THE

# CONSTITUTIONAL HISTORY

OF

# NEW YORK

FROM THE BEGINNING OF THE COLONIAL PERIOD TO THE YEAR 1905, SHOWING THE ORIGIN, DEVELOPMENT, AND JUDICIAL CONSTRUCTION OF THE CONSTITUTION

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IN FIVE VOLUMES

VOL. IV.

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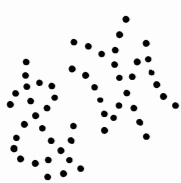

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# PREFACE.

Judges have been making and writing constitutional history from the beginning. The provision in the first Constitution by which they were made members of the Council of Revision, which was given power to consider all bills passed by the legislature, before they could become laws, gave the judges substantial control of legislation, subject to the power of the legislature to pass a bill over the veto. The governor was a member of the council, but he had no more authority than any other member; this situation made it possible for the judges to exercise a predominant influence in determining the validity or propriety of proposed legislation. If a bill was not approved, it was customary for the council to designate the chancellor or one of the judges to prepare a statement of objections to it, for transmission to the legislature. These objections were quite like executive veto messages since the abolition of the council, and, omitting questions of policy, were in the usual form of decisions declaring an act invalid on constitutional grounds. The function of the judges as members of the council was essentially executive, for their power reached beyond the determination of constitutional questions, and they might reject a bill on questions of policy. By the abolition of the council the function of the judge became purely judicial, and the executive power of the council was vested solely in the governor. This changed the relation of the judge to legislation. Under the first Constitution vetoes by the council were treated as executive only, and not as final judicial adjudications; we therefore find that, in numer-

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ous instances, the legislature passed bills over the veto, even where the objections were on constitutional grounds. It should be remembered, however, that, under these conditions, the judges had the last word as to the constitutionality of a law, for they still had the power to declare laws unconstitutional even if passed over their veto while acting as members of the Council of Revision.

I have already pointed out in previous volumes that the power possessed by the courts to declare laws unconstitutional is, in effect, a veto power, and since the abolition of the Council of Revision the exercise of this power by the courts may be characterized as a judicial veto, as distinguished from an executive veto, but with the important difference that the judicial veto is final, while the executive veto may be overruled by the legislature.

Judicial decisions have had a significant influence in shaping our constitutional system, for, by a process of interpretation, the principles of the Constitution are elucidated and applied to the varying conditions of modern social, political, and commercial life. A history of the Constitution would be incomplete without some note of these decisions. On great constitutional questions the judges usually bestow special and elaborate attention to the inception and evolution of the particular constitutional provision under consideration, and in many instances many decisions might be cited in which the judges have made history, not only by sustaining or rejecting statutes which have affected great public interests, but, by the construction given to the Constitution, have pointed out the proper course to be pursued by the various departments of the government, and have prescribed the extent and limitations of the rights of citizens as members of the state. It is not too much to say that a history of a large part of the Constitution might be written from judicial decisions.

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From the abundance of rich material I have tried to select cases which are most likely to aid the reader, lay as well as professional, in obtaining a clear view of the problems presented to the court, and the reasons for the decision. An effort has been made to state the essential facts in each case, and I have often quoted freely from the opinions, for the purpose of presenting a complete view of the questions involved, thus showing the development resulting in the policies formulated in the written instrument, and which policies have been described in the first three volumes.

I have included several historical notes which seem more appropriate here than in previous volumes. This is in accordance with the plan already pointed out of placing the historical notes where they would best elucidate the subject. It is hoped that this volume will be useful to the lawyer in searching for precedents relating to particular provisions, and in discovering and applying the proper principles of construction. But it has not been written for lawyers only: it has been my purpose so to present the history and discussion of constitutional principles that every citizen may readily ascertain and appreciate the policies outlined in the Constitution, and which so vitally affect his personal and political rights.

So far as practicable, judicial notes have been brought down to the date of publication of this work.

## Amendments of 1905.

The legislature of 1903 finally adopted four amendments, and the legislature of 1905 three. All of them were to be submitted to the people at the general election in November, 1905. These amendments include article 6, sections 1 and 2; article 7, amending section 4, and adding two new sections, 11 and 12; article 8, section 10, and article 12, section 1. The text of these amendments will

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be found in the notes to the articles so amended. My historical record, so far as the Constitution is concerned, closes with the legislative session which ended May 5, 1905; I am, therefore, unable to state the result of the submission of these amendments. Assuming that they may be approved, they are given in full. If approved, or if not approved, this volume will contain the Constitution as in force on the last day of December, 1906, and until other amendments are adopted. After the result of the election is known, the reader may make the book complete, as to the form of the Constitution, by noting the approval or rejection of each amendment on the margin thereof.

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# THE CONSTITUTION OF THE STATE OF NEW YORK,

**As revised in 1894, and including the amendments of 1899, 1901, and 1905.**

The amendments appear in the following pages in connection with the sections or articles to which they relate. The original form of the Constitution of 1894 will be found in the Introduction. The text given in this volume states the Constitution as in force at the end of the year 1906.

## PREAMBLE.

**We, the people of the State of New York, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution.**

The first Constitution had no preamble in the sense in which that term is applied in subsequent Constitutions, but it had a long introduction. The makers of that Constitution were establishing a new order of things, and,



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like the men who gave to the world the Declaration of Independence, they seemed to think that a "decent respect to the opinions of mankind" justified, if it did not require, a statement of the reasons which impelled the momentous action they were about to take in organizing a new and independent government in the face of an enemy who held possession of a large part of the colony, including its chief city. They therefore prefaced the Constitution they were about to adopt with a recital of the action taken by representative bodies of patriots, leading up to the independence of the colonies. This recital included the recommendation of the Continental Congress that governments be organized in the various colonies, the action of the Third Provincial Congress of New York, recommending the election of delegates, with full power to act upon that recommendation, the election of the Fourth Provincial Congress, which became the First Constitutional Convention, and its ratification of the Declaration of Independence on the 9th of July, which instrument declared, among other things, that "these united colonies are, and of right ought to be, free and independent states." The Declaration of Independence was then quoted at length as a part of the introduction, being thus reaffirmed nine months after its original ratification, and the Convention declared that, by reason of the action already taken by the several congresses, and the dissolution of the ties that bound the colonies to the British government, all power had reverted to the people, who had clothed the Convention with full authority to institute a new government, and this new possession and assertion of popular rights was expressed in the first section of the Constitution, which declared that "no authority shall, on any pretense whatever, be exercised over the people or members of this state, but such as shall be derived from and granted by them."

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After forty-four years of experience and development under this Constitution it was obviously unnecessary, if not inappropriate, to continue this form of preamble in preparing a new constitution. The Convention of 1821, therefore, omitted any reference to the original struggle for independence, and adopted a brief preamble, including only an acknowledgment of Divine grace and benevolence in permitting the people to make choice of their form of government. The Convention of 1846 enlarged the idea of the preamble, and not only expressed gratitude to Almighty God for freedom, but declared that the Constitution was established "in order to insure its blessings." This preamble was continued in the Constitution of 1894.

The preamble is usually considered as an abstract statement, not needing judicial interpretation, and it has therefore received little attention from the courts. This remark does not apply with equal force to the preamble to the Federal Constitution, which contains a more formal statement of the purposes of the instrument, incorporating and continuing several phrases previously used in colonial history, and which preamble has received express judicial interpretation in several cases. An exception to the general omission of the preamble to our Constitution as a subject of judicial consideration appears in *Lindenmuller* v. *People* (1861) 33 Barb. 548, where Justice Allen, discussing the validity of the act of 1860, chap. 501, prohibiting certain amusements on Sunday in the city of New York, after citing the action of the Convention of 1777 in ratifying the Declaration of Independence, which contained a direct and solemn appeal "to the Supreme Judge of the world," and expressed a "firm reliance on the protection of Divine Providence" for the support of the Declaration, refers to the preambles of 1821 and 1846, and says that they "recognize some of the fundamental principles of the Christian religion, and are cer-

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tainly very far from ignoring God as the supreme ruler and judge of the universe, and the Christian religion as the religion of the people, embodying the common faith of the community, with its ministers and ordinances, existing without the aid of, or political connection with, the state, but as intimately connected with a good government, and the only sure basis of sound morals." This case will be noticed again under the section relating to religious toleration; but it may be observed that the principles enunciated in it were approved by the court of appeals, in 1877, in *Neuendorff* v. *Duryea*, 69 N. Y. 557, in which the same statute was construed and its validity sustained.

While there are few cases in which the preamble has received direct attention, there are numerous judicial decisions relating to the Constitution generally which do not construe specific provisions, and which therefore cannot be appropriately considered under particular sections. These decisions relate not only to general principles of construction and other questions of constitutional interpretation, but also to questions arising under the Federal Constitution which have frequently been considered by state courts. I have therefore collected in this note several cases of a general character, and for convenience of reference have, so far as practicable, arranged them according to topics. Other decisions involving questions under the Federal Constitution are considered in a note on "Legislative Power," at the beginning of article 3.

### WHAT IS A CONSTITUTION?

Many pages might be filled with a dissertation on the origin and evolution of the term "constitution" as an expression of the principles of government, but the subject has already been amply treated by political writers whose

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works are easily accessible, and the scope of this work will permit only a few general suggestions with particular reference to our own history, some parts of which have not been considered in general articles on this subject. The student of history has not failed to notice the change in the use of the term "constitution" as applied to forms and powers of government, and the practical restriction of its use in modern times to the primary fundamental law of political society or of subordinate corporate or voluntary organizations. An illustration of the present use of the term by a nation which, coming out of a remote antiquity, has recently adopted a most progressive modern policy, is found in the constitution of Japan, which went into operation in 1889. The following preamble shows a curious mingling of inherited absolute power and popular rights:

"Having, by virtue of the glories of our ancestors, ascended the throne of a lineal succession unbroken for ages eternal, desiring to promote the welfare of, and to give development to the moral and intellectual faculties of, our beloved subjects, the very same that have been favored with the benevolent care and affectionate vigilance of our ancestors, and hoping to maintain the prosperity of the State, in concert with our people, and with their support, we hereby promulgate, in pursuance of our imperial rescript of the 12th day of the 10th month of the 14th year of Meiji, a fundamental law of the State, to exhibit the principles by which we are to be guided in our conduct, and to point out what our descendants and our subjects and their descendants are forever to conform.

"The rights of sovereignty of the State we have inherited from our ancestors, and we shall bequeath them to our descendants. Neither we nor they shall in future fail to wield them in accordance with the provisions of the Constitution hereby granted. We now declare to respect

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and protect the security of the rights and of the property of our people, and to secure to them the complete enjoyment of the same within the extent of the provisions of the present Constitution, and of the law."

Under the early Roman law the acts of the emperor were termed constitutions, and Mr. Hunter (Roman law, p. 76) says they included "edicts, general ordinances issued cy him in his capacity of magistrate; decrees, judicial decisions pronounced either on final appeal or in the exercise of his summary jurisdiction; *epistulæ* or *rescripta,* written replies to the inquiries of judges or of private persons on particular points; and *mandata,* orders to the imperial officers in the provinces." Referring to the division of the law into two parts, written and unwritten, the same writer, p. 119, suggests that "its origin seems to flow from the institutions of two states,—Athens and Sparta;" and he points out the interesting fact that "the Spartans preferred to commit to memory what they were to observe as statutes; but the Athenians guarded what they found enacted in their written statutes."

In the article on home rule in the preceding volume, I have quoted the provision of the Duke's Laws, 1665, authorizing the inhabitants of a town to establish "peculiar constitutions" relating to local affairs. Here the term is evidently used in the sense of ordinances, or by-laws. So in the Dongan charter of New York, April, 1686, the governing body of the city was authorized "to make laws, orders, ordinances, and constitutions" relating to city affairs; and the Albany charter, granted a few months later, contained the same provision. In the later history of the colony the term began to acquire its modern signification, and was applied to the form of government rather than to details of local administration, as indicated by the Duke's Law and the Dongan charters. While

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the constitution of England is not written, it has a scope, character, and meaning as definite as an American written constitution. The English use of the term is apparent in one of the questions contained in an inquiry by the home government, addressed to the American colonies in 1773, asking information concerning various aspects of colonial affairs, and which included the question "What is the constitution of the government?" Governor Tryon, answering for New York, in June, 1774, referred to the original charters to the Duke of York, and the change from a proprietary to a royal government in consequence of the Duke's accession to the throne; and, proceeding further, said the colony had a governor appointed by the Crown, a council similar to the English privy council, and an assembly; pointing out particularly that, in executive affairs, the council was similar to the English privy council, and, as a part of the legislature, was similar to the House of Lords. I have already pointed out in a former chapter that the colonial council was the predecessor of the state senate. The Governor further said that the common law of England was considered the fundamental law of the province, and that English statutes of a general nature, passed before the colony had a legislature, were binding on the colony. The Governor then described the judicial system and other elements of local government. All these features of government described by Governor Tryon were, with modifications, subsequently included in the written Constitution of the state. The slow evolution in the use of the term "constitution" is indicated by the fact that the convention which framed the first Constitution of New York almost invariably called it a "form of government." The early resolutions relating to this subject refer to a form or frame of government, and not specifically to a constitution. Sometimes it is called a plan of government. But whatever its framers chose to

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call it while deliberating upon it, the instrument took its place as one of the great political documents of that period, and became known as, as it was in fact, the Constitution of the state.

It is only natural that judges and writers on public affairs should attempt to define a constitution. If a definition is desired we need seek no higher authority than Judge Story, who, in his "Commentaries on the Constitution of the United States," vol. 1, § 338, says that "the true view to be taken of our state Constitutions is that they are forms of government, ordained and established by the people in their original sovereign capacity, to promote their own happiness and permanently to secure their rights, property, independence, and common welfare." Bouvier (Law Dict. 1, p. 335) defines a constitution as the fundamental law of a free country, which characterizes the organism of the country, and secures the rights of the citizen, and determines his main duties as a freeman. Judge Edwards, in *McKoan* v. *Devries* (1848) 3 Barb. 196, considering the object of a state constitution, says it is undoubtedly "to establish the fundamental permanent law of the state,—that law which is not to be left to ordinary legislation;" and he quotes the foregoing definition by Judge Story. He then observes that a "convention that establishes a constitution has all the powers which the people possess in their original sovereign capacity;" and it must be presumed that a constitutional provision was intended to be permanent and wholly beyond legislative control. A concise definition of the term is given by Judge Allen, in *People* v. *New York C. R. Co.* (1862) 24 N. Y. 485, who says that a "constitution is an instrument of government, made and adopted by the people for practical purposes connected with the common business and wants of human life." Judge Johnson, in *Newell* v. *People* (1852) 7 N. Y. 97, says a constitution is the "most solemn and deliberate of all human writings," ordaining "the fundamental law of states." "The Constitution is the voice of the people, speaking in their sovereign capacity." *Re New York Elev. R. Co.* (1877) 70 N. Y. 327, 342.

The American and English constitutional systems were compared in *People ex rel. Mathews* v. *Toynbee* (1855) 20 Barb. 168, 194, affirmed in (1856) 13 N. Y. 378, where it is said that "the provisions of the great charter and the acts of later times for the protection of life, liberty, and property are statutory regulations which Parliament may repeal or modify at pleasure. They are limita-

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tions upon the power of the Crown, and not upon that of Parliament. . . . We have incorporated the prohibitions of the English statutes for the protection of life, liberty, and property into our Constitution, not as limitations upon executive authority, but as limitations upon legislative power. The same unrestrained dominion over property which the Parliament and people of Great Britain have denied to the Crown, and reserved to Parliament, the people of the state of New York have denied to the legislature, and reserved to themselves."

"The Constitution is the basis upon which rests that complicated social organization called the State." *People* v. *Rathbone* (1895) 145 N. Y. 434, 438, 28 L. R. A. 384, 40 N. E. 395.

"The object of a written constitution is to regulate, define, and limit the powers of government by assigning to the executive, legislative, and judicial branches distinct and independent powers. The safety of free government rests upon the independence of each branch, and the even balance of power between the three. Unite any two of them and they will absorb the third with absolute power as a result. Weaken any one of them by making it unduly dependent upon another and a tendency toward the same evil follows." *People ex rel. Burby* v. *Howland* (1898) 155 N. Y. 270, 41 L. R. A. 838, 49 N. E. 775.

Discussing the provision that a person shall not be compelled to be a witness against himself, Judge Denio, in *People ex rel. Hackley* v. *Kelly* (1861) 24 N. Y. 74, makes an important observation on the general scope and purpose of a constitution. He says: "Constitutional provisions are not leveled solely at the evils most current at the times in which they are adopted, but, while embracing these, they look to the history of the abuses of political society in times past, and in other countries, and endeavor to form a system which shall protect the members of the state against those acts of oppression and misgovernment which unrestrained political or judicial power are, always and everywhere, most apt to fall into."

*Adoption of constitution.*—An amendment is deemed adopted when it becomes a part of the constitution. *People* v. *Norton* (1871) 59 Barb. 169. This case involved the effect of a vote approving an amendment and the canvass and certification of the result by the state board of canvassers. See also *Real* v. *People* (1870) 42 N. Y. 270. The Constitution of 1894, art. 14, § 1, following the rule established in 1874, definitely prescribes the time when an amendment shall take effect.

*Amended constitution.*—An amended constitution must be read as

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a whole, and as if every part had been adopted at the same time, and as one law, and effect must be given to every part of it, each clause explained and qualified by every other part. *People ex rel. Killeen* v. *Angle* (1888) 109 N. Y. 564, 17 N. E. 413, opinion, page 575, quoting from *Gilbert Elev. R. Co.* v. *Anderson* (1877) 3 Abb. N. C. 452: "If there be any repugnancy between an amended statute or law and the original, which cannot be so construed as to leave them both to stand, and each have a legitimate office to perform, the original enactment must be deemed to have been repealed by the later expression of the popular will."

*Amendment.*—A constitutional provision can be impliedly abrogated by the adoption of another and later one which is antagonistic to it, although the original provision may, in terms, remain unaltered. The later will of the people, constitutionally made known, must, in such cases, take the place of the other provision, even though it may still, in form, remain in the organic law as a part thereof. It can only be said that in the case of the constitutional amendment, the fact of its opposition to a former provision, and the intent to displace it by the amendment adopted, must be so plainly shown by the provisions themselves that there can be no rational doubt in regard to it. *People ex rel. Carter* v. *Rice* (1892) 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921.

It may be assumed as an undoubted proposition that a new constitution of a state, as the supreme law, supersedes all laws existing when the constitution takes effect, in conflict with its provisions, if it appears, from a just construction of the instrument, that it was intended to have a present binding and operative force upon the matter or thing upon which the conflict arises. *People ex rel. Inebriates' Home* v. *Brooklyn* (1897) 152 N. Y. 399, 404, 46 N. E. 852.

The effect of the revised Constitution of 1894 on existing offices under art. 10, § 2, which was continued without change from the Constitution of 1846, was considered in *Re Brenner* (1902) 170 N. Y. 185, 192, 63 N. E. 133.

*Who may raise constitutional question.*—Parties must have a direct interest. *Sinclair* v. *Jackson* (1826) 8 Cow. 543. When attorney general cannot raise question in action by the people. *People* v. *Rensselaer & S. R. Co.* (1836) 15 Wend. 113, 30 Am. Dec. 33; *Waterloo Woolen Mfg. Co.* v. *Shanahan* (1891) 128 N. Y. 345, 14 L. R. A. 481, 28 N. E. 358.

A peculiar question relating to the right of individuals to object to the validity of a statute was considered in *Wetmore* v. *Brooklyn*

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*Gaslight Co.* (1870) 42 N. Y. 384, involving the use by the public of private wharves on the East river, in Brooklyn.

Constitutional question can be raised only by a person who has an interest in the controversy. *Board of Education* v. *Board of Education* (1902) 76 App. Div. 355, 361, 78 N. Y. Supp. 522.

*When question may be raised.*—Where the objection to the validity of a law is not apparent from the act itself it should be distinctly stated in the pleadings, so that the adverse party may have an opportunity to show that the act was regularly passed. *People ex rel. Scott* v. *Chenango* (1853) 8 N. Y. 317.

A commitment of a child found in an employment contrary to the act of 1876 for the protection of children (Laws 1876, chap. 122) is a final judgment within the meaning of the habeas corpus act. Upon habeas corpus the constitutionality of the statute under which the commitment was made cannot be impeached; for this would be to inquire into the legality of the judgment. *Re Donohue* (1876) 1 Abb. N. C. 1.

The constitutionality of a statute need not be attacked by the defendant for the first time on a trial of an action, for the reason that the objection against the validity of the act cannot be obviated by the plaintiff. *Brookman* v. *Hamill* (1869) 54 Barb. 209, (1871) 43 N. Y. 554, 3 Am. Rep. 731. But a constitutional question cannot be raised for the first time in the court of appeals. *Vose* v. *Cockcroft* (1871) 44 N. Y. 415, where Hunt, C., says: "There is no proceeding known in a civil case by which questions can be presented for review in the court of appeals which have not been presented to the court below and there decided, although the facts upon which it might have been presented sufficiently appear." This principle was reaffirmed by the same court in *Delaney* v. *Brett* (1872) 51 N. Y. 78, where, after stating that the court possessed only appellate jurisdiction to review judgments of the general term, it is said that this necessarily excludes "the consideration of a matter or subject that has not been presented for adjudication to the subordinate court." See also *Dodge* v. *Cornelius* (1901) 168 N. Y. 242, 61 N. E. 244.

Constitutional questions are never considered by the court of appeals unless they are essential to the determination of the appeal. *People ex rel. Wetmore* v. *New York County* (1865) 2 Keyes, 288, citing *Frees* v. *Ford* (1852) 6 N. Y. 176; *People ex rel. Simpson* v. *Wells* (1904) 99 App. Div. 364, 91 N. Y. Supp. 219, (1905) 181 N. Y. 252.

*How question raised.*—The court will not consider constitutional

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questions upon affidavits presented on a motion for an injunction *pendente lite*, "especially in a case where the public interest is gravely concerned." *Knowles* v. *Conklin* (1902) 77 App. Div. 633, 78 N. Y. Supp. 1021.

## PRINCIPLES OF CONSTRUCTION.

"The first rule in interpreting and construing a constitution is to give to it the effect and meaning contemplated by its framers and by the people who adopted it. And the first rule for ascertaining what that intent and meaning was, is that it is to be gathered, if possible, from the plain and ordinary meaning of the words used." *People ex rel. McClelland* v. *Roberts* (1895) 91 Hun, 101, 34 N. Y. Supp. 641, 36 N. Y. Supp. 677, (1896) 148 N. Y. 360, 31 L. R. A. 399, 42 N. E. 1082.

A written constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of government and individual citizens, according to its spirit and the intent of its framers, and indicated by its terms. *People ex rel. Bolton* v. *Albertson* (1873) 55 N. Y. 50, 55.

In construing a constitution the only sound principle is to declare *Ita lex scripta est*, to follow and to obey; arguments *ab inconvenienti* cannot be considered for the purpose of enlarging or contracting its import. *People* v. *Morrell* (1839) 21 Wend. 563, 583; *Newell* v. *People* (1852) 7 N. Y. 109.

The language of a constitution cannot be extended beyond the scope of its terms because the enlarged construction would be desirable or convenient. *People ex rel. Williams* v. *Dayton* (1874) 55 N. Y. 367.

In the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect, and we are not concerned with the wisdom of their insertion. "As adopted by the people, the intent is to be ascertained, not from speculating upon the subject, but from the words in which the will of the people has been expressed. To hold otherwise would be dangerous to our political institutions. . . . It must be presumed that its framers understood the force of the language used and as well the people who adopted it." *People v. Rathbone* (1895) 145 N. Y. 434, 438, 28 L. R. A. 384, 40 N. E. 395.

The rule that, in the construction of a law, every part of it must be viewed in connection with the whole, so as to make, if possible,

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all its parts harmonious (1 Kent, Com. 462), must be applied in the construction of a constitution. Where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the lawmaker is plain. *People ex rel. Jackson* v. *Potter* (1872) 47 N. Y. 375, construing the provisions of the judiciary article of 1869, relating to vacancies in the office of justice of the supreme court.

"The same general rules which govern the construction and interpretation of statutes and written instruments generally apply to and control in the interpretation of written constitutions. They are made by practical and intelligent men, for the practical administration of the government, and they are to receive that interpretation which will give effect to the intent of the framers, as deducible from the language employed, and operate most benignly in the interest of the governed, and best harmonize with and give effect to the general scope and design of the instruments. As in other written instruments, the intent and design of a particular provision being ascertained from the words used, effect will be given to it in harmony with such intent and design. . . . If words have a doubtful meaning, or are susceptible of two meanings, they should, within the rule, receive that which will effectuate the intent of the framers of the constitution, and the general intent of the instrument." *People* v. *Fancher* (1872) 50 N. Y. 288, 291.

"The language of a constitution is presumed to be selected with more care and exactness than that of a statute, and when such language has a definite meaning, there is no occasion for construction, and it is not the province of courts to speculate upon what might have been intended." *People ex rel. Garling* v. *Van Allen* (1873) 55 N. Y. 31, 35, per Church, Ch. J.

Nothing but a clear violation of the Constitution will justify a court in overruling the legislative will. *Re New York Elev. R. Co.* (1877) 70 N. Y. 327, 342.

If the act and the Constitution can be so construed as to enable both to stand, and each can be given a legitimate office to perform, it is the duty of the court to give them such construction. *People ex rel. Killeen* v. *Angle* (1888) 109 N. Y. 564, 17 N. E. 413.

Greater care and caution should be used in adding or striking out words from a provision in our organic law, on the ground that it is necessary in order to obtain the true meaning of such provision, than if such provision were contained in a statute, because the fundamental law of the state is presumed to be, and indeed is, prepared with the very greatest deliberation, and adopted only after

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every opportunity for reflection upon the meaning of each word has been had by different legislatures and by the people at large. *People ex rel. Gilbert* v. *Wemple* (1891) 125 N. Y. 485, 489, 26 N. E. 921.

Where the terms of a written constitution are clear and unambiguous, and have a well understood meaning and application, effect must be given to the intent of its framers as indicated by the language employed. The operation and effect of the instrument will not be extended by construction beyond the fair scope of the terms employed, merely because the more restricted and literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision, plain and precise in its terms. *Settle* v. *Van Evrea* (1872) 49 N. Y. 280.

A provision of the fundamental law which attempts to regulate the forms in which the legislative will is to be expressed in the enactment of laws is difficult of a just and reasonable application in all cases, and is, at best, of very doubtful utility. A constitutional provision intended to operate as a restraint upon the legislature with respect to the language and form of expression to be used in framing acts of legislation is not to be so construed as to embrace cases not fairly within its general purpose or policy, or the evils which it was intended to correct, though they may be within its letter; and this is applicable particularly to § 17 of article 3, prohibiting the enactment of statutes by reference only. *People ex rel. Everson* v. *Lorillard* (1892) 135 N. Y. 285, 31 N. E. 1011.

Where a clause of a constitution which has received a settled and judicial construction is adopted in the same words by the framers of another constitution, it will be presumed that the construction was likewise adopted. *Re Smith* (1895) 90 Hun, 568, 36 N. Y. Supp. 40, citing 2 Black, Const. Law, 68. In this case it is also said that "where, in framing a new or amended constitution, the framers of an article relating to the same subject-matter that is embraced in an article or provision of the former constitution, which has received a judicial construction, employ different language, or, while employing the same language, add to it words of qualification, limitation, or restriction, it must be held that they intended to avoid the effects of the construction placed upon the article or provision as it existed in the former constitution." This case involved the validity of an assembly apportionment by a board of supervisors under the Constitution of 1894. The general term declared the apportionment invalid, but this decision was reversed, and the ap-

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portionment sustained by the court of appeals, in (1896) 148 N. Y. 187, 42 N. E. 592.

A constitution must usually be regarded as mandatory, and not merely directory. *People ex rel. Crowell* v. *Lawrence* (1862) 36 Barb. 177, affirmed in (1869) 41 N. Y. 137.

Every positive direction contains an implication against anything contrary to it, but which would frustrate or disappoint the purpose of that provision. *People ex rel. Wood* v. *Draper* (1857) 15 N. Y. 532, 544. A construction cannot be accepted which defeats or nullifies a constitutional provision. *People ex rel. Inebriates' Home* v. *Brooklyn* (1896) 11 App. Div. 114, 42 N. Y. Supp. 657, (1897) 152 N. Y. 399, 46 N. E. 852.

*Aid to construction.*—It is proper to look into the proceedings of the convention by which the instrument was framed when the court is seeking to ascertain the purpose which led to the insertion of a particular provision. *Goedel* v. *Palmer* (1897) 15 App. Div. 86, 89, (1897) 152 N. Y. 412, 46 N. E. 851. The journals of the Commission of 1872 were consulted for a like purpose. *People ex rel. Henderson* v. *Westchester County* (1895) 147 N. Y. 20, 30 L. R. A. 74, 41 N. E. 563.

*Doubtful construction not encouraged.*—Forced and doubtful interpretations of the language of the Constitution, as contradistinguished from its more natural and popular import, are not to be encouraged or upheld. *Purdy* v. *People* (1842) 4 Hill, 384.

*Existing statutes.*—A constitution is to be held as prepared and adopted in reference to existing statutory laws upon the provisions of which, in detail, it must depend to be set in practical operation. *People ex rel. Jackson* v. *Potter* (1872) 47 N. Y. 375.

*Legislative construction.*—Upon a question of real doubt as to the meaning of a particular clause in the Constitution, a legislative construction, if deliberately given, is entitled to much weight, although it is not conclusive upon the judicial tribunals. *Coutant* v. *People* (1833) 11 Wend. 512.

In the chapter on the Convention of 1801 I have quoted the suggestion made by Governor (formerly Chief Justice) Jay that the legislature pass a declaratory act construing the section of the Constitution in relation to the Council of Appointment, and thus settle the controversy between the Governor and the senate members of the council as to their respective powers; and have also there quoted the assembly resolution in response to the Governor's suggestion, in which the opinion was expressed that the legislature had no "authority to interpose between the Executive and the mem-



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bers of the Council of Appointment touching the right of nomination, or to pass a declaratory act defining the powers of the said council, or prescribing the manner in which the same shall be exercised." The Governor also suggested that the controversy might be settled by judgment of law. It would have been easy to make a case for judicial consideration, and this course would now be adopted under similar circumstances. The legislature of 1801, however, concluded to recommend a convention; and thus the people themselves, acting through delegates chosen for that purpose, pronounced, in 1801, a judicial construction of a constitutional provision adopted in 1777. It is noteworthy that thus early in our history the assembly declined to exercise the distinctly judicial function of construing the Constitution. More than half a century after the Convention of 1801, Justice Brown, writing the opinion of the supreme court in the *Toynbee Case* (1855) 20 Barb. 168, 195, construing the prohibitory liquor law of 1855, reiterated the opinion expressed by the assembly, and said that while "the legislature may declare what a particular term or expression means when used in a statute, . . . it cannot declare what the same term or expression means, and thus enlarge or restrain its signification, when used in the Constitution. It is of no consequence what the legislature think of it, or what import they attribute to it. The real inquiry is, What did the framers of the Constitution mean by it, and what was its known legal definition and signification when the Constitution was adopted?"

A long and uninterrupted practical construction of a Constitution by the legislature, and which has been acquiesced in and acted upon by the executive and administrative departments of the government, is entitled to great, and often even controlling, weight in its interpretation. "It has almost the force of a judicial exposition (Story, Const. § 408); and unless such legislation and practice is manifestly in violation of the words used, the greatest weight should be given to it in construing them. (Cooley, Const. Lim. 67, and cases cited.)" *People ex rel. Williams* v. *Dayton* (1874) 55 N. Y. 367, 378; also *People ex rel. Einsfeld* v. *Murray* (1896) 149 N. Y. 367, 32 L. R. A. 344, 44 N. E. 146, which presents an interesting instance of practical construction sustaining the provision in the liquor tax law of 1896, which divides the liquor tax between the state and localities, following a legislative policy which had prevailed during the entire history of the state, and which was embodied in statutes enacted without the two-thirds vote required by § 20 of article 3, which had been a part of the Constitution since 1821.

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Provisions are generally found in state constitutions enjoining upon the legislature the passing of laws on special subjects to carry out the policy defined in the instrument. Such provisions are incapable of enforcement by judicial or other mandate; but they have generally been effective through the moral sanction which they possess to induce the legislature to discharge the duty cast upon it. *People ex rel. Inebriates' Home* v. *Brooklyn* (1897) 152 N. Y. 390, 409, 46 N. E. 852.

*Meaning, when fixed.*—"The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time, when a court has occasion to pass upon it. The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." Cooley, Const. Lim. 6th ed. 69, cited in *Reilly* v. *Gray* (1894) 77 Hun, 402, 409, 28 N. Y. Supp. 811, in which the court also say that "in construing a provision of the Constitution, its history and the conditions and circumstances attending its adoption must be kept in view."

*Object.*—A constitution should be so construed as best to promote the objects for which it was made. Extremes of construction—liberal or strict—should be avoided, and the purpose for which the Constitution was framed and the government established should be kept steadily in view. *North River S. B. Co.* v. *Livingston* (1825) 3 Cow. 713, 750, where this rule is stated by Chief Justice Savage with special reference to the Federal Constitution.

*Scope of constitution.*—A constitution is not to be interpreted precisely like a statute. A constitutional convention is not, like the legislature, obliged to look carefully to the preservation of vested rights. Subject to popular approval and the Federal Constitution, it may "deal with all private and social rights, and with all the existing laws and institutions of the state." The authors of a constitution do not execute a delegated power "limited by other constitutional restraints," but, "as the founders of a state," must be deemed "intent only upon establishing such principles as seemed best calculated to produce good government and promote the public happiness at the expense of any and all existing institutions which might stand in their way." Article 8, § 7 of the Constitution of 1846, prescribing the liability of stockholders of banks, was held to apply to existing banks as well as to banks afterwards organized. *Re Oliver Lee & Co.'s Bank* (1860) 21 N. Y. 9.

*Self-executing provisions.*—The provision of article 8, § 6, requiring the legislature to provide for the redemption of bills in specie, is not self-executing. *Metropolitan Bank* v. *Van Dyck* (1863) 27 N. Y. 400.

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Article 2, § 1, defining the qualifications of voters, is self-executing. *People* v. *Barber* (1888) 48 Hun, 198.

The provision of article 6, § 6, relating to the transfer of causes on the abolition of the court of oyer and terminer, is self-executing. *People* v. *Hoch* (1896) 150 N. Y. 293, 44 N. E. 976.

Article 5, § 9, civil service, is self-executing under existing statutes, without further legislation (*People ex rel. McClelland* v. *Roberts* [1896] 148 N. Y. 360, 31 L. R. A. 399, 42 N. E. 1082), but it is not self-executing as to minor political subdivisions which were not included in the civil service system when the amendment was adopted. *Chittenden* v. *Wurster* (1897) 152 N. Y. 345, 37 L. R. A. 809, 46 N. E. 857.

*Special term.*—Before the court will deem it their duty to declare a statute unconstitutional a case must be presented in which there can be no rational doubt. Especially when the question is presented for the decision of a single judge on a collateral motion. *Macomber* v. *New York* (1860) 17 Abb. Pr. N. S. 35.

It has frequently been held that the court at special term should not declare an act of the legislature unconstitutional, except in an extremely clear case. *Re Lexington Ave.* (1882) 63 How. Pr. 464, per Lawrence, J. (1883) 92 N. Y. 629; *People ex rel. Clark* v. *Sing Sing Prison* (1902) 39 Misc. 113, 117, 78 N. Y. Supp. 907. In *Re Bayard* (1881) 25 Hun, 546, the judge at special term held an act unconstitutional. This was reversed at general term. In *Smith* v. *Keteltas* (1900) 32 Misc. 111, 66 N. Y. Supp. 260, (1901) 62 App. Div. 174, 70 N. Y. Supp. 1065, the court, at special term, declined to declare an act void, it not being perfectly clear that it violated the Constitution. So in *Meyers* v. *New York* (1900) 32 Misc. 522, 527, 66 N. Y. Supp. 755, (1900) 54 App. Div. 631, 66 N. Y. Supp. 755, the judge at special term thought that, as a matter of judicial propriety, "he should not, except in a palpable case, assume to pronounce an act of the legislature a violation of the Constitution," especially in this case, where the act had been before the appellate division on several occasions, when its constitutionality might have been, but was not, questioned. The constitutionality of a law of the state ought not to be called in question summarily on a motion to strike out part of a pleading as irrelevant. *Brien* v. *Clay* (1852) 1 E. D. Smith, 649. The court will not determine that a statute on which the plaintiff's right to maintain the action depends is unconstitutional, upon the hearing of a motion on affidavits. *Havemeyer* v. *Ingersoll* (1871) 12 Abb. Pr. N. S. 301.

"It has been repeatedly held that a single judge ought not to

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declare an act of the legislature unconstitutional unless a case is presented in which there can be no rational doubt." *People ex rel. Klein* v. *McDonald* (1896) 52 N. Y. Supp. 898.

*Waiver.*—A person may renounce a constitutional provision made for his own benefit. *Baker* v. *Braman* (1843) 6 Hill, 47; *Sherman* v. *McKeon* (1868) 38 N. Y. 266; *Phyfe* v. *Eimer* (1871) 45 N. Y. 102; *Vose* v. *Cockcroft* (1871) 44 N. Y. 415; *Detmold* v. *Drake* (1871) 46 N. Y. 318; *Connors* v. *People* (1872) 50 N. Y. 240; *People* v. *Quigg* (1874) 59 N. Y. 83; *Brooklyn* v. *Copeland* (1887) 106 N. Y. 496, 13 N. E. 451; *Brooklyn Park* v. *Armstrong* (1871) 45 N. Y. 234, 239, 6 Am. Rep. 70; *Akin* v. *Water Comrs.* (1894) 82 Hun, 265, 31 N. Y. Supp. 254; *New York* v. *Manhattan R. Co.* (1894) 143 N. Y. 1, 26, 37 N. E. 494, applying the rule to a corporation; *Dodge* v. *Cornelius* (1901) 168 N. Y. 242, 61 N. E. 244; *Whitaker* v. *Staten Island Midland R. Co.* (1902) 76 App. Div. 351, 78 N. Y. Supp. 410; *Sentenis* v. *Ladew* (1893) 140 N. Y. 463, 466, 37 Am. St. Rep. 569, 35 N. E. 650; *Embury* v. *Conner* (1850) 3 N. Y. 511, 53 Am. Dec. 325; *Re Cooper* (1883) 93 N. Y. 507; *Re Cullinan* (1892) 76 App. Div. 362, 78 N. Y. Supp. 466.

## CONSTITUTIONS OF OTHER STATES.

In an action for divorce the court declined to consider an allegation that a judgment of divorce in Louisiana was void because the statute under which it was obtained was invalid under the Constitution of that state. There was no evidence nor Louisiana decisions cited showing that a statute authorizing a divorce for the past conduct of the defendant had been held unconstitutional in that state. "In the face of a formal and deliberate judgment of a court of the state of Louisiana decreeing a divorce, with the Constitution of the state and the laws of its general assembly before it, we may not assume that the law of that state, as settled by its judiciary, is against the validity of the statutes, and of this judgment under them; nor may we apply to that Constitution and those statutes our own interpretation and adjudication, for that would be to substitute the law of New York for the law of Louisiana." Such a judgment is entitled to full faith and credit under the Federal Constitution if the court had jurisdiction of the parties and of the subject-matter. *Hunt* v. *Hunt* (1878) 72 N. Y. 217, 28 Am. Rep. 129.

The supreme court in *Dodge* v. *Platte County* (1878) 16 Hun, 285, sustained a statute of Missouri ratifying proceedings in relation

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to railroad aid bonds, following the judgment of a competent court of that state that the provision of the Constitution of Missouri, adopted in 1865, limiting the power to vote railroad aid, did not affect corporations previously created by special charter; but the court of appeals, in 82 N. Y. 218, did not agree with the general term on this point, and held that the validity of the act in question had not been sustained by the courts of Missouri, and was invalid under its Constitution.

Chancellor Kent, in *Livingston* v. *Tompkins* (1820) 4 Johns. Ch. 430, declined to consider the validity of a statute of New Jersey, observing that the constitutionality of that act was not a proper subject of discussion in that case. "That question belongs, in the first instance, to the courts of that state, and ultimately to the Supreme Court of the United States."

## CONSTITUTION OF THE UNITED STATES.

*Accused, rights of.*—The provision in the 6th Amendment of the Federal Constitution, that the accused shall be confronted with the witnesses against him, applies only to citizens of the United States on trial in the Federal courts, charged with a violation of the Constitution of the United States or laws of Congress. *People* v. *Penhollow* (1886) 42 Hun, 103.

*Attainder.*—The provision of the public health law, § 140, making it a misdemeanor for a person to practise medicine who had ever been convicted of felony, is not an act of attainder under article 1, § 10, of the Federal Constitution. *People* v. *Hawker* (1897) 152 N. Y. 234, 240, 46 N. E. 607.

*Bankruptcy.*—The voluntary branch of the Federal bankruptcy law, passed August 19, 1841, was within the power of Congress, and therefore constitutional. *Kunzler* v. *Kohaus* (1843) 5 Hill, 317. See also *Sackett* v. *Andross* (1843) 5 Hill, 327; *Dresser* v. *Brooks* (1848) 3 Barb. 429; *McCormick* v. *Pickering* (1850) 4 N. Y. 276.

*Bills of credit.*—Bills of credit under the provision of the Federal Constitution, article 1, § 10, subd. 1, include paper designed to circulate as money, or answering the ordinary purposes of coin. *Indiana* v. *Woram* (1843) 6 Hill, 33, 40 Am. Dec. 378.

Certificates issued under a law of the state of Missouri, for service rendered by members of the militia of that state, are not bills of credit within the provision of the Federal Constitution, article 1, § 10, prohibiting states from emitting them. *People* v. *Brie* (1887) 43 Hun, 317, affirmed in (1887) 105 N. Y. 618.

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*Common carriers.*—Congress has power to enact legislation designed to secure the safety of passengers on steam vessels, and to give to them a remedy by action against the carrier for injuries resulting from his violation of the law designed for their protection. *Carroll* v. *Staten Island R. Co.* (1874) 58 N. Y. 126, 17 Am. Rep. 221.

*Construction by state courts.*—The Federal courts will be governed by the construction given to a state law by the courts thereof, in the absence of any objection that the act is repugnant to the Constitution, laws, or treaties of the United States. *Barker* v. *Jackson* (1826) 1 Paine, 559, Fed. Cas. No. 989.

*Corporations.*—Congress has power to alter or amend the charter of ac orporation created by it, even to the disadvantage of such corporation, especially where the right of amendment has been reserved in the act of incorporation. *Brewer* v. *Union P. R. Co.* (1884) 31 Hun, 545, (1886) 101 N. Y. 647.

*Crimes.*—The Federal Constitution does not regulate the punishment of crimes against the state. *Barker* v. *People* (1824) 3 Cow. 686.

It was not the purpose of the 14th Amendment to interfere with the ordinary administration of justice by the courts of a state, nor to affect their jurisdiction over crimes and offenses defined and declared by its laws, and committed within its territorial jurisdiction. Jurisdiction over crimes, with some exceptions, is a state, and not a Federal, jurisdiction. The 14th Amendment confers upon the courts of the United States no jurisdiction to supervise the administration by the state tribunals of the criminal law of the state, or to correct errors, or to modify or change their judgments. Errors in procedure must be corrected, if at all, by the state courts. "The extent or limitations of the new jurisdiction devolved on the United States courts under the 14th Amendment has not yet been fully ascertained or adjudged, but the Supreme Court of the United States has steadily and in repeated instances disclaimed jurisdiction under it to review errors assigned on trials in state courts, or to constitute itself a general court of review." *Re Buchanan* (1895) 146 N. Y. 264, 271, 40 N. E. 883.

*Due process.*—The provision of the 14th Amendment of the Federal Constitution, that no person shall be deprived of life, liberty, or property without due process of law, was held to have been violated by the proceedings in an action in Vermont, in which an attachment was issued against property of a nonresident, but in which no notice of attachment was given to him. *People* v. *Duane* (1890) 121 N. Y. 367, 24 N. E. 845.

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*Faith and credit.*—The requirement that full faith and credit must be given to the judgments of the courts of another state does not prevent a court in this state from determining whether such other court had jurisdiction of the subject-matter and of the persons of the parties. A judgment without such jurisdiction is a nullity. The record is not conclusive. *Noyes* v. *Butler* (1849) 6 Barb. 613; *Kerr* v. *Kerr* (1869) 41 N. Y. 272; *Re Norwood* (1884) 32 Hun, 196; *Smith* v. *Central Trust Co.* (1897) 154 N. Y. 333, 48 N. E. 553; *Atherton* v. *Atherton* (1898) 155 N. Y. 129, 40 L. R. A. 291, 63 Am. St. Rep. 650, 49 N. E. 933; *Martin* v. *Central Vermont R. Co.* (1888) 50 Hun, 347, 3 N. Y. Supp. 82; *Ward* v. *Boyce* (1897) 152 N. Y. 191, 36 L. R. A. 549, 46 N. E. 180.

The effect of the faith and credit clause in the Federal Constitution is not impaired by holding that it does not apply to a divorce granted in another state, where both parties were residents of this state, and the defendant was not personally served with process, and did not appear in the action. "The Constitution did not mean to confer a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state." *Hoffman* v. *Hoffman* (1871) 46 N. Y. 30, 33, 7 Am. Rep. 299.

The faith and credit clause does not apply to the disqualifications as a witness in consequence of a judgment of conviction in another state. Such disqualifications are wholly a subject of state regulation. The New York statute (2 Rev. Stat. 701, § 23 [2 Edm. § 23, p. 724]) disqualifying a person as a witness upon conviction of a felony relates only to convictions in the state. *Sims* v. *Sims* (1878) 75 N. Y. 466.

The faith and credit clause does not apply to the status of persons sustaining to each other the relation of parent and child, whether such relation is a natural one or is established by state law; and such relationship can have no extraterritorial effect. Each state is the sole judge of the consequences of such relationship, and may regulate the descent and inheritance of property. *Miller* v. *Miller* (1879) 18 Hun, 507.

The clause applies only to final judgments, and not to provisions for alimony, which are subject to a further order of the court. The courts of this state will not give effect to such foreign judgment by enforcing collateral remedies. *Lynde* v. *Lynde* (1900) 162 N. Y. 405, 48 L. R. A. 679, 76 Am. St. Rep. 332, 56 N. E. 979.

This subject was considered in *Commercial Pub. Co.* v. *Beckwith* (1903) 188 U. S. 567, 47 L. ed. 598, 23 Sup. Ct. Rep. 382.

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The general purpose of the constitutional provision relating to faith and credit appears to be "to introduce uniformity in the rules of proof, to prescribe the effect of such proof or authentication, and to attribute to foreign judgments 'positive and absolute verity, so that they cannot be contradicted or the truth of them denied, any more than in the state where they originated.'" The provision of the New York Code of Civil Procedure, § 1780, limiting the right of a foreign corporation to sue another foreign corporation in this state to cases where the cause of action arose in this state, does not authorize an action here upon a judgment rendered in another state. The restriction in the Code does not violate the faith and credit clause of the Federal Constitution. *Anglo-American Provision Co.* v. *Davis Provision Co.* (1902) 169 N. Y. 506, 88 Am. St. Rep. 608, 62 N. E. 587, affirmed in (1903) 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92.

*Federal Constitution supreme.*—If a provision in a state Constitution is in conflict with any of the provisions of the Federal Constitution, it must fail; for within its sphere of operation that instrument is supreme, and no more by constitutional provisions than by legislation can the states of the Union override its prohibitions. *Re Tuthill* (1900) 163 N. Y. 133, 49 L. R. A. 781, 79 Am. St. Rep. 574, 57 N. E. 303.

*Fugitives from justice.*—Under the provision of the Federal Constitution relating to fugitives from justice, article 4, § 2, subd. 2, a warrant by the governor for the arrest of such a fugitive, which contains a recital of the required facts, is, without other proof, a sufficient justification for holding the prisoner on habeas corpus. *People ex rel. Draper* v. *Pinkerton* (1879) 77 N. Y. 245.

Under the Federal Constitution, article 4, § 2, relating to interstate extradition of fugitives from justice, a person arrested and surrendered on one charge may be indicted and tried for another; but authorities are cited to show that a fugitive from justice, surrendered on a specific charge, by a foreign nation, in pursuance of a treaty, cannot be tried for another offense. *People ex rel. Post* v. *Cross* (1892) 64 Hun, 348, 19 N. Y. Supp. 271, affirmed by court of appeals, (1892) 135 N. Y. 536, 31 Am. St. Rep. 850, 32 N. E. 246; *United States* v. *Rauscher* (1886) 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234.

*Fugitive slaves.*—The fugitive slave provision of the Federal Constitution, article 4, § 2, subd. 3, applied only to fugitives, and a slave would be free if the master voluntarily brought him into a free state for any purpose of his own. The Federal convention

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evidently framed the provision upon the principle that the escape of a slave from a state in which he was lawfully held to service, into one which had abolished slavery, would, *ipso facto,* transform him into a free man. A slave who, in 1852, came into this state with his master, not as a fugitive, was adjudged to be free by operation of the provisions of the Revised Statutes relating to slavery. *Lemmon* v. *People* (1860) 20 N. Y. 562. This subject is also considered under the head of "Slaves," in the note on "Legislative Power," article 3, § 1.

*Hudson river.*—The people of the state of New York, as the successors of their former sovereign, were, by the Declaration of Independence, in 1776, invested with all the prerogative rights of the King of England, and the state thereby became the owner of the soil under the waters of the Hudson river, below highwater mark, as far up as the tide ebbs and flows, and it also became vested with the absolute control over the river, and by valid legislation might exercise all the power which could have been exerted by the King previous to the American Revolution; but, on the ratification by New York of the Federal Constitution, containing the clause, article 1, § 8, subd. 3, that "Congress shall have power to regulate commerce with foreign nations and among the several states," the state yielded and granted to Congress the power to regulate commerce and navigation upon the waters of the Hudson river, but it surrendered nothing more. The United States did not thereby acquire any proprietary or territorial rights, but only the use of the water, and the right of the state as the owner of the soil was in no way diminished. *Rumsey* v. *New York & N. E. R. Co.* (1892) 63 Hun, 200, 206, 17 N. Y. Supp. 672.

*Involuntary servitude.*—The application of the 13th Amendment prohibiting involuntary servitude was considered in connection with one of the Van Rensselaer leases which required certain personal service to be performed by the lessee, and the court say that the amendment does not "embrace contract service of any description. . . . Such service is never involuntary. The party may at any time renounce it. It is connected with the enjoyment of property, and by refusing to accept or enjoy the property, the party may at all times escape the personal servitude." *Tyler* v. *Heidorn* (1866) 46 Barb. 439.

*Jurisdiction of courts.*—The jurisdiction conferred by the Constitution on a Federal court in an action by a state against a citizen of another state is not exclusive, but such an action may be main-

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tained in a state court. *Delafield* v. *Illinois* (1841) 2 Hill, 159; *Indiana* v. *Woram* (1843) 6 Hill, 33, 40 Am. Dec. 378.

Under the provision of the 11th Amendment that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state," the courts of the United States have not even a concurrent jurisdiction in such a case, and the court of chancery has all the jurisdiction it possessed before the adoption of the amendment. *Garr* v. *Bright* (1845) 1 Barb. Ch. 157.

State courts are confined in the exercise of their jurisdiction to the limits of their own state, and jurisdiction between citizens of different states is, by the Federal Constitution, conferred on the Federal courts. *Douglas* v. *Phenix Ins. Co.* (1892) 63 Hun, 393, 18 N. Y. Supp. 259, in which an attachment in Massachusetts of a debt alleged to be due to a New York corporation was held to be invalid without service on the corporation, citing *Plimpton* v. *Bigelow* (1883) 93 N. Y. 592, 598, where the principle is said to be well settled that "a corporation has its domicil and residence alone within the bounds of the sovereignty which created it, and that it is incapable of passing personally beyond that jurisdiction."

Under §§ 711 and 5328 of the United States Revised Statutes (U. S. Comp. Stat. 1901, pp. 577, 3622) the Federal courts and the courts of New York have concurrent jurisdiction of an offense committed on the Hudson river, and the offender may be indicted, tried, and convicted in a state court. Such concurrent jurisdiction is not repugnant to the provision of the 5th Amendment that no person shall be subject for the same offense to be twice put in jeopardy. *People* v. *Welch* (1893) 74 Hun, 474, 26 N. Y. Supp. 694 (1894) 141 N. Y. 266, 24 L. R. A. 117, 38 Am. St. Rep. 793, 36 N. E. 328.

*Jury trial.*—The provisions of the 5th Amendment, that "no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation," and the provision of the 7th Amendment, that "in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved," were intended to be restrictive upon the government of the United States and upon its officers exclusively, and were not intended to limit or control state legislation. *Livingston* v. *New York* (1831) 8 Wend. 85, 22 Am. Dec. 622, citing *Jackson ex dem. Wood* v. *Wood* (1824) 2 Cow. 819, note; *Pratt Institute* v. *New York* (1904) 99 App. Div. 525, 91 N. Y. Supp. 136.

The provision of the 6th Amendment to the Federal Constitution,

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securing trial by an impartial jury, does not prevent the legislature from regulating the method of procuring and impaneling a jury; and if the defendant does not take advantage of statutory provisions designed to protect his rights, he should not complain in the absence of proof of injury. *People* v. *Mack* (1898) 35 App. Div. 114, 54 N. Y. Supp. 698.

*Legal tender act.*—Congress had power to pass the legal tender act of 1862, chapter 33. It was incident to the power to borrow money and issue notes therefor. *Metropolitan Bank* v. *Van Dyck* (1863) 27 N. Y. 400.

*Maritime liens.*—The legislature cannot confer on a state court jurisdiction to proceed *in rem* against a vessel to enforce a maritime lien. The Federal district courts have exclusive jurisdiction in such cases. *Bird* v. *The Josephine* (1868) 39 N. Y. 19.

*National banks.*—Banks organized under the national banking act are subject to state laws, and it is only when a state law incapacitates them from discharging their duties to the government that it becomes unconstitutional. The validity of private contracts is not a subject of national legislation, but is to be governed by state laws. The power to create a corporation as an appropriate instrument for the execution of a constitutional power does not carry with it authority to confer upon that corporation unlimited privileges or immunities from state law, but only such as are necessary to enable it to effect the legitimate national objects for which it is created. National banks are subject to state usury laws. *First Nat. Bank* v. *Lamb* (1872) 50 N. Y. 95, 10 Am. Rep. 438.

It is not competent for Congress to deprive the state courts of jurisdiction in actions against banking corporations under the Federal banking law, or to restrict jurisdiction to particular courts. *Cooke* v. *State Nat. Bank* (1873) 52 N. Y. 96, 11 Am. Rep. 667.

*Naturalization.*—The naturalization clause in the Federal Constitution, article 1, § 8, subd. 4, confers on Congress exclusive jurisdiction of this subject. State courts may be adopted as agents for the exercise of this power. *Re Ramsden* (1857) 13 How. Pr. 429.

*Property.*—Congress has not the constitutional power to prescribe for the states a rule for the transfer of property within them, nor has it the power to declare that a contract or conveyance between citizens of a state affecting the title to real estate is void because not stamped as required by the Federal statute. *Moore* v. *Moore* (1872) 47 N. Y. 467, 7 Am. Rep. 466.

*Treaties.*—Under the provision of the Constitution of the United States, article 6, § 2, that "this Constitution and the laws of the

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United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land," the treaty with France, made in 1843, was not self-executing, and without legislation by Congress the President had no authority to issue a mandate commanding the marshal of New York to surrender a prisoner to the diplomatic agents of the French government. *Re Metzger* (1847) 1 Barb. 248.

*Unreasonable searches and seizures.*—The production of the records of a public office in obedience to a subpœna for that purpose, though some of such papers may have been made by the accused for the purpose of concealing a crime alleged to have been committed by him, is not a violation of the provision of the 4th Amendment, which guarantees immunity from unreasonable searches and seizures. *People* v. *Coombs* (1899) 158 N. Y. 532, 53 N. E. 527.

This subject was considered in *People* v. *Adams* (1903) 176 N. Y. 351, 63 L. R. A. 406, 98 Am. St. Rep. 675, 68 N. E. 636, where it appeared that defendant's private papers were taken by a police officer claiming to act under a search warrant, but the court declined to express any opinion as to the legality of the seizure. The papers were used against him on a criminal trial, and the court held that he was not thereby compelled to be a witness against himself.

*Volunteers and substitutes.*—The legislature had power, as provided by the act of 1865, chap. 29, § 4, to limit the amount to be paid to volunteers or substitutes in the Federal Army. Replying to the objection that, under article 1, § 8, subdivisions 12, 13, 14, 15, and 17 of the Constitution, legislation by Congress concerning the Army, and making provision for calling forth the militia, was exclusive, the court said the "act had nothing to do with the militia of the state, nor with calling them forth. Its only object was to encourage volunteering and enlistments, so as to shield the citizens of the state from a draft, and at the same time aid the general government in putting down the Rebellion." *Powers* v. *Shepard* (1872) 48 N. Y. 540.

## ARTICLE I.

### [Bill of Rights.]

**§ 1. [*Rights of citizens.*]—No member of this state shall be disfranchised, or deprived of any of the rights or**

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**privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.**

[Magna Charta, chap. 39; New York Charter of Liberties, 1683, par. 13; Const. 1777, art. 13; 1821, art. 7, § 1; 1846, art. 1, § 1.]

The introduction of this section by Gilbert Livingston in the first constitutional convention has been noticed in a former volume, and it there appears that the section, as then adopted, has been continued without change of principle in all subsequent Constitutions. It has received frequent judicial attention from various points of view, covering a wide range of questions involving the personal rights of citizens. The following notes are intended to show the general result of this judicial consideration, with occasional expressions of opinion by individual judges.

MEMBERS OF THE STATE.

By the 14th Amendment "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

A person born of alien parents during their temporary sojourn in the state is a citizen. *Lynch* v. *Clarke* (1844) 1 Sandf. Ch. 583.

A corporation is not a citizen. *People* v. *Imlay* (1855) 20 Barb. 68; *Duquesne Club* v. *Penn Bank* (1885) 35 Hun, 390.

RIGHTS OF CITIZENS.

*Accused, rights of.*—The right of the accused to be confronted by the witnesses against him (1 Rev. Stat. 94, § 14), though subject to legislative alteration or repeal, is, while it continues in force, a right secured by this section to citizens of the state. The rule is satisfied if, in extreme cases, the accused is confronted by an adverse witness at any time during the proceedings upon the same accusation, and, if the witness afterwards dies, his evidence may be read on a subsequent trial for the same offense. *People* v. *Penhollow* (1886) 42 Hun, 103.

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*Appeal.*—"No person has a constitutional right to appeal, and no court has an inherent right to entertain an appeal. The right, if it exists, and in all cases where it does exist, is simply the continuance of an existing practice by the Constitution, subject to the legislative right to curtail or abolish it, or it must be founded in some statute." *People* v. *Rutherford* (1900) 47 App. Div. 209, 62 N. Y. Supp. 224.

*Corporations.*—Citizens of this state may form a corporation under the laws of another state without in fact going into that state or intending to do business there, and may then, as such corporation, transact business in this state, subject to the restrictions imposed by our laws as to foreign corporations. *Demarest* v. *Flack* (1891) 128 N. Y. 205, 13 L. R. A. 854, 28 N. E. 645; *Lancaster* v. *Amsterdam Improv. Co.* (1893) 72 Hun, 18, 25 N. Y. Supp. 309, reversed without affecting this point in (1894) 140 N. Y. 576, 24 L. R. A. 322, 35 N. E. 964.

*Court-martial.*—A member of the militia has no inherent right to be tried by jury for a violation of the military code. The creation of a court-martial for the trial of such offenses is a valid exercise of legislative power, and a person made subject to the jurisdiction of such a court is not disfranchised nor deprived of any of the rights or privileges secured to citizens of this state. *People ex rel. Underwood* v. *Daniell* (1872) 50 N. Y. 274.

The right of the accused to appear not only in person, but by counsel, in any trial in any court, is secured to citizens of this state by § 6 of article 1 of the Constitution. A regulation of the military code denying this right in cases of court-martial was held to be invalid. *People ex rel. Garling* v. *Van Allen* (1873) 55 N. Y. 31.

*Crimes.*—Punishment for crimes need not be uniform in all parts of the state, and the citizens have no inherent and guaranteed right to such uniformity. Section 351 of the Penal Code, prohibiting pool-selling, is constitutional. *People* v. *Stedcker* (1902) 75 App. Div. 449, 78 N. Y. Supp. 316. See also *People* v. *Havnor* (1896) 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; *Re Bayard* (1881) 25 Hun, 546, where an act was sustained which prescribed in Cohoes punishment for petit larceny different from that prescribed in other parts of the state.

*Education.*—A citizen cannot determine the public school to which he will send his children, nor select the teachers under whose charge they may be placed. These matters are under the control of public school authorities, and the citizen must conform to prescribed regulations, if reasonable. *People ex rel. Dietz* v. *Easton* (1872) 13 Abb.

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Pr. N. S. 159; *People ex rel. King* v. *Gallagher* (1883) 93 N. Y. 438, 45 Am. Rep. 232.

Chief Judge Ruger in the latter case said it would seem to be a plain deduction from the *Slaughter-House Cases,* 16 Wall. 36, 21 L. ed. 394, that the privilege of receiving an education at the expense of the state, being created and conferred solely by the laws of the state, and always subject to its discretionary regulation, might be granted or refused to any individual or class at the pleasure of the state. From which the inference seems reasonable that the right to an education is not one of "the rights and privileges secured to citizens." But the effect of this opinion must be deemed modified, if not wholly neutralized, by the common school provision incorporated in the Constitution of 1894, by which the legislature is expressly commanded to maintain a system of free common schools "wherein all the children of the state may be educated." The right to an education is now one of the rights secured by the Constitution.

*Fire department.*—The rule of the New York Fire Department, prohibiting members from affiliating with any club of association intended to procure legislation respecting the department, is not a violation of the provision relating to rights and privileges secured to citizens of the state, and a member of the department who disobeys such an order is subject to discipline therefor. Membership in the department is voluntary, and a member who objects to its rules may withdraw if he desires greater freedom of action than the regulations permit. Such regulations do not abridge any rights of citizenship. *People ex rel. Clifford* v. *Scannell* (1902) 74 App. Div. 406, 77 N. Y. Supp. 704.

*Master and servant.*—Persons intending to assume the relation to each other of master and servant have the right to agree upon the rate of wages which the servant is to receive, and they cannot constitutionally be deprived of this right. A city, as well as an individual, possesses the right to negotiate for the services of its employees, and it cannot by law be compelled to pay the prevailing rate of wages in the locality. A provision of the labor law, 1889, chapters 192 and 567, § 3, requiring the payment of the prevailing rate of wages on municipal contracts, is unconstitutional. *People ex rel. Rodgers* v. *Coler* (1901) 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716. As to hours of labor, see *People ex rel. Cossey* v. *Grout* (1904) 179 N. Y. 417, 72 N. E. 464.

*Minors.*—It is not an unconstitutional interference with the rights and privileges secured to citizens to provide by statute that property

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given to an infant by will may be used for the support or education of the infant during minority, although, by the terms of the will, such beneficiary would not regularly come into the possession and enjoyment of the property until she arrived at her majority. "To affirm that this was depriving her of any right or privilege secured by the Constitution is little better than saying that an infant has a constitutional right to grow up in ignorance, or enjoys the chartered privilege of suffering for the want of necessary food and raiment." *Clarke* v. *Van Surlay* (1836) 15 Wend. 436, 445; *Cochran* v. *Van Surlay* (1838) 20 Wend. 365, 32 Am. Dec. 570.

The rights of children committed to charitable institutions under § 291 of the Penal Code, and the duty of the institution to which such a commitment may be made, are considered in *People ex rel. Van Heck* v. *New York Catholic Protectory* (1886) 3 How. Pr. N. S. 343, and *Re Donohue* (1876) 1 Abb. N. C. 1.

*Offices.*—"Eligibility to office is not declared as a right or principle by any express terms of the Constitution, but it results as a just deduction from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the Constitution." The legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications which the Constitution has not required. This general eligibility to office must therefore be deemed one of the rights and privileges secured to citizens of the state, and an unauthorized denial of it is invalid. *Barker* v. *People* (1824) 3 Cow. 686, 703, 15 Am. Dec. 322.

A citizen may be required to perform public service in an official capacity, and may be subjected to a penalty for his refusal. The sovereign has a right to compel the performance of a service for its benefit by the subject. The burdens of government are unavoidable qualifications, and belong essentially to the lot of freemen. *Brooklyn* v. *Scholes* (1883) 31 Hun, 110.

The right of a citizen to hold a public office was not violated by the act of 1883, chap. 354, providing for the appointment of three state civil service commissioners, not more than two of whom could be appointed from the same political party. This provision did not disfranchise any citizen, nor deprive him of any right or privilege secured to any other citizen of the state. If two appointments were made from one political party, that class was exhausted, and the third appointment must have been made from another class. Any person in that class was eligible to appointment. The legisla-



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ture may create classes as a basis of eligibility to office. Under this statute three political appointments were possible, but the governor was not required to appoint from any political party. *Rogers* v. *Buffalo* (1890) 123 N. Y. 173, 9 L. R. A. 579, 25 N. E. 274.

The right to continue to hold an office to which a person has been chosen is not absolute, but an office not protected by the Constitution may be abolished by the legislature. *People ex rel. Mitchell* v. *Sturges* (1898) 156 N. Y. 580, 51 N. E. 295.

The general rule is that "to be a citizen is to be qualified for the enjoyment of any right or privilege under our state government." *People ex rel. Price* v. *Woodbury* (1902) 38 Misc. 189, 77 N. Y. Supp. 241, in which it was held at special term by Leventritt, J., that § 1560 of the revised charter of New York of 1901, which disqualifies from holding any office in the city or in any county composing the city any person receiving a pension under any department of the city or from any city fund, is unconstitutional.

*Parties, rights of.*—The right of a party to be present at the trial of his case is one of the rights secured to citizens of this state by the common law, and a party cannot be constitutionally excluded from such trial. An order of a referee allowing the presence of counsel in a given proceeding, but excluding the party himself, was held to be a violation of a constitutional right. *Chandler* v. *Avery* (1888) 47 Hun, 9.

A citizen's right to defend an action brought against him is not absolute, but is subject to a limited control by law. Section 162 of the Code of Civil Procedure, which authorizes a summary judgment in an action by the sheriff on a bond for liberties of the jail, is valid. All the issues were presumably tried in the action against the sheriff for an escape, in which action the sureties in the bond had an opportunity to defend. They voluntarily became sureties, and thereby subjected themselves to the conditions imposed by the statute, including the possibility that a judgment might be ordered against them in the sheriff's action, without a trial. *Buttling* v. *Hatton* (1897) 18 App. Div. 128, 45 N. Y. Supp. 720.

*Property.*—Private rights in general, including the rights relating to property, are, as a rule, subjects of exclusive state jurisdiction, and are not within the cognizance of Federal legislation or judicial determination. They are rights and privileges secured to citizens as citizens of the state, and not as citizens of the United States. "The legal rules of property existing in New York are those prescribed by the laws of New York, and such laws are the same whether they are administered by the courts of the state or by the

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courts of the nation. There is no national code or system of laws respecting private property." Whenever, as in a few exceptional cases, the general government is authorized to act, it undertakes through its courts to administer the state laws. "If a question is found to have been settled by the highest appellate court of a state, that decision is binding upon the courts of the United States to the same extent as upon the courts of the state in which it was made." On a question involving local personal or property rights, "the highest court of the nation has no legal pre-eminence over any of the courts of this state." It is therefore one of the privileges of a citizen of the state to have questions relating to such rights determined by a state tribunal. *Towle* v. *Forney* (1856) 14 N. Y. 423.

Among the rights and privileges secured to citizens of the state is the right to be protected in the enjoyment of their property. They are entitled to the best judgment of public officers in making contracts for municipal work, and a statute (in this case the labor law) which deprives such officers of any discretion in making such contracts, but requires them to pay the prevailing rate of wages in the locality, is an infringement of the rights of property owners, who are required by taxation to bear the expenses of municipal government. *People ex rel. Rodgers* v. *Coler* (1901) 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716.

The act of 1872, chap. 741, validating certain paving assessments in Utica, did not violate this section. *Mann* v. *Utica* (1872) 44 How. Pr. 334.

*Public health.*—The rights and privileges secured to a citizen must yield to the right of the preservation of the public health, which is one of the highest functions of government. *People* v. *Hawker* (1897) 152 N. Y. 234, 240, 46 N. E. 607.

A municipal corporation may, under legislative authority, enact an ordinance requiring licenses for the sale of meats outside the public markets. Such an ordinance is not an unwarranted interference with the rights and privileges secured to citizens under the Constitution. *Buffalo* v. *Hill* (1903) 79 App. Div. 402, 79 N. Y. Supp. 449.

Section 66 of the Sanitary Code of New York, which prohibits the sale of milk in the city without a written permit granted by the board of health, is constitutional, and does not unreasonably interfere with any of the rights or privileges secured to a citizen of the state. *People ex rel. Lieberman* v. *Vandecarr* (1903) 175 N. Y. 440, 67 N. E. 913.

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*Race discrimination.*—Equal rights and privileges are secured to white and colored persons by the Federal and state Constitutions, and for the protection of these rights the legislature had authority to enact § 383 of the Penal Code, prohibiting the exclusion of colored persons from places of amusement. *People* v. *King* (1888) 110 N. Y. 418, 1 L. R. A. 293, 6 Am. St. Rep. 389, 18 N. E. 245.

*Suffrage.*—The right of suffrage is secured by the Constitution. The legislature cannot add a test not recognized by the Constitution, nor vary the qualifications prescribed, unless expressly authorized by that instrument, under conditions therein stated. The provision in the convention act of 1867, chap. 194, requiring voters, if challenged, to take an oath of loyalty, was held unconstitutional. *Green* v. *Shumway* (1868) 39 N. Y. 418.

*Vaccination.*—The act of 1893, chap. 661, § 200, requiring the vaccination of school children, and authorizing their exclusion from school if not vaccinated, does not violate this provision of the Constitution. The state has no constitutional right to compel any person to submit to vaccination, "but where the state grants a privilege, it has the right to determine the conditions upon which it may be enjoyed; has a right to regulate the privilege in the interests of the fullest enjoyment by all, and so long as this regulation does not operate to deprive any member of this state of 'any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers' . . . there is no ground on which the statute may be declared null and void." *Viemeister* v. *White* (1903) 88 App. Div. 44, 84 N. Y. Supp. 712, affirmed in (1904) 179 N. Y. 235, 72 N. E. 97.

*Vocation.*—A man's business, or his right to transact legitimate business, is one of the privileges included in this section. An auctioneer was held entitled to protection against city authorities who stationed in front of his place of business a man bearing the placard "Strangers, beware of mock auctions." *Gilbert* v. *Mickle* (1846) 4 Sandf. Ch. 357.

"It is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit." *People* v. *Marx* (1885) 99 N. Y. 386, 52 Am. Rep. 34, 2 N. E. 29, in which the oleomargarine law of 1884, chap. 202, was condemned as unconstitutional, because it interfered with the citizen's right to carry on a lawful business. For the same reason the same court, in *Re Jacobs* (1885) 98 N. Y. 98, 50 Am. Rep. 636, refused to sustain the

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tenement house act of 1884, chap. 272, because it attempted to restrict the right to labor, or the right to exercise a lawful vocation in a lawful manner.

The right to labor means "the right of every man to do such lawful work as he finds employment to do, on such terms as he can agree upon with his employer." The terms of employment include the hours of labor. The act of 1891, chap. 105 (Buffalo charter), which requires contracts to contain a provision that the contractor shall not discriminate against labor organizations nor accept more than eight hours as a day's work, to be performed within nine consecutive hours, is constitutional. A person may perform labor for the city under such a contract or not, as he pleases. His liberty of choice is not interfered with nor his right to labor infringed by this statute. *People* v. *Warren* (1894) 77 Hun, 120, 28 N. Y. Supp. 303. This subject is also considered in *People* v. *Warren* (1895) 13 Misc. 615, 34 N. Y. Supp. 942, where it was held that chap. 385 of the Laws of 1870, as amended by chap. 622, Laws 1894, limiting to citizens only the right to be employed on certain public contracts, violated the state and Federal Constitutions, and also the treaty of the United States with the King of Italy, which provided, in substance, that Italians resident in the United States should enjoy the same rights and privileges in respect to their persons and property as are secured to our own citizens.

The right of a child to pursue a trade is indisputable, but it must be not only one which is lawful, but which, as to the child of immature years, the state or sovereign, as *parens patriæ*, recognizes as proper and safe. The right is subject to a modified control by the legislature, which may declare it unsuitable for a child of immature years to perform in public exhibitions. *People* v. *Ewer* (1894) 141 N. Y. 129, 25 L. R. A. 794, 38 Am. St. Rep. 788, 36 N. E. 4.

## LAW OF THE LAND.

The phrase "law of the land" is synonymous with the words "due process of law," and has the same legal import and effect. It does not mean merely an act of the legislature, for that would abrogate all restraints upon legislative authority. The clause means that the statute which deprives a citizen of the rights of person or property without a regular trial according to the course and usage of the common law would not be the law of the land in the sense of the Constitution. *People* v. *Toynbee* (1855) 20 Barb. 194, affirmed in (1856) 13 N. Y. 378.

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The rights and privileges secured to citizens include the formalities and the safeguards recognized as due process of law, or the orderly application of the law of the land. *People ex rel. Frank* v. *Davis* (1903) 80 App. Div. 448, 457.

The words "by the law of the land" do not mean a statute passed for the purpose of working a wrong. Rights and privileges cannot be taken away unless the matter is adjudged upon trial had according to the course of the common law. "It must be ascertained judicially that he has forfeited his privileges, or that someone else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation." *Taylor* v. *Porter* (1843) 4 Hill, 140, 40 Am. Dec. 274; also *White* v. *White* (1849) 5 Barb. 474, in which the married woman's act of 1848, chap. 200, was held unconstitutional. *Wynehamer* v. *People* (1856) 13 N. Y. 392.

The act of 1797, chap. 51, "to settle disputes concerning the titles to lands in the county of Onondaga," and appointing a commission to take testimony and determine all controversies relating to such lands, was held to be the law of the land within the meaning of this section, although applicable only to a single county. *Barker* v. *Jackson* (1826) 1 Paine, 559, Fed. Cas. No. 989.

The act of 1818, chap. 213, providing for closing streets in the city of New York, and which vested in the city the title to the land in the streets so closed, was held to deprive adjoining owners of their property in such land. The legislature has no power to transfer property from one person to another without the owner's consent, and a statute which purports to do this is not due process of law, and is therefore not the law of the land. *Re John & C. Streets* (1839) 19 Wend. 659.

§ 2. [*Trial by jury.*]—The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.

[Const. 1777, art. 41; 1821, art. 7, § 2; 1846, art. 1, § 2.]

A provision preserving trial by jury was included in the original draft of the first Constitution, presented to the convention which framed that instrument. A sketch

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of the proceedings of the convention in relation to it, showing the original form of the section, and its subsequent modifications, will be found in the chapter on the first Constitution. The provision, as finally adopted by the convention, was in the following form:

"Trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established, and remain inviolate forever."

By the Constitution of 1821 the provision was stated, and has since continued, in the following form:

"The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever."

The provision allowing parties to waive a jury in civil cases was added in 1846, and the Convention of 1867 included in its proposed constitution a provision specifically authorizing a jury of six in justices' courts. Attempts were made in the Convention of 1777 and in subsequent conventions to modify the rule requiring unanimity, and to permit a verdict by a specified number of jurors.

The provision, as stated in the Constitution of 1777, illustrates a suggestion frequently made in this work that the founders of our state government incorporated and crystallized in the first Constitution existing conditions and institutions so far as practicable. They did not attempt to define trial by jury, nor specify the cases in which such trial should be had. They preserved the right as already established, and, by another section (35), continued colonial statutes which were in force on the 19th of April, 1775; so that whatever right of trial by jury existed in the colony on that day was preserved by the Constitution, and could not be modified nor abridged by the legislature.

Trial by a jury of twelve was established early in the history of the colony. The first assembly, 1683, formally stated this policy in its first act,—the famous Charter of

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Liberties and Privileges,—which declared that "all tryalls shall be by verdict of twelve men, and as near as may be peers or equals and of the neighborhood and in the county, shire or division where the fact shall arise or grow, whether the same be by Indictment, Infermacon, Declaracon or otherwise against the person, Offender, or Defendant," and the act relating to courts, chap. 7, also provided for a court of sessions, to be held every year in each county, with general jurisdiction in civil and criminal cases, which were to be tried before a jury of twelve men. There was also to be a court of oyer and terminer with jurisdiction of all capital, criminal, or civil cases and causes triable at common law. Trial by jury was secured by the provision that "no person's right or property shall be by this court determined" unless the facts in relation thereto be admitted by the party, either directly or by default, "or the fact be found by the verdict of twelve men of the neighborhood, as it ought of right to be done by the law." The judiciary act passed by the revived assembly of 1691, chap. 4, providing for courts of session, common pleas, the mayor's court of New York, and the supreme court, expressly declared that no question of fact on a trial in any of these courts should be deemed determined unless by the admission or default of a party, or the verdict of a jury of twelve men. The new Charter of Liberties, of 1691, reasserted the policy of trial by jury in all cases as declared in the charter of 1683. Subsequent legislation modified the rule by denying the right of a trial by jury in minor cases, both civil and criminal. Thus, by the act passed October 14, 1732, a person charged with a misdemeanor, breach of the peace, or other criminal offense under the degree of grand larceny, might be tried by three justices of the peace, without a jury. This rule was re-enacted and continued in the act passed September 1, 1744. The offense of stealing prop-

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erty of the value of less than five pounds was added by an act passed January 13, 1768. Acts passed October 14, 1732, and September 1, 1744, conferred the same criminal jurisdiction on a court to be composed of the mayor, deputy mayor, or recorder, and two aldermen of New York. These statutes in relation to small offenses were in force on the 19th of April, 1775, and, by operation of § 35 of the first Constitution, became a part of the legal system of the new state.

Similar changes were made in the policy relating to minor civil causes, but the statutes need not be mentioned here in detail. The policy relating to small causes was expressed in the act passed March 12, 1772, conferring jurisdiction on justices of the peace, mayors, recorders, and aldermen to try causes involving less than five pounds, and which provided for a jury of six men. This continued the rule stated in several earlier statutes. The right of trial by jury, secured and preserved by the first Constitution, included the general right to have questions of fact determined by a jury, to be composed in the higher courts of twelve men, and in the lower courts of six, except that summary convictions were authorized for minor offenses, without a jury.

The right of trial by jury means the right as it existed at the adoption of the Constitution. If, under specified circumstances, such a right did not exist at that time, a person is not afterwards entitled to have it provided by law, but in legislating in relation to such circumstances, or new circumstances, a jury trial may be provided or not, at the discretion of the legislature. *Colon* v. *Lisk* (1897) 13 App. Div. 195, 201, 43 N. Y. Supp. 364; *Sheppard* v. *Steele* (1870) 43 N. Y. 52, 3 Am. Rep. 660; *People ex rel. Witherbee* v. *Essex County* (1877) 70 N. Y. 228, 234. This rule should be considered in connection with the observation of the court in the *Wynehamer Case* (1856) 13 N. Y. 378, 426, that the phrase "in all cases in which it has heretofore been used" is generic, and that "it does not limit the right to the mere instances in which it had

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been used, but extends it to such new instances and like cases as might afterwards arise;" and it is there said that felonies, being triable by jury at the adoption of the Constitution, new felonies subsequently created must also be tried by a jury, because they belonged to the same class.

Writings are to be construed as to the time when they are made; and "heretofore" in the jury clause, means before 1846, and cannot, to limit its meaning, be carried back to 1777, and confined to the cases which, at that earlier period, were triable by jury. *Wynehamer* v. *People* (1856) 13 N. Y. 378, 427; *People* v. *Kennedy* (1855) 2 Park. Crim. Rep. 312.

The meaning of the word "used" in the jury provision in the Constitution of 1777 was considered in *Malone* v. *Saints Peter & Paul's Church* (1902) 172 N. Y. 269, 64 N. E. 961, where Judge Haight, in an interesting review of the provision, after observing that the "unwritten common law of England was largely made up of customs which had existed from an ancient period and was in force in the colony of New York," and that there was no statute specifying the cases in which parties were entitled to a trial by jury, says that of necessity the word "used" referred to the customs then existing. Judge Haight's remark that "there was no statute specifying the cases in which parties were entitled to a trial by jury" should be considered in connection with the colonial statutes already cited in this note, defining the jurisdiction of certain courts, and expressly declaring that no question of fact should be deemed determined except by admission or default, or by the verdict of a jury of twelve men. Certain courts had jurisdiction of specified classes of actions, and these actions were triable by jury.

*Apprentice.*—"The constitutional right of trial by jury . . . does not extend to claims to the custody of children under indentures of apprenticeship." *Re Donohue* (1876) 1 Abb. N. C. 1.

*Assault and battery.*—A person charged with assault and battery was, under the common law, entitled to a trial by a jury of twelve men. The act of 1850, chap. 210, relating to the jurisdiction of justices of the peace in the town of Watervliet, and which, in effect, required the immediate trial of the accused without an opportunity to give bail, was held unconstitutional. *People* v. *Carroll* (1855) 3 Park. Crim. Rep. 22. This rule was changed by § 26 of article 6, as added by the judiciary article of 1869.

*Challenge.*—The act of 1858, chap. 332, under which the people were entitled to five peremptory challenges in certain criminal cases,

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did not impair defendant's right to a trial by jury. The subject of challenges is wholly within the discretion of the legislature. *Walter* v. *People* (1865) 32 N. Y. 147.

The right of trial by jury was not impaired by the act of 1873, chap. 427, which authorized the court, without the aid of triers, to try and determine challenges to jurors. "It took nothing from the prisoner which the accused had previously enjoyed, and in no way interfered with his right to an impartial, unbiased jury." *Weston* v. *People* (1875) 6 Hun, 140.

*Contempt.*—Courts of justice have had the power of punishing contempt by summary proceedings from time immemorial. It was a part of the common law which was continued by the Constitution, and a person charged with contempt is not entitled to a trial by jury. *Egan* v. *Lynch* (1883) 17 Jones & S. 454.

*Corporations.*—An act authorizing the expulsion of members of medical societies under specified conditions was held not obnoxious to the constitutional provision preserving the right of trial by jury. Medical societies might constitutionally be vested with disciplinary power over their members. *Re Smith* (1833) 10 Wend. 449.

The constitutional provision relating to trial by jury does not apply to the proceeding for the dissolution of an insolvent corporation. *Re Mechanics' F. Ins. Co.* (1857) 5 Abb. Pr. 444.

Stockholders in insolvent banking associations are not, in proceedings to enforce their liability under the act of 1849, chap. 226, entitled to a trial by jury. The proceedings are in equity, formerly the court of chancery, and parties in that court could not, as a matter of right, demand a trial by jury. *United States Trust Co.* v. *United States F. Ins. Co.* (1858) 18 N. Y. 199. The same rule is declared in relation to proceedings against insolvent insurance companies under the act of 1862, chap. 412. *Sands* v. *Kimbark* (1863) 27 N. Y. 147; *Sands* v. *Tillinghast* (1863) 24 How. Pr. 435.

There is no constitutional right to a trial by jury in a proceeding to set aside a corporate election. 1 Rev. Stat. 602, § 5 (1 Edm. 560), authorizing summary proceedings in such cases, was held constitutional. *Re Newcomb* (1891) 42 N. Y. S. R. 442, 18 N. Y. Supp. 16.

*Counterclaim.*—Section 974 of the Code of Civil Procedure, prescribing, in substance, that the mode of trial of an issue raised by a counterclaim shall be the same as if an action were brought upon the same counterclaim, does not give the defendant an absolute right to a trial by jury, but an application for such a trial should be made on notice, as prescribed by § 970. The right to a trial by jury upon a counterclaim is further restricted if the action is of an equitable

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character, for in such a case a right to a trial by jury did not exist at common law, and is not secured by the Constitution. The code, therefore, does not apply to a counterclaim in an action to foreclose a mortgage. *Mackellar* v. *Rogers* (1888) 109 N. Y. 468, 472, 17 N. E. 350. The same subject is considered in *Herb* v. *Metropolitan Hospital & Dispensary* (1903) 80 App. Div. 145, 80 N. Y. Supp. 552, citing authorities relating to issues raised by counterclaim, and suggesting the proper practice under the Code of Civil Procedure.

*Court-martial.*—A person accused before a court-martial is not entitled to a trial by jury. Such a mode of trial did not exist when the Constitution was adopted, and would be wholly incompatible with the object, end, and organization of courts-martial. *People ex rel. Underwood* v. *Daniell* (1871) 6 Lans. 44, affirmed in (1872) 50 N. Y. 274.

*Court cannot withdraw case from jury.*—In an action at law the court has no power to discharge the jury, and, in their absence, pass upon the questions presented. The Constitution gives the parties the right to have questions determined by the jury, and not by the court. This right may be waived, but parties cannot be deprived of it by the court without their consent. *Gansberg* v. *Sagemohl* (1902) 67 App. Div. 554, 73 N. Y. Supp. 984.

*Damages.*—The act of 1855, chap. 296, so far as it provided for summary proceedings to ascertain the damages caused by a prior unlawful taking of land under an alleged exercise of the right of eminent domain, deprived the owner of the land of the right to resort to a common law remedy for the ascertainment of his damages, and the trial of the issue by a jury, and was therefore unconstitutional. *Re Townsend* (1868) 39 N. Y. 171.

*Decedents' estates.*—In *Re Kipp* (1902) 70 App. Div. 567, 75 N. Y. Supp. 589, a proceeding to compel the payment of a claim for funeral expenses under subd. 3 of § 2729 of the Code of Civil Procedure as added by the act of 1901, chap. 293, the temporary administrator challenged on appeal the validity of the act, on the ground that it violated the constitutional provision preserving trial by jury; but the appellate division declined to consider the objection, for the reason that it had not been taken in the court below; observing that it was too late to raise that question for the first time on appeal.

*Disorderly persons.*—Proceedings for the punishment of disorderly persons, and to require sureties to keep the peace, fall within the exceptions included in the colonial act of 1744 and the state acts of 1801 and 1813 in relation to summary convictions for minor offenses.

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A trial by jury is not a matter of right in such cases. *Duffy* v. *People* (1841) 1 Hill, 355 (1843) 6 Hill, 75.

The offense of keeping a bawdy house was indictable at common law and triable by jury. 1 Rev. Stat. 638, § 1, so far as it subjects this offense to summary conviction and punishment without a trial by jury, was held unconstitutional. *Warren* v. *People* (1857) 3 Park. Crim. Rep. 544.

The legislature cannot, by classing among disorderly persons those who were entitled to a jury trial, take the right away. Selling intoxicating liquors in violation of law was an offense triable by jury under the common law. *People ex rel. Killmer* v. *Baird* (1877) 4 N. Y. Week. Dig. 576.

*Divorce.*—An issue of fact in an action for divorce on the ground of adultery is triable by jury, under the Constitution, but such a trial may be waived. *Batzel* v. *Batzel* (1877) 54 How. Pr. 139.

*Eminent domain.*—The Constitution does not require a jury trial on the assessment of damages where property is taken under the right of eminent domain, as for streets or highways. The provision relates to trials of issues of fact, in civil and criminal proceedings in courts of justice, and proceedings before a jury in highway cases are not jury trials within the meaning of this provision. *Livingston* v. *New York* (1831) 8 Wend. 85, 22 Am. Dec. 622; *People ex rel. Herrick* v. *Smith* (1860) 21 N. Y. 595.

Proceedings to take land for railroad purposes under the right of eminent domain do not constitute a jury trial within the meaning of the Constitution. *Beekman* v. *Saratoga & S. R. Co.* (1831) 3 Paige, 45, 22 Am. Dec. 679.

*Equity.*—The transfer of causes from the court of chancery to the supreme court, on the abolition of the former court by the Constitution of 1846, did not give the right to a trial by jury in the supreme court. Issues in the court of chancery were triable by the court, but the chancellor might, in a proper case, refer the issue of fact to a jury for determination. Trial by jury was not a matter of right in such a case. *Palmer* v. *Lawrence* (1851) 5 N. Y. 389.

*Equity actions.*—The joinder of an equitable cause of action with others purely legal does not deprive the defendant of the right of trial by jury. *Wheelock* v. *Lee* (1878) 74 N. Y. 495, 500; *Bradley* v. *Aldrich* (1869) 40 N. Y. 511, 100 Am. Dec. 528.

If the plaintiff fails to make a case in an action for equitable relief, he cannot have a trial of issues in an action for fraud, and an assessment of damages therefor without a jury. The defendant is

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entitled to have the issue of fraud tried by a jury. *Bradley* v. *Aldrich* (1869) 40 N. Y. 504, 100 Am. Dec. 528.

The jury provision does not apply to actions for equitable relief. When a court of equity acquires jurisdiction of an action it may retain it for all purposes, and will award any damages to which a party may be entitled, although such damages might have been the subject of a separate action, in which the issues would have been triable by a jury. *Lynch* v. *Metropolitan Elev. R. Co.* (1891) 129 N. Y. 274, 15 L. R. A. 287, 26 Am. St. Rep. 523, 29 N. E. 315.

A defendant in an action which, under the allegations of the complaint, is purely an "action in equity," is not entitled to a jury trial as a constitutional right, without reference to what the proofs given upon the trial of such action may or may not establish. *Porter* v. *International Bridge Co.* (1903) 79 App. Div. 358, 79 N. Y. Supp. 434 (1903) 175 N. Y. 467, 67 N. E. 1089.

In an ordinary action in equity for an injunction and damages against an elevated railroad company the issues are to be determined by the court without a jury. *Pope* v. *Manhattan R. Co.* (1903) 79 App. Div. 583, 80 N. Y. Supp. 316.

*Evidence.*—The provision in § 12 of the Liquor Tax Law of 1857, chap. 628, that if any person shall be seen to drink in a building occupied by a person licensed to sell liquors, it shall be prima facie evidence that the liquor was sold by the licensee with intent to be drunk on the premises, deprives the accused of the right of trial by jury. The offense was selling liquor with intent that it should be drunk on the premises. The defendant was entitled to have this question tried by a jury. *People* v. *Lyon* (1882) 27 Hun, 180.

In *Board of Excise* v. *Merchant* (1886) 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484, the validity of the section was sustained, but without special consideration of the jury provision.

*Excise.*—The provision in the prohibitory law of 1855, chap. 231, authorizing summary convictions for its violation, is not objectionable as denying the right of trial by jury. Trial by jury for offenses below the grade of grand larceny is not secured by the Constitution. *People* v. *Quant* (1855) 12 How. Pr. 83.

Under the excise act of 1857, chap. 628, intoxication in a public place was declared to be an offense punishable criminally. The accused was, at his election, entitled to give bail, and demand a trial by jury. *Hill* v. *People* (1859) 20 N. Y. 363.

The act of 1873, chap. 549, which authorized boards of excise to cancel liquor licenses, was not a violation of the constitutional provision securing the right of trial by jury. The regulation of the

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liquor traffic is a subject of exclusive legislative discretion (*Metropolitan Board of Excise* v. *Barrie* [1866] 34 N. Y. 657), and the license is a mere permit, which may be revoked under conditions to be prescribed by the legislature. *People ex rel. Presmeyer* v. *Police & Excise Comrs.* (1874) 59 N. Y. 92.

Certificates issued under the liquor tax law of 1896, chap. 112, are property (*People* v. *Durante* [1897] 19 App. Div. 292, 45 N. Y. Supp. 1073), but such certificates are issued under statutory provisions declaring their status and the conditions under which they may be revoked, and applicants take them with all the privileges and subject to all the burdens imposed upon them by law. They may be revoked by the court without a trial by jury. *Re Livingston* (1897) 24 App. Div. 51, 48 N. Y. Supp. 989; *Re Lyman* (1901) 59 App. Div. 217, 69 N. Y. Supp. 309.

*Ex parte proceedings.*—The act of 1865, chap. 26, which authorized the commitment of a person to the New York State Inebriate Asylum on *ex parte* affidavits, and without any provision for his examination as to the truth of the acts charged, was held unconstitutional in *Re Janes* (1866) 30 How. Pr. 446.

*Habitual criminals.*—The act of 1873, chap. 357, providing for the summary conviction of habitual criminals who were declared to be disorderly persons, did not deprive them of the right of trial by jury. Such persons were not entitled to trial by jury before the adoption of the Constitution. *People* v. *McCarthy* (1873) 45 How. Pr. 97.

*Impartial jury.*—The constitutional provision not only secures the right of trial by jury, but it guarantees a trial by an impartial jury. This right was not impaired by the act of 1872, chap. 475, which authorized a juror to sit in criminal cases, although he had formed an opinion as to the guilt or innocence of the accused, provided he would declare on oath, and the court should be satisfied, that he could determine the case impartially, without being influenced by such previous opinion. The court must determine the question of impartiality; this determination, being based on an examination of the juror, and his own oath as to his competency, is sufficient to insure a jury as impartial as could probably have been secured under the common law. A jury is obtained under regulations prescribed by law, and the legislature may change these regulations, provided the right to an impartial jury is not thereby impaired. *Stokes* v. *People* (1873) 53 N. Y. 164, 13 Am. Rep. 492.

*Indian lands.*—A citizen who enters upon lands held by Indians before their title has been extinguished and they have been removed

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by the act or approbation of the government acquires no such rights of property or possession as are contemplated by the Constitution. He must be regarded as a trespasser and an intruder, subject to removal by summary proceedings in the same manner as he would be from the public domain or other property of the state, and is not entitled to a trial by jury. The state has the right, without the determination of a judicial tribunal, to provide for a summary removal of such intruders. There is nothing to be tried and nothing for the court to determine in respect to the right of occupancy and possession. Such a removal does not affect a party's right of action to assert his title to the land from which he has been removed. *People ex rel. Cutler* v. *Dibble* (1857) 16 N. Y. 203, affirmed in (1858) 21 How. 366, 16 L. ed. 149.

*Intoxication.*—The offense of intoxication in a public place may be summarily tried by a magistrate without a jury, and in such a case the defendant is not entitled to a jury trial. The class of disorderly persons may be enlarged by the addition of others, without subjecting the new case to the operation of the jury provision of the Constitution. *People* v. *Burleigh* (1883) 1 N. Y. Crim. Rep. 522.

Under the act of 1857, chap. 628, the offense of public intoxication was not subject to summary trial and conviction, but the defendant was entitled to give bail and be tried on an indictment. *People* v. *Putnam* (1857) 3 Park. Crim. Rep. 386. This rule was changed by the act of 1869, chap. 856.

*Justices' courts.*—The right of trial by jury is not impaired by increasing the jurisdiction of justices' courts, and thereby authorizing actions in those courts triable before a jury of six men, instead of in the supreme court, triable before a jury of twelve men, where the action must have been brought if the jurisdiction of the inferior court had not been extended. Trial by jury is still preserved. *Dawson* v. *Horan* (1868) 51 Barb. 459; *Knight* v. *Campbell* (1872) 62 Barb. 16.

*Liens.*—The act of 1862, chap. 482, giving a lien on vessels for labor and materials, and authorizing the enforcement of the lien by proceedings *in rem*, is not obnoxious to the provision preserving trial by jury. Similar proceedings for the enforcement of liens had been authorized before the adoption of the Constitution, and a party was not entitled, as a matter of right, to a trial by jury in such cases. *Sheppard* v. *Steele* (1870) 43 N. Y. 52, 3 Am. Rep. 660.

An action to foreclose a mechanic's lien is a suit in equity, triable by a court without a jury, in which neither party has a right to a jury trial, except as to such issues as may be framed and sent to

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a jury. *Kenney* v. *Apgar* (1883) 93 N. Y. 530, 550; *Schillinger Fire-Proof Cement & Asphalt Co.* v. *Arnott* (1897) 152 N. Y. 584, 590, 46 N. E. 956; *Smith* v. *Fleischman* (1897) 23 App. Div. 355, 48 N. Y. Supp. 234.

A proceeding to enforce an attorney's lien under § 66 of the Code of Civil Procedure is of an equitable character, analogous in some respects to the foreclosure of a mechanic's lien, and the parties are not entitled to a trial of the issues by a jury. *Re King* (1901) 168 N. Y. 53, 60 N. E. 1054; *Fenwick* v. *Mitchell* (1901) 34 Misc. 617, 70 N. Y. Supp. 667.

*Misdemeanors.*—The act of 1870, chap. 47, which conferred on courts of special sessions in Monroe county exclusive jurisdiction of petit larceny not charged as a second offense, did not violate this provision of the Constitution. *People ex rel. Stetzer* v. *Rawson* (1872) 61 Barb. 619. The same rule was declared as to the act of 1879, chap. 390, conferring on courts of special sessions exclusive jurisdiction in certain cases. *People ex rel. Comaford* v. *Dutcher* (1880) 83 N. Y. 240.

After 1830 misdemeanors for the violation of the excise law were not triable by courts of special sessions, but by courts of general sessions or of oyer and terminer, which were courts proceeding according to the course of the common law. Under statutes in force at the adoption of the first Constitution, particularly the act of 1744, relating to the punishment of offenses below the grade of grand larceny, the defendant was not entitled to a jury trial as a matter of right. Under the state government the right of trial by jury was bestowed in the case of several minor offenses. The new Constitution (1846), speaking from the time it took effect, protected this right as fully as if it had existed at the adoption of the first Constitution. The provision in the prohibitory liquor law of 1855, chap. 231, authorizing the trial of offenders by a jury of six men, was therefore held to be unconstitutional. *Wynehamer* v. *People* (1856) 13 N. Y. 378, 426. Section 26 of article 6, added in 1869, modified the jury provision so far as it related to courts of special sessions, by authorizing the legislature to regulate the jurisdiction of those courts.

Under this provision a statute which deprives a person charged with a misdemeanor of the right to a trial by a jury cannot be held unconstitutional. *People* v. *Levy* (1898) 24 Misc. 469, 53 N. Y. Supp. 643.

A person charged with a misdemeanor is not entitled to a trial by



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jury in the city of New York. *People* v. *Stein* (1903) 80 App. Div. 357, 80 N. Y. Supp. 847.

