A

# TREATISE

ON THE

# CONSTITUTIONAL LIMITATIONS

WHICH REST UPON

## THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION.

BY

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# PREFACE TO THE SECOND EDITION.

In the Preface to the first edition of this work, the author stated its purpose to be, to furnish to the practitioner and the student of the law such a presentation of elementary constitutional principles as should serve, with the aid of its references to judicial decisions, legal treatises, and historical events, as a convenient guide in the examination of questions respecting the constitutional limitations which rest upon the power of the several State legislatures. In the accomplishment of that purpose, the author further stated that he had faithfully endeavored to give the law as it had been settled by the authorities, rather than to present his own views. At the same time, he did not attempt to deny — what he supposed would be sufficiently apparent — that he had written in full sympathy with all those restraints which the caution of the fathers had imposed upon the exercise of the powers of government, and with faith in the checks and balances of our republican system, and in correct conclusions by the general public sentiment, rather than in reliance upon a judicious, prudent, and just exercise of authority, when confided without restriction to any one man or body of men, whether sitting in legislative capacity or judicial. In this sympathy and faith he had written of jury trials and the other safeguards to personal liberty, of liberty of the press and of vested rights; and he had also endeavored to point out that there are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restrictions which the people impose by their State constitutions. But while not predisposed to discover in any part of our system the rightful existence of any unlimited power, created by the Constitution, neither on the other hand had he designed to advance new doctrines, or to do more than state clearly and with reasonable conciseness the principles to be deduced from the judicial decisions.

The unexpected favor with which the work has been received having made a new edition necessary, the author has reviewed every part of it with care, but without finding occasion to change in any important particular the conclusions before given. Further reflection has only tended to confirm him in his previous views of the need of constitutional restraints at every point where agents are to exercise the delegated authority of the people; and he is gratified to observe that in the judicial tribunals the tendency is not in the direction of a disregard of these restraints. The reader will find numerous additional references to new cases and other authorities; and some modifications have been made in the phraseology of the text, with a view to clearer and more accurate expression of his views. Trusting that these modifications and additions will be found not without value, he again submits his work "to the judgment of an enlightened and generous profession."

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UNIVERSITY OF MICHIGAN,
ANN ARBOR, July, 1871.

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## PREFACE TO THE THIRD EDITION.

THE second edition being exhausted, the author, in preparing a third, has endeavored to give full references to such decisions as have recently been made or reported, having a bearing upon the points discussed. It will be seen on consulting the notes that the number of such decisions is large, and that some of them are of no little importance.

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## OF THE PROTECTION TO PROPERTY BY "THE LAW OF THE LAND."

THE protection of the subject in the free enjoyment of his life, his liberty, and his property, except as they might be declared by the judgment of his peers or the law of the land to be forfeited, was guaranteed by the twenty-ninth chapter of Magna Charta, "which alone," says Sir William Blackstone, "would have merited the title that it bears of the *Great* Charter."[1] The people of the American States, holding the sovereignty in their own hands, have no occasion to exact pledges from any one for a due observance of individual rights; but the aggressive tendency of power is such, that they have deemed it of no small importance, that, in framing the instruments under which their governments are to be administered by their agents, they should repeat and re-enact this guaranty, and thereby adopt it as a principle of constitutional protection. In some form of words, it is to be found in each of

[1] 4 Bl. Com. 424. The chapter, as it stood in the original charter of John, was: "Ne corpus liberi hominis capiatur nec imprisonetur nec disseisietur nec utlagetur nec exuletur, nec aliquo modo destruatur, nec rex eat vel mittat super eum vi, nisi per judicium parium suorum, vel per legem terræ." No freeman shall be taken or imprisoned or disseised or outlawed or banished, or any ways destroyed, nor will the king pass upon him, or commit him to prison, unless by the judgment of his peers, or the law of the land. In the charter of Henry III. it was varied slightly, as follows: "Nullus liber homo capiatur vel imprisonetur, aut disseisietur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ." See Blackstone's Charters. The Petition of Right — 1 Car. I. c. 1 — prayed, among other things, "that no man be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent, by act of Parliament; that none be called upon to make answer for refusal so to do; that freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the king's special command, without any charge." The Bill of Rights — 1 Wm. and Mary, § 2, c. 2 — was confined to an enumeration and condemnation of the illegal acts of the preceding reign; but the Great Charter of Henry III. was then, and is still, in force.

the State constitutions;[1] and, though verbal differences *appear in the different provisions, no change in language, [* 352]

[1] The following are the constitutional provisions in the several States: — *Alabama:* "that, in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself, or be deprived of his life, liberty, or property, but by due process of law." Art. 1, § 8. — *Arkansas:* "That no person shall . . . be deprived of his life, liberty, or property, without due process of law." Art. 1, § 9. — *California:* Like that of Alabama. Art. 1, § 8. — *Connecticut:* Same as Alabama, substituting "course of law" for "process of law." Art. 1, § 9. — *Delaware:* Like that of Alabama, substituting for "process of law," "the judgment of his peers, or the law of the land." Art. 1, § 7. — *Florida:* Like that of Alabama. Art. 1, § 9. — *Georgia:* "No person shall be deprived of life, liberty, or property, except by due process of law." Art. 1, § 3. — *Illinois:* "No person shall be deprived of life, liberty, or property, without due process of law." Art. 1, § 2. — *Iowa*, the same. Art. 1, § 9. — *Kentucky:* "Nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land." Art. 13, § 12. — *Maine:* "Nor be deprived of his life, liberty, property, or privileges, but by the judgment of his peers, or the law of the land." Art. 1, § 6. — *Maryland:* "That no man ought to be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Declaration of Rights, § 23. — *Massachusetts:* "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Declaration of Rights, Art. 12. — *Michigan:* "No person shall . . . be deprived of life, liberty, or property, without due process of law." Art. 6, § 32. — *Minnesota:* Like that of Michigan. Art. 1, § 7. — *Mississippi:* The same. Art. 1, § 2. — *Missouri:* Same as Delaware. Art. 1, § 18. — *Nevada:* "Nor be deprived of life, liberty, or property, without due process of law." Art. 1, § 8. — *New Hampshire:* Same as Massachusetts. Bill of Rights, Art. 15, — *New York:* Same as Nevada. Art. 1, § 6. — *North Carolina:* "That no person ought to be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." Declaration of Rights, § 17. — *Pennsylvania:* Like Delaware. Art. 9, § 9. — *Rhode Island:* Like Delaware. Art. 1, § 10. — *South Carolina:* Like that of Massachusetts, substituting "person" for "subject." Art. 1, § 14. — *Tennessee:* "That no man shall be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." Art. 1, § 8. — *Texas:* "No citizen of this State shall be deprived of life, liberty, property, or privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land." Art. 1, § 16. — *West Virginia:* "No person, in time of peace, shall be deprived of life, liberty, or property, without due process of law." Art. 2, § 6. Under

it is thought, has in any case been made with a view to
[* 353] essential * change in legal effect; and the differences in phraseology will not, therefore, be of importance in our discussion. Indeed, the language employed is generally nearly identical, except that the phrase "due process [or course] of law" is sometimes used, sometimes "the law of the land," and in some cases both; but the meaning is the same in every case.[1] And, by the fourteenth amendment, the guaranty is now incorporated in the Constitution of the United States.[2]

If now we shall ascertain the sense in which the phrases "due process of law" and "the law of the land" are employed in the several constitutional provisions which we have referred to, when the protection of rights in property is had in view, we shall be able, perhaps, to indicate the rule, by which the proper conclusion may be reached in those cases in which legislative action is objected to, as not being "the law of the land;" or judicial or ministerial action is contested as not being "due process of law," within the meaning of these terms as the Constitution employs them.

If we examine such definitions of these terms as are met with in the reported cases, we shall find them so various, that some difficulty must arise in fixing upon one which shall be accurate, complete in itself, and at the same time appropriate in all the cases. The diversity of definition is certainly not surprising, when we consider the diversity of cases for the purposes of which it has been attempted, and reflect that a definition that is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another.

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders

each of the remaining constitutions, equivalent protection to that which these provisions give, is believed to be afforded by fundamental principles recognized and enforced by the courts.

[1] 2 Inst. 50; Bouv. Law. Dic. "Due process of Law," "Law of the land;" State *v.* Simons, 2 Spears, 767; Vanzant *v.* Waddell, 2 Yerg. 260; Wally's Heirs *v.* Kennedy, *ib.* 554; Greene *v.* Briggs, 1 Curt. 311; Murray's Lessee *v.* Hoboken Land Co., 18 How. 276, per *Curtis* J.; Parsons *v.* Russell, 11 Mich. 129, per *Manning*, J.; Ervine's Appeal, 16 Penn. St. 256; Banning *v.* Taylor, 24 Penn. St. 292; State *v.* Staten, 6 Cold. 244; Huber *v.* Reiley, 53 Penn. St. 112.

[2] See *ante*, p. 11.

judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the *general rules which govern society. [*354] Every thing which may pass under the form of an enactment is not therefore to be considered the law of the land." [1]

The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry" and "render judgment only after trial." It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. "The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.'" [2] But there are many cases in

[1] Dartmouth College *v.* Woodward, 4 Wheat. 519; Works of Webster, Vol. V. p. 487. And he proceeds: "If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

[2] Per *Bronson*, J., in Taylor *v.* Porter, 4 Hill, 140. See also Jones *v.* Perry, 10 Yerg. 59; Ervine's Appeal, 16 Penn. St. 256; Arrowsmith *v.* Burlingim, 4 McLean, 498; Lane *v.* Dorman, 3 Scam. 238; Reed *v.* Wright, 2 Greene (Iowa), 15; Woodcock *v.* Bennett, 1 Cow. 740; Kinney *v.* Beverley, 2 H. & M. 536; Commonwealth *v.* Byrne, 20 Grat. 165. "Those terms, 'law of the land,' do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken, imprisoned, disseised of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed, and be deprived of his property, his liberty, and his life, without crime? Yet all this he may suffer if an act of the assembly simply denouncing those penalties upon particular persons, or a particular class of persons, be in itself a law of the land within the sense of the

which the title to property may pass from one person to another, without the intervention of judicial proceedings, properly so called; and we have already seen that special legislative acts designed to accomplish the like end have also been held valid in [* 355] * some cases. The necessity for "general rules," therefore, does not preclude the legislature from establishing special rules for particular cases, provided the particular cases range themselves under some general rule of legislative power; nor is there any requirement of judicial action which demands that, in every case, the parties interested shall have a hearing in court.[1]

On the other hand we shall find that general rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights. While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the

Constitution; for what is in that sense the law of the land must be duly observed by all, and upheld and enforced by the courts. In reference to the infliction of punishment and devesting the rights of property, it has been repeatedly held in this State, and it is believed in every other of the Union, that there are limitations upon the legislative power, notwithstanding these words; and that the clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode, and usages of the common law, as derived from our forefathers, are not effectually 'laws of the land' for those purposes." Hoke *v.* Henderson, 4 Dev. 15. Mr. Broom says: "It is indeed an essential principle of the law of England, 'that the subject hath an undoubted property in his goods and possessions; otherwise there shall remain no more industry, no more justice, no more valor; for who will labor? who will hazard his person in the day of battle for that which is not his own?' The Banker's Case, by *Turnor*, 10. And therefore our customary law is not more solicitous about any thing than 'to preserve the property of the subject from the inundation of the prerogative.' *Ibid.*" Broom's Const. Law, p. 228.

[1] See Wynehamer *v.* People, 13 N. Y. 432, per *Selden*, J. In James *v.* Reynolds, 2 Texas, 251, Chief Justice *Hemphill* says: "The terms 'law of the land' . . . are now, in their most usual acceptation, regarded as general public laws, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals." And see Vanzant *v.* Waddell, 2 Yerg. 269, per *Peck*, J.; Hard *v.* Nearing, 44 Barb. 472. Nevertheless there are many cases, as we have shown, *ante*, pp. 97, 109, in which private laws may be passed in entire accord with the general public rules which govern the State; and we shall refer to more cases further on.

whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, which condemns it as unknown to the law of the land. Mr. Justice *Edwards* has said in one case: "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."[1] And we have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are considering, than the following, from an opinion by Mr. Justice *Johnson* of the Supreme Court of the United States: "As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, — that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."[2]

* The principles, then, upon which the process is based [* 356] are to determine whether it is "due process" or not, and not any considerations of mere form. Administrative and remedial process may change from time to time, but only with due regard to the landmarks established for the protection of the citizen. When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it,

[1] Westervelt *v.* Gregg, 12 N. Y. 209. See also State *v.* Staten, 6 Cold. 233.

[2] Bank of Columbia *v.* Okely, 4 Wheat. 235. "What is meant by 'the law of the land'? In this State, taking as our guide Zylstra's Case, 1 Bay 384; White *v.* Kendrick, 1 Brev. 471; State *v.* Coleman and Maxy, 1 McMull. 502, there can be no hesitation in saying that these words mean the common law and the statute law existing in this State at the adoption of our constitution. Altogether they constitute a body of law prescribing the course of justice to which a free man is to be considered amenable for all time to come." Per *O'Neill*, J., in State *v.* Simons, 2 Speers, 767. See also State *v.* Doherty, 60 Me. 509. It must not be understood from this, however, that it would not be competent to change either the common law or the statute law, so long as the principles therein embodied, and which protected private rights, were not departed from.

and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession;[1] but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.[2]

Private rights may be interfered with by either the legislative, executive, or judicial department of the government. The executive department in every instance must show authority of law [* 357] for its action, and occasion does not often arise * for an examination of the limits which circumscribe its powers. The legislative department may in some cases constitutionally authorize interference, and in others may interpose by direct action. Elsewhere we shall consider the police power of the State, and endeavor to show how completely all the property, as well as all the people within the State, are subject to control under it, within certain limits, and for the purposes for which that power is exercised. The right of eminent domain and the right of taxation will also be discussed separately, and it will appear that under each the law of the land sanctions devesting individuals of their prop-

[1] Vanzant *v.* Waddell, 2 Yerg. 260; Lenz *v.* Charlton, 23 Wis. 478.

[2] See Wynehamer *v.* People, 13 N. Y. 432, per *Selden*, J. In State *v.* Allen, 2 McCord, 56, the court, in speaking of process for the collection of taxes, say: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative 'law of the land.'" And see Hard *v.* Nearing, 44 Barb. 472; Sears *v.* Cottrell, 5 Mich. 251; Gibson *v.* Mason, 5 Nev. 302.

erty against their will, and by somewhat summary proceedings. In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid; and in other cases property can only be taken for the support of the government, and each citizen can only be required to contribute his proportion to that end. But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment. The purpose must be public, and must have reference to the needs or convenience of the public. No reason of general public policy will be sufficient, it seems, to validate such transfers when they operate upon existing vested rights.[1]

Nevertheless, in many cases and many ways remedial legislation may affect the control and disposition of property, and in some cases may change the nature of rights, give remedies where none existed before, and even devest legal titles in favor of substantial equities where the legal and equitable rights do not chance to concur in the same persons.

The chief restriction upon this class of legislation is, that vested rights must not be disturbed; * but in its appli- [* 358] cation as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The right to private prop-

[1] Taylor *v.* Porter, 4 Hill, 140; Osborn *v.* Hart, 24 Wis. 91; s. c. 1 Am. Rep. 161. In matter of Albany Street, 11 Wend. 149, it is intimated that the clause in the Constitution of New York, withholding private property from public use except upon compensation made, of itself implies that it is not to be taken *in invitum* for individual use. And see matter of John and Cherry Streets, 19 Wend. 676. A different opinion seems to have been held by the Supreme Court of Pennsylvania, when they decided in Harvey *v.* Thomas, 10 Watts, 63, that the legislature might authorize the laying out of private ways over the lands of unwilling parties, to connect the coal-beds with the works of public improvement, the constitution not in terms prohibiting it. See note to p. 531, *post.*

erty is a sacred right; not, as has been justly said, "introduced as the result of princes' edicts, concessions and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm." [1]

But as it is a right which rests upon equities, it has its reasonable limits and restrictions; it must have some regard to the general welfare and public policy; it cannot be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds, which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all.[2]

And it may be well at this point to examine in the light of the reported cases the question, What is a vested right in the constitutional sense? and when we have solved that question, we may be the better able to judge under what circumstances one may be justified in resisting a change in the general laws of the State affecting his interests, and how far special legislation may control his rights without coming under legal condemnation. In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense. In many cases the courts, in the exercise of their ordinary jurisdiction, cause the property vested in one person to be trans-

[1] Arg. Nightingale *v.* Bridges, Show. 138. See also Case of Alton Woods, 1 Rep. 45 *a;* Alcock *v.* Cook, 5 Bing. 340; Bowman *v.* Middleton, 1 Bay, 282; *ante*, p. 37 and note, p. 175 and note.

[2] The evidences of a man's rights — the deeds, bills of sale, promissory notes, and the like — are protected equally with his lands and chattels, or rights and franchises of any kind; and the certificate of registration and right to vote may be properly included in the category. State *v.* Staten, 6 Cold. 243. See Davies *v.* McKeeby, 5 Nev. 369.

ferred to another, either through the exercise of a statutory power, or by the direct force of their judgments or decrees, or by means of compulsory conveyances. If in these cases the courts have jurisdiction, they proceed in accordance with "the law of the land;" and the right of one man is devested by way of enforcing a higher and better right in another. Of these cases we do not propose to speak: constitutional questions cannot well arise concerning them, unless they are attended by circumstances of irregularity which are supposed to take them out of the general rule. All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they become devested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order. What we desire to reach in this connection is the true meaning of the term "vested rights" when employed for the purpose of indicating the interests of which one cannot be deprived by the mere force of legislative enactment, or by any other than the * recognized modes of transferring title [* 359] against the consent of the owner, to which we have alluded.

### *Interests in Expectancy.*

And it would seem that a right cannot be regarded as a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another. Acts of the legislature, as has been well said by Mr. Justice *Woodbury*, cannot be regarded as opposed to fundamental axioms of legislation, "unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee."[1] And Chancellor *Kent*, in speaking of retrospective statutes, says that while

[1] Merrill *v.* Sherburne, 1 N. H. 213. See Ride *v.* Flanders, 39 N. H. 304.

such a statute, "affecting and changing vested rights, is very generally regarded in this country as founded on unconstitutional principles, and consequently inoperative and void," yet that "this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon vested rights."[1]

And it is because a mere expectation of property in the future is not considered a vested right, that the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living; and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out [*360] by the statute of descents. But this promise is no * more than a declaration of the legislature as to its present view of public policy as regards the proper order of succession, — a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property; it cannot be sold or mortgaged; it is not subject to debts; and it is not in any manner taken notice of by the law until the moment of the ancestor's death, when the statute of descents comes in, and for reasons of general public policy transfers the estate to persons occupying particular relations to the deceased in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir, to be protected by the Constitution. An anticipated interest in property cannot be said to be vested in any person so long as the owner of the interest in possession has full power, by virtue of his ownership, to cut off the expectant right by grant or devise.[2]

If this be so, the nature of estates must, to a certain extent, be

[1] 1 Kent, Com. 455. See Briggs *v.* Hubbard, 19 Vt. 91; Bridgeport *v.* Housatonic R. R. Co., 15 Com. 492; Baugher *v.* Nelson, 9 Gill, 299; Gilman *v.* Cutts, 23 N. H. 382.

[2] *In re* Lawrence, 1 Redfield, Sur. Rep. 310. But after property has once vested under the laws of descent, it cannot be divested by any change in those laws. Norman *v.* Heist, 5 M. & S. 171. See *post*, 379, and notes.

subject to legislative control and modification.[1] In this country estates tail have been very generally changed into estates in fee-simple, by statutes the validity of which is not disputed.[2] Such statutes operate to increase and render more valuable the interest which the tenant in tail possesses, and are not therefore open to objection by him.[3] But no other person in these cases has any vested right, either in possession or expectancy, to be affected by such change; and the expectation of the heir presumptive must be subject to the same control as in other cases.[4]

The cases of rights in property to result from the marriage relation must be referred to the same principle. At the common law the husband immediately on the marriage succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away.[5] But other interests * were merely in expectancy. He [* 361] could have a right as tenant by the courtesy initiate in the wife's estates of inheritance the moment a child was born of the marriage, who might by possibility become heir to such estates. This right would be property, subject to conveyance and to be taken for debts; and must therefore be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed. But while this interest remains in expectancy merely, — that is to say, until it becomes initiate, — the legislature must have

[1] Smith on Stat. and Const. Construction, 412.

[2] De Mill *v.* Lockwood, 3 Blatch. 56.

[3] On the same ground it has been held in Massachusetts that statutes converting existing estates in joint tenancy into estates in common were unobjectionable. They did not impair vested rights, but rendered the tenure more beneficial. Holbrook *v.* Finney, 4 Mass. 567; Miller *v.* Miller, 16 Mass. 59; Anable *v.* Patch, 3 Pick. 363; Burghardt *v.* Turner, 12 Pick. 534. Moreover, such statutes do no more than either tenant at the common law has a right to do, by conveying his interest to a stranger. See Bombaugh *v.* Bombaugh, 11 S. & R. 192; Wildes *v.* Vanvoorhis, 16 Gray, 147.

