canal Co. v. Wright, 9 W. & S. 9; Rundle v. Delaware & Raritan Canal Co., 14 How. 80.

[26] Watuppa Reservoir Co. v. Fall River, 147 Mass. 548.

[27] Commonwealth v. Alger, 7 Cush. 53; Watuppa Reservoir Co. v. Fall River, 154 Mass. 305.

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further public improvements, it has likewise done so on the theory of a reservation in the original grant.[28] But generally compensation is a matter of constitutional right, where public use requires the destruction of works established under legislative authority,[29] and some courts seem inclined to assume such a right, even where the work has been constructed under a mere passive or implied license.[30]

On the whole the preponderance of judicial opinion may be said to support the view that a public act granting the use of public property, as distinguished from a license to pursue a dangerous business, if accepted and acted upon by the grantee, creates a right of property which cannot be taken away without compensation.

**§ 577. Revocability not affected by exclusiveness.**—The question of the revocability of a license exemption or franchise does not seem to be affected by the element of exclusiveness. Exclusive privileges, i. e., privileges which are protected against competing grants, are contrary to the constitutions of a number of states, but not contrary to the Fourteenth Amendment.[31] As, however, a license to pursue a dangerous business is in its nature revocable, the same is true of a monopoly of the like character: the same considerations of public health or safety which in the first instance justified the exclusion of competition, subsequently justify the withdrawal of the exclusive privilege.[32] On the other hand an exclusive franchise granting special rights in public property (laying of pipes, maintenance of a bridge) may be made the subject of a contract and of an irrevocable grant, and is protected against subsequent competing grants by the federal constitution.[33]

[28] Newport &c. Bridge Co. v. United States, 105 U. S. 470. See also People ex rel. Chicago v. West Chicago Street R. Co., 203 Ill. 551, 68 N. E. 78.

[29] Bailey v. Philadelphia &c. R. R. Co., 4 Harr. (Del.), 389; Washington Bridge Co. v. State, 18 Conn. 53; Miller v. Craig, 11 N. J. Eq. 175; Glover v. Powell, 10 N. J. Eq. 211; Chicago v. Laflin, 49 Ill. 172; Sherman v. Sherman, 18 R. I. 504; Langdon v. Mayor, 93 N. Y. 129; Williams v. Mayor, 105 N. Y. 419.

[30] Yates v. Milwaukee, 10 Wall. 497; State v. Sargent, 45 Conn. 358; Lewis v. Portland, 25 Or. 133, 35 Pac. 256.

[31] See below, §§ 674-681; Slaughter House cases, 16 Wall. 36.

[32] Butchers' Union &c. Co. v. Crescent City &c. Co., 111 U. S. 746; see § 680, *infra*.

[33] The Binghamton Bridge, 3 Wall. 51, 1866; New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S. 650.

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## SUGGESTIONS REGARDING RIGHTS CLAIMED UNDER AFFIRMATIVE PUBLIC SANCTION. §§ 578-582.

**§ 578. Theory of vested rights.**—The course of adjudications on the legal status of rights, exemptions and privileges claimed under affirmative sanction of public authority reveals a number of anomalies and difficulties. We find the original theory of the contractual inviolability of corporate charter rights and of exemptions from taxation so much modified, that the extent of protection has become extremely uncertain; decisions depend upon refinements of construction which leave us without any guidance as to future cases; and there are cases in which the public is allowed to ignore its own grants and assurances, contrary to the plainest dictates of justice.

For much of this unsatisfactory state of the law the contract theory of public grants seems to be responsible. The state has been held to a contractual obligation, where it had plainly acted in a sovereign capacity, and it has been allowed to override manifest equities upon the plea that it had no power to bargain away its governmental authority. Had it been possible from the beginning to substitute for the idea of a contract that of a vested right or interest, a much more harmonious and equitable doctrine would have been produced. Our courts have had little occasion to discuss what are vested rights, owing to the absence of the term in most of our state constitutions. The name "vested" itself indicates little beyond the idea of inviolability. We, however, sometimes find in place of it the term "acquired right" which corresponds to the French and German terminology *(droit acquis, erworbenes Recht)*, and which indicates that the right rests upon a valuable consideration, upon a *quid pro quo* received by the state, or expended by the holder. The protection of vested rights would then mean that the state cannot resume its grants or licenses, valid in their inception, and for which either an equivalent has been received, or upon the faith of which expenditures have been invited and made, without making proper compensation.

**§ 579. Equity of executed consideration.**—It is easy to point out cases in which the courts have been controlled by this element of executed consideration.[34] Upon the theory of a

[34] See the lottery cases cited *supra* § 563. Freleigh v. State, 8 Mo. 606; Mississippi Society of Arts &c. v. Musgrove, 44 Miss. 820, 7 Am.

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contract, the mere promise or undertaking on the part of the grantee that he will carry on his enterprise would be sufficient to give him constitutional protection.[35] But there are cases in which municipal grants of street rights were protected as contracts only when they had been acted upon by the grantee. Thus where an ordinance allowing a double track was repealed after the second track had been laid, it was held that the city would have been obliged to make compensation if expense had been reasonably incurred in reliance upon the original ordinance, but that in the case before the court there was no right to indemnity since the tracks were laid after the objections of the Mayor to the double track had been made known to the President of the Company.[36] The Supreme Court of Indiana has refused to apply the doctrine of the Dartmouth College case, where a charter was amended four days after the original act, before any rights were acquired on the faith of it,[37] and the attitude of the United States Supreme Court itself toward corporate charters is determined not nearly so much by the theory of contract or of reserved power as by the substantial character of the rights and equities involved.[38] It should also be noted that while the Supreme Court correctly denies that the official relation constitutes a contract,[39] it protects the salary of the officer after he has earned it upon the theory of a contract implied in law, which in this case can only mean, that by performing the duties of the office the right to the salary becomes vested.[40] Upon the theory of contract the holder of a franchise might properly claim that the terms of the original grant should remain forever unimpaired; upon the theory of vested rights he is in the same position as any other holder of property, i. e., subject to the full exercise of the police power.

Rep. 723; also Phalen v. Virginia, 8 How. 163.

[35] See Chicago Municipal Gas Light &c. Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 618.

[36] Lake Roland Elec. R. Co. v. Baltimore, 77 Md. 352, 20 L. R. A. 126. See also Classen v. Ches. Guano Co., 81 Md. 258, municipal ordinance allowing to build beyond bulkhead line, not having been acted upon, construed as revocable license.

[37] Cincinnati, H. & I. R. Co. v. Clifford, 113 Ind. 460, 15 N. E. 524.

[38] See the recent cases of Stearns v. Minnesota, 179 U. S. 223, and Looker v. Maynard, 179 U. S. 46.

[39] Butler v. Pennsylvania, 10 How. 402.

[40] Fisk v. Jefferson Police Jury, 116 U. S. 131.

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**§ 580. Licenses limited in time not a surrender of the police power.**—How should liquor licenses, lottery franchises, and permits for offensive establishments fare under the theory of vested rights? The prevailing doctrine is that the state cannot bargain away its police power, but this doctrine is applied in an extreme and unjust manner.

Let it be conceded that a legislature cannot bind its successors to tolerate any direct menace to life or property or to public morals, anything, in short, which is a nuisance *per se*. There are other conditions which affect safety, order and morals in a more remote manner, conditions which it may be desirable to remove, but to which the community may adjust itself without immediate danger. The maintenance of a lottery or the sale of intoxicating liquor may thus be tolerated in a community under proper regulations, without greater evil than would result from the evasion of an unenforceable or unenforced prohibition. A legislative policy which takes this fact into consideration is legitimate and defensible. There are industries which cannot be conducted without some danger to safety, health or comfort, and which are yet useful and even necessary. Legislative policy may favor such industries under regulations minimising their evils, if a balancing of advantages and disadvantages shows a clear gain to the community. If then individuals or corporations embark upon such undertakings and invest their capital under legislative sanction, are their interests to be absolutely at the mercy of the government, without any constitutional protection? Such seems to be the prevailing doctrine of our courts which hold that the legislature cannot make a contract binding upon the state which secures the right to continue in a business, conceded to be attended with public inconvenience, although not a nuisance *per se*. In promulgating this doctrine without qualification, a very obvious distinction is lost sight of: namely, that between a reasonable exercise and a surrender of the police power. Useful and valuable purposes may be subserved by temporary licenses, hence they are reasonable acts of government to the protection of which the state may bind itself, but perpetual privileges and licenses are never necessary and therefore necessarily unreasonable.

While, therefore, a business carried on under temporary license may be subject to police regulations, it should be con-

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stitutionally secure from suppression and confiscation, except upon payment of compensation.

**§ 581. Perpetual licenses unreasonable.**—In reason, the same principles should apply to all other licenses, franchises, and exemptions. The United States Supreme Court has recognised the grant of a perpetual exemption from taxation as a binding contract, but the tendency of constitutional development has been to stamp such an exemption as unreasonable. On the other hand the exemption of a person which must end with his life, in consideration of public services which he has rendered upon the faith of the promise, ought to be protected against withdrawal.

Licenses and grants of street rights have now invariably a time limit, frequently under constitutional mandate, the unreasonableness of perpetual privileges thus being recognised by the fundamental law.

The maximum duration of such grants is commonly fixed by positive provision; but the reasonableness of the period may be generally tested by the expenditure made by the licensee. It is obvious that the amount of the license fee which may be nominal, can furnish no proper standard. So it has been held that a municipal corporation cannot revoke a license before the licensee has been reimbursed for his outlay,[41] but that after a long period of enjoyment such reimbursement will be presumed.[42] In a majority of cases thirty years is an ample period for the amortisation of the capital invested.

**§ 582. Licenses in terms made revocable.**—Where a license is made revocable in its terms, it must be conceded that there can be no constitutional claim to protection,[43] but the justice and policy of revocable licenses is doubtful, for they will be invariably accepted in reliance upon the non-exercise of the right to revoke, and the revocation is therefore as much a hardship as if the right had not been reserved.[44] It is interesting to note that the German Trade Code has abandoned the system of revocable licenses, and in the case of the liquor busi-

[41] Town of Spencer v. Andrew, 82 Iowa 14, 12 L. R. A. 115.

[42] City Council Augusta v. Burum, 93 Ga. 68, 26 L. R. A. 340.

[43] Schwuchow v. Chicago, 68 Ill. 444.

[44] Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495.

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ness even forbids time limitations, every license being granted for the life of the holder.[45]

In Massachusetts the principle of revocability is extended to the location of street railroad tracks. The report of the Special Committee appointed under the act of 1897 to investigate the relations between cities and towns and street railway companies speaks of the legal position of the latter as "peculiar, almost anomalous," and as "in theory to the last degree illogical." While the Committee found that the system worked on the whole satisfactorily, so that neither the municipalities nor the companies desired a radical change, the former wishing to retain the right of revocation at will as a weapon—"a sort of discussion bludgeon"—the latter preferring to a fixed term a franchise practically permanent, and what the report calls a tenure during good behavior, yet the Committee recommended that the action of the municipal authorities should be subject to revision, and the law now provides for revocation of locations, upon notice and hearing, if the public necessity and convenience in the use of the streets so require, for good and sufficient reasons to be stated in the order therefor, such order, unless the company consents, not to be valid until approved by the board of railroad commissioners after public notice and hearing.[46] The right of appeal to a higher administrative authority gives practically the same security against arbitrary spoliation as would result from judicial protection. The chief difference between such tenure and a contractual right seems to be that the latter can be forfeited only by breach of duty and misconduct, while the former may have to be surrendered without compensation, if public interest requires it, even where the company is not at fault. But the requirement of notice and hearing and the right of appeal afford adequate protection against the assertion of unjust and capricious claims of public interest. It is to be expected that the board of railroad commissioners will develop a rational and consistent body of rules and principles for the approval and disapproval of municipal orders of revocation.

[45] § 40.

[46] Revised Laws, ch. 112, § 32.

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## CHAPTER XXVII.

### SOCIAL AND ECONOMIC REFORMS.

§ 583. **In general.**—The establishment of the modern social and economic system involved the abrogation of a number of institutions which claimed the protection due to vested rights: seignorial rights and bondage, class and trade privileges and monopolies, burdens and restrictions on property in land, and the holdings of the Dead Hand. In America the institution of slavery has furnished the one great example of vested rights antagonistic to the progress of civilisation. The downfall of old systems has often been preceded by great political crises and revolutions, and the measures directed against them have in consequence not always been normal manifestations of law and government, and hardly furnish a test for the limitations of the police power. But the necessary reforms have always been finally accomplished by legislation, and it is instructive to note the attitude which government, claiming to act through the form of law, has taken toward the problem of vested rights.

#### THE ABOLITION OF SLAVERY. §§ 584-586.

§ 584. **Early legislation.**—There are two ways in which a state may abrogate slavery without a spoliation of vested rights: by emancipating the future issue of living slaves, and by granting compensation.

The former plan was adopted by some of the Northern states. Pennsylvania in 1780 abolished the slavery of children as a consequence of the slavery of the mother; such children were, however, to remain the servants of the proprietor of the mother until the age of twenty-eight. Connecticut and Rhode Island provided in 1784 that children thereafter born of slaves should be free. New York adopted the method of the Pennsylvania law in 1799, New Jersey in 1804. The statutory service of the children was similar to that of apprentices bound out by the overseers of the poor.

§ 585. **Legislation during the civil war and the question of compensation.**—For the Southern states emancipation was not considered by responsible governments until after the out-



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break of the Civil War.[1] On March 6, 1862, President Lincoln recommended to Congress the adoption of a joint resolution to the effect that the United States ought to co-operate with any state which may adopt gradual abolishment of slavery, giving to such state pecuniary aid, to be used by such state, in its discretion, to compensate for the inconveniences, public and private, produced by such change of system. Such a resolution was adopted by Congress on April 10. In Missouri serious efforts were made in the Legislature to carry through some plan of gradual emancipation, but they failed.[2] On April 16, 1862, Congress abolished slavery in the District of Columbia, providing for compensation to the slave owners and appropriating $1,000,000 for that purpose,[3] but on June 19, 1862, an act was passed declaring that thereafter neither slavery nor involuntary servitude should exist in the Territories, without making any mention of compensation.[4] In the Preliminary Emancipation Proclamation of September 22, 1862, the President stated that he would in due time recommend that upon the restoration of constitutional relations loyal citizens in the South be compensated for all losses by acts of the United States, including the loss of slaves. The emancipation of January 1, 1863, was purely a war measure, not applying to pacified districts, and while it freed millions of slaves it did not attempt to abrogate the institution even in the territory for which it was proclaimed. Under the circumstances, compensation was out of the question. On December 31, 1862, Congress had provided that in the new state of West Virginia all children thereafter born of slaves should be free, slaves under the age of ten years should be free when twenty-one; slaves between the ages of ten and twenty-one should be free when twenty-five.[5] This plan of gradual emancipation became part of the Constitution of West Virginia; it will be noticed that as to living slaves under twenty-one it took away vested rights; but it did not provide for compensation. In 1864 a number of Southern States, acting under Northern dictation, abolished slavery, immediately and without compensation. The same course was taken voluntarily by Maryland, November 1, 1864,

[1] The Constitution of Kentucky of 1791, Art. 7, provided that slaves should not be emancipated by law without the consent of the owners, or without paying full compensation.

[2] Thorpe, Constitutional History of the United States III, 39—68.

[3] 12 Stat. at L. 376.

[4] 12 Stat. at L. 432.

[5] 12 Stat. at L. 633.

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and Missouri, January 11, 1865. When the Thirteenth Amendment to the federal constitution, abolishing slavery, was proposed, the discussion turned upon the question whether the national government had power to abolish for the states, not whether any government might abolish without compensation. Compensation was not considered and the amendment became part of the constitution without it.

**§ 586. Constitutional aspect of abolition.**—Abolition in the United States came as the result of a war, of which slavery had been the cause, and which had cost more money than the slaves had been worth; it came moreover when the institution had been practically destroyed and could not possibly have been maintained any longer. It is therefore impossible to draw general constitutional inferences from the denial of compensation; on the other hand, there is nothing to show that at any time before the war or even during the first years of the war, outright abolition without compensation was regarded as a constitutional power of government. The precedents of England, France and Russia had been in favor of compensation. The preponderance of opinion in favor of compensation is all the more remarkable as the property abolished was of a kind utterly repugnant to moral sentiment.

TRADE PRIVILEGES AND FEUDAL RIGHTS. §§ 587-588.

**§ 587. Class and trade privileges and exemptions.**—The constitutional status of established privileges and exemptions in America has already been considered. They have never been of overruling importance in the United States so as to dominate the economic system of the country. It is well recognised that they are contrary to public policy, and their abolition for compensation is therefore clearly justified.[6]

In the states of the European Continent the demand for freedom of trade and industry, and for equality in the distribution of public burdens, led to an extensive abrogation of privileges and exemptions of various kinds, and the right to compensation seems to have been determined largely by equitable considerations.

The abolition of gild monopolies was not regarded as sub-

[6] West River Bridge Co. v. Dix, 6 How. 507; Commissioners of the Sinking Fund v. Green &c. River Navigation Co., 79 Ky. 73; Mills v. County of St. Clair, 7 Ill. 197; Central Bridge Corp. v. Lowell, 70 Mass. (4 Gray) 474.



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ject to an obligation to make compensation, as their privileges were of a semi-political character, and were claimed to be held for the public benefit and not for private emolument. A German imperial law of 1654 gave to municipal governments the power to alter any gild charter.[7] In England the tendency was since the Fifteenth Century to supersede the restrictive bye-laws of companies and corporations by parliamentary enactment, which, while they did not establish freedom of trade, at least placed trade restrictions under public sanction and control,[8] so that the final abolition of restrictions[9] did not appear as a measure directed against private right; it saved, indeed, the customs of gilds which by that time had become practically impotent.[10] In France gild monopolies were abolished in 1776, but it is said that the gild of barbers was excepted, because they had bought their privilege and the state could not pay them[11]—a clear recognition of the principle of vested rights. The French law abolishing the monopoly of brokers (excepting exchange brokers) provided for indemnifying those established in the business.[12] Prussia abrogated trade monopolies (Bannrechte), partly without compensation "because experience has shown that the abrogation does not diminish profits,"[13] while as to others compensation was made to depend upon proof of loss.[14] A Prussian law of 1861 abolished exemptions from the land tax, granting compensation of twenty times the amount of the annual tax where the exemption had been originally granted for a consideration or otherwise rested upon special acts of a private nature, and of thirteen and a half times the amount, in the absense of such title. The Prussian income tax law of 1891 was made to apply to members of the formerly sovereign houses as soon as provision should have been made for their indemnification.

§ 588. **Seignorial rights.**—Seignorial rights of a feudal character are unknown in the United States. The Constitution of New York of 1846[15] abolished all feudal tenures with all their

[7] Reichsabschied 1654, Art. 106; Roscher Nationaloekonomie III, p. 802.

[8] Especially 5 Eliz. c. 4.

[9] 54 Geo. III, c. 96.

[10] Cunningham, Growth of English Commerce, § 276.

[11] Roscher, III, 873.

[12] Law July 18, 1866.

[13] Buchenberger Agrarwesen, § 27.

[14] Roscher, III, p. 875.

[15] I, § 11.

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incidents, saving rents and services certain, theretofore lawfully created or reserved. Similar provisions are found in Wisconsin, Minnesota and Arkansas. The provision was taken over from the Revised Statutes of 1828 and is also to be found in the Revised Laws of 1813. The saving clause shows that the abolition was intended to be retroactive; but as military tenures never existed in New York any more than in the other colonies or states, it is not easy to see what vested rights could have been destroyed, the main incident to socage tenure, the rent service, being expressly saved by the statute. The abolition of military tenures in England[16] was accompanied by the creation of an excise tax to compensate the King for his loss; but no provision was made for compensating the mesne lords whose tenures and incidental profits were likewise taken away. The earlier plan for abolishing military tenures, moved in Parliament in the reign of James I, contained a provision "for a convenient rent to be assured to the lords of every knight's fee;" and upon the abrogation of patrimonial and heritable jurisdictions in Scotland in 1747 an indemnity of £164000 was awarded to the lords. The seignorial rights in France (1789), Austria (1848), and Prussia (1850) were abrogated without provision for indemnity.[17] The denial of compensation in these cases rested upon the theory that rights to compulsory personal services, hunting privileges, mortuaries, etc., were mere incidents to a personal servitude, and that their exaction could not grow into vested rights.[18]

PERPETUITIES AND MORTMAIN. §§ 589-596.

§ 589. **Perpetual rents.**—Perpetual ground rents are either incidents to a socage tenure (rents service), or rest upon grant without the relation of lord and tenant.[19] They have for a long time ceased to be created in this country, but rents dating from earlier periods still exist in Eastern states, notably in New York and Pennsylvania. In 1869 a statute was enacted in Pennsylvania enabling the owner of property burdened with an irredeemable rent to institute proceedings against the

[16] 12 Car. II, c. 24, 1660.

[17] Roscher Nationaloekonomie II, § 124; Meyer Verwatungsrecht, p. 299. The German laws on the subject are collected in Kraut, Privatrecht, 1886, p. 118-122.

[18] Lassalle, System der erworbenen Rechte I, 191, § 9.

[19] Rents charge, or rents seek; Blackst. II, 41.

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owner of the rent for its redemption at a sum to be assessed by a jury, the damages not to be estimated at less than twenty years' purchase thereof.[20] This statute was declared unconstitutional upon the ground that the removal of restrictions on alienation did not constitute a public use for which the power of eminent domain can be exercised.[21] This decision cannot be accepted as sound. In the words of one of the justices of the court: "It cannot be that contracts of a past generation are beyond the reach of law for a proper purpose, a purpose not to destroy, but to change, to suit the interests of the state. Otherwise a contract would stand on a higher platform than that of the people to change their form of government." It appears from the opinion that the court would have admitted the validity of an act forbidding the future creation of perpetual ground rents. There can indeed be no doubt that the prevention of perpetual burdens is a legitimate object of public policy.[22] And it may be confidently asserted, that whatever policy may be legitimately pursued by prospective statutes, may also be enforced against vested rights of indefinite duration by the exercise of the power of eminent domain. Otherwise the heritage of past generations would shackle forever the future of the economic and social system of the country. Upon the principle laid down by the Pennsylvania court, no constitutional legislation could have abolished the feudal system of Europe.

**§ 590. Perpetual covenants.**—There seems to have been no legislation in this country dealing retroactively with perpetual restrictions upon the use of land. It is, however, well established that the courts will construe such restrictions as covenants rather than as conditions if it is possible to do so,[23] and the specific enforcement of a covenant may be refused, when the condition of the property has materially changed.[24] "It must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is inconvenient to the public weal that such a lati-

[20] Laws 1869, p. 47.

[21] Palairet's Appeal, 67 Pa. St. 479. See Wilson v. Iseminger, 185 U. S. 55.

[22] See § 370, *supra*.

[23] Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; Post v. Weil, 115 N. Y. 361, 5 L. R. A. 422; Stanley v. Colt, 5 Wall. 119.

[24] Trustees of Columbia College v. Thacher, 87 N. Y. 311; Duke of Bedford v. Trustees of the British Museum, 2 Myl. & K. 552; Addison on Contracts, 9th edn. p. 284.

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tude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their personal representatives to answer in damages for breach of their obligations; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying property, and impress upon their lands and tenements a peculiar character which should follow them into all hands however remote.'"[25] A law of Massachusetts provides that conditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years from the date of their creation except in cases of gifts for public charitable or religious purposes. But the law does not apply to conditions or restrictions existing at the time of its enactment.[26]

§ **591. Entails.**—The rule against perpetuities is received in America as part of the common law,[27] and in Louisiana the rule of the French Civil Code accomplishes the like purpose.[28] The estate tail of the English law does not constitute a perpetuity, since the tenant in tail was at least since the fifteenth century enabled to convey a fee simple by fine and recovery. In many, perhaps nearly all, of the United States estates tail have been abolished by statute, so in Virginia in 1776, in New York in 1786. The statute of New York undertook to convert existing estates tail into estates in fee simple. While this destroyed the estates in remainder and reversion, it cannot be regarded as an interference with vested rights, since even before the statute these future interests had been liable to be cut off by the tenant in tail. A special statute for the barring of an entail has therefore been held constitutional in Ohio.[29] In Illinois estates tail are converted into life estates in the first tenant with remainder in fee simple in the persons to whom at common law it would pass upon his death.[30] This statute, however, applies only to estates tail to be created in the future; and it seems that a retroactive provision of this nature would be unconstitutional, since the common law right

[25] Lord Brougham in Keppel v. Bailey, 2 Myl. & K. 517.

[26] Laws 1887, ch. 418; Rev. Laws, ch. 134, § 20.

[27] Gray, Rule Against Perpetuities, § 200; Chilcott v. Hart, 23 Col. 40, 35 L. R. A. 41.

[28] Louisiana Code, § 768.

[29] Carroll v. Olmsted, 16 Oh. 251.

[30] Rev. Stat. Conveyances, § 6.

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of the tenant in tail to suffer a recovery or the method of assurance substituted therefor in America must be regarded as constituting a vested property right.[31]

**§ 592. Acts of secularisation.**—The holding of property to charitable uses, and the holdings of corporations under licenses in mortmain or other statutory authority corresponding to such license, constitute exceptions to the rule against perpetuities.

During the Middle Ages, and down to the last century the large possessions of the Catholic Church illustrated in a conspicuous manner and on an enormous scale the evils of landed property withdrawn from commerce and alienation. These evils led in France (1789), Germany (1801), and Italy (1870) to a process of so-called secularisation by which the state confiscated large amounts of ecclesiastical property.[32] These acts of secularisation were generally admitted to be violations of the principle of the sanctity of vested rights, but were justified or excused on the ground of political necessity.

**§ 593. Suppression of monasteries in England.**—The suppression of the monasteries in England at the time of the Reformation was accomplished only in part by direct confiscation. In the canon law suppression is a technical term for the taking of benefices for cause and by a judicial proceeding. Henry VIII began his attack upon the possessions of the church by procuring in 1528 from the Pope a license to suppress certain monasteries. A general visitation followed in 1535 for the purpose and with the result of discovering abuses sufficient to serve as a warrant for suppression. In the case of the most important monasteries, however, surrenders voluntary in form[33] were obtained or extorted from Friars and Superiors who submitted themselves to the King's clemency. The first act of confiscation was that of 1536.[34] It applied to all monasteries of less than £200 annual income, which on account of abuses in their conduct were granted to the King

[31] Gilpin v. Williams, 25 Oh. St. 283.

[32] The process of secularisation was also applied by the Christian Emperors to property devoted to the pagan cult; Codex 1, 11, 5: omnia loca quae sacris error veterum deputavit, nostrae rei jubemus sociari.

[33] For form of such surrender see Rymer's Foedera, XIV, 748.

[34] 27 H. VIII, c. 28.

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and his heirs and assigns "to do and use herewith his and their own wills to the pleasure of Almighty God and to the honour and profit of this realm." Yearly pensions were to be allowed to the chief heads and governors of these houses, and the monks were to be committed to honorable great monasteries. The statute of 31 Henry VIII chapter 13 entitled "an act for dissolution of monasteries and abbies" is generally believed to have accomplished the suppression of religious houses; but the act merely confirms former suppressions and surrenders and vests in the King all other monasteries, etc., "which hereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other means shall come to the King's hands." The acts of 37 H. VIII cap. 4 and 1 Edw. VI cap. 14 vested in the possession of the King without office found all chantries, colleges, free chapels and hospitals with certain exceptions (the cathedral churches, the colleges of Oxford, Cambridge, Eton, etc). The act recited the abuses connected with these institutions, and that their conversion to good and godly uses had best be committed to the King. It made provision for annuities to be granted to all persons supported out of these establishments, and directed the continuation of all grammar schools maintained thereby; the income from a portion of the lands confiscated was to be applied toward the maintenance of piers, walls and banks against the ravages of the sea. All these acts are careful to save the rights of strangers, but fail to recognise a right of reversion in the original donors or their heirs.[35]

**§ 594. Virginia legislation.**—There are a few cases in the history of American legislation which throw some light on the constitutional aspects of the secularisation of ecclesiastical property.

In Virginia the Episcopal Church had become established during the colonial period, and under legislative sanction property had become vested in the various parishes. At the time of the Revolution, the rights of the church to all its property were confirmed and several statutes were passed from 1784 to 1788 for the vesting of such property in appropriate church authorities. In 1798 however all these confirmatory acts were repealed as inconsistent with the constitution and the princi-

[35] Burnet, History of Reformation I, 260.

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ples of religious freedom, and in 1801 the legislature passed an act claiming the right of the state to all the property of the Episcopal Churches, and directed the overseers of the poor to sell all vacant glebe lands and appropriate the proceeds to the use of the poor in the parish. The United States Supreme Court, in a case coming from that portion of the District of Columbia formerly belonging to Virginia, held the acts of 1798 and 1801 inoperative to divest the church of the property acquired previous to the revolution.[36] In the state of Virginia itself, this legislation, though with considerable doubt and division of judicial opinion, was sustained and finally acquiesced in.[37]

§ 595. **Pawlet v. Clark.**—A different disposition was made of a case coming from Vermont. A Royal Charter of 1761 had granted lands in the township of Pawlet in the then Province of New Hampshire in a number of shares, among them "one share for a glebe for the Church of England as by law established." After the Revolution the township fell to Vermont. Vermont in 1794 granted to the towns of the state the entire property of the glebes therein situate for the use and support of religious worship; and by another statute of 1805 changed the grant for the use of the schools of the towns. This act was upheld upon the ground that from the time of the charter to the act of 1794 there existed no episcopal church in the town of Pawlet, and that before the erection of such church, the state of Vermont, as the successor to the rights of the Crown, with the assent of the town, had power to appropriate the land to other uses. The original grant in other words was held imperfect for want of a grantee capable of taking.[38] A grant by a charter of the same year to a duly incorporated society was held to be irrevocable.[39]

§ 596. **The Mormon Church case.**—In the case of the Mormon Church the Supreme Court had to deal with an act of federal legislation. The Church of Jesus Christ of the Latter Day Saints had been organised in 1851 by an act or ordinance of the so-called state of Deseret which was confirmed by the

[36] Terrett v. Taylor, 9 Cranch 43, 1815.

[37] Turpin v. Locket, 6 Call 113, 1804; Selden v. Overseers of Poor, 11 Leigh 132, 1840.

[38] Pawlet v. Clark, 9 Cr. 292, 1815.

[39] Society for the Prop. of the Gospel v. New Haven, 8 Wh. 464.

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territorial legislature of Utah in 1855. The act of Congress organising the territory had provided that all its laws should be submitted to Congress and upon disapproval by it should be null and void.[40] It was not, however, until 1862 that Congress acted. By act of July 1, 1862, it disapproved and annulled the incorporating ordinance of the state of Deseret of 1851, and the confirmatory territorial act of 1855, and all other acts establishing, maintaining or countenancing polygamy; and it provided that no corporation or association for religious or charitable purposes should hold real estate of greater value than $50,000, and that all real estate held in contravention of this provision should be forfeited and escheat to the United States.[41] After an interval of twenty-five years Congress in 1887 undertook to carry into effect the previous act of 1862. By statute of March 3d of that year it dissolved the corporation of the church of Jesus Christ of Latter Day Saints, and directed proceedings to be taken for winding up its affairs and for forfeiting and escheating its property held in violation of the act of 1862 (excepting property held exclusively for purposes of worship or burial); such property to be disposed of for the benefit of the common schools of the territory.[42] Suit was brought accordingly by the United States, and it was found that all property had been acquired since 1862, and that only one piece was used for religious purposes; a receiver was accordingly appointed. Upon appeal to the Supreme Court, the decree of the lower court was sustained.[43] It was held that under the act of 1862 the corporation could be legally dissolved, and that its real propertly was liable to pass to the United States, whether upon the theory of forfeiture for violation of law, or upon that of reverter as a consequence of corporate dissolution, the United States, through the Town Site Act, having been the donor of the corporate lands; and that the personal property ceased to be the subject of private ownership and became subject to the disposal of the sovereign: that in accordance with general principles of jurisprudence the proper and lawful disposition of all this property was to devote it to other public beneficial uses, and that the appropri-

[40] Act Sept. 9, 1850, § 6; 9 Stat. at L. p. 453.

[41] 12 Stat. at L. 501.

[42] I Suppl. Rev. Stat. p. 568.

[43] Mormon Church (the late Corporation &c.) v. United States, 136 U. S. 1.

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ation of such property as had been forfeited and escheated to the United States, to common school purposes, was within the power of Congress. This suit did not determine which of the property became forfeited or escheated; nor did the Supreme Court decide what was the proper mode of disposition of the non-forfeited property. These questions seem to have received no further judicial determination, for by resolution of October 25, 1893, Congress restored to the Church all personal property on condition that polygamy should be no longer sanctioned, and by act of March 26, 1896, the real property was restored.[44]

## LEGISLATIVE POWER OVER ELEEMOSYNARY TRUSTS. §§ 597-601.

**§ 597. Eleemosynary trusts under the Dartmouth College doctrine.**—The extent of the legislative power over corporate or trust property held for eleemosynary purposes can hardly be regarded as definitely settled.

In the case of The Trustees of Dartmouth College v. Woodward,[45] in which the whole question was most fully discussed, the eleemosynary trust was vested in a corporation created by royal charter. The act of the legislature, the validity of which was attacked, primarily attempted the alteration of the constitution of the corporation, by changing its name, its governing body, and some principles and details of management; but its purpose was not to destroy the trust itself, or to appropriate the property to uses alien to the intentions of the founder. The Supreme Court held that the particular consti-

[44] In the case of the suppression of the order of the Knights Templar in the beginning of the 14th century, it was affirmed by the judges of England that the King and the lords of the fees might well and lawfully retain the lands of the order as their escheats, in consequence of the dissolution of the order, but because said lands had been given for the defence of Christians, it seemed to the King and the lords for the health of their souls and the discharge of their consciences, that said lands according to the wills of the givers should be assigned to other men of holy religion to the intent that their profits might be devoted and charitably disposed to other godly uses. The lands were therefore by statute vested in the order of the Brethren of the Hospital of St. John. (Statutum de terris templariorum, 17 Ed. II, St. 3, 1324.) Here as in the Mormon Church case we find a claim of absolute right, but a disposition preserving the property to its original or to related uses.

[45] 4 Wheat. 518, 1819.

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tution of the corporation was an essential part of its charter, and that this charter constituted a contract. Justice Story seems to intimate[46] that with the assent of the corporation the object of the legislature could have been accomplished,[47] and that the act would also have been valid under a power of amendment or repeal reserved in the charter. Following the latter suggestion, most states have since made such reservation in granting corporate charters.

It appears that the decision in itself does not determine the question in how far the objects of the eleemosynary foundation are protected, or in how far they are subject to legislative control under a reserved power over corporate charters.

The former question was, however, very fully discussed in the opinions delivered. The contract between the state and the corporation itself, consisting in the charter, was evidently not the only one which the court recognised as entitled to constitutional protection; while Chief Justice Marshall in one place speaks of a contract between the King (state) and the trustees,[48] he in another place says: "This is plainly a contract to which the donors, the trustees, and the crown were the original parties,"[49] and in still another passage[50] he lays all stress upon the contract made between the donors and the trustees for the benefit of education. It is admitted that the case is not quite so clear as that of a gift to an individual: "Neither the founders of the college nor the youth for whose benefit it was founded complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected."[1] But the difficulty arising from the want of a definite beneficiary is overcome by the establishment of the "body corporate as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust."[2] Yet a valid and binding contract seems to exist even irrespective of the fact of incorporation. "The founders of the college * * * contracted for

[46] p. 712.

[47] The assent of the corporation would not excuse a perversion of the original purposes of the foundation: State v. Adams, 44 Mo. 570; Pennsylvania College Cases, 13 Wall. 190.

[48] p. 638.

[49] p. 643.

[50] p. 646.

[1] p. 641.

[2] p. 654.

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the perpetual application of the funds which they gave to the objects for which those funds were given."[3] "Religion, Charity, and Education, are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States that contracts for their benefit must be excluded from the protection of words which in their natural import, include them?"[4] In the opinion of Justice Washington eleemosynary trusts are inviolable because the powers, rights and privileges incident to them flow from the property of the founder in the funds assigned for the support of the charity.[5] It is impossible to escape the conclusion that the court considered property vested in trustees for eleemosynary purposes as protected upon the theory of contract with or without incorporation; in fact the argument of the court is directed to showing that the fact of incorporation cannot be relied upon as a basis for the exercise of legislative powers which the court plainly assumes could not be claimed without it.[6]

If it may then be assumed that eleemosynary trusts, whether incorporated or unincorporated, enjoy the fullest constitutional protection under the doctrine of the Dartmouth College case, the further question arises: is this protection impaired or taken away through incorporation under laws which reserve to the legislature full power of amendment and repeal over the charter?

§ 598. **Doctrines laid down in Mormon Church case.**—The only decision of the Supreme Court of the United States which throws light upon that question is the one rendered in the Mormon Church case.[7] Here the act incorporating an eleemosynary corporation was disapproved and annulled by Congress in the exercise of a general power reserved in the act establishing the territorial government of Utah, and the corporation itself was subsequently dissolved. It is to be noted that Congress directed that the title to real property held and used for places of worship, parsonages and burial grounds should be transferred to trustees and continued for the same pur-

[3] p. 652.
[4] p. 646.
[5] p. 661.
[6] p. 635, 638.
[7] Mormon Church (the late Corporation &c.) v. United States, 136 U. S. 1.

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poses. With regard to property not so reserved the Supreme Court laid down the principle that the personal property ceases to be the subject of private ownership and becomes subject to the disposal of the sovereign authority, and that the real estate reverts to the donors or grantors subject to the charitable use. If the particular charitable use to which the corporation has devoted its property is unlawful or impracticable, the Supreme Court holds that its application to cognate purposes (in this instance educational) may be directed. The court admits that in some states in that case the property would revert to the donor or his heirs discharged of any trust; but it declares that this doctrine cannot be applied where the fund is accumulated from numberless small contributions so that the donors cannot be ascertained, and with regard to real estate the doctrine would be immaterial in the present case, since the land of the dissolved corporation was originally granted by the United States and would therefore fall to it even under the right of reversion.

§ 599. **Effect of reserved power over corporate charter.**— The whole tenor of the decision negatives the claim of power to dissolve an eleemosynary corporation in such a manner as to destroy the charitable trust for which it has been created, provided such trust continues to be lawful and practicable. In such a case the reserved power over the corporate charter seems to extend no farther than to authorise such alterations in the administration of the trust as will not destroy either its individuality or its main object.[8] Thus it has been held that under a reservation of power the legislature cannot change a female seminary into a mixed school,[9] nor direct the property of one educational institution to be administered by the trustees of another upon the plea that such consolidation would better subserve the purposes of education.[10] Where the original object of the trust has ceased to exist or to be practicable (as, e. g., a trust for the manumission of slaves or

[8] State v. Adams, 44 Mo. 570, 582; Allen v. McKeen, 1 Sumn. 276, 1833. In Miller v. New York, 15 Wall. 478, the Supreme Court said that the reserved power will not warrant legislation to direct the funds of donors to new uses inconsistent with the purposes of the charter.

[9] Webster v. Cambridge Female Seminary, 78 Md. 193.

[10] Ohio v. Neff, 52 Oh. St. 375 (case of Cincinnati College). See also Graded School District v.

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for the redemption of persons captured by pirates) the power of a court of equity to direct the application of the property to similar or cognate uses instead of having it revert to the original donor or his heirs, is asserted in some jurisdictions and denied in others,[11] but the power of the legislature to provide in such a case for the disposition of the property in its discretion does not appear to have been denied by any court.

**§ 600. Trust objects becoming contrary to public policy.**— But is it competent for the legislature to destroy or alter a trust once validly created upon the ground that under changed ideas of public policy the accomplishment of the object embodied in the trust appears to be unlawful? The answer to this question should not be doubtful, if the policy in opposition to the trust is justifiable upon the general principles of the police power. Even conceding that the trust involves a contract between the donor and the trustees, private parties cannot be allowed by their contracts to hinder or obstruct a course of legislative policy which would be otherwise legitimate. Thus it is clear that a trust, valid in its inception, to establish a school for the common education of white and colored children, would have to yield to a law requiring the separation of the races in schools.

If the trust were incorporated, it is true that under the doctrine of the Dartmouth College case the state itself would be a party to the contract, but even without a reserved power this contract would probably give way to the exercise of the police power. Since in charitable trusts there are as a rule no specific persons who are entitled to the benefit of the endowment, they do not seem to be within the letter or spirit of the Fourteenth Amendment, which speaks only of depriving persons of property. There is good reason for protecting the property rights of persons, for all persons are equal before the law, and as persons die the law can control and protect future generations through its absolute power over the devolution of property by death; and if certain forms of individual

Trustees of Bracken Academy, 95 Ky. 436, and Cary Library v. Bliss, 151 Mass. 365; but see the acts of New Jersey cited by Justice Bradley in 136 U. S. p. 60.

[11] See review of cases in Jackson v. Phillips, 14 Allen 539, p. 580-596.

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property become detrimental to the community, they can be taken from individuals on payment of compensation.

But purposes and interests, though incorporated and endowed with legal personality, have no claim to constitutional equality, they do not die, and the exercise of the power of eminent domain would be of no avail, since compensation would not change the purpose. As long as a purpose is regarded as lawful it should be secured from spoliation, but there ought to be constitutional power to prevent the perpetuation of interests which are found to be detrimental or useless to the public. The police power should therefore be held to extend to the abrogation of eleemosynary trusts and foundations under proper safeguards against the abuse of this power. The safeguard most in accordance with our constitutional principles would be the formulation of the conditions justifying state interference by general law, and judicial proceedings establishing the existence of one of these conditions in each particular case.

**§ 601. English legislation.**—Even in England where the legislature pays the most scrupulous regard to the sanctity of vested rights, some concession has been made to the legitimate demand that the state ought to be able to control endowments, which have outlived their usefulness. It is provided by the Endowed Schools Act 1869[12] that the Endowed School Commissioners (since 1874 the Charity Commissioners) shall have power in such manner as may render any educational endowment most conducive to the advancement of education, to alter and add to any existing, and to make any new trusts, directions and provisions, including the consolidation and division of endowments.[13] But in the case of endowments created less than fifty years before the passage of the act, the govern-

[12] 32 and 33 Vict. ch. 56.

[13] § 9 of Act.

*Note.*—Power over eleemosynary trusts by Prussian law.

The following provisions of the Prussian Landrecht (Part II, Title VI) illustrate the principles of the German law regarding the power of the state over eleemosynary trusts.

§ 73. The corporation may not use that which a member or a stranger has given for a specific object, for a different purpose.

§ 74. In how far under altered circumstances the state, after the death of the donor, may vary the purpose of the trust, is to be judged by the principles of § 193.

§ 75. In all cases in which such disposition is intended, the corpo-

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ing body must assent to the new scheme. The scheme of legislation submitted to Parliament had specified the principal conditions under which interference would be called for and be justifiable: where the original purpose has failed; where the foundation creates pauperism and immorality; where foundations, being insufficient in value, may usefully be united with others; where in foundations which are sixty years old there are no beneficial results or the benefits are insignificant compared to the value of the foundation.

In America the theory of contractual protection might be found to be an obstacle to the recognition of the two conditions last mentioned as justifying an interference with established trusts, except under a reserved power of alteration, where the trust is incorporated.

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ration must first be heard, and its opinion must not be departed from without a preponderance of reasons.

§ 76. The corporation may not of its own authority depart from the means prescribed for the realisation of the objects of the trust.

§ 77. The state itself may alter these means and arrangements only where it clearly appears that through them the object cannot be accomplished or will fail.

§ 78. If provisions are made in favor of certain definite persons, they cannot be departed from without the consent or full compensation of such persons.

§ 189. If the object of a corporation prescribed in its charter can no longer be accomplished, or fails entirely, the state may dissolve it.

§ 190. The same is true, if this object, on account of altered circumstances, becomes manifestly detrimental to the public welfare.

§ 191. If the accomplishment of the object is merely hindered by abuses or defects of the constitution, the state is merely entitled to provide the necessary measures for the removal of the defects or the restoration of good order.

§ 192. If a corporation is altogether dissolved, and no other provision regarding its property is made by the charter for this contingency, the property escheats to the state, to be otherwise applied to the public good.

§ 193. If, however, there are money or other things, that have been entrusted to the administration of the dissolved corporation for a certain definite object, the state must take care that the purpose of the donor, according to the conditions prescribed by him, be further carried out as far as possible.

§ 194. If the state cannot or will not do this, the donor or his heirs may recover the trust property or funds.

§ 195. If the donor is no longer in existence, and his heirs cannot be ascertained, the property of the former trust belongs to the state as ownerless property, in accordance with the principles of § 192.

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**§ 602. Summary of principles regarding property under the police power.**—The principles regarding the relation of the constitutional protection of property to the police power may be briefly summarised as follows:

1. The purposes for which the police power may be exercised do not justify the taking of lawful property without compensation.

2. Confiscatory regulation is equivalent to taking, but reasonable regulation leaving the owner in substantial enjoyment of his property, though diminishing its returns, is legitimate without compensation.

3. Things imminently dangerous or offensive, and serving no useful purpose, have no status as property and therefore enjoy no constitutional protection (nuisances *per se*).

4. The continuance in an established business may be forbidden without compensation, if the interests of health, safety or morals make its suppression desirable, although it is not a nuisance *per se*: the disposition of an article may be forbidden under like conditions.

5. A public license or grant authorising the doing of a thing prejudicial to health, safety or morals, is subject to revocation without compensation.

6. A contractual obligation cannot be impaired for the benefit of the party obligated; but otherwise a proper exercise of the police power is not rendered unlawful by the fact that it makes impossible the performance of contracts entered into by a person affected thereby.

7. A lawful trust cannot be impaired unless it is organised under a corporate charter which is subject to a reserved power of alteration or repeal.

The following is submitted as preferable to the principles formulated in rules 4 and 5, and in rule 7:

An established business, lawful when established, or established under a license of reasonable duration, constitutes a vested right of property, and its continuance cannot be forbidden under a changed legislative policy without compensation.

Where property is held upon eleemosynary trusts, and, in accordance with principles established by general law, its continued application to the original uses is found to be detrimental or useless to the public, its application to different eleemosynary uses may be required.



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## FUNDAMENTAL RIGHTS.

## THIRD: EQUALITY.

## CHAPTER XXVIII.

### EQUALITY AS A POLITICAL PRINCIPLE.

§ 603. **Social and natural inequality.**—A number of state constitutions, following the words of the Declaration of Independence, contain the statement that all men are created equal. The idea of a natural equality of men has been a powerful factor in bringing about legal equality; but the recognition of the latter does not imply assent to the former. The recognition of a natural inequality has become a problem of great political importance only since essentially different races have come to live together under governments recognising in theory the principle of equal rights. The European states have always had to deal within their several jurisdictions with populations which from a racial point of view have been essentially upon the same level. The inequality of classes which formerly controlled their political systems was social and not natural. The institutions of property, inheritance and the family make it possible to add inequality of classes to the natural inequality of individuals, and to deprive the latter of its due effect, so that wealth and other advantages come to be distributed upon the basis of birth and social connection rather than of individual merit. It is easily understood how under a system of social inequality the idea of a natural equality may arise as a protest against the injustice of the former, and become attractive to many minds.

Social distinctions are inseparable from the institutions of family and property, and exist in all democratic states; if in such states they are less pronounced than in others, it is because of equal educational facilities, manifold opportunities to acquire wealth, absence of caste and class prejudice, and the denial of special legal and political advantages.[1]

§ 604. **Political inequality.**—The mediaeval political system was based upon the legalisation and consequent crystallisation

[1] Rousseau Social Contract, II, 11. "It is precisely because the force of circumstances tends always to destroy equality, that the force of legislation ought always to tend to maintain it."



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of social inequalities, and the recognition of the "estates" as essential factors in the constitution. The different classes were perpetuated by descent, transition from one to the other was impossible or beset with legal obstacles, the same pursuits were not open to all, they were subject to different rules of law in property, procedure, and police, they had unequal shares in political representation, and the lower classes had no share in it at all. The higher classes enjoyed manifold privileges and exemptions, the lowest were subject to burdens and services. The controlling places in the government were practically reserved to those of the highest rank. In monarchical countries the system culminated in the crown and the court, essentially social institutions. The crown, as the source of honor and dignities, could raise from the lower ranks to the higher, but it was not as in the oriental despotisms a levelling factor. And so the tendency of the Middle Ages was to make the economic divisions of society the basis of legal status, and to make that status hereditary.

§ 605. **Equality in England.**—Under the English constitution, many of the features just stated were much mitigated or did not exist at all. The only substantial privilege enjoyed by the nobility was the hereditary right to sit in the House of Lords, and in consequence of the system of primogeniture there was a close social connection between nobility and gentry. At the opposite scale, villenage and serfdom disappeared as early as the fifteenth century, and, barring comparatively unimportant exceptions created by such police measures as the statutes of laborers, and the liability of sailors to be impressed for service in the navy, all Englishmen enjoyed an equal measure of personal freedom. Property qualifications were required for the exercise of the electoral franchise and for jury service, and the most important administrative office, that of Justice of the Peace, was reserved to the landed gentry; but while the common law recognised as a matter of form and name different social grades,[2] the rules of property, of procedure, and of crimes, were practically the same for all.[3] Thus it has

[2] Blackstone I, 403-407.

[3] This became true in course of time also of the benefit of clergy. —In the course of the discussion in Parliament of Lord Hardwicke's Marriage Bill (1753), the attorney general said: "If it were possible I confess that a distinction should be made between the marriage of people of rank and fortune and

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come that equality has never been a great issue in the constitutional history of England.

**§ 606. Equality in France.**—In France, the privileges and exemptions of the nobility and the excessive burdens thrown upon the lower classes, together with gross violations of the right of personal liberty, constituted the great grievances which led to the French Revolution. The night of August 4th, 1789, saw the abrogation of seignorial exactions, privileges and immunities. Equality became one of the watchwords of French constitutionalism. The declaration of 1789 said, "The law is the expression of the general will. All citizens have a right to participate in making it personally or by their representatives. It must be the same for all whether it protects or punishes. All citizens being equal in its eyes, are equally eligible to all public dignities, places and employments, according to their capacities, and without other distinction than that of their virtues and talents." The declaration of 1793 enumerated equality, liberty, security and property, as natural and imprescriptible rights, and stated that all men are equal by nature and before the law. The preamble to the constitution of 1848 says: the French Republic has for its principles liberty, equality, fraternity.

The French publicists find the principle of equality embodied chiefly in the following rules and institutions: the universal suffrage; the equal obligation of military service; rules regarding promotion in the army; apportionment of taxes according to ability to pay; the establishment of the governmental schools, and the principle of competition in them and in the admission to public services; the equal right of inheritance of children and the abolition of entails; the abolition of privileges in the matter of carrying arms, hunting and fishing, and of jurisdictional privileges.[4]

**§ 607. Equality in Prussia.**—In Prussia, as in the rest of Germany, social inequality was sanctioned and fixed by law down to the beginning of the nineteenth century. The nobility, the burgesses, and the peasants, formed the three great estates, which were recognised by the Prussian code of 1794. While

those of the people we commonly call vulgar; but this is impossible in this country, and therefore it was not attempted."

[4] Ducrocq Droit Administratif, 1147—1152.

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this code contained the statement that "the laws of the state bind all its members without distinction of estate, rank or sex," yet it was not until 1807 that nobles were allowed to pursue common trades, and that burgesses were allowed to become peasants and vice versa, and that both were made competent to acquire the landed estates of the nobility. The Prussian Constitution of 1850 declares that all Prussians are equal before the law, and that class privileges are not recognised. As explained by a writer of authority,[5] this declaration means that laws shall be applied without respect of person, rich or poor, high or low, and that no law shall sanction an exception from this principle in favor of any class, and that all political privileges formerly recognised in favor of the members of certain estates, either in public or in private law, shall be abrogated. A special clause throws all public employments open to all who are properly qualified, and another clause proclaims the principle that the enjoyment of civil and political rights is independent of religious faith. Exceptions from the principle of equality are recognised in favor of the members of the royal house and of the formerly sovereign nobility.

§ 608. **Equality under American state constitutions.**—In the American colonies social distinctions became marked with the advancement of wealth, but, barring moderate property qualifications for the exercise of active political rights, there were no legal differences in the status of white men. In the first state constitutions the idea of equality occupied no conspicuous place. The only provisions of a special nature bearing on the principle which we find, are the denial of hereditary tenure of office or public emoluments, and some denunciations of monopolies. Civil equality was accepted as a matter of course, and so were the departures from the principle of political equality, both in the exclusion of large numbers from the franchise, and in the status of the black race. In the first third of the nineteenth century the establishment of universal manhood suffrage and the abrogation of property qualifications for the holding of office did away with the remnants of political inequality, and high office ceased in fact as well as in law to be reserved to the upper classes.

An analysis of the state constitutions shows that—not taking account of the proclamation of the natural equality of men

[5] Roenne, Staatsrecht der preussischen Monarchie, § 151.