*New offense.*—The true rule undoubtedly is that when the legislature creates a new offense it is placed on the same footing as other previous offenses of the same grade, and is equally governed by the provision of the Constitution. *People* v. *Kennedy* (1855) 2 Park. Crim. Rep. 312, Parker, J.

*New York charter.*—Under the act of 1857, chap. 344, New York district courts had no power to impanel a jury of twelve men. The district courts were statutory courts, deriving all their powers and jurisdiction from the statute, which fixed the number of jurors at six. The purpose of the constitutional provision preserving the right of trial by jury was to secure the continuance of the right of trial by a common law jury of twelve men in cases where or in which a trial by a jury of twelve was used when the Constitution was adopted. *People ex rel. Metropolitan Bd. of Health* v. *Lane* (1869) 55 Barb. 168.

The offenses specified in subds. 1 and 2 of § 1458 of the New York consolidation act of 1882, chap. 410, are not misdemeanors, but petty offenses, and subject to summary conviction by city magistrates. *People ex rel. Frank* v. *Davis* (1903) 80 App. Div. 448,

*Nuisance.*—An action to recover damages for a nuisance, or for a statutory penalty for creating or continuing a nuisance, is triable by jury. *Fire Department* v. *Harrison* (1859) 2 Hilt. 455.

An action to abate a nuisance and for damages was triable by jury under the common law before the adoption of the Constitution. The right is therefore preserved by that instrument. *Hudson* v. *Caryl* (1871) 44 N. Y. 553; *McNulty* v. *Mt. Morris Electric Light Co.* (1900) 56 App. Div. 9, 67 N. Y. Supp. 395; *Libmann* v. *Manhattan R. Co.* (1891) 59 Hun, 428, 13 N. Y. Supp. 378, where it was also held that if the plaintiff joined a cause of action for equitable relief with one for damages in maintaining a nuisance, the defendant might compel him to elect between the causes of action, for the reason that, in an action based on a nuisance, the defendant was entitled to a trial by jury.

*Penalties.*—The act of 1896, chap. 383, authorizing a summary and exclusive proceeding for the seizure, forfeiture, and sale of any boat or vessel used by any person in interfering with oysters or other shellfish belonging to another, was held invalid, because it deprived the owner of the vessel seized of the right of trial by jury. The forfeiture of property used in violation of the statute was, in effect, a penalty, and actions to enforce forfeitures or penalties had usually

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been tried by a jury. This statute made no provision for such a trial. *Colon* v. *Lisk* (1897) 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

*Pleading.*—A defense cannot be stricken out as sham, if the defendant is entitled to a jury trial thereon. *Belsena Coal Min. Co.* v. *Liberty Dredging Co.* (1899) 27 Misc. 191, 57 N. Y. Supp. 739.

*Procedure.*—The subject of preparing jury lists and drawing and impaneling jurors is within the discretion of the legislature. *People* v. *Dunn* (1899) 157 N. Y. 528, 43 L. R. A. 247, 52 N. E. 572; *People* v. *Meyer* (1900) 162 N. Y. 357, 56 N. E. 758.

*Public health.*—Prior to the Constitution of 1846 the right to a trial by jury had not been granted in cases relating to public health, where the public interests required action to be taken. Early legislation shows that the "absolute control over persons and property, so far as the public health was concerned, was vested in boards or officers, who exercised a summary jurisdiction over the subject, and who were not bound to wait the slow course of the law, and that juries had never been used in this class of cases." This power was frequently vested in municipal officers. The act of 1866, chap. 74, creating the Metropolitan Sanitary District, and authorizing summary proceedings for the purpose of preserving public health, did not deprive a person charged with a violation of the statute of the right of trial by jury. Such right did not exist at the adoption of the Constitution. *Metropolitan Bd. of Health* v. *Heister* (1868) 37 N. Y. 661; *Re Smith* (1895) 84 Hun, 465, 32 N. Y. Supp. 317, 146 N. Y. 68, 28 L. R. A. 820, 40 N. E. 497, construing the public health law of 1893, chap. 661, § 24, relating to infectious and contagious diseases and the general effect of quarantine laws.

*Recognizance.*—The act of 1844, chap. 315, which, among other things, required a forfeited recognizance to be docketed, and gave it the force and effect of a judgment, making it a lien on land and enforceable by execution, did not violate the provision preserving the right of trial by jury. The recognizance was an acknowledgment of record that a debt was due, and was, in its legal effect, a confession of judgment. No action upon it was necessary, for there was nothing to be tried. *Gildersleeve* v. *People* (1850) 10 Barb. 35; *People* v. *Quigg* (1874) 59 N. Y. 83.

*Referee.*—An appointment of a referee to try an action is not a violation of this provision. Trial by referees was well known during the colonial period, and this exception to the right of trial by jury was a part of the legal system which became the heritage of the

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state on the adoption of the first Constitution. *Lee* v. *Tillotson* (1840) 24 Wend. 337, 35 Am. Dec. 624.

Notwithstanding the provision guaranteeing trial by jury, the court may direct a reference in an action involving the examination of a long account. Such references were often directed prior to the adoption of the Constitution. *Van Marter* v. *Hotchkiss* (1864) 1 Keyes, 585; *Shepard* v. *Eddy* (1888) 15 N. Y. Civ. Proc. Rep. 403, 18 N. Y. S. R. 839, 2 N. Y. Supp. 534. The same subject is considered in *Doyle* v. *Metropolitan Elev. R. Co.* (1893) 136 N. Y. 505, 32 N. E. 1008.

*Special proceedings.*—The act of 1797, chap. 51, providing for the appointment of commissioners to settle disputes as to lands in Onondaga county, and authorizing them to take evidence and report thereon, did not create a court. The commissioners acted as arbitrators, and the act did not violate the constitutional provision preserving the right of trial by jury. *Barker* v. *Jackson* (1826) 1 Paine, 559, Fed. Cas. No. 989.

*Special sessions.*—The act of 1801, chap. 70, authorizing the trial by courts of special sessions, without a jury, of cases of petit larceny and other minor offenses, did not violate the provision of the section (41) of the Constitution of 1777, preserving the right of trial by jury as theretofore used in the colony. The act of 1801 was a substantial re-enactment of the colonial act passed September 1, 1744, under which persons charged with petit larceny were to be tried by a court of special sessions without a jury. *Jackson ex dem. Wood* v. *Wood* (1824) 2 Cow. 819, note. The provisions of the act of 1801 were substantially continued in the Revised Laws of 1813, which, by chap. 104, § 4, authorized summary convictions by courts of special sessions without a jury. This was also held constitutional in *Murphy* v. *People* (1824) 2 Cow. 815.

The provision preserving trial by jury "in all cases in which it has heretofore been used" means a common law jury of twelve men, and does not include petit offenses which, before the Constitution, were triable by a court of special sessions. *People ex rel. Murray* v. *Special Sessions Justices* (1878) 74 N. Y. 406; *People ex rel. Comaford* v. *Dutcher* (1880) 83 N. Y. 240, 242, where the court considered the jury section in connection with § 26 of article 6, added in 1869, providing that "courts of special sessions shall have such jurisdiction of offenses of the grade of misdemeanor as may be provided by law," and said that prior to this amendment the statute conferring exclusive jurisdiction on these courts in cases of misdemeanor would have been a violation of the jury provision, because it

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would have deprived a defendant of the right of trial by a jury of twelve men; that the amendment "was no doubt designed to invest the legislature with authority to confer upon courts of special sessions full and exclusive jurisdiction in this class of cases, which it was held not to possess under the decisions of the courts; and it must be regarded as a modification and a restriction of the limitation of power which was held to exist by virtue of § 2 of article 1 in respect to offenses of the character specified," and that the act of 1879, chap. 390, conferring exclusive jurisdiction on courts of special sessions in cases of petit larceny charged as a first offense was valid.

The jurisdiction of the recorder's court of Poughkeepsie was considered in *People* v. *Iverson* (1899) 46 App. Div. 301, 61 N. Y. Supp. 220, where it was held that a defendant charged with being a disorderly person under the charter could not constitutionally claim the right of trial by jury. *People ex rel. Eckler* v. *Clark* (1881) 23 Hun, 374, where it was held that the act of 1834, chap. 78, which authorized a person accused of disturbing a religious meeting to demand a trial by a jury of six, did not violate this constitutional provision.

*Summary proceedings.*—The jury provision does not apply to summary proceedings for the recovery of real property, and the statute authorizing a jury of six in such cases is constitutional. *Roberts* v. *Cone* (1870) 3 Alb. L. J. 151.

*Sunday law.*—A person accused of Sabbath breaking is entitled to a jury trial. *Re Erbe* (1894) 13 Misc. 404, 35 N. Y. Supp. 102.

*Venue.*—A defendant in a civil action has no constitutional right to a trial by jury in a county where the cause of action accrued. *People* v. *Rouse* (1891) 39 N. Y. S. R. 656, 15 N. Y. Supp. 414.

*Village ordinance.*—A person charged with violating a village ordinance prohibiting obstructions in streets is not entitled to a trial by jury. *People* v. *Van Houten* (1895) 13 Misc. 603, 35 N. Y. Supp. 186.

*Waiver.*—A defendant who pleads guilty to a charge within the jurisdiction of the court cannot afterwards be heard to assert that the statute under which he is convicted is unconstitutional for the reason that it deprives him of the right to a trial by jury. *Plato* v. *People* (1857) 3 Park. Crim. Rep. 586.

The right of trial by jury may be deemed waived by the conduct or silence of the parties. *Baird* v. *New York* (1878) 74 N. Y. 382; *Greason* v. *Keteltas* (1858) 17 N. Y. 491; *Barlow* v. *Scott* (1861) 24 N. Y. 40; *West Point Iron Co.* v. *Reymert* (1871) 45 N. Y. 703;

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*People ex rel. Yale* v. *Eckler* (1880) 19 Hun, 609; *Mackellar* v. *Rogers* (1888) 109 N. Y. 468, 17 N. E. 350.

§ 3. [*Religious. toleration*]—The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

[Const. 1777, art. 38; 1821, art. 7, § 3; 1846, art. 1, § 3.]

The origin of this section will be found in the chapter on the first Constitution, in the first volume of this work, where, in notes to the original draft, the opinions and purposes of prominent delegates on the subject of religious toleration are disclosed by the amendments offered by them in framing the section. The reader will also find in the index other references to the subject of religious opinions, forms of worship, test oaths, and other aspects of the development of religious liberty during the colonial period. These citations show varying but gradually expanding ideas concerning religious toleration, culminating in the broad and comprehensive view expressed in the first Constitution. The object sought to be attained by the constitutional declaration is evinced by the preamble to the section in the first Constitution, which states that "we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind." The framers of the first Constitution, not content with the mere declara-

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tion of the principle of religious toleration, sought to guard it from infringement by the additional provision contained in § 35, that the continuance of the English common and statute law thereby declared should not include any statutes or parts of the common law "as may be construed to establish or maintain any particular denomination of Christians or their ministers." But even these provisions, intended to accomplish the separation of church and state, and insure absolute freedom from ecclesiastical influence, did not satisfy the founders of our government, for, by another section, which might be deemed a corollary to the other provisions, they excluded ministers of the Gospel and priests of every denomination from the right to hold office; stating, as a reason, that these persons, being dedicated "to the service of God and the cure of souls, ought not to be diverted from the great duties of their function;" and this exclusion was not abrogated until 1846. The section securing religious liberty, omitting the preamble, was continued in the Constitution of 1821, and also in the Constitution of 1846, with a clause added in the latter Constitution, relating to the competency of witnesses. The section was not changed by the Constitution of 1894.

The courts have had little occasion to consider this section, for its meaning is so plain and comprehensive, and public approval of its object is so general, that it needs little judicial attention. The constitutional provision relating to religious toleration was considered by Chief Justice (afterwards Chancellor) Kent in *People* v. *Ruggles* (1811) 8 Johns. 290, 5 Am. Dec. 335, where blasphemy was declared to be an offense punishable at common law, and a conviction of the defendant on a charge of contumelious reproach and profane ridicule of Christ was sustained. In the course of his opinion the Chief Justice, after quoting from the English case of *Rex* v. *Woolston*,

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2 Strange, 834, Fitzg. 64, the statement that "whatever strikes at the root of Christianity tends manifestly to the dissolution of civil government," says that "such offenses have always been considered independent of any religious establishment or the rights of the church. . . . We stand equally in need now, as formerly, of all the moral discipline and of those principles of virtue which help to bind society together. The people of this state, in common with the people of this country, profess the general doctrines of Christianity as the rule of their faith and practice." Offenses like that charged in this case do not relate to any religious establishment or to any form of government, but are punishable "because they strike at the root of moral obligation, and weaken the security of the social ties." "The noble and magnanimous" constitutional declaration was not intended to withdraw "religion in general, and with it the best sanctions of moral and social obligation, from all consideration and notice of the law. The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, are granted and secured; but to revile with malicious and blasphemous contempt the religion professed by almost the whole community is an abuse of that right."

Ten years afterwards, in the Convention of 1821, the subject of religious liberty was again fully considered, and the following section was once adopted: "The legislature shall not pass any laws by which any person shall be compelled to attend upon, or support, any place of public worship; or to maintain any ministry against his consent; or which shall, in any manner restrain the free exercise of religious profession and worship." Erastus Root proposed the following additional provision: "The judiciary shall not declare any particular religion to be the law of the land, nor exclude any witness on account of

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his religious faith." Mr. Root denied that, under the Constitution, courts had power to declare blasphemy to be an indictable offense. He said it had been determined that Christianity was the law of the land, and that it had been borrowed from the common law of England. Chancellor Kent, who wrote the opinion in the *Ruggles Case,* replied to Mr. Root, saying that he had not stated that decision correctly. "The court had never declared or adjudged that Christianity was a religion established by law. They had only decided that to revile the author of Christianity in a blasphemous manner, and with a malicious intent, was an offense against public morals, and indictable. . . . The authors of our Constitution never meant to extirpate Christianity more than they meant to extirpate public decency. . . . They meant to preserve, so far as it came within their cognizance, the morals of the country, which rested on Christianity as the foundation. . . . The common law, as applied to correct such profanity, is the application of common reason and natural justice to the security of the peace and good order of society." Daniel D. Tompkins also opposed the Root amendment. The next day Mr. Root submitted his amendment in the following form: "It shall not be declared or adjudged that any particular religion is the law of the land;" and this was adopted by a vote of 62 to 26. Chancellor Kent voted for it, saying it could do no harm and might be a security. Mr. Root also offered an amendment that "no witness shall be questioned as to his religious faith." Colonel Young said that if this was intended to admit witnesses who did not believe in a Supreme Being, he was opposed to it. "The testimony of the atheist and infidel ought not to be placed upon an equality with others, as he could feel no responsibility." Chancellor Kent also opposed the amendment, saying that the oath of such a person, taken on a book in

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which he did not believe, "was a mockery, and the evidence ought not to be admitted." Mr. Briggs said he regretted to see the narrow views entertained by the Chancellor and Colonel Young. He said it "was impossible to ascertain who were atheists and who not." Mr. Root objected to the rule which required a jury to be told that a man "is not to be believed because he does not think as they may believe in regard to future rewards and punishments." Mr. Root's amendment in relation to the competency of witnesses was rejected by a vote of 8 to 94 The Convention was evidently not satisfied with the result of its deliberations on religious liberty, for when, a few days afterwards, the subject was taken up again, General Tallmadge moved to strike out the provisions already adopted, and restore the section on religious toleration in the existing Constitution. Chief Justice Spencer, Henry Wheaton, Martin Van Buren, Rufus King, Chancellor Kent, Colonel Young, and others participated in this debate, and finally the Convention, by a vote of 74 to 41, concluded to continue the existing constitutional provision relating to religious toleration.

In a few early decisions the courts, following the common law, declared that persons who did not believe in a God and in future rewards and punishments were not competent witnesses. This subject was carefully considered by Chief Justice Spencer in *Jackson ex dem. Tuttle* v. *Gridley* (1820) 18 Johns. 98, who, after citing the fundamental principle that "religion is a subject on which every man has a right to think according to the dictates of his understanding," and that "it is a solemn concern between his conscience and his God, with which no human tribunal has a right to meddle," says that "no testimony is entitled to credit unless delivered under the solemnity of an oath which comes home to the conscience of the witness, and will create a tie arising from his be-

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lief that false swearing would expose him to punishment in the life to come. On this great principle rest all our institutions and especially the distribution of justice between man and man." In this case a witness was excluded who was shown to have declared his "disbelief in a God and a future state of rewards and punishments," and the rule was laid down that the witness himself could not be heard, under oath, to deny such proof of incompetency. A person incompetent to take an oath as a witness could not be permitted to take an oath for the purpose of showing his competency.

The subject was again considered in *Butts* v. *Swartwood* (1823) 2 Cow. 431, where Judge Sutherland said that the "proper test of a witness's competency on the ground of his religious principles is whether he believes in the existence of a God who will punish him if he swears falsely." A person who professed belief in the doctrine of universal salvation was admitted as a competent witness.

In *People* v. *Matteson* (1823) 2 Cow. 433, note, Walworth, Circuit Judge, questioned the accuracy of the ruling by Chief Justice Spencer that the test of the witness's competency should be his belief in future punishments, and expressed the opinion that a witness was competent if he believed that God would punish the wicked in this life, without believing in future punishments.

The Revised Statutes of 1830 (2 Rev. Stat. 408) contain the following provisions relating to the competency of witnesses: Section 87, "every person believing in the existence of a Supreme Being who will punish false swearing shall be admitted to be sworn if otherwise competent;" and § 88, "no person shall be required to declare his belief in the existence of a Supreme Being, or that He will punish false swearing, or his belief or disbelief of any other matter as a requisite to his admission

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to be sworn or to testify in any case. But the belief or unbelief of every person offered as a witness may be proved by other and competent testimony." These provisions stated in statutory form the rules relating to the competency of witnesses laid down in the foregoing decisions. The revisers in their notes refer to these decisions as the basis of the sections, and say that § 87 is the "best adapted to the existing state of society," and that it embraces "the case, not only of many denominations of Christians, but all believers in other religious tenets, and of Pagans who must frequently be called on to testify."

In *People* v. *M'Garren* (1837) 17 Wend. 460, it was said that a witness might have been rejected as incompetent if the objection had been taken before he was sworn, but evidence afterwards offered in relation to his religious belief was held proper for the purpose of impeaching his credibility.

The Convention of 1846 found the state of the law on this subject—statutory and judicial—as expressed in the foregoing decisions and statutes, applied with more or less flexibility and with some fluctuation by the judges in disposing of specific questions relating to the competency of witnesses. In that Convention Mr. Taggart offered an amendment to the section on religious toleration, providing that "no person shall be deprived of any right or provision, or rendered incompetent as a witness, on account of his religious belief or unbelief." He said "his main object was to abolish the law which declared persons holding certain opinions incompetent as witnesses. He desired to see such objections apply to the credibility, not the competency, of the witness." Mr. Simmons opposed the amendment, remarking that a "more dangerous idea could not be spread through the state, than that a witness was to be tolerated who was a disbeliever in the existence of a Supreme Being, and

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in his moral government to punish false swearing. It was unsafe to have the rights of persons, their liberty, and their property depend on the testimony of an individual who avowed himself to have no faith or belief in a supreme moral governor of the universe. All intelligent and civilized nations had adopted this rule." Several delegates spoke on the amendment, and after considerable debate it was adopted by a vote of 63 to 46, and finally stated in the form in which it appears in § 3.

The subject of competency of witnesses was again considered by the supreme court in *Stanbro* v. *Hopkins* (1858) 28 Barb. 265, where it was held that, although under the Constitution a witness was not incompetent on account of his religious belief, he might be cross-examined on this subject for the purpose of affecting his credibility.

I have already quoted from the opinion of Chief Justice Kent in *People* v. *Ruggles* (1811) 8 Johns. 290, 5 Am. Dec. 335, in which blasphemy was held to be indictable, and from the discussion to which that decision gave rise in the constitutional Convention of 1821. The subject of religious observance was presented from another point of view by the act of 1860, chap. 501, "to preserve the public peace and order on the first day of the week, commonly called Sunday," applicable only to the city of New York. The validity of this act was considered and sustained by the New York superior court in *People* v. *Hoym* (1860) 20 How. Pr. 76, where Justice Hoffman reviews colonial and state legislation in relation to Sabbath observance, and says that the restrictions rest "upon the principle of the preservation of good order, and the public morality and peace." This statute was again considered in *Lindenmuller* v. *People* (1861) 33 Barb. 548, and was sustained as a valid exercise of legislative power under the Constitution. The defendant was indicted for

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giving theatrical exhibitions on Sunday, in violation of the statute. He asked an acquittal on the ground that the act was unconstitutional. Some observations made by Justice Allen in this case may profitably be quoted here, not only on account of their intrinsic importance, but also because they were substantially approved sixteen years afterwards by the court of appeals. Justice Allen says that Christianity is the common law of the state; at least, in a qualified sense, "not to the extent that would authorize a compulsory conformity in faith and practice to the creed and formula of worship of any sect or denomination, or even in those matters of doctrine and worship common to all denominations styling themselves Christian, but to the extent that entitles the Christian religion and its ordinances to respect and protection as the acknowledged religion of the people. . . . Individual consciences may not be enforced, but men of every opinion and creed may be restrained from acts which interfere with Christian worship, and which tend to revile religion and bring it into contempt." The right of religious belief does not excuse acts which interfere "with the religious worship and rights of conscience of those who represent the religion of the country as established, not by law, but by the consent and usage of the community, and existing before the organization of the government," and "their acts may be restrained by legislation, even if not indictable at common law. . . . Christianity is not the legal religion of the state, as established by law. If it were, it would be a civil or political institution, which it is not;" but it is, nevertheless, "the religion of the people. This fact is everywhere prominent in all our civil and political history. . . . Compulsory worship of God in any form is prohibited, and every man's opinion on matters of religion, as in other matters, is beyond the reach of law. . . . Every act

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done maliciously, tending to bring religion into contempt, may be punished at common law, and the Christian Sabbath, as one of the institutions of that religion, may be protected from desecration by such laws as the legislature, in their wisdom, may deem necessary to secure to the community the privilege of undisturbed worship, and to the day itself that outward respect and observance which may be deemed essential to the peace and good order of society, and to preserve religion and its ordinances from open reviling and contempt; and this not as a duty to God, but as a duty to society and to the state. . . . With us the Sabbath as a civil institution is older than the government," and it is subject to governmental regulation. "In this state the Sabbath exists as a day of rest by the common law, and without the necessity of legislative action to establish it; and all that the legislature attempt to do in the 'Sabbath laws' is to regulate its observance. . . . The Christian Sabbath is, then, one of the civil institutions of the state, and to which the business and duties of life are, by the common law, made to conform and adapt themselves. . . . Offenses against it are not punishable as sins against God, but as injurious to and having a malignant influence on society." The statute is clearly within the Constitution, which declares "that the liberty of conscience secured by it shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. The legislature have declared that Sunday theatres are of this character, and come within the description of acts and practices which are not protected by the Constitution, and they are the sole judges. The act is clearly constitutional, as dealing with and having respect to the Sabbath as a civil and political institution, and not affecting to interfere with religious belief or worship, faith or practice."

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The same statute was again under judicial consideration in *Neuendorff* v. *Duryea* (1877) 69 N. Y. 557, and it was again sustained. The *Lindenmuller Case* was cited as declaring the law of the state on this subject, the court of appeals saying that "it is there held with great force of argument, that the Christian Sunday may be protected from desecration by such laws as the legislature in its wisdom may deem necessary; and that it is the sole judge of the acts proper to be prohibited with a view to the public peace;" and that in that case the subject was exhausted, "and the true ground of judgment there occupied, and all the arguments upon this branch of the case in the present state of civil society in this country are there advanced and elaborated," and it was needless to repeat them.

The effect of the qualifying clause of the section—"but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this state"—was considered in *People* v. *Pierson* (1903) 176 N. Y. 201, 63 L. R. A. 187, 98 Am. St. Rep. 666, 68 N. E. 243. The defendant was indicted and convicted under § 288 of the Penal Code for neglecting to provide medical attendance for a minor child, who, it was alleged, died in consequence of such neglect. The defendant said "his reason for not calling a physician was that he believed in Divine healing, which could be accomplished by prayer. He stated that he belonged to the Christian Catholic Church, of Chicago, that he did not believe in physicians, and his religious faith led him to believe that the child would get well by prayer. He believed in disease, but believed that religion was a cure of disease." The conviction was sustained on the ground that the legislature, by positive statute, had imposed on parents the duty of providing medical attendance for

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their children; that a violation of this duty was an offense punishable by law under the statute, and that the court could not consider the defendant's religious belief as an excuse or defense. "The peace and safety of the state involves the protection of the lives and health of its children, as well as the obedience to its laws. Full and free enjoyment of religious profession and worship is guaranteed, but acts which are not worship are not." Parental neglect to provide medical attendance for children is "a public wrong which the state, under its police powers, may prevent. . . . Sitting as a court of law for the purpose of construing and determining the meaning of statutes, we have nothing to do with these variances in religious beliefs, and have no power to determine which is correct. We place no limitations upon the power of the mind over the body, the power of faith to dispel disease, or the power of the Supreme Being to heal the sick. We merely declare the law as given us by the legislature."

§ 4. [*When writ of habeas corpus not to be suspended.*]— The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension.

[Const. 1821, art. 7, § 6; 1846, art. 1, § 4. This subject is considered in the article on the Bill of Rights, in the chapter on the Convention of 1821.]

§ 5. [*Excessive bail, fines, and punishments prohibited; rights of witness.*]— Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

[Const. 1846, art. 1, § 5.]

A sketch of this section, omitting the last clause, will



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be found in the article on the Bill of Rights in the chapter on the Constitution of 1821. It has there been noted that the first three clauses were included in the English Declaration of Right of 1689, were enacted by the legislature in the act relating to the rights of citizens, passed January 26, 1787, and were included in the ten amendments to the Federal Constitution proposed to the legislatures by Congress in 1789, and afterwards duly ratified. These clauses were not included in the first and second state Constitutions, but were incorporated in the Bill of Rights by the Convention of 1846, which added the clause relating to the detention of witnesses.

*Cruel and unusual punishments.*—In *Barker* v. *People* (1824) 3 Cow. 686, 15 Am. Dec. 322, the court considered the subject of cruel and unusual punishments, which had been incorporated in the 8th Amendment to the Federal Constitution, but which was not then included in the state Constitution. The court deemed the Federal constitutional provision inapplicable to strictly state legislation, and therefore the act of 1815, chap. 1, which excluded from office persons convicted of dueling, was not subject to condemnation as inflicting a cruel and unusual punishment. Considering the subject further the court say that "the power of the legislature in the punishment of crimes is not a special grant or a limited authority to do any particular thing, or to act in any particular manner. It is a part of the 'legislative power of this state.' . . . It is the sovereign power of a state to maintain social order by laws for the due punishment of crimes." The power of the state over crimes is committed to the legislature without definition or description of crimes or punishments, and the legislature has unlimited discretion to define and punish crime, except as restricted in a few cases by the Constitution itself. The punishment imposed by the statute against dueling was held to be not unconstitutional.

Justice Rumsey, in *Re Bayard* (1881) 25 Hun, 546, discussing the prohibition against cruel and unusual punishments, said it had received little judicial attention, for the obvious reason that the question would probably not often arise, in view of the fact that punishments must first be declared by the legislature, which usually represents the moral ideas of the people, but that text writers seemed to

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understand the phrase as "prohibiting any cruel or degrading punishment not known to the common law, and prohibiting also those degrading punishments which, in any state, had become obsolete when its existing Constitution was adopted, and punishments so disproportioned to the offense as to shock the sense of the community." The court sustained as constitutional the act of 1880, chap. 456, which imposed in the city of Cohoes a punishment for petit larceny different from that imposed by law in other parts of the state. The punishment, though different, was not "cruel and unusual," within the meaning of the Constitution. The legislature has power, in its discretion, to increase or change punishments in different localities, to meet special emergencies. The Sunday barbering law of 1895, chap. 826, discriminated as to offenses in different parts of the state. This act was held constitutional in *People* v. *Havnor* (1896) 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 541, but the question that it violated the prohibition against cruel and unusual punishments does not seem to have been raised. The Ives pool law of 1884 contains a similar discrimination. This act has also been sustained as constitutional. *People* v. *Stedeker* (1902) 75 App. Div. 449, 78 N. Y. Supp. 316.

This section was not violated by the act of 1884, chap. 153, relating to the collection of taxes in Lewis county, which prohibited owners of land in default for taxes from peeling bark or cutting timber thereon before the payment of the taxes, under a penalty of $500. *Prentice* v. *Weston* (1888) 47 Hun, 121, affirmed, but without reference to this question, in (1888) 111 N. Y. 460, 18 N. E. 720.

The subject of cruel and unusual punishments was further considered in *People ex rel. Kemmler* v. *Durston* (1890) 119 N. Y. 569, 7 L. R. A. 715, 16 Am. St. Rep. 859, 24 N. E. 6, in which the court sustained the act of 1888, chap. 489, amending the Code of Criminal Procedure in relation to the infliction of the death penalty by substituting electrocution for the method then in use. Judge O'Brien refers to the origin of the provision in the English Declaration of Right already noted, and says: "When the statute referred to was enacted in England it was not intended as a check upon the power of Parliament to prescribe such punishment for crime as it considered proper. Its enactment did not change any law then existing, nor did it mitigate the harshness of criminal punishments in that country; as is shown by the fact that for more than half a century after it appeared on the statute book, a long catalogue of offenses were punishable by death, many of which were not visited with that extreme penalty before the Bill of Rights was passed.

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. . The history of the times in which this provision assumed the form of a law shows that it was, after all, intended to be little more that a declaration of the rights of the subject. The English people were about to place upon the throne, made vacant by revolution, a foreign prince, whose life had been spent in military pursuits rather than in the study of constitutional principles and the limitations of power, as then understood in the country he was to govern. . . . We entertain no doubt in regard to the power of the legislature to change the manner of inflicting the penalty of death." The act prescribes no new punishment for the offense.

The provisions in the New York Code of Criminal Procedure, §§ 491 and 492, respecting the solitary confinement of convicts condemned to death, were not in conflict with the Constitution of the United States, as they are construed by the court of appeals of that state. *McElvaine* v. *Brush* (1891) 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156.

*Excessive bail.*—In *People* v. *Tweed*, 13 Abb. Pr. N. S. 148, Justice Learned, at special term, in an action to recover $6,312,000, and in which bail on an order of arrest had been fixed at $1,000,000, refused to reduce the bail, holding that the constitutional provision against excessive bail applied only to criminal actions.

§ 6. [*Rights of accused in criminal cases; taking private property for public use.*]—No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this state may keep, with the consent of Congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on presentment or indictment of a grand jury; and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without

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**due process of law; nor shall private property be taken for public use without just compensation.**

[Const. 1821, art. 7, § 7; 1846, art. 1, § 6.]

This section appears for the first time in the Constitution of 1821.

GRAND JURY.

The Constitution of 1777 had secured the right of trial by jury, but, while the grand jury as an English inheritance was an established institution in the colony, the right to a preliminary investigation of an alleged offense before the accused could be put on trial was not guaranteed by the first Constitution. The first colonial assembly, which met in October, 1683, gave its first attention to a declaration of principles; and by the "Charter of Liberties and Privileges," which was its first legislative act, not only affirmed and guaranteed the right of trial by jury, but expressly declared that "in all cases, capital or criminal, there shall be a grand inquest, who shall first present the offense, and then twelve men of the neighborhood to try the offender, who, after his plea to the indictment, shall be allowed his reasonable challenges." This provision was repeated in the new Charter of Liberties of 1691. This subject during the first constitutional period was under legislative regulation; but in the act passed January 26, 1787, "concerning the rights of citizens of this state," commonly known as the Bill of Rights, it was declared that "no citizen shall be taken or imprisoned for any offense upon petition or suggestion unless it be by indictment or presentment of good and lawful men of the same neighborhood where such deeds be done, in due manner or by due process of law." This principle was stated more fully in the 5th Amendment to the Federal

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Constitution, and it will be observed that the foregoing section in the state Constitutions is almost identical with the 5th Amendment, with the addition of clauses of a local character, and of a clause taken from the 6th Amendment, relating to the right to counsel. The 5th Amendment was deemed applicable only to Federal cases; and, by including the provision in the state Constitution, the policy indicated by the Charter of Liberties of 1683, the Bill of Rights of 1787, and by the 5th Amendment was permanently incorporated in our constitutional system.

As originally introduced in the Convention of 1821, the section excepted from the necessity of an indictment "petit larceny, assault and battery, and breaches of the peace;" but after some discussion the exception was confined to petit larceny. Chief Justice Spencer, a member of the committee that presented the section, said the chief object in reporting these provisions was to remove the doubt which had been heretofore expressed of the constitutionality of the existing mode of proceeding in the prosecution of these minor offenses, which required speedy punishment, "and would be too vexatious, and productive of too much delay, to subject to the form of indictments by a grand jury."

It will be noted that, as adopted in 1821, the section secured the right to counsel only in trials of impeachment or indictment. The Constitution of 1846 extended this right to include "any trial in any court," and this provision was continued in the Constitution of 1894.

### INDICTMENT.

The provision requiring an indictment means "to answer in a course of criminal proceedings,—to answer *criminaliter*, with a view to punishment under the criminal law; and has no reference whatever to those collateral or incidental proceedings which are discipli-

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nary in their character, or have exclusive regard to some special character or relation which belongs to the individual." It was accordingly held that the provision of the Revised Statutes (1 Rev. Stat. 53, § 7; 1 Rev. Stat. 93, § 72) authorizing the discipline and expulsion of members of medical societies by a proceeding therein prescribed was constitutional. *Re Smith* (1833) 10 Wend. 449.

"Where the act was criminal at common law, or already prohibited by a former statute, the imposition of a civil penalty would not take away the power to punish by indictment. So, where the statute itself contains any provisions showing that the legislature did not intend that the civil penalty should constitute the only punishment, the remedy by indictment would not be taken away." The provision in the excise act of 1857, chap. 628, imposing civil penalties for its violation, was not exclusive, but the offender was also punishable by indictment. *Behan* v. *People* (1858) 17 N. Y. 516.

Where an offense is by statute divided into degrees, a defendant indicted for the offense in its highest degree may be convicted of a lower degree without a violation of this provision of the Constitution. The legislature has power to provide for such a conviction, and it cannot be said that the defendant is tried without indictment. *People* v. *Didien* (1859) 17 How. Pr. 224.

A new indictment is not necessary where a defendant, regularly convicted, escapes from prison, but he may be retaken and recommitted even after the original term has expired, and may be required to serve out the term for which he was sentenced. Such a proceeding does not violate his constitutional rights. *Haggerty* v. *People* (1873) 53 N. Y. 476.

An indictment need not necessarily be found in the county where the crime was committed. The legislature has power to provide for an indictment and trial in another county. *Mack* v. *People* (1880) 82 N. Y. 235, sustaining 2 Rev. Stat. 727, § 50, which authorizes an indictment for burglary and larceny in the county where the offense was committed, or in another county into which the stolen property may be carried.

Sections 277 and 293 of the Code of Criminal Procedure, which authorize the amendment of an indictment by inserting the true name of the defendant if any other name has been used, do not violate this constitutional provision. No security afforded by the Constitution is taken away or impaired; such an amendment can have no "other effect than to promote the ends of justice by rendering of no avail a purely technical objection, without depriving a

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defendant of any substantial right." *People* v. *Johnson* (1887) 104 N. Y. 213, 10 N. E. 690.

A peculiar question involving the validity of an indictment arose in *People* v. *Petrea* (1883) 92 N. Y. 128. A statute amending the grand jury law of Albany county was declared to be void because it was a local act and obnoxious to § 18 of article 3 of the Constitution; but the grand jury had been drawn under the statute and presented the indictment under which the defendant was tried. The grand jury was drawn from a list of petit jurors instead of from a special list of grand jurors, prepared as required by statute. The court said the jurors were drawn by the proper officer, were regularly summoned and retained by the sheriff, were recognized, impaneled, and sworn as grand jurors by the court, and as grand jurors found the indictment. Observing that the constitutional provision requiring an indictment had been regarded "as one of the securities of civil liberty," the court say that the "Constitution does not define what shall constitute a grand jury" nor prescribe the mode of its selection. "It is doubtless competent for the legislature to enact such regulations and make such changes respecting the mode of selecting and procuring grand jurors, as it may deem expedient, not trenching, however, upon the essential feature of the system. . . . The grand jury, although not selected in pursuance of a valid law, were selected under color of law and semblance of legal authority. The defendant in fact enjoyed all the protection which he would have had if the jurors had been selected and drawn pursuant to the general statutes." The court held that an "indictment found by a jury of good and lawful men, selected and drawn as a grand jury under color of law, and recognized by the court and sworn as a grand jury, is a good indictment by a grand jury within the sense of the Constitution, although the law under which the selection was made is void."

That part of the prohibitory liquor law of 1855, chap. 231, which prohibited the sale of intoxicating liquor, and provided penalties therefor, did not create an infamous crime. *People* v. *Quant* (1855) 12 How. Pr. 83, 88.

## RIGHT TO COUNSEL.

Prior to the Constitution of 1846 a person on trial before a court-martial was not entitled to counsel as a matter of right. The allowance of counsel was within the discretion of the court. The Constitution of 1821, under which this case was decided, secured the right to counsel only in cases of trials of impeachment or indictment. *Rathbun* v. *Sawyer* (1836) 15 Wend. 451. The Constitution

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of 1846 extended the right to counsel to trials in "any court whatever;" and it was held in *People ex rel. Garling* v. *Van Allen* (1873) 55 N. Y. 31, that the amendment included a court-martial, and that therefore a person on trial before such a court was constitutionally entitled to counsel. The court said that "no reason is perceived why counsel should not be allowed before these courts. They are as useful and necessary there as before any other judicial tribunal. The personal character, property, and liberty of the accused are involved, and may be seriously jeoparded if he is deprived of the aid of professional skill and learning."

A police board, authorized to hear charges against a policeman, and remove him for a violation of the rules of discipline, is not a court within the meaning of this section. "The offense charged is not a violation of a law of the state, or such as is or can be tried in a court of justice." The board had power to prescribe the rules of discipline and to regulate the procedure on charges for a violation of it. *People ex rel. Farrell* v. *Board of Police* (1880) 20 Hun, 402.

The police commissioners of the city of New York constitute a "subordinate and administrative tribunal, vested with disciplinary powers, and not a court limited in its functions, within the provisions of the Constitution." *People ex rel. Flanagan* v. *Board of Police* (1883) 93 N. Y. 97.

A person on trial before a board of police commissioners is not constitutionally entitled to counsel. The allowance of counsel is in the discretion of the board. Such a board is not a court. *People ex rel. Fallon* v. *Police Com'rs* (1883) 31 Hun, 209.

A police commissioner on trial before the mayor of New York, who had authority to remove him, was held entitled to be represented by counsel. It was an element of the right to be heard on the charges which was secured to him by the statute. *People ex rel. New York* v. *Nichols* (1880) 79 N. Y. 582. This rule was applied in *People ex rel. Campbell* v. *Hannan* (1890) 56 Hun, 469, 10 N. Y. Supp. 71, affirmed in (1890) 125 N. Y. 691, 26 N. E. 751, on the trial of a member of the police force by the police board of Troy.

A person summoned as a witness before a legislative committee has no constitutional right to the aid of counsel. *People ex rel. McDonald* v. *Keeler* (1885) 99 N. Y. 465, 52 Am. Rep. 49, 2 N. E. 615.

This provision gives the defendant "a right to appear and defend in person and with counsel in every part of the trial." It forbids

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the hearing by the jury of any evidence in the absence of himself and his counsel, without his consent. *People* v. *Palmer* (1887) 43 Hun, 397.

This subject was considered in *People* v. *Thorn* (1898) 156 N. Y. 286, 42 L. R. A. 368, 50 N. E. 947, and it was there held that the view of premises, authorized by §§ 411 and 412 of the Code of Criminal Procedure, was not a part of the trial, that it was not the taking of evidence, and that the view might be had without the presence of the defendant or his counsel, who might waive the right to be present.

The right applies before indictment and while the defendant is in jail awaiting the action of the grand jury; and in *People ex rel. Burgess* v. *Riseley* (1883) 13 Abb. N. C. 186, Justice Westbrook granted an order allowing a private consultation between the defendant and his counsel. A person accused of crime is entitled to the benefit of counsel at every stage of the proceeding.

## TWICE IN JEOPARDY.

*Competent court.*—Where a verdict of conviction was set aside on the ground that the court had no jurisdiction because one member of it was related to the defendant within the prohibited degrees, such verdict is not a bar to another trial on the same indictment. The defendant had not been in jeopardy in the constitutional sense; that term implies that he was on trial before a court of competent jurisdiction. *People* v. *Connor* (1894) 142 N. Y. 130, 36 N. E. 807.

*Concurrent jurisdiction of Federal courts.*—It seems that if an offense is punishable under Federal law and also under state law, a conviction in one jurisdiction is not a bar to a prosecution in the other. *People* v. *Welch* (1893) 74 Hun, 474, 26 N. Y. Supp. 694, affirmed in (1894) 141 N. Y. 266, 24 L. R. A. 117, 38 Am. St. Rep. 793, 36 N. E. 328.

*Correcting judgment.*—According to *Shepherd* v. *People* (1862) 25 N. Y. 406, it seems that the court at that time did not have power to correct an erroneous judgment entered on a lawful conviction, but that rule has been changed by § 543 of the Code of Criminal Procedure. In this case the judgment was reversed and the prisoner discharged on the ground that, an erroneous judgment having been pronounced, he could not be subjected to another trial, although the first conviction was regular. This defect in procedure was cured in part by the act of 1863, chap. 226, which authorized the appellate

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court, in case an erroneous judgment had been pronounced on a legal conviction, to remit the case to the court below, with directions to pronounce the proper judgment. This course was adopted in *Hussy* v. *People* (1867) 47 Barb. 503.

Where a defendant had been legally and regularly convicted, but the proper sentence was not pronounced, the court of appeals, acting under statute authority, remitted the record to the oyer and terminer, with directions to pronounce the proper sentence. The defendant was not by this proceeding put twice in jeopardy. *Ratzky* v. *People* (1864) 29 N. Y. 124.

*Discharge of jury.*—Where, on the trial of an indictment, a juror was improperly withdrawn on the district attorney's motion, and the defendant was convicted on another trial on the same indictment, which was said to be erroneous, and the defendant was discharged, it was held, in *People* v. *Barrett* (1806) 1 Johns. 66, that this was no bar to another trial on a new indictment. The same case is reported in (1805) 2 Caines, 304, 2 Am. Dec. 239, and it was there held that the withdrawal of a juror on the district attorney's motion, because he was unable to produce certain testimony, was a bar to another trial on the same indictment. It will be observed that it was said in the case, as reported in 1 Johns. 66, that the indictment was defective, and could not have been made the basis of a legal conviction.

The same subject was considered in *Grant* v. *People* (1860) 4 Park. Crim. Rep. 527, where it was said that an arbitrary discharge of a jury, in the absence of circumstances calling for an exercise of discretion by the court, is a bar to a second trial. *Klock* v. *People* (1856) 2 Park. Crim. Rep. 676.

In *Burns* v. *People* (1848) 1 Park. Crim. Rep. 182, a defendant who had been convicted of assault and battery was held liable to another indictment for manslaughter on the subsequent death of the person assaulted. *People* v. *Casborus* (1816) 13 Johns. 351, an arrest of judgment does not prevent a second trial on the same indictment.

Where the jury is discharged either on a failure to agree or for any other lawful reason, the defendant may be again tried before another jury, and he is not thereby put twice in jeopardy. *People* v. *Olcott* (1801) 2 Johns. Cas. 301, 1 Am. Dec. 168; *People* v. *Reagle* (1871) 60 Barb. 527; *People* v. *Denton* (1801) 2 Johns. Cas. 275; *People* v. *Goodwin* (1820) 18 Johns. 187, 9 Am. Dec. 203, where the court said that while the first jury was deliberating on the case the defendant was not legally in jeopardy. "He has not been tried for

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the offense imputed to him; to render the trial complete and perfect, there should have been a verdict either for or against him." It will be noted that this case was decided before the provision against being put twice in jeopardy was included in the state Constitution. *King* v. *People* (1875) 5 Hun, 297, where the first jury was discharged because the defendant had not been properly arraigned.

*New trial.*—Where, on a trial on an indictment on different counts, there is a specific verdict of guilty on one count, and the verdict is silent as to the other counts, and there is a conviction on the verdict of guilty, it is a bar to further prosecution on the counts on which the verdict is silent, and a reversal of the conviction on appeal does not subject the defendant to another trial for the offense of which he has been acquitted. "He asks a correction of so much of the judgment as convicted him of guilt. He is not to be supposed to ask correction or reversal of so much of it as acquitted him of offense. He, therefore, waives his privilege as to one, and keeps it as to the other." The acquittal still stands good and is a bar to another trial for that offense. *People* v. *Dowling* (1881) 84 N. Y. 478, in which it is said that the question had not been decided before in that court, except that *Guenther* v. *People* (1861) 24 N. Y. 100, is cited as authority for the rule that a specific conviction for one offense on a general trial involving several offenses is in effect an acquittal of others; but the conviction was affirmed, and the effect of the acquittal as a bar was therefore not directly involved in the result.

Another aspect of the constitutional provision was presented in *People* v. *Palmer* (1888) 109 N. Y. 413, 4 Am. St. Rep. 477, 17 N. E. 213, in which the defendant was indicted for assault in the first degree and convicted of assault in the third degree. This conviction was reversed, and the defendant claimed that the reversal was a bar to another trial for the higher offense. Discussing this question and construing § 464 of the Code of Criminal Procedure, which provides that "the granting of a new trial places the parties in the same position as if no trial had been had," and that "all the testimony must be produced anew, and the former verdict cannot be used or referred to, either in evidence or in argument," the court say that "the effect of the defendant's appeal is merely to continue the trial under the indictment in the appellate court, and if reversal of the judgment of conviction follows, that judgment, as well as the record of the former trial, have been annulled and expunged by the judgment of the appellate court, and they are as though they

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never had been; while the indictment is left to stand as to the crime of which the prisoner had been charged and convicted, as though there had been no trial." The defendant, by his appeal, waives the constitutional protection and asks for a new trial, and the court say that it is a self-evident proposition that no constitutional right of the party is thereby invaded. The second jeopardy is incurred with the defendant's consent. "The case stands as though there had been no trial; the record is expunged and there is no determination in regard to the matter but the judgment of the appellate court." The defendant must be tried again on the original indictment, for he himself has removed the constitutional bar against another trial. See also *People* v. *Wheeler* (1903) 79 App. Div. 396, 397, 79 N. Y. Supp. 454; *People* v. *Rulloff* (1860) 5 Park. Crim. Rep. 77, which declares the same rule.

*Revoking commutation.*—The act of 1886, chap. 21, § 14, providing in substance that if a convict whose sentence is commuted shall thereafter, and before the expiration of the full term for which he was sentenced, commit a felony, he shall, on conviction of the felony, be required also to serve out the remainder of the term under the original sentence, was held constitutional, and not a violation of the provision against being twice put in jeopardy for the same offense. The commutation is a statutory privilege, and the legislature has power to prescribe the conditions on which it may be allowed. *People ex rel. Willis* v. *Sage* (1896) 11 App. Div. 4, 42 N. Y. Supp. 251.

*Solitary confinement.*—The jeopardy provision does not apply where the defendant convicted of murder is kept in solitary confinement during the pendency of an appeal on which the judgment of conviction is affirmed and the defendant re-sentenced. The appeal stays only the execution of the death sentence, and even if the solitary confinement pending such appeal was illegal, it ended with the second sentence. Section 491 of the Code of Criminal Procedure expressly requires the solitary confinement of a defendant while awaiting execution. *People ex rel. Trezza* v. *Brush* (1891) 60 Hun, 399, 15 N. Y. Supp. 512.

*Trial necessary.*—Where a newspaper reporter who had concealed himself in the jury room for the purpose of obtaining information for publication was discovered and taken before the presiding judge, and, on giving up the notes taken by him in the jury room, was discharged, but refused to promise not to publish such notes, but did afterwards publish them, and was subsequently ordered to show cause why he should not be punished for a criminal contempt, it

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was held that the first proceedings against him were not a constitutional bar to the second prosecution for contempt. There had been no trial; the inquiry was informal, to ascertain the facts relating to the interference with the deliberations of the jury, and to determine whether action by the court was necessary at that time. The judge released the relator from custody because he was of the opinion that he had no jurisdiction to act in the then position of the case; on a subsequent presentation of proof formal proceedings were commenced, resulting in the relator's conviction for contempt. *People ex rel. Choate* v. *Barrett* (1890) 56 Hun, 351, 9 N. Y. Supp. 321, affirmed in (1890) 121 N. Y. 678, 24 N. E. 1095.

Where a *nolle prosequi* is entered on an indictment, and a new indictment is found, the defendant cannot, on the second indictment, plead that he is being put twice in jeopardy. He was not put in jeopardy by the first indictment. The prisoner had no trial upon the merits on the former indictment, and was never in jeopardy thereon within the meaning of the Constitution. *Gardiner* v. *People* (1866) 6 Park. Crim. Rep. 155.

*Variance.*—Where the court on the defendant's motion directed a verdict of acquittal on the ground of variance between the proof and the indictment, such an acquittal is not a bar to a trial on a new indictment. *People* v. *Meakim* (1891) 61 Hun, 327, 15 N. Y. Supp. 917; (1892) 133 N. Y. 214, 30 N. E. 828. The same subject is considered in *Canter* v. *People* (1867) 1 Abb. App. Dec. 305, construing 2 Rev. Stat. 701, § 24, which provided that a former acquittal on the ground of variance was not a bar to a trial on a new indictment. This provision is continued in § 340 of the Code of Criminal Procedure.

A view of this provision presented by the statutes of 1860, chap. 410, and 1861, chap. 303, in which the law in relation to capital offenses was changed, was considered in *Hartung* v. *People* (1863) 26 N. Y. 167.

The Habitual Criminals Act of 1873, chap. 357, does not violate this provision. *People* v. *McCarthy* (1873) 45 How. Pr. 97.

## WITNESS AGAINST HIMSELF.

The words "criminal case" in this section mean a prosecution for a criminal offense. "The primary and most obvious sense of the mandate is that a person prosecuted for a crime shall not be compelled to give evidence on behalf of the prosecution against himself in that case." But the right secured by this provision was not vio-

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lated by § 14 of the prohibitory act of 1853, chap. 539, which made a person offending against the act a competent witness against any other person so offending, and he might be compelled to testify in a judicial investigation of the offense, but the testimony so given could not be used against him in any other proceeding, civil or criminal. "If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offense." But if he is protected by statute, and the testimony so given cannot be used against him, he is not privileged. *People ex rel. Hackley* v. *Kelly* (1861) 24 N. Y. 74; *People* v. *Sharp* (1887) 107 N. Y. 429, 1 Am. St. Rep. 851, 14 N. E. 319, in which § 79 of the Penal Code was held constitutional; *Perrine* v. *Striker* (1839) 7 Paige, 598, construing the act of 1837, chap. 437, to prevent usury, which guaranteed immunity to a party who might give evidence in an action under the statute.

"No one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained. . . . Nothing short of absolute immunity from prosecution can take the place of the privilege by which the law affords protection to the witness." *People ex rel. Taylor* v. *Forbes* (1894) 143 N. Y. 219, 38 N. E. 303.

This rule is reiterated in *People ex rel. Lewisohn* v. *O'Brien* (1903) 176 N. Y. 253, 68 N. E. 353, with the additional statement that "where the court can see that the refusal to answer is a mere device to protect a third party, and that the witness is in no possible danger of disclosing facts that would lead to his own indictment and conviction, an answer may be insisted upon." In this case the defendant was sustained in his refusal to answer whether he had ever been in a certain building which was alleged to have been used as a gambling place. Section 342 of the Penal Code does not afford a witness full constitutional protection, for the reason that it does not "prevent the use of evidence against him which may be obtained through his testimony, but simply excludes such testimony." This case was decided in October, 1903. The legislature of 1904, by chap. 649, amended § 342 of the Penal Code to read as follows:

"No person shall be excused from attending and testifying, or

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producing any books, papers, or other documents before any court or magistrate, upon any investigation, proceeding, or trial, for a violation of any of the provisions of this chapter, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding."

Upon the passage of this law a new proceeding was instituted against the same defendant and involving the rights of the same witness. *People ex rel. Lewisohn* v. *General Sessions Court* (1904) 96 App. Div. 201, 89 N. Y. Supp. 364, affirmed November 15, 1904, 179 N. Y. 594, 72 N. E. 1148. Justice Ingraham, writing the opinion in the appellate division, considers the effect of the constitutional declaration that a person shall not be compelled to be a witness against himself, and says "the right of a witness to refuse to answer a question upon the ground that it would tend to criminate him or subject him to a penalty or to disgrace or degrade him is not protected by a constitutional provision. It is within the power of the legislature to determine the extent and limit of the personal right of a witness to refuse to answer questions asked him in the course of a judicial proceeding. The legislature has power to require a witness to answer any question, except so far as he is protected by the constitutional provision which prohibits his being compelled to be a witness against himself, and it follows that if the answers to the questions asked cannot in any way be used against the witness in a criminal proceeding, the provisions of the Constitution are not violated." The new statute was held to give "the witness complete immunity from prosecution for any crime in relation to the acts about which he was interrogated, and if he has this immunity it necessarily follows that compelling him to answer in relation to the crime, although he was directly connected with it, does not compel him to be a witness against himself in a criminal proceeding." *Brown* v. *Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, was cited as sufficient authority for sustaining the amended Penal Code section, for the reason that the section is almost identical with the statute under consideration in that case, and that the provision in relation to the

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immunity of the witness is the same in the state Constitution as in the Federal Constitution.

The prohibitory law of 1855, chap. 231, did not compel a person to be a witness against himself. *People* v. *Quant* (1855) 12 How. Pr. 83, 88.

The right secured by this provision is violated by the forcible examination of a female prisoner for the purpose of ascertaining her condition. *People* v. *McCoy* (1873) 45 How. Pr. 216.

This right was not violated by requiring a defendant on a criminal trial to stand up so that a witness could see him for the purpose of identification. The defendant was not thereby compelled to be a witness against himself. *People* v. *Gardner* (1894) 144 N. Y. 119, 28 L. R. A. 699, 43 Am. St. Rep. 741, 38 N. E. 1003.

False and fraudulent statements intended to become the basis of an illegal charge for official fees may, even if they have not become public documents, be used against the defendant when produced in response to a subpœna, and such use of them as evidence is not a violation of this provision. The defendant is not thereby compelled to give evidence against himself. *People* v. *Coombs* (1899) 158 N. Y. 532, 53 N. E. 527.

Where private papers of the defendant were unlawfully seized by police officers and used in evidence against him on a prosecution for a crime, his constitutional right was not thereby violated. He was not called as a witness, and was not compelled to give evidence against himself. The possession of the papers was of itself a crime. *People* v. *Adams* (1903) 176 N. Y. 359, 63 L. R. A. 406, 98 Am. St. Rep. 675, 68 N. E. 636.

Where, as under the act of 1873, chap. 777, to suppress obscene literature, punishment of the offense is seriously augmented if committed by a person of twenty-one years of age or upwards, "it may well be doubted whether the convict would be properly required to expose himself to it by any information supplied by his own oath. That would be making him a witness against himself, which the Constitution of the state has prohibited in criminal cases. Under this restraint the court must act on the best information that can be obtained, and not unfrequently that will be supplied by the prisoner's own appearance." The judge may consult his own senses and act upon the conclusion which they suggest. *People ex rel. Ziegler* v. *Special Sessions Justices* (1877) 10 Hun, 224.

*Silence no presumption.*—In any proceeding by the state to deprive a citizen of his liberty or property, "the facts which in law justify it must be alleged and established. The legislature has no



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power to enact that they may be inferred or presumed from the silence of the party accused, or from his failure to answer under oath. . . . It is a constitutional right of the party charged with the commission of acts which, if true, constitute a crime or create a penalty or impose a forfeiture, to answer without verification. No law can be valid which directly or indirectly compels a party to accuse or incriminate himself, or to testify by affidavit or otherwise with respect to his guilt or innocence." The legislature may not invade his constitutional privilege to remain silent. *Re Peck* (1901) 167 N. Y. 391, 53 L. R. A. 883, 60 N. E. 775, construing the provision of the liquor tax law relating to the cancelation of a certificate. *Re Cullinan* (Kray Certificate) 82 App. Div. 445, 81 N. Y. Supp. 567, (1904) 97 App. Div. 122, 89 N. Y. Supp. 683. The same subject was considered in *Thomas* v. *Harrop* (1852) 7 How. Pr. 57; *Gadsden* v. *Woodward* (1886) 103 N. Y. 242, 8 N. E. 653.

The act of 1867, chap. 194, providing for a constitutional convention, which required a person, if challenged, to take a prescribed oath of loyalty, violated this provision. "His refusal to testify that he is innocent operates to produce his conviction, and seals his guilt. . . . It is only an evasion of the provision cited to condemn a person for a refusal to swear to innocence." *Green* v. *Shumway* (1868) 39 N. Y. 422.

*Waiver.*—This right may be waived, and is waived if the defendant becomes a witness as authorized by the act of 1869, chap. 678, relating to testimony in criminal cases. *Connors* v. *People* (1872) 50 N. Y. 240.

The act of 1869 is permissive only, and is constitutional. *People* v. *Courtney* (1884) 94 N. Y. 490.

The right is also waived by the holder of a liquor tax certificate who puts in a verified answer in a proceeding by petition for the cancelation of his certificate. He might have served an unverified answer. *Re Cullinan* (Micha Certificate) (1902) 76 App. Div. 362, 78 N. Y. Supp. 466; *Brandon* v. *People* (1870) 42 N. Y. 265.

This right is not violated where a person subpœnaed to produce a paper voluntarily surrenders the paper out of court before the return of the subpœna, and the paper is afterwards used as evidence against him. By thus delivering it he waives his constitutional privilege. *People* v. *Sebring* (1895) 14 Misc. 31, 35 N. Y. Supp. 237, Rumsey, J.

A person who, at his own request, appears before a grand jury and testifies on a charge of conspiracy, cannot afterwards be heard to allege that his constitutional privilege has been violated. *People*

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v. *Willis* (1898) 23 Misc. 568, 52 N. Y. Supp. 808, Van Wyck, J.; affirmed in (1898) 32 App. Div. 626, 53 N. Y. Supp. 1111.

DUE PROCESS OF LAW.

The clause in this section—"nor be deprived of life, liberty, or property without due process of law"—is a brief summary of several provisions, some of which are of very ancient origin. Thus, the 39th Article of Magna Charta, 1215, states the following fundamental principle: "No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed, nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land." This provision of Magna Charta was restated in another form by an act of Parliament passed in the 28th year of Edward III. 1354, which declared "that no man, of what estate or condition that he be, shall be put out of his land or tenement, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought to answer by due process of law." I think this was the earliest statutory use of the phrase "due process of law" now so common in our Constitutions and so frequently cited in judicial decisions involving the rights of citizens. These declarations were in substance repeated in the act passed in the reign of Charles I., 1628, in response to the Petition of Rights. This was succeeded by the famous Habeas Corpus act of 1679, and the Declaration of Right, of 1689. But six years prior to the declaration of William and Mary, the New York colonists, in their first assembly, 1683, asserted in the proposed Charter of Liberties the 39th article of Magna Charta, stating it in the following form: "No man, of what estate or condition soever, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disherited, nor banished, nor any ways destroyed, without being brought to answer by

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due course of law;" and this was repeated in the Charter of Liberties, passed in 1691.

It has already been noted that the first section of our Constitution restates, in the form proposed by Gilbert Livingston in the first constitutional convention, some of the primary rights of citizens as declared in Magna Charta. It was the original plan of that convention to include a Bill of Rights in the Constitution, but this result was not accomplished, except as to a few items. In the first volume of this work I have quoted the New York act of 1787 concerning the rights of citizens. That statute contained a declaration of several principles which probably would have been included in a constitutional Bill of Rights had not the unhappy situation of the convention prevented the proper consideration of this subject in connection with the Constitution. That statutory Bill of Rights reiterated the 39th article of Magna Charta in another form, and declared the right of trial by jury, and the right to the presentment of a criminal charge by a grand jury, which have already been quoted. The provisions relating to the protection of life, liberty, and property are stated in this Bill of Rights as follows:

"No citizen of this state shall be taken or imprisoned, or be disseised of his or her freehold or liberties or free customs, or outlawed or exiled or condemned, or otherwise destroyed, but by lawful judgment of his or her peers, or by due process of law."

"No person, of what estate or condition soever, shall be taken or imprisoned, or disinherited, or put to death without being brought to answer by due process of law, and no person shall be put out of his or her franchise or freehold, or lose his or her life or limb, or goods and chattels, unless he or she be duly brought to answer, and be forejudged of the same by due course of law, and if any-

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thing be done contrary to the same it shall be void in law, and holden for none."

All these numerous forms of expression, beginning with Magna Charta and ending with the New York Bill of Rights of 1787, were stated in the 5th Amendment to the Federal Constitution, 1789, in the simple declaration that "no person shall be deprived of life, liberty, or property without due process of law;" and this was incorporated in the New York Constitution of 1821.

### LIBERTY.

"Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." *Re Jacobs* (1885) 98 N. Y. 98, 50 Am. Rep. 636, quoting Justice Field's remark in *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* (1884) 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652, "that among the inalienable rights as proclaimed in the Declaration of Independence is the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their property or develop their faculties so as to give them their highest enjoyment;" and also Justice Bradley's remark in the same case that "'the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States,' of which he cannot be deprived without invading his right to liberty within the meaning of the Constitution." And the opinion expressed in *Live Stock Dealers & Butchers Asso.* v. *Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388, 398, Fed. Cas. No. 8,408, that "there is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor."

"It is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. . . . The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen,

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as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." *People* v. *Marx* (1885) 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People* v. *Gillson* (1888) 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *People ex rel. McPike* v. *Van De Carr* (1904) 91 App. Div. 20, 86 N. Y. Supp. 644.

The right to liberty includes the right to exercise his faculties and to follow a lawful avocation for the support of life. One may be confined in a constitutional sense, without putting his person in confinement. *Bertholf* v. *O'Reilly* (1878) 74 N. Y. 509, 30 Am. Rep. 323.

"The word 'liberty' . . . has a broad meaning. It includes liberty of action, which is interfered with by a command to lay aside all business and excuses and appear at a designated place and give testimony. It embraces the right to keep secret one's books and papers, his business methods and his knowledge of his own affairs. Yet these constitutional rights may all be interfered with by due process of law when the general good requires it. By due course of law qualifications and limitations may be imposed and the natural rights of the citizen somewhat abridged, without infringing upon constitutional liberty. . . . Organized society requires some sacrifice of personal liberty by its members, and the Constitution which organized the state government makes liberty subject to due process of law." *Re Davies* (1901) 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 118, construing the anti-monopoly law of 1899, chap. 690. See *Wright* v. *Hart* (1905) 103 App. Div. 218, 93 N. Y. Supp. 60, as to statutes regulating sales of merchandise in bulk.

## WHAT IS DUE PROCESS?

In *Re John & C. Streets* (1839) 19 Wend. 658, 676, Judge Cowen says that this clause is an enlargement and extension of the words in Magna Charta that "no freeman shall be disseised of his freehold, etc., but by the law of the land;" and quotes Lord Coke's remark, 2 Inst. 50, that these words were "properly rendered 'due process of law,' among which he mentions the writ original at the common law, the ordinary mode of commencing a suit to try the title. . . . Our Constitution adopts the very words of Coke, and means undoubtedly that, to work a change of property from one private person to another, some proceeding must be had in a court of justice or before magistrates; at least, that the legislature should have no power to deprive one of his property, and transfer it to

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another, by enacting a bargain between them, unless it be in the hands of the latter a trust for public use."

"This provision is the most important guaranty of personal rights to be found in the Federal or state Constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. . . . This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights. . . . Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential." *Stuart* v. *Palmer* (1878) 74 N. Y. 183, 30 Am. Rep. 289.

The clause means "a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property." *Taylor* v. *Porter* (1843) 4 Hill, 140, 40 Am. Dec. 274.

"Due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity when there to prove any fact which, according to the Constitution and the usages of the common law, would be a protection to him or his property." The phrase means substantially the same as "law of the land," as used in § 1 of article 1. *People ex rel. Witherbee* v. *Essex County* (1877) 70 N. Y. 228.

Private property cannot be taken from one person and delivered to another person, or applied to the private use of another, except by a suit instituted and conducted in accordance with the prescribed course of procedure for determining the title to property. The institution and conduct of such a suit is what is meant by "due process of law." *Re Hatch* (1877) 11 Jones & S. 89, Curtis, Chief Justice.

Due process of law means "that every citizen shall have his day in court, and that he shall have the benefit of those rules of the common law generally deemed to be fundamental in their nature because sanctioned by reason, by which judicial trials are governed. These rules, which secure to the accused a judicial trial, it is beyond the power of the legislature to subvert." *Wynehamer* v. *People* (1856) 13 N. Y. 378, 447. A person cannot be deprived of

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his liberty or property by mere legislation, but the legislature may "regulate what shall be the due process of the law by which the citizen may be put upon his trial concerning his liberty, or his property, provided that the statute destroys none of those safeguards to individual freedom and rights which the people of England finally acquired for themselves, and which, as part of the common law of that land, we took over and adopted in the formation of a state government." *People* v. *Sickles* (1898) 156 N. Y. 541, 51 N. E. 288.

"Any act the legislature may, in the uncontrolled exercise of its power, think fit to pass, is, in no sense, the process of law designated by the Constitution." *Westervelt* v. *Gregg* (1854) 12 N. Y. 202, 62 Am. Dec. 160.

To say that "the law of the land" or "due process of law" may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. "The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is; or, at least, it cannot be created by a legislative act which aims at their destruction." *Wynehamer* v. *People* (1856) 13 N. Y. 378.

In *Happy* v. *Mosher* (1872) 48 N. Y. 313, construing the act of 1862, chap. 482, relating to liens on vessels, the court say that due process of law "need not be a legal proceeding according to the course of the common law, neither must there be personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided 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."

"A method of procedure having the sanction of settled usage is commonly regarded as due process of law." *People* v. *Adirondack R. Co.* (1899) 160 N. Y. 225, 236, 54 N. E. 689.

Due process of law does not necessarily import a trial by jury. The legislature "has the power to provide the ways and means by which the rights of persons may be protected, and their wrongs redressed, and to compel amends to be made to the party injured

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from the property of the person in the wrong. But it must be made through the instrumentality of some judicial proceeding. The nature and character of the proceeding, the practice to be adopted therein, and the manner in which the parties shall be brought before the tribunal to give it jurisdiction, are within the province and constitutional power of the legislature." *Squares* v. *Campbell* (1871) 60 Barb. 391.

"The citizen is entitled to the absolute control of his estate, unless taken for public use in due form of law; and this right it is the duty of the court to maintain. His land can be so taken only by 'due process of law.' But when the conditions required by the Constitution . . . to be observed for the protection of the rights of the citizen have been complied with, it must be regarded as a fulfilment of the direction in respect to 'due process of law.'" *Re Central Park* (1872) 63 Barb. 282.

While "due process of law requires that a hearing or an opportunity to be heard be given by means of due notice by such board or officials before they exercise such judgment and discretion, to the persons whose property rights are to be so affected, this doctrine . . . has no application whatever to the legislature. It applies only to the judicial department of government, which embraces for the time being every official to whom the doing of any act of a judicial nature is intrusted by the legislature, though the legislature might legislatively do such act itself." Every citizen is presumed to participate in the act of the legislature. *Re Curren* (1898) 25 Misc. 432, 54 N. Y. Supp. 917, affirmed, without considering this subject, in (1899) 38 App. Div. 82, 55 N. Y. Supp. 1018.

It was not the purpose of the 14th Amendment "to interfere with the ordinary administration of justice by the courts of a state, or to affect the final and ultimate jurisdiction of the courts of a state, over crimes and offenses, defined and declared by its laws and committed within its territorial jurisdiction. . . . 'Due process of law' and what constitutes it is, within the limitation mentioned, to be determined by the state in every case where the state can exercise rightful authority." Jurisdiction over crimes is usually "a state, and not a Federal jurisdiction. The state constitutes appropriate tribunals for the trial of offenses, and prescribes the procedure for the investigation, trial, and punishment of crimes. That is 'due process of law,' within the meaning of these words, which affords to every citizen the equal protection of the laws, and in

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case of accusation of crime, the right of trial by jury before one of its duly constituted tribunals having jurisdiction of the crime, under a procedure which the state prescribes. The 14th Amendment confers upon the courts of the United States no jurisdiction to supervise the administration by state tribunals of the criminal law of the state, or to correct errors, or to modify or change their judgments." *Re Buchanan* (1895) 146 N. Y. 264, 40 N. E. 883.

A statute of limitation cannot be said to deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit. *Wheeler* v. *Jackson* (1890) 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76, affirming (1887) 105 N. Y. 681.

Due process requires notice to the owner of property of an intention to take the same for a public purpose. He must have an opportunity to be heard. *Re Brooklyn* (1895) 87 Hun, 54, 33 N. Y. Supp. 869.

A corporation is a person within the meaning of this provision. *Rochester & C. Turnp. Road Co.* v. *Joel* (1899) 41 App. Div. 43, 58 N. Y. Supp. 346.

A municipal corporation may, in the interest of public health, interfere in some cases with the private property of the citizen and regulate his action concerning it. *Re Wissels* (1881) 13 N. Y. Week. Dig. 185.

### DUE PROCESS CLASSIFIED.

Due process of law has been a subject of frequent consideration by the courts, involving various forms of remedies prescribed by statute, either directly or by a delegation of authority to municipal corporations, and including numerous proceedings, judicial and otherwise, by which the rights of the citizen were sought to be affected. This field of judicial inquiry is very broad, embracing various and complex questions relating to this important constitutional provision. The scope and results of judicial investigation can probably be studied most conveniently by a classification of decisions, showing, first, proceedings which have been held to be due process of law, and second, proceedings which have been condemned as violations of this constitutional provision.

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IS DUE PROCESS.

The following have been held to be due process of law:—

*Animals.*—The act of 1867, chap. 814, amending the cattle law of 1862, chap. 459, under which amendatory act a person seizing an animal trespassing under specified conditions was required to institute a proceeding on notice to the owner of the animal, who was given the right of trial by jury, and which proceeding might result in a sale of the animal seized to satisfy the judgment. *Fox* v. *Dunckel* (1869) 55 Barb. 431, distinguishing *Rockwell* v. *Nearing* (1866) 35 N. Y. 302, which construed and condemned the act of 1862, chap. 459; *Leavitt* v. *Thompson* (1873) 52 N. Y. 62; *Campbell* v. *Evans* (1871) 45 N. Y. 356; *Cook* v. *Gregg* (1871) 46 N. Y. 439; *Jones* v. *Sheldon* (1872) 50 N. Y. 477, which limits the application to animals trespassing from the highway; *Squares* v. *Campbell* (1871) 60 Barb. 391; *McConnell* v. *Van Aerman* (1869) 56 Barb. 534.

An order made by a justice of the peace under § 125 of the County Law, requiring the owner of a vicious dog to kill him immediately. The statute imposes a penalty for the owner's refusal to comply with the order, and in an action therefor, all questions relating to his rights and the regularity and propriety of the order may be litigated. This is due process of law. *People ex rel. Renshaw* v. *Gillespie* (1898) 25 App. Div. 91, 48 N. Y. Supp. 882.

*Barber law.*—The act of 1895, chap. 823, known as the Sunday barbering law. "Every man's liberty and property is, to some extent, subject to the general welfare, as each person's interest is presumed to be promoted by that which promotes the interest of all." *People* v. *Havnor* (1896) 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 541.

*Bottling acts.*—The bottling acts, 1887, chap. 377. as amended by chap. 181, Laws 1888. *People* v. *Cannon* (1892) 63 Hun, 306, (1893) 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759, and (1893) 139 N. Y. 645, 34 N. E. 1098.

*Brooklyn.*—The act of 1876, chap. 187, authorizing the use of steam as a motive power on Atlantic avenue in Brooklyn. *People* v. *Long Island R. Co.* (1880) 60 How. Pr. 395.

The Brooklyn act of 1880, chap. 528, imposing a penalty on any person refusing to serve as an election officer. "The power to impose these penalties results from the right of the sovereign to compel the performance of a service for its benefit by the subject." *Brooklyn* v. *Scholes* (1883) 31 Hun, 110.

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The act of 1866, chap. 622, in relation to the taxation of charitable institutions in Brooklyn. *Dyker Meadow Land & Improv. Co.* v. *Cook* (1896) 3 App. Div. 164, 38 N. Y. Supp. 222, (1899) 159 N. Y. 6, 53 N. E. 690.

*Contempt.*—The act of 1875, chap. 91, conferring power upon a canal investigating commission appointed by the legislature, and authorizing the commission to punish witnesses for contempt. The proceeding to adjudicate and to impose sentence, if adjudged guilty, is due process of law. *People* v. *Learned* (1875) 5 Hun, 626.

A proceeding to punish for contempt of court is due process of law under the Constitution. *Egan* v. *Lynch* (1883) 17 Jones & S. 454.

1 Rev. Stat. 154, § 13, subd. 4, authorizing the legislature to punish as for contempt a witness refusing to answer before it or before a legislative committee. *People ex rel. McDonald* v. *Keeler* (1885) 99 N. Y. 463, 52 Am. Rep. 49, 2 N. E. 615. This statutory provision has been continued in § 4 of the legislative law.

*Crimes.*—The riot act of 1855, chap. 428, which makes a city or county liable for the destruction of property by a mob. "The state, in the exercise of its sovereign powers, holds the city responsible, without its consent, and without previous process of law, for the consequences of acts not committed by them, or by their authority or permission, but over which they could exercise no control, and which they had not the physical means to avert." *Davidson* v. *New York* (1864) 27 How. Pr. 342.

Section 688 of the Penal Code, which provides for an increased punishment on conviction for a second offense. It is a reasonable exercise of legislative discretion in the treatment of crimes and their punishment. "Reason suggests that the persistent and hardened offender needs a severer punishment. The previous punishment having failed to reform him, his guilt, upon his further offending, is greater, and being so, severer treatment is needed to compel him to reform his ways, and in furtherance of the effort to prevent crime." The defendant had due process of law, for the statute "announced the enhanced penalty which he would incur by repeating his infraction of the laws against crime." He was charged and tried for the aggravated crime, and the course of the administration of justice was regular in all respects. *People* v. *Sickles* (1898) 156 N. Y. 541, 51 N. E. 288.

The provision in the act of 1877, chap. 387, requiring the recorder of Kingston to collect from each person charged with a criminal offense triable before him, who shall waive an examination, all costs

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of the proceedings, with authority to commit for nonpayment of such costs. *People ex rel. Staudacher* v. *Webb* (1878) 7 N. Y. Week. Dig. 488.

*Drainage.*—The drainage act of 1869, chap. 888, as amended by chap. 303, Laws 1871. The act is designed to promote the preservation of the public health. Land is taken either by assessment or directly, under the power of eminent domain, and the landowner's damages are to be fully paid. *Re Ryers* (1878) 72 N. Y. 1, 28 Am. Rep. 88.

*Elevators.*—The act of 1888, chap. 581, fixing the maximum charge for elevating grain, and making a violation of the act a misdemeanor. "No one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all." The legislative power "may be exercised so as to impair the value of property or limit or restrict the uses of property, yet in this there is no infringement of the constitutional guaranty, because that guaranty is not to be construed as liberating persons or property from the just control of the laws." *People* v. *Budd* (1889) 117 N. Y. 1, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, affirmed in (1891) 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

*Excise.*—The civil damage act of 1873, chap. 646, which authorized an action against the owner of premises for damages resulting from the sale of intoxicating liquor by his lessee. "The right of the state to regulate the traffic in intoxicating liquors within its limits has been exercised from the foundation of the government, and is not open to question. The state may prescribe the persons by whom and the conditions under which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as, in its judgment, are proper to secure society against the dangers of the traffic, and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication." The licensee accepts the license with all the conditions imposed. While the act "indirectly operates to restrain the absolute freedom of the owner in the use of his property, and may justly be said to impair its value," this is not a taking of it within the meaning of the Constitution. "He is not deprived either of the title or the possession. The use of his property for any other lawful purpose is unrestricted, and he may let or use it as a place for the sale of liquors, subject to the liability which the act imposes. . . . . All property is held subject to the power

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of the state to regulate or control its use to secure the general safety and the public welfare." *Bertholf* v. *O'Reilly* (1878) 74 N. Y. 509, 30 Am. Rep. 323.

The provision of the excise law of 1857, chap. 628, that if a person is seen to drink liquor on licensed premises it should be deemed presumptive evidence that the liquor was sold by the licensee, who, however, might testify in relation to such sale. "The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted." *Board of Excise* v. *Merchant* (1886) 103 N. Y. 143, 57 Am. Rep. 705, 8 N. E. 484.

The provision of the liquor tax law of 1896, chap. 112, which forbids the holder of a liquor tax certificate from giving away any food to be eaten on the premises where liquor is sold. The prohibition against giving away food did not deprive the holder of the certificate of liberty or property without due process of law. The power to regulate the sale of liquor includes the power to determine upon what premises the liquor may be sold, and what other use shall be made of the premises. This regulation is a reasonable exercise of legislative power. *People ex rel. Bassett* v. *City Prison* (1896) 6 App. Div. 520.

Proceedings under the liquor tax law of 1896, chap. 112, for the cancelation of liquor tax certificates. While these certificates are declared to be property, they are held under limitations prescribed by the legislature, and subject to its regulation. *Re Livingston* (1897) 24 App. Div. 51, 48 N. Y. Supp. 989.

*Forest preserve.*—The forest preserve law of 1897, chap. 220, which authorized the forest preserve board to take land for park purposes, and provided for submitting disputed claims as to compensation to the court of claims. "The method of taking is within the exclusive control of the legislature." While in the absence of agreement provision must be made for determining the compensation by an impartial tribunal, payment need not be provided in advance, but payment must be assured. The treasury of the state is pledged to meet the claims under this statute, and an adequate tribunal is provided for the determination of such claims. *People* v. *Adirondack R. Co.* (1899) 160 N. Y. 225, 54 N. E. 689.

*Gambling.*—Sections 344*a* and 344*b* of the Penal Code relating to certain forms of gambling. *People* v. *Adams* (1903) 176 N. Y. 351, 63 L. R. A. 406, 98 Am. St. Rep. 675, 68 N. E. 636.

*Game.*—The provision of the game law of 1871, chap. 721, which prohibited the possession of certain birds after the 1st of March. "The property was acquired subsequent to the passage of the act,

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and with the presumed knowledge of its provisions and conditions. The legislature may pass many laws the effect of which may be to impair or even destroy the right of property. Private interest must yield to the public advantage." *Phelps* v. *Racey* (1875) 60 N. Y. 10, 19 Am. Rep. 140. See *People* v. *Bootman* (1904) 95 App. Div. 469, 88 N. Y. Supp. 887, 180 N. Y. 1.

*Indemnitors.*—The provisions of §§ 1421–25 of the Code of Civil Procedure, authorizing the substitution of the sureties in an indemnity bond in an action against the sheriff on account of a levy made by him. The injured party's right of action is not taken away, but is confined in its enforcement to the real and actual trespassers. *Hein* v. *Davidson* (1884) 96 N. Y. 175, 48 Am. Rep. 612.

The mandatory provision requiring the substitution of the indemnitors, added by amendment in 1887, was held invalid in *Levy* v. *Dunn* (1899) 160 N. Y. 504, 73 Am. St. Rep. 699, 55 N. E. 288.

*Insane persons.*—A proceeding under the act of 1874, chap. 446, for a commitment of an alleged insane person. *Ayers* v. *Russell* (1888) 50 Hun, 282, 3 N. Y. Supp. 383.

The provisions of the insanity law, 1896, chap. 545, and of §§ 2323*a*, 2323*b*, and 2336*a* of the Code of Civil Procedure, relating to the appointment of a committee of an alleged insane person. *Re Walker* (1900) 57 App. Div. 1, 67 N. Y. Supp. 647, citing *Parker* v. *Willard State Hospital* (1901) 50 App. Div. 622, 63 N. Y. Supp. 113.

*Insurance companies.*—The authority conferred by the act of 1867, chap. 846, on the board of fire underwriters to collect 2 per cent of the premiums received by persons engaged in the insurance business in the city of New York for the purpose of defraying the expenses of the fire patrol. The amount collected is not a tax, and the power conferred on the corporation is a valid exercise of the police power. *New York Fire Underwriters* v. *Whipple* (1896) 2 App. Div. 361, 37 N. Y. Supp. 712.

*Jurors.*—The act of 1896, chap. 378, providing for a special commissioner of jurors and for special juries in criminal cases in certain counties. "If the law of the state has made provision for the choosing of an impartial jury for the trial of a defendant, his trial is none the less by due process of law because the jury is composed of persons taken from the body selected by the special commissioner of jurors from the general list." The special commissioner does not select a particular panel, nor exercise any judicial function as to the qualifications of the twelve men who may ultimately be chosen to serve; the court alone exercises the judicial

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function of deciding upon the qualifications of the jurors, and it does so entirely unhampered by the previous examination and inquiry of the commissioner. If a person has had a "trial before an impartial jury taken from the county, and conducted according to the law of the land, he has had all the benefit of the constitutional guaranty." *People* v. *Dunn* (1899) 157 N. Y. 528, 43 L. R. A. 247, 52 N. E. 572. See also *People* v. *Ebelt* (1905) 180 N. Y. 470, 73 N. E. 235, as to jurors in Westchester county. The court applies the principles declared as to grand jurors in *People* v. *Petrea*, 92 N. Y. 128.

*Letters.*—A letter placed in the postoffice passes out of the control of the sender and into the control of the party to whom it is directed, and the postmaster or postoffice department is the agent of the party addressed to forward the letter to him, and it cannot be taken from him without due process of law. *Kennedy* v. *Dr. David Kennedy Corp.* (1900) 32 Misc. 480, 66 N. Y. Supp. 225, Sp. T. Betts, J.

*License.*—An ordinance prohibiting a hackman from soliciting patronage in the street, which ordinance is in substance included in the license accepted by him, is due process of law, and the license may be revoked upon proof of its violation. *People ex rel. Van Norder* v. *Sewer, Water & Street Comrs.* (1904) 90 App. Div. 555, 86 N. Y. Supp. 445.

*Liens.*—The act of 1862, chap. 482, in relation to liens on vessels. *Happy* v. *Mosher* (1872) 48 N. Y. 313; *Sheppard* v. *Steele* (1870) 43 N. Y. 52, 3 Am. Rep. 660.

*Mileage books.*—The act of 1895, chap. 1027, did not deprive the defendant of property without due process of law. *Dillon* v. *Erie R. Co.* (1897) 19 Misc. 116, 43 N. Y. Supp. 320.

*Milk ordinance.*—An ordinance of the city of Syracuse, authorizing a milk inspector to seize and destroy impure milk. *Blazier* v. *Miller* (1877) 10 Hun, 435.

*Monopolies.*—The anti-monopoly act of 1899, chap. 690, which authorizes a person to be examined as a witness on the application of the attorney general for the purpose of instituting a proceeding under the statute. *Re Davies* (1901) 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 118.

*New York city.*—The act of 1871, chap. 57, for widening Broadway in the city of New York, which authorized the supreme court to open an order made on the report of the commissioners and direct a re-examination of the question of valuation. *Re Broadway* (1872) 61 Barb. 483, affirmed in (1872) 49 N. Y. 150.

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The provision in the New York charter of 1873, chap. 335, authorizing the police board to remove a police officer on charges made under its rules. The police commissioners "are a subordinate and an administrative tribunal, vested with disciplinary powers, and not a court limited in its functions, within the provisions of the Constitution." *People ex rel. Flanagan* v. *Board of Police* (1883) 93 N. Y. 97.

The provisions of the New York city tax law of 1843, chap. 230, authorizing summary proceedings for the collection of unpaid taxes. Proceedings for the assessment and collection of taxes are administrative, and not judicial. *McMahon* v. *Palmer* (1886) 102 N. Y. 176, 55 Am. Rep. 796, 6 N. E. 400, affirmed in (1889) 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324, citing *Re New York Protestant Episcopal Public School* (1864) 31 N. Y. 574.

The New York rapid transit act, 1898, chap. 4. *Re Rapid Transit R. Comrs.* (1892) 65 Hun, 63, 19 N. Y. Supp. 561.

The provision of the New York consolidation act of 1882, chap. 410, as amended by chap. 84, Laws 1887, which authorizes the board of health to require a supply of water in tenement houses under specified conditions. *Health Department* v. *Trinity Church* (1895) 145 N. Y. 32, 27 L. R. A. 710, 45 Am. St. Rep. 579, 39 N. E. 833.

An order of the health department of the city of New York, prohibiting the occupation of certain premises until prescribed repairs had been made. No notice of the order was given and none was required, for the action of the health department was not final and conclusive. Notwithstanding the order, the questions involved were still open to judicial inquiry. *Egan* v. *Health Department* (1897) 20 Misc. 38, 45 N. Y. Supp. 325, Sp. T.

The provisions of various statutes relating to the widening of Elm street, in the city of New York. *Browning* v. *Collis* (1897) 21 Misc. 155, 47 N. Y. Supp. 76, Sp. T.

The provisions of the New York charter, §§ 707, 712, as amended by the act of 1901, chap. 466, relating to commitments of persons convicted of vagrancy. *People ex rel. Abrams* v. *Fox* (1902) 77 App. Div. 245, 79 N. Y. Supp. 56.

*Niagara reservation.*—The provision in the Niagara Reservation act of 1883, chap. 336, which made final and conclusive the second report of the commissioners appointed to appraise damages. *Re State Reservation* (1885) 37 Hun, 537, (1886) 102 N. Y. 734, 7 N. E. 916. The same subject was considered in a proceeding under the railroad law. *Re Prospect Park & Coney Island R. Co.* (1881) 85 N. Y. 489.



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*Nuisances.*—The metropolitan sanitary district act of 1866, chap. 74, which authorized the board of public health to abate nuisances. Summary proceedings for the abatement of nuisances are due process of law within the meaning of the Constitution. *Cooper* v. *Schultz* (1866) 32 How. Pr. 107; *Metropolitan Bd. of Health* v. *Heister* (1868) 37 N. Y. 661.

The act of 1892, chap. 646, prohibiting in certain localities the business of fat rendering or other specified noxious manufactures. *People* v. *Rosenberg* (1893) 67 Hun, 52, 22 N. Y. Supp. 56. The judgment of conviction was reversed on other points in (1893) 138 N. Y. 410, 34 N. E. 285.

*Recognizance.*—The remedy under the act of 1844, chap. 315, which authorizes a summary judgment on a forfeited recognizance. The execution of a recognizance was a voluntary act, and a waiver of ordinary legal proceedings for its enforcement. *People* v. *Quigg* (1874) 59 N. Y. 83.

*Summons, substituted service.*—Section 435 of the Code of Civil Procedure, providing for a substituted service of summons. *Continental Nat. Bank* v. *Thurber* (1893) 74 Hun, 632, 26 N. Y. Supp. 956, affirmed in (1894) 143 N. Y. 648, 37 N. E. 828.

*Taxes.*—The act of 1873, chap. 119, which authorized boards of supervisors to determine claims for taxes erroneously paid on account of disputed town boundaries. The remedy was cumulative. A town is not deprived of its property without due process of law, and the taxpayers specially interested and the towns were entitled to be heard before the board of supervisors. This, if on reasonable notice, was due process of law. *People ex rel. Witherbee* v. *Essex County* (1877) 70 N. Y. 228.

The provisions of the tax law authorizing the collector to levy and sell, for an unpaid tax, any property in the possession of the person from whom the tax is due. "Possession under the statute is not merely a badge of ownership, it is title, so as to subject the property to seizure and sale for a tax against the possessor. . . Although the right to take the plaintiff's property for the tax was not adjudged in a judicial proceeding, the act of the legislature and the acts of the administrative officers thereunder, is, we think, due process of law within the meaning of the Constitution." *Hersee* v. *Porter* (1885) 100 N. Y. 403, 3 N. E. 338.

The act of 1881, chap. 689, relating to certain public improvements in the town of New Lots, Kings county, directing a levy of the amount due to the state on account of the cancelation of taxes which had been held to be invalid, and directing the apportionment

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of the amount on property therein specified, after a hearing by the owners thereof. The property owners were not entitled to be heard as to the aggregate amount to be collected; that subject was within the discretion of the legislature, and the amount could not be changed by any hearing. "The legislature determines expenditures and amounts to be raised for their payment. . . . It may err, but the courts cannot review its discretion." *Spencer* v. *Merchant* (1885) 100 N. Y. 585, 3 N. E. 682, affirmed in (1887) 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

The act of 1882, chap. 287, making a tax deed in certain counties conclusive after a lapse of fifteen years. It does not assume to cure jurisdictional defects. "It raises a conclusive presumption of regularity, but leaves the question of the assessor's jurisdiction and authority unaffected." *Ensign* v. *Barse* (1887) 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401.

The provisions of the Lewis county tax law (chap. 153, Laws 1884, as amended by chap. 215, Laws 1885) prohibiting the owner of land on which the tax has been returned as unpaid, from peeling bark or cutting timber on such land until the tax is paid, subject to a penalty of $500. It is not an unwarrantable interference with the use of property by its owner. He owes a duty to the state, which has a right to preserve the property on which the lien and the tax attaches, and prevent its destruction until the tax is paid. *Prentice* v. *Weston* (1888) 111 N. Y. 460, 18 N. E. 720.

Statutes transferring from the comptroller to county treasurers power to sell land for unpaid taxes do not deprive persons of property without due process of law. *People* v. *Ulster County* (1885) 36 Hun, 491.

The provision of the charter of the city of New Rochelle, 1899, chap. 128, § 208, fixing the lineal assessment for a local improvement begun under the previous village charter. *People ex rel. Scott* v. *Pitt* (1901) 64 App. Div. 316, 72 N. Y. Supp. 191, affirmed in (1902) 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662.

The special franchise tax law of 1899, chap. 712. *New York ex rel. Brooklyn City R. Co.* v. *State Tax Comrs.* (1905) 199 U. S. 48, 50 L. ed. 79, 25 Sup. Ct. Rep. 713, affirming (1903) 174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69.

*Trusts.*—The act of 1893, chap. 452, which provided, among other things, that when the beneficiary of the income of personal property should become entitled to the remainder in the trust fund, he might execute a release or conveyance thereof to himself, whereupon the trust estate should cease and determine and the whole estate should be merged in the remainder, or reversion. *Re Heinze* (1897) 20 Misc. 371, 46 N. Y. Supp. 247. The same subject is considered in

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*Oviatt* v. *Hopkins* (1897) 20 App. Div. 168, 46 N. Y. Supp. 959, and *Newcomb* v. *Newcomb* (1900) 33 Misc. 191, 200, 68 N. Y. Supp. 430.

*Vinegar act.*—The vinegar law of 1889, chap. 515. *People* v. *Girard* (1895) 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823.

*White Plains.*—The White Plains act of 1890, chap. 315, authorizing the trustees to change the grade of streets. An abutting owner has no vested interest in the grade of a street, and a change of such grade is not the taking of private property. *Smith* v. *White Plains* (1893) 67 Hun, 81, 22 N. Y. Supp. 450.

## NOT DUE PROCESS.

*Animals.*—The act of 1862, chap. 459, to prevent animals running at large, so far as it assumes to give the owner of premises the right to seize and sell animals trespassing thereon. "The legislature transcends the limits of its authority when it enacts that one citizen may take, hold, and sell the property of another, without judicial process, and without notice to the owner, as a mere penalty for a supposed private injury." *Rockwell* v. *Nearing* (1866) 35 N. Y. 302.

An ordinance of the city of Brooklyn providing that the owner of a dog that attacked a person elsewhere than on the owner's premises might be required immediately to kill such dog, but which ordinance did not require notice to the owner or an opportunity to be heard. The common council had no power to make an ordinance authorizing the destruction of property without notice. *People ex rel. Shand* v. *Tighe* (1894) 9 Misc. 607, 30 N. Y. Supp. 368, Sp. T. Gaynor, J.

*Appeal.*—"An appeal brought pursuant to a statute which authorizes an appeal after the time provided by law had expired, or authorizes a further appeal after the only appeal authorized by law had been brought and finally decided, although it might result in the reversal of the judgment, and be in form a judicial proceeding, would not be what is known as due process of law, which is not satisfied by a judgment based upon an unconstitutional statute. A judgment is a contract which is subject to interference by the courts so long as the right of appeal therefrom exists, but when the time within which an appeal may be brought has expired, it ripens into an unchangeable contract, and becomes property, which can be disposed of or affected only by the act of the owner or through the power of eminent domain. It is then beyond the reach of legislation affecting the remedy, because it has become an absolute right,

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which cannot be impaired by statute." *Germania Sav. Bank* v. *Suspension Bridge* (1899) 159 N. Y. 362, 54 N. E. 33.

*Cause of action.*—"A vested right of action is property in the same sense in which tangible things are property, and it 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. Every man is entitled to a certain 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. . . . 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." *Cody* v. *Dempsey* (1903) 86 App. Div. 335, 83 N. Y. Supp. 899, reaffirming as to § 640*d* of the Penal Code the views expressed by the same court in *Grossman* v. *Caminez* (1903) 79 App. Div. 15, 79 N. Y. Supp. 900, cited in the note on police power.

*Commitment.*—A final commitment under the act of 1892, chap. 467, to St. Saviour's Sanitarium of an alleged inebriate female without notice or hearing, and without her presence at any stage of the proceeding. The objection that the proceeding was without notice was not cured by the provision in the act that nothing therein contained should be construed to limit the right of the courts to review the detention by habeas corpus. She was entitled to notice at some stage of that proceeding before final judgment. *People ex rel. Ordway* v. *St. Saviour's Sanitarium* (1898) 34 App. Div. 363, 56 N. Y. Supp. 431.

*Compulsory arbitration.*—After a claim against a city has been rejected by the courts as invalid, the legislature cannot direct its submission to and determination by arbitrators without the city's consent. Such an arbitration is not due process of law. *Baldwin* v. *New York* (1865) 45 Barb. 359; *People ex rel. Baldwin* v. *Haws* (1862) 37 Barb. 440.

*Contempt.*—A person cannot be punished by imprisonment for contempt without notice and an opportunity to be heard before a court clothed with authority to act and decide the questions involved. Before a party can be adjudged guilty of contempt for the nonpayment of alimony, a personal demand must be made upon him, and an order to show cause must also be served upon him personally; service upon his attorney is not sufficient. *Goldie* v. *Goldie* (1902) 77 App. Div. 12, 79 N. Y. Supp. 268.

An order striking out a defendant's answer in an action for

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divorce because of his refusal to pay alimony and counsel fees. The right to defend an action is property, and is protected by the 14th Amendment. *Sibley* v. *Sibley* (1902) 76 App. Div. 132, 78 N. Y. Supp. 743.

*Corporations.*—A statute cannot be sustained which assumes to validate subscriptions to the capital stock of a railroad company because the cash payment required to make the subscription valid has not in fact been paid. The legislature cannot thus make a binding contract where none existed before; it would take property without due process of law. *New York & O. Midland R. Co.* v. *Van Horn* (1874) 57 N. Y. 473.

The act of 1886, chap. 271, directing that property and franchises of a dissolved street surface railroad corporation be sold at public auction to any other corporation possessing similar powers; and the act of 1886, chap. 310, directing that the affairs of any corporation dissolved by statute be wound up in an action for that purpose, to be brought by the attorney general, with a sale of its property by a receiver. The consents acquired by the dissolved corporation were property, and "the attempt to transfer them to a third party by the mere force of the statute, without the consent or knowledge of their lawful owners, was an effort to change their ownership without due process of law." *People* v. *O'Brien* (1888) 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

A decree of the General Assembly of Knights of Labor of America, annulling the charter of a local assembly, and confiscating its property. "Bills confiscating the property of citizens or of associations, without judicial process, are forbidden by the Constitution; and no person, corporation, or association authorized to acquire and hold property, can be devested of it by the fiat of any organization, nor in any way without its consent, or by due process of law." *Wicks* v. *Monihan* (1891) 130 N. Y. 232, 14 L. R. A. 243, 29 N. E. 139, following *Austin* v. *Searing* (1859) 16 N. Y. 112, 69 Am. Dec. 665, where the same rule was applied in relation to the action of the Grand Lodge of Odd Fellows, in annulling the charter of a local lodge.

The act of 1897, chap. 281, amending § 394 of the Code of Civil Procedure, which had the effect to reduce from six years to three years the time within which an action might be brought against a director of a moneyed corporation to enforce a common law liability. The legislature may shorten statutes of limitation, but it must allow a reasonable time for suits upon existing causes of action. A

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right of action "is property, and if a statute of limitations, acting upon that right, deprives the claimant of a reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be deprived of property without due process of law." *Gilbert* v. *Ackerman* (1899) 159 N. Y. 118, 45 L. R. A. 118, 53 N. E. 753.

The act of 1895, chap. 417, which requires every street surface and elevated railroad company in a city or village to transport without charge a policeman or fireman who has received a certificate of appointment from specified authorities. It was an invasion of property rights. *Wilson* v. *United Traction Co.* (1902) 72 App. Div. 233, 76 N. Y. Supp. 203.

*Decedents' estates.*—The act of 1870, chap. 394, which authorized the examination of a person alleged to have in his possession property belonging to a decedent's estate, and the issue of a warrant by the surrogate to seize such property and deliver it to the executor or administrator. *Re Beebe* (1880) 20 Hun, 462.

*Drainage.*—The drainage act of 1867, chap. 372. No opportunity was given to the owners of land to object to the assessment. A grievance day—"an opportunity to be heard in respect to the justice and correctness of a proposed assessment—is a necessary part of the due process of law for the levying of assessments on property in this state for any purpose." *People ex rel. Pulman* v. *Henion* (1892) 64 Hun, 471, 19 N. Y. Supp. 488.

*Evidence.*—A commissioner appointed in this state to take the deposition of a witness in an action pending in another state derives no authority from, and does not exercise any judicial function under, the laws of this state; his power to act is derived entirely from the appointment of the court of another state. The commissioner, who was a notary public, is not connected with the judicial department of the government of this state. "He is not under the control of any of the officers or departments of the state government. He cannot be punished for an abuse of his power by this state." A warrant issued by him committing a witness for refusing to answer alleged pertinent questions, but which does not in terms adjudge him guilty of contempt, is not due process of law, which means "law in its regular course of administration through courts of justice." *People ex rel. MacDonald* v. *Leubischer* (1898) 34 App. Div. 577, 54 N. Y. Supp. 869.