[4] See 1 Washb. Real Pr. 81–84 and notes. The exception to this statement, if any, must be the case of tenant in tail after possibility of issue extinct; where the estate of the tenant has ceased to be an inheritance, and a reversionary right has become vested.

[5] Westervelt *v.* Gregg, 12 N. Y. 208.

full right to modify or even to abolish it.[1] And the same rule will apply to the case of dower; though the difference in the requisites of the two estates are such that the inchoate right to dower does not become property, or any thing more than a mere expectancy at any time before it is consummated by the husband's death.[2] In neither of these cases does the marriage alone give a vested right. It gives only a capacity to acquire a right. The same remark may be made regarding the husband's expectant interest in the after-acquired personalty of the wife: it is subject to any changes in the law made before his right becomes vested by the acquisition.[3]

### *Change of Remedies.*

Again: *the right to a particular remedy is not a vested right.* This is the general rule; and the exceptions are of those peculiar cases in which the remedy is part of the right itself.[4] As a general rule every State has complete control over the remedies which it offers to suitors in its courts.[5] It may abolish one class of courts and create another. It may give a new and additional remedy for a

[1] Hathorn *v.* Lyon, 2 Mich. 93; Tong *v.* Marvin, 15 Mich. 60. And see the cases cited in the next note.

[2] Barbour *v.* Barbour, 46 Me. 9; Lucas *v.* Sawyer, 17 Iowa, 517; Noel *v.* Ewing, 9 Ind. 57; Moore *v.* Mayor, &c., of New York, 4 Sandf. 456, and 8 N. Y. 110; Pratt *v.* Tefft, 14 Mich. 191; Reeve, Dom. Rel. 103, note. A doubt as to this doctrine is intimated in Dunn *v.* Sargeant, 101 Mass. 340.

[3] Westervelt *v.* Gregg, 12 N. Y. 208; Norris *v.* Beyea, 13 N. Y. 273; Kelly *v.* McCarthy, 3 Bradf. 7. And see Plumb *v.* Sawyer, 21 Conn. 351; Clark *v.* McCreary, 12 S. & M. 347; Jackson *v.* Lyon, 9 Cow. 664; *ante*, 287–292. If, however, the wife has a right to personal property subject to a contingency, the husband's contingent interest therein cannot be taken away by subsequent legislation. Dunn *v.* Sargeant, 101 Mass. 336. In Sutton *v.* Asker, 66 N. C. 172, it was decided that where by the statute the woman's right of dower was subject to be defeated by the husband's conveyance, a subsequent statute restoring her common-law rights was inoperative as to all existing marriages.

[4] See *ante*, p. 290, and cases cited. The giving of a lien by statute does not confer a vested right, and it may be taken away by a repeal of the statute. Watson *v.* N. Y. Central R. R. Co., 47 N. Y. 157; Woodbury *v.* Grimes, 1 Col. 100.

[5] Rosier *v.* Hale, 10 Iowa, 470; Smith *v.* Bryan, 34 Ill. 377; Lord *v.* Chadbourne, 42 Me. 429; Rockwell *v.* Hubbell's Adm'rs, 2 Doug. (Mich.) 197; Cusic *v.* Douglas, 3 Kansas, 123; Holloway *v.* Sherman, 12 Iowa, 282; McCormick *v.* Rusch, 15 Iowa, 127.

right already in existence.[1] And it may abolish old remedies and * substitute new. If a statute providing a remedy [* 362] is repealed while proceedings are pending, such proceedings will be thereby determined, unless the legislature shall otherwise provide;[2] and if it be amended instead of repealed, the judgment pronounced in such proceedings must be according to the law as it then stands.[3] And any rule or regulation in regard to the remedy which does not, under pretence of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation.[4]

But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away.[5] And every man is entitled to a certain

[1] Hope *v.* Jackson, 2 Yerg. 125; Foster *v.* Essex Bank, 16 Mass. 245; Paschall *v.* Whitsett, 11 Ala. 472; Commonwealth *v.* Commissioners, &c., 6 Pick. 508; Whipple *v.* Farrar, 3 Mich. 436; United States *v.* Samperyac, 1 Hemp. 118; Sutherland *v.* De Leon, 1 Texas, 250; Anonymous, 2 Stew. 228. See also Lewis *v.* McElvain, 16 Ohio, 347; Trustees, &c. *v.* McCaughey, 2 Ohio, N. S. 152; Hepburn *v.* Curts, 7 Watts, 300; Schenley *v.* Commonwealth, 36 Penn. St. 29; Bacon *v.* Callender, 6 Mass. 303; Brackett *v.* Norcross, 1 Greenl. 92; Ralston *v.* Lothain, 18 Ind. 303; White School House *v.* Post, 31 Conn. 241.

[2] Bank of Hamilton *v.* Dudley, 2 Pet. 492; Ludlow *v.* Jackson, 3 Ohio, 553; Eaton *v.* United States, 5 Cranch, 281; Schooner Rachel *v.* United States, 6 Cranch, 329.

[3] See cases cited in last note. Also, Commonwealth *v.* Duane, 1 Binney, 601; United States *v.* Passmore, 4 Dall. 372; Patterson *v.* Philbrook, 9 Mass. 151; Commonwealth *v.* Marshall, 11 Pick. 350; Commonwealth *v.* Kimball, 21 Pick. 373; Hartung *v.* People, 21 N. Y. 99; State *v.* Daley, 29 Conn. 272; Rathbun *v.* Wheeler, 29 Ind. 601; State *v.* Norwood, 12 Md. 195; Bristol *v.* Supervisors, &c., 20 Mich. 95; Sumner *v.* Miller, 64 N. C. 688.

[4] See *ante*, pp. 287–292.

[5] Dash *v.* Van Kleek, 7 Johns. 477; Streubel *v.* Milwaukee and M. R. R. Co., 12 Wis. 67; Clark *v.* Clark, 10 N. H. 386; Westervelt *v.* Gregg, 12 N. Y. 211; Thornton *v.* Turner, 11 Minn. 339; Ward *v.* Brainerd, 1 Aik. 121; Keith *v.* Ware, 2 Vt. 174; Lyman *v.* Mower, *ib.* 517; Kendall *v.* Dodge, 3 Vt. 360; State *v.* Auditor, &c., 33 Mo. 287; Griffin *v.* Wilcox, 21 Ind. 370; Norris *v.* Doniphan, 4 Met. (Ky.) 385; Terrill *v.* Rankin, 3 Bush, 453. An equitable title to lands, of which the legal title is in the State, is under the same constitutional protection that the legal title would be. Wright *v.* Hawkins, 28 Texas, 452. Where an individual is allowed to recover a sum as a penalty, the right may be taken away at any time before judgment. Oriental Bank *v.* Freeze,

remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice, or to submit to conditions not imposed upon his fellows as a means of obtaining it.[1] Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law.[2] Even Congress, it has been held, has no power to protect parties assuming to act under the authority of the general government, during the existence of a civil war, by depriving persons illegally arrested by them of all redress in the [* 363] courts.[3] * And if the legislature cannot confiscate property or rights, neither can it authorize individuals to assume at

6 Shep. 109; Engle *v.* Schurtz, 1 Mich. 150; Confiscation Cases, 7 Wall. 454; Washburn *v.* Franklin, 35 Barb. 599; Welch *v.* Wadsworth, 30 Conn. 149; O'Kelly *v.* Athens Manuf. Co., 36 Geo. 51; United States *v.* Tynen, 11 Wall. 88; Chicago & Alton R.R. Co. *v.* Adler, 56 Ill. 350; *post*, 383. See also Curtis *v.* Leavitt, 17 Barb. 309, and 15 N. Y. 9; Coles *v.* Madison County, Breese, 115; Parmelee *v.* Lawrence, 48 Ill. 331; *post*, 375–376.

[1] Thus, a person cannot be precluded by test oaths from maintaining suits. McFarland *v.* Butler, 8 Minn. 116; *ante*, 289, note. See *post*, 368, 369, note.

[2] Griffin *v.* Mixon, 38 Miss. 434. See next note. Also Rison *v.* Farr, 24 Ark. 161; Hodgson *v.* Millward, 3 Grant's Cas. 406. But no constitutional principle is violated by a statute which allows judgment to be entered up against a defendant who has been served with process, unless within a certain number of days he files an affidavit of merits. Hunt *v.* Lucas, 97 Mass. 404.

[3] Griffin *v.* Wilcox, 21 Ind. 370. In this case the act of Congress of March 3, 1863, which provided "that any order of the president or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts, to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress," was held to be unconstitutional. The same decision was made in Johnson *v.* Jones, 44 Ill. 142. It was said in the first of these cases that "this act was passed to deprive the citizens of all redress for illegal arrests and imprisonments; it was not needed as a protection for making such as are legal, because the common law gives ample protection for making legal arrests and imprisonments." And it may be added that those acts which are justified by military or martial law are equally legal with those justified by the common law. So in Hubbard *v.* Brainerd, 35 Conn. 563, it was decided that Congress could not take away a vested right to sue for and recover back an illegal tax which had been paid under protest to a collector of the national revenue. See also Bryan *v.* Walker, 64 N. C. 146. Nor can the right to have

their option powers of police, which they may exercise in the condemnation and sale of property offending against their regulations, or for the satisfaction of their charges and expenses in its management and control, rendered or incurred without the consent of its owners.[1] And a statute * which authorizes a [*364] party to seize the property of another, without process or

a void tax sale set aside be made conditional on the payment of the illegal tax. Wilson *v.* McKenna, 52 Ill. 44; and other cases cited, *post*, 368, 369, note. The case of Norris *v.* Doniphan, 4 Met. (Ky.) 385, may properly be cited in this connection. It was there held that the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," in so far as it undertook to authorize the confiscation of the property of citizens as a punishment for treason and other crimes, by proceedings *in rem* in any district in which the property might be, without presentment and indictment by a grand jury, without arrest or summons of the owner, and upon such evidence of his guilt only as would be proof of any fact in admiralty or revenue cases, was unconstitutional and void, and therefore that Congress had no power to prohibit the State Courts from giving the owners of property seized the relief they would be entitled to under the State laws. A statute which makes a constitutional right to vote depend upon an impossible condition is void. Davies *v.* McKeeby, 5 Nev. 369. See further State *v.* Staten, 6 Cold. 243; Rison *v.* Farr, 24 Ark. 161; Hodgson *v.* Millward, 3 Grant, 406. Where no express power of removal is conferred on the executive, he cannot declare an office forfeited for misbehavior; but the forfeiture must be declared in judicial proceedings. Page *v.* Hardin, 8 B. Monr. 648; State *v.* Pritchard, Law Reg. Aug. 1873, p. 514.

[1] The log-driving and booming corporations, which were authorized to be formed under a general law in Michigan, were empowered, whenever logs or lumber were put into navigable streams without adequate force and means provided for preventing obstructions, to take charge of the same, and cause it to be run, driven, boomed, &c., at the owner's expense; and it gave them a lien on the same to satisfy all just and reasonable charges, with power to sell the property for those charges and for the expenses of sale, on notice, either served personally on the owner, or posted as therein provided. In Ames *v.* Port Huron Log-Driving and Booming Co., 11 Mich. 147, it was held that the power which this law assumed to confer was in the nature of a public office; and *Campbell*, J., says: "It is difficult to perceive by what process a public office can be obtained or exercised without either election or appointment. The powers of government are parcelled out by the Constitution, which certainly contemplates some official responsibility. Every officer not expressly exempted is required to take an oath of office as a preliminary to discharging his duties. It is absurd to suppose that any official power can exist in any person by his own assumption, or by the employment of some other private person; and still more so to recognize in such an assumption a power of depriving individuals of their property. And it is plain that the exercise of such a power is an act in its nature public, and not private. The case, however, involves more than the assumption of control. The

warrant, and to sell it without notification to the owner, for the punishment of a private trespass, and in order to enforce a penalty against the owner, can find no justification in the Constitution.[1]

corporation, or rather its various agents, must of necessity determine when the case arises justifying interference; and having assumed possession, it assesses its own charges; and having assessed them, proceeds to sell the property seized to pay them, with the added expense of such sale. These proceedings are all *ex parte*, and are all proceedings *in invitum*. Their validity must therefore be determined by the rules applicable to such cases. Except in those cases where proceedings to collect the public revenue may stand upon a peculiar footing of their own, it is an inflexible principle of constitutional right that no person can legally be devested of his property without remuneration, or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and the facts. When his property is wanted *in specie*, for public purposes, there are methods assured to him whereby its value can be ascertained. Where a debt or penalty or forfeiture may be set up against him, the determination of his liability becomes a judicial question; and all judicial functions are required by the Constitution to be exercised by courts of justice, or judicial officers regularly chosen. He can only be reached through the forms of law upon a regular hearing, unless he has by contract referred the matter to another mode of determination."

[1] A statute of New York authorized any person to take into his custody and possession any animal which might be trespassing upon his lands, and give notice of the seizure to a justice or commissioner of highways of the town, who should proceed to sell the animal after posting notice. From the proceeds of the sale, the officer was to retain his fees, pay the person taking up the animal fifty cents, and also compensation for keeping it, and the balance to the owner, if he should claim it within a year. In Rockwell *v.* Nearing, 35 N. Y. 307, 308, *Porter*, J., says of this statute: "The legislature has no authority either to deprive the citizen of his property for other than public purposes, or to authorize its seizure without process or warrant, by persons other than the owner, for the mere punishment of a private trespass. So far as the act in question relates to animals trespassing on the premises of the captor, the proceedings it authorizes have not even the mocking semblance of due process of law. The seizure may be privately made; the party making it is permitted to conceal the property on his own premises; he is protected, though the trespass was due to his own connivance or neglect; he is permitted to take what does not belong to him without notice to the owner, though that owner is near and known; he is allowed to sell, through the intervention of an officer, and without even the form of judicial proceedings, an animal in which he has no interest by way either of title, mortgage, pledge, or lien; and all to the end that he may receive compensation for detaining it without the consent of the owner, and a fee of fifty cents for his services as an informer. He levies without process, condemns without proof, and sells without execution." And he distinguishes these proceedings from those in distraining cattle, *damage feasant*, which are always remedial, and under which the party was authorized to detain the property in pledge for the payment of his damages. See

*Limitation Laws.*

Notwithstanding the protection which the law gives to vested rights, it is possible for a party to debar himself of the right to assert the same in the courts, by his own negligence or laches. * If one who is dispossessed "be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession merely, both to punish his neglect (*nam leges vigilantibus, non dormientibus subveniunt*), and also because it is presumed that the supposed wrong-doer has in such a length of time procured a legal title, otherwise he would sooner have been sued."[1] Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no rights in the premises. Such a statute is a statute of repose.[2] Every government is under obligation to its citizens to afford them all needful legal remedies;[3] but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time.[4]

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When the period prescribed by statute has once run, so as to cut

also opinion by *Morgan*, J., in the same case, pp. 314–317, and the opinions of the several judges in Wynehamer *v.* People, 13 N. Y. 395, 419, 434, and 468. Compare Campbell *v.* Evans, 45 N. Y. 356; Cook *v.* Gregg, 46 N. Y. 439.

[1] 3 Bl. Com. 188; Broom, Legal Maxims, 857.

[2] Such a statute was formerly construed with strictness, and the defence under it was looked upon as unconscionable, and not favored; but Mr. Justice *Story* has well said, it has often been matter of regret in modern times that the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light as an unjust and discreditable defence, it had not received such support as would have made it what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against State demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. Bell *v.* Morrison, 1 Pet. 360. See Leffingwell *v.* Warren, 2 Black, 599.

[3] Call *v.* Hagger, 8 Mass. 430.

[4] Beal *v.* Nason, 2 Shep. 344; Bell *v.* Morrison, 1 Pet. 360; Stearns *v.* Gittings, 23 Ill. 387; State *v.* Jones, 21 Md. 437.

off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title.[1] It is vested as completely and perfectly, and is as safe from legislative interference as it would have been if it had been perfected in the owner by grant, or any species of assurance.[2]

All limitation laws, however, must proceed on the theory that the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law.[3] Where they relate [* 366] to * property, it seems not to be essential that the adverse claimant should be in actual possession;[4] but one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce. It has consequently been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be

[1] Brent *v.* Chapman, 5 Cranch, 358; Newby's Adm'rs *v.* Blakey, 3 H. & M. 57; Parish *v.* Eager, 15 Wis. 532; Baggs's Appeal, 43 Penn. St. 512; Leffingwell *v.* Warren, 2 Black, 599. See cases cited in next note.

[2] See Knox *v.* Cleveland, 13 Wis. 249; Sprecker *v.* Wakelee, 11 Wis. 432; Pleasants *v.* Rohrer, 17 Wis. 557; Moor *v.* Lisce, 29 Penn. St. 262; Morton *v.* Sharkey, McCahon (Kan.), 113; McKinney *v.* Springer, 8 Blackf. 506; Stipp *v.* Brown, 2 Ind. 647; Wires *v.* Farr, 25 Vt. 41; Davis *v.* Minor, 1 How. (Miss.) 183; Holden *v.* James, 11 Mass. 396; Lewis *v.* Webb, 3 Greenl. 326; Woart *v.* Winnick, 3 N. H. 473; Martin *v.* Martin, 35 Ala. 560; Briggs *v.* Hubbard, 19 Vt. 86; Thompson *v.* Caldwell, 3 Lit. 137; Wright *v.* Oakley, 5 Met. 400; Couch *v.* McKee, 1 Eng. 495; Atkinson *v.* Dunlap, 50 Me. 111; Girdner *v.* Stephens, 1 Heis. 280; s. c. 2 Am. Rep. 700; Bradford *v.* Shine's Adm'r, 13 Fla. 393; s. c. 7 Am. Rep. 239. But the statute of limitations may be suspended for a period as to demands not already barred. Wardlaw *v.* Buzzard, 15 Rich. 158; Caperton *v.* Martin, 4 W. Va. 138; s. c. 6 Am. Rep. 270; Bender *v.* Crawford, 33 Tex. 745; s. c. 7 Am. Rep. 270.

[3] Stearns *v.* Gittings, 23 Ill. 389; per *Walker*, J., Sturgis *v.* Crowninshield, 4 Wheat. 207, per *Marshall*, Ch. J.; Pearce *v.* Patton, 7 B. Monr. 162; Griffin *v.* McKenzie, 7 Geo. 163; Coleman *v.* Holmes, 44 Ala. 125.

[4] Stearns *v.* Gittings, 23 Ill. 389; Hill *v.* Kricke, 11 Wis. 442.

valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims.[1]

All statutes of limitation, also, must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity: if it should attempt to do so, it would be not a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action;[2] though what shall be considered a

[1] Groesbeck *v.* Seeley, 13 Mich. 329. In Case *v.* Dean, 16 Mich. 12, it was held that this statute could not be enforced as a limitation law in favor of the party in possession, inasmuch as it did not proceed on the idea of limiting the time for bringing suit, but by a conclusive rule of evidence sought to pass over the property to the claimant under the statutory sale in all cases, irrespective of possession. See also Baker *v.* Kelly, 11 Minn. 480. The case of Leffingwell *v.* Warren, 2 Black, 599, is *contra*. That case follows Wisconsin decisions. In the leading case of Hill *v.* Kricke, 11 Wis. 442, the holder of the original title was not in possession; and what was decided was that it was not necessary for the holder of the tax title to be in possession in order to claim the benefit of the statute; ejectment against a claimant being permitted by law when the lands were unoccupied. This circumstance of possession or want of possession in the person whose right is to be extinguished seems to us of vital importance. How can a man justly be held guilty of laches in not asserting claims to property, when he already possesses and enjoys the property? The old maxim is, "That which was originally void cannot by mere lapse of time be made valid;" and if a void claim by force of an act of limitation can ripen into a conclusive title as against the owner in possession, the policy underlying that species of legislation must be something beyond what has been generally supposed.

[2] So held of a statute which took effect some months after its passage, and which, in its operation upon certain classes of cases, would have extinguished adverse claims unless asserted by suit before the act took effect. Price *v.* Hopkin, 13 Mich. 318. See also Call *v.* Hagger, 8 Mass. 423; Proprietors, &c. *v.* Laboree, 2 Greenl. 294; Society, &c. *v.* Wheeler, 2 Gall. 141; Blackford *v.* Peltier, 1 Blackf. 36; Thornton *v.* Turner, 11 Minn. 339; Osborn *v.* Jaines, 17 Wis. 573; Morton *v.* Sharkey, McCahon (Kan.), 113; Berry *v.* Ramsdell, 4 Met. (Ky.) 296. In the last case cited it was held that a statute which only allowed thirty days in which to bring action on an existing demand was unreasonable and void. And see what is said in Auld *v.* Butcher, 2 Kansas, 135. But a statute giving a new remedy against a railroad company for an injury, may limit to a short time, *e. g.*, six months, the time for bringing suit. O'Bannon *v.* Louisville, &c., R. R. Co., 8 Bush, 348.

reasonable time must be settled by the judgment of the
[* 367] legislature, into the wisdom of * whose decision in establishing the period of legal bar it does not pertain to the jurisdiction of the courts to inquire.[1]

*Alterations in the Rules of Evidence.*

It must also be evident that *a right to have one's controversies determined by existing rules of evidence is not a vested right.* These rules pertain to the remedies which the State provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature;[2] and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before. It has accordingly been held in New Hampshire that a statute which removed the disqualification of interest, and allowed parties to suits to testify, might lawfully apply to existing causes of action.[3] So may a statute which mod-

[1] Stearns *v.* Gittings, 23 Ill. 387; Call *v.* Hagger, 8 Mass. 430; Smith *v.* Morrison, 22 Pick. 430; Price *v.* Hopkin, 13 Mich. 318; De Moss *v.* Newton, 31 Ind. 219. But see Berry *v.* Ramsdell, cited in preceding note.