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taken from the Declaration of Independence—twenty states[6] have no distinct guaranty of equality, the majority of the others prohibit special privileges, two[7] have a statement that government is instituted for the equal protection and benefit of the people, two[8] guarantee equality before the law, and one[9] equality of civil and political rights. South Carolina copies the provision of the Fourteenth Amendment and Wyoming provides as follows: "Since equality in the enjoyment of natural and civil rights is made sure only through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex or any circumstance or condition whatsoever other than individual incompetency or unworthiness duly ascertained by a court of competent jurisdiction."[10] This is the fullest and the only adequate formulation of the principle of political equality to be found anywhere, but the equality of civil rights is likewise assumed rather than expressed.

**§ 609. The Fourteenth Amendment and the Slaughter House Cases.**—By the Fourteenth Amendment of the Constitution of the United States, the principle of equality throughout the states has been placed under federal protection. The abolition of slavery having been made part of the fundamental law by the Thirteenth Amendment, and before the Fifteenth Amendment undertook to bestow upon the former slaves the active political franchise, it was intended to secure to them an equal and just administration of the laws on the part of the states. That a further reaching effect of the amendment was not generally foreseen, appears from the well-known words of Justice Miller in the Slaughter House Cases:[11] "In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as

[6] Colorado, Delaware, Illinois, Indiana, Louisiana, Maine, Minnesota, Mississippi, Missouri, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, West Virginia, Wisconsin.

[7] Ohio and Idaho.

[8] Arkansas and Florida.

[9] Alabama.

[10] Constitution, Art. I, § 3.

[11] 16 Wall. 36, 1872.

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a class, was the evil to be remedied by this clause, and by it such laws are forbidden. If, however, the states did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorised to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other."

§ 610. **Equality and equal protection of the laws.**—In the thirty years that have passed since the decision on the Slaughter House Cases the equality provision of the Fourteenth Amendment has, however, assumed an entirely different aspect. The principle of equality is relied upon more and more to check the exercise of governmental powers, and the controlling jurisdiction of the federal supreme court is invoked with increasing frequency to give it effect.

The precise meaning of the clause in question has, however, not yet been defined. The words are "nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws." The equal protection of the laws does certainly not mean equal participation in government, and its primary meaning is simply equal security in person and property. This narrower conception was undoubtedly most conspicuous in the minds of the framers of the amendment, and if the act of May 31, 1870,[12] may be regarded as a further definition of the clause, it was also the meaning given to it by Congress. The section reads: "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."[13] These words are not absolutely in-

[12] Now § 1977 Revised Statutes.

[13] This understanding of the equal protection of the laws also appears in the case of Roberts v. Boston, 5 Cush. 198, where it is said that the principle "will not warrant the assertion that men and women are legally clothed with the same

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consistent with legislative discrimination according to the dictates of the public welfare, and equality under the police power is, as will be seen, a problem of considerable complexity. The Supreme Court has leaned strongly against allowing the plea of a violation of the equal protection of the laws. In one case in which the appeal to the Fourteenth Amendment was sustained, there was a grossly partial administration of laws, pretending to be equal, but aimed at the oppression of a particular class,[14] in another case the inequality concerned the relative treatment of two parties in litigation, that is to say, the administration of justice.[15] In the matter of the police power legislative discretion on the part of the states is respected within wide limits.[16] But recent decisions show a tendency to subject statutory classification to a more rigid test.[17]

§ 611. **Equality and due process of law.**—The essential principles of equality must, however, govern the exercise of the police power, whether under the requirement of the equal protection of the laws, or under that of due process. The two ideas are closely associated in the minds of the courts. In the litigation over the state regulation of railroad charges all the later cases emphasised the equal protection of the laws. In the Minnesota case[18] it was said that in so far as railroad companies were deprived of their property through unreasonably

civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment, but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

Coke's comment on the words of the Great Charter, *nulli vendemus*, etc., contains the essence of the principle of equality as originally understood in the phrase of the equal protection of the laws: "and therefore every subject of this realm, for injury done *in bonis terris vel persona* by any other subject, be he ecclesiastical or temporal, free or bond, man or woman, old or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay."

[14] Yick Wo v. Hopkins, 118 U. S. 356.

[15] Gulf &c. R. R. Co. v. Ellis, 165 U. S. 150.

[16] Plessy v. Ferguson, 163 U. S. 537; Atchison &c. R. R. Co. v. Matthews, 174 U. S. 96.

[17] Cotting v. Godard, 183 U. S. 79; Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

[18] Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418.

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low rates, while other persons were allowed to receive reasonable profits upon the capital they had invested, the companies were deprived of the equal protection of the laws. In the Texas case[19] it was said that the equal protection of the laws is denied where property is wrested from an individual without compensation for the benefit of another or of the public, and in the Nebraska case[20] equal protection and due process are treated almost as meaning the same thing.

The state courts likewise identify equality and due process of law. So it is said in Millett v. People,[21] that due process of law or the law of the land is the general public law binding upon all the members of the community, and not partial or private laws affecting the rights of private individuals or classes of individuals. The law of the land has been said to be the opposite of arbitrary, unequal and partial legislation,[22] and as due process may be said to be the essence of constitutional government, so the Supreme Court has said "the equality of rights of citizens is a principle of republicanism."[23]

Equality is for the purpose of controlling the validity of legislation a more definite conception than liberty, for it has the advantage of being measurable. Government cannot be conceived without an infringement of liberty, while the claim of equality is consistent, in idea at least, with almost any form of governmental power. The power of criminal and civil legislation, the judicial power, the taxing power, and the police power, may all be exercised with a due regard for the principle of equality.

The principle of equality has, however, this great difficulty: it cannot mean that all persons must under all circumstances be treated alike, but it can only mean that equal conditions must receive equal treatment. But what constitutes inequality of condition? Is it not true that all unequal and class legislation of former times was based upon alleged inequality of condition? And is not class legislation justified to-day upon the same ground? Only a practical and concrete treatment of the problem can produce workable theories.

[19] Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362.

[20] Smyth v. Ames, 169 U. S. 466.

[21] 117 Ill. 294.

[22] State v. Loomis, 115 Mo. 307; and see State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L. R. A. 265.

[23] United States v. Cruikshank, 92 U. S. 542.

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For the purpose of further analysis the idea of equality may be expressed by saying that it excludes in principle both particular burdens and special privileges, but admits of reasonable classification.

It is then necessary to inquire, what is meant by particular burdens, special privileges, and reasonable classification.

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## CHAPTER XXIX.

### PARTICULAR BURDENS.

**§ 612. Subject selected to be responsible for condition calling for burden.**—It is an elementary principle of equal justice, that where the public welfare requires something to be given or done, the burden be imposed or distributed upon some rational basis, and that no individual be singled out to make a sacrifice for the community. This principle lies at the foundation of the law of taxation, and applies equally to the police power. With reference to the latter it may be expressed by saying that to justify the imposition of a burden there must be some connection of causation or responsibility between the person selected or the right impaired and the danger to the public welfare or the public burden which is sought to be avoided or relieved. The violation of this principle is illustrated in a statute of Illinois of 1855, which provided that a railroad company should be liable to pay the expenses of coroner's inquest and burial not only if a person should be killed by its cars or machinery or any accident thereto, but also if any person should die on any of its cars. If a person happens to die on a railroad car from illness, there is evidently not the slightest causal connection between the business of the railroad company and the public inconvenience and loss for which the statute seeks to make the railroad company responsible. The provision was therefore held unconstitutional in the absence of any violation of law or omission of duty.[1] A municipal ordinance required a railroad company to place powerful arc lamps twenty-five feet above its tracks at a number of street crossings and to keep them lighted every night from dark to dawn. It appeared that the railroad company ran no trains through the city after 8 P. M. It was held that the object of the ordinance could not be the security of the citizens from the running of trains, and that the required arrangement and power of the lamps showed that the city meant to throw the duty of lighting its streets upon the rail-

[1] Ohio & Mississippi R. Co. v. Lackey, 78 Ill. 55.



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road company. The ordinance was therefore declared void.[2] So the obligation to pave, clean and sprinkle the whole of the streets through which a street railroad runs cannot be imposed upon a street railroad company except as a consideration for the grant of a franchise,[3] although it may be required to keep the portion occupied by the tracks free from dust.[4]

The United States Supreme Court states the principle illustrated in these cases by saying: "The property must be the cause of the detriment."[5] It is not sufficient that some property is needed to promote some public interest or relieve some public necessity, otherwise the taking of private property for public use without compensation would be justified. It is, however, on the contrary, a dictate of the principle of equality, that where some person's property is taken for public use, an equivalent be given for the sacrifice and this equivalent be borne by the public at large. "The equal protection of the laws which by the Fourteenth Amendment no state can deny to the individual, forbids legislation, in whatever form it may be stated, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public."[6]

A number of cases require consideration in which the connection between burden and responsibility is doubtful or not obvious.

**§ 613. Particular services.**—The Ordinance for the Northwest Territory provided that no man's particular services shall be de-

[2] Cleveland, C. C. & St. L. R. C. v. Connersville, 147 Ind. 277, 46 N. E. 579.

[3] State v. New Orleans C. & L. R. Co., 49 La. Ann. 1571.

[4] Dillon Municipal Corporations, § 721, and § 620, *infra*.

[5] Davidson v. New Orleans, 96 U. S. 97.

[6] Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362. The following will further illustrate the operation of the principle: The law requires that a tenement house shall not cover more than a certain proportion of a building lot; here the building erected by the owner covering the entire lot would be the cause of unsanitary conditions through lack of ventilation; hence there is no compensation. If, on the other hand, the law requires that the owner leave a portion of his lot adjoining the street vacant in order to increase the width of the street, the condition sought to be avoided or remedied is not one for which the owner is responsible, and the burden is placed upon him for the benefit of the public simply because his property is needed; hence compensation is due. St. Louis v. Hill, 116 Mo. 527.

The Prussian Code of 1794 (Introduction, §§ 74, 75) provides: Par-

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manded without just compensation, and this provision has been embodied in the constitution of some states.[7] In other states this rule would follow from the principle of equality.

Where the law requires of a person engaged in a business affected with a public interest a report of transactions or conditions, the purpose is generally to control the business; and this duty, it seems, can also be imposed where the primary object is to furnish vital statistics; so where a minister is required to report the marriages which he solemnises;[8] or where physicians are made to report cases of birth or death in their practice.[9] It is probably not a sufficient justification of the requirement of a particular service, that it requires no substantial sacrifice of time or money; so it has been held that street railroad companies cannot be required to carry policemen without payment of fare.[10].

The most important case of particular services required belongs to the judicial power, under which attorneys are required to defend poor persons. In Illinois, [11] Michigan, [12], California [13] and Washington, [14] it is held that this duty may be imposed as incident to the office and the privileges of an attorney, though no compensation be provided, while in Indiana[15] and Wisconsin[16] the county was held liable for compensation, and in Indiana the requirement without compensation was held unconstitutional. The amount of compensation may be fixed by authority.[17]

§ 614. **Emergency services.**—The duty to render common public services does not violate the principle of equality, although not every one may in every instance be called upon to perform

ticular rights and advantages of members of the state must yield to rights and duties for the promotion of the public welfare, if a conflict between the two arises. But the state is bound to indemnify the one who is required to sacrifice his particular rights and advantages for the benefit of the commonwealth.

[7] e. g. Indiana and Tennessee.

[8] State v. Madden, 81 Mo. 421.

[9] Robinson v. Hamilton, 60 Iowa, 134; State v. Wordin, 56 Conn. 216.

[10] Wilson v. United Traction Co., 76 N. Y. Suppl. 203.

[11] Vise v. Hamilton Co., 19 Ill. 78.

[12] Bacon v. Wayne Co., 1 Mich. 461.

[13] Rowe v. Yuba Co., 17 Cal. 61.

[14] Presby v. Klickitat Co., 5 Wash. 329.

[15] Blythe v. State, 4 Ind. 525; Webb v. Baird, 6 Ind. 13.

[16] Dane Co. v. Smith, 13 Wis. 585.

[17] Samuels v. County of Dubuque, 13 Iowa 536.

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them.[18] In an emergency the duty naturally devolves on those who are able to help and who are at hand. The common law has long recognised that all persons are required to aid and assist in the enforcement of the law, and authorises the sheriff to call out the power of the county, if necessary to break resistance. In such cases the call will necessarily be confined to a portion of the able-bodied men only, and unless the selection is clearly affected by favor or partiality, the rule of equality is not violated.

Thus services may be enlisted in case of a conflagration.[19] The Revised Code of Chicago[20] provides that every person present at a fire shall be subject and obedient to the orders of the fire marshal in extinguishing the fire and removing and protecting property, a refusal to obey being punished by fine, and power being given to arrest and detain the person refusing until the fire is extinguished, when he is to be taken before a magistrate. In Minnesota an ordinance providing for the arrest of persons refusing at a fire to obey the orders of authorised persons was held void on the ground that the arrest was intended as punishment and was not inflicted by due process of law.[21]

So the duty to report cases of contagious disease may be laid not merely upon heads of families, and physicians, but upon, any person having knowledge of a case.[22]

Since in all these cases the duty is in reality general, no compensation is due.[23]

**§ 615. Underwriters' patrols.**—A peculiar instance of compulsory service is found at present in the legislation of New York, Illinois, and other states, creating so-called underwriter's patrols.[24] Boards of underwriters are incorporated, at the meetings of which each company, agent, or person doing fire

[18] As to liability to military conscription see Kneedler v. Lane, 45 Pa. St. 238. Parker v. Kaughman, 34 Ga. 136; as to road labor see Dennis v. Simon, 51 Oh. St. 233, 36 N. E. 832, *Re* Dassler, 35 Kan. 678, 12 Pac. 130.

[19] By a colonial act of 1711 the fire wards of Boston were authorised to command and require assistance for the extinguishing of fires and recovering goods from buildings, and the provision has since been made general for the state (R. L. ch. 32, § 14).

[20] § 644.

[21] Judson v. Reardon, 16 Minn. 431.

[22] Chapin Municipal Sanitation, p. 431; required in a number of states.

[23] Sears v. Gallatin County, 20 Mont. 462, 40 L. R. A. 405.

[24] Ill. Rev. Stat. ch. 142, N. Y. Laws 1867, ch. 846.

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insurance business in the city is entitled to representation and to one vote. The majority may determine upon the maintenance of a fire patrol and upon a maximum expense to be incurred therefor, the amount not to exceed a certain percentage of the aggregate of premiums returned, and every underwriter is for this purpose required under penalty to make a statement of the premiums received by him. The amount is assessed upon all underwriters in proportion to the premiums received. This legislation was sustained in New York as a police regulation imposed upon those having the sole right to do insurance business, for the purpose of preserving life and property.[25] In order to justify this compulsion, it is necessary to regard efforts to minimise losses as reasonably incident to the insurance business.

DANGERS DUE TO NATURAL CONDITIONS. §§ 616-620.

**§ 616. At common law.**—It is not doubted that the owner of a house abutting on a public street may be required to keep the roof free from snow, the fall of which might injure persons passing on the street.[26] While he is not responsible for the fall of the snow, its liability to fall from a considerable height is due to the erection of the building, and thus the owner is indirectly responsible for the danger. It seems to be essential to the common law idea of a nuisance, that the offensive condition be due either to the act of man, or to the failure to maintain that which has been erected and created by human agency, in a safe or proper condition. At common law there is no liability for a natural condition not in any way traceable to positive human action. Thus malarial swamps, or lowlands, swollen streams, weeds or insects, or diseased animals, do not constitute actionable nuisances.[27]

**§ 617. Under the police power.**—It does not, however, follow that such conditions are beyond the police power. There is some legislation dealing with dangers of this kind, so especially for filling in lots covered with stagnant water.[28] The duty to destroy Canada thistles and other noxious weeds is some-

[25] New York Board of Underwriters v. Whipple, 37 N. Y. Suppl. 712.

[26] Shipley v. Fifty Associates, 106 Mass. 194.

[27] Giles v. Walker, 24 Q. B. D. 656.

[28] Chapin Municipal Sanitation, p. 196.

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times cast upon owners of lands, and upon railroad companies with regard to their right of way. In Illinois the county authorities are empowered by statute to take possession of an infected tract (without unnecessarily depriving the owner of any legitimate use and enjoyment) and to exterminate the thistles at the expense of the owner.[29] A statute of Massachusetts[30] directed, for sanitary purposes, the raising of certain lowlands to a level thirteen feet above low water mark. The work was required in the first instance of the owner; upon his default the work was to be done by the public at his expense, but he was given the alternative right to demand that the land be taken over by the public at a fair valuation.[31] We thus find that the owner is given an election between improvement at his expense, and expropriation under eminent domain. What the public needs is the improvemnt and not the land, and only because it cannot be expected to present the private owner with the improvement, it needs the land in order to make the improvement, provided that the owner cannot be induced to make the improvement or pay for it. The necessity for the exercise of the right of eminent domain is thus conditional, and may be avoided by the owner. Under the statute, however, the owner is not compelled to make the improvement at his expense. The Supreme Court of Massachusetts has, however, upheld other laws requiring owners to raise their lands to such permanent grade as may be necessary to secure complete drainage thereof.[32]

§ 618. **Reasonableness of requirement.**—It seems just that an owner should be compelled to put his land in such condition that it will not be imminently dangerous to others, provided it can be done at a reasonable expense. In the case of the raising of low lands it may well be urged that the danger is not imminent and that the expense exceeds what may be called the condition upon which property is held in the community.

The rightfulness of the requirement to clear land of weeds and pests would likewise depend upon the difficulty and expense of the undertaking. An ordinance of a county of California declared ground squirrels to be a public nuisance, and

[29] Act of March 15, 1872; Rev. Stat. ch. 18.

[30] Laws of 1872, ch. 299.

[31] Bancroft v. Cambridge, 126 Mass. 438.

[32] Nickerson v. Boston, 131 Mass. 306. See Rev. Laws, ch. 75, §§ 75, 79.

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required all owners of land within the county within 90 days to exterminate and destroy such ground squirrels on their respective lands. The Supreme Court of the state regarded the requirement as incapable of being carried out, and declared the ordinance unreasonable and void.[33] The court said: "Such an ordinance differs materially from laws requiring an occupant of lands to keep them free from noxious weeds, or such as make it the duty of an owner of diseased domestic animals to kill them in order to prevent the spread of the disease. These are matters over which the property owner has control, and the requirements are reasonable and just."

§ 619. **Land not the source of the danger.**—It seems, however, that the improvement of natural conditions cannot be compelled, where the land to be improved does not contain the source or instrument of the danger. An act of Illinois of May 19, 1883, authorised municipalities to require repairs of embankments of riparian owners whose duty it was in law or equity to maintain them, but the act was repealed in 1899, and probably never had any application, since no such duty existed. An early act of Louisiana[34] imposed the duty of making levees to protect the inhabitants against inundation upon riparian proprietors. The dike burdens recognised by the ancient laws and customs of lower Germany fall upon all the owners of lands exposed to floods, and correspond to the principle of joint compulsory improvements sanctioned by the Supreme Court in Wurts v. Hoagland.[35] A Prussian statute provides that where land is in such condition and location that the maintenance of a forest on it will diminish or remove the danger of floods or landslides, the establishment or maintenance of forests can be compelled, if the loss to be averted considerably outweighs the injury resulting to the owner from the restrictions imposed upon him. Full compensation must be awarded to the owner.[36]

[33] Ex parte Hodges, 87 Cal. 162.

[34] Act No. 31, February 7, 1829.

[35] 114 U. S. 606.

[36] Act of July 6, 1875. This legislation is an application of the general principle laid down by the Prussian Code of 1794, which says: the state can restrict the private property of its citizens only where thereby a considerable injury can be avoided from others or from the state itself, or a considerable advantage can be procured for either, provided the one or the other can be done without any disadvantage to the owner. Also where the injury to be averted or the advantage



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Reference has been made before to the doctrine enunciated by the Supreme Court of Massachusetts that when land forms a natural barrier to water courses the owner may be prohibited from unduly weakening it by removal of soil;[37] but this is far from holding that positive measures of protection may be required of the owner.

So a railroad company cannot be required to maintain a causeway which it has built for its own use, and which happens to protect lands lying back of it from the inroads of the tide.[38]

The principle seems to be that where the natural condition of property threatens an imminent danger which can be averted at reasonable expense or by reasonable restrictions, the owner may be required to do what is necessary to avert the loss; the owner of property can, however, not be required to take measures for the removal of dangers originating beyond his property, simply because his property is needed or adapted for measures of relief.

**§ 620. Cleaning sidewalks.**—The courts are not agreed whether owners of lots abutting on a street can be required to keep the sidewalk free from snow and ice. The duty has been sustained in Massachusetts,[39] in New York,[40] and in Indiana,[41] while the power to impose it has been denied in Illinois[42] and New Hampshire.[43] The requirement is sanctioned by the English Public Health Act.[44]

In Massachusetts the ordinance was upheld as a police regulation requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely built city, imposed upon those who are so situated that they can most promptly and conveniently perform it, and who have also a peculiar interest in the sidewalk, deriving special benefits from

to be procured, from or to the state or its citizens, considerably outweighs the disadvantage resulting to the owner from the restriction. In the latter case, however, the state must take care that the owner who is restrained be completely indemnified for the injury suffered by him. Bk. I, Title 8, §§ 29-31.

[37] Commonwealth v. Tewksbury, 11 Mete. 55; Commonwealth v. Alger, 7 Cush. 53.

[38] Koch v. Delaware etc. R. R. Co., 53 N. J. L. 256.

[39] Goddard, Petitioner, 16 Pick. 504, 1835.

[40] Carthage v. Frederick, 122 N. Y. 268.

[41] Reinken v. Fuehring, 130 Ind. 382.

[42] Gridley v. Bloomington, 88 Ill. 554; Chicago v. O'Brien, 111 Ill. 532.

[43] State v. Jackman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438.

[44] 38 and 39 Viet. ch. 55, § 44.

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it for purposes of building and passage. The New York court rests its decision chiefly on the necessity to the public and the small inconvenience to the owner. In Illinois, on the other hand, it is held that the abutting owner has the same interest in the removal of the snow as other citizens, and no more; and that the requirement is therefore a special burden inconsistent with the principle of equality. We have then in support of the power the argument of necessity and convenience and special interest; against the power, the contention that the burden bears no relation to a condition peculiar to the person charged.

The argument in favor of sustaining the duty seems the stronger one. The abutting owner has in the street fronting his premises special easements of light and air, he may use it for piling up brick while building, and keep carriages waiting in front of his door, and he frequently uses part of the street bed for areas, coal holes, and vaults. This special interest seems sufficient to justify the imposition upon those who enjoy it of a common service which is not unduly burdensome. Where the city undertakes to clean the main portion of the street, it may also be said that the apportionment of expense and labor between the city and the owner corresponds approximately to the proportion of public and private interest in the street. The power to regulate property relations by changing indefinite equities into definite rights and obligations between the parties is properly a legislative power where the regulation affects many persons in the same condition,[45] and, especially in cases involving small amounts, is apt to produce better practical justice, than an attempt to weigh minutely charges and benefits. Here the duty is laid according to a comprehensive and general system, and there is no such disproportion between benefit and burden as to show an abuse of legislative power.[46]

In view of the fact that heavy snowfall and the formation of ice can generally not be foreseen or guarded against, and that there is urgent need of immediate relief to prevent discomfort and accident, it may also be said that there is in such cases an emergency which justifies the enlistment of the aid of all who are in a position to render services without a sub-

[45] Commonwealth v. Alger, 7 Cush. 53.

[46] Parsons v. District of Columbia, 170 U. S. 45, 52, 57.

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stantial sacrifice. This argument has especial force where the duty is thrown upon occupying owners.

It is certain that the view upholding the power corresponds to the long established practice of legislation, and it may be noted that in Illinois, where the requirement was held to be unconstitutional, the power to impose it was given to the city of Chicago as early as 1837. Every presumption is in favor of the constitutionality of a governmental power which has always been exercised, and has commended itself to the popular judgment as fair and reasonable.

The Supreme Court of Illinois sustains the imposition upon street railroad companies of the duty to clean that part of the streets which is occupied by them, partly upon the ground that the construction of the tracks prevents water, etc., from running down the gutters, partly upon the ground of special rights which the railroad company has in the street, while the abutting owner is held to have no such special right.[47]

In Wisconsin, Michigan and Nebraska an owner may also be required to keep the sidewalk in front of his lot in repair.[48]

## SPECIAL LIABILITY IN CONNECTION WITH HAZARDOUS UNDERTAKINGS. §§ 621-638.

**§ 621. Extension of liability beyond common law principles.** —In a number of cases the law throws burdens upon those who engage in a business or undertaking specially affecting the public welfare, which are not in accordance with the rules of liability of the common law. The departure from the rules of the common law has been complained of as a departure from the rules of justice, and by an identification of justice with due process of law the question of constitutional power has been raised.[49] Since these special rules of liability are reg-

[47] Chicago v. Chicago Union Traction Co., 199 Ill. 259, 65 N. E. 243.

[48] Hiner v. Fond du Lac, 71 Wis. 74; Lynch v. Hubbard, 101 Mich. 43; Lincoln v. Janesch, 63 Neb. 707, 56 L. R. A. 762.

The question of the power to require the building of sidewalks is closely connected with the question of the constitutionality of special assessments, which belongs to the taxing power. The requirement to build sidewalks has been upheld as a police regulation in Palmer v. Way, 6 Col. 106, and Mayor of New Iberia v. Fontelieu, 108 La. 460, 32 So. 369, and as an exercise of the power to compel labor on roads in Trustees of Town of Paris v. Berry, 25 Ky. 483.

[49] Missouri Pacific R. Co. v. Humes, 115 U. S. 512.

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ularly created to insure an increased protection of persons and property, they fall, if valid, within the province of the police power. They involve the principle of equality, since the imposition of a special liability would be undue discrimination, if the special circumstances of the business did not justify it.

**§ 622. Liability for the cost of official supervision.**—Most states, since the latter part of the past century, have created offices or commissions to supervise certain branches of business which in a special manner affect safety or some other public interest. This has been done especially with regard to railroads and mines, and banking and insurance. In some cases the cost of these administrative services has been thrown upon the business that has made them necessary. In several states this system has been abandoned in the case of railroad commissions,[1] as unwise, since commissioners paid by the railroad companies were found not to be sufficiently independent. The validity of such a requirement does not, however, depend upon its wisdom, and has been sustained by the United States Supreme Court.[2] The court holds that the exaction is not in the nature of a tax, and that to require that the burden of a service deemed essential to the public in consequence of the existence of the corporations and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, is neither denying to the corporations the equal protection of the laws, nor making any unjust discrimination against them. The court refers to the fact that the requirement that a vessel examined shall pay for the examination, is a part of all quarantine systems. So the vessels pay for the services of the pilots whom they are compelled to employ. In New York a statute was sustained imposing the cost of an electrical commission upon the electrical companies subject to its supervision.[3] In Illinois the fees of grain inspectors are borne by the owners of grain warehouses,[4] and the fees of mine inspectors by the owners of the mines inspected.[5]

[1] So in Iowa, 1888, ch. 28, § 31.

[2] Charlotte etc. R. R. Co. v. Gibbes, 142 U. S. 386.

[3] People ex rel. N. Y. &c. Co. v. Squire, 107 N. Y. 593; New York v. Squire, 145 U. S. 175.

[4] People v. Harper, 91 Ill. 367.

[5] Chicago &c. Coal Co. v. People, 181 Ill. 270, 54 N. E. 961, 48 L. R. A. 554. Similar decisions in Louisiana: New Orleans v. Kee, 31 So. 1014 (laundries); Louisiana State Bd. of Health v. Standard Oil Co., 31 So. 1015 (coal oil).

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The many statutes recently enacted for the admission to certain professions upon examination almost invariably provide that the examiners be paid by fees charged the candidates; it has, however, been held that the cost of the official examination of railroad engineers as to their fitness for their position may be laid only upon the railroad company employing the engineer examined, and not upon other railroad companies: i. e., the railroad company can be made to pay only for a service indirectly rendered to it by the state.[6]

**§ 623. Liability for the cost of remedial measures.**—It has been held in Minnesota that a special license fee may be collected of liquor dealers for the purpose of making up a fund for the establishment and maintenance of an asylum for inebriates.[7] Here, too, the cost of a public service is laid upon that business which renders the service necessary.

**§ 624. Liability for acts of persons employed under legal compulsion.**—It has never been contended that because a steamer must have officers examined and licensed by federal authority,[8] the owner of the steamer ceases to be liable for their negligence. The liability of the owner is justified by the fact that he may choose his officers from among those properly qualified, that they are subject to his orders and to discharge for misconduct, and that the license does not mean a guaranty of fitness.[9] A statute of Pennsylvania[10] provided that no mine shall be operated without the supervision of a mine foreman;[11] that no one may act as a mine foreman unless he is registered as a holder of a certificate of qualification granted by the secretary of internal affairs;[12] and that the mine foreman shall visit and examine every working place in the mine and direct that it be properly secured by props or timber, and shall see that all slopes, shafts, ways, signal apparatus, pulleys and

[6] Baldwin v. Louisville & N. R. R. Co., 85 Ala. 619, 7 L. R. A. 266; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96.

[7] State v. Cassidy, 22 Minn. 312, 1875.

[8] United States Rev. Stat. 4438, 4463.

[9] So a druggist is not relieved from liability for injuries caused by a prescription negligently put up by an employee, by the fact that the employee was a registered pharmacist, which class alone was by statute allowed to fill prescriptions. Burgess v. Sims Drug Company, 114 Iowa 275, 86 N. W. 307, 54 L. R. A. 364.

[10] Digest 1895, p. 1340.

[11] § 108.

[12] § 101.

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timbering are in safe and efficient working condition.[13] For any injury to person or property occasioned by any violation of the act or any failure to comply with its provisions by any owner, operator, mine foreman, or fireboss, the statute gave a right of action against the owner or operator.[14] The Supreme Court of Pennsylvania held that so much of the last mentioned section as imposed a liability upon the mine owner for the failure of the foreman to comply with those provisions of the act which compel his employment and define his duties, was unconstitutional and void.[15] The decision should probably not be understood as meaning that the mere compulsory employment of the foreman and the vesting in him of certain powers of direction was sufficient or intended to relieve the mine owner from the duty of the greatest care on his part, but only that in so far as a direction was made by the foreman within his statutory powers, the owner could not be made liable for the consequences of complying with such direction. It would have to be assumed that the owner did not know of the foreman's incompetency, or, having such knowledge, had no power to discharge him. The principle would then simply be that one person cannot be made liable for the acts of another person, which are made binding upon him by law. Such liability would be without any fault, a special burden without any possibility of avoiding it.

**§ 625. Ship's liability for fault of pilot.**—Yet it has been held by the United States Supreme Court, in accordance with certain decisions of state courts,[16] that a vessel is liable for a collision solely due to the fault of the pilot whose employment was compelled by the port regulations.[17] The court bases its decision upon the old established principle of the maritime law impressing upon the ship the liability for the damages it has caused, a principle not yielding to port regulations which the ship owner voluntarily adopts by bringing the vessel within the port. It is also said that "it is the duty of the master to interfere in cases of the pilot's intoxication or manifest incapacity, in cases of danger which he does not foresee, and in all

[13] §§ 149, 150.

[14] § 216.

[15] Durkin v. Kingston Coal Company, 171 Pa. St. 193.

[16] Bussy v. Donaldson, 4 Dall. 206; Williamson v. Price, 4 Mart. N. S. 399; Yates v. Brown, 8 Pick. 23.

[17] The China, 7 Wall. 53.

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cases of great necessity. The master has the same power to displace the pilot that he has to remove any subordinate officer of the vessel. He may exercise it or not, according to his discretion."

Perhaps this view of the relation of the master to the pilot may help to reconcile the decision with the principle before stated. In England the vessel under similar circumstances is by statute exempt from liability.[18] Such is also the rule under article 738 of the German Commercial Code. And the same rule has recently been recognised by the Supreme Court of the United States as governing actions at common law as distinguished from suits in admiralty.[19]

§ 626. **Civil damage acts.**—In several states the law provides that any person, or designated relatives (especially husband, wife, child and parent), who shall be injured in person or property or means of support, by any intoxicated person, or in consequence of the intoxication of any person, shall have a cause of action for damages against the person who by supplying the liquor caused the intoxication, and against the person who as owner, etc., permits the occupation of premises for the sale of the liquor which causes the intoxication resulting in such injury.[20] In some states also the recovery of gambling losses is allowed against the owner of the premises who knowingly allows them to be used for gambling.

It is obvious that in such cases the chain of causation between the conduct of the person held liable and the injury for which he is held liable is so long and in its initial links so weak that common sense rather revolts against the injustice of the rule. Yet the rule has been held to be constitutional.[21]

The New York Court of Appeals holds that while the legislature may not impose upon one man a liability for an injury suffered by another with which he had no connection, it may change the rule of the common law which looks only to the proximate cause of the mischief, in attaching legal responsi-

[18] 52 Geo. III, ch. 29, § 30; Merchant Shipping Act, 1894, § 633.

[19] Homer Ramsdell Transportation Co. v. Compagnie Gen. Transatlantique, 182 U. S. 406.

[20] e. g. Mass. Rev. Laws, ch. 100, § 58.

[21] Bertholf v. O'Reilly, 74 N. Y. 509, 1878; Mullen v. Peck, 49 Oh. St. 447, 31 N. E. 1077; Bedore v. Newton, 54 N. H. 117; State v. Ludington, 33 Wis. 107; Howes v. Maxwell, 157 Mass. 333.

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bility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. The court admits that the only absolute protection against the liability imposed by the act is to be found in not using or permitting the premises to be used for the sale of intoxicating liquors, and it relies strongly upon the legislative power to prohibit such sale entirely. Instead of prohibiting the legislature may discourage the traffic by creating liability for consequential damages. The court speaks of the act as an extreme exercise of legislative power, and it is to be noted that New York has abandoned this legislation, giving a cause of action to a person injured through intoxication only if he gave notice to the seller not to sell to the person intoxicated.[22]

It appears that the only ground upon which the liability of the owner of the premises can be sustained is that he might have forbidden their use for selling intoxicating liquors. This implies that he had no absolute right to let them for that purpose, and that again means that the sale of liquor is absolutely within the control of the legislature.[23] Upon a similar reasoning the civil damage acts in cases of gambling are to be supported.[24]

[22] Liquor Tax Law, § 39.

[23] Howes v. Maxwell, 157 Mass. 333.

[24] Trout v. Marvin, 62 Oh. St. 132, 56 N. E. 655.

*Note: Subcontractors' liens.*—A similar difficulty is presented by the provisions of the Mechanics' Lien Laws which allow subcontractors or laborers to file liens against the property upon which they have been employed, for labor and material furnished in improving it, although there is no privity of contract between them and the owner. This legislation does not fall under the police power, since it is enacted merely for the enforcement of private claims, and will therefore not be fully considered here. See Boisot, Mechanics' Lien Laws, § 23. It is sustained in a number of jurisdictions upon the ground that the law constitutes the contractor the owner's agent for contracting with others, and makes the owner the surety for the performance of the contractor's subcontracts, and that the law may thus import its stipulations into future contracts between owner and contractor. Hart v. Boston &c. R. R. Co., 121 Mass. 510; Bardwell v. Mann, 46 Minn. 285, 48 N. W. 1120; Mallory v. La Crosse Abattoir Co., 80 Wis. 170. Other jurisdictions, however, deny that the law may impose burdens upon the owner as a condition of allowing him to improve his property, the creation of which he has not by any act of his invited, and which he cannot by reasonable precautions avoid. Waters v. Wolf, 162 Pa. St. 153; Palmer v. Tingle, 55 Oh. St. 423, 45 N. E. 313; John Spry Lumber Co. v. Sault Savgs. Bk. Loan & Trust Co., 77 Mich. 199, 43 N. W. 778.

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If the power of prohibition did not exist, if the owner had a constitutional right to let his premises for the sale of liquor, he could evidently not be held for consequences of the exercise of that right over which he had no control.

It follows also from the principle that acts which are of common right cannot be burdened with consequences flowing from acts of others which cannot be foreseen or avoided, that when the tenant sells liquor illegally without the knowledge of the landlord, the latter cannot be held liable.[25]

**§ 627. Liens under U. S. revenue laws.**—The United States Revenue laws, under which land used for an illicit distillery may be forfeited, provide[26] that no bond of a distiller shall be approved, unless he is the owner in fee, unencumbered by any mortgage, judgment or other lien, of the lot of land on which the distillery is situated, or unless he files with the collector the written consent of the owner and of any mortgagor or lienor, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority over such mortgage or lien, and that in case of the forfeiture of the distillery premises the title to the same shall vest in the United States discharged from such mortgage, judgment or other incumbrance.[27]

It also appears from the case of United States v. Stowell, last cited, that personal property used in the violation of the revenue laws, does not become the subject of forfeiture, unless so used with the consent or connivance of the owner.

If the law is to be free from the objection of creating arbitrary and therefore unconstitutional burdens, it should make the owner or his property liable at most for the fair value of the labor and material furnished, and not for any contract price agreed upon between lienor and contractor in excess of what the owner agreed to pay; and there should be either a provision that lien notices must be filed within a brief period after the work is done, or that the lien notice shall invalidate only payments made by the owner to the contractor subsequent to such notice. Kellogg v. Howes, 81 Cal. 170, 22 Pac. 509; Stimson Mill Co. v. Braun, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726, 1902.

[25] State v. Williams, 30 N. J. L. 102; City of Campbellsburg v. Odewalt (Ky.), 72 S. W. 314.

[26] Rev. St. § 3262.

[27] Dobbins v. United States, 96 U. S. 395; United States v. Stowell, 133 U. S. 1.

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**§ 628. Dangers arising from the operation of railroads.**—It is a matter of common experience that the employment of steam or other mechanical power for purposes of locomotion is attended with danger to the safety of persons and, under certain conditions, of property. The courts recognise this by exacting of railroad companies an extraordinary degree of care. They have, moreover, in view of the difficulty of proving negligence, raised certain presumptions unfavorable to the railroad company or other carrier: thus where an accident happens, and the passenger shows that he was free from negligence, it will be presumed that the carrier was at fault,[28] and if fire can be traced to the locomotive of a railroad a like presumption will arise.[29]

Rules that the courts evolve without legislation will naturally also be sanctioned by the courts if enacted by statute.[30] In North Carolina a statute has been upheld which shifts the burden of proving contributory negligence on the part of the passenger to the railroad company.[31] A statute of Kentucky provides that the killing or injuring of cattle by the engine or car of any company shall be prima facie evidence of negligence and carelessness on the part of the company, its agents and servants.[32] So in a number of Southern states, statutes making railroad companies responsible for all damage done or caused by the running of trains, to cattle or otherwise, have been interpreted as shifting the burden of proof, and have been upheld upon this construction.[33]

**§ 629. Injuring or killing of cattle.**—In many states legislation has been enacted requiring railroad companies to fence their tracks in order to prevent the straying of cattle thereon. As the requirement tends to protect the safety of trains and passengers as well as that of the cattle, it is clearly an exercise of the police power.[34] In Kentucky it seems to be justified

[28] Yeomans v. Contra Costa etc. Co., 44 Cal. 71.

[29] Shearman & Redfield, Negligence 5th Ed. § 676.

[30] Augusta & S. R. R. Co. v. Randell, 79 Ga. 304.

[31] Wallace v. Western N. C. R. Co., 104 N. C. 442.

[32] Kentucky Statutes 1899, § 809.

[33] Little Rock etc. R. Co. v. Payne, 33 Ark. 816; Tilley v. St. Louis &c. R. C., 49 Ark. 535; Macon &c. R. Co. v. Vaughn, 48 Ga. 464; Mobile &c. R. C. v. Williams, 53 Ala. 595; Nashville & Chattanooga R. Co. v. Peacock, 25 Ala. 229.

[34] Thorpe v. Rutland &c. R. Co., 27 Vt. 140; Railway Co. v. Sharpe, 38 Oh. St. 150; Pennsylvania R. C. v. Riblet, 66 Pa. St. 164; Missouri

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exclusively as a measure of safety of traffic, for it has been held to be an unconstitutional delegation of the police power to leave it to the option of the adjoining land owner whether the fence shall be built or not.[35] It is generally admitted that where the requirement exists, the company failing to erect or maintain such fence may be made liable for all damage to cattle caused thereby,[36] although the owner allowed his cattle to stray, and trespass on the tracks.[37]

It has also been held that a statute is valid which makes the railroad company liable for the killing or injuring of stock by moving trains, etc., on unfenced tracks, the act being interpreted as applying to stock killed in consequence of the neglect to maintain fences and as containing an implied requirement to build a fence.[38] A similar statute was held to be unconstitutional in Washington, partly on the ground that no provision was made for the case that no fence could be lawfully erected, and also because the erection of a fence would apparently excuse from liability even where there was negligence.[39] This case evidently assumes that an absolute liability cannot be imposed. The question whether in the absence of any requirement of fencing, express or implied, the legislature can make the railroad company liable for the killing or injuring of cattle by the running of trains irrespective of negligence or of the lack of fencing, has been presented to the courts of several states: six of these have declared such law to be unconstitutional.[40]

Pac. R. Co. v. Humes, 115 U. S. 512; Missouri Pac. R. Co. v. Harrelson, 44 Kan. 253, 24 Pac. 465; Johnson v. Oregon Short Line R. Co. (Idaho), 53 L. R. A. 744; Illinois Central R. R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618.

[35] Owensboro &c. R. R. Co. v. Todd, 91 Ky. 175, 11 L. R. A. 285; *contra:* Birmingham etc. R. R. Co. v. Parsons, 100 Ala. 662.

[36] Missouri Pac. R. Co. v. Humes, 115 U. S. 512; Birmingham etc. R. Co. v. Parsons, 100 Ala. 662; Jones v. Galena etc. R. R. Co., 16 Iowa 6; Texas Central R. R. Co. v. Childress, 64 Tex. 346; Quackenbush v. Wisconsin &c. R. R. Co., 62 Wis. 411, 22 N. W. 519, 71 Wis. 472, 37 N. W. 834.

[37] Corwin v. New York & Erie R. R. Co., 13 N. Y. 42; otherwise at common law, Munger v. Tonawanda &c. R. R. Co., 4 N. Y. 349.

[38] Sullivan v. Oregon R. R. & N. Co., 19 Or. 319.

[39] Oregon R. & N. Co. v. Smalley, 1 Wash. St. 206, 23 Pac. 1008, 22 Am. St. Rep. 143.

[40] Zeigler v. N. & S. Ala. R. Co., 58 Ala. 594; Birmingham etc. R. R. Co. v. Parsons, 100 Ala. 662; Bielenberg & Montana etc. R. Co., 8 Mont. 271, 2 L. R. A. 813; Jensen v. Union Pacific R. Co., 6 Utah 253, 4 L. R. A. 724; Schenck v. Union

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while one court has left the question open.[41] The Supreme Court of the United States has not yet had occasion to pass upon the question. The constitutionality of the burden may be defended by the analogy of the absolute liability for damage done by fire; but, as pointed out by the Supreme Court of Connecticut,[42] in this case the animals injured are where they ought not to be—trespassers obstructing the defendant's railroad track, directly exposing the defendant's property to hazard and loss.

**§ 630. Fire started by sparks from locomotives.**—On the other hand it is well established that railroad companies may be made liable for losses by fire communicated to property by sparks escaping from locomotives, notwithstanding the fact that they have used every possible precaution. The law upon the subject is fully reviewed in the learned opinion of Justice Gray in St. Louis & S. F. R. Co. v. Mathews.[43] It appears that the rule of absolute liability was established in Massachusetts as early as 1840, changing the earlier rule contained in the statute of 1837, which absolved the railroad company on proof of due caution and diligence.[44] The reasons on which this statute was maintained are stated by Shaw, Ch. J., in Hart v. Western Railroad Co.:[45]

"Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger; and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are, and so they cannot be regarded as a nuisance. The manifest intent and design of this statute, we think, and its legal effect, are, upon the consideration stated, to afford some indemnity against this risk to those who are exposed to it and to throw the responsibility upon those who are thus authorised to use a somewhat dangerous apparatus, and who realise a profit from it."[46]

Pacific R. Co., 5 Wyo. 430; Cateril v. Union Pacific R. R. Co., 2 Id. 540, 21 Pac. 416; Oregon R. R. Nav. Co. 1008, 22 Am. St. Rep. 143.

[41] Wadsworth v. Union Pacific R. v. Smalley, 1 Wash. St. 206, 23 Pac. Co., 18 Col. 600, 23 L. R. A. 812.

[42] Grissell v. Housatonic R. R. Co., 54 Conn. 447.

[43] 165 U. S. 1.

[44] Lyman v. Boston & Worcester R. R. Co., 4 Cush. 288.

[45] 13 Mete. 99.

[46] See, also, Grissell v. Housa-

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**§ 631. Railroad crossings.**—The obligation frequently expressed in railroad charters that the railroad company shall put highways which they cross in such condition and state of repair as not to impair or interfere with its free and proper use, relates to highways in existence when the railroad is built. In the absence of any positive regulation the expense of carrying a new street over a railroad must be borne by the municipality laying out the street,[47] and in Illinois an ordinance requiring the railway company to make a safe and proper crossing was held invalid.[48] It is held in Massachusetts, Minnesota and Kansas that the railroad company is entitled to compensation for planking its roadway at the crossing of a new street,[49] and in Michigan such compensation may be claimed as a constitutional right.[50]

Gradually, however, the view has been gaining ground that the duty to make crossings safe may be imposed upon railroad companies, although the highway is built across the railroad and not vice versa. In some cases this duty was created under a reserved power to aliow the corporate charter,[1] but the requirement has also been maintained in the absence of any such reservation as an exercise of the police power.[2] In Illinois a law of 1869[3] provided that "hereafter, at all of the railroad

tonic &c. R. R. Co., 54 Conn. 447; Flinn v. New York C. & H. R. R. Co., 142 N. Y. 11, 36 N. E. 1046; Baltimore & Ohio R. R. Co. v. Kreager, 61 Oh. St. 312, 56 N. E. 203.

[47] Northern Central R. R. Co. v. Baltimore R. R. Co., 46 Md. 425; People v. Lake Shore & M. S. R. Co., 52 Mich. 277.

[48] Illinois Central R. Co. v. Bloomington, 76 Ill. 447. It was said in a later decision that the point was left undecided in this case which merely held that the city having made the crossing could not recover the expense from the railroad company (Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309).

[49] State v. Hennepin Co. Distr. Ct., 42 Minn. 247, 7 L. R. A. 121; Boston & Albany R. Co. v. Cambridge, 159 Mass. 283; Kansas Central R. R. Co. v. County Commissioners, 45 Kans. 716.

[50] Chicago & Grand Trunk R. Co. v. Hough, 61 Mich. 507; compare with People v. Lake Shore & M. S. R. Co., 52 Mich. 277, where it was intimated that the railroad company might be held for the expense of making approaches.

[1] Albany &c. R. Co. v. Brownell, 24 N. Y. 345; Portland &c. R. Co. v. Deering, 78 Maine, 61; New York & N. E. R. Co. v. Waterbury, 60 Conn. 1.

[2] Boston &c. R. Co. v. Railroad Commissioners, 79 Me. 386; Baltimore & O. S. W. R. R. Co. v. State (Ind.), 65 N. E. 508.

[3] Now § 8 of the Act of 1874, regarding fencing and operation of railroads.

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crossings of highways and streets in this state, the several railroad corporations shall construct and maintain said crossings and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property." The Supreme Court of Illinois regards this as a legitimate police regulation, no matter whether the highway comes to the railroad or the railroad to the highway.[4] This view has been practically adopted by the Supreme Court of the United States.[5]

As the safety of crossings may require the elevation or depression of tracks and involve great expense, it is proper to inquire whether the imposition of the duty is in accordance with constitutional principles. The problem is here, as in the case of cattle guards and fences, one of causation and responsibility. Can the railroad company be held accountable for dangers resulting from improvements which are not for its benefit and which it has not invited? Is it not true that the municipality in directing travel across the railroad creates a new danger which the operation of the railroad itself would never have caused? This contention has been answered by pointing out that travel across the railroad is as much a necessity as travel on it, and that the avoidance of accidents with regard to it is one of the inevitable risks of railroad operation, for which the owners of the railroad may be held responsible no matter at what time the travel is conducted across the road. "Unless every railroad company takes its right of way subject to the right of the public to have other roads constructed across its track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across the state would be an obstacle in the way of its future prosperity of no inconsiderable magnitude."[6] Consequently "every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way;"[7] and,

[4] Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309, the point not being directly involved in the case.

[5] Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226. Similar principle where one railroad crosses another railroad. See Detroit, Ft. W. & B. I. Ry. v. Commissioners of Railroads, 127 Mich. 219, 86 N. W. 842, affirmed Detroit &c. Ry. v. Osborn, 189 U. S. 383.

[6] Chicago & A. R. Co. v. Joliet etc. R. Co., 105 Ill. 388.

[7] Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309.

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if so, the imposition upon it of the burden of measures required for the safety of the highway from dangers due to the operation of the railroad is justifiable.

It is, however, also true that the operation of the railroad would not cause danger at the particular place if it were not for the new establishment of the highway. There is at least a divided responsibility, and this, together with the great expense of raising or lowering tracks, has led in many instances to agreements between municipalities and railroad companies, by which the burden of the abolition of grade crossings is divided between both.[8] In the New England States provision has been made by statute for an apportionment of the burden, in which the state shares.[9]

**§ 632. Injury to passengers.**—Nebraska seems to be the only state which imposes upon railroad companies a liability notwithstanding due diligence on their part or slight negligence on the part of the passenger. The statute reads:[10] "Every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road except in cases where the injury done arises from the criminal negligence of the person injured, or where the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." Criminal negligence has been defined as flagrant and reckless disregard of one's own safety and indifference to injury liable to follow.[11] The statute has been upheld in a number of cases without a thorough discussion of principle;[12] and in a recent case the court says:[13] "Whether these decisions are altogether sound in principle we will not stop now to inquire. They silence opposition by their mere numerical strength, and without acknowledging a servile submission to precedent we feel

[8] See Brooke v. Philadelphia, 162 Pa. 123; Argentine and A. T. & St. F. R. Co., 55 Kan. 730; Kelly v. Minneapolis, 57 Minn. 294; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57; Chicago v. Jackson, 196 Ill. 496, 63 N. E. 1013.

[9] Boston & A. R. Co. v. County Commissioners, 116 Mass. 73; Laws 1890, ch. 428; Rev. Laws, ch. 111, § 149; Woodruff v. Catlin, 54 Conn. 277; New York & N. E. R. Co. v. Bristol, 151 U. S. 556.

[10] Compiled Statutes, ch. 72, Art. I, § 3.

[11] Chicago, B. & Q. R. Co. v. Hague, 48 Neb. 97.

[12] Union P. R. Co. v. Porter, 38 Neb. 226, "it is not believed that the statute is unconstitutional."

[13] Chicago, R. I. & P. R. Co. v. Young, 58 Neb. 678, 79 N. W. 556,

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bound to accept them as conclusive evidence of what the law is." The Supreme Court of the United States has affirmed another decision involving the same statute, partly, it is true, upon the ground that the railroad company accepted the liability with its charter, but strongly intimating that the rule of absolute liability is justifiable on principle.[14]

**§ 633. Absolute liability for personal injuries under other legal systems.**—As early as 1838 a Prussian law provided: "A railroad company is bound to compensate for all damage arising in the carriage on its road to the persons or goods carried or to other persons and their property, unless it can prove that the damage was caused by the fault of the person injured or by an inevitable outward accident. The dangerous character of the enterprise itself is not to be regarded as such accident relieving from responsibility."

A German Imperial Law of 1871 provides: "If in the operation of a railroad a person is killed or injured in his body, the manager or owner is liable for the resulting damage unless he shows that the accident was caused by a force of nature or by the person's own fault."

The liability thus extends to passengers, servants and strangers equally.

The same principle was adopted in favor of workmen only, but so as to include factories, mines, quarries, engineering works, buildings above 30 feet in height, and agricultural employments, by the English Workmen's Compensation Acts of 1897 and 1900. The workman loses his right only if his own serious and wilful misconduct is the cause of the accident.

Compare Report of Industrial Commission, IV, p. 29, which says: "No witness demands that the law of employers' liability shall be made as broad as in Great Britain, where the employer is liable for a limited amount of damages on account of injury from any cause whatever, in the absence of contributory negligence on the part of the employee injured."

**§ 634. Constitutionality of absolute liability.**—If the rule of absolute liability is held to be unconstitutional, it must be on the ground that justice and equality forbid that a person be required to make good the loss of another, unless some fault,

[14] Chicago, R. I. & Pac. R. Co. v. Zernecke, 59 Neb. 689, 55 L. R. A. 610, S. C. 183 U. S. 582.



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or culpability, can be imputed to him. This is the position taken by the courts of Alabama, Montana, Wyoming, and Utah.[15] But while the common law does require fault of some kind as a general principle, it has always recognised some exceptions (trespass of cattle, fire, etc.), and it cannot be said that the rules of the common law represent the only and final conclusions of justice.[16] The principle that inevitable loss should be borne not by the person on whom it may happen to fall, but by the person who profits by the dangerous business to which the loss is incident, embodies a very intelligible idea of justice, and which seems to be in accord with modern social sentiment. Moreover, the rule of absolute liability is established in our law in the case of fires caused by locomotives and has been sanctioned by the United States Supreme Court.[17] It also underlies the rule of *respondeat superior*, since the employer cannot relieve himself from liability for acts done by the servant within the scope of his employment, by proof of the greatest possible care in the selection of the servant. Logic and consistency, therefore, demand that liability irrespective of negligence should not be denounced as unconstitutional. The required element of causation may readily be found in the voluntary employment of dangerous instruments or agencies. Some preceding voluntary act, it seems, ought to exist, in order to justify liability; thus it seems that where a railroad company as common carrier is under a duty to receive cattle for transportation, it cannot be held liable for bringing into a state cattle which communicates Texas fever, if it had no reason to believe, after the exercise of the utmost diligence, that the cattle it received for transportation were liable to impart or capable of communicating the fever.[18]

The Supreme Court of Utah, in recognising the rule of ab-

[15] See § 629, *supra*.