*Excise.*—The act of 1855, chap. 231, "to prevent intemperance, which devoted to destruction intoxicating liquors kept or used contrary to its provisions." Such liquor was property, and could not

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thus be summarily destroyed. *Wynehamer* v. *People* (1856) 13 N. Y. 378.

The supreme court in *People* v. *Quant* (1855) 12 How. Pr. 83, had sustained the act. Referring to this decision Judge Comstock said in the *Wynehamer Case* that it exhibited a "singular misapprehension" in regard to the principle enunciated by the court of appeals, and which was deemed settled by ample authority.

*Fire limits.*—The common council of Buffalo, having granted permission for the erection of certain wooden buildings, a subsequent rescission of the resolution without the owner's consent was held invalid on the ground that the owner of the land, having entered into contracts for the erection of the buildings, and a portion of the materials therefor having been delivered, he had acquired property rights under the original resolution which could not be taken away. *Buffalo* v. *Chadeayne* (1889) 27 N. Y. S. R. 60, 7 N. Y. Supp. 501, affirmed in (1892) 134 N. Y. 163, 31 N. E. 443.

*Foreclosure.*—A foreclosure judgment which includes property not included in the complaint, and which was not embraced in the litigation. *Clapp* v. *McCabe* (1895) 84 Hun, 379, 32 N. Y. Supp. 425 (1898) 155 N. Y. 525, 50 N. E. 274.

*Franchise.*—The town of Jamaica granted a franchise to a gas company to lay conductors "for conducting gas in and through the public streets and highways of said town;" afterwards a portion of the town was incorporated as the village of Richmond Hill. The franchise was construed to include not only existing streets, but also streets which might thereafter be enlarged, changed, or opened, and it was not affected by the incorporation of the village. The village might impose reasonable regulations concerning the exercise of the franchise, but it could not arbitrarily refuse permission to the company to place its conductors under the streets. The franchise is property, and such action by the village would deprive the company of its property without due process of law. *People ex rel. Woodhaven Gaslight Co.* v. *Deehan* (1897) 153 N. Y. 528, 47 N. E. 787.

A franchise granted to a street surface railroad company, especially when consummated by obtaining the consents of municipal authorities and property owners, is property of which the company cannot be deprived without compensation; hence, subsequent action by the city in laying out a park-way under legislative authority could not deprive the company of its right to construct its road on a street afterwards included in such park-way. *Coney Island, Ft.*

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*H. & B. R. Co.* v. *Kennedy* (1897) 15 App. Div. 588, 44 N. Y. Supp. 825.

The act of 1898, chap. 151, amending the act of 1882, chap. 92, by omitting therefrom the provision authorizing the Rochester & Charlotte Turnpike Company to impose a toll for the use of its road by velocipedes and bicycles. The franchise conferred by the act of 1882 was property of which the company could not be deprived except by eminent domain. *Rochester & C. Turnp. Road Co.* v. *Joel* (1899) 41 App. Div. 43, 58 N. Y. Supp. 346.

*Indemnitors.*—The mandatory provision in § 1421 of the Code of Civil Procedure as amended in 1887, requiring the substitution of indemnitors in an action against the sheriff. The court has no discretion; indemnitors may or may not be responsible. The court cannot compel them to furnish security, and they may not be able to do so. *Levy* v. *Dunn* (1899) 160 N. Y. 504, 73 Am. St. Rep. 699, 55 N. E. 288.

*Inebriate asylum.*—The act of 1865, chap. 266, "for the better regulation and discipline of the New York State Inebriate Asylum," which authorized the commitment of an inebriate to the institution on *ex parte* affidavits and without an opportunity to be heard. The alleged inebriate was deprived of his liberty without due process of law. *Re Janes* (1866) 30 How. Pr. 446, Balcom, J.

*Labor law.*—The provision in § 3 of the labor law, requiring contractors on public works, either with the state or a municipal corporation, to pay the prevailing rate of wages in the locality where the work is performed, and requiring each such contract to contain a stipulation to the effect that a violation of the foregoing provision shall render the contract void. Taxpayers have a right to assail the statute. "Local property owners, who are the parties that in the end must bear the expense of the improvement, are entitled to the benefit of the best judgment and discretion of the city officers in making the contract for the work. To the extent that such judgment and discretion is taken away by arbitrary enactments not in their interest, but in favor of opposing interests, their constitutional rights of liberty and property are invaded," and their property is taken without due process of law. The legislature cannot deprive the contractor of the benefit of his contract "by imposing burdensome conditions with respect to the means of performance, or to regulate the rate of wages. . . . When he is not left free to select his own workmen upon such terms as he and they can fairly agree upon, he is deprived of that liberty of action and right to accumulate property embraced within the guaranties of the

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Constitution, since his right to the free use of all his faculties in the pursuit of an honest vocation is so far abridged. . . . A law that restricts freedom of contract on the part of both the master and servant cannot in the end operate to the benefit of either." *People ex rel. Rodgers* v. *Coler* (1901) 166 N. Y. 1, 15, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716.

*Married women.*—The act of 1848, chap. 200, "for the more effectual protection of the property of married women," which provided that the property of a woman then married should not be "subject to the disposal of her husband, but shall be her sole and separate property," so far as it affected the husband's title to a legacy to his wife which had already become vested. *Westervelt* v. *Gregg* (1854) 12 N. Y. 202, 62 Am. Dec. 160.

*Metropolitan police district.*—The metropolitan police district excise act of 1866, chap. 578, which provided for the seizure and, at least, an implied confiscation of intoxicating liquors under specified conditions. *People* v. *Krushaw* (1866) 31 How. Pr. 344, note, General Sessions.

*Mileage books.*—The 2-cent mileage book law of 1895, chap. 1027, as to a corporation previously chartered with the right to charge more than 2 cents per mile. *Beardsley* v. *New York, L. E. & W. R. Co.* (1900) 162 N. Y. 230, 56 N. E. 488, following *Lake Shore & M. S. R. Co.* v. *Smith* (1899) 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Watson* v. *Delaware. L. & W. R. Co.* (1900) 32 Misc. 311, 66 N. Y. Supp. 798, in which it is said that "this statute arbitrarily, without due process of law, deprives the defendant of the right to full compensation for services according to its charter."

*Monuments.*—The act of 1888, chap. 543, giving a lien for the unpaid purchase price of a monument, which lien might be asserted and the monument removed without notice to the purchaser. The act provides no tribunal before which the purchaser of a monument can appear and have his rights adjudicated, but assumes to take away his property and give it to another without any legal process, and without giving him an opportunity to be heard and defend his title and possession. *Brooks* v. *Tayntor* (1896) 17 Misc. 534, 40 N. Y. Supp. 445, Sp. T.

*New York city.*—The act of 1860, chap. 449, which required the city of New York to pay the sum which might be awarded against the city by arbitrators who were authorized to adjust and determine the damages due to contractors on account of certain public improvements. The city was, by the act, deprived of a right to a trial according to the course of the common law. *People ex rel. Baldwin*

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v. *Haws* (1862) 37 Barb. 440; *Baldwin* v. *New York* (1864) 42 Barb. 549 (1864) 2 Keyes, 387.

The provisions of §§ 707–811 of the Greater New York charter of 1897, chap. 378, which, among other things, authorized the superintendent of the workhouse to determine by investigation whether a person committed to the institution is identical with some former prisoner, and report to the commissioner of correction, who, after confirming the identity, is required to fix the term of imprisonment of the person committed. The term is dependent upon the action of the superintendent and commissioner in determining the question of identity. The person charged has no notice and no opportunity to be heard, and is therefore deprived of liberty without due process of law. *Re Kenny* (1898) 23 Misc. 9, 49 N. Y. Supp. 1037, affirmed in (1898) 30 App. Div. 624, 53 N. Y. Supp. 1111. These provisions were continued with modifications in the revised charter of 1901, chap. 466, and as modified the sections were sustained in *People ex rel. Abrams* v. *Fox* (1902) 77 App. Div. 245, 79 N. Y. Supp. 56.

The act of 1900, chap. 663, amending § 1212 of the Greater New York charter of 1897, prohibiting the disposal of garbage by specified methods in the borough of Brooklyn, and requiring the immediate removal of any such business to some place outside the borough. This was held invalid as to an existing corporation, carrying on this business under a contract with the city, at a place chosen by the municipal authorities, and which business did not create a nuisance, and was not detrimental to the public health. *New York Sanitary Utilization Co.* v. *Health Department* (1901) 61 App. Div. 106, 70 N. Y. Supp. 510.

The New York City Riverside Park act of 1896, chap. 727. It applied, so far as practicable, other provisions of law relating to taking property for public purposes. The court held that this was permissive only, and was not a sufficient compliance with the rule requiring notice in proceedings to take private property for a public purpose, and that the act was therefore unconstitutional. "The matter of notice must be not merely permissive, but actually prescribed by the legislature in order that the assessment may be valid." *Re New York* (1901) 34 Misc. 719, Special Term, 70 N. Y. Supp. 227.

*Notice of assessment.*—The act of 1870, chap. 619, amending chap. 217, Laws 1869, which authorized an assessment for a public improvement in the town of New Lots, Kings county, without notice to the owners of the land. "The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. . . . The constitutional validity of law is to be tested, not by what has

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been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice." *Stuart* v. *Palmer* (1878) 74 N. Y. 183, 30 Am. Rep. 289; *Re Middletown* (1880) 82 N. Y. 196; *Re Livingston Street* (1880) 82 N. Y. 621, where it was held that statutes were not invalid because not requiring notice to landowners of an application for the appointment of commissioners. The constitutional requirement is satisfied if provision is made for notice of a hearing by commissioners appointed to appraise the damages. *People ex rel. Griffin* v. *Brooklyn* (1851) 4 N. Y. 419, 55 Am. Dec. 266; *Re Lowden* (1882) 89 N. Y. 548; *Re De Peyster* (1882) 80 N. Y. 565; *Re New York* (1885) 99 N. Y. 569, 2 N. E. 642; *Spencer* v. *Merchant* (1885) 100 N. Y. 585, 3 N. E. 682, affirmed in 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921, in which the court sustained the act of 1881, chap. 689, which re-levied a part of the assessment covered by the acts of 1869 and 1870, which were held invalid in *Stuart* v. *Palmer* (1878) 74 N. Y. 183, 30 Am. Rep. 289; *Re Amsterdam* (1891) 126 N. Y. 158, 27 N. E. 272; *Re Brooklyn* (1895) 87 Hun, 54, 33 N. Y. Supp. 869.

*Notice of injury.*—The provision in the Port Jervis charter (1896, chap. 529, § 82) which requires a person receiving an injury that might be the subject of an action to give notice thereof within forty-eight hours after the accident, or be excluded from any right to maintain an action therefor. A right of action for such an injury is property. The short limitation in this statute is unreasonable. "All limitation laws 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;" and these laws must also "proceed on the idea that the party has full opportunity afforded him to try his right in the courts." (Cooley, Const. Lim. 6th ed. p. 449.) "Due process of law requires that the party should have a fair opportunity to be heard before the issues are decided." In this case the injury sustained by the plaintiff did not develop until after the time limited by the charter for the service of a notice, and a notice was not served until thirty days after the accident. It was held that the plaintiff was entitled to recover notwithstanding his failure to give the notice within the time fixed by the charter. *Barry* v. *Port Jervis* (1901) 64 App. Div. 268, 72 N. Y. Supp. 104.

*Oleomargarine act.*—The oleomargarine act of 1884, chap. 202, § 4. The act "prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race. Measures of this kind are

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dangerous even to their promoters." Citizens should not be excluded from industries, lawful in other respects, in order to protect another class against competition. Such legislation, including this act, violates the letter as well as the spirit of the Constitution. *People* v. *Marx* (1885) 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

*Partition, unknown heirs.*—Section 841 of the Code of Civil Procedure, as amended in 1889, chap. 40, providing that if the proceeds of a sale in partition, paid into court for unknown heirs, remain unclaimed for twenty-five years, such unknown heirs shall be presumed to be dead, and § 1582, which directs the disposition of such proceeds, violate the constitutional provision against taking property without due process of law. *People ex rel. Miller* v. *Ryder* (1891) 124 N. Y. 500, 26 N. E. 1040; *People ex rel. Griffin* v. *Ryder* (1892) 65 Hun, 175, 19 N. Y. Supp. 977.

*Passage tickets.*—Section 615, as added, and § 616 of Penal Code, as amended by chap. 506 of the Laws of 1897, prohibiting the sale of passage tickets on vessels or railroad trains except by agents specially authorized for that purpose by the persons or corporations owning or operating such vessels or trains. "Brokerage in such tickets has been a lawful business in this state for many years, and many persons have pursued it. It is still a lawful business, although the right to engage in it is limited to such persons as may be appointed by the transportation companies." The act interferes with the liberty of the citizen, and is void. *People ex rel. Tyroler* v. *City Prison* (1898) 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006.

*Private roads.*—1 Rev. Stat. 513, § 77, authorizing a private road *lor* v. *Porter* (1843) 4 Hill, 140, 40 Am. Dec. 274. This subject is to be laid out over the lands of a person without his consent. *Tay*now included in the Constitution, article 1, § 7.

*Prizes with food products.*—Section 355*a* of the Penal Code, which prohibits the giving of prizes on the sale of articles of food. "This law interferes with the free sale of food, for the condition is imposed that no one shall sell food and at the same time, and as part of the transaction, give away any other thing." The act infringes "upon the liberty of the owner or dealer in food products to pursue a lawful calling in a proper manner," and, at least to some extent, deprives a person of his property by curtailing his power of sale. It is not a valid exercise of the police power. *People* v. *Gillson* (1888) 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

*Procedure, preferences in civil actions.*—Section 793 of the Code of Civil Procedure, as amended in 1904, chap. 173, which required

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the court to designate a day certain for the trial of a preferred cause, and to try the cause on that day. The party against whom such a preferred cause is moved may be deprived of an opportunity to prepare for trial, and may be compelled to go on trial without proper preparation, or else suffer a default. He may, by the enforcement of the rule, be deprived of life, liberty, or property without due process of law. "The process of the law includes every step, from summons to judgment; and if a party is deprived of any right usually accorded to others, it is not due process of law." *Riglander* v. *Star Co.* (1904) 98 App. Div. 101, 90 N. Y. Supp. 772. See also *Martin's Bank* v. *Amazonas Co.* (1904) 98 App. Div. 146, 90 N. Y. Supp. 734.

*Proceeding without process.*—A proceeding *in rem* without personal service or voluntary appearance, in which property is not seized or attached, nor within the jurisdiction of the court. *Ward* v. *Boyce* (1897) 152 N. Y. 191, 36 L. R. A. 549, 46 N. E. 180.

*Real estate sales in certain cities.*—Section 640*d* of the Penal Code, added in 1901, chap. 128, making criminal in cities of the first and second classes an offer of real property for sale without the written authority of the owner or his agent, or of a person who has made a written contract for the purchase of such property. It is an unwarrantable interference with the liberty of the citizen. *Grossman* v. *Caminez* (1903) 79 App. Div. 15, 79 N. Y. Supp. 900; *Cody* v. *Dempsey* (1903) 86 App. Div. 335, 83 N. Y. Supp. 899.

*Receivers.*—Taking a person's property from him by an unauthorized proceeding, and placing it in the hands of a receiver, and then subjecting him to the expenses of the proceeding. He is entitled to the restoration of his property, and cannot be charged with the expenses of the receivership. *Weston* v. *Watts* (1887) 45 Hun, 219.

*Redemption on execution sale.*—Section 1440 of the Code of Civil Procedure as amended in 1881, chap. 681, relating to the sale, redemption, and conveyance of real property sold on execution. "The obvious intention of the act is to take away from the owner all remedy for the recovery of his property, except upon the payment by him to his adversary of a sum of money which must frequently be greater than the value of the property itself." It takes property without due process of law. *Gilman* v. *Tucker* (1891) 128 N. Y. 190, 13 L. R. A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040.

*Sheriff's costs on attachment.*—Under § 709 of the Code of Civil Procedure the sheriff, after an attachment has been vacated, cannot, as against the real owner, retain possession of the property until his costs and expenses are paid. This part of the section is unconsti-

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tutional. The sheriff's claim is against the plaintiff in the attachment, and to permit the sheriff to hold the property as against the true owner would be "to take the property of one party against his or its consent and apply it to the payment or discharge of the obligations of another." *Bowe* v. *United States Reflector Co.* (1885) 36 Hun, 407.

*Summary proceedings against certain trespassers.*—The act of 1896, chap. 313, authorizing a summary and exclusive proceeding for the seizure, forfeiture, and sale of any boat or vessel used by any person in interfering with oysters or other shellfish belonging to another. Neither the act condemned nor the property is a nuisance. The legislature cannot, when no public right or interest is involved, "arbitrarily declare property a public nuisance for the purpose of devoting it to destruction," nor can the legislature forfeit to the state property of one person "upon the sole ground that he had, in some manner, interfered with the private rights of another." The legislature cannot arbitrarily "provide that any procedure it may choose to declare such shall be regarded as due process of law." *Colon* v. *Lisk* (1897) 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

*Tenement houses.*—The act of 1884, chap. 272, "to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses in certain cases." The constitutional provision may be violated "without the physical taking of property for public or private use. . . . Its capability for enjoyment and adaptability to some use are essential characteristics and attributes, without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property." *Re Jacobs* (1885) 98 N. Y. 98, 50 Am. Rep. 636.

*Transfer tax.*—The act of 1889, chap. 76, amending the tax law in relation to taxable transfers, providing for a tax upon remainders and reversions which had vested prior to June 30, 1885, upon their coming into actual possession or enjoyment. *Re Pell* (1902) 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789.

*Vaccination.*—An order of the Brooklyn health commissioner for the compulsory isolation of a person who refused to be vaccinated. Such isolation can be ordered only when persons are infected with or exposed to contagious or infectious diseases. Such exposure must be an actual fact, and not a mere possibility. *Re Smith* (1895) 146 N. Y. 68, 28 L. R. A. 820, 48 Am. St. Rep. 769, 40 N. E. 497.

*Villages.*—Under the village water act of 1875, chap. 181, author-

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izing the assessment of water rents, the owner of the property is entitled to notice of such assessment and an opportunity to be heard. *Dasey* v. *Skinner* (1890) 33 N. Y. S. R. 15, 11 N. Y. Supp. 821.

*Vinegar.*—The provision in § 50 of the agricultural law which "allows farmers to manufacture, and farmers and purchasers from them to deal in, cider vinegar which does not contain an acidity equivalent to the presence of at least 4½ per centum by weight of absolute acetic acid, while it prohibits all other persons from manufacturing and dealing in cider vinegar that has not that amount of acidity. This is clearly a discrimination in favor of the farmer," and is not due process of law. *People* v. *Windholz* (1904) 92 App. Div. 569, 86 N. Y. Supp. 1015.

*Warehousemen.*—The provision in the act of 1895, chap. 633, which prohibits an action against a warehouseman concerning property deposited with him, unless he claims some right, title, or interest in it other than a lien. *Milligan* v. *Brooklyn Warehouse & Storage Co.* (1901) 34 Misc. 55, 68 N. Y. Supp. 744, Gaynor, J.

The warehouse act of 1895, chap. 633. *Follett Wool Co.* v. *Albany Terminal Warehouse Co.* (1901) 61 App. Div. 296, 70 N. Y. Supp. 474.

*Witness.*—The provision in § 618*a* of the Code of Criminal Procedure (added in 1902, chap. 94) which authorized the issue of a subpœna by a court of record in this state to compel a person to attend a court of record in another state, as a witness therein. It deprives such person of his liberty without due process of law. *Re Pennsylvania* (1904) 45 Misc. 46, 90 N. Y. Supp. 808. See also *Re Grout* (1905) 105 App. Div. 98, 93 N. Y. Supp. 711, which denies to a judge power *ex parte* to commit a defaulting witness under § 856 of the Code of Civil Procedure.

## PRIVATE PROPERTY CANNOT BE TAKEN FOR PUBLIC USE WITHOUT COMPENSATION.

*In general.*—"The term 'property' is of the largest import, and embraces every mode in which it may be applied to the public use, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments." *Caro* v. *Metropolitan Elev. R. Co.* (1880) 14 Jones & S. 138, where it was held that polluting the air of a dwelling house with noisome, though not unwholesome, smells, which interferes with the enjoyment of life and property by rendering such enjoyment uncomfortable, is a taking of property.

"Private property may be constitutionally taken for public use in two modes; that is to say, by taxation and by right of eminent

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domain. These are rights which the people collectively retain over the property of individuals, to resume such portions of it as may be necessary for public use. The right of taxation and the right of eminent domain rest substantially on the same foundation. Compensation is made when private property is taken in either way. Money is property. Taxation takes it for public use, and the taxpayer receives, or is supposed to receive, his just compensation in the protection which government affords to his life, liberty, and property, and in the increase of the value of his possessions by the use to which the government applies the money raised by the tax. When private property is taken by right of eminent domain, special compensation is made." Judge Ruggles, in *People ex rel. Griffin* v. *Brooklyn* (1851) 4 N. Y. 419, 55 Am. Dec. 266.

"Individuals are protected in the enjoyment of their property, except so far as it may be taken in two ways; *viz.*, as a public tax, upon principles of just equality, or for public use, with a just compensation, ascertained according to the provisions of the Constitution." *People ex rel. Post* v. *Brooklyn* (1849) 6 Barb. 209.

The constitutional provision does not apply where property is not taken, and where the only claim relates to incidental or consequential injuries of indefinite amount, not capable of estimate. Such injuries may be the subject of an independent action for damages. *Drake* v. *Hudson River R. Co.* (1849) 7 Barb. 508, but it was held in *Radcliff* v. *Brooklyn* (1850) 4 N. Y. 195, 53 Am. Dec. 357, that an action would not lie to recover damages resulting from excavations made by a municipal corporation within the boundaries of a street, in consequence of which a portion of the adjoining land fell into the street, no negligence being imputed to the municipal authorities. "An act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow."

The constitutional prohibition against taking private property without compensation does not apply to a preliminary survey which a railroad company is authorized to make under its charter, if the statute requires the company to make compensation for property actually taken. "Unless the legislature possess power to authorize an entry for this purpose, the clause of the Constitution which, by implication, permits private property to be taken for public use upon making just compensation, . . . would be nugatory." The Constitution does not prohibit the legislature from permitting an entry to be made upon the property of an individual for the purpose of a



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preliminary examination. *Polly* v. *Saratoga & W. R. Co.* (1850) 9 Barb. 449.

No private property is taken in the constitutional sense by a judgment recovered against a city or county under the riot act of 1855, chap. 428. The judgment is to be paid from money raised by taxation. *Davidson* v. *New York* (1864) 27 How. Pr. 342.

A statute which requires an owner of property to pay a portion of the expense of a water meter does not take property without compensation, within the meaning of the Constitution. It is a police regulation. *Hill* v. *Thompson* (1882) 16 Jones & S. 481.

"The Federal government, as an independent sovereignty, has the power of condemning land within the states for its own use," but it "may lay aside its sovereignty, and, as a petitioner, enter the state courts and there accomplish the same end through proceedings authorized by the state legislature." The state may thus delegate its powers to an "independent political corporation where the use is public and the convenience is shared by its own citizens." *Re United States* (1884) 96 N. Y. 227, construing chap. 147, Laws 1876, relating to Spuyten Duyvil creek.

The legislature has no power to authorize experiments as to new methods of railroad construction and operation which involve the taking or impairment of private property, without providing compensation to the owner. It was accordingly held that the act of 1885, chap. 554, which provided for the construction of an "illustrative section" of an elevated railroad in New York, was invalid, for the reason, among other things, that it made no provision for compensation to abutting owners or owners of the fee of the street. *People ex rel. Harvey* v. *Loew* (1886) 102 N. Y. 471, 7 N. E. 297.

"A municipal corporation, in the exercise of its discretionary or judicial power of determining when, where, and how to make improvements, such as streets, sidewalks, sewers, etc., has the right to do so upon a plan which substantially involves the appropriation by it of the property of a citizen to the public use." *Seifert* v. *Brooklyn* (1886) 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321.

*Bicycle path.*—A bicycle path may be established and maintained within the bounds of the highway under the authority of the act of 1899, chap. 152, as amended by Laws 1900, chap. 640, without compensation to an abutting owner; his right of access is not impaired by such bicycle path. *Ryan* v. *Preston* (1901) 59 App. Div. 97, 69 N. Y. Supp. 100.

*Canals.*—"When the public agents have entered upon and taken possession of the property in the manner contemplated by the stat-

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ute . . . the event has happened which entitles the owner to an appraisement of his damages." He is not obliged to wait until the completion of the work. *People ex rel. Utley* v. *Hayden* (1844) 6 Hill, 359.

When lands are to be taken for canal purposes "the appropriation is complete when the officers of the state have entered upon and taken possession of the land and constructed the canal upon it," and if compensation is made or provided for, the title of the state becomes complete, and the property does not revert on the abandonment of the land for canal purposes. *Rexford* v. *Knight* (1854) 11 N. Y. 308.

*Cause of action.*—The right to sue a specific individual is not a constitutional right which cannot be taken away, provided adequate and complete protection to the right of property is left. *Hein* v. *Davidson* (1884) 96 N. Y. 175, 180, 48 Am. Rep. 612.

*Cemeteries.*—Under the act of 1813 (2 R. L. 445, § 267), which, among other things, authorized the city of New York to make by-laws for regulating or preventing interments of the dead, a by-law prohibiting interments in a certain part of the city was sustained, and it was held to prohibit interments even in private property within the prescribed district. No property was taken by operation of the by-law; it was a police regulation, and no compensation was required. *Coates* v. *New York* (1827) 7 Cow. 585.

*Compensation.*—"Just compensation requires a full indemnity, and nothing more. Where the value of the benefit is certain, there can be no doubt as to the propriety of including it as a part of the compensation." The owner obtains a just compensation if he has a full equivalent for what he surrenders to the public. *Betts* v. *Williamsburgh* (1853) 15 Barb. 255, citing *Livingston* v. *New York* (1831) 8 Wend. 85, 22 Am. Dec. 622, where it is said that "the benefit accruing to a person whose land is taken for a street by the increased value of adjacent property belonging to him may be set off against the loss or damage sustained by him by the taking of his property for a street, and, if equal to the loss or damage, is a just compensation for the property so taken."

It is no objection to a statute providing for taking private property for a public use that payment of compensation is deferred until the amount needed can be raised by taxation, although meanwhile no interest is allowed, and the public assumes possession. *Hamersley* v. *New York* (1874) 56 N. Y. 533. This principle was applied in *New York* v. *Wright* (1890) 34 N. Y. S. R. 904, 12 N. Y. Supp. 20.

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"A provision for compensation is an indispensable attendant upon the due and constitutional exercise of the power of depriving an individual of his property under the right of eminent domain. . . . A law authorizing the taking of a man's land, and remitting him for his sole remedy for compensation to a fund to be obtained by taxation of certain specified lands in a limited district, according to benefits, is not a sure and adequate provision depending upon no 'hazard, casualty, or contingency whatever,' such as law and justice require to meet the constitutional requirement." There should at least be a "pledge of the faith and credit of the state, or of one of its political divisions, for the payment of the property owner, accompanied with practical and available provisions for securing the application of the public faith and credit to the discharge of the constitutional obligation of payment." *Sage* v. *Brooklyn* (1882) 89 N. Y. 189.

Benefit may be set off in ascertaining compensation. *Long Island R. Co.* v. *Bennett* (1877) 10 Hun, 91; *Genet* v. *Brooklyn* (1885) 99 N. Y. 296, 1 N. E. 777.

A provision is not unconstitutional which postpones payment of damages for a street improvement one year after the award. *Allen* v. *Northville* (1886) 23 N. Y. Week. Dig. 317.

The act of 1868, chap. 552, providing for laying out, making, grading, and regulating a highway in Westchester county, which required the expense to be assessed upon property lying within five hundred yards of either side of the highway, did not provide an adequate method for compensation. *Mitchell* v. *White Plains* (1891) 62 Hun, 231, 16 N. Y. Supp. 828, affirmed in (1893) 138 N. Y. 627, 33 N. E. 1083.

A statute authorizing property to be taken must provide for compensation, but it need not require such compensation to be prior to or coincident with the taking; it is enough if the provision for compensation is certain, definite, and adequate. *Re Gilroy* (1898) 32 App. Div. 216, 52 N. Y. Supp. 990, following *Re New York* (1885) 99 N. Y. 569, 2 N. E. 642; *Connolly* v. *Van Wyck* (1901) 35 Misc. 746, 72 N. Y. Supp. 382.

"Unless the statute imposes a duty to pay, it cannot be implied from the mere fact of the taking of land for a city street. The authority to take will be ineffectual unless accompanied with proper provision for payment. . . . A remedy for compensation contingent upon the realization of a fund from taxation for benefits within a limited assessment district does not meet the constitutional requirements," nor does "a local special assessment imposed on

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lands adjoining those taken for raising the money required to make payment therefor. . . . It is not certain, definite, or adequate, and does not provide payment without any unreasonable delay." *Re South Market Street* (1893) 67 Hun, 594, 22 N. Y. Supp. 432.

*Consequential damages.*—Consequential damages caused by the construction, in a proper manner, of public works by a municipal corporation, are not the subject of an action, and although the owner of land may be temporarily deprived of its use while such works are being constructed, it is not a taking of his property within the meaning of the Constitution, and he is not entitled to compensation. *Atwater* v. *Canandaigua* (1891) 124 N. Y. 602, 27 N. E. 385.

*Dower.*—An inchoate right of dower is not property the value of which can be estimated, and such a right is destroyed where the husband's land is taken by eminent domain under a statute which vests the absolute title in the municipal corporation. "Dower is not the result of contract, but a positive institution of the state, founded on reasons of public policy." *Moore* v. *New York* (1853) 8 N. Y. 110, 59 Am. Dec. 473.

*Drainage.*—While the occupancy and use of the lands for the purpose of constructing and maintaining a ditch for the draining of the low lands upon its borders, under the Royalton drainage act of 1867, chap. 774, did not deprive the owner of the fee, and gave the public but an easement, it was such an interference with the proprietary interests of the owner as entitled him to the just compensation made necessary by the Constitution as a condition precedent to the taking of private property for public use. *People ex rel. Williams* v. *Haines* (1872) 49 N. Y. 587; followed in *Re Cheesbrough* (1879) 17 Hun, 561, construing the act of 1871, chap. 566, relating to the drainage of certain lands in the city of New York.

*Foreign insurance companies.*—Statutes requiring outside insurance companies to pay to the fire department of New York a percentage of all premiums of insurance effected by such agent in that city as a condition of being permitted to do business in the state do not take property without compensation. "It is competent for the legislature to regulate the business of insurance within this state, to designate who may effect insurances, to prohibit agencies therefor, and to impose the payment of a tax as a condition to the establishment of such agencies. A tax upon a particular business may be levied for the benefit of a public charity, and may be made payable directly to the persons having the direction thereof. The fire department of the city of New York is the representative of a

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public charity." *Fire Department* v. *Noble* (1854) 3 E. D. Smith, 440; *Fire Department* v. *Wright* (1854) 3 E. D. Smith, 453.

*Franchise.*—A franchise is private property under this provision. It is taken when the party to whom it has belonged is deprived of the power or means of exercising it; but it is not taken when its emoluments are diminished by an improvement which does not destroy or impair such power or means; such a diminution is not within the constitutional prohibition. "An indirect reduction of the profits of a thing does not constitute a seizure of it, so long as its substance, whether physical or moral, remains intact." *Re Hamilton Avenue* (1852) 14 Barb. 405.

A corporate franchise includes the right to use the railroad for all purposes authorized by law, and also "the right or privilege to contract for its use with other railroads, and thereby derive a profit." These rights cannot be taken away except by eminent domain, or under the police power. *Roddy* v. *Brooklyn City & N. R. Co.* (1898) 32 App. Div. 311, 52 N. Y. Supp. 1025.

*Highways.*—An abutting owner, by which is meant "a person having land bounded on the side of a public street and having no title or estate in its bed or soil, and no interests or private rights in the street, except such as are incident to lots so situated," has "incorporeal private rights therein which are incident to his property, which may be so impaired as to entitle him to damages." *Abendroth* v. *Manhattan R. Co.* (1890) 122 N. Y. 1, 11 L. R. A. 634, 19 Am. St. Rep. 461, 25 N. E. 496; *Egerer* v. *New York C. & H. R. R. Co.* (1902) 70 App. Div. 421, 75 N. Y. Supp. 476.

"Abutters upon a public street claiming title to their premises by grant from the municipal authorities, which contains a covenant that a street to be laid out in front of such property shall forever thereafter continue for the free and common passage of, and as public streets and ways for, the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon. The ownership of such easement is an interest in real estate, constituting property within the meaning of that term as used in the Constitution of the state, and requires compensation to be made therefor before it can lawfully be taken from its owner for public use." *Lahr* v. *Metropolitan Elev. R. Co.* (1887) 104 N. Y. 268, 10 N. E.

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528. *Kane* v. *New York Elev. R. Co.* (1891) 125 N. Y. 164, 11 L. R. A. 640, 26 N. E. 278; *Pond* v. *Metropolitan Elev. R. Co.* (1889) 112 N. Y. 186, 8 Am. St. Rep. 734, 19 N. E. 487 (in which it was held that the abutting owner could recover only the temporary damages that had been sustained up to the time of the commencement of the action); *Reining* v. *New York, L. & W. R. Co.* (1891) 128 N. Y. 157, 14 L. R. A. 133, 28 N. E. 640. See also *People ex rel. Dilzer* v. *Calder* (1903) 89 App. Div. 503, 85 N. Y. Supp. 1015, where it is said that "an easement is a constitutional right of property which cannot be taken from its owner without just compensation."

The public acquires only a right of way over land taken for a highway, and the fee continues in the owner. A corporation cannot take such land without making compensation to the owner. *Presbyterian Society* v. *Auburn & R. R. Co.* (1842) 3 Hill, 567; *Williams* v. *New York C. R. Co.* (1857) 16 N. Y. 97, 69 Am. Dec. 651; *Carpenter* v. *Oswego & S. R. Co.* (1861) 24 N. Y. 655; *Mahon* v. *New York C. R. Co.* (1860) 24 N. Y. 658; *Wager* v. *Troy Union R. Co.* (1862) 25 N. Y. 526; *Bloomfield & R. Natural Gaslight Co.* v. *Calkins* (1875) 62 N. Y. 386; *Craig* v. *Rochester City & B. R. Co.* (1868) 39 N. Y. 404; *Buffalo* v. *Pratt* (1892) 131 N. Y. 293, 15 L. R. A. 413, 30 N. E. 233; *Dusenbury* v. *Mutual U. Teleg. Co.* (1882) 11 Abb. N. C. 440.

As a general rule "where lands are bounded by a public street, the legal presumption is that the grantor intended to convey the soil" to the center of the street; but the presumption does not apply where land is described as bounded by the line of the street unless a contrary intention clearly appears. An abutting owner, even if he does not own the fee of the street, has an easement in the street in common with the whole public to pass and repass, and also to have free access to and from his premises. The construction of a street surface railroad with the consent of the legislature is not an infringement of such an abutting owner's rights which will entitle him to compensation. *Clark* v. *Rochester City & B. R. Co.* (1888) 18 N. Y. S. R. 903, 2 N. Y. Supp. 563; *Kellinger* v. *Forty-Second Street & G. Street R. Co.* (1872) 50 N. Y. 206.

In *Stroub* v. *Manhattan R. Co.* (1891) 14 N. Y. Supp. 773, an injunction was granted restraining the defendant from constructing an additional track in front of the plaintiff's premises until it had acquired plaintiff's easement by purchase or otherwise.

An abutting owner is not entitled to consequential damages caused by the change of grade of a railroad company's tracks by a direct mandate of the legislature. *Fries* v. *New York & H. R. Co.* (1901)

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169 N. Y. 270, 62 N. E. 358. But the same company was held liable to an abutting owner for damages caused by the erection of a station house which was not required by the act directing a change of grade. *Dolan* v. *New York & H. R. Co.* (1902) 74 App. Div. 434, 77 N. Y. Supp. 815. The rights of abutting owners as affected by the change of grade of Park avenue were also considered in *Pape* v. *New York & H. R. Co.* (1902) 74 App. Div. 175, 77 N. Y. Supp. 725.

Power cannot be given to a municipal corporation in opening a street to take the whole of a lot against the owner's consent, when part only is required for the street, whereby the corporation becomes the owner of the whole lot, with a provision that the part not needed for the street may be applied to private use. "The Constitution, by authorizing the appropriation of private property to public use, impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another; it is in violation of natural right." *Re Albany Street* (1834) 11 Wend. 149, 25 Am. Dec. 618, construing 2 R. L. 416, § 179, relating to streets in the city of New York. This statute was again considered in *Embury* v. *Conner* (1850) 3 N. Y. 511, 53 Am. Dec. 325, where it was said that while one man's property cannot, without his consent, be transferred to another under the exercise of the right of eminent domain, if it is in fact transferred with the owner's consent, a statute authorizing it is not objectionable on constitutional grounds.

As a general rule land in a city street which is discontinued or closed under lawful authority reverts to the adjoining owner, who thereupon becomes entitled to the land to the center of the street, and the city cannot hold the land as private property, and dispose of it to third persons. *Re John & C. Streets* (1839) 19 Wend. 659.

The general highway act (1 Rev. Stat.) so far as it authorizes the laying out of roads through wild and unimproved land, no mode for compensation to the owners being provided, is unconstitutional. *Gould* v. *Glass* (1855) 19 Barb. 179; *Wallace* v. *Karlenowefski* (1854) 19 Barb. 118.

The grantor of land used by a plank road company has no reversion, and is not entitled to compensation on a surrender of the land to a town for highway purposes. *Heath* v. *Barmore* (1872) 50 N. Y. 302.

The owner of land in the city of New York included in a street laid out on a map made by commissioners under the act of 1813, chap. 86, is not entitled to compensation for buildings erected within

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such street after the filing of the map. *Re 127th Street* (1878) 56 How. Pr. 60, Daniels, J.

"The right to property includes the right to use that property for any lawful purpose of profit to the owner. . . . Whenever that right is restricted, property is taken within the meaning of the Constitution." The legislature cannot constitutionally deprive an owner of property of the right to use it even to the extent of erecting buildings thereon in his discretion, by providing that such right shall cease on filing a map appropriating such land for public streets. A statute thus depriving the owner of the right to use his property takes it without compensation, and is unconstitutional. *Re Rogers Ave.* (1885) 29 Abb. N. C. 361, 22 N. Y. Supp. 27, Sp. T. Judge Cullen.

An easement in a street, the fee of which is in the city, is property, and cannot be destroyed or impaired without compensation to the owner. *Story* v. *New York Elev. R. Co.* (1882) 90 N. Y. 122, 43 Am. Rep. 146; *Mahady* v. *Bushwick R. Co.* (1883) 91 N. Y. 148, 43 Am. Rep. 661; *Tiffany* v. *United States Illuminating Co.* (1884) 67 How. Pr. 73, affirmed in 9 Jones & S. 280; *Carter* v. *New York Elev. R. Co.* (1888) 14 N. Y. S. R. 859, (1888) 134 N. Y. 168, 31 N. E. 514.

The rule in the *Story Case* was applied in *Egerer* v. *New York C. & H. R. R. Co.* (1891) 130 N. Y. 108, 14 L. R. A. 381, 29 N. E. 95, where it was held that an abutting owner's right of access could not be destroyed or impaired by discontinuing the street without providing compensation for the injury sustained by him, or furnishing other adequate means of access.

A change of grade of a street is not a taking of property which will entitle an abutting owner to damages, even if such a change of grade is made by a private corporation under a contract with the city, provided the work is done with due care, and in a skilful manner. *Wilson* v. *New York C. & H. R. R. Co.* (1886) 2 N. Y. Supp. 65. See *Re Comesky* (1903) 83 App. Div. 137, 81 N. Y. Supp. 1049; also *Re Borup* (1905) 102 App. Div. 262, 92 N. Y. Supp. 624.

A change of grade of a street is not the taking of property, and an abutting owner is not entitled to compensation therefor. *Talbot* v. *New York & H. R. Co.* (1896) 151 N. Y. 155, 45 N. E. 382.

Where land is taken for a highway or street, and the public acquires only a right of way, with the powers and privileges incident to that right, the owner of the fee retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for all purposes not incompatible with the right of way (*Jackson ex dem. Yates* v.

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*Hathaway* [1818] 15 Johns. 447, 452, 8 Am. Dec. 263; *Higgins* v. *Reynolds* [1865] 31 N. Y. 156; *Niagara Falls Suspension Bridge Co.* v. *Bachman* [1871] 4 Lans. 523; *Fisher* v. *Rochester* [1872] 6 Lans. 225; *Williams* v. *Kenney* [1853] 14 Barb. 629), and the public cannot lawfully take such materials without the owner's consent and use them on other parts of the highway, except that where the grade of the land is above the surface of the highway and it is necessary to remove a part of the soil for the purpose of providing access to the land, materials so removed may be used on other parts of the highway. *Robert* v. *Sadler* (1887) 104 N. Y. 229, 233, 58 Am. Rep. 498, 10 N. E. 428.

*Hudson river, riparian owner.*—The bank of the Hudson between high and low water mark belongs to the people, and a riparian proprietor has no better right to the use of it than any other person. The legislature may authorize erections in front thereof and any other citizen may navigate the same waters as well as the riparian proprietor. The legislature has power to authorize a railroad company to construct a road between high and low water mark, and an adjoining owner is not entitled to compensation. His property is not taken, and whatever loss he sustains is *damnum absque injuria*. *Gould* v. *Hudson R. R. Co.* (1852) 6 N. Y. 522, citing *Lansing* v. *Smith* (1826) 8 Cow. 146, affirmed in (1829) 4 Wend. 9, 21 Am. Dec. 89.

*Muniments of title.*—A statute which assumes to destroy or nullify a party's muniments of title is just as effective in depriving him of his property as one which bestows it directly upon another. In the one case it despoils the owner directly, and in the other renders him defenseless against any assault upon his property. *Gilman* v. *Tucker* (1891) 128 N. Y. 190, 13 L. R. A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040.

*Oyster beds.*—An oyster bed planted in public waters under legislative authority is private property, and it cannot, without compensation, be destroyed by sewage discharged upon it by a municipal corporation. "Any direct invasion of a man's land is a taking of his property within the meaning of the Constitution." The destruction of oysters by casting sewage upon them was as clearly a taking of property as their physical removal and conversion would have been. *Huffmire* v. *Brooklyn* (1900) 162 N. Y. 584, 48 L. R. A. 421, 57 N. E. 176.

The same rule was applied as to the effect of discharging city sewage on private property in *Sammons* v. *Gloversville* (1901) 34 Misc. 459, 70 N. Y. Supp. 284.

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*Railroad aid.*—A statute authorizing a town to issue bonds in aid of a railroad does not take private property for a public use within the meaning of the Constitution. *Grant* v. *Courter* (1857) 24 Barb. 232.

In *Sweet* v. *Hulbert* (1868) 51 Barb. 312, the supreme court declared unconstitutional the act of 1868, chap. 334, authorizing the town of Saratoga to issue bonds in aid of a certain railroad and donate the proceeds to the railroad company.

*Snow and ice.*—A municipal ordinance requiring the removal of snow and ice from sidewalks, and imposing a penalty on the adjoining occupant for a neglect to comply with the ordinance, is not the taking of private property within the meaning of the Constitution, but is valid as an exercise of the police power. *Carthage* v. *Frederick* (1890) 122 N. Y. 269, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480.

*Taxation.*—An assessment on adjoining land for the expense of opening a street is not the taking of private property within the meaning of the Constitution, but the exercise of the power of taxation. *Striker* v. *Kelly* (1844) 7 Hill, 9.

The transfer tax act of 1885, chap. 483, as amended by chap. 713, Laws 1887, is not obnoxious to the 14th Amendment. *Wallace* v. *Myers* (1889) 4 L. R. A. 171, 38 Fed. 184, citing *Re McPherson* (1887) 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685.

"If the proceedings of the taxing power have been so fatally defective, on account of a failure to comply with the requirements of the statute, that no title to the property of the taxpayer has passed to the purchaser at the tax sale," the taxpayer does not thereafter hold his property "at the mercy of the legislature, and subject to its power at any time, so far as he is concerned, to validate and give life and effect to the otherwise void sale." His property cannot be transferred to a third person by a legislative act without giving him an opportunity to pay the tax. *Cromwell* v. *MacLean* (1890) 123 N. Y. 474, 25 N. E. 932.

"A freeholder cannot be deprived of his land under the taxing power of the state unless the procedure prescribed, when strictly construed, is substantially complied with." *Lockwood* v. *Gehlert* (1891) 127 N. Y. 241, 27 N. E. 812.

*Trade label.*—"The right to a trade label is a property right." *People ex rel. McPike* v. *Van De Carr* (1904) 91 App. Div. 20, 86 N. Y. Supp. 644.

*Water.*—The owner of land through which a stream of water runs has a valid right to the use of the water, and it is private

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property which cannot be taken for a public use without compensation. *Gardner* v. *Newburgh* (1816) 2 Johns. Ch. 162, 7 Am. Dec. 526.

An easement for the use of water in a running stream is property under this provision, and it cannot be destroyed or impaired without compensation to the owner. *Arnold* v. *Hudson River R. Co.* (1873) 55 N. Y. 661.

A municipal corporation has no power to widen a natural non-navigable stream which runs through a person's land, and cut down the banks and remove the soil for the purpose of making the enlargement, without rendering compensation to the owner for the property so taken. In this case the owner, in compliance with a resolution adopted by the common council, had dredged the stream and removed certain obstructions therefrom on his own land, and afterwards the city authorities cut down the banks for the purpose of widening the stream; this was held an unauthorized taking of property. *Schenectady* v. *Furman* (1895) 145 N. Y. 482, 45 Am. St. Rep. 624, 40 N. E. 221.

An owner of land has no property right in subterranean water. "He does not own the particles of which it is formed. His property in the water is in its use while it remains upon or under his land; it is the usufructuary right, the same as in flowing water;" but he may recover damages from a municipal corporation which withdraws the water by means of driven wells on adjoining land. *Westphal* v. *New York* (1902) 75 App. Div. 252, 78 N. Y. Supp. 56; *Reisert* v. *New York* (1902) 69 App. Div. 302, 74 N. Y. Supp. 673; *Forbell* v. *New York* (1900) 164 N. Y. 522, 51 L. R. A. 695, 79 Am. St. Rep. 666, 58 N. E. 644; *Smith* v. *Brooklyn* (1899) 160 N. Y. 357, 49 L. R. A. 664, 54 N. E. 787, in which the same rule was applied as to surface water, the court saying that it is a well-settled rule "that no one may divert, or obstruct, the natural flow of a stream for his own benefit, to the injury of another;" that the "right to the use and enjoyment of a stream of water, running in a defined and natural channel, *jure naturæ*, appertains to the riparian landowners," and that any diversion of it is an interference with a natural right, for which damages may be recovered. Citing *Van Wycklen* v. *Brooklyn* (1890) 118 N. Y. 424, 24 N. E. 179.

*Wharves.*—The owner of a private wharf may be made subject to rules prescribed by harbor masters authorized to regulate and station ships and vessels in New York harbor. Such rules, if reasonable, are valid under the police power, and are not an unwarrantable interference with private property. *Vanderbilt* v. *Adams* (1827) 7 Cow.

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349; *Roosevelt* v. *Godard* (1868) 52 Barb. 533; *Re Union Ferry Co.* (1885) 98 N. Y. 139.

The construction of the Albany basin in the Hudson river rendered private docks less accessible, in consequence of which they were much depreciated in value, and no compensation was provided therefor. The dock owner's right of access thereto was held to be subject to legislative control, according to public convenience. Every great public improvement usually affects individual convenience and property, but remote consequences must be borne "as a part of the price to be paid for the advantages of the social condition." *Lansing* v. *Smith* (1826) 8 Cow. 146, affirmed in (1829) 4 Wend. 9, 21 Am. Dec. 89.

## EMINENT DOMAIN.

It is now well settled that the right of eminent domain remains in the government, or in the aggregate body of the people, in their sovereign capacity, and they have the right to resume the possession in the manner directed by the organic and the statute laws of the state, whenever the public interest requires it. "If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose." *Beekman* v. *Saratoga & S. R. Co.* (1831) 3 Paige, 73, 22 Am. Dec. 679; *Hartwell* v. *Armstrong* (1854) 19 Barb. 166.

"The power of eminent domain is the right of the state, as sovereign, to take private property for public use upon making just compensation. . . . All private property, both tangible and intangible, is subject to the right, including that already devoted to a public use, although the latter, as matter of policy rather than of right, is protected and favored by the state to some extent. . . . While the state may delegate the power to a subject for a public use, it cannot permanently part with it as to any property under its jurisdiction, but may resume it at will, subject to property rights and the duty of paying therefor." *People* v. *Adirondack R. Co.* (1899) 160 N. Y. 225, 54 N. E. 689, affirmed in (1899) 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460.

"The right of the state to take the property . . . is an absolute and inherent one. It is an attribute of political sovereignty, and the

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constitutional provision only operates upon the mode of exercise of the right." It seems self-evident "that the sovereign power, subject to the restrictions interposed by the fundamental law, may be exercised with respect to the public as well as the private rights of citizens." *People* v. *Baltimore & O. R. Co.* (1889) 117 N. Y. 150, 22 N. E. 1026.

"The common law right of eminent domain has ever been regarded as a high prerogative of sovereignty, to be exercised whenever the public necessity required; and this right is impliedly admitted, both in the Constitution of the state and of the United States. . . . It belongs to the legislative power of the government to determine for what public purposes private property shall be taken, and the necessity or expediency of such appropriation." *Buffalo & N. Y. C. R. Co.* v. *Brainard* (1853) 9 N. Y. 100; *People ex rel. Herrick* v. *Smith* (1860) 21 N. Y. 595.

"Notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people, in their sovereign capacity; and they have a right to resume the possession of the property in the manner directed by the Constitution and laws of the state, whenever the public interest requires it. This right of resumption may be exercised not only where the safety, but also where the interest or even the expediency, of the state is concerned; as where the land of the individual is wanted for a road, canal, or other public improvement." A railroad is a public benefit, and a railroad corporation may be authorized to take land under the right of eminent domain. *Beekman* v. *Saratoga & S. R. Co.* (1831) 3 *Paige*, 45, 22 Am. Dec. 679; *Buffalo & N. Y. C. R. Co.* v. *Brainard* (1853) 9 N. Y. 100; *New York & H. R. Co.* v. *Kip* (1871) 46 N. Y. 546, 7 Am. Rep. 385; *New York C. & H. R. R. Co.* v. *Metropolitan Gaslight Co.* (1875) 63 N. Y. 326.

The right of eminent domain implies the right in the sovereign power to determine the time and occasion, and as to what particular property it may be exercised. It also includes the right to determine the estate or quantity of interest in the lands which shall be taken,—whether an estate for years, for life, or in fee; whether a right of reversion in any event shall be left in the owner, or whether a mere easement shall be taken without devesting the fee and general ownership of the land. *Heyward* v. *New York* (1852) 7 N. Y. 314.

No greater interest in property will be taken than is necessary to satisfy the requirements of the statute. The fee will not be taken

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if an easement only will be sufficient. *Washington Cemetery* v. *Prospect Park & C. I. R. Co.* (1877) 68 N. Y. 591.

The legislature has power to authorize a foreign corporation to exercise the right of eminent domain in this state by taking private property for corporate purposes. *Morris Canal & Bkg. Co.* v. *Townsend* (1857) 24 Barb. 658; *Re Townsend* (1868) 39 N. Y. 171.

If only the use of property is obtained by eminent domain, the reversion remains in the owner, and, on the termination of the use, the title reverts to him. *Heard* v. *Brooklyn* (1875) 60 N. Y. 242.

Authority conferred on a city to destroy buildings to prevent the spread of fire is not a grant of the right of eminent domain, and the destruction of a building under such authority is not a taking of property within the meaning of the Constitution. No statute was necessary to authorize the destruction of the property; its destruction was authorized "by the law of overruling necessity; it was the exercise of a natural right belonging to every individual, not conferred by law, but tacitly excepted from all human codes." A long line of authorities sustains the rule that "in a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, or any other great public calamity, the private property of any individual may be lawfully destroyed for the relief, protection, or safety of the many, without subjecting the actors to personal responsibility for the damages which the owner has sustained." In this case the act (2 R. L. 368, the New York Charter of 1813) directed the city authorities to procure an assessment by a jury of the damages sustained by the owner of property in consequence of its destruction, and the amount was made a charge against the city, and an action could not be maintained to recover the damages. *Russell* v. *New York* (1845) 2 Denio, 461.

*Second taking.*—Property taken by a railroad corporation under the right of eminent domain becomes its private property, and cannot be taken from it without compensation. The corporation cannot afterwards be compelled by statute to take a new highway across its road at its own expense. *Miller* v. *New York & E. R. Co.* (1856) 21 Barb. 513.

This decision was overruled in the *Albany Northern R. Co.* v. *Brownell* (1862) 24 N. Y. 345, where it was held that the act of 1853, chap. 62, requiring a railroad company to take a highway across its tracks at its own expense and without compensation, was constitutional; that the railroad corporation does not acquire the same unqualified title and right of disposition which individuals

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have in their land; that such land is acquired for a public use, and it therefore continues subject to the control of the legislature, which may subject the corporation to new restrictions or increased burdens; but the statute does not permit such second taking of land appropriated by the railroad corporation for engine houses or other structures, without compensation.

The same rule was applied in *Boston & A. R. Co.* v. *Greenbush* (1873) 52 N. Y. 510.

The legislature "may change one kind of public use into another, so long as the property continues to be devoted to public use. What belongs to the public may be controlled and disposed of in any way which the public agents see fit." If the city owns the fee in the street the legislature may authorize the use of such street by a railroad company, and the city cannot demand compensation therefor. *People* v. *Kerr* (1863) *27* N. Y. 188.

The act of 1853, chap. 62, requiring a railroad company to take a highway across its tracks at its own expense and without compensation, is an instance of a second taking of property already devoted to a public use. In *Albany Northern R. Co.* v. *Brownell* (1862) 24 N. Y. 345, the railroad company objected to the validity of the statute on the ground that it was "repugnant to the Constitution, as the taking of private property for the use of the public without recompensing the owner." The court said a corporation organized under the general railroad law had the right to take and use land for the purposes of its incorporation during its corporate existence; that the land so taken was deemed appropriated to a public use, and was subject to the exercise of the reserved power of the legislature concerning corporate franchises. By the operation of the highway law the property of the company is not taken from it nor is its practical use interfered with.

The same rule was applied as to streets laid out under the general village law of 1870, chap. 281. *Re Folts Street* (1897) 18 App. Div. 568, 46 N. Y. Supp. 43.

General power to take land for a public use does not, prima facie or presumptively, include property already in public use under the sanction of the law. *Re Boston & A. R. Co.* (1873) 53 N. Y. 574.

The legislature has power "to deprive corporations of their franchises and take from them the property necessary to their enjoyment in the exercise of the sovereign right of eminent domain, upon making compensation. . . . But this must be done by special act of the legislature and under a power granted in express terms. A corporation, either private or municipal, cannot, under a general

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power to take lands for a public use, take from another corporation having the like power lands or property held by it for a public purpose pursuant to its charter. But an easement may be acquired *in invitum*, by legislative authority, in lands held and occupied for a public use, when such easement may be enjoyed without detriment to the public or interfering with the use to which the lands are devoted." *Re Rochester Water Comrs.* (1876) 66 N. Y. 413.

The principle is well established that "land once taken and appropriated to a public use, pursuant to law, under the right of eminent domain, cannot, under general laws and without special authority from the legislature, be appropriated to a different public use." In this case it was held that the general highway laws did not confer sufficient authority to take the land of a railroad company which was needed for depot purposes; but that express and direct legislative authority was required to authorize the taking of such railroad lands for highway purposes. The highway act of 1853, chap. 62, requiring a railroad company to take a highway across its tracks without compensation, was held not to authorize the taking of railroad lands appropriated for general purposes. *Prospect Park & C. I. R. Co.* v. *Williamson* (1883) 91 N. Y. 552.

"The general authority conferred upon railroad corporations to acquire lands against the will of the owner is broad and comprehensive. In terms it covers all and excepts none. But because it could not be intended that the state, having authorized one taking whereby the lands became impressed under authority of the sovereign with a public use, meant to nullify its own grant by authority to another corporation to take them again for another public use, unless it is so specifically decreed, it has been ruled that lands so held and impressed with a public trust were not embraced in words of general authority." In this case a wharf or dock used by a steamboat company for the landing of freight, which had been acquired by purchase, was held not exempt under the rule against a second taking of property devoted to a public use. *Re New York, L. & W. R. Co.* (1885) 99 N. Y. 12, 1 N. E. 27.

In *New York C. & H. R. R. Co.* v. *Metropolitan Gaslight Co.* (1875) 63 N. Y. 326, the same rule is applied in a proceeding to take the property of a gaslight company which was held not exempt under the power of eminent domain, and the court said its land was not held under the right of eminent domain, and that there was nothing in its charter which conferred upon it any special privileges in this respect.



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"The legislature may interfere with property held by a corporation for one public use, and apply it to another, and without compensation, where no private interests are involved or invaded. . . . The legislature may delegate this power to public officers or to corporate bodies, municipal or other. It is a rule, however, that such delegation of power must be in express terms, or must arise from a necessary implication." The provision in the Buffalo charter, authorizing the city to take property for various public purposes, was held not to authorize the taking of property owned by railroad corporations, and which had been devoted to a public use. *Re Buffalo* (1885) 68 N. Y. 167.

"Lands held by a corporation, but not used for or necessary to a public purpose, but simply as a proprietor and for any private purpose to which they may be lawfully applied, may be taken as if held by an individual owner. . . . The need of the land sought in aid of collateral enterprises, remotely connected with the running or operating of the road, will not justify the assertion of the right of eminent domain." *Re Rochester, H. & L. R. Co.* (1888) 110 N. Y. 119, 17 N. E. 678.

General statutes which authorize railroads to cross or intersect one another are not within the rule prohibiting the taking of property already devoted to a public use. "One railroad has the right to cross another railroad, and such right is given by the statutes;" land acquired for railroad purposes is subject to this right, and this rule applies generally to all highways. *Buffalo, B. & L. R. Co.* v. *New York, L. E. & W. R. Co.* (1893) 72 Hun, 587, 25 N. Y. Supp. 155; *Geneva & W. R. Co.* v. *New York C. & H. R. R. Co.* (1895) 90 Hun, 9, 35 N. Y. Supp. 339, (1897) 152 N. Y. 632, 46 N. E. 1147.

In *Re Brooklyn* (1894) 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983, the court sustained the provision in the act of 1886, chap. 335, relating to the annexation of New Lots to the city of Brooklyn, which authorized the city to acquire by condemnation the property of the Long Island Water Supply Company. It will be observed that this case is within the rule that authority to take property already devoted to public use should be conferred by special statute.

The rule that, where property has been appropriated for one public use it cannot be taken for another without express authority of the legislature, does not apply where the second taking is by the state. "The right or power of eminent domain is one inherent in and incident to sovereignty," and cannot be parted with. The legislature cannot delegate the power to a corporation to such an extent

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as to prevent the state itself from exercising it at any time, nor can it place such a corporation upon an equality with the state in the exercise of such power; and when the state chooses to exercise the power, it is exclusive. *Adirondack R. Co.* v. *Indian River Co.* (1898) 27 App. Div. 326, 50 N. Y. Supp. 245, involving the right of the state to take land for the forest preserve, notwithstanding its previous preliminary appropriation by a railroad corporation. *People* v. *Adirondack R. Co.* (1899) 160 N. Y. 225, 54 N. E. 689, affirmed in (1899) 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460, where the court considered the rights of the same railroad company under a map filed by it in accordance with the railroad law, and held that this could not prevent the state from taking the land under the forest preserve law, observing that "a delegated power of eminent domain cannot be turned against the sovereign which conferred it and which is the source of all power." See also *Re Prospect Park & C. I. R. Co.* (1876) 67 N. Y. 372, as to highways.

The legislature cannot, by an attempted exercise of the power of eminent domain, take land which had been acquired for a public highway and donate it to an individual. The rule that the property of one person cannot be taken away from him and transferred to another was applied to a statute (1868, chap. 687) which directed the reduction of the width of a highway to three rods, and which provided for a reversion of the land excluded, without compensation, to the public, and without expense to the adjoining owners, except the expense of the proceeding to change the width of the highway. "To take the property of one, though it be the public, and donate it to an individual, is not only a violation of natural right, but of the spirit of the Constitution." *People ex rel. Failing* v. *Palatine* (1869) 53 Barb. 70.

## PUBLIC USE.

An owner of property is not entitled to be heard as to the propriety of taking it for a public purpose. "The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the legislature. It may be exercised by means of a statute which shall at once designate the property to be appropriated and the purpose of the appropriation; or it may be delegated to public officers, or . . . to private corporations established to carry on enterprises in which the public are interested." *People ex rel. Herrick* v. *Smith* (1860) 21 N. Y. 595.

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"The general improvement of the public highways of the state, whether canals or rivers that are navigable, is for the benefit of the state at large, though some locality or some individuals may be benefited more than others. The expenditure may, in fact, be improvident, and the work may prove to be useless to the public; but the legislature, as the depository of the sovereign powers of the people, must necessarily be the judge of the propriety and utility of making it. . . . Reason and authority, as well as the fitness of things, demand that when an act of the legislature appropriating money is assailed upon the ground that the purpose of such appropriation is local or private, and not public, the question shall be determined by the language and general scope of the act." *Waterloo Woolen Mfg. Co.* v. *Shanahan* (1891) 128 N. Y. 345, 14 L. R. A. 481, 28 N. E. 358.

"Where the taking of private property, for a use claimed to be public, is authorized by the legislature, its determination of the public character of the use is not conclusive. The existence of the public use in any class of cases is a question reviewable by the courts. If, however, the use is certainly a public one, the legislature is the proper body to determine the necessity of the exercise of the right of eminent domain, and the extent to which it shall be carried, and there is no restraint on the power save that of requiring that compensation be made." *Re Union Ferry Co.* (1885) 98 N. Y. 139.

An improvement may be a public use although it does not benefit the people of the whole state, but the direct public benefit may be confined to a particular community. The lighting of public streets and public places is a public benefit, and the legislature has power to confer on a gaslight company the right to take property for specified public uses by eminent domain. *Bloomfield & R. Natural Gaslight Co.* v. *Richardson* (1872) 63 Barb. 437.

Under the canal acts of 1817, chap. 262. and of 1870, chap. 202, the canal commissioners had the right to enter on private property and appropriate it to public use, and did not thereby become trespassers, even if the property used, as stones for walls or for filling, was taken from private land, without any other appropriation of the land for canal purposes. Compensation need not precede the appropriation of private property; it is only necessary that provision be made for compensation. *Rogers* v. *Bradshaw* (1823) 20 Johns. 744; *Jerome* v. *Ross* (1823) 7 Johns. Ch. 343, 11 Am. Dec. 484; *Wheelock* v. *Young* (1830) 4 Wend. 650. The same subject is

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considered with the same result in *Baker* v. *Johnson* (1842) 2 Hill, 342; *Smith* v. *Helmer* (1849) 7 Barb. 416.

Private property may be taken for the purpose of making a railroad, or any other public improvement of the like nature, upon paying a just compensation, whether such public improvement is made by the agents of the state, or by the agents of a private corporation; but the benefit to result to the public must be of "paramount importance in comparison with the individual loss or inconvenience, and an ample and certain provision should always be made for a full and adequate compensation to the individual whose property is thus taken." If private property is to be taken for a public use, the act authorizing it must provide in advance an adequate and certain remedy whereby the compensation is assured. "The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided and upon an adequate fund, whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so." *Bloodgood* v. *Mohawk & H. R. R. Co.* (1837) 18 Wend. 9, 31 Am. Dec. 313.

The legislature has power to authorize a municipal corporation to acquire, by eminent domain, the absolute title to land taken for a public use, and when so taken no reversionary interest remains, and the property may afterwards be used for a purpose other than that for which it was originally taken. *Heyward* v. *New York* (1852) 7 N. Y. 314.

"The use and benefit is not required to be universal, nor, in the largest sense, even general. If it is confined to a specific district it may still be public. If some parties are more benefited than others, this forms no objection to the use, if the public interest and convenience are thereby subserved." *Hartwell* v. *Armstrong* (1854) 19 Barb. 166.

A private water company chartered to supply the people of a municipality with pure and wholesome water may take property, including springs and streams of water, and the use to which the same is to be devoted is public. *Re Malone Waterworks Co.* (1891) 38 N. Y. S. R. 95, 15 N. Y. Supp. 649.

Corporations organized under the water companies act of 1873, chap. 737, may acquire property by purchase or condemnation, and such property is held for a public use, although water is supplied to individuals as well as to municipal corporations. *Stamford Water Co.* v. *Stanley* (1886) 39 Hun, 424; *Re New Rochelle Water Co.*

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(1887) 46 Hun, 525; *Pocantico Waterworks Co.* v. *Bird* (1891) 130 N. Y. 249, 26 N. E. 246.

Water to be taken under the Middletown act of 1866, chap. 347, as amended by chap. 85, Laws 1879, is for a public use. *Re Middletown* (1880) 82 N. Y. 196.

A public market is a public use, and land may be taken for it by eminent domain. *Re Cooper* (1883) 28 Hun, 515.

The courts of this state have repeatedly held that land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health, or business, is taken for a public use. *Re Central Park* (1872) 63 Barb. 282; *Brooklyn Park* v. *Armstrong* (1871) 45 N. Y. 234, 6 Am. Rep. 70; *Re New York* (1885) 99 N. Y. 569, 2 N. E. 642; *Re Rochester* (1893) 137 N. Y. 243, 33 N. E. 320.

The purpose for which land is to be taken or appropriated under the act of 1867, chap. 372, relating to the drainage of lands in certain towns, was held not to be a public use; the drainage was for the benefit of private owners of land. *People ex rel. Pulman* v. *Henion* (1892) 64 Hun, 471, 19 N. Y. Supp. 488.

A tramway about four miles in length, proposed to be constructed for the use of a private corporation, was held not to be a public purpose. "A possible limited use by a few, and not then as a right, but by way of permission or favor, is not sufficient to authorize the taking of private property against the will of the owner." *Re Split Rock Cable Road Co.* (1898) 128 N. Y. 408, 28 N. E. 506.

In *Re Niagara Falls & W. R. Co.* (1888) 108 N. Y. 375, 15 N. E. 429, a proceeding in which the company sought to take land by eminent domain, the court say: "The general principle is now well settled that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used, and the extent to which such right shall be delegated, are questions appertaining to the political and legislative branches of the government; while, on the other hand, the question whether the uses are in fact public, so as to justify the taking *in invitum* of private property therefor, is a judicial question, to be determined by the courts. . . . What is a public use is incapable of exact definition." The expressions "public interest" and "public use" are not synonymous. "The establishment of furnaces, mills, and manufactures, the building of churches and hotels and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the

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domain of public uses for which private ownership may be displaced by compulsory proceedings. . . . Railroads are highways furnishing means of communication between different points, promoting traffic and commerce, and facilitating exchanges; in a word, they are improved ways. In every form of government the duty of providing public ways is acknowledged to be a public duty." Judge Cooley's remark is quoted (Const. Lim. 669) that "when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to these matters of public necessity which, on account of their peculiar character, and the difficulty, perhaps impossibility, of making provision for them otherwise, it is alike proper, useful, and needful for the public to provide." In this case the proposed road was to be about 3 miles long, beginning at or on state land, and terminating on private land, without access from any public highway, and intended only for the convenience of visitors who might wish to see the falls, the river, and the whirlpool. The court say that this "is not a public purpose which justifies the exercise of the high prerogative of sovereignty" in taking property by condemnation proceedings.

The same rule was applied in *Deansville Cemetery Asso.* (1876) 66 N. Y. 569, 23 Am. Rep. 86, in which it was held that cemetery associations organized under a general law could not, by condemnation, take land for cemetery purposes. See also *Re Townsend* (1868) 39 N. Y. 171; *Re Eureka Basin Warehouse & Mfg. Co.* (1884) 96 N. Y. 42, where an act was declared unconstitutional which assumed to authorize a manufacturing corporation to take land by condemnation; *Re New York, L. & W. R. Co.* (1885) 99 N. Y. 12, 1 N. E. 27; *Re Rochester, H. & L. R. Co.* (1888) 110 N. Y. 119, 17 N. E. 678.

§ 7. [*Compensation for private property, how ascertained; private roads; drainage.*]—When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall

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be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited. General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches, and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes.

[Const. 1846, art. 1, § 7.]

COMPENSATION, HOW ASCERTAINED.

"The historical fact is that complaints had existed in respect to the methods of appraisement, and the Convention [of 1846] solved that difficulty by selecting and approving these two methods, inferentially forbidding all others." *Clark* v. *Miller* (1874) 54 N. Y. 528.

It seems that the provisions of this section relating to the method of ascertaining the compensation to be made on taking private property for public purposes, which were included in the Constitution of 1846, were prospective, and applicable only to cases occurring after January 1, 1847. These provisions are not self-executing, and could only be put into operation by legislation; hence, existing provisions of law relating to the method of ascertaining compensation are applicable, in the absence of legislation providing other machinery. *People ex rel. Dubois* v. *Ulster County* (1848) 3 Barb. 332.

Compensation must be ascertained by a jury or by commissioners appointed by a court of record. An assessment of damages by assessors under the Rochester charter was held invalid. *House* v. *Rochester* (1853) 15 Barb. 517. A similar provision in the Utica charter was also held invalid in *Clark* v. *Utica* (1854) 18 Barb. 451.

The constitutional provision that compensation must be ascertained either by a jury or by commissioners cannot be waived by the owner of the land. "The determination of the amount of compensation is in the nature of a judicial proceeding, and where the amount is to be paid for by the public, the public, as a party in

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interest, have a right to that proceeding." *Hanlon* v. *Westchester County* (1870) 57 Barb. 383.

The legislature cannot vest in the supreme court the power to increase or diminish the sum awarded as damages by a jury or by commissioners. *Rochester Waterworks Co.* v. *Wood* (1871) 60 Barb. 137; *Re Middletown* (1880) 82 N. Y. 196; *Re Malone Waterworks Co.* (1891) 38 N. Y. S. R. 95, 15 N. Y. Supp. 649.

The legislature may constitutionally authorize a reassessment of damages in a manner different from that adopted for the first assessment, provided such reassessment is by one of the methods prescribed in the Constitution. The act of 1847, chap. 455, authorizing a reassessment by a jury where the first assessment had been made by commissioners, was sustained. *Clark* v. *Miller* (1874) 54 N. Y. 528.

In *Re Ulster & D. R. Co.* v. *Gross* (1883) 31 Hun, 83, the court expressed great doubt whether the expenses of taking the land can ever be charged against the owner, and said that "whenever he is made to pay such expenses, he fails to receive just compensation to that extent."

"The provisions of the Constitution as to the mode and manner of ascertaining the compensation to be paid for private property when taken for public use are for the sole benefit of the owner." *Re Hand Street* (1889) 55 Hun, 132, 8 N. Y. Supp. 610.

The Constitution does not secure the right to review an award by a jury or by commissioners. The subject of such a review is within the discretion of the legislature. *Re De Camp* (1896) 151 N. Y. 557, 45 N. E. 1039.

See *Re Borup* (1905) 102 App. Div. 262, 92 N. Y. Supp. 624, as to damages on change of grade under Laws 1903, chap. 610, adding § 11*a* to the highway law.

*Notice.*—The property owner is entitled to notice of the impaneling of the jury and of the subsequent proceedings before them. *People ex rel. Stephens* v. *Tallman* (1862) 36 Barb. 222.

The owner is not entitled to notice of application for appointment of commissioners. *Long Island R. Co.* v. *Bennett* (1877) 10 Hun, 91; *Re New York Elev. R. Co.* (1877) 70 N. Y. 327; *Re Middletown* (1880) 82 N. Y. 196.

An owner of land is entitled to notice of an intention to take the same for a public purpose, and of the proceedings to ascertain the damages. *People ex rel. Dexter* v. *Mosier* (1890) 56 Hun, 64, 8 N. Y. Supp. 621; *McLaughlin* v. *Miller* (1891) 124 N. Y. 510, 26 N. E. 1104.

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*Jury.*—The act of 1847, chap. 31, § 4, relating to the power of the Hudson River Railroad Company to take lands for railroad purposes, which, among other things, authorized a judge of a court of record to appoint "a jury of appraisers," to be composed of twelve men whose names were to be drawn from the grand jury box, to assess the damages in cases where property was taken by condemnation, and which permitted the certificate of appraisement to be signed by a majority of the appraisers, was held a compliance with the constitutional provision requiring damages to be ascertained by a jury. An examination of the subject of taking private property for public use during twenty years immediately preceding the Convention of 1846 shows that "the term 'a jury' had been in frequent use as descriptive of a body of jurymen drawn in the ordinary mode of drawing juries, to whom was committed the appraisement of damages for private property taken for public uses, and whose decision was to be made by a majority." Four such statutes were passed by the legislature of 1846 immediately preceding the Convention. These instances were deemed sufficient "to establish the position that at the time of the Convention there was a known legislative usage in respect to this subject, according to which the term 'jury' did not necessarily import a tribunal consisting of twelve men acting only upon an unanimous determination, but, on the contrary, was used to describe a body of jurors of different numbers and deciding by majorities or otherwise, as the legislature in each instance directed." The Convention of 1846, which incorporated in the Constitution for the first time the provision requiring compensation to be ascertained by a jury or by commissioners, "ought, therefore, to be deemed to have used this term [jury] in the sense in which it was then known to the law, and to have selected out of the modes of proceeding theretofore in use in taking private property, those two modes which they thought best calculated to secure both public and private rights,—appraisement by commissioners or by juries,—giving to this latter term, not the restricted meaning which belongs to it when used in reference to trials, civil or criminal, but the broader sense which it had acquired by legislative use." *Cruger* v. *Hudson River R. Co.* (1854) 12 N. Y. 190.

The term "jury," as used in the Constitution, "means a body of jurymen drawn in the ordinary mode of drawing jurors for service in the courts." *People ex rel. Eckerson* v. *Haverstraw* (1896) 151 N. Y. 75, 45 N. E. 384; *Clark* v. *Utica* (1854) 18 Barb. 451.

*Commissioners.*—It is not competent for the legislature to appoint

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commissioners to ascertain the compensation on taking private property for a public use, or devolve the duty upon any body or set of men other than those indicated by the Constitution. *People ex rel. Cook* v. *Nearing* (1863) 27 N. Y. 306.

Considering the powers and duties of commissioners appointed to ascertain damages, the court, in *Re New York* (1885) 34 Hun, 441, say that the Constitution, neither in terms nor by fair implication, requires that the commissioners shall take evidence concerning the value of the property intended to be appropriated, "but they have been left at liberty to proceed upon their own personal examination and investigation, and to act upon the knowledge or information obtained in that manner."

Where a statute provides for commissioners to ascertain the compensation, such commissioners must be appointed by the court, and such appointment "must not only in form be made by the court, but it must be its independent, untrammeled act, in the exercise of judicial responsibility." It was accordingly held that an act authorizing the common council to nominate twelve persons, three of whom were selected by lot, to become commissioners for the purpose of ascertaining the compensation to be awarded for property taken, was unconstitutional; the persons selected did not constitute a jury, and the common council could not constitutionally select commissioners. *Menges* v. *Albany* (1874) 56 N. Y. 374; *Hilton* v. *Bender* (1877) 69 N. Y. 75.

A majority of the commissioners may act. *Astor* v. *New York* (1875) 62 N. Y. 580; *Re New York* (1885) 99 N. Y. 569, 2 N. E. 642; *Re Fourth Ave.* (1854) 11 Abb. Pr. 189.

A local court of record cannot be authorized to appoint commissioners to appraise property outside the territorial jurisdiction of the court. The Constitution evidently means that the commissioners must be appointed by a court of competent jurisdiction; that is, a court possessing lawful jurisdiction over the subject and the persons affected by the proceeding. So held in a proceeding under a statute which authorized the superior court of Buffalo to appoint commissioners to appraise the damages caused by taking land outside the city for city park purposes. *Re Buffalo* (1893) 139 N. Y. 422, 34 N. E. 1103.

## PRIVATE ROADS.

In *Taylor* v. *Porter* (1843) 4 Hill, 140, 40 Am. Dec. 274, the supreme court declared unconstitutional the provisions of the Re-

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vised Statutes, 1 Rev. Stat. 513, § 77 *et seq.*, providing for laying out private roads. Such a proceeding in effect transferred the property of one person to another, and the owner of the road became substantially the owner of the land; or, at least, the original owner was deprived of the beneficial use of it without his consent. The Convention of 1846 amended the Constitution by providing specifically for laying out private roads.

This provision does not apply to a way by necessity nor to a way used by the owner for his own convenience, and which crosses land afterwards subdivided and sold. *Wheeler* v. *Gilsey* (1867) 35 How. Pr. 139.

In *Berridge* v. *Shults* (1900) 32 Misc. 444, 66 N. Y. Supp. 204, Justice Chase at special term held unconstitutional the provision of the highway law, § 111, providing for a jury of six in a proceeding to lay out a private road, saying this was not the jury contemplated by the Constitution, and cited *People ex rel. Eckerson* v. *Haverstraw* (1896) 151 N. Y. 75, 45 N. E. 384.

## DRAINAGE.

The provision in relation to drainage, added to this section in 1894, was not retroactive, and did not affect proceedings pending under prior drainage laws, which limited the drainage of agricultural lands to cases where it was necessary for the preservation of the public health. *Re Penfield* (1896) 3 App. Div. 30, 37 N. Y. Supp. 1056.

In *Re Lent* (1900) 47 App. Div. 349, 62 N. Y. Supp. 227, the East Chester drainage act of 1871, chap. 882, was held unconstitutional because it did not require notice of assessment to be given to property owners.

In *Re Tuthill* (1900) 163 N. Y. 133, 49 L. R. A. 781, 79 Am. St. Rep. 574, 57 N. E. 303, the drainage act of 1895, chap. 384, intended to carry into effect the new drainage provision of the Constitution, was held unconstitutional so far as it authorized the assessment of any part of the expense upon owners of land adjoining the land sought to be drained. The amendment only "authorizes laws which will enable an agricultural landowner, desirous of draining his lands, to exercise the right of eminent domain, and thereunder to appropriate another's lands for the purpose, under such restrictions as shall be deemed proper to be made, and upon his making due compensation. No right is conferred or implied to assess a portion of the cost and expense upon the other landowners." It was inti-

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mated, but not decided, that the amendment to § 7 is obnoxious to the provisions of the Federal Constitution. Judge Gray said he was unable "to resist the conclusion that the constitutional amendment is invalid and inoperative;" but Chief Judge Parker thought the amendment was not in conflict with the Federal Constitution.

§ 8. [*Freedom of speech and press; evidence in libel cases.*]—Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

[Const. 1821, art. 7, § 8; 1846, art. 1, § 8.]

*Freedom of the press.*—In the Introduction I have quoted the prohibition against the freedom of the press which was contained in the instructions issued to Sir Edmund Andros on his appointment as governor of several American provinces, including New York, in 1688, and have noted the fact that the prohibition was continued in subsequent instructions.

The provision of the Revised Statutes (1 Rev. Stat. 665, § 28) which prohibited an advertisement of a lottery was not obnoxious to the constitutional provision securing liberty of the press. The Constitution prohibits lotteries, and the statute was intended to carry that prohibition into effect; but it did not prohibit an editorial article "showing the existence of an illegal lottery, and where the same is carried on, for the purpose of denouncing and exposing it." *Hart* v. *People* (1882) 26 Hun, 396.

A by-law of an associated press prohibiting the associates, under a specified penalty, from receiving and publishing regular news despatches from any other association, is not a violation of this provision relating to the liberty of the press. It is a proper subject of contract between publishers. *Matthews* v. *Associated Press* (1891) 61 Hun, 199, 15 N. Y. Supp. 887.

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In *People* v. *Most* (1902) 71 App. Div. 160, 75 N. Y. Supp. 591, the provision of § 675 of the Penal Code, that a person who wilfully and wrongfully commits any act which disturbs or endangers the public peace is guilty of a misdemeanor, was made the basis of an indictment for the publication of an article in a newspaper which "characterized government as 'nothing more than murder dominion,' and called upon the adherents of anarchy—persons supposed to be in sympathy with the editor of the paper—to execute the judgment by killing" the heads of nations by various means particularly specified. The court say: "That the promulgation of such unnatural and outrageous doctrines in this state of civilization 'seriously endangers' the public peace is a question which to us does not seem to admit of debate. Every civilized nation heretofore has existed, and hereafter must exist, if at all, by the enforcement of law. Its recognition and enforcement are the safeguards of the state. Indeed, upon it depends its existence. . . . Whoever openly or secretly advocates the resort to force, in opposition to the law of the state, for the accomplishment of any purpose, or the righting of any wrong, either real or imaginary, seriously endangers the public peace." The Constitution "does not give to a citizen the right to murder, nor does it give him the right to advise the commission of that crime by others."

*Libel.*—The controversy relating to the right of the jury to determine both the law and the fact in libel cases, which had continued many years, was settled in this state by the act "concerning libels," passed April 6, 1805, in which the preamble recited that "doubts exist whether, on the trial of an indictment or information for a libel, the jury have a right to give their verdict on the whole matter in issue;" wherefore it was enacted that in libel cases "the jury, who shall try the same, shall have a right to determine the law and the fact under the direction of the court, in like manner as in other criminal cases, and shall not be directed or required by the court or judge, before whom such indictment or information shall be tried, to find the defendant guilty, merely on the proof of the publication by the defendant of the matter charged to be libelous, and of the sense ascribed thereto, in such indictment or information," and the defendant was permitted "to give in evidence in his defense the truth of the matter contained in the publication charged as libelous; provided always, that such evidence shall not be a justification, unless, on the trial, it shall be further made satisfactorily to appear that the matter charged as libelous was published with good motives and for justifiable ends."

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This statute was the basis of the provision on this subject incorporated in the Constitution by the Convention of 1821, and which has been continued without change in subsequent Constitutions. On the question of justification the court, in *People* v. *Sherlock* (1901) 166 N. Y. 180, 59 N. E. 830, said "the belief of the defendant in the truth of the article is not admissible in justification of the libel. This was the rule at common law, and neither the statute of 1805 nor the constitutional provision has changed it."

In *George* v. *Jennings* (1875) 4 Hun, 66, the opinion is not reported, but the headnote states that the provision of this section that "in cases of libel, if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted," applies "only to criminal prosecutions. In civil actions where the truth of the alleged libel is pleaded in justification, it may be proved as a complete bar to the suit. In such cases the motive with which the publication was made is not material. The rule is the same in slander cases."

The subject of reports of judicial proceedings was considered in *Johns* v. *Press Pub. Co.* (1892) 46 N. Y. S. R. 859, 19 N. Y. Supp. 3, where the court say that "aside from *ex parte* petitions and the like, any publication made in the ordinary course of judicial proceedings is privileged if the article be a fair and impartial account thereof. Though the publication may be to the disadvanatge of the particular suitor, the paramount advantage to the public fully justifies the end attained;" and the opinion of Lawrence, J., in *Rex* v. *Wright* (1834) 8 T. R. 298, is cited, in which he says, in substance, that, "though the publication of proceedings in courts of justice may severely reflect on individuals, yet such publications, if they contain true accounts, are not libels, nor the subjects of actions, because it is of great importance that the proceedings of courts of justice shall be known; that the general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the person whose conduct may be the subject of the proceedings;" and also the opinion of Pollock, C. B., in *Ryalls* v. *Leader* (1866) L. R. 1 Exch. 299: "We ought to make as wide as possible the right of the public to know what takes place in any court of justice, and to protect a fair, bona fide statement of proceedings there." The court in the principal case say further that "the truth, irrespective of motives, is a complete justification to a civil action for libel. In criminal prosecutions the accused is

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obliged to go a step further and prove that the publication was made with good motives and for justifiable ends. . . . Every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. . . . Report and comment are two separate and distinct things. A report is the mechanical reproduction of what actually took place. Comment is the judgment passed on the circumstances reported by one who has applied his mind to them. . . . Blending the reports and comment together does not make the article libelous if it would not be such if the one were separated from the other."

*Schuyler* v. *Curtis* (1895) 147 N. Y. 434, 31 L. R. A. 286, 49 Am. St. Rep. 671, 42 N. E. 22, is an interesting case in relation to the right of privacy, considered especially with reference to a project to erect a statue to a deceased person, and the weight to be given to objections to the project made by such person's living relatives. An injunction to restrain the erection of the statue was denied.

§ 9. [*Right to assemble and petition; divorces; lotteries prohibited.*]—No law shall be passed abridging the right of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; nor shall any lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

[Const. 1846, art. 1, § 10.]

"The right of the people peacefully to assemble to discuss or deliberate upon matters of a public or private nature is one of those fundamental rights secured by the Constitution itself, and the privilege of animadverting freely upon public men and public measures is an instance growing out of that right." This is clearly distinguishable from an assemblage "to resist the execution of the laws, to disturb public order, or for the perpetration of acts inspiring public terror or alarm." The court defined a riot as a "tumultuous dis-

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turbance of the public peace by three or more persons assembled together of their own authority, mutually assisting each other against all who oppose them, and engaged in executing some design in a violent or turbulent manner, to the terror and alarm of bystanders or the neighborhood." *People* v. *Judson* (1849) 11 Daly, 1, 82, General Sessions.

"Courts will not restrain and prohibit a citizen from petitioning the legislature, or any public body, or asking action by either in his behalf, whether with or without the authority of law, unless to do so would be a violation of some covenant or agreement with others." *People* v. *Canal Board* (1874) 55 N. Y. 390.

*Lotteries.*—A sketch of the history of lotteries, including the addition in 1894 of the provision relating to pool-selling, will be found in the third volume.

The word "lottery" indicates "a scheme for the distribution of prizes for the obtaining of money or goods by chance." *People* v. *Noelke* (1883) 94 N. Y. 137, 40 Am. Rep. 128, in which it was also held that the New York lottery statutes did not violate the interstate commerce provision of the Federal Constitution.

In *Charles* v. *People* (1848) 1 N. Y. 180, the publication of a foreign lottery was held to be a criminal offense under our statutes.

The distribution of pictures by lot among members of the American Art Union, under specified conditions, was held to be a lottery in *Almshouse* v. *American Art-Union* (1852) 7 N. Y. 228, and to subject the Union to the penalty prescribed by 1 Rev. Stat. 664, § 22. "The intention of the scheme is to sell them [the pictures] for more than they can be sold for at private sale, and this was to be brought about by an appeal to the universal passion for playing at games of chance. The indulgence of this passion was precisely what the Constitution intended to repress and prohibit." The scheme "is a distribution by lot of a small number of prizes among a great number of persons."

A gift concert was held to be a lottery, where the holder of a ticket was entitled to admission and to whatever sum might be awarded to the number of his ticket. *Negley* v. *Devlin* (1872) 12 Abb. Pr. N. S. 210; *Rolfe* v. *Delmar* (1868) 7 Robt. 80.

A scheme for the sale of packages of candy, some of which contained tickets for silverware, was held to be a lottery in *Hull* v. *Ruggles* (1874) 56 N. Y. 424.

"Playing policy," so-called, was declared to be a lottery in *Wilkinson* v. *Gill* (1878) 74 N. Y. 63, 30 Am. Rep. 264.

Where bonds were issued by the Austrian government according



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to a plan by which the holder purchased the bonds either at their face or their market value, with the further provision that, on a specified contingency, the holder, besides receiving the principal and interest on the bond, might, by lot or chance, receive an additional sum, to be determined according to a prescribed scheme, it was held that the bonds were not lottery tickets. "In loaning money upon these bonds the holder thereof ran no risk of loss, if the principal and interest were paid, and he took the chance which might arise in case it should be determined by lot that his bond was entitled to a larger sum than the principal, interest, and premium, which he was sure to get in any event." This was not a lottery. *Kohn* v. *Koehler* (1884) 96 N. Y. 362, 48 Am. Rep. 628.

*Pool-selling.*—In *Reilly* v. *Gray* (1894) 77 Hun, 402, 28 N. Y. Supp. 811, the court, in sustaining the act of 1887, chap. 479, relating to pool-selling, cited *Com.* v. *Ferry* (1888) 146 Mass. 203, 15 N. E. 484, in which a pool "is defined to be a combination of stakes, the money derived from which is to go to the winner;" and in which it is said that "registering bets and selling pools are not distinct kinds of unlawful business, but different parts of one transaction, representing different stages of it." The principal case explains the practice relating to the auction pool, French pool, and book-making. Betting on horse races was not deemed a lottery at the time of the adoption of the Constitution, and it was therefore not intended to be included in the constitutional prohibition. Pool-selling was said to be a development of betting,—a combination in the same line.

The New York common pleas reached a different conclusion concerning the act of 1887, and in *Irving* v. *Britton* (1894) 8 Misc. 201, 28 N. Y. Supp. 529, held the act unconstitutional so far as it purported to authorize pool-selling at a horse race; that a pool on a horse race is a lottery, and that book-making is illegal. The opinion of Justice McLennan at special term, in the *Reilly Case*, was cited as authority for the decision, but it will be observed that the order of the special term had already been reversed by the general term, as above stated. The decision by the general term in the *Reilly Case* was rendered in April, 1894; the constitutional convention held that year added pool-selling and book-making to the prohibition against lotteries.

Following the adoption of the new Constitution, the legislature of 1895 passed chap. 570, providing for a state racing commission, and authorizing associations for the improvement of the breed of horses. This statute was considered by the New York common pleas at special term in *Dudley* v. *Flushing Jockey Club* (1895) 14 Misc. 58,

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36 N. Y. Supp. 128, which held the statute unconstitutional so far as it authorizes and allows a recovery for "sweepstakes" won upon a horse race.

The same statute was considered without passing upon its constitutionality in *People ex rel. Weaver* v. *Van De Carr* (1896) 150 N. Y. 439, 44 N. E. 1040, construing § 351 of the Penal Code as amended in 1895.

The racing act of 1895 was before the court of appeals in *People ex rel. Sturgis* v. *Fallon* (1897) 152 N. Y. 1, 37 L. R. A. 419, 46 N. E. 302, where § 17, which fixes the penalty for recording bets or wagers on horse races, was declared to be constitutional. It reduced the penalty for the commission of the prohibited acts, but that subject was said to be within the exclusive jurisdiction of the legislature.

The same statute was also sustained in *People ex rel. Lawrence* v. *Fallon* (1897) 152 N. Y. 12, 37 L. R. A. 227, 57 Am. St. Rep. 492, 46 N. E. 296, and it was there held that the act is a special law, and within the exception specified in § 352 of the Penal Code.

The legislature had power to enact §§ 344*a* and 344*b* of the Penal Code relating to certain forms of gambling. *People* v. *Adams* (1903) 176 N. Y. 351, 63 L. R. A. 406, 98 Am. St. Rep. 675, 68 N. E. 636, affirmed (1904) 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372.

**§ 10. [*Sovereignty in real property; escheats.*]—The people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the state; and all lands the title to which shall fail, from a defect of heirs, shall revert, or escheat, to the people.**

[Const. 1846, art. 1, § 11.]

In the chapter on the Constitution of 1846 I have given a sketch of various discussions relating to the title to real property, resulting in the adoption of this and other sections intended to state certain general principles, and in some respects to modify the common law. The status of property and the ultimate title and authority concerning it which the people possess in their sovereign capacity were considered in *People* v. *Trinity Church* (1860) 22 N. Y. 44, where the court took occasion to say that this section does not "declare a mere

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presumption of a present title which can be repelled by proving a grant from the state, but an absolute rule of political sovereignty, incapable of yielding to any circumstances whatever. The people 'are deemed,' not presumed, to possess the original and ultimate property, etc.; in other words, all private titles are held from them as the political sovereignty, as in England all lands are held under the Crown in the same sense. When, by the Revolution, the colony of New York became separated from the Crown of Great Britain, and a republican government was formed, the people succeeded the King in the ownership of all lands within the state which had not already been granted away, and they became from thenceforth the source of all private titles. To the same source, also, titles return by reverter or escheat when the person last seised dies, without heirs capable of inheriting. The Constitution is simply declaratory of these principles as the fixed and unalterable rules of public law. . . . The ownership or right of property therein mentioned is fixed and unchangeable. It can never pass away from the people by grant or otherwise, because it is the original and ultimate ownership of the political sovereign which is referred to, and not the title or estate which a private person can acquire to himself and his heirs, to be holden of the state, and subject to escheat. By whatever name we may call the highest estate of an individual known to our laws, there is a theoretical title in the state of a still higher nature, to which the right of possession and enjoyment becomes annexed on the failure of the inheritance. This is the 'original and ultimate property' spoken of in the Constitution."

In *Jackson ex dem. Winthrop* v. *Ingraham* (1809) 4 Johns. 163, the supreme court said it could not "take notice of any title to land not derived from our own government, and verified by a patent under the great seal of the state or the province of New York. Whether claimants to lands within this state, founded on French grants, might not have had an equitable claim on the government under the capitulation of Montreal in 1760, or the treaty of 1763, is a question with which this court has no concern. Such a claim might have been presented and urged to the government, but it does not afford that evidence of legal title which can be recognized by this court. We can look no further than to the titles derived under our own grants. This has been the uniform sense of our courts from the first establishment of the English government in the colony of New York." It appears that by an order of the privy council in England on the 12th of August, 1768, no Canadian claim to lands south of the 45th degree of north latitude was to operate, un-

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less such claim was consummated and confirmed by a grant under the seal of New York. The colonial assembly declined to recognize these claims, and in 1773 declared them to be "extravagant and destitute of all foundation."

The supreme court in *O'Meara* v. *Allegany* (1874) 3 Thomp. & C. 235, said that land in an Indian reservation was embraced in the right of sovereignty as defined by this section; that the state might therefore provide for the construction of a bridge on such reservation, and that the statute authorizing such a bridge was, in effect, an assertion of the right of eminent domain. The decision was reversed in the court of appeals (1874) 59 N. Y. 316, on the construction of the statute, and without considering the Indian titles.

Naturalization under the Federal statutes has no retroactive effect. *Heney* v. *Brooklyn Benev. Soc.* (1868) 39 N. Y. 333.

*Johnston* v. *Spicer* (1887) 107 N. Y. 185, 198, 13 N. E. 753, contains a sketch of the history of legislation relating to escheats.

The courts have had frequent occasion to consider subjects relating to escheats and the rights of aliens, but the cases for the most part involve questions of procedure or evidence and determine the status of persons or property under particular circumstances without special reference to the Constitution. These decisions may be found in the digests, but are not of special interest here.

§ 11. [*Feudal tenures abolished.*]—All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, however, all rents and services certain which at any time heretofore have been lawfully created or reserved.

[Const. 1846, art. 1, § 12.]

The abolition of feudal tenures, first by statute and then by the Constitution, has been considered in the chapter on the Convention of 1846, in connection with the subject of agricultural leases and other topics relating to real property.

This subject is considered in *Tyler* v. *Heidorn* (1866) 46 Barb. 439.

§ 12. [*Absolute ownership of estates.*]—All lands within this state are declared to be allodial, so that, sub-

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ject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates.

[Const. 1846, art. 1, § 13.]

This subject is considered in connection with the work of the Convention of 1846. The rights of riparian owners along the Hudson river are considered in *Gould* v. *Hudson River R. Co.* (1852) 6 N. Y. 522, and in *Kerr* v. *West Shore R. Co.* (1891) 127 N. Y. 269, 27 N. E. 833.

In *People ex rel. Howell* v. *Jessup* (1899) 160 N. Y. 256, 54 N. E. 682, the court had occasion to determine the title acquired by the town of South Hampton under the Andros and Dongan charters, and also the right of a riparian owner on Great South bay.

§ 13. [*Leases of agricultural lands limited.*] — No lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid.

[Const. 1846, art. 1, § 14.]

The history of this section will be found in the second volume, in connection with the work of the Convention of 1846.

In *Stephens* v. *Reynolds* (1852) 6 N. Y. 454, the court, after a brief statement of the reasons which prompted the Convention of 1846 to include this section in the Constitution, say that the "leases or grants of land prohibited by the Constitution were such as were held by the tenants upon a reservation of an annual or periodical rent or service, to be paid as a compensation for the use of the lands, in contradistinction from a consideration paid for the estate granted. It is still competent to make a grant for life or lives upon a given consideration to be paid for the estate. This consideration may be payable all at once, or by instalments, or in services, so that it be not by way of rent. By the Constitution there must be a reservation of rent or service. A reservation is defined to be a keeping aside, or providing, as where a man lets or parts with his land but reserves or provides himself a rent out of it for his own livelihood." It was held that a lease which contained a covenant by

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the lessor to devise the land to the lessee's wife, a daughter of the lessor, in consideration of which the lessee agreed to furnish the lessor with comfortable support during her life, was not within the constitutional prohibition.

A similar lease was construed with the same result in *Parsell* v. *Stryker* (1869) 41 N. Y. 480.

A lease for twelve years, with a continuing covenant to renew at the end of each period of twelve years, was held good as to the first twelve, but void as to the covenant for renewal, the court observing that such a covenant was against the spirit and policy of the constitutional provision. *Hart* v. *Hart* (1856) 22 Barb. 606.

In *Rutherford* v. *Graham* (1875) 4 Hun, 796, a peculiar contract was held to be a sale of a right of dower, and not a lease within the meaning of the Constitution.

A lease for a longer period than twelve years would not be valid for that period, but the lease itself would be void *in toto*. An agreement including two leases executed at the same time, one for eight years, and one for a further period of twelve years, making twenty years in all, was declared invalid, the court observing that "otherwise the whole policy of the constitutional provision could be defeated by cutting a very long term up into successive short terms by the use of separate instruments all executed at the same time." *Clark* v. *Barnes* (1879) 76 N. Y. 301, 32 Am. Rep. 306.

"The character of the land is made, by the Constitution, the test of the validity of the lease, not the purpose for which the lease was made." Accordingly, a lease of agricultural land for the purpose of taking iron ore therefrom, but reserving to the lessor the use of a part of the land for any other purpose, was held invalid. The lessee had the right to use a part of the land for agricultural purposes in addition to its use for mining iron ore. *Odell* v. *Durant*, (1875) 62 N. Y. 524.