It may be remarked here, that statutes of limitation do not apply to the State unless they so provide expressly. Gibson *v.* Choteau, 13 Wall. 92. And State limitation laws do not apply to the United States. United States *v.* Hoar, 2 Mas. 311; People *v.* Gilbert, 18 Johns. 228. And it has been held that the right to maintain a nuisance cannot be acquired under the statute. State *v.* Franklin Falls Co., 49 N. H. 240.

[2] Kendall *v.* Kingston, 5 Mass. 533; Ogden *v.* Saunders, 12 Wheat. 349, per *Marshall*, Ch. J.; Fales *v.* Wadsworth, 23 Me. 533; Karney *v.* Paisley, 13 Iowa, 89; Commonwealth *v.* Williams, 6 Gray, 1; Hickox *v.* Tallman, 38 Barb. 608; Webb *v.* Den, 17 How. 576; Pratt *v.* Jones, 25 Vt. 303. See *ante*, p. 288 and note.

[3] Rich *v.* Flanders, 39 N. H. 323. A very full and satisfactory examination of the whole subject will be found in this case. To the same effect is Southwick *v.* Southwick, 49 N. Y. 510.

ifies the common-law rule excluding parol evidence to vary the terms of a written contract;[1] and a statute making the protest of a promissory note evidence of the facts therein stated.[2] These and the like cases will sufficiently illustrate the general rule, that the whole subject is under the control of the legislature, which prescribes such rules for the trial and determination as well of existing as of future rights and controversies as in its judgment will most completely subserve the ends of justice.[3]

* A strong instance in illustration of legislative control [* 368] over evidence will be found in the laws of some of the States in regard to conveyances of lands upon sales to satisfy delinquent taxes. Independent of special statutory rule on the subject, such conveyances would not be evidence of title. They are executed under a statutory power; and it devolves upon the claimant under them to show that the successive steps which under the statute lead to such conveyance have been taken. But it cannot be doubted that this rule may be so changed as to make a tax deed *prima facie* evidence that all the proceedings have been regular, and that the purchaser has acquired under them a complete title.[4] The burden of proof is thereby changed from one party to the other; the legal presumption which the statute creates in favor of the purchaser being sufficient, in connection with the deed, to establish his case, unless it is overcome by countervailing testimony. Statutes making defective records evidence of valid conveyances are of a similar nature; and these usually, perhaps always, have reference to records before made, and provide for making them competent evidence where before they were merely void.[5] But they devest no title, and are not even retrospective in character. They merely establish what the legislature regards as a reasonable and just rule

[1] Gibbs *v.* Gale, 7 Md. 76.

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

[3] Per *Marshall*, Ch. J., in Ogden *v.* Saunders, 12 Wheat. 249; Webb *v.* Den, 17 How. 577; Delaplaine *v.* Cook, 7 Wis. 54; Kendall *v.* Kingston, 5 Mass. 534; Fowler *v.* Chatterton, 6 Bing. 258.

[4] Hand *v.* Ballou, 12 N. Y. 543; Forbes *v.* Halsey, 26 N. Y. 53; Delaplaine *v.* Cook, 7 Wis. 54; Allen *v.* Armstrong, 16 Iowa, 508; Adams *v.* Beale, 19 Iowa, 61; Amberg *v.* Rogers, 9 Mich. 332; Lumsden *v.* Cross, 10 Wis. 289; Lacey *v.* Davis, 4 Mich. 140; Wright *v.* Dunham, 13 Michigan, 414; Abbott *v.* Lindenbower, 42 Mo. 162; s.c. 46 Mo. 291. The rule once established may be abolished, even as to existing deeds. Hickox *v.* Tallman, 38 Barb. 608.

[5] See Webb *v.* Den, 17 How. 577.

for the presentation by the parties of their rights before the courts in the future.

But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretence of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land [* 369] requires an opportunity for a trial;[1] and there * can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute, therefore, which should make a tax-deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.[2]

[1] Tift *v.* Griffin, 5 Geo. 185; Lenz *v.* Charlton, 23 Wis 482; Conway *v.* Cable, 37 Ill. 89; *ante*, 362, note; *post*, 382–83 and notes.

[2] Groesbeck *v.* Seeley, 13 Mich. 329; Case *v.* Dean, 16 Mich. 13; White *v.* Flynn, 23 Ind. 46; Corbin *v.* Hill, 21 Iowa, 70; Abbott *v.* Lindenbower, 42 Mo. 162; s. c. 46 Mo. 291. And see the well-reasoned case of McCready *v.* Sexton, 29 Iowa, 356. Also, Wright *v.* Cradlebaugh, 3 Nev. 349. As to how far the legislature may make the tax deed conclusive evidence that mere irregularities have not intervened in the proceedings, see Smith *v.* Cleveland, 17 Wis. 556; Allen *v.* Armstrong, 16 Iowa, 508. Undoubtedly the legislature may dispense with mere matters of form in the proceedings as well after they have taken place as before; but this is quite a different thing from making tax deeds conclusive on points material to the interest of the property owner. See, further, Wantlan *v.* White, 19 Ind. 470; People *v.* Mitchell, 45 Barb. 212; McCready *v.* Sexton,

And a statute which should make the certificate or opinion of an officer conclusive evidence of the illegality of an existing contract would be equally nugatory;[1] though perhaps if parties should enter into a contract in view of such a statute then existing, its provisions might properly be regarded as assented to and incorporated in their contract, and therefore binding upon them.[2]

### *Retrospective Laws.*

Regarding the circumstances under which a man may be said to have a vested right to a defence against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected.[3] In both cases the demand is

*supra*. It is not competent for the legislature to compel an owner of land to redeem it from a void tax sale as a condition on which he shall be allowed to assert his title against it. Conway *v.* Cable, 37 Ill. 82; Hart *v.* Henderson, 17 Mich. 218; Wilson *v.* McKenna, 52 Ill. 44; Reed *v.* Tyler, 56 Ill. 292; Dean *v.* Borchsenius, 30 Wis. 236. But it seems that if the tax purchaser has paid taxes and made improvements, the payment for these may be made a condition precedent to a suit in ejectment against him. Pope *v.* Macon, 23 Ark. 644. The case of Wright *v.* Cradlebaugh, 3 Nev. 349, is valuable in this connection. "We apprehend," says *Beatty*, Ch. J., "that it is beyond the power of the legislature to restrain a defendant in any suit from setting up a good defence to an action against him. The legislature could not directly take the property of A. to pay the taxes of B. Neither can it indirectly do so by depriving A. of the right of setting up in his answer that his separate property has been jointly assessed with that of B., and asserting his right to pay his own taxes without being encumbered with those of B. . . . Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the usages of the common law or the provisions of the Constitution, would be a protection to him or his property." See Taylor *v.* Miles, 5 Kansas, 498; s. c. 7 Am. Rep. 558.

[1] Young *v.* Beardsley, 11 Paige, 93. An act to authorize persons whose sheep are killed by dogs, to present their claim to the selectmen of the town for allowance and payment by the town, and giving the town after payment an action against the owner of the dog for the amount so paid, is void, as taking away trial by jury, and as authorizing the selectmen to pass upon one's rights without giving him an opportunity to be heard. East Kingston *v.* Towle, 48 N. H. 57; s. c. 2 Am. Rep. 174.

[2] See *post*, p. 403, note.

[3] *Ante*, p. 365, note 5, and cases cited.

gone, and to restore it would be to create a new contract for the parties, — a thing quite beyond the power of legislation. So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment.[1] But there are many cases in which, by existing laws, defences based upon mere informalities are allowed in suits upon contracts, or in respect to legal proceedings, in some of which a regard to substantial justice would warrant the legislature in interfering to take away the defence if it possesses the power to do so.

[* 370] * In regard to these cases, we think investigation of the authorities will show that *a party has no vested right in a defence based upon an informality not affecting his substantial equities*. And this brings us to a particular examination of a class of statutes which is constantly coming under the consideration of the courts, and which are known as *retrospective laws*, by reason of their reaching back to and giving some different legal effect to some previous transaction to that which it had under the law when it took place.

There are numerous cases which hold that retrospective laws are not obnoxious to constitutional objection, while in others they have been held to be void. The different decisions have been based upon diversities in the facts which make different principles applicable. There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *eo nomine* by the State constitution, and provided further that no other objection exists to them than their retrospective character.[2] Nevertheless legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.[3] And

[1] In Medford *v.* Learned, 16 Mass. 215, it was held that where a pauper had received support from the parish, to which by law he was entitled, a subsequent legislative act could not make him liable by suit to refund the cost of the support. This case was approved and followed in People *v.* Supervisors of Columbia, 43 N. Y. 135. See *ante*, p. 362, and note.

[2] Thornton *v.* McGrath, 1 Duvall, 349; State *v.* Squires, 26 Iowa, 340; Beach *v.* Walker, 6 Conn. 197; Schenley *v.* Commonwealth, 36 Penn. St. 57.

[3] Dash *v.* Vankleek, 7 Johns. 477; Norris *v.* Beyea, 13 N. Y. 273; Plumb *v.* Sawyer, 21 Conn. 351; Whitman *v.* Hapgood, 13 Mass. 464; Medford *v.* Learned, 16 Mass. 215; Ray *v.* Gage, 36 Barb. 447; Watkins *v.* Haight, 18 Johns. 138;

some of the States have deemed it just and wise to forbid such laws altogether by their constitutions.[1]

* A retrospective statute curing defects in legal pro- [* 371]
ceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden. Of this class are the statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon;[2] irregularities in the

Garrett *v.* Beaumont, 24 Miss. 377; Briggs *v.* Hubbard, 19 Vt. 86; Perkins *v.* Perkins, 7 Conn. 558; Hastings *v.* Lane, 3 Shep. 134; Guard *v.* Rowan, 2 Scam. 499; Sayre *v.* Wisner, 8 Wend. 661; Quackenbos *v.* Danks, 1 Denio, 128; Garrett *v.* Doe, 1 Scam. 335; Thompson *v.* Alexander, 11 Ill. 54; State *v.* Barbee, 3 Ind. 258; Allbyer *v.* State, 10 Ohio, N. S. 588; State *v.* Atwood, 11 Wis. 422; Bartruff *v.* Remey, 15 Iowa, 257; Tyson *v.* School Directors, 51 Penn. St. 9; Colony *v.* Dublin, 32 N. H. 432; Torrey *v.* Corliss, 32 Me. 33; Atkinson *v.* Dunlop, 50 Me. 111; *Ex parte* Graham, 13 Rich. 277; Hubbard *v.* Brainerd, 35 Conn. 576; Conway *v.* Cable, 37 Ill. 82; Clark *v.* Baltimore, 29 Md. 277; Williams *v.* Johnson, 30 Md. 500; State *v.* The Auditor, 41 Mo. 25; Merwin *v.* Bullard, 66 N. C. 398; Haley *v.* Philadelphia, 68 Penn. St. 137; S. C. 8 Am. Rep. 153; Bennett *v.* Fisher, 26 Iowa, 497.

[1] See the provision in the Constitution of New Hampshire, considered in Woart *v.* Winnick, 3 N. H. 481; Clark *v.* Clark, 10 N. H. 386; Willard *v.* Harvey, 24 N. H. 351; and Rich *v.* Flanders, 39 N. H. 304; and that in the Constitution of Texas, in De Cordova *v.* Galveston, 4 Texas, 470. The Constitution of Ohio provides that "the General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; provided, however, that the General Assembly may, by general laws, authorize the courts to carry into effect the manifest intention of parties and officers, by curing omissions, defects, and errors in instruments and proceedings, arising out of their want of conformity with the laws of this State, and upon such terms as shall be just and equitable." Under this clause it was held competent for the General Assembly to pass an act authorizing the courts to correct mistakes in deeds of married women previously executed, whereby they were rendered ineffectual. Goshorn *v.* Purcell, 11 Ohio, N. S. 641. Under a provision in the Constitution of Tennessee that no retrospective law shall be passed, it has been held that a law authorizing a bill to be filed by slaves, by their next friend, to emancipate them, although it applied to cases which arose before its passage, was not a retrospective law within the meaning of this clause. Fisher's Negroes *v.* Dobbs, 6 Yerg. 119. An act for the payment of bounties for past services was held not retrospective in State *v.* Richland, 20 Ohio, N. S. 369. See further, Society *v.* Wheeler, 2 Gall. 105; Officer *v.* Young, 5 Yerg. 320.

That the legislature cannot retrospectively construe statutes and bind parties thereby, see *ante* p. 93 *et seq.*

[2] Butler *v.* Toledo, 5 Ohio, N. S. 225; Strauch *v.* Shoemaker, 1 W. & S. 175; McCoy *v.* Michew, 7 W. & S. 390; Montgomery *v.* Meredith, 17 Penn. St. 42;

organization or elections of corporations;[1] irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution through the carelessness of officers, or other cause;[2] irregular proceedings in courts, &c.

The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.

A few of the decided cases will illustrate this principle. In Kearney *v.* Taylor[3] a sale of real estate belonging to infant tenants in common had been made by order of court in a partition suit, and the land bid off by a company of persons, who proposed subdividing and selling it in parcels. The sale was confirmed in their names, but by mutual arrangement the deed was made to one only, for convenience in selling and conveying. This deed failed to convey the title, because not following the sale. The legislature afterwards passed an act providing that, on proof being made to the satisfaction of the court or jury before which such deed was offered in evidence that the land was sold fairly and without fraud, and the deed executed in good faith and for a sufficient consideration, and with the consent of the

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Dunden *v.* Snodgrass, 18 Penn. St. 151; Williston *v.* Colkett, 9 Penn. St. 38; Boardman *v.* Beckwith, 18 Iowa, 292. And see Walter *v.* Bacon, 8 Mass. 472; Locke *v.* Dane, 9 Mass. 360; Patterson *v.* Philbrook, 9 Mass. 153; Trustees *v.* McCaughy, 2 Ohio, N. S. 152. The right to provide for a reassessment of taxes irregularly levied is undoubted. See Brevoot *v.* Detroit, 23 Mich. 322; State *v.* Newark, 34 N. J. 237; Musselman *v.* Logansport, 29 Ind. 533. But, of course, if the vice is in the nature of the tax itself, it will continue and be fatal, however often the process of assessment may be repeated. See *post*, 382.

[1] Syracuse Bank *v.* Davis, 16 Barb. 188; Mitchell *v.* Deeds, 49 Ill. 416.

[2] See Menges *v.* Wertman, 1 Penn. St. 218; Yost's Report, 17 Penn. St. 524; Bennett *v.* Fisher, 26 Iowa, 497; Allen *v.* Archer, 49 Me. 346; Commonwealth *v.* Marshall, 69 Penn. St. 328; State *v.* Union, 4 Vroom, 250.

[3] 15 How. 494. And see Boyce *v.* Sinclair, 3 Bush, 261.

persons reported as purchasers, the deed should have the same effect as though it had been made to the purchasers. That this act was unobjectionable in principle was not denied; and it cannot be doubted that a prior statute, authorizing the deed to be made to one for the benefit of all and with their assent, would have been open to no valid objection.[1]

In certain Connecticut cases it was insisted that sales made of real estate on execution were void, because the officer had included in the amount due several small items of fees not allowed by law. It appeared, however, that, after the sales were made, the legislature had passed an act providing that no levy should be deemed void by reason of the officer having included greater fees than were by law allowable, but that all such levies, not in other respects defective, should be valid and effectual to transmit the title of the real estate levied upon. The liability of the officer for receiving more than his legal fees was at the same time left unaffected. In the leading case the court say: "The law, undoubtedly, is retrospective; but is it unjust? All the charges of the officer on the execution in question are perfectly reasonable, and for necessary services in the performance of his duty; of consequence they are eminently just; and so is the act confirming the levies. A law, although it be retrospective, if conformable to entire justice, this court has repeatedly decided is to be recognized and enforced."[2]

In another Connecticut case it appeared that certain marriages had been celebrated by persons in the ministry who were not empowered to perform that ceremony by the State law, and that the marriages were therefore invalid. The legislature had afterwards passed an act declaring all such marriages valid, and the court sustained the act. It was assailed as an exercise of the

[1] See Davis *v.* State Bank, 7 Ind. 316, and Lucas *v.* Tucker, 17 Ind. 41, for decisions under statutes curing irregular sales by guardians and executors. In many of the States general laws will be found providing that such sales shall not be defeated by certain specified defects and irregularities.

[2] Beach *v.* Walker, 6 Conn. 197; Booth *v.* Booth, 7 Conn. 350. And see Mather *v.* Chapman, 6 Conn. 54; Norton *v.* Pettibone, 7 Conn. 319; Welch *v.* Wadsworth, 30 Conn. 149; Smith *v.* Merchand's Ex'rs, 7 S. & R. 260; Underwood *v.* Lilly, 10 S. & R. 97; Bleakney *v.* Bank of Greencastle, 17 S. & R. 64; Menges *v.* Wertman, 1 Penn. St. 218; Weister *v.* Hade, 52 Penn. St. 474; Ahl *v.* Gleim, 52 Penn. St. 432; Selsby *v.* Redlon, 19 Wis. 17; Parmelee *v.* Lawrence, 48 Ill. 331.

judicial power; but this it clearly was not, as it purported to settle no controversies, and merely sought to give effect to the desire of the parties, which they had ineffectually attempted to carry out by means of the ceremony which proved insufficient. And while it was not claimed that the act was void in so far as it made [* 373] effectual the legal relation * of matrimony between the parties, it was nevertheless insisted that rights of property dependent upon that relation could not be affected by it, inasmuch as, in order to give such rights, it must operate retrospectively. The court in disposing of the case are understood to express the opinion that, if the legislature possesses the power to validate an imperfect marriage, still more clearly does it have power to affect incidental rights. "The man and the woman were unmarried, notwithstanding the formal ceremony which passed between them, and free in point of law to live in celibacy, or contract marriage with any other persons at pleasure. It is a strong exercise of power to compel two persons to marry without their consent, and a palpable perversion of strict legal right. At the same time the retrospective law thus far directly operating on vested rights is admitted to be unquestionably valid, because manifestly just."[1]

It is not to be inferred from this language that the court understood the legislature to possess power to select individual members of the community, and force them into a relation of marriage with each other against their will. That complete control which the legislature is supposed to possess over the domestic relations can hardly extend so far. The legislature may perhaps divorce parties, with or without cause, according to its own view of justice or public policy; but for the legislature to marry parties against their consent, we conceive to be decidedly against "the law of the land." The learned court must be understood as speaking here with exclusive reference to the case at bar, in which the legislature, by the retrospective act, were merely removing a formal impediment to that marriage which the parties had assented to, and which they had attempted to form. Such an act, unless special circumstances conspired to make it otherwise, would certainly be "manifestly just," and therefore might well be held

[1] Goshen *v.* Stonington, 4 Conn. 224, per *Hosmer*, J. The power to validate void marriages held not to exist in the legislature where, by the constitution, the whole subject was referred to the courts. White *v.* White, 105 Mass. 325.

"unquestionably valid." And if the marriage was rendered valid, the legal incidents would follow of course. In a Pennsylvania case the validity of certain grading and paving assessments was involved, and it was argued that they were invalid for the reason that the city ordinance under which they had been made was inoperative, because not recorded as required by law. But the legislature had passed an act to validate this ordinance, and had declared therein that the omission to record the ordinance should not affect or impair the lien of the assessments against the lot owners. In passing upon the validity of this act, the court express the following views: "Whenever there is a right, though imperfect, the constitution does not prohibit the legislature from giving a remedy. In Hepburn *v.* Curts,[1] it was said, 'The legislature, provided it does not violate the constitutional provisions, may pass retrospective laws, * such as in their operation may affect suits [* 374] pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings.' What more has been done in this case? . . . While (the ordinance) was in force, contracts to do the work were made in pursuance of it, and the liability of the city was incurred. But it was suffered to become of no effect by the failure to record it. Notwithstanding this, the grading and paving were done, and the lots of the defendants received the benefit at the public expense. Now can the omission to record the ordinance diminish the equitable right of the public to reimbursement? It is at most but a formal defect in the remedy provided, — an oversight. That such defects may be cured by retroactive legislation need not be argued."[2]

On the same principle legislative acts validating invalid contracts have been sustained. When these acts go no farther than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in con-

[1] 7 Watts, 300.