[16] "The principle of the common law, that for a lawful, reasonable and careful use of property the owner cannot be made liable, is not so wrought into the constitution or into the very idea of property that it cannot be departed from by the legislature where protection to persons or to property may require it." Grissell v. Housatonic R. R. Co., 54 Conn. 447.

[17] It has also been recognized in the case of a statute creating an absolute liability for damage done to highways by herds of cattle. Jones v. Brim, 165 U. S. 180.

[18] Missouri, K. & S. R. Co. v. Haber, 169 U. S., p. 613, 636.

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solute liability in case of damage done by cattle to highways, distinguished the decision from that in which the absolute liability of railroad companies for stock killed had been held to be unconstitutional, by pointing out that railroad companies were under duty to run their trains, thus applying the principle that absolute liability can be attached only to a voluntary act.[19] However, the running of trains is so essential to the operation of a railroad, that the duty must be regarded as voluntarily assumed in opening the road for traffic.

**§ 635. Penal liability and fault—Wrongful intent dispensed with.**—The question whether wrongful intent is essential to the commission of a crime, has been greatly discussed by writers on criminal law.[20] Whatever may be the true principle in case of felonies,[21] it is well established that in the case of misdemeanors (which include nearly all police offenses) the legislature may dispense with the requirement of wrongful intent, understanding thereby the intent to violate the law. Under the wording of the statutes, such intent has not been held to be essential to make a person liable for selling adulterated food or milk.[22]

In these cases there is a voluntary act which the party does at his peril, and he is not excused either by ignorance of law or ignorance of fact. Either kind of ignorance implies a fault, and it must be assumed that with due diligence the true character of the act could have been ascertained. The statute of Illinois against adulteration of food provides that no person shall be convicted under any of the sections of the act, if he shows to the satisfaction of the court or jury, that he did not know that he was violating any of the provisions of the act, and that he could not, with reasonable diligence have obtained the knowledge.[23]

Where the law prohibits the possession of killed game dur-

[19] Brim v. Jones, 11 Utah 200, 29 L. R. A. 97.

[20] Bishop New Criminal Law I. §§ 285-336, 425-429.

[21] See Reg v. Tolson, 23 Q. B. Div. 168; Commonwealth v. Mash, 7 Metc. 472, and Bishop's note thereto, New Cr. L. I. § 303a, notes 15, 16, 18.

[22] People v. West, 106 N. Y. 293; Commonwealth v. Farren, 9 Allen 489. "If the legislature deem it important that those who sell shall be held absolutely liable notwithstanding their ignorance of the adulteration, we can see nothing unreasonable in throwing this risk upon them;" also Commonwealth v. Evans, 132 Mass. 11.

[23] Criminal Code, § 9m.

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ing the close season, it has been held to be no valid defence that the game was killed and acquired during the open season.[24] This decision assumes that it is possible so to arrange the killing and buying of game that it will be disposed of entirely during the open season. A statute of Maryland provided that any person should be liable to an indictment who should have in his possession any book or record of numbers drawn in any lottery or any record of any lottery ticket. The accused alleged that the articles were given him by some one he did not know, to deliver them to another man, and that he had no knowledge what the articles were. It was held that it was not necessary to allege or show knowledge; that on grounds of necessity mere possession might be made to constitute the offense; it being intimated that under a reasonable construction of the statute an innocent finder or other clearly innocent holder would not be punishable, or would at most have a nominal fine imposed upon him—the latter alternative, it would seem, a somewhat questionable expedient.[25] Perhaps a penalty may be imposed notwithstanding that the unlawful character of the act could not have been ascertained with due diligence, if the act itself may be entirely forbidden. So a person might be punished for selling liquor to a minor, though the minor represented himself to be of age, and his true age could not be discovered. And so as to a sale to a habitual drunkard.[26] It is held in New Hampshire that the legislature may provide for double damages for injuries caused by the bite of a dog; "it was to discourage the keeping of such dogs that the penalty was imposed,"[27] and the keeping of dogs is under the absolute control of the legislature.

Mere protective measures may, of course, be taken whether the party whose property is affected thereby is at fault or not; so animals straying at large may be impounded irrespective of

[24] Smith v. State, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404.

[25] Ford v. State, 85 Md. 465.

[26] Under the following decisions ignorance does not protect: Farmer v. People, 77 Ill. 322; Humpeler v. People, 92 Ill. 400; Jamison v. Burton, 43 Io. 282; Commonwealth v. Julius, 143 Mass. 132, 8 N. E. 898; Commonwealth v. Zelt, 138 Pa. 615, 11 L. R. A. 602; State v. Hartfiel, 24 Wis. 60. In Ohio and Indiana ignorance has been held to be a protection; Miller v. State, 3 Oh. St. 475; State v. Kalb, 14 Ind. 403; Farrell v. State, 45 Ind. 371.

[27] Craig v. Gerrish, 58 N. H. 513.

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any negligence on the part of their owner; and he may be charged with the cost of impounding.[28]

**§ 636. Knowledge presumed.**—The Supreme Court of Massachusetts says: "Of course, all liability is measured by the defendant's knowledge. The question accurately stated is what knowledge is sufficient to throw the peril of action upon the person who does a certain act."[29] And this is further explained as follows: "When according to common experience a certain fact generally is accompanied by knowledge of the further elements necessary to complete what it is the final object of the law to prevent, or even short of that, when it is very desirable that people should find out whether the further elements are there, actual knowledge being a difficult matter to prove, the law may stop at the preliminary fact, and, in the pursuit of its policy, may make the preliminary fact enough to constitute a crime. It may say that, as people generally do know when they are selling intoxicating liquors, they must discover at their peril whether what they sell will intoxicate. It may say that if a man will have connection with a woman to whom he is not married, he must take the chance of her turning out to be married to some one else. In like manner it may say that people are not likely to resort to a common gaming house without knowing it, and that they must take the risk of knowing the character of the place to which they resort, if the implements of gaming are actually present."[30]

**§ 637. Penal liability of railroad companies.**—Railroad companies or their agents cannot be made liable criminally or in penal damages for the killing of stock without any neglect on their part.[31] The killing is not a voluntary act, and the running of the trains a lawful occupation which the legislature could not prohibit entirely. The matter assumes a different aspect where the railroad company neglects to fence its tracks; this supplies the element of fault, and penal liability is jus-

[28] McVey v. Barker, 92 Mo. App. 498.

[29] Commonwealth v. Regan, 182 Mass. 22, 64 N. E. 407.

[30] Commonwealth v. Smith, 166 Mass. 370, 44 N. E. 503, 1896. Also Cordes v. State, 37 Kan. 48: knowledge sufficient to excite the suspicions of a prudent man would be equivalent to knowledge of the ultimate fact.

[31] State v. Divine, 98 N. C. 778.

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tified.[32] The validity of penal liability has been denied under statutes making simply an exception in favor of railroad companies fencing their tracks, on the ground that as the statute imposes no duty to fence, there is no fault.[33] The penal liability in the acts for the protection of live stock is generally imposed for damage caused by the absence of the fence. Punitive damages or other penalties have also been imposed by statute for failure to pay for the injury done within a stated time after notice is given to the railroad company. Such a penalty has been declared invalid in North Carolina[34] and in Nebraska.[35] The Supreme Court of the United States has sustained a law giving punitive damages in case of refusal to pay within thirty days after demand, but the penalty was imposed only if the duty to fence was neglected.[36] To impose a penalty simply because a claim is resisted, seems to violate the constitutional right to due process and equal justice; for if there is a defence to the claim there must be an opportunity to have an adjudication upon it: the penalty can be legitimate only if the litigation shows that a defence was interposed vexatiously, for the purpose of delay.[37] The decision in Minneapolis, &c, R. R. Co. v. Beckwith can be reconciled with this view by treating the statute in question as imposing a penalty for failure to fence, and remitting the penalty, if the claim is paid without litigation.

In Atchison, &c, R. R. Co. v. Matthews[38] the Supreme Court, in sustaining a statute imposing the payment of an attorney's fee upon railroad companies in actions against them for damages in case of loss by fire caused by sparks from locomotive, said: "If in order to accomplish a given beneficial result, a result which depends upon the action of a corporation,

[32] Cairo & St. L. R. Co. v. Peoples, 92 Ill. 97; Tredway v. Sioux City &c. R. R. Co., 43 Ia. 527; Missouri Pac. R. Co. v. Humes, 115 U. S. 512; Barnett v. Atlantic & P. R. Co., 68 Mo. 56; where the penal liability consists in double damages, the penalty is also proportionate to the offense.

[33] Wadsworth v. Union Pac. R. Co., 18 Col. 600, 23 L. R. A. 812.

[34] State v. Divine, 98 N. C. 778.

[35] A. & N. R. Co. v. Baty, 6 Neb. 37, partly by reason of special constitutional provisions not touching the general principle of liability.

[36] Minneapolis & St. L. R. R. Co. v. Beckwith, 129 U. S. 26.

[37] See especially remarks in Cotting v. Kansas C. St. Y. Co., 183 U. S. 79, 100, 102; but see Union Cent. Life Ins. Co. v. Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504, and further as to attorney's fees §§ 714, 727, *infra*.

[38] 174 U. S. 96.

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the legislature has the power to prescribe a specific duty, and punish a failure to comply therewith by a penalty, either double damages or attorney's fees, has it not equal power to prescribe the same penalty for failing to accomplish the same result, leaving to the corporation the selection of the means it deems best therefor?"[39] The court assumes that it is within the power of the corporation to produce the desired result; in other words, that it is at fault in not producing it. If this assumption is incorrect, if the highest degree of care will not prevent the injury, the imposition of the penalty cannot be justified on principle; but the imposition of an attorney's fee need not necessarily be regarded as a penalty. If treated as part of the compensation, it may be included in the absolute liability for the inevitable loss.

**§ 638. Penalty corresponding to fault.**—It has been held in Illinois that a provision of law giving a cause of action for any accident in a mine, as a penalty for the neglect to employ a mine manager as required by statute, in a case where the accident was not due to his non-employment, was void, because there was nothing in the title of the act to indicate such liability, and it was held not to be a proper means of enforcing the statutory duty, so that the title might have given notice of it.[40] It may also be contended that since under the constitution of Illinois all penalties must be proportioned to the nature of the offense, the liability for an accident which has no connection with the neglect of the statutory duty, must be unconstitutional, since it bears no intelligible relation or proportion to the offense.

As a general principle, the neglect of a statutory duty will justify the imposition of a penalty; but a person cannot be made penally liable without any fault whatever, while he may be made liable civilly for the injury resulting from the dangerous use to which he has put his property, though not otherwise in fault. The difference is that the imposition of a civil liability is in the nature of a regulation, while penal liability is not regulation, but punishment for the violation of a regulation.

[39] p. 102.

[40] Woodruff v. Kellyville Coal Co., 182 Ill. 480, 55 N. E. 550.

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# CHAPTER XXX.

## SPECIAL PRIVILEGES.

### A. DISCRIMINATIVE LICENSES. §§ 639-655.

**§ 639. Cases calling for discrimination.**—A license does not necessarily involve personal discrimination; it is sometimes in reality an occupation tax; in other cases it is simply a certificate that certain conditions which have been prescribed by law, and which do not require particular personal qualification, have been complied with, as in a license to incorporate, or in case of building regulations, where, however, the term "permit" is more commonly used.[1] There are, however, other licenses which proceed upon the idea of discrimination, either according to the circumstances of specific cases or according to personal differences. Since the requirement in these cases has the effect that what one person is allowed to do, another person may be forbidden, the principle of equality in its simplest form is broken through, and the question is whether some higher form of equality is not recognised in the justice of the discrimination, or whether the inequality is not a necessary condition of the public welfare.

Licenses based on discrimination of circumstances or persons occur as follows:

1. Where promiscuous or indiscriminate freedom to act will disturb public order or interfere with the common use of public places. Parades or processions may impede public traffic, and if a number are held at the same time, serious conflicts may result. Fruit-stands and cab-stands cannot be indefinitely multiplied, and the number of street railroads on the streets or of ferries plying on the river between two highways must be limited. To some extent the limitation may come about naturally, without regulation, but what all cannot do equally, no one can claim as a matter of absolute right. Here, then, the maintenance of order in public places requires a restriction of rights to limited numbers or stated times or both.[2]

2. Where an occupation is offensive to the senses and ob-

[1] See §§ 37, 38, *supra*.

[2] See §§ 173, 174, *supra*.



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noxious to comfort, it may be restricted with regard to locality, and some assurance may be required that it will be conducted with the greatest possible care and regard to the surrounding neighborhood. The same is true, in an even stronger degree, of places and establishments which, unless surrounded with considerable safeguards, endanger public safety and health. This applies to the scavenger business, chemical factories, packing and rendering establishments, slaughterhouses, markets, gunpowder factories, livery stables, and other places of a like character.

3. In some occupations it is the lack of personal qualification and competence which causes the public danger and needs to be guarded against. The medical profession is the principal one within this category; but the occupation of dentist, pharmacist, railroad engineer, pilot, architect, plumber, and even barber, have been held to be subject to the same principle.

4. Finally a number of occupations are held to be dangerous to peace, order and morality; so above all that of selling liquor, but also selling weapons, the keeping of places of public amusement, the business of the pawnbroker, junkdealer, etc. The business of auctioneer and of the itinerant merchant may be mentioned in this connection as presenting peculiar facilities for fraud and for evasion of legal regulations. The public danger can here be guarded against by regulations regarding the conduct of the business, or by seeing that the business does not get into the hands of persons of questionable character, or of notoriously bad reputation.

In all the four cases the pursuit of certain occupations cannot be claimed as a matter of constitutional right as being part of the liberty secured by the fundamental law, for the reason that these occupations in a special manner affect and endanger peace, order, and security, according to principles before discussed.[3]

**§ 640. Right to equality notwithstanding liability to entire prohibition.**—It has been asserted that where an avocation cannot be pursued as a matter of common right, the general principle of equality has no application. Upon this theory it has been held that the right to sell liquor may be confined to male persons.[4] While the restriction of liquor licenses to men may be justified on other grounds, it is conceived that the broad

[3] See §§ 492-494, *supra*.

[4] Blair v. Kilpatrick, 40 Ind. 312.

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denial of the principle of equality to the right to carry on a business subject to license is not in accordance with sound constitutional doctrine. Necessary restriction cannot sanction or cover arbitrary discrimination. Where a right is conceded under conditions and qualifications, there is no reason why an equal chance should not be given to all capable of complying with such conditions, and why such qualifications should not be required to have a bearing upon the evils or dangers justifying the restriction.

It is necessary, therefore, to inquire in how far the principle of equality is or can be maintained under a policy of restriction. An obvious difference exists between the first two classes mentioned which rest on objective conditions, and the last two classes which involve subjective or personal qualifications.

RESTRICTIONS BASED ON OBJECTIVE CONDITIONS. §§ 641-645.

**§ 641. Regulations superseding administrative discretion.** —Where the restriction is called for by objective conditions it is possible to eliminate the personal factor entirely. Regulations may be prescribed which, though strict and onerous, may be complied with by any one who wishes to secure the right, or if numbers are necessarily restricted, the right may be made to depend on priority of application. Restrictions on the basis of locality may be enforced without creating special privileges, where within the locality sufficient accommodation can be had for all applicants, so in requiring fresh meat to be sold at the public market,[5] or in prohibiting slaughter houses within city limits, or in specified portions thereof.[6] With regard to the removal of garbage, the Supreme Court of Kansas has laid down what seems to be the sound principle, that the regulations must leave a way open to every person who will comply with the requirements of the ordinance, to engage in the business;[7] but in an early case in Massachusetts such a limitation was not regarded as necessary.[8]

[5] St. Louis v. Webber, 44 Mo. 547; State v. Sarradat, 46 La. Ann. 700, 24 L. R. A. 584; Ex parte Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

[6] Beiling v. Evansville, 144 Ind. 644, 42 N. E. 621; Cronin v. People, 82 N. Y. 318.

[7] Matter of Lowe, 54 Kan. 757, 27 L. R. A. 545.

[8] Re Vandine, 6 Pick. 187, 1828. See State v. Hill, 126 N. C. 1139. 50 L. R. A. 473, where an ordinance requiring a license for scavenger work which prevented owners from removing refuse from their own

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**§ 642. License a ministerial or a judicial act.**—If the law prescribes exhaustively the conditions under which the act or thing is permissible, either no license is required, or the license is in the nature of a certificate the issue of which is a ministerial act. The license assumes a different character where the law does not specify the conditions under which the act or matter is to be lawful, but requires a determination to be made from case to case according to the judgment of some designated authority. The law delegating such discretion may be a statute or an ordinance, the authority designated may be the legislative body of a municipality or some administrative officer or board.

**§ 643. Unregulated discretion: cases in which held unconstitutional.**—There are authorities which hold that an ordinance regulating noxious establishments or the use of public places cannot lawfully be framed in such a manner as to make the right in each case dependent upon a permit without specifying the conditions under which the permit is to be issued or withheld. It has thus been held that absolute discretion cannot be given to boards of health to grant or withhold permission to conduct laundries,[9] or to the Mayor to revoke permits for keeping steam engines,[10] that the right to erect buildings,[11] to run a hackney coach,[12] to store inflammable oil,[13] or pressed hay,[14] to establish a slaughter house,[15] or a hospital,[16] or a dairy,[17] or a laundry,[18] cannot be made to depend upon the permission granted by the common council, still less upon the permission of an administrative officer,[19] without further regulation of the conditions determining the grant or refusal of the license. So, with regard to the use of public places, an ordinance was declared void, which required for parades the

premises was held unreasonable and void on account of its special provisions.

[9] Re Woh Lee, 26 Fed. 471.

[10] Baltimore v. Radecke, 49 Md. 217.

[11] Newton v. Belger, 143 Mass. 598, 10 N. E. 464; State v. Tenant, 110 N. C. 609, 15 L. R. A. 423.

[12] State v. Fiske, 9 R. I. 94.

[13] Richmond v. Dudley, 129 Ind. 112, 13 L. R. A. 587.

[14] Mayor of Hudson v. Thorne, 7 Paige (N. Y.), 261.

[15] Barthet v. New Orleans, 24 Fed. Rep. 563.

[16] Bessonies v. Indianapolis, 71 Ind. 189.

[17] State v. Mahner, 43 La. Ann. 496, 9 Sou. Rep. 480.

[18] Yick Wo v. Hopkins, 118 U. S. 356.

[19] Sioux Falls v. Kirby, 6 S. D. 62, 25 L. R. A. 621.

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consent of the mayor; it was admitted that it might be proper to confine parades to certain streets or certain hours, or require previous notice to the police; but it was held that general conditions must be fixed by bye-laws, and that to commit an arbitrary power to the Mayor was unreasonable.[20] In Illinois an ordinance was held to be invalid which prohibited parades, processions and open air meetings without a permit from the police department, such permit to designate the route to be followed and to issue without fee.[21] The decision went partly on the ground that the ordinance was an unauthorized delegation of power by the common council to the police department, partly that it gave the authorities a power to discriminate. In Michigan an ordinance making all processions with music illegal without the consent of the mayor and council, and requiring those authorised to conform to the directions of the mayor and chief of police, under heavy penalties, was held to be invalid because it left the matter to an irregular official discretion, when, if regulated at all, it must be regulated by permanent legal provisions operating generally and impartially.[22] A similar decision was made in Wisconsin,[23] where, however, the ordinance discriminated in favor of certain kinds of processions.

The theory upon which these decisions proceed is either that a power of regulation delegated by the legislature must be exercised by the body in which it is vested and may not be further delegated by it, or that an ordinance which leaves everything to the circumstances of the individual case is in reality no regulation and unreasonable by virtue of its looseness,[24] or that the uncontrolled discretion gives opportunity for arbitrary discrimination and thus violates the principle of the equal protection of the laws.[25] Where the statute vests

[20] Anderson v. Wellington, 40 Kan. 173, 2 L. R. A. 110.

[21] Chicago v. Trotter, 136 Ill. 430. The soundness of this decision must be doubted, since the issue of the permit might well have been regarded as a ministerial act.

[22] Matter of Frazee, 63 Mich. 396.

[23] State ex rel. Garrabad v. Dering, 84 Wis. 585.

[24] Newton v. Belger, 143 Mass. 598. So in England a bye-law has been held unreasonable and void that every person who shall play a noisy instrument or sing or preach in any street without a previous written license from the Mayor shall be fined, etc., as it would enable a Mayor to legalise a nuisance or prohibit a lawful act which was not a nuisance. Munro v. Watson, 51 J. P. 660, 57 L. T. 366.

[25] Yick Wo v. Hopkins, 118 U. S. 356.

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the discretion directly in the administrative authority, there may also be an objection on the ground that the legislature has abdicated an authority which under the constitution it must exercise itself.[26]

**§ 644. Unregulated discretion; cases in which sustained.**— There are, however, also decisions of a contrary tenor. Thus ordinances have been sustained, which without further specification of conditions require a permit for the erection of wooden buildings within the fire limits,[27] or for the keeping of swine in a town,[28] or for the establishment of a dairy stable in the city limits,[29] or for the beating of drums in the streets,[30] or for the moving of a building through the streets,[31] or even for the erection of any building, without further regulation.[32] In South Carolina the Supreme Court declined to consider in a mandamus proceeding the constitutionality of a law giving the state board of agriculture power to grant or refuse licenses for the mining of phosphate, but intimated that the Fourteenth Amendment did not apply to the case.[33] The Supreme Court of Massachusetts has held that the legislature may permit the use of public places for purposes of parades or public speaking upon such terms as it pleases, and may leave the permit to the discretion of the mayor or board of police; and this view has been confirmed by the United States Supreme Court.[34]

The decisions sustaining discretionary power without further regulation are based partly upon the free exercise of proprietary control, partly upon the theory that a power to prohibit includes the power to permit upon any terms deemed expedient, "For the legislature absolutely or conditionally to

[26] Noel v. People, 187 Ill. 587, 58 N. E. 616.

[27] Hine v. New Haven, 40 Conn. 478; Ex parte Fiske, 72 Cal. 125, (not presumed that power will be exercised wantonly; impossible to establish a general rule beforehand); McCloskey v. Kreling, 76 Cal. 511.

[28] Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860.

[29] St. Louis v. Fischer, 167 Mo. 654, 67 S. W. 872.

[30] Re Flaherty, 105 Cal. 558, 27 L. R. A. 529.

[31] Wilson v. Eureka City, 173 U. S. 32.

[32] Commissioners of Easton v. Covey, 74 Md. 262.

[33] Port Royal Mining Co. v. Hagood, 30 S. C. 519, 3 L. R. A. 841.

[34] Commonwealth v. Plaisted, 148 Mass. 375, 2 L. R. A. 142; Commonwealth v. Davis, 162 Mass. 510; Davis v. Massachusetts, 167 U. S. 43.

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forbid public speaking in a highway or public park is no more an infringement of the rights of the member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes."[35] "The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."[36] Neither of the two theories justifies a power of arbitrary discrimination where a matter is simply subject to regulation and not to prohibition, and this is recognised by the Supreme Court of Massachusetts.[37]

So also the Supreme Court of Michigan, which in the Frazee case, long regarded as the leading case upon the point now under discussion, had held an unregulated discretion in the mayor to allow or disallow parades to be invalid, upholds a free discretion as to permitting or forbidding addresses on public places,[38] distinguishing the former case as one concerning the question, "who may travel on a public highway," while the making of addresses in public places may be prohibited.

The distinction thus emphasized between things which are subject to prohibition, and things which are subject to regulation, seems plausible, and may serve to reconcile otherwise conflicting decisions.[39] Yet even as applied to the former, the doctrine propounded in Massachusetts and California should, if possible, be taken to mean that the unregulated discretion must be exercised judicially, and, if understood as sanctioning an arbitrary or uncontrollable discretion, should be rejected. There can be no doubt that it is desirable to protect the principle of equality wherever it is possible to do so. To deny the application of the principle to the use of public places for public speaking, or to acts which may be altogether prohibited, is not only unnecessary, but seems contrary to the spirit of our institutions, and it needs no argument to show

[35] Commonwealth v. Davis, 162 Mass. 510.

[36] Davis v. Massachusetts, 167 U. S. 43.

[37] Newton v. Belger, 143 Mass. 598.

[38] Love v. Judge of Recorder's Court of Detroit (Phelan), 128 Mich. 545, 55 L. R. A. 618.

[39] See Harrison v. People, 101 Ill. App. 224, as to licenses for bowling alleys.

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that an uncontrolled power to grant or withhold privileges which might be accorded on equal terms, is open to the greatest abuses.

**§ 645. Vote or consent of people of locality.**—In some cases the discretion to allow or forbid the location of noxious establishments, which is withheld from the administrative authorities, is committed to a vote of the people of the locality concerned. This has been upheld in Illinois with reference to places for the sale of liquor and with regard to livery stables,[40] and has been declared invalid in California with regard to public laundries,[41] and in Missouri with regard to livery stables.[42] But in California and Missouri the qualified prohibition extended practically throughout the city, so that the vote of the citizens might have made a lawful business altogether impossible; in Illinois it was confined to residence streets.

It may therefore be said that the local legislative body may leave the discretion to allow or forbid to the people of the locality only where and in so far as it has the power to prohibit it altogether. The fact that it is the people who decide is accepted as a sufficient answer to the objection that this method involves both delegation of power and uncontrolled discretion.

PROFESSIONAL QUALIFICATION. §§ 646-650.

**§ 646. Methods of ascertaining fitness.**—Where an occupation demands for its safe exercise competent knowledge, the right to pursue it should be granted equally to all who furnish satisfactory proof of such knowledge. There are two principal methods of ascertaining fitness: the requirement of a diploma of an institution giving the requisite instruction, and an examination by public authority. Not infrequently the fact of having practiced the occupation in question for a stated number of years is accepted as sufficient evidence of qualification, and still more commonly the requirement operates prospectively only upon persons not already engaged in the occupation at the time the requirement is made.[43] Assum-

[40] Swift v. People, 162 Ill. 534; Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853.

[41] Ex parte Sing Lee, 96 Cal. 354.

[42] St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470.

[43] See below § 684 on question of classification.

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ing that the freedom of occupation may be restricted in this manner,[44] the exaction of a test of fitness does not create a special privilege or violate the principle of the equal protection of the laws, provided the qualification is obtainable by reasonable effort.[45]

**§ 647. Discriminations in tests of fitness.**—Unjust discriminations in the tests of fitness may, however, violate the principle of equality. It is therefore important to note that no statute makes the right to practice medicine dependent upon the recognition of some particular school of medicine.[46] Care is also generally taken to give the principal schools (homeopathic and allopathic) representation upon the examining board or boards; but it was held that the exclusion of eclectic examiners is not in itself discrimination, unless it can be shown that applications for admission are improperly rejected.[47]

In Kentucky it was said: "In a case where it was clear from the evidence that a discrimination had been made against a system of medicine we should not hesitate to hold that the board had exceeded its power."[48] From the necessity of the case, much must be left to the discretion of the examining or licensing authorities, not only in determining the qualification of the applicant, but also in determining what is a reputable institution or institution in good standing for the purpose of recognising its diploma;[49] administrative action is here due process of law, and where an appeal is granted, it may lie to other administrative or executive authorities;[50] but since a properly qualified person ought to be entitled to admission to practice as a matter of right, there should be an ultimate remedy in the courts against gross partiality or abuse

[44] §§ 492-497, *supra*.

[45] Physicians, Dent v. West Virginia, 129 U. S. 114; Ex parte Spinney, 10 Nev. 323, 1875; druggists, State v. Forcier, 65 N. H. 42; plumbers, People v. Warden, 144 N. Y. 529; Singer v. Maryland, 72 Md. 464; State v. Gardner, 58 Oh. St. 599, 51 N. E. 136; barbers, State v. Zeno, 79 Minn. 80, 48 L. R. A. 88; horseshoers, held unconstitutional in Illinois on a special ground, Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558.

[46] See § 113, *supra*.

[47] Allopathic State Board of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 South. Rep. 809.

[48] Nelson v. State Board of Health, 22 Ky. Law Rep. 438, 50 L. R. A. 383. See also State v. Gregory, 83 Mo. 123.

[49] State ex rel. Coffey v. Chittenden (Wis.), 88 N. W. 587.

[50] So in Ohio to governor and attorney-general, France v. State, 57 Oh. St. 1, 47 N. E. 1041.

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of discretion.[1] In accordance with this view courts have afforded relief by mandamus where the board made requirements not prescribed by the statute,[2] or left the determination of the reputability of a school to a foreign body or refused to recognise a diploma after having recognised an institution as reputable.[3]

§ 648. **Encroachment upon judicial power.**—It has been held in Illinois that the legislature cannot prescribe conclusively the qualifications which will entitle a person to be admitted to the practice of the law, since the constitutional independence of the courts requires that they should judge for themselves whether their practitioners are competent or not;[4] the main contention in this case concerned the mutual limitations between two departments of the government, and not the limitations upon the government as such in favor of the liberty of the citizens; for the power to regulate the right to practice law was not questioned. In New York it has been held to fall within the legislative power.[5]

§ 649. **Delegation of legislative power.**—It has been held in Ohio that the right to act as a steam engineer cannot be made to depend upon a license to be granted by an administrative officer if upon examination he find the applicant trustworthy and competent, subject in case of refusal to appeal to a higher administrative officer.[6] While the court dwells upon the absence of rules and the unlimited discretion of the officer, it seems to base its decision upon the unconstitutionality of delegation of legislative power. If this is the controlling element, it would not have saved the statute if it had directed the examiners to frame rules by which they were to be guided in testing applicants; yet the power to frame such rules is not regarded as an unconstitutional delegation of legislative power in case of the civil service laws, and some rules are generally promulgated by medical and other examining boards. It is a sound constitutional principle that if the right to pursue an

[1] This follows from the principle of the separation of powers; a conclusive determination by administrative authorities satisfies the due process required by the Fourteenth Amendment. Reetz v. Michigan, 188 U. S. 505.

[2] State v. Lutz, 136 Mo. 633.

[3] State Board of Dental Examiners v. People, 123 Ill. 227.

[4] Re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519.

[5] In Re Cooper, 22 N. Y. 67.

[6] Harmon v. State, 66 Oh. St. 249, 64 N. E. 117.



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occupation can be made to depend upon a test of qualification that test ought to be defined by general rules, but it is hardly necessary that every detail of the rules should emanate from the legislature directly. The mere requirement of trustworthiness and competence is not a definition of a test. It follows that there must be a specification of the course of study which the applicant must pursue, or of branches of knowledge with which he must be familiar. A test which is vague and undefined is liable to abuse and oppression, but is also the easiest if liberally administered, and it is interesting to note that the stricter constitutional principle involves stricter and therefore possibly more burdensome requirements. It may be mentioned that the practice condemned in Ohio is sanctioned by the federal legislation regarding the licensing of captains' mates, engineers and pilots.[7]

**§ 650. Privileges accompanying professional license.**—A license resting upon professional qualification cannot be made the basis for the granting of privileges which have no connection with such qualification. Thus it is plain that licensed plumbers could not be given an exclusive right to sell toilet or gas fixtures. Upon a somewhat similar ground it has been held in Minnesota and Illinois that registered pharmacists cannot be given the sole right to sell patent and proprietary medicines.[8] The case is, however, different from the one before suggested, in that the sale of patent medicines may be made a subject of police regulation and might be confined to persons properly qualified. The decisions cited, therefore, rely mainly upon the absence in the statutes of any provision for examination or analysis of the patent medicines sold, the pharmacist being, on the contrary, expressly exempted from liability for their unsoundness, and they hold the measure untenable as a police regulation because failing to give adequate protection.[9] It should, however, be observed that statutes requiring professional qualification as a rule do not prescribe special rules for the practice of the profession or business, nor increase the common law liability for lack of skill, so that the license imports neither special duty[10] nor special regula-

[7] U. S. R. St. 4439-4442.

[8] State v. Donaldson, 41 Minn. 74, 42 N. W. 781; Noel v. People, 187 Ill. 587, 58 N. E. 616.

[9] § 149, *supra*.

[10] So a physician is not required to render professional services. Hurley v. Eddingfield, 156 Ind. 416, 59 N. E. 1058, 53 L. R. A. 135.

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tion; and this is justifiable, since the requirement of a license is not intended as a privilege, but as a common restraint, and the law may regard the possession of the required qualification as sufficient guaranty that it will be used for the benefit of the public. Upon a somewhat similar principle the law may entrust the sale of liquors to druggists, without special responsibilities which could not be met by other persons as well.[11]

## QUALIFICATION OF CHARACTER. §§ 651-653.

**§ 651. Administrative determination.**—In some occupations the interests of safety, health or morals are held to justify the requirement of good character, so that this qualification does not constitute a special privilege.[12] The liquor business is typical of this class, but the requirement is also made with regard to the practice of medicine and law,[13] and in European countries is made to apply to teachers, dancing masters, keepers of bathing establishments, pawnbrokers,[14] etc. The determination of character does not admit of equally objective tests as that of knowledge, and the statute can indicate the qualification hardly otherwise than by speaking of suitable persons or persons of good character, leaving the determination in individual cases to the judgment of licensing authorities. Their discretion under such statutes, while a judicial one, is not easily controllable, and it has been held in Michigan that all disqualifications debarring from the right to engage in a lawful business must be specific, and that the charge of bad character is so vague that the applicant cannot meet it.[15] The same court, however, in a later case,[16] held that the suitability of a place for the sale of liquor may be left to the discretion of the municipal authorities, and intimated that the question of fitness of the person might be delegated in like manner. This decision seems in effect to overrule Robison v. Miner and was dissented from by two of the judges of the

[11] Commonwealth v. Fowler, 96 Ky. 166.

[12] Re Ruth, 32 Ia. 250; Commonwealth v. Blackington, 24 Pick. 352. So as to bookmaking licenses: State v. Thompson, 160 Mo. 333, 54 L. R. A. 950.

[13] The Supreme Court of Illinois admits that the legislature may create disqualifications debarring from the practice of the law, based on character; Re Day, 181 Ill. 73.

[14] 35 and 36 Vict. ch. 93.

[15] Robison v. Miner, 68 Mich. 549.

[16] Sherlock v. Stuart, 96 Mich. 193.

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court. The doctrine of Robison v. Miner may perhaps be reconciled with the practice of legislation by holding that while the statute may speak simply of good moral character, the administrative board should base its refusal of a license upon specific facts. As a matter of fact, proof of good character is generally a very perfunctory matter, and a license will hardly be refused unless the unfitness is gross and manifest. And while it is not uncommonly said that the fair and honest discretion of the licensing authorities will be respected by the courts, the cases in which after rejection of the application for a license mandamus was denied, uniformly show that there was ample legal ground, supported by sufficient evidence, for the refusal.[17] Where the application of a fit person was rejected, it will appear upon examination of the facts of the case that the law allowed other grounds for refusing the license[18] and that the rejection was justified by one of these grounds. Under the laws of New York, authorisation for the establishment of savings banks and trust companies is granted only upon ascertaining that the general fitness of the organisers for the discharge of the duties appertaining to the trust is such as to command the confidence of the community.[19] It is very clear that specific proof of facts showing qualification is here out of the question.

**§ 652. Substitution of ministerial function.**—The requirement of good character is generally recognised to be of little value in its practical operation, and there is, therefore, a tendency to substitute for it definite disqualifications and safeguards. So in the matter of the liquor business, the law, by provisions for bonds and sureties and high license fees, by restrictions as to location and as to the conduct of the business, and by the exclusion of persons who have been convicted of a violation of the laws or who have forfeited previous licenses by misconduct or breach of condition, can accomplish as much as by a system of personal selection with its inevitable concomitants of favoritism and risk of corruption. Notwithstanding this tendency, the constitutionality of admin-

[17] Batters v. Dunning, 49 Conn. 479; Reed's Appeal, 114 Pa. St. 452; State v. Cass County Commissioners, 12 Neb. 54.

[18] Raudenbusch's Petition, 120 Pa. St. 328.

[19] Banking Law, § 153.

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istrative discretion in the matter of granting or refusing liquor licenses is generally conceded.

In New York, where the system of discretionary power has been abandoned by the legislature in the case of the liquor business, the courts strongly sustain it on principle. Thus a charter provision that the mayor shall have authority to grant licenses to any person desiring to be engaged in the business of auctioneer was construed as giving him a discretion which the courts would not control.[20] While in this particular business the history of legislation showed that a discretionary power was intended to be conferred, the court went so far as to hold that the word license by irresistible implication involved a discretion to refuse,—a position hardly sustainable.[21] The court expressed itself very decidedly in favor of administrative discretion, and left the question open, how an abuse of that discretion should be dealt with. The opinion says: "The practice of nearly a century in this state has taught us that there is little to fear from an abuse of this power, for during that time we have yet to learn of an instance where it has been perverted for improper purposes, or excited public condemnation or disapproval. In the government of the affairs of a great municipality many powers must necessarily be confided to the discretion of its administrative officers, and it can be productive only of mischief in the treatment of such questions to substitute the discretion of strangers to the power, in place of that of the officers best acquainted with the necessities of the case, and to whom the legislature has specially confided their exercise. Whether any remedy is afforded by the law for an abuse of such discretion it is not now necessary to inquire, as that question cannot be presented on an application for a mandamus." The same view has been taken of licenses for places of amusement.[22]

The very liberal view thus expressed by the Court of Appeals

[20] People v. Grant, 126 N. Y. 473, 27 N. E. 964.

[21] The same construction is placed on the term license in North Carolina. Muller v. Buncombe County, 89 N. C. 171.

[22] Armstrong v. Murphy, 65 N. Y. Appl. Div. 123; 72 N. Y. Suppl. 473. The New York Court of Appeals also upholds a provision of the Sanitary Code of the City of New York whereby the right to sell milk is made to depend upon a permit of the Board of Health subject to the conditions thereof, although these conditions are not defined in the Code; however, the question of the validity of these conditions was held

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of New York with regard to administrative discretion are in marked contrast to the sound tendency of legislative policy as manifested in the Liquor Tax Law of 1896. It is not, however, to be assumed that no relief would be afforded, if an arbitrary exercise of discretion could be shown.

The liquor business also being one which may be entirely prohibited, the issue of a license may be made to depend upon the consent of adjoining or neighboring owners.[23]

**§ 653. Administrative discretion as regards business intrinsically harmless.**—Where a business is intrinsically harmless, the law, it seems, cannot leave it to the discretion of administrative officers to determine what persons are proper to engage in it. Such a power was therefore held unconstitutional with regard to the right to engage in a "temporary or transient business."[24] The act did not indicate in what manner the temporary or transient business was dangerous or objectionable, and moreover left it to the mayor to license such persons as he found to be proper persons to engage in such business. This was held to confer an unrestrained discretion. In Vermont a similar statute was sustained on the ground that the business, in the judgment of the legislature, offered special opportunities for fraud, and that the discretion was intended to be exercised judicially, although its fair exercise was not controllable by mandamus. With reference to the case of State v. Conlon, just cited, the court said: "Had the Connecticut statute, like ours, defined 'temporary or transient business,' granted no exclusive privileges to any persons of the class of transients, or referred the granting of licenses to the legal discretion, instead of the mere caprice of the local authorities, possibly it might have been held constitutional."[25]

JUDICIAL CONTROL. §§ 654, 655.

**§ 654. Judicial character of discretion.**—Considering the extent to which unregulated discretion of local or administrative authorities in the grant or refusal of discriminative

not to be properly before the court. People v. Vandecarr, 175 N. Y. 440, 67 N. E. 913. The opinion dwells upon the necessity of giving to the police power in a large city a liberal interpretation.

[23] Crowley v. Christensen, 137 U. S. 86; Swift v. People, 162 Ill. 534. Such consent may then give a right to the issue of the license. Harrison v. People, 195 Ill. 466, 63 N. E. 191.

[24] State v. Conlon, 65 Conn. 478.

[25] State v. Harrington, 68 Vt. 622, 34 L. R. A. 100.

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licenses is upheld as legal, it is most important that the discretion shall in every case be a judicial and not an arbitrary discretion. Thus an early law writer says: "Where anything is left to any person to be done according to his discretion the law intends it must be done with a sound discretion and according to law, and the Court of King's Bench hath a power to redress things that are otherwise done notwithstanding they are left to the discretion of those that do them; and though there be a latitude of discretion given to one, yet he is circumscribed that what he does be necessary and convenient, without which no liberty can defend it."[26] In the absence of statutory specification, the nature of the subject-matter will as a rule sufficiently indicate the considerations upon which the discretion is to be exercised. The honest exercise of such discretion may then be made conclusive; for where the question is one of expediency, and the determination must be based upon probabilities rather than upon facts, administrative action constitutes due process of law, and a review of the courts is not a matter of constitutional right.[27]

Where there is either a refusal to hear an application for a license, or a violation of jurisdictional or procedural limitations, the common law writs afford relief.[28]

Where there is a hearing in due form, it must be difficult to prove an abuse of discretion, but grossly arbitrary and oppressive action would constitute official misfeasance in office, and redress would be given by the courts.[29] An unregulated administrative (and probably also municipal) discretion is therefore not, like a similar legislative discretion, entirely beyond judicial control.

**§ 655. Federal protection against arbitrary discretion.**— An undefined official discretion in the matter of granting licenses against the arbitrary exercise of which the state should afford no relief, might be held to violate the Fourteenth Amendment. While the United States Supreme Court has

[26] Tomlins Law Dictionary "Discretion."

[27] See cases cited in following section; also Giles' Case, 2 Stra. 881, Ex parte Yeager, 11 Gratt. 655.

[28] United States v. Douglass, 19 D. C. 99; Gross' License, 161 Pa. 344; §§ 208-210, *supra*.

[29] Rex v. Young & Pitts, 1 Burr. 557; Zanone v. Mound City, 103 Ill. 552; St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo. 560.

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repeatedly sustained the vesting of unregulated discretion in administrative authorities as not being contrary to the equal protection of the laws,[30] yet these decisions were rendered in cases in which it was not charged that the discretion was arbitrarily or oppressively exercised. They are, therefore, quite compatible with the assumption that every administrative discretion must by construction at least be a judicial discretion to be reasonably and impartially exercised. The case of Yick Wo v. Hopkins[31] shows that the prohibition of the Fourteenth Amendment is adequate to prevent the delegation of administrative powers calculated to produce oppression and discrimination. In the case of Gundling v. Chicago,[32] the Supreme Court clearly indicates that its attitude towards unregulated administrative powers will be determined by the spirit in which the discretion is exercised. "The ordinance in question in that case [Yick Wo v. Hopkins] was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, with (without?) reference to the competency of the persons applying or the propriety of the place selected. It was also held that there was a clear and intentional discrimination made against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race and was wholly arbitrary and unjust. It appeared that both petitioners, who were engaged in the laundry business, were Chinese and had complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire or as a protection against injury to the public health, and yet the supervisors, for no reason other than discrimination against the Chinese, refused to grant the licenses to the petitioners and to some 200 other Chinese subjects, while granting them to eighty people who were not such subjects and were working under precisely the same conditions. Such an ordinance so executed was held void by this court. * * *

[30] Davis v. Massachusetts, 167 U. S. 43; Wilson v. Eureka City, 173 U. S. 32; Gundling v. Chicago, 177 U. S. 183.

[31] 118 U. S. 356.

[32] 177 U. S. 183.

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The ordinance in question here does not grant to the mayor arbitrary power such as is described in the above mentioned laundry case. * * * In the case at bar the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be entrusted with the sale of cigarettes, provided such applicant will file a bond, as stated in the ordinance, as a security that he will faithfully observe and obey the laws of the state and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is to be submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him."

Under this decision it would not seem to make any difference whether the discretion is delegated to administrative officers, or reserved to be exercised from case to case by the municipal legislative authority.

## B. MONOPOLIES. §§ 656-681.

**§ 656. Historical remarks.**—The customs of English cities and boroughs and of companies and fellowships, concerning trade and commerce, resting upon prescription or confirmed or granted by charter, were to a great extent in the nature of exclusive privileges or monopolies. Apart from these, grants of monopolies by royal letters patent became common during the reign of Queen Elizabeth, especially with regard to the following classes of rights: rights of manufacture where new processes had been discovered or introduced; publishing rights; rights to trade in newly opened channels of commerce; rights affecting the royal prerogative (exportation of coin and foreign exchange); sole rights to manufacture and sell; or sole rights to license certain occupations on the ground that the indiscriminate exercise of the right or occupation would be prejudicial to the public (keeping inns, peddlers, making gold or silver, or playing cards, etc.).

The last class of patents was used as a source of royal revenue and to bestow bounties upon favorites, and became the subject of much complaint, and in 1601 most of these grants were revoked by the Queen. In 1603 an exclusive patent for the making and selling of playing cards was declared void in

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the case of Monopolies,[33] on the ground that it was against common law and against divers acts of Parliament, that the Queen was deceived in her grant, and that she could not suppress the making of cards any more than of dice, bowls, balls, etc., which are works of labor and art though they serve for pleasure, recreation and pastime. Royal proclamations annulling patents and forbidding applications for them were issued also in 1603 and 1610; but the practice of granting them apparently continued, for parliament petitioned against them in 1621. In 1623[34] the statute of monopolies was enacted, which declared to be contrary to the laws of the realm and utterly void, all monopolies, grants and licenses for sole buying, selling, making, working, or using of anything, as well as all grants of power to give license to do anything against the tenor of any law, or to compound for penalties or forfeitures incurred,—saving, however, expressly the customs and charters of cities, boroughs and corporations, and letters patent to be made of the sole working or making of new manufactures to the true and first inventor, for a term not exceeding fourteen years. The act is declaratory of the common law, and establishes authoritatively a limitation upon the royal prerogative. It does not of course bind Parliament itself, whose sanction is since that time required for all exclusive rights not contained in the reservations of the statute. During the reign of Charles I these reservations were liberally construed, and monopolies were granted which can hardly be brought under the category of new manufactures (so the exclusive right of publishing weekly price currents); but the subject appears to have lost gradually its character as a public grievance, and the Declaration of Rights of 1689 does not mention monopolies.[35]

**§ 657. American constitutional provisions.**—Monopolies are

[33] Darcy v. Allen, 11 Coke Rep. 84.

[34] 21 Jac. c. 3.

[35] The question of monopolies was agitated toward the end of the seventeenth century in connection with the East India Company. The royal prerogative to grant exclusive trading licenses of this nature was sustained judicially in 1685. East India Company v. Sandys, 10 St. Tr. 371. But in January, 1694, the House of Commons resolved "that all the subjects of England have equal rights to trade to the East Indies unless prohibited by Act of Parliament," and the first Parliamentary charter to the company was granted in 1693. See C. P. Ilbert Government of India, p. 28.

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by that name made the subject of constitutional provisions in but few states. The constitution of Maryland contains a clause that monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered,[36] and in North Carolina, Tennessee, Arkansas and Texas the prohibition of monopolies is coupled with that of perpetuities. The declaration of Massachusetts and other states that there is no other title to particular and exclusive privileges than what arises from the consideration of services rendered to the public, would practically prevent all monopolies inconsistent with the principle of equality; and the prohibition contained in many state constitutions of local or special laws granting to any corporation or association or any individual any special or exclusive privilege, immunity or franchise whatever, is an effectual bar at least to all monopolies depending upon direct and special legislative grant.

As affected by the general principle of equality, it is proposed to consider the question of the validity of monopolies with reference to three different classes: monopolies of necessity; monopolies to secure the benefit of original production; and monopolies against common right.

### MONOPOLIES OF NECESSITY (FRANCHISES). §§ 658-662.

**§ 658. Right to occupy highway.**—The exclusive use of public property or of delegated public power, usually designated as a franchise, constitutes a legal monopoly. In so far as a method of using public property cannot be thrown open to the public indiscriminately, such a monopoly is natural and inevitable, unless the state or municipality assumes the management or ownership of the enterprise itself. This appears in the most important class of these franchises: the right to occupy highways with tracks, pipes, poles or wires, the grant of which necessarily involves selection and limitation of numbers. The same is true of the right to span public rivers by bridges. The inherent power of the legislature to grant franchises of this nature is not questioned, and it is not constitutionally bound to secure at least equality of chance by providing for bids and granting the franchise to the highest bidder. Where the legislature is prohibited by the constitution from passing special or local acts granting special or exclusive priv-

[36] Art. 41 of Declaration of Rights.

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ileges, it may yet by general act delegate to municipal corporations power to grant privileges of this kind.[37] That a municipality is held not to have inherent power to grant street franchises, is no argument against the constitutionality of such monopolies, but simply a matter of limitation of delegated powers in the hands of subordinate authorities.[38]

**§ 659. Right of condemnation of property.**—The case of enterprises involving the exercise of the power of eminent domain is somewhat different. It is possible for the legislature to delegate the exercise of this power generally. New York as early as 1848 granted the power to build railroads, and incidentally to condemn property, to all corporations complying with the statutory conditions, and this policy was followed in other states. Such a provision avoids a legal monopoly. But there are weighty reasons why such a right should not be allowed to be exercised indiscriminately, and New York now again requires the consent of its railroad commissioners for the building of any new road.[39]

**§ 660. Temporarily exclusive right under special legislation.**—The fact that certain street rights cannot be enjoyed indiscriminately by all does not necessarily mean that they can be enjoyed only by one. The grant of competing franchises is still possible to a limited extent. But wherever a franchise is granted by special act, it is necessarily exclusive of others until another grant is made, and the legislature, whether state or local, cannot be compelled to make such other grant. Every franchise depending upon special grant is therefore for the time being exclusive of further competition.[40] This is very different from a monopoly the continuance of which is legally secured either permanently or for a specified period against derogatory grants of competing franchises. The validity of monopolies of the latter kind will be discussed presently.

**§ 661. Canals and river improvements.**—It has never been

[37] Chicago City R. Co. v. People, 73 Ill. 541; Atchison St. R. Co. v. Missouri Pac. R. Co., 31 Kan. 660.

[38] Davis v. Mayor, 14 N. Y. 506; Eichels v. Evansville St. R. Co., 78 Ind. 261; Louisville City Ry. Co. v. Louisville, 8 Bush (71 Ky.) 415.

[39] Railroad Law, § 59; People v. Board of Railroad Commissioners, 160 N. Y. 202, 54 N. E. 697.

[40] Raritan, etc., R. Co. v. Delaware etc. Canal Co., 18 N. J. Eq. 546; Indianapolis Cable Street R. Co. v. Citizens Street R. Co., 127 Ind. 369, 8 L. R. A. 539.

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contended that the state is bound to keep the inevitable monopolies connected with the use of highways in its own hands, and the general practice has been to leave their exploitation to private enterprise. A conspicuous exception is to be found in the matter of canals, which have been built by states as well as by private corporations. River improvements undertaken by public authority have generally been treated as public works, not managed for profit. Irrespective of any federal questions of interstate commerce, the state, under the doctrine enunciated in Illinois Central R. Co. v. Illinois (1), cannot bargain away the control of a navigable river which constitutes a natural highway;[41] but a different doctrine may apply where a river is not naturally navigable. In Maine a grant of an exclusive right of navigation to individuals in consideration of their improving the navigation of the river was sustained.[42] The state of Kentucky granted to a private corporation the control of the navigation of a river with the right to collect tolls in consideration of keeping locks and dams in repair, for a term of thirty years; this was held to be an irrepealable contract, though subject to the exercise of the power of eminent domain, on payment of compensation.[43] A similar grant by the legislature of Michigan was sustained by the federal supreme court.[44] This subject has less importance since navigable rivers have passed so largely under the control of the federal government.

§ 662. **Bank notes.**—The issue of bank notes to circulate as money is a function requiring such extensive safeguards for the protection of the public that it has never been regarded as a matter of common right, but as a privilege to be granted by the state.[45] There is no logical reason why it should not be on the same terms open to all, and this is practically the law under the present American national bank system.[46] But as long as a positive act of the state is necessary to authorise the issue, it follows that in the absence of prohibitions against special legislation the authorisation may be granted to one

[41] 146 U. S. 387.

[42] Moor v. Veazie, 32 Me. 343.

[43] McReynolds v. Smallhouse, 71 Ky. 447; Commissioners etc. v. Green River Co., 79 Ky. 73.

[44] Sands v. Manistee River Improvement Co., 123 U. S. 288.

[45] Briscoe v. Bank of Commonwealth of Kentucky, 11 Pet. 257; Davidson v. Lanier, 4 Wall. 447.

[46] U. S. Rev. Stat. Title 62, chap. 2.

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bank or to a limited number of banks, and thus constitute a monopoly for the time being. In this respect the note privilege resembles other franchises.

MONOPOLIES TO SECURE THE BENEFIT OF ORIGINAL PRODUCTION (AUTHOR'S AND INVENTOR'S RIGHTS).
§§ 663-665.