The same subject was considered in *Massachusetts Nat. Bank* v. *Shinn* (1900) 163 N. Y. 360, 57 N. E. 611, construing a lease for the exclusive purpose of mining iron ore, and a lease of twenty years was sustained. The court say that "the purpose is no test of validity, for the lease, whatever its purpose, if it covers agricultural lands, must exclude that use, or it will be void, provided the term exceeds twelve years."

In *Witherbee* v. *Stower* (1880) 23 Hun, 27, a similar question was presented involving the construction of a lease for fifty years of 4 acres of land, to be used for the manufacture of coal, and which land was said to be worthless and unfit for any other purpose.

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A life lease reserving an annual money rent is valid. It is necessarily for an indefinite period, and may terminate before the expiration of the constitutional limit, but its continuance beyond that time does not make it void. Life estates are not destroyed by this constitutional provision. The term "longer period" should be construed as meaning a definite period, and as not applicable to an estate whose duration is wholly indefinite and uncertain. *Parish* v. *Rogers* (1897) 20 App. Div. 279, 46 N. Y. Supp. 1058.

§ 14. [*Restraints on alienation prohibited.*]—All fines, quarter-sales, or other like restraints upon alienation, reserved in any grant of land hereafter to be made, shall be void.

[Const. 1846, art. 1, § 15.]

An interesting history of this section and the construction of a lease including a provision for quarter-sales may be found in *De Peyster* v. *Michael* (1852) 6 N. Y. 467, 57 Am. Dec. 470, which has been cited in a former part of this work in connection with the subject of tenures.

A covenant in a deed, the fee remaining in the grantor, that the grantee should pay to the grantor a specified sum on the sale of prescribed parcels, is not a restriction on alienation. *Bennet* v. *Washington Cemetery* (1890) 24 Abb. N. C. 459, 11 N. Y. Supp. 203, citing *Bennett* v. *Culver* (1884) 97 N. Y. 250, where the same deed was construed by the court of appeals.

§ 15. [*Indian lands.*]—No purchase or contract for the sale of lands in this state, made since the fourteenth day of October, one thousand seven hundred and seventy-five, or which may hereafter be made, of or with the Indians, shall be valid, unless made under the authority and with the consent of the legislature.

[Const. 1777, art. 37; 1821, art. 7, § 12; 1846, art. 1, § 16.]

*The Jay amendment.*—This section has been continued from the Constitution of 1821 without change. The sub-

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ject was included in the Constitution of 1777, but was not in the original draft of that instrument as presented to the Convention. In the chapter on the work of the first Convention it appears that, while the Constitution was under consideration, John Jay presented a section relating to Indian land, which, with some modifications, became § 37 of the Constitution of 1777, and the basis of the present provision. The subsequent acquisition of nearly all the land then held by the Indians has rendered this provision almost obsolete; but until the Indian title to the remaining reservations shall be extinguished by allotment or otherwise, the restriction imposed by the section will possess all its original force, though in a reduced and diminishing degree. Following the custom of stating in a preamble the reasons for constitutional or legislative action, Mr. Jay prefixed to his proposed section a statement reciting that "the right of preëmption to all Indian lands within this state appertains to the good people thereof," that "it is of great importance to the safety of this state that peace and amity with the Indians within the same be at all times supported and maintained," and that "the frauds too often practised towards the said Indians in contracts for their lands have, in divers instances, been productive of dangerous discontents and animosities." In disposing of this section the Convention omitted the first clause in the preamble, which asserted the right of preëmption to Indian lands by the people of the state, but retained the remainder. The section incorporated in the Constitution the policy regarding Indian land which had prevailed scarcely without interruption during the entire colonial period, and the importance of the original provision is manifest from the fact that when the first Constitution was adopted the Indians were in possession and control of a large part of the state.

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*Dutch policy.*—The Dutch adopted at the beginning the policy of purchasing Indian lands. Thus, Peter Schagen, in a letter to the States General, dated November 5, 1626, says that the colonists had purchased Manhattan Island for sixty guilders ($24). This policy was expressed in the first "Freedoms and Exemptions," 1629, in the provision that whosoever shall settle elsewhere than on Manhattan Island, which had already been purchased, "shall be obliged to satisfy the Indians for the land they shall settle upon." The patent to Kiliaen Van Rensselaer, bearing date August 13, 1630, of the tract afterwards embracing the county of Rensselaer and parts of the counties of Albany and Columbia, recited the purchase thereof from certain Indians. In the preliminary article on agricultural leases in the chapter on the Convention of 1846 I have given a sketch of the history of the Manor of Rensselaerwyck, and the influence of the land policy there established in producing the constitutional provision limiting such leases to twelve years. The requirement in the first Freedoms and Exemptions that land must be purchased from the Indians was repeated in the Freedoms and Exemptions of 1650, in the provision that the settlers must satisfy the natives for the soil.

The Dutch expressly recognized the Indian title, and sought to extinguish it by treaty or purchase. The Assembly of XIX., in a communication to the States General, under date of October 25, 1634, say that the Dutch West India Company purchased Manhattan Island of the Indians, "who were the indubitable owners thereof," and "there laid the foundation of a city," and also established colonies elsewhere, "for which purpose were also purchased from the chiefs of the Indians the lands and the soil, with their respective attributes and jurisdictions."

The feudal system, established in a modified form by

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the Freedoms and Exemptions, was inconsistent with the general right of the people to become independent landowners. We are therefore not surprised to find that, in a new project of Freedoms and Exemptions, proposed in October, 1634, but which was not approved by the States General, it was declared that "all private and poor people are excluded from these Exemptions, Privileges and Freedoms, and are not allowed to purchase any lands or grounds from the sachems or Indians in New Netherland, but must repair under the jurisdiction of the respective Lords Patroons."

The history of that period shows that there was an active and protracted controversy between the Dutch and English as to the title to certain parts of Long Island and Connecticut, but this controversy, especially in its national aspects, was terminated by the English conquest in 1664.

*English policy.*—The English government at this period apparently entertained different views of the obligation to purchase Indian land, for we find that, in an answer to a remonstrance concerning colonial affairs, presented by the Dutch ambassador to Charles I. in 1632, in which it was claimed that the English had usurped a certain plantation in the north parts of Virginia, which had been bought by the Dutch of the natives, it was denied that the Indians were in bona fide possession of the lands "so as to be able to dispose of them either by sale or donation, their residence being unsettled and uncertain, and being in common," and that it could not be proved that all the natives had joined in the pretended sale. If this was intended as a statement of English policy, it was soon modified, for in subsequent colonial history the English as well as the Dutch did, at least nominally, purchase of the Indians land which was occupied and settled in the course of colonization.

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The policy of a central control of Indian affairs, which included a prohibition against purchasing Indian lands without the consent of the government, and which policy has been expressed in all our Constitutions, was asserted in the Dutch Freedoms and Exemptions and continued under the English colonial administration; accordingly, we find that the governor and council exercised jurisdiction over this subject, and granted or refused, in their discretion, petitions for leave to purchase Indian lands. I have elsewhere given a history of the establishment of the New York assembly in 1683. At its second session in October, 1684, the assembly enacted a law which stated in substance the rule in relation to Indian contracts, which was incorporated ninety-three years afterwards in the first Constitution. This act provided "that from henceforward no purchase of lands from the Indians shall be esteemed a good title without leave first had and obtained from the governor, signified by a warrant under his hand and seal, and satisfaction for the said purchase acknowledged by the Indians from whom the purchase was made;" and the deed, with proof of payment, was required to be recorded in the office of the secretary of the colony.

The English policy of purchasing lands from the Indians, to which I have already referred, was formally adopted by the Duke of York, for many years proprietor of the colony. In his instructions to Governor Andros, in 1674, he observed that if opportunities are presented for purchasing "great tracts of land," the Governor and council should use their discretion and make such purchases as might be deemed for his interest. So, in the Duke's instructions to Governor Dongan in January, 1683, the Governor was requested to purchase from the Indians, on reasonable terms, land contiguous to the Duke's territory. Instructions to subsequent governors

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embrace substantially the same directions, and their reports show the purchase of large tracts which were added to the colonial possessions.

*Treaty of 1701.*—On the 19th of July, 1701, a conference was held at Albany between Lieutenant Governor John Nanfan and representatives of the Five Nations (Mohawks, Oneidas, Onondagas, Cayugas, and Senecas), at which time an agreement was made with the Indians concerning a large tract of land. The Lieutenant Governor, in his report on the 20th of August, said he had procured from the Five Nations an instrument whereby they convey to the Crown of England "a tract of land 800 miles long and 400 miles broad, including all their beaver hunting." But this transaction, by which the Crown apparently acquired 320,000 square miles of territory,—a tract some six times larger than the state of New York,—does not seem to have been deemed a cession and relinquishment of territory, but, at most, an arrangement by which the English government acquired a general dominion and assumed the defense and protection of the Five Nations. I have not seen a copy of the instrument referred to by Lieutenant Governor Nanfan, and from Wraxall's Indian Records (unpublished), containing an abridgment of the transactions relating to Indian affairs, it seems that the deed was not recorded in the original transactions, which are now said to be lost. Wraxall's Abridgment quotes from the original transactions a proposition made by a representative of the Five Nations, and which was apparently accepted, that "we do give and render up all that land where the beaver hunting (is) which they won by the sword then eighty years ago, and pray that he, the King, may be our Protector and Defender," and they offered to sign and seal an instrument to be prepared for that purpose. The arrangement was apparently not completed, or, at least, it seems to have re-

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quired further attention, for on the 14th of September, 1726, the representatives of three tribes, the Senecas, the Onondagas, and Cayugas, executed an instrument intended to confirm the agreement made in 1701. A copy of this second deed is preserved in the New York archives. It recites that, at the Albany Conference, July 19, 1701, the sachems of the Five Nations "did give and render up all their land where the Beaver Hunting is which they won with the sword then eighty years ago, to our Great King, praying that he might be their Protector and Defender there," and for which they requested that an instrument be prepared for them to sign and seal and to be carried to the King. The deed then goes on to ratify and confirm the agreement made in 1701, and grants to the King "all the said land and Beaver Hunting, to be protected and defended by his said Majesty, his heirs and successors, to and for the use of us, our heirs and successors, and the said three nations."

*Sir William Johnson's negotiations.*—The apparent effect of the arrangement initiated in 1701 and consummated by three members of the Indian confederacy in 1726 was to establish an English protectorate over the territory embraced in the treaty. The Indians did not abandon the land, and the English acquired no rights or ownership therein. This construction was afterwards maintained by the Indians and acquiesced in by the Crown, for in subsequent negotiations between Sir William Johnson, superintendent of Indian affairs, and the Indians, concerning the acquisition of territory, the treaty of 1701 was ignored, or, at least, was not deemed to give the English an absolute title or even a right of possession. The history of the relations between the English and the Indians in New York for several years prior to 1768, when a new treaty was made relating directly to the acquisition of territory, discloses a long

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series of negotiations in which Sir William Johnson manifested a degree of patience, persistence, intelligence, and integrity which readily accounts for his high standing with his own government and the esteem in which he was held by the Indians. The details of that history need not be given here. The negotiations during this period do not show any change of policy concerning Indian land, but, on the contrary, they evince a purpose to continue the policy which had prevailed more than a century, and which recognized the Indian title, and required its extinguishment by purchase.

*Fort Stanwix treaty of 1768.*—The last important treaty relating to territory made with the Indians prior to the Revolution was the so-called Fort Stanwix treaty, which bears date November 5, 1768. By this treaty the western boundary of English possessions was established by an irregular line beginning at Owego, near Pennsylvania, and terminating at the mouth of the Canada creek, where it empties into Wood's creek, near Oneida lake. This seems to have been the western boundary of the colony when the first Constitution was adopted, in 1777, though the nominal boundaries of the colony were deemed of much wider extent.

*Governor Tryon's report.*—An interesting view of this question is presented in a report on the colony made by Governor William Tryon to the home government June 11, 1774. He discusses the boundary question at some length, including the effect of the so-called treaty of 1701. In answer to the question "What are the reputed boundaries, and are any parts disputed, and by whom?" he says, among other things, that "the boundaries of the province of New York are derived from two sources: First, the grants from King Charles the Second to his brother, James, Duke of York, dated the 12 of March, 166¾ and the 29 of June, 1674, which were intended to

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convey to the Duke all the lands claimed by the Dutch, the first occupants of this colony. Secondly, from the submission and subjection of the Five Nations of Indians to the Crown of England;" and he describes the boundary as "extending westward nearly to the head of the Mohawk branch of Hudson's river, and southward of that branch to within a few miles of the north boundary of Pennsylvania," and says this is the only construction that will satisfy the treaty of Fort Stanwix.

Governor Tryon's observations on the Indian title are of such historical importance that they deserve to be quoted here in full. He says:

"The Second Source of the Title of this Government is grounded on the Claim of the Five Nations who are in the Treaty of Utrecht [1713] acknowledged by France to be subject to Great Britain. Soon after the English conquered this Country from the Dutch, pursuing their system of Policy, they entered into a strict Alliance with the Natives, who by Treaties with this Colony subjected themselves to the Crown of England, and their lands to its protection, and from this period were always treated as Subjects, and their Country consider'd by this Government as part of the Province of New York, which probably gave rise to the extended jurisdiction of the Colony beyond the Duke's Grants, signified by the Words 'the teretories depending thereon' which are found in all the Commissions of the Crown to its Governors. Nor has the Crown except by the Confirmation of the Agreement fixing the Boundary of Connecticut at about Twenty miles east of Hudson's River at any time contracted the jurisdiction of the Colony Westward of Connecticut River and Southward of the Latitude 45 the Proclamation of His Present Majesty of the 7th of October, 1763. leaving the jurisdiction Southward of that Latitude as it stood before, tho' it prohibits for the present the farther

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extension of the Grants and Settlements into the Country thereby reserved to the Indians, to avoid giving Umbrage to that people who complained they were too much straitned in their hunting grounds. It is uncertain at this Day to what Extent the Five Nations carried their claim to the Westward and Northward but there is no doubt it went to the North beyond the 45 Degree of Latitude and Westward to Lake Huron, their Beaver Hunting Country being bounded to the West by that Lake, which Country the Five Nations by Treaty with the Governor of this Province at Albany in 1701, surrender'd to the Crown to be protected and defended for them—Mitchel in his Map extends their Claim much further Westward, and he is supported in this opinion by Maps and other Authorities very Ancient aud Respectable."

"The Boundaries of the Province of New York are as follows: On the South, the Atlantic Ocean, including Long Island, Staten Island and others of less note. On the west, the Banks of Hudson's River from Sandy Hook, on the Ocean, to the 41 Degree of Latitude, thence the line established between New York and New Jersey to Delaware River thence the River Delaware to the North-east corner of Pensylvania or the Beginning of the Latitude 43, which in Mitchel's Map is by mistake carried thro' the whole of that degree. Thence the North Boundary Line of Pennsylvania to the Northwest corner of that Province, and continuing the same line to a point in Lake Erie which bears due south from the East Bank of the Streight of D'Etroit and of Lake Huron to the Forty Fifth Degree of Northern Latitude. On the North, a line from a point on the East Bank of Lake Huron in the Latitude of forty five East to the River St. Lawrence, or the South Boundary Line of Quebec; Thence along the South Boundary Line of that Province across the River St. Lawrence to the Monument on the



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East Bank of Lake Champlain, fixed there in the 45 degree of Northern Latitude; Thence East along the Line already run and marked to the Monument or Station fixed on the West Bank of the River Connecticut in the same Latitude. On the East, the Western Banks of the River Connecticut from the last mentioned Station to the Southwest Corner of the Province of New Hampshire, in the North boundary Line of the Massachusetts Bay, and from thence along that Line, (if continued) and the Western limits of the Province of Massachusetts Bay, and the Colony of Connecticut."

The Governor, in reply to another question, says that, assuming Lake Huron to be the western boundary, as inferred from the treaty of 1701, the general extent of the colony east and west was about 456 miles, and of the northern part, including Vermont, about 500 miles; and he also estimates the number of square miles, exclusive of lakes, at 82,112, or 52,551,680 acres. But the geography of the province was materially altered by events which were rapidly hastening to a culmination when Governor Tryon made his report, and in less than a year afterwards the colonies, beginning at Lexington, became involved in a war with the government which had requested this information concerning the province. If the boundaries indicated in this report could have been maintained for the new state, its rank as the Empire State in the Union would have been even more distinctively established. Its area would have been almost equal to the combined area of England and Ireland.

*Treaty of Paris, 1783.*—In the chapter on the first Constitution I have noted in the Convention proceedings a proposition to include in the Constitution the boundaries of the state; but such boundaries were not inserted, and apparently no attempt was made by the Convention to

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define the territorial extent of the new state. We may assume that the statesmen of that period were familiar with the Tryon report, or at least with the facts relating to the various Indian treaties, and doubtless appreciated the geographical uncertainties indicated by Governor Tryon. Besides, the results of the war might, as they did, modify the supposed boundaries of the state, and a description in the Constitution would have become incongruous and of course inaccurate in the light of the provisions of the treaty of peace, which materially reduced its area.

The ambitious designs of the colonists to seize and hold Canada for the new nation could not be realized, and the treaty of peace, by which the independence of the new nation was formally acknowledged, definitively prescribed the northern boundary, which excluded from the province of New York some 35,000 square miles of territory embraced in Governor Tryon's estimate of its area. By the treaty of peace signed at Paris September 3, 1783, and ratified by Congress early in January, 1784, the northern boundary of the United States, so far as it affected New York, was fixed at the 45th parallel of latitude, beginning at the Connecticut river, "from thence by a line due west on said latitude until it strikes the river Iroquois or Cataraquy (St. Lawrence); thence along the middle of said river into Lake Ontario; through the middle of said lake until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie and through the middle of said lake."

*State policy.*—The foregoing sketch, omitting many interesting details, shows substantially the development of the colonial policy in regard to the acquisition of Indian land, and presents the situation at the close of the Revolutionary War, when, by the treaty of peace, the

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thirteen colonies were acknowledged to be free and independent states, and the English Crown surrendered and relinquished all sovereignty over any part of the boundaries included in the treaty. While the state of New York thus acquired jurisdiction over the territory embraced in its boundaries, the Indians were still in possession and acknowledged to be the owners of nearly all the western part of the state. The colonial policy regarding these lands was continued; several statutes were passed in the early years of the state appointing commissioners to negotiate with the Indians in relation to their land and for other purposes relating to Indian affairs, and by an act passed April 11, 1785, commissioners were expressly directed "to obtain a cession or grant, to the use of the people of this state, of such lands within this state now holden or claimed by the native Indians as such Indians shall be willing to dispose of on reasonable terms." It will not be profitable to follow in detail the acquisition of Indian land. The proceedings of the commissioners of Indian affairs have not been published, but there are two manuscript volumes of their transactions in the state library which are readily accessible to the student who may wish to pursue this subject further. Various treaties between the United States and the Indian nations also deal with this question and have an important bearing on our relations with the Indians. Space will not permit a consideration of this subject from the Federal point of view, but our state courts have, on several occasions, determined questions relating to Indian titles and the proper construction of the constitutional provision in relation to Indian contracts.

*Chancellor Kent's views.*—Chancellor Kent considered this subject on several occasions. In *Jackson ex dem. Klock* v. *Hudson* (1808) 3 Johns. 375, 3 Am. Dec. 500, being then chief justice, he said, in delivering the judg-

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ment of the court, that the "policy, or the abstract right of granting lands in the possession of the native Indians, without their previous consent, as original lords of the soil, is a political question" with which the court had nothing to do in a contest between two citizens, neither of whom deduced any title from the Indians. The object and scope of the original constitutional provision in relation to contracts with Indians were considered by Chancellor Kent in *Goodell* v. *Jackson* (1823) 20 Johns. 693, 11 Am. Dec. 351. He called attention to the clause in the preamble already quoted relating to frauds which had been practised upon the Indians, and said: "The Constitution assumes as a fact, one great truth, verified by the whole history of our country, that the Indians, in their commercial dealings with the whites, were comparatively a feeble and a degraded race, who stood in need of the arm of government constantly thrown around them." The Chancellor cited the resolution of the Continental Congress of November, 1779, relating to the Six Nations, declaring that no land should be sold by the Indians, either as individuals or as a nation, unless by the consent of Congress; and he noted the similarity between this resolution and the provision in the New York Constitution of 1777. "It was worthy of the character of our people," he said, "enjoying so great a superiority over the Indians in the cultivation of the mind, in the lights of science, the distinctions of property, and the arts of civilized life, to have made the protection of the property of the feeble and dependent remnants of the Nations within our limits a fundamental article of government. It is not less wise than it is just to give to that article a benign and liberal interpretation in favor of the beneficial end in view." The Chancellor said: "The Six Nations were a great and powerful confederacy, and our ancestors a feeble colony, settled near the coasts of the ocean, and

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along the shores of the Hudson and Mohawk, when these Indians first placed themselves and their lands under our protection, and formed a covenant chain of friendship that was to endure for ages. And when we consider the long and distressing wars in which the Indians were involved on our account with the Canadian French, and the artful means which were used from time to time to detach them from our alliance, it must be granted that fidelity has been nowhere better observed, or maintained with a more intrepid spirit, than by these generous barbarians." The Chancellor held that, under the Constitution, the purchase of land by a white man of an individual Indian was invalid without the consent of the legislature.

The same rule was applied in *Lee* v. *Glover* (1828) 8 Cow. 189, and in *Murray* v. *Wooden* (1837) 17 Wend. 531.

Chancellor Kent retired from office on the 31st of July, 1823, by operation of the age limit provision of the Constitution, which then terminated judicial service at sixty. During the next three years he delivered a course of law lectures at Columbia College, and in 1826 began the publication of his "Commentaries on American Law." In the first volume of this work, at page 270, discussing the Indian title, he says: "The title of the European nations, and which passed to the United States, to this immense territorial empire, was founded on discovery and conquest; and, by the European customary law of nations, prior discovery gave this title to the soil, subject to the possessory right of the natives, and which occupancy was all the right that European conquerors and discoverers, and which the United States, as succeeding to their title, would admit to reside in the native Indians. The principle is, that the Indians are to be considered merely as occupants; to be protected while in peace in the possession of their lands, but to be deemed incapable of transferring

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the absolute title to any other than the sovereign of the country."

*Judge Bronson's opinion.*—I have already quoted somewhat freely from authorities relating to the acquisition of Indian lands, but the remarks of Judge Bronson, in *Ogden* v. *Lee* (1844) 6 Hill, 546, present a view of the subject not fully embraced in other judicial opinions or public documents. He says:

"The European governments whose people discovered and made settlements in North America claimed the sovereignty of the country, and the ultimate title, but not the immediate right of possession, to all the lands within their respective limits. Upon the principle laid down by Vattel, bk. 1, §§ 81, 209, they might have asserted a larger right; for the native Indians lived by fishing and hunting, without converting to the purposes of agriculture any considerable portion of the vast tracts of country over which they wandered. But the Europeans pursued the more just and politic course of acquiring the Indian title by purchase. The claim which they set up and asserted amounted to little more than a preëmption, or the right of purchasing from the Indians all the lands within the bounds of their respective discoveries, to the exclusion of all other nations. It is true that the British Crown granted charters and issued patents for large tracts of land before the Indian right had been extinguished; and these instruments purported to convey the property in fee. It was so of the grant made by Charles the Second to his brother, the Duke of York, in 1664, which included all the territory now constituting the states of New York and New Jersey. But these grants were not intended to convey, and the grantees never pretended that they had acquired, an absolute fee in the land. They neither took nor claimed anything more than the ultimate fee, or the right of dominion after the Indian

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title should be extinguished. And so far as the state of New York is concerned, I am happy to say that, beyond what may have been acquired by conquest in lawful war, the Indians have never been deprived of a single foot of land without their voluntary consent. Their title by occupancy has been uniformly acknowledged, both by the colonial and state governments, from the first settlement of the country down to the present day; and it cannot now be successfully questioned in the judicial tribunals."

*The Massachusetts claim.*—An interesting question relating to Indian lands in the western part of the state was considered in *Blacksmith* v. *Fellows* (1852) 7 N. Y. 401, affirmed in (1856) 19 How. 366, 15 L. ed. 684. Judge Edmonds, who wrote the prevailing opinion in the court of appeals, discussing the history of the title to these lands, says that there was originally a dispute between the states of New York and Massachusetts as to a large tract of land of which the Tonawanda reservation was a part. "In 1786 that dispute was settled by a cession from Massachusetts to New York of the government, sovereignty, and jurisdiction of the lands in controversy, and by the cession from New York to Massachusetts of 'the right of preëmption of the soil from the native Indians and all other right or title of New York' to the same. The lands were then in the independent occupancy of a nation of Indians and were owned by them, and all that Massachusetts acquired by the cession to her was the exclusive right of buying from the Indians when they should be disposed to sell." The Massachusetts interest was subsequently conveyed to Ogden and Fellows, who also, with the consent of the United States, acquired the title of the Indians, subject to their right of occupancy of certain reservations. The consent of the Federal government was expressed in a treaty dated May 20, 1842. Under the peculiar circumstances of this case,

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which need not be stated here, it was held that an individual Indian, in exclusive possession of a part of the Tonawanda reservation, was entitled to maintain an action, in his own name, to recover damages for a trespass committed on such land.

The Ogden and Fellows claims were also considered in *Ogden* v. *Lee* (1844) 6 Hill, 546, affirmed in (1846) 5 Denio, 628; *Fellows* v. *Denniston* (1861) 23 N. Y. 423; *People ex rel. Cutler* v. *Dibble* (1857) 16 N. Y. 203, affirmed in (1858) 21 How. 366, 16 L. ed. 149.

*Other judicial construction.*—The effect of the change of political relations brought about by the Revolution is considered in *Seneca Nation* v. *Christie* (1891) 126 N. Y. 122, 27 N. E. 275, where the court say that "the nature of the Indian title to lands on this continent was established by the system of public law adopted by European nations regulating their possessions here. It became the recognized principle that discovery, followed by possession, vested in the sovereign by whose subjects the discovery was made the absolute title to the soil of the lands within the limits of the discovered territory, subject, however, to the right of occupation by the Indian tribes, which could only be extinguished by their voluntary consent, unless forfeited under the laws of war. It was a necessary sequence to the claim that the sovereign had the ultimate title to the soil, that the right to extinguish the Indian occupation was exclusively vested in the sovereign. The Indians were held to be incapable of alienating their lands except to the Crown, and all purchases made from them without its consent were regarded and treated as absolutely void. The title of the Crown was subject to grant, but a grant from the Crown only conveyed the fee, subject to the right of Indian occupation; and when that was extinguished, under the sanction of the Crown the possession then attached to the fee, and the title to the

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grantee was thereby perfected. These general principles were announced by Chief Justice Marshall in the great case of *Johnson* v. *M'Intosh* (1823) 8 Wheat. 543, 5 L. ed. 681, which has ever since been regarded as a sound exposition of the nature of Indian titles.

"The several colonial charters undertook to define the territorial limits of the respective colonies. In many cases the boundaries were indefinite and in some cases conflicting. The Crown, however, except in case of proprietary charters, exercised the right of making grants of unappropriated lands within the chartered limits of the colonies, although the right of soil and jurisdiction was vested in the colonial governments. On the Declaration of Independence the colonies became sovereign states. They were so acknowledged by the treaty of peace of 1783, and Great Britain by that treaty 'relinquished all claims to the government, property, and territorial rights' within the several colonies. It is the received opinion that the colonies succeeded to the title of the Crown to all the ungranted lands within their respective boundaries, with the exclusive right to extinguish by purchase the Indian title, and to regulate dealings with the Indian tribes. . . . The original states, before and after the adoption of the Federal Constitution, assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdictions. They exercised the power, which had before been vested in the Crown, to treat with the Indians, and this they did independently of the government of the United States. This was notably true of the state of New York. Laws were enacted from time to time by the legislature of the state authorizing treaties with the Indians (see Laws of 1784, chap. 22; Laws of 1788, chap. 47; Laws of 1813, chap. 29, § 52; Laws of 1839, chap. 58; Laws of 1831, chap.

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234). In 1788 the state entered into treaties with the Onondagas and Oneidas, and in 1789 with the Cayugas, whereby it acquired the title to large tracts of land in the central part of the state, and many subsequent treaties were made with these tribes by which the state finally acquired nearly all their remaining lands. Similar treaties were made with the St. Regis, Mohawk, and Seneca Indians. In all, more than thirty treaties were made between the state and various tribes, independently and without the intervention of the government of the United States. . . . In all cases the state, and not the United States, was the contracting party with the Indians. The treaties were in no sense treaties made by the President and Senate of the United States. The list of governors who participated in making them embraced many of the great names in the history of the state. It includes the Clintons, Tompkins, Van Buren, Marcy, Wright, and Seward. . . . It is evident that the eminent statesmen who participated in these negotiations did not understand that the prohibition in the Federal Constitution that 'no state shall enter into any treaty, alliance, or confederation' (article 1, § 10) or the other provision vesting the treaty-making power in the President and Senate (article 2, § 2, subd. 2) prevented the state from negotiating with the Indian tribes therein for the extinguishment of the Indian title."

After referring to the Federal policy of making treaties with Indian tribes, and of regarding them as, in some sense, nations, which prevailed for nearly a century, the court say that a radical change was wrought by recent congressional legislation, and cite the act of Congress of March 3, 1871, prohibiting further dealing with the Indian nations or tribes by treaties, and which enacts that "no Indian nation or tribe within the territory of the United States shall be regarded or recognized as an in-

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dependent nation, tribe, or power, with whom the United States may contract by treaty," and other legislation indicating the new relations which the Indians were to sustain to the general government. The various transactions of the state with the Indians in relation to their land are said not to be treaties in the constitutional sense, and are not "inconsistent with the exercise by the United States of its general jurisdiction for the protection of the Indians in their right of occupancy of their lands."

The nature of the Indian title and occupancy was again considered in *People ex rel. Cutler* v. *Dibble* (1857) 16 N. Y. 203, affirmed in (1858) 21 How. 366, 16 L. ed. 149, sustaining the New York act of 1821, chap. 204, which made it unlawful "for any person or persons, other than Indians, to settle or reside upon any lands belonging to or owned by any nation or tribe of Indians within the state," and all leases, contracts, and agreements made by any Indians, whereby any person or persons other than Indians shall be permitted to reside upon such lands, were declared to be void. Provision was made for the summary removal of intruders by a judge's order. This provision was attacked as unconstitutional, on the ground that it denied the right of trial by jury, and that it deprived a person of property without due process of law. This decision has already been cited in the note to the section relating to trial by jury, and the reasons assigned by the court in determining the validity of the act are there stated. In the course of his opinion, Judge Brown makes some observations bearing on the general subject of this note. He says: "The Indians are not citizens of the state in the exact sense of that term. They have been treated, since our first intercourse with them, as quasi independent nations or tribes, having governments and institutions and national attributes of their own; but, both collectively and individually, feeble and helpless com-

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pared with the whites, and therefore needing constantly the protection and paternal care of the government. Their rights of property in their lands rise no higher than the right of occupancy, which it has been the constant care of the government never to disturb, unless with their consent, and then only under regulations of justice and humanity."

The power of the state to tax Indian lands received judicial attention in *Fellows* v. *Denniston* (1861) 23 N. Y. 423, in which the court construed several statutes providing for the appointment of commissioners to lay out highways on Indian reservations, and authorizing the taxation thereof for the purpose of defraying the cost of such highways and the sale of lands for the nonpayment of taxes, but with the proviso that no sale for the purpose of collecting the tax should in any manner affect the right of the Indians to occupy said lands. Discussing the relations of the Indians and the state to lands included in the reservations, the court say that "the Indian nation, in a collective or national capacity, has the right of occupancy of the land, but no power to sell or in any way dispose of it to others, except to the state; or to persons authorized by it to purchase; and the government of the state has the ultimate right of soil, or title in fee simple, subject to the Indian right of occupancy. The right to purchase the Indian claim, or, in the language usually employed, to extinguish the Indian title, thus existing in the state or in its grantees, is usually called the right of preëmption. This right of preëmption, as to these reservations, resided in the state of New York in the year 1786; but the state of Massachusetts set up a claim to the effect that the western part of this state, including the reservations in question, was covered by the charter of that colony, which, it was insisted, extended its territory quite across the continent to the Pacific ocean."

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New York's preëmption right was conveyed to Massachusetts by the compact of December 16, 1786, which exempted the lands from taxation while they were owned by Massachusetts, and from any general or state tax during fifteen years after the confirmation of the compact. The court said the Indians were not prejudiced by the highway tax nor by any sale which might take place pursuant to it. The power to tax Indian land was denied unless the Indian right of occupancy were protected, for it was observed that without any provision saving the rights of the Indians, the whole tribe might be dispossessed by the purchaser at the comptroller's sale. "Such taxes were inconsistent with the policy which this state has always observed towards the Indian tribes residing on their reservations within this state." All our Constitutions contain a provision restricting the right to deal with Indian lands. "This alone would go far to show that their lands were not to be subjected to the burdens imposed upon the lands of citizens, for, without ability to sell, it might often happen that it would be impossible for them to raise the money necessary to pay their taxes. It would be quite inconsistent with principle to allow all the lands of these people to be taken from them and sold to strangers, under the silent operation of general laws, while the sanction of the legislature, passing upon the actual transaction, is required to a valid alienation of the smallest parcel."

In *Seneca Nation* v. *Hammond* (1875) 6 Thomp. & C. 595, construing the act of 1873, chap. 455, which authorized any individual Indian residing on certain reservations to sell and dispose of timber growing on land enclosed and occupied by him, the court questioned "the authority of the legislature to pass an act vesting the title to property owned by an Indian nation in its collective capacity in individual Indians of the nation."

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§ 16. [*Common law continued.*]—Such parts of the common law, and of the acts of the legislature of the colony of New York as together did form the law of the said colony on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said colony, and of the Convention of the state of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated.

[Const. 1777, art. 35; 1821, art. 7, § 13; 1846, art. 1, § 17.]

The section continues and asserts a well established rule which was perfectly familiar to the statesmen who framed the first Constitution. In the official report made by Governor Tryon, June 11, 1774, in response to inquiries by the home government concerning colonial affairs, he says, among other things, in his answer to the question "What is the constitution of the government?" that "the Common Law of England is considered as the Fundamental law of the Province and it is the received Doctrine that all the Statutes (not Local in their Nature, and which can be fitly applied to the circumstances of the Colony) enacted before the Province had a Legislature, are binding upon the Colony; but the Statutes passed since do not affect the Colony, unless by being specially named, such appears to be the Intention of the British Legislature."

This authoritative statement, made less than a year

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before the battle of Lexington, by one of the ablest of the colonial governors, clearly describes the existing legal system, and amply justifies the wisdom of the men who, even in the excitement and turmoil of a great political revolution, calmly determined to preserve in the Constitution the personal rights and the principles of organized society which are such distinguishing features of the English common law.

A provision on this subject continuing the English common and statute law and the colonial legislation in force on the 19th of April, 1775, was included in the first Constitution. The Convention of 1821 revised the section, omitting several provisions which were deemed important by the framers of the first Constitution. The Convention of 1846 added a provision relating to codification which was omitted by the Convention of 1894.

The declaration in this section continuing the English common and statute law accords with the principle stated in *Bogardus* v. *Trinity Church* (1833) 4 Paige, 178, 197, that "it is a natural presumption, and therefore is adopted as a rule of law, that on the settlement of a new territory by a colony from another country, especially where the colonists continue subject to the same government, they carry with them the general laws of the mother country which are applicable to the situation of the colonists in the new territory, which laws thus become the laws of the colony until they are altered by common consent or by legislative enactment. . . . The common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, become in fact the common law rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New York by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province."

In the chapter on the colonial period I have referred to the fact that under the colonial legislative policy statutes were deemed to be in force from the time of their approval by the governor, but

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were subject to disapproval and repeal by the Crown. This subject was considered in *People* v. *Trinity Church* (1860) 22 N. Y. 44, 50, where the court, commenting on the action of Queen Anne in 1708, approving a colonial act of 1699, and disapproving an act passed in 1702, say that "the colonial statutes had the force of laws without the approval of the home government, and until they were annulled or disapproved. According to the uniform tenor of the royal charters and instructions, the power of assenting to or withholding assent from colonial statutes was conferred on the governors. After being enacted by the provincial legislature and approved by the governor they were to be transmitted to the home government for examination, with the proviso, however, that all such laws should be valid and binding until disapproved and rejected by the Crown."

The common law of England was the law of the colony on the 19th of April, 1775, so far as it was applicable to the circumstances of the colonists, "and it has since continued so to be when conformable to our institutions, unless it was established by an English statute which has been abrogated, or was rejected in colonial jurisprudence, or has been abolished by our legislation." *Cutting* v. *Cutting* (1881) 86 N. Y. 522, 529; *Shayne* v. *Evening Post Pub. Co.* (1901) 168 N. Y. 70, 55 L. R. A. 777, 85 Am. St. Rep. 654, 61 N. E. 115, where an action for libel was continued and revived against the directors of a defunct corporation, contrary to the rule of the common law, which was held inapplicable in this state.

This section was applied in *People ex rel. McClelland* v. *Roberts* (1896) 148 N. Y. 360, 31 L. R. A. 399, 42 N. E. 1082, construing the civil service amendment, article 5, § 9, and it was there held that, by operation of this section, the civil service act of 1883, with amendments, was continued, and that new legislation under the civil service amendment was not necessary to provide a scheme of administration.

The statute of 43 Elizabeth, relative to charitable uses, was never in force in the state of New York. *Dutch Church* v. *Mott* (1838) 7 Paige, 77; *Williams* v. *Williams* (1853) 8 N. Y. 525; but in this case the court said that "the law of charitable uses as it existed in England at the time of the Revolution, and the jurisdiction of the court of chancery over the subject, became the law of this state upon the adoption of the Constitution of 1777, and has not been repealed. It does not derive its origin from the statute of 43 Elizabeth, chap. 4, nor depend upon it. It was borrowed from the civil law, as modified by the institutions of Christianity, and at a very early period became part of the common law."



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The subject of charitable uses was considered in *Holland* v. *Alcock* (1888) 108 N. Y. 312, 2 Am. St. Rep. 420, 16 N. E. 305.

The common law of England in relation to the easement of light and air was not in force in the colony of New York on the 19th of April, 1775, and therefore was not continued by this section of the Constitution. *Myers* v. *Gemmel* (1851) 10 Barb. 537.

"In the absence of proof of the statute law of another state, it will be presumed that the common law prevails therein" (citing *Whitford* v. *Panama R. Co.* [1861] 23 N. Y. 465; *Waldron* v. *Ritchings* [1870] 3 Daly, 288); also that the common law of a particular state corresponds with our own. *Holmes* v. *Broughton* (1833) 10 Wend. 75, 25 Am. Dec. 536; *Cahill Iron Works* v. *Pemberton* (1893) 30 Abb. N. C. 450.

It seems that the English statutes of mortmain were not in force in the colony of New York. *Phœnix* v. *Columbia College* (1903) 87 App. Div. 438, 84 N. Y. Supp. 897.

§ 17. [*Royal grants and charters preserved.*]—All grants of land within this state, made by the King of Great Britain, or persons acting under his authority, after the fourteenth day of October, one thousand seven hundred and seventy-five, shall be null and void; but nothing contained in this Constitution shall affect any grants of land within this state, made by the authority of the said King or his predecessors, or shall annul any charters to bodies politic and corporate, by him or them made, before that day; or shall affect any such grants or charters since made by this state, or by persons acting under its authority; or shall impair the obligation of any debts contracted by the state, or individuals, or bodies corporate, or any other rights of property, or any suits, actions, rights of action, or other proceedings in courts of justice.

[Const. 1777, art. 36; 1821, art. 7, § 14; 1846, art. 1, § 18.]

This subject was included in the first Constitution. It was modified in some respects by the Convention of 1821, but, as adopted by that Convention, has not since been changed.

Questions relating to the effect of this provision were considered

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in *Demarest* v. *New York* (1878) 74 N. Y. 161; *People* v. *Clarke* (1853) 9 N. Y. 349.

§ 18. [*Damages for injuries causing death.*]—The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.

[New.]

A sketch of the origin of this provision has been given in the chapter on the Fourth Constitution, 1894.

This provision does not act retrospectively, and therefore does not affect causes of action which had accrued when it took effect. *Isola* v. *Weber* (1895) 147 N. Y. 329, 41 N. W. 704; *O'Reilly* v. *Utah, N. & C. Stage Co.* (1895) 87 Hun, 406, 34 N. Y. Supp. 358.

The section did not affect the power of the supreme court to supervise and reduce verdicts for damages. *Medinger* v. *Brooklyn Heights R. Co.* (1896) 6 App. Div. 42, 39 N. Y. Supp. 613.

The employer's liability act of 1902, chap. 602, does not violate this section. *Gmaehle* v. *Rosenberg* (1903) 83 App. Div. 339, 82 N. Y. Supp. 366.

An interesting discussion of this question will be found in *Rosin* v. *Lidgerwood Mfg. Co.* (1903) 89 App. Div. 245, 86 N. Y. Supp. 49, where the court doubts the power of the legislature to require notice as a prerequisite to a common law action to recover damages for injuries resulting in death.

## ARTICLE II.

### [SUFFRAGE.]

§ 1. [*Qualifications of voters.*]—Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state one year next preceding an election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may of-

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fer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people, provided that in time of war no elector in the actual military service of the state, or of the United States, in the Army or Navy thereof, shall be deprived of his vote by reason of his absence from such election district; and the legislature shall have power to provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside.

[Const. 1777, art. 7; 1821, art. 2, § 1; Am. 1826; 1846, art. 2, § 1; Am. 1864; Am. 1874.]

*Scope of section.*—This section "specifies the qualifications necessary to the elective franchise, provides who shall have the right to vote, and one duly qualified cannot be deprived of that right by any inferior tribunal." An inmate of the Soldiers' Home in the town of Bath was held not to be a resident of that town, and therefore not entitled to vote. *Silvey* v. *Lindsay* (1887) 107 N. Y. 55, 13 N. E. 444.

"The right of a citizen of this state to vote is protected by most careful provisions of the Constitution and the statutes. The legislature has no power to enact a law by which a person thus qualified can be deprived of his vote, and no person can lawfully exercise power conferred upon him in such a way as to prevent a duly registered citizen from exercising that right." *People* v. *Hochstim* (1902) 76 App. Div. 25, 78 N. Y. Supp. 638, 986, per Ingraham, J., construing the powers conferred on the superintendent of elections under the metropolitan election district act of 1898, as amended in 1899.

In *Gotcheus* v. *Matheson* (1870) 58 Barb. 152, Justice Murray, at special term, discussing the effect of an act of Congress by which a deserter from the Army forfeited his citizenship on failure to return to duty under specified conditions, says: "It is the exclusive province of the state to regulate the qualifications of its voters. It

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is the exclusive province of Congress to regulate the question of citizenship of the United States." Congress has no power to prescribe the qualifications of voters in the states. In the same case it is said that it is the duty of inspectors of election "to ascertain who are citizens; not to adjudge, declare, and enforce forfeitures of citizenship. It is their duty to ascertain who are and who are not legal voters, and to reject the votes of those that are illegal, and receive the votes of those that are legal." The plaintiff declined to answer certain questions by the inspectors, involving his supposed desertion from the Army, and his vote was, for that reason, rejected. It was held that this rejection was improper without proof that the plaintiff had been convicted of the offense of desertion.

The electors cannot be deprived of the results of an election by an unwarranted assumption of authority by a county board of canvassers in rejecting returns from an election district. Such a board acts ministerially. *People ex rel. Deuchler* v. *County Canvassers* (1882) 64 How. Pr. 334.

"The right of suffrage is one of the most valuable and sacred rights which the Constitution has conferred upon the citizen of the state. About it have been erected safeguards, with the object of securing to each qualified elector the fullest and freest exercise of his constitutional privilege, and also of obtaining the greatest protection against the perpetration of frauds at the polls, which shall be consistent with a certainty that every person entitled to vote shall have his ballot received, deposited, and counted. . . . The Constitution of the state provides that the citizen, fulfilling the stated conditions of age, citizenship, and residence, shall be entitled to vote at the election." The inspectors of election have "no discretion to reject the vote of a person who has satisfied the statutory tests, and when that is done, his vote must be deposited, and that is the time when, in legal contemplation, it is finally received. . . . The lawfulness of a vote cannot be determined until it has been received, and the elector's rights cannot be annulled without a trial where he may have an opportunity of bringing forward his proofs and having them passed upon in a proper way and by a proper tribunal." The inspectors may not act on their own opinions or knowledge. "Practically the law leaves it to the conscience of the person offering to vote to decide whether he can or will do so when his right is challenged." The inspectors cannot do more than to make use of the machinery provided by the law to test the voter's legal qualifications, and they cannot decide upon the truth or falsity of the answers to their questions. *People ex rel. Stapleton* v. *Bell* (1890) 119 N. Y.

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175, 23 N. E. 533, citing *People ex rel. Smith* v. *Pease* (1863) 27 N. Y. 45, 84 Am. Dec. 242.

*Legislative control.*—The legislature cannot add to the disabilities or disqualifications of voters authorized by the Constitution, hence the provision in the constitutional convention act of 1867, chap. 194, which required voters, if challenged, to take an oath of loyalty, was held to be invalid as imposing a disqualification not authorized by the Constitution. *Green* v. *Shumway* (1868) 39 N. Y. 418, 425.

A statute which makes a supervisor ineligible to the office of superintendent of the poor does not deprive an elector of his constitutional right to vote for any office. The office of superintendent of the poor is not made elective by the Constitution, and is therefore subject to legislative regulation. The legislature may impose a disqualification to the office which may have the effect to exclude certain persons from eligibility, and the elector's choice is not thereby constitutionally invaded. *People ex rel. Furman* v. *Clute* (1872) 50 N. Y. 451, 10 Am. Rep. 508.

"The right to vote, secured to the citizen by the Constitution, must be exercised in the manner and subject to the regulations lawfully prescribed by the legislature in respect to the time when and the method by which his will is expressed, and in order to make his will and intention effectual at the election, he must comply with at least all the substantial requirements of law." *People ex rel. Nichols* v. *County Canvassers* (1891) 129 N. Y. 395, 14 L. R. A. 624, 29 N. E. 327, in which ballots intended for one district were used in another, and it was held that under the ballot reform act of 1890, chap. 262, as amended in 1891, chap. 296, the ballots could not be counted, because not properly indorsed for the districts in which they were used.

"The right to vote at an election is derived from the Constitution; the manner of voting is regulated by statute." Every adult male citizen is entitled to vote at every election for every office required by law to be filled thereat. "The Constitution contains no restriction upon this right, and the only express power given to the legislature in reference to it is to enact laws 'for ascertaining by proper proofs the citizens who shall be entitled to the right of suffrage.' There is, of course, an implied power to regulate the manner of voting, but any law which prohibits the right to vote is unconstitutional." Section 104 of the election law, as it stood in March, 1894, authorized a voter to write or paste on the official ballot the name of a candidate who had not been nominated, thus intending to give the voter a right to vote for any person, whether nominated or not.

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In a case where an office was not named on the official ballot, and for which no nominations had been made, it was held that voters were entitled to vote for candidates for such office, and the court sustained the election of a candidate whose name and the title of the office were pasted on official ballots. Section 104 was construed "to give a voter the right, not only to vote for any person for an office named on the official ballot, but also for an office which ought to have been named thereon, but which had been omitted therefrom by the neglect of the official charged with the duty of its preparation." *People ex rel. Goring* v. *Wappinger's Falls* (1894) 83 Hun, 130, 31 N. Y. Supp. 758, affirmed in (1895) 144 N. Y. 616, 619, 39 N. E. 641, where the court said that "if the clerk, or other officer, charged with the duty, neglect to print upon the official ballot the name of an office which, under the law, was to be filled at the election for which the official ballots were prepared, the qualified voter will not thereby be deprived of his constitutional right to vote for any person he chooses for such an office."

The provision in the New York consolidation act of 1882, chap. 410, that the polls at a general election shall close at 4 o'clock in the afternoon, does not mean simply that the polling places are to be closed, but that voting is then to stop. The provision is constitutional, and does not conflict with the right of suffrage guaranteed to every qualified citizen. *Re 32d Election District* (1888) 18 N. Y. S. R. 785, 3 N. Y. Supp. 107, Barrett, J.

*Residence.*—"The domicil or home requisite as a qualification for voting purposes means a residence which the voter voluntarily chooses and has a right to take as such, and which he is at liberty to leave, as interest or caprice may dictate, but without any present intention to change it." *People* v. *Cady* (1894) 143 N. Y. 100, 25 L. R. A. 399, 37 N. E. 673.

An elector's absence from the election district in which he resides and has established a right to vote will not deprive him of his residence, though his absence extend through a series of years. *People* v. *Platt* (1889) 117 N. Y. 159, 22 N. E. 937.

"The Constitution does not define the essentials of the required residence, and there is nothing in it upon which a court can hold that only a residence on land is intended. In the absence of a constitutional definition, the definition usually adopted by the courts must govern. Residence means the act or state of being seated or settled in a place. It imports not only personal presence in a place, but an attachment to it by those acts or habits which express the closest connection between a person and a place." In this case a

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man who lived with his wife on board a lighter alongside a pier in New York was held to have acquired a voting residence in the election district in which the pier was situated. *Re Collins* (1882) 64 How. Pr. 63, Freedman, J.

*Election district.*—The legislature has power to prescribe the boundaries of an election district. In this respect it is supreme. It may locate the polling places according to its own judgment and discretion. "If the district is so situated that there is no convenient place within it to hold an election, there is nothing in the Constitution that prohibits the legislature from authorizing" a polling place to be located outside the district. "No vote can be registered, cast, or counted in this state, except at the polling place of some election district." A statute which authorized polling places for the town of Lockport to be located in the city of Lockport was held not obnoxious to the provision that an elector must vote in the election district in which he resides, and not elsewhere. Such location of polling places was deemed proper, and electors who voted at such polling places must be deemed to have voted in their own election district, and not elsewhere, within the meaning of the Constitution. City voters could not vote at these polling places: they were exclusively for the use of town voters, and were the only polling places designated for the town. *People ex rel. Lardner* v. *Carson* (1898) 155 N. Y. 491, 50 N. E. 292, citing *People* v. *McKane* (1894) 143 N. Y. 455, 38 N. E. 950, where six election districts were so arranged that they converged in one building where all the votes were registered and cast; but this situation was not deemed an objection to the validity of the election, and no question was raised concerning it.

*Minority representation.*—A question involving the validity of a statute providing for minority representation in the New York board of aldermen was considered, but not decided, in *People ex rel. Angerstein* v. *Kenney* (1884) 96 N. Y. 294. The act of 1878, chap. 400, provided for the election of aldermen by senate districts and also at large, but limited the right of any elector to vote for more than two thirds of the number to be chosen at large or from his senate district. The relator, claiming title to the office, denied the constitutionality of the act on the ground that it deprived electors of the right to vote for all officers to be chosen by the people. Before the case was decided the term of office had expired, and the court declined to pass upon the constitutional question. The court held, however, that the defendants were legally elected. It did not appear that any person was denied the right to vote for all officers, and it seems that every elector voted for as many candidates as he

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chose. "If he chose voluntarily to waive his constitutional right to vote for six and to vote for but four, that he could do and his ballot would be a valid ballot." The validity of the statute would clearly have been brought in question if a voter had been denied the right to vote for candidates equal to the whole number of officers to be chosen, either at large or from a senate district.

*Women excluded.*—A woman is not entitled to vote. Having designated the persons who are entitled to vote at elections, this section has the effect to negative the right of the elective franchise to all others. The fact that a woman is a citizen of this state and of the United States does not invest her with this privilege. "The elective suffrage is not a natural right of the citizen. It is a franchise dependent upon law, by which it must be conferred to permit its exercise. . . . It is a political right, to be given or withheld at the pleasure of the lawmaking power of the sovereignty, and is not deemed to be within the privileges and immunities guaranteed to the citizen by the Constitution of the United States (art. 4, § 2) as those terms have been understood and applied, and therefore no such right was derived from their use in the 14th Amendment to that instrument, which merely furnished additional guaranty for the protection of the privileges and immunities of the citizen, without extending their import." *People* v. *Barber* (1888) 48 Hun, 198.

*Re Cancellation of Names* (1893) 5 Misc. 375, 26 N. Y. Supp. 167, holding unconstitutional the act of 1892, chap. 214, which conferred on women the right to vote for school commissioner.

In *Re Woods* (1893) 5 Misc. 575, 26 N. Y. Supp. 169, the court denied an application for a mandamus against a county canvassing board, requiring it to reject votes cast by women under the act of 1892, for the reason that such a board acts ministerially, and not judicially, and had no power to pass upon the constitutionality of the act. Judicial tribunals alone possess that power.

In *Re Gage* (1894) 141 N. Y. 112, 25 L. R. A. 781, 35 N. E. 1094, the act of 1892, chap. 214, was again declared unconstitutional. The office of school commissioner was made elective by the people, which meant that incumbents of the office could be chosen only by electors qualified under the suffrage section. The legislature could not constitutionally include women in the class of qualified electors.

Women cannot vote for school commissioners. *Re Inspectors of Election* (1893) 25 N. Y. Supp. 1063.

*The Church amendment.*—The Statutory Revision

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Commission, during the six years that I was a member of it (1895–1900), had frequent occasion to consider the clause in this section relating to the right to vote on questions submitted to the people, especially with reference to proposed legislation intended to confer on women the right to vote on tax questions at municipal elections. My examination of these questions resulted in the conclusion that women could not be given even this limited right of suffrage without a constitutional amendment, and the commission declined to recommend any bill of this character. The suggestion was sometimes made that under this section the legislature could not limit to taxpayers only the right to vote on financial questions, but that all persons entitled to vote for officers must also be permitted to vote on all other questions. The policy of limiting to taxpayers or owners of property the right to vote on questions of local administration involving taxation had long been established. The Constitution of 1846 had provided for the incorporation of cities and villages, and had authorized legislation regulating local affairs. The first general village law (1847) limited to property owners the right to vote on tax questions. This policy was continued in the general village law of 1870, and these two statutes were both in force when the clause now under consideration was incorporated in the Constitution by the amendment of 1874. Besides these general laws, there were numerous local statutes embodying the same policy. While the amendment of 1874 might have seemed to require a change of policy, and to have clothed every person qualified to vote for an officer with the right to vote on any question submitted to the people, the practice of the legislature was not changed, and it continued to enact laws restricting the right to vote at municipal elections on tax questions,

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the same as if the constitutional amendment had not been adopted. In view of this situation, and without a judicial construction of the amendment, the Revision Commission, in preparing the general village law of 1897, continued the policy already established, and by that law limited to taxpayers the right to vote on questions involving a tax or the creation of a debt. In 1898 the charter of the village of Fulton was revised, the new legislation being largely borrowed from the general village law. The provision relating to the qualifications of voters on propositions was copied *verbatim* from the general law, hence any construction of this provision in the Fulton charter must necessarily apply to the village law.

In preparing the second volume of this work I examined this subject as critically as available means would permit, and have there given the history of the amendment, which will be found in the chapter on the Convention of 1867, and in the chapter on the Commission of 1872. After that volume had been written the amendment received judicial consideration by the court of appeals in *Spitzer* v. *Fulton* (1902) 172 N. Y. 285, 92 Am. St. Rep. 736, 64 N. E. 957. I do not know of any other case involving this amendment, and it therefore contains the first, but perhaps not the final, judicial construction of the new provision. The decision directly involves the validity of a statute limiting to taxpayers only the right to vote on tax questions at a village election. The court, in deciding the case, considered two constitutional provisions; namely, the suffrage section,—article 2, § 1,—and the municipal corporations section, article 12, § 1. Speaking of the suffrage article the court say that its obvious purpose is "to prescribe the general qualifications that voters throughout the state were required to possess to authorize them to vote for public officers or upon public questions relating to general governmental affairs;" also

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that it "was intended merely to define the general qualifications of voters for elective officers or upon questions which may be submitted to the vote of the people which affect the public affairs of the state . . . to the general governmental affairs of the state. . . . But we are of the opinion that that article was not intended to define the qualifications of voters upon questions relating to the financial interests or private affairs of the various cities or incorporated villages of the state, especially when, as in this case, it relates to borrowing money or contracting debts."

If it was the intention of the court to limit the application of this provision to qualifications of voters "throughout the state" to entitle them to vote for officers and "upon public questions relating to general governmental affairs," and to exclude municipal elections, the construction is apparently contrary to the intention of the framers of the provision. The clause—"and upon all questions which may be submitted to the vote of the people"—was introduced in the Convention of 1867 by Sanford E. Church, who, in 1870, became the first chief judge of the new court of appeals. Judge Comstock moved to amend by adding the words "of the state at large . . . so as to avoid the question of municipal charters," apparently intending to exclude municipal corporations from the operation of the new provision. Mr. Church, after quoting the existing provision relating to the qualifications of voters for officers, said it seemed to him "proper that the same qualifications should exist upon all questions which may be submitted to the vote of the people," and that "we should have the same rule applied to the election of all officers and to all other questions on which the people will vote." The clause, as modified by Judge Comstock, omitting the phrase "at large," so as to read "and upon all questions which may be submitted to the vote of

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the people of the state," was adopted by the Convention, and included in the proposed Constitution. If this Constitution had been approved by the people, the application of the new clause would evidently have been limited to questions submitted to the people of the state, and would not have affected the power of the legislature concerning municipal corporations. The Commission of 1872 reported the amendment in the same form, but while the Commission's amendments were under consideration by the senate of 1873 the words "of the state" were stricken out. The assembly agreed to this change and the clause was adopted in 1874 without this limitation.

If the Church amendment is to be limited to questions submitted to the people of the whole state, its inclusion in the Constitution was hardly necessary, for, by the provision limiting the creation of state debts (article 7, § 4), a law to create a debt exceeding $1,000,000 must be submitted to the people of the state, and even without the new clause in the suffrage section, the legislature would not be likely to attempt to limit to taxpayers only the right to vote on a question which the Constitution requires to be submitted to the people. The Constitution already prescribed the qualifications of voters on the question of calling a constitutional convention and on constitutional amendments. The court had decided in *Barto* v. *Himrod* (1853) 8 N. Y. 483, 59 Am. Dec. 506, that the legislature could not delegate to the people the question whether a certain bill should become a law, for the reason that the legislative power had been vested in the senate and assembly, and the people had not reserved to themselves any power to ratify or confirm proposed legislation; therefore the legislature could not transfer to the people the responsibility of making the laws. Other questions, like the question of continuing the contract labor system in the state prisons, which was submitted to

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the people in 1883, could only be useful in ascertaining public opinion, and the result could not bind the legislature. The exclusion of municipal elections from the scope of the Church amendment seems to give it the same practical effect as if the words "of the state" had been retained as a part of the clause.

As an additional reason for sustaining the Fulton act, the court cited § 1 of article 12, which provides for the incorporation of cities and villages, and authorizes legislation restricting the power of taxation, etc. The suffrage article was deemed by the court to have only a general application, while the other provision was deemed to be local, and to vest the legislature with ample authority to regulate all matters relating to taxation, the creation of municipal debts, and the protection of taxpayers. A village is a subordinate governmental agency, created by the legislature, and subject to destruction by the same power. The legislature may specifically designate the parts of the functions of government to be committed to the village, and may regulate the methods and details of its administration. It may not only regulate the power of taxation, as expressly authorized by the Constitution, but it may also prescribe the extent of taxation and the means by which questions relating to taxation are to be determined. It may vest in the board of trustees or other local officers the power to determine questions of taxation, or it may delegate that power to a larger body composed not only of village officers, but also of all the taxpayers. The question thus submitted to the taxpayers is not submitted to the people within the meaning of the suffrage section, but the taxpayers thus authorized to vote become, as to such questions, a part, and the controlling part, of the governing body of the village. By the Fulton act and the general village law the taxpayers control the larger questions of taxation, but all qualified electors

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share in the government to the extent that they may vote for village officers. It is a mixed system of local administration; namely, by officers chosen by the vote of all the electors, whether taxpayers or not; but such officers are subject to the control of the taxpayers alone on important financial subjects.

Possibly the decision in the *Spitzer Case* may have a controlling influence in determining the validity of the act of 1901, conferring on women taxpayers the right to vote on tax questions in towns and villages, and several local statutes by which women have been given the right to vote on financial questions, for if the legislature is not bound to submit questions of taxation to all the people of a municipality, but may vest taxpaying men only with the right to determine these questions, it may not be easy to discover any good constitutional reason for excluding taxpaying women from the exercise of the same right. The court intimates that even as to the qualifications of voters at an election of officers, the suffrage section has only a general, and not a local, application. This question was not involved in the *Fulton Case,* but would be presented if the legislature should exclude electors qualified under the Constitution from the right to vote for municipal officers.

§ 2. [*Exclusion from right of suffrage.*]—No person who shall receive, accept, or offer to receive, or pay, offer, or promise to pay, contribute, offer, or promise to contribute to another, to be paid or used, any money or other valuable thing as compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election; and upon

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challenge for such cause, the person so challenged, before the officers authorized for that purpose shall receive his vote, shall swear or affirm before such officers that he has not received or offered, does not expect to receive, has not paid, offered, or promised to pay, contributed, offered, or promised to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at such election, and has not made any promise to influence the giving or withholding of any such vote, nor made or become directly or indirectly interested in any bet or wager depending upon the result of such election. The legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.

[Const. 1821, art. 2, § 2; 1846, art. 2, § 2; Am. 1874.]

A history of this section will be found in previous volumes.

§ 3. [*Voting residence.*]—For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison.

[Const. 1846, art. 2, § 3.]

"The plain reading of the Constitution is that a sojourn in a seminary of learning has no effect whatever, one way or the other, on the question of legal residence for the purpose of voting. . . . A person who is a legally qualified voter may leave his home in any part of the state and enter an institution of learning as a student;

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by this act he does not lose his residence for the purpose of voting at the place from whence he came. The fact that he is enrolled as a student in an institution of learning has no effect whatever upon his residence for the purpose of voting; he could, if he chose, acquire a residence at the place where the seminary is located, but this would have to be established by acts entirely distinct from his residence therein. The mere intention to change his residence would not suffice." In this case, involving an application for registration by students at St. Joseph's Seminary in Yonkers, the court say that "no person is allowed to enter or remain in this seminary as a student unless he intends in good faith to become a Roman Catholic priest, and renounces all other residence or homes save that of the seminary itself, and upon his admission to the priesthood he continues in the seminary until assigned elsewhere by his ecclesiastical superiors. . . . No acts which are distinct and independent of the presence of the petitioners in St. Joseph's Seminary are disclosed," and they were held not entitled to vote in the election district in which the seminary is located. *Re Barry* (1900) 164 N. Y. 18, 52 L. R. A. 831, 58 N. E. 12, citing *Re Goodman* (1895) 146 N. Y. 284, 40 N. E. 769; *Re Garvey* (1895) 147 N. Y. 117, 41 N. E. 439, in which the student rule was applied under different circumstances with the same result. See also *Re McCormack* (1903) 86 App. Div. 362, 83 N. Y. Supp. 847.

But in *Re Ward* (1892) 48 N. Y. S. R. 613, 29 Abb. N. C. 197, 20 N. Y. Supp. 606, it was held that persons might change their residence, and establish a new residence in the town where an institution of learning was located, and be entitled to vote there, although they were students in the institution. If they have abandoned their former residence, and, at the time, have no other residence than the town in which the institution is located, they are entitled to vote there.

In *Silvey* v. *Lindsay* (1887) 107 N. Y. 55, 13 N. E. 444, an inmate of the Soldiers' Home in Bath was held not entitled to vote in that town. He was in the institution for temporary purposes, and apparently not with any intention to make the town his permanent residence. "His presence there was eleemosynary in its character; he was there as a dependent because he had no means of support or relatives to maintain him, and liable to be discharged whenever the board of trustees were satisfied that he was of sufficient ability or means to support himself. . . . As to the Home, he was a beneficiary, and nothing else. As to Bath, his residence was a beneficiary's residence, and no other. . . . He could not gain



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a residence by being an inmate, which means nothing more than his presence in the Home." He was "kept," that is, supported, at the institution at public expense. The Home "is an asylum supported at public expense, and its members are within the mischief against which that provision is aimed, the participation of an unconcerned body of men in the control, through the ballot box, of municipal affairs in whose further conduct they have no interest, and from the mismanagement of which by the officers their ballots might elect they sustain no injury."

The court, considering the general scope of this section, observed that it "disqualifies no one, confers no right upon any one. It simply eliminates from those circumstances the fact of presence in the institution named or included within its terms. It settles the law as to the effect of such presence, and as to which there had before been a difference of opinion, and declares that it does not constitute a test of a right to vote, and is not to be so regarded. The person offering to vote must find the requisite qualifications elsewhere."

In *Re Cunningham* (1904) 45 Misc. 206, 91 N. Y. Supp. 974, several soldiers, members of a regiment of the United States Army stationed at Plattsburgh, and who lived outside the military reservation, were held entitled to be registered as voters.

In *Re Batterman* (1895) 14 Misc. 213, 35 N. Y. Supp. 593, Justice Herrick, at chambers, held that the Home for Aged Men in the town of Colonie was an institution included in this section, at least as to inmates admitted after January 1, 1895; that the section is not retroactive; that a person who had become an inmate of the institution before the amended section took effect, and had voted in that election district, was entitled to continue to vote there. The change in the Constitution did not deprive him of that right.

A person known as an "unpaid helper" in Bellevue hospital, an institution supported at public expense, was an inmate of the hospital under a bare license,—that is, with mere permission to use it as an asylum,—and he could not gain a residence there while enjoying the maintenance which it afforded him. The superintendent had no authority to employ unpaid help, and made no contract with the helper. He received "board, lodging, support, and maintenance," and to him the hospital was "an asylum at the public expense, with the usual almshouse and municipal lodging-house accompaniment of work." *People ex rel. McShane* v. *Hagen* (1900) 48 App. Div. 203, 62 N. Y. Supp. 816, affirmed in 164 N. Y. 570, 58 N. E. 1091.

A person committed to the Tombs city prison in New York and

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supported there at public expense is a prisoner, and cannot gain a voting residence in the election district in which the prison is situated, even under an illegal commitment. "The Tombs is not a place of residence. It is not constructed or maintained for that purpose. It is a place of confinement for all except the keeper and his family, and a person cannot, under the guise of a commitment, or even without any commitment, go there as a prisoner, having a right to be there only as a prisoner, and gain a residence there." *People* v. *Cady* (1894) 143 N. Y. 100, 25 L. R. A. 399, 37 N. E. 673.

**§ 4. [*Registration of voters.*]—Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters; which registration shall be completed at least ten days before each election. Such registration shall not be required for town and village elections except by express provision of law. In cities and villages having five thousand inhabitants or more, according to the last preceding state enumeration of inhabitants, voters shall be registered upon personal application only; but voters not residing in such cities or villages shall not be required to apply in person for registration at the first meeting of the officers having charge of the registry of voters.**

[Const. 1821, art. 2, § 3; 1846, art. 2, § 4.]

"Registration is the method of proof prescribed for ascertaining the electors who are qualified to cast votes, and the registers are the lists of such electors. It is a part of the machinery of elections and is a reasonable regulation, which conduces to their orderly conduct and fairness. It is one safeguard against frauds." *People ex rel. Stapleton* v. *Bell* (1890) 119 N. Y. 175, 23 N. E. 533.

"The election laws are designed to secure a fair expression by the electors of their choice of public officers. It is of paramount importance, under our system of government, that unqualified persons shall be excluded from the suffrage, and that elections shall

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be conducted in a way which shall secure public confidence that the results are truly and honestly declared. It is eminently proper that inspectors and boards of registry should act under the sanction of an official oath, and that they should comply with the forms prescribed by statute in conducting elections. . . . The statute does not create the right to vote. It exists by force of the Constitution," and cannot be defeated "because election officers failed to qualify or to certify the register, it not being shown that the result was changed by the omission." *People ex rel. Frost* v. *Wilson* (1875) 62 N. Y. 186, 193, 194, reversing 3 Hun, 437, where it is said that "the right of suffrage is not conferred by the Constitution. It is recognized as an existing right, and it either declares the qualifications that the voter must possess in order to entitle him to exercise the right, or it authorizes the legislature to provide for ascertaining who are entitled to vote." If the court intended to suggest that there is an inherent right of suffrage, the suggestion is not sustained by our constitutional history.

**§ 5. [*Manner of voting.*]—All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting shall be preserved.**

[Const. 1777, art. 6; 1821, art. 2, § 4; 1846, art. 2, § 5.]

It is competent for the legislature to authorize the election of town supervisors, either by ballot, by ayes and noes, or by a show of hands. *People ex rel. Clancy* v. *Westchester County* (1893) 139 N. Y. 524, 34 N. E. 1106.

In *People ex rel. Klein* v. *McDonald* (1896) 52 N. Y. Supp. 898, Justice Andrews suggests that the proviso at the end of this section does not apply to voting by ballot, but to other means added by the amendment of 1894; that the voting by ballot implies secrecy, and that the proviso was unnecessary as applied to this manner of voting; that § 5 must be construed in connection with § 1, which guarantees to every qualified person the right to vote, and that a provision of the election law which authorizes an illiterate person to be aided by another in the act of voting must, of necessity, be sustained, because otherwise such voter might be disfranchised.

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§ 6. [*Bi-partisan election boards.*]—All laws creating, regulating, or affecting boards or officers charged with the duty of registering voters, or of distributing ballots at the polls to voters, or of receiving, recording, or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes. All such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties, as the legislature may direct. Existing laws on this subject shall continue until the legislature shall otherwise provide. This section shall not apply to town meetings, or to village elections.

[New.]

A sketch of election boards, including the development of the bi-partisan idea, will be found in the chapter on the Fourth Constitution, 1894, in connection with the adoption of this section.

## ARTICLE III.

### [THE LEGISLATURE.]

§ 1. [*Legislative power.*]—The legislative power of this state shall be vested in the senate and assembly.

[Const. 1777, art. 2; 1821, art. 1, § 1; 1846, art. 3, § 1.]

It has been pointed out in the notes to the amendments of 1874 that the Commission of 1872 recommended the insertion of the word "an" before assembly in this section, and that this change was approved by the legislatures of 1873 and 1874, but that it was omitted in the

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engrossed copy of the amendments. The change was intended to make the section more precise in form. The Convention of 1894 sought to accomplish the same result by changing "a" to "the" before the word "senate."

In previous volumes a sketch has been given of the colonial legislative system, from which it appears that during the first half of the colonial legislative period the governor was a constituent member of the legislature, and often sat with the legislative council during its deliberations, and that, while he was afterwards, by royal order, excluded from such deliberations, he was, nevertheless, deemed a part of the legislative system, and legislative power was said to be vested in the governor, the council, and the assembly. The governor's present relation to legislation is defined in article 4, and particularly in § 9, which prescribes his functions in relation to bills submitted to him by the legislature. While not expressly stated in this section, legislative power is now, as it was under the colonial system, vested in the governor as well as in the legislature, and he is a part of the legislative system, but with the difference that the legislature only can originate legislation, while the governor's power is limited to the approval or rejection of bills; which power, during the thirty day period, is absolute and final.

## LEGISLATIVE POWER.

Every statute is an exercise of legislative power; in this manner the people, speaking through their representatives, declare the law of the state which, directly or indirectly, shall control and regulate the property, interests, and conduct of the people, so far as such control and regulation may be a legitimate subject of legal enactment. Of the more than fifty thousand statutes which have been enacted during the history of the state the larger part have been accepted without question, and their validity

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has not been challenged. They relate to ordinary affairs and are conceded to be within the proper scope of legislative action. Many statutes, however, have been assailed on the ground that in their enactment the legislature exceeded its constitutional authority, and that such statutes were therefore unconstitutional and void. While the legislative power of the state is vested in the senate and assembly, it is a delegated power, and must be exercised within the limitations imposed either by the state or the Federal Constitution. Many subjects which might be deemed of general interest and beneficial to the state or some part of it, and unobjectionable as a matter of policy, have, nevertheless, been withdrawn from legislative consideration, and are to be disposed of, if at all, by the people themselves, or by agencies other than the legislature. So the first question to which the legislature must address itself in considering any proposed legislation is whether it is within the constitutional power of that body. Ordinarily, and in the large majority of cases, this question needs little, if any, consideration, for the reason, as already suggested, that the great mass of legislation is unquestionably a valid exercise of legislative power.

The first Constitution contained few limitations on the power of the legislature, but subsequent Constitutions have imposed important restrictions on legislative action, and have, in some cases, reserved power to the people themselves, and in others have committed these subjects to subordinate local agencies in the political subdivisions of the state. Limitations on legislative power have also been imposed by the Federal Constitution, which has deprived the states of any authority to enact laws on specified classes of subjects, including laws impairing the obligation of contracts, affecting vested rights, denying equal protection

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of the laws, depriving citizens of the privileges and immunities secured by the Constitution, and laws infringing upon the power of Congress to regulate commerce.

The legislature usually expresses its will through statutes, but it may also exercise its authority by resolution, either concurrently, by both houses, or by the action of one alone. Various commissions which have been appointed by resolution, investigating committees, standing committees charged with the performance of some specific duty, with instructions to report at a subsequent session of the legislature, and numerous special committees are instances of this class of legislative action; but, to be effectual, such action usually needs confirmation by the legislature in the form of a statute.

In the following summary I have tried to state the principal cases in which the question of legislative power has been considered as an essential element in determining the judgment of the court, and an attempt has been made to classify these decisions under appropriate alphabetical heads, so that the reader may readily ascertain whether a given aspect of legislative power has received judicial consideration. This classification embraces not only questions under the state Constitution, but also decisions involving Federal questions so far as they affect the exercise of legislative power. Many cases involving questions under particular constitutional provisions are omitted here, and will be found in notes to various sections.

*In general.*—"The legislative power of the state, which, by the Constitution, is vested in the senate and assembly (§ 1, article 3), covers every subject which, in the distribution of the powers of government between the legislative, executive, and judicial departments, belongs, by practice or usage, in England or in this country, to the legislative department, except in so far as such power had been withheld or limited by the Constitution itself, and subject also to such restrictions upon its exercise as may be found in the

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Constitution of the United States. From this grant of legislative power springs the right to enact all laws which the legislature shall deem expedient for the protection of public and private rights, and the prevention and punishment of public wrongs." *Lawton* v. *Steele* (1890) 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 813, 23 N. E. 878, affirmed in (1894) 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

In *Dash* v. *Van Kleeck* (1811) 7 Johns. 477, 5 Am. Dec. 291, Judge Spencer, discussing the question of legislative power, says: "I must insist that our state legislature, when acting within the pale of the Constitutions of the United States and of this state, has the same omnipotence which Judge Blackstone ascribes to the British Parliament: 'it has sovereign and uncontrollable authority in the making, confirming, restraining, abrogating, repealing, reviving, and expounding of laws concerning all matters, of all possible denominations.'"

"The boundary of legislative power in the enactment of laws in the assumed exercise of this power of sovereignty, which injuriously affects persons or property, is indistinct, and no rule or definition can be formulated under which, in all cases, it can be readily determined whether a statute does or does not transgress the fundamental law. The power of the British Parliament is not the test of legislative power under the written Constitution of the American states. But the great landmarks of civil liberty, embodied in our state Constitutions, were established by our English ancestors, and upon questions such as the one now before us [the elevator act of 1885, chap. 581] we may study with profit the principles and practice of the law of England. When a statute is challenged as overstepping the boundaries of legislative power, the object sought to be obtained by the legislature, the nature and functions of government, the principles of the common law, the practice of legislation, and legal adjudications are pertinent and important considerations and elements in the determination of the controversy." *People* v. *Budd* (1889) 117 N. Y. 1, 5 L. R. A. 599, 15 Am. St. Rep. 460, 22 N. E. 670, affirmed in (1892) 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

The Supreme Court of the United States has no "authority, on a writ of error from a state court, to declare a state law void on account of its collision with a state Constitution, it not being a case embraced in the judiciary act which gives the power of writ of error to the highest judicial tribunal of the state." *Jackson ex dem. Hart* v. *Lamphire* (1830) 3 Pet. 280, 7 L. ed. 679.

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"The legislature are nowhere restrained, directed, or limited in regard to the nature, grade, or character of evidence which they must have as the basis of their action, or to guide them in their decisions. In some specified cases their power is limited, and in others conditional, depending upon the existence of certain facts. But they must necessarily decide whether such facts exist. Their general power to prescribe and regulate evidence for every other tribunal in the state has never been questioned, and it would present a singular anomaly if they were wanting in power to do the same for themselves, or to alter and change the same at pleasure; and it would be equally strange if any judicial tribunal in the state were permitted to review their decision upon the question of fact, on the existence of which their power to legislate in a particular case is made to depend." *DeCamp* v. *Eveland* (1854) 19 Barb. 81.

"The people, in framing the Constitution, committed to the legislature the whole lawmaking power of the state which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception." There are few positive restraints upon the legislative power contained in the Constitution. *People ex rel. Wood* v. *Draper* (1857) 15 N. Y. 532, per Denio, Ch. J.

Judge Bronson in *Taylor* v. *Porter* (1843) 4 Hill, 140, 40 Am. Dec. 274, presents an interesting view of the general powers of the legislature, saying, among other things, that "under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it, and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the state who transcends his jurisdiction, are utterly void. . . . The security of life, liberty, and property lies at the foundation of the social compact, and to say that the grant of 'legislative power' includes the right to attack private property is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established."

"Courts have no concern with the propriety or wisdom of legislation. That power has been committed by the Constitution to the legislative department of the government, and with its exercise courts cannot interfere. They can only determine whether, in a given case, the legislature has exceeded its authority, or violated

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any provision of the Constitution; and when this point is decided their duty is performed." *People ex rel. Rochester* v. *Briggs* (1872) 50 N. Y. 553.

A right derived from the exercise of legislative authority is as much within the power of that body to change, modify, or abrogate, as it was in the first instance to enact it. *People ex rel. McCarthy* v. *French* (1881) 10 Abb. N. C. 418.

An "expenditure may in fact be improvident and the work may prove to be useless to the public, but the legislature, as the depository of the sovereign powers of the people, must necessarily be the judge of the propriety and utility of making it. . . . The judicial department cannot institute an inquiry concerning the motives and purposes of the legislature in order to attribute to it a design contrary to that clearly expressed or fairly implied in the bill, without disturbing or impairing, in some measure, the powers and functions assigned by the Constitution to each department of the government." *Waterloo Woolen Mfg. Co.* v. *Shanahan* (1891) 128 N. Y. 345, 14 L. R. A. 481, 28 N. E. 358.

"The legislature could not declare in advance the intent of subsequent legislatures or the effect of subsequent legislation upon existing statutes." *Mongeon* v. *People* (1874) 55 N. Y. 613.

Denying to the legislature the power to prescribe how much a citizen shall pay for a substitute in the national Army, Justice Clerke, in *Powers* v. *Shepard* (1865) 45 Barb. 524, says that "constitutional government, under whatever form it may exist, is not based on the idea that all the conduct and acts and interests of a citizen are the proper subjects of legislation. On the contrary, the tendency of such a system is to confine the action of government within as limited a sphere as is consistent with the maintenance of the peace, good order, and progress of society. It recognizes the great truth that the most important and sacred purposes and interests of society are not within the domain of civil law, but are regulated by the power of self-adjustment which God has implanted in it through the balancing and antagonism of the varied needs and aspirations of the individuals of whom it is composed." This decision was reversed in 49 Barb. 418, 48 N. Y. 540, but without affecting the force of the foregoing suggestions concerning the limitations on legislative power.

*Retrospective statutes.*—Chancellor Kent (then Chief Justice) says in *Dash* v. *Van Kleeck* (1811) 7 Johns. 477, 5 Am. Dec. 291, that it is a "principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent Parliament, is not to

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have a retrospective effect." This rule has been applied in numerous cases, including *Sayre* v. *Wisner* (1832) 8 Wend. 662 (dower); *Palmer* v. *Conly* (1847) 4 Denio, 374 (penalties); *Calkins* v. *Calkins* (1848) 3 Barb. 305 (mortgage redemption); *Jackson ex dem. Hicks* v. *Van Zandt* (1815) 12 Johns. 168 (act of 1782, abolishing entails); *People* v. *Columbia County* (1833) 10 Wend. 363 (actions by people); *Hackley* v. *Sprague* (1833) 10 Wend. 114 (effect of revised statutes); *Luhrs* v. *Eimer* (1880) 80 N. Y. 171 (inheritance from alien); *Re Protestant Episcopal Public School* (1870) 58 Barb. 161, affirmed without considering this point in (1872) 47 N. Y. 556 (New York sewerage, act of 1865).

The owner of land which has been overflowed by a reservoir constructed by a canal company cannot be compelled by a subsequent statute to submit to an appraisal of his damages by commissioners appointed by the supreme court. Such a statute is retroactive and deprives the landowner of a right to a trial by jury. *Re Townsend* (1868) 39 N. Y. 171.

In *Re Beams* (1859) 17 How. Pr. 459, Justice Ingraham, while conceding "the manifest impropriety of the passage of laws which, in their operation, were to affect existing rights," sustained the act of 1858, chap. 338, which authorized proceedings to obtain relief from fraud or irregularity in assessments for local improvements in New York, and held that relief might be obtained under it for assessments made before its passage, saying that the act was sufficiently comprehensive to embrace assessments both before and after its passage, and that no rights had been acquired which were affected by it.

This act was under consideration from another point of view in *Re Palmer* (1869) 40 N. Y. 561, where it was held that the act of 1869, chap. 883, amending § 11 of the Code of Procedure, prohibiting thereafter appeals to the court of appeals from any order or judgment in any proceeding under the act of 1858, was retroactive, and applied to appeals then pending in the court of appeals.

"Ordinarily a statute only speaks for the future, and where vested rights are involved the legislature cannot affect the present or the past; but there are many remedial statutes that mainly affect past transactions, and are enacted for that purpose. Statutes confirming illegal or irregular proceedings of various public officers are of this character, and can have no relation to other than past transactions." The act of 1871, chap. 695, providing relief from illegal assessments, was given a retrospective effect. *People ex rel. Pells* v. *Ulster County* (1875) 65 N. Y. 300. The same principle

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was applied in *People* v. *Francisco* (1902) 76 App. Div. 262, 78 N. Y. Supp. 423, construing the effect of a comptroller's deed under § 132 of the tax law.

The retroactive effect of statutes was considered in *O'Reilly* v. *Utah, N. & C. Stage Co.* (1895) 87 Hun, 407, 34 N. Y. Supp. 358, construing §§ 1903 and 1904 of the Code of Civil Procedure in relation to actions to recover damages for injuries resulting in death, and it is there said that "statutes affecting remedies, or rules of procedure for enforcing rights, are declared to be retroactive on grounds which would be deemed insufficient to give a retroactive effect to statutes enlarging or restricting substantive rights." But the constitutional amendment on this subject, added in 1894 (art. 1, § 18), which abrogated the money limitation in such actions, was held not retroactive, applying the general rule applicable to statutes (*New York & O. Midland R. Co.* v. *Van Horn* [1874] 57 N. Y. 473), that a "law is never to have retroactive effect unless its express letter or clearly manifested intention requires that it should have such effect. If all its language can be satisfied by giving it prospective operation, it should have such operation only."

The drainage act of 1895, chap. 384, passed to carry into effect the drainage provision of the Constitution of 1894, was held not retroactive, and it could not be used to sustain proceedings, otherwise invalid, taken and then pending for the purpose of draining agricultural lands under previous statutes which limited the right to cases affecting the public health. *Re Penfield* (1896) 3 App. Div. 30, 37 N. Y. Supp. 1056.

"It is the duty of courts to assume that the legislature did not intend to violate the Constitution, and to so construe this statute as to bring it within the constitutional limitations, if possible. The presumption is that such a retrospective operation as to affect rights already accrued was not intended, unless the words used admit of no other reasonable conclusion." It was held that the legislature could not authorize an appeal from a judgment after the existing statutory time had elapsed, for the reason that the rights of the parties under the judgment had become fixed, and could not be made the subject of legislative action. *Germania Sav. Bank* v. *Suspension Bridge* (1899) 159 N. Y. 362, 54 N. E. 33, citing *Burch* v. *Newbury* (1852) 10 N. Y. 374, 394 (appeals in equity cases under § 460 of the Code of Procedure of 1849); *Dunlop* v. *Edwards* (1850) 3 N. Y. 341 (appeals under § 457 of the Code of Procedure of 1849); *Benton* v. *Wickwire* (1873) 54 N. Y. 226 (mechanic's lien). In *Bay* v. *Gage* (1862) 36 Barb. 447, the court considered the

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subject of retrospective statutes, and said that "whether a law is prospective or retrospective is a question of construction, in the absence of any express declaration in the act by which it is determined. . . . Laws are not unconstitutional simply for the reason that they are retrospective. Retrospective laws which do not impair the obligation of contracts, or affect vested rights, or partake of the character of *ex post facto* laws, are not forbidden by the Constitution." The act of 1861, chap. 221, amending the revised statutes in relation to the effect of a judgment in ejectment, was held not retroactive. "Considerations of propriety as to the right of reviewing judgments are not sufficient to raise the presumption that the law was intended to act upon judgments previously recovered." The court cited *People* v. *Carnal* (1852) 6 N. Y. 463, where it was held that the statute which authorized a writ of error in behalf of the people, to review a judgment rendered in favor of the defendant, did not authorize such a writ to review a judgment rendered prior to its passage. *Ely* v. *Holton* (1857) 15 N. Y. 595, involving the construction of an amendatory act authorizing a further appeal in certain cases, but it was given only a prospective effect.

*Statutes presumed valid.*—"Before the court will deem it their duty to declare an act of the legislature unconstitutional, a case must be presented in which there can be no rational doubt." *Ex parte M'Collum* (1823) 1 Cow. 550; *Morris* v. *People* (1846) 3 Denio, 382; *Beecher* v. *Allen* (1849) 5 Barb. 169; *People ex rel. Rochester* v. *Briggs* (1872) 50 N. Y. 553; *Kerrigan* v. *Force* (1877) 68 N. Y. 381; *Central Crosstown R. Co.* v. *Twenty-third Street R. Co.* (1877) 54 How. Pr. 168; *People ex rel. Hatfield* v. *Comstock* (1879) 78 N. Y. 356; *Sweet* v. *Syracuse* (1891) 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; *Schneider* v. *Rochester* (1895) 90 Hun, 171, 35 N. Y. Supp. 786; *Fort* v. *Cummings* (1895) 90 Hun, 481, 36 N. Y. Supp. 36; *Rathbone* v. *Wirth* (1896) 6 App. Div. 277, 40 N. Y. Supp. 535; *Ziegler* v. *Corwin* (1896) 12 App. Div. 60, 42 N. Y. Supp. 855; *Gilbert Elev. R. Co.* v. *Handerson* (1877) 70 N. Y. 361.

"Every presumption is in favor of the validity of legislative acts." *New York & L. I. Bridge Co.* v. *Smith* (1896) 148 N. Y. 540, 42 N. E. 1088; *Re New York Elev. R. Co.* (1877) 70 N. Y. 327, 342; *Wright* v. *Hart* (1905) 103 App. Div. 218, 93 N. Y. Supp. 60.

"Every act of the legislature must be upheld by the courts unless it be in substantial conflict with some provision of the Constitution." *Pearce* v. *Stephens* (1897) 18 App. Div. 101, 45 N. Y. Supp. 422; *People ex rel. Simpson* v. *Wells* (1905) 181 N. Y. 252.

In construing a statute the court must assume "that the legis-

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lature had evidence before it which created the demand" for the particular legislation, and if any state of circumstances would justify the statute, the court must presume that it existed. *Re Annon* (1888) 50 Hun, 413, 2 N. Y. Supp. 275, affirmed in (1889) 117 N. Y. 1, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670.

It is to be presumed that an act was not passed by the legislature without mature reflection and full consideration of the provisions contained in it and of the well-settled constitutional principles relating to it. *Roosevelt* v. *Godard* (1868) 52 Barb. 533.

"If it cannot be made to appear that a law is in conflict with the Constitution by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert or other witnesses is not admissible to show that, in carrying out a law enacted by the legislature, some provision of the Constitution may possibly be violated. . . . If the act upon its face is not in conflict with the Constitution, then extraneous proof cannot be used to condemn it." *People ex rel. Kemmler* v. *Durston* (1890) 119 N. Y. 569, 7 L. R. A. 715, 16 Am. St. Rep. 859, 24 N. E. 6, citing *People ex rel. Bolton* v. *Albertson* (1873) 55 N. Y. 50; *People ex rel. Wood* v. *Draper* (1857) 15 N. Y. 532; *Re New York Elev. R. Co.* (1877) 70 N. Y. 327, 342.

## ATTORNEYS.

In *Re O'Neill* (1882) 90 N. Y. 584, the court say "they have no doubt of the power of the legislature to admit persons not citizens to practise as attorneys and counselors of the courts of this state," but it was held that, under the statute and rules of the court of appeals then in force, an alien could not be admitted as an attorney.

## COMMERCE.

Congress has exclusive jurisdiction to regulate navigation between the several states, but cannot control navigation employed in an internal commerce which does not concern other states. *North River S. B. Co.* v. *Livingston* (1824) 1 Hopk. Ch. 170, affirmed in (1825) 3 Cow. 713.

A bond to indemnify the city of New York against expenses which might be incurred in maintaining immigrants is valid, and not repugnant to the Constitution or laws of the United States. *Candler* v. *New York* (1828) 1 Wend. 493.

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The New York statute of 1832, chap. 131, incorporating the Rensselaer & Saratoga Railroad Company, and which authorized the company to erect a bridge over the Hudson river between Troy and Green island, was not a violation of the commerce clause of the Federal Constitution. By the delegation of power to the Federal government, as expressed in the Constitution, the entire sovereignty over the waters of the states vested in Congress and the several state legislatures. The power to build bridges was not delegated to the Federal government; it therefore continues in the state; but the exercise of this power must not interfere with free navigation. A bridge with a draw sufficient for the use of coasting vessels was held to be a proper exercise of the state's power over navigable streams. *People* v. *Rensselaer & S. R. Co.* (1836) 15 Wend. 113, 30 Am. Dec. 33.

In an action to recover off-shore pilotage (*Cisco* v. *Roberts* [1867] 36 N. Y. 292) in which the owner of the vessel denied his liability, the court say that no issue is presented as to the relative boundaries of state and Federal jurisdiction, for in this respect all that belongs to either is confessedly vested in the states, in the absence of Federal legislation. Every maritime nation claims the power "to exercise such rights on the neighboring seas—the common domain of all—as are essential to the protection of its own territorial dominion. . . . The regulations of port pilotage stand substantially on the same footing with our quarantine laws. It is the right and the duty of the state, by appropriate legislation, to guard the public health and the security of general commerce, and to provide against the dangers to which every maritime people are exposed by intercepting and averting them on the sea, without the bounds of exclusive territorial dominion." The plaintiff's right to pilotage under the state law was sustained.

The provision of the act of 1871, chap. 721, prohibiting the possession of certain game birds after a specified date, is not a violation of the commerce provision of the Federal Constitution. *Phelps* v. *Racey* (1875) 60 N. Y. 10, 19 Am. Rep. 140. See *People* v. *Bootman* (1904) 95 App. Div. 469, 88 N. Y. Supp. 887, affirmed in (1904) 180 N. Y. 1, 72 N. E. 505.

In the absence of legislation by Congress regulating commerce among the states, as authorized by the Federal Constitution, article 1, § 8, subd. 3, state laws creating railroad corporations, and authorizing them to effect a consolidation with other similar corporations in other states, are valid. *Boardman* v. *Lake Shore & M. S. R. Co.* (1881) 84 N. Y. 157.

The power of the state to prohibit within its borders the sale of

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lottery tickets issued in another state was considered in *People* v. *Noelke* (1883) 94 N. Y. 137, 46 Am. Rep. 128. Our penal statutes against lotteries do not violate the interstate commerce provision of the Federal Constitution. These statutes do not constitute an impairment of a contract obligation: they "prohibit the making of certain contracts within our boundaries, but do not undertake to say what contracts may or may not be made under a foreign law."

The franchise tax act of 1881, chap. 361, is not a regulation of commerce. *Horn Silver Min. Co.* v. *New York* (1891) 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403, affirming (1887) 105 N. Y. 76, 11 N. E. 155.

The acts of 1884, chap. 534, and 1885, chap. 499, are not obnoxious to the commerce clause as to a telegraph company which has become an agency of the general government, and entitled to construct lines on post roads. *Western U. Teleg. Co.* v. *New York* (1889) 3 L. R. A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 552.

A state license fee imposed on a telegraph company doing business in several states is not a violation of the interstate commerce provision of the Federal Constitution. *Philadelphia* v. *Postal Teleg. Cable Co.* (1893) 67 Hun, 21, 21 N. Y. Supp. 556.

The mileage book act of 1895, chap. 1027, did not violate the commerce clause of the Federal Constitution. *Dillon* v. *Erie R. Co.* (1897) 19 Misc. 116, 43 N. Y. Supp. 320; *Beardsley* v. *New York, L. E. & W. R. Co.* (1897) 15 App. Div. 251; *Purdy* v. *Erie R. Co.* (1900) 162 N. Y. 42, 48 L. R. A. 669, 56 N. E. 508.

The state cannot prohibit the sale therein of convict-made goods which are not marked as such. Such attempted prohibition is a violation of the commerce clause of the Federal Constitution. *People* v. *Hawkins* (1898) 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257.

A city ordinance which requires nonresidents to obtain a license and pay a specified fee before selling or offering for sale certain products within the city is obnoxious to the commerce clause. *Buffalo* v. *Reavey* (1899) 37 App. Div. 228, 55 N. Y. Supp. 792.

The section of the labor law (Laws 1897, chap. 415, § 14) which provides that "all stone of any description, except paving blocks and crushed stone, used in state or municipal works within this state, or which is to be worked, dressed, or carved for such use, shall be so worked, dressed, or carved within the boundaries of the state," is a regulation of commerce, and repugnant to the interstate commerce clause of the Federal Constitution. "The citizens of other states have the right to resort to the markets of this state



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for the sale of their products, whether it be cut stone or any other article which is the subject of commerce. The citizens of this state have the right to enter the markets of every other state to sell their products, or to buy whatever they need, and all interference with the freedom of interstate commerce by state legislation is void." *People ex rel. Treat* v. *Coler* (1901) 166 N. Y. 144, 59 N. E. 776.

A foreign railroad corporation which operated a line of cabs in the city of New York was not, as to this part of its business, engaged in interstate commerce. *People ex rel. Pennsylvania R. Co.* v. *Knight* (1903) 171 N. Y. 354, 98 Am. St. Rep. 610, 64 N. E. 152, affirmed in (1904) 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202.

The provision of the act of 1862, chap. 487, amended in 1865, chap. 586, which imposed a tonnage tax on vessels entering the port of New York, was void under the commerce provision of the Federal Constitution, article 1, § 10, subd. 2. *Inman S. S. Co.* v. *Tinker* (1876) 94 U. S. 238, 24 L. ed. 118. The acts of 1867, chap. 256, and 1871, chap. 205, requiring the payment of certain fees to the New York harbor masters, were held void under this same constitutional provision. *Cole* v. *Johnson* (1881) 10 Daly, 258. For the same reason the court in *Way* v. *New Jersey S. B. Co.* (1904) 133 Fed. 188, held void the provision in the act of 1897, chap. 592, § 63, requiring the payment of certain fees to the Albany harbor master.

## CONCURRENT RESOLUTION.

The legislature may create an investigating commission by concurrent resolution; it need not be done by statute. "There is no clause in the Constitution expressly prohibiting the creation of a commission by concurrent resolution." Appointing commissioners for various purposes by concurrent resolution has been practised by both state and national legislatures more or less from the organization of this government. It has been repeatedly done in this state since the adoption of the Constitution of 1846. *People* v. *Learned* (1875) 5 Hun, 626.

## CORPORATIONS.

*Actions.*—In an action against a corporation, foreign or domestic, including a municipal corporation, on an instrument for the payment of money only, the legislature may authorize a summary judgment unless the corporation procures an order of a judge, directing the trial of the issues. Section 1778 of the Code of Civil Procedure

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was held to be constitutional. *Moran* v. *Long Island City* (1886) 101 N. Y. 439, 5 N. E. 80.

*Banks.*—The future debts of a banking corporation are subject to regulation by the legislature. *Hagmayer* v. *Alten* (1901) 72 N. Y. Supp. 623, 36 Misc. 59, citing *Barnes* v. *Arnold* (1899) 45 App. Div. 314, 61 N. Y. Supp. 85.

*Cemeteries.*—Cemetery corporations may be required to discontinue interments, and to remove the dead from cemeteries which, by reason of their location, may be deemed detrimental to public health. *Went* v. *Methodist Protestant Church* (1894) 80 Hun, 266, 30 N. Y. Supp. 157, (1896) 150 N. Y. 577, 44 N. E. 1129, citing *Windt* v. *German Reformed Church* (1847) 4 Sandf. Ch. 471; *Richards* v. *Northwest Protestant Dutch Church* (1859) 32 Barb. 42.

*Consolidation.*—Discussing the question of corporate consolidation, Judge Andrews, in *People* v. *New York, C. & St. L. R. Co.* (1892) 129 N. Y. 474, 15 L. R. A. 82, 29 N. E. 959, says that "the statutes for the consolidation of domestic corporations are to be treated as acts of incorporation, and that on consolidation being effected under their provisions, the constituent companies, unless such an intention is excluded by the language of the statute, are deemed to be dissolved and their powers and faculties, to the extent authorized, become vested in the consolidated company, as a new corporation, created by the act of consolidation. . . . It is perfectly competent for the legislature, in consolidation acts, to declare what shall be the status of the domestic corporations which shall avail themselves of their provisions, and also of the consolidated company;" but it could not vest the franchise of an outside corporation in the consolidated company, "nor authorize any change or conversion of the stock of the constituent corporations into the stock of the consolidated company, nor confer any exclusive authority for their consolidation." It could only authorize a New York corporation, on the like consent being given by the home states of other corporations, "to merge the franchise, property, and interests of the several constituents into what would practically be one corporation."

*Eminent domain.*—The legislature may, by general or special law, grant to railroad corporations the power to take private property for public use on making compensation therefor. *Buffalo & N. Y. C. R. Co.* v. *Brainard* (1853) 9 N. Y. 100.