[2] Schenley *v.* Commonwealth, 36 Penn. St. 29, 57. See also State *v.* Newark, 3 Dutch. 185; Den *v.* Downam, 1 Green (N. J.), 135; People *v.* Seymour, 16 Cal. 332; Grim *v.* Weisenburg School District, 57 Penn. St. 433; State *v.* Union, 33 N. J. 355. The legislature has the same power to ratify and confirm an illegally appointed corporate body that it has to create a new one. Mitchell *v.* Deeds, 49 Ill. 416.

sequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power.

By statute of Ohio, all bonds, notes, bills, or contracts negotiable or payable at any unauthorized bank, or made for the purpose of being discounted at any such bank, were declared to be void. While this statute was in force a note was made for the purpose of being discounted at one of these institutions, and was actually discounted by it. Afterwards the legislature passed an act, reciting that many persons were indebted to such bank, by bonds, bills, notes, &c., and that owing, among other things, to doubts of its right to recover its debts, it was unable to meet its own obligations, and had ceased business, and for the purpose of winding up its affairs had made an assignment to a trustee; therefore the said act authorized the said trustee to bring suits on the said bonds, bills, notes, &c., and declared it should not be lawful for the defendants in such suits "to plead, set up, or insist upon, in defence, that the notes, bonds, bills, or other written evidences of such indebtedness are void on account of being contracts against or in viola-
[* 375] tion of any statute * law of this State, or on account of their being contrary to public policy." This law was sustained as a law "that contracts may be enforced," and as in furtherance of equity and good morals.[1] The original invalidity was only because of the statute, and that statute was founded upon reasons of public policy which had either ceased to be of force, or which the legislature regarded as overborne by countervailing reasons. Under these circumstances it was reasonable and just that the makers of such paper should be precluded from relying upon such invalidity.[2]

[1] Lewis v. McElvain, 16 Ohio, 347.

[2] Trustees v. McCaughy, 2 Ohio, N. S. 155; Johnson v. Bentley, 16 Ohio, 97. See also Syracuse Bank v. Davis, 16 Barb. 188. By statute, notes issued by unincorporated banking associations were declared void. This statute was afterwards repealed, and action was brought against bankers on notes previously issued. Objection being taken that the legislature could not validate the void contracts, the judge says: "I will consider this case on the broad ground of the contract having been void when made, and of no new contract having arisen since the repealing act. But by rendering the contract void it was not annihilated. The object of the [original] act was not to vest any right in any unlawful banking association, but directly the reverse. The motive was not to create a privilege, or shield them from the payment of their just debts, but to restrain them from

By a statute of Connecticut, where loans of money were made, and a bonus was paid by the borrower over and beyond the interest and bonus permitted by law, the demand was subject to a deduction from the principal of all the interest and bonus paid. A construction appears to have been put upon this statute by business men which was different from that afterwards given by the courts; and a large number of contracts of loan were in consequence subject to the deduction. The legislature then passed a "healing act," which provided that such loans theretofore made should not be held, by reason of the taking of such bonus, to be usurious, illegal, or in any respect void; but that, if otherwise legal, they were thereby confirmed, and declared to be valid, as to principal, interest, and * bonus. The case of Goshen *v.* [* 376] Stonington[1] was regarded as sufficient authority in support of this act; and the principle to be derived from that case was stated to be "that where a statute is expressly retroactive, and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice, then, both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained."[2]

violating the law by destroying the credit of their paper, and punishing those who received it. How then can the defendants complain? As unauthorized bankers they were violators of the law, and objects not of protection but of punishment. The repealing act was a statutory pardon of the crime committed by the receivers of this illegal medium. Might not the legislature pardon the crime, without consulting those who committed it? . . . How can the defendants say there was no contract, when the plaintiff produces their written engagement for the performance of a duty, binding in conscience if not in law? Although the contract, for reasons of policy, was so far void that an action could not be sustained on it, yet a moral obligation to perform it, whenever those reasons ceased, remained; and it would be going very far to say that the legislature may not add a legal sanction to that obligation, on account of some fancied constitutional restriction." Hess *v.* Werts, 4 S. & R. 361. See also Bleakney *v.* Bank of Greencastle, 17 S. & R. 64; Menges *v.* Wertman, 1 Penn. St. 218; Boyce *v.* Sinclair, 3 Bush, 264.

[1] 4 Conn. 224. See *ante*, p. 272–3.

[2] Savings Bank *v.* Allen, 28 Conn. 97. See also Savings Bank *v.* Bates, 8 Conn. 505; Andrews *v.* Russell, 7 Blackf. 474; Grimes *v.* Doe, 8 Blackf. 371; Thompson *v.* Morgan, 6 Minn. 292; Parmelee *v.* Lawrence, 48 Ill. 331. In Curtis *v.* Leavitt, 17 Barb. 309, and 15 N. Y. 9, a statute forbidding the interposition of the defence of usury was treated as a statute repealing a penalty. See, further, Wilson *v.* Hardesty, 1 Md. Ch. 66; Welch *v.* Wadsworth, 30 Conn.

After the courts of the State of Pennsylvania had decided that the relation of landlord and tenant could not exist in that State under a Connecticut title, a statute was passed which provided that the relation of landlord and tenant "shall exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this commonwealth, on the trial of any case now pending or hereafter to be brought within this commonwealth, any law or usage to the contrary notwithstanding." In a suit which was pending and had been once tried before the statute was passed, the statute was sustained by the Supreme Court of that State, and afterwards by the Supreme Court of the United States, into which last-mentioned court it had been removed on the allegation that it violated the obligation of contracts. As its purpose and effect was to remove from contracts which the parties had made a legal impediment to their enforcement, there would seem to be no doubt, in the light of the other authorities we have referred to, that the conclusion reached was the only just and proper one.[1]

In the State of Ohio, certain deeds made by married women were ineffectual for the purposes of record and evidence, by reason of the omission on the part of the officer taking the acknowledgment to state in his certificate that, before and at the time of the grantor making the acknowledgment, he made the contents known to her by reading or otherwise. An act was afterwards passed which provided that "any deed heretofore executed pursuant to
[* 377] * law, by husband and wife, shall be received in evidence in any of the courts of this State, as conveying the estate of the wife, although the magistrate taking the acknowledgment of such deed shall not have certified that he read or made known the contents of such deed before or at the time she acknowledged the execution thereof." This statute, though with some hesitation at first, was held to be unobjectionable. The deeds with the defective acknowledgments were regarded by the legislature and by the court

149; Wood *v.* Kennedy, 19 Ind. 68; Washburn *v.* Franklin, 35 Barb. 599; Parmelee *v.* Lawrence, 48 Ill. 331. The case of Gilliland *v.* Phillips, 1 S. C. N. S. 152, is *contra*; but it discusses the point but little, and makes no reference to these cases.

[1] Satterlee *v.* Mathewson, 16 S. & R. 169, and 2 Pet. 380. And see Watson *v.* Mercer, 8 Pet. 88; Lessee of Dulany *v.* Tilghman, 6 G. & J. 461; Payne *v.* Treadwell, 16 Cal. 220; Maxey *v.* Wise, 25 Ind. 1.

as being sufficient for the purpose of conveying at least the grantor's equitable estate; and if sufficient for this purpose, no vested rights would be disturbed, or wrong be done, by making them receivable in evidence as conveyances.[1]

Other cases go much farther than this, and hold that, although the deed was originally ineffectual for the purpose of conveying the title, the healing statute may accomplish the intent of the parties by giving it effect.[2] At first sight these cases might seem to go beyond the mere confirmation of a contract, and to be at least technically objectionable, as depriving a party of property * without [* 378] an opportunity for trial, inasmuch as they proceeded upon the assumption that the title still remained in the grantor, and that the healing act was required for the purpose of divesting him of

[1] Chestnut *v.* Shane's Lessee, 16 Ohio, 599, overruling Connell *v.* Connell, 6 Ohio, 358; Good *v.* Zercher, 12 Ohio, 364; Meddock *v.* Williams, 12 Ohio, 377; and Silliman *v.* Cummins, 13 Ohio, 116. Of the dissenting opinion in the last case, which the court approve in 16 Ohio, 609–10, they say: "That opinion stands upon the ground that the act operates only upon that class of deeds where enough had been done to show that a court of chancery ought, in each case, to render a decree for a conveyance, assuming that the certificate was not such as the law required. And where the title in equity was such that a court of chancery ought to interfere and decree a good legal title, it was within the power of the legislature to confirm the deed, without subjecting an indefinite number to the useless expense of unnecessary litigation." See also Lessee of Dulany *v.* Tilghman, 6 G. & J. 461; Journeay *v.* Gibson, 56 Penn. St. 57. But the legislature, it has been declared, has no power to legalize and make valid the deed of an insane person. Routsong *v.* Wolf, 35 Mo. 174.

[2] Lessee of Walton *v.* Bailey, 1 Binn. 477; Underwood *v.* Lilly, 10 S. & R. 101; Barnet *v.* Barnet, 15 S. & R. 72; Tate *v.* Stooltzfoos, 16 S. & R. 35; Watson *v.* Mercer, 8 Pet. 88; Carpenter *v.* Pennsylvania, 17 How. 456; Davis *v.* State Bank, 7 Ind. 316; Dentzel *v.* Waldie, 30 Cal. 138; Estate of Sticknoth, 7 Nev. 227; Goshorn *v.* Purcell, 11 Ohio, N. S. 641. In the last case the court say: "The act of the married woman may, under the law, have been void and inoperative; but in justice and equity it did not leave her right to the property untouched. She had capacity to do the act in a form prescribed by law for her protection. She intended to do the act in the prescribed form. She attempted to do it, and her attempt was received and acted on in good faith. A mistake subsequently discovered invalidates the act; justice and equity require that she should not take advantage of the mistake; and she has therefore no just right to the property. She has no right to complain if the law which prescribed forms for her protection shall interfere to prevent her reliance upon them to resist the demands of justice." Similar language is employed in the Pennsylvania cases. See, further, Dentzel *v.* Waldie, 30 Cal. 138.

it, and passing it over to the grantee.[1] Apparently, therefore, there would seem to be some force to the objection that such a statute deprives a party of vested rights. But the objection is more specious than sound. If all that is wanting to a valid contract or conveyance is the observance of some legal formality, the party may have a legal right to avoid it: but this right is coupled with no equity, even though the case be such that no remedy could be afforded the other party in the courts. The right which the healing act takes away in such a case is *the right in the party to avoid his contract*,— a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect.[2] As the point is put by Chief Justice *Parker* of Massachusetts, a party cannot have a vested right to do wrong;[3] or, as stated by the Supreme Court of New Jersey, "Laws curing defects which would otherwise operate to frustrate what must be presumed to be the desire of the party affected, cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the justice and equity of the case."[4]

The operation of these cases, however, must be carefully restricted to the parties to the original contract, and to such other persons as may have succeeded to their rights with no greater equities. A subsequent *bona fide* purchaser cannot be deprived of the property which he has acquired, by an act which retrospectively deprives his grantor of the title which he had when the purchase was made. Conceding that the invalid deed may be made good as between the parties, yet if, while it remained invalid, and the grantor still retained the legal title to the land, a third person has purchased and received a conveyance, with no notice of any fact [*379] which should *preclude his acquiring an equitable as

[1] This view has been taken in some similar cases. See Russell *v.* Rumsey, 35 Ill. 362; Alabama, &c., Ins. Co. *v.* Boykin, 38 Ala. 510; Orton *v.* Noonan, 23 Wis. 102; Dade *v.* Medcalf, 9 Penn. St. 108.

[2] In Gibson *v.* Hibbard, 13 Mich. 215, a check, void at the time it was given, for want of a revenue stamp, was held valid after being stamped as permitted by a subsequent act of Congress. A similar ruling was made in Harris *v.* Rutledge, 19 Iowa, 389. The case of State *v.* Norwood, 12 Md. 195, is still stronger. The curative statute was passed after judgment had been rendered against the right claimed under the defective instrument, and it was held that it must be applied by the appellate court. See *post*, 381.

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

[4] State *v.* Newark, 3 Dutch. 197.

well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to divest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal title is no longer separated from equities, but in the hands of the second purchaser is united with an equity as strong as that which exists in favor of him who purchased first. Under such circumstances even the courts of equity must recognize the right of the second purchaser as best, and as entitled to the usual protection which the law accords to vested interests.[1]

If, however, a grantor undertakes to convey more than he possesses, or contrary to the conditions or qualifications which, for the benefit of others, are imposed upon his title, or in fraud of the rights of others whose representative or agent he is, so that the defect in his conveyance consists not in any want of due formality, nor in any disability imposed by law, it is not in the power of the legislature to validate it retrospectively; and we may add, also, that it would not have been competent to authorize it in advance. In such case the rights of others intervene, and they are entitled to protection on the same grounds, though for still stronger reasons, which exist in the case of the *bona fide* purchasers above referred to.[2]

[1] Brinton *v.* Seevers, 12 Iowa, 389; Southard *v.* Central R.R. Co., 2 Dutch. 22; Thompson *v.* Morgan, 6 Minn. 292; Meighen *v.* Strong, 6 Minn. 177; Norman *v.* Heist, 5 W. & S. 171; Greenough *v.* Greenough, 11 Penn. St. 494; Le Bois *v.* Bramel, 4 How. 449; McCarthy *v.* Hoffman, 23 Penn. St. 508. Sherwood *v.* Fleming, 25 Texas, 408; Wright *v.* Hawkins, 28 Texas, 452. The legislature cannot validate an invalid trust in a will, by act passed after the death of the testator, and after title vested in the heirs. Hilliard *v.* Miller, 10 Penn. St. 338. See Snyder *v.* Bull, 17 Penn. St. 58; McCarthy *v.* Hoffman, 23 Penn. St. 507; Bolton *v.* Johns, 5 Penn. St. 145; State *v.* Warren, 28 Md. 338. The cases here cited must not be understood as establishing any different principle from that laid down in Goshen *v.* Stonington, 4 Conn. 209, where it was held competent to validate a marriage, notwithstanding the rights of third parties would be incidentally affected. Rights of third parties are liable to be incidentally affected more or less in any case in which a defective contract is made good; but this is no more than might happen in enforcing a contract or decreeing a divorce. See *post*, p. 384. Also, Tallman *v.* Janesville, 17 Wis. 71.

[2] In Shouk *v.* Brown, 61 Penn. St. 327, the facts were that a married woman held property under a devise, with an express restraint upon her power to alienate. She nevertheless gave a deed of the same, and a legislative act was afterwards obtained to validate this deed. Held void. *Agnew*, J.: "Many cases have been cited to prove that this legislation is merely confirmatory and

We have already referred to the case of contracts by municipal corporations which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action. If the contract is one which the legislature might originally have authorized, the case falls within the principle above laid down, and the right of the legislature to confirm it must be recognized.[1] This

valid, beginning with Barnet *v.* Barnet, 15 S. & R. 72, and ending with Journeay *v.* Gibson, 56 Penn. St. 57. The most of them are cases of the defective acknowledgments of deeds of married women. But there is a marked difference between them and this. In all of them there was a power to convey, and only a defect in the mode of its exercise. Here there is an absolute want of power to convey in any mode. In ordinary cases a married woman has both the title and the power to convey or to mortgage her estate, but is restricted merely in the manner of its exercise. This is a restriction it is competent for the legislature to remove, for the defect arises merely in the form of the proceeding, and not in any want of authority. Those to whom her estate descends, because of the omission of a prescribed form, are really not injured by the validation. It was in her power to cut them off, and in truth and conscience she did so, though she failed at law. They cannot complain, therefore, that the legislature interferes to do justice. But the case before us is different. [The grantor] had neither the right nor the power during coverture to cut off her heirs. She was forbidden by the law of the gift, which the donor imposed upon it to suit his own purposes. Her title was qualified to this extent. Having done an act she had no right to do, there was no moral obligation for the legislature to enforce. Her heirs have a right to say . . . 'the legislature cannot take our estate and vest it in another who bought it with notice on the face of his title that our mother could not convey to him.' The true principle on which retrospective laws are supported was stated long ago by *Duncan*, J., in Underwood *v.* Lilly, 10 S. & R. 101; to wit, where they impair no contract, or disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, which do not vary existing obligations contrary to their situation when entered into and when prosecuted." In White Mountains R.R. Co. *v.* White Mountains R.R. Co. of N. H., 50 N. H. 50, it was decided that the legislature had no power, as against non-assenting parties, to validate a fraudulent sale of corporate property. In Alter's Appeal, 67 Penn. St. 341; s. c. 5 Am. Rep. 433; the Supreme Court of Pennsylvania declared it incompetent for the legislature, after the death of a party, to empower the courts to correct a mistake in his will which rendered it inoperative — the title having already passed to his heirs. But where it was not known that the decedent left heirs, it was held competent, as against the State, to cure defects in a will after the death, and thus prevent an escheat. Estate of Sticknoth, 7 Nev. 229.

[1] See Shaw *v.* Norfolk R.R. Corp., 5 Gray, 179, in which it was held that the legislature might validate an unauthorized assignment of a franchise. Also, May *v.* Holdridge, 23 Wis. 93, and cases cited, in which statutes authorizing the reassessment of irregular taxes were sustained. In this case, *Paine*, J., says: "This rule must of course be understood with its proper restrictions. The work

principle is one which has very often been acted upon in the case of municipal subscriptions to works of internal improvement, where the original undertaking was without authority of law, and the authority given was conferred by statute retrospectively.[1]

It has not usually been regarded as a circumstance of importance in these cases, whether the enabling act was before or after the corporation had entered into the contract in question; and if the legislature possesses that complete control over the subject of taxation by municipal corporations which has been declared in many cases, it is difficult to perceive how such a corporation can successfully contest the validity of a special statute, which only sanctions a contract previously made by the * corporation, and [* 380] which, though at the time *ultra vires*, was nevertheless for a public and local object, and compels its performance through an exercise of the power of taxation.[2]

for which the tax is sought to be assessed must be of such a character that the legislature is authorized to provide for it by taxation. The method adopted must be one liable to no constitutional objection. It must be such as the legislature might originally have authorized had it seen fit. With these restrictions, where work of this character has been done, I think it competent for the legislature to supply a defect of authority in the original proceedings, to adopt and ratify the improvement and provide for a reassessment of the tax to pay for it." And see Brewster *v.* Syracuse, 19 N. Y. 116; Kunkle *v.* Franklin, 13 Minn. 127; Boyce *v.* Sinclair, 3 Bush, 264; Dean *v.* Borchsenius, 30 Wis. 236; Stuart *v.* Warren, 37 Conn. 225.

[1] See, among other cases, McMillan *v.* Boyles, 6 Iowa, 330; Gould *v.* Sterling, 23 N. Y. 457; Thompson *v.* Lee County, 3 Wall. 327; Bridgeport *v.* Housatonic R.R. Co., 15 Conn. 475; Board of Commissioners *v.* Bright, 18 Ind. 93; Gibbons *v.* Mobile, &c., R.R. Co., 36 Ala. 410.

[2] In Hasbrouck *v.* Milwaukee, 13 Wis. 37, it appeared that the city of Milwaukee had been authorized to contract for the construction of a harbor, at an expense not to exceed $100,000. A contract was entered into by the city providing for a larger expenditure; and a special legislative act was afterwards obtained to ratify it. The court held that the subsequent legislative ratification was not sufficient, *proprio vigore*, and without evidence that such ratification was procured with the assent of the city, or had been subsequently acted upon or confirmed by it, to make the contract obligatory upon the city. The court say, per *Dixon*, Ch. J.: "The question is, can the legislature, by recognizing the existence of a previously void contract, and authorizing its discharge by the city, or in any other way, coerce the city against its will into a performance of it, or does the law require the assent of the city, as well as of the legislature, in order to make the obligation binding and efficacious? I must say that, in my opinion, the latter act, as well as the former, is necessary for that purpose, and that without it the obligation cannot be enforced. A contract void for want of capacity in one

[* 381] * Nor is it important in any of the cases to which we have referred, that the legislative act which cures the

or both of the contracting parties to enter into it is as no contract; it is as if no attempt at an agreement had ever been made. And to admit that the legislature, of its own choice, and against the wishes of either or both of the contracting parties, can give it life and vigor, is to admit that it is within the scope of legislative authority to devest settled rights of property, and to take the property of one individual or corporation and transfer it to another." This reasoning is of course to be understood in the light of the particular case before the court; that is to say, a case in which the contract was to do something not within the ordinary functions of local government. See the case explained and defended by the same eminent judge in Mills *v.* Charlton, 29 Wis. 413. The cases of Guilford *v.* Supervisors of Chenango, 18 Barb. 615, and 13 N. Y. 143; Brewster *v.* Syracuse, 19 N. Y. 116; and Thomas *v.* Leland, 24 Wend. 65, especially go much further than is necessary to sustain the text. See also Bartholomew *v.* Harwinton, 33 Conn. 408; People *v.* Mitchell, 35 N. Y. 551; Barbour *v.* Camden, 51 Me. 608; Weister *v.* Hade, 52 Penn. St. 474; State *v.* Sullivan, 43 Ill. 413; Johnson *v.* Campbell, 49 Ill. 316. In Brewster *v.* Syracuse, parties had constructed a sewer for the city at a stipulated price, which had been fully paid to them. The charter of the city forbade the payment of extra compensation to contractors in any case. The legislature afterwards passed an act empowering the Common Council of Syracuse to assess, collect, and pay over the further sum of $600 in addition to the contract price; and this act was held constitutional. In Thomas *v.* Leland, certain parties had given bond to the State, conditioned to pay into the treasury a certain sum of money as an inducement to the State to connect the Chenango Canal with the Erie at Utica, instead of at Whitestown as originally contemplated, — the sum mentioned being the increased expense in consequence of the change. Afterwards the legislature, deeming the debt thus contracted by individuals unreasonably partial and onerous, passed an act, the object of which was to levy the amount on the owners of real estate in Utica. This act seemed to the court unobjectionable. "The general purpose of raising the money by tax was to construct a canal, a public highway, which the legislature believed would be a benefit to the city of Utica as such; and independently of the bond, the case is the ordinary one of local taxation to make or improve a highway. If such an act be otherwise constitutional, we do not see how the circumstance that a bond had before been given securing the same money can detract from its validity. Should an individual volunteer to secure a sum of money, in itself properly leviable by way of tax on a town or county, there would be nothing in the nature of such an arrangement which would preclude the legislature from resorting, by way of tax, to those who are primarily and more justly liable. Even should he pay the money, what is there in the constitution to preclude his being reimbursed by a tax?" Here, it will be perceived, the corporation was compelled to assume an obligation which it had not even attempted to incur, but which private persons, for considerations which seemed to them sufficient, had taken upon their own shoulders. We have expressed doubts of the correctness of this decision, *ante*, 230–31, note, where a number of cases are cited, bearing upon the point.

irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision;[1] and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered.[2] It has been held that a statute allowing amendments to indictments in criminal cases might constitutionally be applied to pending suits;[3] and even in those States in which retrospective laws are forbidden, a cause must be tried under the rules of evidence existing at the time of the trial, though different from those in force when the suit was commenced.[4] And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when their decision is rendered.[5]

[1] Bacon *v.* Callender, 6 Mass. 309; Butler *v.* Palmer, 1 Hill, 324; Cowgill *v.* Long, 15 Ill. 203; Miller *v.* Graham, 17 Ohio, N. S. 1; State *v.* Squires, 26 Iowa, 340; Patterson *v.* Philbrook, 9 Mass. 151.