**§ 663. Equity of exclusive right.**—The substance of patent and copyright is the sole right to reproduce and exploit commercially ideas which have been embodied in concrete form. Both, therefore, strictly speaking, constitute monopolies. They differ from other monopolies in that they do not violate the principle of equality, since the author or inventor has created the field of profitable activity which the law reserves to him. The exclusion of others, while under a purely mechanical conception of rights of property an interference with their natural liberty, is dictated by strong considerations of equity which all civilised systems of law have come to recognise. Conceivably these rights might have been developed as forms of property ("founded on labor and invention," as Blackstone says[47]) by the common law, as the exclusive right to use words and symbols in connection with merchandise has been evolved by the courts under the name of trade-marks. In fact, it was formerly believed by eminent judges that at common law the author of a literary composition even after the first publication retained the right to reprint and publish the same in perpetuity to the exclusion of all others,[48] a doctrine which was denied in America,[49] and seems to have been abandoned in England.[50] As regards patents, they were, as the name implies, originally created by royal letters patent by virtue of the Prerogative, and this practice received parliamentary sanction when the statute against monopolies provided that it should not extend to letters patent in favor of the true and first inventor for the sole working or making of a new manufacture. Author's rights were secured by statute in 1709.[1]

**§ 664. Federal legislation.**—The constitution of the United States sanctions this class of monopolies by empowering Con-

[47] Commentaries II, 405.

[48] Donaldson v. Becket, 4 Burr. 2408, 1774; Millar v. Taylor, 4 Burr. 2303.

[49] Wheaton v. Peters, 8 Pet. 590.

[50] Jeffreys v. Boosey, 4 H. L. Cas. 815, 1854; Reade v. Conquest, 9 C. B. (N. S.) 755, 1861.

[1] 8 Anne, ch. 21.

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s "to promote the progress of science and useful arts, by ring for limited times to authors and inventors the ex- ve right to their respective writings and discoveries."[2] legislation of Congress under this clause recognises two ses or rights: patents and copyrights. The patent right sists in the exclusive right to make, use and vend any new useful art, machine, manufacture or composition of mat-[3] or any new and original design, impression, ornament, ipe or configuration of any article of manufacture;[4] the copy- ht in the sole liberty of printing, reprinting, publishing and nding, or completing, copying, executing and finishing, any ook, map, chart, dramatic or musical composition, engraving, t, print, photograph, painting, drawing, chromo, statue or models for works of the fine arts, or of publicly performing nd representing any dramatic composition.[5]

This legislation evidently does not cover all novel ideas, inventions, discoveries or creations, the sole exploitation of which would be profitable (e. g. architects' designs, medical discoveries, improvements in methods of business), and it has not been decided whether or to what extent the states in the absence of congressional legislation or in cases not covered by the constitutional clause may recognise rights of similar character, except that trade-marks are generally protected as common law rights by the states, and cannot be placed under exclusive federal control.[6] The difficulty of determining questions of novelty, priority and identity militates against a very great enlargement of this class of rights, and would, if it were attempted, lead to many of the evils of monopolies.

**§ 665. Monopoly character.**—The monopoly character of patent and copyright is recognised in the laws of all countries by granting the respective rights for limited periods only: under foreign systems also by making it a duty to exercise the privilege for the public benefit. Thus in England the Board of Trade may order the patentee to grant licenses on such terms as the board may deem just,[7] and if a book which is of importance to the public is out of print, and the holder of the copyright, after the death of the author, refuses to reprint it, the Judicial Committee of the Privy Council may upon petition

[2] Constn. I, 8.
[3] Rev. Stat. § 4884, 4886.
[4] § 4929.
[5] § 4952.
[6] Trade-Mark Cases, 100 U. S. 82.
[7] § 22 Patents Act, 1883.

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[7] § 22 Patents Act, 1883.

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of another person, grant him a license to reprint.[8] Similar provisions would undoubtedly be within the power of Congress, and it may be mentioned that before the establishment of the federal constitution an act of New York required authors to furnish their works at reasonable prices.[9]

## MONOPOLIES AGAINST COMMON RIGHT. §§ 666-673.

**§ 666. State monopolies.**—Monopolies which are justified neither by the purpose of securing the fruits of invention or authorship, nor by the impossibility of granting certain privileges indiscriminately to all alike, are established either as measures of revenue and finance, or for the encouragement and support of undertakings needed by the public, or to restrict or supervise a business affecting public safety or morals. The monopoly may be exercised either by the state itself or one of its subordinate divisions, or may be granted to a private individual or corporation.

The great monopolies of European states (tobacco, matches, formerly salt), are financial in character, the lottery monopolies belong to the third class, while the post office monopoly is primarily an institution for the public benefit which must exclude competition from its profitable business in order to carry on the unprofitable business. The coinage of money is an authoritative prerogative essential to the authentication of the quality of legal tender, and thereby differs from ordinary monopolies.

State monopolies are so uncommon in this country that their constitutionality has not been much discussed. The monopolistic feature of the post office has never been questioned.[10] The monopoly of the liquor traffic established by the South Carolina dispensary act was first declared unconstitutional,[11]

[8] Copyright Act 1842, § 5.

[9] 1786, 1 Greenl. 275.

[10] U. S. Rev. Stat. § 3982 et seq. In a royal grant of the office of postmaster to foreign parts (July 19, 1632, XIX Rymer's Foedera 385) the monopoly is justified by the consideration "how much it imports to the state of the King and this realm that the secrets thereof be not disclosed to foreign nations, which cannot be prevented if a promiscuous use of transmitting or taking up of foreign letters and packets should be suffered." Cromwell spoke of the Post Office as the best means to discover and prevent dangerous and wicked designs against the commonwealth.

[11] McCullough v. Brown, 41 S. C. 220, 23 L. R. A. 410.

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but later on upheld as a valid measure of police control of the traffic in an article dangerous to the public welfare, it being at the same time admitted that the monopolising of an ordinary article of commerce would be unconstitutional.[12] Where it is held under special constitutional provisions that the state may not engage in an ordinary business,[13] a state monopoly would thereby likewise be excluded; and so where it is held that a municipal corporation may not be authorised to assume ordinary economic functions (like the supply of fuel), a municipal monopoly would be impossible.[14]

**§ 667. Municipal monopolies.**—If a state monopoly is valid, a municipal monopoly may, it seems, be authorised by legislation; the validity of municipal monopolies therefore resolves itself into a question of delegated powers. The question has arisen chiefly with regard to market and slaughter-house monopolies. Market monopolies have been upheld in a number of cases, especially in Southern states;[15] in Wisconsin a power to direct the location and management of slaughter-houses has been held to sanction the establishment of a municipal slaughter-house monopoly;[16] while in Illinois a monopoly has been held illegal where the power was merely to establish a market.[17] It does not appear that the validity of a municipal market monopoly expressly authorised by the legislature has ever been denied; however, an express authorisation to prohibit private markets is not usual.[18] The cases sustaining the municipal monopoly hold that market regulations must be impartial and allow to all an equal opportunity to sell. Therefore an ordinance allowing sales only at market stalls is invalid where the market does not furnish accommodations to

[12] State v. Aiken, 42 S. C. 222, 26 L. R. A. 345.

[13] Rippe v. Becker, 56 Minn. 100, 23 L. R. A. 857.

[14] Opinion of Justices, 155 Mass. 598, 30 N. E. 1142; Re Municipal Fuel Plants, (Mass.), 66 N. E. 25, 1903.

[15] Newson v. Galveston, 76 Tex. 559; Jacksonville v. Ledwith, 26 Fla. 163; State v. Sarradat, 46 La. Ann. 700, 24 L. R. A. 584; Ex parte Byrd, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328. For earlier authorities see Dillon Municipal Corporations, § 386.

[16] Milwaukee v. Gross, 21 Wis. 241, 91 Am. Dec. 472, 1866.

[17] Caldwell v. Alton, 33 Ill. 416.

[18] In Louisiana cities are authorised by statute to prescribe the distance at which private markets may be located from public markets. New Orleans v. Faber, 105 La. 208, 53 L. R. A. 165; Natal v. Louisiana, 139 U. S. 621.



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persons desiring to sell their produce, and they would be compelled to sell to the tenants of stalls in order to dispose of their goods.[19] Market monopolies are not common in this country and other municipal monopolies hardly exist.[20] With regard to public monopolies generally it may be said that since in a measure all citizens are partners, the constitutional objections against monopolies drawn from the principle of equality do not apply.

**§ 668. Private monopolies against common right—Ferries.** —The most common and conspicuous kind of a private monopoly is that of keeping a ferry across a river. In the laws of most of the states provisions are to be found requiring a license for setting up a ferry, and prohibiting the carrying of persons for hire across a river within a given distance from an established ferry. It is a commonly accepted doctrine that this is not against common right, since immemorially the right to keep a ferry has been regarded as a franchise.[21] Hale in his treatise de jure maris, chapter 2, says, "the King by an ancient right of prerogative hath had a certain interest in many fresh rivers * * * 1st, a right of franchise or privilege that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the King. He may make a ferry for his own use or the use of his family, but not for the common use of all the King's subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz: that it keeps attendance at due times, keep a boat in due order, and take but reasonable toll." And Blackstone III 219 says: "Where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the King's subjects; otherwise he may be grievously amerced; it would be therefore extremely

[19] Hughes v. Detroit, 75 Mich. 574, 4 L. R. A. 863.

[20] Municipal Affairs, Dec., 1898, Milo R. Maltbie Municipal Functions. As to local liquor monopolies similar to the South Carolina State monopoly see Guy v. Cumberland Co. Commissioners, 122 N. C. 471, where such a monopoly was held not to be forbidden by an express constitutional declaration against monopolies; also Plumb v. Christie, 103 Ga. 686.

[21] It is so treated by the Revised Laws of Massachusetts of 1649.

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hard if a new ferry were suffered to share his profits which does not also share his burden." As a matter of logic and principle, these arguments are not conclusive. The ferry franchise does not confine itself to the connection between two highways on opposite sides of a river, the landing facilities on which cannot be matter of indiscriminate common right; but it forbids the running of a ferry between two points privately owned,[22] although this can be done without asking any special favor at the hands of the public; for a ferry does not encumber a river or affect navigation as a bridge does, and the right to navigate a public river is not a special privilege. The right to exact toll cannot be said to be the privilege constituting the franchise, for it would not legalise an unauthorised ferry, if the keeper were to make a bargain with each passenger regarding his fare, and while anybody may keep a boat for crossing from his land for himself and his family,[23] it has been held that numerous persons may not combine to establish a ferry for their joint use.[24] The gist of illegality at common law is the injury done to the established ferry by diverting its business, and the true consideration of public policy underlying the franchise is that an undertaking beneficial to the public should be encouraged by keeping off competition and thereby securing a reasonable profit. Such a consideration may perhaps legitimately induce the legislature to withhold the grant of a competing franchise where legislative authorisation is in the nature of things indispensable, as in the case of a bridge monopoly, but it is not a sufficient justification for prohibiting the exercise of a common right. For to what useful business could not the same argument be made to apply? Apothecaries were formerly encouraged in a similar way, and therefore pharmacies are in Germany to the present day monopolies. In reason the ferry monopoly stands on no better foundation; but since the right has always been regarded as a franchise, the prohibition of private ferries is not considered to be an interference with common right, and so the exclusive privilege

[22] Young v. Harrison, 6 Ga. 130; School Trustees v. Tatman, 13 Ill. 27; Stark v. Miller, 3 Mo. 470; Murray v. Menefee, 20 Ark. 561.

[23] Trent v. Cartersville Bridge Co., 11 Leigh 544; Hanson v. Webb, 3 Cal. 236; Greer v. Hangabook, 47 Ga. 282 (statutory provision); Alexandria Ferry Co. v. Wisch, 73 Mo. 655, 39 Am. Rep. 535.

[24] Warren v. Tanner, 21 Ky. L. Rep. 1678, 49 L. R. A. 248.

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is uniformly upheld,[25] even in states where monopolies are expressly forbidden.[26] In North Dakota, the constitution of which forbids all special privileges and immunities which upon the same terms shall not be granted to all citizens, the court justifies these privileges on the ground that public opinion has never crystallised against grants of exclusive ferry franchises.[27] In Missouri, however, it has been intimated that under the constitution of 1875 the grant of an exclusive ferry privilege might be invalid.[28]

**§ 669. Monopoly as a means of police control—Slaughter-house cases.**—It may be argued that if the state or a municipality may itself monopolise a business dangerous to the health or morals of the community, it should be allowed to employ a private agency for the same purpose, if more economical, and thus entrust the management of the monopolised business to an individual or a corporation. The monopoly would then be an instrument of the police power. This view was taken by the Supreme Court of the United States of the slaughter-house monopoly in the City of New Orleans, which upon the fullest discussion was sustained as not contravening the Fourteenth Amendment;[29] and while in a later case[30] it was doubted whether that particular monopoly was in reality granted for the preservation of the public health, the principle of the decision has not been overruled.

The decision in the Slaughter-House Cases is not binding

[25] McGowan v. Stark; 1 Nott & McC., S. C. 387, 9 Am. Dec. 712, 1818; Mills v. County of St. Clair, 4 Ill. 53, 8 How. 569; Stark v. Miller, 3 Mo. 470, 1834; Norris v. Farmers' Teamsters Co., 6 Cal. 590; McRoberts v. Washburne, 10 Minn. 23; Sullivan v. Lafayette Co. Supervisors, 58 Miss. 790; Prosser v. Wapello Co., 18 Io. 327; Douglas' Appeal, 118 Pa. St. 65; Mayor etc. v. Starin, 106 N. Y. 1; Nixson v. Reed, 8 S. D. 507, 32 L. R. A. 315; and authorities cited 12 A. & E. Cyclop. of Law, 2 edn. p. 1090, note 2.

[26] Broadway etc. Ferry Co. v. Hankey, 31 Md. 346; Toll Bridge Co. v. Flowers, 110 N. C. 381, 1892.

[27] Patterson v. Wollman, 5 N. D. 608.

[28] Carroll v. Campbell, 108 Mo. 350. The grant of a ferry franchise is not in itself exclusive of other competing grants. Fall v. Sutter Co., 21 Cal. 237.

In Germany ferry privileges have been largely abolished; Meyer Ver waltungsrecht I, p. 554.

[29] Slaughter House Cases, 16 Wall. 36, 1872; State v. Fagan, 22 La. Ann. 545.

[30] New Orleans Gas Light Co. v. Louisiana Light etc. Co., 115 U. S. 650.

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upon the state courts, which may hold such a monopoly contrary to the principles of the constitutions of their respective states, but the logical consequence of such a doctrine would be either to forbid state or municipal monopolies altogether, or to allow them only on condition that the monopoly be operated directly by the state or municipality through its own employees.

**§ 670. License, lease, or contract.**—If it be conceded that some business is so much affected with a public interest that it may be municipalised to the exclusion of independent private enterprise, and that at the same time the business may be operated through private or corporate agency, the delegation generally takes the form of a license, lease, or contract, and not of a grant of a franchise, which as a rule is beyond municipal powers, and which by many state constitutions is expressly inhibited to the state legislatures.[31] The difference is, however, one of form rather than of substance, the licensee, lessee, and contractor being as well protected as the holder of a franchise, while he is not subject to proceedings in the nature of a quo warranto. The validity of such delegation has been repeatedly recognised. Thus the city of New Orleans allowed private owners to establish markets within a district otherwise forbidden to private markets, and to maintain such markets under contract with the city. The owners conveyed the land and the market to the city and became its lessees, they were to be subject to all market regulations and their rates of charges were fixed by the city. These were held to be public markets.[32] So park authorities may give one person the exclusive privilege of maintaining a restaurant in a park,[33] and it has been held that a city may contract with one person for the removal of all garbage.[34] There are, on the other hand, cases in which this latter power has been denied, on the ground

[31] Chicago City R. R. Co. v. People, 73 Ill. 541.

[32] New Orleans v. Faber, 105 La. 208, 53 L. R. A. 165.

[33] State v. Schweichardt, 109 Mo. 496; Gushee v. New York, 42 App. Div. 37, 58 N. Y. S. 967; privilege of running stages, Amer. Steel House Co. v. Willcox, 77 N. Y. Supp. 1010; but an exclusive privilege of letting chairs has been held to interfere with the common use of the park, since it led to the removal of benches. Kurtz v. Clausen, 77 N. Y. S. 97.

[34] Grand Rapids v. De Vries, 123 Mich. 570, Kerr v. Simmons, 82 Mo. 269; State v. Orr, 68 Conn. 101; Smiley v. McDonald, 42 Neb. 5, 27 L. R. A. 540, modified, so as to apply

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that under proper regulations the business can be thrown open generally, though a license may be required.[35]

§ 671. **Power over monopolised business.**—The question of the validity of delegated monopolies against common right cannot be regarded as settled, but as a matter of legislative practice the tendency seems against them. If allowed, it can be only upon condition that in employing the private agency the state or municipality does not surrender its control or allow the private management to be made an instrument of oppression. These qualifications were recognised in the grant of the New Orleans slaughter-house monopoly, which subjected the business to police regulations, limited its charges, and secured equal service to all. It should also be observed that the slaughter-house monopoly was held by the Supreme Court to be revocable by the legislature before the expiration of its term.[36]

§ 672. **Restriction of numbers.**—If the two main objections to a monopoly are that they prevent free competition and shut out the mass of citizens from certain occupations, it is only a difference of degree whether the right to carry on the business is confined to one or to a circumscribed number or to a specified class. It has, however, been held in Arkansas that the constitutional provision against monopolies has no application to a restriction of numbers in a business dangerous to the public welfare,[37] and the Supreme Court of Massachusetts has said that the prohibition of exclusive privileges is not violated where the exclusion is merely the collateral and incidental effect of provisions enacted solely with a view to secure the welfare of the community.[38] Where, however, the constitution expressly provides that the legislature shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens, it has been held, upon very full consideration, that a

only to nuisances *per se*, in Iler v. Ross, 90 N. W. 869, 57 L. R. A. 895. Scavenger Monopolies exist in a few other cities; see Chapin Municipal Sanitation, p. 691-693.

[35] Matter of Lowe, 54 Kans. 757, 27 L. R. A. 545; State v. Hill, 126 N. C. 1139, 50 L. R. A. 473; Iler v. Ross (Neb.), 57 L. R. A. 895, 90 N. W. 869; see also Chicago v. Rumpf, 45 Ill. 90.

[36] Butchers' Union Co. v. Crescent City Co., 111 U. S. 746; see § 679, *infra*.

[37] Ex parte Levy, 43 Ark. 42.

[38] Commonwealth v. Blackington, 24 Pick. 352; Decie v. Brown, 167 Mass. 290, 45 N. E. 765.

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liquor license may not be refused simply because a sufficient number have already been granted.[39] In England also it has been held that an absolute limitation of numbers is inconsistent with the right which each applicant has to the exercise of judicial discretion by the licensing authorities in his particular case.[40]

The restriction of licenses in point of number is a not uncommon feature of liquor legislation, so especially in Massachusetts (not more than one to each 1000 inhabitants, in Boston one to each 500). Practically the same result follows where public need is one of the controlling factors in granting or refusing licenses, or where excessive number is a good ground of refusal.[41] Where numbers are restricted, some approach to equality may be secured by provisions for fair competition in the matter of application, to avoid favoritism. But where a discrimination is made among applicants of equal merit, and numbers are limited, there is, after all, something in the nature of a monopoly, and the constitutional principle against exclusive privileges suffers an exception on the ground of public safety or morals.

§ 673. **Resulting privileges.**—It remains to consider certain statutory provisions which, while not intended to grant monopolies, have incidentally the effect of creating exclusive privileges.

1. An act of Iowa prohibited the sale of products of petroleum for illuminating purposes which will emit combustible vapor at a temperature of less than 105 degrees F., except the lighter products of petroleum when used in the Welsbach lamp. The act was declared unconstitutional on the ground that it conferred an exclusive privilege upon the manufacturers of that lamp.[42] This decision is based upon the important prin-

[39] Ex parte Levy, 43 Ark. 42.

[40] Reg. v. Walsall Justices, 3 C. L. R. 100.

[41] So in Pennsylvania, and formerly in New York, see §§ 210, 211, *supra*.

[42] State v. Santee, 111 Io. 1, 53 L. R. A. 763. In Cincinnati &c. R. Co. v. Bowling Green, 57 Oh. St. 336, an ordinance required a railroad company to maintain electric lights, prescribing the kind of lights and lamps to be employed. An electric company in the village had the sole right to use these lights, which were patented, within the village, so that the railroad company had to procure its lights from this company. This was sustained on the ground that the electric company was under obligation to furnish its lights on reasonable terms.

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ciple that police regulations in requiring arrangements or safeguards must describe them abstractly and by reference to the required qualities, and must not name some specific patented article or the product of some particular manufacturer. As long as it is possible that the prescribed standard may be reached by others, their exclusion constitutes an unlawful monopoly in favor of the one named.[43]

2. An act of New York provided that the sale of transportation tickets should be restricted to agents specially authorised by transportation companies, but further allowed the properly authorised agent of any transportation company to purchase from the agent of another company a ticket for a passenger desiring a through ticket over the lines of both companies. It was held that by this latter provision the agent of one company was really enabled to engage in the ticket brokerage business generally, that thus the ticket brokerage business was confined to appointees of transportation companies, and that this power of selection confided to corporations wholly unconnected with the state government constituted a monopoly and vitiated the act.[44]

3. In Illinois it has been held that the power to license and control commission merchants may not be vested in a board appointed by incorporated associations organised for the promotion of interests allied to the produce commission business, since this violates the provision of the state constitution[45] prohibiting the legislature from granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise.[46] This decision likewise embodies an important principle, which has not yet obtained full recognition, namely, that licensing and examining powers should not be granted to particular named associations or institutions.[47]

[43] See also Fishburn v. Chicago, 171 Ill. 338, 49 N. E. 532, 39 L. R. A. 482. Discriminations and preferences in public contracts involve somewhat different considerations from those applicable to the exercise of the police power, especially where patented inventions are to be used see Dillon Mun. Corp. §§ 467, 468. As to preference of union labor in public contracts (held illegal) see Adams v. Brennan, 177 Ill. 194, 52 N. E. 314.

[44] People v. Warden of City Prison, 157 N. Y. 116, 51 N. E. 1006.

[45] Art. 4, § 22.

[46] Lasher v. People, 183 Ill. 226, 55 N. E. 663.

[47] See § 56, *supra*.

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Privileges of this kind have, however, been sustained in several states, so in California and Maryland the power of medical societies to appoint or elect medical examiners,[48] and in Indiana the right of the State Dental Association to appoint three of the five members of the state board of examiners, on the ground that appointment to office is a duty and not a privilege.[49] The Supreme Court of Massachusetts, in sustaining an act which made the right to practice medicine dependent on a license obtained from the State Medical Society or the University, said that if the power had been confined to the medical society exclusively, there might be ground for doubt, but that the difficulty was removed by the licensing power being equally conferred upon the University.[50] New York authorises the Court of Appeals to admit the graduates of seven named law schools to the practice of the law without examination.[1] All these privileges are contrary to the principle of equality. A mere right of nomination or recommendation to the executive for appointment is not open to objection in the same degree, and the admission to the practice of a profession upon the diploma of any institution complying with certain requirements is not inconsistent with equality of right.

## REVOCABILITY OF MONOPOLIES AND GRANT OF COMPETING RIGHTS. §§ 674-681.

**§ 674. Distinguished from prohibition of business.**—The power to grant competing rights whereby the value of a monopoly as such is lost, must be distinguished from the power to prohibit altogether the exercise of the right to which the monopoly grant referred, so that not only the monopolistic character of the business, but the business itself, is destroyed. The latter is part of the general question how far under the

[48] Ex parte Frazer, 54 Cal. 94; Scholle v. State, 90 Md. 729, 50 L. R. A. 411.

[49] Ferner v. State, 151 Ind. 247, 51 N. E. 360. A similar bill was vetoed in Illinois in 1903, on the ground that it interfered with the executive appointing power.

[50] Hewitt v. Charier, 16 Pick. 353, 1835. Where the examining privilege is given to a state institution, or where the state, as the result of an examination by its own university, grants special certificates which do not confer exclusive privilege to practice (as in the case of certified public accountants) it is difficult to make out a case of unconstitutional monopoly, yet such legislation violates the spirit of the principle of equality.

[1] Code Civil Procedure, § 58.

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police power an existing business may be prohibited or a right destroyed, and may be illustrated by the revocability of lottery privileges.[2] As the essential feature of a monopoly is the exclusiveness of the right, the main question with regard to them is whether this exclusiveness may be destroyed, i. e. whether the exercise of competing rights may be authorised.

The early grants of patents and monopolies under the royal prerogative were nearly always limited to terms varying from seven to thirty years and generally contained a clause "that if at any time during said term it shall appear that such grant is contrary to law, or mischievous to the state, or generally inconvenient, then upon signification made by us * * * or by six or more of our Privy Council of such prejudice this our present grant shall be void."[3]

The statutory sanction of patents and copyrights retained the limitation to terms of years, but did not provide for powers of revocation. Patents and copyrights under the laws of the United States, as under all other systems, are limited in time, but during the statutory term the exclusiveness is of the essence of the right, and cannot be taken away without compensation.

**§ 675. Unequivocal grant of exclusive character required.** —In the case of franchises or monopolies against common right—assuming the exclusion of the general public from the exercise of the right to be valid at least for the time being, as it necessarily is in all street franchises and as it was held to be in the Slaughter-House Cases,—we must ask, first: was there an intention expressed to secure the grantee against subsequent competing grants? and second: was there power to bind the public against such subsequent action? In other words, was it within the power of the granting body to make a contract unimpairable under the federal constitution?

The courts demand that the exclusive character of the grant be expressed in the clearest terms, every doubt being resolved against the grantee.[4] In the case of the Binghamton Bridge,[5] charters were granted at the same time for a number of bridges to different companies. In the charter to the Delaware Bridge

[2] Stone v. Mississippi, 101 U. S. 814; Douglas v. Kentucky, 168 U. S. 488. See § 563, *supra*.

[3] XIX Rymer's Foedera, 577.

[4] Charles River Bridge v. Warren Bridge, 11 Pet. 419; Fall v. Sutter County, 21 Cal. 237.

[5] 3 Wall. 51.

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Company it was expressly provided that it should not be lawful to erect any bridge across the said east and west branches of the Delaware River within two miles either above or below the bridge to be erected under the charter. The charter before the Supreme Court invested another company authorised to build a bridge across the Chenango River with all privileges and immunities contained in the foregoing incorporation of the Delaware Bridge Company; and it was held that this made the two-mile prohibition applicable to the Chenango River, although that river was not mentioned in the other act. Here the intent of the legislature was allowed to prevail over the express terms, a liberality of construction not to be found in later decisions.[6] It has been held that a law prohibiting county courts from licensing a ferry within half a mile from an established ferry, did not constitute a contract, and could be repealed at any time,[7] that a provision that county authorities shall not grant competing ferry rights does not prevent the legislature from authorising a city council to make such grants,[8] and that a mere agreement not to grant rights or privileges which will impair or destroy those conferred by an ordinance giving a corporation permission to operate a street railway system in the streets of a city, will not prevent the city from granting like permission to others.[9]

**§ 676. Principle of strict construction justified.**—Under the principle of strict construction the corporation applying for the franchise (which usually submits the form of the grant) is compelled to make it clear that it desires exclusive privileges, and cannot derive any advantage from using ambiguous terms which it may prefer in order not to arouse opposition, in reliance upon the sufficiency of those terms to support a claim of a monopoly. "It is a matter of public history which this court cannot refuse to notice, that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations,

[6] See Stein v. Bienville Water Supply Co., 141 U. S. 67.

[7] Wheeling & B. Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287; Williams v. Wingo, 177 U. S. 601.

[8] Fanning v. Gregoire, 16 How. 523, 534.

[9] Indiana Cable Street R. Co. v. Citizens Street R. Co., 127 Ind. 369, 8 L. R. A. 539; it seems the city had no power to make the original grant exclusive.

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is drawn originally by the parties who are personally interested in obtaining the charter; and that they are often passed by the legislature in the last days of its session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner and it is impossible that every member can deliberately examine every provision in every bill upon which he is called on to act. On the other hand, those who accept the charter have abundant time to examine and consider its provisions, before they invest their money. * * * And if individuals choose to accept a charter in which the words used are susceptible of different meanings,—or might have been considered by the representatives of the state as words of legislation and subject to future revision and repeal and not as words of contract,—the parties who accept it have no just right to call upon this court to exercise its high power over a state upon doubtful or ambiguous words, nor upon any supposed equitable construction, or inferences made from other provisions in the act of incorporation."[10]

**§ 677. Rival public undertakings.**—Where the charter or grant is silent, no covenant is implied on the part of the granting municipality that it will not itself establish a competing enterprise, but it will not be allowed to tax the private corporation for the payment of the obligations incurred in erecting the competing works, nor to discriminate directly or indirectly in its taxation against those citizens who do not transfer their patronage to the city.[11]

Where a power of alteration or revocation is expressly reserved, its exercise by the establishment of rival municipal works is not rendered invalid by the hardship which it inflicts upon the grantee.[12] Such municipal action may be a violation of faith, or it may be a measure of self-protection; it is a question for the corporation to determine in the first instance whether it will accept so precarious a grant.

**§ 678. Question of power to make exclusiveness a matter of right.**—Where the intention to grant an exclusive franchise

[10] Ohio Life Insurance & Trust Co. v. Diebolt, 16 How. 416, 435, 436.

[11] Skaneateles etc. Water Company v. Skaneateles, 161 N. Y. 154, 55 N. E. 562, S. C. 184 U. S. 354. See also North Springs Water Co. v. Tacoma, 21 Wash. 517, 47 L. R. A. 214.

[12] Hamilton Gas &c. Co. v. Hamilton, 146 U. S. 258.

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is clear the question of power arises. In the case of municipal corporations the power depends primarily upon the provisions of the charter or statute under which the city acts. These provisions are strictly construed;[13] so a power to grant exclusive track rights was held to apply only to streets specifically designated by the council and not to extend to granting the first right to build in any streets which the council might name in the future.[14] In Iowa a power to grant and refuse ferry licenses (as distinguished from a power to license and regulate) was held to authorise a grant under which the city binds itself to issue no other license.[15] But where a city has merely power to license the use of streets for tracks, etc., the power to grant exclusive privileges will not be implied.[16] There may perhaps be city charters or statutes which expressly authorise the municipalities to grant franchises and privileges so as to make them exclusive in a binding manner, but they must be extremely rare, and it is hardly conceivable that this would be done otherwise than with a limitation to a term of years. A city in granting a license for water works may, however, contract not to establish within a specified period, water works of its own, since municipal competition would be practically destructive of the private business.[17]

**§ 679. Grant of competing right as impairing the obligation of a contract.**—The question of the validity of the grant of competing rights in derogation of a prior legislative grant of exclusive privileges has come before the United States Supreme Court under the clause of the constitution forbidding laws impairing the obligation of contracts. In the case of the Binghamton Bridge Company[18] a perpetual bridge monopoly was held to be a binding contract; the New Orleans slaughter-house monopoly, granted for twenty-five years, was held to be revocable before the expiration of that time;[19] the New Orleans gas and water monopolies, granted for fifty years, were

[13] Minturn v. Larue, 23 How. 435; Wright v. Nagle, 101 U. S. 791.

[14] Detroit Citizens' Street R. Co. v. Detroit Railway, 110 Mich. 384, S. C. 171 U. S. 48.

[15] Burlington etc. Ferry Co. v. Davis, 48 Iowa 133.

[16] State ex rel. St. Louis Underground R. Co. v. Murphy, 134 Mo. 548; Carroll v. Campbell, 108 Mo. 550, as to ferries; Dillon § 692, Booth, Street Railways, § 108.

[17] Walla Walla v. W. W. Water Co., 172 U. S. 1.

[18] 3 Wall. 51.

[19] Butchers Union v. Crescent City &c. Co., 111 U. S. 746.

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held to be secure against the grant of competing franchises.[20] No distinction is therefore made between perpetual monopolies and those limited in time; but the test is whether the grant relates to an undertaking which in its nature cannot be thrown open indiscriminately, or whether it affects a business exercisable as a matter of common right, and restricted only for the real or alleged advancement of the public health or of some other interest. In the latter case, the exercise of the police power which justifies the original restriction of private right, is also held to justify the abrogation of the restriction at any time.

In the case of the Binghamton Bridge it was merely contended that the legislature did not grant an exclusive franchise; its power to make such grant was conceded. Should the state courts hold that under the state constitution the legislature is powerless to bind subsequent legislatures, there would be no valid contract; probably the United States Supreme Court would follow this construction of the state constitution, although it claims the power of independent judgment where it is itself opposed to the theory of a contract.[21]

**§ 680. Louisiana slaughter-house and gas cases.**—The Louisiana slaughter-house and gas company cases show some fluctuation or modification of opinion on the part of the Supreme Court. The slaughter-houses cases sanction a monopoly for the protection of the public health, the Butchers' Union case holds such a monopoly to be revocable, the gas company cases sustain the irrevocability of a gas monopoly. The slaughter-house cases go on the broad ground that the Fourteenth Amendment affords no protection against monopolies, the Butchers' Union case upon the ground that the legislature cannot bargain away its power to protect public health or morals, the gas company cases on the ground that the supply of gas is a public business and involves the grant of franchises which in their nature cannot be of common right. The slaughter-house cases do not suggest that a monopoly against common right cannot be irrevocably granted for a definite period, and

[20] New Orleans Gas Light Co. v. Louisiana Light &c. Co., 115 U. S. 650; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; St. Tammany Water Works Co. v. N. O. Water Works Co., 120 U. S. 64.

[21] Freeport Water Co. v. Freeport, 180 U. S. 587, 595; Douglas v. Kentucky, 168 U. S. 488.

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the grant there was for a period of twenty-five years. The Butchers' Union case says that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health. Had the slaughter-house monopoly endangered the public health, or had the public health required additional slaughter-house facilities not furnished by the monopoly, a case would have been presented within the principle of Beer Co. v. Massachusetts and Stone v. Mississippi. But it was not charged, nor does the opinion of the Supreme Court intimate, that the continuation of the monopoly was inconsistent with the public health. The abrogation of the monopoly was an economic and not a sanitary measure. The decision of the Supreme Court means therefore that while a monopoly against common right can be granted for police purposes, the Supreme Court will not recognise such a monopoly as a contract, i. e. it is intrinsically revocable, no matter whether the revocation be demanded by the public health or not. This seems an important modification of the Slaughter-House Cases, which do not suggest any distinction between a slaughter-house and a bridge monopoly. On the other hand, where the monopoly is not against common right, but relates to a public franchise, it may be made exclusive so that subsequent competing grants cannot be made, and this constitutes a contract. Such a contract is subject to further regulations in the interest of health or safety, but its total abrogation by the grant of competing rights would, it seems, not even be justified by regard for the public health or safety, requiring a different or additional supply of light; the abrogation even for that purpose could be accomplished only by the exercise of the power of eminent domain.

**§ 681. Perpetual monopolies and monopolies limited in time.** —In many states the constitution is explicit that the legislature may not grant exclusive privileges by special or local act, and in North Carolina, under the more general constitutional provision above cited, the courts have held repeatedly that the legislature cannot create a monopoly.[22]

As a matter of general constitutional principle, it would seem to be proper to make a distinction between perpetual mo-

[22] McRee v. Wilmington &c. R. Co., 47 N. C. 2 Jones 186; Washington &c. Toll Bridge Co. v. Commissioners of Beaufort, 81 N. C. 491; Thrift v. Elizabeth City, 122 N. C. 31.

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nopolies and those limited to a period of years. A perpetual monopoly is unjustifiable on any consideration, hence unreasonable, and should be held to be intrinsically beyond the power of the legislature to grant; the history of monopolies strongly supports this view. On the other hand, if circumstances justify the grant of exclusive privileges, justice to the grantee would seem to require that in return for his outlay there should be power to secure him in the enjoyment of his privilege for a reasonable length of time, sufficient at least to reimburse him for the capital invested.

It has already been pointed out that the decisions of the federal supreme court do not support this distinction, and it might require constitutional provision to fix the length of the permissible term. Our constitutions are with few exceptions silent regarding the general validity of monopolies; perhaps the provision found in a number of constitutions that the right of eminent domain shall never be so construed as to prevent the legislature from taking the property or franchises of incorporated companies,[23] has reference to exclusive privileges.

[23] Pennsylvania, Illinois, Nebraska, West Virginia, Missouri, Arkansas, California, Colorado, Georgia, Alabama.

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## CHAPTER XXXI.

### CLASSIFICATION AND DISCRIMINATION.

§ 682. **Statement of problem.**—Under the head of particular burdens a number of cases have been discussed in which the justification of police legislation was questioned on the ground that there was not sufficient causal connection between the right impaired and the public danger sought to be avoided. Much more frequent are the cases in which, while this connection is conceded, it is objected that the restraint is imposed upon some while others who are in a similar position are arbitrarily exempted from it. This objection involves the question of the validity of class legislation, and, in so far as it can be successfully maintained, constitutes one of the most effectual limitations upon the exercise of the police power. The legislative discrimination which is thus questioned may be based on time, on locality, on personal status, and on difference of acts or occupations.

DISCRIMINATION BASED ON TIME.—EXCEPTIONS IN FAVOR OF EXISTING CONDITIONS. §§ 683-687.

§ 683. **1. Where new measure amounts merely to regulation.**—It is obvious that a restrictive or prohibitive measure under the police power must operate very differently upon those who have invested property or acted otherwise in reliance upon the former condition of the law, and those who have not yet committed themselves in this manner. The loss and sacrifice which the measure entails upon the former exceeds by far the burden placed upon the latter. While an exception in favor of the former will of course create a discrimination in the operation of the measure, such discrimination may be a dictate of equity, and may even be demanded by a due regard for constitutional rights. On the other hand, the exception should not go further than the equity of the case requires, or it may become unconstitutional inequality.

The first case to be considered is where the new measure amounts to no more than a regulation even as regards previously vested interests. There is then no doubt that it can



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be constitutionally applied to them, and an exception in their favor should be allowed only if the application of the rule to them produced special hardship, or where it would impair the obligation of existing contracts.[1] Thus increased stringency in the regulations of liquor saloons are generally made applicable to existing places, and are not confined to those to be opened in the future, but where the regulation refers to location, establishments previously located are properly excepted.[2]

The establishment of a qualification for the practice of a profession may be such that it can be complied with by established practitioners, and then its retroactive operation would not be unconstitutional; so the Supreme Court has said that the same reasons which control in imposing conditions upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, and that therefore a knowledge of the new acquisitions of the profession may be required for continuance in its practice.[3] In this case physicians having had ten years' practice were exempt from the requirement of examination, their experience being regarded as sufficient evidence of qualification, and on the like ground the exemption of five or ten years' practitioners is upheld in other states.[4]

§ 684. **Exemption of established practitioners.**—It is clear that the requirement of an examination is a hardship for any established practitioner very different from the same requirement imposed upon future applicants for admission, and therefore, whether the fact of being engaged in practice when the statute is enacted, irrespective of length of time of such practice, can be regarded as a test of fitness or not, it should be regarded as a sufficient reason for exemption.[5]

The exemption, not of all established practitioners, but only of those who have been engaged in business for a certain

[1] Re Ten Hour Law for Street Railway Corporations (R. I.), 54 Atl. 602.

[2] Re Hawkins, 165 N. Y. 188, 58 N. E. 884.

[3] Dent v. West Virginia, 129 U. S. 114.

[4] State v. Hathaway, 115 Mo. 36; Williams v. People, 121 Ill. 84; State v. Vandersluis, 42 Minn. 129, 6 L. R. A. 119; Ex parte Spinney, 10 Nev. 323.

[5] State v. Randolph, 23 Oregon 74, 17 L. R. A. 470; Fox v. Territory, 2 Wash. T. 297; State v. Creditor, 44 Kan. 465.

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number of years, has something arbitrary in it, and has been condemned by the Supreme Court of Ohio as class legislation.[6] But if prolonged practice may be taken as proof of experience, it is necessary to fix upon a certain number of years, and this kind of arbitrariness is, as has been pointed out before, inevitable in a police regulation. If the exemption must come down to the date of enactment, the state is powerless to prevent an evasion of the act on the part of those who begin practice in contemplation of the new law and in order to escape its requirements.

The policy of legislation as to established practitioners is not uniform; in Illinois in the same year an act was passed requiring licenses for architects upon examination, excepting those already practicing the profession, and also an act requiring examination of "any person now or hereafter engaging in or working at the business of plumbing."[7] In New Hampshire it was held unconstitutional to exempt existing practitioners not merely from the requirement to establish their qualification, but also from the payment of the fee exacted from all others, the latter point being controlling,[8] or to exempt by reason of the accidental circumstance of residence or non-residence in the same town.[9]

**§ 685. 2. Where new regulation is destructive of vested interests.**—The second class of cases requiring consideration is that in which a measure which in its prospective operation is merely a regulation, becomes, when applied to vested interests, prohibition or taking of property. So if a law regulating the

[6] Harmon v. State, 66 Oh. St. 249, 64 N. E. 117, 58 L. R. A. 618.

[7] Laws 1897, p. 81 and p. 279.

[8] State v. Pennoyer, 65 N. H. 113. 18 Atl. 878, 5 L. R. A. 709.

[9] State v. Hinman, 65 N. H. 103.

If existing practitioners are not exempted, it must be asked: Who is to examine the members of the examining board? The very fact that they by implication are exempt raises a serious question as to the constitutionality of the acts which fail to exempt all other existing practitioners.

See, also, in the matter of Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519, where the exemption by the legislature of law students, who had commenced their studies at the time certain new rules regarding admission to practice went into effect, from the operation of those rules, was treated as arbitrary classification. However, this was not the main ground for holding the statute unconstitutional, the chief argument being, that the act constituted a legislative encroachment upon the constitutional independence of the judicial power.

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practice of medicine should require a four years' course in a medical college without accepting another test; existing practitioners could practically not comply with this requirement, and if it were applied to them, it would oust them from the practice of their profession; this would be clearly unconstitutional. Thus the establishment of fire limits within which frame buildings are forbidden is a regulation as applied to vacant property, while as to existing frame houses it would be a taking of property; hence the exemption of such houses is not only not contrary to, but is demanded, by the constitution.[10]

**§ 686. 3. Where new measure amounts to prohibition.**— The third class of cases is where the police measure exceeds the scope of regulation, and amounts to prohibition. Retroactive prohibition means in most cases the taking or economic destruction of property, but while it resembles the second class of cases in this respect, it differs from that class in two other respects: the policy of prohibition implies an evil or danger of exceptional magnitude, and any exception not merely allows a partial perpetuation of the evil or danger, but in addition may give to those excepted a monopoly instead of a mere advantage. It has been shown before that retroactive prohibition without compensation is constitutional, although the granting of compensation has never been held unconstitutional; the demands of equity might therefore always be satisfied by compensation; the question here to be considered is whether if compensation is not intended the law may constitutionally except vested interests from the prohibition.

**§ 687. Exception in favor of existing rights.**—In Illinois it has been held that a municipal charter power to direct the location and management of, and to regulate and prohibit, slaughtering establishments within the city, could not be so exercised as to prohibit only the future erection of slaughterhouses.[11] The court laid down the principle in rather sweeping terms: "If it prohibited one from carrying on the business that prohibition should extend to all regardless of the time the business may have been commenced." But it should be noted that in this case the regulation emanated from the

[10] Wadleigh v. Gilman, 12 Me. 403. [11] Tugman v. Chicago, 78 Ill. 405.

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board of health, while the power of regulation belonged only to the city council, so that there was an independent ground of illegality.[12]

In Massachusetts the municipal power to prohibit was expressly confined to the future erection of noxious establishments.[13] There must be many cases in which it is the undue multiplication of noxious establishments which creates the sanitary danger, and in which the district to which the prohibition applies is not large enough to give to the existing establishments which are suffered to continue, a virtual monopoly of the business: in such cases there can be no reasonable objection to the policy of exemption. Where the effect of the exemption is that the evil will not be sensibly abated, but simply be made more profitable to those who are pursuing it, the inequality of operation may constitute a fatal defect. Thus an act of New Jersey passed in 1893 created very onerous conditions for licensing race courses established after January 1, 1893, while those previously established were allowed to operate under a much more liberal licensing system. This was held to be unconstitutional discrimination.[14]

In San Francisco an ordinance was passed prohibiting the future acquisition or disposition of any land for purposes of interment, but allowing interments to be made in lots already purchased for that purpose for the use of the owners and their families. This was held illegal as discriminating in favor of those who had already purchased burial plots as

[12] In Crowley v. West, 52 La. Ann. 526, 47 L. R. A. 652, the City Council required all livery stables to be erected after passage of the ordinance to be located outside of a designated district comprehending the business portion of the city. At the time there were in that district four livery stables; ground had been purchased for the erection of a fifth one. The owner of the ground after the passage of the ordinance proceeded to erect the stable in the prohibited district, and contested the right of the city to treat his stable as a nuisance. It was held that the ordinance under the circumstances made an unjust discrimination and was unreasonable; but it was also held that the charter of the city did not give it power to exclude livery stables from any portion of the city.

In Kentucky it has been intimated that the exemption of persons owning liquor at the time of the enactment of a statute forbidding its sale at retail in certain localities would be unconstitutional discrimination; Stickrod v. Commonwealth, 86 Ky. 285, 5 S. W. 580.

[13] General Statutes, ch. 80, § 92; see now Rev. Laws, ch. 75, § 108.

[14] State v. Elizabeth, 56 N. J. L. 71, 23 L. R. A. 525.

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against those who had not.[15] It appeared that the effect of the ordinance would have been to deprive a cemetery association of the right to dispose of its unsold lots, while at the same time, under the terms of the ordinance, a very much larger portion of the cemetery already disposed of would have continued to be available for burial purposes. Here then the exception in favor of existing rights was only partial, in that it ignored the vested interest of the cemetery association, and at the same time was so far-reaching as to nullify almost the beneficial effect of the ordinance.

As a matter of constitutional and statutory policy it would seem to make a great difference whether the continuation of existing conditions will be temporary or perpetual. In the case of licenses to practice professions, the period of existing lives is the limit of inequality; on the other hand the exemption of existing corporate rights may create a perpetual privilege or monopoly. Where existing frame houses are excepted from the operation of new building regulations, the law often forbids repairs when the damage amounts to more than a certain proportion of the original value; and thus a gradual disappearance of such houses is practically assured. The power of eminent domain is of course always available for the abrogation of vested rights.

## DISCRIMINATION BETWEEN LOCALITIES. §§ 688-690.

**§ 688. Constitutional provisions.**—In the case of Missouri v. Lewis,[16] the Supreme Court decided that the equal protection clause of the Fourteenth Amendment does not prevent the application of different rules to different local divisions of the state. "It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made." In the case before the court a difference was made in the right of appeal from the courts of certain counties of the state and those of the rest of the state. It was held that the state was free to establish different systems of courts for different portions of its territories, and might even place them under different systems of laws. The same opinion

[15] Matter of Bohen, 115 Cal. 372, 36 L. R. A. 618.

[16] 101 U. S. 22, 1880.

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had been briefly expressed in Munn v. Illinois,[17] and later in Budd v. New York,[18] where the statute in question applied only to certain cities.

It is clear that unequal treatment of localities may work injustice and oppression as well as the unequal treatment of individuals or classes. The abuses of special or local legislation have led to the constitutional prohibition of such legislation in a number of enumerated matters in many states, and in a number of constitutions we find the general provision that all general laws or laws of a general nature must be uniform in their operation throughout the state. And even without such provision circumstances may stamp local legislation as unconstitutional discrimination.[19]

It is not intended by such a provision to make all regulations of a local character impossible; but the legislature may undoubtedly by uniform laws vest powers of local regulation in local authorities, which power may be unequally exercised according to the varying needs of different localities. The principle of local self-government is then supposed to give an adequate protection to local interests. There remains the possibility of abuse in the creation of local divisions, determining their boundaries in such a manner as to tie together conflicting interests, and give preponderance to one over the other. This may be prevented to some extent by making annexation of one locality to another dependent upon a vote of the inhabitants affected; but where this method cannot be or is not pursued, great injustice may be done, especially through unequal distribution of the benefits of public improvements, without any relief through the courts.[20] The system of local assessments for

[17] 94 U. S. 113.

[18] 143 U. S. 517.

[19] "We do not say that there may not be local legislation, for it is very common in our statute books, but that an act divested of any peculiar circumstances, and *per se* made indictable should be so throughout the state as essential to that equality and uniformity which are fundamental conditions of all just and constitutional legislation." State v. Divine, 98 N. C. 778, 1887.

The Illinois horseshoers' act was held unconstitutional as special and local legislation because applying only to localities of a certain population. Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558. Discrimination between cities and country districts in the matter of selling liquor has been sustained in South Carolina, State v. Berlin, 21 S. C. 292, 53 Am. Rep. 677.

[20] Kelly v. Pittsburgh, 104 U. S. 78. See State v. Minnetonka, 57 Minn. 526, 25 L. R. A. 755.

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special benefit affords in the matter of public improvements a partial remedy, which is, however, without constitutional guaranty.

**§ 689. Discrimination in location of noxious establishments.**—In the exercise of the police power discriminations between different parts of the same municipality are especially possible in the licensing of noxious establishments. There is inequality as a matter of fact between different neighborhoods of the same city, there are residence districts and factory districts. Are the public authorities debarred from considering these actual and inevitable differences for the sake of an abstract principle of equality, which would in fact operate very unequally? In Illinois an ordinance was upheld which made the erection of a livery stable in residence streets dependent upon the consent of adjoining owners; but the case turned upon the point whether the license might be made to depend upon a vote of the locality, and the discrimination between residence and other districts was without argument assumed to be legitimate.[21] Such a distinction seems very reasonable, but great difficulties must be felt where a municipality undertakes to confine houses of ill-fame to certain streets. Such a regulation has been upheld in Louisiana, and has been confirmed by the Supreme Court of the United States as not violating any federal right, but in that case the houses in the designated district were not legalised.[22] The opinion goes very far in sanctioning the legality of local discrimination in the matter of nuisances.

**§ 690. Discrimination to be justified by local conditions.**—Where discrimination on the part of railroad companies between different individuals, associations and corporations was made illegal, it was held that this had no application to different municipal corporations; and it is clear that absurd consequences would arise from insisting upon equal treatment of all places by railroad companies.[23] The principle of equality would seem to demand that local discriminations should be justified by and correspond to different local conditions, but should not be based upon distinctions discountenanced by the constitution or by the policy of the law. That local discrim-

[21] Chicago v. Stratton, 162 Ill. 494.

[22] L'Hote v. New Orleans, 51 La. Ann. 93, 44 L. R. A. 90, S. C. 177 U. S. 587; see § 179, *ante*.

[23] Little Rock & Ft. Sm. R. Co. v. Oppenheimer, 64 Ark. 271.

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ination might violate the Fourteenth Amendment was intimated by the Supreme Court in Missouri v. Lewis, above cited: "It is not impossible that a distinct territorial establishment and jurisdiction might be intended or might have the effect of a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise, it will be time enough then to consider it." But the Supreme Court has held that oppressive regulations regarding laundries confined to a certain district were not contrary to the Fourteenth Amendment, local discrimination being a legitimate incident to the exercise of the police power.[24] It was said in the later case of Yick Wo v. Hopkins,[25] that the Barbier case had no element of invidious discrimination against the Chinese.

## DISCRIMINATION BASED ON PERSONAL STATUS. §§ 691-720.

### RACE. §§ 691-700.

**§ 691. Indians, Chinese, and free negroes before the Fourteenth Amendment.**—While differences of nationality and religion have on the whole been ignored by American legislative policy, the relations between different races have given rise to problems of considerable importance. Until recent times the principal non-European races with which the American people have come in contact, have been the Indian, the Chinese and the African. The status of the Indians who have been treated as wards of the nation, subject to manifold restraints, need not be considered here. The Chinese being incapable of naturalisation have always remained aliens and their constitutional status is therefore determined by principles to be discussed later on. Where statutes or ordinances speak of Chinese, they must be understood as referring to subjects of the Emperor of China, and not of Chinese born in the United States, who as citizens are exempt from discriminating legislation.[26] The legal status of free negroes until the passage of the Fourteenth and Fifteenth Amendments was admittedly that of an inferior and dependent race; the Supreme Court of the United States held them incapable of acquiring United States citizenship;[27] in a number of states their immigration was pro-

[24] Barbier v. Connolly, 113 U. S. 27.

[25] 118 U. S. 356.

[26] United States v. Wong Kim Ark, 169 U. S. 649.

[27] Dred Scott v. Sanford, 19 How. 393.

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hibited,[28] and they were in other respects subjected to discriminating legislation.[29]

§ 692. **Fourteenth Amendment.**—The Fourteenth Amendment gave the negro the privilege and immunities of United States citizenship, and guaranteed to him the equal protection of the laws. It was clearly the policy of the framers of the Fourteenth Amendment to protect the negro against oppressive legislation, but hardly to place him on a plane of perfect equality with the whites. It required a separate amendment to secure the negro against discrimination on account of his race in the matter of suffrage. No explicit provision was made as to his right to hold office, but a law excluding negroes from jury service was held unconstitutional, as denying the equal protection of the law to a colored man when he is put upon trial for an alleged offense against the state.[30] It has been held in Maryland that negroes may be excluded from the practice of the law.[31] It seems, however, that this and similar discriminations are within the prohibition of the Fourteenth Amendment as interpreted in Strauder v. West Virginia.