A foreign corporation may be authorized to take land in this state by eminent domain. *Morris Canal & Bkg. Co.* v. *Townsend* (1857) 24 Barb. 658; *Re Townsend* (1868) 39 N. Y. 171; *New York,*

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*N. H. & H. R. Co.* v. *Welsh* (1894) 143 N. Y. 411, 42 Am. St. Rep. 734, 38 N. E. 378.

*Franchise not exclusive.*—"It is competent for the legislature, after granting a franchise to one person or corporation which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant; unless the right so to do is expressly prohibited by the first grant." *Ft. Plain Bridge Co.* v. *Smith* (1864) 30 N. Y. 44, citing *Charles River Bridge* v. *Warren Bridge* (1837) 11 Pet. 420, 9 L. ed. 773; *Mohawk Bridge Co.* v. *Utica & S. R. Co.* (1837) 6 Paige, 554; *Oswego Falls Bridge Co.* v. *Fish* (1846) 1 Barb. Ch. 547.

*Foreign corporations.*—The legislature has power to prescribe the conditions on which foreign insurance companies may do business in this state, and to prohibit any person from acting as agent for them before their compliance with such conditions. *People* v. *Imlay* (1855) 20 Barb. 68.

The legislature has power to authorize suits against foreign corporations either *in rem* or *in personam*, and to prescribe the procedure in either case. *Barnett* v. *Chicago & L. H. R. Co.* (1875) 6 Thomp. & C. 358; *Pope* v. *Terre Haute Car Mfg. Co.* (1881) 87 N. Y. 137.

The legislature may impose a tax on an outside corporation doing business in this state. "The tax is not imposed upon its property, but for the privilege which is extended to it by the state of doing business here as a corporation and in its corporate name." *People ex rel. Southern Cotton Oil Co.* v. *Wemple* (1892) 131 N. Y. 64, 27 Am. St. Rep. 542, 29 N. E. 1002.

The legislature may constitutionally authorize a corporation to collect and receive premiums on insurance effected in this state, and appropriate such sums to the payment of the expenses of the fire patrol. It is a proper exercise of the police power. *New York Fire Underwriters* v. *Whipple* (1896) 2 App. Div. 361, 37 N. Y. Supp. 712.

*Forfeiture.*—"The general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter, or to comply with its provisions, does not, *ipso facto*, lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that purpose by the attorney general in behalf of the people; but it

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cannot be denied that the legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts, by any omission of duty or violation of its charter or default as to limitations imposed." *Brooklyn Steam Transit Co.* v. *Brooklyn* (1879) 78 N. Y. 524.

An action against a corporation to enforce a forfeiture is "always within the control of the state, as the sole party interested, to prosecute or abandon at its mere will and pleasure," and it "can, through the action of its legislature, not only discontinue an action brought by it, but can also repeal or confirm charters, waive or abolish causes of forfeiture, release rights of action, and limit the operation of its statutes upon individuals and corporations at its own will." *People* v. *Ulster & D. R. Co.* (1891) 128 N. Y. 240, 28 N. E. 635.

*Increased burdens.*—It is competent for the legislature to lay upon corporations burdens in addition to those prescribed by their charters. *New York, L. E. & W. R. Co.* v. *Dunkirk* (1892) 65 Hun, 494, 20 N. Y. Supp. 596. See other cases on this point in notes to article 8, § 1.

*Insurance.*—The constitutional rights of a member of a fire insurance company are not affected by § 125 of the insurance law prescribing the method by which a mutual company may be changed to a stock company. *Grobe* v. *Erie County Mut. Ins. Co.* (1899) 39 App. Div. 183, 57 N. Y. Supp. 290.

*Mileage books.*—The legislature may compel railroad corporations to issue mileage books. *Beardsley* v. *New York, L. E. & W. R. Co.* (1897) 15 App. Div. 251, 44 N. Y. Supp. 175.

*Plank roads.*—The legislature had power, by the act of 1864, chap. 25, to provide that if plank roads therein specified should be abandoned, or the charter expire by its own limitation, such road should become a public highway on making compensation to the owners of reversionary interests. *People ex rel. Mitchell* v. *Lawrence* (1869) 54 Barb. 589.

*Railroads.*—"Railroad corporations hold their property and exercise their functions for the public benefit, and they are therefore subject to legislative control. The legislature which has created them may regulate the mode in which they shall transact their business, the price which they shall charge for the transportation of freight and passengers, the speed at which they may run their trains, and the way in which they may cross or run upon highways and turnpikes used for public travel. It may make all such regulations as are appropriate to protect the lives of persons carried upon rail-

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roads, or passing upon highways crossed by railroads . . . although the power to alter and amend the charters of such corporations has not been reserved." *People ex rel. Kimball* v. *Boston & A. R. Co.* (1877) 70 N. Y. 569.

The legislature had power, by the railroad law of 1848, to impose on railroad companies the duty of maintaining fences and cattle guards. *Waldron* v. *Rensselaer & S. R. Co.* (1850) 8 Barb. 390.

*Reserved power of amendment or repeal.*—It is proper for the legislature to reserve to itself the right to amend or repeal a charter granted to a private corporation. *McLaren* v. *Pennington* (1828) 1 Paige, 102. *Beal* v. *New York C. & H. R. R. Co.* (1886) 41 Hun, 172, where it was held that, under a charter reserving this power, the legislature might extend the existence of the corporation, provide for its consolidation with other corporations, and authorize its successors to receive its property and effects. *New York* v. *Twenty-third Street R. Co.* (1889) 113 N. Y. 311, 21 N. E. 60, sustaining a statute requiring a railroad corporation to pay into the city treasury a percentage of its gross receipts, instead of a license fee, as under an earlier statute. *People* v. *O'Brien* (1888) 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692, but the reserved power was held not to authorize the legislature to take away or destroy property or annul contracts.

"The legislature . . . had the power, without violating the Federal Constitution, to repeal or amend laws pertaining to business or stock corporations organized under the law of 1875, and to prescribe the liability of stockholders in such corporations to its creditors for all debts contracted after the act was repealed or amended." *Berwind-White Coal Min. Co.* v. *Ewart* (1895) 11 Misc. 490, 32 N. Y. Supp. 716, affirmed without considering this point in (1895) 90 Hun, 60, 35 N. Y. Supp. 573.

*School districts.*—The legislature may transfer territory from one union free school district to another, or merge it in such other district, or abolish it entirely. *Board of Education* v. *Board of Education* (1902) 76 App. Div. 355, 78 N. Y. Supp. 522.

*Town aid.*—An act authorizing towns to aid in the construction of a railroad was sustained in *Grant* v. *Courter* (1857) 24 Barb. 232. The constitutional amendment of 1874 prohibited such local aid.

*Trusts.*—The legislature has power to transfer the legal title from the mere naked trustees to the *cestui que trusts* (after the latter are incorporated) in a case where the trustees might themselves, under a decree of the court, be compelled to make such a transfer. *Reformed Protestant Dutch Church* v. *Mott* (1838) 7 Paige, 77.

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## CRIMES.

In 1824 Chancellor Sanford, considering the validity of the anti-dueling act of 1815, chap. 1, made some observations in *Barker* v. *People* (1824) 3 Cow. 686, 15 Am. Dec. 322, which may properly be quoted at the beginning of an article on the power of the legislature in relation to crimes. "The power of the legislature in the punishment of crimes," he said, "is not a special grant or a limited authority to do any particular thing, or to act in any particular manner. It is a part of 'the legislative power of this state.' . . . It is the sovereign power of a state to maintain social order by laws for the due punishment of crimes. It is a power to take life and liberty and all the rights of both when the sacrifice is necessary to the peace, order, and safety of the community. This general authority is vested in the legislature; and as it is one of the most ample of their powers, its due exercise is among the highest of their duties. When an offender is imprisoned, he is deprived of the exercise of most of the rights of a citizen; and when he suffers death, all his rights are extinguished. The legislature have power to prescribe imprisonment or death as the punishment of any offense. The rights of a citizen are thus subject to the power of the state in the punishment of crimes, and the restrictions of the Constitution upon this, as upon all the general powers of the government, are that no citizen shall be deprived of his rights unless by the law of the land or the judgment of his peers, and that no person shall be deprived of life, liberty, or property without due process of law. . . . The power of the state over crimes is thus committed to the legislature, without a definition of any crime, without a description of any punishment to be adopted or to be rejected, and without any direction to the legislature concerning punishments. It is, then, a power to produce the end by adequate means,—a power to establish a criminal code, with competent sanctions,—a power to define crimes and prescribe punishments by laws in the discretion of the legislature." This is a general statement of the power of the legislature on this subject, and its application will be noted in the following cases.

The court sustained the anti-dueling act, which, among other things, deprived the person convicted under it of the right thereafter to hold any "post of profit, trust, or emolument, civil or military, under this state."

*Arson.*—By early statutes relating to crimes arson ceased to be a common law offense and became a statutory crime, and it was classified into four degrees. This classification was valid, and an accused

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person, being chargeable with knowledge of the law, was bound to know that such a classification had been made, and that under an indictment for a higher he might be found guilty of a lower degree. *People* v. *Didien* (1859) 17 How. Pr. 224.

*Electrocution.*—"Whether the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases was a question for the determination of the legislature," and its determination is conclusive upon the court. *People ex rel. Kemmler* v. *Durston* (1890) 119 N. Y. 569, 7 L. R. A. 715, 16 Am. St. Rep. 859, 24 N. E. 6.

*Future cases.*—"The legislature has power to pass a statute as to criminal offenses applicable alone to the future, and such statute will not repeal the prior law on the subject, nor give immunity to past offenders." *People* v. *Maxwell* (1894) 83 Hun, 157, 31 N. Y. Supp. 564.

*Indeterminate sentence.*—The legislature has power to provide for an indeterminate sentence; such a sentence is definite for the maximum term. The board created for this purpose may also be constitutionally vested with the power to terminate the sentence before the expiration of the maximum period, on conditions prescribed by law. Such legislation does not interfere with the governor's pardoning power. *People ex rel. Clark* v. *Sing Sing Prison* (1902) 39 Misc. 113, 78 N. Y. Supp. 907, Sp. T.

The same principle was applied in commitments for vagrancy under the provisions of §§ 707–712 of the Greater New York charter, which vested prison authorities and magistrates with power to fix the term of imprisonment according to specified conditions. *People ex rel. Abrams* v. *Fox* (1902) 77 App. Div. 245, 79 N. Y. Supp. 56, distinguishing *Re Kenny* (1898) 23 Misc. 9, 49 N. Y. Supp. 1037, affirmed in (1898) 30 App. Div. 624, 53 N. Y. Supp. 1111, where these sections, as they stood prior to the amendment of 1901, were held unconstitutional, on the ground that they deprived the persons of liberty without due process of law.

*Jurisdiction.*—A state has no extraterritorial jurisdiction of crimes. *People* v. *Merrill* (1855) 2 Park. Crim. Rep. 590.

*Place of imprisonment.*—In *Brown* v. *People* (1878) 75 N. Y. 437, sustaining the act of 1874, chap. 209, authorizing boards of supervisors to contract for the confinement of short term prisoners in penitentiaries, the court cite the remark in *King* v. *Bishop of Rochester* (1722) Fortescue, 101, that "the King can choose his own prison to detain, as well as his own court to try;" and say that the

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people may do the same thing, but they "must prescribe by law what prison or prisons they may choose." This had been done by the act of 1874. "We have no doubt of the power of the legislature to designate a place of imprisonment in a part of the state other than the county jail of the county of the offense and trial; nor of its power to use all the instrumentalities of the state in procuring such place, and in securing confinement in it."

*Place of trial.*—A person accused of burglary and larceny in one county may be tried for the burglary in an adjoining county, if he has carried the stolen property into that county. A statute authorizing such a trial is constitutional. The legislature can take away, in a particular instance, the local character of the offense of burglary, and may lawfully direct that the offender be tried in another county than that in which the act was done. *Mack* v. *People* (1880) 82 N. Y. 235.

*Second offense.*—The imposition of a more severe punishment for a second offense is not limited to cases where the first offense is committed in this state. Such a first offense committed in another state may be made the basis of a second conviction and punishment here, notwithstanding a pardon granted by the executive of such other state. *People* v. *Price* (1889) 53 Hun, 185, 6 N. Y. Supp. 833, affirmed in (1890) 119 N. Y. 650, 23 N. E. 1149.

*State not liable to person convicted of crime.*—John Roberts was convicted of burglary in 1877, and sentenced to state prison for twenty years. In October, 1878, he was pardoned by the governor, and in April, 1895, was restored to citizenship. The legislature of 1895 passed a law permitting Roberts to present to the board of claims a claim for damages sustained by him in consequence of his conviction, on the theory that the state, having used its power and judicial machinery to convict him of an offense of which he was innocent, should make compensation to him for the loss, damages, and expenses sustained or incurred by him under such improper arrest and conviction. The board of claims made an award in his favor which was reversed by the appellate division, and its judgment was affirmed by the court of appeals. *Roberts* v. *State* (1899) 160 N. Y. 217, 54 N. E. 678. The latter court said that the pardon and restoration to citizenship had no retroactive effect on the judgment of conviction, which remained unreversed. A pardon implies guilt, and is an act of grace, not of right. "If the judgment was erroneous, the remedy was by appeal, or by application to set it aside, and not by pardon. That question was for the judicial branch of the state government to determine, and not for the legislative or executive

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department." But aside from this question, the court said that the evidence showed that Roberts was properly convicted, and that, on the facts, the award of the board of claims was, for that reason, erroneous. If the claimant "was not improperly convicted and imprisoned, he had no valid claim."

*Suspension of sentence.*—The act of 1893, chap. 279, amending the Penal Code by authorizing the suspension of sentence in certain cases, was a valid exercise of legislative power, and it did not interfere with the governor's prerogative to grant reprieves, commutations, and pardons. *People ex rel. Forsyth* v. *Court of Sessions* (1894) 141 N. Y. 288, 23 L. R. A. 856, 36 N. E. 386.

*Uniformity not required.*—Punishment for crimes need not be uniform throughout the state. The court sustained the act of 1880, chap. 456, under which petit larceny in Cohoes was punishable by an imprisonment not exceeding one year, although elsewhere, under the general law, the maximum imprisonment could not exceed six months. The act was valid if it applied to all persons in Cohoes. *Re Bayard* (1881) 25 Hun, 546. See *Williams* v. *People* (1862) 24 N. Y. 405.

### DECLARATORY STATUTE.

The legislature has no judicial powers, and cannot, upon any pretense, interpose its authority respecting questions of interpretation pending in the courts. *People ex rel. Mutual L. Ins. Co.* v. *New York* (1857) 16 N. Y. 424.

### DELEGATION OF LEGISLATIVE POWER.

The Constitution in terms vests legislative power in the senate and assembly; but, by recent amendments, extensive powers of local legislation may be delegated to municipal corporations. In addition to these specific constitutional provisions the courts have had frequent occasion to determine the validity of statutes which, in effect, delegated legislative power to subordinate governmental agencies or other departments of the government. These statutes include various aspects of administration, both local and general, and many of them have not received judicial attention. The following cases present numer-

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ous questions relating to the delegation of power, and show some diversity of judicial construction.

*Boards of supervisors.*—The application of principles relating to the delegation of power was considered with reference to boards of supervisors in *People ex rel. Wakeley* v. *McIntyre* (1898) 154 N. Y. 628, 49 N. E. 70, and the court there said that within the limits of the power delegated to such boards by the Constitution, they are "clothed with the sovereignty of the state, and are authorized to legislate as to all details precisely as the legislature might have done in the premises;" and therefore that such a board, in authorizing a town to borrow money for the construction of highways, might prescribe conditions for the protection of taxpayers and to insure proper administration.

*Cemeteries.*—A statute conferring on the municipal authorities of New York the right to make by-laws regulating or prohibiting interments in that city was sustained in *Coates* v. *New York* (1827) 7 Cow. 585.

The legislature may delegate to cemetery associations power to make ordinances in relation to the administration of their affairs, but they are binding only on members. *Johnstown Cemetery Asso.* v. *Parker* (1899) 45 App. Div. 55, 60 N. Y. Supp. 1015.

*Corporations.*—"The legislature cannot confer upon a moneyed corporation power to enact by-laws contravening, repealing, or in any wise changing the statutory or common law of the land." *Seneca County Bank* v. *Lamb* (1858) 26 Barb. 595.

*Courts.*—The act of 1884, chap. 439, authorizing the supreme court and county court to require railroad corporations to station flagmen at certain crossings, did not vest legislative power in those courts. The power is judicial. *People* v. *Long Island R. Co.* (1892) 134 N. Y. 506, 31 N. E. 873.

*Eminent domain.*—The power of eminent domain may be delegated to corporations. *Re Union Ferry Co.* (1885) 98 N. Y. 139. Additional citations on this point will be found under the heads of "Eminent Domain" and "Public Use," in the note to § 6 of article 1.

*Foreign insurance companies.*—The act of 1875, chap. 60, which required the superintendent of insurance to collect from outside insurance companies taxes, license fees, etc., equal in amount to those imposed in the home state of such companies on New York insurance companies doing business there, when such amount charged is

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greater than our own, was held not to be objectionable because the amount to be paid by such outside companies was subject to the discretion of the legislature of another state. The legislature of this state may take the legislation of another state as the basis for the regulation of our internal affairs, and may therefore make the payment of such a tax dependent on the action of another state. *People* v. *Fire Asso.* (1883) 92 N. Y. 311, 44 Am. Rep. 380.

*Free school law.*—The proposed free school law of 1849, chap. 140, by its own terms was not to become operative until approved by the people at a general election. This delegation of power from the legislature to the people was sustained in *Johnson* v. *Rich* (1851) 9 Barb. 680, but was held unconstitutional in *Thorne* v. *Cramer* (1851) 15 Barb. 112; *Bradley* v. *Baxter* (1853) 15 Barb. 122, and by the court of appeals in *Barto* v. *Himrod* (1853) 8 N. Y. 483, 59 Am. Dec. 506.

*Local approval.*—Several cases are reported in which the courts considered the validity of statutes delegating to the people of a municipality the power to determine whether certain local bills passed by the legislature should become laws, or whether certain specified provisions of laws should be in force as to a given locality.

The act of 1853, chap. 217, proposing amendments to the New York charter, was to be submitted to the people of the city for their approval. In *People* v. *Stout* (1856) 23 Barb. 349, the submission was held unconstitutional on the ground that the legislative power of the state could not be delegated to the people of a locality.

The act of 1823, chap. 111, for the construction of the Albany basin at the termination of the Erie and Champlain canals, was, by its terms, to become void unless the corporation of the city of Albany should file its consent to the act within sixty days after its passage. Such consent was duly filed in the office of the secretary of state. The validity of this provision was considered in *Corning* v. *Greene* (1856) 23 Barb. 33, and the court there said that a "statute that is not an expression of the legislative will alone has no binding force as a law. It can only become a law, mandatory and obligatory upon those who are subjects of it, by a declaration of the legislative will. An attempt, therefore, to call in another party to aid in the business and divide the responsibilities of legislation, so that the act shall not be the single expression of the legislative will, but the sovereign function is discharged in part, at least, by a party unknown and unrecognized by the fundamental law, would be in contravention of the Constitution, and render the act void." The court held that the act was invalid.

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The legislature of 1853 passed an act, chap. 283, authorizing the village of Rome to subscribe for stock in a certain railroad corporation. But such subscription could not be made until the act had been approved by two thirds of the taxpaying voters of the village. This act was sustained in *Bank of Rome* v. *Rome* (1858) 18 N. Y. 38, where the court pointed out the distinction between an act which could have no validity until approved by the people, and an act which, by its own terms, is complete in itself, but which vests in a municipal corporation power to do or decline to do what the statute authorizes. The people do not determine that the law shall or shall not take effect; they simply determine whether they will avail themselves of its provisions.

*Starin* v. *Genoa, Gould* v. *Sterling* (1861) 23 N. Y. 439, and *Grant* v. *Courter* (1857) 24 Barb. 232, involved the same principle. The only question submitted was whether it was expedient for the town to exercise a new power conferred upon it absolutely by the legislature; namely, whether it would authorize a subscription in aid of the construction of certain railroads.

*Clarke* v. *Rochester* (1864) 28 N. Y. 605, belongs to the same class. The act construed authorized the subscription for railroad stock after a vote of the people. The court say that the electors of municipal corporations may be made the "depositories of such powers of local government as the legislature may see fit to prescribe, and the exercise of which is not repugnant to any of the general arrangements of the Constitution."

Another view of this subject was presented by the general village law of 1847, chap. 426, which authorized the people in any existing village to adopt a resolution to apply specified portions of the act to that village. The court of appeals in *Bank of Chenango* v. *Brown* (1863) 26 N. Y. 467, sustained the act. Discussing the distinction between a statute which could not take effect without a vote of the people of the state, or which delegated to the people the power to accept or reject it as a part of the law governing them, and the submission of a similar question to the people of a specified locality, the court say that the "people of a particular municipality or local body are not the constituents of the legislature. They are not the people of the state of New York who have irrevocably committed their power of legislation to the legislature by a delegation which does not permit that legislature to remand any legislative question to their constituency. A city or a town or a village is a separate recognized local body, which, without exercising legislative power, may signify, if permitted, its assent or dissent to any grant or withdrawal

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of powers or privileges. The vote of the whole people of the state upon a question of the expediency of a general statute may be essentially an act of legislation. The vote of a local constituency is an assent or dissent to an act of grant or deprivation done by the legislature, but affecting themselves." While it was not necessary to have the corporate consent to the adoption of specified statutory provisions, such consent did not invalidate the law. Several statutes were cited which submitted charter provisions to the people of specified localities, or authorized the creation of debts and the subscription for corporate stock, but only on the assent of a specified number of taxpayers or voters. This decision furnished ample judicial authority for similar provisions in the general village law of 1870, chap. 291, and of 1897, chap. 414, under which villages incorporated by special act might reincorporate under the general law.

It is competent for the legislature to delegate to the people of a specified district power to determine whether a license to sell intoxicating liquors shall be granted therein. *Gloversville* v. *Howell* (1877) 70 N. Y. 287.

*Local boards.*—The New York city public health law of 1866, chap. 74, did not contain an unconstitutional delegation of power to the board of health. The board might properly be vested with power to make and enforce by-laws and ordinances relating to public health. *Cooper* v. *Schultz* (1866) 32 How. Pr. 107. See also *People ex rel. Cox* v. *Special Sessions Justices* (1876) 7 Hun, 214; *Re Zborowski* (1877) 68 N. Y. 88.

In *Schuster* v. *Metropolitan Bd. of Health* (1867) 49 Barb. 450, it was said that the metropolitan board of health "hold office by the appointment of the governor, and are not elected by the people of the city of New York, nor appointed by any power so elected. They are not officers holding from a source permitting the exercise of local legislation to be conferred on them."

The same principle was declared in *People* v. *Acton* (1867) 48 Barb. 524, construing the act of 1867, chap. 806, which concentrated in the metropolitan board of police various powers and functions theretofore vested in several municipal bodies. The court say that "the legislature cannot confer the power to discharge duties and make regulations and pass laws relating thereto, upon state officers, no matter how appointed, whether by the governor and senate or by the legislature; and, although the legislature might have the power to take the discharge of such duties from the mayor or common council, they were required to place the performance of them with

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local officers or boards, and could not vest officers appointed under authority of the state with the performance of such duties."

The power conferred upon commissioners appointed under the New York rapid transit act of 1875, chap. 606, to determine the necessity of railways, to fix the routes and prescribe the plan of their construction, is administrative, and not legislative. *Re New York Elev. R. Co.* (1877) 70 N. Y. 327; *Gilbert Elev. R. Co.* v. *Kobbe* (1877) 70 N. Y. 361.

*Municipal corporations.*—The legislature may delegate to a municipal corporation the power to make by-laws and ordinances, and such an ordinance, when within the scope of municipal authority, has all the force of a statute. *Carthage* v. *Frederick* (1890) 122 N. Y. 269, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; *Hoey* v. *Gilroy* (1891) 129 N. Y. 132, 29 N. E. 85; *Rochester* v. *Simpson* (1892) 134 N. Y. 414, 31 N. E. 871; *Jorgensen* v. *Squires* (1895) 144 N. Y. 280, 39 N. E. 373; *Ford* v. *New York C. & H. R. R. Co.* (1898) 33 App. Div. 474, 53 N. Y. Supp. 764; *Buffalo* v. *Hill* (1903) 79 App. Div. 402, 79 N. Y. Supp. 449; *People* v. *Timmerman* (1903) 79 App. Div. 565, 80 N. Y. Supp. 285; *Tanner* v. *Albion* (1843) 5 Hill, 121, 40 Am. Dec. 337; *New York* v. *Ryan* (1854) 2 E. D. Smith, 368.

*Official terms.*—Construing § 3 of article 10 that "when the duration of any office is not provided by this Constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment," it was said in *People ex rel. Percival* v. *Cram* (1900) 164 N. Y. 166, 58 N. E. 112, that the power could not be delegated by the legislature to a civil service commission.

*United States.*—"While the Federal government, as an independent sovereignty, has the power of condemning lands within the states for its own public use, we see no reason to doubt that it may lay aside its sovereignty, and, as a petitioner, enter the state courts and there accomplish the same end through proceedings authorized by the state legislature." The state may delegate its powers to an independent political corporation where the use is public and the convenience shared by its own citizens. *Re United States* (1884) 67 How. Pr. 121.

*Villages.*—The legislature may delegate to the people of a village the power to discontinue its corporate existence. *Blauvelt* v. *Nyack* (1876) 9 Hun, 153.

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## DISCRIMINATION.

In *People* v. *Lowndes* (1892) 130 N. Y. 455, 29 N. E. 751, construing the Penal Code provision prohibiting the planting or gathering of oysters by nonresidents, the court say the act was passed for the purpose of establishing a discrimination between citizens and nonresidents as to this particular business, and that it was a lawful exercise of legislative power over the common property of the citizens of the state.

## ELECTIONS.

*Declaring result of election.*—"The legislature can provide for the manner in which the result of an election shall be determined and declared, and their enactment is binding." *People ex rel. Conliss* v. *North* (1878) 72 N. Y. 124.

*Election districts.*—The legislature has power to determine the boundaries of an election district, and may locate the polling places according to its own judgment and discretion, or it may delegate this power to local authorities, who may constitutionally, within reasonable limits, and if deemed more convenient for the voters, locate a polling place outside the district. *People ex rel. Lardner* v. *Carson* (1898) 155 N. Y. 491, 50 N. E. 292. This case has already been cited under the suffrage section (article 2, § 1).

*Special elections.*—In annexing to New York a part of Westchester county, and creating a separate judicial district in such annexed territory (Laws 1873, chap. 613), the legislature had power to provide that the first election should be held under the election laws applicable to Westchester county, instead of under the New York election law, though the act, as a whole, was not to take effect until after such election. *People* v. *Flanagan* (1876) 66 N. Y. 237.

*Town meetings.*—"The election of a public officer must be referred to the day upon which the electoral body, in which the right of selection resides, expresses its choice by voting for candidates for the office, and not to some subsequent day when the result is declared. . . . When the votes of the electors have been given the choice is made, though the precise result may not be officially ascertained for weeks or months afterwards. The canvass of votes or statements is a ministerial act, following the election, and evidence of the result, but the will of the voters, expressed by the deposit of their

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ballots, is the essential thing in every election. The day upon which that essential act is performed in the manner prescribed by law is the day upon which the candidate is really elected, though the choice may not be officially declared until a considerable period afterwards." A subsequent change of the official term cannot affect an officer thus elected, though the term be changed before the votes are canvassed. *People ex rel. Le Roy* v. *Foley* (1896) 148 N. Y. 677, 43 N. E. 171, where it was also held that "the legislature has the power to prescribe the time and manner of holding town meetings for the election of town officers and the transaction of town business. It may designate a single day for that purpose or provide . . . for the election of officers on one day, and the transaction of the other general business of the town on the following day."

Construing the act of 1897, chap. 439, which provided for changing the time of holding town meetings and for adjusting official terms to conform to the new arrangement, the supreme court, in *People ex rel. Clark* v. *Treacy* (1899) 46 App. Div. 216, 61 N. Y. Supp. 288, say: "We know of no instance in which the legislature has assumed to direct that an elective office shall be filled earlier than at the election next preceding the expiration of the term of the present incumbent; and we doubt whether it is within the power of the legislature to make such a direction as to constitutionally elective offices. . . . The provisions of the Constitution limiting offices to fixed terms is entirely inconsistent with such an assumption of authority by the legislature."

## EQUAL PROTECTION OF THE LAWS.

A statute prohibiting foreign corporations from transacting business within this state except upon specified conditions is not repugnant to the provision of the Federal Constitution which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." A foreign corporation is not a person within this provision, and the legislature may regulate the conditions under which it may do business within the state. *People* v. *Fire Asso.* (1883) 92 N. Y. 311, 44 Am. Rep. 380.

Permission granted to a foreign corporation to do business within the state is not a matter of right, but of comity, and may be granted subject to such terms as the legislature may think proper to impose. *Horn Silver Min. Co.* v. *New York* (1891) 143 U. S. 305, 36 L. ed.



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164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403, affirmed in (1887) 105 N. Y. 76, 11 N. E. 155.

The civil service acts of 1884, chap. 410, and 1887, chap. 464, giving a preference to veterans, do not deny equal protection of the laws. All persons in a given class have an equal right. The statutes give a preference to veterans as a reward for meritorious service in preserving the existence of the nation, and do not infringe any constitutional right guaranteed to other citizens. *Re Wortman* (1888) 22 Abb. N. C. 137, Daniels, J.

A statute which conferred on taxpayers in the county of New York the right of review of assessments more limited than the right conferred on persons residing in other counties was held not obnoxious to this provision. It prohibits class legislation, but does not prohibit local or special legislation. *People ex rel. Second Ave. R. Co.* v. *Coleman* (1889) 21 N. Y. S. R. 178, 4 N. Y. Supp. 417.

The act of 1892, chap. 646, regulating the rendering business, is not objectionable as denying equal protection of the laws. *People* v. *Rosenberg* (1893) 67 Hun, 52, 22 N. Y. Supp. 56, reversed on other points in (1893) 138 N. Y. 410, 34 N. E. 285.

Statutes which impose a punishment on persons between prescribed ages, who are sentenced to specified institutions, different from the punishment imposed generally for like offenses, do not deny equal protection of the laws. They create classes, and all persons in the same class are subject to the same rule. *People ex rel. Duntz* v. *Coon* (1893) 67 Hun, 523, 22 N. Y. Supp. 865.

License fees imposed under state law on telegraph companies engaged in interstate business are not a violation of this provision. *Philadelphia* v. *Postal Teleg. Cable Co.* (1893) 67 Hun, 21, 21 N. Y. Supp. 556.

The act of 1895, chap. 823, prohibiting barbering on Sunday except in the city of New York and in the village of Saratoga Springs, does not deny equal protection of the laws within the meaning of the Federal Constitution. It is not class legislation. It affects alike all persons similarly situated. *People* v. *Havnor* (1896) 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 541. See also *Wright* v. *Hart* (1905) 103 App. Div. 218, 93 N. Y. Supp. 60, as to statutes regulating sales of merchandise in bulk.

Statutes which impose a special tax on resident insurance agents do not violate this provision. All persons in the same class are similarly affected. *Fire Department* v. *Stanton* (1899) 159 N. Y. 227, 54 N. E. 28.

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The state may establish separate schools for white and for colored children, and it does not thereby deny to any citizen equal protection of the laws, provided such schools afford equal facilities for acquiring an education. *People ex rel. King* v. *Gallagher* (1883) 93 N. Y. 438, 45 Am. Rep. 232; *People ex rel. Cisco* v. *Queens* (1900) 161 N. Y. 598, 48 L. R. A. 113, 56 N. E. 81.

The Code of Civil Procedure, § 3268, authorizing the defendant in a court of record to require security for costs where the plaintiff is an infant (not suing as a poor person) whose guardian *ad litem* has not given such security, is not class legislation, and does not deny equal protection of the laws. *Venanzio* v. *Weir* (1901) 64 App. Div. 483, 72 N. Y. Supp. 234.

The prohibition against poolselling and other forms of gambling in § 351 of the Penal Code is not a violation of this provision. *People* v. *Stedeker* (1902) 75 App. Div. 449, 78 N. Y. Supp. 316.

The provision of § 384*h*, subd. 1 of the Penal Code, which prohibits the contractor with the state from requiring more than eight hours' work for a day's labor, denies equal protection of the laws. *People* v. *Orange County Road Constr. Co.* (1903) 175 N. Y. 84, 65 L. R. A. 33, 67 N. E. 129.

A franchise tax on savings banks, as imposed by § 187*b* of the tax law, added in 1901, does not deny equal protection of the laws. Savings banks are not charitable or benevolent corporations, and there is no discrimination in the tax. *People ex rel. Bank for Savings* v. *Miller* (1903) 84 App. Div. 168, 82 N. Y. Supp. 621, citing *Monroe County Sav. Bank* v. *Rochester* (1867) 37 N. Y. 365.

In *People ex rel. McPike* v. *Van De Carr* (1904) 91 App. Div. 20, 86 N. Y. Supp. 644, the court quotes from *Barbier* v. *Connolly* (1885) 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, the statement that by the constitutional provision securing equal protection of the laws it is "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all, under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens

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should be laid upon one than are laid upon others in the same calling and condition; and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." The appellate division, applying this rule to § 640 of the Penal Code as amended in 1903, chap. 272, relating to the use of the flag of the United States in connection with trade labels or in the manufacture and sale of merchandise, say that the statute makes a clear discrimination "between citizens engaged in business, in the use of a representation of the American flag in connection with their business. The merchant and the manufacturer are made criminals for using such representation, while the book publisher, the newspaper proprietor, the jeweler, and the stationer are permitted to use the symbol in their business, to put it upon their merchandise, and to make profit by its use."

The provision of chap. 625 of Laws 1903, amending the highway law by requiring the registration of automobiles used on the highway, but exempting from such registration automobiles kept in stock by a manufacturer, was not obnoxious to this provision of the Constitution. The mischief aimed at was the unregulated and dangerous use of highways by these vehicles; no such mischief can arise while the vehicle is in stock, and the manufacturer or dealer must register the vehicle before using it upon the highways. *People* v. *MacWilliams* (1904) 91 App. Div. 176, 86 N. Y. Supp. 357.

## EVIDENCE.

*Changing rules of evidence.*—Rules of evidence are at all times subject to modification and control by the legislature. "The changes which are enacted from time to time may be made applicable to existing causes of action, as the law thus changed would only prescribe the rule for future controversies." In *Howard* v. *Moot* (1876) 64 N. Y. 262, the court conceded that a law making "evidence conclusive which is not so necessarily in and of itself, and thus preclude the adverse party from showing the truth, would be void as indirectly working a confiscation of property or a destruction of vested rights;" but said that this was not the "effect of declaring any circumstance or any evidence, however slight, prima facie proof of a fact to be established, leaving the adverse party at liberty to rebut and overcome it by contradictory and better evidence." The act of 1821, chap. 19, to perpetuate certain testimony respecting the title to the Pulteney estate, was sustained. See *Supreme Lodge K. of P.* v. *Meyer* (1904) 198 U. S. 508, 519, 49 L. ed. 1146, 1149, 25 Sup. Ct. Rep. 754.

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The legislature has power to change the rules of evidence or the details of the trial, both as to prior and as to subsequent offenses; applied in construing the act of 1872, chap. 475, in relation to challenges to jurors in criminal cases. *Stokes* v. *People* (1873) 53 N. Y. 164, 13 Am. Rep. 492.

In *People ex rel. Miller* v. *Ryder* (1891) 124 N. Y. 500, 26 N. E. 1040, construing the sections of the Code of Civil Procedure, §§ 841 and 1582, relating to the disposition of the proceeds of a sale in partition, the court say that, conceding the power of the legislature to change rules of evidence as they have previously existed, and to provide other and new remedies, "laws of this character which are intended to have retroactive operation should be strictly construed, especially in so far as they provide for the vesting of property."

*Physical examinations.*—The act of 1893, chap. 721, amending § 873 of the Code of Civil Procedure by authorizing a physical examination of the plaintiff in an action to recover damages for personal injuries, was a constitutional exercise of power by the legislature. "The statute enacts a rule of procedure, the purpose of which is the discovery of the truth in respect to certain allegations which the plaintiff has presented for judicial investigation in the courts of justice. It prescribes a method of aiding the court and jury in the correct determination of an issue of fact raised by the pleadings, . . . and does not violate any of the express or implied restraints upon legislative power to be found in the fundamental law." *Lyon* v. *Manhattan R. Co.* (1894) 142 N. Y. 298, 25 L. R. A. 402, 37 N. E. 113.

*Presumptions.*—In *Wood* v. *Byington* (1847) 2 Barb. Ch. 387, Chancellor Walworth, considering the act of 1843, chap. 172, which provided that, in a proceeding to mortgage a decedent's real estate for the payment of debts, a judgment recovered against the personal representatives shall be prima facie evidence of a debt, said it could not have a retroactive effect, and that it was "a matter of doubt whether the legislature can rightfully declare that the result of a litigated suit against one person shall be evidence against another, to affect rights of the latter which had accrued previous to the passage of the statute establishing such a rule of evidence."

"The legislature has power to determine by law what shall, in civil cases, be received by the courts as presumptive evidence." *Hand* v. *Ballou* (1855) 12 N. Y. 541, sustaining the act of 1850, chap. 183, which made the comptroller's tax deed presumptive evidence of the regularity of the sale.

This act was repealed in 1855, chap. 427, and in *Hickox* v. *Tall-*

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*man* (1860) 38 Barb. 608, it was held that deeds under it were not presumptive evidence of regularity in the comptroller's proceedings; that there was no vested right in a rule of evidence, but that the legislature might change it at pleasure; and that a grantee in a comptroller's deed given while the act of 1850 was in force was required to make full proof of every fact relating to the comptroller's jurisdiction.

*White* v. *Wheeler* (1889) 51 Hun, 573, 4 N. Y. Supp. 405, sustains a statute and cites others making a tax deed presumptive evidence

The act of 1885, chap. 448, declaring the effect of conveyances by the comptroller on tax sales, was sustained in *People* v. *Turner* (1889) 117 N. Y. 227, 15 Am. St. Rep. 498, 22 N. E. 1022, in which the court say that "the power of the legislature to change rules of evidence as they exist at common law . . . has been uniformly held not to be affected or restricted by the constitutional provisions prohibiting the taking of life, liberty, or property without due process of law." See also *Turner* v. *New York* (1897) 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38, where the court, sustaining the statute, say it is a statute of limitations, and does not deprive the owner of property without due process of law. Followed in *Saranac Land & Timber Co.* v. *Comptroller* (1899) 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642.

Discussing the validity of the provision in the excise act of 1857, chap. 628, that whenever any person is seen to drink on licensed premises it shall be prima facie evidence that the liquor was sold by the licensee or his agent with intent to be drunk on the premises, the court, in *People* v. *Lyon* (1882) 27 Hun, 180, say that "if the legislature can declare that a certain fact is prima facie evidence of the defendant's guilt, such a declaration means that the jury must convict unless the defendant explains away this evidence; and if they can declare a fact to be prima facie, it would seem to follow that they might declare it conclusive evidence." But this law made an act which was always lawful done by one person, prima facie evidence that another person had committed a criminal offense. The jury, not the legislature, must judge whether the evidence proves the charge. The defendant was indicted and convicted for a violation of the excise law. The conviction was reversed and the provision in question held unconstitutional because it deprived the defendant of the right of trial by jury.

The same provision of the excise law was under consideration again in the court of appeals in an action to recover penalties (*Board of Excise* v. *Merchant* [1886] 103 N. Y. 143, 54 Am. Rep. 705, 8 N.

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E. 484), and was sustained, the court saying that "the general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party, and thus deny him the opportunity for a trial, would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act prima facie evidence of crime over which the party charged had no control and with which he had no connection, or which made that prima facie evidence of crime which had no relation to a criminal act, and no tendency whatever by itself to prove a criminal act. But so long as the legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense, and to submit all the facts to the jury, to be weighed by them upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds." The court said that, under the circumstances, the drinking was good common law evidence of a sale in violation of the statute.

"Even in criminal prosecutions the legislature may, with some limitations, enact that when certain facts have been proved they shall be prima facie evidence of the existence of the main fact in question. . . . The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved must not be merely and purely arbitrary, or wholly unreasonable, unnatural, or extraordinary, and the accused must have, in each case, a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper." A provision of this kind does not in reality and finally change the burden of proof. *People* v. *Cannon*, *People* v. *Quinn*, *People* v. *Bartholf* (1893) 139 N. Y. 32, 36 Am. St. Rep. 668, 34 N. E. 759, sustaining the bottling act of 1887, chap. 377, as amended, Laws 1888, chap. 181, which made the possession by a junk dealer of certain bottles and kegs presumptive evidence of an unlawful use thereof.

The provision of the general village law of 1870, chap. 291, making the certificate of the second election for the purpose of incorporation "final and conclusive proof of the incorporation of such village, and the regularity thereof, in all courts and places," was

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sustained in *People* v. *Snedeker* (1899) 160 N. Y. 350, 54 N. E. 659, the court observing that it was a "wise provision, for it prevents the confusion and danger which might result if the question of incorporation were left open to attack years after the village had been in existence for all practical purposes."

## EXCISE.

The legislature has power to enact laws prohibiting the sale of intoxicating liquors, and to provide penalties for their violation. The prohibitory law of 1855, chap. 231, was sustained. *People* v. *Quant* (1855) 12 How. Pr. 83; *Rome* v. *Knox* (1856) 14 How. Pr. 268.

"A law prohibiting the indiscriminate traffic in intoxicating liquors, and placing the trade under public regulation to prevent abuse in their sale and use, violates no constitutional restraints." Licenses to sell liquor may be modified, revoked, or continued, as the legislature may deem fit. License laws fall within the legislative power exerted unremittedly since the origin of the government. *Metropolitan Bd. of Excise* v. *Barrie* (1866) 34 N. Y. 657; *People ex rel. Presmeyer* v. *Board of Police & Excise* (1874) 59 N. Y. 92; *People ex rel. Einsfeld* v. *Murray* (1896) 149 N. Y. 367, 32 L. R. A. 344, 44 N. E. 146 (liquor tax law of 1896).

The civil damage act of 1873, chap. 646, was sustained in *Bertholf* v. *O'Reilly* (1878) 74 N. Y. 509, 30 Am. Rep. 323.

The power of the legislature to regulate the traffic in liquor includes the power to determine the premises upon which liquor shall be sold, and for what other purposes the premises shall be used. *People ex rel. Bassett* v. *City Prison* (1896) 6 App. Div. 520, 39 N. Y. Supp. 582.

## EX POST FACTO LAWS.

Quoting the definition of an *ex post facto* law given by Justice Chase in *Calder* v. *Bull* (1798) 3 Dall. 386, 1 L. ed. 648, as "one that punishes as a crime an act done before its passage, and which, when committed, was not punishable; and an act that aggravates a crime or inflicts a greater punishment than the law annexed to it when

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committed; or a law that alters the rules of evidence in order to convict an offender," the court of appeals, in *People* v. *Hawker* (1897) 152 N. Y. 234, 240, 46 N. E. 607, said that the provisions of the public health law, § 140, prohibiting any person who had ever been convicted of felony from practising medicine, and making a violation of the prohibition a misdemeanor, did not come within this definition, and therefore was not an *ex post facto* law.

The following laws were held to be not *ex post facto*:

The act of 1846, chap. 327, providing for the taxation of reserved rents. It applies only to rents accruing after its passage. *Le Couteulx* v. *Erie County* (1849) 7 Barb. 249.

In *Gotcheus* v. *Matheson* (1870) 58 Barb. 152, Justice Murray, at special term, sustained the act of Congress of March 3, 1865, which declared a forfeiture of citizenship by a deserter from the United States Army who failed to return to duty within sixty days, as required by a proclamation which the President was authorized to issue. The act was not *ex post facto.*

The act making the husband or wife of a party a witness, Laws 1867, chap. 887. *Southwick* v. *Southwick* (1872) 49 N. Y. 510.

The Penal Code, § 688, regulating punishments for a second offense, although the first offense was committed before the enactment of the Code. "The first offense was not an element of or included in the second, and so subjected to added punishment, but is simply a fact in the past history of the criminal which the law takes into consideration when prescribing punishment for the second offense." *People* v. *Raymond* (1884) 96 N. Y. 38.

The act of 1892, chap. 662, amending § 106 of the Penal Code by reducing and mitigating the minimum punishment for perjury. *People* v. *Hayes* (1894) 140 N. Y. 484, 23 L. R. A. 830, 37 Am. St. Rep. 572, 35 N. E. 951.

The act of 1897, chap. 427, amending § 529 of the Code of Criminal Procedure, regulating the hearing of appeals in criminal cases. *People* v. *Lyons* (1898) 29 App. Div. 174, 51 N. Y. Supp. 811.

The following laws were held to be *ex post facto:*

The act of 1860, chap. 410, which repealed the provisions of the Revised Statutes in relation to the infliction of the death penalty, substituting a new rule, and subjecting to this rule persons convicted under the Revised Statutes. It was void as to persons so previously convicted. "No one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offense was com-

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mitted, and which existed as a law at that time." *Hartung* v. *People* (1860) 22 N. Y. 95, 104; *Kuckler* v. *People* (1862) 5 Park. Crim. Rep. 212; *Shepherd* v. *People* (1862) 25 N. Y. 406. In the latter case Judge Sutherland, quoting the definition by Chief Justice Marshall in *Fletcher* v. *Peck* (1810) 6 Cranch, 87, 3 L. ed. 162, that an *ex post facto* law is one which makes the act punishable in a manner in which it was not punishable when committed, adds the clause "or which increases the punishment with which the act was punishable when committed."

The act of 1900, chap. 625, amending § 444 of the Code of Criminal Procedure, relating to convictions for a lesser offense than that charged in the indictment, was *ex post facto* as to a person indicted before the amendment, and he could not be afterwards convicted of such lesser offense. *People* v. *Cox* (1901) 67 App. Div. 344, 73 N. Y. Supp. 774.

## FRANCHISE.

The amendment of 1874, article 3, § 18, which, among other things, prohibited the legislature from granting any exclusive privilege or franchise, does not "prohibit a private or local bill to amend the charter of a private corporation by regulating powers, rights, privileges, and franchises which it previously possessed." *Re New York Elev. R. Co.* (1877) 70 N. Y. 327.

*Ferries.*—The South Ferry and Hamilton Avenue Ferry between New York and Brooklyn, having been established by the city of New York under the Cornbury charter of 1708 and subsequent grants, vested rights were thereby acquired which cannot be taken away by the legislature. *Benson* v. *New York* (1850) 10 Barb. 223.

The charter granted by Governor Dongan to Albany, in 1686, included power to establish and maintain ferries. In *Aikin* v. *Western R. Corp.* (1859) 20 N. Y. 370, the court of appeals considered this provision, and while neither asserting nor denying that it conferred on the city an exclusive franchise, not subject to legislative control, cited the Albany charter of 1826, chap. 185, which, in express terms, confirmed the ferry provision in the Dongan charter, and declared that the grant should be construed to confer on the city the sole and exclusive right of establishing and maintaining ferries between Albany and Greenbush, giving to the city the same rights on both sides of the Hudson river. The court say that "if full and complete

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authority over the ferries in question was not given by the Dongan charter to the city of Albany, then all the power not so given was reserved to and remained in the government, and was transferred from the colonial governors, or the Crown, to the legislature of the state." The court took occasion to observe that while the power to construe charters was not vested in the legislature, but in the courts, the act of 1826 nevertheless operated "as a grant to the city of Albany of any power which might remain in the legislature over the ferries." The Dongan charter of 1686 and the legislative charter of 1826 together conferred on the city "full, complete, and exclusive control of all the ferries within its limits, so far as the legislature could confer that power."

*Fulton steamboat grant.*—The legislature had power to grant an exclusive franchise to Livingston, Fulton, and others to navigate the waters of this state. *Livingston* v. *Van Ingen* (1812) 9 Johns. 506; *Ogden* v. *Gibbons* (1819) 4 Johns. Ch. 150. This subject will be considered again in notes to § 18 of this article.

*Rival franchise.*—The harbor masters' law of 1819, chap. 18, was held to be the grant of an office in the nature of a franchise, but a similar grant might at any time be made to others. "But, without the grant of a rival power from the same authority, individuals have no right to set up a rival office or business and assume to themselves the performance of the same public duties for the like emoluments. . . . The grant itself in the case of an office of this sort implies a prohibition against its exercise by others, unless they can show an equal authority." *Tyack* v. *Bromley* (1843) 4 Edw. Ch. 258.

The act of 1790, chap. 37, granted the right to erect and maintain for sixty years a toll bridge across the Harlem river, and prohibited, with certain exceptions, any other competing bridge or ferry. The legislature of 1832, chap. 162, authorized the erection of a railroad bridge near the toll bridge. The original franchise was held not to be exclusive, and a subsequent legislature had power to establish another bridge or a ferry at the same place. *Thompson* v. *New York & H. R. Co.* (1846) 3 Sandf. Ch. 625.

The charter of the Fort Plain Bridge Co., granted in 1827, chap. 209, prohibited another bridge or ferry within one mile of the bridge which might be erected by the company. This prohibition was repealed in April, 1857, chap. 495, and in July of the same year the defendant began the construction of a free bridge within 49 feet of the other, and without obtaining any special authority from the legislature. The rights of the parties were determined in *Fort Plain*

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*Bridge Co.* v. *Smith* (1864) 30 N. Y. 44, where *Charles River Bridge* v. *Warren Bridge* (1837) 11 Pet. 420, 9 L. ed. 773, is cited as authority for the doctrine that "it is competent for the legislature, after granting a franchise to one person or corporation which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant, unless the right so to do is expressly prohibited by the first grant." See also *Oswego Falls Bridge Co.* v. *Fish* (1846) 1 Barb. Ch. 547.

The same rule is applied in *Syracuse Water Co.* v. *Syracuse* (1889) 116 N. Y. 167, 5 L. R. A. 546, 22 N. E. 381, where it is said that "public grants are to be so strictly construed as to operate as a surrender by them of the sovereignty no farther than is expressly declared by the language employed for the purpose of their creation. The grantee takes nothing in that respect by inference. Such is deemed the legal intent of the state in imparting to its citizens or corporations powers and privileges of public character. And therefore, except so far as they are, by the terms of the grant, made exclusive, the power is reserved to grant and permit the exercise of competing and rival powers and privileges, however injurious they may be to those taken by the prior grantee."

But according to *Suburban Rapid Transit Co.* v. *New York* (1891) 128 N. Y. 510, 28 N. E. 525, the power to deprive a corporation of a franchise will not be deemed to have been exerted "in the absence of some unequivocal expression of legislative intent."

*Street railroads.*—Construing the street surface railway act of 1884, chap. 252, which embodied the constitutional provisions requiring the consent of the local authorities and property owners, with the additional provision that if a street railroad company had already constructed a railroad in a particular street, the consent of such company should be obtained before another railroad could be constructed in the same street, the court, in *Re Thirty-fourth Street R. Co.* (1886) 102 N. Y. 343, 7 N. E. 172, sustained the additional provision as a proper exercise of legislative power. After referring to the two constitutional provisions, already noted, the court say that "the Constitution, neither by express language nor by implication, abridges the legislative power over the subject outside of the matters particularly enumerated," and that "a constitutional provision which withdraws from the cognizance of the legislature a particular subject, or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves

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all other matters and incidents under its control. . . . The legislature is prohibited from granting a franchise to construct a street railroad, except upon certain specified conditions. But it is not prohibited from annexing further conditions not inconsistent therewith, and whether other conditions are necessary or proper is a matter resting in the wisdom and discretion of the legislature."

## HABEAS CORPUS.

"This writ cannot be abrogated or its efficiency curtailed by legislative action. . . . It was in use before Magna Charta, and came to us as a part of our inheritance from the mother country, and exists as a part of the common law of the state. It is intended and well adapted to effect the great object secured in England by Magna Charta, and made a part of our Constitution, that no person shall be deprived of his liberty 'without due process of law.'" *People ex rel. Tweed* v. *Liscomb* (1875) 60 N. Y. 559, 19 Am. Rep. 211.

## HIGHWAYS AND STREETS.

Prior to the Constitution of 1846 the legislature had no power to authorize a private road to be laid out over lands of a person without his consent. *Taylor* v. *Porter* (1843) 4 Hill, 140, 40 Am. Dec. 274.

"The regulation of roads and highways, and the modes of travel and transportation thereon, is a part of the ordinary duties of the legislature. It is entirely within its control. It may say what shall be the rate of speed at which horses or vehicles may proceed, to which side parties meeting shall turn, in what vehicles and in what quantities merchandise or materials of any kind may be transported." The act of 1857, chap. 417, prohibiting on a certain highway in Dutchess county a load containing more than two tons of iron ore unless in a vehicle with a tire 6 inches in width, was sustained. *Seward* v. *Beach* (1859) 29 Barb. 239.

In *Brooklyn City & N. R. Co.* v. *Coney Island & B. R. Co.* (1861) 35 Barb. 364, the court said the legislature had power to confer the privilege of building a horse railroad in the streets of Brooklyn without the consent of the owners of the soil; such a use of the street is merely a mode of exercising the public right of travel, and not an appropriation of the property of the owners of the land requiring compensation in damages.

In *Fearing* v. *Irwin* (1874) 55 N. Y. 486, it was held that the

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legislature had power to pass an act for closing streets in the city of New York, and to effect such closing through such local officers or municipal board or organization as it should choose, and it could prescribe the particular action thereof which should work the result. The legislative control over streets in New York was also declared in *People* v. *Kerr* (1863) 27 N. Y. 188, and in *Re Sackett, D. & DeG. Streets* (1878) 74 N. Y. 95, where it is said that "the legislature has power to determine where and when streets shall be constructed, and their width and mode of improvement, and the courts cannot sit in review upon its action in such matters." *Re Certain Streets* (1878) 7 N. Y. Week. Dig. 202.

While the legislature undoubtedly had the power to authorize the village authorities to pass ordinances and by-laws (which they might enforce) limiting and restricting the use which the public might make of the streets beyond their rights of travel, it had not the power, neither had the municipal authorities, as against the adjoining owner, to confer upon any person the right to make use of the highway for any other purpose than to pass and repass, without the consent of the owner of the fee. An injunction was granted against the use as a hack stand of that portion of the street in front of plaintiff's premises, notwithstanding a village by-law authorizing such use. *McCaffrey* v. *Smith* (1886) 41 Hun, 117.

The legislature, by virtue of its general control over public streets and highways, has the power to authorize structures in the streets for the convenience of business, which, without such authority, and under the principles of the common law, would be held to be encroachments and obstructions. This power it may delegate to the governing body in a municipal corporation. Applied in the case of an awning. *Hoey* v. *Gilroy* (1891) 129 N. Y. 132, 29 N. E. 85, and in the case of a bay window in *Wormser* v. *Brown* (1896) 149 N. Y. 163, 43 N. E. 524.

The legislative power over streets must be exercised subject to the constitutional rights of adjoining owners; and while it may direct the closing of a street, and may empower the municipality to discontinue its use as such, the power must not be exercised without affording an abutting owner access to his premises without making compensation, at least, unless there is provided or left for him other means of access. *Egerer* v. *New York C. & H. R. R. Co.* (1891) 130 N. Y. 108, 14 L. R. A. 381, 29 N. E. 95.

In *People ex rel. Bull* v. *Buffalo* (1900) 52 App. Div. 157, 65 N. Y. Supp. 163, affirmed in (1901) 166 N. Y. 604, 59 N. E. 1128, the court sustained as constitutional a provision in the Buffalo charter

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authorizing, in a contract for street pavements, a clause to the effect that the contractor will, at his own expense, keep and maintain the pavement in good condition for ten years.

Section 98 of the railroad law in relation to the pavement of streets and the duty imposed on street railroad companies is a valid exercise of legislative power. *Doyle* v. *New York* (1901) 58 App. Div. 588, 69 N. Y. Supp. 120.

"The legislature has the supreme control of the streets and public highways, and has the right to regulate and restrict their use." *People ex rel. Van Norder* v. *Sewer, Water, & Street Commission* (1904) 90 App. Div. 555, 86 N. Y. Supp. 445.

Written notice of the existence of snow and ice on a sidewalk or street cannot be required as a prerequisite to an action for damages. *McMullen* v. *Middletown* (1905) 46 Misc. 360, 92 N. Y. Supp. 410.

## INDIAN LANDS.

"It is not within the legislative power of the state to enable the Indian nation to make, or others to take from the Indians, grants or leases of lands within their reservations. In that matter the Federal government, having the power under the Constitution to do so, has assumed to control it by the act of Congress of June 30, 1834 (chap. 161 [4 Stat. at L. 729]), which provides that 'no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto from any Indian nation or tribe of Indians shall be of any validity' in law or equity, unless the same is made by treaty or convention, entered into pursuant to the Constitution. . . . As respects their lands, subject only to the preëmptive title, the Indians are treated as the wards of the United States, and it is only pursuant to the Federal authority that their lands can be granted or demised by or acquired by conveyance or lease from them." *Buffalo, R. & P. R. Co.* v. *Lavery* (1894) 75 Hun, 396, 27 N. Y. Supp. 443, affirmed in (1896) 149 N. Y. 576, 43 N. E. 986; *Jimeson* v. *Pierce* (1902) 78 App. Div. 9, 79 N. Y. Supp. 3, sustains the provision of the New York Indian law which authorizes the peacemakers' court of the Seneca Nation to partition real estate among the heirs of a deceased Indian.

## JUDICIARY.

*Admiralty.*—The legislature has no power to confer admiralty jurisdiction on state courts. The Federal courts have exclusive jurisdiction in such cases. *Bird* v. *The Josephine* (1868) 39 N. Y. 19.

*City courts.*—In *People ex rel. Metropolitan Bd. of Health* v.

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*Lane* (1869) 55 Barb. 168, the court sustained the act of 1857, chap. 344, providing for a jury of six in the district courts of New York. These courts were successors to the justices' courts in which the jury had been limited to six prior to the adoption of the Constitution of 1846.

The act of 1887, chap. 557, authorizing the city of Buffalo to acquire land outside the city for park purposes, vested in the superior court jurisdiction to entertain proceedings in relation to such land. This provision was held unconstitutional in *Re Buffalo* (1892) 46 N. Y. S. R. 81, 18 N. Y. Supp. 771.

The same principle as to the jurisdiction of a local court was applied in *Pierson* v. *Fries* (1896) 3 App. Div. 418, 38 N. Y. Supp. 765, construing provisions concerning the city court of Mount Vernon.

The act of 1895, chap. 601, which abolished the office of police justice in the city of New York, and provided for the appointment of city magistrates to hold courts of special sessions, was a valid exercise of legislative power. *People ex rel. Thornton* v. *Hogan* (1895) 14 Misc. 48, 35 N. Y. Supp. 226; *Koch* v. *New York* (1897) 152 N. Y. 72, 46 N. E. 170.

*Court of appeals.*—The Constitution of 1846 created a court of appeals, to be composed of eight judges, but did not prescribe how many should constitute a quorum. The judiciary act of 1847, chap. 280, declared that six judges should constitute a quorum. The validity of this statutory provision was challenged in *Oakley* v. *Aspinwall* (1850) 3 N. Y. 547, but the court, overruling the argument that the Constitution inflexibly required the presence of eight judges in all cases, said it was "safe to conclude that the omission to declare that a less number than eight might constitute the court was either accidental, or it was designed that the legislature should determine what number should make a quorum. . . . The Constitution did not prepare the court for service. It declared that such a tribunal should exist, provided from what number and class of judges it should be constituted; enjoined upon the legislature the duty of organizing it [article 6, § 25], and left its jurisdiction and course of procedure to be defined by law. Legislative action was necessary before the court could be said to exist for any practical purpose. Without this it could not have assembled and given audience to suitors; and it owes its being not more to the Constitution than to the act of 1847 and subsequent statutes which fashioned it and endowed it with form and legal vitality. The Constitution called for the court and presented the materials of which it might

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be formed, and the legislature, under the express authority of the Constitution, organized it." The legislature had power to provide for a quorum to be composed of less than the whole number of judges "in order to guard against accident, render the court capable of efficient action, and to avoid the necessity of any judges sitting when interested or related to a party to a suit." The judiciary article of 1869 and the Constitution of 1894 fixed the number of judges at seven and required a quorum of five.

*Extraordinary terms.*—Section 234 of the Code of Civil Procedure, as amended in 1895, authorizing the governor to appoint extraordinary terms of the appellate division and of other branches of the supreme court, does not violate the provision in § 2 of article 6, conferring on the appellate division power to fix the time and place for holding trial and special terms, and to assign justices in the departments to hold such terms or to make rules therefor. *People* v. *Young* (1897) 18 App. Div. 162, 45 N. Y. Supp. 772.

*Jurors.*—The legislature has control over the subject of challenges to jurors. *Walter* v. *People* (1865) 32 N. Y. 147; *Stokes* v. *People* (1873) 53 N. Y. 164, 13 Am. Rep. 492.

The qualifications of jurors in the city of New York was considered in *People ex rel. Turner* v. *Plimley* (1896) 8 App. Div. 323, 41 N. Y. Supp. 365, 1128, (1896) 150 N. Y. 571, 44 N. E. 1128, construing the provision in § 1080 of the Code of Civil Procedure which provided, among other things, that "a person dwelling or lodging in the city and county of New York for the greater part of the time between the 1st day of October and the 30th day of June next thereafter, is a resident of that city and county for that jury year, . . . and it is not necessary that he should have been assessed or should have voted there;" and it was held that a resident of New Jersey who voted in that state, but conducted business in the city of New York, was eligible as a trial juror in that city. "A state in which such person may have a substantial, although not a domiciliary residence, may exact from him the performance of some of those political duties which rest upon those who are legally domiciled there."

*Justices' courts.*—The amendment of the Code of Procedure in 1861, chap. 158, conferring on justices' courts jurisdiction in actions of replevin, was valid, notwithstanding the fact that an action might afterwards be brought in an inferior court in which a jury was composed of six, as well as in a court of record in which the jury was composed of twelve. A provision preserving the right of trial by jury did not prevent the legislature from increasing the jurisdiction of courts. *Knight* v. *Campbell* (1872) 62 Barb. 16.



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*Legislature.*—The power of the legislature to exercise judicial functions was considered in *People ex rel. McDonald* v. *Keeler* (1885) 99 N. Y. 463, 52 Am. Rep. 49, 2 N. E. 615. The court say that "to declare what the law shall be is a legislative power; to declare what it is or has been is judicial. . . . But notwithstanding this general division of powers, certain powers, in their nature judicial, are, by the express terms of the Constitution, vested in the legislature." After referring to some of these judicial powers, including impeachment, the election of its own members, and the removal of certain officers, the court observes that it would be "going too far to say that every statute is necessarily void which involves action on the part of either house partaking in any degree of a judicial character, if not expressly authorized by the Constitution. Where the statute relates to the proceedings of the legislative body itself, and is necessary or proper to enable it to perform its constitutional functions," it cannot be regarded as "such an invasion of the province of the judiciary as to bring it within any implied prohibition of the state Constitution."

*Supreme court.*—In *People ex rel. Decker* v. *Waters* (1893) 4 Misc. 1, 23 N. Y. Supp. 691, certiorari to review proceedings of excise commissioners in refusing a license under the act of 1892, Justice Parker said that a person had no inherent right to demand a license. Discussing the suggestion that the legislature intended to confer on the supreme court the power to review proceedings by excise commissioners, and, in the exercise of discretion, to require such commissioners to issue a license, the judge further said that the legislature was without power "to require the supreme court, or the justices thereof, to perform other than judicial duties," and cannot assign to the "supreme court or the justices thereof, the performance of administrative duties such as are devolved upon boards of excise, boards of health, and boards of supervisors."

In *Re Mount Morris* (1886) 41 Hun, 29, it was held that the legislature might constitutionally delegate to the justices of the supreme court the power of determining whether a bridge between two towns should be built under specified circumstances, the court observing that "to determine the liability of towns to erect and maintain bridges, to enforce such liability, and to order the mode in which it shall be performed, are acts peculiarly judicial in their character."

*Troy recorder.*—The legislature had power to vest in the recorder of Troy (Laws 1849, chap. 121) the powers of a justice of the supreme court at chambers and of a county judge, including jurisdic-

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tion in proceedings supplementary to execution. The office of supreme court commissioner was abolished by the Constitution of 1846, but this did not prevent the legislature from distributing the powers and functions of the office among other branches of the judiciary. *Hayner* v. *James* (1858) 17 N. Y. 316; *Cashman* v. *Johnson* (1857) 4 Abb. Pr. 256.

### LABOR.

The legislature may, by general law, regulate the compensation of laborers on state work, if vested rights or the obligations of contracts are not thereby affected. *Clark* v. *State* (1894) 142 N. Y. 101, 36 N. E. 817. The same principle was applied in *Ryan* v. *New York* (1904) 177 N. Y. 271, 69 N. E. 599.

### LIMITATION OF ACTIONS.

This topic is closely related to remedies, procedure, and evidence, and often the same decision considers two or more of these subjects in determining the validity of statutes. For convenience the cases have been arranged in separate groups, though several are cited under more than one topic. The following decisions bear particularly on the question of legislative power in relation to the limitation of actions and other judicial proceedings.

In *Dubois* v. *Kingston* (1880) 20 Hun, 500, the court say it is the general rule "that a statute only impairing the remedy is constitutional, especially when it operates merely by way of limitation in point of time," citing *Butler* v. *Palmer* (1841) 1 Hill, 324, and also *Jackson ex dem. Lepper* v. *Griswold* (1809) 5 Johns. 142, where Judge Thompson said that the statute of limitations considered in that case was a mere question of expediency for the legislature.

The general doctrine in relation to statutes of limitations is stated in *Rexford* v. *Knight* (1854) 11 N. Y. 308, 313, where the court, quoting from *Jackson ex dem. Hart* v. *Lamphire* (1830) 3 Pet. 290, 7 L. ed. 683, say that the "time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the

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country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court." The provision of the Revised Statutes (1 Rev. Stat. 226, § 49) requiring claims for damages on account of land appropriated for canal purposes to be presented within one year after the law took effect was sustained as a valid exercise of legislative power.

"The limitations prescribed by positive law constitute no part of a contract, and legislation which merely alters or limits a remedy, but yet preserves an existing remedy in substance in the ordinary course of justice, is not violative of the organic law." The court sustained the Brooklyn act of 1885, chap. 405, prohibiting an action or proceeding to compel the execution or delivery of a lease on a tax sale made more than eight years prior to the passage of the act, unless such action or proceeding should be brought within six months. It was a short statute of limitations, but it gave tax purchasers a reasonable opportunity to enforce their claims. *Wheeler* v. *Jackson* (1886) 41 Hun, 410, affirmed in (1887) 105 N. Y. 681, 13 N. E. 931, (1890) 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76.

An act prohibiting an action to set aside an assessment for a local improvement unless brought within thirty days after the delivery of the warrant was sustained in *Loomis* v. *Little Falls* (1901) 66 App. Div. 299, 72 N. Y. Supp. 774.

In *Hulbert* v. *Clark* (1891) 128 N. Y. 295, 14 L. R. A. 59, 28 N. E. 638, the court say that "the statute of limitations does not, after the prescribed period, destroy, discharge, or pay the debt, but it simply bars a remedy thereon. The debt and the obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. The legislature could repeal the statute of limitations and then the payment of a debt upon which the right of action was barred at the time of the repeal could be enforced by action, and the constitutional rights of the debtor are not invaded by such legislation" (citing *Campbell* v. *Holt* [1885] 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209). In the *Hulbert Case* an action was brought to foreclose a real estate mortgage under seal, given to secure the payment of promissory notes, on which notes the statute of limitations had run. The court held that the foreclosure action was proper, although an action on the notes could not then have been maintained because of the statute bar, saying "it is a general rule, recognized in this country

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and in England, that when the security for a debt is a lien on property, personal or real, the lien is not impaired because the remedy at law for the recovery of the debt is barred."

If, when a statute of limitations affecting a particular claim is enacted, the time for commencing an action on such a claim is unlimited, it is a question for the court whether the time fixed by the statute is reasonable and sufficient to give the claimant a fair opportunity to prepare his claim and present it to the proper tribunal. The legislature has power to cut down the time, but not to such an extent as practically to deny an opportunity to bring an action. *Parmenter* v. *State* (1892) 135 N. Y. 154, 31 N. E. 1035; *Gilbert* v. *Ackerman* (1899) 159 N. Y. 118, 45 L. R. A. 118, 53 N. E. 753; *Green* v. *Port Jervis* (1900) 31 Misc. 59, 64 N. Y. Supp. 547, where an act was held invalid which required a claim for personal injuries to be presented to a municipal corporation within forty-eight hours after the injury occurred. It was an unreasonable limitation. *People ex rel. Grout* v. *Stillings* (1902) 76 App. Div. 143, 78 N. Y. Supp. 942; *Slocum* v. *Stoddard* (1884) 7 N. Y. Civ. Proc. Rep. 240.

The legislature may waive the statute in a particular case. *People ex rel. Kellner* v. *New York* (1893) 3 Misc. 131, 23 N. Y. Supp. 1060.

Statutes of limitation need not be uniform throughout the state. *Rider* v. *Mt. Vernon* (1895) 87 Hun, 27, 33 N. Y. Supp. 745.

## MORAL OBLIGATION.

Replying to the argument that the legislature had no power to legalize and validate a claim which had already been declared invalid by the judicial tribunals, the court, in *Wrought Iron Bridge Co.* v. *Attica* (1890) 119 N. Y. 204, 23 N. E. 542, said it was well settled "that claims supported by a moral obligation and founded in justice, where the power exists to create them, but the proper statutory proceedings are not strictly pursued, or for any reason are informal and defective, may be legalized by the legislature and enforced either against the state itself or any of its political divisions through the judicial tribunals." The legislature has the power to legalize defective proceedings of town authorities upon the faith of which the plaintiff acts, and "in this way confer power upon the courts to compel the town to pay those obligations which its officers contracted without observing the necessary steps pointed out by the statute and the benefits of which it had already received and continues to enjoy." The court cited *Guilford* v. *Chenango County*

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(1855) 13 N. Y. 143, which sustained a statute directing the adjustment and payment of a claim against a town which had already been submitted to the electors at a town meeting and rejected.

So in *Cole* v. *State* (1886) 102 N. Y. 48, 6 N. E. 277, the court said it was "unable to find in the Constitution anything which deprives the legislature of the power of giving to the board of claims, or any other proper tribunal, jurisdiction to hear and determine claims against the state which are founded in right and justice, solely for the reason that they could not be enforced against an individual in the courts." In the absence of a positive constitutional prohibition "there is no good reason why the state should be powerless to do justice, or to recognize obligations which are meritorious and honorary, and to provide tribunals to pass upon them." See also *O'Hara* v. *State* (1889) 112 N. Y. 146, 2 L. R. A. 603, 8 Am. St. Rep. 726, 19 N. E. 659; *Cayuga County* v. *State* (1897) 153 N. Y. 279, 47 N. E. 288.

Where a highway was laid out under an unconstitutional statute, the moral obligation to pay for it was just as complete as it would have been if the requirements of the Constitution upon this subject had been carefully and scrupulously observed. For that reason it was within the power, and it was clearly the duty, of the legislature to provide for the payment of the debts incurred in making the improvement, as it was made in conformity to an invalid act previously enacted by its authority. *Knapp* v. *Newtown* (1874) 3 Thomp. & C. 748, 1 Hun, 268.

Mandamus was held to be the proper remedy against the mayor of New York, who had refused to countersign a warrant for the payment of money raised by tax to defray the city's share of certain improvements required by statute. He was charged with a specific duty as a public officer. The work required of a railroad company in the alteration of a street had been performed, and its money honestly expended, and a plain duty was therefore imposed on the mayor to facilitate the payment of the money so expended, and his failure to discharge this obligation worked gross wrong and injustice. A denial of the writ would have compelled the company to sue the city on a claim which had been audited by the proper officers, and for the payment of which money had already been raised by tax and was in the city treasury. *People ex rel. New York & H. R. Co.* v. *Havemeyer* (1874) 4 Thomp. & C. 365, citing *People* v. *Columbia County* (1833) 10 Wend. 363.

In *Swift* v. *State* (1882) 89 N. Y. 52, 66, involving a claim for extra compensation in the construction of a public building, it was held

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that, on the facts disclosed, the state was under no legal or moral obligation to allow extra compensation.

Moral obligation was made the true basis of an appropriation of a percentage of premiums by agents of foreign insurance companies under the act of 1849, chap. 178, and subsequent legislation for the benefit of firemen in cities and villages. The state thus diverted a tax which had been previously paid into the treasury by foreign insurance companies. It was "in no just sense or respect a gift of the public money, or a charity on the part of the state. It was an appropriation of the tax to a proper governmental and public purpose, and was received, not on the ground of poverty or as alms, but as fairly and fully earned and justly paid. . . . It was a new and further distribution of the public burdens, with a view of more nearly equalizing their pressure and dividing them more justly." The court sustained the continuance of the appropriation after the services of the firemen were no longer required, saying that the state thereby "recognized an honorable obligation founded upon their past services and the injuries and suffering which those had occasioned;" and even after a paid department had been substituted for a volunteer department, "justice and good faith required that the state should recognize its honorable obligation to keep up the fund as it had done for many years. . . . Since the state cannot be sued without its consent, and acts without legal compulsion, it must be just. It must have honor and conscience. The motives which guide and control it must be those of absolute justice, and in almost every case its action, which is free and not compelled, must be governed by moral and honorable obligations, or solicitude for the public welfare." *Exempt Firemen's Benev. Fund* v. *Rome* (1883) 93 N. Y. 313, 45 Am. Rep. 217.

Certain financial institutions advanced to the city of New York funds to be used for municipal purposes after the appropriations for a given year had been exhausted. These advances were made in good faith and with the expectation that appropriate legislation would authorize their repayment. An act requiring such repayment was sustained, the court saying, among other things, that "municipal corporations are creatures of the state, and exist and act in subordination to its sovereign power. The legislature may determine what moneys they may raise and expend, and what taxation for municipal purposes may be imposed; and it certainly does not exceed its constitutional authority when it compels a municipal corporation to pay a debt which has some meritorious basis to rest on." *New York* v. *Tenth Nat. Bank* (1888) 111 N. Y. 446, 18 N. E. 618.

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So in *People ex rel. Kellner* v. *New York* (1893) 3 Misc. 131, 23 N. Y. Supp. 1062, where, by reason of a statute prohibition a transaction of city authorities was technically illegal, the court sustained an enabling act which authorized the city authorities to hear and determine a claim growing out of such transaction, and allow all such sums as they might deem right in equity and justice, and the statute of limitations was not to be deemed a bar to the claim. The city had received the benefit of the contract and was justly bound to pay the claim, although, under the existing law, the claimant could not maintain an action thereon.

There was no moral obligation to reimburse persons called into the military service of the United States by operation of the Federal draft laws, and the drafted men's act of 1892, chap. 664, was declared invalid, because, in effect, it made a gift to the persons included in its provisions. "Every government must possess the inherent right or power to call upon its citizens to perform military duty in time of war. The exercise of this power involves the right of self-preservation, and that right in the government imposes upon the citizen a corresponding duty to render such services whenever the emergency arises, and it is demanded of him. The government must necessarily be the judge of the necessity for requiring the performance of this duty." The individuals selected in the manner provided by the act of Congress "were under obligations to serve, but they were permitted to commute such services, or pay in lieu thereof to the government a specified sum of money." The individuals mentioned in the act have no claim, legal or equitable, against the town or county where the money was to be raised by taxation. "Those who actually served under the conscription only discharged their obligations to the general government. Those who commuted simply paid so much money in order to be relieved from the obligation to render military service," and a tax to reimburse them would be a gift and void. *Bush* v. *Orange County* (1899) 159 N. Y. 212, 45 L. R. A. 556, 70 Am. St. Rep. 538, 53 N. E. 1121, citing *Taber* v. *Erie County* (1892) 131 N. Y. 432, 30 N. E. 177, where claims for reimbursement presented by persons who had furnished substitutes were rejected.

"If the state, in carrying out a policy of justice through its legislature, appropriates money to pay a debt or to repair an injury inflicted upon an individual or a locality, obligatory upon it in honor and justice, that is but a part of its legitimate functions and duties as a sovereign, and the purpose in such case would seem to be

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public." *Waterloo Woolen Mfg. Co.* v. *Shanahan* (1891) 128 N. Y. 345, 14 L. R. A. 481, 28 N. E. 358.

A town was held to be under no moral obligation to reimburse a collector for town taxes collected by him, and deposited in a bank which afterwards failed, causing a loss of the money, and the legislature had no power to direct the levy of a tax upon the town for such reimbursement. *Mercer* v. *Floyd* (1898) 24 Misc. 164, 53 N. Y. Supp. 433.

See, as to highway damages, *Re Borup* (1905) 182 N. Y. 222, 74 N. E. 838.

MUNICIPAL CORPORATIONS.

*Aid to private corporations.*—In *Clarke* v. *Rochester* (1864) 28 N. Y. 605, the act of 1851, chap. 389, which authorized the city, on specified conditions, to subscribe to the stock of a railroad company, was sustained. A similar statute was sustained in *Benson* v. *Albany* (1857) 24 Barb. 248; *Bank of Rome* v. *Rome* (1858) 18 N. Y. 38; *People ex rel. Doty* v. *Henshaw* (1870) 61 Barb. 409.

The power to authorize a municipal corporation to take stock in a railroad company was again declared in *People ex rel. Albany & S. R. Co.* v. *Mitchell* (1866) 35 N. Y. 551, but such a municipal corporation had no inherent power to subscribe for stock, and could not do so without legislative authority.

The power of the legislature to compel a municipal corporation to take stock in a private company was considered in *People ex rel. Dunkirk, W. & P. R. Co.* v. *Batchellor* (1873) 53 N. Y. 128, 13 Am. Rep. 480, and it was there held that the municipal corporation could not be compelled to take such stock against its will and without its consent. Municipal corporations are "created by the legislature as instrumentalities of the government, and, so far as legislation for governmental purposes is concerned, are absolutely subject to its control." Such municipal corporations cannot be compelled to enter into contracts where the purpose is private. The court distinguished *People ex rel. McLean* v. *Flagg* (1871) 46 N. Y. 401, which sustained a mandatory statute directing the construction of a highway in a town, requiring the creation of a town debt by the issue of its bonds, and imposing a tax upon the property of the town to pay the bonds without the consent of the citizens or town authorities.

The legislature had power to prescribe the method by which a town might determine its assent to a proposition to aid a corporate enterprise; it might take from the taxpayers the power to determine this question and transfer it to a town officer, and add or modify con-

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ditions respecting the determination of such assent. *Duanesburgh* v. *Jenkins* (1874) 57 N. Y. 177.

In *Williams* v. *Duanesburgh* (1876) 66 N. Y. 129, the court said that even if a mandatory statute requiring a town to subscribe for railroad stock and issue bonds for its payment was invalid, such bonds, having been issued under the statute, and without judicial compulsion, were binding obligations, and the town was deemed to have acted voluntarily in issuing them.

The power of a municipal corporation to aid a private enterprise was distinctly limited in *Weismer* v. *Douglas* (1876) 64 N. Y. 92, 21 Am. Rep. 586, which held unconstitutional an act authorizing a village to issue its bonds and raise money to be used for the purchase of stock of a manufacturing corporation. Observing that it was a private undertaking for private business and profit, and that the benefit to the public was remote and consequential, the court say that "the legislature may not empower a majority to compel a minority to enter into a private business, whether the form of affecting the end be by a direct statute or through the operation of taxation."

*Bonds.*—The legislature has power to impose on municipal bonds the characteristics of commercial paper and give them the element which furnishes protection to a bona fide holder where authority is apparent, but not real. *Alvord* v. *Syracuse Sav. Bank* (1885) 98 N. Y. 599.

*Civil service.*—The legislature had power by the act of 1887, chap. 464, to impose a specific duty on municipal corporations in relation to the employment of honorably discharged Union soldiers and sailors. Persons having a preference under the statute are entitled to enforce their rights by mandamus. The legislature may lawfully provide for the doing of public works in such manner and with such agencies as it deems proper. *Re Sullivan* (1890) 55 Hun, 285, 8 N. Y. Supp. 401.

*Claims.*—The legislature, by statutes, submitted to the electors of a town the question whether a certain private claim against the town should be paid. The electors rejected the claim, and afterwards an act was passed requiring the payment of the claim by the town, and directing that a tax be raised for that purpose. This legislation was declared valid in *Guilford* v. *Chenango County* (1855) 13 N. Y. 143. The legislature was not bound by the adverse vote of the electors. It was not a judicial determination.

In *Rider* v. *Mt. Vernon* (1895) 87 Hun, 27, 33 N. Y. Supp. 745, the court sustained a statute which prescribed a short period for the presentation of claims for damages against the city, and in reply to

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the argument that statutes of limitations must be uniform through the state, and can only be established by a general act of the legislature, said: "There is no provision of our state Constitution which requires that laws shall be uniform in their operation throughout the state, and the whole matter of municipal liability is subject to legislative control. The legislature may prohibit all actions of this character against municipalities, and it may impose such conditions precedent to the maintenance of such actions as it sees fit. And it may prescribe one limitation for one city and another period for others."

The legislature has power to authorize the presentation of an amended claim against a municipal corporation where the claim filed under a prior statute is defective and cannot be maintained, and may limit the amended claim to the amount included in the original claim. In this case the claim was for damages caused by the change of grade of a street, for which the common law gave no right of action. The subject, therefore, being purely of legislative cognizance, that body had the right to prescribe the conditions on which the claim might be presented and maintained. *People ex rel. Grout* v. *Stillings* (1902) 75 App. Div. 569, 78 N. Y. Supp. 333.

*Enabling act.*—The legislature has power to pass an enabling act authorizing the proper officers of a municipal corporation to examine a claim against it which is illegal under an existing statute, and to fix and determine what sum, if any, "is justly due and owing and right in equity and justice," and such an act may waive the statute of limitations. *People ex rel. Kellner* v. *New York* (1893) 3 Misc. 131, 23 N. Y. Supp. 1060.

*Labor law.*—The Buffalo superior court (*People ex rel. Warren* v. *Beck* [1894] 10 Misc. 77, 30 N. Y. Supp. 473) sustained a provision in the Buffalo charter that contractors with the city shall bind themselves not to accept more than eight hours as a day's work, nor to employ any man or set of men for more than eight hours in twenty-four consecutive hours except in case of necessity. The superintendent of a contracting company was convicted of a misdemeanor for a violation of this provision. This conviction was affirmed by the superior court, but was reversed by the court of appeals ([1894] 144 N. Y. 225, 39 N. E. 80) on the ground that the charter provision was not penal, and could not be made the basis of a criminal prosecution, but without considering the constitutionality of the statute. A similar provision in the general labor law was declared unconstitutional in *People ex rel. Rodgers* v. *Coler* (1901) 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716. See

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also *People ex rel. Cossey* v. *Grout* (1904) 179 N. Y. 417, 72 N. E. 464.

*Loans for highways.*—The legislature may authorize a loan upon a town which includes villages for the purpose of establishing or improving a highway which does not pass through any village. *People ex rel. Weeks* v. *Queens County* (1879) 18 Hun, 4.

*Local affairs.*—The legislature possesses full power, except as restricted by the Constitution, to control by direct legislation the local affairs of a public nature of any of the civil divisions of the state. *People* v. *Tweed* (1875) 63 N. Y. 202, citing *People ex rel. McLean* v. *Flagg* (1871) 46 N. Y. 401. This principle was applied in *People ex rel. Cox* v. *Special Sessions Justices* (1876) 7 Hun, 214, sustaining the act which conferred on a municipal board of health power to make ordinances relating to the administration of its affairs. *New York* v. *Fulton Market Fishmongers' Asso.* (1886) 3 How. Pr. N. S. 491; *Whitney* v. *New York* (1855) 6 Abb. N. C. 329; *Wilson* v. *Whitmore* (1895) 92 Hun, 466, 36 N. Y. Supp. 550.

*New civil divisions.*—The power of the legislature to establish new civil divisions of the state for general and permanent purposes of civil government, including, in the discretion of the legislature, existing civil divisions usually known as municipal corporations, provided the constitutional powers and capacities of such municipal corporations are not thereby impaired, was declared in *People ex rel. Wood* v. *Draper* (1857) 15 N. Y. 532, sustaining the metropolitan police district act of 1857, which established a police district to be composed of the counties of New York, Kings, Westchester, and Richmond.

The act of 1865, chap. 554, creating a capital police district, as amended in 1866, chap. 483, was sustained in *People ex rel. McMullen* v. *Shepard* (1867) 36 N. Y. 285. The creation of a metropolitan sanitary district by the act of 1866, chap. 74, was also sustained in *Metropolitan Bd. of Health* v. *Heister* (1868) 37 N. Y. 661.

The legislature has no power to "carve out from the territory of the state a district for judicial purposes not bounded by town or county, city or village lines, and erect therein a local court." *People ex rel. Townsend* v. *Porter* (1882) 90 N. Y. 68.

The power of the legislature to erect counties and towns is considered in notes to §§ 4 and 5 of this article, and the like power in relation to cities and villages is considered under § 1 of article 12.

*New York.*—The regulation of the rates of ferriage upon the New York and Brooklyn ferries is within the control of the legislature, and so long as those rates are not regulated by them, they are the

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proper subject of regulation by the city government, or of contract between the corporation and its lessees. *People* v. *New York* (1860) 32 Barb. 102.

"The corporation of the city of New York is a public corporation, and hence its charter is always subject to amendment or alteration." Section 17 of article 1 of the Constitution relating to royal charters "is not a restraint upon legislative power, but simply a declaration that the Constitution itself shall not annul such charters." It was therefore competent for the legislature, by the charter of 1873, to abolish the board of assistant aldermen, and to provide that after a specified date the board of aldermen should be the common council. *Demarest* v. *New York* (1878) 74 N. Y. 161.

In connection with the erection of the New York courthouse under the act of 1860, chap. 509, certain banks, insurance, and trust companies advanced large sums of money for municipal purposes, the appropriations having been exhausted. These moneys were advanced without authority of law, to meet an emergency, with the expectation that subsequent legislative action would ratify the advance. An act of the legislature (1872, chap. 9) authorizing the payment of such advances was sustained as a valid exercise of legislative power. *New York* v. *Tenth Nat. Bank* (1888) 111 N. Y. 446, 18 N. E. 618.

Discussing the method of appointing the commissioner of jurors in New York under the charter of 1873, Judge Andrews, in *People ex rel. Taylor* v. *Dunlap* (1876) 66 N. Y. 162, says: "It was competent for the legislature to make it a city or county office, and to vest the power of appointment in city or county authorities;" it could abolish the office or change its character from a county to a city office and provide for a different mode of appointment. In view of the fact that the city and county of New York were then conterminous, Judge Andrews further said there was "no incongruity in committing to the city government and to officers appointed by the city authorities control of the subject of selecting and returning jurors within the territory of the city and county, and certainly there is no defect of legislative power to provide that the jury system should be administered by city officers. It is for the legislature to distribute the powers of local government as between the city and county governments as it may deem best; and this discretion, when not restrained or excluded by some provision of the Constitution, is absolute."

The same principle was applied in *Re Allison* v. *Welde* (1902) 172 N. Y. 421, 65 N. E. 263, in which the court sustained the

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act of 1901, chap. 602, providing for a commissioner of jurors in counties containing more than a million inhabitants, to be appointed by the justices of the appellate division of the supreme court of the department in which the county is located. The act practically applies only to the counties of New York and Kings, and the case involved the appointment of a commissioner in New York county.

The legislature had power to confer jurisdiction upon the municipal court of the city of New York in actions for the recovery of money only against nonresident natural persons having a place of business in the city. *Routenberg* v. *Schweitzer* (1900) 165 N. Y. 175, 58 N. E. 880.

In *People ex rel. Pumpyansky* v. *Keating* (1901) 62 App. Div. 348, 71 N. Y. Supp. 97, the court say they see no reason why the legislature may not authorize the use of a portion of a street under the stairway of an elevated railroad station as a news stand. It is a waste portion of the street. The city may thus derive a revenue from it, and it is not an unreasonable invasion of the public right.

*Ordinances.*—"An ordinance adopted by a municipal corporation, pursuant to authority expressly delegated by the legislature, has the same force within the corporate limits as a statute passed by the legislature itself. . . . Where, however, the power to legislate is general or implied, and the manner of exercising it is not specified, there must be a reasonable use of such power or the ordinance may be declared invalid by the courts." *Carthage* v. *Frederick* (1890) 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480.

The legislature had power to authorize, by the general village law of 1870, chap. 291, a local ordinance requiring peddlers to take out a license; and such an ordinance was sustained in *Ballston Spa* v. *Markham* (1890) 58 Hun, 238, 11 N. Y. Supp. 826. See also *Stamford* v. *Fisher* (1893) 140 N. Y. 187, 35 N. E. 500, construing a similar ordinance adopted under the authority of the act of 1883, chap. 465.

*Parks.*—The legislature has power to vest in a municipal corporation authority to provide for the protection of its parks and public places, but not to the extent of interfering with the use of private property by prohibiting the posting of any advertisements whatever upon fences inclosing private property fronting on or adjacent to such parks. *People* v. *Green* (1903) 85 App. Div. 400, 83 N. Y. Supp. 460.

*Public health.*—The legislature may authorize local boards of health to enact sanitary ordinances. *Polinsky* v. *People* (1875) 73 N. Y. 65; *Cartwright* v. *Cohoes* (1899) 39 App. Div. 69, 56 N. Y.

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Supp. 731, affirmed in (1901) 165 N. Y. 631, 59 N. E. 1120; *People* v. *Cipperly* (1886) 101 N. Y. 634, 4 N. E. 107.

*Regulating liability.*—"The legislature has the power to determine the form in which the franchises and obligations of municipal government should be conferred upon a city," and may provide that the city shall not be liable in damages for any nonfeasance or misfeasance on the part of the common council or any officer of the city, of any duty imposed on them by the charter; but the remedy of the party shall be by mandatory proceedings against the city or by action against the officer. *Gray* v. *Brooklyn* (1869) 2 Abb. App. Dec. 267; *Bieling* v. *Brooklyn* (1890) 120 N. Y. 98, 24 N. E. 389.

*Towns.*—A town is created by the legislature and is vested with certain powers relating to self-government, but subservient in all cases to the general government,— that is, the state. As against the town itself its boundaries may be changed at the pleasure of the legislature, or they may at any time be extended, or restricted, or the town itself destroyed by consolidating it with another town or municipality, and this without even the request or consent of any of the inhabitants. The objects and purposes of a town are to exercise and discharge duties of local self-government, and nothing else. It cannot expend money for any other purpose, and in this it is limited by the legislative will. *Henderson* v. *New York* (1901) 65 App. Div. 180, 72 N. Y. Supp. 609.

## NAVIGABLE WATERS.

"The title to lands under tide waters in this country, which, before the Revolution, was vested in the King, became, upon the separation of the colonies, vested in the states within which they were situated. The people of the state, in their right of sovereignty, succeeded to the royal title, and through the legislature may exercise the same powers which, previous to the Revolution, could have been exercised by the King alone, or by him in conjunction with Parliament, subject only to those restrictions which have been imposed by the Constitution of the state and of the United States. . . . The public right in navigable waters was in no way affected or impaired by the change of title. The state, in place of the Crown, holds the title as trustee of a public trust; but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide waters, or authorize a use inconsistent with the public right, subject to the paramount control of Congress through laws passed in pursuance of the power to regulate commerce given by the

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Federal Constitution." *People* v. *New York & S. I. Ferry Co.* (1877) 68 N. Y. 71; *Kerr* v. *West Shore R. Co.* (1891) 127 N. Y. 269, 27 N. E. 833; *Saunders* v. *New York C. & H. R. R. Co.* (1894) 144 N. Y. 75, 26 L. R. A. 378, 43 Am. St. Rep. 729, 38 N. E. 992.

The Albany basin is a public highway and is subject to legislative control. *Hart* v. *Albany* (1832) 3 Paige, 213.

The legislature has power to authorize the erection of a bridge over a navigable stream used by coasting vessels, provided such a bridge does not essentially injure the navigation of the waters which it crosses. *People* v. *Rensselaer & S. R. Co.* (1836) 15 Wend. 113, 30 Am. Dec. 33.

## NUISANCE.

"It is a legal solecism to call that a public nuisance which is maintained by public authority. Even an act of a corporation, which would otherwise have been a nuisance, has been deemed lawful because authorized by its charter." *Harris* v. *Thompson* (1850) 9 Barb. 350, citing *Charles River Bridge* v. *Warren Bridge* (1837) 11 Pet. 420, 9 L. ed. 773.

No length of time will legalize a nuisance. "As against the right of the legislature or the common council, under its authority, to make provision for preventing the filling up of the public water channels and harbors, the fact that an owner . . . has, for twenty years or more, done acts upon his own land the effect of which was to fill up such channels and harbors, is clearly no defense. The doing of such acts amounts to a public nuisance. The harbors are for the public use, and the obstructing and filling them up, it cannot be doubted, constitutes a common or public nuisance." *Ogdensburg* v. *Lovejoy* (1873) 2 Thomp. & C. 83, affirmed in (1874) 58 N. Y. 662.

The same principle was applied in construing a by-law prohibiting interments in certain parts of New York. It affected property which had been used for this purpose more than a century. *Coates* v. *New York* (1827) 7 Cow. 585.

A statute authorizing the erection of an elevated railroad is no defense to an action by an abutting owner against a company for damages caused by the erection and operation of the road. The legislature cannot thus injuriously affect a citizen's property rights. *Abendroth* v. *Manhattan R. Co.* (1890) 122 N. Y. 1, 11 L. R. A. 634, 19 Am. St. Rep. 461, 25 N. E. 496.

"It is a familiar law that the shores of navigable rivers and streams and the lands under the waters thereof belong to the state

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within whose territorial limits they lie, and may be appropriated by the state to all municipal purposes. The state may authorize the construction of bridges, piers, wharves, or other obstructions in navigable waters, and when such structures are not obnoxious to the regulations of Congress, and do not come in conflict with the paramount authority of the United States, they are not nuisances." *Kerr* v. *West Shore R. Co.* (1891) 127 N. Y. 269, 27 N. E. 833.

The legislature has power to authorize the authorities of New York to prevent the pollution of the sources of the water supply for the city, and abate and remove the cause of any such pollution. *Kelley* v. *New York* (1895) 89 Hun, 246, 35 N. Y. Supp. 1109.

## OBLIGATION OF CONTRACTS.

*Albany basin.*—The act of 1823, chap. 111, authorizing the construction of the Albany basin, and which interfered with the use of certain docks which had been built on land granted by the state, did not violate the provision against impairing the obligation of contracts. *Lansing* v. *Smith* (1828) 8 Cow. 146.

*Bankrupts.*—A state bankrupt or insolvent law which authorizes a discharge on the petition of creditors, in force when a contract is made, does not, in the constitutional sense, impair the obligation of such a contract. The agreement of a contracting party is qualified by the law, and he must be deemed absolved from the contract from the happening of the event specified in the statute; and where, after his discharge under such a statute, an execution was afterwards issued against him on a judgment recovered on such a contract prior to such discharge, the execution was set aside. *Mather* v. *Bush* (1819) 16 Johns. 233, 8 Am. Dec. 313. But following *Sturges* v. *Crowninshield* (1819) 4 Wheat. 122, 4 L. ed. 529, which held the New York insolvent act of April 3, 1811, unconstitutional as impairing the obligation of contracts, a motion to set aside an execution on a judgment apparently affected by this act was denied. *Roosevelt* v. *Cebra* (1819) 17 Johns. 108.

In *Kunzler* v. *Kohaus* (1843) 5 Hill, 317, discussing the voluntary branch of the Federal bankrupt act of 1841, Judge Cowen says that the directly granted power over bankruptcies carries the incidental authority to modify the obligation of contracts, so far as the modification may result from a legitimate exercise of the delegated power. "No one will deny that Parliament may modify and discharge the obligation of contracts in exercising its powers over bankrupts and their creditors." The prohibition against such legislation by states



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is not applicable to the same extent to the powers which may be exercised by Congress.

*Brooklyn garbage act.*—The Brooklyn garbage act of 1900, chap. 663, prohibiting a certain kind of business in that borough, and requiring its immediate removal therefrom, impaired the obligation of a contract for the disposal of garbage, and was invalid. *New York Sanitary Utilization Co.* v. *Health Department* (1901) 61 App. Div. 106, 70 N. Y. Supp. 510.

*Cemeteries.*—In *New York* v. *Slack* (1824) 3 Wheeler Crim. Cas. 237, an ordinance was sustained which prohibited interments in certain parts of the city of New York. It did not impair the obligation of a contract nor affect the title to the property. It was a regulation concerning its use which was within the scope of municipal power.

A by-law under the provision of 2 Rev. Laws, 445, § 267, authorizing the city of New York to make by-laws regulating interments, and which by-laws affected the use of land held in trust for the sole purpose of interment, was valid as a police regulation. *Coates* v. *New York* (1827) 7 Cow. 585.

*Certificate of deposit.*—The act of 1899, chap. 451, as amended by chapters 171 and 503 of 1901, authorizing alleged owners of certificates of deposits to recover the amount thereof, and which required notice to third parties to be published in two newspapers, did not afford adequate protection to such parties, and as to them impaired the obligation of a contract and was void. *Re Cook* (1903) 86 App. Div. 586, 83 N. Y. Supp. 1009.

*Civil damage act.*—The civil damage act of 1873, chap. 646, did not impair the obligation of a contract. It was a part of the state excise system and licenses were received subject to its provisions. *Baker* v. *Pope* (1874) 5 Thomp. & C. 102.

*Competing franchise.*—This provision was not violated by the acts authorizing the construction of a railroad bridge across the Harlem river (1832, chap. 162; 1836, chap. 268; and 1840, chap. 242), although such a bridge seriously affected the revenues of a company authorized by an act passed March 31, 1790, to construct a bridge across the same river, and prohibited the construction of any other bridge or the use of any other means of communication across the river except for certain local purposes. The toll bridge act did not create a grant or franchise which would prevent the legislature from authorizing the construction of another bridge or ferry at the same place, and the grant to the railroad company did not impair the obli-

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gation of a contract. *Thompson* v. *New York & H. R. Co.* (1846) 3 Sandf. Ch. 625.