[2] Watson *v.* Mercer, 8 Pet. 88; Mather *v.* Chapman, 6 Conn. 54; Bristol *v.* Supervisors, &c., 20 Mich. 93; Satterlee *v.* Mathewson, 16 S. & R. 169, and 2 Pet. 380.

[3] State *v.* Manning, 11 Texas, 402.

[4] Rich *v.* Flanders, 39 N. H. 304.

[5] State *v.* Norwood, 12 Md. 195. In Eaton *v.* United States, 5 Cranch, 281, a vessel had been condemned in admiralty, and pending an appeal the act under which the condemnation was declared was repealed. The court held that the cause must be considered as if no sentence had been pronounced; and if no sentence had been pronounced, then, after the expiration or repeal of the law, no penalty could be enforced or punishment inflicted for a violation of the law committed while it was in force, unless some special provision of statute was made for that purpose. See also Schooner Rachel *v.* United States, 6 Cranch, 329; Commonwealth *v.* Duane, 1 Binney, 601; United States *v.* Passmore, 4 Dall. 372; Commonwealth *v.* Marshall, 11 Pick. 350; Commonwealth *v.* Kimball, 21 Pick. 373; Hartung *v.* People, 22 N. Y. 100; Norris *v.* Crocker, 13 How. 129; Insurance Co. *v.* Ritchie, 5 Wall. 541; *Ex parte* McCardle, 7 Wall. 506; United States *v.* Tyner, 11 Wall. 88; Engle *v.* Shurtz, 1 Mich. 150. In the McCardle case the appellate jurisdiction of the United States Supreme Court in certain cases was taken away while a case was pending. Per *Chase*, Ch. J.: "Jurisdiction is power to declare the law; and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. This is not less clear upon authority than upon principle." But where a State has jurisdiction of a subject, *e. g.* pilotage, until Congress establishes regulations, and penalties are incurred under a State act, and afterwards Congress legislates on the subject, this does not repeal, but only suspends the State law;

But the healing statute must in all cases be confined to validating acts which the legislature might previously have author-
[* 382] ized. * It cannot make good retrospectively acts or contracts which it had no power to permit or sanction in advance.[1] There lies before us at this time a volume of statutes of one of the States, in which are contained acts declaring certain tax-rolls valid and effectual, notwithstanding the following irregularities and imperfections: a failure in the supervisor to carry out separately, opposite each parcel of land on the roll, the taxes charged upon such parcel, as required by law; a failure in the supervisor to sign the certificate attached to the roll; a failure in the voters of the township to designate, as required by law, in a certain vote by which they had assumed the payment of bounty moneys, whether they should be raised by tax or loan; corrections made in the roll by the supervisor after it had been delivered to the collector; the including by the supervisor of a sum to be raised for township purposes without the previous vote of the township, as required by law; adding to the roll a sum to be raised which could not lawfully be levied by taxation without legislative authority; the failure of the supervisor to make out the roll within the time required by law; and the accidental omission of a parcel of land which should have been embraced by the roll. In each of these cases, except the last, the act required by law, and which failed to be performed, might by previous legislation have been dispensed with; and perhaps in the last case there might be question whether the roll was rendered invalid by the omission referred to, and, if it was, whether the subsequent act could legalize it.[2] But if township officers should assume to do acts under the power of taxation which could not lawfully be justified as an exercise of that power, no subsequent legislation could make them good. If, for instance, a part of the property in a taxing district should be assessed at one rate, and a part at another, for a burden resting equally upon all, there would be no such apportionment as is essential to taxation, and the roll would be beyond the reach of curative legisla-

and a penalty previously incurred may still be collected. Sturgis *v.* Spofford, 45 N. Y. 446.

[1] See *ante*, 379, and note 1.

[2] See Weeks *v.* Milwaukee, 10 Wis. 242; Dean *v.* Gleason, 16 Wis. 1; *post* 515, note.

tion.[1] And if persons or property should be assessed for taxation * in a district which did not include them, the [* 383] assessment would not only be invalid, but a healing statute would be ineffectual to charge them with the burden. In such a case there would be a fatal want of jurisdiction; and even in judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it.[3]

*Statutory Privileges and Exemptions.*

The citizen has no vested right in statutory privileges and exemptions. Among these may be mentioned, — exemptions from the performance of public duty upon juries, or in the militia, and the like; exemptions of property or person from assessment for the

[1] See Billings *v.* Detten, 15 Ill. 218; Conway *v.* Cable, 37 Ill. 82; and Thames Manufacturing Co. *v.* Lathrop, 7 Conn. 550, for cases where curative statutes were held not effectual to reach defects in tax proceedings. As to what defects may or may not be cured by subsequent legislation, see Allen *v.* Armstrong, 16 Iowa, 508, Smith *v.* Cleveland, 17 Wis. 556, and Abbott *v.* Lindenbower, 42 Mo. 162. In Tallman *v.* Janesville, 17 Wis. 71, the constitutional authority of the legislature to cause an irregular tax to be reassessed in a subsequent year, where the rights of *bona fide* purchasers had intervened, was disputed; but the court sustained the authority as "a salutary and highly beneficial feature of our systems of taxation," and "not to be abandoned because in some instances it produces individual hardships." Certainly *bona fide* purchasers, as between themselves and the State, must take their purchases subject to all public burdens justly resting upon them. The case of Conway *v.* Cable is instructive. It was there held among other things, — and very justly as we think, — that the legislature could not make good a tax sale effected by fraudulent combination between the officers and the purchasers. In Miller *v.* Graham, 17 Ohio, N. S. 1, a statute validating certain ditch assessments was sustained, notwithstanding the defects covered by it were not mere irregularities; but that statute gave the parties an opportunity to be heard as to these defects.

[2] See Wells *v.* Weston, 22 Mo. 385; People *v.* Supervisors of Chenango, 11 N. Y. 563; Hughey's Lessee *v.* Howell, 2 Ohio, 231; Covington *v.* Southgate, 15 B. Monr. 491; Morford *v.* Unger, 8 Iowa, 82; *post*, 499, 500.

[3] So held in McDaniel *v.* Correll, 19 Ill. 228, where a statute came under consideration which assumed to make valid certain proceedings in court which were void for want of jurisdiction of the persons concerned. See also Denny *v.* Mattoon, 2 Allen, 361; Nelson *v.* Rountree, 23 Wis. 367; Griffin's Ex'r *v.* Cunningham, 20 Grat. 109, per *Joynes*, J.; Richards *v.* Rote, 68 Penn. St. 248; State *v.* Doherty, 60 Me. 504. Walpole *v.* Elliott, 18 Ind. 259, is distinguishable from these cases. In that case there was not a failure of jurisdiction, but an irregular exercise of it.

purposes of taxation; exemptions of property from being seized on attachment, or execution, or for the payment of taxes; exemption from highway labor, and the like. All these rest upon reasons of public policy, and the laws are changed as the varying circumstances seem to require. The State demands the performance of military duty by those persons only who are within certain specified ages; but if, in the opinion of the legislature, the public exigencies should demand military service from all other persons capable of bearing arms, the privilege of exemption might be recalled, without violation of any constitutional principle. The fact that a party had passed the legal age under an existing law, and performed the service demanded by it, could not protect him against further calls, when public policy or public necessity was thought to require them.[1] In like manner, exemptions from taxation are always subject to recall, when they have been granted merely as a privilege, and not for a consideration received by the public; as in the case of exemption of buildings for religious or educational purposes, and the like.[2] So, also, are exemptions of property from execution.[3] So, a license to carry on a particular trade for a specified period, may be recalled before the period has elapsed.[4] So, as before stated, a penalty given by statute may be taken away by statute at any time before judgment is recovered.[5]

[1] Commonwealth *v.* Bird, 12 Mass. 443; Swindle *v.* Brooks, 34 Geo. 67; Mayer, *Ex parte*, 27 Texas, 715. And see Dale *v.* The Governor, 3 Stew. 387.

[2] See *ante*, 280, 281, and notes. All the cases concede the right in the legislature to recall an exemption from taxation, when not resting upon contract. The subject was considered in People *v.* Roper, 35 N. Y. 629, in which it was decided that a limited immunity from taxation, tendered to the members of voluntary military companies, might be recalled at any time. It was held not to be a contract, but "only an expression of the legislative will for the time being, in a matter of mere municipal regulation." And see Christ Church *v.* Philadelphia, 24 How. 300; Lord *v.* Litchfield, 36 Conn. 116.

[3] Bull *v.* Conroe, 13 Wis. 238.

[4] Of this there can be no question unless a fee was paid for the license; and well-considered cases hold that it may be even then. See Adams *v.* Hackett, 5 Gray, 597; Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657; *ante*, p. 283, note.

[5] Oriental Bank *v.* Freeze, 6 Shep. 109. The statute authorized the plaintiff, suing for a breach of a prison bond, to recover the amount of his judgment and costs. This was regarded by the court as in the nature of the penalty; and it was therefore held competent for the legislature, even after breach, to so modify the law as to limit the plaintiff's recovery to his actual damages. See *ante*, p. 362, note 5, and cases cited.

So an offered bounty may be recalled, except as to so much as was actually earned while the offer was a continuing one; *and the fact that a party has purchased property or [* 384] incurred expenses in preparation for earning the bounty cannot preclude the recall.[1] A franchise granted by the State with a reservation of a right of repeal must be regarded as a mere privilege while it is suffered to continue, but the legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchises granted to them solely upon the faith of the sovereign grantor.[2] A statutory right to have cases reviewed on appeal may be taken away, by a repeal of the statute, even as to causes which had been previously appealed.[3] A mill-dam act which confers upon the person erecting a dam the right to maintain it, and flow the lands of private owners on paying such compensation as should be assessed for the injury done, may be repealed even as to dams previously erected.[4] These illustrations must suffice under the present head.

### *Consequential Injuries.*

It is a general rule that no one has a vested right to be protected against consequential injuries arising from a proper exercise of rights by others.[5] This rule is peculiarly applicable to injuries resulting from the exercise of public powers. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the owner of his property, without affording him any redress. The construction of a new way or the discontinuance of an old one may very seriously affect the

[1] East Saginaw Salt Manuf. Co. *v.* East Saginaw City, 19 Mich. 271; s. c. 2 Am. Rep. 82, and 13 Wall. 373. But as to so much of the bounty as was actually earned before the change in the law, the party earning it has a vested right which cannot be taken away. People *v.* State Auditors, 9 Mich. 327. And it has been held competent in changing a county seat to provide by law for compensation, through taxation to the residents of the old site. Wilkinson *v.* Cheatham, 43 Geo. 258.

[2] Per *Smith*, J., in Pratt *v.* Brown, 3 Wis. 611.

[3] *Ex parte* McCardle, 7 Wall. 506.

[4] Pratt *v.* Brown, 3 Wis. 603. But if the party maintaining the dam had paid to the other party a compensation assessed under the statute, it might be otherwise.

[5] For the doctrine *damnum absque injuria*, see Broom's Maxims, 185; Sedgwick on Damages, 30, 112.

value of adjacent property; the removal of a county or State capital will often reduce very largely the value of all the real estate of the place from whence it was removed: but in neither case can the parties, whose interests would be injuriously affected, enjoin the act, or claim compensation from the public.[1] The general laws of the State may be so changed as to transfer, from one town to another, the obligation to support certain individuals, who may become entitled to support as paupers, and the Constitution will present no impediment.[2] The granting of a charter to a new corporation may sometimes render valueless the franchise of an existing corporation; but unless the State by contract has precluded itself from such new grant, the incidental injury [* 385] * can constitute no obstacle.[3] But indeed it seems idle to specify instances, inasmuch as all changes in the laws of the State are liable to inflict incidental injury upon individuals, and, if every citizen was entitled to remuneration for such injury, the most beneficial and necessary changes in the law might be found impracticable of accomplishment.

We have now endeavored to indicate what are and what are not to be regarded as vested rights, and to classify the cases in which individual interests, in possession or expectancy, are protected

[1] See *ante*, p. 208, and cases cited in note 2. Also, Wilkinson *v.* Cheatham, 43 Geo. 258.

[2] Goshen *v.* Richmond, 4 Allen, 460; Bridgewater *v.* Plymouth, 97 Mass. 390.

[3] The State of Massachusetts granted to a corporation the right to construct a toll-bridge across the Charles River, under a charter which was to continue for forty years, afterwards extended to seventy, at the end of which period the bridge was to become the property of the commonwealth. During the term the corporation was to pay 200*l.* annually to Harvard College. Forty-two years after the bridge was opened for passengers, the State incorporated a company for the purpose of erecting another bridge over the same river, a short distance only from the first, and which would accommodate the same passengers. The necessary effect would be to decrease greatly the value of the first franchise, if not to render it altogether worthless. But the first charter was not exclusive in its terms; no contract was violated in granting the second; the resulting injury was incidental to the exercise of an undoubted right by the State, and as all the vested rights of the first corporation still remained, though reduced in value by the new grant, the case was one of damage without legal injury. Charles River Bridge *v.* Warren Bridge, 7 Pick. 344, and 11 Pet. 420. See also Turnpike Co. *v.* State, 3 Wall. 210; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35; English *v.* New Haven, &c., Co. 32 Conn. 240; Binghampton Bridge Case, 27 N. Y. 87, and 3 Wall. 51.

against being devested by the direct interposition of legislative authority. Some other cases may now be considered, in which legislation has endeavored to control parties as to the manner in which they should make use of their property, or has permitted claims to be created against it through the action of other parties against the will of the owners. We do not allude now to the control which the State may possess through an exercise of the police power, — a power which is merely one of regulation with a view to the best interests and the most complete enjoyment of rights by all, — but to that which, under a claim of State policy, and without any reference to wrongful act or omission by the owner, would exercise a supervision over his enjoyment of undoubted rights, or which, in some cases, would compel him to recognize and satisfy demands upon his property which have been created without his assent.

In former times sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government.[1] But the ideas which suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law. The instances of attempt to interfere with it have not been numerous since the early colonial days. A notable instance of an attempt to substitute the legislative judgment for that of the proprietor, regarding the manner in which he should use and employ his property, may be mentioned. In the State of Kentucky an act was at one time passed to compel the owners of wild lands to make certain improvements upon them within a specified time, and declared them forfeited to the State in case the statute was not

[1] Montesq. Sp. of the Laws, B. 7. Such Laws, though common in some countries, have never been numerous in England. See references to the legislation of this character, 4 Bl. Com. 170. Some of these statutes prescribed the number of courses permissable at dinner or other meal, while others were directed to restraining extravagance in dress. See Hallam, Mid. Ages, c. 9, pt. II.; and as to Roman sumptuary laws, Encyc. Metrop. Vol. X. p. 110. Adam Smith said of such laws, "It is the highest impertinence and presumption in kings and ministers to pretend to watch over the economy of private people, and to restrain their expense, either by sumptuary laws, or by prohibiting the importation of foreign luxuries." Wealth of Nations, B. 2, c. 3. As to prohibitory liquor laws, see *post*, 581–584.

complied with. It would be difficult to frame, consistently with the general principles of free government, a plausible argument in support of such a statute. It was not an exercise of the right of eminent domain, for that appropriates property to some specific public use on making compensation. It was not taxation, for that is simply an apportionment of the burden of supporting the government. It was not a police regulation, for that could not go beyond preventing an improper use of the land with reference to [* 386] * the due exercise of rights and enjoyment of legal privileges by others. It was purely and simply a law to forfeit a man's property, if he failed to improve it according to a standard which the legislature had prescribed. To such a power, if possessed by the government, there could be no limit but the legislative discretion; and if defensible on principle, then a law which should authorize the officer to enter a man's dwelling and seize and confiscate his furniture if it fell below, or his food if it exceeded, an established legal standard, would be equally so. But in a free country such laws when mentioned are condemned instinctively.[1]

But cases may sometimes present themselves in which improvements actually made by one man upon the land of another, even though against the will of the owner, ought on grounds of strict equity to constitute a charge upon the land improved. If they have been made in good faith, and under a reasonable expectation on the part of the person making them, that he was to reap the benefit of them, and if the owner has stood by and suffered them to be made, but afterwards has recovered the land and appropriated the improvements, it would seem that there must exist against him at least a strong equitable claim for reimbursement of the expenditures made, and perhaps no sufficient reason why provision should not be made by law for their recovery.

Accordingly in the several States statutes will be found which undertake to provide for these equitable claims. These statutes are commonly known as *betterment laws;* and as an illustration of the whole class, we give the substance of that adopted in Vermont. It provided that after recovery in ejectment, where he or those through whom he claimed had purchased or taken a lease of the land, sup-

[1] The Kentucky statute referred to was declared unconstitutional in Gaines v. Buford, 1 Dana, 499. See also Violett v. Violett, 2 Dana, 326.

posing at the time that the title purchased was good, or the lease valid to convey and secure the title and interest therein expressed, the defendant should be entitled to recover of the plaintiff the full value of the improvements made by him or by those through whom he claimed, to be assessed by jury, and to be enforced against the land, and not otherwise. The value was ascertained by estimating the increased value of the land in consequence of the improvements but the plaintiff at his election might have the value of the land without the improvements assessed, and the defendant should purchase the same at that price within four years, or lose the benefit of his claim for improvements. But the benefit of the law was not given to one who had entered on land * by [* 387] virtue of a contract with the owner, unless it should appear that the owner had failed to fulfil such contract on his part.[1]

This statute, and similar ones which preceded it, have been adjudged constitutional by the Supreme Court of Vermont, and have frequently been enforced. In an early case the court explained the principle of these statutes as follows: "The action for betterments, as they are now termed in the statute, is given on the supposition that the legal title is found to be in the plaintiff in ejectment, and is intended to secure to the defendant the fruit of his labor, and to the plaintiff all that he is justly entitled to, which is his land in as good a situation as it would have been had no labor been bestowed thereon. The statute is highly equitable in all its provisions, and would do exact justice if the value either of the improvements or of the land was always correctly estimated. The principles upon which it is founded are taken from the civil law, where ample provision was made for reimbursing the *bona fide* possessor the expense of his improvements, if he was removed from his possession by the legal owner. It gives to the possessor not the expense which he has laid out on the land, but the amount which he has increased the value of the land by his betterments thereon; or, in other words, the difference between the value of the land as it is when the owner recovers it, and the value if no improvement had been made. If the owner takes the land together with the improvements, at the advanced value which it has from the labor of the possessor, what can be more just than that he should

[1] Revised Statutes of Vermont of 1839, p. 216.

pay the difference? But if he is unwilling to pay this difference, by giving a deed as the statue provides, he receives the value as it would have been if nothing had been done thereon. The only objection which can be made is, that it is sometimes compelling the owner to sell when he may have been content with the property in its natural state. But this, when weighed against the loss to the *bona fide* possessor, and against the injustice of depriving him of the fruits of his labor, and giving it to another, who, by his negligence in not sooner enforcing his claim, has in some measure contributed to the mistake under which he has labored, is not entitled to very great consideration."[1]

[* 388] * The last circumstance stated in this opinion — the negligence of the owner in asserting his claim — is evidently deemed important in some States, whose statutes only allow a recovery for improvements by one who has been in possession a certain number of years. But a later Vermont case dismisses it from consideration as a necessary ground on which to base the right of recovery. "The right of the occupant to recover the value of his improvements," say the court, "does not depend upon the question whether the real owner has been vigilant or negligent in the assertion of his rights. It stands upon a principle of natural justice and equity; viz., that the occupant in good faith, believing himself to be the owner, has added to the permanent value of the land by his labor and his money; is in equity entitled to such added value; and that it would be unjust that the owner of the land should be enriched by acquiring the value of such improvements, without compensation to him who made them. This principle of natural justice has been very widely, we may say universally recognized."[2]

[1] Brown *v.* Storm, 4 Vt. 37. This class of legislation was also elaborately examined and defended by *Trumbull*, J., in Ross *v.* Irving, 14 Ill. 171, and in some of the other cases referred to in the succeeding note. See also Bright *v.* Boyd, 1 Story, 478; s. c. 2 Story, 607.