§ 693. **Federal civil rights legislation.**—In the so-called Civil Rights Cases[32] the Supreme Court of the United States decided that the Fourteenth Amendment, being intended as a prohibition upon the states, authorised congressional legislation only in so far as its purpose would be to enforce this prohibition; that therefore Congress might legislate to afford redress against discrimination or abridgment of rights or unequal treatment on the part of the state or under color of state authority,[33] but could not directly prescribe rules for private action. It was consequently held that an act of Congress providing that all persons regardless of race or color should be entitled to the full and equal enjoyment of the

[28] Pendleton v. State, 6 Ark. 509; State v. Claiborne, 19 Tenn. (Meigs) 331; Hatwood v. State, 18 Ind. 492; Nelson v. People, 33 Ill. 390. See present constitution of Oregon, Art. I, § 35, retaining the old provision.

[29] State v. Manual, 20 N. C. (4 Dev. & Bat.) 20; African M. E. Church v. New Orleans, 15 La. Ann. 441; see, however, Memphis v. Winfield, 8 Humphreys (27 Tenn.) 707.

[30] Strauder v. West Virginia, 100 U. S. 303.

[31] Re Taylor, 48 Md. 28.

[32] 109 U. S. 1, 1883.

[33] Ex parte Virginia, 100 U. S. 339. See People v. Brady, 40 Cal. 198, sustaining a law incapacitating Indians and Mongolians from testifying in criminal cases in favor of or against white persons, notwithstanding the 14th Amt. But it seems

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accommodation of public conveyances and places of amusement was not authorised by the constitution, since it attempted to forbid discrimination not exercised under color of state authority.

The amendment has further been construed to the effect that Congress cannot provide for the punishment of a conspiracy on the part of individuals to deprive a person of the equal protection of the laws or of equal privileges and immunities under the laws, or to prevent or hinder state authorities from giving or securing to all persons within the state the equal protection of the laws;[34] but may provide for the punishment of a conspiracy to injure, oppress, threaten or intimidate a person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States.[35]

**§ 694. State legislation forbidding discrimination.**—The substance of the federal law declared unconstitutional in the Civil Rights Cases is embodied in the statutes of some Northern states,[36] which provide that no person shall be denied the full and equal enjoyment of the accommodations, advantages, facilities and privileges of all hotels, inns, taverns, restaurants, public conveyances on land or water, theatres and other places of public resort and amusement, because of race, creed or color.[37] The constitutionality of provisions of this character has been upheld,[38] except when their operation cannot be confined to one state, but necessarily affects interstate commerce. Thus a statute forbidding the separation of the two races on steamboats within the state is unconstitutional in so far as it will deprive the passenger coming from without the state of the privilege of separate accommodation.[39]

**§ 695. Discrimination apart from statute.**—It will be noted

clear that the protection of the criminal law does not operate equally where a white man is assaulted by a Chinese, and where a Chinese is assaulted by a white man.

[34] U. S. Rev. Stat. § 5519; United States v. Harris, 106 U. S. 629.

[35] United States Revised Statutes, § 5508; Ex parte Yarbrough, 110 U. S. 651; United States v. Waddell, 112 U. S. 76.

[36] During the reconstruction period similar statutes existed in Southern states. Donnell v. State, 48 Miss. 661; Joseph v. Bidwell, 28 La. Ann. 382.

[37] New York Penal Code, § 383; Illinois Criminal Code, 42 i-r; in some statutes the use of cemeteries is included.

[38] People v. King, 110 N. Y. 418, 1888; Baylies v. Curry, 128 Ill. 287.

[39] Hall v. De Cuir, 95 U. S. 485.

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that these statutes regulate the proprietary control of private property which is in other respects subject to a strong exercise of the police power, and which according to prevalent opinion either by common law is, or by statute may be made, subject to the duty of fair and equal service to the public. The common law duty of carriers, innkeepers, etc., is to furnish accommodation impartially to all who may apply and pay therefor, provided they are not personally obnoxious by reason of disease, intoxication or other offensive personal condition. That the mere fact of color cannot under our constitutions be regarded as making a person in a legal sense objectionable, must be clear.[40] Provided, however, that accommodation is afforded, and that the accommodation, though differing according to the price charged is equal for all who are willing to pay the same price, the common law duty of equal service is held to be satisfied, although there be separation according to race, setting aside different coaches and waiting rooms of railroads, and different portions of theatres, for each of the two races.[41] Such separate accommodation does not answer the requirements of the Civil Rights Acts.[42] These statutes, therefore, increase the burden of the common law, and there should be some justification for this. The courts which sustain the statutes hold in effect that it is a legitimate exercise of the police power to prohibit any method of regulation of places of public resort which prevents the free commingling and association of the two races, and which accentuates the condition of inferiority of the one race. The statutes are regarded as appropriate measures to elevate an oppressed race, and to relieve it from the stigma of degrading discrimination.[43] There is no good reason why the power, if recognised at all, should be confined to those classes of business which happened to be treated by the common law as common or public, and the extension of the requirements of the civil rights acts to restaurants or barber shops is constitutional.[44] The practical difficulty of enforcing requirements of this nature is a strong safeguard

[40] Chicago & N. W. R. R. Co. v. Williams, 55 Ill. 185.

[41] Westchester &c. R. Co. v. Miles, 55 Pa. St. 209; Younger v. Judah, 111 Mo. 303, 16 L. R. A. 558; Chilton v. St. L. & I. M. R. Co., 114 Mo. 88, 19 L. R. A. 269; Smith v. Chamberlain, 38 S. C. 529, 19 L. R. A. 710; Bowie v. Birmingham Railway Co., 125 Ala. 397, 50 L. R. A. 632.

[42] Baylies v. Curry, 128 Ill. 287; Donnell v. State, 48 Miss. 661.

[43] People v. King, 110 N. Y. 418.

[44] Ferguson v. Gies, 82 Mich. 358;

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against their undue extension. It is believed that these statutes have never been enforced except in sporadic instances.

**§ 696. Compulsory separation.**—The separation of the two races by state authority represents a policy opposite to that of the civil rights legislation. Such separation is attempted to be enforced in three directions: in marriage, in education, and in the accommodations of public conveyances.

**§ 697. a. Miscegnation.**—The laws of a number of states prohibit marriages between white persons and negroes or persons of more than a stated proportion of African blood;[45] in some states the prohibition is made by the constitution. With the exception of one case, which was subsequently overruled,[46] the state and federal courts have uniformly sustained the validity of this prohibition.[47] The Supreme Court of the United States has not had occasion to pass upon this question; but it has sustained a law punishing illicit sexual intercourse between white and colored persons more severely than the same offense between persons of the same race, saying that where the same punishment is meted out to both offenders, the white and the black, there is no discrimination.[48] By the same argument, it would probably refuse to see any discrimination in the prohibition of intermarriage; and in Plessy v. Ferguson[49] the prohibition of intermarriages is mentioned as a legitimate exercise of the police power. Marriage is clearly a matter in which race difference has a natural and specific operation, and whether it can be regarded as established that the offspring is apt to be degenerate or not, the legislature, in judging of the evil tendencies of such marriage in physical respects, must exercise a large discretion, and the prohibition is at least as reasonable as that of marriages between first cousins.

Messenger v. State, 25 Nebr. 674, 41 N. W. 638. See Bowlin v. Lyon, 67 Ia. 536 and Iowa Laws of 1884, ch. 105.

[45] See Stimson, § 6112.

[46] Burns v. State, 48 Ala. 195; Green v. State, 58 Ala. 190.

[47] State v. Gibson, 36 Ind. 389; State v. Jackson, 80 Mo. 175; State v. Hairston, 63 N. C. 451; Lonas v. State, 3 Heisk, 287; Dodson v. State, 61 Ark. 57, 1895; Scott v. State, 39 Ga. 321; Ex parte Francois, 3 Woods 367; Re Hobbs, 1 Woods 537; Ex parte Kinney, 3 Hughes 9; Frasher v. State, 3 Tex. App. 263; State v. Tutty, and State v. Ward, 41 Fed. 753, 7 L. R. A. 50.

[48] Pace v. Alabama, 106 U. S. 583.

[49] 163 U. S. 537.

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**§ 698. b. Education.**—The constitutions of a number of states require separate schools for the children of the two races, and the practice of separation prevails throughout the South, and to some extent in Northern states. At the same time constitutions or laws seek to secure equality of school benefits.[1] Upon the assumption that separation is consistent with equality of privileges, it has been upheld both in state and in federal courts.[2] The Supreme Court of the United States has not directly adjudicated the point.[3] Where no special provision for education of colored children exists, they cannot be excluded from the public schools.[4] Separate education may be justified like the prohibition of intermarriage, by the specific bearing of race upon the subject: there is sufficient ground for maintaining that in view of the different mental characteristics of the two races separate schools can produce better results, or that separation is desirable in the interest of discipline. The distinction of race in this matter is analogous to the distinction of sex, and separate education of the two sexes while not universal is common and traditional. Since education is provided in public schools, the state or municipality cannot remain neutral or inactive but must decide in favor of joint or separate education. In the exercise of the police power it may, however, also forbid joint educa-

[1] North Carolina: There shall be no discrimination in favor of, or to the prejudice of either race. Florida: Impartial provision shall be made for both. Indiana: The trustees of each township * * * shall organise the colored children into separate schools, having all the rights and privileges of other schools * * * provided there are not a sufficient number within attending distance, the several districts may be consolidated and form one district. But if there are not a sufficient number within reasonable distance to be thus consolidated the trustees shall provide such other means of education for said children as shall use their proportion according to numbers of school revenue to the best advantage.

[2] State v. Cincinnati, 19 Oh. 178; Cory v. Carter, 48 Ind. 327; State v. McCann, 21 Oh. St. 198; Ward v. Flood, 48 Cal. 36; Chrisman v. Brookhaven, 70 Miss. 477, 12 Southern 458, 1893; Lehew v. Brummell, 103 Mo. 546, 11 L. R. A. 828; People v. Gallagher, 93 N. Y. 438; People ex rel. Cisco v. School Board, 161 N. Y. 598, 56 N. E. 81; Martin v. Board of Education, 42 W. Va. 514, 26 S. E. 348, 1896; Bertonneau v. Board of Directors, 3 Woods 177; United States v. Buntin, 10 Fed. 730.

[3] Cummings v. County Board of Education, 175 U. S. 528, "we need not consider that question (i e., of separate education) in this case."

[4] State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713.

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tion in private institutions. Whether, in the absence of express state legislation, the local school authorities have the power to separate, is a different question; in some states any race discrimination in the management of schools is forbidden.[5] The Supreme Court of Illinois in the case last cited intimates that voluntary separation in the public schools not in violation of law could not be interfered with by the courts. Separate taxation of white persons for white schools, and of colored persons for colored schools, has been held unconstitutional, both under provisions of the state constitution and as resulting in inequality contrary to the Fourteenth Amendment.[6]

**§ 699. c. Separation in public conveyances.**—Legislation requiring under penalties that railroad companies provide separate cars for the two races, and forbidding the riding of a person of the one race in a car set apart for the other, has been upheld by the Supreme Court of the United States, provided that the separation is not enforced as against interstate passengers.[7]

The following seems to be the strongest argument in favor of the legality of compulsory separation: it is legitimate for transportation companies to provide separate accommodation for the two races, just as it may provide ladies' waiting rooms, or cars for smokers, as conducive to the comfort of the parties thus separately accommodated. Transportation companies may be subjected to public control in the interest of public convenience and comfort, and if separate accommodation is generally demanded, and not unreasonably burdensome, it may be compelled by law. It then follows also that the failure to provide it or the failure to maintain it on the part of the railroad company, may be visited with penalties, and a passenger who intrudes himself into a compartment in which he is not wanted may likewise be punished. The facts in Plessy v. Ferguson did not call for more than a recognition of these principles.

[5] Wyoming Constitution VII, 10; Illinois School Law XVI, 4; Chase v. Stephenson, 71 Ill. 383; People v. Alton, 179 Ill. 615, 54 N. E. 421.

[6] Dawson v. Lee, 83 Ky. 49; Puitt v. County Commissioners, 94 N. C. 709.

[7] Plessy v. Ferguson, 163 U. S. 537; Louisville &c. R. Co. v. Mississippi, 133 U. S. 587; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388; Smith v. State, 100 Tenn. 491, 41 L. R. A. 432.

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But the law, it seems, assumes a different aspect, if it is made to apply to persons of different races who wish to travel together. The right to associate with other free citizens is an essential constitutional right, and may be regarded as a privilege of United States citizenship; it should extend to travel on public highways as well as to other social and economic relations;[8] and while such a right may perhaps be in some degree restrained by public exigencies under given conditions, as e. g. in case of contagious disease, it is too important and fundamental to yield to a mere sentiment of prejudice. The act of Louisiana passed upon in Plessy v. Ferguson contained an exception in favor of servants traveling with families of the other race, and a similar exception in favor of all persons of different race who wish to travel together, or special accommodation for them, seems to be demanded by a due regard for constitutional rights.

§ 700. **Segregation and equality.**—Compulsory separation clearly constitutes discrimination. Is such discrimination consistent with perfect equality, or is it consistent with such equality as the constitution guarantees?

It is argued that discrimination which consists only in separation, necessarily operates on both races alike and therefore is not inequality. Some support of this view may be found in the analogy of sex. The interests of morality may require that in certain employments women be kept separate from men; yet such separation may be carried out with a sincere and anxious regard for equality. Separation between two classes cannot but affect the two classes simultaneously, and if we regard them as units, equally; the essential problem is, however, whether the law may create legal classes and then treat them as units, without violating the equality of each member of one class with any member of the other class.

It is a feature of the legislation against the commingling of the races that persons having as little as one-eighth or one-fourth of African blood are classed with the inferior race.[9] Whatever may be said in favor of the legitimacy of race separation, this classing of mixed blood with one race rather than

[8] See, however, Cully v. Baltimore & O. R. R. Co., 1 Hughes 536.

[9] For decisions classing those having more than half blood of the white race with the latter see Polly Gray v. State, 4 Oh. 353; Lane v. Baker, 12 Oh. 237; Jeffries v. Ankeny, 11 Oh. 372.

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another is not justifiable on any intelligible principle of equality, and a deliberate pushing down of those who approach the superior race. Or, if it is said that persons of mixed blood are inferior to both races, it is an injustice to the black race to expose it alone to the influence of this degeneracy. If it is believed that mixed marriages produce inferior offspring, why allow mulattoes to marry negroes, if they are not allowed to marry whites? Here it seems clear that a protection is accorded to one race which is not accorded to the other. This is an illustration of the truth that it is extremely difficult to reconcile race distinctions with the principles of our constitutional law.

Assuming, however, that two classes are not only distinct, but each in itself homogeneous, it is the established opinion that separation if strictly mutual is not contrary to the principle of equality, or to the narrower principle of the equal protection of the laws. If under the plea of separation gross discrimination is practiced against the colored race, relief may perhaps be had under the principles laid down in Yick Wo v. Hopkins,[10] but if separation inevitably and incidentally results in some inequality, such inequality must be borne as a necessary consequence of an otherwise beneficial and constitutional policy. This view is in accord with the decision of the Supreme Court in Cummings v. County Board of Education,[11] where federal interference was refused though the system of separation deprived the colored pupils of high school privileges. The Supreme Court indicates in its opinion that it is the constitutional duty of the state to reconcile as far as possible equality with separation.[12]

## SEX. §§ 701-703.

**§ 701. Civil and political status.**—The common law of England has never discriminated against women in matters of property, contract, tort or crime, by reason of their sex, except in the rules of descent, but it placed married women under far reaching disabilities. These disabilities have been entirely or to a great extent abrogated in all the states, in some cases by constitutional provisions, and this legislation is important

[10] 118 U. S. 356.

[11] 175 U. S. 528.

[12] See Hooker v. Town of Greenville (N. C.), 42 S. E. 141, where a proportionate amount of school money was given to an adjoining district in order to secure school privileges.



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for the purpose of the police power, as showing an altered conception not only of the relation of marriage, but also of the general claims of the female sex to equal rights and to civil independence.

In Wyoming, Colorado, Idaho and Washington, women enjoy the right of suffrage to the same extent as men, in some states they are allowed to vote for certain statutory offices, chiefly such as are connected with education, but generally speaking women are excluded from the electoral franchise.

The right of women to hold office is sometimes regulated by express legal provision;[13] in the absence of such provision they have been held incapable of filling a constitutional elective office, on the ground that only electors can be chosen,[14] or a judicial office, because by immemorial tradition only men were qualified to act as judges;[15] but the tendency is perhaps to recognise their right to hold statutory offices.[16] On the whole it is clear that women in their political status are far from enjoying equality with men.

**§ 702. Status under the police power.**—The Constitution of California provides:[17] "No person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation or profession." Illinois[18] and Washington[19] make like provision by statute, with exceptions as to military employment and the right to hold public or (in Illinois) elective offices.

At common law there were no express rules as to the right of women to pursue avocations, the matter being determined largely by custom. Even now positive rules are an exception, and the question, where it arises, is whether a custom by which women have been kept out of certain employments should be interpreted as a disability. This is the view which has been taken in several jurisdictions with reference to admission of

[13] United States Rev. Stat. § 165.

[14] Oren v. Abbott, 121 Mich. 540, 47 L. R. A. 92; Atchison v. Lucas, 83 Ky. 451. *Contra*, Wright v. Noell, 16 Kans. 601.

[15] Op. Justices, 165 Mass. 599, 32 L. R. A. 350, 43 N. E. 927; State v. Adams, 58 Oh. St. 612, 51 N. E. 135.

[16] See State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, with full note.

[17] Art. XX, § 18.

[18] Act March 22, 1872.

[19] Ballinger's Code, § 3322.

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women to the practice of the law, which was denied in Massachusetts, Illinois, Virginia and Maryland.[20]

The federal supreme court has held that the right to practice law is not one of the privileges and immunities of United States citizenship, and no use appears to have been made of the argument that the equal protection of the law demanded that women should be allowed the same means of earning a livelihood as men.[21] In Illinois the disability to practice law by reason of sex was abolished afterwards by statute, and in most jurisdictions the right is now conceded. With regard to other professions and the ordinary kinds of business there seems to exist neither express prohibition nor implied disability.

The disability to practice law does not afford any foundation for the claim that the legislature may freely determine what avocations may be pursued by women. The legal profession is in this matter treated more as an office than as a private business. The principle of the equal protection of the laws seems to demand that women shall have the same opportunities of earning their living as men, unless the pursuit is such that sex constitutes a special ground of objection. The laws relating to the right of married women to establish themselves as sole traders, affect only questions of civil liability of husband and wife and the right to earnings,[22] and do not fall under the police power. It would probably be a legitimate exercise of the police power to make a married woman's right to engage in industrial employment to depend upon her husband's consent, as a regulation of marital authority, but such legislation would be contrary to public sentiment and does not exist.

The equality of the sexes should not prevent discriminative police provisions based on difference of sex, though they may operate chiefly as disabilities imposed on women. That discrimination does not necessarily operate in this direction, appears from a statute of Ohio providing special punishment

[20] Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239; Re Bradwell, 55 Ill. 535; In re Lockwood, 154 U. S. 116; Re Maddox, 93 Md. 727, 55 L. R. A. 298. *Contra*, Re Hall, 50 Conn. 131, 47 Am. Rep. 625.

[21] Bradwell v. Illinois, 16 Wall. 130; In re Lockwood, 154 U. S. 116.

[22] Schouler Domestic Relations, 5th edn. §§ 163-170; Todd v. Clapp, 118 Mass. 495.

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against tramps, and defining them so as to exclude females.[23] Here it is the male sex which is discriminated against.

Special provisions regarding women occur in legislation regarding labor and the retailing of intoxicating liquors. The laws for the protection of women employees have been considered before.[24]

**§ 703. Employment of women in the liquor business.**—In Indiana liquor licenses may be granted only to male persons,[25] and the employment of women in places where intoxicating liquors are retailed is not uncommonly restricted or even forbidden. In New York no woman not a member of the keeper's family may sell or serve liquor on the premises;[26] in some cases any employment of women in such a place is made unlawful.[27] In California, under the constitutional provision above quoted, an ordinance making it a misdemeanor for a female to wait on any person in any dance cellar or bar room was held invalid,[28] but later on an ordinance prohibiting the sale of liquors in dance cellars or other places of amusement where females attend as waitresses, was sustained,[29] as was also the refusal of licenses to those employing females,[30] upon the ground that the constitutional clause did not prevent the prescribing of conditions upon which the business of retailing liquors shall be permitted to be carried on. It would seem that in all these cases alike the female was practically prohibited from engaging in one particular business, and that the particular form in which the result is accomplished should be immaterial. An unqualified constitutional recognition of the equality of sexes in all employments naturally makes it difficult to support legislative discrimination even for the most legitimate purposes.

In the absence of specific constitutional provisions the prohibiton of the employment of females as waitresses in places where liquor is retailed has been sustained without difficulty.[31] This should not be placed upon the ground that the control over the liquor trade is so absolute as to allow discrimination

[23] State v. Hogan, 63 Oh. St. 202, 58 N. E. 572.

[24] See § 311, *supra*.

[25] Blair v. Kilpatrick, 40 Ind. 332.

[26] Liquor Tax Law, § 31.

[27] Re Considine, 83 Fed. Rep. 157.

[28] Re Maguire, 57 Cal. 604.

[29] Ex parte Hayes, 98 Cal. 555, 20 L. R. A. 701.

[30] Foster v. Police Commissioners, 102 Cal. 483.

[31] Bergman v. Cleveland, 39 Oh. St. 651; City of Hoboken v. Goodman (N. J. L.), 51 Atl. 1092; Ma-

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in the free discretion of legislative or administrative authorities, but rather upon the ground that the principle of equality of the sexes yields under circumstances where it would be an encouragement to vice. It seems that women could not be prohibited from accepting employment in wholesale liquor establishments, although these are as much at sufferance as the saloon, and even a sweeping prohibition of their employment in places of retail sale, as e. g. the employment of scrub-women at hours when the place is not frequented by customers, would be unreasonable.

A legal provision which should undertake to prohibit women from frequenting saloons would undoubtedly be a more incisive interference with individual liberty. If applied to all places where liquor is sold to be drunk on the premises it would under the social conditions of many cities be clearly unreasonable; in Kentucky an ordinance forbidding women to "go in and out of any building where a saloon is kept, etc.," was held to be oppressive and void;[32] but municipal ordinances have been sustained making it unlawful for any female to be after midnight in any public drinking saloon.[33] The test of the validity of the prohibition would seem to be that the presence of females in a particular class of places, or at some particular time, involves a danger to public order or public morals. The provision of the Rhode Island law[34] forbidding the sale to women of liquor to be drunk on the premises would probably be sustained on the theory of absolute legislative power over intoxicating liquors; but on principle it seems an unjustifiable discrimination, since the mere consumption of liquor in public places on the part of women is no more immoral than it is on the part of men.

It should be concluded that the equality of sexes is a constitutional principle only in so far as sex or the difference of sex does not constitute a specific danger. The proper recognition of the natural inequality of the sexes should not be regarded as contrary to any principle of our constitutional law.

rion v. Reynolds, 14 Mont. 383; Re Considine, 83 Fed. Rep. 157; State v. Consadine, 16 Wash. 358, 47 Pac. 755 (here employment in any capacity forbidden).

[32] Gastineau v. Commonwealth, 22 Ky. Law Rep. 157, 49 L. R. A. 111.

[33] Ex parte Smith, 38 Cal. 702, 1869; Adams v. Cronin, 29 Colo. 488, 69 Pac. 590.

[34] General Laws, ch. 102, § 13.

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ALIENS. §§ 704-707.

§ 704. **Power of United States.**—The constitutional status of aliens must be considered with reference to the power of the United States and of the states.

The United States has, as against other nations, all the powers which a sovereignty may exercise under the principles of international law, except in so far as these powers may be modified by special treaty stipulations. In the exercise of these powers the federal government is limited by the requirement of due process of law, but it has been settled by judicial decision that due process does not require judicial proceedings either for the exclusion or for the deportation or expulsion of aliens, but that the enforcement of laws in those respects may be entrusted to executive officers without any appeal to the courts,[35] while infamous and probably any other punishment can be inflicted on aliens only by the judgment of a court.[36]

In other countries the question usually discussed in this connection is whether the executive without express legislative delegation of authority may expel aliens. In England the power of the Crown is denied;[37] in Germany the right of the executive is recognized;[38] in France it is delegated by statute.[39] No such power is claimed for the federal executive in the United States.

§ 705. **Power of states.**—The states are bound in their treatment of aliens partly by the international obligations of the United States, partly by the provisions of the federal constitution. A state cannot exclude aliens from its territory for political or economic reasons, or limit them in their right to carry on foreign commerce, since in these points the federal authority is not merely supreme but exclusive. The state can therefore not put a tax upon immigrants or place other restrictions upon their right to land or come into the state.[40] An

[35] Ekiu v. United States, 142 U. S. 651; Fong Yue Ting v. United States, 149 U. S. 698; Lem Moon Sing v. United States, 158 U. S. 538; Yamataya v. Fisher, 189 U. S. 86 (at least where he has not yet acquired a permanent and settled residence, but probably irrespective of this limitation).

[36] Wong Wing v. United States, 163 U. S. 228.

[37] See Law Quarterly Review, Vol. VI, p. 27.

[38] Georg Meyer, Staatsrecht, § 215.

[39] Act of December 3, 1849, Art. 7.

[40] Passenger Cases, 7 How. 283; State v. S. S. Constitution, 42 Cal. 578; People v. Compagnie Generale

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exception from this principle is recognised as to measures confined strictly to immigrants dangerous to health or morals, especially quarantine measures.[41] Nor is it, generally speaking, competent for the states to deprive resident aliens of any privileges accorded to foreigners by the comity of nations or to discriminate against them where equal treatment is guaranteed by treaty.[42]

**§ 706. Equal protection and equal capacity.**—A similar prohibition rests upon the states in consequence of the Fourteenth Amendment, which forbids them to deny to any *person* within their jurisdiction the equal protection of the law. That with regard to aliens equal protection means equal justice and equal security rather than perfect equality[43] follows from the well established principle that the states may in accordance with the common law deny to aliens the right to own land,[44] unless such right is stipulated by treaty.[45]

It would be unwarranted to infer from the peculiar power of the states over land tenures that the legal capacity of aliens is in other respects completely under their control, so that the duty of legal protection would apply only to such rights as the state chooses to allow aliens to acquire. It is true that the distinction between security of rights held, and capacity to hold rights, is recognized by the United States Revised Statutes. § 1977 gives to all persons the same security, while § 1978 gives only to all citizens of the United States the same right to inherit, purchase, lease, sell, hold and convey real and personal property.

As to the right to engage in occupations the federal statutes are silent except that under § 1977 discriminative taxes, licenses and exactions of every kind are forbidden. So an act of Pennsylvania (of June 15, 1897) taxing employers for every foreign born unnaturalized person employed by them was declared unconstitutional by the state and federal courts.[46]

Transatlantique, 107 U. S. 159; Henderson v. Mayor, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275.

[41] New York v. Miln, 11 Pet. 102; Morgan's &c. Co. v. Louisiana, 118 U. S. 455; Compagnie Francaise v. Louisiana State Board of Health, 186 U. S. 380.

[42] Yick Wo v. Hopkins, 118 U. S. 356; Re Lee Sing, 43 Fed. Rep. 359.

[43] See § 1977 R. St.

[44] Fairfax v. Hunter, 7 Cr. 602.

[45] Chirac v. Chirac, 2 Wh. 259; Hauenstein v. Lynham, 100 U. S. 483.

[46] Juniata Limestone Co. v. Fag-

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Before the enactment of the federal statute above cited laws were upheld requiring of aliens a special license fee for digging in gold mines,[47] and imposing upon them an inheritance tax.[48] A state may undoubtedly require citizenship of its own officers, and by analogy, it seems, of all avocations involving a public trust,[49] and the requirement is a common one in the rules relating to admission to the practice of the law.

As to other occupations, the requirement of citizenship is uncommon, but is found occasionally, so in a statute of New York prescribing the qualification of chiropodists.[50] It has been held in Maryland that the law may provide that liquor licenses shall be issued only to citizens.[1] "If we assume for the sake of argument that Trageser has under treaties every right which a citizen could have, the answer is that no citizen of the United States can complain because a police regulation denies him the privilege of selling liquor even if the privilege is granted to other citizens." In view of the expressions as to the right to sell liquor, to be found in Crowley v. Christensen,[2] it is not improbable that the exclusion of aliens would be sustained by the Supreme Court; but with regard to other occupations, even those requiring special skill, or moral qualifications, discrimination against resident aliens ought not to lie in the discretion of the states. The analogy of the disability to hold land, a survival of feudal conceptions, should not be extended. It has, accordingly, been held in Michigan that citizenship may not be made a requirement for engaging in the avocation of a barber.[3]

Upon well established principles, the right to engage in foreign trade is beyond the control of the states. But it is also clear that the right to take up any other common occupation cannot be barred by the states to resident aliens. For otherwise a state might close all profitable avocations to

ley, 187 Pa. 193, 42 L. R. A. 442; Fraser v. McConway & Torley Co., 82 Fed. Rep. 257.

[47] People v. Naglee, 1 Cal. 232. The Act of Congress of May 10, 1872, confines the right to locate mineral claims on public lands to citizens of the United States.

[48] Mager v. Grima, 8 How. 490.

[49] As to trusts under private instruments, see Roby v. Smith, 131 Ind. 342; Farmers' L. & Tr. Co. v. C. & A. R. R. Co., 27 Fed. Rep. 146; Shirk v. La Fayette, 52 Fed. Rep. 857.

[50] Laws of 1895, ch. 864, § 4.

[1] Trageser v. Gray, 73 Md. 250.

[2] 137 U. S. 86.

[3] Templar v. State Board of Examiners (Mich.), 90 N. W. 1058.

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them, and, by preventing them from earning a livelihood, drive them away. Such a result would bring about international complications and can therefore be only a matter of national action. The federal adjudications in the matter of discrimination against Chinese in the laundry business, while involving also treaty rights, seem to support this position.[4]

**§ 707. Resident and non-resident aliens.**—In a number of states the rights of resident aliens are secured by provisions of the state constitutions. Thus Wisconsin provides:[5] "No distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment or descent of property."[6] Wyoming[7] adds taxation of property. Oregon[8] restricts the guaranty to white foreigners.

Aliens who are at the same time non-residents may, it seems, be discriminated against, in the absence of treaty stipulations, in the matter of membership in corporations, and probably in other matters not affecting either fundamental rights or commerce.[9]

## NON-RESIDENTS. §§ 708-712.

**§ 708. Citizens of other states.**—Non-residents are either citizens of the United States or aliens. It is not common to make provision for state citizens not residing in the state; if they reside abroad, it is only their national citizenship that is relevant; by taking up their residence in another state they become under the Fourteenth Amendment citizens of that state.[10] Hence, as between the states, residence and citizenship mean practically the same thing, and the state constitutions regulating the qualifications for suffrage generally speak of residents or inhabitants, and not of state citizens.

The status of citizens of other states under the police power need be considered only in so far as they are non-residents, and we may confine ourselves to non-resident citizens, as powers over non-resident aliens have been discussed in connection with alienage.

The Constitution of the United States provides, IV 2: "The

[4] Yick Wo v. Hopkins, 118 U. S. 356; Re Parrott, 1 Fed. Rep. 481.

[5] Constitution I, 15.

[6] Neb. I, 25; Col. II, 27; Mont. III, 25; West Virginia II, 5, contain practically the same provision.

[7] Constitution I, 29.

[8] Constitution I, 31.

[9] State v. Travelers' Insurance Company, 70 Conn. 590, 40 Atl. 465, 1895.

[10] Bradwell v. Illinois, 16 Wall. 130; Chicago & N. W. R. Co. v. Ohle, 117 U. S. 123.

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citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." Section 1978 of the Revised Statutes says: "All citizens of the United States shall have the same right in every state and territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property."

**§ 709. Non-resident U. S. citizens.**—Have these clauses any application to non-residents? It may be urged that the law of a state discriminating against non-residents applies to its own citizens who may reside out of the state, so that a non-resident who is a citizen of another state is treated exactly like a citizen of the first state under like circumstances. Thus marital rights and privileges may be confined to parties marrying or living within the state creating the rights.[11] Yet within the United States residence and citizenship go so commonly together that the courts may take cognizance of the fact that a discrimination against non-residents is in many cases a discrimination against citizens of other states. So it has been held that non-resident creditors cannot be postponed to resident creditors in their right to share in the assets of an insolvent debtor.[12] There is obviously no intrinsic relation between the fact of residence and the preference given. The same is true of the general right to institute actions.[13] Otherwise, however, of a law which provides that when the defendant is out of the state the statute of limitations shall not run against the plaintiff, if the latter resides in the state, but shall, if he resides out of the state. This the Supreme Court upholds as a valid discrimination upon the ground that if the statute does not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the state where the parties reside, and yet if the defendant should be found in the state whose law is under consideration, it may be only in a railroad train, a suit could be sprung upon him after the claim had been forgotten.[14] There is, consequently, a relation between residence and the

[11] Conner v. Elliot, 18 How. 591; Pratt v. Tefft, 14 Mich. 191; Atkins v. Atkins, 18 Neb. 474; Bennett v. Harms, 51 Wis. 251; Buffington v. Grosvenor, 46 Kan. 730, 27 Pac. 137, 13 L. R. A. 282.

[12] Blake v. McClung, 172 U. S. 239.

[13] Cole v. Cunningham, 133 U. S. 107.

[14] Chemung Canal Bank v. Lowery, 93 U. S. 72, 1876.

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running of the statute of limitations which makes a discrimination on that basis justifiable. And the question should be in every case: has residence any bearing upon the subject-matter of the law? Non-residents have a constitutional right to become creditors and they must have the usual rights to secure their claims, they may therefore not be forbidden to become or freely select trustees under deeds of trust,[15] but executors and administrators, who are primarily officers of the court which has jurisdiction of the devolution of decedents' estates, may be required to be residents in order to be under the control of the court.[16]

**§ 710. Non-residence relevant for police purposes.**—In the matter of police legislation, the requirement of a valid reason for discrimination means that the fact of non-residence constitutes a special objection or danger. Even where this condition exists, the police power may give way to the freedom of interstate commerce.[17] With regard to domestic business only, it has been held in New Hampshire that no discrimination in licenses can be made between the citizens of the state and of other states in the sale of shrubs or trees, or of lightning rods.[18] The same has been held with regard to peddlers;[19] yet it may be argued that in a business regulated on account of the lack of fixed location a discrimination against non-residents should be valid.[20] It is clear that a resident of the state can be held liable more easily than a non-resident for fraud or violation of police regulations.

The exclusion of others than inhabitants of the state from the right to retail liquor, which has been sustained,[21] may be justified upon similar principles; the Supreme Court, however, seems to sanction this discrimination upon the broader ground that the selling of liquor is not one of the rights of

[15] Roby v. Smith, 131 Ind. 342.

[16] Woerner, Administration, §§ 230, 241.

[17] Leisy v. Hardin, 135 U. S. 100.

[18] State v. Lancaster, 63 N. H. 267; State v. Wiggin, 64 N. H. 508, 1 L. R. A. 56.

[19] Ex parte Bliss, 63 N. H. 135.

[20] Germany allows the authorities to grant and by implication also to refuse peddling licenses to foreigners, Trade Code § 56d.

[21] Welsh v. State, 126 Ind. 71, 9 L. R. A. 664; Mette v. McGuckin, 18 Neb. 323, affirmed U. S. Supreme Court L. ed. Bk. 37, p. 934 (not officially reported); Kohn v. Melcher, 29 Fed. Rep. 433, 1887, where only residents of the county could be licensed so that there was no discrimination between states as such.

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citizenship to which the guaranty of the Fourth Article of the constitution applies.[22] But a discriminating license tax placed on non-residents has been held to be invalid.[23]

**§ 711. Practice of medicine, etc.**—Perhaps the state might confine the right to practice medicine to residents, though such a provision does probably not occur; on the contrary, an exemption from the requirement of a state license is not infrequently established in favor of non-resident physicians called into the state for consultation, and has been upheld as reasonable.[24] With regard to attorneys the requirement of residence would probably not be questioned; in New York a special provision has been deemed necessary to allow them to reside in another state.[25] Perhaps the provisions against bringing into the state armed bodies of men for the protection of property might be sustained, though the prohibition does not extend to the employment of residents; for the letting of services for purposes involving peace and safety is clearly an employment subject to control, and non-residents may be expected to be more indifferent to the peace of the state than residents. The Report of the Industrial Commission[26] questions whether the provision is consistent with the national constitution.

In a number of states the laws relating to the admission to the practice of medicine provide for the issue of licenses to practitioners who have practiced for a stated number of years prior to the enactment of the law within the state. This constitutes a discrimination in favor of residents, which has been justified on the ground that a person may be competent to practice in a locality, with the climatic and sanitary conditions of which he is familiar, while without scientific training he may be incompetent to practice in another locality.[27] It may also be said that with regard to resident practitioners established local reputation is sufficient protection against quackery. The provision has generally been upheld.[28]

[22] Leisy v. Hardin, 135 U. S. 100.

[23] Sinclair v. State, 69 N. C. 47.

[24] State v. Van Doran, 109 N. C. 864; Parks v. State Ind., 64 N. E. 862; State v. Bohemier, 96 Me. 257, 52 Atl. 643.

[25] Code Civil Proc. § 60.

[26] V, 144.

[27] Ex parte Spinney, 10 Nev. 323, 328.

[28] State v. Green, 112 Ind. 462, 14 N. E. 352; People v. Phippin, 70 Mich. 6, 37 N. W. 888; State v. Creditor, 44 Kans. 565, 24 Pac. 346;

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**§ 712. Proprietary resources of state.**—An exception to the principle of equality between citizens of different states, or between residents and non-residents, is recognised in the matter of the enjoyment of and participation in the resources of the state held by it in a quasi-proprietary capacity. Where a state institution is supported by taxation of the people of the state, it seems just that the people of the state may be preferred, and that they may have the benefits of the institution free, while non-residents pay fees. So in state universities, or benevolent and charitable institutions. The same rule has also been applied to the natural common property of the state, fish and game, oyster beds, etc., in which a special interest of the inhabitants of the state is recognised by virtue of "citizenship and domicil united."[29]

CORPORATIONS. §§ 713-715.

**§ 713. Inequalities due to special charters.**—When corporations were created by special act of the legislature, the charters not infrequently contained grants of special powers and immunities, and different corporations, even of the same kind, were very apt to differ from each other in method of organization and corporate capacity. Under the system of general incorporation laws these inequalities are greatly reduced, but where the general incorporation laws were of narrow scope, one law providing for one kind of business or activity, another for another restricted class, inequalities were sure to result. So for a long time in New York incorporation for business purposes required five original members, for manufacturing purposes only three; so the laws for the incorporation of religious societies of different denominations allowed different amounts of property to be held by each.[30] Such inequalities between different classes of corporations may still occur.

**§ 714. Discrimination in administration of justice.**—When

People v. Hasbrouck, 11 Utah 291, 39 Pac. 918; Craig v. Board of Medical Examiners, 12 Mont. 203, 29 Pac. 532.

[29] Corfield v. Coryell, 4 Wash. C. C. 371, 1825; McCready v. Virginia, 94 U. S. 391; Haney v. Compton, 36 N. J. L. 507; State v. Corson (N. J. L.) 50 Atl. 780; Rogers v. Jones, 1 Wend. 237; People v. Lowndes, 130 N. Y. 455; State v. Medbury, 3 Rh. I. 138; Chambers v. Church, 14 Rh. I. 398, 51 Am. Rep. 410; Commonwealth v. Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A 475.

[30] See § 466, *supra*.

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we compare corporations with individuals it must be borne in mind that there is a large body of corporate law without analogy in the law relating to individuals, namely, that relating to corporate organisation and methods of action. Moreover, since the liability of corporations is limited, it would seem justifiable to subject them to special rules to enforce prompt payment of their debts. The decision in Gulf, etc., R. R. Co. v. Ellis[31] is not contrary to this view, since in that case the statute discriminated against railroad companies as debtors, and thus singled them out from other corporations in a matter on which the peculiar nature of the railroad business had no bearing. Special considerations, however, would seem to apply to claims against insurance companies, which therefore may be singled out in legislation imposing penalties for vexatious delays in paying policies.[32] A statute of Mississippi, allowing an attorney's fee to be taxed against the unsuccessful appellant whenever an appeal shall be taken from the judgment of any court in any action for damages brought by any citizen of the state against any corporation, was held to be unconstitutional. The legislature desired to avoid discrimination between parties to the same action and therefore allowed the attorney's fee, whether the appeal was taken by the corporations or the citizens; but in doing so was held to have discriminated arbitrarily between unsuccessful appellants in different actions according to the character of the defendant.[33] If the attorney's fee had been allowed only against the corporations it might have been contended with considerable force, that where a class of litigants is accorded the privilege of limited liability, its right to appeal may be restrained by reasonable conditions not generally applicable to appellants;[34] and so a discrimination against corporations might be justified where they interpose vexatious or dilatory defenses, though perhaps not where they oppose a claim in good faith.[35] Corporations being entitled to equal justice with individuals, every pro-

[31] 165 U. S. 150.

[32] Union Central Life Insurance Co. v. Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; Fidelity Mut. Life Ins. Co. v. Mettler, 185 U. S. 308; Farmers' & Merchants Ins. Co. v. Dobney, 62 Neb. 213, 86 N. W. 1070, S. C. 189 U. S. 301, 47 Law. Ed. 821, with note.

[33] Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641.

[34] This view, however, was not taken by the Mississippi court.

[35] Hocking Valley Coal Co. v. Rosser, 53 Oh. St. 12, 29 L. R. A. 386.

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cedural discrimination should be based on some consideration peculiar to the nature of the body corporate.[36]

**§ 715. Corporate capacity and vested rights.**—In the field of the police power, the chief point in which corporations differ from individuals is their limited capacity. They can engage only in such lines of activity as are marked out by law, they cannot go beyond the objects set out in their charter, and under some jurisdictions cannot under one charter combine diverse and distinct objects.[37] The legislature may at its pleasure vary or increase these limitations, and in this respect a very important inequality exists between corporations and individuals.

It is, on the other hand, clear that where a corporation has, in accordance with its charter powers, invested funds in some enterprise, it is entitled to the protection of the law in the enjoyment of its property, and in its dealings with others incidental to such enjoyment, in the same manner as individuals. It was held in Arkansas and Rhode Island that laws regarding the mode or time of payment of wages may be enacted with regard to corporations, or special classes of corporations only, under the reserved power to alter corporate charters;[38] but the opposite view is taken in other states.[39]

The Supreme Court of the United States strongly supports the doctrine that corporations as owners of property may not be discriminated against. "It is now well settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."[40] In the different railroad rate cases the position of the state derives no strength from the fact that legislation is directed against corporations, the corporate property being treated as the property of the shareholders. Moreover "the power to enact legislation of this character cannot be founded

[36] The legislature may recognise the local influence of large corporations by allowing a change of venue from the place where they keep their principal office; Snell v. Cincinnati Street R. R. Co., 60 Oh. St. 256, 54 N. E. 270.

[37] *Supra*, § 360.

[38] Leep v. St. Louis & I. M. R. Co., 58 Ark. 407, 23 L. R. A. 264; State v. Browne & Sharpe Mfg. Co., 18 R. I. 16.

[39] Johnson v. Goodyear &c. Mining Co., 127 Cal. 4, 59 Pac. 304; Braceville Coal Co. v. People, 147 Ill. 66.

[40] Covington &c. Turnpike Co. v. Sandford, 164 U. S. 578; also Gulf &c. R. Co. v. Ellis, 165 U. S. 150, 154.

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upon the mere fact that the thing affected is a corporation, even when the legislature has power to amend or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means."[41]

In every case where a restraint is imposed on corporations alone, the question ought to be: would the evil or danger sought to be met be exactly the same if the owner of the business or property would be an individual? If so, the discrimination is unjustifiable. But if some kind of business may be subjected to special regulations by reason of its special circumstances, and if such business happens to be carried on only by corporations, it is no objection that the statute does not speak of individuals, so in the case of the railroad or insurance business.[42]

FOREIGN CORPORATIONS. §§ 716-720.

**§ 716. Foreign corporations not engaged in commerce.**—A sharp distinction must be made between such foreign corporations as do not carry on commerce with other states or nations, and such as do.

Foreign corporations which do not carry on commerce: insurance companies, banking, mining and manufacturing corporations, may be forbidden to do any business within the state, either through their officers, or through agents or brokers, or they may be admitted on such conditions as the state chooses to impose.[43]

The state may discriminate against them in favor of domestic corporations doing the like business, and may impose additional restraints as a condition of permitting a continuance of

[41] Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 698.

[42] See Ballard v. Mississippi Cotton Oil Co. (Miss.), 34 Sou. 533. In this case it was held unconstitutional to single out corporations for the abrogation of the fellow servant rule, for as to that rule, corporate and individual employers stand alike; otherwise if railroad corporations had been singled out, their business being especially hazardous. In Indiana the abrogation of the rule with regard to "railroad and other corporations" was sustained as to railroad corporations. Pittsburgh &c. R. R. Co. v. Montgomery, 152 Ind. 1; Tullis v. Lake Erie & W. R. R. Co., 175 U. S. 348.

[43] Hooper v. California, 155 U. S. 648; Nutting v. Massachusetts, 183 U. S. 553. The judgment of an administrative officer in determining the existence of statutory conditions may therefore be made conclusive. Provident Sav. Life Ass. Soc. v. Cutting, 181 Mass. 261, 63 N. E. 433.

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the business,[44] but it cannot forbid its citizens to deal with such corporations when such dealings are possible without any act done by the corporation or in its behalf by agents or brokers, within the prohibited territory, as by effecting insurance in a foreign company by a letter sent through the mails.[45] The only condition that may not be imposed upon a foreign corporation is the surrender of rights enjoyed under the federal constitution, especially of the right to resort to the federal courts or to have actions against it removed to them,[46] but the state has a right to exclude a foreign corporation, although the reason for the exclusion is that the corporation resorts to the federal courts.[47] There is no state legislation which absolutely excludes foreign corporations, or imposes prohibitive conditions upon their admission; on the contrary, the states show great liberality toward corporations organised in other states, and in some cases courts have held them to be relieved of restraints imposed on domestic corporations of the like character.[48] Nor is it regarded unlawful for the citizens of one state to seek incorporation in another state and then do business in their own state.[49]

**§ 717. Foreign corporations engaged in commerce.**—On the other hand, foreign corporations carrying on interstate or foreign commerce—steamship, railroad, telegraph and express companies—have an absolute right to do business with any state without license or any condition as to capital, subject only to taxes upon the physical property they have within the state, and to such restraints as are required to preserve public safety and order.[50]

[44] Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410; Philadelphia Fire Association v. New York, 119 U. S. 110; Pembina, &c., Co. v. Pennsylvania, 125 U. S. 181.

[45] Allgeyer v. Louisiana, 165 U. S. 578.

[46] Home Insurance Co. v. Morse, 20 Wall. 445.

[47] Doyle v. Continental Ins. Co., 94 U. S. 535.

[48] See Vanderpoel v. Gorman, 140 N. Y. 563.

[49] Oakdale Mfg. Co. v. Garst, 18 R. I. 484.

[50] Western Union Telegraph Co. v. Texas, 105 U. S. 460; Gloucester Ferry Co. v. Pa., 114 U. S. 196; Philadelphia & Sou. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326; McCall v. California, 136 U. S. 104; Crutcher v. Kentucky, 141 U. S. 47. The case of Louisville & Nashville R. R. Co. v. Kentucky, 161 U. S. 677, supports the doctrine that interstate commerce corporations are subject to the police power of the



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In so far as the cases cited do not relate to taxation, their effect is that foreign corporations may send goods and agents into any state without a license from state authorities. In doing so the corporation does not itself enter the other state.[1] It should be borne in mind that corporations consist of physical persons; these physical persons, domiciled in one state, have under the federal constitution the right to send merchandise and agents into another state for the purpose of commerce. In Crutcher v. Kentucky the court says: "The accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right." In other words, if an express company may carry goods from New York to Kentucky, and for that purpose may establish an agency in Kentucky, the fact that it is incorporated is for many purposes indifferent.

§ 718. **Exercising corporate powers within state.**—The right to carry on commerce may be claimed irrespectively of the assertion of any particular corporate privileges which the associated individuals may happen to possess. But can the same position be successfully maintained where corporate privileges are claimed within the state? The simplest case is that the commerce cannot be carried on without the holding of fixed physical property within the state, as in the case of a railroad company seeking to extend its line into another state. Can this be done without authority from the state? While the freedom of interstate commerce is not satisfied by the plea that residents are subjected to the same burdens regarding domestic commerce as are sought to be imposed upon non-residents with regard to interstate or foreign commerce,[2] yet it has never been contended that if a right bearing upon interstate commerce may be withheld from residents such right may be claimed by non-residents. It follows that if it is not claimed that residents may without authority form themselves into a corporation to build a line of railroad, though it is to be an instrument of interstate commerce, such claim can still less be made for non-residents. No one would deny this where

state in which they operate; but the exercise of state authority in that case was the prohibition of the consolidation of competing railroad companies, and this related to the exercise of powers on the part of corporations domestic, and not foreign.

[1] Pennsylvania v. Standard Oil Co., 101 Pa. St. 119.

[2] Robbins v. Shelby County Taxing District, 120 U. S. 489.

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it is a question of exercising the power of eminent domain,[3] but the practice is the same as to extension of railroad lines into other states generally. "Without objection, so far, from the federal authority, whether legislative or judicial, it has become customary for a state adjacent to the state creating a railroad corporation to legislatively grant authority to such foreign corporation to enter its territory with its road, to make running arrangements with its own railroad, to buy or lease them or to consolidate with the companies owning them. Sometimes, as in the present case, such foreign corporation is declared upon its acceptance of prescribed terms and conditions, to become a domestic corporation of such adjacent state, and to be endowed with all the rights and privileges enjoyed by similar corporations created by such state."[4]

**§ 719. Foreign railroad companies.**—Many states provide that foreign railroad companies may enter the state upon filing their charters or becoming subject to the laws regarding domestic corporations.[5] Practically these are conditions for doing interstate business; yet they have never been questioned.[6] Of course, the United States may by act of Congress grant the like authority, and this has been done generally for telegraph companies establishing their lines along post roads.[7] But it cannot be said that the non-action of Congress must mean freedom from any license, for it is well established that lands cannot be held in corporate capacity without the authority of some state creating the corporation, and the principle of freedom from the requirement of license being necessarily broken through, it seems illogical to say that one state must accept the license or authority of another state when such authority can have no extra-territorial operation except by comity.

[3] As to maintaining ferries between two states, if the right in both is a franchise, see the remarks of the Supreme Court in the case of the Gloucester Ferry Case, 114 U. S. 196. In that case no difficulty was felt since in the opinion of the Supreme Court the running of ferries across the Delaware River was free under the laws of Pennsylvania. See, however, Douglas' Appeal, 118 Pa. St. 65.

[4] St. Louis & S. F. R. R. Co. v. James, 161 U. S. 545, 555.

[5] Stimson American Stat. Law, II, 8881.

[6] See Commonwealth v. Mobile & Oh. R. R. Co., 23 Ky. Law Rep. 784, 54 L. R. A. 916.

[7] Act of July 24, 1866, Western Union Tel. Co. v. Pensacola, &c., Co., 96 U. S. 1.

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**§ 720. Fixed corporate property within the state.**—The Supreme Court recognises a distinction between doing business in a state on the part of a foreign corporation, and isolated commercial transactions entered into from outside of the state;[8] but since the right to keep an agency in the state is free from state restraint, it seems that the distinction ought to be between doing business with and doing business without fixed corporate property within the state. If interstate commerce can be carried on in such a way that the corporation has merely agencies in the state, and does not hold property there, it cannot be placed under the requirement of a license. But the holding of property is controllable by the state. The case is analogous to that of aliens: they do not depend upon the states for their right to carry on foreign commerce with and in the state; but without state authority they cannot hold land, though the land be used in connection with such commerce.[9]

DISCRIMINATION BASED ON DIFFERENCE OF ACTS OR OCCUPATIONS. §§ 721-738.

**§ 721. Police power may single out particular evils.**—While an ideal or perfect system of equality might require a legislative treatment of all public dangers by measures exactly adequate to their menace, this is manifestly a standard which it is impossible to realise. The police power has dealt and deals with evils as public sentiment requires, and that other evils of a different kind affecting different interests and having different consequences are not drawn within the range of legislation, or that they are regulated and restrained in a different manner and treated with greater severity or leniency, is not deemed a sufficient reason to invalidate a measure otherwise legitimate, confining itself to some particular danger. So the absence of any legislation against gambling would be no argument against liquor legislation, or vice versa. As long as the evils are sufficiently distinct, no question is made of the validity of a partial or unequal exercise of the police power.[10]

[8] Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.