*Constitutional amendment.*—The constitutional amendment of 1874, article 8, § 11, which prohibited certain municipal corporations from thereafter giving any money or property or loaning any money or credit to a corporation, did not affect railroad aid bonds previously executed and delivered in escrow, but which were not delivered to the company until after the amendment took effect. "The obligations of an existing contract can no more be impaired by an amendment to the Constitution of a state than by an act of the legislature." *Cherry Creek* v. *Becker* (1890) 123 N. Y. 161, 25 N. E. 369, distinguishing *Falconer* v. *Buffalo & J. R. Co.* (1877) 69 N. Y. 491, where it was held that the constitutional amendment, which took effect January 1, 1875, terminated town bonding proceedings unless a right had been acquired to have the proceedings completed by issuing the bonds.

*Corporations.*—The act of 1852, chap. 361, relating to the dissolution of manufacturing corporations in Herkimer county, did not impair the obligation of stockholders under § 7 of the act of 1811, in relation to manufacturing corporations, which made the stockholders at the time of dissolution liable for all debts then owing by the company. *Walker* v. *Crain* (1853) 17 Barb. 119; *Story* v. *Furman* (1862) 25 N. Y. 214.

Town officers, acting under statute authority, granted to a plank road company the use of a certain highway under an agreement by the company to keep the road in repair without expense to the town. A subsequent statute authorizing the company to abandon such highway, and releasing it from any further duty of keeping it in repair, was held not unconstitutional as impairing the obligation of a contract. Such town officers were public agents and the authority conferred on them might be revoked or transferred to others, and their contracts might be modified or rescinded by the legislature with the consent of the other party. *People* v. *Fishkill & B. Pl. Road Co.* (1857) 27 Barb. 445.

The general banking act of 1831, chap. 260, contained a provision authorizing the legislature to amend or repeal it at any time. The act of 1849, chap. 226, which declared the liability of stockholders in banking corporations substantially as stated in the Constitution, article 8, § 7, was held not unconstitutional as impairing the obligation of contracts, and an objection denying its validity under the Federal Constitution was overruled for the reason, among others, that in this case the bank was organized after the latter statute was passed, and

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that the stockholders must have assumed all the obligations imposed by the Constitution and the statute. *United States Trust Co.* v. *United States F. Ins. Co.* (*Empire City Bank*) (1858) 18 N. Y. 199.

"If the legislature, in pursuance of a right reserved, may alter or repeal the charter of a corporation without violating the obligation of a contract, the same thing, I apprehend, may be done by the people when they establish the fundamental law of the state. . . . Regarding the reserved power to alter, modify, or repeal, as a part of the compact, its literal and obvious interpretation is that the franchise and privileges granted were at all times subject to abrogation or change by the legislative power of the state." Considering the effect of the provision in the Constitution of 1821, article 7, § 9, which required a two-thirds vote of the legislature to amend a charter of a corporation, the court said: "The fundamental law might be changed either in respect to the constitution of the legislative body, the mode of its action, or the majorities by which it could act in reference to this or any other subject. The power reserved in this charter was one to be exercised at any time by the existing legislative authority, however constituted, and in any mode conforming to the organic law of the state for the time being." The two-thirds clause did not follow the contract under the new Constitution, which permitted a modification of the charter by a majority of the legislature. *Re Reciprocity Bank* (1860) 22 N. Y. 9; *Re Oliver Lee & Co.'s Bank* (1860) 21 N. Y. 9, affirmed as *Sherman* v. *Smith* (1861) 1 Black, 587, 17 L. ed. 163.

An act authorizing a corporation to reduce its capital stock does not affect the obligation of a contract. *Joslyn* v. *Pacific Mail S. S. Co.* (1872) 12 Abb. Pr. N. S. 329.

"The rights and franchises of a private corporation organized under a general law are as inviolable as the rights and franchises of a corporation organized under a special charter." The court say that the doctrine of *Dartmouth College* v. *Woodward* (1819) 4 Wheat. 518, 4 L. ed. 629, establishing the inviolability of the charter of a private corporation containing no reservation or the right to change it, "is applicable to every species of corporation, excepting those owned by the state or established for governmental purposes, and has been applied to religious corporations." *People ex rel. Sturges* v. *Keese* (1882) 27 Hun, 483, construing the act of 1868, chap. 803, relating to the qualifications of voters in Protestant Episcopal churches, and applying it only to corporations subsequently organized, except as otherwise determined by the vestry.

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Purchasers under a railroad foreclosure organized a new corporation under the act of 1874, chap. 430, as amended by chap. 446, Laws 1876. The secretary of state refused to file the new certificate of incorporation, on the ground that the tax required by the act of 1886, chap. 143, had not been paid. It was claimed by the corporation that the organization was only a continuation of the former corporation, whose property had been acquired by the foreclosure sale, and that if the act of 1886 did apply to the new corporation it was obnoxious to the constitutional provision against impairing the obligation of contracts. This contention was not sustained, the court saying that "the right to be a corporation which the old corporation had was not mortgaged and was not sold, and did not pass to the purchasers; and they only obtain such a right upon filing the certificate mentioned, and then they obtain it by direct grant from the state, and not in any degree by the sale and purchase of the franchises, etc. of the old corporation." *People ex rel. Schurz* v. *Cook* (1888) 110 N. Y. 443, 18 N. E. 113.

"Creditors, contractors, and stockholders have a right to rely upon the promise of the state that the annulment of the corporate charter shall not affect the remedies existing in their favor against the corporation, and this promise is a contract, protected by the provisions of the Federal Constitution." *People* v. *O'Brien* (1888) 111 N. Y. 1, 53, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692, construing the act of 1886, chap. 268, which dissolved the Broadway Surface R. R. Company.

A water company organized under the act of 1873, chap. 737, as amended by chap. 213, Laws 1881, does not obtain an exclusive privilege or franchise. "The grantee of the charter takes nothing by implication, and the state is no further bound nor restricted than can be read in the act." There is no prohibition against granting another charter for a similar franchise. *Re Brooklyn* (1894) 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983; *Skaneateles Waterworks Co.* v. *Skaneateles* (1899) 161 N. Y. 154, 46 L. R. A. 687, 55 N. E. 562.

The corporation created by the act of 1871, chap. 750, relating to the Protestant Episcopal church, acquired contract rights which were protected by the Federal Constitution, and land donated to the corporation could not afterwards be subjected to taxation contrary to the statute. *People ex rel. Long Island* v. *Dohling* (1896) 6 App. Div. 86, 39 N. Y. Supp. 765.

A certificate of stock issued by a building and loan association cannot be subsequently modified by the association so as to affect the contract stated in the certificate, and if the certificate author-

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izes the holder to withdraw and receive a specified sum thereon, by-laws cannot afterwards be adopted reducing this amount. Such change impairs the obligation of the contract. *Sinteff* v. *People's Bldg. Loan & Sav. Asso.* (1899) 37 App. Div. 340, 57 N. Y. Supp. 611, affirmed in (1901) 166 N. Y. 630, 60 N. E. 1120.

"A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect of altering or revoking, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate in the particular case upon the corporation or parties affected by it." Applied in the case of union free school districts, and it was held that a district, a part of whose territory had been taken by statute and transferred to another district, could not invoke the constitutional provision against impairing the obligation of contracts for the purpose of preventing the consummation of the territorial change directed by the statute. *Board of Education* v. *Board of Education* (1902) 76 App. Div. 355, 78 N. Y. Supp. 522.

The legislature, acting under the reserved power to alter or repeal charters, may repeal a statute under which a corporation is entitled to exemption from taxation, and such repeal does not impair the obligation of a contract. *Pratt Institute* v. *New York* (1904) 99 App. Div. 525, 91 N. Y. Supp. 136.

*Dower.*—A widow's right of dower is a right acquired by the marriage contract, and one of the benefits promised to her by the law of the contract, in consideration of her entering into that relation, and such a contract cannot be impaired by subsequent legislation. *Lawrence* v. *Miller* (1849) 2 N. Y. 245, 250.

*Eminent domain.*—This provision was violated by the act of 1868, chap. 687, which reduced from 4 rods to 3 rods the width of a certain highway in Montgomery county, and transferred the excluded land to the adjoining owner without making compensation to the town. The easement acquired by the town on opening the highway and paying the damages therefor became a vested right, and such easement could not be donated to adjoining owners. *People ex rel. Failing* v. *Highway Comrs.* (1869) 53 Barb. 70.

Bonds having been issued to raise money for the payment of land taken for a public improvement, and such land having been pledged for the payment of the bonds, a contract was thereby created

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between the bondholder on one part and the city and state on the other, and a subsequent statute authorizing the sale of any of such lands free from encumbrances impaired the obligation of the contract, and was therefore void. *Brooklyn Park Comrs.* v. *Armstrong* (1871) 45 N. Y. 234, 6 Am. Rep. 70.

"The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any state interference. If no assent be given to a transaction, no faith is pledged in respect to it, and there would seem in such case to be no room for the operation of the prohibition." Proceedings under the right of eminent domain are not in the nature of a contract. Such proceedings are in the nature of an inquest, which may be vacated and a new hearing ordered. *Garrison* v. *New York* (1874) 21 Wall. 196, 22 L. ed. 612.

The act of 1790 which appropriated that part of the city of New York known as the Battery to public uses only, and prohibited its use for private purposes, did not create a contract under which adjoining owners might interfere to prevent the appropriation of a part of the Battery for an elevated railroad. The use of it by such a railroad is a public use. *Spader* v. *New York Elev. R. Co.* (1877) 3 Abb. N. C. 467.

The obligation of a contract as affected by the right of eminent domain was considered in *Re New York* (1885) 34 Hun, 441. The act of 1884, chap. 522, provided for laying out certain parks in the 23d and 24th wards of New York and in the adjacent districts in Westchester county, and declared that "all leases and other contracts in regard to said lands so taken for said park, or park-ways, or any part thereof, and all covenants, contracts, or engagements, between landlord and tenant or any other contracting parties, shall, upon the confirmation of such report, respectively cease and determine and be absolutely discharged according to law." The court say that the constitutional "restraint has not been considered as one affecting the right to take private property for public uses," but that "all contracts and obligations relating to property must be regarded as having been entered into in subordination to that right and to the duty to make compensation upon which it has been rendered dependent." This decision was affirmed without considering this point in (1885) 99 N. Y. 569, 2 N. E. 642.

Where property is taken for a public use on certain conditions imposed by the legislature, it cannot abrogate such conditions and treat the property as if no conditions whatever had been attached to its condemnation. The provisions for the protection of the owners of

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property taken or assessed constitute a contract between such owners and the people of the state which the legislature has no power, by its subsequent action, to impair. Applied where a boulevard had been opened under a statute which provided that if a railroad should thereafter be authorized therein the owners of the land should be entitled to the same damages as though no street had ever been opened, and they were not limited to nominal damages. *Re Southern Boulevard R. Co.* (1890) 58 Hun, 497, 12 N. Y. Supp. 466.

An award of damages made by a city under statute authority, and confirmed by the court, has all the force and effect of a judgment, and is a contract of the highest nature. "The obligation of a contract is impaired in the constitutional sense by any law which prevents its enforcement, or which materially abridges the remedy for enforcing it which existed when it was contracted, and does not supply an alternative remedy equally adequate and efficacious." The remedy is a part of the obligation, "and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void." A repeal of the statute under which the award was made could not affect its validity nor prevent its payment. *People ex rel. Reynolds* v. *Buffalo* (1893) 140 N. Y. 300, 37 Am. St. Rep. 563, 35 N. E. 485.

*Exemptions.*—This provision in the Federal Constitution "applies only to contracts which impose obligations under the general principles of law." A statute exempting from taxation persons who had served a specified time in the militia was held not to create a contract between the state and the citizen, and the legislature might repeal it without impairing the obligation of the contract. *People ex rel. Cunningham* v. *Roper* (1866) 35 N. Y. 629; *People ex rel. Sears* v. *Board of Assessors* (1881) 84 N. Y. 610. See also *People ex rel. Long Island* v. *Dohling* (1896) 6 App. Div. 86, 39 N. Y. Supp. 765, as to statute contract for exemption from taxation.

*Franchise tax.*—The special franchise tax law of 1899, chap. 712, does not impair the obligation of contracts. *People ex rel. Metropolitan Street R. Co.* v. *Tax Comrs.* (1903) 174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69, affirmed (1905) 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705.

*Harbor masters.*—This provision is not violated by the act of 1819, chap. 18, which authorizes harbor masters to regulate and station vessels in the East and North rivers. The authority extends to private wharves, but no private rights are thereby invaded. *Vanderbilt* v. *Adams* (1827) 7 Cow. 348.

*Insurance.*—A member of a mutual insurance company is prohib-

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ited by the insurance law, § 56, from maintaining an action against the company for an accounting. Such an action must be brought by the attorney general. This statute does not violate the provision against impairing the obligation of contracts. It prescribes the remedy to be applied for the purpose of inquiring into the affairs of the company. *Swan* v. *Mutual Reserve Fund Life Asso.* (1898) 155 N. Y. 9, 49 N. E. 258; *Greeff* v. *Equitable Life Assur. Soc.* (1899) 160 N. Y. 19, 46 L. R. A. 288, 73 Am. St. Rep. 659, 54 N. E. 712.

A mutual benefit association cannot by its by-laws, nor can the legislature, require the holder of a beneficiary certificate to change the beneficiary therein if the certificate, when issued, conformed to the charter and rules of the association. *Roberts* v. *Cohen* (1901) 60 App. Div. 259, 70 N. Y. Supp. 57.

*Judgments.*—The legislature cannot impair the validity of a judgment, nor deprive the judgment creditor of a remedy for its collection, nor reserve to itself the power to provide by law for the payment of the judgment by taxation only, especially, as in this case, where the judgment was obtained on a contract made before the act was passed. *Hadfield* v. *New York* (1866) 6 Robt. 501, construing the act of 1865, chap. 646, relating to final judgments against the city of New York.

The act of 1872, chap. 629, which made the marine court of New York a court of record, and which had the effect to extend the time for the commencement of an action on a judgment of that court previously recovered, did not impair the obligation of a contract. It affected only the remedy on the judgment. *Camp* v. *Hallanan* (1886) 42 Hun, 628.

*Legislative contracts.*—"Rights acquired under a statute of a state, which is in its nature a contract, and which does not reserve to the legislature the power of repeal, cannot be devested by subsequent legislation." *Brooklyn C. R. Co.* v. *Brooklyn City R. Co.* (1860) 32 Barb. 358.

*Liquor tax law.*—A liquor tax certificate issued under the liquor tax law of 1896, chap. 112, and amendments, is a contract between the holder and the state and constitutes property of which the holder cannot be deprived except for a violation of the law. An amendment of the law bearing even date with a certificate authorized the commissioner of excise to make a new enumeration in the territory including the place where the business was to be carried on. Such an enumeration was afterwards made, resulting in an increase of the tax in that district, but such increase was held not to affect this certificate, which was protected by the constitutional provision

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against impairing the obligation of contracts. *Re Hilliard* (1898) 25 App. Div. 222, 49 N. Y. Supp. 286, affirmed in (1898) 155 N. Y. 702, 50 N. E. 1118.

A liquor license in force when the liquor tax law of 1896, chap. 112, took effect, was not a contract, but it was subject to revocation by the state. *Kresser* v. *Lyman* (1896) 74 Fed. 765.

The act of 1897, chap. 312, authorizing actions by the commissioner of excise on bonds given by holders of liquor tax certificates, was applicable to bonds made before its passage, and it did not impair the obligation of a contract. *Lyman* v. *Rochester Title Ins. Co.* (1899) 37 App. Div. 234, 56 N. Y. Supp. 1111.

*Lotterics.*—In *People* v. *Noelke* (1883) 94 N. Y. 137, 46 Am. Rep. 128, construing the statute against the sale of lottery tickets, and applying it to tickets issued by the Louisiana State Lottery, the court say that the constitutional prohibition against the passage of laws impairing the obligation of contracts does not prevent the state from enacting laws forbidding contracts deemed immoral and against public policy. "There is no impairment of a contract obligation by our law against lotteries. We prohibit the making of certain contracts within our boundaries. The statute does not undertake to say what contracts may or may not be made under a foreign law. . . . We forbid the contract within our borders; we do not tamper with an existing valid obligation." The transaction here was a violation of a criminal statute, and it made no difference that the lottery itself was authorized by the laws of Louisiana.

*Married women.*—The act of 1848, chap. 200, "for the more effectual protection of the property of married women," so far as it "was intended to affect existing rights of property in married persons" impaired the effect of the contract of marriage by which the husband became entitled to the choses in action of the wife, including legacies and distributive shares. *Holmes* v. *Holmes* (1848) 4 Barb. 295.

This statute and the amendatory act of 1849, chap. 375, were considered in *Blood* v. *Humphrey* (1854) 17 Barb. 660, and it was there held that, as to future acquisitions of property by married women, the statutes were constitutional and did not impair the obligation of the marriage contract.

The same rule was applied in *Benedict* v. *Seymour* (1854) 11 How. Pr. 176; *Sleight* v. *Read* (1854) 18 Barb. 159; *Thurber* v. *Townsend* (1860) 22 N. Y. 517.

"It is competent for the legislature to alter the rule in respect to the rights of husband and wife in property subsequently to be ac-

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quired, without impairing the obligation of contracts." *Kelly* v. *McCarthy* (1854) 3 Bradf. 7, Surrogate Court.

*Mechanic's lien.*—The New York mechanic's lien law of 1851, chap. 513, applied to labor performed after it took effect, although the contract was previously made; and it did not impair the obligation of a contract. *Miller* v. *Moore* (1854) 1 E. D. Smith, 739.

The New York city mechanic's lien law of 1851, chap. 513, applied to a contract made before its passage. It was limited to work done after its passage. *Sullivan* v. *Brewster* (1853) 8 How. Pr. 207; *Hauptman* v. *Catlin* (1859) 20 N. Y. 247.

*Mileage books.*—The mileage book act of 1895, chap. 1027, so far as it affected the defendant, did not impair the obligation of a contract. *Dillon* v. *Erie R. Co.* (1897) 19 Misc. 116, 43 N. Y. Supp. 320.

*Municipal corporations.*—A ferry franchise held by a city is within the constitutional prohibition against impairing the obligation of contracts. *Benson* v. *New York* (1850) 10 Barb. 223.

The riot act of 1855, chap. 428, which imposed on cities and counties a liability for damages caused by mobs, and made a judgment recovered for such damages a charge against a municipality, is not obnoxious to the provision against impairing the obligation of a contract. The political or governmental powers of the city are not vested rights, and the "legislature may alter or amend any of the provisions of its charter, so long as there is no deprivation of or interference with her vested rights of property." *Davidson* v. *New York* (1864) 27 How. Pr. 342.

"The rights of municipal corporations to property in lands and its usual incidents, and to create and establish ferries and railroad franchises, are quite distinct and separate from their duties as legislatures having authority to pass ordinances for the control and government of persons and interests within the city limits." A franchise granted by a municipal corporation to a railroad company, and which is accepted on specified conditions, is a contract, and cannot be impaired without the company's consent. Accordingly the court declared invalid a subsequent ordinance requiring the company to pay an annual license fee. "It is the imposition of an annual tax upon the company in derogation of its rights of property, and on that account is unlawful and void." *New York* v. *Second Ave. R. Co.* (1865) 32 N. Y. 261.

Under the act of 1872, chap. 702, relating to railroad tracks in Fourth avenue, in the city of New York, the court considered a question affecting the city's rights under a contract made by it with

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the railroad company in 1832, but it was held that, either by operation of an act of 1859, chap. 387, relating to this contract, or by the acquiescence of the city, it was not in a situation to object to the new law. The city had no vested right to control the street, but such control was subject to the direction of the legislature. *People ex rel. New York & H. R. Co.* v. *Havemeyer* (1874) 4 Thomp. & C. 365.

Bonds were issued by the city of Yonkers, payable to bearer, and transferable by delivery. The bonds having been stolen from the original owner, an act was passed requiring the city to issue duplicate bonds, declaring that thereupon the city should be discharged from liability on the original bonds, but that holders thereof might maintain an action against the original owner on an indemnity bond to be given to the city on the issuing of the duplicates. This act was declared unconstitutional because it impaired the obligation of the contract, and deprived bona fide holders of the right to maintain an action thereon against the city. The legislature could not thus change the obligation imposed by the bonds, and compel the holder to resort to a third party to enforce payment. The court quoted Judge Story's remark in his Commentaries on the Constitution, § 1385, that "any law which enlarges, abridges, or in any manner changes the intention of the parties resulting from the stipulations in the contract, necessarily impairs it." *People ex rel. Manhattan Sav. Inst.* v. *Otis* (1882) 90 N. Y. 48.

The act of 1885, chap. 499, "providing for placing electrical conductors underground in cities of this state and for commissioners of electrical subways," does not violate the contract rights of lighting corporations previously organized, but it is an exercise of the police power which the legislature might delegate to municipal authorities. *People ex rel. New York Electric Lines Co.* v. *Squire* (1888) 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820.

The Greater New York charter (Laws 1897, chap. 378) did not impair the obligation of a contract previously made by the board of supervisors of the county of Queens for sprinkling highways therein, and which was in force when the charter took effect. The new city became liable for the payment of claims under the contract, and this transfer of liability did not impair the rights of the contractor. The same rule was applied to the act of 1898, chap. 588, creating the county of Nassau out of that part of the county of Queens not included in the city of New York. *Re Vacheron* (1900) 51 App. Div. 182, 64 N. Y. Supp. 503.

*Officers.*—The power of the legislature to reduce an official salary

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not protected by the Constitution was considered at some length, but not decided, in *People ex rel. Woodworth* v. *Burrows* (1858) 27 Barb. 89. It was urged that an acceptance of an office at a fixed salary was not a grant, and did not create an unalterable contract. An officer must be deemed to accept such an office knowing that the legislature may, in its discretion, and for reasons satisfactory to itself, reduce the compensation for official service.

A public office is not a grant, and the right to it does not depend upon or partake of the nature of a contract, and the legislature may abolish an office or shorten its term, unless it is protected by the Constitution. *Long* v. *New York* (1880) 10 N. Y. Week. Dig. 405.

*Patents of land.*—The patent to Zephaniah Platt, in 1784, of a tract 7 miles square on both sides of the Saranac river, and bounded east by Lake Champlain, conveyed an exclusive property in the river, it not being a navigable stream. The patent was an executed contract within the principle of *Fletcher* v. *Peck* (1810) 6 Cranch, 136, 3 L. ed. 177, and the state could not pass an act impairing the estate of the patentee or rendering it null and void. The court accordingly held that the acts of 1801 and 1813, requiring the owners of dams on certain streams so to reconstruct them that they would permit the free passage of salmon, violated the constitutional provision against impairing the obligation of contracts and were void as to this patent, for if the dam were adjudged to be a nuisance the grant would be manifestly impaired, because the grantee would be prohibited the use and enjoyment of a valuable and essential part of it. "The principle adopted by the Supreme Court of the United States extends as fully to a case where a material and essential part of the grant is impaired, as to a case where it is entirely impaired." *People* v. *Platt* (1819) 17 Johns. 195.

The act of 1797, to provide for settling disputes concerning certain land in Onondaga county, did not impair the obligation of a contract. The land was held under a patent from the state, and the act did not assume to affect the patentee's title. The legislature had power to enact laws intended to settle disputes concerning the title to this land, which had been conveyed by the patentee to different grantees. *Jackson ex dem. Hart* v. *Lamphire* (1830) 3 Pet. 280, 7 L. ed. 679.

*Preferred creditors.*—"The legislature could, for reasons of public policy and justice, give classes of creditors preference over other classes, so long as creditors not preferred are left with substantial remedies. . . . The holders of registered policies were given a preference of payment upon a fund substantially created with money

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contributed by them." A statutory provision giving them a preference over other policy holders did not violate the obligation of a contract. *Atty. Gen.* v. *North America L. Ins. Co.* (1880) 82 N. Y. 172.

*Public printer.*—The provision of the election law of 1896, chap. 909, which authorized the secretary of state to procure the printing of the compilation of election laws, and to purchase registration books wherever he deemed it desirable for the best interest of the state, did not impair the obligation of a contract for the public printing. *People ex rel. Weed-Parsons Printing Co.* v. *Palmer* (1896) 18 Misc. 103, 41 N. Y. Supp. 878.

*Railroads.*—The act of 1864, chap. 402, providing for the confirmation of railroad aid bonds issued by towns, did not violate the provision against impairing the obligation of contracts. The subject of issuing the bonds in the first instance, and the validation of their issue to cure supposed defects, is within the power of the legislature. *People ex rel. Albany & S. R. Co.* v. *Mitchell* (1865) 45 Barb. 208, (1866) 35 N. Y. 551.

The act of 1875, chap. 600, which fixed the maximum street car fare in Buffalo at 5 cents, did not impair the obligation of a contract between two street railroad companies, under which they were authorized to charge a higher rate. The contract was deemed to have been made subject to the possibility that the legislature might change the rate of fare. *Buffalo East Side R. Co.* v. *Buffalo Street R. Co.* (1888) 111 N. Y. 132, 2 L. R. A. 384, 19 N. E. 63.

Income bonds which conferred certain voting rights on the holders were issued by a railroad company which afterwards sought to consolidate with a foreign corporation. In an action to restrain such consolidation on the ground that it affected the rights of the bondholders, it was held that the consolidation did not impair the obligation of the contract. *Hart* v. *Ogdensburg & L. C. R. Co.* (1893) 69 Hun, 378, 23 N. Y. Supp. 639.

The provision of § 98 of the railroad law, 1890, chap. 565, authorizing local authorities to regulate the speed of street cars, confers a continuing power, and such authorities cannot bind their successors by an exercise of the power; and it seems that an ordinance prescribing the rate of speed does not become a contract which will prevent further action by local authorities. *Brooklyn* v. *Nassau Electric R. Co.* (1897) 20 App. Div. 31, 46 N. Y. Supp. 651.

City authorities cannot add to the burdens of a corporation which received its rights from the legislature. The corporation having accepted a grant and built a road, a contract obligation was

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established which neither party alone could interpret or fix the liability of the other; and the authorities of a city in which the road was located could not determine what the corporation should do in the performance of its contract, except as prescribed in its franchise. Thus, a corporation could not be required to aid in the construction of an asphalt pavement under a contract which only required it to keep the street in repair. *Binghamton* v. *Binghamton & P. D. R. Co.* (1891) 61 Hun, 479, 16 N. Y. Supp. 225, distinguished in *Mechanicville* v. *Stillwater & M. Street R. Co.* (1901) 35 Misc. 513, 71 N. Y. Supp. 1102, where Justice Russell held that the company was liable to construct a pavement ordered by village authorities, notwithstanding the terms of the franchise. The Binghamton paving question appears again under new contracts and legislation in *Davidge* v. *Binghamton* (1901) 62 App. Div. 525, 71 N. Y. Supp. 282.

The constitutional provision against impairing the obligation of contracts does not prevent legislation relating to grade crossings. Such legislation is an exercise of the police power. *Lehigh Valley R. Co.* v. *Adam* (1902) 70 App. Div. 427, 75 N. Y. Supp. 515.

*Recording acts.*—"It is within the undoubted power of state legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts." *Jackson ex dem. Hart* v. *Lamphire* (1830) 3 Pet. 280, 7 L. ed. 679. Compare *Varick* v. *Briggs* (1839) 22 Wend. 543.

*Remedies.*—The jail liberties act of 1798, chap. 91, was not a violation of this provision. It did not impair the remedy of the creditor by confinement of the debtor's body. The constitutional provision "cannot be understood to apply to all the detail of municipal regulations rendering more easy or less inconvenient the process and proceedings for the recovery of debts. . . . The Constitution could not have an eye to such details so long as contracts were submitted, without legislative interference, to the ordinary and regular course of justice and the existing remedies were preserved in substance and with integrity." *Holmes* v. *Lansing* (1802) 3 Johns. Cas. 73.

The act of 1797, chap. 51, relating to the settlement of certain disputes concerning lands in Onondaga county, does not violate this provision. It is a statute of limitations and relates only to the remedy. *Barker* v. *Jackson* (1826) 1 Paine, 559, Fed. Cas. No. 989.

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The act of 1846, chap. 274, which, while abolishing distress for rent, also repealed the provisions of the Revised Statutes (1 Rev. Stat. 746, §§ 12 to 17 inclusive), which gave the landlord having a claim for rent a preference over other creditors of the tenant, did not impair the tenant's obligation to pay rent. The preference in favor of the landlord was not the result of an agreement between him and the tenant. "In the nature of things, there is a distinction between the change of a contract and a change of the remedy to enforce the performance of the contract." *Stocking* v. *Hunt* (1846) 3 Denio, 274.

The act of 1842, chap. 277, which reduced the time for advertising a foreclosure sale from twenty-four weeks to twelve weeks, did not violate this constitutional provision. It applied to all mortgages whether executed prior or subsequent to its passage. The power of sale was to be executed according to the law in force at the time of the foreclosure. *James* v. *Andrews* (1852) Selden's Notes, pt. 1, p. 6, affirming (1850) 9 Barb. 482.

The act of 1842, chap. 157, making additional exemptions from execution, applies to debts contracted before as well as after its passage. "The contracting of a debt does not, in any legal sense, create a lien upon the debtor's property. He is as much at liberty to deal with and to transfer it bona fide as though he were entirely free from debt. The right which a creditor, by becoming such, acquires is to have the use and benefit of the laws for the collection of debts which may be in force when he shall have occasion to resort to them to enforce his demand against the debtor. . . . But it is admitted that a contract may be virtually impaired by a law which, without acting directly upon its terms, destroys the remedy, or so embarrasses it that the rights of the creditor under the legal remedies existing when the contract was made are substantially defeated. With this necessary qualification the jurisdiction of the states over the legal proceedings of their courts is supreme." *Morse* v. *Goold* (1854) 11 N. Y. 281, 62 Am. Dec. 103.

The act of 1846, chap. 274, abolishing distress for rent, simply changed the remedy on the contract. *Guild* v. *Rogers* (1850) 8 Barb. 502. The provision of the same statute authorizing a re-entry for the nonpayment of rent applied to leases made prior to its passage. *Van Rensselaer* v. *Snyder* (1855) 13 N. Y. 299.

The same rule was applied even where the lease in terms authorized the landlord to distrain or re-enter for nonpayment of rent. The legislature may abolish or modify the remedy specified in the contract, and itself prescribe the remedy to which parties must resort

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for the enforcement of contract obligations. *Conkey* v. *Hart* (1856) 14 N. Y. 22. See also *Tyler* v. *Heidorn* (1866) 46 Barb. 439.

The act of 1857, chap. 344, providing for security on the transfer of a cause from a district court to the court of common pleas in New York, did not impair the obligation of a contract. It affected the remedy only. *Johnson* v. *Ackerson* (1870) 40 How. Pr. 222, affirmed in (1871) 3 Daly, 430.

A statute which gave to persons claiming to have paid an illegal tax an opportunity to present to the board of supervisors a claim for reimbursement did not vest in such persons any absolute right beyond legislative control, and a repeal of the statute did not impair the obligation of a contract. *People ex rel. Canajoharie Nat. Bank* v. *Montgomery County* (1876) 67 N. Y. 109, 23 Am. Rep. 94.

*State contract.*—A contractor cannot compel the state to proceed with the erection of a public building under a contract with him. The state, like an individual, may abandon an enterprise which it has undertaken and refuse to allow the contractor to proceed, or it may commit the completion of the contract to its own immediate servants and agents, or make a new contract with other persons without any default by the original contractor. While the state might thus violate the contract, its obligation is not impaired, and the original party would have a claim against the state for damages, which would doubtless be recognized and protected by the legislature. *Lord* v. *Thomas* (1876) 64 N. Y. 107.

In *Danolds* v. *State* (1882) 89 N. Y. 36, 42 Am. Rep. 277, the same principle was applied, and the plaintiff whose contract before its completion had been terminated by the state was awarded prospective profits. The court said the "contracts were binding upon the state; it could refuse to perform them on its part and arrest the performance of them by the contractors, but it could in no way destroy or get rid of the obligation of them."

*Statute of limitations.*—The act of 1885, chap. 405, requiring actions to be brought within six months against the city of Brooklyn or its registrar of arrears to compel the execution of a lease upon any sale for taxes and assessments or water rates made more than eight years prior to the passage of the act, and requiring the cancelation of sales upon which no leases shall have been given and no action commenced, did not violate this constitutional provision. It was a statute of limitations, and fixed a reasonable time for the enforcement of contracts. *Wheeler* v. *Jackson* (1887) 44 Hun, 410, affirmed in (1887) 105 N. Y. 681, (1890) 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76.



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The statute of limitations acts only on the remedy, and does not affect the obligation of a contract. A repeal of a statute removes the bar, and gives the creditor an indefinite period within which to commence an action. In this case it was held that an action to foreclose a real estate mortgage given to secure promissory notes might be brought within twenty years, although the time had passed within which an action at law might be brought on the notes. *Hulbert* v. *Clark* (1891) 128 N. Y. 295, 14 L. R. A. 59, 28 N. E. 638.

*Supreme court reporter.*—A contract for the publication of the reports of decisions of the supreme court of this state, made with the reporter, is protected by the constitutional prohibition against impairing the obligation of contracts, and the legislature cannot increase the burdens imposed by the contract, nor deprive the parties of the benefit of its provisions. It is not a public contract, but the individual contract of the reporter, who receives no compensation from the state. *Banks* v. *Hun* (1897) 20 App. Div. 501, 47 N. Y. Supp. 193.

*Trusts.*—The obligation of a contract is not impaired by an act authorizing the chancellor to discharge a trustee under a will and appoint a new trustee. "There is no matter of contract involved in the substitution of new trustees with the assent of the chancellor in the place of those named in a testamentary devise, unless the act be one which infringes some vested right of the trustees," nor does the substitution affect the interest of the beneficiaries. *Williamson* v. *Suydam* (1867) 6 Wall. 723, 18 L. ed. 967.

*Wills.*—"General regulations for the descent and transmission of property, in case of the death of the possessor, to his widow, heirs, and next of kin, cannot be regarded as constituting a contract with them so as to bring those laws within the prohibition of the Constitution of the United States, nor as vesting the expectants under such laws with rights or privileges within the meaning of the Constitution of the state." *Re Lawrence* (1848) 1 Redf. 310, per McVean, surrogate.

## OFFICERS.

The legislature, in order to suppress dueling, had power to impose, as a penalty for a violation of the act, a forfeiture of the right to hold any post of profit, trust, or emolument. *Barker* v. *People* (1824) 3 Cow. 686, 15 Am. Dec. 322.

In the case of the *Lieutenant-Governor's Claim* (1829) 2 Wend. 213, 216, the court of errors held that the legislature had no power

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to deprive that officer of the right equally with the other members of the court to express his opinion and to vote in the decision of every question arising therein.

In *Re Members of Court of Errors (Chancellor's Case)* (1830) 6 Wend. 158, the same court held that, notwithstanding the provision of the revised statutes that no judge of any appellate court shall take part in the decision of any case or matter which shall have been determined by him when sitting as a judge of any other court, the chancellor might decide or take part in the decision of a case determined by him when sitting as a circuit judge.

The legislature is not restricted in power by the Constitution from controlling or changing the term or the fees of an office, or from abolishing altogether an office created by it. *People ex rel. Wilbur* v. *Eddy* (1870) 57 Barb. 593; *People* v. *Devlin* (1865) 33 N. Y. 269, 88 Am. Dec. 377; *Coulter* v. *Murray* (1873) 4 Daly, 506. This subject was considered in *Gertum* v. *Kings County* (1888) 109 N. Y. 170, 16 N. E. 328, in connection with the abolition of the town of New Lots and the absorption of its territory in the city of Brooklyn. It was conceded that while the town existed the legislature could not abolish the office of justice of the peace nor shorten the term; but this rule did not prevent the legislature from abolishing the town and merging it in a city. See *People ex rel. Devery* v. *Coler* (1903) 173 N. Y. 103, 65 N. E. 956.

It is no defense to an indictment against inspectors of election for a violation of duty that they deemed the act under which the election was held unconstitutional. They are ministerial officers, and cannot sit in judgment on the constitutionality of the law. *Hall* v. *People* (1882) 90 N. Y. 498.

The legislature has power to impose on an election officer a penalty for refusing to serve. *Brooklyn* v. *Scholes* (1883) 31 Hun, 110.

The legislature has power to authorize the summary removal of a municipal officer. *People ex rel. Gere* v. *Whitlock* (1883) 92 N. Y. 191.

The legislature may prohibit the appointment of more than two members of the state civil service commission from the same political party. *Rogers* v. *Buffalo* (1890) 123 N. Y. 173, 9 L. R. A. 579, 25 N. E. 274, and may require the selection of members of the board of police commissioners from different political parties. *Pearce* v. *Stephens* (1897) 18 App. Div. 101, 45 N. Y. Supp. 422.

The legislature had power to provide that the decision of the commissioner of public safety in a city of the second class, dismissing a member of the police force upon charges preferred against

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him, should be final and conclusive, and not subject to review by any court. The office of policeman is a legislative, and not a constitutional office. *People ex rel. Miller* v. *Peck* (1902) 73 App. Div. 89, 76 N. Y. Supp. 328.

## POLICE POWER.

*In general.*—Blackstone defines police power (4 Com. 162) as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations."

In *Varick* v. *Smith* (1835) 5 Paige, 137, 28 Am. Dec. 417, Chancellor Walworth says that the legislature is the sole judge as to the expediency of making police regulations interfering with the natural rights of our citizens, which regulations are not prohibited by the Constitution.

Discussing the validity of the oleomargarine act of 1884, chap. 202, Justice Dykman, writing the opinion in *People* v. *McGann* (1884) 34 Hun, 358, says the police power "is a power vested in the legislature to ordain such laws and ordinances as shall be deemed essential and necessary for the welfare, health, and property of the public. The underlying foundation of the power is the principle that all property must be so used that it shall not become injurious to others. All reasonable restraints may be imposed for the attainment of this end which may be deemed necessary by the lawmaking power, even though they amount to absolute prohibition, and the propriety of such restrictions is a legislative question entirely free from all judicial control." In *People* v. *King* (1888) 110 N. Y. 418, 1 L. R. A. 293, 6 Am. St. Rep. 389, 18 N. E. 245, the court say that "the police power covers a wide range of particular unexpressed powers reserved to the state, affecting freedom of action, personal conduct, and the use and control of property."

Each successive legislature must, from necessity, "be left untrammeled, except by the restraints of the fundamental law, and when called upon to act upon subjects which concern the health, morals, or interests of the people as affected by a public use of property for which compensation is exacted by its owners, they are unlimited by constitutional restraint," and the "authority of the legislature in the exercise of its police powers could not be limited or restricted by the provisions of contracts between individuals or corporations."

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*Buffalo East Side R. Co.* v. *Buffalo Street R. Co.* (1888) 111 N. Y. 132, 2 L. R. A. 384, 19 N. E. 63, sustaining the act of 1875, chap. 600, fixing street railroad fares in Buffalo.

*Amusements.*—The legislature has power to regulate places of amusement and require them to be licensed. *Wallack* v. *New York* (1874) 3 Hun, 84, affirmed in (1876) 67 N. Y. 23, where it was held that an action to restrain the enforcement of penalties provided by the law on the ground of its invalidity could not be maintained; at least, until such invalidity had been judicially determined.

*Animals at large.*—The legislature had no power to authorize the summary seizure of animals trespassing within a private enclosure, as provided by the act of 1862, chap. 459. *Rockwell* v. *Nearing* (1866) 35 N. Y. 302.

The act of 1867, chap. 814, amending the act of 1862, to prevent animals from running at large in the highways, was a valid exercise of police power. *Campbell* v. *Evans* (1869) 54 Barb. 566, affirmed in (1871) 45 N. Y. 356.

*Buildings.*—The New York act of 1885, chap. 454, restricting to 80 feet the height of dwelling houses intended for the use of more than one family, on streets exceeding 60 feet in width, was a valid exercise of police power, but it did not apply to hotels. *People ex rel. Kemp* v. *D'Oench* (1888) 111 N. Y. 359, 18 N. E. 862.

*Business.*—In *People* v. *McGann* (1884) 34 Hun, 358, the supreme court sustained the oleomargarine act of 1884, chap. 202, as a valid exercise of police power; but the court of appeals took a different view, and in *People* v. *Marx* (1885) 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, condemned the act as unconstitutional because it interfered with the right of the citizen to carry on a lawful business. This case has already been cited under the head of "Liberty," in the article on due process of law. *People* v. *Meyer* (1903) 89 App. Div. 185, 85 N. Y. Supp. 834, sustains the act of 1902, chap. 385, amending § 26 of the agricultural law, prohibiting the sale of oleomargarine under specified circumstances.

Discussing the validity of the act of 1884, chap. 272, which prohibited the manufacture of cigars in tenement houses, and rejecting the argument that the legislature could pass the act "in the exercise of the police power which every sovereign state possesses," the court (*Re Jacobs* [1885] 98 N. Y. 98, 50 Am. Rep. 636) say that the police power "is very broad and comprehensive and is exercised to promote the health, comfort, safety, and welfare of society. Its exercise in extreme cases is frequently justified by the maxim *Salus populi suprema lex est.* Under it the conduct of an individual and the use of property may be regulated so as to interfere to some

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extent with the freedom of the one and the enjoyment of the other; and in cases of great emergency, engendering overruling necessity, property may be taken or destroyed without compensation, and without what is commonly called due process of law. The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it." But "the police power is not without limitations, and . . . in its exercise the legislature must respect the great fundamental rights guaranteed by the Constitution. . . . Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive." These views were approved in *People* v. *Marx* (1885) 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29, and in *People* v. *Gillson* (1888) 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343. See also *Wright* v. *Hart* (1905) 103 App. Div. 218, 93 N. Y. Supp. 60, sustaining the act of 1902, chap. 528, "to regulate the sale of merchandise in bulk." The act was designed to prevent fraud in the sale of merchandise, and especially to protect creditors of the vendor in case of a sale of property "'either in bulk or out of the ordinay course of business." It was a valid exercise of police power.

The act of 1888, chap. 581, fixing the maximum of elevator charges, is a valid exercise of police power. *People* v. *Budd* (1889) 117 N. Y. 1, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, affirmed in (1892) 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

The plumbers' act of 1892, chap. 602, was sustained as a valid exercise of legislative power. *People ex rel. Nechamcus* v. *City Prison* (1895) 144 N. Y. 529, 27 L. R. A. 718, 39 N. E. 686.

The vinegar act of 1889, chap. 515, was sustained in *People* v. *Girard* (1895) 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823.

The provision relating to cider vinegar contained in the agricultural law, as amended in 1901, was sustained in *People* v. *Niagara Fruit Co.* (1902) 75 App. Div. 11, 77 N. Y. Supp. 805.

The anti-barbering act of 1895, chap. 823, was a valid exercise of police power. *People* v. *Havnor* (1896) 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707, 43 N. E. 541.

The act of 1900, chap. 633, prohibiting the business of garbage rendering in the borough of Brooklyn, and requiring the immediate discontinuance and removal therefrom of any such existing business, was not, as to an existing contract, a valid exercise of police power. *New York Sanitary Utilization Co.* v. *Health Department* (1901) 61 App. Div. 106, 70 N. Y. Supp. 510.

The provision of the agricultural law prohibiting the use of pre-

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servatives in dairy products, with certain exceptions, was declared unconstitutional in *People* v. *Biesecker* (1901) 169 N. Y. 53, 57 L. R. A. 178, 88 Am. St. Rep. 534, 61 N. E. 990. The court say that "the limits of the police power must necessarily depend, in many instances, on the common knowledge of the times. An enactment of a standard of purity of an article of food, failing to comply with which the sale of the article is illegal, to be valid must be within reasonable limits, and not of such a character as to practically prohibit the manufacture or sale of that which, as a matter of common knowledge, is good and wholesome."

The Penal Code amendment of 1900, § 384*p*, prohibiting trading stamps, was not a valid exercise of police power. *People ex rel. Madden* v. *Dycker* (1902) 72 App. Div. 308, 76 N. Y. Supp. 111. The trading stamp law of 1904, chap. 657, adding § 384*q* to the Penal Code, was also held to be unconstitutional in *People ex rel. Appel* v. *Zimmerman* (1905) 102 App. Div. 103, 92 N. Y. Supp. 497.

The act of 1896, chap. 803, requiring the registration of plumbers, is not a valid exercise of police power. *Schnaier* v. *Navarre Hotel & Importation Co.* (1905) 182 N. Y. 83, 74 N. E. 561.

The provision of the transportation corporations law, § 69, prohibiting any gaslight company from charging rent on its meters, is a valid exercise of police power. *Buffalo* v. *Buffalo Gas Co.* (1903) 81 App. Div. 505, 80 N. Y. Supp. 1093.

The provision of the Penal Code, § 640*d*, added in 1901, chap. 128, restricting business by real estate agents in cities of the first and second classes, was not a valid exercise of police power. *Grossman* v. *Caminez* (1903) 79 App. Div. 15, 79 N. Y. Supp. 900. See *Whiteley* v. *Terry* (1903) 83 App. Div. 197, 82 N. Y. Supp. 89, where the court suggests a contrary view of this statute. The latter case was followed by the appellate term of the supreme court in *Charles* v. *Arthur* (1903) 84 N. Y. Supp. 284.

*Cemeteries.*—The act (2 Rev. Laws, 445, § 267) authorizing the authorities of the city of New York to make by-laws regulating or prohibiting interments was a valid exercise of legislative power, and a by-law prohibiting interments in certain parts of the city was sustained as a police regulation. *Coates* v. *New York* (1827) 7 Cow. 585; *Brick Presby. Church* v. *New York* (1826) 5 Cow. 538.

*Children.*—The legislature had power, by the act of 1866, chap. 245, to authorize the New York Juvenile Asylum to receive and bind out children belonging to certain specified classes. Such legislation "is essential to the good order and protection of the community, and constitutes a part of the general police power of the state. That power cannot be more humanely and usefully exercised than it is

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by making salutary and wise provisions for the education, improvement, comfort, and security of the destitute, homeless, and needy children found in the large cities of the state." *People ex rel. Splain* v. *New York Juvenile Asylum* (1874) 2 Thomp. & C. 475, affirmed in (1874) 59 N. Y. 629.

The Penal Code provision, § 292, prohibiting the exhibition of a female child under the age of sixteen years as a dancer, is valid as an exercise of police power. The legislature having determined that it is for the best interest of the state and of young girls that they should not be exhibited as dancers before they reach the age of sixteen years, its decision is final, and is not subject to review by the courts upon the ground that the law infringes upon the rights of parents in some particular cases. *Re Ewer* (1893) 70 Hun, 239, 24 N. Y. Supp. 500, affirmed in (1894) 141 N. Y. 129, 36 N. E. 4, where the court say that the "right to personal liberty is not infringed upon because the law imposes limitations or restraints upon the exercise of the faculties with which the child may be more or less exceptionally endowed."

The Penal Code provision, § 288, which requires parents to furnish suitable medical attendance for their children, is a valid exercise of police power. *People* v. *Pierson* (1903) 176 N. Y. 201, 63 L. R. A. 187, 98 Am. St. Rep. 666, 68 N. E. 243.

*Commerce.*—The police power of the state is limited by the Federal Constitution; "that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States." The state cannot counteract the commercial power of Congress. The provisions of the forest, fish, and game law, making it a misdemeanor to have in one's possession certain fresh water fish during the close season, violated the commerce clause of the Federal Constitution and could not be sustained as a valid exercise of police power of the state. *People* v. *Buffalo Fish Co.* (1899) 30 Misc. 130, 62 N. Y. Supp. 543, Lambert, J., affirmed in (1899) 45 App. Div. 631, 62 N. Y. Supp. 1143, and in (1900) 164 N. Y. 93, 52 L. R. A. 803, 79 Am. St. Rep. 622, 58 N. E. 34, where the court of appeals limits the application of the statute to fish taken in the waters of this state; those imported from a foreign country are not within the prohibition of this statute. Followed in *People* v. *Bootman* (1904) 180 N. Y. 1, 72 N. E. 505, and also substantially followed in *People* v. *Booth & Co.* (1903) 42 Misc. 321, 86 N. Y. Supp. 272, holding unconstitutional Laws 1902, chap. 194, § 141, requiring possessors of fish to give a bond not to violate the law. See same case, 105 App. Div. 184.

"Each state may pass such laws affecting commerce, to operate

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within its own limits, not in direct conflict with the provisions of the Constitution of the United States or acts of Congress, as are necessary for the preservation of the life, the health, the personal rights, and the property of its citizens and of those enjoying its protection." *Fitch* v. *Livingston* (1851) 4 Sandf. 492, affirmed in court of appeals, but not reported.

*Commitments.*—"Temporary commitments of a summary character may be made *ex parte* in the exercise of the general police power of the state." Such commitments are due process of law. *People ex rel. Ordway* v. *St. Saviour's Sanitarium* (1898) 34 App. Div. 363, 56 N. Y. Supp. 431.

*Excise.*—The civil damage act of 1873, chap. 646, was a valid exercise of police power. *Franklin* v. *Schermerhorn* (1876) 8 Hun, 112; *Bertholf* v. *O'Reilly* (1878) 74 N. Y. 509, 30 Am. Rep. 323.

The liquor tax law of 1896, chap. 112, is valid as an exercise of police power. *People ex rel. Einsfeld* v. *Murray* (1896) 149 N. Y. 367, 32 L. R. A. 344, 44 N. E. 146.

*Fires.*—The New York city act of 1830, chap. 291, for the prevention of fires, which prohibited any person from keeping more than a specified quantity of gunpowder, was valid as a police regulation. *Foote* v. *Fire Department* (1843) 5 Hill, 99.

*Fish.*—The right to fish in the waters of the state is not absolute, but may be limited and abridged by the legislature. The power of the state in this respect may be exercised through local officers. *People* v. *Thompson* (1883) 18 N. Y. Week. Dig. 145.

*Flag.*—Construing § 640 of the Penal Code, as amended in 1903, chap. 272, relating to the desecration of the flag of the United States, the court, in *People ex rel. McPike* v. *Van De Carr* (1904) 91 App. Div. 20, 86 N. Y. Supp. 644, say: "It was competent for the legislature to make it a misdemeanor to publicly mutilate, deface, defy, defile, trample upon, or cast contempt, either by word or act, upon the national or state flag, and mutilation of the flag may mean the printing of an advertisement on the ensign itself. Such legislation is within the police power of the state, for it relates to the preservation of the peace. It tends to prevent the commission of acts which would arouse the indignation of the public and lead to the infliction of summary chastisement upon an offender; for it is not a mere rhetorical phrase to say that the people have constituted themselves the guardians and protectors of the national flag;" but "the interdiction by the state of the use of a picture or representation of the American flag as a trademark or upon trade labels, or in connection with an advertisement of merchandise, in no way relates to any one of the legitimate subjects to which the police power of

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the state extends. . . . The government of the United States has not prohibited the use of the flag in connection with advertisements. Trade labels, of which a representation of the national ensign forms a part, are accepted at the patent office." Affirmed (1904) 178 N. Y. 425, 70 N. E. 965.

*Food products.*—The act of 1884, chap. 202, to prevent deception in sales of dairy products, was construed in *People* v. *Cipperly* (1886) 101 N. Y. 634, 4 N. E. 107, which reversed the judgment of the court below (1885) 37 Hun, 319, on the dissenting opinion of Learned, P. J., who held, contrary to the majority of the court, that § 13, fixing an arbitrary standard by which to determine the quality of milk, was a valid exercise of legislative power. On the subject of adulterated milk see *People* v. *Hills* (1901) 64 App. Div. 584, 72 N. Y. Supp. 340; *People* v. *Laesser* (1903) 79 App. Div. 384, 79 N. Y. Supp. 470.

The anti-oleomargarine act of 1885, chap. 183, was sustained in *People* v. *Arensberg* (1887) 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277.

Section 41 of the public health law was sustained in *Crossman* v. *Lurman* (1902) 171 N. Y. 329, 98 Am. St. Rep. 599, 63 N. E. 1097, affirmed in (1904) 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234.

*Foreign insurance companies.*—The legislature has power to require foreign insurance companies doing business in this state to contribute a percentage of premiums, to be used in defraying the expenses of a municipal fire department. The act of 1867, chap. 846, was sustained. *New York Fire Underwriters* v. *Whipple* (1896) 2 App. Div. 361, 37 N. Y. Supp. 712.

*Indian lands.*—The statute of 1821, chap. 204, authorizing the summary removal, by a judge's order, of intruders on Indian lands, was a valid exercise of the police power of the legislature. "This right of summary removal is indispensably necessary to the protection of its own property, and to enable the state to fulfil its duties and obligations to the remnants of the Indian tribes within its borders, who are too feeble and helpless to protect themselves. It is under no constitutional or other obligation to wait the judicial determination of the courts to remove intruders from what are indisputably the ungranted lands of the state, or the reservations of the Indian tribes." *People ex rel. Cutler* v. *Dibble* (1857) 16 N. Y. 203.

*Labor.*—The provision of the labor law (Laws 1897, chap. 415, § 110) prohibiting work in a bakery by an employee more than sixty hours in any one week, or an average of more than ten hours per day, is not a valid exercise of police power. The court say that in its judgment there is "no reasonable foundation for holding this to

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be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker." It is further said that the limitation of the hours of labor "has no such direct relation to, and no such substantial effect upon, the health of the employee" as to justify the court in regarding it as really a health law. The statute is also condemned because it "interferes with the right of contract between the employer and employees concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment." *Lochner* v. *New York* (1905) 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, reversing *People* v. *Lochner* (1904) 177 N. Y. 145, 69 N. E. 373.

The Penal Code provision, § 384*h*, subd. 1, prohibiting contractors with the state or a municipal corporation from requiring more than eight hours for a day's labor, is not a valid exercise of police power. It has no relation to public health, morals, or order. *People* v. *Orange County Road Constr. Co.* (1903) 175 N. Y. 84, 65 L. R. A. 33, 67 N. E. 129.

The legislature could not, as attempted by the labor law (Laws 1897, chap. 415, §§ 180, 184), require persons engaged in horseshoeing to be licensed as a condition of pursuing such business. It was not a legitimate exercise of the police power, and the court say the law cannot be sustained as being in any just sense a regulation for the promotion of the public health or of the health or morals of the class of persons who follow horseshoeing as a trade; citing *Bessette* v. *People* (1901) 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215, in which a similar statute of that state was held to be unconstitutional. *People* v. *Beattie* (1904) 96 App. Div. 383, 89 N. Y. Supp. 193.

*Navigation.*—The legislature had power, by the act of 1839, chap. 175, to regulate the speed of steamboats while passing, coming to, or departing from, the wharves at Albany. *People* v. *Jenkins* (1841) 1 Hill, 469.

*Nuisance.*—The legislature had power to authorize the common council of Ogdensburg to adopt ordinances to preserve its harbors and water channels. Conceding that placing an obstruction in navigable waters would be a maritime tort and under the exclusive jurisdiction of United States courts, "still the legislature of a state may confer upon municipalities, where navigable waters and harbors exist, police authority over the same; and a violation of any regulation the municipal authority should adopt, if within the power conferred, would be within the jurisdiction of the state courts."

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Navigable waters within the state are still state, and not United States, territory; "and the state or its municipalities under it may pass all laws or ordinances for their government not in conflict with the Constitution of the United States or the laws of Congress, enacted within its constitutional powers." *Ogdensburg* v. *Lyon* (1872) 7 Lans. 215. The same ordinance was considered in *Ogdensburg* v. *Lovejoy* (1874) 2 Thomp. & C. 83, which has already been cited in the note on "Nuisances."

"The legislature, under the police power, may certainly regulate or even prohibit the carrying on of any business in such manner and in such place as to become dangerous or detrimental to the health, morals, or good order of the community." The act of 1892, chap. 646, prohibiting fat rendering, etc., in certain cities, was valid if limited to cases where the facts showed that the act complained of constituted a public nuisance. *People* v. *Rosenberg* (1893) 138 N. Y. 410, 34 N. E. 285.

The legislature may, in the exercise of its police power, prohibit the use of certain nets in public waters for the purpose of fishing therein, and authorize the summary removal and destruction of such nets. *Lawton* v. *Steele* (1890) 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 813, 23 N. E. 878, affirmed in (1894) 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

The act of 1900, chap. 494, amending the Penal Code, § 389, by prohibiting the manufacture of certain dangerous substances, was sustained as a valid exercise of police power. *People* v. *Lichtman* (1901) 65 App. Div. 76, 72 N. Y. Supp. 511.

*Ordinances.*—The legislature, in the exercise of its police power, may authorize municipal corporations to enact ordinances in relation to local subjects within the scope of the jurisdiction conferred by the charter, and such ordinances have the same force and effect as statutes. *Carthage* v. *Frederick* (1890) 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480.

A municipal ordinance prescribing the weight of loaves of bread baked and sold by licensed bakers was held to be unreasonable, and not a proper exercise of police power, it being shown that there was a demand for smaller loaves. *Buffalo* v. *Collins Baking Co.* (1899) 39 App. Div. 432, 57 N. Y. Supp. 347.

A Buffalo market ordinance which required a license for certain kinds of business elsewhere in the city was sustained in *Buffalo* v. *Hill* (1903) 79 App. Div. 402, 79 N. Y. Supp. 449.

The legislature may, under the exercise of the police power, delegate to a municipal corporation authority to enact ordinances regu-

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lating billposting, and such ordinances will be sustained if reasonable. *Rochester* v. *West* (1900) 164 N. Y. 510, 53 L. R. A. 548, 79 Am. St. Rep. 659, 58 N. E. 673.

*Personal rights.*—The Penal Code provision, § 383, prohibiting discrimination against colored persons in the enjoyment of privileges at places of amusement, is a valid exercise of police power. *People* v. *King* (1888) 110 N. Y. 418, 1 L. R. A. 293, 6 Am. St. Rep. 389, 18 N. E. 245.

"The owner of real property in a city holds it subject to such reasonable police regulations with respect to its use as may be necessary for the health, safety, or convenience of the public. Subject to these restrictions he has the right to use his land for building purposes, and unless he is guilty of some personal negligence in the use or enjoyment of the property, which endangers the safety of others, he cannot be held responsible for the results of accidents." *Burke* v. *Ireland* (1901) 166 N. Y. 305, 312, 59 N. E. 914.

*Pilots.*—The act of 1865, chap. 115, concerning Hell Gate pilots, was a valid police regulation. *People* v. *Sperry* (1867) 50 Barb. 170.

*Poor persons.*—The provision of 2 R. L., 441, § 25, requiring the owner or master of a vessel coming to New York to indemnify the city against any expense which might be incurred by the city on account of any passenger brought in such vessel, was sustained as a valid exercise of police power. The court say that "the right of excluding paupers, and compelling those who bring foreigners among us to indemnify the state against their support, concerns the police of the state, and is one which does not belong to Congress by any express power, nor is it incidental to any express power." *Candler* v. *New York* (1828) 1 Wend. 493, 500. This policy was continued by the act of 1824, chap. 37, providing for a similar report as to passengers brought from foreign countries. The latter act was sustained in *New York* v. *Miln* (1837) 11 Pet. 102, 9 L. ed. 648; *Henderson* v. *Wickham* (1875) 92 U. S. 259, 23 L. ed. 543.

*Prison-made goods.*—The act of 1896, chap. 931, requiring prison-made goods to be labeled "convict made," cannot be sustained as a valid exercise of police power. "No court has yet invoked the police power to justify a statute, the purpose of which was to enhance the wages of labor in certain factories by suppressing, through the agencies of the criminal law, the sale of competing products made in prisons. If the wages of labor in a few factories producing goods such as are also made in prisons may be regulated by the police power, there is no reason why that power may not be used to regulate the rewards of labor in any other field of human exertion."

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*People* v. *Hawkins* (1898) 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257.

*Public health.*—The metropolitan sanitary district act of 1866, chapters 74 and 686, created a board of health and transferred to it the powers and functions theretofore devolved upon several municipal boards and officers as to matters relating to public health, and authorized the new board to make by-laws on this subject. The legislature had power to confer on the board the right to make by-laws and ordinances to effectuate the purpose of its creation. *Coe* v. *Schultz* (1866) 47 Barb. 64.

The public health law of 1850, chap. 324, authorized municipal boards of health to make regulations for the preservation of the public health. An ordinance of the city of Syracuse regulating the sale of milk was sustained as a valid exercise of the power conferred by this statute. *Blazier* v. *Miller* (1877) 10 Hun, 435.

The act of 1875, chap. 604, prohibiting the deposit of certain unwholesome substances in the waters about the city of New York, was sustained as a valid exercise of police power. *New York* v. *Furgueson* (1881) 23 Hun, 594.

In *Re Jacobs* (1885) 98 N. Y. 98, 50 Am. Rep. 636, involving the validity of the act of 1884, chap. 272, "to improve the public health, by prohibiting the manufacture of cigars," etc., in tenement houses, the act was held unconstitutional, the court saying it could not be sustained as an exercise of police power. If the legislature "passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health." The legislative declaration that the act is intended to improve the public health does not conclude the courts, "and they must yet determine the fact declared and enforce the supreme law."

The act of 1885, chap. 183, making it a misdemeanor to sell or bring to a butter or cheese manufactory adulterated milk for the purpose of having it manufactured into butter or cheese, was sustained as a valid exercise of legislative power. *People* v. *West* (1887) 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610.

The Penal Code amendment of 1887 (§ 335*a*), prohibiting prizes in connection with the sale of articles of food, was not a valid exercise of police power. *People* v. *Gillson* (1888) 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

The legislature may require owners of tenement houses to supply water therefor under reasonable regulations, to be prescribed by the

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local board of health. *Health Dept.* v. *Trinity Church* (1805) 145 N. Y. 32, 27 L. R. A. 710, 45 Am. St. Rep. 579, 39 N. E. 833, followed in *Tenement House Dept.* v. *Moeschen* (1904) 179 N. Y. 325, 72 N. E. 231.

The Penal Code Provision, § 288, prohibiting, with certain exceptions, maternity hospitals, etc., is a valid exercise of police power. *People ex rel. Wagner* v. *Hagan* (1900) 52 App. Div. 387, 65 N. Y. Supp. 120, affirmed in (1900) 165 N. Y. 607, 58 N. E. 1091.

*Railroads.*—The provision of the railroad law requiring companies to erect and maintain suitable fences and gates was intended, in a great measure, as a police regulation for the benefit of the public, as well as a regulation for the benefit of owners of adjoining land. *Staats* v. *Hudson River R. Co.* (1866) 4 Abb. App. Dec. 287.

The act of 1887, chap. 616, requiring railroad passenger cars to be heated by steam, is a valid exercise of police power. *People* v. *New York, N. H. & H. R. Co.* (1890) 55 Hun, 409, 8 N. Y. Supp. 672, affirmed in (1890) 123 N. Y. 635, 25 N. E. 953.

The regulation of the speed of street cars is a proper subject of police power. Neither the legislature nor the common council can, by contract, devest itself of authority to provide for the objects properly within the scope of police power. *Brooklyn* v. *Nassau Electric R. Co.* (1897) 20 App. Div. 31, 46 N. Y. Supp. 651.

The power to regulate street railroads was also considered in *Coney Island, Ft. H. & B. R. Co.* v. *Kennedy* (1897) 15 App. Div. 588, 44 N. Y. Supp. 825.

The act of 1897, chap. 506, prohibiting brokerage in passage tickets, was not a valid exercise of police power. *People ex rel. Tyroler* v. *City Prison* (1898) 157 N. Y. 116, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006.

It is not only within the power, but it is also the duty, of the state, through its legislature, to provide for and secure to the community the safety of railroad crossings of streets in large cities. It is within the police power of the state, and it cannot be contracted away by any agreement between the cities and the railroad companies. Grade crossings may be abolished. *Lehigh Valley R. Co.* v. *Adam* (1902) 70 App. Div. 427, 75 N. Y. Supp. 515.

The act of 1895, chap. 417, requiring street railroad companies to transport policemen and firemen without charge, was not a valid exercise of police power. "Its evident purpose and effect is to relieve the municipalities referred to therein from a portion of the burden of maintaining their police and fire departments at the expense of the several street railway companies within their limits," and

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even if "the public safety requires that the public officers mentioned be carried upon such railroads, it is not apparent why, in order to promote that safety, they should be carried free of charge." *Wilson* v. *United Traction Co.* (1902) 72 App. Div. 233, 76 N Y. Supp. 203.

*Riparian owner.*—The act of 1878, chap. 190, prohibiting the removal of sand on the seashore in a specified part of Staten Island, which was passed for the purpose of protecting a certain highway, was a valid exercise of police power, even as against a riparian owner. The land below high-water mark belongs to the state; and assuming that such owner has an absolute title to the beach, from which he has been accustomed to take sand, yet the power of the legislature to prevent the continuance of such use of his property rests upon the familiar maxim that every owner of land must so use his property as not to injure the public interests. *Hodges* v. *Perine* (1881) 24 Hun, 516.

*Streets.*—The electrical subways act of 1885, chap. 499, which provides for placing electrical conductors under ground in cities, was a valid exercise of police power. After noting the historical fact that "the primary and fundamental object of all public highways is to furnish a passageway for travelers in vehicles or on foot through the country," that they were originally designed for the use of travelers alone, but in the course of time and in the interest of the general prosperity and comfort of the public, they have been put, especially in large cities, to numerous other uses; but such uses have always been held to be subordinate to the original design and use, and that they have been appropriated in recent times for the reception of sewers, water pipes, gas pipes, pipes for heating and manufacturing purposes, underground railroads, trenches for wires for telegraph, telephone, and other purposes, which all require in their construction the disruption of the pavements and the temporary interruption, at least, of the rights of travelers in the public highways,—the court say that "the due and orderly arrangement of the various and conflicting claims to privileges in the streets of large cities . . . is pre-eminently a police power, and it is within the legitimate authority of a legislature to delegate its exercise to municipal corporations." *People ex rel. New York Electric Lines Co.* v. *Squire* (1888) 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820, affirmed in (1892) 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880. The same question was considered with the same result in *American Rapid Teleg. Co.* v. *Hess* (1891) 125 N. Y. 641, 13 L. R. A. 454, 21 Am. St. Rep. 764, 26 N. E. 919. See also *Rochester* v. *Bell Teleph. Co.* (1900) 52 App. Div. 6, 64 N. Y. Supp. 804; *Geneva* v. *Geneva*

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*Teleph. Co.* (1900) 30 Misc. 236, 62 N. Y. Supp. 172; *Western U. Teleg. Co.* v. *New York* (1889) 3 L. R. A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 552.

*Summary seizures.*—The act of 1896, chap. 383, authorizing the summary seizure and disposal of any boat used in interfering with oysters, etc., belonging to another, was not within the police power of the legislature. *Colon* v. *Lisk* (1897) 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

*Sunday.*—The act of 1901, chap. 392, amending the Penal Code, § 267, by prohibiting the sale of uncooked meat at any time on Sunday, was a valid exercise of police power. *People ex rel. Woodin* v. *Hagan* (1901) 36 Misc. 349, 73 N. Y. Supp. 564.

*Tenement houses.*—The New York tenement house acts of 1901, chapters 334 and 555, were valid as an exercise of police power. *New York* v. *Herdje* (1902) 68 App. Div. 370, 74 N. Y. Supp. 104; *Signell* v. *Wallace* (1901) 35 Misc. 656, 72 N. Y. Supp. 348.

## PRIVILEGES AND IMMUNITIES.

It has already been noted in the chapter on the first Constitution that the clause relating to privileges and immunities of citizens was included in the Articles of Confederation adopted by the Continental Congress in 1778. Article 4 of that instrument contains the provision that "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states." The Federal Constitution (1787) continued this provision by declaring (article 4, § 2, subd. 1) that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" and the 14th Amendment (1868) repeated it in the clause most frequently quoted in recent years, in the mandate addressed to all members of the Union: "No state shall make or enforce any law which shall abridge the privileges and



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immunities of citizens of the United States." The New York courts have had frequent occasion to test the validity of statutes as affected by this provision.

Chief Justice (afterwards Chancellor) Kent in *Livingston* v. *Van Ingen* (1812) 9 Johns. 576, commenting on this provision, says: "It means only that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights. Their persons and property must in all respects be equally subject to our law."

The provision in the original Federal Constitution was considered in *Livingston* v. *Tompkins* (1820) 4 Johns. Ch. 416, 8 Am. Dec. 598, involving the right of the states of New York and New Jersey to control navigation in public waters separating the two states, and Chancellor Kent said he had hitherto "understood and believed that the citizens of each state were entitled, under the Constitution of the nation, to free ingress and egress to and from any other state, and were entitled to all immunities of citizens in every state."

The provision was held not to apply to a resident of Pennsylvania who sought to maintain in this state an action against a Pennsylvania corporation. Construing § 1780 of the Code of Civil Procedure, it was said that the constitutional provision does not secure to citizens of any state the right to exercise, in another state, privileges and immunities which are not conferred upon citizens of that state. *Adams* v. *Penn Bank* (1885) 35 Hun, 393. This section of the Code was again construed under like conditions and with the same result in *Robinson* v. *Oceanic Steam Nav. Co.* (1889) 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625. See also *Anglo-American Provision Co.* v. *Davis Provision Co.* (1902) 169 N. Y. 506, 88 Am. St. Rep. 608, 62 N. E. 587, affirmed in (1903) 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92.

The act of 1831, chap. 300, to abolish imprisonment for debt, and which prohibited the arrest on civil process of a person who had been a resident of the state for one month, was held not to apply to a nonresident, although he had been in the state more than a month prior to the arrest. Citizens of other states must put themselves on a footing with our own citizens, "and then they are entitled to the like immunities." The Constitution does not guarantee them any greater privileges. *Frost* v. *Brisbin* (1837) 19 Wend. 11, 32 Am. Dec. 423.

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The act of 1851, chap. 95, prohibiting persons from acting as agents of foreign insurance companies not authorized to do business in this state, is not a violation of this provision. The act takes from no citizen of Pennsylvania any privilege which it allows to a citizen of New York. It applies to nonresident as well as resident agents. A corporation is not a citizen, and is not entitled to any privilege not granted to a citizen. *People* v. *Imlay* (1855) 20 Barb. 68.

Judge Denio in *Lemmon* v. *People* (1860) 20 N. Y. 562, 607, had occasion to quote this clause while discussing the effect of the fugitive slave provision, and said that no other provision of the Constitution had so strongly tended to constitute the citizens of the United States one people.

The establishment of separate schools for white and for colored children does not violate this provision, if the schools afford equal educational facilities. An order of the board of public instruction of the city of Albany providing separate schools for colored children was sustained. *People ex rel. Dietz* v. *Easton* (1872) 13 Abb. Pr. N. S. 159.

The subject was again considered with special reference to the 14th Amendment in *People ex rel. King* v. *Gallagher* (1883) 93 N. Y. 438, 45 Am. Rep. 232, involving the right of the state to establish and maintain separate schools for colored persons. It was claimed that a colored person not only had a right equal with a white person to acquire an education, but that such education should be furnished at the same time and place with that afforded to any other child, and that a denial of this right was an abridgment of the privileges and immunities guaranteed by the Constitution. Chief Judge Ruger gave a brief historical summary of the origin of the amendment, and quoted from Justice Strong in *Ex parte Virginia* (1879) 100 U. S. 344, 25 L. ed. 678, the statement that "one great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the states;" and also from *Strauder* v. *West Virginia* (1879) 100 U. S. 306, 25 L. ed. 665, the further observation by the same learned judge, that the amendment was "designed to assure to the colored race the enjoyment of all of the civil rights that under the law are enjoyed by white persons, and to give that race the protection of the general government in that enjoyment when it should be denied by the states." Chief Judge Ruger thought it was a "plain deduction" from the *Slaughter-House Cases* (1872) 16 Wall. 36, 21 L. ed. 394, that the "privilege of receiving an education at the

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expense of the state, being created and conferred solely by the laws of the state, and always subject to its discretionary regulation, might be granted or refused to any individual or class at the pleasure of the state." The right conferred by the constitutional provision was in this case deemed to include "the privilege of obtaining an education under the same advantages and with equal facilities for its acquisition with those enjoyed by any other individual," but it did not attempt to regulate social conditions, which, for the most part, are beyond the reach of the legislative functions of government to organize or control. "When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it is organized, and performed all of the functions respecting social advantages with which it is endowed. . . . A natural distinction exists between these races which was not created neither can it be abrogated by law, and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination against such race or an abridgment of its civil rights." The establishment of separate schools was sustained, provided they conferred equal facilities for obtaining an education.

The civil service acts of 1884, chap. 410, and 1887, chap. 464, giving a preference to veterans, were not obnoxious to this provision. These statutes did not affect any rights constitutionally guaranteed to citizens. *Re Wortman* (1888) 22 Abb. N. C. 137, 2 N. Y. Supp. 324, Daniels, J.

The elective franchise is not affected by this provision. *People* v. *Barber* (1888) 48 Hun, 198.

A corporation is not a citizen within the meaning of this provision, and therefore a foreign corporation is not, as a matter of right, entitled to enjoy in this state the privileges conferred on domestic corporations. "The right of citizens to associate themselves together to do business as a corporation is not a natural or inherent right, but is a special privilege granted by the sovereign power; and a privilege so granted cannot be exercised in a sovereignty other than that granting it, except by comity." *People ex rel. Parke, D. & Co.* v. *Roberts* (1895) 91 Hun, 158, 36 N. Y. Supp. 368, (1896) 149 N. Y. 608, 44 N. E. 1127.

The requirement of § 14 of the banking law that certain foreign corporations should, before doing business in the state, deposit with the superintendent of banks securities for the protection of domestic creditors and shareholders, is not a violation of this provision. *Peo-*

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*ple* v. *Granite State Provident Asso.* (1900) 161 N. Y. 492, 55 N. E. 1053.

"It was never one of the privileges or immunities of a citizen of the United States to be confronted with the witnesses against him in a state court," and the legislature may provide that a "trial of a misdemeanor may be had in the absence of the defendant, if he appear by counsel." *People* v. *Welsh* (1903) 88 App. Div. 65, 84 N. Y. Supp. 703.

The main purpose of § 1 of the 14th Amendment "was the protection of negroes against invidious distinctions as to their legal rights. While it has not such a restricted sense as matter of law, it would be a long stretch of interpretation to extend it to the protection of persons in holding state offices. It cannot be affirmed that any person has a right to be appointed to a nonelective municipal office. If the municipality confers such an office upon an individual he cannot be said to have a property right therein until a definite term of tenure has been affixed thereto. At the most it is only a privilege, and as to privileges of citizens we have the definite utterance of the Supreme Court of the United States in *Presser* v. *Illinois* (1886) 116 U. S. 252, 266, 29 L. ed. 615, 619, 6 Sup. Ct. Rep. 580, where it is held that 'a state may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States.'" The veteran provisions of the Constitution and of the civil service laws are "precisely and completely within the language and spirit of this opinion of the United States Supreme Court." *People ex rel. Kenny* v. *Folks* (1903) 89 App. Div. 171, 85 N. Y. Supp. 1100.

## PROCEDURE.

*Appeal.*—"No person has a constitutional right to appeal, and no court has an inherent right to entertain an appeal. The right, if it exists, and in all cases where it does exist, is simply the continuance of an existing practice by the Constitution, subject to the legislative right to curtail or abolish it, or it must be founded in some statute." Appeals in criminal cases are regulated by the Code of Criminal Procedure. *People* v. *Rutherford* (1900) 47 App. Div. 209, 62 N. Y. Supp. 224.

An appeal is not a matter of inherent right, but it is subject to legislative regulation, unless specifically guaranteed by the Constitution. *People ex rel. Grissler* v. *Fowler* (1874) 55 N. Y. 675;

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*Ryan* v. *Waule* (1875) 63 N. Y. 57. But the right to appeal cannot be extended after the time provided by law has expired. The judgment conferred a vested right which could not be affected by a new right to appeal. *Germania Sav. Bank* v. *Suspension Bridge* (1899) 159 N. Y. 362, 54 N. E. 33.

The legislature may deny the right of appeal in actions not determined when the statute takes effect. If no right of appeal has attached by the rendition of a judgment, the subject is within the control of the legislature, and it may deny such right as to future cases. *Grover* v. *Coon* (1848) 1 N. Y. 536.

*Conditional right of action.*—It is competent for the legislature to attach a condition to the maintenance of a common law action, as well as one created by statute; and when they have done so its averment and proof cannot safely be omitted. An act was sustained which prohibited an action against the city until after the expiration of forty days from the presentation of the claim to the common council. This was held a necessary averment in the complaint. *Reining* v. *Buffalo* (1886) 102 N. Y. 308, 6 N. E. 792.

*Criminal cases.*—The legislature has power to enact rules of procedure for the trial of criminal cases, and the provisions of the Code of Criminal Procedure, §§ 464 and 543, relating to the effect of a reversal of a conviction and an order granting a new trial, were sustained as a valid exercise of legislative power. *People* v. *Palmer* (1888) 109 N. Y. 413, 4 Am. St. Rep. 477, 17 N. E. 213. This case has already been cited in a note under the topic "Twice in Jeopardy."

*Foreign corporations.*—"There is nothing constitutional or fundamental in the method of procedure in an action." It is within the discretion of the legislature. An action either *in rem* or *in personam* may be authorized against a foreign corporation. *Barnett* v. *Chicago & L. H. R. Co.* (1875) 6 Thomp. & C. 358; *Hiller* v. *Burlington & M. River R. Co.* (1877) 70 N. Y. 223, sustaining a personal service of a summons in this state on one of the defendant's directors in an action on contract and without attaching property. The court say that "the legislature has power to determine how and upon whom service shall be made;" and "any service must be deemed sufficient which renders it reasonably probable that the party proceeded against will be apprised of what is going on against him, and have an opportunity to defend."

In *Hein* v. *Davidson* (1884) 96 N. Y. 175, 48 Am. Rep. 612, construing and sustaining the provisions of the Code of Civil Procedure, §§ 1421-5, providing for the substitution of the sureties to an undertaking indemnifying a sheriff against a levy made by him as de-

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fendants in an action against him because of such levy, the court say that the "right of the legislature to regulate the civil procedure for the enforcement of rights is wide enough to permit it to say when an officer acting under the requirements of that procedure may be sued and when he may not be, provided only that he is not shielded so as to deprive the citizen of adequate remedy for any trespass or wrong."

*Liquor tax law.*—The legislature had power, by the act of 1897, chap. 312, amending the liquor tax law, to authorize the state commissioner of excise to bring an action on a bond given under § 18 by the holder of a liquor tax certificate, although at the time of the breach of the condition of the bond the law did not specify who might bring an action for its enforcement. *Lyman* v. *Rochester Title Ins. Co.* (1899) 37 App. Div. 234, 56 N. Y. Supp. 1111.

*Minors.*—"It is clearly . . . within the powers of the legislature as ***parens patriæ,*** to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs." A statute authorizing a sale of the estate of infants for their maintenance and education was sustained. *Cochran* v. *Van Surlay* (1838) 20 Wend. 365, 32 Am. Dec. 570, followed in *Towle* v. *Forney* (1856) 14 N. Y. 423, which affected the title to a part of the property belonging to the same estate.

The same rule was declared as to the estates of minors in *Leggett* v. *Hunter* (1859) 19 N. Y. 445, also in *Brevoort* v. *Grace* (1873) 53 N. Y. 245, where the court say that the procedure is subject to legislative determination. See also *Re Field* (1892) 131 N. Y. 184, 30 N. E. 48; *Ebling* v. *Dreyer* (1896) 149 N. Y. 460, 44 N. E. 155.

*Place of trial.*—It has been uniformly held that the legislature has power to designate in what counties certain actions shall be tried. *Czarnowsky* v. *Rochester* (1900) 55 App. Div. 388, 66 N. Y. Supp. 931, affirmed in (1901) 165 N. Y. 649, 59 N. E. 1121, citing *Brooklyn* v. *New York* (1881) 25 Hun, 612; *Getman* v. *New York* (1892) 66 Hun, 236, 21 N. Y. Supp. 116; *Lyman* v. *Matty* (1898) 35 App. Div. 227, 54 N. Y. Supp. 765, also *People* v. *Rouse* (1891) 39 N. Y. S. R. 656, 15 N. Y. Supp. 414.

*Preferences in civil actions.*—The legislature had no power, as attempted by Laws 1904, chap. 173, amending § 793 of the Code of Civil Procedure, to require the court to designate a day certain for the trial of a preferred cause, and to try the cause on that day. The party against whom such a preferred cause is moved may be de-

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prived of an opportunity to prepare for trial, and may be compelled to go to trial without proper preparation, or else suffer a default. *Riglander* v. *Star Co.* (1904) 98 App. Div. 101, 90 N. Y. Supp. 772. See also *Martin's Bank* v. *Amazonas Co.* (1904) 98 App. Div. 146, 90 N. Y. Supp. 734.

*Security for costs.*—In *McLaughlin* v. *Kipp* (1903) 82 App. Div. 413, 81 N. Y. Supp. 896, the court sustained the provision in the Military Code authorizing security for costs in actions against militia officers for acts done in their official capacity. The court said that statutes requiring security for costs by nonresident suitors had frequently been sustained in other states and in the Federal courts. No New York case is cited on this point, but several cases are cited in which the power was affirmed irrespective of statutes, and before the enactment of legislation on the subject.

*Substituted service.*—"A citizen of a state is bound by its laws, both substantive and those regulating judicial procedure. Acquiring jurisdiction of resident defendants by constructive service of process is proceeding according to the course of the common law, and is due process of law. . . . Every sovereignty has power to regulate the procedure of its courts and prescribe the rights which plaintiffs may acquire, and the liabilities which may be imposed on resident defendants by judgments recovered in its tribunals." The provision for substituted service in § 435 of the Code of Civil Procedure is valid. *Continental Nat. Bank* v. *Thurber* (1893) 74 Hun, 632, 26 N. Y. Supp. 956, affirmed in (1894) 143 N. Y. 648, 37 N. E. 828, citing *Hunt* v. *Hunt* (1878) 72 N. Y. 217, 28 Am. Rep. 129, and *Rigney* v. *Rigney* (1891) 127 N. Y. 408, 24 Am. St. Rep. 462, 28 N. E. 405.

*Surplus in partition.*—Sections 2798 and 2799 of the Code of Civil Procedure, requiring, in certain cases, the payment into surrogate's court of the proceeds of the surplus on a sale in partition or foreclosure, were sustained in *Re Stilwell* (1893) 139 N. Y. 337, 34 N. E. 777.

## PROPERTY.

The legislature has no power to transfer property from one person to another without the owner's consent, unless under the exercise of the right of eminent domain, the power of taxation, or in proceedings for the enforcement of a judgment. In *Jackson ex dem. McCloughry* v. *Lyon* (1824) 9 Cow. 664, it was said that the legislature could not transfer property from one set of heirs to another. The same subject is considered with a like result in *Powers* v. *Ber-*

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*gen* (1852) 6 N. Y. 358. See also *People ex rel. Miller* v. *Ryder* (1891) 124 N. Y. 500, 26 N. E. 1040; *People ex rel. Griffin* v. *Ryder* (1892) 65 Hun, 175, 19 N. Y. Supp. 977.

The legislature may authorize the acquisition of the absolute title to property under the power of eminent domain without any right of reversion to the original owner on the abandonment of the purposes for which the property was originally taken. *Heyward* v. *New York* (1852) 7 N. Y. 314, and may determine whether a fee or lesser estate shall be taken. *Sweet* v. *Buffalo, N. Y. & P. R. Co.* (1879) 79 N. Y. 293.

The same principle was applied in the case of land taken by the state. *Eldridge* v. *Binghamton* (1890) 120 N. Y. 309, 24 N. E. 462, where it was said that the state could acquire property by adverse possession as well as by condemnation or purchase.

## RATIFICATION.

The legislature has often found it necessary to afford relief from mistakes made in administering public affairs by officers, state and local, who sometimes omit or vary prescribed formalities, thereby rendering their acts technically irregular and defective. Sometimes these defects are jurisdictional, and sometimes they exist only in matters of detail. The session laws show numerous legalizing statutes intended to cure these defects and validate official proceedings. These curative statutes are frequently general, intended to validate all official acts of a given class, like those relating to notaries public and inferior magistrates not involving judicial questions, but they often affect only special cases. Usually the legislature tries to ascertain the actual defects sought to be cured, but sometimes the statute is comprehensive in terms and intended to embrace all the acts of specified officers relating to a particular proceeding. A few of these legalizing statutes have received judicial attention, but the larger part of them have been accepted and accomplish the curative purpose desired without question. The validity of several of this class of statutes has been

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challenged in the courts, and the following abstract will show the general course of judicial construction. The result of the decisions seems to be that if the officers whose acts are questioned had jurisdiction, the legislature may cure defects relating only to matters of detail in administration; but if such officers had no jurisdiction, the legislature cannot retrospectively confer such jurisdiction, and ratify proceedings which would otherwise be invalid. These legalizing statutes may usually be sustained on the theory that the legislature may retrospectively dispense with a matter of detail which it might have omitted in the original statute, and which was a subject of legislative discretion not affecting jurisdiction, or, as sometimes stated, the legislature may do retrospectively what it might have done in the first instance, provided it does not thereby affect vested rights, impair contracts, take property without due process of law, nor deprive a citizen of any of the rights secured to him by the Constitution. So, while many statutes in terms validate all acts and proceedings in a given case, and might on their face be broad enough to include even jurisdictional questions, they would doubtless in construction be limited to matters of detail.

Where there is "municipal jurisdiction of the subject-matter, and the defects in the exercise of it are irregularities in the mode of procedure, it is within the legislative discretion to adopt and confirm the result of the informal act, or to send back the matter to the municipality with power to begin again and go forward in the mode prescribed by the original authority." *Tifft* v. *Buffalo* (1880) 82 N. Y. 204.

*Common council.*—The legislature may ratify the illegal action of a common council, notwithstanding the fact that a judgment has been obtained based on such illegality, and further proceedings may thereupon be had on the judgment, and relief may be obtained against it. *Wetmore* v. *Law* (1860) 34 Barb. 515.

*Corporations.*—The legislature may validate and correct proceed-

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ings in the organization of a corporation. *Syracuse City Bank* v. *Davis* (1853) 16 Barb. 188.

*Elections.*—The legislature may ratify an irregular election of a public officer. *People* v. *Flanagan* (1876) 66 N. Y. 237.

*Repealed statute.*—The legislature may ratify the acts of public officers performed under a statute which had inadvertently been repealed, but which was afterwards re-enacted. *McKee Land & Improv. Co.* v. *Williams* (1901) 63 App. Div. 553, 71 N. Y. Supp. 1141.

*State officers.*—Where property has been sold or services rendered to state officers for state purposes with an expectation that compensation would be made therefor, the legislature may ratify the acts of such officers though previously unauthorized. *O'Hara* v. *State* (1889) 112 N. Y. 146, 2 L. R. A. 603, 8 Am. St. Rep. 726, 19 N. E. 659.

*Towns.*—Commissioners of highways by direction of the voters of a town brought an action relating to town affairs in which they were unsuccessful, and were obliged to pay costs. The town refused to reimburse them for these costs. They brought an action against the town to recover the amount and failed. The legislature then passed an act authorizing the question of the payment of the amount to be submitted to and determined by the electors of the town, and at such an election the claim was rejected. Afterwards the legislature passed an act providing for the audit and payment of the claim, and directing that a tax on the town be raised for this purpose. The legislature had power to validate a private claim against a town and require its payment by taxation. *Guilford* v. *Chenango County* (1855) 13 N. Y. 143; followed in *Wrought Iron Bridge Co.* v. *Attica* (1890) 119 N. Y. 204, 23 N. E. 542, sustaining a statute legalizing the acts of town authorities in the purchase and erection of a bridge.

The legislature may validate irregular acts of a town in relation to a subscription to the stock of a railroad company, and the statute for that purpose may be given a retrospective effect. *People ex rel. Albany & S. R. Co.* v. *Mitchell* (1866) 35 N. Y. 551.

*Unconstitutional acts.*—Although an act is unconstitutional, the legislature may, by a subsequent act, direct the expenses incurred by such legislation to be paid. *People ex rel. Kingsland* v. *Bradley* (1872) 64 Barb. 228.

The same principle was applied in *Knapp* v. *Newtown* (1874) 1 Hun, 268, where it was held that the legislature may require a town to pay bonds issued for a local improvement, though the statute un-

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der which they were issued is unconstitutional. See also *Duanesburgh* v. *Jenkins* (1874) 57 N. Y. 177, where it was held that the legislature might validate irregular acts in relation to railroad aid bonds. Also *Rogers* v. *Stephens* (1881) 86 N. Y. 623.

But where the required percentage of a subscription by an individual to the stock of a private corporation had not been paid, and the subscription was therefore invalid, the legislature could not, by an attempted validation of the subscription, make a binding contract between parties when none existed before. It cannot take the private property of one individual without his consent and give it to another. *New York & O. Midland R. Co.* v. *Van Horn* (1874) 57 N. Y. 473. The legislative validation of a contract was sustained in *Davidge* v. *Binghamton* (1901) 62 App. Div. 525, 71 N. Y. Supp. 282.

So, where town railroad commissioners issued bonds without obtaining the town's consent, such bonds could not be validated by the legislature. "As the legislature had no power to compel the town to issue its bonds in aid of the railroad without its consent, it could not, by subsequent act, dispense with the condition in the original act requiring such consent as a prerequisite to their issue." *Hardenbergh* v. *Van Keuren* (1878) 16 Hun, 17. Also *Horton* v. *Thompson* (1878) 71 N. Y. 513, where the act of 1871, chap. 809, ratifying certain informalities in railroad aid bonds, was held to be unconstitutional. This act was sustained in *Thompson* v. *Perrine* (1880) 103 U. S. 806, 26 L. ed. 612, the court declining to follow the state court.

## REMEDY.

The legislature may change the prescribed mode by which rights are to be determined, and such change may be applied to existing conditions. *Re Smith* (1833) 10 Wend. 449.

"Where the legislature have the power to provide redress for either a public or private wrong, the remedy or mode of redress is wholly a subject of legislative discretion." *People ex rel. New York Inebriate Asylum* v. *Osborn* (1870) 57 Barb. 663.

"Legal remedies are, in the fullest sense, under rightful control of the legislatures of the several states, notwithstanding the provision in the Federal Constitution securing the inviolability of contracts; and it is not a valid objection to legislation on that subject that the substituted remedy is less beneficial to the creditors than the one which obtained at the time the debt was contracted." The court sus-

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tained the act of 1842, chap. 157, which provided for additional exemptions from execution; the law affected the remedy only. *Morse* v. *Goold* (1854) 11 N. Y. 281, 62 Am. Dec. 103.

Applied in *Johnson* v. *Ackerson* (1870) 40 How. Pr. 222, affirmed in (1871) 3 Daly, 430, sustaining an act requiring an undertaking on the transfer of a cause from a district court to the court of common pleas of New York; also in *Cook* v. *Gregg* (1871) 46 N. Y. 439, sustaining the acts relating to animals running at large, 1862, chap. 459, 1867, chap. 814. *People ex rel. Witherbee* v. *Essex County* (1877) 70 N. Y. 228; *Cole* v. *State* (1886) 102 N. Y. 48, 6 N. E. 277, where it is said that "the legislative power is sufficient, even as between individuals, to afford new remedies and to create liabilities not before existing, where they are based upon general principles of justice." *People ex rel. Miller* v. *Ryder* (1891) 124 N. Y. 500, 26 N. E. 1040, where it was held that laws affecting remedies which are intended to have retroactive effect must be strictly construed. See also *O'Reilly* v. *Utah, N. & C. Stage Co.* (1895) 87 Hun, 406, 34 N. Y. Supp. 358, where the court considered §§ 1903 and 1904 of the Code of Civil Procedure relating to actions to recover damages for injuries causing death, and also the new constitutional provision on this subject, article 1, § 18, and held that such provision did not have a retroactive effect. *Persons* v. *Gardner* (1899) 42 App. Div. 490, 56 N. Y. Supp. 822, 59 N. Y. Supp. 463, giving a retroactive effect to the banking law amendment of 1897, chap. 441, in relation to actions by receivers.

*Appropriations.*—The act of 1866, chap. 876, § 10, which prohibited the recovery of a judgment against the city of New York except upon proof that there was money remaining in the city treasury which had been appropriated for the particular claim, did not affect the debt, but only the remedy. *Tribune Association* v. *New York* (1867) 48 Barb. 240.

*Contract not affected.*—Statutes of limitation which prolong or shorten the period within which an existing remedy may be enforced are constitutional. Applied to a statute extending the time for appeal. *Burch* v. *Newbury* (1849) 4 How. Pr. 145.

"A remedy does not attach to a contract or a right, but may be repealed or modified. It simply changes the mode in which a contract or a right may be enforced." *People ex rel. Waldron* v. *Carpenter* (1866) 46 Barb. 619. A remedy may be suspended if the ultimate liability on the contract is not thereby impaired. *Wolfkiel* v. *Mason* (1863) 16 Abb. Pr. 221.

*Insurance law.*—Section 56 of the insurance law, which restricts

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to the attorney general the right to take proceedings against an insurance company, affects only the remedy, and does not impair the contract of a policy holder. *Swan* v. *Mutual Reserve Fund Life Asso.* (1898) 155 N. Y. 9, 49 N. E. 258.

*Judgments.*—"A judgment creditor of an owner [of land] has no estate or proprietary interest in the land. He stands wholly upon the law, which gives him a remedy for the collection of his debt by a sale of the land under execution, in case sufficient personal property of the debtor should not be found. This remedy is not secured by contract, but is purely statutory. . . . Acts have been passed shortening and lengthening the duration of the liens of existing judgments, and even providing for their extinguishment without any proceeding to which the judgment creditor was a party. . . . It is clearly within the power of the legislature to abolish the lien of all judgments at any time before rights have become vested or estates acquired under them, and, placing real estate on the same footing as personal property, to confine the remedies of the creditor to the property held by the debtor at the time of issuing the execution." *Watson* v. *New York C. R. Co.* (1872) 47 N. Y. 157.

*Mechanic's lien.*—The legislature may regulate a remedy according to its pleasure. Construing the New York city mechanic's lien law of 1851, chap. 513, the court say: "It was competent [for the legislature] to provide a new remedy for the builder or mechanic who was already under a contract for the work, and to limit it to cases where the work was yet to be performed." *Hauptman* v. *Catlin* (1859) 20 N. Y. 247; *Miller* v. *Moore* (1854) 1 E. D. Smith, 739.

*Penalty.*—Where a penalty has been imposed by law the legislature has power to repeal it entirely, or to limit the cases in which it is recoverable, even though an action has been brought for its recovery. *Fire Department* v. *Ogden* (1879) 59 How. Pr. 21.

*Pending action.*—"The legislature are in the habit of changing the form of proceeding to try rights in various ways." The court sustained an act which altered the mode of proceeding in point of form in a suit pending when the act was passed. It did not affect a vested right, but only altered the form of the remedy. *People ex rel. Israel* v. *Tibbets* (1825) 4 Cow. 384.

*Remedy a matter of right.*—It is not competent for the legislature to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief. "If he is denied all remedy for the wrong inflicted upon him, the deprivation of his property becomes just as effectual as though it had been taken from him by direct legislative enactment." A stat-

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ute which destroys his muniments of title has this result and is unconstitutional. *Gilman* v. *Tucker* (1891) 128 N. Y. 190, 13 L. R. A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040. See *McMullen* v. *Middletown* (1905) 46 Misc. 360, 92 N. Y. Supp. 410.

The same subject was considered in *Re St. Lawrence & A. R. Co.* (1892) 133 N. Y. 270, 31 N. E. 218. So in *People ex rel. Reynolds* v. *Buffalo* (1893) 140 N. Y. 300, 37 Am. St. Rep. 563, 35 N. E. 485, the court say that "the obligation of a contract is impaired, in the constitutional sense, by any law which prevents its enforcement, or which materially abridges the remedy for enforcing it which existed when it was contracted, and does not supply an alternative remedy equally adequate and efficacious. . . . No property right acquired under a state statute can be devested by repeal."

*Retrospective acts.*—In *Syracuse City Bank* v. *Davis* (1853) 16 Barb. 188, the court, referring to the general rule that rights absolutely vested cannot be affected or subverted by the legislature, quotes from Kent's Com. the statement that "this doctrine is not understood to apply to remedial statutes which may be of a retrospective character, provided they do not impair contracts or disturb absolutely vested rights; and only go to confirm rights already existing; and are in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations," and applied the principle to a statute legalizing the incorporation of a bank. "Acts are valid which give remedies where none existed before, through defects that would have been fatal had the legislature not interfered and given a perfect remedy by curing intervening irregularities."

*Revival of action.*—The legislature may revive proceedings which have abated by the death of a party. *Re Grove* (1873) 64 Barb. 526.

*Service of process.*—Service of process is within the discretion of the legislature. *Pope* v. *Terre Haute Car & Mfg. Co.* (1881) 87 N. Y. 137.

*Torts.*—"There is no inhibition in the Constitution against depriving a person of a cause of action originating in a naked tort. Though the legislature may not pass a law impairing the obligation of contracts, it unquestionably has power to pass a statute which shall operate retrospectively, and sweep away any right of action that arose from a tort." *Guillotel* v. *New York* (1878) 55 How. Pr. 114.

## SEPARABLE PROVISIONS.

"Where part of a law is in conflict with the Constitution, and that

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part is entirely separable from the residue, so that other portions of the law can be enforced without reference to it, there the unconstitutional part only will be condemned. But where the legislative provision is indivisible, . . . the provision is wholly void." *Wynehamer* v. *People* (1856) 13 N. Y. 441; *Duryee* v. *New York* (1884) 96 N. Y. 477 (New York ordinance).