[2] Whitney *v.* Richardson, 31 Vt. 306. For other cases in which similar laws have been held constitutional, see Armstrong *v.* Jackson, 1 Blackf. 374; Fowler *v.* Halbert, 4 Bibb, 54; Withington *v.* Corey, 2 N. H. 115; Bacon *v.* Callender, 6 Mass. 303; Pacquette *v.* Pickness, 19 Wis. 219; Childs *v.* Shower, 18 Iowa, 261; Scott *v.* Mather, 14 Texas, 235; Saunders *v.* Wilson, 19 Texas, 194; Brackett *v.* Norcross, 1 Greenl. 92; Hunt's Lessee *v.* McMahan, 5 Ohio, 132; Longworth *v.* Worthington, 6 Ohio, 10. See further, Jones *v.* Carter, 12 Mass. 314; Dothage *v.* Stuart, 35 Mo. 251; Fenwick *v.* Gill, 38 Mo. 510; Howard *v.*

* Betterment laws, then, recognize the existence of an [* 389] equitable right, and give a remedy for its enforcement where none had existed before. It is true that they make a man pay for improvements which he has not directed to be made; but this legislation presents no feature of officious interference by the government with private property. The improvements have been made by one person in good faith, and are now to be appropriated by another. The parties cannot be placed in *statu quo*, and the statute accomplishes justice as near as the circumstances of the case will admit, when it compels the owner of the land, who, if he declines to sell, must necessarily appropriate the betterments made by another, to pay the value to the person at whose expense they have been made. The case is peculiar; but a statute cannot be void as an unconstitutional interference with private property which adjusts the equities of the parties as near as possible according to natural justice.[1]

Zeyer, 18 La. An. 407; Pope *v.* Macon, 23 Ark. 644; Marlow *v.* Adams, 24 Ark. 109; Ormond *v.* Martin, 37 Ala. 598; Love *v.* Shartzer, 31 Cal. 487. For a contrary ruling, see Nelson *v.* Allen, 1 Yerg. 376. Mr. Justice *Story* held in Society, &c. *v.* Wheeler, 2 Gall. 105, that such a law could not constitutionally be made to apply to improvements made before its passage; but this decision was made under the New Hampshire Constitution, which forbade retrospective laws. The principles of equity upon which such legislation is sustained would seem not to depend upon the time when the improvements were made. See Davis's Lessee *v.* Powell, 13 Ohio, 308. In Childs *v.* Shower, 18 Iowa, 261, it was held that the legislature could not constitutionally make the value of the improvements a personal charge against the owner of the land, and authorize a personal judgment against him. The same ruling was had in McCoy *v.* Grandy, 3 Ohio, N. S. 463. A statute had been passed authorizing the occupying claimant at his option, after judgment rendered against him for the recovery of the land, to demand payment from the successful claimant of the full value of his lasting and valuable improvements, or to pay to the successful claimant the value of the land without the improvements, and retain it. The court say: "The occupying claimant act, in securing to the occupant a compensation for his improvements as a condition precedent to the restitution of the lands to the owner, goes to the utmost stretch of the legislative power touching this subject. And the statute . . . providing for the transfer of the fee in the land to the occupying claimant, without the consent of the owner, is a palpable invasion of the right of private property, and clearly in conflict with the Constitution."

[1] In Harris *v.* Inhabitants of Marblehead, 10 Gray, 44, it was held that the betterment law did not apply to a town which had appropriated private property for the purposes of a school-house, and erected the house thereon. The law, it was said, did not apply "where a party is taking land by force of the statute,

*Unequal and Partial Legislation.*

In the course of our discussion of this subject it has been seen that some statutes are void though general in their scope, while others are valid though establishing rules for single cases only. An enactment may therefore be the law of the land without being a general law. And this being so, it may be important to consider in what cases constitutional principles will require a statute to be general in its operation, and in what cases, on the other hand, it may be valid without being general. We speak now in reference to general constitutional principles, and not to any peculiar rules which may have become established by special provisions in the constitutions of individual States.

The cases relating to municipal corporations stand upon peculiar grounds from the fact that those corporations are agencies of government, and as such are subject to complete legislative control. Statutes authorizing the sale of property of minors and other persons under disability are also exceptional, in that they are applied for by the parties representing the interests of the owners, and are remedial in their character. Such statutes are supported by the presumption that the parties in interest would consent if capable of doing so; and in law they are to be considered as assenting [* 390] in * the person of the guardians or trustees of their rights.

And perhaps in any other case, if a party petitions for legislation and avails himself of it, he may justly be held estopped from disputing its validity;[1] so that the great bulk of private legislation which is adopted from year to year, may at once be dismissed from this discussion.

Laws public in their objects may, unless express constitutional provision forbids,[2] be either general or local in their application;

and is bound to see that all the steps are regular. If it did, the party taking the land might in fact compel a sale of the land, or compel the party to buy the school-house, or any other building erected upon it." But as a matter of constitutional authority, we see no reason to doubt that the legislature might extend such a law even to the cases of this description.

[1] This doctrine was applied in Ferguson *v.* Landram, 5 Bush, 230, to parties who had obtained a statute for the levy of a tax to refund bounty moneys, which statute was held void as to other persons.

[2] See *ante*, p. 128, note 1, and cases cited. To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to

they may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors or married women, bankers or traders, and the like. The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same by persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge.

But a statute would not be constitutional which should proscribe a class or a party for opinion's sake,[1] or which should select particular * individuals from a class or locality, and sub- [* 391] ject them to peculiar rules, or impose upon them special

all parts of the State; all that is required is that it shall apply equally to all persons within the territorial limits described in the act. State *v.* County Commissioners of Baltimore, 29 Md. 516.

[1] The sixth section of the Metropolitan Police Law of Baltimore (1859) provided that "no Black Republican, or indorser or supporter of the Helper book,

obligations or burdens from which others in the same locality or class are exempt.[1]

The legislature may suspend the operation of the general laws of the State; but when it does so the suspension must be general, and cannot be made for individual cases or for particular localities.[2]

shall be appointed to any office" under the Board of Police which it established. This was claimed to be unconstitutional, as introducing into legislation the principle of proscription for the sake of political opinion, which was directly opposed to the cardinal principles on which the Constitution was founded. The court dismissed the objection in the following words: "That portion of the sixth section which relates to Black Republicans, &c., is obnoxious to the objection urged against it, if we are to consider that class of persons as proscribed on account of their political or religious opinions. But we cannot understand, officially, who are meant to be affected by the proviso, and therefore cannot express a judicial opinion on the question." Baltimore *v.* State, 15 Md. 468. See also p. 484. This does not seem to be a very satisfactory disposition of so grave a constitutional objection to a legislative act. That courts may take judicial notice of the fact that the electors of the country are divided into parties with well-known designations cannot be doubted; and when one of these is proscribed by a name familiarly applied to it by its opponents, the inference that it is done because of political opinion seems to be too conclusive to need further support than that which is found in the act itself. And we know no reason why courts should decline to take notice of those facts of general notoriety, which, like the names of political parties, are a part of the public history of the times.

It has been decided that State laws forbidding the intermarriage of whites and blacks are such police regulations as are entirely within the power of the States, notwithstanding the provisions of the new amendments to the federal Constitution. State *v.* Gibson, 36 Ind. 389. Compare State *v.* Hairston, 63 N. C. 451; Ellis *v.* State, 42 Ala. 525. It is also said colored children may be required to attend separate schools, if impartial provision is made for their instruction. State *v.* Duffy, 7 Nev. 342; s. c. 8 Am. Rep. 713. But some States forbid this. People *v.* Board of Education, 18 Mich. 400. And when separate schools are not established for colored children, they are entitled to admission to the other public schools. State *v.* Duffy, *supra*.

[1] Lin Sing *v.* Washburn, 20 Cal. 534. There is no reason, however, why the law should not take notice of peculiar views held by some classes of people, which unfit them for certain public duties, and excuse them from the performance of such duties; as Quakers are excused from military duty, and persons denying the right to inflict capital punishment are excluded from juries in capital cases. These, however, are in the nature of exemptions, and they rest upon considerations of obvious necessity.

[2] The statute of limitations cannot be suspended in particular cases while allowed to remain in force generally. Holden *v.* James, 11 Mass. 396; Davison *v.* Johonnot, 7 Met. 393. See *ante*, 365, note. The general exemption laws cannot be varied for particular cases or localities. Bull *v.* Conroe, 13 Wis. 238, 244. The legislature, when forbidden to grant divorces, cannot pass special acts

Privileges may be granted to particular individuals when by so doing the rights of others are not interfered with; disabilities may be removed; the legislature as *parens patriæ*, when not forbidden, may grant authority to the guardians or trustees of incompetent persons to exercise a statutory control over their estates for their assistance, comfort, or support, or for the discharge of legal or equitable liens upon their property; but every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied * in all similar cases, would not be legitimate legislation, [* 392] but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough."[1] This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.[2]

authorizing the courts to grant divorces in particular cases for causes not recognized in the general law. Teft *v.* Teft, 3 Mich. 671; Simonds *v.* Simonds, 103 Mass. 572. See, for the same principle, Alter's Appeal, 67 Penn. St. 341. The authority in emergencies to suspend the civil laws in a part of the State only, by a declaration of martial law, we do not call in question by any thing here stated. Nor in what we have here said do we have any reference to suspensions of the laws generally, or of any particular law, under the extraordinary circumstances of rebellion or war.

[1] Locke on Civil Government, § 142; State *v.* Duffy, 7 Nev. 349.

[2] In Lewis *v.* Webb, 3 Greenl. 326, the validity of a statute granting an appeal from a decree of the Probate Court in a particular case came under review. The court say: "On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that, if the legislature should pass a general law, and add a section by way of proviso, that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the supposed case differ from the present? A resolve passed after the general law can produce only the same

Special courts cannot be created for the trial of the rights and obligations of particular parties;[1] and those cases in which legislative acts granting new trials or other special relief in judicial proceedings, while they have been regarded as usurpations of judicial authority, have also been considered obnoxious to the objection that they undertook to suspend general laws in [* 393] special * cases. The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, — like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in

effect as such proviso. In fact, neither can have any legal operation." See also Durham *v.* Lewiston, 4 Greenl. 140; Holden *v.* James, 11 Mass. 396; Piquet, Appellant, 5 Pick. 64; Budd *v.* State, 3 Humph. 483; Wally's Heirs *v.* Kennedy, 2 Yerg. 554. In the last case it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law; the mass of the community and those who made the law by another; whereas the like general law affecting the whole community equally could not have been passed." See further, Officer *v.* Young, 5 Yerg. 320; Griffin *v.* Cunningham, 20 Grat. 31 (an instructive case); Arnold *v.* Kelley, 5 W. Va. 446.

[1] As, for instance, the debtors of a particular bank. Bank of the State *v.* Cooper, 2 Yerg. 599. Compare Durkee *v.* Janesville, 28 Wis. 464, in which it was declared that a special exemption of the city of Janesville from the payment of costs in any proceeding against it to set aside a tax or tax sale was void.

particulars of primary importance to their "pursuit of happiness;"[1] and those who should claim a right do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived.

Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government.[2] The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so, and, as a rule of construction, are always to be leaned against as probably not contemplated or designed. It has been held that a statute requiring attorneys to render services in suits for poor persons without fee or reward, was to be confined strictly to the cases therein prescribed; and if by its terms it
*expressly covered civil cases only, it could not be ex- [*394]

[1] Burlamaqui (Politic Law, c. 3, § 15) defines *natural liberty* as the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and so as not to interfere with an equal exercise of the same rights by other men. See 1 Bl. Com. 125. Lieber says: "Liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of, or in the most efficient protection of his rights, claims, interests, as a man or citizen, or of his humanity manifested as a social being." Civil Liberty and Self-Government.

[2] In the Case of Monopolies, Darcy *v.* Allain, 11 Rep. 84, the grant of an exclusive privilege of making playing cards was adjudged void, inasmuch as "the sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; *for the end* of all these monopolies is for the private gain of the patentees." And see Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; State *v.* Cincinnati, &c., Gas Co., 18 Ohio, N. S. 262. Compare with these, State *v.* Milwaukie Gas Light Co. 29 Wis. 454. On this ground it has been denied that that the State can exercise the power of taxation on behalf of corporations who undertake to make or to improve the thoroughfares of trade and travel for their own benefit. The State, it is said, can no more tax the community to set one class of men up in business than another; can no more subsidize one occupation than another; can no more make donations to the men who build and own railroads in consideration of expected incidental benefits, than it can make them to the men who build stores or manufactories in consideration of similar expected benefits. People *v.* Township Board of Salem, 20 Mich. 452.

tended to embrace defences of criminal prosecutions.[1] So where a constitutional provision confined the elective franchise to "*white* male citizens," and it appeared that the legislation of the State had always treated of negroes, mulattoes, and *other colored persons* in contradistinction to white, it was held that although quadroons, being a recognized class of colored persons, must be excluded, yet that the rule of exclusion would not be carried further.[2] So a statute making parties witnesses against themselves cannot be construed to compel them to disclose facts which would subject them to criminal punishment.[3] And a statute which authorizes summary process in favor of a bank against debtors who have by express contract made their obligations payable at such bank, being in derogation of the ordinary principles of private right, must be subject to strict construction.[4] These cases are only illustrations of a rule of general acceptance.[5]

There are unquestionably cases in which the State may grant privileges to specified individuals without violating any constitutional principle, because, from the nature of the case, it is impossible they should be possessed and enjoyed by all; and if it is important that they should exist, the proper State authority must be left to select the grantees. Of this class are grants of the franchise to be a corporation. Such grants, however, which confer upon a few persons what cannot be shared by the many, and which, though supposed to be made on public grounds, are nevertheless frequently of great value to the corporators, and therefore sought with avidity, are never to be extended by construction beyond the plain terms in which they are conferred. No rule is

[1] Webb *v.* Baird, 6 Ind. 13.

[2] People *v.* Dean, 14 Mich. 406. See Bailey *v.* Fiske, 34 Me. 77; Monroe *v.* Collins, 17 Ohio, N. S. 665. The decisions in Ohio were still more liberal, and ranked as white persons all who had a preponderance of white blood. Gray *v.* State, 4 Ohio, 354; Jeffres *v.* Ankeny, 11 Ohio, 372; Thacker *v.* Hawk, *ib.* 376; Anderson *v.* Millikin, 9 Ohio, N. S. 406. But see Van Camp *v.* Board of Education, 9 Ohio, N. S. 406. Happily all such questions are now disposed of by constitutional amendments. It seems, however, in the opinion of the Supreme Court of California, that these amendments do not preclude a State denying to a race, *e. g.*, the Chinese, the right to testify against other persons. People *v.* Brady, 40 Cal. 198; S. C. 6 Am. Rep. 604.

[3] Broadbent *v.* State, 7 Md. 416. See Knowles *v.* People, 15 Mich. 408.

[4] Bank of Columbia *v.* Okely, 4 Wheat. 241.

[5] See 1 Bl. Com. 89, and note.

better settled than that charters of incorporation are to be construed strictly against the corporators.[1] The just presumption in *every such case is, that the State has [*395] granted in express terms all that it designed to grant at all. "When a State," says the Supreme Court of Pennsylvania, "means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power that belongs to her, it is so easy to say so, that we will never believe it to be meant when it is not said. . . . In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending [its privileges], let the legislature see to it, but remember that nothing but plain English words will do it."[2]

[1] Providence Bank *v.* Billings, 4 Pet. 514; Charles River Bridge *v.* Warren Bridge, 11 Pet. 544; Perrine *v.* Chesapeake and Delaware Canal Co, 9 How. 172; Richmond, &c., R.R. Co. *v.* Louisa R.R. Co., 13 How. 71; Bradley *v.* N. Y. & N. H. R.R. Co., 21 Conn. 294; Parker *v.* Sunbury & Erie R.R. Co., 19 Penn. St. 211; Wales *v.* Stetson, 2 Mass. 143; Chenango Bridge Co. *v.* Binghampton Bridge Co., 27 N. Y. 87, and 3 Wall. 51; State *v.* Krebs, 64 N. C. 604.

[2] Pennsylvania R.R. Co. *v.* Canal Commissioners, 21 Penn. St. 22. And see Commonwealth *v.* Pittsburg, &c., R.R. Co., 24 Penn. St. 159; Chenango Bridge Co. *v.* Binghampton Bridge Co., 27 N. Y. 93, per *Wright*, J.; Baltimore *v.* Baltimore, &c., R.R. Co., 21 Md. 50; Richmond *v.* Richmond & Danville R.R. Co., 21 Grat. 614. We quote from the Supreme Court of Connecticut in Bradley *v.* N. Y. & N. H. R.R. Co., 21 Conn. 306: "The rules of construction which apply to general legislation, in regard to those subjects in which the public at large are interested, are essentially different from those which apply to private grants to individuals, of powers or privileges designed to be exercised with special reference to their own advantage, although involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially for the purposes for which they were enacted; the latter liberally, in favor of the public, and strictly as against the grantees. The power in the one case is original and inherent in the State or sovereign power, and is exercised solely for the general good of the community; in the other it is merely derivative, is special if not exclusive in its character, and is in derogation of common right, in the sense that it confers privileges to which the members of the community at large are not entitled. Acts of the former kind, being dictated solely by a regard to the benefit of the public generally, attract none of that prejudice or jealousy towards them which naturally would arise towards those of the other description, from the consideration that the latter were obtained with a view to the benefit of particular individuals, and the apprehension that their interests might be promoted at the sacrifice or to the injury of those of others whose interests should be equally regarded. It is universally understood to be one of

[* 396] * And this rule is not confined to the grant of a corporate franchise, but it extends to all grants of franchises or privileges by the State to individuals, in the benefits of which the people at large cannot participate. "Private statutes," says *Parsons*, Ch. J., "made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words or from necessary implication."[1] And the grant of ferry rights, or the right to erect a toll-bridge, and the

the implied and necessary conditions upon which men enter into society and form governments, that sacrifices must sometimes be required of individuals for the general benefit of the community, for which they have no rightful claim to specific compensation; but, as between the several individuals composing the community, it is the duty of the State to protect them in the enjoyment of just and equal rights. A law, therefore, enacted for the common good, and which there would ordinarily be no inducement to pervert from that purpose, is entitled to be viewed with less jealousy and distrust than one enacted to promote the interests of particular persons, and which would constantly present a motive for encroaching on the rights of others."

[1] Coolidge *v.* Williams, 4 Mass. 140. See also Dyer *v.* Tuscaloosa Bridge Co., 2 Port. (Ala.) 296; Grant *v.* Leach, 20 La. An. 329. In Sprague *v.* Birdsall, 2 Cow. 419, it was held that one embarking upon the Cayuga Lake six miles from the bridge of the Cayuga Bridge Co., and crossing the lake in an oblique direction so as to land within sixty rods of the bridge, was not liable to pay toll under a provision in the charter of said company which made it unlawful for any person to cross within three miles of the bridge without paying toll. In another case arising under the same charter, which authorized the company to build a bridge across the lake *or* the outlet thereof, and to rebuild in case it should be destroyed or carried away by the ice, and prohibited all other persons from erecting a bridge within three miles of the place where a bridge should be erected by the company, it was held, after the company had erected a bridge across the lake and it had been carried away by the ice, that they had no authority afterwards to rebuild across the *outlet* of the lake, two miles from the place where the first bridge was built, and that the restricted limits were to be measured from the place where the first bridge was erected. Cayuga Bridge Co. *v.* Magee, 2 Paige, 116; s. c. 6 Wend. 85. In Chapin *v.* The Paper Works, 30 Conn. 461, it was held that statutes giving a preference to certain creditors over others should be construed with reasonable strictness, as the law favored equality. In People *v.* Lambier, 5 Denio, 9, it appeared that an act of the legislature had authorized a proprietor of lands lying in the East River, which is an arm of the sea, to construct wharves and bulkheads in the river, in front of his land, and there was at the time a public highway through the land, terminating at the river. Held, that the proprietor could not, by filling up the land between the shore and the bulkhead, obstruct the public right of passage from the land to the water, but that the street was, by operation of law, extended from the former terminus over the

like, is not only to be construed strictly against the grantees, but it will not be held to exclude the grant of a similar and competing privilege to others, unless the terms of the grant render such construction imperative.[1]

*The Constitution of the United States contains pro- [*397]
visions which are important in this connection. One of these is, that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States,[2] and all persons born or naturalized in the United States, and subject to its jurisdiction, are declared to be citizens thereof, and of the State wherein they reside.[3] The States are also forbidden to make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, or to deprive any person of life, liberty, or property, without due process of law, or to deny to any person within their jurisdiction the equal protection of the laws.[4] Although the precise meaning of "privileges and immunities" is not very definitely settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to, and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights, and the right to be exempt, in property and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to.[5] To this extent, at least, discriminations could not be made by State laws against them. But it is unquestionable that many other rights and privileges may be made — as they usually are — to depend upon actual residence: such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like. And the constitutional provisions are not

newly made land to the water. Compare Commissioners of Inland Fisheries *v.* Holyoke Water Power Co., 104 Mass. 446; s. c. 6 Am. Rep. 247.