[9] In the case of partnerships it cannot make any difference under the laws of which state they are organised, as long as the statutes of the domestic jurisdiction leave partnerships unregulated; State v. Cadigan, 73 Vt. 245, 57 L. R. A. 666.

[10] See e. g. State v. Hogreiver, 152 Ind. 652, 53 N. E. 921.

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**§ 722. Police power may single out one side of a relation.**—Moreover for the purposes of the police power the same transaction may have very different aspects as it concerns one or the other party thereto; with reference to the one it may be a matter of business or sufficiently public in character to become a legitimate interest of the community, while from the point of view of the other party it may be of a social or private character. Thus engaging in or exhibiting a prize fight is different from witnessing it and prostitution differs from visiting a prostitute, and while the law may take cognisance of the private side of the act,[11] it need not do so. Thus in the matter of intoxicating liquor, the law deals with traffic and not with consumption. The purchaser is not even regarded as a participant or accessory to the offense of selling.[12] The aim of legislation is to reduce consumption, but legislation can reach consumption most efficiently through traffic, and consumption becomes important only where it produces open or habitual drunkenness. The keeper of a gambling house or lottery need not be a gambler, but he may be singled out for punishment while the person who gambles may be left unpunished.[13] It is legitimate for the police power to attempt to restrain temptation and scandal instead of the individual acts constituting the real evil, because the former and subsidiary evil is distinct, although the policy results in a different treatment of the two parties to the same transaction. The difference between professional or business dealing and private acts affords full justification for this discrimination.

**§ 723. Discrimination between similar evils.**—Where the danger or evil presented by different acts or conditions is substantially the same, and legislation does not apply to them alike, there ought to be some reason for the discrimination. Thus where a specific form of danger requires specific remedies not otherwise applicable, legislation applying specially to this danger is not only justifiable, but, if there is to be regulation, inevitable. Thus the laws requiring certain safeguards in the operation of railroads could not be made to apply to mines, or

[11] See Ill. Crim. Code, § 225; State v. Botkin, 71 Ia. 87.

[12] State v. Cullins, 53 Kans. 100; Commonwealth v. Willard, 22 Pick. 476; State v. Rand, 51 N. H. 361. *Contra:* State v. Bonner, 2 Head. (Tenn.) 135, 1858; but in Tennessee the prevailing doctrine was subsequently adopted. Harney v. State, 8 Lea 113.

[13] State v. Woodman (Mont.), 67 Pac. 1118.

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vice versa. The validity of legislation restricted in this respect to either is therefore not questioned.[14] Where dangers and evils presented in different forms and relations are so similar that they may be dealt with by like restraints and obligations the chief reason for legitimate discrimination lies in the difference of degree to which the public interest is enlisted. The private law is on the whole independent of this consideration; thus fraud is dealt with irrespective of form or degree by civil causes of action for damages, while criminal or police legislation regarding fraud singles out certain practices. It must be regarded as a considerable advance in police legislation, if a general law comprehensively defines the various forms of adulteration practised with regard to articles of consumption, even though similar frauds in other kinds of merchandise fail to be reached by the statute.[15] The same is true of other phases of police legislation, whether concerning public health, safety or morals, or economic interests. The common law in a general and abstract manner deals with conditions obnoxious to the public good (nuisance, conspiracy, etc.), but the generality of the restraint is at the expense of certainty and definiteness; it is generally inadequate to cope with evils arousing the public interst which are not so flagrant as to amount to crimes, and it affords no preventive relief.

The police power finds its peculiar province in the conditions and measures which the criminal law fails to reach and provide for, and which require a more particular definition than the criminal law affords. It is here that discrimination becomes necessary and that the danger of partial legislation arises.

§ 724. **Abstract classification according to degree of danger.**—The method of discrimination most in accordance with the spirit of constitutional equality is that of abstract determination, where it can be applied. This would mean that the condition is defined by reference to the public interest which it affects and the degree of danger which it imports, so that all other dangers of the same kind and degree would be cov-

[14] "The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind." Soon Hing v. Crowley, 113 U. S. 703.

[15] See § 280, *supra*.

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ered by the definition. A law which should provide that all articles made of compound material, where the compound is not known in the trade by a distinctive name, must, if exposed for sale, be labeled in such a manner as to show the ingredients and their proportion, would satisfy this standard. Manifestly few police statutes are framed in such a general way.[16] An approach to such generalisation may, however, be found where the law defines by numbers or other measurable quantities. Where the degree of danger depends upon the extent to which some practice is carried, this would seem to be a just basis of discrimination. But any such limitation by reason of being positive has an element of arbitrariness in it, which is inevitable and yet has furnished a ground for condemning the measure. Thus some statutes for the protection of laborers have been confined to establishments in which the number of employees is ten or more, and it has been asked what difference it can make whether the number is nine or eleven.[17] But such reasoning would be destructive of the distinction between full age and infancy, and of every other positive limitation in law. The size of a business may have no relation to the evil contended with, as e. g. in the regulation of charges,[18] but where it has, a positive limitation on that basis should be regarded as unobjectionable.[19] This has been recognised by the Supreme Court with reference to safety legislation for mines, which applied only to mines in which more than five men were employed at one time.[20]

**§ 725. Classification by social or economic groups.**—In many cases, however, it is impracticable to define the required degree of danger in abstract terms, while it is easy to indicate it by reference to the particular business or other concrete

[16] A provision of so sweeping and general a character has even been treated as constitutionally objectionable. Dorsey v. State, 38 Tex. Cr. Ap. 527, 40 L. R. A. 201. See § 41, *supra*.

[17] State v. Haun, 61 Kan. 146.

[18] Cotting v. Kansas City St. Y. Co., 183 U. S. 79.

[19] A classification of peddlers according to the amount of taxes paid on the stock of goods, residents paying $25 or more being exempt from license fees, held arbitrary and unconstitutional, State v. Mitchell (Me.), 53 Atl. 887; but *quere* whether it is not the irresponsibility of the small dealer which calls for police regulation. Certainly the criticism, that the selection of the amount of $25 rather than $24 or $26 shows the arbitrariness of the rule, is untenable.

[20] Consolidated Coal Co. v. Illinois, 185 U. S. 203; Daniels v. Hilgard, 77 Ill. 640.

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form in which it appears. The dangers with which the police power copes are not divided into as many different kinds or degrees as there are economic or social groups or forms of action; but these groups or forms are distinguished by a certain uniformity of practice, in which an evil may assume special magnitude which calls for regulative action by the state. Therefore there is a rough correspondence between group and degree of danger, and the greater degree of danger peculiar to a group will justify its being singled out for police restraint. Thus it is generally conceded that the operation of railroads is attended with so much risk of injury that special rules of liability are justifiable, and it is no objection that the danger is not or cannot be defined abstractly, without reference to the class. It may, however, be that the particular group is singled out simply because it happens to arouse public attention, or because the restraint may serve some ulterior interest by which the business is affected. Classification on the basis of social or economic groups thus easily becomes discrimination in the objectionable sense, and its validity is then questioned. The constitutional problem is one of the utmost importance: Is classification legitimate? Is it consistent with equality? Classification is undoubtedly a legitimate legislative function, but it is also clear that it can be abused in such a manner as to produce substantial inequality and favoritism or oppression. In consequence of this liability to abuse, legislative classification has in recent times been subjected to a strong judicial control;[21] and it is necessary to inquire whether this control has proceeded upon definite constitutional principles differentiating lawful from unlawful discrimination.

§ 726. **Synopsis of decisions.**—It will be of advantage to give a brief synopsis of the principal cases in which the question of discrimination has been raised and decided; most of these cases have been adverted to and commented upon in other connections.

§ 727. **Legislation for the prevention of accidents.**—Laws have been upheld creating, with regard to railroad companies only, rules of liability for injury to person or property which

[21] For one of the earliest cases in which class legislation (an act forbidding attorneys to buy choses in action) was impugned as contrary to equal natural rights, see People v. Walbridge, 6 Cow. (N. Y.) 512, 1826; but the court disposed of this contention with a few words.

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do not exist at common law: in case of injury through acts of fellow servants;[22] in case of live stock killed or injured;[23] in case of fire caused by sparks from locomotives.[24] The special risk incident to the operation of railroads is held to justify the imposition of special duties. On the other hand, a boiler inspector's act may exempt from its operation railroad locomotives and railroad engineers,[25] the discrimination being perhaps justified by the greater difficulty in carrying out the inspection where engines are constantly moving from place to place.

For obvious reasons it is legitimate to distinguish between longer and shorter roads in the matter of safeguards against certain accidents which are more liable to happen on the former.[26] By analogy, legislation for prevention of accidents in mines may except those which employ a very small number of miners.[27]

The allowance of extra costs or attorney's fees to the successful plaintiff in actions against railroad companies for injuries is sustained in some states[28] and condemned in others.[29] The United States Supreme Court upholds this discrimination,[30] and in this connection suggests a distinction between special legislation against railroad companies relating to the recovery of claims in general, and relating to the recovery of claims which are in some way connected with the hazardous nature of the railroad business. The railroad company may not be discriminated against in so far as it is merely a

[22] Missouri Pacific R. R. Co. v. Mackey, 127 U. S. 205.

[23] Missouri Pacific R. R. Co. v. Humes, 115 U. S. 512; Minneapolis & St. Louis R. R. Co. v. Beckwith, 129 U. S. 26; Minneapolis & St. Louis R. R. Co. v. Emmons, 149 U. S. 364.

[24] St. Louis & San Francisco R. Co. v. Mathews, 165 U. S. 1.

[25] State v. McMahon, 65 Minn. 453, 68 N. W. 77.

[26] New York, N. H. & H. R. R. Co. v. New York, 165 U. S. 628.

[27] Consolidated Coal Co. v. Illinois, 185 U. S. 203.

[28] Kansas Pacific R. R. Co. v. Mower, 16 Kan. 573; Johnson v. Chicago, M. & St. P. R. R. Co., 29 Minn. 425, 13 N. W. 673; Illinois Central R. R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618; Gulf, &c., R. R. Co. v. Ellis (Tex.), 18 S. W. 723, 17 L. R. A. 286; Peoria, &c., R. R. Co. v. Duggan, 109 Ill. 537; Perkins v. St. Louis & Iron Mountain R. R. Co., 103 Mo. 52.

[29] Wilder v. Chicago, C. & W. M. R. R. Co., 70 Mich. 382; South. & N. Ala. R. R. Co. v. Morris, 65 Ala. 193.

[30] Atchison, &c., R. Co. v. Matthews, 174 U. S. 96.

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debtor.[31] The recovery of debts as such belongs to the administration of justice and the distinction drawn by the court may be taken to mean that in the administration of justice perfect equality between debtor and creditor, or between the two parties to litigation, must be observed,[32] while in the exercise of the police power discrimination is legitimate if its purpose is to induce greater care against accident.[33]

§ 728. **Sanitary legislation.**—A statute of Illinois[34] made it unlawful for more than six persons to occupy the same room for sleeping purposes at the same time in any lodging house in any city of 100,000 inhabitants or more. The act was declared unconstitutional because it discriminated between keepers of lodging houses and keepers of inns and boarding houses,[35] and the statute was thereupon amended so as to include these classes.[36] The court said: "If intended as a measure to protect health, the act should have been directed against the evil which threatens to introduce sickness or disease, whether found in a lodging house, boarding house or hotel, and as its penalties are not so leveled, it can but be regarded as partial and discriminatory legislation." But if a lodging house is one in which persons, though strangers to each other, are allowed to inhabit one common room,[37] the evil attempted to be remedied hardly seems to extend to hotels or boarding houses. The obnoxious condition may prevail in

[31] Gulf, &c., R. R. Co. v. Ellis, 165 U. S. 150.

[32] See, however, as to corporations, § 714, *supra*.

[33] See Randolph v. Builder's, &c., Supply Co., 106 Ala. 501, 17 Sou. 731; Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006. As to penalty for not paying promptly life insurance policies see Union Central Life Insurance Co. v. Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; Fidelity Mut. Life Ass'n. v. Mettler, 185 U. S. 308. If the delay is vexatious and not justified by a bona fide defence, the discrimination against life insurance companies seems justifiable since claims against them on the part of the insured are entitled to special consideration. The Supreme Court of the United States upholds also legislation granting an attorney's fee against an insurance company unsuccessfully defending an action for total loss in case of fire insurance. Farmers' & Merchants' Insurance Company v. Dobney, 189 U. S. 301, S. C. below, 62 Neb. 213, 86 N. W. 1070. The decision in Gulf, &c., R. R. Co. v. Ellis is not referred to.

[34] April 21, 1899.

[35] Bailey v. People, 190 Ill. 28, 60 N. E. 98.

[36] Laws 1901, p. 304.

[37] English Public Health Act, § 89.

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private tenements; but the discrimination between the business of letting rooms for lodging and conditions of private living is a legitimate one under the police power, and would probably be respected by the courts.

**§ 729. Public order.**—Where a permit was required for using the public streets for processions, an exception made in favor of funeral processions, fire companies, state militia and political parties, was held to constitute a discrimination fatal to the whole regulation.[38] In this case there was also an unlawful delegation of uncontrolled discretion to administrative authorities. A similar discrimination between different kinds of processions in Massachusetts was not questioned.[39]

A statute of Illinois forbidding the use of the national flag for advertising purposes made an exception in favor of art exhibitions. It was declared unconstitutional, partly upon that ground.[40] The fact that an art exhibition appeals to higher sentiments than mercantile advertising might have been held to justify the discrimination.

**§ 730. Legislation against gambling.**—A statute of Missouri was upheld which punished bookmaking and pool selling on events occurring beyond the state.[41] The court said that bookmaking on events occurring within the state was not thereby sanctioned, that a police statute need not necessarily deal with the whole of a recognised evil, and that the statute did not strike at a class of persons, but at a class of transactions. So an act was sustained in Illinois punishing bookmaking and pool selling, and containing a proviso that it should not apply to the actual enclosure of a fair or race track association during the time of the meetings, the court holding that the bets made on the race tracks were left to the prohibition of the general statutes.[42] In Missouri a discrimination in favor of bookmaking on race courses was first condemned, and later on, upon a very slight distinction, sustained.[43] If the evil of

[38] State v. Dering, 84 Wis. 585.

[39] Com. v. Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142.

[40] Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181; see § 183, *supra*.

[41] State v. Burgdoerfer, 107 Mo. 1, 14 L. R. A. 846.

[42] Swigart v. People, 154 Ill. 284.

[43] State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L. R. A. 231; State v. Thompson, 160 Mo. 333, 54 L. R. A. 950; the act of 1897, which was upheld, differed from the act of 1895 in the fact that it required a license; it really added therefore to the dis-

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betting can be reduced by localising it, this should be held a sufficient ground for discrimination. The Criminal Code of Illinois[44] punishes the making of contracts to have or give the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold. The Supreme Court of Illinois, treating the statute as referring only to the specified articles of property, sustained it, because the remedy need only be as comprehensive as the evil the law designed to remove. "It is not indispensable, in order to be constitutional the section should embrace all kinds of personal property whether such kinds of personal property had usually or commonly been the subject of option dealing or not."[45]

§ 731. **Legislation against fraud.**—It is not held to be unjust discrimination that the law singles out for punishment fraud committed against or in a particular kind of business.[46] Thus the law may punish those who by deception obtain board or lodging in any hotel, while it has no similar provision for the protection of boarding houses.[47] The law may single out bankers for punishment for receiving deposits when insolvent;[48] but it may not make a separate crime of offenses committed against a particular bank by its officers.[49] The law may forbid the use of harmless coloring matter in oleomargarine, while allowing it in butter.[50] If the practice of coloring winter butter has been carried on so long as to be regarded legitimate, it may be said that the public is not defrauded thereby.

§ 732. **Licensing occupations.**—In Ohio an act which required all those engaging in the business of plumbing to secure a license but provided that in case of a firm or corporation the examination and licensing of any one member of such firm or the manager of the corporation should satisfy the re-

crimination according to the place the further discrimination of personal selection.

[44] § 130.

[45] Booth v. People, 186 Ill. 43, 57 N. E. 798; the Supreme Court of the United States in sustaining this decision did not advert to the question of equality or discrimination; Booth v. Illinois, 184 U. S. 425.

[46] See for specific enumeration of fraudulent practices, Ill. Cr. Code 117, 125 b.

[47] State v. Kingsley, 108 Mo. 135, 18 S. W. 994.

[48] Baker v. State, 54 Wis. 368, 12 N. W. 12; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 303.

[49] Budd v. State, 3 Humph. 483.

[50] Capital City Dairy Co. v. Ohio, 183 U. S. 238.

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quirements of the act, was held to constitute an invalid discrimination.[1] It is to be presumed that if the act had provided that the members of the firm or corporation not examined should not engage directly in the work of plumbing, it might have been upheld.

In Minnesota an act which exempted from certain restrictions on peddling, manufacturers, mechanics, nurserymen, farmers and butchers selling their own wares, was for that reason declared to be void.[2] The decision ignores the fact that the policy of the legislation regarding peddlers is determined by the lack of settlement of those who follow the business, and that this objection does not apply to the classes excepted by the act. In Iowa the exemption of persons who have served in the union army or navy, from the payment of a license fee for peddling, has been held unconstitutional.[3]

§ 733. **Regulation of rates and charges.**—In the regulation of railroad rates the legislature may classify railroads according to the amount of business or according to the length of the line of the railroad,[4] but a business not enjoying special privileges may not be discriminated against on account of its size, since that would single out the owner simply by reason of the successful conduct of a business;[5] the classification would proceed on the theory "that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits, his charges may be cut down." In the matter of rates of interest a provision limiting the rate of discount to be charged by individual bankers only, was declared unconstitutional,[6] but after the law had been amended by omitting the word "individual," it was sustained.[7]

[1] State v. Gardner, 58 Oh. St. 599, 51 N. E. 136.

[2] State v. Wagner, 69 Minn. 206, 38 L. R. A. 677; upheld in Nebraska for purposes of taxation, Rosenbloom v. State, 89 N. W. 1053, 57 L. R. A. 922; also in Pennsylvania, New Castle v. Cutler, 15 Pa. Super. Ct. 612, 625.

[3] State v. Garbroski, 111 Iowa 496; 56 L. R. A. 570.

[4] Chicago, B. & Q. R. R. Co. v. Iowa, 94 U. S. 155; Dow v. Beidelman, 125 U. S. 680.

[5] Cotting v. Kansas City St. Y. Co., 183 U. S. 79.

[6] Carter v. Coleman, 84 Ala. 256.

[7] Youngblood v. Birmingham Trust & Savings Co., 95 Ala. 521, 20 L. R. A. 58.

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An act allowing a higher than the regular rate of interest to pawnbrokers was held valid in California.[8]

The strong preponderance of opinion is in favor of the validity of legislation making an exception from the general usury laws in favor of building and loan associations on the ground that the co-operative nature of their plan of business makes the general objections to usury inapplicable.[9]

**§ 734. Anti-trust legislation.**—The provision contained in many statutes against trusts, that the law is not to apply to agricultural products or live stock, while in the possession of the producer or raiser, was sustained in Texas on the ground that in the case of producers, etc., who must dispose of their products quickly and who have no facility for combination, the conditions are different from those affecting the sellers or buyers of other articles.[10] The Supreme Court of the United States, however, declared the Illinois anti-trust act unconstitutional because it contained a similar exception,[11] holding that the classification bore no reasonable or just relation to the acts prohibited. A wider power of discrimination was conceded under the taxing power than under the police power. The argument relied upon by the Supreme Court of Texas to justify the exception was not referred to by the Supreme Court of the United States.

**§ 735. Labor legislation.**—An act requiring glass screens for the protection of motormen on electric cars only, while no similar protection need be furnished on cable or steam cars, is sustained in Ohio.[12] The court says it cannot judicially know that similar means of protection are required on cable cars. The Supreme Court of the United States has sustained an act limiting the time per day during which laborers may be employed in underground mines, dwelling upon the fact that the statute does not limit the hours of all workmen, but confines itself to employments which the legislature has deemed detri-

[8] Jackson v. Shawl, 29 Cal. 267.

[9] See authorities cited, § 304, *supra*.

[10] Waters Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936. In consequence of the decision of the U. S. Supreme Court next cited the Texas law was subsequently declared unconstitutional. State v. Waters-Pierce Oil Co., 67 S. W. 1057.

[11] Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

[12] State v. Nelson, 52 Oh. St. 88, 39 N. E. 22, 26 L. R. A. 317.

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mental to health.[13] The Supreme Court of Illinois, on the other hand, has declared a statute unconstitutional which provided that no female should be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week, partly upon the ground that the right to contract was liberty and property and could not be absolutely controlled by the legislature, partly upon the ground that there was arbitrary discrimination between manufacturers and merchants, and between women and men.[14] A Nebraska law establishing an eight hours' day for all classes of mechanics, servants and laborers, excepting those engaged in farm and domestic labor, was held invalid, partly as making an unjustifiable discrimination between different classes of laborers, partly as taking liberty and property without due process of law.[15]

A statute of California prohibiting work in bakeries from 6 p. m. on Saturdays to 6 a. m. on Sundays was declared unconstitutional as special legislation not warranted by the peculiar conditions of the business,[16] while the regulation of hours of labor in bakeries has been upheld in New York.[17]

Statutes making it unlawful for barbers to do business on Sundays, while the exercise of other callings is either not forbidden, or is left to the general Sunday laws, which impose lighter penalties or allow it to be determined as a question of fact whether a business is a work of necessity or not,[18] have been held invalid in Illinois,[19] California,[20] and Washington,[21] while they are sustained in New York,[22] Michigan,[23] Tennes-

[13] Holden v. Hardy, 169 U. S. 366.

[14] Ritchie v. People, 155 Ill. 98.

[15] Low v. Rees Printing Co., 41 Nebr. 127; but see Wenham v. State (Neb.), 91 N. W. 421, 58 L. R. A. 825, eight hours' day for women.

[16] Ex parte Westerfield, 55 Cal. 550. Yet we read in a treatise on the hygienic conditions of occupations: "That the labor in bake houses is very damaging to health and shortens life is well known to the trade and causes it to be given up whenever circumstances permit." (J. T. Arlidge, Hygiene, Diseases, and Mortality of Occupations, London, 1892.)

[17] People v. Lochner, 76 N. Y. Sup. 396, 73 App. Div. 120.

[18] Commonwealth v. Waldman, 140 Pa. 89, 11 L. R. A. 563; State v. Frederick, 45 Ark. 347; Stone v. Graves, 145 Mass. 353, 13 N. E. 906; Ungericht v. State, 119 Ind. 379, 21 N. E. 1082.

[19] Eden v. People, 161 Ill. 296, 43 N. E. 1108.

[20] Ex parte Jentzsch, 112 Cal. 468.

[21] Tacoma v. Krech, 15 Wash. 296.

[22] People v. Havnor, 149 N. Y. 195, 43 N. E. 541.

[23] People v. Bellet, 99 Mich. 151, 22 L. R. A. 696, 57 N. W. 1094.

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see,[24] Minnesota[25] and Oregon,[26] the decision in the Minnesota case being affirmed by the Supreme Court of the United States.[27]

Weekly payment or store order acts have been held constitutional though confined to factories,[28] or to mines and factories,[29] and on the other hand have been declared unconstitutional because confined to mines and manufactories,[30] or to merchants on the one side and coal operatives on the other,[31] or because confined to specified classes of corporations,[32] or to corporations or trusts employing ten or more persons.[33] If the practice of using store orders was confined to the employments singled out by the legislature, the classification would seem to be legitimate. Since, however, the prohibition can be made general, it is safer to avoid the question by doing so. The store order act upheld by the Supreme Court of the United States[34] was general in character. An act allowing plaintiff in actions for wages if successful to recover an attorney's fee in addition to damages and costs was upheld in Illinois,[35] and declared invalid in Ohio[36] and Michigan,[37] and a statute of Texas allowing such recovery of attorney's fees in certain actions including actions for wages, against railroad corporations only, was held to be unconstitutional by the Supreme Court of the United States.[38] A coal weighing act was declared unconstitutional in Illinois partly because its provisions applied only to mines whose products were shipped by rail or water.[39] Acts making it unlawful for employers to prevent employees from

[24] Breyer v. State, 102 Tenn. 103.

[25] State v. Petit, 74 Minn. 376.

[26] Ex parte Northrup, 69 Pac. 445.

[27] Petit v. Minnesota, 177 U. S. 164.

[28] Massachusetts Opinion of Justices, 163 Mass. 589.

[29] Indiana: Hancock v. Yaden, 121 Ind. 366; later West Virginia doctrine, State v. Peel Splint Coal Co., 36 W. Va. 802.

[30] Godcharles v. Wigeman, 113 Pa. St. 431; earlier West Virginia doctrine, State v. Goodwill, 33 West Va. 179; State v. Fire Creek, &c., Co., 33 W. Va. 188; State v. Loomis, 115 Mo. 307; Frorer v. People, 141 Ill. 171.

[31] Dixon v. Poe (Ind.), 65 N. E. 518.

[32] Braceville Coal Co. v. People, 147 Ill. 66.

[33] State v. Haun, 61 Kan. 146, 47 L. R. A. 369.

[34] Knoxville Iron Co. v. Harbison, 183 U. S. 13.

[35] Vogel v. Pekoc, 157 Ill. 339.

[36] Hocking Valley Coal Co. v. Rosser, 53 Oh. St. 12.

[37] Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

[38] Gulf, &c., R. R. Co. v. Ellis, 165 U. S. 150.

[39] Harding v. People, 160 Ill. 459.

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joining labor unions, or to discharge or threaten to discharge them on account of such connection, have been declared unconstitutional in Missouri and Illinois partly as interfering with the free right of contract, partly because discriminating between union and non-union men.[40] It is not easy to see how if the legislature has power to protect membership in trade unions it can do so otherwise than by an act applying specially to members of unions. If there is a discrimination it consists in this that the employer may not threaten to discharge a man because he is a member of a union, but may threaten to discharge a man because he is not a member of a union. The argument therefore is in reality that if you give one class of men some protection, you must give another class not the same but a corresponding protection. The act to be equal in spirit would have to provide that no employer shall threaten to discharge a laborer either because he is or because he is not a member of a union. This is carrying the principle of equality one step beyond its usual application, since the legislature in dealing with one evil, is compelled to deal also with a different evil which may not have made itself felt as such.

**§ 736. Principles deducible from decisions.**—The foregoing synopsis of decisions shows the law in a formative state: the courts assert the power to condemn classification that seems unjust, but have not in their arguments proceeded much beyond general phrases of denunciation. It is easy to find very sweeping expressions in favor as well as against the power of classification. The Supreme Court of the United States has said "the specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint, because like restrictions are not imposed upon other business of a different kind,"[41] and: "Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."[42] Yet within three years after the decision last cited the court condemned two important state statutes on the

[40] State v. Julow, 129 Mo. 163; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007.

[41] Soon Hing v. Crowley, 113 U. S. 703, 1885.

[42] Atchison, &c., R. Co. v. Matthews, 174 U. S. 96, 106, 1899.



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ground of unconstitutional classification.[43] The Supreme Court of Illinois, in the case of Vogel v. Pekoc,[44] in which it supported a legislative classification, explained a long line of previous decisions against classification as finding sufficient support in the violation of other constitutional rights.

**§ 737. Systematic legislation.**—The statement that the remedy should be coextensive with the evil has been used by the same court to sustain a classification in one case, and to annul a classification similar in principle in another.[45] Fluctuations and inconsistencies are inevitable when a new constitutional principle is in process of development. What will be the final result of this development? The stringent exercise of judicial control will tend, and is already tending, to bring about more systematic methods of legislation. If legislation is piecemeal or haphazard, the danger is inevitable that legislators may be influenced by the clamor of interests without ascertaining the existence of conditions requiring special legislation, or by a misapprehension of those conditions due to a skilful presentation of one-sided and partial views. Systematic legislation means that the whole range of the danger or evil is presented and that the classes excepted as well as those covered are taken into consideration. If in a comprehensive codification of labor laws particular trades are specified as requiring special treatment, there is a certain guaranty that the discrimination is not without valid reasons. The guaranty would be still greater, if the details of classification were left to administrative regulation under adequate securities for the judicial and impartial exercise of such power;[46] but the principles of such classification would have to be most carefully defined, in order to avoid the fatal objection of an unconstitutional delegation of legislative powers.[47] But it would be decidedly premature to say that it is the constitutional duty of the legislature to adopt such comprehensive methods of legislation, or to substitute a system of abstract for that of concrete classification.

[43] Cotting v. Kansas City St. Y. Co., 183 U. S. 79; Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

[44] 157 Ill. 339.

[45] Booth v. People, 186 Ill. 43, 57 N. E. 798; Bailey v. People, 190 Ill. 28, 60 N. E. 98.

[46] The German Trade Code leaves in a number of cases the specification of particular trades, or of exceptions to general rules, to the Federal Council; so §§ 16, 56b, 105d, 105g; but this delegated power is not subject to judicial control.

[47] See e. g. Mass. Rev. L., ch. 106, § 38.

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**§ 738. Formulation of principle.**—The constant and immemorial practice of legislation sanctions regulations and restraints confined to particular classes of business. Nearly the whole of the former English economic legislation consisted of statutes each of which dealt with one trade only, and the early American inspection laws singled out special classes of merchandise. It has never been intimated that all possible forms of mercantile fraud must be dealt with or none, or all sanitary dangers or none. It has always been characteristic of English legislation to proceed tentatively, step by step, and many important reforms could have been accomplished in no other way.[48] Under the operation of the Fourteenth Amendment, the legislative power is certainly not as free in this respect as it used to be, and on the whole this restriction is a distinct gain, for it tends towards equality, and in a democracy equality is the surest, and, in the long run, the only possible guaranty of liberty. But classification, and therefore class legislation, has not yet been abolished, it is merely placed under judicial control. The principles guiding such control must be evolved by further adjudication; it seems, however, that the trend of decisions may be summarised in the following limitations: Where a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted; and where the restraint is general, with certain exceptions, the excepted classes must either be entirely free from the danger, or the exception must tend to reduce the general danger, or a distinct and legitimate public policy must favor the toleration of the evil under circumstances where it is outweighed by great benefits. The decisions of the Supreme Court of the United States seem to be in accordance with these principles.

[48] It may even be said that particular laws and customs and special privileges have been the precursors of many of the most valued common rights and principles of the modern law; witness the devisability of land, its descent to all children, the system of recording deeds, negotiability of choses in action, patent rights and copyright, incorporation, &c.

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# INDEX.

[REFERENCES ARE TO SECTIONS.]


ABUTTING OWNER,
special use of street by, 172.
upon street, cleaning sidewalks by, 620.
ACCOUNTANTS,
regulation as to certified public, 495, 673, note 50.
ACROBATIC AND AERONAUTIC EXHIBITIONS, 120.
ACCUMULATIONS,
prohibition of, 368.
ADMINISTRATIVE DISCRETION. See DISCRETION.
ADMIRALTY AND MARITIME JURISDICTION,
police legislation under, 66.
ADULTERATION. See FOODSTUFFS.
definition of, 280, 723.
ADVERTISEMENTS AND SIGNS,
unsightliness of, 182, and note 1.
by prostitutes, 246.
of claims for sale, 301.
use of flag in advertisements, 63, 183, 729.
AGRICULTURAL PRODUCTS,
exception of from operation of laws against trusts, invalid, 356, 734.
ALIENATION,
conditions against, invalid, 515.
law restricting to less profitable disposition, 516.
restraints upon, 365, 366.
suspension of power of, 367.
ALIENS. See CHINESE.
registration of, 45.
refusal of license for sale of liquors, 207, 706.
right to hold or dispose of property, 515, 516, 706, 720.
deportation of, and federal power over, 704.
state power, 705.
protection of, under Fourteenth Amendment, 706.
right to carry on business, 706.
non-resident aliens as members of corporations, 707.
ALTERATIONS,
in buildings, involving partial prohibition, 542.
excessively expensive, 548, 549.
ALUM,
in baking powder, prohibition of, 32.




Digitized by Google

[REFERENCES ARE TO SECTIONS.]

AMUSEMENTS, PUBLIC. See THEATERS.
what are, 250.
theater regulations, 251.
license of places of, administrative discretion in issuing, 652.
ANARCHISM,
freedom of speech and, 475-478.
propaganda of, as inciting to crime, 476, 477.
legislation of Illinois, 477.
federal law forbidding entry of those opposed to organized government, 478.
legislation of New York and New Jersey, 478.
ANIMALS. See CRUELTY TO ANIMALS, CATTLE.
bodies of dead, property unless they become nuisance, 125, 522.
destructive animals, 121.
federal inspection of, when meat intended for exportation, 136.
keeping of, in city, may be forbidden, 141.
running at large of, 156, 526.
running on streets, 168.
cruelty to animals, 248, 249.
abandonment of disabled, 249, 523.
compulsory improvement of breed of, 438, 439.
killing of abandoned, and compensation to owner, 249, 523.
killing of diseased animals, 524.
license to keep within city, 644.
APPOINTING POWER,
vested in private associations, 673.
APPROPRIATION OF PROPERTY. See EMINENT DOMAIN.
ARCHITECTS,
qualifications of determined by law, 118, 493.
examination of, and exemption of those already practicing, 684.
ARID STATES,
water in, 414-417.
ARMED BODIES OF MEN,
statutes against use of, 92.
employment of non-resident, forbidden, 92, 711.
ARMS. See MILITARY ORGANIZATIONS.
right to bear, and military organizations, 91.
carrying of concealed weapons, 90 and n. 1.
ARREST,
with or without warrant, 87.
by officer or private person, 87.
for disobedience, in case of fire, as punishment, 614.
ART,
obscenity and, rules controlling, 239, 480.
freedom of, 479.
ARTESIAN WELLS.
regulation of use as between owners in the same vicinity, 425.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

ASSASSINATION,
political, 477.
ASSEMBLY, RIGHT OF,
unlawful assembly, 477.
under constitution, 480, 484.
ASSOCIATED PRESS,
restrictive by-laws, 345.
obligation to furnish news, 386.
ASSOCIATION, RIGHT OF,
history of, 481.
political associations, 481.
in America, and power of control, 482-484.
for economic and commercial purposes, see corporations and combinations.
ASYLUM. See INEBRIATES, INSANE.
for habitual drunkards, 227, 623.
commitment of insane to, 252-254.
right to apply for discharge at any time, 255.
private, state control of, 256.
ATHEISTS,
disqualifications of, 461.
denial of God as blasphemy, 465.
ATTORNEYS. See LAW, PRACTICE OF.
laws requiring service of, without compensation, 613.
corporation required to pay fees of, in action against it for damages, 637, 714, 727.
required to reside in state where practicing, 711.
recovery of attorney's fee by laborer, in action for wages, 735.
ATTORNEY'S FEES,
in addition to damages, as penalty, 637, 714, 727, 735.
AUCTION SALES,
regulation of, and license of auctioneers, 290, 652.
license of auctioneer, and freedom of commerce, 294, 295.
of articles in original package, cannot be taxed, 295.
BAKERIES,
laws regulating work in, 316, 317, 735.
BAKING POWDER. See ALUM.
BALLOTS,
conditions annexed to printing at public expense, 483.
BANKING,
requirements of bond or deposit to engage in business of, 40.
restriction of business to corporations, 364, 401.
systematic official control of institutions of, 399.
ground of supervision of business of, 400.
private banker, exempt from restrictions, 401.
restrictions upon, applied to business done under title of bank, 495.
savings banks, fitness of organizers required in New York, 651.
issue of notes may be made a monopoly by government, 662.
punishment of banks for receiving deposits when insolvent, 731.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

BANK NOTES. See BANKS.
BANKRUPTCY,
federal power, 65.
state and federal laws, 306, 307.
retroactive laws, 557.
BANKRUPT SALES,
legislative and municipal regulation of, 292.
BARBERS. See TRADES AND OCCUPATIONS.
regulation of, 494.
restriction of business of, to citizens, 706.
Sunday work, forbidden, 735.
BATHING ESTABLISHMENTS,
safety requirements, 120.
BETTING. See GAMBLING.
contracts unenforcable, 190, 195.
statutory regulation of, 195.
dealing in futures as, 201.
betting at horse races, discrimination in favor of, 730.
BEACONS AND BUOYS,
local power regarding, 80.
BIBLE,
reading of, in public schools, 463.
BICYCLES,
license upon owners of, 38.
requirement of numbers for, 41.
free use of streets for, 168.
long continued racing on, prohibition of, 248.
BILLIARDS,
playing for money, or loser to pay for use of table, 192.
tables and bowling alleys, license or prohibition of, 193.
BILLBOARDS,
limitation of height of, 118, 182.
prohibition of, as safety measure, 147, 182.
BILLS OF EXCHANGE, FOREIGN,
dealing in, not commerce, 74, 79.
BILL OF RIGHTS,
Swiss and U. S. constitutions, 64.
BIRDS. See FISH AND GAME.
killing of song birds forbidden, 249, 419.
BLACK LISTING. See LABORERS.
prohibition of, and legitimate information regarding a discharged employee, 329.
BLASPHEMY. See RELIGION.
definition of, 465.
BOARDS OF HEALTH.
state and local, powers of, 123, 147.
regulation of offensive establishments by, 177.
conditions imposed by, in granting license to sell milk, 652, note 22.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

BOARDING HOUSES. See INNS AND LODGING HOUSES.
for emigrants, posting of rates required, 41.
registration of guests, 46.
laws against overcrowding, 728.
BOARD OF TRADE,
legitimacy of business of, 202.
quotations of must be furnished equally to all, 386.
BONDS AND DEPOSITS,
as measure of police control, 40.
requirement in quasi-public businesses, 40, 297, 494.
bond required in sale of liquors, 207.
required of warehousemen, 297.
BOOKS,
sale of obscene, 236, 237.
censorship of, 471.
New York statute requiring furnishing of, at reasonable prices, 375.
BOOK-MAKING.
prohibition of, 195.
on streets, as obstruction, 169.
BOOMS. For Floating Lumber.
flooding of lands in connection with, 409, 413.
BOTTLING ACTS,
question whether for protection of public interest, 298.
BOULEVARDS,
heavy vehicles may be forbidden on, 171.
houses required to be set back, on, 181, 514, note 41.
BOUNTIES,
conditions attached to grant of, 24.
to sugar producers, constitutionality of, 428.
BOWLING. See BILLIARDS.
BREAD,
regulation of sale of, 275.
regulation of price of, 375.
assise of, 374.
BREWERY,
rendered useless by prohibitory liquor legislation, 539, 540.
BRIDGES. See NAVIGABLE WATERS.
erection of, by state authority, over navigable rivers, 72, 80.
local regulation of, 159.
exclusive charter right to erect, 362, 363, 675.
compensation to riparian owner, when bridge piers built upon his land, 404.
when an obstruction to navigation, 407.
perpetual bridge monopoly a contract, 679.
BROKERS,
dealing in foreign bills of exchange, tax upon, not tax on interstate commerce, 74, 79.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

BROKERS—continued.
foreign legislation controlling, 203.
monopoy of, in France, abolished, 587.
BRUTALITY. See CRUELTY TO ANIMALS, PRIZE FIGHTS.
in sports and amusements, 248.
to animals, 249.
BUCKET SHOPS. See GAMBLING HOUSES.
prohibition of, 59, 202.
BUILDING AND LOAN ASSOCIATIONS,
payment by, of premiums in addition to regular rate of interest, 304.
rates of interest, exception as to, in case of, 733.
BUILDINGS AND STRUCTURES. See HOUSES.
inspection of, 47, 128.
limitation of height, 118, 180, 514, 538.
permits for construction of, 118.
regulation of, for health, 128, 542.
regulation as to sightliness, 180, 181.
party walls, 443.
permits to erect cannot be made dependent upon uncontrolled administrative discretion, 643, 644.
permits for moving, 644.
BURIALS. See CEMETERIES.
police control of, 125.
BUSINESS AFFECTED WITH A PUBLIC INTEREST. See PUBLIC INTEREST, BUSINESS AFFECTED WITH.
CAB STANDS,
privilege to keep, as justification of regulation of fares, 377.
as special use of streets, 173.
CAMP MEETINGS,
prohibition of temporary business in neighborhood of, 175, note 15.
CANADA THISTLES,
obligation to remove, 617.
CARCASSES,
of animals, as nuisance, 522.
CATTLE,
quarantine against infected, 77, 82, 129.
federal inspection of, when meat is to be exported, 79.
state quarantine, excluding infected, from state, 83, 129, 136, 138.
state laws regarding treatment or destruction of diseased, 129.
slaughtering of, regulated, 129.
quarantine against cattle from another state, as means of discrimination, 138.
regulations to prevent cruelty to, in course of transportation, 249.
killing of infected cattle, and compensation, 524.
killing of, by moving trains, and railroad's liability in damages, 629, 634, 727.
railroad's liability for bringing diseased cattle into state, 634.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

CEMETERIES,
local power to remove or locate, 125, 141.
removal of, as nuisances, 178.
reasonableness of regulation, 530.
prohibition of, where established under license, 565.
prohibition of creation of, as discrimination in favor of existing, 689.
CENSORSHIP. See STAGE CENSORSHIP.
of press, 471.
in time of war, 471, note.
laws of Russia, as to, 471, note.
CHARGEABLE,
persons actually chargeable and persons likely to become chargeable, 271, 491.
CHARGES. See RATES AND CHARGES.
CHARITY. See TRUSTS, ELEEMOSYNARY.
state control of private, or charitable institutions, 268, 269.
gifts to charitable corporations, legislative regulation of, 369.
CHARTERS. See CORPORATE CHARTERS.
CHICAGO,
anarchists, case, 477.
CHILDREN. See MINORS, WOMEN AND CHILDREN, PARENT AND CHILD.
regulation of conditions of work, 131, 310.
employment of young, forbidden, 258.
employment of, as actors, 259.
commitment to reform school, 260-263.
placing out in other states, by charitable societies of other states, restrained, 263 n.
compulsory education of, 264, 265.
truant schools, 265.
CHINESE,
registration of, by act of 1892, 45.
exclusion of Chinese labor, 329, 486.
cannot be compelled to live in separate portion of city, 491.
discrimination against in granting laundry licenses, and Fourteenth Amendment, 655, 706.
disqualified from giving evidence in favor of, or against white men, in criminal cases, 693, n. 33.
CHIROPODIST,
alien forbidden to engage in business of, in New York, 706.
CHOSES IN ACTION,
sending without state for collection prohibited, 301.
prohibition of purchase by lawyer, 725 n.
CHRISTIAN SCIENCE,
regulations of the practice of medicine and, 133, 154.
compulsory vaccination and, 144n., 447.
and treatment other than medical, 154, 468.
compulsory medical treatment, 468.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

CIGARETTES,
prohibition of manufacture and sale of, 130, 134.
as articles of commerce, 137, 145.

CITIZENSHIP, RIGHTS OF,
and sale of liquors, 229.
and interstate migration, 488.
negroes', under Fourteenth Amendment, 691.
and public office, 706.
citizenship of United States confers, in several states, 708, 709.
"Citizenship and domicil united" as requirement for participation in common property of state, 712.

CIVIL DAMAGE ACTS. See LIQUORS.
liquor and gambling, 626.

CIVIL RIGHTS LEGISLATION,
federal and state, 693, 694.

CLAIMS,
sending out of state for collection, 301 n.

CLASSIFICATION. See CLASS LEGISLATION, EQUALITY, DISCRIMINATION.
statutory and equality, 610.
discrimination and, in general, 682.
for police regulation, 724, 725.
judicial control of and attitude towards legislative, 725, 736, 738.
in anti-trust legislation, exclusion of agricultural products, 734.
principle of valid classification, 738.

CLASS LEGISLATION,
bottling acts as, 298.
regulation of hours of labor in factories as, 313, 314.
in regard to payment of wages, 320, 321.
regulation of charges in particular classes of business, 378.
special rates for railroad mileage tickets as, 393.
statutory classification, and Fourteenth Amendment, 610.
restraint on class for its own protection, 155.

CLEARANCE CARDS,
right of discharged laborer to, 327.

COAL,
sale by weight may be required, 275.
requirement that miners of be paid by weight unconstitutional in Illinois, 275.
agreement for control of supply of, in market, 347.
coal-weighing acts, 394, 502, 735.
gauging boatloads of before sale, and freedom of commerce, 75.
records of weighing for statistical information, 44.

COERCION. See LABORERS, TRADES UNIONS, COMBINATIONS OF EMPLOYERS.
of laborers by employers, 325, 326.
of employers by labor organizations, 332-334.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

COINAGE,
federal power, 65.
public monopoly, 666.
COLLECTION AGENCIES. See DEBTORS, PROTECTION OF.
annoying practices forbidden, 301.
COLORED PERSONS. See NEGROES.
COLORING MATTER. See FOODSTUFFS, OLEOMARGARINE.
when a substantial ingredient, 32.
when used to deceive, 32.
requirement of offensive coloring in manufacture of oleomargarine, 49, 282.
used in oleomargarine, 62, 77, 284, 731.
colored netting, to make fruit look attractive, 286.
COMBINATIONS IN RESTRAINT OF TRADE. See TRUSTS, MONOPOLY, CONSPIRACY, LAW OF.
federal control and commerce clause, 79, 341, 342.
English legislation, 338.
state legislation, 339, 340.
federal legislation, 341.
when manufacturing concerns are in restraint of interstate commerce, 79, 341, 342.
common law rules and their application, 200, 343-353.
agreements not to deal with those refusing to adopt certain rules, 345.
contract for exclusive sale of certain goods, 346.
division of business or regulation of rates, 347.
agreement by vendor not to engage in same business, 348.
consolidation of corporations, 349-351.
corporations as, 351, 352.
agreements to fix price, 354.
constitutionality of legislation, 355.
discrimination by laws in favor of agricultural products, 356, 734.
COMBINATIONS OF EMPLOYERS,
legal as means of combating labor unions, 326.
and labor unions, 337, 356.
COMBINATIONS OF LABORERS. See TRADE UNIONS.
COMMERCE. See COMBINATIONS IN RESTRAINT OF TRADE, INSPECTION, RAILROADS AND COMMON CARRIERS, QUARANTINE, ORIGINAL PACKAGE DOCTRINE, TRUSTS.
not a regulation of, to require railroads to post rates for interstate traffic, 41.
state law requiring coloring of oleomargarine when it is an article of commerce, 49, 58, 284.
labels on "convict-made" goods, 50.
federal legislation under commerce clause, 65-67.
federal control over state legislation, 69-85.
agent of railroad of another state free from license tax, 73, 79, 295.
agent of express company, engaged in, 73.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

COMMERCE—continued.
drummers, engaged in interstate commerce, free from license tax, 74, 294.
tax upon auctioneers selling goods from another state, 74, 295.
state regulations affecting interestate trains, 135, 699.
federal control of state laws for inspection of articles before export, and of imported articles, 75, 77, 233, 277.
state liquor regulations and interstate, 76, 230-233.
business which is commerce distinguished from business not commerce, 79.
freedom of, when congress has not acted, 80.
original package doctrine, 81, 232, 284.
state cannot discriminate against imported articles, 82.
lawful articles of, what are, 83.
state police power and freedom of, 84.
summary of principles of federal control of, 85.
and state regulation of immigration, 101, 705.
tax upon emigrant agents not a tax upon interstate commerce, 74, 79, 328, 489.
state inspection and quarantine, 136, 138, 139, 705.
local police power and interstate, 159.
lotteries and commerce power, 198.
state exclusion of paupers, and burdens upon those bringing into state, 271.
state taxation of, invalid, 295.
strikes, when an interference with, 341, 356.
manufactures, when controlled by commerce power, 341.
sale of manufactured product from one state to another, 342.
trusts and federal power, 341, 342, 355.
fish and game laws interfering with freedom of, 420.
civil rights legislation as regulation of, 694, 699.
state cannot forbid aliens engaging in, 706.
regulations as to itinerant dealers from other states as regulation of, 710.
corporations engaged in interstate, 717, 720.
COMMERCE CLAUSE. See COMMERCE.
COMMISSION MERCHANTS,
regulation of business of, 297.
licensing of, entrusted to private association, 673.
COMMITMENT.
summary, of vagrants and prostitutes, 98, 99, 244.
of habitual drunkards to asylums or curative institutions, 227.
of insane to asylums, due process in, 252-254.
of minors to reform school, rights of parents, 260-263.
of persons disobeying orders of fire officials, 614.
COMMON CARRIERS. See RAILROADS AND COMMON CARRIERS.
COMPENSATION. See EMINENT DOMAIN.
for property taken by eminent domain, 504-506.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

COMPENSATION—continued.
for injury to property by public use, 507-510, 576.
and taking or regulation of property under police power, 511-517.
taking samples of foodstuffs for inspection, and, 519.
for property destroyed to check fire, or from military necessity, 534-537.
for property rendered useless by change of legislation, constitutional question, 539-541.
on abolition of slavery, 584-586.
for loss in abolition of trade monopolies in Europe, 589.
lawful property cannot be taken without, 602.
COMPETITION. See also UNFAIR COMPETITION.
legislature cannot protect from, 60, 288, 293, 494.
danger of, justifying Sunday legislation, 186.
justifying protection of class, 155.
combinations to restrict or prevent, 347, 349-351, 354.
whether it creates inequality of circumstances and conditions so as to justify discrimination in charges, 391, 392.
COMPULSION,
as an instrument of the police power, 22.
COMPULSORY ASSOCIATIONS. See ENFORCED BENEFITS.
as means of control, 56.
principles applying to, 57.
applied to callings affecting public, for which license is required, 57.
of riparian proprietors, to prevent inundation, 113, 442, 619.
COMPULSORY BENEFITS. See DRAINAGE, IRRIGATION, COMPULSORY INSURANCE.
discussion of, 428-444.
compulsory insurance, 432-437.
compulsory improvement of land or of breed of animals, 438, 439.
compulsory joint improvements, 440-444.
COMPULSORY EDUCATION. See EDUCATION.
regulations concerning, 264-266.
COMPULSORY INSURANCE,
in Germany, 432.
constitutionality of, 433-437.
in connection with registration of titles, 435.
teachers' pension fund, 436.
of workmen, 437.
COMPULSORY SERIVCE,
of laborers, 448-452.
specific enforcement of labor contract, 450-452.
attorneys required to defend poor persons, 613.
emergency services, 614.
CONCEALED WEAPONS. See ARMS.
carrying of, 90 and note 19.
CONDITIONAL PARDON,
valid conditions of, 104.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

CONSCRIPTION,
military, 614, note.
CONSEQUENTIAL DAMAGES,
509, 570.
CONSPIRACY, LAW OF,
and labor organizations, 330-332, 335, 356.
agreement constituting conspiracy, and agreement merely unenforceable, 345.
agreement that purchaser shall not sell goods of any other person, 346.
division of business, or regulation of rates, 347.
and beneficial trade agreements, 355.
trusts and labor unions, 356.
and anarchistic agitation, 476.
CONSTITUTION,
as judicially enforceable law, 17.
policy of, as enforced by courts, 20, 21.
amendments to, passed in consequence of adverse judicial decisions, 155.
CONSTRUCTION OF STATUTES,
principles of, 158, n. 9.
CONTAGIOUS AND EPIDEMIC DISEASES. See QUARANTINE, DISINFECTION.
report of, required, 43, 52.
inspection in cases of, 47.
state prohibition of immigrants having, 71, 88, 122, 705.
federal power over diseased immigrants, 123.
in animals, state quarantine against, 129, 136, 138.
state quarantine against another state where epidemic exists, 139.
any one having knowledge of, required to report, 614.
CONTRACTS. See CORPORATE CHARTERS, DARTMOUTH COLLEGE CASE.
limitation of hours of labor as affecting freedom of contract, 155, 500.
gaming contracts unenforceable, 190, 195, 201.
state bankruptcy laws, and obligation of, 306, 307.
state laws forbidding contracts payable in gold, 308, 309.
freedom of contract and legislation regarding payment of wages, 321.
freedom of contract and stipulations in labor contract, 323, 324.
police power cannot be contracted away, 24, 362, 556, 561, 564, 580.
in restraint of trade, void, 355.
corporate charter as contract, 24, 361, 362, 561, 569.
charter not recognized as, unless intent to contract, and consideration, 362, 676.
exemption from taxation as, 363, 561, 568.
labor contract for an unreasonable time, 449.
specific enforcement of labor, 450-452.
freedom of contract, as constitutional right, 498-503.
police power, and existing, 555.
valid police regulation, making performance of existing contract impossible, 556, 602.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

CONTRACTS—continued.
federal power and impairment of, 558.
bankruptcy and legal tender laws affecting, 557, 558.
specie contracts, 559.
scaling laws, 560.
license to pursue business prejudicial to safety and morals, 561.
license to conduct lottery, 563.
liquor licenses not, 564.
license of offensive establishments not, 565, 602.
exemptions from public service not, 566.
exemptions from liability for debt, 567.
determination of charges in corporate charter, or by municipality under legislative authority, 570-572.
license to use streets or public property for term of years as contract, 576, 577.
inviolability of, and vested rights, 578, 579.
license for limited time, 580.
revocable licenses, 582.
exclusive charter right a, 675, 679, 680.
charter or grant not exclusive, and municipal establishment of competing enterprise, 677.
CONTRACT LABOR,
federal law regarding importation of, 65, 329, 486.
and state laws, 450, 451.
CONVICT LABOR,
report of Industrial Commission on, 310.
CONVICT-MADE,
labelling goods, 50.
COPYRIGHT,
federal power, 65.
history of author's rights, 663.
federal legislation, 664.
exercise of privilege for public benefit, 665.
CORNERING THE MARKET,
defined, 200.
prohibition of, 340.
CORPORATIONS. See CORPORATE CHARTERS.
reports as to lawful conduct of business, 54.
reports of violation of law, 55.
compulsory testimony of shareholder or officer, 55, note.
licensed, for particular business, 219.
holding stock of rival corporations, 349.
power must be exercised by directors and cannot be surrendered to trustees, 350.
consolidation of, 349-351.
monopolistic, 351, 352, 354.
general coporate rights, 357.
discussion of powers and regulation, 357-364.