This rule has been applied in numerous cases, but it will not be profitable to give them in detail. In the following cases statutes were held to contain separable provisions, and parts of them were sustained: *Re Ryers* (1878) 72 N. Y. 1, 28 Am. Rep. 88 (drainage law of 1869); *People ex rel. Angerstein* v. *Kenney* (1884) 96 N. Y. 294 (the New York charter of 1873, as amended by the act of 1878, chap. 400, even if the inconsistent provisions are in the same sections); *People ex rel. New York Electric Lines Co.* v. *Squire* (1888) 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820 (electrical subways act of 1885); *Lawton* v. *Steele* (1890) 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 813, 23 N. E. 878 (fish and game act of 1883, chap. 317); *Re Malone Waterworks Co.* (1890) 38 N. Y. S. R. 95, 15 N. Y. Supp. 649 (Malone waterworks act of 1857, chap. 156); *Re New York & L. I. Bridge Co.* v. *Smith* (1896) 148 N. Y. 540, 42 N. E. 1088 (New York and Long Island bridge company act of 1892, chap. 411); *People ex rel. Rochester* v. *Briggs* (1872) 50 N. Y. 553 (Rochester charter amendment of 1872, chap. 771); *Re Van Antwerp* (1874) 56 N. Y. 261 (Brooklyn assessment act of 1872, chap. 812); *Re Sackett, D. & DeG. Streets* (1878) 74 N. Y. 95 (Brooklyn act of 1868, chap. 631, to widen certain streets); *Re Middletown* (1880) 82 N. Y. 196 (Middletown water act of 1866, chap. 347); *Re De Vaucene* (1866) 31 How. Pr. 289 (act of 1866 to regulate the sale of intoxicating liquors in the metropolitan police district); *Parfitt* v. *Ferguson* (1899) 159 N. Y. 111, 53 N. E. 707 (the New Utrecht improvement act of 1891, chap. 59); *Re Oneida Street* (1899) 37 App. Div. 266, 55 N. Y. Supp. 959 (Syracuse charter of 1885, chap. 26, § 167); *Bohmer* v. *Haffen* (1900) 161 N. Y. 390, 55 N. E. 1047 (railway in West Farms and Morrisania, 1863, chap. 361); *People ex rel. Lefkowitz* v. *Manhattan Hospital* (1900) 33 Misc. 414, 68 N. Y. Supp. 647 (insanity law of 1896, chap. 545).

"A legislative act may be entirely valid as to some classes of cases and clearly void as to others. A general law for the punishment of offenses, which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective, but such invalidity would not affect the operation of the law in regard to

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the cases which were within the legislative control." *Jachne* v. *New York* (1888) 128 U. S. 189, 32 L. ed. 398, 9 Sup. Ct. Rep. 70.

In an article on the veto power, in the second volume, I have given an account of a plan proposed in the Convention of 1867 to confer on the governor the power to veto independent portions of a bill, and have expressed my views in favor of a constitutional provision giving a governor this power as to thirty-day bills, but not as to bills which might be amended during the session of the legislature. The foregoing rule, under which the courts sustain parts and reject other parts of statutes where the provisions are separable, is an application of the principle which the Convention of 1867 sought to extend to the governor. An adverse decision on a constitutional question by the courts is, in effect, a judicial veto, and it is not easy to discover any good reason why there should not be an executive veto allowed in the same cases. The governor has power to reject a bill as unconstitutional, or because some part of it is unconstitutional; the courts possess the like power. The plan suggested would give the governor an opportunity to prune the bill before it becomes a law, and thus in many cases avoid the necessity of appealing to the courts to determine its constitutionality.

### SLAVES.

In the article on slavery in New York, in the first volume, I have cited the act of 1799 providing for the gradual abolition of slavery, and also the act of 1817, which, among other things, required the person entitled to the service of a child of a slave to make an affidavit as to his age, in default of which he was not entitled to the service of such child as authorized by the statute, but such child was entitled to his freedom after arriving at



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the age of eighteen years. In *Griffin* v. *Potter* (1835) 14 Wend. 209, the validity of this legislation was challenged, but sustained. The court say that "when our government was first instituted, one portion of the population was in bondage to the other. Slavery existed by virtue of the laws which were in force previous to our political existence as a state. It could be justified only by necessity. It was at war with our principles; and, as the legislature was of opinion that there was no necessity for its continuance, a law was passed to operate upon those thereafter to be born." There was no inherent right of the master to the services of a slave. The relations between the two were the result of an arbitrary arrangement of society which was subject to legislative control, and the legislature therefore had power to impose conditions on the continuance of the services, and to secure emancipation on the master's failure to comply with the conditions. The court further say "it is a fundamental principle of our government that all men are born free and equal; that is, entitled by nature to equal freedom and equal rights. The regulations of civil society have qualified the rights of different portions of society. The best interests of the whole sometimes require that some shall be put under the guardianship and control of others. It is therefore by virtue of the arbitrary institutions of society, and by those alone, that one man has an interest in the services of another; property, strictly speaking, in the person of a human being, cannot exist." The right of one man to the services of another exists "by authority of law,—by force of the positive institutions of civil society." The power of the legislature over social relations is sufficiently ample to justify any act regulating the status of masters and slaves.

The provision of the same statute requiring the master to provide slave children with elementary education was

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also sustained as a legitimate exercise of legislative power. By the abolition of slavery, which was fixed by the statute to take place July 4, 1827, slave children would become members of society with the same status as white children, and the legislature had power to require masters of such slave children to prepare them in some degree for their new relation to society.

The subject of slavery was also considered in *Lemmon v. People* (1860) 20 N. Y. 562, where the court, construing the provision of the Revised Statutes (1 Rev. Stat. 657) making free every slave brought into this state, except on certain conditions, say that "every sovereign state has a right to determine by its laws the condition of all persons who may at any time be within its jurisdiction; to exclude therefrom those whose introduction would contravene its policy, or to declare the conditions upon which they may be received, and what subordination or restraint may lawfully be allowed by one class or description of persons over another. Each state has, moreover, the right to enact such rules as it may see fit respecting the title to property, and to declare what subjects shall, within the state, possess the attributes of property, and what shall be incapable of a proprietary right."

## STATE MARITIME JURISDICTION.

The provision of the Revised Statutes (1 Rev. Stat. 62,65) which defines the boundaries of the state, and declares that its sovereignty and jurisdiction shall extend to all places within the boundaries so declared, was intended to define simply the actual territorial bounds of the state, and was not intended and could not operate as a restriction upon subsequent legislation. "It is not claimed that the sovereignty and jurisdiction of this state extend to its vessels when at sea, as they do to places within its boundaries for all purposes, such as service of process, the execution of judgments and the like, but only that when acts done at sea become the subject of adjudica-

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tion here, the rights and liabilities of parties may in some cases be determined with reference to our statutes." *McDonald* v. *Mallory* (1879) 77 N. Y. 546, 33 Am. Rep. 664.

### SUNDAY.

The legislature has power to regulate the observance of Sunday. *People* v. *Hoym* (1860) 20 How. Pr. 76; *Lindenmuller* v. *People* (1861) 33 Barb. 548; *Neuendorff* v. *Duryea* (1877) 69 N. Y. 557.

This subject is also considered in notes to § 3 of article 1 on "Religious Toleration."

### TAXATION.

We come now to one of the foundation principles of organized society; namely, the right to compel each citizen to contribute to the support of the government. Many topics considered under legislative power relate only to details of administration, but taxation is fundamental. It is scarcely conceivable that any organized government could long exist without taxation in some form, either a direct levy of taxes on property, or indirect taxation by licenses, the sale of privileges and franchises, a tax on imports, manufactures, business, or incomes, or some other method of producing revenue to defray the expenses of government. It is an attribute of sovereignty, and the power is substantially coextensive with the necessity. It is one of the powers inherited by the state from another form of government; and largely because of the difficulty of prescribing definite limits to the power, it has been omitted from the Constitution except as to some of its minor features. The Constitution is substantially silent on this subject, and, except as restrained by the application of other principles of government, the power of the legislature is unlimited. Frequent attempts have been made to include taxation in the Constitution. The Convention of 1867 proposed a section

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requiring uniformity of taxation, which was separately submitted to the people by the legislature, and rejected by a large adverse vote. Several propositions relating to taxation were submitted to the Convention of 1894, but no provision on this subject was adopted, except a further modification of the section relating to municipal indebtedness.

The absence of constitutional restraints has left the legislature free to act according to its own discretion, except as limited by provisions relating to the fundamental rights of citizens, but subject to judicial review within somewhat narrow limits. The decisions cited in this note show the scope and variety of tax legislation, and point out the principles of construction applicable to this branch of legislative power. It will not be profitable to cite all the cases bearing incidentally on taxation; many of them refer to tax questions for the purpose of illustrating the discussion of other subjects, and also by way of repetition of well-established principles without announcing any new doctrine. Many decisions involve only procedure incident to taxation, or the interpretation and application of statutory provisions, or causes of action and rights growing out of tax proceedings.

*In general.*—"The taxing power is one of the inherent powers of government and belongs appropriately to the legislative department. . . . Within the limits of legitimate taxation, the legislative discretion is utterly uncontrollable, as it is indefinable in its objects, purposes, uses, and extent. . . . So far as the tax is general or imposed upon all, or all of a class of persons within prescribed limits or districts upon some common principle or rule, and the tax is for some public purpose, there is no limit to the power of the legislature to authorize taxation, and no remedy or mode of correction for unjust laws involving such taxation but through the ballot box." *Clarke* v. *Rochester* (1857) 24 Barb. 446, (1866) 34 N. Y. 355; *Genet* v. *Brooklyn* (1885) 99 N. Y. 301, 1 N. E. 777; *State* v. *Kings County* (1891) 125 N. Y. 312, 26 N. E. 272.

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"Taxation is indisputably a legislative power. The Constitution of this state will be searched in vain for any clause which contains any restriction or limitation on the taxing power of the legislature." The legislature can, "under the power to levy taxes, apportion the public burthens among all the taxpaying citizens of the state, or among those of a particular section or political division." A claim against a town, not recoverable by action, may be validated by the legislature, and a tax may be imposed on the town for its payment. *Guilford* v. *Chenango County* (1855) 13 N. Y. 143.

The taxing power was again asserted in *Brewster* v. *Syracuse* (1859) 19 N. Y. 116, sustaining an act authorizing the city of Syracuse to levy a special tax for the relief of a sewer contractor in addition to the contract price.

In *People ex rel. Post* v. *Brooklyn* (1849) 6 Barb. 209, the court, after remarking that it is by no means easy to trace the dividing line between the power to take private property by eminent domain and to take it by taxation, that the powers are somewhat blended, that each is an exercise of the sovereign power over individual property, and that both are requisitions for the public use, say that "taxes are defined to be burdens or charges imposed upon persons or property to raise money for public purposes;" that "the right to impose a tax is inherent in every government, as essential to its existence. It operates on all the persons and property belonging to the state. It is not conferred upon the legislature by any specific clause of the Constitution. . . . The legislature has not the constitutional authority to exact from a single citizen, or a single town or county or city, the means of defraying the entire expenses of the state. . . . Legitimate taxation is limited to the imposing of burdens or charges for a public purpose, equally upon the persons or property within a district known and recognized by law as possessing a local sovereignty for certain purposes, as a state, county, city, town, village, etc."

*Action to collect tax.*—The legislature has power to provide for the collection of an unpaid tax by action. *New York* v. *Colgate* (1854) 12 N. Y. 140, also *Litchfield* v. *McComber* (1864) 42 Barb. 288, where it is said that "a tax assessed by authority of law for a general or local purpose creates a duty and an obligation by the taxpayer to make the payment. This obligation results from the nature of the relation between the government and the constituent. The obligations are mutual. The former owes security and protection, while the latter owes services and contributions of money to the extent of his ability."

*Apportionment.*—"In a representative democracy, the right of tax-

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ing the citizen is an inseparable incident of popular sovereignty; and this power is committed to the government to be exercised, and not to be alienated. . . . In exercising the power of apportionment, it has been usual with us, as with other governments, to relieve certain classes of persons from the pressure of burdens which, for special reasons, would be as to them peculiarly onerous; and this has been done as an incident in the adjustment of general statutes, and on such terms as seemed good to the lawmaking power for the time being; but it has never been our policy to enter into irrevocable contracts securing to individuals or classes, as against the state, special privileges and immunities not granted to other citizens, and opposed to the theory of the Constitution." *People ex rel. Cunningham* v. *Roper* (1866) 35 N. Y. 629, sustaining an act abrogating certain exemptions from taxation based on militia service. *Astor* v. *New York* (1874) 5 Jones & S. 539.

Taxation takes property for public use; "and the taxpayer receives, or is supposed to receive, his just compensation in the protection which government affords to his life, liberty, and property, and in the increase of the value of his possessions by the use to which the government applies the money raised by the tax. . . . Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burthen. . . . Taxation operates upon a community, or upon a class of persons in a community, and by some rule of apportionment. . . . It must be conceded that the power of taxation and of apportioning taxation, or of assigning to each individual his share of the burthen, is vested exclusively in the legislature unless this power is limited or restrained by some constitutional provision. The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment; and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation." The Constitution contains no such limitation or restraint. It has not been "ordained that taxation shall be general so as to embrace all persons or all taxable persons within the state, or within any district, or territorial division of the state; nor that it shall or shall not be numerically equal, as in the case of a capitation tax; nor that it must be in the ratio of the value of each man's land, or all his goods, or of both combined; nor that a tax 'must be coextensive with the district or upon all the property in a district which has the character of and is known to the law as a local sovereignty.'" Nor has it been "ordained or forbidden that a tax shall be apportioned according to the benefit which

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each taxpayer is supposed to receive from the object on which the tax is expended. . . . Taxation is sometimes regulated by one of these principles, and sometimes by another; and very often it has been apportioned without reference to locality or to the taxpayer's ability to contribute, or to any proportion between the burthen and the benefit." *People ex rel. Griffin* v. *Brooklyn* (1851) 4 N. Y. 419, 55 Am. Dec. 266, followed in *People ex rel. Crowell* v. *Lawrence* (1869) 41 N. Y. 137.

It is a general proposition "that the taxpayer is supposed to receive just compensation in the benefits conferred by government and in the proper application of the tax, and that, in the exercise of the taxing power, the legislature ought, as nearly as practicable, to apportion the tax according to the benefit which each taxpayer is supposed to receive from the object upon which the tax is expended. But the power of apportionment is included in the power to impose taxes, and is vested in the legislature; and in the absence of any constitutional restraint the exercise by it of such power of apportionment cannot be reviewed by the courts. . . . The people have been content to leave to the wisdom and justice of the legislature, unrestrained by specific regulations, the subject of determining how the public burdens shall be apportioned among them. . . . To undertake to review the action of the legislature in this respect, and to enforce by judicial power absolute equality of taxation, or to declare a law unconstitutional on the ground that a locality is taxed for what might seem to the court more than its just proportion of an expenditure for a public purpose would be a usurpation of the province of the legislature." *Gordon* v. *Cornes* (1872) 47 N. Y. 608 (Brockport Normal School); *Wilson* v. *New York* (1855) 4 E. D. Smith, 675.

"It is not competent for the legislature, in the exercise of the power of taxation, to charge the property of one citizen by a course of proceeding unknown to the common law, and differing from that by which the property of all other citizens is taxed or charged." *Granger* v. *Buffalo* (1879) 6 Abb. N. C. 238.

The legislature has power to exempt a corporation from taxation above a specified valuation. *People ex rel. Troy Union R. Co.* v. *Carter* (1889) 52 Hun, 458, 5 N. Y. Supp. 507, affirmed in (1889) 117 N. Y. 625, 22 N. E. 1128; *Hewitt* v. *New York & O. M. R. Co.* (1875) 12 Blatchf. 452, Fed. Cas. No. 6,443.

*Discrimination.*—A street, about half of which was occupied by railroads, was paved under a statute which provided that, in estimating the benefit from paving upon such a street, a company owning a

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railroad should be estimated to be benefited in such proportion as its tracks and usage of said street might bear to the whole width of the street, and be assessed proportionately. Replying to the argument that the provision arbitrarily discriminates against a particular class of property, and fixes an arbitrary measure of its assessment without regard to the actual benefit received, the court reaffirm "the complete and well-nigh absolute authority of the legislature over the subject of taxation," and say that corporations are creatures of the legislature, and are subject to its control, and that it was competent for the legislature to lay upon them burdens in addition to those prescribed by their charters. *New York, L. E. & W. R. Co.* v. *Dunkirk* (1892) 65 Hun, 494, 20 N. Y. Supp. 596.

The subject of discrimination is considered in *Re Pell* (1902) 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789, cited below under the head of "Transfer Tax," and a provision of the amended transfer tax law (1899) was condemned because it discriminated in favor of the owners of certain estates.

*Double taxation.*—"In the consideration of the effect and meaning of laws imposing taxes, it would undoubtedly be the duty of the court to so construe them, if possible, as to avoid unequal and double taxation; but in determining the question of legislative power we are precluded from entertaining such considerations, and must be governed by the constitutional authority conferred upon the legislative body. In performing the duty of levying taxes for the support of government, state legislatures may, in the exercise of their undoubted power, impose double taxes or lay burdens beyond the financial capacity of the classes taxed, and however impolitic or unwise such a course would be, the courts have no right to interfere with the exercise of the legislative discretion. . . . Such questions properly belong to the legislative branch of the government, whose exclusive duty it is to apportion and impose the taxes required for the use of the government." *People* v. *Home Ins. Co.* (1883) 92 N. Y. 328, affirmed in (1889) 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *People* v. *Delaware & H. Canal Co.* (1889) 54 Hun, 598, 7 N. Y. Supp. 890, affirmed in (1890) 121 N. Y. 666, 24 N. E. 1093, in which the court considered a question relating to unequal taxation.

While the legislature may constitutionally impose double taxation, its purpose to do so can never be inferred, but must plainly appear. The bank is, in some sense, a trustee of the depositors, and takes their money and invests it and pays them the net interest which it earns; and it cannot be supposed that there is any system of laws under which taxation can, at the same time, be imposed upon a

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trustee and the beneficiary in respect of the same property. *People ex rel. Savings Bank* v. *Coleman* (1892) 135 N. Y. 231, 31 N. E. 1022.

*Drafted men.*—"The power to impose taxes, general or local, which rests with the legislature, is without much express restriction in the Constitution, and yet even this power cannot be said to be absolute. On general principles it has at least one limitation, and that is that the money to be raised must be required for some purpose that in some sense, at least, can be said to be public. The legislature cannot authorize taxation for the purpose of making gifts, or paying gratuities to private individuals." Drafted men included in the act of 1892, chap. 664, providing for their reimbursement by counties, cities, and towns, had no claim, legal or equitable, against the municipality where the money was to be raised by taxation, and even a majority of the taxpayers could not authorize such taxation and thereby bind the minority. *Bush* v. *Orange County* (1899) 159 N. Y. 212, 45 L. R. A. 556, 70 Am. St. Rep. 538, 53 N. E. 1121.

*Foreign corporations.*—Foreign corporations may be taxed in this state. *International Life Assur. Soc.* v. *Tax Comrs.* (1858) 28 Barb. 318; *People* v. *Equitable Trust Co.* (1884) 96 N. Y. 387; *People ex rel. Savings Bank* v. *Coleman* (1892) 135 N. Y. 231, 31 N. E. 1022; *People ex rel. Pennsylvania R. Co.* v. *Wemple* (1893) 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720; *People ex rel. Parke, D. & Co.* v. *Roberts* (1895) 91 Hun, 158, 36 N. Y. Supp. 368, affirmed in (1896) 149 N. Y. 608, 44 N. E. 1127; *People ex rel. Klipstein & Co.* v. *Roberts* (1899) 36 App. Div. 597, 55 N. Y. Supp. 950, affirmed in (1901) 167 N. Y. 617, 60 N. E. 1117.

"The state power of taxation extends in general to all property, real or personal, having an actual situs within the state, irrespective of the residence of the owner. The state may not only tax property within its limits, but the business and occupation of its citizens and the franchises of domestic corporations; and when it permits foreign corporations to carry on business in the state, it may ordinarily subject the privilege to such taxation as it may deem expedient." *People ex rel. Pennsylvania R. Co.* v. *Wemple* (1893) 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720.

*Franchise tax.*—"The state legislature had an undoubted right, by virtue of its jurisdiction over corporations organized under its laws, to levy such tax upon their business and privileges, aside from all property taxation, as, in its discretion, it might deem just and proper in order to provide revenues for the state." *People* v. *Home Ins. Co.* (1883) 92 N. Y. 328, affirmed in (1889) 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

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"Domestic corporations engaged in both state and interstate commerce may lawfully be subjected by the state to a franchise tax, measured by its whole capital or business, or in any other way, in the discretion of the legislature, without taking notice of the part of its business arising from interstate commerce, provided no hostile discrimination is made against such part. . . . Corporate franchises are only taxable within the jurisdiction which creates them, and where alone they can be said to have a situs." *People ex rel. Pennsylvania R. Co.* v. *Wemple* (1893) 138 N. Y. 1, 19 L. R. A. 604, 33 N. E. 720.

In *People ex rel. Pennsylvania R. Co.* v. *Knight* (1902) 171 N. Y. 354, 98 Am. St. Rep. 610, 64 N. E. 152, affirmed in (1903) 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202, a foreign corporation was held liable to a franchise tax on a distinct part of its business carried on in this state.

The special franchise tax act of 1899, chap. 712, was sustained in *Buffalo Gas Co.* v. *Volz* (1900) 31 Misc. 160, 64 N. Y. Supp. 534, and also in *People ex rel. Metropolitan Street R. Co.* v. *State Tax Comrs.* (1903) 174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69, affirmed (1905) 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705. In the latter case the court of appeals say that "the general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the state;" but a corporation has no authority to do anything in the public highways without special authority from the state or some municipal officer or body acting under its authority; such a privilege is known as a special franchise, or the right to do something in the public highway which, except for the grant, would be a trespass. The act of 1899 "declares in substance that the right, authority, or permission to construct, maintain, or operate some structure intended for public use, 'in, under, above, on, or through streets, highways, or public places,' such as railroads, gas pipes, water mains, poles and wires for electric, telephone, and telegraph lines, and the like, is a special franchise;" and it is made to include the tangible property of the corporation within the limits of a street or other public place. Special franchises were, for the first time, made subject to taxation. The legislature, possessing the entire taxing power, had authority to provide for the taxation of special franchises and impose administrative functions relating thereto on state officers.

*Imports.*—A state cannot tax imports before "they have passed into the mass of general property, by being sold by the importer either for consumption or resale, or by being divided by him into smaller quantities by the breaking up of the casks or packages in

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which they were imported, so as to destroy the character of import which subjected them to duties under the laws of the United States;" such "a power in a state is incompatible with the power of Congress to regulate commerce, for it could be used to destroy it by subjecting sales of imported articles to so high a tax as absolutely to prevent them." A brokerage tax on such imports is invalid. *People* v. *Moring* (1867) 3 Keyes, 374.

*Indian lands.*—The legislature cannot by taxation deprive the Indians of their right to occupy the lands set apart to them in this state. *Fellows* v. *Denniston* (1861) 23 N. Y. 420.

*Indirect taxation.*—"All exactions imposed upon citizens by public authority are, in a general sense, taxes, whether imposed for regulation or revenue;" but the liquor tax law of 1896 is not a tax law in the ordinary sense. It is a modified continuation of the excise system, which, in some form, has prevailed during the whole history of the state, and was inherited from the colonial period. It seeks to raise revenue by license fees rather than by the imposition of a direct tax on property. "It is probably competent for the legislature to tax occupations or business as a source of revenue, and it could tax the liquor traffic for this purpose. The selection of the subjects of taxation rests with the legislature, and the imposition of a license fee for revenue on a business or occupation is an exercise of the power of taxation. But an exaction imposed as a condition of the right to carry on a business dangerous to public morals, or which may involve public burdens, by way of discouragement or regulation, is not in any proper sense a tax. It does not proceed upon the principle upon which taxes are levied, and upon which taxation is justified, *viz.*, the protection afforded by the government to the taxpayer." *People ex rel. Einsfeld* v. *Murray* (1896) 149 N. Y. 367, 32 L. R. A. 344, 44 N. E. 146.

*Interstate commerce.*—"The general power of a state to tax business pursuits and callings carried on within the state does not, as is held, extend to the taxation of such pursuits where the business is that of interstate commerce." *People ex rel. Pennsylvania R. Co.* v. *Wemple* (1893) 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720.

*License.*—Statutes requiring a license for places of amusement are a legitimate exercise of the taxing power. *Wallack* v. *New York* (1875) 3 Hun, 84, (1876) 67 N. Y. 23.

*Limited district.*—By the original plan the Chenango canal was to terminate at Whitesborough; but afterwards (1834) the legislature authorized a change of the terminus to Utica, provided a bond be given by individuals to indemnify the state against the additional

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expense to be caused by such change. The bond was accordingly given, and afterwards the legislature imposed on the city of Utica the payment by tax of the amount so secured. Notwithstanding the bond, the legislature had power to impose the tax on the district supposed to be benefited by the canal, even if the persons giving the bond were thereby relieved from its obligation. The legislature might determine the district benefited by the improvement, and impose a tax on it for that purpose. *Thomas* v. *Leland* (1840) 24 Wend. 65. This case is also an authority, although not suggested in the opinion, on the power of the legislature to impose on a limited district a specified portion of the expense of constructing a state work. The district selected for this purpose was within the discretion of the legislature.

A limited district statute was sustained in *Sun Mut. Ins. Co.* v. *New York* (1853) 8 N. Y. 241.

Whether a district is benefited or not, and whether the assessment should be for this or any other reason made upon the district, the legislature is the exclusive judge. The Constitution has imposed no restriction upon its power in this respect. It is within the power of the legislature to impose a tax upon a locality for any purpose deemed proper. *Litchfield* v. *Vernon* (1869) 41 N. Y. 123. See *Genet* v. *Brooklyn* (1885) 99 N. Y. 296, 1 N. E. 777.

"The making and improvement of public highways, and the imposition and collection of taxes, are among the ordinary subjects of legislation. The towns of the state possess such powers as the legislature confers upon them. They are a part of the machinery of the state government, and perform important municipal functions which are regulated and controlled by the legislature." While it may be just that "local expenditures and improvements should, in general, be left to the discretion of those immediately interested," the legislature has power to require a town to construct a highway and provide for the expense thereof by imposing a direct tax without the consent of the town. *People ex rel. McLean* v. *Flagg* (1871) 46 N. Y. 401. The same principle was applied in *Re Van Antwerp* (1874) 56 N. Y. 261.

The legislature may determine absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned, and its action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. *Spencer* v. *Merchant* (1885) 100 N. Y. 585, 3 N. E. 682, affirmed in (1888) 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

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The act of 1885, chap. 428, which authorized Cayuga county to present to the board of claims a claim for expenses incurred in the trial of convicts in the Auburn state prison for crimes committed in the prison, was a valid exercise of legislative power. Under the English and American policy offenses are usually tried in the county where they are committed, and at county expense. State prisons are state institutions, under exclusive state control. The county in which a prison may be located has no voice in its management, and can exercise no supervision over its inmates. It is reasonable that the state, not the county alone, should bear the expense of the trial of offenses committed in such a prison. The legislature had original power to make the expense in such cases a state instead of a county charge, and it had ample authority, after the expense had been incurred, to reimburse the county from the state treasury. "If, in the opinion of the legislature, one county or political division has been compelled to bear more than its proper share of taxation, or taxes have been locally assessed and paid which in equity should have been charged upon the whole state, there can be no doubt that, in the absence of constitutional limitation, the legislature may remedy the injustice, and direct reimbursement out of the treasury of the state." *Cayuga County* v. *State* (1897) 153 N. Y. 279, 47 N. E. 288.

*Moral obligation.*—The taxpayers of each county are under moral obligation to make their contributions to the state treasury equal to those of other taxpayers, and principles of justice as well as of equity require that irregularities produced by the operation of the statutes should be remedied by the legislature. *State* v. *Kings County* (1891) 125 N. Y. 312, 26 N. E. 272.

*Municipal corporations.*—The legislature may delegate to municipal corporations the power to make local improvements and prescribe assessment districts on which taxes may be imposed for the payment of the expense of such improvements, according to benefits to be received by owners of property therein. *People ex rel. Griffin* v. *Brooklyn* (1851) 4 N. Y. 419, 55 Am. Dec. 266; *Howell* v. *Buffalo* (1867) 37 N. Y. 267; *Re New York Protestant Episcopal Public School* (1864) 31 N. Y. 574; *Ireland* v. *Rochester* (1868) 51 Barb. 416; *Re Sackett, D. & De G. Streets* (1878) 74 N. Y. 95; *Moran* v. *Troy* (1877) 9 Hun, 540.

The legislature may, by changing the boundaries of municipal corporations, bring into their tax jurisdiction property not previously subject thereto, and such property may be taxed for municipal indebtedness existing at the time of such change of territory. *Pumpelly* v. *Owego* (1863) 45 How. Pr. 219, Court of Appeals; but in

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*Re Town of Flatbush* (1875) 60 N. Y. 398, the court say that after awards had been actually paid for property taken, the title to which had become vested in fee in the city of Brooklyn, the legislature had no authority to compel an adjoining town to be taxed for the payment of debts previously contracted and for bonds already existing.

The legislature may revise and correct its enactments so as to accomplish in the final result the same justice which it may be presumed it would have provided for in the first instance if it could have foreseen the actual results to follow upon its first enactments. After an assessment for local improvements has been paid, the legislature may direct a municipal corporation to reimburse the property owners for such assessments and raise the necessary amount by taxation. *People ex rel. Lucey* v. *Molloy* (1898) 35 App. Div. 136, 54 N. Y. Supp. 1084, affirmed in (1899) 161 N. Y. 621, 55 N. E. 1099.

*Nonresident.*—The legislature may refuse to recognize the rule that personal property can be taxed only at the residence of the owner, and may say that "any personal property which is within the state, and which has the benefit of the protection of its laws, whether tangible or intangible, shall be subject to assessment for the taxes levied by the state;" but it does not follow that because it has that power it also has the power to bring within the jurisdiction of our courts, for the purpose of enforcing a tax levied upon that property, the person of a nonresident so as to make him personally liable for the amount of the tax. The tax was only a lien upon the property taxed, and imposed no personal liability on the owner. *New York* v. *McLean* (1901) 57 App. Div. 601, 68 N. Y. Supp. 606.

*Notice.*—An owner of land is entitled to notice of assessment. *Jordan* v. *Hyatt* (1848) 3 Barb. 275; *Ireland* v. *Rochester* (1868) 51 Barb. 416; *Lang* v. *Kiendl* (1882) 27 Hun, 66 (second assessment directed by legislature); *People ex rel. Brooklyn City R. Co.* v. *Board of Assessors* (1883) 92 N. Y. 430 (property omitted from previous roll); *Re Union College* (1891) 129 N. Y. 308, 29 N. E. 460, followed in *Re Flower* (1891) 129 N. Y. 643, 29 N. E. 463; *Re Lamb* (1889) 51 Hun, 633, 4 N. Y. Supp. 858, affirmed in (1890) 121 N. Y. 703, 24 N. E. 1100 (second assessment); *McLaughlin* v. *Miller* (1891) 124 N. Y. 510, 26 N. E. 1104; *Seaman* v. *Dickenson* (1896) 1 App. Div. 19, 36 N. Y. Supp. 748. The rule does not apply to proceedings for the collection of water rents. *Hennessey* v. *Volkening* (1893) 30 Abb. N. C. 100, 22 N. Y. Supp. 528.

"The imposition of taxes is, in its nature, administrative, and not

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judicial, but assessors exercise quasi judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation. . . . It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made." *Palmer* v. *McMahon* (1889) 133 U. S. 660, 33 L. ed 772, 10 Sup. Ct. Rep. 324, affirming (1886) 102 N. Y. 176, 55 Am. Rep. 796, 6. N. E. 400, and construing the act of 1843, chap. 230.

The legislature may prescribe the kind of notice and mode of giving it. *Lamb* v. *Connolly* (1890) 122 N. Y. 531, 25 N. E. 1042.

*Private purpose.*—It must be conceded that there is a limit somewhere to the power of taxation in reference to the purposes for which it may be exercised, but it must be quite clear that the legislature has erred before the courts can arrest the consequences of its action. "The legitimate object of raising money by taxation is for public purposes, and the proper needs of government, general and local, state and municipal. . . . That is a public purpose from the attainment of which will flow some benefit or convenience to the public, whether of the whole commonwealth or of a circumscribed community." An act which authorizes the taxation of property in a town to aid a private manufacturing corporation is a violation of the principle that taxation should be limited to a public purpose. *Weismer* v. *Douglas* (1876) 64 N. Y. 92, 21 Am. Rep. 586.

*Public property.*—Municipal property devoted to public purposes is not taxable by the municipality unless expressly made so by statute; but the property owned by a municipality for public purposes is liable to be assessed for local improvements. Streets are intended for public travel, and cannot be regarded as municipal property like public buildings, in which the title to the land vests in the municipality, and may be sold and conveyed by local authorities. *Smith* v. *Buffalo* (1895) 90 Hun, 118, 35 N. Y. Supp. 635; *People ex rel. New York* v. *Board of Assessors* (1888) 111 N. Y. 509, 2 L. R. A. 148, 19 N. E. 90.

*Railroad aid.*—The act of 1869, chap. 907, relating to taxation in towns which had furnished aid in constructing railroads, is constitutional. *Clark* v. *Sheldon* (1887) 106 N. Y. 104, 12 N. E. 341.

*Redemption.*—After land has been sold for taxes the legislature cannot, by extending the time to redeem, impair the purchaser's interest therein, without making provision for compensation. *Dikeman* v. *Dikeman* (1845) 11 Paige, 484.

*Release.*—"The legislature may release property which has been

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assessed for taxation. The power over the subject is unlimited, and can be exercised in any way and at any time during the proceedings for taxation." *People ex rel. American Bible Soc.* v. *Tax & A. Comrs.* (1894) 142 N. Y. 348, 37 N. E. 116.

*State property.*—The legislature may authorize the taxation of state property. *Hassan* v. *Rochester* (1876) 67 N. Y. 528.

*Transfer tax.*—The legislature has power to impose taxes on gifts, legacies, and collateral inheritances. Act of 1885, chap. 483, sustained. *Re McPherson* (1887) 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; *Re Sherwell* (1891) 125 N. Y. 376, 26 N. E. 464; *Re Vanderbilt* (1900) 50 App. Div. 246, 36 N. Y. Supp. 1079, affirmed in (1900) 163 N. Y. 597, 57 N. E. 1127.

"The tax imposed is not, in a proper sense, a tax upon the property passing by will or under the statutes of descents or distributions. It is a tax upon the right of transfer by will, or under the intestate law of the state. Whether these laws are regarded as a limitation on the right of the testator to dispose of property by will, or upon the right of devisees to take under a will, or the right of heirs or next of kin to succeed to the property of an intestate, is not material. The so-called tax is an exaction made by the state in the regulation of the right of devolution of property of decedents, which is created by law, and which the law may restrain or regulate. Whatever the form of the property, the right to succeed to it is created by law." *Re Sherman* (1897) 153 N. Y. 1, 46 N. E. 1032.

The amendment of § 230 of the tax law in 1899, chap. 76, "providing for a tax upon remainders and reversions which had vested prior to June 30, 1885, upon their coming into an actual possession or enjoyment," is unconstitutional for the reason, among other things, that it does not include "the vested estates upon remainder or reversion, as to which the intermediate life estate terminated between June 30, 1885, and March 14, 1899." It therefore makes an unconstitutional discrimination between remaindermen. *Re Pell* (1902) 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789.

The legislature may impose "a transfer tax upon the exercise by a last will and testament of a power of appointment derived from a deed executed before the passage of any statute imposing a tax upon the right of succession to the property of a decedent." Section 220 of the tax law authorizing the taxation of such a power of appointment is valid. "The legislature could provide that no power of appointment should be exercised by will, or that it should be exercised only upon the payment of a gross or ratable sum for the



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privilege. It could exact this condition independent of the date or origin of the power. All this necessarily flows from the absolute control by the legislature of the right to make a will." *Re Delano* (1903) 176 N. Y. 486, 64 L. R. A. 279, 68 N. E. 871. Also *Re Dows* (1901) 167 N. Y. 227, 52 L. R. A. 433, 88 Am. St. Rep. 509, 60 N. E. 439, affirmed in *Orr* v. *Gilman* (1902) 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213.

"Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. . . . To a considerable, although more or less varying, extent the succession determined by the law of the domicil is recognized in other jurisdictions. But it hardly needs illustration to show that the recognition is limited by the policy of the local law. . . . Succession to a tangible chattel may be taxed wherever the property is found." A resident of Illinois died leaving, among other assets, a sum of money which had then been on deposit about fourteen months in a New York trust company. It was held that this deposit had been delayed in the jurisdiction of New York long enough to justify that state in taxing it under the transfer tax law. The succession, including this deposit, was taxed in Illinois, but the deposit was held to be also taxable in New York. "No doubt this power on the part of two states to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same state should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that in successions after death, *Mobilia sequuntur personam* and domicil governs the whole." The deposit was due from a New York debtor which was subject to the law of that state. "Power over the person of the debtor confers jurisdiction. . . . And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death." *Blackstone* v. *Miller* (1903) 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277, affirming (1902) 171 N. Y. 682, 64 N. E. 1118.

*United States bonds.*—"The principle that a state cannot, in the exercise of the power of taxation, tax obligations of the United States, was established at an early day. But the tendency both of the Federal and state courts has been in the direction of limiting the operation of this immunity and to uphold state statutes imposing taxation, which, although operating indirectly upon property in government securities, were enacted for another purpose, and where

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the indirect taxation was merely an incident to the exercise by the state of an acknowledged power of government. . . . The inclusion of United States bonds in the valuation under the laws for the taxation of inheritances for the purpose of ascertaining the tax was a valid exercise of the legislative power of a state, and did not constitute a taxation of Federal securities;" but it was held in this case that by the transfer tax act of 1892, chap. 399, such securities could not be included in the estimate of the valuation of the decedent's estate. *Re Sherman* (1897) 153 N. Y. 1, 46 N. E. 1032, followed in *Re Plummer* (1900) 47 App. Div. 625, 62 N. Y. Supp. 1145, affirmed in (1900) 161 N. Y. 631, 57 N. E. 1122, affirmed in (1900) 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829.

That portion of its capital which a New York bank has invested in the stock, bonds, or other securities of the United States is not liable to taxation by the state. *People ex rel. Bank of Commerce* v. *Tax Comrs.* (1862) 2 Black, 620, 17 L. ed. 451; *Bank Tax Case* (1864) 2 Wall. 200, 17 L. ed. 793. But a state may, under certain limitations, tax the shares in the hands of shareholders. *Van Allen* v. *Assessors* (1865) 3 Wall. 573, 18 L. ed. 229; *New York* v. *Tax & A. Comrs.* (1866) 4 Wall. 244, 18 L. ed. 344. Federal certificates of indebtedness cannot be taxed by the state. *The Banks* v. *New York* (1868) 7 Wall. 16, *sub nom. New York ex rel. Bank of New York Nat. Bkg. Asso.* v. *Connelly,* 19 L. ed. 57. Nor national bank notes. *Bank of New York* v. *New York County* (1868) 7 Wall. 26, 19 L. ed. 60.

*Validation.*—The legislature may validate an irregular assessment for local improvement and make the amount a lien on the property assessed. *Mann* v. *Utica* (1872) 44 How. Pr. 334. See also *Smith* v. *Buffalo* (1895) 90 Hun, 118, 35 N. Y. Supp. 635; *Terrel* v. *Wheeler* (1890) 123 N. Y. 76, 25 N. E. 329.

The legislature has power to validate a tax notwithstanding the omission of the assessors to verify the assessment roll. The assessors had jurisdiction to make the assessment, the legislature might have dispensed with the certificate of the assessors, and the tax would have been valid without it. *People ex rel. Flower* v. *Bleckwenn* (1889) 55 Hun, 169, 7 N. Y. Supp. 914, affirmed in (1891) 129 N. Y. 637, 29 N. E. 1031; *Re Lamb* (1889) 51 Hun, 633, 4 N. Y. Supp. 858, affirmed in (1890) 121 N. Y. 703, 24 N. E. 1100. But the legislature cannot, by a validating act, confirm a sale made under a void assessment. *Cromwell* v. *MacLean* (1890) 123 N. Y. 474, 25 N. E. 932. See also *State* v. *Kings County* (1891) 125 N. Y. 312, 26 N. E. 272.

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The legislature may validate assessments for taxes, notwithstanding the omission of property primarily liable to taxation. *Van Deventer* v. *Long Island City* (1893) 139 N. Y. 133, 34 N. E. 774.

"Assessments for municipal improvements are a species of tax, the imposition of which is within the power of the legislature, unlimited, except as specifically restrained by the Constitution, and that where an assessment for municipal purposes is irregular, the legislature itself, without notice to the persons assessed, may make the assessment or may authorize a reassessment." If the thing omitted which constitutes the defect sought to be removed is something which the legislature might have dispensed with by a previous statute, it may do so by a subsequent one. If the irregularity consists in doing some act or doing it in the mode which the legislature might have made immaterial by a prior statute, it may do so by a later one. *Hatzung* v. *Syracuse* (1895) 92 Hun, 203, 36 N. Y. Supp. 521; *Hagner* v. *Hall* (1896) 10 App. Div. 587, 42 N. Y. Supp. 63; *Loomis* v. *Little Falls* (1901) 66 App. Div. 299, 72 N. Y. Supp. 774; *Williams* v. *Albany* (1887) 122 U. S. 154, 30 L. ed. 1088, 7 Sup. Ct. Rep. 1244; *Ziegler* v. *Flack* (1886) 22 Jones & S. 69; *Re Van Antwerp* (1874) 56 N. Y. 261; *People ex rel. Richmond* v. *Wilson* (1888) 21 N. Y. S. R. 120, 3 N. Y. Supp. 326, affirmed in (1890) 121 N. Y. 684, 24 N. E. 1098.

The legislature may cure defects in proceedings by the comptroller for the sale of land for unpaid taxes. *People* v. *Francisco* (1902) 76 App. Div. 262, 78 N. Y. Supp. 423.

## VESTED RIGHTS.

*In general.*—"Every right resting in perfect obligation is vested, and such a right being conferred by statute renders it no more sacred than if it were sanctioned merely by the law of nature or the common law." *Butler* v. *Palmer* (1841) 1 Hill, 324.

*Actions.*—"A cause of action or defense given by a statute, founded on grounds of public policy, conferred no vested right which could not be taken away by a similar statute, and . . . a repeal of a law which gave such right of action or defense terminated all claim to such recovery or defense, although the contract was made previously." *Washburn* v. *Franklin* (1861) 24 How. Pr. 515; citing *Curtis* v. *Leavitt* (1887) 15 N. Y. 9; *Central Bank* v. *Empire Stone Dressing Co.* (1858) 26 Barb. 23; *People* v. *Livingston* (1831) 6 Wend. 526.

"A party has no vested right in a defense based upon an infor-

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mality not affecting his substantial equities," and the legislature may constitutionally take away such defenses. *Tifft* v. *Buffalo* (1880) 82 N. Y. 204.

"There is nothing in the Constitution which directly or impliedly gives any litigant a vested right to the trial of an equity case by a judge without a jury." *Underhill* v. *Manhattan R. Co.* (1891) 27 Abb. N. C. 478, 18 N. Y. Supp. 43, sustaining § 970 of the Code of Civil Procedure.

As to a party's right to interpose a defense, see *Sibley* v. *Sibley* (1902) 76 App. Div. 132, 78 N. Y. Supp. 743.

The act of 1892, chap. 514, relating to an attorney's qualifications as a witness on the probate of a will to which he is a subscribing witness, does not, because retrospective, affect vested rights. The statute is remedial. *Re Gagan* (1892) 47 N. Y. S. R. 444, 20 N. Y. Supp. 426. See *Supreme Lodge K. of P.* v. Meyer (1904) 198 U. S. 508, 519, 49 L. ed. 1146, 1149, 25 Sup. Ct. Rep. 754.

*Adverse possession.*—The occupancy and possession of land for twenty-five years was held to entitle the owner to the continued enjoyment of his property as against city authorities who claimed that a part of the land was included in a public street. They must first acquire possession by regular process of law. *Varick* v. *New York* (1819) 4 Johns. Ch. 53.

*Appeal.*—After the rights of the parties under a judgment have become fixed by the lapse of the time prescribed by statute for taking an appeal, the legislature cannot give a new right of appeal. *Germania Sav. Bank* v. *Suspension Bridge* (1899) 159 N. Y. 362, 54 N. E. 33.

*Contracts.*—A newspaper publisher who had fully performed his contract for the publication of certain legal notices was held not affected by the statute prohibiting the payment of a claim or the rendition of a judgment therefor, unless an appropriation had been made for that purpose. *Wood* v. *New York* (1866) 34 How. Pr. 501.

The acceptance of a bid on a contract for the construction of a sewer gave the contractor a vested right of which he could not be deprived without compensation. In *Re Protestant Episcopal Public School* (1870) 58 Barb. 161, (1872) 47 N. Y. 556.

*Corporations.*—While ordinarily privileges and franchises granted to a private corporation are vested rights, and cannot be devested or altered nor its charter amended without its consent, the rule does not apply where the act of incorporation reserves the right of amendment or repeal. *McLaren* v. *Pennington* (1828) 1 Paige, 102.

The charter of the Mohawk Bridge Company, Laws 1805, chap. 127, prohibited any ferry within one mile of the bridge at Schenec-

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tady. This did not prevent the legislature from authorizing the erection of a railroad bridge within that distance, and the use of it for ordinary railroad purposes. The bridge company's franchise was not exclusive, and the legislature was not deprived of the "power to provide for the conveyance of freight or passengers from one part of the state to another by an improvement which was entirely unknown at the time when the grant to the bridge company was made." *Mohawk Bridge Co.* v. *Utica & S. R. Co.* (1837) 6 Paige, 554.

As to the vested rights of members of mutual benefit associations, see *Farmers' Loan & T. Co.* v. *Aberle* (1896) 18 Misc. 257, 41 N. Y. Supp. 638.

A franchise granted by town authorities to a gaslight company is not affected by a subsequent incorporation of a part of the town as a village. The company's rights continue under the village government. *People ex rel. Woodhaven Gaslight Co.* v. *Deehan* (1897) 153 N. Y. 528, 47 N. E. 787.

*Damages.*—An award of damages on laying out a public street gives the owner of the land a vested right in the sum awarded, and his right cannot be defeated by a discontinuance of the proceedings. *Hawkins* v. *Rochester* (1828) 1 Wend. 53, 19 Am. Dec. 462, citing *Re Beekman Street*, 20 Johns. 269. In *Re Anthony Street* (1839) 20 Wend. 618, 32 Am. Dec. 608, it was held that the right did not become fixed until the confirmation of the report making the award, and that the court might, before final confirmation, grant leave to discontinue the proceedings.

After the right has become complete by confirmation, it cannot be devested by a repeal of the statute under which the damages were awarded. *People ex rel. Fountain* v. *Westchester County* (1848) 4 Barb. 64.

Where the right to damages has become vested by the lapse of time prescribed by statute, an amendment imposing other conditions cannot have a retroactive effect. *Ganson* v. *Buffalo* (1864) 2 Abb. App. Dec. 236.

*Declaratory laws.*—"A statute is never construed to operate retrospectively so as to take away a vested right." *Sayre* v. *Wisner* (1832) 8 Wend. 661, citing *Dash* v. *Van Kleeck* (1811) 7 Johns. 477.

In *Salters* v. *Tobias* (1832) 3 Paige, 338, the court say that "in this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law." They

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are entitled to respect as expressions of legislative opinion, but can have no binding effect on the court.

*Divorce.*—A party has a vested right in a judgment for alimony, and it cannot be affected by subsequent legislation authorizing the court to vary or modify it. *Walker* v. *Walker* (1898) 155 N. Y. 77, 49 N. E. 663; *Livingston* v. *Livingston* (1903) 173 N. Y. 377, 61 L. R. A. 800, 93 Am. St. Rep. 600, 66 N. E. 123; *Goodsell* v. *Goodsell* (1903) 82 App. Div. 65, 81 N. Y. Supp. 806.

*Evidence.*—"There can be no vested right in a mere rule of evidence," and a presumption declared by statute may be abrogated by its repeal. *Hickox* v. *Tallman* (1860) 38 Barb. 608.

A rule of evidence is defined as the "mode and manner of proving the competent facts and circumstances upon which a party relies to establish the fact in dispute in judicial procedure." While the legislature may undoubtedly change or alter a rule of evidence, this power cannot be invoked as against the immunity guaranteed to a witness under § 2460 of the Code of Civil Procedure, which declared that an answer by a witness could not be used against him in any other action or proceeding, civil or criminal, and a subsequent amendment omitting the word "civil" could not take away such immunity. *Lapham* v. *Marshall* (1889) 51 Hun, 36, 3 N. Y. Supp. 601.

*Execution.*—The act of 1801, chap. 66, in relation to imprisonment for debt, provided for the discharge of an imprisoned debtor on his making an assignment of his property, prohibited subsequent executions against his person, and also prohibited an action on the judgment, but authorized subsequent property executions indefinitely with certain exemptions. The act of 1808, chap. 163, modified the former act by prohibiting an action on the judgment, but continuing the immunity from arrest. In *Spencer* v. *Richardson* (1810) 7 Johns. 116, the court said the act of 1808 did not invalidate the effect of the debtor's discharge, and did not violate any immunity vested in him by the act of 1801, but afforded an additional means of reaching his property.

*Exemptions.*—A citizen has no vested right in an exemption from taxation because of the performance of prescribed military service. A statute authorizing such exemption is subject to repeal at any time by the legislature. *People ex rel. Cunningham* v. *Roper* (1866) 35 N. Y. 629; *People ex rel. Sears* v. *Board of Assessors* (1881) 84 N. Y. 610.

*Extra allowance.*—The provision of the Code of Procedure (1851), § 308, giving the plaintiff a right to an extra allowance in a difficult

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or extraordinary case, was complete on the rendition of the verdict, and conferred on him a vested right, which could not be taken away by a subsequent repeal of this provision. *Cook* v. *New York Floating Dry Dock Co.* (1858) 1 Hilt. 556.

*Highways.*—Where land is taken by the public for a highway, and compensation is made to the owner, the easement becomes a vested right in the public, and the legislature has no power to donate the easement to an adjoining owner. *People ex rel. Failing* v. *Highway Comrs.* (1869) 53 Barb. 70.

*Inheritance tax.*—A surrogate's decree establishing the liability of certain religious corporations for the payment of an inheritance tax on property received by them is not affected by subsequent legislation amending the original statute imposing the tax and exempting religious corporations from taxation. *Re Wolfe* (1892) 66 Hun, 389, 21 N. Y. Supp. 515.

*Judgments.*—"There is no such vested right in a judgment in the party in whose favor it is rendered as to preclude its re-examination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed;" and the award of commissioners in proceedings under the right of eminent domain, even when approved by the court, possesses no greater sanctity. *Garrison* v. *New York* (1874) 21 Wall. 196, 22 L. ed. 612, construing the New York act of 1871, chap. 57, and other statutes, relating to public improvements in the city of New York.

*Labor law.*—A person who performed labor for a municipal corporation was held entitled to the prevailing rate of wages, notwithstanding the subsequent amendment of the labor law, which omitted municipal corporations from the statute. *McCann* v. *New York* (1900) 52 App. Div. 358, 65 N. Y. Supp. 308, (1901) 166 N. Y. 587, 59 N. E. 1125.

*Married women.*—A husband's interest in his wife's property, which he acquired under the common law, was not devested by the act of 1848, chap. 200, for the more effectual protection of the property of married women. The act was unconstitutional. *White* v. *White* (1849) 5 Barb. 474.

The amendment of 1849, chap. 375, applicable to the wife's future acquisitions, was sustained in *Sleight* v. *Read* (1854) 18 Barb. 159.

The legislature had no power by the act of 1848, in relation to the property of a married woman, to deprive a husband of a legacy which had become vested in him prior to the passage of the law. *Westervelt* v. *Gregg* (1854) 12 N. Y. 202, 62 Am. Dec. 160.

In *Berley* v. *Rampacher* (1856) 5 Duer, 183, it was said that the

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act of 1853, chap. 576, "exempting the husband from his common-law liability, ought not to be construed as affecting the vested rights of creditors. So construed it would be unconstitutional and void." But in *Foote* v. *Morris* (1853) 12 N. Y. Legal Obs. 61, it was held that a creditor acquired no such vested right in a contingent liability of a future husband when the debt was contracted as to render the statute of 1853 inoperative.

Marriage and the birth of issue prior to the New York married women's enabling act of 1848 did not give a vested right as tenant by the curtesy, so as to prevent the application of such act. *Re Mitchell* (1891) 61 Hun, 372, 16 Supp. 180.

*Municipal corporations.*—In *People* v. *Morris* (1835) 13 Wend. 325, 330, Judge Nelson says "it is an unsound and even absurd proposition that political power, conferred by the legislature, can become a vested right as against the government in any individual or body of men. It is repugnant to the genius of our institutions and the spirit and meaning of the Constitution, for by that fundamental law all political rights not there defined and taken out of the exercise of legislative discretion were intended to be left subject to its regulation. . . . Political power conferred by the legislature is a public trust, to be executed not for the benefit or at the will of the trustee, but for the common weal." Municipal corporations "are severally political institutions, erected to be employed in the internal government of the state. There is no contract between the government and governed. . . . The only interest involved is the public interest. . . . We know of no vested rights of political power in any citizen or body of citizens, except those conferred by the Constitution. That is our Bill of Rights, and is analogous to those granted to kingdoms or minor communities, such as towns and cities, by princes and superior lords on the continent, or by the Crown of England" This discussion arose in a case involving the effect of the provisions of the revised statutes regulating licenses to grocers to sell intoxicating liquors, and it was held that the statute applied to cities and villages previously incorporated, and superseded charter provisions authorizing such licenses by municipal officers.

Vested rights possessed by a city are as indestructible by legislative act as the property rights of citizens. Speaking of the Forty-second street reservoir the court say that "the weight of authority is to the effect that the property which New York holds in its proprietary or private character, though originally derived from the power claiming the ultimate title, and which concerns the private advantage of the corporation as a distinct legal personalty, is

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stamped with so many of the rights and powers of natural persons or private corporations as that the city cannot be deprived of this reservoir without due process of law and without just compensation." The Dongan charter of 1686 is cited as authority for the opinion that New York became the owner of waste lands within the city boundaries, and the city's title is said to have been confirmed by the Montgomery charter of 1730, and by the Constitutions of 1777, 1821, and 1846. Justice Macomber quotes from Kent's Notes to the New York Charter some observations on Magna Charta, and also a remark that "corporate franchises in this country rest on a basis which ought to be at least as solid as Magna Charta, for they are founded on grants which are contracts." *Webb* v. *New York* (1882) 64 How. Pr. 10.

*New York.*—The Cornbury charter of 1708 conferred certain perpetual ferry privileges between the city and Long Island. Hamilton ferry and South ferry having been established under this and other grants, it was held that the city had acquired vested rights therein which could not be taken away by the legislature. Fulton ferry having been established at the time of the grants to New York, became vested in the city by an indefeasible title. *Benson* v. *New York* (1850) 10 Barb. 223.

The power of the state over a city street was considered in *People ex rel. New York & H. R. Co.* v. *Havemeyer* (1874) 4 Thomp. & C. 365. The company was incorporated in 1831, and in 1832 a contract was made between it and the city of New York in relation to the occupation of certain streets. This contract was in effect annulled by statute in 1859. The act of 1872, chap. 702, which provided for the alteration of a street occupied by the company, prescribing the alterations to be made, and imposing a share of the expense on the city, was sustained as a valid exercise of legislative power. The city at one time had "control over the occupation by the railroad of the street by the force of a power conferred. The body which gave it the power could withdraw it and exercise it for itself. It has done so, and that takes no inherent or vested right from the city."

*Officers.*—The incumbent has no vested right in an office. *People ex rel. Wilbur* v. *Eddy* (1870) 57 Barb. 593; *People* v. *Devlin* (1865) 33 N. Y. 273, 88 Am. Dec. 377; *People ex rel. Fisk* v. *Board of Education* (1893) 69 Hun, 212, 23 N. Y. Supp. 473, (1894) 142 N. Y. 627, 37 N. E. 565.

In *Ricketts* v. *New York* (1884) 67 How. Pr. 320, it was held that the board of estimate and apportionment of New York had no

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power, during his term, to reduce the compensation of the supreme court crier which had been fixed by the board of supervisors.

In the absence of constitutional or statutory restraints, the power of appointment implies the power of removal, when no definite term is attached to the office by law. *People ex rel. Cline* v. *Robb* (1891) 126 N. Y. 180, 27 N. E. 267, construing statutes giving to veterans preference in appointments in the state prisons.

The holder of a teacher's certificate in Brooklyn at the time of the creation of Greater New York had no vested right which entitled him to appointment to a position in the schools of the new city, as against regulations which the board of education had authority to prescribe under the charter. *Re Stebbins* (1899) 41 App. Div. 269, 58 N. Y. Supp. 468.

By the act of 1901, chap. 534, amending the second class cities charter of 1898, chap. 182, an alderman became entitled to a salary. This was a vested right which could not be taken away by subsequent legislation, declaring that the statute giving the salary should not take effect until a specified date, and that an alderman should not be entitled to salary prior to that date. His right to the salary became complete when the original amendatory statute took effect. *Young* v. *Rochester* (1902) 73 App. Div. 81, 76 N. Y. Supp. 224.

*Pardons.*—A person convicted of a criminal offense has no vested right in a commutation which the governor is authorized by statute to grant for good behavior or otherwise. *Re Whalen* (1892) 47 N. Y. S. R. 313, 19 N. Y. Supp. 915.

*Penalties.*—A person has no vested right in penalties imposed by the Federal revenue laws for the omission to stamp a written instrument. *Hoppock* v. *Stone* (1867) 49 Barb. 524.

*Pension.*—A pension is a mere gratuity and confers no vested right. *People ex rel. Price* v. *Woodbury* (1902) 38 Misc. 189, 77 N. Y. Supp. 241.

*Railroads.*—The farm crossings provision of the general railroad act of 1841, chap. 140, did not apply to existing corporations. They had already acquired the right of way and made compensation to landowners for any obstruction to the use of their land which might result from the operation of the railroad. *Milliman* v. *Oswego & S. R. Co.* (1850) 10 Barb. 87.

A franchise authorizing a street railroad in a city does not prevent a similar franchise to another company to occupy the same street provided there is no actual interference with the rights of the first company. The first franchise was not exclusive. *Brooklyn City & N. R. Co.* v. *Coney Island & B. R. Co.* (1861) 35 Barb. 364.

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*Tax deed.*—The act of 1882, chap. 287, declaring that after fifteen years a tax deed should be conclusive evidence of the regularity of the tax proceedings, did not deprive the owner of any vested rights in property. *Chamberlain* v. *Taylor* (1885) 36 Hun, 24.

*Tax sale.*—The legislature, by an attempted extension of time to redeem from a tax sale, cannot, without providing compensation, impair the right which a purchaser has acquired to an absolute deed, or to a lease for a limited term on a failure to redeem within a specified time. *Dikeman* v. *Dikeman* (1845) 11 Paige, 484.

## WILLS.

The legislature has long exercised the power to regulate, to some extent, the transfer of property by will, including especially the power to prescribe formalities relative to the execution, revocation, and probate of wills, the settlement of estates, and also restrictions and limitations on legacies and devises. Trusts, powers, uses, remainders and reversions, accumulations of estates, the suspension of the power of alienation, restraints on gifts to corporations, and other regulations incident to the devolution of the property of decedents have also received legislative attention, developing through many years, resulting in a comprehensive body of laws on these subjects, which are intended to represent and illustrate the present condition and needs of society. The general authority of the legislature over these subjects can scarcely be doubted, and would probably not be questioned.

The courts have had little occasion to consider questions of the power of the legislature over property transferred by will in particular instances, but in *Re New York Protestant Episcopal Public School* (1864) 31 N. Y. 574, the court, per Chief Judge Denio, after observing that "the legislature has no constitutional power to cause land to be sold for the purpose of disentangling an estate, where the parties entitled to future estates are under no disability, and are competent to act for themselves," say that this "may be done where the rights of infants, lunatics, etc., are concerned," and that it is "firmly established that the legislature has full power to order sales

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of the estates of infants for the purpose of unfettering the title for the support of the infants, or for any reasons connected with their interests and welfare;" that "authority to pass such laws is deduced from the sovereign power, which is vested in the government to superintend the interests and provide for the welfare of infant children and lunatics, and which, under the system prevailing in England, is vested in the King, who is said in such cases to act as *parens patriæ*, and which the court of chancery usually exercises by delegation from the sovereign;" that "the same power which is vested in the Crown touching parties under disability of infancy and lunacy embraces the case of property given for the purposes of charity, and it is vested in the sovereign in the same paternal character." The court sustained an act (1806, chap. 52) which extinguished the title of certain officers to property therein mentioned, and vested such title in a school corporation.

In *Dammert* v. *Osborn* (1893) 140 N. Y. 30, 35 N. E. 407, construing a will made by a resident of Peru, which contained a bequest for the purpose of establishing a charitable institution in New York, the court say: "There is no law that forbids gifts to charity here by testators in other countries, or that requires us to reject the gift unless it is made in all respects in conformity with our local law;" that the provision of the Revised Statutes relating to the suspension of the power of alienation of personal property was not intended "to interdict dispositions made in other countries to take effect here;" that restraints, like those limiting bequests to corporations, "applied to members of the political community from which the will emanated, and not to persons in other countries where no such restrictions existed. Such bequests are valid here if valid where made. . . . It is no part of our public policy to condemn such gifts to charitable or benevolent corporations here. . . . The policy that dictated our statutes against perpetuities and accumulations did not anticipate any danger from abroad, and our recent decisions are to the effect that they are local in their general scope and effect."

The power of individuals to devise their lands is the creature of positive law, and may be abrogated entirely, or modified and restricted, at the pleasure of the legislature. To make such changes is the province and frequently the duty of the legislature; its power to make them is inherent and inalienable, and the rights of all persons, artificial as well as natural, corporations as well as individuals, are of necessity subject to its exercise. *Ayres* v. *Methodist Episcopal Church* (1849) 3 Sandf. 351.

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The privilege of making a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion. *Re Delano* (1903) 176 N. Y. 486, 64 L. R. A. 279, 68 N. E. 871.

§ 2. [ *Senate and assembly, how constituted.* ]—The senate shall consist of fifty members, except as hereinafter provided. The senators elected in the year one thousand eight hundred and ninety-five shall hold their offices for three years, and their successors shall be chosen for two years. The assembly shall consist of one hundred and fifty members, who shall be chosen for one year.

[Assembly, Const. 1777, art. 4; 1801, § 1; 1821, art. 1, § 2; 1846, art. 3, § 2. Senate, Const. 1777, art. 10; 1801, § 3; 1821, art. 1, § 2; 1846, art. 3, § 2.]

This section was proposed by the Convention of 1894. It increases the senate from 32 to 50 members, and the assembly from 128 to 150. It also provides for a possible increase in the senate beyond 50, according to the plan proposed in § 4. It will be remembered that, under the Constitution of 1846, senators were elected in odd-numbered years. The Convention of 1894 provided for city elections in odd-numbered years, and, in accordance with the proposed policy of separating state and municipal elections, it became necessary to hold elections for state officers in even-numbered years; and it was accordingly provided that senators elected in 1895 should hold office for three years, which would bring subsequent elections of senators in even-numbered years. The structure of the legislature has been a subject of frequent consideration, not only in conventions, but in the legislature itself. Various suggestions relating to this subject have been noted in previous volumes.

§ 3. [*Senate districts.*]—The state shall be divided into fifty districts, to be called senate districts, each of

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which shall choose one senator. The districts shall be numbered from one to fifty, inclusive.

District number one (1) shall consist of the counties of Suffolk and Richmond.

District number two (2) shall consist of the county of Queens.

District number three (3) shall consist of that part of the county of Kings comprising the first, second, third, fourth, fifth, and sixth wards of the city of Brooklyn.

District number four (4) shall consist of that part of the county of Kings comprising the seventh, thirteenth, nineteenth, and twenty-first wards of the city of Brooklyn.

District number five (5) shall consist of that part of the county of Kings comprising the eighth, tenth, twelfth, and thirtieth wards of the city of Brooklyn, and the ward of the city of Brooklyn which was formerly the town of Gravesend.

District number six (6) shall consist of that part of the county of Kings comprising the ninth, eleventh, twentieth, and twenty-second wards of the city of Brooklyn.

District number seven (7) shall consist of that part of the county of Kings comprising the fourteenth, fifteenth, sixteenth, and seventeenth wards of the city of Brooklyn.

District number eight (8) shall consist of that part of the county of Kings comprising the twenty-third, twenty-fourth, twenty-fifth, and twenty-ninth wards of the city of Brooklyn, and the town of Flatlands.

District number nine (9) shall consist of that part of the county of Kings comprising the eighteenth, twenty-sixth, twenty-seventh, and twenty-eighth wards of the city of Brooklyn.

District number ten (10) shall consist of that part of the county of New York within and bounded by a line beginning at Canal street and the Hudson river, and running thence along Canal street, Hudson street, Dominick

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street, Varick street, Broome street, Sullivan street, Spring street, Broadway, Canal street, the Bowery, Division street, Grand street, and Jackson street, to the East river, and thence around the southern end of Manhattan island, to the place of beginning, and also Governor's, Bedlow's, and Ellis islands.

District number eleven (11) shall consist of that part of the county of New York lying north of district number ten, and within and bounded by a line beginning at the junction of Broadway and Canal street, and running thence along Broadway, Fourth street, the Bowery and Third avenue, St. Mark's place, Avenue A, Seventh street, Avenue B, Clinton street, Rivington street, Norfolk street, Division street, Bowery and Canal street, to the place of beginning.

District number twelve (12) shall consist of that part of the county of New York lying north of districts numbers ten and eleven, and within and bounded by a line beginning at Jackson street and the East river, and running thence through Jackson street, Grand street, Division street, Norfolk street, Rivington street, Clinton street, Avenue B, Seventh street, Avenue A, St. Mark's place, Third avenue, East Fourteenth street to the East river, and along the East river, to the place of beginning.

District number thirteen (13) shall consist of that part of the county of New York lying north of district number ten, and within and bounded by a line beginning at the Hudson river at the foot of Canal street, and running thence along Canal street, Hudson street, Dominick street, Varick street, Broome street, Sullivan street, Spring street, Broadway, Fourth street, the Bowery and Third avenue, Fourteenth street, Sixth avenue, West Fifteenth street, Seventh avenue, West Nineteenth street, Eighth avenue, West Twentieth street, and the Hudson river, to the place of beginning.

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District number fourteen (14) shall consist of that part of the county of New York lying north of districts numbers twelve and thirteen, and within and bounded by a line beginning at East Fourteenth street and the East river, and running thence along East Fourteenth street, Irving place, East Nineteenth street, Third avenue, East Twenty-third street, Lexington avenue, East Fifty-third street, Third avenue, East Fifty-second street, and the East river, to the place of beginning.

District number fifteen (15) shall consist of that part of the county of New York lying north of district number thirteen, and within and bounded by a line beginning at the junction of West Fourteenth street and Sixth avenue, and running thence along Sixth avenue, West Fifteenth street, Seventh avenue, West Fortieth street, Eighth avenue, and the transverse road across Central park at Ninety-seventh street, Fifth avenue, East Ninety-sixth street, Lexington avenue, East Twenty-third street, Third avenue, East Nineteenth street, Irving place, and Fourteenth street, to the place of beginning.

District number sixteen (16) shall consist of that part of the county of New York lying north of district number thirteen, and within and bounded by a line beginning at Seventh avenue and West Nineteenth street, and running thence along West Nineteenth street, Eighth avenue, West Twentieth street, the Hudson river, West Forty-sixth street, Tenth avenue, West Forty-third street, Eighth avenue, West Fortieth street, and Seventh avenue, to the place of beginning.

District number seventeen (17) shall consist of that part of the county of New York lying north of district number sixteen, and within and bounded by a line beginning at the junction of Eighth avenue and West Forty-third street, and running thence along West Forty-third street, Tenth avenue, West Forty-sixth street, the Hudson



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river, West Eighty-ninth street, Tenth or Amsterdam avenue, West Eighty-sixth street, Ninth or Columbus avenue, West Eighty-first street, and Eighth avenue, to the place of beginning.

District number eighteen (18) shall consist of that part of the county of New York lying north of district number fourteen, and within and bounded by a line beginning at the junction of East Fifty-second street and the East river, and running thence along East Fifty-second street, Third avenue, East Fifty-third street, Lexington avenue, East Eighty-fourth street, Second avenue, East Eighty-third street, and the East river, to the place of beginning; and also Blackwell's island.

District number nineteen (19) shall consist of that part of the county of New York lying north of district number seventeen, and within and bounded by a line beginning at West Eighty-ninth street and the Hudson river, and running thence along the Hudson river and Spuyten Duyvil creek around the northern end of Manhattan island; thence southerly along the Harlem river to the north end of Fifth avenue; thence along Fifth avenue, East One Hundred and Twenty-ninth street, Fourth or Park avenue, East One Hundred and Tenth street, Fifth avenue, the transverse road across Central park at Ninety-seventh street, Eighth avenue, West Eighty-first street, Ninth or Columbus avenue, West Eighty-sixth street, Tenth or Amsterdam avenue, and West Eighty-ninth street, to the place of beginning.

District number twenty (20) shall consist of that part of the county of New York lying north of districts numbers eighteen and fifteen, and within and bounded by a line beginning at East Eighty-third street and the East river, running thence through East Eighty-third street, Second avenue, East Eighty-fourth street, Lexington avenue, East Ninety-sixth street, Fifth avenue, East One

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Hundred and Tenth street, Fourth or Park avenue, East One Hundred and Nineteenth street to the Harlem river, and along the Harlem and East rivers, to the place of beginning; and also Randall's island and Ward's island.

All the above districts in the county of New York bounded upon or along the boundary waters of the county shall be deemed to extend to the county line.

District number twenty-one (21) shall consist of that part of the county of New York lying north of districts numbers nineteen and twenty, within and bounded by a line beginning at East One Hundred and Nineteenth street and the Harlem river, and running thence along East One Hundred and Nineteenth street, Fourth or Park avenue, One Hundred and Twenty-ninth street, Fifth avenue, and the Harlem river, to the place of beginning; and all that part of the county of New York not hereinbefore described.

District number twenty-two (22) shall consist of the county of Westchester.

District number twenty-three (23) shall consist of the counties of Orange and Rockland.

District number twenty-four (24) shall consist of the counties of Dutchess, Columbia, and Putnam.

District number twenty-five (25) shall consist of the counties of Ulster and Greene.

District number twenty-six (26) shall consist of the counties of Delaware, Chenango, and Sullivan.

District number twenty-seven (27) shall consist of the counties of Montgomery, Fulton, Hamilton, and Schoharie.

District number twenty-eight (28) shall consist of the counties of Saratoga, Schenectady, and Washington.

District number twenty-nine (29) shall consist of the county of Albany.

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District number thirty (30) shall consist of the county of Rensselaer.

District number thirty-one (31) shall consist of the counties of Clinton, Essex, and Warren.

District number thirty-two (32) shall consist of the counties of St. Lawrence and Franklin.

District number thirty-three (33) shall consist of the counties of Otsego and Herkimer.

District number thirty-four (34) shall consist of the county of Oneida.

District number thirty-five (35) shall consist of the counties of Jefferson and Lewis.

District number thirty-six (36) shall consist of the county of Onondaga.

District number thirty-seven (37) shall consist of the counties of Oswego and Madison.

District number thirty-eight (38) shall consist of the counties of Broome, Cortland, and Tioga.

District number thirty-nine (39) shall consist of the counties of Cayuga and Seneca.

District number forty (40) shall consist of the counties of Chemung, Tompkins, and Schuyler.

District number forty-one (41) shall consist of the counties of Steuben and Yates.

District number forty-two (42) shall consist of the counties of Ontario and Wayne.

District number forty-three (43) shall consist of that part of the county of Monroe comprising the towns of Brighton, Henrietta, Irondequoit, Mendon, Penfield, Perinton, Pittsford, Rush, and Webster, and the fourth, sixth, seventh, eighth, twelfth, thirteenth, fourteenth, sixteenth, seventeenth, and eighteenth wards of the city of Rochester, as at present constituted.

District number forty-four (44) shall consist of that part of the county of Monroe comprising the towns of

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Chili, Clarkson, Gates, Greece, Hamlin, Ogden, Parma, Riga, Sweden, and Wheatland, and the first, second, third, fifth, ninth, tenth, eleventh, fifteenth, nineteenth and twentieth wards of the city of Rochester, as at present constituted.

District number forty-five (45) shall consist of the counties of Niagara, Genesee, and Orleans.

District number forty-six (46) shall consist of the counties of Allegany, Livingston, and Wyoming.

District number forty-seven (47) shall consist of that part of the county of Erie comprising the first, second, third, sixth, fifteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth wards of the city of Buffalo, as at present constituted.

District number forty-eight (48) shall consist of that part of the county of Erie comprising the fourth, fifth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and sixteenth wards of the city of Buffalo, as at present constituted.

District number forty-nine (49) shall consist of that part of the county of Erie comprising the seventeenth, eighteenth, and twenty-fifth wards of the city of Buffalo, as at present constituted; and all the remainder of the said county of Erie not hereinbefore described.

District number fifty (50) shall consist of the counties of Chautauqua and Cattaraugus.

[Const. 1777, art. 12; 1821, art. 1, § 5; 1846, art. 3, § 3.]

The Convention of 1894, following the uniform custom of its predecessors, made a senate apportionment which appears in this section. The first Constitution, 1777, divided the state into four senate districts known as the southern, middle, western, and eastern, and apportioned among them twenty-four senators, the mini-

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mum number fixed by that Constitution, which also provided for a possible increase to one hundred. The Convention of 1801 fixed the number of senators permanently at thirty-two. The second Constitution, 1821, continued this number, but increased the number of districts to eight, apportioning four senators to each district. The third Constitution, 1846, provided for thirty-two single districts, and made an apportionment accordingly. Legislative apportionments have been made from time to time, and these are described in the article on apportionment in the chapter on the Convention of 1894. The Convention of 1894 divided the state into fifty senate districts, which will continue until 1906, when they may be changed by the legislature under the authority conferred by the next section, after the enumeration of 1905.

The foregoing section describes the senate districts as thereby established. The following table shows the population of each district according to the state enumeration of 1892, except that where a county contains more than one district, the aggregate population of the county is given, as in the apportionment tables in the third volume. In these cases the county is deemed the unit for the purpose of considering the question of equality of distribution among the several districts and counties.

The enumeration of 1892 showed a citizen population of 5,790,865; this number, divided by 50, makes a senate ratio of 115,817.

SENATE APPORTIONMENT OF 1894.

1. Suffolk,
Richmond.
105,464—10,353.

2. Queens.
123,974+8,157.

3, 4, 5, 6, 7, 8, and 9, Kings.
Total pop. 868,983,
average 124,140 3/7+8,323 3/7,
making an aggregate for the
county of 58,264.

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10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, New York. Total pop. 1,423,984, average 118,665 4/12+2,848-4/12, making an aggregate for the county of 34,180.

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22. Westchester.
129,224+13,407.

---

23. Orange,
Rockland.
124,596+8,779.

---

24. Dutchess,
Columbia,
Putnam.
132,393+16,576.

---

25. Ulster,
Greene.
116,235+418.

---

26. Delaware,
Chenango,
Sullivan.
113,544—2,273.

---

27. Montgomery,
Fulton,
Hamilton,
Schoharie.
114,568—1,249.

---

28. Saratoga,
Schenectady,
Washington.
131,683+15,866.

---

29. Albany.
156,748+40,931.

---

30. Rensselaer.
121,679+5,862.

---

31. Clinton,
Essex,
Warren.
104,767—11,050.

---

32. St. Lawrence,
Franklin.
117,704+1,887.

---

33. Otsego,
Herkimer.
95,031—20,186.

---

34. Oneida.
117,205+1,388.

---

35. Jefferson,
Lewis.
95,659—20,158.

---

36. Onondaga.
142,058+26,241.

---

37. Oswego,
Madison.
110,697—5,120.

---

38. Broome,
Cortland,
Tioga.
118,911+3,094.

---

39. Cayuga,
Seneca.
86,507—29,310.

---

40. Chemung,
Tompkins,
Schuyler.
95,330—20,487.

---

41. Steuben,
Yates.
101,716—14,101.

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42. Ontario,
Wayne.
93,512—22,305.

43, 44. Monroe.
Total pop. 181,230,
average 90,615—25,202, making an aggregate for the county of 50,404.

45. Niagara,
Genesee,
Orleans.
120,221+4,404.

46. Allegany,
Livingston,
Wyoming.
108,345—7,472.

47, 48, 49. Erie.
Total pop. 304,713,
average 101,571—14,246, making an aggregate for the county of 42,738.

50. Chautauqua,
Cattaraugus.
133,584+17,767.

§ 4. [*Census; senate reapportionment.*]—An enumeration of the inhabitants of the state shall be taken under the direction of the secretary of state, during the months of May and June, in the year one thousand nine hundred and five, and in the same months every tenth year thereafter; and the said districts shall be so altered by the legislature at the first regular session after the return of every enumeration, that each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, and no block in a city inclosed by streets or public ways shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county than the population of a town or block therein adjoining such district. Counties, towns, or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

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No county shall have four or more senators, unless it shall have a full ratio for each senator. No county shall have more than one third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one half of all the senators.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

[Const. 1777, art. 5; Am. 1801, § 3; 1821, art. 1, § 6; 1846, art. 3, § 4.]

This section contains important modifications relating to senate apportionments. A sketch of the discussion of this subject will be found in the article on apportionment in the chapter on the Convention of 1894. The last sentence, authorizing an increase in the number of senators above fifty, is at present applicable only to the counties of New York, Kings, and Erie. If the senate ratio for the whole state under the enumeration of 1905, or any subsequent enumeration, should show that a county in this class is entitled to an additional senator, the number of senate districts in that county will be increased accordingly, and the whole number of senators will be correspondingly increased.

*Apportionments.*—In *People ex rel. Carter* v. *Rice* (1892) 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921, it was held that an apportion-

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ment could be made at an extraordinary session of the legislature. The court at the same time considered and decided *Horn* v. *Oneida County* and *People ex rel. Pond* v. *Monroe County*, and they are reported in connection with the *Carter Case*. The apportionment act of 1892, which was the basis of the controversy in these cases, has already been considered in the article on apportionment, in the chapter on the Convention of 1894. The Constitution was amended in 1894 by specifically requiring the apportionment to be made at the first regular session after an enumeration.

*Enumeration.*—In the *Carter Case*, it was held that the duty of the legislature to provide for a decennial enumeration is a continuing duty, and that the failure of the first legislature after the close of a decennial period to direct such an enumeration did not exhaust the power, but it was the duty of each succeeding legislature to provide for the constitutional enumeration. In the chapter on the Convention of 1894 I have given a sketch of the provision by which it was intended to make the constitutional requirement of a decennial enumeration self-executing so far as practicable by imposing on the secretary of state the positive duty of taking such an enumeration every tenth year.

*Senate districts.*—In the *Carter Case* it was held that the provision of the Constitution relating to the reapportionment of senate districts vested in the legislature discretionary power, which was not subject to judicial review. A more rigid rule regarding senate apportionments was included in the Constitution of 1894.

§ 5. [*Assembly apportionment.*] — The members of the assembly shall be chosen by single districts, and shall be apportioned by the legislature at the first regular session after the return of every enumeration among the several counties of the state, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member. The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it

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to a member. But the legislature may abolish the said county of Hamilton and annex the territory thereof to some other county or counties.

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment, which shall be made as follows: One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county, containing less than the ratio and one half over. Two members shall be apportioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall be apportioned to the counties having the highest remainders in the order thereof respectively. No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens.

Until after the next enumeration, members of the assembly shall be apportioned to the several counties as follows: Albany county, four members; Allegany county, one member; Broome county, two members; Cattaraugus county, two members; Cayuga county, two members; Chautauqua county, two members; Chemung county, one member; Chenango county, one member; Clinton county, one member; Columbia county, one member; Cortland county, one member; Delaware county, one member; Dutchess county, two members; Erie county, eight members; Essex county, one member; Franklin county, one member; Fulton and Hamilton counties, one member; Genesee county, one member; Greene county, one member; Herkimer county, one member; Jefferson county, two members; Kings county, twenty-one members; Lewis county, one member; Livingston county, one member; Madison county, one member; Monroe county, four mem-

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bers; Montgomery county, one member; New York county, thirty-five members; Niagara county, two members; Oneida county, three members; Onondaga county, four members; Ontario county, one member; Orange county, two members; Orleans county, one member; Oswego county, two members; Otsego county, one member; Putnam county, one member; Queens county, three members; Rensselaer county, three members; Richmond county, one member; Rockland county, one member; St. Lawrence county, two members; Saratoga county, one member; Schenectady county, one member; Schoharie county, one member; Schuyler county, one member; Seneca county, one member; Steuben county, two members; Suffolk county, two members; Sullivan county, one member; Tioga county, one member; Tompkins county, one member; Ulster county, two members; Warren county, one member; Washington county, one member; Wayne county, one member; Westchester county, three members; Wyoming county, one member, and Yates county, one member.

In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall assemble on the second Tuesday of June, one thousand eight hundred and ninety-five, and at such times as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory, in as compact form as practicable, each of which shall be wholly within a senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled, and shall cause to be filed in the office of the secretary of state and

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of the clerk of such county, a description of such districts, specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the last preceding enumeration; and such apportionment and districts shall remain unaltered until another enumeration shall be made, as herein provided; but said division of the city of Brooklyn and the county of Kings to be made on the second Tuesday of June, one thousand eight hundred and ninety-five, shall be made by the common council of the said city and the board of supervisors of said county, assembled in joint session. In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest, number of inhabitants, excluding aliens, as the case may require. No town, and no block in a city inclosed by streets or public ways, shall be divided in the formation of assembly districts, nor shall any district contain a greater excess in population over an adjoining district in the same senate district, than the population of a town or block therein adjoining such assembly district. Towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens; but in the division of cities under the first apportionment, regard shall be had to the number of inhabitants, excluding aliens, of the election districts according to the state enumeration of one thousand eight hundred and ninety-two, so far as may be, instead of blocks. Nothing in this section shall prevent the division, at any time, of counties

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and towns, and the erection of new towns by the legislature.

An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same.

[Const. 1777, art. 5; 1821, art. 1, § 7; 1846, art. 3, § 5; Am. 1874.]

The first Constitution made an apportionment of members of assembly. This was obviously necessary at that time, because there was no legislature, therefore no legislative machinery by which an apportionment could be made. The second and third Constitutions did not make an assembly apportionment. The Convention of 1894, having determined to increase the number of members of assembly from 128 to 150, under new rules intended to secure greater equality of representation, decided to make an apportionment instead of leaving the subject to the legislature. The number of members apportioned to each county was accordingly fixed by the Convention and appears in this section, but the creation of districts in counties entitled to more than one member was committed to local boards, as under the third Constitution. This subject is considered at length in the article on apportionment in the chapter on the Convention of 1894. It will be observed that the section contains new rules and limitations relating to assembly apportionments, which are intended to prevent a repetition of the wide discrepancies in representation among counties which were possible and sometimes occurred under former Constitutions. In the article on apportionment in the third

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volume I have formulated rules for assembly apportionments which I think embody the principles stated in the new Constitution. For convenience those suggested rules are repeated here as follows:

"Divide the aggregate citizen population of the state by 150,—the quotient will be the general ratio.

"First. Apportion one member to each county (including Fulton and Hamilton as one) containing less than a ratio and a half. These will constitute the first group.

"Second. Apportion two members to each county containing a ratio and a half or more. These will constitute the second group until modified by the third group.

"Third. Ascertain the aggregate citizen population above two full ratios, and divide this aggregate by the number of members not included in the first and second groups; the quotient will be the ratio for the apportionment of such remaining members. Apportion these members by this ratio to the counties having more than two original ratios, using the highest final remainders in the order thereof respectively. Add to the number of members apportioned to each county on the new ratio the two members primarily apportioned to such counties in the second group. The result will constitute the completed third group. As finally constituted the first group will be composed of counties having less than an original ratio and a half, with one member each; the second group will be composed of counties with two members each, including counties with an original ratio and a half or more to which an additional member has not been apportioned on the ratio for the third group; and the third group will be composed of counties having more than two members."

The following notes include cases decided under the

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Constitution of 1846, and also under the present Constitution.

*Assembly districts.*—"The general power of the legislature to change the boundaries of cities and towns is subject to the injunction that assembly districts shall not be altered. . . . If it becomes desirable to change a boundary line of a town or city, which is also a dividing line between assembly districts, the act adopted for the purpose should be so framed as to take effect at the next reorganization of assembly districts, or in some other mode consistent with the constitutional injunction." *Kinne* v. *Syracuse* (1866) 3 Keyes, 110, holding unconstitutional the act of 1858, chap. 341, which excluded territory from Syracuse, and annexed it to an adjoining town in another assembly district, without making any provision for the status of the excluded territory, or the exercise of political rights by its inhabitants.

The discretionary power of the legislature in creating assembly districts was asserted in *Baird* v. *Kings County* (1893) 138 N. Y. 95, 20 L. R. A. 81, 33 N. E. 827, construing the provisions of the Constitution in this respect prior to the amendment of 1894. This case has already been considered in the apportionment article in the third volume. The apportionment in this instance was declared unconstitutional, and the board of supervisors of Kings county was directed to reconvene and reconstruct the assembly districts therein. Most of the questions discussed in this case would probably not have arisen under the Constitution of 1894. The second apportionment of Kings county, made in pursuance of the order of the court of appeals, was considered by that court and sustained in *Re Baird* (1894) 142 N. Y. 523, 37 N. E. 619. Another aspect of the Kings county apportionment was involved in *Re Whitney* (1894) 142 N. Y. 531, 37 N. E. 621. Aliens were included in the apportionment, contrary to the constitutional mandate, but the court held that in view of the distribution of aliens in the county the result would not have been materially different if they had been excluded, and the apportionment was therefore sustained. The inclusion of aliens was said to have been harmless.

In *People ex rel. Henderson* v. *Westchester County*, 147 N. Y. 1, 30 L. R. A. 74, 41 N. E. 563, the court sustained the annexation act of 1895, which transferred territory from one assembly district to another, but especially preserved political rights until another enumeration. The same act was considered in *People ex rel. Field* v.

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*New York* (1895) 89 Hun, 460, 35 N. Y. Supp. 817, where it was held that the board of aldermen of New York had no power to include the annexed territory in an assembly apportionment of that city.

Under the Constitution of 1894, which contains more rigid rules relating to assembly apportionments, boards of supervisors may still exercise some discretion, though more limited than under the previous Constitution, in establishing assembly districts. The court observes that the words "which from their location" disclose "the manifest intent to vest in the board discretion to determine whether the location of a town is such as to justify placing it in a district that will more nearly secure numerical equality, or whether the demands of convenience, contiguity, and compactness require a reasonable departure from an equal division of the number of inhabitants between two districts." *Smith* v. *St. Lawrence County* (1896) 148 N. Y. 187, 42 N. E. 592.

*Boards of supervisors.*—The provision vesting in the board of supervisors power to establish assembly districts in counties entitled to more than one member was incorporated in the Constitution by the Convention of 1846, and a sketch of the discussion relating to it will be found in the chapter on that Convention. The powers of the board were considered in *Kinne* v. *Syracuse* (1866) 3 Keyes, 110, where, construing the act of 1858, chap. 341, amending the charter of Syracuse by excluding therefrom certain territory and making it a part of the town of De Witt, which had the apparent effect to change assembly district lines, the court say that "the only power conferred upon boards of supervisors respecting assembly districts is the power to form them at the time fixed in the Constitution, and to reorganize them at such time as shall be prescribed by the legislature at its first session after each decennial enumeration. That duty being performed, the authority of the board of supervisors over the subject is at an end till another enumeration. They have no power of alteration in the interim."

*Constitution directory as to time.*—In *Rumsey* v. *People* (1859) 19 N. Y. 41, considering the apportionment act of 1857, and replying to the argument that it was invalid for the reason that it was not passed at the first session after the enumeration of 1855, Judge S. B. Strong says the constitutional direction "has not generally been considered so peremptory as to prohibit the performance of those acts at another time," and that "it is apparent that no such restriction was designed, as to the time when such apportionment of assembly districts and formation of senate districts should be established, from the omission of a direction contained in the provision relative to the



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reorganization of the judicial districts, . . . that it should be made at no other time." The Constitution of 1894 changed the rule by requiring the apportionment to be made at the first regular session after the enumeration, thus intending to prohibit an apportionment at an extraordinary session of the legislature. If, as held in the *Rumsey Case,* the apportionment provision in the former Constitution was directory, the same rule would doubtless be applied to the corresponding provision in the present Constitution.

*New counties and towns.*—Under the Constitution of 1846 the legislature had power to erect new counties. In *Rumsey* v. *People* (1859) 19 N. Y. 41, the court, construing the act of 1854, chap. 386, erecting Schuyler county, in connection with the constitutional provision that "no new county shall hereafter be erected unless its population shall entitle it to a member," say that the last decennial enumeration does not furnish to the legislature the only guide in determining the population when considering the propriety of erecting a new county. "It is left to the legislative bodies to ascertain the population in the best way they can." In this case parts of three counties were included in the new county, and towns were also divided in carving out the new territory. No separate census had been taken of these distinct portions of the new county, and it was impracticable for the legislature to attempt to follow the last enumeration. "The legislature was undoubtedly the appropriate tribunal to make the requisite inquiry, in order to ascertain whether their proposed act would be in conformity with the constitutional requisition. It is to be presumed that due inquiry was made, and the statute must be considered as a legislative declaration that the population of the proposed new county was sufficient." *De Camp* v. *Eveland* (1854) 19 Barb. 81.

The Schuyler county act was again considered in *Lanning* v. *Carpenter* (1859) 20 N. Y. 447, where its constitutionality was directly in issue, and the act was held invalid on the ground that the legislature had exceeded its authority in the alteration of senate, assembly, and judicial districts.

"The power to divide counties or towns and to erect new counties and towns, or to change their boundaries, is legislative in its character and is conferred upon the senate and assembly by the general grant of legislative power; and unless restrained in a particular case by other provisions or arrangements of the Constitution, the time and mode of its exercise is in the discretion of the legislature. The power of the legislature to erect new counties, although not conferred by any express grant, is implied in the prohibition in § 5 of

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article 3, relating to members of assembly, that 'no new county shall be hereafter erected unless its population shall entitle it to a member.'" The act of 1895, chap. 934, which annexed a portion of Westchester county to the city and county of New York, was sustained so far as it related to municipal affairs, but the act did not affect the status of the annexed territory as a part of existing assembly, senate, and judicial districts. *People ex rel. Henderson* v. *Westchester County* (1895) 147 N. Y. 1, 30 L. R. A. 74, 41 N. E. 563.

The power of the legislature to erect new towns was again affirmed in *Fort* v. *Cummings* (1895) 90 Hun, 481, 36 N. Y. Supp. 36.

*Wards.*—In the chapter on the Convention of 1846, I have noted the proposition to prohibit the division of wards in creating assembly districts, and its rejection by the Convention. In the *Whitney Case* (1894) 142 N. Y. 531, 37 N. E. 621, the division of wards in establishing assembly districts was sustained. The Constitution of 1894 does not prohibit the divison of a ward, but the prohibition applies only to the division of a block.

§ 6. [*Compensation of members.*]—Each member of the legislature shall receive for his services an annual salary of one thousand five hundred dollars. The members of either house shall also receive the sum of one dollar for every ten miles they shall travel in going to and returning from their place of meeting, once in each session, on the most usual route. Senators, when the senate alone is convened in extraordinary session, or when serving as members of the court for the trial of impeachments, and such members of the assembly, not exceeding nine in number, as shall be appointed managers of an impeachment, shall receive an additional allowance of ten dollars a day.

[Const. 1821, art. 1, § 9; 1846, art. 3, § 6; Am. 1874.]

The subject of the compensation of members of the legislature was for many years left to the legislature itself. The history of this subject, and the development of a movement finally resulting in fixing the compensation in the Constitution, will be found in the first and

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second volumes. The subject was considered not only in convention, but in numerous independent amendments proposed in the legislature.

§ 7. [*Members not to receive certain civil appointments.*]—No member of the legislature shall receive any civil appointment within this state, or the Senate of the United States, from the governor, the governor and senate, or from the legislature, or from any city government, during the time for which he shall have been elected; and all such appointments and all votes given for any such member for any such office or appointment shall be void.

[Const. 1821, art. 1, § 10; 1846, art. 3, § 7; Am. 1874.]

This provision had its origin in the Convention of 1821, where the committee on the legislature reported the following proposed section: "No member of the legislature shall receive any civil appointment under the government of this state during the term for which he shall have been elected." Mr. Birdseye proposed to limit the prohibition by stating it in the following form: "No member of the legislature shall receive any civil appointment from the governor and senate, or from the legislature, during the term for which he shall have been elected." This was adopted and included in the Constitution of 1821. Mr. E. Williams, discussing the section, said "the judiciary officers, the attorney general, the comptroller, the secretary of state, canal commissioners, etc., are the great honorable and valuable offices" to which members of the legislature might reasonably aspire, "and on the examination of the subject it will be found that nineteen out of twenty of these offices have been filled out of the legislature from year to year. It has been continued until the people have expressed their disapprobation from one part of the state to the other;

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and although they have selected, in many instances, fit and suitable candidates for office, yet, inasmuch as they were taken from the legislature,—the body who superintends and manages the appointing power,—they have been considered improper selections. An idea is entertained that the legislature has been rendered subservient to the appointing power for the promotion of political views and the advancement of individuals in that body." It should be noted that during the period covered by these observations the power of appointment was vested in the Council of Appointment, composed of the governor and four senators, chosen by the assembly. The council was abolished by this Convention. Mr. Williams thought the principle of the objection to the appointment of members of the legislature would apply with equal force under the new provision for appointments by the governor and senate. Mr. Bacon said it might sometimes happen "that in point of talent and capacity, a member of the legislature would be rather better adapted to some executive or judicial office which was to be filled than any other person to be found who was not a member, but the case would not be so frequent, nor the disparity so great, as to produce any serious public inconvenience, or prevent the state from being at all times well served. . . . Whether its character had heretofore been tarnished by sacrificing its independence to the desire of office, and whether subserviency to the purposes of party had been made the price of a commission from those who had it to bestow, it might perhaps be difficult directly to prove; but when we see, as we have done at no remote period, more than one third of a legislative body returning home with their commissions in their pockets, the people would inevitably draw from it some unkind inferences." The Convention of 1846 amended the section by declaring the effect of appointments made contrary to its provisions,

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and also by applying it to appointments to the Senate of the United States. The Commission of 1872, whose amendments, so far as they were approved by the legislature, were adopted in 1874, further modified the section by applying it to appointments under a city government, and by changing the word "term" to "time." The power prohibited by the section is political, and relates only to qualifications for office. The section imposes a specific disqualification, and the prohibition is not likely to be disregarded by the appointing power. It seems clear that the disqualification applies during the entire time for which a member of the legislature is elected, and would not be removed by his resignation. It also seems clear that a person elected to the legislature is not disqualified by this section prior to the first day of January following his election, which date is fixed by § 6 of article 10 as the beginning of the legislative term. This term must, I think, be deemed the "time" for which he is elected, as prescribed in the foregoing section.

A question has arisen in our recent political history whether a person elected to the legislature may, after the beginning of the legislative term, and before he takes the oath of office, receive an appointment under this section. In January, 1899, an assemblyman-elect, who had been chosen at the general election in 1898, was a candidate for appointment by the governor to fill a vacancy in the office of district attorney. In January, 1900, another assemblyman-elect, who had been chosen in 1899, was a candidate for appointment to the office of special county judge. Neither of them had taken the oath of office as a member of assembly. In both years I held the position of legal adviser to the governor, and gave the question some consideration, but in both cases a decision became unnecessary because the candidates for appointment concluded to remain in the assembly. I am not aware of

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any judicial decision involving the validity of an appointment by the governor of a person who had been elected to the legislature. The action of the Commission of 1872 in changing the word "term" to "time" seems to have had some significance, although my researches have failed to disclose any reason assigned for the change. It is not difficult to suggest conditions which would make an appointment of a member-elect, after the beginning of the legislative term, as objectionable as if he were actually in office; for the party in power with a narrow majority might secure political advantage by giving a lucrative office to a member-elect, and by a special election procure the return of one more closely in sympathy with the dominant party or faction.

While pursuing my studies in connection with this work I found that the original section received a practical construction in 1823. At the first election under the new Constitution, November, 1822, Jacob Sutherland was elected to the office of senator. The senate journal shows that at the opening of the session on the 7th of January, 1823, Erastus Root, president of the senate, presented a communication from Mr. Sutherland in which he said that considerations, which it was then unnecessary and perhaps improper to state, had determined him not to take his seat in the senate. The "considerations" became manifest soon afterwards, for on the 29th of the same month Mr. Sutherland was appointed by Governor Yates to the office of justice of the supreme court under the new Constitution. The doubt as to the Governor's power of appointment suggested in 1899 and 1900 was not then expressed for the first time. Mr. Hammond, in his Political History of New York (Vol. 2, p. 107), speaking of Mr. Sutherland's appointment, says that "many persons entertained scruples whether, by declining the office of senator, he could render himself

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eligible to an appointment by the legislative or executive authorities of the state. . . . On the other hand, it was alleged that in order to be brought within the spirit and meaning of the clause in the Constitution, he must not only be elected, but, by his own voluntary act, become a member of the legislature." The significance of this practical construction is increased by the fact that Governor Yates had been for several years a justice of the supreme court; that Erastus Root, then president of the senate, had been one of the leaders in the Convention of 1821, and that Mr. Sutherland was also a member of the same Convention. They declined to construe the section as applicable to a member-elect before he had taken the oath of office. Mr. Hammond, whose book was published in 1842, says that the construction of the Constitution which resulted in Mr. Sutherland's appointment had, with great propriety, been acquiesced in ever since, and he expressed the opinion that "it would be absurd to permit a single county to deprive the state of the services of a citizen in a high office by electing him a member of the assembly against his will." It may be proper to observe that, in these modern days, whatever may have been the former practice, a man is not often elected to the legislature against his will.

The validity of an appointment of a member of the legislature under this section was considered in *Stewart* v. *New York* (1897) 15 App. Div. 548, 44 N. Y. Supp. 575. A member had been appointed to the office of clerk of a district court in New York, and the appointment was sustained on the ground that the justice who made it was not an officer under the city government.

§ 8. [*Certain officers disqualified as members.*]—No person shall be eligible to the legislature who, at the time of his election, is, or within one hundred days previous

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thereto has been, a member of Congress, a civil or military officer under the United States, or an officer under any city government. And if any person shall, after his election as a member of the legislature, be elected to Congress, or appointed to any office, civil or military, under the government of the United States, or under any city government, his acceptance thereof shall vacate his seat.

[Const. 1821, art. 1, § 11; 1846, art. 3, § 8; Am. 1874.]

This section was modified in important particulars by the Commission of 1872.