[1] Mills *v.* St. Clair County, 8 How. 569; Mohawk Bridge Co. *v.* Utica & S. R.R. Co., 6 Paige, 554; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87; s. c. 3 Wall. 51.

[2] Const. of United States, art. 4, § 2. See *ante*, pp. 15, 16.

[3] Const. of United States, 14th Amendment.

[4] Const. of United States, 14th Amendment.

[5] Corfield *v.* Coryell, 4 Wash. 380; Campbell *v.* Morris, 3 H. & McH. 554; Crandall *v.* State, 10 Conn. 343; Oliver *v.* Washington Mills, 11 Allen, 281.

violated by a statute which allows process by attachment against a debtor not a resident of the State, notwithstanding such process is not admissible against a resident.[1] The protection by due process of law has already been considered. It was not within the power of the States before the adoption of the fourteenth amendment, to deprive citizens of the equal protection of the laws; but there were servile classes not thus shielded, and when these were made freemen, there were some who disputed their claim to citizenship, and some State laws were in force which established discriminations against them. To settle doubts and preclude all such laws, the fourteenth amendment was adopted; and the same securities which one citizen may demand, all others are now entitled to.

*Judicial Proceedings.*

Individual citizens require protection against judicial action as well as against legislative; and perhaps the question, what constitutes due process of law, is as often made in regard to judicial proceedings as in any other cases. But it is not so difficult here to arrive at satisfactory conclusions, since the bounds of the judicial authority are much better defined than those of the legislative, and each case can generally be brought to a definite and well-settled test.

The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. Jurisdiction is, [* 398] *first*, of * the subject-matter; and, *second*, of the persons whose rights are to be passed upon.[2]

A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be devested by means of them.

[1] Campbell *v.* Morris, 3 H. & McH. 554; State *v.* Medbury, 3 R. I. 141. And see generally the cases cited, *ante*, p. 16, note.

[2] Bouvier defines jurisdiction thus: "Jurisdiction is a power constitutionally conferred upon a court, a single judge, or a magistrate, to take cognizance and decide causes according to law, and to carry their sentence into execution. The tract of land within which a court, judge, or magistrate has jurisdiction is called his *territory*; and his power in relation to his territory is called his *territorial jurisdiction*." 3 Bouv. Inst. 71.

And on this point there is an important maxim of the law, that is to say, that consent will not confer jurisdiction:[1] by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its judgment by the law. The law creates courts, and with reference to considerations of general public policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties.

Accordingly, where a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all. Consent is sometimes implied from failure to object; but there can be no * waiver of rights by laches in a case where consent [* 399] would be altogether nugatory.[2]

In regard to private controversies, the law always encourages arrangements;[3] and the settlements which the parties may make for themselves, it allows to be made for them by arbitrators mutually chosen. But the courts of a country cannot have those controversies referred to them by the parties which the law-making power has seen fit to exclude from their cognizance. If the judges

[1] Coffin *v.* Tracy, 3 Caines, 129; Blin *v.* Campbell, 14 Johns. 432; Cuyler *v.* Rochester, 12 Wend. 165; Dudley *v.* Mayhew, 3 N. Y. 9; Preston *v.* Boston, 12 Pick. 7; Chapman *v.* Morgan, 2 Greene (Iowa), 374; Thompson *v.* Steamboat Morton, 2 Ohio, N. S. 26; Gilliland *v.* Administrator of Sellers, *ib.* 223; Dicks *v.* Hatch, 10 Iowa, 380; Overstreet *v.* Brown, 4 McCord, 79; Green *v.* Collins, 6 Ired. 139; Bostwick *v.* Perkins, 4 Geo. 47; Georgia R.R. &c. *v.* Harris, 5 Geo. 527; State *v.* Bonney, 34 Me. 223; Little *v.* Fitts, 33 Ala. 343; Ginn *v.* Rogers, 4 Gilm. 131; Neill *v.* Keese, 5 Texas, 23; Ames *v.* Boland, 1 Minn. 365; Brady *v.* Richardson, 18 Ind. 1; White *v.* Buchanan, 6 Cold. 32.

[2] Bostwick *v.* Perkins, 4 Geo. 47; Hill *v.* People, 16 Mich. 351; White *v.* Buchanan, 6 Cold. 32.

[3] Moore *v.* Detroit Locomotive Works, 14 Mich. 266; Coyner *v.* Lynde, 10 Ind. 282.

should sit to hear such controversies, they would not sit as a court; at the most they would be arbitrators only, and their action could not be sustained on that theory, unless it appeared that the parties had designed to make the judges their arbitrators, instead of expecting from them valid judicial action as an organized court. Even then the decision could not be binding as a judgment, but only as an award; and a mere neglect by either party to object the want of jurisdiction could not make the decision binding upon him either as a judgment or as an award. Still less could consent in a criminal case bind the defendant; since criminal charges are not the subject of arbitration, and any infliction of criminal punishment upon an individual, except in pursuance of the law of the land, is a wrong done to the State, whether the individual assented or not. Those cases in which it has been held that the constitutional right of trial by jury cannot be waived are strongly illustrative of the legal view of this subject.[1]

If the parties cannot confer jurisdiction upon a court by consent, neither can they by consent empower any individual other than the judge of the court to exercise its powers. Judges are chosen in such manner as shall be provided by law; and a stipulation by parties that any other person than the judge shall exercise his functions in their case would be nugatory, even though the judge should vacate his seat for the purposes of the hearing.[2]

Sometimes jurisdiction of the subject-matter will depend upon considerations of locality, either of the thing in dispute or of the parties. At law certain actions are local, and others are [*400] transitory. *The first can only be tried where the property is which is the subject of the controversy, or in respect to which the controversy has arisen. The United States courts take cognizance of certain causes by reason only of the fact that the parties are residents of different States or countries.[3]

[1] Brown v. State, 8 Blackf. 561; Work v. Ohio, 2 Ohio, N. S. 296; Cancemi v. People, 18 N. Y. 128; Smith v. People, 9 Mich. 193; Hill v. People, 16 Mich. 351. See also State v. Turner, 1 Wright, 20.

[2] Winchester v. Ayres, 4 Greene (Iowa), 104.

[3] See a case where a judgment of a United States court was treated as of no force, because the court had not jurisdiction in respect to the plaintiff. Vose v. Morton, 4 Cush. 27. As to third persons, a judgment against an individual may sometimes be treated as void, when he was not suable in that court or in that manner, notwithstanding he may have so submitted himself to the jurisdiction as

The question of jurisdiction in these cases is sometimes determined by the common law, and sometimes is matter of statutory regulation. But there is a class of cases in respect to which the courts of the several States of the Union are constantly being called upon to exercise authority, and in which, while the jurisdiction is conceded to rest on considerations of locality, there has not, unfortunately, at all times been entire harmony of decision as to what shall confer jurisdiction. We refer now to suits for divorce from the bonds of matrimony.

The courts of one State or country have no general authority to grant divorce, unless for some reason they have control over the particular marriage contract which is sought to be annulled. But what circumstance gives such control? Is it the fact that the marriage was entered into in such country or State? Or that the alleged breach of the marriage bond was within that jurisdiction? Or that the parties resided within it either at the time of the marriage or at the time of the offence? Or that the parties now reside in such State or country, though both marriage and offence may have taken place elsewhere? Or must marriage, offence, and residence, all or any two of them, combine to confer the authority? These are questions which have frequently demanded the thoughtful attention of the courts, who have sought to establish a rule at once sound in principle, and that shall protect as far as possible the rights of the parties, one or the other of whom, unfortunately, under the operation of any rule which can be established, it will frequently be found has been the victim of gross injustice.

We conceive the true rule to be that the actual, *bona fide* residence of either husband or wife within a State will give to that * State authority to determine the *status* of such [* 401] party, and to pass upon any questions affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage, or of any alleged offence; and that any such court in that State as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions, and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for

to be personally bound. See Georgia R.R. &c. *v.* Harris, 5 Geo. 527; Hinchman *v.* Town, 10 Mich. 508.

that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party.[1]

[1] There are a number of cases in which this subject has been considered. In Inhabitants of Hanover *v.* Turner, 14 Mass. 227, instructions to a jury were sustained, that if they were satisfied the husband, who had been a citizen of Massachusetts, removed to Vermont merely for the purpose of procuring a divorce, and that the pretended cause for divorce arose, if it ever did arise, in Massachusetts, and that the wife was never within the jurisdiction of the court of Vermont, then and in such case the decree of divorce which the husband had obtained in Vermont must be considered as fraudulently obtained, and that it could not operate so as to dissolve the marriage between the parties. See also Vischer *v.* Vischer, 12 Barb. 640; and McGiffert *v.* McGiffert, 31 Barb. 69. In Chase *v.* Chase, 6 Gray, 157, the same ruling was had as to a foreign divorce, notwithstanding the wife appeared in and defended the foreign suit. In Clark *v.* Clark, 8 N. H. 21, the court refused a divorce on the ground that the alleged cause of divorce (adultery), though committed within the State, was so committed while the parties had their domicile abroad. This decision was followed in Greenlaw *v.* Greenlaw, 12 N. H. 200. The court say: "If the defendant never had any domicile in this State, the libellant could not come here, bringing with her a cause of divorce over which this court had jurisdiction. If at the time of the [alleged offence] the domicile of the parties was in Maine, and the facts furnished no cause for a divorce there, she could not come here and allege those matters which had already occurred, as a ground for a divorce under the laws of this State. Should she under such circumstances obtain a decree of divorce here, it must be regarded as a mere nullity elsewhere." In Frary *v.* Frary, 10 N. H. 61, importance was attached to the fact that the *marriage* took place in New Hampshire; and it was held that the court had jurisdiction of the wife's application for a divorce, notwithstanding the offence was committed in Vermont, but during the time of the wife's residence in New Hampshire. See also Kimball *v.* Kimball, 13 N. H. 225; Bachelder *v.* Bachelder, 14 N. H. 380; Payson *v.* Payson, 34 N. H. 518; Hopkins *v.* Hopkins, 35 N. H. 474. In Wilcox *v.* Wilcox, 10 Ind. 436, it was held that the residence of the libellant at the time of the application for a divorce was sufficient to confer jurisdiction, and a decree dismissing the bill because the cause for divorce arose out of the State was reversed. And see Tolen *v.* Tolen, 2 Blackf. 407. See also Jackson *v.* Jackson, 1 Johns. 424; Barber *v.* Root, 10 Mass. 263; Borden *v.* Fitch, 15 Johns. 121; Bradshaw *v.* Heath, 13 Wend. 407. In any of these cases the question of actual residence will be open to inquiry wherever it becomes important, notwithstanding the record of proceedings is in due form, and contains the affidavit of residence required by the practice. Leith *v.* Leith, 39 N. H. 20. And see McGiffert *v.* McGiffert, 31 Barb. 69; Todd *v.* Kerr, 42 Barb. 317; Hoffman *v.* Hoffman, 46 N. Y. 30; People *v.* Dawell, 25 Mich. 247. The Pennsylvania cases agree with those of New Hampshire, in holding that a divorce should not be granted unless the cause alleged occurred while the complainant had domicile within the State.

*But to render the jurisdiction of a court effectual in [*402] any case, it is necessary that the thing in controversy, or

Dorsey *v.* Dorsey, 7 Watts, 349; Hollister *v.* Hollister, 6 Penn. St. 449; McDermott's Appeal, 8 W. & S. 251. And they hold also that the injured party in the marriage relation must seek redress in the forum of the defendant, unless where such defendant has removed from what was before the common domicile of both. Calvin *v.* Reed, 35 Penn. St. 375; Elder *v.* Reel, 62 Penn. St. 308; s. c. 1 Am. Rep. 414. For cases supporting to a greater or less extent the doctrine stated in the text, see Harding *v.* Alden, 9 Greenl. 140; Ditson *v.* Ditson, 4 R. I. 87; Pawling *v.* Bird's Ex'rs, 13 Johns. 192; Kerr *v.* Kerr, 41 N. Y. 272; Harrison *v.* Harrison, 19 Ala. 499; Thompson *v.* State, 28 Ala. 12; Cooper *v.* Cooper, 7 Ohio, 594; Mansfield *v.* McIntyre, 10 Ohio, 28; Smith *v.* Smith, 4 Greene (Iowa), 266; Yates *v.* Yates, 2 Beasley, 280; Maguire *v.* Maguire, 7 Dana, 181; Waltz *v.* Waltz, 18 Ind. 449; Hull *v.* Hull, 2 Strob. Eq. 174; Manley *v.* Manley, 4 Chand. 97; Hubbell *v.* Hubbell, 3 Wis. 662; Gleason *v.* Gleason, 4 Wis. 64; Hare *v.* Hare, 15 Texas, 355. And see Story, Confl. Laws, § 230 *a*; Bishop on Mar. and Div. 727 *et seq.*; *ib.* (4th ed.) Vol. II. § 155 *et seq.* The recent cases of Hoffman *v.* Hoffman, 46 N. Y. 30; s. c. 7 Am. Rep. 299; Elder *v.* Reel, 62 Penn. St. 308; s. c. 1 Am. Rep. 414; and People *v.* Dawell, 25 Mich. 247, are very explicit in declaring that where neither party is domiciled within a particular State, its courts can have no jurisdiction in respect to their marital *status*, and any decree of divorce made therein must be nugatory. A number of the cases cited hold that the wife may have a domicile separate from the husband, and may therefore be entitled to a divorce, though the husband never resided in the State. These cases proceed upon the theory that, although in general the domicile of the husband is the domicile of the wife, yet that if he be guilty of such act or dereliction of duty in the relation as entitles her to have it partially or wholly dissolved, she is at liberty to establish a separate jurisdictional domicile of her own. Ditson *v.* Ditson, 4 R. I. 87; Harding *v.* Alden, 9 Greenl. 140; Maguire *v.* Maguire, 7 Dana, 181; Hollister *v.* Hollister, 6 Penn. St. 449. The doctrine in New York seems to be, that a divorce obtained in another State, without personal service of process or appearance of the defendant, is absolutely void. Vischer *v.* Vischer, 12 Barb. 640; McGiffert *v.* McGiffert, 31 Barb. 69; Todd *v.* Kerr, 42 Barb. 317. See Cox *v.* Cox, 19 Ohio, N. S. 502; s. c. 2 Am. Rep. 415. An appearance by defendant afterwards for the purposes of a motion to set aside the decree, which motion was defeated on technical grounds, will not affect the question. Hoffman *v.* Hoffman, 46 N. Y. 30; s. c. 7 Am. Rep. 299.

Upon the whole subject of jurisdiction in divorce suits, no case in the books is more full and satisfactory than that of Ditson *v.* Ditson, *supra*, which reviews and comments upon a number of the cases cited, and particularly upon the Massachusetts cases of Barber *v.* Root, 10 Mass. 265; Inhabitants of Hanover *v.* Turner, 14 Mass. 227; Harteau *v.* Harteau, 14 Pick. 181; and Lyon *v.* Lyon, 2 Gray, 367. The divorce of one party divorces both. Cooper *v.* Cooper, 7 Ohio, 594. And will leave both at liberty to enter into new marriage relations, unless the local statute expressly forbids the guilty party from contracting a

the parties interested, be subjected to the process of the court. Certain cases are said to proceed *in rem*, because they take notice rather of the thing in controversy than of the persons concerned; and the process is served upon that which is the object of [* 403] the suit, without * specially noticing the interested parties; while in other cases the parties themselves are brought before the court by process. Of the first class admiralty proceedings are an illustration; the court acquiring jurisdiction by seizing the vessel or other thing to which the controversy relates. In cases within this class, notice to all concerned is required to be given, either personally or by some species of publication or proclamation; and if not given, the court which had jurisdiction of the property will have none to render judgment.[1] Suits at the common law, however, proceed against the parties whose interests are sought to be affected; and only those persons are concluded by the adjudication who are served with process, or who voluntarily appear.[2] Some cases also partake of the nature both of proceedings *in rem* and of personal actions, since, although they proceed by seizing property, they also contemplate the service of process on defendant parties. Of this class are the proceedings by foreign attachment, in which the property of a non-resident or concealed debtor is seized and retained by the officer as security for the satisfaction of any judgment that may be recovered against him, but at the same time pro-

second marriage. See Commonwealth *v.* Putnam, 1 Pick. 136; Baker *v.* People, 2 Hill, 325.

[1] Doughty *v.* Hope, 3 Denio, 594. See Matter of Empire City Bank, 18 N. Y. 199; Nations *v.* Johnson, 24 How. 204, 205; Blackwell on Tax Titles, 213.

[2] Jack *v.* Thompson, 41 Miss. 49. As to the right of an attorney to notice of proceedings to disbar him, see notes to pp. 337 and 404. "Notice of some kind is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power. It is of the essence of a cause. Without it there cannot be parties, and without parties there may be the form of a sentence, but no judgment obligating the person." See Littleton *v.* Richardson, 34 N. H. 179; Black *v.* Black, 4 Bradf. Sur. Rep. 205. Where, however, a statute provides for the taking of a certain security, and authorizes judgment to be rendered upon it on motion, without process, the party entering into the security must be understood to assent to the condition, and to waive process and consent to judgment. Lewis *v.* Garrett's Adm'r, 6 Miss. 434; People *v.* Van Eps, 4 Wend. 390; Chappee *v.* Thomas, 5 Mich. 53; Gildersleeve *v.* People, 10 Barb. 35; People *v.* Lott, 21 Barb. 130; Pratt *v.* Donovan, 10 Wis. 378; Murray *v.* Hoboken Land Co., 18 How. 272; Philadelphia *v.* Commonwealth, 52 Penn. St. 451; Whitehurst *v.* Coleen, 53 Ill. 247.

cess is issued to be served upon the defendant, and which must be served, or some substitute for service had before judgment can be rendered.

In such cases, as well as in divorce suits, it will often happen that the party proceeded against cannot be found in the State, and personal service upon him is therefore impossible, unless it is allowable to make it wherever he may be found abroad. But any such service would be ineffectual. No State has authority to invade the jurisdiction of another, and by service of process compel parties there resident or being to submit their controversies to the determination of its courts; and those courts will consequently be sometimes unable to enforce a jurisdiction which the State possesses in respect to the subjects within its limits, unless a substituted service is admissible. A substituted service [*404] is provided by statute for many such cases; generally in the form of a notice, published in the public journals, or posted, as the statute may direct; the mode being chosen with a view to bring it home, if possible, to the knowledge of the party to be affected, and to give him an opportunity to appear and defend. The right of the legislature to prescribe such notice, and to give it effect as process, rests upon the necessity of the case, and has been long recognized and acted upon.[1]

But such notice is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of, the authority of the court ceases. The statute may give it effect so as far as the subject-matter of the proceeding is within the limits, and therefore under the control, of the State; but the notice cannot be made to stand in the place of process, so as to

[1] "It may be admitted that a statute which authorized any debt or damages to be adjudged against a person upon purely *ex parte* proceedings, without pretence of notice, or any provision for defending, would be a violation of the constitution, and void; but when the legislature has provided a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the courts have not the power to pronounce the proceedings illegal." *Denio*, J., in Matter of Empire City Bank, 18 N. Y. 200. See, also, per *Morgan*, J., in Rockwell *v.* Nearing, 35 N. Y. 314; Nations *v.* Johnson, 24 How. 195; Beard *v.* Beard, 21 Ind. 321; Mason *v.* Messenger, 17 Iowa, 261; Cupp *v.* Commissioners of Seneca Co., 19 Ohio, N. S. 173; Campbell *v.* Evans, 45 N. Y. 356; Happy *v.* Mosher, 48 N. Y. 317.

subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another State or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings.[1]

[* 405] Where a party has property in a State, and * resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.