Digitized by Google

[REFERENCES ARE TO SECTIONS.]

CORPORATIONS—continued.
formation of as royal prerogative, 358.
formation by special charter or under general act, 359.
doctrine of *ultra vires*, 360 and note 8, 715.
usual restrictions on organisation, 360.
charter as contract, 361 and n., 561, 569, 715.
reservation of power to change charter, 361.
police power cannot be contracted away, 362, 561, 562.
charter power to fix rates, and legislative regulation, 362.
regulation of, cannot destroy property, 362.
affected with public interest, regulation of, 363.
charter power to fix rates, and legislative regulation, 363.
compulsory incorporation to engage in certain business, 364.
statute of mortmain, 368.
religious and charitable, restrictions upon holding property by, 369.
may be required by law to exercise corporate powers for purpose for which created, 439.
limited liability of, 567, 714.
determination of rates in charter, as contract, 570-572.
eleemosynary, state power in changing direction of, or directing administration of trust, 597-600.
discrimination against, in administration of justice, 714.
are persons, within constitutional protection, 715.
foreign corporations, valid conditions imposed upon by state, 716.
foreign, engaged in interstate commerce, 717-720.
holdings of land by foreign, engaged in commerce, 719, 720.
CORPORATE CHARTER. See CORPORATIONS.
as contract, 24, 361, 561, 569.
police power cannot be contracted away, 24, 362, 561-564, 580.
conditions annexed to grant of, to college or university, 267.
bye-laws under, in restraint of trade, illegal, 344.
power by, to hold stock in other corporations, 349.
grant of, and conditions thereto, 358, 359.
under special or general act, 359.
charter must be accepted, 359.
reservation of power to change, 361 and n.
modification of principle of Dartmouth College case, 362, 363.
strict construction of charter privileges, 362, 676.
property cannot be destroyed under power to repeal or amend, 362.
legislative and judicial power over, 363.
determination of charges in, as contract, 570-572.
of eleemosynary corporation, and charter as contract, 592, 599, 600.
special privilege in, under special act, as monopoly, 713.
CORPORATE POWERS OF STATE,
promotion of public welfare through, 8, 12, 22, 23.
health and safety regulation by exercise of, 111, 114, 122.
control of convict labor, and labor on public works, 310.
encouragement of industry through exercise of, 428.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

CORPORATE POWERS OF STATE—continued.
regulation of meetings and parades in public places, 644.
state institutions, and common state property, use by non-resident, 712.
COTTON,
in the seed, restraints on sale of, 93.
CREDITORS,
preference to those within state invalid, 709.
sending claims out of the state for collection, 301, note.
CRIME,
misdemeanors distinguished from, 26.
criminal law as sanction of police legislation, 26.
self crimination, 53, 54.
prevention of, 86-110.
prevention of by police patrol, 86.
prevention of by regulating certain businesses, 93, 289.
criminal law, and local ordinance power, 157.
incitement to, 476, 477.
intent in crime and misdemeanor, 635.
conviction of, debarring person from certain occupations, 110, 287, 544, 545.
knowledge presumed, in statutory offense 635, 636.
CRIMINAL CHARACTER,
cannot be punished as such, 94-96.
CRIMINAL LAW,
as sanction of police legislation, 26.
distinguished from police power, in dealing with fraud, 272.
CRIMINALS,
supervision of known, 86.
detention of suspected criminals upon charge of vagrancy, 100.
control after conviction, 102-110.
conditional pardon, 104.
indeterminate sentence and parole, 105-107.
suspension of sentence, and probation, 108.
police supervision of, after expiration of sentence, 110.
CRUELTY TO ANIMALS,
legislation to prevent, 249.
regulation to prevent, in transportation, 249.
killing of abandoned animals by society for prevention of, 523.
CULTURE,
freedom of, 479.
DAIRY,
license to keep within city limits, 643, 644.
DAMAGE,
remoteness of cause of, as affecting liability, 612.
civil damage acts, 626.
liability for, when not due to negligence, 633-634.
civil and penal liability for, 636.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

DAMAGE—continued.
by railroad company, penalties for delaying to pay compensation, 637.
consequential, 509, 510.
DAMS. See MILL DAMS.
DANGEROUS SPORTS,
statutory provisions regarding, 120.
DARTMOUTH COLLEGE CASE,
corporate charter as contract, 24, 361, 561, 569.
modifications of doctrine, 362, 562, 563.
eleemosynary trusts and, 597.
DEAD BODIES,
property, when acquired for dissection, 125.
control of burial of, 125.
of animals, property unless they become nuisances, 522.
DEBTORS, PROTECTION OF. See USURY, LEGAL TENDER.
in general, 300.
in collection of debts, 301.
publication of debts, 301.
sending claims for debt out of state for collection, 301 n.
usury laws, 302-304, 557.
bankruptcy legislation, 305-307, 557.
legislation against contracts payable in gold, 308, 309.
legal tender laws, 558, 559.
exemption from liability for debts, 567.
legislation may not discriminate against railroad as debtor, 714, 727.
DELEGATION OF LEGISLATIVE POWER,
to administrative board or officer, 34, 496, 497.
to professional associations, 56, 57.
to prison boards, in regard to parole or indeterminate sentence, 106.
to administrative officer, in regulation of parades and meetings, 174, 643.
in requiring consent of majority of inhabitants of district to certain business, 207, 212.
to community and local option, 217.
to people of district to determine as to location of noxious establishment, 645.
to administrative officer or board, to frame rules for admission to certain occupations, 649.
DEPARTMENT STORES,
ordinance or statute regarding, invalid, 148, 494.
DEPENDENTS. See INSANE, MINORS, PAUPERS.
care and control, in general, 11.
general discussion of control of, 252-271.
DEPOSITS. See BONDS AND DEPOSITS.
DETECTIVES, PRIVATE,
acting as police officers, 92.
DIKES. See EMBANKMENTS.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

DIPLOMA,
from institution of learning, as evidence of professional qualification, 133.
DISABILITY,
of ex-convicts, 110, 210, 544, 545.
of aliens, 207, 704-707, 720.
of women, 701-703, 244.
DISCRETION. See LICENSE, DISCRIMINATION, EQUALITY, PARADES AND PROCESSIONS.
uncontrolled, of administrative officer in granting license or permit, 212, 642-645, 632.
judicial control of administrative, in grant of licenses, 653-655.
DISINFECTION,
in case of contagious diseases, 123.
temporary dispossession of property for, 518.
as precautionary measure, 521.
DISCRIMINATION. See EQUALITY, CLASSIFICATION, RACE.
in railroad rates, common law rule, 73.
in taxing peddlers, 74.
against products of other states by inspection laws, 76, 77, 277.
under color of sanitary regulation, 138, 139.
against imports, by state, 82, 138.
principle of non-discrimination, 82.
against certain schools of medicine or persons by examining board, 152-154, 647, 673 n.
against poor, in definition of nuisances, 178.
against district in confining unwholesome establishments to it, 179.
in liquor legislation against products of other states, 232, 233.
against imported articles, by license fees, 294, 295.
in regulation of hours of labor, against factories or other specified industries, 313, 317, 735.
between men and women in limitation of hours of labor, 313, 314, 735.
against specified industries in legislation regarding payment of wages, 320, 321.
between combinations of labor and combinations of capital, 337, 356.
in anti-trust laws, in favor of certain industries, 356, 734.
by public-service corporation, in furnishing service, 387.
by railroad companies, in rates for long and short hauls or because of size of shipments, 391, 392.
requirement of special mileage rates as, 393.
against certain organisations in permitting street parades, 174, 468, 481, 643, 729.
in licensing occupations, 497.
in regulation of contracts, 500, 502.
and uncontrolled administrative discretion in granting license, 212, 642-645.
judicial control of administrative discretion to prevent, 653-655.
statutory classification and, 610, 724, 725.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

DISCRIMINATION—continued.
in the fixing qualification for admission to professions, in favor of existing practitioners, 544, 545, 683, 684.
in favor of existing establishments by prohibition of erection of new ones, 687.
between localities, 688-690.
because of race, 691-700.
because of sex, 701-703.
against aliens, 704-707.
against non-residents of state or United States, 708-712.
against corporations, in regulation of industry, 715.
in police measures against different evils, 721, 723.
between lodging houses and hotels in prohibiting overcrowding, 728.
DISPENSARY SYSTEM,
in South Carolina and elsewhere, 218, 233.
constitutionality of, 666.
DISTRICT OF COLUMBIA,
exercise of police power with regard to, 67.
DIVISION FENCES. See NEIGHBORS' RIGHTS.
joint erection of, 444.
DOCKS. See WHARFS, PIERS AND DOCKS.
DOGS,
property in, 421.
tax upon to pay damages resulting from killing of sheep, 434.
if kept in unlawful manner or for unlawful purpose, may be destroyed, 526, 527.
double damages for injury caused by, 635.
DRAINAGE,
majority may compel minority of owners to join in improvements, 127, 441, 442.
drains and ditches, when across private property, constitutional question, 427.
creation of district, by vote, including land of those not consenting, 441, 442.
owners of land may be required to raise grade so as to secure adequate, 617.
DRUGGISTS,
report by, or record of, sales of liquor or poisons, 43, 222.
prescriptions as papers of public nature, 53.
compulsory associations of, 56.
limitation of sale of proprietary medicines to, 149, 650.
sale of liquor as medicine by, 222, 223, 650.
hours of work of drug clerks and druggists, 316.
DRUMMERS,
within protection of interstate commerce, 74, 79, 294.
license tax upon, a regulation of commerce, 294.
DRUNKARDS. See HABITUAL DRUNKARDS.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

DUE PROCESS OF LAW,
applied to legislation, 20.
and Fourteenth Amendment, 69.
and confinement of prostitutes by administrative process, 244.
in commitment of insane persons to asylum, 253, 254.
in commitment of children to reform schools, 260-262.
taking of property, and bankruptcy laws, 307.
and trust legislation, 355.
taking property by repeal or alteration of corporate charter, 362, 363.
and unreasonable regulation of railroad charges, 380, 611.
reasonableness of charges can only be established by, 381, 386.
in case of attack upon government, 475, n. 11.
compensation for property taken for public use, 506.
hearing in case of destruction of property as nuisance, 521, 531.
in killing abandoned animals, 523.
in forfeiture of property, 526, 527.
change of legislative policy rendering existing property useless, 538-540.
and equal protection of laws, 611.

EASEMENT,
fee of street in adjoining owner and public easement, 160.
of public for use of navigable water, 403-405.
riparian owner's easement of access for navigable streams, 408, 409.
as to use of water by riparian owners, 414.
of mutual support, 424.
of drains, ditches and private roads, 427.

ECONOMIC INTERESTS,
in general, 12.
attitude of government towards, 15.

EDUCATION,
may be made compulsory, 264.
truant schools, 265.
state control of private schools, 266.
graduate instruction and state control, 267.
freedom of culture, 479.

ELEVATORS. See GRAIN ELEVATORS.

EMBALMING,
regulation of, 125, 132, 493.

EMBANKMENTS. See RIPARIAN OWNERS.
duties of riparian owners to erect, 114, 409, 619.

EMINENT DOMAIN. See COMPENSATION.
exercise for public purpose, 181.
may be exercised for conversion of brook into navigable river, 413.
taking of property by, 504-506.
may be exercised to secure raising of grade of land, for sanitary purposes, 617.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

EMINENT DOMAIN—continued.
grant of power of, to public service corporations, 659.
corporation exercising must be granted power by state in which exercised, 718.
EMIGRATION,
from United States, federal power of controlling, 487.
freedmen of, from one state to another, 488, 489.
to territories of United States, 490.
EMIGRANT AGENT,
tax upon, not interference with interstate commerce, 74, 79, 328, 489.
requirement of license fee from, 328 489.
EMPLOYERS' LIABILITY,
for injury to laborer, 322, 633.
EMPLOYMENT AGENCIES,
regulation of, 287, 328.
EMPLOYMENTS. See TRADES AND OCCUPATIONS.
sanitary regulations in certain, 131.
ENGINEERS,
licensing of railroad, 73.
rules prescribing qualifications of, by state, 80.
licensing of mining engineers, 115.
licensing of, on steamboats, 117.
abandonment of train by, in case of a strike, 333, 452.
cost of examination of railroad, placed upon conmpany, 622.
licensing of, by administrative officer, 648.
ENGLISH CONSTITUTION,
relation of statutory law to, 17.
ENGROSSING,
common law rule against, 200.
English and American legislation against, 338, 339.
ENTAILS,
introduced from England, 367.
abolished by statute, 591.
EQUALITY AND EQUAL PROTECTION OF THE LAWS,
of participation in public benefits, 23.
violation of, in statutory definition of nuisances, 178.
and limitation of number of licenses to sell liquor or engage in other business, 211, 640, 672.
and uncontrolled administrative discretion, 642-645, 652.
discretion in granting liquor or other licenses, 212.
of male and female laborers, and labor legislation, 313, 314.
violation of, in regulating hours of labor and payment of wages in certain industries, 313, 314, 320, 321.
and federal legislation as to seamen, 329.
regulation of charges in particular businesses, 378.
of service, by corporations affected with public interest, 387-394.
of charges by railroad companies, required, 390, 391, 392.
uniformity of charges and, 394.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

EQUALITY AND EQUAL PROTECTION—continued.
principle of, and licensing of occupations, 497.
natural and social inequality, 603.
political, 604.
in England, France, Prussia, 605-607.
in American state constitiutions, 608.
under Fourteenth Amendment, 609-611.
and classification for police regulation, 610, 682, 721-725.
unreasonable regulation of railroad rates, and equal protection of law, 611.
application of principle of, 611.
and special burdens upon persons and property, in general, 612-615.
where business not one which can be engaged in as a common right, 640.
control of administrative discretion in granting licenses, in interest of, 653-655.
and natural monopoly, 658-661.
appointment of examiners for admission to certain professions, by associations, 673.
prohibition of erection of new establishments, as discrimination in favor of those in existence, 687.
civil rights legislation, 693, 694.
separation of races and, 700.
discrimination between sexes and, 701-703.

ESTRAYS,
impounding of, where owner not at fault, 635.

EXAMINING BOARDS,
medical, representation of different schools of medicine on, 153, 647.

EXCHANGES,
regulation of stock exchanges, 202, 203.
restrictions as to membership in, 345.

EXCOMMUNICATION,
a form of social control, 484.

EXPATRIATION,
right of, 487.

EXPLOSIVES,
transportation of nitroglycerine, within state control, 83.
report of sale of, 93.
regulations to prevent accident in transportation of, 117.
manufacture and storage of, 119.
prohibition of storing, within city limits, 565.
permit to store cannot depend upon uncontrolled administrative discretion, 643.

EXPULSION FROM CLUBS,
as form of social control, 484 note.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

EX POST FACTO LAWS. See RETROACTIVE LEGISLATION.
test oath cases, 544.
and prohibition of practice of medicine because of conviction of crime, 545, 546.
EXPRESS BUSINESS,
agent of, engaged in commerce, 73.
railroad is not bound to furnish accommodations for, to all companies alike, 395.
FACTORIES,
employment of children in, forbidden, 258.
limitation of hours of labor in, 131, 149, 316, 317, 735.
limitation of hours of female laborers in, 311-314.
FEDERAL CONTROL,
of state police legislation, 69-84.
summary of principles of, 85.
FEDERAL POLICE REGULATIONS,
in general, 65.
as to commerce and navigation, 66.
as to Indians and territories, 67.
FELLOW-SERVANT RULE,
715 n. 42.
abolished with regard to corporations, with regard to railroad corporations, 727.
FENCES. See DIVISION FENCES.
FENCING RAILROAD TRACKS,
629, 637.
FERTILISERS,
inspection of, 277.
FERRIES,
on waters between states, 72 n. 9.
exclusive franchise to, and prohibitions of monopoly, 668.
exclusive franchise to, as contract, 675.
municipal power to grant exclusive franchise, 678.
FIRE,
regulation of building to prevent, 33, 118.
destruction of property to check or prevent, 118, 534, 535.
owners forbidden to set fire to their own buildings, 118.
every one at fire may be required to assist in extinguishing it, 614.
caused by sparks from locomotive, and liability of railroad, 628, 630.
FIRE INSURANCE. See INSURANCE.
compulsory in Germany, 432.
FIRE LIMITS,
municipal establishment of, 33, 118.
establishment of, when power not expressly given to cities, 141.
frame building erected within, 528, 537.
establishment of, and existing contracts for erecting frame building, 556.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

FIRE LIMITS—continued.
uncontrolled discretion of administrative officer in allowing erection of wooden buildings within, 644.
establishment of, does not affect existing frame buildings, 685.
FIRE SALES,
regulation of, 292.
FISH AND GAME,
laws protecting, 24.
history of legislation, 418.
methods of hunting or fishing forbidden, 418.
possession of in closed season, unlawful, 418, 516, 635.
constitutionality of legislation, 419, 422.
laws interfering with interstate commerce, 420.
summary destruction of property used for unlawful fishing or hunting, 527.
game unlawfully killed may be summarily destroyed, 528.
non-residents of state may be charged for hunting or fishing licenses, 712.
FLAG,
legislation forbidding use of, in advertisement, 63, 183, 729.
FLOOD,
action of state to prevent, 114.
duties of riparian proprietors, 114, 409, 619.
flooding land by mill dams, compensation for, 410-413, 508.
preservation of forests as means of preventing, 423, 619.
FOODSTUFFS,
regulations to prevent sale of impure milk, 32, 147.
inspection of, and commerce power, 77.
adulteration of, 41, 129, 280.
regulations to prevent fraud in sale of, 147, 279, 280, 282-284.
taking samples for inspection, and compensation for, 519.
sale of adulterated, 635, 723.
FOREIGN COMMERCE. See COMMERCE.
FOREIGN CORPORATIONS. See CORPORATIONS.
distinction between carrying on commerce in state and exercising corporate powers in state, 717, 718.
FORESTALLING,
common law rule, 200.
English and American legislation against, 338, 339.
FORESTS,
protection and preservation of, 423.
when required for protection from floods, 619.
FORFEITURE,
of property unlawfully used or acquired, judicial process in, 525-528.
of license for cause, 546 (n. 26).
under United States laws, of property used for illicit distillery, 627.
FORNICATION,
punishment of, 240, 241.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

FOURTEENTH AMENDMENT,
control of state police power under it, in general, 69.
protection of property under, 84.
legislation for health and safety, and, 134.
and due process, 244.
and power of majority of property owners to bind minority in creation of drainage, 441, 442.
fundamental rights under, 445.
equality and equal protection of the laws, 609-611.
slaughter house cases, 609.
protection under, from administrative discretion in issuing licenses, 655.
protection of negroes under, 692.
protection of aliens under, 706.
FRANCHISE,
to occupy streets with tracks, requires legislative authority, 163, 658.
right to incorporate as franchise, 358.
to use streets, under special act, and for exclusive use, 660.
exclusive, to ferry companies, 668.
exclusive franchise as contract, 675.
FRAUD,
in general, 12.
prevention of in sale of oleomargarine, 77, 84, 146, 147, 284, 731.
prevention of in sale of milk, 147.
preventive measures against, 272, 273-298.
forms of legislation against, 272.
prohibition and regulation to prevent, 285.
on creditors, by selling stock of merchandise, 287, n. 3.
public and private interest in prevention of, 298.
FREE MASONS,
exemptions of, from restrictions on other associations, 481.
FRESH MEATS. See MARKETS.
inspection of, as regulation of commerce, 77, 138.
required to be sold in public markets, 640.
FUTURES. See OPTIONS AND FUTURES.
GAMBLING,
legislation regarding, 189-203.
police power over, 188.
contracts unenforceable, 190, 195, 201.
common gamblers, 191.
dealing in futures as, 201.
forbidden when public, 453.
apparatus for, summary destruction of, 526.
recovery of gambling losses against owner of premises, 626.
prohibition of book-making, 195, 730.
gift sales as appealing to gambling instinct, 293.
GAMBLING HOUSE,
keeping of, legislation against, 191, 193, 722.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

GAMBLING HOUSE—continued.
bucket shops, 202.
recovery of gambling losses against owner of premises, who allows use as, 626.
one within, presumed to know character of place, 636.
GAME. See FISH AND GAME.
GAMES OF CHANCE,
legislation concerning, 190, 191.
and games for pastime and recreation, 189.
GAMES OF SKILL,
licensing of, 192, 193.
GARBAGE,
collection of, and property in, 522.
business of removing and license, 641, 670.
removal as monopoly, 670.
GAS,
waste of natural, constitutionality of legislation forbidding, 422.
regulation of pressure in pipes, 556.
charter or grant to company to erect gas works, and municipal competing establishment, 677.
exclusive monopoly to gas company a contract, 679, 680.
GAS COMPANY,
forbidden to charge for meters, 394.
GILDS,
requirement of royal license for, 481.
approval of ordinances by justices of peace, 481.
GIFT SALES,
prohibition of, 293.
GOLD CONTRACTS,
prohibition of, 308, 309.
GOLD AND SILVER,
requirement of stamp upon, to prevent fraud in sale of articles made of, 281.
GOTENBURG SYSTEM,
of controlling liquor traffic, 219.
GOVERNMENTAL POWERS,
division of, 1.
GOVERNMENT, ATTACKS UPON. See LIBEL, ANARCHISM.
GRADE CROSSINGS. See CROSSINGS, RAILROAD.
abolition of, 548.
abolition of, affecting contracts, 556.
distribution of cost of abolishing, between municipality and railroad, 548, 631.
GRAIN ELEVATORS. See WAREHOUSING.
regulation of, 297.
regulation of charges of, 372, 375, 376.
prohibition of discrimination in rates charged by, 390.
fees for inspectors of, borne by owners of, 622.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

GROUND RENTS. See RENTS.
GROUND SQUIRRELS,
owner required to exterminate, 618.
HABITUAL DRUNKARDS,
sale of liquor to, 205, 218, 226.
punishment of, 225.
treatment of, compulsory, 227.
asylum for, may be maintained by fees from liquor dealers, 623.
liability of dealer for sale of liquor to, when person not known to be, 635.
HALL MARK,
on gold and silver, 281.
HANDBILLS,
prohibition of distribution on streets, 158, 164.
HARBOR,
regulation of, by state and federal commerce power, 72, 117, 135.
harbor lines, establishment of, and riparian owners, 405, 406.
cannot be parted with to private company, 574.
HAZARDOUS UNDERTAKING,
special rules of liability in connection with, 621-638.
HEALTH,
growth of health legislation, 111.
police regulations to protect, 122-133.
control of callings affecting, 132, 133.
legislation and Fourteenth Amendment, 134.
legislation and federal commerce power, 136-139.
local powers for protection of health, 140-142.
questions involved in health legislation, 143-155.
protection of, in regulation of sale of food, 280-282.
labor legislation as a sanitary measure, 310, 314.
compulsory association for drainage as a sanitary measure, 442.
destruction of house for protection of health, 520, 521 n.
sanitary regulations in houses, 128, 150, 542.
reasonableness of requirements of sanitary improvements, 150.
removal of offensive establishment, as sanitary measure, 565.
laws against overcrowding in lodging houses, 728.
HOMESTEADS,
exemption from liability for debt, 557, 567.
HOMICIDE, JUSTIFIABLE,
where necessary to suppress riot, 88, 445 n.
to prevent an escape, 445 n.
HORSE RACES. See RACE COURSES.
general regulation of, 194.
betting at, 195, 730.
HORSESHOEING,
act regulating, 497, 688 n.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

HOSPITALS,
regulation of location of, in cities, 141.
license to conduct, and administrative discretion, 643.
HOTELS. See INNS AND LODGING HOUSES.
punishment of fraud in obtaining board at, 731.
HOURS OF LABOR. See LABORERS.
limitation of, in general, 131, 155.
limitation of, for women, 149, 311-314, 735.
limitation of, whether sanitary or social measure, 314.
limitation of, for adult males, 316, 317, 735.
limitation, and existing contracts, 556.
on public works, 310.
HOUSES. See BUILDINGS AND STRUCTURES.
street numbers on houses, 41.
sanitary requirements in, 150, 542.
party walls, 443.
street name affixed to, 519.
destruction of, as sanitary measure, 520, 521 n.
when used for unlawful purpose, may be destroyed, 525.
HOUSES OF CORRECTION. See REFORM SCHOOLS.
ICE,
on navigable waters, common property of people of state, 417, note 26.
removal of, from sidewalks, 620.
IGNORANCE OF FACT,
not excusing from liability, 635.
ILL-FAME, HOUSES OF. See PROSTITUTES, PROSTITUTION.
regulation of, 243.
frequenting, 97, 246, 722.
confinement to particular district of city, 179, 245, 689.
keeping, as crime or disorderly conduct, 157, 244, 245.
as common law nuisances, 245.
liability of owner of house, 245.
house may not be destroyed, 245, 525.
IMITATION,
of butter, by coloring oleomargarine, 32, 62, 284, 731.
by coloring distilled vinegar, 32.
prohibition of established imitation products, 285.
IMMIGRATION. See MIGRATION.
registration of immigrants, 45.
law of 1903, 65.
state power, 71.
state regulation to exclude objectionable classes, 101, 271.
exclusion of diseased persons by federal legislation, 123.
federal exclusion of paupers, 271.
federal law against entry of anarchists, 478.
exclusiveness of federal power over foreign, 486, 705.
freedom of, from one state to another, 488, 705.
from territories of United States, 490.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

IMMORALITY. See OBSCENITY, FORNICATION, PROSTITUTION.
and obscenity, 234-239.
fornication, 240, 241.
prostitution, 242-246.
IMPORTS. See COMMERCE.
INCORPORATION. See CORPORATE CHARTER.
INCRIMINATING REPORTS. See REPORTS.
immunity from prosecution upon, 53, 54.
distinction between compulsory notice and compulsory testimony, 54.
INDETERMINATE SENTENCE.
constitutionality of, 105, 106.
judicial determination of sentence, 106.
control of prison authorities by legislation, 106.
INDIANS,
federal control over lands of, 67.
disqualified from giving evidence in favor of or against white men in criminal cases, 693, n. 33.
liquor in Indian country, 526, note 40.
INEBRIATES. See HABITUAL DRUNKARDS.
INFANTS. See MINORS, CHILDREN, PARENT AND CHILD, WOMEN AND CHILDREN.
infants' boarding houses, license for, 493.
INFLAMMABLE MATERIAL,
regulation of transportation of, 117, 119.
INNS AND LODGING HOUSES. See BOARDING HOUSES.
registration of guests, 46.
regulation of, 175.
rates, regulation of, 373.
obligation to serve all guests, 388.
laws against overcrowding in, 728.
INSANE,
restraints upon the, 252.
commitment of, to asylum, due process in, 253, 254.
right of insane person to apply for discharge, 255.
private asylum for, control of, 256.
INSPECTION,
as incident of regulation, 47.
where a violation of privacy, 47.
state laws regarding, and federal constitution, 75, 276-278.
of food stuffs, 77, 277.
discrimination by, against products from other states, 77, 233.
as means of control, 93
of mines, 115.
in case of contagious diseases, 123.
of tenement houses, 128.
of markets and slaughter houses, 129.
of cattle, 79, 136.
discrimination against other states by, in liquor legislation, 233.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

INSPECTION—continued.
for prevention of fraud, 276-278.
discrimination by inspection, laws applicable only to goods imported, 279.
New York prohibition of laws for, 278.
taking sample for, and compensation, 519.
INSURANCE. See COMPULSORY INSURANCE.
requirement of bonds or deposits to engage in business of, 40.
contract of, not commerce, 78.
speculative element in, 199.
corporations engaged in, subject to certain conditions, 219.
combinations between insurance companies forbidden, 340.
restriction of business to corporations, 364, 401.
regulations of rates of, 375.
legislation against discrimination in rates of, 390.
state control, 399.
ground of supervision of business of, 400.
compulsory, 432-437.
compulsory maintenance of fire patrol by those engaged in, 615.
state may exclude foreign companies, 716.
prompt payment of claims by, 714, 727, note 33.
INTEREST. See USURY.
regulation of rate of, 302-304.
regulation of, as affecting existing contracts, 555, 557.
premium, in addition to, in case of building loan associations, 733.
INTERSTATE COMMERCE. See COMMERCE.
INTERSTATE COMMERCE ACT. See RAILROADS.
public interest, business affected with, analysis of, 341.
discrimination by railroads forbidden, 391, 392.
INTIMIDATION,
by organizations of labor, of other laborers or employers, 332-334.
INTOXICATING LIQUORS. See LIQUORS.
INTOXICATION,
as a punishable offence, 225.
INUNDATION. See FLOODS.
IRRIGATION,
majority of property owners may compel minority to join in, 127, 441, 442.
control of waters needed for, 414-417.
ITINERANT MERCHANTS. See PEDDLERS.
license required of, 39, 289, 292.
municipal license, tax upon, reasonableness of, 39.
definition of, 289.
uncontrolled administrative discretion in granting license to, 653.
from other states, and interstate commerce, 710.
JUDICIAL CONTROL,
as to reasonableness, 63, 128, 150, 151.



Digitized by Google

[REFERENCES ARE TO SECTIONS.]

JUDICIAL CONTROL—continued.
reasonableness of municipal ordinances, 142, 158, 178, 179, 286.
of safety legislation, 144.
of discretionary power in administrative officers to issue liquor or other licenses, 209, 653-655.
reasonableness of regulation of charges of business affected with public interest, 379, 385.
of rates determined by a commission, 381, 382.
jurisdiction of federal court over rates fixed by state, 382.
of administrative determination as to nuisances, 521, 526, 527.
of municipal determination as to nuisances, 531, 533.
as to reasonableness of improvements required to property, 549.
as to reasonableness of rates and charges determined by legislature, 550.
of legislative classification, 725, 736-738.
JUDICIAL CONTROL OF POLICY,
under written constitutions, 16, 17.
the American principle, 17, 20.
Swiss and German principle, 17.
in a new field of legislation, 21.
JURY SERVICE,
exemption from, not a contract, 566.
JUSTICE, CIVIL AND CRIMINAL,
administration of, as function of government, 7.
equality in administration of, 610, 714.
JUSTICES OF THE PEACE,
proceedings before, to prevent breaches of the peace, 89.
KNOWN THIEVES,
may not be punished unless for specific acts, 96.
others may not be forbidden to associate with, 457.
LABELS (SIGNS, MARKS, STAMPS),
indicating ingredients in articles of food, 41.
"convict made," 50.
"tenement made," 51.
required in sale of oleomargarine, 284.
LABORERS. See HOURS OF LABOR, COMPULSORY SERVICE, TRADE UNIONS, WAGES, WOMEN AND CHILDREN, LABOR CONTRACT, STRIKES.
legislation protecting, and attitude of courts, 21.
notice of strike to, when employed to take place of strikers, 41.
importation of, under contract, 65, 329, 486.
regulation of hours, and condition of work places, 131.
limitation of hours of labor, 155.
limitation of hours of labor, as affecting right of contract, 155, 500.
legislation for protection of, 310-329.
state regulation of, upon public works, and of convict labor, 310.
hours of female, 311-314, 735.
hours of adult males, 316, 317, 735.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

LABORERS—continued.
payment of wages at regular intervals and in cash, 319-321, 502, 735.
contract with employee, exempting him from liability for injury received by, 322.
penalty for leaving without notice, 323.
fines for imperfect work, 324.
coercion of, by employer, in exercise of right of voting, 325.
coercion by employer, against membership in unions, 326, 735.
blacklisting, 327.
requirement of statement by employer as to reason of discharge, 327.
employment agencies, 328.
federal power of excluding foreign laborers, 329.
combinations of, 330-337.
combinations to raise wages, 356.
contract of, specific enforcement of, 448-452.
contracts of seamen, 329, 451.
specific enforcement of contract, when business affected with public interest, 333, 452.
employer's liability for injury to, when not due to laborer's negligence, 633.
legislation protecting, applied to establishments employing certain number of, 724.
LABOR CONTRACT,
limitation of hours of labor, as affecting right of contract, 155, 500.
for an unreasonable time, 449.
no specific enforcement of, 450-452.
question of punishment of breach of, 450-452.
LAND,
health regulation as to, 127.
restrictions upon alienation of, 365-369.
mortmain, in Europe and America, 368, 369, 592-596.
perpetual rents, prohibition of, 370, 589.
long leases, 371.
streams necessary for irrigation of, 416, 417.
private roads or drains across land of another, 427.
drainage and irrigation, 441, 442.
division fences, 444.
conditions against alienation, invalid, 515.
entry for public purpose not a trespass, 518.
boundary monuments may be erected at owner's expense, 519.
abolition of feudal tenures, 588.
destruction of existing perpetual rents, 589.
perpetual covenants, or restrictions upon use of land, 590.
entails, 591.
lots covered with stagnant water or improperly drained may be required to be filled in, 617.
owner of, may be required to destroy noxious weeds, 617.
improvement required, reasonableness of, 618.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

JUDICIAL CONTROL—continued.
reasonableness of municipal ordinances, 142, 158, 178, 179, 286.
of safety legislation, 144.
of discretionary power in administrative officers to issue liquor or other licenses, 209, 653-655.
reasonableness of regulation of charges of business affected with public interest, 379, 385.
of rates determined by a commission, 381, 382.
jurisdiction of federal court over rates fixed by state, 382.
of administrative determination as to nuisances, 521, 526, 527.
of municipal determination as to nuisances, 531, 533.
as to reasonableness of improvements required to property, 549.
as to reasonableness of rates and charges determined by legislature, 550.
of legislative classification, 725, 736-738.
JUDICIAL CONTROL OF POLICY,
under written constitutions, 16, 17.
the American principle, 17, 20.
Swiss and German principle, 17.
in a new field of legislation, 21.
JURY SERVICE,
exemption from, not a contract, 566.
JUSTICE, CIVIL AND CRIMINAL,
administration of, as function of government, 7.
equality in administration of, 610, 714.
JUSTICES OF THE PEACE,
proceedings before, to prevent breaches of the peace, 89.
KNOWN THIEVES,
may not be punished unless for specific acts, 96.
others may not be forbidden to associate with, 457.
LABELS (SIGNS, MARKS, STAMPS),
indicating ingredients in articles of food, 41.
"convict made," 50.
"tenement made," 51.
required in sale of oleomargarine, 284.
LABORERS. See HOURS OF LABOR, COMPULSORY SERVICE, TRADE UNIONS, WAGES, WOMEN AND CHILDREN, LABOR CONTRACT, STRIKES.
legislation protecting, and attitude of courts, 21.
notice of strike to, when employed to take place of strikers, 41.
importation of, under contract, 65, 329, 486.
regulation of hours, and condition of work places, 131.
limitation of hours of labor, 155.
limitation of hours of labor, as affecting right of contract, 155, 500.
legislation for protection of, 310-329.
state regulation of, upon public works, and of convict labor, 310.
hours of female, 311-314, 735.
hours of adult males, 316, 317, 735.

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[REFERENCES ARE TO SECTIONS.]

LIBERTY—continued.
economic, and protection of classes from oppression, 299.
in general, different aspects, 445.
LICENSE. See DISCRETION, DISCRIMINATION, EQUALITY, LIQUORS.
conditions attached to, 24, 652, note 22.
as a matter of right, in liquor traffic, 36, 206.
as a police measure, 37 and note 38.
discriminative licenses, 38, 639.
high license as method of restriction, 39.
as means of control, 93, 494.
of mining engineers and foremen, 115.
of ship officers, 117.
of slaughter houses and markets, 129, 639, 643.
of physicians, 133, 495.
to use streets, 163, 168, 173.
of draymen, peddlers, auctioneers, using streets, 173.
uncontrolled administrative discretion in granting, 212, 642-645, 652.
liquor license as a matter of judicial discretion, 208-210.
of theaters, 251.
limitation of number of licenses to sell liquor or engage in other business, 211, 640, 672.
requirement of, for private asylum, 256.
of peddlers and itinerant merchants, 289, 292, 653, 732.
of auctioneers, 290.
where discriminating against imported articles, 294.
required of emigrant agents, 328.
as means of control, in insurance and banking, 401.
as contract, 561, 562.
to conduct lotteries, revocable, 563.
liquor, not a contract, 564.
to use public property, 573, 577.
not a surrender of police power, 575, 580, 602.
perpetual license unreasonable, 581.
revocable, for use of public property, 582.
business established under license of reasonable duration as vested interest, 580, 602, 681.
requirement of good character as qualification to secure, 651, 652.
to keep noxious establishments, or for sale of liquor, depending upon consent of adjoining property owners, 645, 652.
judicial control of administrative discretion in granting, 653-655.
revocation of, power of administrative authorities with regard to, 546 n. 26.
LICENSE OR OCCUPATION TAX. See LICENSE.
distinguished from license for regulation, 37, 295.
as a police measure, 38.
LIENS,
subcontractor's, and owner's liability, 626, n.
under United States revenue laws upon property used as distillery, 627.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

LAND—continued.
requirement that animal pests be destroyed by owner of, 618.
where naturally source of imminent danger, owner may be required to take reasonable steps to avert, 619.
LAUNDRIES,
absolute administrative discretion in granting permission to conduct, 643.
people of locality concerned given right to decide whether to permit, 645.
discrimination against Chinese in licensing, and Fourteenth Amendment, 134, 655, 706.
LAW, PRACTICE OF. See PROFESSIONS.
legislative power of determining qualifications for, 648.
requirement of qualification of good character to engage in practice of, 651.
admission of graduates of certain schools to practice of, without examination, 673.
qualifications for, and legislation applying to existing practitioners, 683, 684.
right to, of negroes, under Fourteenth Amendment, 692.
right of women to, 702.
exclusion of aliens from, 706.
LEASES,
limitation of term of, of agricultural land, 371.
LEGAL TENDER,
and state laws regarding payment of debts, 308, 309.
retrospective federal laws affecting contracts, 558, 559.
scaling laws, 560.
LETTERS. See POST OFFICE.
contract by letter with foreign insurance company, 717.
LEVEES. See EMBANKMENTS.
LEWDNESS,
in conduct, 235.
LIABILITY,
of railroad for accidents, 79.
employer cannot exempt himself from, for injury to laborer, 322.
special rules of, in connection with hazardous undertakings, 621-638.
for acts of persons employed under legal compulsion, 624.
absolute liability without fault, 629, 630, 632-634.
penal liability and fault, 635-638.
LIBEL,
signing of libelous articles, 55.
freedom of speech, and law of, 472, 473.
seditious libel, or libel against government and officials, 472, 474.
Lord Holt's opinion regarding, 475, n. 11.
LIBERTY. See ASSEMBLY, ASSOCIATION, PRESS AND SPEECH, PERSONAL LIBERTY, RELIGION.
gradations enumerated, 27.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

LIBERTY—continued.
economic, and protection of classes from oppression, 299.
in general, different aspects, 445.
LICENSE. See DISCRETION, DISCRIMINATION, EQUALITY, LIQUORS.
conditions attached to, 24, 652, note 22.
as a matter of right, in liquor traffic, 36, 206.
as a police measure, 37 and note 38.
discriminative licenses, 38, 639.
high license as method of restriction, 39.
as means of control, 93, 494.
of mining engineers and foremen, 115.
of ship officers, 117.
of slaughter houses and markets, 129, 639, 643.
of physicians, 133, 495.
to use streets, 163, 168, 173.
of draymen, peddlers, auctioneers, using streets, 173.
uncontrolled administrative discretion in granting, 212, 642-645, 652.
liquor license as a matter of judicial discretion, 208-210.
of theaters, 251.
limitation of number of licenses to sell liquor or engage in other business, 211, 640, 672.
requirement of, for private asylum, 256.
of peddlers and itinerant merchants, 289, 292, 653, 732.
of auctioneers, 290.
where discriminating against imported articles, 294.
required of emigrant agents, 328.
as means of control, in insurance and banking, 401.
as contract, 561, 562.
to conduct lotteries, revocable, 563.
liquor, not a contract, 564.
to use public property, 573, 577.
not a surrender of police power, 575, 580, 602.
perpetual license unreasonable, 581.
revocable, for use of public property, 582.
business established under license of reasonable duration as vested interest, 580, 602, 681.
requirement of good character as qualification to secure, 651, 652.
to keep noxious establishments, or for sale of liquor, depending upon consent of adjoining property owners, 645, 652.
judicial control of administrative discretion in granting, 653-655.
revocation of, power of administrative authorities with regard to, 546 n. 26.
LICENSE OR OCCUPATION TAX. See LICENSE.
distinguished from license for regulation, 37, 295.
as a police measure, 38.
LIENS,
subcontractor's, and owner's liability, 626, n.
under United States revenue laws upon property used as distillery, 627.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

LIFE,
taking of, to prevent felony or escape of felon, 445 n.
LIQUORS. See SALOONS, WINES.
municipal regulation as to place of sale, 33.
license tax upon sale of, 37.
bond required of liquor dealers, 40.
report of sales of, by druggists, 43.
internal arrangements of rooms for sale of, 52, 244.
sale of, may be prohibited, 59.
when sale prohibited, exceptions in favor of medicinal, mechanical and sacramental uses, 59, 221-224.
state police power, and federal commerce clause, 76, 80, 81, 83, 230-233.
original package doctrine, 81, 230-232.
sale forbidden in case of riot, 89, n.
license for sale of, refused ex-convicts, 110.
prohibition of manufacture and sale of, 134.
constitutional basis of control of, 204.
regulation and prohibition, 205.
license as matter of right, 206.
uncontrolled discretion in administrative officer to grant license, 212, 654.
regulation of traffic in, 205-212.
distinction between wholesale and retail trade in, 205.
statutory disqualifications of right to sell, 207, 229, 652.
legal distinction between fermented and distilled liquors, 205, 214, 215.
discretionary power of licensing to sell, 208-210.
limitation of number of licenses, 211, 640, 672.
prohibition of sale of, 213-217.
state prohibition, 214, 215.
local option, 213, 216, 217.
public monopoly of sale of, 218, 219, 666.
not used as beverage, 220-224.
sale of, as medicine, cannot be forbidden, 222, 223, 650.
use for sacramental purposes, 224.
excessive use of intoxicating, 225-227.
restrictions upon habitual drunkards, 226, 227.
state power over and federal constitution, 228, 233.
privilege of selling not a right of citizenship, 229.
employment of women in sale of, 244, 703.
private consumption of, 453-455.
possession of, as evidence of manufacture or sale, 455.
sale and consumption of, in clubs, 456.
statute prohibiting distillation of grain into, and grain owned at time, 516.
may be destroyed when unlawfully kept for sale, 525.
property rendered useless by prohibition of manufacture and sale of, 539, 540, 546.
license to sell or manufacture, not a contract, 362, 564.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

LIQUORS—continued.
special license fee from dealers in, to maintain asylum for inebriates, 623.
law giving action for damages caused by intoxicated persons, against one who sells, and owner of premises, 626.
sale to minor or habitual drunkard, not knowing him to be such, 635.
right to sell, confined to males, 640, 703.
requirement of good character to secure license for sale of, 651.
license to sell, depending upon consent of neighboring property owners, 645, 652.
regulations applying to existing saloons, 683.
discrimination between city and country districts in regulating sale of, 688, n.
refusal of license to aliens, 207, 706.
refusal of license to one not a resident of state, 710.
punishment of traffic in, 722.
LITERATURE,
sale of obscene, forbidden, 237.
when depicting immorality, 239, 479.
literary, scientific and aesthetic interests, 479.
LIVE STOCK. See CATTLE.
LIVERY STABLES,
determination of location of, by property owners of districts, 645, 689.
prohibition of erection, of new stables, as discrimination in favor of those existing, 687, n.
LOCAL OPTION,
as to sale of liquors, 216, 217.
LOTTERIES,
prohibition of, 59.
excluded from mails and from interstate commerce, 65, 198.
general discussion of, 196-198.
importation or carrying of tickets from one state to another forbidden, 198.
license to conduct a lottery not a contract, 362, 563, 674.
revocation of lottery grant, and contracts affected thereby, 556.
possession of lottery ticket, punishable, 635.
LOW LAND,
raising of level of, required, 617.
LUNATICS. See INSANE.
MACHINERY,
inspection of, 47, 119.
police regulations for protection from dangerous machinery, 119.
MALICE,
malicious interference, 334.
malicious erections, 426.
MANUFACTURE,
as affected by commerce power, 79, 231, 341, 342.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

MARKS. See LABELS, HALL MARKS.
MARKETS,
inspection of by municipal authorities, 129.
municipal markets, 129, 565.
fresh meat required to be sold in public, 641.
municipal monopoly of, 669.
MARRIAGE,
polygamy, federal legislation against, 67, 468.
prohibition of, in case of disease, 124.
autonomistic, or without observance of statute, 241.
reports of, by minister solemnizing, 613.
between blacks and whites, prohibited, 697.
marital rights may be confined to those living in state creating rights, 709.
married woman's liability for family expenses, 567.
MEASURES. See WEIGHTS AND MEASURES.
MEAT. See FRESH MEAT.
MEDICINE. See PHYSICIANS.
practice of, ex-convicts excluded from in New York, 110, 346, 545.
regulation of sale of, in interest of health, 130.
qualifications required for practice of, 133, 152-154.
neglect of parents to call medical aid for those in their custody, 133.
legislative discrimination against certain schools of, in regulating practice of, 152-154.
treatment other than medical, 154, 468.
sale of liquor as, 222-223, 650.
vivisection, 249, 480.
exclusive selling arrangements and rebates, 346.
compulsory medical treatment, 468.
freedom of medical science, 479.
regulations for admission to practice of, applied to existing practitioners, 542.
examining board for practice of, representation of various schools, upon, 153, 647, 673.
discrimination against system of, by examining board, 647.
proprietary medicines, limitation of sale to druggists, 149, 650.
requirement of residence in state where practicing, 711.
MIGRATION. See IMMIGRATION.
and settlement, freedom of, 485-491.
freedom of, within state, 491.
MILITARY OPERATIONS,
destruction and appropriation of property, 536, 537.
MILITARY ORGANIZATIONS. See ARMED BODIES OF MEN.
prohibition of voluntary organizations, 91, 482.
conscriptions, 614, n.
MILITARY TELEGRAPH LINES,
control of, in time of war, 471.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

MILITIA,
organization of, under state law, 91.
release from service in, because of religious scruples, 469.
exemption from service in, 566.
MILK,
prohibition of sale of adulterated, 32, 147.
sale of milk from diseased cattle, 129.
conditions attached to license to sell, 652, note 22.
MILL DAMS,
power of states to authorize, 72.
flooding of other property by, 410-412, 508.
obligation to provide passageway for fish, 419.
MINES,
legislation for safety of miners, 115.
employment of children, forbidden, 258.
miners paid by weight, to have weighers chosen by them, 274.
prohibition of female labor in, 311.
hours of labor in, legislation limiting, 155, 316, 735.
weekly payment acts, and company store orders, 319-321.
fees of mine inspectors borne by owners of, 622.
state license of foreman, and liability of owner of mine, 624.
employment of mine manager required and penalty for noncompliance, 638.
requirement of license for mining of phosphate, 644.
legislation for protection of miners, applied to mines over certain size, 724, 727.
MINORS. See PARENT AND CHILD, WOMEN AND CHILDREN, CHILDREN.
refusal of license to, for sale of liquors, 209.
sale of liquors to, 205, 218, 258.
control of, 257-267.
restrictions upon adults in dealings with, 258.
reasonableness in regulation as to, 259.
employment of, as actors, 259.
curfew ordinances, 259.
commitment of, to reform school, 260-263.
state control of education of, 264-266, 479.
sale of liquor to one who represents himself as of age, liability for, 635.
MISCEGENATION,
prohibition of, 697.
MISDEMEANOR,
distinguished from felony, 26.
arrest for, without warrant, 87.
MONOPOLY. See COMBINATIONS IN RESTRAINT OF TRADE; TRUSTS; CONSPIRACY, LAW OF.
legislative creation of, by requiring use of specific article, prohibited, 34, 673.
state establishment of, 142.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

MONOPOLY—continued.
creation of, by limiting sale of legitimate article to one class of persons, 149, 650.
in professions, by choosing examiners from certain bodies of practitioners, 56, 673.
public, of sale of liquors, 218, 219, 666.
of sale of liquors to private corporation, as means of police control, 219, 669.
English and American legislation against, 338, 339.
prohibition of attempts at, 340, 341.
common law rule and its application, 343-353.
corporate, illegal, 352.
when is monopoly point reached, 353, 354.
grant of, in corporate charter, 363.
regulation of rates, where business is legal or virtual monopoly, 376-378.
requirement of equal service by, 387, 388, 393, 667.
regulations for public convenience, 398.
abrogation of monopoly and contracts affected thereby, 556.
exclusive license to use streets, and, 574, 577.
abolition of gild or trade monopoly, and compensation for loss thereby, 587.
history of, in English law, 656.
American constitutional provisions against, 657.
natural monopoly, 658-662, 680.
patent and copyright, 663-665.
state monopoly, 666.
municipal monopoly, 667.
private ferry monopoly, 668.
exclusive license and, 670.
government in creating, does not surrender its control, 671.
limitation of number of licenses and, 672.
revocability of grant of, 674.
exclusive charter right, 675.
charter not recognized as exclusive unless necessary, 676.
grant of, as contract, 677-680.
perpetual, or limited in time, 681.
in existing establishments by prohibition of erection of new ones, 687.
MONUMENTS,
of history or art, preservation of, 14.
boundary, may be erected at owners' expense, 519.
MORMON CHURCH,
federal legislation against polygamy, 67, 468.
property held by, congressional legislation as to, 596.
MORTMAIN,
legislation in England, 368.
legislation in United States, 369, 466.
secularisation of church lands, 592.

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[REFERENCES ARE TO SECTIONS.]

MORTMAIN—continued.
suppression of monasteries in England, 593.
application of principle in states, 594, 595.
the Mormon church case, 596.
MUNICIPAL CORPORATION,
power over location of establishments affecting health, 140, 141.
construction of powers of, 141, 142.
prohibition of gold contracts by, 309.
state regulation of municipal employment of labor, 310.
licenses by, for use of street, 574.
revocable license by, for use of street and exercise of power to revoke, 581, 582.
must have legislative authority to grant franchise for street railroad, 163, 658.
creation of monopoly by, 667, 669.
grant by, to company and establishment of competing enterprise, 677.
power to grant exclusive franchise, 678.
MUNICIPAL REGULATION. See STREETS.
offensive trades and establishments, 42, 150, 158, 178, 179.
reasonableness of, 33, 63, 286.
establishment of fire limits, 33, 118, 141.
as to places for sale of liquors, 33.
license when business legal by state law, 38.
as to cemeteries, 125, 141, 529, 687.
of markets and slaughter houses, 129, 640, 643, 669.
in interest of health and safety, 140-142.
construction of municipal power of regulation, 141, 142, 158, n. 9.
regulation must tend to remove danger, 148, 687.
for public order and comfort, 156.
where matter is covered by state law, 157.
when affecting commerce, 159.
of streets and their use, 160-164.
of offensive establishments, 177-179, 529-531, 533.
of theaters and public performances, 251.
to prevent fraud, reasonableness of, 286.
by license fees, reasonableness of, 286, 292.
of water and other rates, 374, n.; 382, n.; 570, 571.
license to use streets for term of years, 574-577.
revocable licenses under, and municipal power to revoke, 581, 582.
MUNICIPAL TRADING,
and private industry, 23 and n., 666.
and monopoly, 667.
NATIONAL EXISTENCE,
governmental functions for maintainance of, 4.
NATIONALITY,
interests of, 479.
NAVIGABLE WATERS. See BRIDGES, RIPARIAN OWNERS, WHARFS, WATER AND WATERCOURSES.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

NAVIGABLE WATERS—continued.
freedom of navigation upon, 72.
where congress has not acted, 72.
local regulations of as to bridges, dams, 72, 80, 159.
encroachments upon, by piers and bridges, 163, 407.
obstruction on, may be forbidden, 170.
use of for warehouses, and business, regulation of, 170.
and riparian owners of submerged land, 403.
where non-navigable made navigable, compensation to riparian owner, 407, 409.
state power over fish in, 420.
federal power to order alterations in structures interfering with navigation, 549.
grant of exclusive right of navigation by state for improvement of river so as to be suitable for navigation, 661.
NAVIGATION. See NAVIGABLE WATERS, VESSELS, PILOTAGE.
coasting trade, 65.
federal regulations of, 66.
regulations for safety of, 117.
interest of riparian owner subject to easement of, 404.
structures interfering with, 549.
NEGROES,
free negroes before Fourteenth and Fifteenth Amendments, 691.
federal and state civil rights legislation, 693, 694.
equal service to, by public service companies, 695.
prohibition of marriage with white, 697.
separation from whites in schools, 698.
separate accommodations in public conveyances, 699.
NEIGHBORS' RIGHTS. See LAND.
easement of support, 424.
underground natural waters, 425.
malicious erections, 426.
private roads or drains across land of another, 427.
party walls and division fences, 443-444.
NEWS AGENCIES,
requirement of service by, to all wishing it, 387.
legislation against discrimination in charges by, 390.
NITROGLYCERINE. See EXPLOSIVES.
transportation of, within state control, 83.
NON-RESIDENTS.
rights of, under constitution, 708-712.
non-resident creditors of insolvent, 709.
running of statute of limitations against non-resident plaintiff, 709.
as trustees under deeds of trust, 709.
as executors or administrators, 709.
in what avocations they may be discriminated against, 710, 711.
exclusion from proprietary resources of state, 712.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

NOTICES,
of rates in emigrants' boarding houses, 41.
posting of rates by railroad company, 41, 73.
posting of prices of bread in Germany, 41.
where of prejudicial character, 49-51.
NOXIOUS WEEDS,
legislation against, 120.
owner of land may be required to destroy, 617.
NUISANCES. See OFFENSIVE TRADES AND ESTABLISHMENTS.
common law of and police power, 29, 616, 617.
classification of, in Illinois, 33.
municipal power to abate, 140, 141, 156.
obstruction of streets, a nuisance, 168, 169.
parades and processions as, 174.
offensive establishments, 176-179, 529-533, 565.
cemeteries as, 178, 530, 565.
keeping of gambling house a nuisance, 191, 193.
obscenity as, 235.
house of ill-fame, 245.
public cruelty to animals as, 248.
public entertainments as, 250.
private, whether subject to police power, 426.
*per se*, administrative action and judicial hearing, 521, 531, 602.
discussion of, in general, 520-524.
where property abated as nuisance, it must be destroyed, 528.
must either be result of human action or inaction, 616.
OATH,
required of members of associations, 481.
test oath uses, 544.
OBSCENITY,
in publications and performances, 236, 237.
in public amusements and theatrical performances, 251.
and scientific publications on offensive subjects, 238, 479.
obscene prints as nuisance *per se*, 520.
OBSTRUCTION,
of streets, 169.
OBJECTS OF GOVERNMENT,
three-fold division of, 4.
OCEAN,
police of ocean, 66.
OCCUPATIONS. See TRADES AND OCCUPATIONS.
OCCUPATION TAX. See LICENSE TAX.
OFFENSIVE ESTABLISHMENTS. See OFFENSIVE TRADES AND ESTABLISHMENTS.
OFFENSIVE TRADES AND ESTABLISHMENTS. See LAUNDRIES, LIVERY STABLES, SLAUGHTER HOUSES.
may be restricted as to location, 141.
regulation of, 176-179.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

OFFENSIVE TRADES AND ESTABLISHMENTS—continued.
confinement of, to specified districts of city, 179, 533.
municipal regulation and abatement as nuisances, 529-531, 565.
under foreign laws, 532.
licenses limited in time to, 580.
decision by the people as to whether location shall be within district, 645.
municipal power to prohibit future erection of, 687.
confining to a part of city as discrimination, 689.
OLEOMARGARINE,
requirement of coloring which renders unsalable, 49, 58, 62.
legislation, in general, 62, 282-284.
state power over use in federal institutions, 67.
a lawful article of commerce, 77, 84.
coloring of, to imitate butter, forbidden, 32, 62, 77, 282, 284, 731.
state prohibition of manufacture and sale of, 62, 134, 283, 541.
federal law regarding, 81, n.
attitude of federal courts toward legislation, 84, 137.
imported in original packages, 137, 284.
prohibition of, as sanitary measure, 145-146.
regulations to prevent fraud in sale of, 147, 282.
labelling of packages of, 282.
property rendered useless by prohibition of manufacture of, 541, 547.
prohibition of coloring, when butter is permitted to be colored, 731.
OPIUM,
possession of, made as misdemeanor, 455.
OPTICIANS,
requirement of license, 493.
OPTIONS AND FUTURES,
dealing in, prohibition of, 59, 201, 730.
legality of, 200.
legislation restraining, 201.
foreign legislation as to, 203.
ORIGINAL PACKAGE DOCTRINE,
as applied to liquors, and Wilson Act, 80, 230-233.
applied to foreign commerce, 81.
applied to interstate commerce, 81, 137.
statutory and judicial modifications of doctrine, 81, 85.
retail packages and, 81, 137, 295.
oleomargarine in, 137, 284.
OSTEOPATHY,
and regulation of practice of medicine, 132-4.
PACKAGE,
requirement of certain form and weight of, in sale of certain commodities, 75, 274, 276.
PARADES AND PROCESSIONS,
as nuisances, 174, 639.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

PARADES AND PROCESSIONS—continued.
discrimination in allowing use of streets for, 467, 480, 729.
uncontrolled discretion in police to allow or prohibit, 174, 643, 644, 729.
PARDON. See CONDITIONAL PARDON.
PARENT AND CHILD. See CHILDREN, MINORS.
right of parent and commitment of child to reform school, 260.
notice to parent of proceeding to commit child, 262.
compulsory education, 264.
truant schools, 265.
PARKS,
regulation of use of by public, 167, 171.
use of, for public meetings, 174, 481, 644.
regulation as to nature of buildings adjoining, 181, 514.
exclusive privilege to conduct business in public, 670.
PAROLE,
of convicted persons, 105, 106.
as means of police supervision, 107.
PARTICULAR BURDENS. See RAILROADS, ABUTTING OWNER, LAND, CIVIL DAMAGES ACTS.
person or property burdened, as responsible for danger, 612.
in general, 612-638.
PARTY WALLS,
legislation permitting building without consent of neighbor, 443.
PATENTS,
federal power, 65.
and state police control, 131.
history of rights of, 663.
federal legislation, 664.
exercise of privilege for public benefit, 665.
PATENT MEDICINES,
sale of, restricted to druggists, 149, 650.
PATENTED INVENTIONS,
use of required in municipal undertakings, question of monopoly, 673, n. 42.
PATROL,
of police officers, 86.
PAUPERS,
and idiots may be excluded by state, 83, 271.
excluded from immigration into United States, 271.
compulsory support of poor by relatives, 270.
compulsory removal of, to their places of settlement, 271.
restriction to place of settlement, 271, 491.
persons likely to become chargeable not paupers, 271, 491.
PAWNBROKERS,
reports of dealings, 43, 93.
limitation of rate of interest to be charged by, 303, 733.
incorporated pawners' societies, 303.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

PEACE,
surety to keep peace, by one who has threatened breach, 89.
bond required of one guilty of breach of, 109.
PEDDLERS. See ITINERANT MERCHANTS.
discriminatory tax upon, when selling articles from another state, 74.
state license of, does not exclude municipal regulation, 157.
may be forbidden to use streets, 173.
regulation of and peddling, 288, 289.
of imported articles, and freedom of commerce, 294, 295.
administrative discretion in licensing, 654.
non-resident peddlers and interstate commerce, 710.
exceptions in favor of those selling wares of their own production, 732.
exception in favor of those who have served in the army, 732.
PENALTIES,
as sanctions of police legislation, 26.
must be proportioned to offense, 26, 638.
PENAL LIABILITY,
of railroad, for accidents, 637.
of corporation in recovery of damages against, 637, 714, 727.
PENSIONS,
conditions attached to grant of, 24.
fund for teachers', by deductions from salaries, 436.
PERPETUITIES,
common law rule against, 367.
PERSONAL LIBERTY,
and limitation of hours of labor, 317.
and acts regulating payment of wages, 323.
discussion of, 446-452.
private consumption of liquors, 453-456.
freedom of social intercourse, 457.
PETITION,
freedom of, 480.
PHARMACISTS. See DRUGGISTS.
control of calling, as sanitary measure, 132.
PHOTOGRAPHING,
for identification of one not adjudged guilty of any offense, 103.
PHYSICIANS. See MEDICINE, VESTED RIGHTS.
compulsory association of, 56.
ex-convicts excluded from practice as, 110, 545, 546.
requirements for practice as, 133.
regulations applying to those already practicing as, 543.
may be required to report births and deaths, 613.
not required to render professional services, 650, n. 10.
election of medical examiners by, as creation of monopoly, 673.
legislation, fixing qualifications exempting those of a certain number of years' practice, 683, 684, 711.
qualifications cannot be so fixed as to oust those practicing as, 685.
requirement of residence in state where practicing, 711.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

PICKETING,
illegality of, 333, 335.
treated as obstruction of streets, 169.
PICTURES, OBSCENE,
prohibition of, 237.
PIERS. See WHARFS, PIERS AND DOCKS.
PILOTAGE,
regulation by state when congress has not acted, 72, 80, 117, 135.
compulsory employment of pilot, and ship's liability for damages because of his fault, 625.
PINKERTON MEN. See ARMED BODIES OF MEN.
PLACARDS,
carrying through streets, as obstruction, 169.
PLUMBING,
inspection of, by health authorities, 47, 128.
control of business of, 132.
examination of those engaging in business of, 684, 732.
discrimination in favor of corporations in licensing plumbers, 732.
POISONS,
report of sale, 43.
sale forbidden except upon responsible prescriptions, 93.
sale in labelled packages, 119.
POLICE,
use of term, 2.
POLICE OFFICERS,
duties of, 86, note.
POLICE PATROL,
as a means of preventing crime, 86.
POLICE POWER,
vagueness of term, 1, 3.
definition of, 3, 8.
limitation of the term, 8.
general divisions of the subject, 9, 10-14.
specific limitations upon, 18.
attitude of government toward the different interests covered by, 15.
general limitations upon, 19, 20.
methods of, in general, 22, 27-35.
cannot be contracted away, 24, 362, 556, 561-564, 575.
distinguished from other governmental powers, 25.
and criminal law, 26, 272, 635.
in a federal state, 64.
federal police legislation, 65-67.
taking of property under, in general, 511-517.
license limited in time not a surrender of, 580.
POLICE SUPERVISION,
of criminals after expiration of sentence, 110.



Digitized by Google

[REFERENCES ARE TO SECTIONS.]

POLICY. See JUDICIAL CONTROL.
judicial, opposed to legislative, 21.
constitutional overriding legislative, 297.
POLITICAL INTERESTS,
protected by bills of rights, 14.
attitude of government toward, 15.
POLITICAL PARTIES. See ASSOCIATION, RIGHT OF.
early prohibition of political association in England, 482.
regulation of, and primary election laws, 483.
POLYGAMY. See MARRIAGE.
federal legislation against, in territories, 67, 468.
POOLING,
by competing interstate railroads, forbidden, 341.
POOR RELIEF. See PAUPERS.
POSITIVE STANDARDS,
of purity in food, 29.
in building regulations, 29.
legal standards usually below customary standards, 30.
POSSE COMITATUS,
sheriff authorized to call out, when necessary, 614.
POSSESSION. See LAND.
temporary disturbance of, 518.
as evidence of wrongful act, 635.
POST OFFICE,
secrecy of letters, 48, 666, n.
lotteries and obscene literature, 65, 198, 236, 246.
as public monopoly, 666.
POSTING,
railroad rates, 41.
hours for meals, etc., in factories, 41.
PRESUMPTION,
of fault or guilt, 546, 628, 635, 636.
PRIMARY ELECTIONS,
regulation of, 483.
PRIMARY SOCIAL INTERESTS,
in general, 10.
attitude of government towards, 15.
PRIVATE CONDUCT, LIBERTY OF. See PERSONAL LIABILITY.
PRIVATE INTEREST,
whether it justifies exercise of police power, 298, 426, 427.
PRIZE FIGHTS,
prohibition of, 248.
PRIZES,
in lotteries or for merit, 198.
PROCESSIONS. See PARADES.
PROFESSIONS. See PHYSICIANS, and LAW, PRACTICE OF.
retroactive legislation as to qualifications for practice of, 544, 545.
expense of examination for admission to, borne by applicants, 622.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

PROFESSIONS—continued.
qualifications for practice of, 646.
requirement of qualifications usually prospective, 646.
discrimination in tests of fitness, 647.
practice of law, 648.
privileges accompanying professional license, 650.
requirement of good character as qualification to engage in practice of, 651.
legislation fixing qualifications for admission to, exempting practitioners of certain number of years, 683, 684.
qualification could not be fixed which would oust existing practitioners, 685.
restrictions upon women, 702.
restrictions upon aliens, 706.
PROHIBITION,
restraint distinguished from, 28.
in general, 58.
by regulation, 58.
of useful businesses, 59, 62.
what may be prohibited, 59.
federal power in matter of commerce, 65.
state power in regard to manufacture of liquor, 76.
of manufacture and sale of oleomargarine, 62, 134, 283.
within city, of establishments likely to become nuisances, 141.
and regulation in liquor traffic, 205.
of liquor traffic, 213-217.
state prohibition, 214, 215.
local prohibition and local option, 216, 217.
principles governing regulation and prohibition in preventing fraud, 285.
private consumption of liquors, whether it may be prohibited, 454, 455.
property rendered useless by, 538-541.
of future establishments, as creating monopoly in existing, 686.
harmless and useful articles cannot be forbidden, 285.
PROPERTY. See LAND, VESTED RIGHTS.
protection of, under Fourteenth Amendment, 84, 445.
taking of, by unreasonable regulation, 178, 179.
regulation, without compensation, 180, 181.
power to alter corporate charters cannot be used to destroy, 362, 363.
freedom of, from restrictions upon alienation, 365-369.
devices for tying up, 366.
perpetuities, rule against, 367.
legislative control of devolution of, after death, 367.
mortmain, statute of, and American legislation, 368, 369, 592.
perpetual rents, 370, 589.
long leases, 371.
taking, by unreasonable regulation of charges, 380.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

PROPERTY—continued.
qualified property, in general, 402.
qualified property of riparian owner, deprivation of without compensation, 404-409.
flooding property, as taking, 409, 410.
flooding by mill dams, or other means, and compensation for, 410-413.
in streams and waters needed for irrigation, must be used for benefit of public, 416, 417.
fish and game as, 418-420.
restrictions upon, in interest of adjacent property, 424-427.
dogs as, 421.
gas and natural wealth, 422.
power of majority of owners to bind minority in creation of drainage district, 127, 441, 442.
party walls and division fences, 443, 444.
holding of, by religious society, 369, 466.
taking of, for public use, and compensation, 504-506, 602.
injury to, as taking, and compensation, 507-510.
consequential damages to, 509, 510.
taking of, under police power, in general, 511-513.
destruction of, as nuisance, 520-522, 531.
unlawfully used, and forfeiture, 525-528, 627.
destruction of, to prevent spread of fire, 534.
destruction of, for military purposes, 535, 536.
rendered useless by change of legislative policy, 538-541.
practice of profession as, 542, 544, 545, 683-685.
confiscation of, by requirement of unreasonable improvements, 548, 549, 618.
confiscation by unreasonable regulation of charges, 550.
withdrawing privilege of limited liability from corporation as taking of property, 567.
grant of use of public property if acted upon is property right, 576.
grant of use of public property a property right when rights have become vested, 578, 579.
revocable license to use streets, and rights acquired thereunder, 582.
abolition of feudal tenures, 588.
perpetual covenants, or restrictions upon use of land, 590.
entails, 591.
secularization of church property, and mortmain, 592-596.
trusts for charitable uses, 597-601.
summary of principles regarding property under police power, 602.
business established under license for reasonable duration as, 580, 602, 681.
special burdens upon, in public interest, as taking, 612.
mechanics' liens upon, 626, n.
right of alien to hold, 706, 707.
PROPORTIONATENESS,
of means to end, judicial control of, 63.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

PROPORTIONATENESS—continued.
in municipal ordinances, measure must tend to remove danger, 128, 142, 148, 736-738.
in health and safety legislation, 149, 150.
PROPRIETARY CAPACITY OF STATE. See CORPORATE POWERS OF STATE.
PROPRIETARY MEDICINES,
sale of, cannot be given to druggists exclusively, 149, 650.
PROSTITUTES. See ILL FAME, HOUSES OF, PROSTITUTION.
commitment of, 98, 99.
treatment of, as vagrants, 97, 98, 244.
state and local power over, 157.
confinement of, to specified districts of city, 179, 244, 245, 689.
registration and inspection of, in France, 243.
prohibition and regulation in United States, 244.
advertising by, 246.
persons other than relatives cannot be forbidden to speak to, on street, 457.
PROSTITUTION. See PROSTITUTES.
ill fame, houses of, basis of regulation of, 242.
regulation or prohibition of, 243-246.
as a crime, 245, 722.
practices in aid of, 246.
PUBLICATIONS. See SPEECH AND PRESS, FREEDOM OF.
obscene and criminal, 236, 237, 248.
libelous, 472-475.
inciting to crime, 477, 478.
attacking government, 475, 478.
PUBLIC BUILDINGS,
regulation of use of, 171.
PUBLICITY,
regulation to secure, 35.
PUBLIC FUNDS,
expenditure in promotion of art and science, 23.
PUBLIC HOUSE TRUSTS. See GOTENBURG SYSTEM.
PUBLIC INTEREST, BUSINESS AFFECTED WITH. See RATES AND CHARGES, RAILROADS AND COMMON CARRIERS, BANKING, INSURANCE, GRAIN ELEVATORS.
statement of doctrine, 372.
forms of, and methods of control, 373.
regulation of rates and charges of, 374-385, 554.
reasonableness of rates determined, 379-385.
requirement of equal service in, 386-394.
special requirements in interest of public convenience, 395-398.
regulation of banking and insurance, 399-401.
breach of labor contract in, 452.
extension of common law liability in, 621.
requirement of equal service to whites and negroes, 693-695, 699.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

PUBLIC MEETINGS. See ASSEMBLY RIGHT OF.
police control of, 174, 468, 480.
PUBLIC PLACES. See STREETS.
PUBLIC MONOPOLY. See MONOPOLY.
of liquor traffic, 218, 219.
post office, 666.
municipal monopoly, 667.
PUBLIC MORALS,
in general, 187.
PUBLIC PURPOSE,
in taxation, 23.
exercise of eminent domain, 181.
as justifying mill dam privileges to manufacturing establishments, 412.
as justifying flooding of land in other ways, 413.
PUBLIC SCHOOLS,
reading of Bible in and religious liberty, 463.
non-attendance of children on catholic holidays, 469.
separation of races in, 698, 700.
right to attend, conditioned on vaccination, 447.
PUBLIC WELFARE,
restraint of individual action under police power to secure, 8.
PURSUIT OF LIVELIHOOD,
principle of freedom of, and its limitations, 492-497.
QUALIFIED PROPERTY. See FISH AND GAME, DOGS, GAS, NAVIGABLE WATERS, RIPARIAN OWNERS, WATER AND WATER COURSES.
QUARANTINE. See CONTAGIOUS AND EPIDEMIC DISEASES.
state power, 71, 80, 136, 488.
by state against infected animals, 77, 82, 129, 136, 138.
discrimination by state in, 82, 138-139.
state and federal, 123.
state quarantine where directly affecting commerce, 138, 139.
detention of person by, 446.
vessels examined, required to pay for examination, 622.
state quarantine and immigration, 705.
RACE. See NEGROES, CHINESE.
influence upon equality, 603.
constitutional protection of negroes, 692.
federal civil rights legislation, 693.
state civil rights legislation, 694.
compulsory separation of blacks and whites, 696.
separation of races in schools, 698.
separation of, in public conveyances, 699.
separation of races, and equality, 700.
RACE COURSES. See HORSE RACES.
betting on, 194, 195, 730.
discrimination in favor of existing, by exemption from new regulations, 687.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

RAILROAD CROSSINGS. See GRADE CROSSINGS.
precautions required at, 116.
requirements at, reasonableness of, 612.
railroad required to keep in safe condition, 631.
grade crossings, abolition of, 548, 556, 631.
RAILROADS AND COMMON CARRIERS. See RATES AND CHARGES, PUBLIC INTEREST, BUSINESS AFFECTED WITH.
valid state regulation as to companies engaged in interstate commerce, 73, 80.
requirement to stop at all stations or at county seats, 73, 397.
freight trains may be forbidden to run on Sunday, 73.
state regulation of rates, 73, 376, 571.
state laws requiring safety appliances, 80, 723.
regulation of railroad crossings, 116, 612.
regulation as to qualifications of employes, 73, 116.
liability for injury to passengers or damage to property, 79, 628-630.
state safety regulation affecting interstate trains, 135.
ordinance requiring flagmen at every crossing, 150.
sale of tickets by unauthorized parties, 60, 61, 291, 298, 673.
hours of labor of employes operating trains, 316.
abandonment of trains by employees in case of strike, 333, 452.
pooling, by interstate railroads, 341.
reasonableness of rates, 379-385.
discriminations in rates by, as to long and short hauls, and size of shipments, 390-392.
classification of traffic for fixing of rates, 393.
mileage tickets, 393, 397.
sleeping car accommodations a matter of special contract, 395.
establishment, maintenance, or discontinuance of depots, 395.
equal access in depot to all owners of cabs, soliciting passengers, 396.
requirement of track connections and connecting business, 397.
construction of railroad dependent upon administrative determination as to its necessity, 401, 659.
legislation as to organization and capitalization of railroad companies, 400, 401.
grade crossings, 548, 556, 631.
determination of rates by state and interstate traffic, 551.
equal protection of laws and unreasonable regulation of rates of, 611.
may be required to bear expense of railroads commissions, 622.
legislation requiring fencing of tracks, 629, 637.
liability of, for fires caused by sparks from locomotive, 630, 727.
liability for injury to passengers, 632.
absolute liability for injury, 633, 634.
liability for bringing diseased cattle into state, 634.
penal liability for injury, when not caused by negligence, 637.
discrimination against, in recovery of claims, 637, 714, 727, 735.
discrimination by, based on local conditions, 690.
requirement of separate coaches for blacks and white, 73, 695, 699.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

RAILROADS AND COMMON CARRIERS—continued.
interstate, doing business in state where not incorporated, 719.
distinction between long and short hauls in regulations to prevent accidents, 727.
RATES AND CHARGES. See RAILROADS, PUBLIC INTEREST, BUSINESS AFFECTED WITH.
public notice as to railroad rates, 41.
legislative regulation must be reasonable, 63, 550.
state regulation of, and interstate traffic, 73, 79, 551.
legislative determination of rates of interest, 302-304, 733.
charter right to fix, and state regulation, 363.
English and American legislation regulating, in business affected with public interest, 374, 375.
where business a monopoly, 376, 377.
reasonableness, legislative or judicial determination of, 379-386.
where business not monopolistic, 378.
fixing of, a legislative function, 384, 385.
taking of property by unreasonable regulation of, 380.
difficulty of determining what charge is reasonable, 384.
judicial regulation of, 385.
conclusive determination by administrative boards, 386.
discrimination in, by railroad companies, 390-392.
requirement of sale of railroad mileage tickets at certain price, 393.
regulation of, for services incidental to business, 394.
bases for determining reasonableness of, 552-554.
legislation changing, and existing contracts, 555.
determination of, in corporate charter, as contracts, 570-572.
deprivation of equal protection of laws and unreasonable regulation of, 611.
REASONABLENESS. See JUDICIAL CONTROL.
principle of, 63.
in municipal ordinances, 33, 142, 150, 158, 286, 292.
in legislative measures, 150, 151, 158.
of regulation of offensive establishments, 177, 178.
in restrictive legislation regarding children, 259.
in limitation of hours of labor, 313, 317.
in regulation of payment of wages, 321.
legislative and judicial control as to charges by business affected with public interest, 379-385.
attitude of federal court as to, in state regulation of charges, 382.
of improvements required to be made to property, 549, 618.
of rates fixed by legislature, 550.
bases for determining, as to rates, 552-554.
of rates of corporations, 572.
REBATES,
by manufacturer to one handling his goods only, 346.
RECOGNIZANCE,
to keep the peace, 89.

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[REFERENCES ARE TO SECTIONS.]

REFORM SCHOOL OR INSTITUTION. See PARENT AND CHILD.
commitment of children to, 260-262.
judicial control of discharge from, 263.
REGULATION,
distinguished from restraint and prohibition, 28.
in general, 35-40.
to secure publicity, 35.
includes partial prohibition, 58.
of use of streets, 165-169, 172-174.
of places of public resort and meetings, 175.
of sale of liquors, in general, 206-212.
principles governing prohibition and, 285.
prejudicial regulation of property and compensation, 512-517.
REGRATING,
English legislation against, 338.
REGISTRATION,
as means of control, 42.
of strangers in United States and Europe, 45.
objections to registration, 46, note 12.
of sales of weapons and poisons, 43, 93.
RELIGIOUS MEETINGS,
protection of, 175, 464.
RELIGION. See MORTMAIN, PUBLIC SCHOOLS.
freedom of, and state control of education, 266.
holdings of property by religious societies, 369, 466.
constitutional guaranty of freedom of, 458.
sectarian legislation, and state support of church, 459, 460.
religious disqualifications, 461.
state recognition of, 462.
reading of Bible in public schools and freedom of, 463.
protection of religious meetings, 464.
blasphemy, 465.
organization of religious societies, 466.
limits of religious freedom, 467, 468.
faith cure, and compulsory medical treatment, 144n., 447, 468.
conflict of civic and religious duties, 469.
REMEDY. See PROPORTIONATENESS OF MEANS TO END.
RENDERING ESTABLISHMENTS. See OFFENSIVE TRADES AND ESTABLISHMENTS.
RENTS,
prohibition of perpetual, 370, 371.
commutation of existing perpetual rents, 589.
REPORTS. See INCRIMINATING REPORTS.
in general, 42.
as applied to business, 43, 93.
requirement of license and constiutional protection against self-crimination, 55.

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[REFERENCES ARE TO SECTIONS.]

REPUTATION,
bad reputation not a punishable offense, 94-96.
RESTRAINT OF TRADE. See COMBINATIONS IN RESTRAINT OF TRADE.
RESTRAINT,
in general, 22.
defined and discussed, 28-30.
whether constitutional where criminality in each case left to determination of jury, 28.
RETROACTIVE LEGISLATION,
and property acquired under previous legislation, 538, 540, 545, 683-687.
regulation of professions and, 542, 544, 545, 683-685.
affecting contracts, 555.
protecting debtors, 557.
federal laws regarding legal tender, 558.
liquor legislation affecting existing conditions, 683.
establishment of fire limits, not retroactive, 685.
RIOTS AND UNLAWFUL ASSEMBLIES,
powers of summary repression, 88.
killing in suppression of, 445, n. 1.
officer may require assistance of anyone at hand in repressing, 614.
destruction of liquor in apprehension of, 537.
RIPARIAN OWNER. See NAVIGABLE WATERS.
compulsory association of owners to prevent inundation, 114, 442, 619.
duty of owner to build or preserve embankments, 114, 409, 619.
title of owner, extent of, 403.
owner's easement of access to navigable stream, 408.
owner's easement subordinate to public right of navigation, 408, 509.
may be forbidden to weaken his land to injury of other property, 619.
RIVERS. See WATERS AND WATER COURSES, NAVIGABLE WATERS.
SAFETY,
growth of safety legislation, 111.
principal subjects of legislation, 113-121.
legislation for, and Fourteenth Amendment, 134.
legislation affecting commerce, 135-139.
local powers, 140-142.
questions involved in safety legislation, 143-155.
labor legislation for, 310.
discrimination in safety legislation, 727.
SAILORS. See SEAMEN.
SALOONS. See LIQUORS.
regulations as to internal arrangements, 52.
women as waitresses, or frequenting, 244, 703.
wine rooms, 244.
decision by people of locality concerned as to whether one shall be established, 645.
regulations applying to existing, 683.
SALTPETRE,
prerogative to dig for, 519, 536.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

SCALPERS, TICKET. See TICKET BROKERAGE.
business prohibited, 61, 291.
SCHOOLS. See PUBLIC SCHOOLS, EDUCATION.
SCIENCE, FREEDOM OF.
maintenance of, necessary, 15.
and legislation regarding practice of medicine, 152-154
and offensive publications, 237-239, 479.
SEAMEN,
federal control over contracts of, 329, 451.
tax upon, for support of Marine Hospital, 434.
SECOND HAND ARTICLES,
regulation of sale of, 93, 130.
SECRET SOCIETIES,
legislation regarding, 481, 482.
SECURITY OF GOOD BEHAVIOR,
in case of threatened crime, 89.
of one guilty of breach of peace, 109.
SECURITY OF THE PEACE,
in case of threatened breach, 89.
SECURITY HOLDING CORPORATION,
whether form of monopoly, 351.
SEDITION AND SEDITIOUS LIBEL. See LIBEL.
SERVANTS,
enticing from masters, illegality of, 333.
indentured servants in American colonies, 450 n. 18.
SERVITUDES. See EASEMENTS.
SEXUAL VICE,
in general, 234.
SHEEP GRAZING,
forbidden within two miles of dwellings, 171.
SHERMAN ANTI-TRUST ACT,
forbidding combinations in restraint of trade and commerce, 341.
interpretation of, 354, 355.
SHIPPING. See VESSELS AND NAVIGATION.
SIC UTERE TUO UT ALIENUM NON LAEDAS,
principle and its application, 8, 406, 439.
SIDETRACKS,
of railroads, for use of factories, &c., 162, n; 427 n. 35.
SIDEWALKS,
obstruction of, 169.
removal of snow and ice from, by abutting owner, 620.
building and keeping in repair by abutting owner, 620 and n.
SIGNS AND STAMPS,
to indicate ingredients of articles to be sold, 41.
SLAUGHTER HOUSES. See OFFENSIVE TRADES AND ESTABLISHMENTS.
municipal power over, 129, 177.
municipal power in location of within city, 141, 179, 640.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

SLAUGHTER HOUSES—continued.
prohibition of, within city, 565, 640.
slaughter house cases, 609, 669.
license to erect dependent upon administrative discretion, 643.
municipal monopoly of, 667.
grant of monopoly to private corporation, as means of police control, 669, 671.
revocability of monopoly, 679, 680.
prohibition of future erection of, as discrimination in favor of existing establishments, 687.
SLAVERY,
abolition of, question of compensation, 584-586.
SMOKE ORDINANCES,
reasonableness of, 177.
SNOW,
removal of from roofs of houses, 616.
removal of from sidewalks, 620.
SOCIAL CONTROL,
right of association for, 484.
SOLICITING,
orders by personal calls, 288.
SPECIE CONTRACTS. See CONTRACTS.
enforcement of, 559.
SPECULATION. See OPTIONS AND FUTURES, GAMBLING.
prohibition of, how far constitutional, 59.
options and futures, 200, 201.
legitimate, 199, 202.
foreign legislation concerning, 203.
SPEECH AND PRESS, FREEDOM OF. See PUBLICATIONS.
development of, and constitutional guaranty, 471.
and law of libel, 472-475.
and attacks upon government, 477, 478 and n.
does not extend to incitement to crime, 476, 477.
and scientific publications, 479.
SPITTING,
in public conveyances, whether within jurisdiction of board of health, 147.
SPENDTHRIFTS,
may be deprived of management of their property, 431.
STAGE CENSORSHIP,
European and American regulations, 251.
SPORTS,
dangerous sports, 120.
brutal sports, 248.
STAR CHAMBER,
court of, referred to, 471, 481.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

STATISTICS AND STATISTICAL INFORMATION,
requirement of, 44.
ministers required to report marriages, physicians required to report births and deaths, 613.
STATUTORY OFFENSES,
knowledge presumed, and wrongful intent dispensed with, 635, 636.
STEAM ENGINE. See ENGINEER.
license required of engineers, 493.
revocation of permit to keep, by administrative officer, 643.
boiler inspection, exemption of locomotives, 727.
STOCK EXCHANGES,
legitimacy of business in, 59, 202.
foreign regulation of, 203.
STOCK YARDS,
as places affected with public interest, 390.
STORE ORDER ACTS. See TRUCK SYSTEM.
STREET RAILWAY. See RATES AND CHARGES, STREETS.
restriction of number of passengers to a car, 175.
may be required to keep part of street occupied by it clean and free of dust, 612, 620.
cannot be forced to carry policemen without pay, 613.
municipal power to grant franchise to, 163, 658.
a monopoly of necessity, 658.
franchise under special legislation, 660.
permission to operate does not exclude similar grant to others, 675.
exclusive track rights granted by city, strictly construed, 678.
STREETS,
use of, by private vehicles a right, 38, 168.
municipal power over, 160-164.
control of, when fee remains in adjoining owner, 160.
encroachments on, 161-163.
common use of, right to, 165, 167-169.
right of city to vacate street, 166.
freedom from obstruction, 168, 169.
preservation of order on, 169.
special uses of, by abutters, 172.
use of, for business purposes, license for, 173.
parades, processions and meetings upon, 174, 468, 480, 643, 644, 729.
names, affixed to private houses, 519.
license to use, for term of years as contract, 574, 576.
exclusive grant of use of, 577.
revocable license for use of, 582.
removal of snow from sidewalks by abutting owner, 620.
railroad required to improve crossing for new street, 631.
STRIKES,
legality of, 332.
illegal acts accompanying, 333, 334, 336.
constitutional power over, 335.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

STRIKES—continued.
may they be forbidden because source of disorder? 336, 337.
and trusts, 337.
and interference with interstate trains, 341, 356.
SUBCONTRACTOR'S LIENS,
how far owner can be made liable, 626 n.
SUMPTUARY LAWS,
history of, 430.
SUNDAY,
freight trains may be forbidden to run on, 73, 80, 159
state regulations for observance of, 184-186.
laws and religious liberty, 470.
prohibition of work by barbers on, 735.
SUSPECTS OR SUSPICIOUS CHARACTERS,
duties of police officers regarding, 86.
treated as criminals, 95.
detention of, on charge of vagrancy, 100.
photographing and measuring, 103.
SUSPENSION OF SENTENCE,
of convicted persons, as means of control, 108.
SUSPICION. See SUSPECTS.
as evidence of crime, 95.
cannot be basis of punishment without some specific offense, 95, 96.
SUPPRESSION. See PROHIBITION.
TARIFFS, PROTECTIVE,
against foreign competition, 12, 428.
and commerce clause, 65.
TAXATION,
of commerce, 70, 73, 74, 295.
exemption from, as contract, 363, 561, 568.
exemption of certain industries from, forbidden, 428.
exemption of property of religious societies from, 464.
TAXING POWER. See LICENSE OR OCCUPATION TAX.
for revenue purposes, 4.
public purpose, 23.
as power of restraint or encouragement, 25.
and the commerce clause, 70.
TELEGRAPH AND TELEPHONE,
regulation of rates, 376.
legislation against discrimination in rates, 390.
arrangements between companies for transmission of messages, must be matter of special contract, 395.
other regulations, 398.
military telegraph lines, control of, in time of war, 471, note.
telegraph companies authorized to establish lines along post roads, 719.
TENEMENT HOUSES,
fire escapes in, 34.
requirement that goods be marked "tenement made," 51.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

TENEMENT HOUSES—continued.
regulation of, in interest of health, 128, 542.
unwholesome businesses in, 151.
destruction of, as sanitary measure, 520.
regulation of, and retroactive legislation, 538.
TERRITORIAL SOVEREIGNTY,
as sustaining power to exclude foreign-built and foreign-owned vessels, 65.
TERRITORIES,
federal police power in, 67.
THEATRES,
requirements in, for safety and comfort, 175, 251.
control over by censorship, 251.
American theatre regulations, 251.
employment of children as actors may be forbidden, 259.
THREATS,
to commit crime, security of peace, 89.
in case of strikes, 333, 334, 336.
TICKET BROKERAGE,
prohibition of, 61, 291.
regulation of, 291.
regulation of, and interstate commerce, 295.
law confining business to railroad appointees, invalid, 673.
TOLERATION,
religious, 459, 465.
political, 475, and see libels, and anarchism.
TORRENS REGISTRATION LAW,
constitutionality of, 437.
TRADES AND OCCUPATIONS. See PROFESSIONS, ARCHITECTS, DRUGGISTS, AUCTION SALES, BARBERS, PEDDLERS, PLUMBERS.
legislation giving associations power of admitting to, 56, 647.
legislation controlling certain, in interests of health, 130, 131.
regulation of, 492-494, 639.
state certification as means of control, 495.
qualifications to pursue, and rules framed by administrative body, 649.
requirement of good character in order to engage in certain, 651.
restriction to citizens, 706.
TRADE MARKS,
common law protection of, 664.
TRADE SECRETS,
revealing of, as form of unfair competition, 288 n.
TRADE UNIONS. See CONSPIRACY, LAW OF; STRIKES.
coercion by employer against membership in, 326, 735.
and combinations of employers, 326.
earlier legislation and decisions, 330, 331.
strikes, 332, 335, 336.
illegal methods in strikes, 333, 334.

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[REFERENCES ARE TO SECTIONS.]

TRADE UNIONS—continued.
influencing other employes to join, and coercion, 333, **334.**
and trusts, 337, 356.
TRADING STAMPS,
legislation forbidding use of, 60, 293.
whether of nature of lottery, 198, 293.
TRAMPS,
defined so as to include males only, 702.
TRESPASS,
entry for public purposes not, 518.
on wild land allowed, under what circumstances, **518.**
TRUCK SYSTEM. See WAGES.
legislation to force payment of wages in cash, 319-321.
discrimination against certain businesses in legislation against, 320, 321, 735.
TRUSTS. See COMBINATIONS IN RESTRAINT OF TRADE, MONOPOLY, CONSPIRACY, LAW OF.
and labor organizations, discrimination between, in legislation, 337, 356.
state legislation against, 339, 340.
federal legislation, 341.
state and federal power as to corporations doing interstate business, 342.
common law rules and their application against, 343-353.
trust organization, 350.
present organization of, 351, 352.
interpretation of anti-trust acts, 354.
constitutionality of anti-trust legislation, 355.
laws against, and exception of agricultural products, 356, **734.**
TRUSTS, ELEEMOSYNARY,
Dartmouth College doctrine, 597.
where use to which property devoted is impracticable, or contrary to public policy, 598, 600, 602.
reserved power over charter of corporation, cannot destroy purpose for which created, if legal, 599, 602.
English legislation as to trusts which have become useless or harmful, 601.
Prussian laws as to trusts, 601 n.
TUNNELS,
right to maintain granted subject to requirements of navigation, **576.**
UNFAIR COMPETITION,
what is, 288, note 11.
UNION LABOR,
required for work under city contracts, **673, n. 43.**
UNLAWFUL ASSEMBLY. See ASSEMBLY.
UNSIGHTLINESS,
police regulation of, 180-183.
of advertisements, 182.

Digitized by Google

[REFERENCES ARE TO SECTIONS.]

UNWHOLESOME OCCUPATIONS,
in tenement houses, 128, 151.
as nuisances, 176.
confinement to specified districts, 179.
USEFUL BUSINESS,
cannot be entirely forbidden, 59, 62, 401.
USURY. See INTEREST.
history of legislation, 302.
American legislation, 303.
constitutionality of legislation, 304.
exceptions in laws, in favor of pawnbrokers, and building and loan associations, 733.
VACATION,
of streets, 166.
VACCINATION,
compulsory vaccination, 144 n., 447.
VAGRANCY,
discussed, 97-100.
definition of, 97.
as criminal offense, 99.
detention for, as means of dealing with suspects, 100.
prostitution as, 97, 98, 244.
living upon earnings of prostitutes as, 246.
punishment of vagrant for leaving county of residence, 491.
VAULT,
under sidewalk not a nuisance *per se*, 162.
VEHICLES,
license of, as a police measure, 168.
stopping of, and obstruction, 169.
VESSELS,
registry, 65.
built abroad and owned by non residents, 65.
regulations to prevent collisions at sea, 117.
forfeiture of, when engaged in unlawful oyster fishing, 525, 527.
federal license of officers, and liability of owners of, for their actions, 624, 625.
VESTED RIGHTS. See PROPERTY.
property rendered useless by change of legislative policy, 539-541.
repeal or change of charter under which acquired, 362, 363.
in a profession, or occupation, and retroactive legislation, 543-547, 683-685.
licenses to conduct lotteries, 563.
license to sell liquors, 564.
license to use public streets or property, 578, 579.
economic or social reforms and, in general, 583-601.
business established under license of reasonable duration as, 580, 602, 681.



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[REFERENCES ARE TO SECTIONS.]

VINEGAR,
coloring of distilled, forbidden, 32.
VIOLENCE. See STRIKES, ANARCHISM.
VIVISECTION,
regulation of, 249, 479.
VOTING,
conditions annexed to, 14.
laborers given time to vote, 314.
coercion by employer to prevent or influence vote of employee, 325.
by women, 701.
WAGES. See TRUCK SYSTEM, STRIKES, CONSPIRACY, LAW OF.
rate of, 318.
payment of, at stated intervals, 319-321, 715, 735.
accrued wages, of discharged laborer, to be paid without abatement, 319 n.
truck acts, 319-321, 502, 735.
legislation to force payment in cash, 319-321.
combinations to raise, early law regarding, 330, 331.
recovery of attorney's fee in action for, 319 n., 714, 735.
assignment of future, forbidden, 319 n.
garnishment of, 301 n.
WAR,
destruction and appropriation in time of, 536, 537.
censorship in time of, 471.
WAREHOUSING. See GRAIN ELEVATORS, PUBLIC INTEREST, BUSINESS AFFECTED WITH.
requirement of service without discrimination, 390.
regulation of, 297.
warehousemen not allowed to store their own grain, 297.
rates charged in, regulation of, 376.
requirement of service without discrimination, 390.
monopoly to licensed warehousemen, unconstitutional, 397 n.
WARRANT,
requirement of, for arrest, 87.
WASTE,
of natural gas, 422.
of water in artesian wells, 425.
WATER AND WATER COURSES. See NAVIGABLE WATERS, RIPARIAN OWNERS.
riparian rights, 403-409.
mill dam privileges and flooding of land by dams, 410-412.
flooding land by other uses of, 413.
control of use, for mining and irrigation, 414-417.
cutting of ice from public waters, 417 n.
natural water, and neighbor's rights, 425.
WATER RATES,
regulation of, 376, 571.
determination of, as contract with company, 571.

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[REFERENCES ARE TO SECTIONS.]

WATER WORKS. See WATER RATES.
charter to company to erect, and competing municipal establishment, 677, 678.
exclusive monopoly to, a contract, 679, 680.
WEAPONS. See ARMS.
report or register of sales, by dealer in, 43, 93.
constitutional provisions as to carrying, 90.
WEEKLY PAYMENT ACTS. See WAGES.
WEIGHTS AND MEASURES,
federal power, 65, 273.
federal inaction and state regulation, 273-275.
official inspection of, 274.
WHARFS, PIERS AND DOCKS. See NAVIGABLE WATERS.
state and local power over, 80.
encroachments upon navigable waters by, 163.
regulation of landing vessels at, 175.
regulation of rates of wharfage, 373.
when buildt by riparian owner, he cannot be deprived of them without compensation, 406.
right of riparian owner to erect, 408.
WINES,
used for sacramental purposes, 224.
exception in favor of native wines, in state prohibition, 214, 215.
WOMEN. See WOMEN AND CHILDREN.
limitation of hours of labor, 311-314.
prohibition of labor in mines, 258, 311.
civil and political rights of, 701.
right to practice law or engage in other employment, 702.
employment of, in liquor business, 703.

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[REFERENCES ARE TO SECTIONS.]

STRIKES—continued.
may they be forbidden because source of disorder? 336, 337.
and trusts, 337.
and interference with interstate trains, 341, 356.
SUBCONTRACTOR'S LIENS,
how far owner can be made liable, 626 n.
SUMPTUARY LAWS,
history of, 430.
SUNDAY,
freight trains may be forbidden to run on, 73, 80, 159
state regulations for observance of, 184-186.
laws and religious liberty, 470.
prohibition of work by barbers on, 735.
SUSPECTS OR SUSPICIOUS CHARACTERS,
duties of police officers regarding, 86.
treated as criminals, 95.
detention of, on charge of vagrancy, 100.
photographing and measuring, 103.
SUSPENSION OF SENTENCE,
of convicted persons, as means of control, 108.
SUSPICION. See SUSPECTS.
as evidence of crime, 95.
cannot be basis of punishment without some specific offense, 95, 96.
SUPPRESSION. See PROHIBITION.
TARIFFS, PROTECTIVE,
against foreign competition, 12, 428.
and commerce clause, 65.
TAXATION,
of commerce, 70, 73, 74, 295.
exemption from, as contract, 363, 561, 568.
exemption of certain industries from, forbidden, 428.
exemption of property of religious societies from, 464.
TAXING POWER. See LICENSE OR OCCUPATION TAX.
for revenue purposes, 4.
public purpose, 23.
as power of restraint or encouragement, 25.
and the commerce clause, 70.
TELEGRAPH AND TELEPHONE,
regulation of rates, 376.
legislation against discrimination in rates, 390.
arrangements between companies for transmission of messages, must be matter of special contract, 395.
other regulations, 398.
military telegraph lines, control of, in time of war, 471, note.
telegraph companies authorized to establish lines along post roads, 719.
TENEMENT HOUSES,
fire escapes in, 34.
requirement that goods be marked "tenement made," 51.

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[REFERENCES ARE TO SECTIONS.]

TENEMENT HOUSES—continued.
regulation of, in interest of health, 128, 542.
unwholesome businesses in, 151.
destruction of, as sanitary measure, 520.
regulation of, and retroactive legislation, 538.
TERRITORIAL SOVEREIGNTY,
as sustaining power to exclude foreign-built and foreign-owned vessels, 65.
TERRITORIES,
federal police power in, 67.
THEATRES,
requirements in, for safety and comfort, 175, 251.
control over by censorship, 251.
American theatre regulations, 251.
employment of children as actors may be forbidden, 259.
THREATS,
to commit crime, security of peace, 89.
in case of strikes, 333, 334, 336.
TICKET BROKERAGE,
prohibition of, 61, 291.
regulation of, 291.
regulation of, and interstate commerce, 295.
law confining business to railroad appointees, invalid, 673.
TOLERATION,
religious, 459, 465.
political, 475, and see libels, and anarchism.
TORRENS REGISTRATION LAW,
constitutionality of, 437.
TRADES AND OCCUPATIONS. See PROFESSIONS, ARCHITECTS, DRUGGISTS, AUCTION SALES, BARBERS, PEDDLERS, PLUMBERS.
legislation giving associations power of admitting to, 56, 647.
legislation controlling certain, in interests of health, 130, 131.
regulation of, 492-494, 639.
state certification as means of control, 495.
qualifications to pursue, and rules framed by administrative body, 649.
requirement of good character in order to engage in certain, 651.
restriction to citizens, 706.
TRADE MARKS,
common law protection of, 664.
TRADE SECRETS,
revealing of, as form of unfair competition, 288 n.
TRADE UNIONS. See CONSPIRACY, LAW OF; STRIKES.
coercion by employer against membership in, 326, 735.
and combinations of employers, 326.
earlier legislation and decisions, 330, 331.
strikes, 332, 335, 336.
illegal methods in strikes, 333, 334.

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[REFERENCES ARE TO SECTIONS.]

TRADE UNIONS—continued.
influencing other employes to join, and coercion, 333, **334.**
and trusts, 337, 356.
TRADING STAMPS,
legislation forbidding use of, 60, 293.
whether of nature of lottery, 198, 293.
TRAMPS,
defined so as to include males only, 702.
TRESPASS,
entry for public purposes not, 518.
on wild land allowed, under what circumstances, **518.**
TRUCK SYSTEM. See WAGES.
legislation to force payment of wages in cash, 319-321.
discrimination against certain businesses in legislation against, **320,** 321, 735.
TRUSTS. See COMBINATIONS IN RESTRAINT OF TRADE, MONOPOLY, CONSPIRACY, LAW OF.
and labor organizations, discrimination between, in legislation, 337, 356.
state legislation against, 339, 340.
federal legislation, 341.
state and federal power as to corporations doing interstate business, 342.
common law rules and their application against, 343-353.
trust organization, 350.
present organization of, 351, 352.
interpretation of anti-trust acts, 354.
constitutionality of anti-trust legislation, 355.
laws against, and exception of agricultural products, 356, **734.**
TRUSTS, ELEEMOSYNARY,
Dartmouth College doctrine, 597.
where use to which property devoted is impracticable, or contrary to public policy, 598, 600, 602.
reserved power over charter of corporation, cannot destroy purpose for which created, if legal, 599, 602.
English legislation as to trusts which have become useless or harmful, 601.
Prussian laws as to trusts, 601 n.
TUNNELS,
right to maintain granted subject to requirements of navigation, **576.**
UNFAIR COMPETITION,
what is, 288, note 11.
UNION LABOR,
required for work under city contracts, **673, n. 43.**
UNLAWFUL ASSEMBLY. See ASSEMBLY.
UNSIGHTLINESS,
police regulation of, 180-183.
of advertisements, 182.

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[REFERENCES ARE TO SECTIONS.]

UNWHOLESOME OCCUPATIONS,
in tenement houses, 128, 151.
as nuisances, 176.
confinement to specified districts, 179.
USEFUL BUSINESS,
cannot be entirely forbidden, 59, 62, 401.
USURY. See INTEREST.
history of legislation, 302.
American legislation, 303.
constitutionality of legislation, 304.
exceptions in laws, in favor of pawnbrokers, and building and loan associations, 733.
VACATION,
of streets, 166.
VACCINATION,
compulsory vaccination, 144 n., 447.
VAGRANCY,
discussed, 97-100.
definition of, 97.
as criminal offense, 99.
detention for, as means of dealing with suspects, 100.
prostitution as, 97, 98, 244.
living upon earnings of prostitutes as, 246.
punishment of vagrant for leaving county of residence, 491.
VAULT,
under sidewalk not a nuisance *per se*, 162.
VEHICLES,
license of, as a police measure, 168.
stopping of, and obstruction, 169.
VESSELS,
registry, 65.
built abroad and owned by non residents, 65.
regulations to prevent collisions at sea, 117.
forfeiture of, when engaged in unlawful oyster fishing, 525, 527.
federal license of officers, and liability of owners of, for their actions, 624, 625.
VESTED RIGHTS. See PROPERTY.
property rendered useless by change of legislative policy, 539-541.
repeal or change of charter under which acquired, 362, 363.
in a profession, or occupation, and retroactive legislation, 543-547, 683-685.
licenses to conduct lotteries, 563.
license to sell liquors, 564.
license to use public streets or property, 578, 579.
economic or social reforms and, in general, 583-601.
business established under license of reasonable duration as, 580, 602, 681.



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[REFERENCES ARE TO SECTIONS.]

VINEGAR,
coloring of distilled, forbidden, 32.
VIOLENCE. See STRIKES, ANARCHISM.
VIVISECTION,
regulation of, 249, 479.
VOTING,
conditions annexed to, 14.
laborers given time to vote, 314.
coercion by employer to prevent or influence vote of employee, 325.
by women, 701.
WAGES. See TRUCK SYSTEM, STRIKES, CONSPIRACY, LAW OF.
rate of, 318.
payment of, at stated intervals, 319-321, 715, 735.
accrued wages, of discharged laborer, to be paid without abatement, 319 n.
truck acts, 319-321, 502, 735.
legislation to force payment in cash, 319-321.
combinations to raise, early law regarding, 330, 331.
recovery of attorney's fee in action for, 319 n., 714, 735.
assignment of future, forbidden, 319 n.
garnishment of, 301 n.
WAR,
destruction and appropriation in time of, 536, 537.
censorship in time of, 471.
WAREHOUSING. See GRAIN ELEVATORS, PUBLIC INTEREST, BUSINESS AFFECTED WITH.
requirement of service without discrimination, 390.
regulation of, 297.
warehousemen not allowed to store their own grain, 297.
rates charged in, regulation of, 376.
requirement of service without discrimination, 390.
monopoly to licensed warehousemen, unconstitutional, 397 n.
WARRANT,
requirement of, for arrest, 87.
WASTE,
of natural gas, 422.
of water in artesian wells, 425.
WATER AND WATER COURSES. See NAVIGABLE WATERS, RIPARIAN OWNERS.
riparian rights, 403-409.
mill dam privileges and flooding of land by dams, 410-412.
flooding land by other uses of, 413.
control of use, for mining and irrigation, 414-417.
cutting of ice from public waters, 417 n.
natural water, and neighbor's rights, 425.
WATER RATES,
regulation of, 376, 571.
determination of, as contract with company, 571.

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[REFERENCES ARE TO SECTIONS.]

WATER WORKS. See WATER RATES.
charter to company to erect, and competing municipal establishment, 677, 678.
exclusive monopoly to, a contract, 679, 680.
WEAPONS. See ARMS.
report or register of sales, by dealer in, 43, 93.
constitutional provisions as to carrying, 90.
WEEKLY PAYMENT ACTS. See WAGES.
WEIGHTS AND MEASURES,
federal power, 65, 273.
federal inaction and state regulation, 273-275.
official inspection of, 274.
WHARFS, PIERS AND DOCKS. See NAVIGABLE WATERS.
state and local power over, 80.
encroachments upon navigable waters by, 163.
regulation of landing vessels at, 175.
regulation of rates of wharfage, 373.
when buildt by riparian owner, he cannot be deprived of them without compensation, 406.
right of riparian owner to erect, 408.
WINES,
used for sacramental purposes, 224.
exception in favor of native wines, in state prohibition, 214, 215.
WOMEN. See WOMEN AND CHILDREN.
limitation of hours of labor, 311-314.
prohibition of labor in mines, 258, 311.
civil and political rights of, 701.
right to practice law or engage in other employment, 702.
employment of, in liquor business, 703.

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