The same rule applies in divorce cases. The courts of the State where the complaining party resides have jurisdiction of the subject-matter; and if the other party is a non-resident, they must be authorized to proceed without personal service of process. The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the *status* of the complaining party, and thereby terminating the marriage;[2] and it might be

[1] Pawling *v.* Willson, 13 Johns. 192; Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369; Curtis *v.* Gibbs, 1 Penn. 399; Miller's Ex'r *v.* Miller, 1 Bailey, 242; Cone *v.* Cotton, 2 Blackf. 82; Kilburn *v.* Woodworth, 5 Johns. 37; Robinson *v.* Ward's Ex'r, 8 Johns. 86; Hall *v.* Williams, 6 Pick. 232; Bartlet *v.* Knight, 1 Mass. 401; St. Albans *v.* Bush, 4 Vt. 58; Fenton *v.* Garlick, 8 Johns. 194; Bissell *v.* Briggs, 9 Mass. 462; Denison *v.* Hyde, 6 Conn. 508; Aldrich *v.* Kinney, 4 Conn. 380; Hoxie *v.* Wright, 2 Vt. 263; Newell *v.* Newton, 10 Pick. 470; Starbuck *v.* Murray, 5 Wend. 161; Armstrong *v.* Harshaw, 1 Dev. 188; Bradshaw *v.* Heath, 13 Wend. 407; Bates *v.* Delavan, 5 Paige, 299; Webster *v.* Reid, 11 How. 460; Gleason *v.* Dodd, 4 Met. 333; Green *v.* Custard, 23 How. 486. In *Ex parte* Heyfron, 7 How. (Miss.) 127, it was held that an attorney could not be stricken from the rolls without notice of the proceeding, and opportunity to be heard. And see *ante*, p. 337 n. Leaving notice with one's family is not equivalent to personal service. Rape *v.* Heaton, 9 Wis. 329. And see Bimeler *v.* Dawson, 4 Scam. 536.

[2] Hull *v.* Hull, 2 Strob. Eq. 174; Manley *v.* Manley, 4 Chand. 97; Hubbell *v.* Hubbell, 3 Wis. 662; Mansfield *v.* McIntyre, 10 Ohio, 28; Ditson *v.* Ditson, 4 R. I. 97; Harrison *v.* Harrison, 19 Ala. 499; Thompson *v* State, 28 Ala. 12; Harding *v.* Alden, 9 Greenl. 140; Maguire *v.* Maguire, 7 Dana, 181; Todd *v.* Kerr, 42 Barb. 317. It is immaterial in these cases whether notice was actually

sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, if they were then within its jurisdiction. But a decree on this subject could only be absolutely binding on the parties while the children remained within the jurisdiction; if they acquire a domicile in another State or country, the judicial tribunals of that State or country would have authority to determine the question of their guardianship there.[1]

* But in divorce cases, no more than in any other, can [* 406] the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which shall be binding upon him personally. It must follow, in such a case, that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs. If the defendant had property within the State, it would be competent to provide by law for the seizure and appropriation of such property, under the decree of the court, to the use of the complainant; but the legal tribunals elsewhere would not recognize a decree for alimony or for costs not based on personal service or appearance. The remedy of the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incidental benefits springing therefrom, and to an order for the custody of the children, if within the State.[2]

When the question is raised whether the proceedings of a court may not be void for want of jurisdiction, it will sometimes be

brought home to the defendant or not. And see heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369.

[1] This must be so on general principles, as the appointment of guardian for minors is of local force only. See Monell *v.* Dickey, 1 Johns. Ch. 156; Woodworth *v.* Spring, 4 Allen, 321; Potter *v.* Hiscox, 30 Conn. 508; Kraft *v.* Wickey, 4 G. & J. 322. The case of Townsend *v.* Kendall, 4 Minn. 412, appears to be *contra*, but some reliance is placed by the court on the statute of the State which allows the foreign appointment to be recognized for the purposes of a sale of the real estate of a ward.

[2] See Jackson *v.* Jackson, 1 Johns. 424; Harding *v.* Alden, 9 Greenl. 140; Holmes *v.* Holmes, 4 Barb. 295; Crane *v.* Meginnis, 1 Gill & J. 463; Maguire *v.* Maguire, 7 Dana, 181; Townsend *v.* Griffin, 4 Harr. 440. In Beard *v.* Beard, 21 Ind. 321, *Perkins*, J., after a learned and somewhat elaborate examination of the subject, expresses the opinion that the State may permit a personal judgment for alimony in the case of a resident defendant, on service by publication only, though he conceded that there would be no such power in the case of non-residents.

important to note the grade of the court and the extent of its authority. Some courts are of general jurisdiction, by which is meant that their authority extends to a great variety of matters; while others are only of special and limited jurisdiction, by which it is understood that they have authority extending only to certain specified cases. The want of jurisdiction is equally fatal in the proceedings of each; but different rules prevail in showing it. It is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it had no authority; and its jurisdiction is to be presumed, whether there are recitals in its records to show it or not. On the other hand, no such intendment is made in favor of the judgment of a court of limited jurisdiction, but the recitals contained in the minutes of proceedings must be sufficient to show that the case was one which the law permitted the court to take cognizance of, and that the parties were subjected to its jurisdiction by proper process.[1]

[* 407] * There is also another difference between these two classes of tribunals in this, that the jurisdiction of the one may be disproved under circumstances where it would not be allowed in the case of the other. A record is not commonly suffered to be contradicted by parol evidence; but wherever a fact showing want of jurisdiction in a court of general jurisdiction can be proved without contradicting its recitals, it is allowable to do so, and thus defeat its effect.[2] But in the case of a court of special and limited authority, it is permitted to go still further, and to show a want of jurisdiction even in opposition to the recitals contained in the record.[3] This we conceive to be the general rule, though

[1] See Dakin *v.* Hudson, 6 Cow. 221; Cleveland *v.* Rogers, 6 Wend. 438; People *v.* Koeber, 7 Hill, 39; Sheldon *v.* Wright, 1 Seld. 511; Clark *v.* Holmes, 1 Doug. (Mich.) 390; Cooper *v.* Sunderland, 3 Iowa, 114; Wall *v.* Trumbull, 16 Mich. 228; Denning *v.* Corwin, 11 Wend. 647; Bridge *v.* Ford, 6 Mass. 641; Smith *v.* Rice, 11 Mass. 511; Barrett *v.* Crane, 16 Vt. 246; Teft *v.* Griffin, 5 Geo. 185; Jennings *v.* Stafford, 1 Ired. 404; Hershaw *v.* Taylor, 3 Jones, 513; Perrine *v.* Farr, 2 Zab. 356; State *v.* Metzger, 26 Mo. 65.

[2] See this subject considered at some length in Wilcox *v.* Kassick, 2 Mich. 165. And see Rape *v.* Heaton, 9 Wis. 329; Bimelar *v.* Dawson, 4 Scam. 536; Webster *v.* Reid, 11 How. 437.

[3] Sheldon *v.* Wright, 5 N. Y. 497; Dyckman *v.* Mayor, &c., of N. Y., 5 N. Y. 434; Clark *v.* Holmes, 1 Doug. (Mich.) 390; Cooper *v.* Sunderland, 3 Iowa, 114; Sears *v.* Terry, 26 Conn. 273; Brown *v.* Foster, 6 R. I. 564; Fawcett *v.* Fowliss, 1 Man. & R. 102. But see Facey *v.* Fuller, 13 Mich. 527, where it was

there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts, which must be passed upon by the courts themselves, and in respect to which the decision of the court once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions.[1]

held that the entry in the docket of a justice that the parties appeared and proceeded to trial was conclusive. And see Selin *v.* Snyder, 7 S. & R. 72.

[1] Britain *v.* Kinnard, 1 B. & B. 432. Conviction under the Bumboat Act. The record was fair on its face, but it was insisted that the vessel in question was not a "boat" within the intent of the act. *Dallas*, Ch. J.: "The general principle applicable to cases of this description is perfectly clear: it is established by all the ancient, and recognized by all the modern decisions; and the principle is, that a conviction by a magistrate, who has jurisdiction over the subject-matter, is, if no defects appear on the face of it, conclusive evidence of the facts stated in it. Such being the principle, what are the facts of the present case? If the subject-matter in the present case were a boat, it is agreed that the boat would be forfeited; and the conviction stated it to be a boat. But it is said that, in order to give the magistrate jurisdiction, the subject-matter of his conviction must be a boat; and that it is competent to the party to impeach the conviction by showing that it was not a boat. I agree, that if he had not jurisdiction, the conviction signifies nothing. Had he then jurisdiction in this case? By the act of Parliament he is empowered to search for and seize gunpowder in any boat on the river Thames. Now, allowing, for the sake of argument, that 'boat' is a word of technical meaning, and somewhat different from a vessel, still, it was a matter of fact to be made out before the magistrate, and on which he was to draw his own conclusion. But it is said that a jurisdiction limited as to person, place, and subject-matter is stinted in its nature, and cannot be lawfully exceeded. I agree: but upon the inquiry before the magistrate, does not the person form a question to be decided upon the evidence? Does not the place, does not the subject-matter, form such a question? The possession of a boat, therefore, with gunpowder on board, is part of the offence charged; and how could the magistrate decide, but by examining evidence in proof of what was alleged? The magistrate, it is urged, could not give himself jurisdiction by finding that to be a fact which did not exist. But he is bound to inquire as to the fact, and when he has inquired his conviction is conclusive of it. The magistrates have inquired in the present instance, and they find the subject of conviction to be a boat. Much has been said about the danger of magistrates giving themselves jurisdiction; and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged that the party is without remedy; and so he is, without civil remedy, in this and many other cases; his remedy is by proceeding criminally; and if the decision were so gross as to call a ship of seventy-four guns a boat, it would be good ground for a criminal pro-

[* 408] * When it is once made to appear that a court has jurisdiction both of the subject-matter and of the parties, the [* 409] judgment which * it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly, or erred in its application of the law to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void.[1] An irregularity may be defined as the failure to observe that particular course of proceeding which, conformably with the practice of the court, ought to have been observed in the case;[2] and if a party claims to be aggrieved by this, he must apply

ceeding. Formerly the rule was to intend every thing against a stinted jurisdiction: that is not the rule now; and nothing is to be intended but what is fair and reasonable, and it is reasonable to intend that magistrates will do what is right." *Richardson*, J., in the same case, states the real point very clearly: "Whether the vessel in question were a boat or no was a fact on which the magistrate was to decide; and the fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the case for a conviction under the game laws of having partridges in possession: could the magistrate, in an action of trespass, be called on to show that the bird in question was really a partridge? and yet it might as well be urged, in that case, that the magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game without being duly qualified to do so: after the conviction had found that the offender kept a dog of that description, could he, in a civil action, be allowed to dispute the truth of the conviction? In a question like the present we are not to look at the inconvenience, but at the law; but surely if the magistrate acts *bona fide*, and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action; and the more so, as he might have been compelled by a mandamus to proceed on the investigation. Upon the general principle, therefore, that where the magistrate has jurisdiction his conviction is conclusive evidence of the facts stated in it, I think this rule must be discharged." See also Mather *v.* Hodd, 8 Johns. 44; Mackaboy *v.* Commonwealth, 2 Virg. Cas. 268; *Ex parte* Kellogg, 6 Vt. 509; State *v.* Scott, 1 Bailey, 294; Facey *v.* Fuller, 13 Mich. 527; Wall *v.* Trumbull, 16 Mich. 228; Sheldon *v.* Wright, 5 N. Y. 512; Freeman on Judgments, § 523, and cases cited.

[1] *Ex parte* Kellogg, 6 Vt. 509; Edgerton *v.* Hart, 8 Vt. 208; Carter *v.* Walker, 2 Ohio, N. S. 339; Freeman on Judgments, § 135.

[2] "The doing or not doing that in the conduct of a suit at law, which, conformably to the practice of the court, ought or ought not to be done." Bouv. Law Dic. See Dick *v.* McLaurin, 63 N. C. 185.

to the court in which the suit is pending to set aside the proceedings, or to give him such other redress as he thinks himself entitled to; or he must take steps to have the judgment reversed by removing the case for review to an appellate court, if any such there be. Wherever the question of the validity of the proceedings arises in any collateral suit, he will be held bound by them to the same extent as if in all respects the court had proceeded according to law. An irregularity cannot be taken advantage of collaterally; that is to say, in any other suit than that in which the irregularity occurs, or on appeal or process in error therefrom. And even in the same proceeding an irregularity may be waived, and will commonly be held to be waived if the party entitled to complain of it shall take any subsequent step in the case inconsistent with an intent on his part to take advantage of it.[1]

We have thus briefly indicated the cases in which judicial action may be treated as void because not in accordance with the *law of the land. The design of the present work does [*410] not permit an enlarged discussion of the topics which suggest themselves in this connection, and which, however interesting and important, do not specially pertain to the subject of constitutional law.

But a party in any case has a right to demand that the judgment of the court be given upon his suit, and he cannot be bound by a delegated exercise of judicial power, whether the delegation be by the courts or by legislative act devolving judicial duties on ministerial officers.[2] Proceedings in any such case would be void; but they must be carefully distinguished from those cases in which the court has itself acted, though irregularly. Even the denial of

[1] Robinson *v.* West, 1 Sandf. 19; Malone *v.* Clark, 2 Hill, 657; Wood *v.* Randall, 5 Hill, 285; Baker *v.* Kerr, 13 Iowa, 384; Loomis *v.* Wadhams, 8 Gray, 557; Warren *v.* Glynn, 37 N. H. 340. A strong instance of waiver is where, on appeal from a court having no jurisdiction of the subject-matter to a court having general jurisdiction, the parties going to trial without objection are held bound by the judgment. Randolph Co. *v.* Ralls, 18 Ill. 29; Wells *v.* Scott, 4 Mich. 347; Tower *v.* Lamb, 6 Mich. 362. In Hoffman *v.* Locke, 19 Penn. St. 57, objection was taken on constitutional grounds to a statute which allowed judgment to be entered up for the plaintiff in certain cases, if the defendant failed to make and file an affidavit of merits; but the court sustained it.

[2] Hall *v.* Marks, 34 Ill. 363; Chandler *v.* Nash, 5 Mich. 409. For the distinction between judicial and ministerial acts, see Flournoy *v.* Jeffersonville, 17 Ind. 173.

jury trial, in cases where that privilege is reserved by the Constitution, does not render the proceedings void, but only makes them liable to be reversed for the error.[1]

There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord *Coke* has laid it down that "even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*."[2]

[1] The several State constitutions preserve the right of trial by jury, with permission in some for the parties to waive the right in civil cases. Those cases which before the constitution were not triable by jury need not be made so now. Dane Co. *v.* Dunning, 20 Wis. 210; Crandall *v.* James, 6 R. I. 104; Lake Erie, &c., R. R. Co. *v.* Heath, 9 Ind. 558; Backus *v.* Lebanon, 11 N. H. 19; Opinions of Judges, 41 N. H. 551; Tabor *v.* Cook, 15 Mich. 322; Stilwell *v.* Kellogg, 14 Wis. 461; Mead *v.* Walker, 17 Wis. 189; Byers *v.* Commonwealth, 42 Penn. St. 89; State *v.* Peterson, 41 Vt. 504; Buffalo, &c., R.R. Co. *v.* Burket, 26 Texas, 588; Sands *v.* Kimbark, 27 N. Y. 147; Howell *v.* Fry, 19 Ohio, N. S. 556; Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45; Guile *v.* Brown, 38 Conn. 243. And where a new tribunal is created without common-law powers, jury trial need not be given. Rhines *v.* Clark, 51 Penn. St. 96; Haines *v.* Levin, *ib.* 412. But the legislature cannot deprive a party of a common-law right, — *e. g.*, a right of navigation, — and compel him to abide the estimate of commissioners upon his damages. Haines *v.* Levin, 51 Penn. St. 412. Where the constitution gives the right, it cannot be made by statute to depend upon any condition. Greene *v.* Briggs, 1 Curt. C. C. 311; Lincoln *v.* Smith, 27 Vt. 328; Norristown, &c., Co. *v.* Burket, 26 Ind. 53. Though it has been held that, if a trial is given in one court without a jury, with a right to appeal and to have a trial by jury in the appellate court, that is sufficient. Beers *v.* Beers, 4 Conn. 535; Stewart *v.* Mayor, &c., 7 Md. 500; Morford *v.* Barnes, 8 Yerg. 444; Jones *v.* Robbins, 8 Gray, 329. But we concur in the views of Judge Blatchford, declared by him in the recent unreported case of Matter of Dana, that an unconditional guaranty of jury trial cannot be satisfied, at least in criminal cases, with the mere privilege to have a trial by jury on condition of first submitting to a trial without it, and then, in case of conviction, taking an appeal. The guaranty clearly intends a trial by jury in the first instance.

In Randall *v.* Kehlor, 60 Me. 37, objection was taken that the requirement of the payment of a jury fee was in violation of the right of jury trial, but the court held otherwise.

[2] Co. Lit. § 212. See Day *v.* Savadge, Hobart, 85. We should not venture to predict, however, that even in a case of this kind, if one could be imagined to exist, the courts would declare the act of Parliament void; though they would

*This maxim applies in all cases where judicial functions [*411] are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause.[1] Nor is it essential that the judge be a party named in the record; if the suit is brought or defended in his interest, or if he is a corporator in a corporation which is a party, or which will be benefited or damnified by the judgment, he is equally excluded as if he were the party named.[2] Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice-Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord *Campbell* observing: "It is of the last importance that the maxim that 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." "We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutory effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and should be set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."[3]

It is matter of some interest to know whether the legislatures of the American States can set aside this maxim of the common

never find such an intent in the statute, if any other could possibly be made consistent with the words.

[1] Washington Insurance Co. *v.* Price, Hopk. Ch. 2; Sigourney *v.* Sibley, 21 Pick. 191; Freeman on Judgments, § 144.

[2] Washington Insurance Co. *v.* Price, Hopk. Ch. 2; Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 759; Pearce *v.* Atwood, 13 Mass. 340; Peck *v.* Freeholders of Essex, Spencer, 457; Commonwealth *v.* McLane, 4 Gray, 427; Dively *v.* Cedar Rapids, 21 Iowa, 565.

[3] Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 759.

law, and by express enactment permit one to act judicially
[* 412] when * interested in the controversy. The maxim itself, it is said, in some cases, does not apply where, from necessity, the judge must proceed in the case, there being no other tribunal authorized to act;[1] but we prefer the opinion of Chancellor *Sandford* of New York, that in such a case it belongs to the power which created such a court to provide another in which this judge may be a party; and whether another tribunal is established or not, he at least is not intrusted with authority to determine his own rights, or his own wrongs.[2]

It has been held that where the interest was that of corporator in a municipal corporation, the legislature might provide that it should constitute no disqualification where the corporation was a party. But the ground of this ruling appears to be, that the interest is so remote, trifling, and insignificant, that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of an individual.[3] And where penalties are imposed, to be recovered only in a municipal court, the judges or jurors in which would be interested as corporators in the recovery, the law providing for such recovery must be regarded as precluding the objection of interest.[4] And it is very common, in a certain class of cases, for the law to provide that certain township and county officers shall audit their own accounts for services rendered the public; but in such case there is no adversary party, unless the State, which passes the law, or the municipalities which are its component parts and subject to its control, can be regarded as such.

But except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people, indeed, when framing their constitution, may establish so great an

[1] Ranger *v.* Great Western R., 5 House of Lords Cases, 88; Stewart *v.* Mechanics and Farmers Bank, 19 Johns. 501.

[2] Washington Insurance Co. *v.* Price, Hopk. Ch. 2. This subject was considered in Hall *v.* Thayer, 105 Mass. 221, and an appointment by a judge of probate of his wife's brother as administrator of an estate of which her father was a principal creditor was held void. And see People *v.* Gies, 25 Mich. 83.

[3] Commonwealth *v.* Reed, 1 Gray, 475.

[4] Commonwealth *v.* Ryan, 5 Mass. 90; Hill *v.* Wells, 6 Pick. 104; Commonwealth *v.* Emery, 11 Cush. 406.

anomaly, if they see fit;[1] but if the legislature is intrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as *being within the province of the judicial authority. [*413] To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.[2]

Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in an appellate court; and the suit may there be dismissed on that ground.[3] The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party.[4]

Mere formal acts necessary to enable the case to be brought before a proper tribunal for adjudication, an interested judge may do;[5] but that is the extent of his power.

[1] Matter of Leefe, 2 Barb. Ch. 39.

[2] See Ames *v.* Port Huron Log-Driving and Booming Co., 11 Mich. 139; Hall *v.* Thayer, 105 Mass. 325.

[3] Richardson *v.* Welcome, 6 Cush. 332; Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 787. And see Sigourney *v.* Sibley, 21 Pick. 106; Oakley *v.* Aspinwall, 3 N. Y. 547.

[4] In Queen *v.* Justices of Hertfordshire, 6 Queen's Bench, 753, it was decided that, if any one of the magistrates hearing a case at sessions was interested, the court was improperly constituted, and an order made in the case should be quashed. It was also decided that it was no answer to the objection, that there was a majority in favor of the decision without reckoning the interested party, nor that the interested party withdrew before the decision, if he appeared to have joined in discussing the matter with the other magistrates. See also the Queen *v.* Justices of Suffolk, 18 Q. B. 416; The Queen *v.* Justices of London, *ib.* 421; Peninsula R.R. Co. *v.* Howard, 20 Mich. 26.

[5] Richardson *v.* Boston, 1 Curtis, C. C. 251; Washington Insurance Co. *v.* Price, Hopk. Ch. 1; Buckingham *v.* Davis, 9 Md. 324; Heydenfeldt *v.* Towns, 27 Ala. 430. If the judge who renders judgment in a cause had previously been attorney in it, the judgment is a nullity. Reams *v.* Kearns, 5 Cold. 217.