A park commissioner in Hornellsville was held to be an officer under the city government, and ineligible to the legislature. "The term 'eligible' relates to the capacity of holding, as well as to the capacity of being elected to the office." *People ex rel. Sherwood* v. *State Canvassers* (1891) 129 N. Y. 360, 14 L. R. A. 646, 29 N. E. 345.

§ 9. [*Time of elections.*]—The elections of senators and members of assembly, pursuant to the provisions of this Constitution, shall be held on the Tuesday succeeding the first Monday of November, unless otherwise directed by the legislature.

[Const. 1821, art. 1, § 15; 1846, art. 3, § 9.]

The first Constitution did not prescribe a time for the election of members of the legislature. The legislature of 1778—the first session at which any laws were enacted—appointed the last Tuesday of April as election day for members of the legislature. Members of the legislature were required to take their seats on the first Monday of July or at the first meeting of the legislature thereafter. The election law of 1787 continued these dates.

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An act passed in 1797 provided that if the governor did not, on or after the first Monday of July and before the first Tuesday of January, convene the legislature, then the legislature should meet on the latter day without any summons or notification. An act passed in 1798 changed the day of meeting from the first Tuesday of January to the last Tuesday of January. This rule continued in force twenty years,—until 1818,—when the day of meeting was changed from the last Tuesday of January to the first Tuesday of January, as first fixed by the act of 1797. It will be observed that, during these twenty years, the time when the legislature was required to meet was six months after the election, which was still to be held on the last Tuesday of April. The Convention of 1821 found the act of 1818 still in force, and by existing statutes members of the legislature were to be elected on the last Tuesday of April. That Convention transferred to the Constitution the statutory provision requiring the legislature to meet on the first Tuesday of January, and also incorporated in the Constitution the provision requiring the election of members of the legislature to be held either in October or November (art. 1, §15).

While the subject was under discussion in the Convention Chief Justice Spencer said: "Too long a period now elapses between the election and the time of the meeting of the legislature; and circumstances may occur in which it would be improper for a member elected in April to take his seat in January. It is a settled maxim that a legislative body should meet as soon after the time of its being elected as possible." The new Constitution was approved by the people in January, 1822, and took effect on the last day of December, 1822. The section of the Constitution which prescribed the time for election of members of the legislature specifically provided that the first election under it should be held on the first Monday

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of November, 1822. The legislature of 1822 passed a new election law in April, after the approval of the Constitution, fixing the first Monday of November as the general election day throughout the state. This date was continued by the revised statutes of 1827, but the general election law of 1842 changed the day to the first Tuesday after the first Monday of November. This date was prescribed by the Constitution of 1846, and has since continued to be the date on which members of the legislature are required to be elected.

**§ 10. [*Quorum; special powers of each house.*]—A majority of each house shall constitute a quorum to do business. Each house shall determine the rules of its own proceedings, and be the judge of the elections, returns, and qualifications of its own members; shall choose its own officers; and the senate shall choose a temporary president to preside in case of the absence or impeachment of the lieutenant governor, or when he shall refuse to act as president, or shall act as governor.**

[Const. 1777, art. 9; 1821, art. 1, § 3; 1846, art. 3, § 10.]

In the chapter including the period from 1874 to 1894, I have given a brief history of the movement to amend this section by depriving the legislature of the power to determine the election and qualifications of its own members, and transfer jurisdiction in such cases to the courts, and have noted the submission of a constitutional amendment intended to accomplish that result, and its rejection in 1892.

The scope of the power conferred on the legislature by this section in determining the election and qualifications of its members is considered in *Barker* v. *People* (1824) 3 Cow. 686, 15 Am. Dec. 322, where the court, construing the anti-dueling act of 1815, chap. 1,

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which deprived a person convicted under it of the right to hold any public office, say that "the power of each house of the legislature to judge of the qualifications of its own members does not determine or illustrate what is or is not a qualification;" that the act could not deprive the legislature of its exclusive jurisdiction. The sense of the constitutional provision is that "each house shall decide upon the qualifications of its own members without interference or control from any other authority. . . . As the authority of each house is exclusive and supreme in all questions concerning the qualifications of its own members, if either house should consider such a disqualification unconstitutional, or for any reason whatever should disregard it, the opinion of the house would prevail in respect to the seat and rights of any member declared ineligible by the courts."

For the general purposes of legislation a majority of each house constitutes a quorum to do business. *People ex rel. Scott* v. *Chenango* (1853) 8 N. Y. 317.

The effect of acts relating to New York city, conferring on certain municipal boards the power to determine the election, returns, and qualifications of members, was considered in *People ex rel. Hatzel* v. *Hall* (1880) 80 N. Y. 117, where it was said that the jurisdiction was cumulative, but did not deprive the courts of jurisdiction to inquire into the right by which any person claims to be a member of the board. And also *People ex rel. Krulish* v. *Fornes* (1903) 79 App. Div. 618, 80 N. Y. Supp. 385, where it was said that a similar provision in the Greater New York charter did not authorize the board of aldermen to go behind the returns of an election, and judge of the validity of an election of a member. The board was bound to award a seat therein to the person certified to have been elected.

§ 11. [*Journals; public sessions; adjournments.*]—Each house shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days.

[Const. 1777, art. 15; 1821, art. 1, § 4; 1846, art. 3, § 11.]

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The provisions of this section relating to legislative journals and meetings will be found in substance in all our Constitutions, and the first Constitution provided specifically that the journals should be kept in the manner previously accustomed by the general assembly of the colony. By the Charter of Liberties, of 1683, and the new charter of 1691, the assembly had power to fix the times of its own meetings during the session and adjourn from time to time at pleasure, without the concurrence of the legislative council or the approval of the governor. As already pointed out in previous volumes, the functions of the council were primarily and chiefly executive; but when the legislative system was established the council was made a part of it and was thereby vested with legislative functions. While in session it might transact both legislative and executive business, or it might meet for executive purposes only. The independence of the assembly as a representative body would have been seriously impaired if its power of adjournment had been made subject to the approval of the council. The power thus vested in the assembly could not readily be abused, for the reason that the governor, with the consent of the council, might adjourn, prorogue, or even dissolve the assembly at any time. The reason for this independence ceased when, by the state Constitution, a legislature was established composed of two branches with equal power.

§ 12. [*Privileges of members.*]—**For any speech or debate in either house of the legislature, the members shall not be questioned in any other place.**

[Const. 1846, art. 3, § 12.]

The instructions from the Duke of York to Governor Dongan, in 1683, providing for the first assembly, guaranteed freedom of debate to members of that body.

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Freedom of debate was also guaranteed to members of the executive council, who were vested with legislative functions and became a part of the colonial legislature.

I have already quoted in the first volume a provision in the English Bill of Rights of 1689 intended to secure freedom of speech in Parliament and protect members of Parliament from being questioned outside for anything said in debate, and also a similar provision included in the New York Bill of Rights of 1787. This subject remained in the statutes until 1846, when it was included in the Constitution.

§ 13. [*Bills may originate in either house.*]—**Any bill may originate in either house of the legislature, and all bills passed by one house may be amended by the other.**

[Const. 1821, art. 1, § 8; 1846, art. 3, § 13.]

This provision appears for the first time in the Constitution of 1821. In the convention that framed that instrument Henry Wheaton, discussing the new provision, said it was "intended to determine a doubt which had sometimes arisen, whether a money bill could originate or be amended in the senate." He quoted from the first Constitution, article 9, the provision that the assembly shall "enjoy the same privileges and proceed in doing business in like manner as the assemblies of the colony of New York of right formerly did," and said that "under the colonial government, the council was appointed by the Crown, and as the colonial legislature was constructed on the model of Parliament, no money bill could originate or be amended except in the assembly, the members of which were the immediate representatives of the people. By the Constitution of Parliament, as it has stood ever since the knights and burgesses began to sit in separate houses, the commons had uniformly asserted their ex-

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clusive right to originate money bills, and had uniformly resisted the right of the lords even to amend them. But as our legislature was constituted, there was no reason why any doubt should be entertained whether the senate could originate or amend such bills. Both houses were the immediate representatives of the people, and both might be considered as equally representing the taxable property of the country. The analogy of the United States Constitution did not apply, because in that government representatives and direct taxes were to be apportioned among the several states by the same rule. It was therefore fit that the House of Representatives in Congress should have the exclusive right of originating revenue bills."

While the colonial assembly claimed the exclusive right to originate money bills, and at some periods of its history denied to the council power even to amend such bills, the assembly's claim was not conceded by the council, nor by the home government. A controversy arose in 1705 between the council and the assembly as to the right of the former to amend money bills, the assembly claiming exclusive control of such bills. The dispute was referred by Governor (Lord) Cornbury to the Lords of Trade, who reported, under date of February 4, 1706, that, in their opinion, the council undoubtedly had "as much to do in the forming of bills for the granting and raising of money as the assembly, and consequently had a right to alter or amend any such money bills, as well as the assembly." Governor Cornbury communicated this opinion to the assembly, but that body declined to yield its claim.

In 1710, during Governor Hunter's administration, another controversy arose between the two branches of the colonial legislature as to the council's right to amend money bills, at which time the assembly again asserted

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the claim which the Lords of Trade in 1706 had declared to be untenable. This dispute was also referred to the home government, and the Lords of Trade, in a communication to Governor Hunter, dated November 13, 1711, say that "as to the assembly's pretence, that the council cannot amend a money bill, it is groundless and will not be allowed of here, the council having an equal right with them in granting money, there being nothing in Her Majesty's commission to you, under the great seal of this Kingdom to the contrary, by virtue of which commission they only sit as an assembly, and therefore you will do well to acquaint them herewith, that they may no longer insist upon what is so ill-grounded." Even this did not convince the assembly, and it persevered in its intention to exercise the powers of the House of Commons in relation to money bills. Forty years afterwards, November, 1751, the council originated and passed a money bill which was sent to the assembly for its concurrence, but the assembly rejected it on the ground that the bill "apparently intrenches on the great essential and undoubted right of the representatives of the people of this colony, to begin all bills for raising and disposing of money."

This is only another instance out of many that might be cited of the independence of the New York colonial assembly. It was often quite troublesome to the home government, especially relating to questions involving the expenditure of money. Even frequent dissolutions of the assembly and new elections made little difference in the situation. The home government often complained that the New York assembly was setting a bad example for the other colonies in asserting so much independence, and it is clear that in no colony were the rights of English freemen more steadily maintained than in New York.

§ 14. [*Enacting clause.*]—The enacting clause of all

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**bills shall be "The People of the State of New York, represented in Senate and Assembly, do enact as follows," and no law shall be enacted except by bill.**

[Const. 1777, art. 31; 1846, art. 3, § 14.]

The evolution of political ideas under a parliamentary form of government may be studied in the enacting clause. The simple statement that the people, represented in the legislature, "do enact as follows," is a solemn declaration that ours is a republican form of government, and that the people, through their chosen representatives, declare the law which shall regulate the affairs of the state. This method of declaring the will of the people is removed only one degree from the highest expression of that will in the adoption of a constitution intended to be the fundamental law, and to control not only their own action, but the action of their agents in the legislature and elsewhere in administering the government. The preamble to the Constitution is the enacting clause of that instrument, and by it, as in this state, the people have declared that they "do establish this Constitution."

An enacting clause contains a statement of the authority by which the law is made. I need not here quote the formal introduction to an edict or decree under an absolute government, showing the name, title, and sovereignty of the ruler. Its general purpose is the same as that of an enacting clause; namely, to state the source and authority of the law. Having derived our legislative structure from the British parliamentary system, it would be interesting to examine the sources and development of that system, especially so far as concerns the policy of popular representation in the lawmaking body. Such examination, however, would perhaps not be altogether profitable nor satisfactory, especially when we recall Blackstone's statement that "the original or first institution of Parlia-



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ment is one of those matters which lie so far hidden in the dark ages of antiquity that the tracing of it out is a thing equally difficult and uncertain." Referring to the Saxon policy of representation in the *witena-gemote,* which embodied the essential attributes of the present Parliament and of our modern legislature, he says: "It indisputably appears, that parliaments, or general councils, are coeval with the kingdom itself;" but he observes that "how those parliaments were constituted and composed is another question, which has been matter of great dispute among our learned antiquaries; and, particularly, whether the commons were summoned at all; or, if summoned, at what period they began to form a distinct assembly."

Parliamentary representation in some form was a Saxon inheritance, and it was perpetuated in Magna Charta (1215), in which King John covenanted to call, on forty days' notice, a "common council of the kingdom" for certain governmental purposes, and to summon the "Archbishops, Bishops, Abbots, Earls, and great Barons" and also "all those who hold of us in chief." The parliamentary policy thus established appears fifty-two years later in the reign of Henry III. in the statute of Marlebridge or Marlborough, 1267, the introduction to which recites, among other things, that "the said King, our Lord, providing for the better Estate of his Realm of England, and for the more speedy ministration of justice, as belongeth to the office of King; and the more discreet men of the said Realm being called together, as well of the higher as of the lower estate, by whom it was provided, enacted, agreed, and ordained," etc. Here was a great council of which the King was only one element, but, as the acknowledged head of the nation, he assumes to seek the advice of the various representatives of the people, and together, King and representatives, they enact

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the statute. Eight years later, 1275, in the enactment of the statute of Westminster I., in the third year of Edward I., a different view of the relations between the Crown and the Parliament is presented, for, in the introduction to that statute, we are told that "by his Council, and by the Assent of the Archbishops, Bishops, Abbots, Priors, Earls, Barons, and the commonalty of the Realm thither summoned," the King "willeth and commandeth," etc. This shows that, while many high officers and other representatives of the people were called into consultation, the statute was deemed the act of the King himself, and an expression of royal authority, rather than of the power or judgment of the people. So in the statute of Gloucester, 1278, the King asserts his royal authority in the statement that "the King himself, providing for the wealth of his Realm, and the more full ministration of justice as to the office of a King belongeth, the more discreet men of the Realm, as well of high as of low degree, being called thither, does establish and ordain," etc. Here the King makes the law, but with the advice, more or less influential, of the members of the council, or Parliament.

Without studying in detail the development of this subject, it may be worth while to note that in 1365 a statute was passed which recited that "our Lord, King Edward, at his parliament holden at Westminster . . . by the assent of the Prelates, Dukes, Earls, Barons, and Commons of his Realm, there assembled, hath made and ordained the things underwritten." Here the King receives more than advice, as indicated in the earlier statute, and procures the "assent" of the parliamentary representatives, and the statute expressly states that it is enacted with this assent. Here was a clear assertion of the principle of the parliamentary authority maintained by the early Saxon councils, in which the representatives of the people not only took part in the ordinary affairs of

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the kingdom, but especially declared their right to regulate the taxation of freemen. Every reader will recall instances of the influence which this principle of the right of taxation has had in shaping modern political society. I have already called attention to the assertion of this principle not only by the English Parliament, but by the early colonial assemblies in New York. In 1402 the enacting clause was stated in the following form: "Our Lord, the King, with the assent of the Lords Spiritual and Temporal, and at the special instance and request of the commons, assembled at the Parliament," etc.

The New York legislative system was established in 1683 by the election of an assembly. At that time the enacting clause in English statutes was stated as follows: "Be it enacted by the King's Most Excellent Majesty, and by and with the advice and consent of the Lords Spiritual and Temporal, and the commons, in this present Parliament assembled, and by the authority of the same," etc. The parliamentary system embracing the King, the Lords Spiritual and Temporal, and the commons, had long before this time been permanently established, and the enacting clause shows that statutes were passed by the authority of Parliament, and not, as indicated in the earlier statutes above cited, upon the authority of the King, with the advice or with the assent of Parliament. The English enacting clause in 1905 is the same as the last clause above quoted.

The New York colonial assembly passed its first statute on the 30th of October, 1683, and, adopting the English rule so far as practicable, the enacting clause was stated in the following form: "Be it enacted by the Governor, council, and Representatives now in General Assembly met and assembled, and by the authority of the same." The council here mentioned was the governor's executive council, which was given legislative

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powers, in conjunction with the powers conferred upon the assembly. I have described this council in former volumes, and have shown that its relation to the assembly, as a part of the legislative system, was substantially the same as that sustained by the modern senate, and by the British House of Lords. History informs us that in the early days the King sat with the councils and parliaments during their deliberations. I have pointed out in a former volume that during the early years of the colonial legislature the governor sat with the council, and was sometimes present during the deliberations of both bodies,—the council and the assembly. In 1703 the clause more closely imitated the English clause, being in the following form: "Be it enacted, and it is hereby enacted accordingly, by his excellency, the governor, by and with the consent of her Majesty's Council and General Assembly of this Colony and by the authority of the same."

The first act passed by the first colonial legislature, 1683, was the famous "Charter of Liberties and Privileges," in which it was declared that the "supreme legislative authority under his Majesty and Royal Highness, James, Duke of York, Albany, etc., Lord proprietor of the said province, shall forever be and reside in a governor, council, and the people met in General Assembly." This charter, though once approved by the Duke, was finally rejected by him as James II., and so did not become effectual; but in the new charter, passed by the revived assembly of 1691, it was again declared that "the supreme legislative power and authority under their Majesties, William and Mary, King and Queen of England, etc., shall forever be and reside in a governor in chief, and council appointed by their Majesties, their heirs and successors; and the people, by their representatives met and convened in General Assembly." The declaration in our Constitution, article 3, § 1, that "the

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legislative power of this state shall be vested in the senate and assembly," states the substance of the foregoing rule, omitting the governor. I have already noted in the first volume the fact that the convention that framed the first Constitution once voted to include the governor as a part of the legislature, but later, on Mr. Jay's motion, receded from this plan.

The status of the people of New York in relation to the British government was radically changed by the adoption of the Declaration of Independence and other action taken by the Provincial Congresses, and instead of being part of a great nation governed primarily by a King and Parliament, and immediately, in their colonial affairs, by their own legislature, they assumed a position of independence; or, as the framers of the first Constitution say, in the introduction to that instrument, by reason of the action already taken by the Continental and Provincial Congresses, "all power whatever hath reverted to the people." The Convention had been chosen for the express purpose, among other things, of framing a new government, and the members of the Convention always remembered and frequently asserted the source of their authority; thus we find in the introduction to numerous articles in the first Constitution the statement that "this Convention therefore, in the name and by the authority of the good people of this state, doth ordain, determine, and declare," etc. This Convention definitely eliminated royal and executive authority from legislation, so far as the enactment of laws was concerned, by the provision included in the first Constitution, that "the style of all laws shall be as follows, to wit: 'Be it enacted by the people of the State of New York, represented in Senate and Assembly.'" The second Constitution did not prescribe the form of the enacting clause. The legislature was therefore at liberty to change the form required by

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the first Constitution. A change was made and appears for the first time in that part of the Revised Statutes embracing the first twenty chapters passed on the 3d of December, 1827, the enacting clause being in the following form: "The people of the State of New York, represented in Senate and Assembly, do declare and enact as follows:" and the explanatory act passed the next day has the same enacting clause. With the first act passed by the legislature of 1828, January 4, the present form of the enacting clause was used, omitting the words "declare and," but other parts of the Revised Statutes subsequently passed used the form adopted in the first part. The form adopted in 1828 was included in the Constitution by the Convention of 1846.

**§ 15. [*Manner of passing bills.*]— No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the state; nor shall any bill be passed or become a law except by the assent of a majority of the members elected to each branch of the legislature; and upon the last reading of a bill, no amendment thereof shall be allowed, and the question upon its final passage shall be taken immediately thereafter, and the yeas and nays entered on the journal.**

[Const. 1846, art. 3, § 15.]

Important changes were made by the Convention of 1894 in relation to the enactment of laws. In the article on the legislature, in the chapter on that Convention, I have given a sketch of the propositions and discussions relating to this subject, including the power vested in

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the governor to waive the constitutional requirement concerning delay in the consideration of bills. The cases cited in this note relate to legislative action under the section as it existed prior to the amendment of 1894.

In *People ex rel. Scott* v. *Chenango* (1853) 8 N. Y. 317, the court say that it is a legal presumption "that a law published under the authority of the government was correctly passed, so far, at least, as relates to matters of form. . . . There is nothing in the Constitution which requires the yeas and nays to be taken in receding from an amendment which the senate had once adopted by the requisite vote and in the prescribed form. . . . The provision of the Constitution requiring the question upon the final passage of a bill to be taken immediately upon its last reading, and the yeas and nays to be entered on the journal, is only directory to the legislature. There is no clause declaring the act to be void if this direction be not followed. . . . It is not competent for the legislature to make the failure of its officers to append the proper certificate defeat the provisions of the Constitution. Such would be the effect of the act if the want of a certificate was made conclusive evidence that three fifths were not present when the final vote was taken."

In *People ex rel. Purdy* v. *Highway Comrs.* (1873) 54 N. Y. 276, 13 Am. Rep. 581, the court say that "when it is necessary to inquire by what vote a law was passed, the judges are to determine from the printed statutes or from the laws on file in the secretary of state's office, whether the requisite vote was received. Upon such an inquiry the printed volume is presumptively correct, and the original act is conclusive." The same subject is also considered in *Purdy* v. *People* (1842) 4 Hill, 384; *De Bow* v. *People* (1845) 1 Denio, 9; *Commercial Bank* v. *Sparrow* (1846) 2 Denio, 97; *Rumsey* v. *New York & N. E. R. Co.* (1898) 130 N. Y. 88, 28 N. E. 763; *People* v. *Devlin* (1865) 33 N. Y. 269, 88 Am. Dec. 377, where Judge Potter expresses the opinion that "legislative journals were not legitimate evidence to impeach the statute produced. They are not made evidence by the Constitution; they are not made so by the statute; they were never made so at common law. They are doubtless evidence, from the necessity of the case, on grounds of public convenience, and from the public character of the facts they contain, to prove the proceedings of the body whose records they are, because the Constitution requires them to be kept. Whenever any act or proceeding of

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such a body becomes necessary to be shown as evidence, such journals may be received, but to impeach the force and effect of a solemn statute duly certified, no authority can be found within the limits of my research to admit them to be legitimate evidence, but much authority may be found to the contrary." By the legislative law of 1892, chap. 682, the presiding officer of each house is required to certify to the passage of every bill by a majority of the house, and, if required in a particular case, that three fifths were present, and that it was passed by a two-thirds vote; and such a certificate is declared to be "conclusive evidence" of the facts therein stated.

This section is cited, but without special discussion, in *People ex rel. McSpedon* v. *Stout* (1856) 23 Barb. 349, involving a question of the delegation of legislative power. The case is cited under that topic in notes to § 1 of article 3.

§ 16. [*Private and local bills limited to one subject.*]—No private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title.

[Const. 1846. art. 3, § 16.]

Sections 16, 17, and 18 present constitutional principles which, while modern in form, are not new in fact. The unpublished manuscripts in the State Library include the instructions issued to William Tryon on his appointment as governor of New York. The instructions bear date February 7, 1771. Two paragraphs relate to the enactment of laws, and they show that the English statesmen who directed colonial affairs fully appreciated the mischiefs intended to be prevented by these three sections. It has already been pointed out in the Introduction that these executive instructions formed a part of the colonial Constitution, and were as binding on the governor, the council, and the assembly of that period as the Constitution is upon the governor and legislature of the present day. These colonial paragraphs relating to the enactment of laws are equivalent to a modern constitutional

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mandate on the same subject. Possibly the constitution makers who formulated these sections were familiar with the colonial precedents; at any rate the ideas expressed in the Tryon instructions and in these sections are similar and in some parts identical. One provision relates particularly to the subject embraced in § 16, another to § 17, and still another to private laws, and will be found in a note to § 18. The policy of § 16 is thus expressed in paragraph 12 of the instructions:

"You are also as much as possible in the passing of all laws to observe that whatever may be requisite upon each different matter be accordingly provided for by a different law, without intermixing in one and the same act such things as have no proper relation to each other. And you are more especially to take care that no clause or clauses be inserted in or annexed to any act which shall be foreign to what the title of such respective act imports, and that no perpetual clause be part of any temporary law."

This asserts the principle of the foregoing section and almost in the same language. The Tryon instructions will be found in Vol. III., Appendix B. The section was included in the Constitution by the Convention of 1846. The evils of the practice prohibited by the colonial instructions had largely increased with the growth of legislation in the state, and it was manifest that reform was needed. The Convention sought to put an end to the practice by limiting private and local statutes to one subject, which must be expressed in the title. The application of this restrictive policy in actual legislation has been a fruitful source of litigation, and the validity of numerous statutes has been challenged on the ground that they violated this provision. These statutes cover a great variety of subjects, being, of course, local or private, but so unrelated that a classification by topics is impracticable. Hence,

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it has seemed most convenient to arrange them in chronological order, in two groups,—affirmative and negative,—including in each group respectively the statutes that have been sustained or condemned under this constitutional provision. I have tried to state the points on which the statutes have been criticized, and to indicate the subjects which were deemed foreign to the main purpose of the act, and occasional quotations from opinions have been given for the purpose of elucidating the questions involved. The courts have, from the first, appreciated the difficulty of formulating any rules of interpretation, and while a few principles have been established, each statute, as a general rule, has been considered on its own merits, and not, as in many other parts of the Constitution, as involving any fundamental policy or principle of government or theory of statutory construction. It is hoped that this arrangement will enable the reader to discover at a glance the question involved in each case, and apply it so far as practicable to the statute under immediate consideration. Several statutes construed by the courts under this section have been declared to be public or general, and therefore not within the purview of the Constitution; for that reason they have not been included in the following summary.

In the constitution proposed by the Convention of 1867 this section was amended by declaring expressly that "if the title contain only one subject, the law shall be valid as to that, and void as to all other subjects." An examination of the cases cited in this note will show that the courts in several instances have adopted the rule that if the provisions of an act are separable, and some of them are constitutional and some of them unconstitutional, the act will be sustained as to the constitutional provisions and rejected as to the others. In several instances specific provisions were deemed foreign to the main purpose of

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the act and were rejected, while the act as a whole was sustained.

In *People ex rel. Rochester* v. *Briggs* (1872) 50 N. Y. 553, Chief Judge Church, discussing the validity of an act as affected by this section, says the object of the provision was twofold; namely, "to prevent a combination of measures in local bills, and secure their passage by a union of interests commonly known as 'log-rolling,' second, to require an announcement of the subject of every such bill, to prevent the fraudulent insertion of provisions upon subjects foreign to that indicated in the title. It was intended that every local subject should stand upon its own merits, and that the title of each bill should indicate the subject of its provisions, so that neither the legislators nor the public would be misled or deceived."

In his opinion in *Van Brunt* v. *Flatbush* (1891) 128 N. Y. 50, 27 N. E. 973, Judge Earl says this provision "has given the courts much trouble. They have been able to formulate no general rule that will solve all the cases coming under this section. Whether the title of an act will stand the test of this constitutional requirement depends generally upon the peculiar provisions of the act. Every provision contained in a private or local bill must be germane to, and fairly connected with, and tending to promote, the subject expressed in the title."

The restriction contained in this section applies only to acts of the legislature, and does not apply to a resolution passed by a board of supervisors under a valid authority conferred upon it by the legislature. *Robert* v. *Kings County* (1896) 3 App. Div. 367, 38 N. Y. Supp. 521, affirmed in (1899) 158 N. Y. 673, 52 N. E. 1126.

*What is a private or local bill?*—In *People ex rel. McConvill* v. *Hills* (1866) 35 N. Y. 449, the court, quoting from Burrill's Law Dictionary, says the word "local" means "relating to places; belonging or confined to a particular place; distinguished from general, personal, or transitory." An act relating to the city of Rochester is local.

In *People* v. *O'Brien* (1868) 38 N. Y. 193, the court say that a local act is "confined in its operation to the property and persons of a specified locality;" while a general law embraces "either persons or property of the people of the state generally, or of some class of persons or species of property, not limiting the operation of the law to any particular locality less than the whole." An act modifying the New York charter was held to be local.

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In *People ex rel. Lee* v. *Chautauqua County* (1870) 43 N. Y. 10, Judge Folger, discussing the question whether a certain act was local or general, says it is not easy to give an exact definition of a local bill, and, after quoting from several text writers and judicial decisions, defines a local act as one "which in its subjects relates but to a portion of the people of the state, or to their property; and may not, either in its subject, operation, or immediate and necessary results, affect the people of the state, or their property in general."

In *Huber* v. *People* (1872) 49 N. Y. 135, it is said that "an act regulating the duties of a public officer under the general laws of the state, if limited in its operation to a part of the state, or to a single county, is local, and must be passed in the form prescribed by the Constitution, although the subject-matter of the enactment is public, and affects public interests."

In *People* v. *Davis* (1872) 61 Barb. 456, the court say " that which concerns the administration of public justice, like legislation respecting a court, though it be of limited jurisdiction,—though its sittings be confined to a certain specified locality,—is a public law; a law which affects, and in which the public generally are interested."

In *Healey* v. *Dudley* (1871) 5 Lans. 115, Mullin, P. J., says that "legislation, to be local within the meaning of the Constitution, must apply to and operate exclusively upon a portion of the territory of the state, and upon the people living therein. If it applies to or operates upon persons or property beyond such locality, it is not local."

Judge Earl also considers the question in *Re New York Elev. R. Co.* (1877) 70 N. Y. 327, and says that "a law applicable to all the people of the state, and operating in all parts of the state, would be most general. But a law may be general without affecting all the people of the state. A law regulating the rights of married women, or of minors, or of adults, or of aliens, would be general, and it would be general although confined to the persons in being at the time of its passage. So, a law conferring new rights upon all existing insurance companies, or railroad companies, or manufacturing companies, would be general. A law which relates to persons or things as a class is general, but one which relates to particular persons or things of a class is special and private."

The court of appeals in *Ferguson* v. *Ross* (1891) 126 N. Y. 459, 27 N. E. 954, deduce from the decisions the rules that "a statute may be public and still local, and therefore within the purview of this provision of the Constitution;" that "an act embracing within its

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scope all the cities of the state, or all things of a certain class, is a general, and not a local act, although, by reason of some limitation based on population or other condition, only a particular city or the inhabitants of a single locality can, in the actual situation, receive its benefits," and that "the fact that an act operates only upon a limited area or upon persons within a specified locality, and not generally throughout the state, is, in most cases, a reasonably accurate test by which to determine whether the act is general or local."

So it is said in *Treanor* v. *Eichhorn* (1893) 74 Hun, 58, 26 N. Y. Supp. 314, that "an act embracing all things of a certain class is a general, and not a local, act, although, by reason of a limitation based on population, only a single locality can receive its benefits."

The pool law of 1887, chap. 479, is a general act. *Reilly* v. *Gray* (1894) 77 Hun, 402, 28 N. Y. Supp. 811; also the plumbers' act of 1892, chap. 602, as amended by chap. 66, Laws 1893. *People ex rel. Nechamcus* v. *City Prison* (1894) 81 Hun, 434, 39 N. Y. Supp. 1095.

In *New York Fire Underwriters* v. *Metropolitan Lloyds* (1895) 11 Misc. 646, 33 N. Y. Supp. 547, the court quotes from Abbott's Law Dictionary the definition of a private act as "an enactment which does not affect the public at large, but bears upon individuals only." The court refers to Chancellor Sanford's suggestion in *Bank of Utica* v. *Smedes* (1824) 3 Cow. 662, that an act incorporating a bank is a public act, even if not so declared in the act itself, as was the case in the act then under consideration. The remark was made in considering a question as to pleading a private statute. But speaking of banks, the Chancellor said that "these institutions are public in their nature and character, and their operations affect the whole community."

Bouvier's Law Dictionary defines a private act as one "operating only upon particular persons and private concerns." It will be observed from the cases cited in the following summary that statutes creating or relating to corporations are classed as private, and within the purview of this section of the Constitution.

The act of 1857, chap. 446, "to amend the charter of the city of New York," is not a private or local bill. "It is intended to regulate the government of a city containing a large portion of the population of the state, authorizing the city authorities to exercise powers of legislation which, without it, would belong to the legislature. A private act is one of an entirely different character, relating to private, and not public, interests, to individual cases, and not to a whole community." *Phillips* v. *New York* (1857) 1 Hilt. 483.

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## STATUTES VALID UNDER ARTICLE 3, § 16.

1847, chap. 432, "in Relation to the Fees and Compensation of Certain Officers in the City and County of New York." It provided for paying certain officers by salaries instead of fees. The act embraced but one subject, namely, the compensation of officers included therein. Two laws were not necessary to accomplish the purposes of the act. *Conner* v. *New York* (1851) 5 N. Y. 285.

1848, chap. 153, "in Relation to Justices and Police Courts in the City of New York." It contained provisions relating to the marine court, but it was held that this court possessed all the main characteristics of a justice's court, and might therefore properly be included in the statute relating to that court, without being specifically mentioned in the title. "It is only where the subjects embraced in the same statute are not expressed by its title, and have no congruity or proper connection, that the evils sought to be prevented by this section of the Constitution can arise." *Re Wakker* (1848) 3 Barb. 162.

1849, chap. 284, "to Incorporate the Panama Railroad Company." The charter of a private corporation may state all details necessary to its organization, purposes, and powers, and if "limited by the act to one body corporate, they constitute in mass the single subject which the act must contain, and which the title may express . . . under the provisions of the Constitution." A provision authorizing the company to own and use steam and sailing vessels in connection with its general business was held not obnoxious to the constitutional provision, but a proper element of the general power conferred on the corporation. *Freeman* v. *Panama R. Co.* (1876) 7 Hun, 122.

1850, chap. 84, "to Enable the Supervisors of the City and County of New York to Raise Money by Tax." It provided for raising by taxation for contingent expenses, for public expenses, for a lamp district, and for preceding tax deficiencies. A part of the sum to be raised for deficiencies was to be levied on a specified part of the city, and the tax to be raised for a lamp district was to be raised from another part, to be specified by a local authority. These subjects were held to be properly within the scope of the title. The power to levy a tax and the mode of exercising the power are not two subjects. "The purpose of the 16th section was that neither the members of the legislature nor the public should be misled by the title; not that the latter should embody all the distinct provisions of

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the bill in detail." *Sun Mut. Ins. Co.* v. *New York* (1853) 8 N. Y. 241.

1850, chap. 111, "for the Relief of the Creditors of the Lockport & Niagara Falls Railroad Company." It provided for the sale of the property of the company; the purchasers were to acquire all its franchises, rights, and privileges, and might sell stock, and "organize the company anew with all the powers of the original corporation." All these provisions were held to be fairly included in the title. *Mosier* v. *Hilton* (1853) 15 Barb. 657.

1854, chap. 386, "to Erect a New County, from Parts of the Counties of Steuben, Chemung, and Tompkins, by the Name of Schuyler, and to Alter the Town Lines of Bradford and Wayne, in the County of Steuben, to Erect the Town of Van Etten, and Annex Parts of the Towns of Erin and Catherine to the Town of Cayuta, in the County of Chemung." The purpose of the act was to erect the county of Schuyler, and all its provisions were subordinate and auxiliary to that purpose. *De Camp* v. *Eveland* (1854) 19 Barb. 81.

1855, chap. 337, "to Enlarge the Jurisdiction of the General and Special Sessions of the Peace in and for the City and County of New York." The act contained provisions relating to courts of oyer and terminer throughout the state, but it was held that this did not make it void. These provisions were neither private nor local, and, so far as the act related to these courts, it was a public act of general application, and therefore not within the constitutional prohibition. The character of the act is to be determined by its provisions, and not by its title. A general law need not have a title. The general provisions were sustained although included in an otherwise local bill without being stated in the title. *People* v. *McCann* (1857) 16 N. Y. 58, 69 Am. Dec. 642; *Williams* v. *People* (1862) 24 N. Y. 405.

1857, chap. 14, "for the Relief of James Ley & Son." It authorized the city of Syracuse to pay the persons named an additional sum on a municipal contract. It was held that the procedure was only a matter of detail and necessarily included in the general subject. "The degree of particularity with which the title of an act is to express its subject is not defined in the Constitution, and rests in the discretion of the legislature. . . . An abstract of the law is not required in the title." *Brewster* v. *Syracuse* (1859) 19 N. Y. 116.

1857, chap. 156, "to Incorporate the Malone Waterworks Company." All the provisions contained in the act relating to the company and its operations were said to be germane to the title. *Re*

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*Malone Waterworks Co.* (1890) 38 N. Y. S. R. 95, 15 N. Y. Supp. 649.

1858, chap. 17, "to Establish and Amend the Charter of the Village of Deposit," and 1873, chap. 330, "to Amend the Charter of the Village of Deposit, Situated Partly in the Town of Sanford, Broome County, and Partly in the Town of Tompkins, Delaware County, and to Revise and Compile the Several Acts Relative to Said Village." Under the charter a notice required by law to be published in one county might be published in a newspaper in the village, although in another county, and the publication was to be deemed valid. This provision, relating to the publication of notices, did not violate the constitutional prohibition. *More* v. *Deyoe* (1880) 22 Hun, 208.

1859, chap. 454, "to Provide for the Closing of the Entrances of the Tunnel of the Long Island Railroad Company, in Atlantic Street, in the City of Brooklyn, and Restoring Said Street to its Proper Grade, and for the Relinquishment, by Said Company, of its Right to Use Steam Power Within Said City." The act embraced but one subject. *People ex rel. Crowell* v. *Lawrence* (1869) 41 N. Y. 137; *Litchfield* v. *Vernon* (1869) 41 N. Y. 123.

1859, chap. 489, "to Enable the Supervisors of the City and County of New York to Raise Money by Tax." Among other things it authorized a tax to be raised to pay existing judgments, and also to pay future judgments against the city. Both provisions were necessary for the purpose of limiting the application of the moneys to be raised by tax. *Sharp* v. *New York* (1859) 31 Barb. 572.

1860, chap. 501, "to Preserve the Public Peace and Order on the First Day of the Week, Commonly Called Sunday." It related exclusively to the city of New York, but the court said the title was broad enough to apply to the whole state. "This, however, is not enough alone to determine that it is improper." The act contains but one local subject. The title gave notice to the people of every locality, that they might be interested in the law. *Neuendorff* v. *Duryea* (1877) 69 N. Y. 557.

1860, chap. 509, "to Enable the Supervisors of the County of New York to Raise Money by Tax for City Purposes, and to Regulate the Expenditure Thereof, and Authorizing the Board of Supervisors of the County of New York to Levy a Tax for County Purposes, and to Regulate the Expenditure Thereof; and Also to Borrow Money in Anticipation of the Collection of the Said Tax, and to Issue 'County Revenue Bonds' Therefor." "An act to raise means for the support of the city government would be incomplete and



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imperfect without the necessary direction for the application and appropriation, a declaration of the purposes for which the means are raised, and to which they shall be applied." A provision authorizing contracts by the common council for city purposes was not foreign to the subject of the act. *Devlin* v. *New York* (1875) 63 N. Y. 8.

1861, chap. 308, "Relative to Contracts by the Mayor, Aldermen, and Commonalty of the City of New York." The general purpose of the act was to regulate city contracts. It provided a board for the revision and confirmation of assessments, transferring to this board the power previously vested in the common council. The creation of this board and the powers conferred upon it were held to be within the scope of the title and general purpose of the act. The assessment was based on a contract for a public improvement, and the action of the board was necessary to give validity to the contract. *Re Tappan* (1869) 54 Barb. 225; *Re Volkening* (1873) 52 N. Y. 650.

1861, chap. 333, "in Relation to Fines, Recognizances, and Forfeitures." All parts of the act were fairly embraced in the title, including a provision continuing an earlier statute containing regulations relating to judgments on forfeited recognizances. *People* v. *Quigg* (1874) 59 N. Y. 83.

1863, chap. 227; 1867, chap. 586; and 1868, chap. 853 (annual tax levy of New York city). Provisions limiting the number of official newspapers which were to be selected by specified officers were sustained as within the general purpose of the acts which related to city taxes and expenditures. *Re Astor* (1872) 50 N. Y. 363.

1864, chap. 547, "Authorizing the Common Council of the City of Buffalo to Lay Out a Public Ground for the Purpose of Maintaining and Protecting a Sea Wall or Breakwater Along the Shore or Margin of Lake Erie." A provision authorizing the condemnation of land for the purposes of the act was embraced in its subject, and was valid. *Sweet* v. *Buffalo, N. Y. & P. R. Co.* (1880) 79 N. Y. 293.

1866, chap. 367, "Relative to the Powers and Duties of the Commissioners of Central Park." The act contained numerous provisions relating to the powers and duties of the commissioners, and the court say that, where the title expresses the general object of the statute, "all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the act, and are germane to the title." *Re Knaust* (1886) 101 N. Y. 188, 4 N. E. 338.

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1866, chap. 398, "to Facilitate the Construction of the New York & Oswego Midland Railroad, and to Authorize Towns to Subscribe to the Capital Stock Thereof." "The provisions of the statute give effect to the objects and purposes disclosed in the title, and such an act is not a violation of the constitutional prohibition, however numerous or various they may be." *People ex rel. Akin* v. *Morgan* (1873) 65 Barb. 473, in which the act of 1871, chap. 298, relating to the same railroad, was considered with the same result. The judgment was reversed on another point in (1874) 55 N. Y. 587.

1866, chap. 578, "to Regulate the Sale of Intoxicating Liquors within the Metropolitan Police District of the State of New York." Justice Lott thought this was a general law; but, conceding it to be local, held that it embraced but one general subject, and that was sufficiently expressed in the title. *Re De Vaucene* (1866) 31 How. Pr. 289.

1866, chap. 648, "to Authorize Certain Towns in the Counties of Ulster, Delaware, Greene, and Schoharie, to Issue Bonds and Take Stock in the Rondout & Oswego Railroad." The act authorized the company, on specified conditions, to apply to the supreme court for the appointment of commissioners of appraisal. This was held to be consistent with the general purpose of the act, and therefore valid. *Rondout & Oswego R. Co.* v. *Deyo* (1871) 5 Lans. 298.

1867, chap. 96, "in Relation to the Establishment of a Normal and Training School in the Village of Brockport." "The subject of the act is single, all its provisions relate to that subject, and the subject is fairly expressed in the title. . . . No one could fail to comprehend that the establishment of such a school in the village might involve the use of the corporate credit, or the levying of a tax, or both." *Gordon* v. *Cornes* (1872) 47 N. Y. 608.

1867, chap. 353, "to Consolidate the Several School Districts and Parts of Districts Within the Corporate Limits of the Village of Saratoga Springs, and to Establish a Free Union School or Schools Therein." The legislature had power to make all needful and incidental provisions to perfect the objects or subject of the act. Several school districts might have been consolidated under the act, even if this particular purpose were not expressed in the title. Replying to the argument that the act conferred the power of taxation without being expressed in the title, the court say that schools cannot be established without means, and that taxation is a necessary element of power to accomplish the object of the law. All parts of the law relate to one object, and provide a scheme for organizing

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and carrying on schools. *People ex rel. Board of Education* v. *Bennett* (1867) 54 Barb. 480.

1867, chap. 393, "to Authorize the Utica Waterworks Company to Increase its Capital Stock, and to Contract with the Common Council of the City of Utica for a Supply of Water in Said City for the Extinguishment of Fires." A provision authorizing the company to increase its capital stock was incidental to the main purpose and was necessary to enable the company to obtain means with which to carry out its part of a contract authorized by the act. *Utica Waterworks Co.* v. *Utica* (1884) 31 Hun, 426.

1867, chap. 846, "to Incorporate the New York Board of Fire Underwriters." Among other things the act gives power to the corporation to create a fire patrol, and regulates its powers and prescribes the manner in which the money to pay its expenses shall be raised and collected. These provisions were essentially of a public character, but the act did not thereby cease to be within the constitutional provision relating to private or local laws. The act was sustained. *New York Fire Underwriters* v. *Whipple* (1896) 2 App. Div. 361, 37 N. Y. Supp. 712.

1868, chap. 631, amended by chap. 710, Laws 1872, chap. 592, Laws 1873, chap. 588, Laws 1874. The act was not rendered unconstitutional by the provision authorizing the park commissioners to determine the district of assessment, and empowering the commissioners of estimate appointed under the proceedings, to assess only such lands as would, in their opinion, be benefited by the improvement. *Re Certain Streets* (1878, Ct. App.) 7 N. Y. Week. Dig. 202.

1868, chap. 842, "to Provide for the Transmission of Letters, Packages, and Merchandise in the Cities of New York and Brooklyn and across the North and East Rivers, by Means of Pneumatic Tubes, to be Constructed beneath the Surface of the Streets and Public Places in Said Cities, and under the Waters of Said Rivers." For the purpose of carrying it into effect the act authorized persons named to conduct the business therein indicated, and to organize a corporation with specified powers and functions. This subject was fairly embraced in the title. *Astor* v. *Arcade R. Co.* (1889) 113 N. Y. 93, 2 L. R. A. 789, 20 N. E. 594.

1869, chap. 876, "to Make Provision for the Government of the City of New York." The provision which prohibited city authorities from creating new offices or increasing existing salaries was held to be within the general purpose of the act. *Sullivan* v. *New York* (1873) 53 N. Y. 652. A similar question relating to a like prohibition in a law applicable to the county of New York (1870,

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chap. 382) was considered, but not decided, in *Drake* v. *New York* (1873) 7 Lans. 340.

1870, chap. 383, "to Make Further Provision for the Government of the City of New York." The provision relating to the New York court of special sessions of the peace was held to be public and therefore valid, although included in a local bill. *People* v. *Davis* (1872) 61 Barb. 456.

1870, chap. 383, "to Make Further Provision for the Government of the City of New York." The act embraces numerous provisions "for the government of the county of New York. Provisions, therefore, in regard to any of the functions of the corporation, or necessary to carry out or render any of them effective, may be, so far as this clause of the Constitution is concerned, incorporated in the act as necessarily connected with the subject-matter of its title." *Re Metropolitan Gaslight Co.* (1881) 85 N. Y. 526.

1870, chap. 741, "to Amend the Code of Procedure." The Code of Procedure treats of the jurisdiction and practice of all the courts of the state, including the district courts of the city of New York. It includes several local courts, and the provisions relating to all these courts are but parts of a general judicial system of practice created by the Code. An act to amend the Code might therefore legitimately contain provisions relating to the jurisdiction or practice of any one or more of the courts of the state. Each provision is part of the general subject. The provision in this act extending the jurisdiction of district courts in New York was included in the general subject, and was valid. *People ex rel. Grissler* v. *Dudley* (1874) 58 N. Y. 323.

1871, chap. 461, "to Revise the Charter of Long Island City." A provision creating a city court was within the general purpose of the act. "An act creating a municipality, and giving to it the necessary legislative, taxing, judicial, and police powers, embraces but one subject. . . . The separate provisions of the act, defining and granting these powers, are but parts of a whole, and essential to make a whole." *Harris* v. *People* (1875) 59 N. Y. 599.

1871, chap. 583, "to Make Provision for the Local Government of the City and County of New York." The act prohibited the entry of a judgment against the city except on issues of law or the verdict of a jury. This provision was sustained in *Lewenthal* v. *New York* (1872) 5 Lans. 532.

1871, chap. 583, "to Make Provision for the Local Government of the City and County of New York." A provision authorizing the board of apportionment "to regulate all salaries of officers and em-

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ployees of the city and county governments" was held to be within the subject expressed in the title. *Fellows* v. *New York* (1876) 8 Hun, 484.

1871, chap. 810, "to Amend an Act Entitled 'An Act to Incorporate the City of Watertown,' Passed May 8, 1869, and to Confirm the Acts of the Common Council in Reference to Local Assessments for Local Improvements." It amended a provision of the Revised Statutes in its application to the city of Watertown, and conferred on the recorder jurisdiction of offenses therein specified. The provision is incidental to the main purpose of the act and relates solely to the powers of an officer of the city. The act was valid. *People ex rel. Thompson* v. *Webster* (1894) 8 Misc. 133, 28 N. Y. Supp. 646.

1872, chap. 219, "in Relation to the Erection of Public Buildings for the Use of the City of Rochester." The provision authorizing the selection of a site was within the purpose of the act, and need not have been expressed in the title. *People ex rel. Hayden* v. *Rochester* (1872) 50 N. Y. 525.

1872, chap. 285, "to Amend an Act Entitled 'An Act to Extend the Powers of Boards of Supervisors, Except in the Counties of New York and Kings.'" The amendment related exclusively to the board of supervisors of Queens county, but it was held unobjectionable under this section. "This advises every one interested in the doings of the board of supervisors that the powers of that board may be increased or diminished." *People ex rel. Burroughs* v. *Brinkerhoff* (1877) 68 N. Y. 259.

In *Phillips* v. *Schumacher* (1877) 10 Hun, 405, it was held that the act of 1875, chap. 482, "to Confer on Boards of Supervisors Further Powers of Local Legislation and Administration, and to regulate the Compensation of Supervisors" was not a local law, but general, and therefore not subject to this constitutional prohibition.

1872, chap. 575, "to Regulate Elections in the City of Brooklyn." "The provisions for preserving the ballots, to be used as evidence, are germane to the regulation of elections." The act is valid. *People ex rel. Dailey* v. *Livingston* (1880) 79 N. Y. 279.

1872, chap. 580, "in Relation to Certain Local Improvements in the City of New York." The act contained numerous details in relation to local improvements, but they were all held to be within its general purpose. *Re Mayer* (1872) 50 N. Y. 504.

1872, chap. 594, "to Authorize the Utica, Ithaca, & Elmira Railroad Company to Extend Their Road, and to Confirm Their Purchase of a Portion of the Roadbed of the Lake Ontario, Auburn, & New York Railroad, and for Other Purposes." The real subject is

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the extension of the road; and all parts of the act, including a provision fixing the maximum rate of fare, were germane to the title. *Parker* v. *Elmira, C. & N. R. Co.* (1901) 165 N. Y. 274, 59 N. E. 81.

1872, chap. 639, "to Amend an Act Entitled 'An Act to Provide for the Drainage of the Swamp, Bog, and Other Low and Wet Lands in the Village of White Plains, and Adjacent Thereto.'" "The amendment consisted in conforming the description of the lands to be drained to the precise description contained in the title, and in extending the area of the assessment, and apportioning the expenses in view of the greater territorial extent of the operations authorized by the amended act." It related only to one subject, and that was expressed in the title to the original act. *People ex rel. Little* v. *Willsea* (1875) 60 N. Y. 507.

1872, chap. 702, "to Improve and Regulate the Use of the Fourth Avenue in the City of New York." The act contained numerous provisions relating to this general purpose, which were all held to be within the general subject expressed in the title. *People ex rel. New York & H. R. Co.* v. *Havemeyer* (1874) 4 Thomp. & C. 365.

1872, chap. 741, "to Confirm an Assessment for the Expense of Paving Broad Street, in the City of Utica." "The substance of the act is to confirm the assessment, and to declare the amount thereof a lien upon the lands or 'property assessed.' . . . The legislature has some discretion in respect to the degree of particularity as to the expression of the objects of the enactment in its title." The act was sustained. *Mann* v. *Utica* (1872) 44 How. Pr. 334.

1872, chap. 771, "to Amend the Several Acts in Relation to the City of Rochester." The act contained thirty sections and included several subjects relating to the government or affairs of the city. Chief Judge Church says that "laws relating to any specified municipal corporation are those which create the body, or define and regulate its powers, and prescribe the mode of their exercise, and, taken together, constitute, in a practical sense, its charter." A title like the one in question "expresses a subject comprehensive enough to embrace all the details of a city charter. . . . The subject expressed embraces the details of the city government, and any provision which relates to that government may be inserted in such an act, and, as a general rule, the means necessary or proper to accomplish the general design indicated in the title of the bill may be adopted. . . . A subject has a signification according to its application, and it is capable of almost infinite division, and many particular or subordinate subjects may be included in one general subject. . . . Where the subject is general, comprehending all

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the functions of the corporation, provisions in relation to any of them, or necessary or pertinent to accomplish and carry out any of them, may be, so far as this constitutional clause is concerned, incorporated in the bill." The principal controversy was over a provision authorizing the city to supply other municipal corporations with water. The court say that this is not an independent subject, but incidental to the main purpose of this part of the act, which relates to procuring an adequate water supply for the city. The court states the rule that "the means of accomplishing a general purpose, and all matters fairly and reasonably connected with it, are proper to be incorporated within the bill, and are germane to the title." The act was sustained. *People ex rel. Rochester* v. *Briggs* (1872) 50 N. Y. 553.

1872, chap. 812, "to Confirm, Reduce, and Levy Certain Assessments on the City of Brooklyn." The fact that assessments for different streets are provided for does not bring it within the prohibition of the Constitution. They are all included under the general subject mentioned in the title. *Re Van Antwerp* (1874) 56 N. Y. 261.

1872, chap. 872, "in Relation to the Croton Aqueduct and Other Public Works in the City of New York." The act transferred to a department of public works various powers previously vested in a department of public parks. The title was deemed sufficiently explicit. *Re Upson* (1882) 89 N. Y. 67.

1873, chap. 84, "in Relation to the Village of Brockport." The village was originally incorporated by special act, but in 1872 attempted to reincorporate under the general law of 1870, chap. 291. The proceedings relating to the reincorporation were confirmed by this act, which also included other provisions relating to the village. The act was valid. *People ex rel. Brockport* v. *Sutphin* (1901) 166 N. Y. 163, 59 N. E. 770.

1873, chap. 199, "to Authorize the Bleecker Street & Fulton Ferry Railroad Company, of the City of New York, to Extend Their Railroad Tracks through Certain Streets and Avenues in the City of New York." The act contained numerous provisions and requirements affecting the management, use, operation, and disposition of the road as extended, but they all related to a single subject. *Central Crosstown R. Co.* v. *23d Street R. Co.* (1877) 54 How. Pr. 168.

1873, chap. 285, "to Authorize the Village of Dansville to Create a Debt for the Purpose of Bringing Water into Said Village for Protection Against Fires, and to Amend the Charter of Said Village." A provision authorizing a debt for the purpose of supplying

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the village with water was only one of the elements of the general subject. "All the provisions of the act are appropriate to an amendment of the charter, and no matter how many particulars are embraced in the statute, they together constitute but one subject." *People ex rel. Faulkner* v. *Dansville* (1874) 4 Thomp. & C. 87.

1873, chap. 335, "to Reorganize the Local Government of the City of New York." The inclusion of a provision authorizing the mayor and aldermen to appoint a commissioner of jurors did not violate the Constitution. "The act of 1847, creating the office of commissioner of jurors, did not, in terms, make it a county office; and neither the mode of appointment or the functions which the officer was to exercise made him distinctively a county officer. . . . It was competent for the legislature to make it a city or county office, and to vest the power of appointment in city or county authorities." *People ex rel. Taylor* v. *Dunlap* (1876) 66 N. Y. 162.

1873, chap. 335, "to Reorganize the Local Government of the City of New York." City officers were prohibited from holding any county office unless such a county office were conferred *ex officio* by the legislature. This was held to be within the general purpose of the act as expressed in the title. The legislature had power to limit the capacity of city officers to hold other offices. *Billings* v. *New York* (1877) 68 N. Y. 413.

1873, chap. 505, "to Reorganize the Village of Gloversville." The act contained provisions relating to the granting of liquor licenses and to suits for penalties. These were held to be police regulations and within the general scope of the act. *Gloversville* v. *Howell* (1877) 70 N. Y. 287.

1873, chap. 528, "to Provide for the Eastern Boulevard in the City of New York, and in Relation to Certain Alterations of the Map or Plan of Said City, and Certain Local Improvements in Connection therewith, to Amend Chapter 626 of the Laws of 1870." All the work authorized by the act was part of one improvement,—one system. Improvements on Tenth avenue were held to be connected with the main purpose of the act. *Re Leake & W. Orphan Home* (1883) 92 N. Y. 116.

1873, chap. 531, "to Open, Lay Out, and Improve Gravesend Avenue, in the County of Kings, and to Authorize the Construction of a Railroad Thereon;" and 1874, chap. 448, "for the Relief of the Park Avenue Railroad Company in the City of Brooklyn, and to Authorize the Extension of its Tracks through Certain Streets and Avenues in Said City." Both of these acts were considered and sustained in *Re Prospect Park & C. I. R. Co.* (1876) 67 N. Y. 372.

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The court say of the act of 1873, that its title expresses only one general subject, namely, to open certain lands for public use, and all the details specified are necessary or incidental to the general purpose of the statute. The court also say that the act of 1874 treats of one subject only, and that all its provisions are fairly within the general scope of the title.

1873, chap. 538, "to Secure Better Administration in the Police Courts of the City of New York." "The provisions substituting new officers for the old, and prescribing the duties of these officers, as well in the police courts as in connection with the court of sessions, of which the former officers were also members, and which are the necessary changes to preserve the harmony of the scheme of legislation and to carry out, in the needful detail, the changes introduced by the act under consideration," all relate to the general subject of the act. *Wenzler* v. *People* (1874) 58 N. Y. 516; *People* v. *Morgan* (1874) 58 N. Y. 679.

1874, chap. 478, "to Require the Eighth Avenue Railroad Company to Extend its Railroad Route in the City of New York, and to Regulate the Use and Operation of the Railroad of Said Company." The details of the act were fairly germane to the title. *Potter* v. *Collis* (1897) 19 App. Div. 392, 46 N. Y. Supp. 471, affirmed in (1898) 156 N. Y. 16, 50 N. E. 413.

1874, chap. 604, "to Provide for the Surveying, Laying Out, and Monumenting of Certain Portions of the City and County of New York, and to Provide Means Therefor." A provision authorizing the acquisition of land for purposes of the act was germane to the subject. *Re Public Works* (1881) 86 N. Y. 437.

1874, chap. 638, "to Ratify and Confirm Certain Orders and Acts of the County Judge of the County of Steuben, Appointing Commissioners to Issue Bonds and Invest the Same in the Stock of the Rochester, Hornellsville, & Pine Creek Railroad Company, and to Legalize All Proceedings under and Pursuant to Such Orders and Acts." The act contained several details, but they were all deemed comprised in one subject, and fairly within the scope of the title. Various acts relating to railroad aid bonds required validation, and the act was intended to accomplish that result. *Rogers* v. *Stephens* (1881) 86 N. Y. 623.

1875, chap. 2, "to Legalize Certain Proceedings of the Common Council of the City of Buffalo." The roadway which was the subject of the litigation was not mentioned in the title, but it was held that the general scope of the act was sufficient to include this particular roadway. *Tifft* v. *Buffalo* (1880) 82 N. Y. 204.

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1875, chap. 605, "in Relation to the County Treasurers of the Counties of Monroe and Seneca," amended by chap. 213, Laws 1879. The provisions authorizing the supervisors to designate the banks in which such treasurers shall deposit the state moneys, and directing such banks to give bonds, pay interest, and keep accounts with the state treasurer, are all parts of the system established by the act for the custody and disposition of the state funds collected by the treasurers designated in the title of the act, and are connected with the same subject. The amendment of 1879 was declaratory of the original act. *Seneca County* v. *Allen* (1885) 99 N. Y. 532, 2 N. E. 459.

1876, chap. 147, "Granting to the United States the Right to Acquire the Right of Way Necessary for the Improvement of the Harlem River and Spuyten Duyvil Creek, [for the Construction of Another Channel] from the North River to the East River, Through the Harlem Kills, and Ceding Jurisdiction over the Same." The act is limited to matters which relate to its subject or which are implied in it, and are necessary to make it effectual; the acquisition of lands, by purchase or compulsory proceedings, the manner of payment, and mode of acquiring means therefor. All these are incidental to or parts of the particular matter, and are material to the accomplishment of the general purpose. *Re United States* (1884) 96 N. Y. 227.

1876, chap. 439, "Relating to the Expenses of Judicial Sales in the County of Kings." A provision giving to the sheriff the exclusive right to sell property on judgments or decrees of courts of record was held to be within the general purpose of the act. *Kerrigan* v. *Force* (1877) 68 N. Y. 381.

1876, chap. 445, "in Relation to That Portion of the Great Western Turnpike Road, Commonly Known as Western Avenue, Lying between Snipe Street, in the City of Albany, on the East, and the West Line of the Proposed New Boulevard, Intersecting the Said Road West of Allen Street, in Said City on the West." The act relates only to Western avenue. It was not necessary to state in the title all that the law required to be done, nor the machinery devised for that purpose. *Hurlburt* v. *Banks* (1876) 52 How. Pr. 196, Sp. T.

This act was also considered and sustained in *People ex rel. Washington Park* v. *Banks* (1876) 67 N. Y. 568.

1879, chap. 382, "in Relation to Lands in Monroe, Oswego, Suffolk, Sullivan, and Other Counties, Bid in for the State at the Tax Sale Held by the Comptroller in the Year 1877, and to Other Lands in

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Said Counties Which Were Sold at Said Sale, on Which Bids Remain Unpaid," and the acts of 1881, chap. 402, and of 1883, chap. 516, relating to tax sales, were sustained in *People* v. *Ulster County* (1885) 36 Hun, 491.

1880, chap. 147, "to Provide for the Relief of the City of Rochester, and the New York Central & Hudson River Railroad Company, in Said City." The act embraced but one subject; namely, the elevation of the railroad tracks above the grades of the streets, including the closing and widening and changing the grade thereof when necessary to secure that object, and the manner of paying the costs and expenses. *Wilson* v. *New York C. & H. R. R. Co.* (1886) 2 N. Y. Supp. 65.

1880, chap. 377, "in Relation to the Government of the City of Brooklyn." The reconstruction of the fire department was an element of the subject, and germane to the title. *People ex rel. McLaughlin* v. *Partridge* (1884) 13 Abb. N. C. 410.

1880, chap. 521, "to Amend Chapter 335 of the Laws of 1873, Entitled 'An Act to Reorganize the Local Government of the City of New York,' and to Reduce the Burden of Taxes to be Levied in Said City." A provision fixing the compensation of police clerks was germane to the title, and valid. *Cregier* v. *New York* (1882) 11 Daly, 171.

1881, chap. 559, to amend "an Act to Provide for the Election of Police Commissioners in the City of Syracuse, and to Establish a Police Force Therein, and to Repeal Certain Sections Thereof." The act changed the method of selecting police commissioners from an election by the people to an appointment by the mayor. This provision was a legitimate element of an amendatory act, and need not have been specifically mentioned in the title. *People ex rel. Gere* v. *Whitlock* (1883) 92 N. Y. 191.

1882, chap. 294, "to Amend Chapter 385 of the Laws of 1862, Entitled 'An Act to Amend and Consolidate the Several Acts Relative to the City of Schenectady.'" The act contained provisions regulating the city's liability for injuries resulting from defective sidewalks. This was within the general purpose of the act, and valid. *Van Vranken* v. *Schenectady* (1884) 31 Hun, 516.

1882, chap. 287, "to Amend Chapter 229 of the Laws of 1879, Entitled 'An Act in Reference to the Collection of Taxes in the Counties of Chautauqua and Cattaraugus, and the Acts Amendatory Thereof and Supplementary Thereto.'" The amendatory act made a tax deed conclusive instead of presumptive evidence of the regularity of the sale and of previous proceedings. This change indi-

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cated the effect to be given to a deed, and was fairly within the scope of the title. *Chamberlain* v. *Taylor* (1885) 36 Hun, 24; *Ensign* v. *Barse* (1887) 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401.

1882, chap. 359, "to Amend and Consolidate the Charter of the Village of Waterloo, Seneca County, New York." The act consolidated numerous statutes in relation to the village. This consolidation was deemed proper in *Reed* v. *Schmit* (1886) 39 Hun, 223.

1882, chap. 410, "to Consolidate into One Act and to Declare the Special and Local Laws Affecting Public Interests in the City of New York." The provision in § 2143, declaring that the Penal Code should have the same effect as if passed after this act, was held germane to the title, and valid. *People* v. *O'Neil* (1888) 109 N. Y. 251, 16 N. E. 68.

1883, chap. 21, "to Amend Chapter 398 of the Laws of 1866, Entitled 'An Act to Facilitate the Construction of the New York & Oswego Midland Railroad, and to Authorize Towns to Subscribe to the Capital Stock Thereof.'" By the amendatory act, property in any town liable to be assessed at the time of issuing bonds was to continue liable to taxation until the bonds or renewals thereof should be paid. This was germane to the title. *Wilcox* v. *Baker* (1897) 22 App. Div. 299, 47 N. Y. Supp. 900.

1883, chap. 309, "to Provide for the Election of a Surrogate, Separate from the County Judge of the County of Steuben, and to Fix the Salary of the Said Surrogate, and also the Salary of the County Judge of Said County Hereafter to be Elected." A provision prescribing the powers of the surrogate was incidental to the general purpose of the act, and valid. *McIntyre* v. *Allen* (1887) 43 Hun, 124.

1884, chap. 516, "to Amend Chapter 410 of the Laws of 1882, Entitled 'An Act to Consolidate into One Act and to Declare the Special and Local Laws Affecting Public Interests in the City of New York' in Relation to the Commissioners of Accounts, New York City." The act related solely to the commissioner of accounts, and was sustained in *Re McAdam* (1889) 27 N. Y. S. R. 352, 7 N. Y. Supp. 454.

1884, chap. 522, "Laying Out Public Places and Parks and Parkways in the 23d and 24th Wards of the City of New York, and in the Adjacent District of Westchester County, and Authorizing the Taking of Lands for the Same." It authorized the use of a portion of Van Cortlandt park for the purposes of a rifle range and military parade ground, and vested jurisdiction of all the territory in the

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department of public parks. These provisions did not constitute separate subjects. *Re New York* (1885) 99 N. Y. 569, 2 N. E. 642.

1885, chap. 17, "for the Relief of the Village of Clinton." The act validated various defective proceedings by the village in relation to the establishment of a water system. These provisions were all held to be within the title. *Water Comrs.* v. *Dwight* (1885) 101 N. Y. 9, 3 N. E. 782.

1885, chap. 238, "to Provide for the Hearing and Determination before the Board of Claims of the Claims of Chester S. Cole and Others, while Acting as Captain of the Port of New York, and Harbor Masters of the Port of New York, and to Ratify and Legalize Their Acts and Services." All these subjects were deemed sufficiently connected to authorize their being placed in one act. *Cole* v. *State* (1886) 102 N. Y. 48, 6 N. E. 277.

1885, chap. 311, "to Amend Chapter 410 of the Laws of 1882, Entitled 'An Act to Consolidate into One Act and to Declare the Special and Local Laws Affecting Public Interests in the City of New York.'" The act was sustained. All the matter in it was "included in some one of the many sections of the consolidation act." *People ex rel. Second Ave. R. Co.* v. *Coleman* (1889) 21 N. Y. S. R. 178, 4 N. Y. Supp. 417.

1885, chap. 414, "to Amend Chapter 604 of the Laws of 1875, Entitled 'An Act to Enforce Collection of Taxes Levied in the County of Lewis;'" also amended by Laws 1885, chap. 215. The act prohibited an owner of land from peeling bark or cutting timber thereon unless the tax had been paid, and imposed a heavy penalty for the violation of this prohibition. This subject was held proper under the general purpose of the act as indicated by its title. *Prentice* v. *Weston* (1888) 47 Hun, 121, affirmed in (1888) 111 N. Y. 460, 18 N. E. 720.

1886, chap. 141, "to Prevent Taking Fish from the Waters of Lake Ontario, Adjacent to the Shore of Jefferson County, or from the Inland Waters of Said County, by Other Means than Angling." "The subject is a single one, and that is the prevention of fishing in certain waters by other means than angling. The title is sufficiently specific." *People* v. *Doxtater* (1894) 75 Hun, 472, 27 N. Y. Supp. 481.

1886, chap. 622, "to Amend the title of, and to Amend an Act Entitled 'An Act Relating to the Assessment of Real Property in the City of Brooklyn, County of Kings, Owned and Occupied by Charitable Corporations, Societies, or Institutions,' passed May 24, 1878." The act amended the title so as to include the whole county

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of Kings, and extended to the county provisions relating to the exemption of charitable institutions from taxation. The object of the amendment was to extend the original statute from the city of Brooklyn to the whole county. The amendment of the title of the original act was a necessary element of this object, and was not another subject. *Dyker Meadow Land & Improv. Co.* v. *Cook* (1896) 3 App. Div. 164, 38 N. Y. Supp. 222.

1887, chap. 544, "to Amend Chapter 776 of the Laws of 1870, Entitled 'An Act to Amend an Act Entitled "An Act to Provide for the Incorporation of Villages," Passed December 7, 1847, and the Several Acts Amendatory Thereof, So Far as the Same Relate to the Village of Mount Vernon, in the County of Westchester; and to Declare, Enlarge, and Define the Powers and Duties of the Officers of Said Village, and to Confirm and Extend the Powers of the Corporation of Said Village.'" All parts of the act were germane to the title. *People ex rel. Lynch* v. *Duffy* (1888) 49 Hun, 276, 1 N. Y. Supp. 896.

1887, chap. 205, "to Legalize the Acts and Proceedings of the Town Board, and the Town Board of Auditors of the Town of Attica, Wyoming County, in Relation to the Erection of a Certain Iron Bridge over the Tonawanda Creek, on Main Street, in the Village of Attica, in Said Town, and the Acts and Proceedings of the Annual Town Meeting of Said Town, Held on the 22d Day of February, 1885, in Relation to Said Bridge, and the Acts and Proceedings of George D. Miller as Highway Commissioner of Said Town in Relation to Said Bridge." A provision relieving the town from any obligation to pay the price fixed by a contract for the erection of a bridge, the proceedings in relation to which were ratified by the act, and authorizing the contractor to bring an action against the town to recover compensation for erecting such bridge, was held germane to the title. *Wrought Iron Bridge Co.* v. *Attica* (1890) 119 N. Y. 204, 23 N. E. 542.

1888, chap. 213, "to Ratify and Confirm Certain Proceedings of the Board of Trustees of the Village of Flushing." Irregular assessments were properly included under this title. *People ex rel. Richmond* v. *Wilson* (1888) 21 N. Y. S. R. 120, 3 N. Y. Supp. 326, affirmed in (1890) 121 N. Y. 684, 24 N. E. 1098.

1889, chap. 161, "in Relation to Public Improvements in the Town of Flatbush, and the Acquisition of the Rights of a Plank Road Company in Said Town." A provision authorizing the construction of a trunk sewer through the town of Flatlands to tidewater was

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held germane to the title. *Van Brunt* v. *Flatbush* (1891) 128 N. Y. 50, 27 N. E. 973.

1889, chap. 291, "to Establish and Maintain a Water Department in and for the City of Syracuse," amended, 1890, chap. 314. The act contained numerous provisions intended to effectuate its purpose, but they were held fairly within the general subject, and germane to the title. *Sweet* v. *Syracuse* (1891) 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289.

1890, chap. 55, "to Incorporate the City of Gloversville." The city was erected out of a part of the town of Johnstown. The remainder of the original territory was continued as the town of Johnstown. The act was sustained. *People* v. *Wilber* (1891) 39 N. Y. S. R. 743, 15 N. Y. Supp. 435.

1890, chap. 523, "in Relation to the Office of Sheriff of the City and County of New York." It related to the sheriff's salary, to under sheriffs and deputies, numerous subordinates, office accounts, official bonds, etc. All these details were germane to the subject expressed in the title. *New York* v. *Gorman* (1898) 26 App. Div. 191, 49 N. Y. Supp. 1026.

1892, chap. 342, "to Establish a Local Court of Civil Jurisdiction in the City of Syracuse, to be Called the 'Municipal Court of the City of Syracuse,' and to Amend the Charter of Said City." The act abolished the office of justice of the peace, and repealed inconsistent acts. The general object of the act was to create an inferior local tribunal, and the abolition of justices' courts was consistent with this purpose. *Curtin* v. *Barton* (1893) 139 N. Y. 505, 34 N. E. 1093.

1893, chap. 537, "Providing for Ascertaining and Paying the Amount of Damages to Lands and Buildings Suffered by Reason of Changes of Grade of Streets or Avenues, Made Pursuant to Chapter 721 of the Laws of 1887, Providing for the Depression of Railroad Tracks in the 23d and 24th Wards in the City of New York, or Otherwise." The subject is the payment of damages sustained by the change of grade of streets. It is limited both as to territory and as to the scope of damages. All elements of the act are fairly germane to the title. *People ex rel. Purdy* v. *Fitch* (1895) 147 N. Y. 355, 41 N. E. 695.

1894, chap. 146, "to Amend Chapter 147 of the Laws of 1864, Entitled 'An Act to Provide for the Erection of a Town Hall in the Town of Jamaica, in the County of Queens,' and Acts Amendatory Thereof." The original act provided for the erection of a town hall, but did not authorize the condemnation of land for this pur-

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pose. The amendatory act added a provision authorizing such condemnation. This was not an independent subject, but an incident of the general purpose of the act, and germane to the title. *Jamaica* v. *Denton* (1895) 70 N. Y. Supp. 837.

1895, chap. 975, "to Divide the Town of Watervliet in the County of Albany, and to Erect the Town of Colonie out of the Part Set Off from Said Town of Watervliet." It erected the town of Colonie, and provided a local government therefor, including the election of a supervisor and justices of the peace. The creation of a town government is necessary in the erection of a new town, and is germane to the general subject. "Where the legislature has power to enact a law, it has the power to embrace in that law everything which is either necessary or proper to make it a complete whole. It can embrace in it everything germane to the main subject of the enactment, and all necessary or proper details." *Fort* v. *Cummings* (1895) 90 Hun, 481, 36 N. Y. Supp. 36.

1896, chap. 178, "to Amend Chapter 686 of the Laws of 1892, Entitled 'An Act in Relation to Counties, Constituting Chapter 18 of the General Laws,' as Amended by Chapter 79 of the Laws of 1894, by Chapter 163 of the Laws of 1894, and by Chapter 742 of the Laws of 1895, Relating to Authorizing Towns to Borrow Money." The amendment applied exclusively to Queens county, and restricted the power to make contracts relating to the construction of highways. Assuming that the amendatory act is to be regarded as local so far as this provision is concerned, it was within the subject expressed in the title, although the particular county affected was not mentioned. *Dunton* v. *Hume* (1897) 15 App. Div. 122, 44 N. Y. Supp. 305, following *People ex rel. Burroughs* v. *Brinkerhoff* (1896) 68 N. Y. 259.

1896, chap. 520, "to Amend Chapter 53 of the Laws of 1879, Entitled 'An Act to Revise the Charter of the City of Auburn,' and the Several Acts Amendatory Thereof and Supplemental Thereto; to Change the Time for Holding Charter Elections in Said City, and to Provide for the Tenure of Office of the Officers of Said City, and of the Several Wards Therein." The act changed the time of holding city elections from spring to fall. All parts of the act related to affairs of the city and to its charter, and were properly included in the general subject. *People ex rel. Stupp* v. *Kent* (1903) 83 App. Div. 554, 82 N. Y. Supp. 172.

1896, chap. 772, "in Relation to the Office of the District Attorney of the County of Kings, Providing for the Election of District Attorney and the Appointment of Clerks, Stenographers, and County



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Detectives for Said Office." It was claimed that a provision of this act repealing a former statute providing for county detectives was invalid because not expressed in the title. The title included county detectives, and the repeal of a former statute on the same subject was incidental to the general purpose of the act. *People ex rel. Dee* v. *Backus* (1896) 11 App. Div. 147, 42 N. Y. Supp. 899, affirmed in (1897) 153 N. Y. 686, 48 N. E. 1106.

1899, chap. 34, "for the Better Administration of Justice in the Town of Sweden, County of Monroe." The act abolishes the office of police justice in the village of Brockport, and establishes a like office for the town of Sweden, which includes the village. Both objects are germane to the main purpose, namely, the improvement of the administration of justice. *People ex rel. Holmes* v. *Lane* (1900) 53 App. Div. 531, 65 N. Y. Supp. 1004.

1899, chap. 257, "in Relation to Clinton Avenue, in the Borough of Brooklyn, in the City of New York." The act widened Clinton avenue between certain points by adding 20 feet on each side, and which spaces were to be used, not for the purposes of travel, but as ornamental court yards for the benefit and improvement of said avenue. The act also included details relative to the acquisition of land for the improvement. The body of the act was germane to its general purpose, and valid. *Re New York* (1901) 57 App. Div. 166, 68 N. Y. Supp. 196, affirmed in (1901) 167 N. Y. 624, 60 N. E. 1108.

1901, chap. 33, "Relating to the Police Department of the City of New York; to Terminate the Terms of Office of the Police Commissioners of Said City; to Abolish the Office of Chief of Police in Said City; to Concentrate the Functions Theretofore Exercised by Such Commissioners and Chief in a Single Commissioner; to Provide for the Appointment and Removal of Such Commissioner and His Deputies; and to Enlarge the Powers Heretofore Exercised by Said Commissioners, and to Confer Such Enlarged Powers Upon Such Single Commissioner and His Deputies; to Transfer the Powers and Functions Heretofore Exercised by the Treasurer of the Police Board to the Comptroller of the City of New York; and to take from Such Commissioner the Control of the General Bureau of Elections, and to Abolish Such Bureau." "The act contains but one subject, the reorganization of the police force in the city of New York." The details all relate to the same subject, and are germane to the general purposes of the act as expressed in the title. *People ex rel. Devery* v. *Coler* (1903) 173 N. Y. 103, 65 N. E. 956.

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## Statutes Invalid Under Article, 3, § 16.

1854, chap. 291, "to Release the Fishkill & Beekman Plank Road Company from the Construction of Part of Their Road, and for Other Purposes." It authorized the release and abandonment of certain parts of a road on specified conditions, permitted the company to relay the road with gravel instead of plank, and inflict penalties in relation to toll gates, and it also legalized the previous acts of the company. It was said in *Fishkill* v. *Fishkill & B. Pl. Road Co.* (1856) 22 Barb. 634, that all these provisions related to one general subject and might properly be included in one law; but the title was defective because it did not embrace the several elements of the subject. The words "and for other purposes" were excluded from consideration, because meaningless under the constitutional provision that the subject must be stated in the title. *People* v. *Fishkill & B. Pl. Road Co.* (1857) 27 Barb. 445.

1863, chap. 227, "to Enable the Board of Supervisors of the County of New York to Raise Money by Tax for the Use of the Corporation of the City of New York." Under it the head of the law department had the right, and it was his duty, to represent the mayor and common council in all legal proceedings. This part of the act was held to be entirely distinct from the subject expressed in the title, and therefore unconstitutional. *Baldwin* v. *New York* (1864) 42 Barb. 549, (1865) 45 Barb. 359, (1866) 2 Keyes, 387.

1863, chap. 361, "to Authorize the Construction of a Railway and Tracks in the Towns of West Farms and Morrisania." A provision authorizing the construction of a railroad in towns not mentioned in the title embraced another subject, and was void. The remainder of the act was sustained. *Bohmer* v. *Haffen* (1900) 161 N. Y. 390, 55 N. E. 1047.

1865, chap. 181, "to Amend Chapter 389 of the Laws of 1851," which was an act relating to the Rochester charter. The act under consideration authorized the Rochester common council to elect seven directors of the Rochester & Genesee Valley Railroad Company, instead of four, as under the previous statute. The title of the act does not indicate any part of the statute of 1851, which is sought to be amended. It was therefore defective, and the act was void. *People ex rel. McConvill* v. *Hills* (1866) 35 N. Y. 449.

1866, chap. 876, "to Enable the Board of Supervisors of the County of New York to Raise Money by Tax for the Use of the Corporation of the City of New York, and in Relation to the Expenditure Thereof." It contained a provision relieving the city from liability beyond the amount appropriated for a specific object, and prohibit-

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ing a judgment against the city by default, and except upon proofs in open court. This was held to be a subject foreign to the general subject of the act, and void. *Smith* v. *New York* (1868) 34 How. Pr. 508.

The same act contained a provision limiting the power of the city to make contracts. This provision was foreign to the subject of the law, and void. *Pullman* v. *New York* (1869) 54 Barb. 169.

The act also extended and continued the term of office of the Croton aqueduct engineer. This provision was foreign to the subject of the act and void. *People ex rel. Bradley* v. *Stevens* (1869) 51 How. Pr. 103, Court of Appeals.

1867, chap. 586, "to Enable the Board of Supervisors of the County of New York to Raise Money by Tax for the Use of the Corporation of the City of New York, and in Relation to the Expenditure Thereof, and to Provide for the Auditing and Payment of Unsettled Claims Against Said City, and in Relation to Actions at Law Against Said Corporation." It contained a provision extending the term of office of councilmen, and regulating their election and duties thereafter. This was held to be a local provision, foreign to the general subject of the act, and, not being stated in the title, was void. *People* v. *O'Brien* (1868) 38 N. Y. 193.

1868, chap. 254, "to Incorporate the Schenectady Astronomical Observatory." The act directed the comptroller to loan to the institution $60,000 from the common school fund and take a mortgage on the observatory property. This subject was not expressed in the title. While means would be necessary to accomplish the purpose of the corporation, a provision that the state should furnish means was not a necessary element of the incorporation of the institution. This provision was void. *People ex rel. Schenectady Astronomical Observatory* v. *Allen* (1870) 42 N. Y. 404.

1868, chap. 631, "to Widen Portions of Sackett, Douglass, and President Streets, and Otherwise to Alter the Commissioner's Map of the City of Brooklyn." In addition to the streets named in the title the act provided for narrowing DeGraw and Union streets; thus five streets were included in the scope of the act. The provisions relating to DeGraw and Union streets were held to be invalid, but the remainder of the act was sustained. *Re Sackett & DeG. Streets* (1878) 74 N. Y. 95.

1868, chap. 687, "to Regulate a Road in the Town of Palatine, Montgomery County." The act provided for reducing the width of a certain highway from 4 rods to 3 rods. Its title might apply to any road in the town named. "The body of the bill expresses its object; the title of the bill disguises and conceals it." It is a

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fraud upon the public and upon the Constitution. The subject is not expressed in the title, and the act is therefore void. *People ex rel. Failing* v. *Highway Comrs.* (1869) 53 Barb. 70.

1868, chap. 717, "Making Appropriations for Certain Expenses of Government, and for Supplying Deficiencies in Former Appropriations." This presents another aspect of the constitutional question. The act was general, but it contained a provision for the erection of a bridge across Cattaraugus creek between the counties of Chautauqua and Erie, and directed a portion of the expense to be levied upon those counties. This provision was held to constitute a local law, and it could not constitutionally be included in the general act. The purpose of the Constitution is "that every bill on a private or local subject shall stand alone, and ask for legislative favor on its own merits. . . . The true view is that such a bill is general, and it is local. Being local, and embracing more than one subject, it is therefore, as to the private or local subject, void." *People ex rel. Lee* v. *Chautauqua County* (1870) 43 N. Y. 10. The situation presented by this case was one of the moving causes which led to the adoption of § 22 of this article, prohibiting riders on appropriation bills.

1868, chap. 855, "Supplementary to Chapter 489 of the Laws of 1867, and to Provide for the Collection and Application of Revenue in the County of New York in Certain Cases." "To state in the title that an act is supplementary to another act is no statement of the subject of the supplementary act; and what followed, that it was 'to provide for the collection and application of revenues in the county of New York in certain cases,' was no statement of the subject, but of a mere incident of the subject, and a very subordinate one." The act contained numerous provisions relating to the powers of the corporation as prescribed by the original act, and very materially changed the character, purposes, and liabilities of the company. The act was void. *Patten* v. *New York Elev. R. Co.* (1876) 3 Abb. N. C. 306, appeal dismissed in (1876) 67 N. Y. 484.

The same act required a corporation therein named to pay to the city comptroller 5 per cent of its net income, which was to be used for city purposes, as therein prescribed. The second part of the title was declared to be misleading, and the whole act was held unconstitutional. *New York* v. *Manhattan R. Co.* (1894) 143 N. Y. 1, 37 N. E. 494.

1868, chap. 864, "to Authorize the Drainage of Marsh Lands," amended in 1869, chap. 282. "It created a private corporation, and its operations affected four counties. . . . The subjects em-

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braced in it were the creation of the corporation, the authority to drain and reclaim tide-water marsh lands, to levy and collect assessments, to exercise the power of eminent domain, and the grant of lands belonging to the state." The act embraces subjects not expressed in the title, and is therefore void. *Coxe* v. *State* (1895) 144 N. Y. 396, 39 N. E. 400.

1869, chap, 507, "to Alter the Commissioner's Map of the City of Brooklyn." The act provided for closing a part of one street and opening another. These subjects were not expressed in the title. The act was void. *People ex rel. Pratt* v. *Brooklyn* (1870) 13 Abb. Pr. N. S. 121.

1869, chap. 569, "in Relation to the Fees of the Sheriff of the City and County of New York, and to the Fees of Referees in Sales in Partition Cases." The act gave the sheriff exclusive power to conduct sales under decrees of courts of record in New York county. This subject was not expressed in the title nor embraced in the general purpose of the act; the provision was therefore void. *Gaskin* v. *Meek* (1870) 42 N. Y. 186. See *Richards* v. *Richards* (1879) 76 N. Y. 186.

1870, chap. 382, § 9, "to Make Further Provision for the Government of the County of New York." A provision for the appointment and removal of court attendants was foreign to the subject of the act, and void. *Murray* v. *New York* (1878) 11 Jones & S. 164.

1870, chap. 383, "to Make Further Provision for the Government of the City of New York." The annual tax levy. The provision reorganizing the court of special sessions of the peace was foreign to the purpose of the act, and void. The constitutional provision is mandatory, and a compliance with it is necessary to the validity of any act coming within its terms. "If a bill is local in its operation and effect, although public in its character, it is within the constitutional enactment." *Huber* v. *People* (1872) 49 N. Y. 132.

1870, chap. 593, "in Relation to Regulating and Grading the Eighth Avenue, in the City of New York." It authorized a change in the grade of certain intersecting streets. This was not included in the subject of the act as indicated by the title, and, so far as concerned the grade of intersecting streets, the act was void. *Re Blodgett* (1882) 89 N. Y. 392.

1871, chap. 706, "to Release the Interest of the People of the State of New York in Certain Real Estate to Catherine McCabe." The act was invalid because the title contained no reference to the

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particular real estate intended to be released. *McCabe* v. *Kenny* (1889) 52 Hun, 514, 5 N. Y. Supp. 678.

1871, chap. 810, "to Amend an Act Entitled 'An Act to Incorporate the City of Watertown,' Passed May 8, 1869, and to Confirm the Acts of the Common Council in Reference to Local Assessments for Local Improvements." The provision confirming previous assessments was held to be invalid, although included in the title. It was not in any sense an amendment of the charter, but an independent subject, which could not be included in an act intended to embrace various charter amendments. *Watertown* v. *Fairbanks* (1876) 65 N. Y. 588.

1872, chap. 711, "to Provide for the Collection of Assessments against Prospect Park and the Parade Ground in the County of Kings." A provision authorizing the taxation of property outside the city for park purposes was foreign to the general subject expressed in the title, and therefore void. *Re Flatbush* (1875) 60 N Y. 398.

1874, chap. 589, "to Amend the Charter of the City of Brooklyn and the Various Amendments Thereof, Passed June 28, 1873, and to Further Amend the Charter of the City of Brooklyn." A provision confirming previous assessments was held to be foreign to the subject of the act, and therefore void. *Re Kiernan* (1875) 6 Thomp. & C. 320, reversed, without considering this point, in (1875) 62 N. Y. 457.

1878, chap. 277, "to Amend Chapter 245 of the Laws of 1875, Entitled 'An Act to Amend Chapter 818 of the Laws of 1868, Entitled "An Act to Incorporate the Village of Port Chester,"' and to Amend Chapter 227 of the Laws of 1877." The act contained a provision authorizing the trustees to vacate assessments for local improvements, and make new assessments therefor. This was held obnoxious to the constitutional provision. The last clause in the title did not indicate that it related to this village, and it was therefore defective. *Tingue* v. *Port Chester* (1886) 101 N. Y. 294, 4 N. E. 625.

1881, chap. 13, "for the Relief of the Towns of Newfane, Wilson, and Lewiston, to Abolish the Office of Railroad Commissioners of Said Towns, and to Enable Each of Said Towns to Adjust its Indebtedness and Issue Bonds Therefor." A provision relating to the town of Somerset was held not germane to the title, and therefore void. *Harris* v. *Niagara County* (1884) 33 Hun, 279.

1881, chap. 456, "for the Removal of the Reservoir Situate in the City of New York, between 40th and 42d Streets." The act provided

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for transforming the property into a public park, to be used in connection with other park property therein described. This was held to be foreign to the subject of the act, and, not being separable from the remainder, the whole act was declared void. *Webb* v. *New York* (1882) 64 How. Pr. 10.

1883, chap. 93, "to Improve the Public Health in the City of New York, by Prohibiting the Manufacture of Cigars and Preparation of Tobacco in Any Form in the Tenement Houses of Said City." The act included not only tenement houses, but also dwelling houses, and was therefore void. *Re Paul* (1884) 94 N. Y. 497.

1885, chap. 377, "to Release the Interest of the People of the State of New York in Certain Real Estate to (Several Persons) and for Other Purposes." A provision releasing the interest of the state in certain personal property was an additional subject not included in the title, and therefore void; but the whole act was declared void for the reason that, even as to real estate, the title did not sufficiently express the intent of the legislature, as evinced by the body of the act. *Johnston v. Spicer* (1887) 107 N. Y. 185, 13 N. E. 753.

1891, chap. 59, "to Amend Chapter 576 of the Laws of 1888, Entitled 'An Act Establishing a Board of Improvement and Defining its Powers and Duties, and to Provide for Lighting the Streets and Other Places in the Town of New Utrecht, in the County of Kings,' as Amended by Chapter 361 of the Laws of 1889." A provision confirming an illegal contract made by the board of improvement was foreign to the general subject of the act, and void. *Parfitt* v. *Furguson* (1899) 159 N. Y. 111, 53 N. E. 707.

1892, chap. 411, "to Further Amend Chapter 395 of the Laws of 1867, Entitled 'An Act to Incorporate the New York and Long Island Bridge Company for the Purpose of Constructing and Maintaining a Bridge over the East River between the City of New York and Long Island.'" The amendatory act contained numerous additional provisions, and the grant of extraordinary powers not within the scope of the original act. These were declared to be invalid, but so much of the act as was germane to the original title was sustained. An act which, by its title, simply amends another act, without specifying the details of the amendment, must be tested by the title of the original act. *Re New York & L. I. Bridge Co.* (1896) 148 N. Y. 540, 42 N. E. 1088.

1894, chap. 598, "to Amend Chapter 361 of the Laws of 1863, Entitled 'An Act to Authorize the Construction of a Railway and Tracks in the Towns of West Farms and Morrisania as Subse-

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quently Amended.'" The title of the original act as amended and all proceedings taken in substantial compliance with that act are confirmed. This provision was not germane to the title, and was void. *Rogers* v. *Union R. Co.* (1894) 10 Misc. 57, 30 N. Y. Supp. 855.

1901, chap. 200, "to Amend the Charter of the City of Rochester, Relative to Expenses Incident to Improvements," and also chap. 719, "to Amend Chapter 14 of the Laws of 1880, Entitled 'An Act to Further Amend Chapter 143 of the Laws of 1861, Entitled "An Act to Amend and Consolidate the Several Acts in Relation to the Charter of the City of Rochester," and to Consolidate Therewith the Several Acts in Relation to the Charter of said city,' Relative to Expenses Incident to Improvements." By the act the legislature "sought to legalize every general tax or local assessment upon any property, real or personal, in the city of Rochester." The subject is not germane to the title. *Rochester* v. *Bloss* (1902) 77 App. Div. 28, 79 N. Y. Supp. 236.

1902, chap. 127, "to Amend Chapter 261 of the Laws of 1885, Entitled 'An Act in Relation to the Management of the Albany Penitentiary,' Relative to the Salary of the Keeper of Said Penitentiary." The act, among other things authorized the penitentiary commission to discharge the superintendent and place the custody of the penitentiary in the hands of the sheriff of Albany county, and the commission is further "empowered, whenever, in its discretion, it is for the best interests of the county of Albany, to discontinue and close said penitentiary, and abandon its use as a prison, and to sell the same and all the lands and appurtenances connected therewith, in the name of the county of Albany." These were new subjects, and not germane to the title. *Corscadden* v. *Haswell* (1904) 177 N. Y. 499, 69 N. E. 1114.

1904, chap. 629, "to Amend Chapter Three Hundred and Eighty-nine of the Laws of Nineteen Hundred and Three, Entitled 'An Act in Relation to the City of Troy, the Government of Said City, and to Create a Municipal Improvements Commission, and to Define its Powers and Duties,' and to Enlarge the Powers and Duties of Said Commission, and to Provide for Additions and Improvements to Prospect Park and to the Waterworks of the City of Troy under the Supervision of Said Commission, and to Authorize the Issuing of Bonds for Such Additions and Improvements, and to Amend Section Twenty-four of Chapter Five Hundred and Seventy-six of the Laws of Eighteen Hundred and Ninety-three, Entitled 'An Act Relative to the Waterworks Department of the City of Troy,

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and to Provide for an Increased Supply of Water in the Said City,' as Amended by Chapter Three Hundred and Seventy of the Laws of Nineteen Hundred, Relative to the Issue of Bonds for the Extension of the Waterworks and an Increased Supply of Water for the City of Troy." The act, among other things, changed the personnel of the municipal improvements commission of Troy by adding to its membership the mayor and corporation counsel. This purpose was not suggested by the title, and the act was therefore invalid. *Cahill* v. *Hogan* (1905) 180 N. Y. 304, 73 N. E. 39.

§ 17. [*Existing laws not applicable by reference.*]—No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act.

[Am. 1874.]

The instructions issued to Governor Tryon relating to the enactment of laws, which are cited in the note to the last section, contained the following provision, paragraph 12:

"And that no act whatever be suspended, altered, continued, revived, or repealed by general words, but that the title and date of such act as suspended, altered, continued, revived, or repealed, be particularly mentioned and expressed in the enacting part."

The similarity between this provision and the foregoing section is apparent, yet more than a century passed, 1771–1874, before the enactment of laws by general reference was prohibited by the Constitution.

A provision on this subject was proposed by the Convention of 1867 in the following form: "No law shall be revived, altered, or amended by reference to its title only, but the act revived, or the section or sections thereof as altered or amended, shall be re-enacted and published

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at length." The subject was taken up again by the Commission of 1872, which reported the section in its present form. The courts have not had frequent occasion to construe this provision, but, so far as I have observed, statutes which have been challenged as invalid under it have all been sustained, as will appear from the following brief summary. Judging from the large number of statutes which included references to other statutes as the basis of jurisdiction, or as prescribing the procedure, which have not been questioned, and also from the remarks found in several judicial opinions, the provision does not now seem to have much practical significance, and apparently it is not now considered a serious restraint on legislative power, especially as to the form of legislation, or the manner in which the legislative will shall be declared. One judge (*People ex rel. Everson* v. *Lorillard* [1892] 135 N. Y. 285, 31 N. E. 1011) intimates that the provision is of "doubtful utility," and it seems clear from the general tenor of the decisions that the courts think the state could get on very well without this provision. One distinct reform, however, should be noted which was accomplished by it; namely, the prevention of a revival and continuance of repealed statutes by mere suggestion in a later law. This method of legislation is pointed out in *Blauvelt* v. *Nyack* (1876) 9 Hun, 153, where the court say that prior to the adoption of this section, the legislature, by a mere reference, had power to revive a repealed statute. The statutes which have been construed in the cases cited in this note have, for convenience, been arranged in chronological order.

1875, chap. 91, "Empowering the Commissioners Appointed to Investigate the Affairs of the Canals of the State, in Pursuance of a Joint Resolution of the Senate and Assembly of 1875, to Compel the Attendance of Witnesses, and Fixing the Compensation of Such Commissioners." The act authorized the commission to issue an

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attachment for contempt, and provided that the "like proceedings shall thereupon be had as if such commission was a court of record, and such witness had been duly subpœnaed to attend before it." The act was sustained, the court observing that the constitutional provision "should receive a strict construction," and if the act is not strictly within the mischief sought to be provided against by the Constitution, it should be held as not within the inhibition. *People* v. *Learned* (1875) 5 Hun, 626.

1875, chap. 369, providing for reassessments for local improvements in Buffalo. It applied the procedure prescribed by the charter. The act was sustained. This section of the Constitution "should only be applied when, in a subsequent statute, another act is referred to, not to amend it, but to give effect to the provisions of the new. In other words, the new act must, by its express terms, provide that an existing law shall be made or deemed a part of it." *Wells* v. *Buffalo* (1878) 14 Hun, 438, (1880) 80 N. Y. 254.

1875, chap. 400, dividing the town of Fishkill and erecting a new town from a part thereof. All laws applicable to the existing town of Fishkill were to apply to the town of Fishkill as continued by the act, except as otherwise therein indicated. This simply preserved such laws, and if it was necessary thus specifically to continue them in force, which may be doubted, the legislature had power to continue them by such a reference. *People ex rel. Stevens* v. *Hayt* (1876) 7 Hun, 39, reversed on questions relating to a writ of mandamus in (1876) 66 N. Y. 606, but without considering the constitutional question.

1875, chap. 595. The act confirms to the corporation powers granted under previous statutes, without specifying such powers, privileges, and franchises. The act was therefore void. *Patten* v. *New York Elev. R. Co.* (1876) 3 Abb. N. C. 306, appeal dismissed in (1876) 67 N. Y. 484. *Ninth Ave. Elev. R. Co.* v. *New York Elev. R. Co.* (1877) 3 Abb. N. C. 347.

1876, chap. 435, "to Amend Chapter 210 of the Laws of 1847, Entitled 'An Act to Provide for the Incorporation of Companies to Construct Plank Roads, and of Companies to Construct Turnpike Roads,' Passed May 7, 1847," did not violate this provision. It referred to a prior statute for rates of toll, but did not expressly apply it. The court say that this constitutional provision should not be extended beyond its letter. *Hathaway* v. *Tuttle* (1881) 12 N. Y. Week. Dig. 240.

1876, chap. 445, in relation to a part of Western avenue in Albany. Assessments for the local improvement were to be made by pro-

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ceedings prescribed by former statutes relating to the city, which were referred to in the act. This act was sustained. The court say that "it is not necessary, in order to avoid a conflict with this article of the Constitution, to re-enact general laws whenever it is necessary to resort to them to carry into effect a special statute." *People ex rel. Washington Park* v. *Banks* (1876) 67 N. Y. 568; *Hurlburt* v. *Banks* (1876) 52 How. Pr. 197.

1880, chap. 344, the Buffalo municipal court. The act applied the procedure prescribed by general statutes for justices' courts. This provision was sustained, but it was held that the act of 1889, chap. 505, providing a different method of selecting jurors in justices' courts, did not apply to the municipal court. *Bergman* v. *Wolff* (1890) 33 N. Y. S. R. 499, 11 N. Y. Supp. 591, Buff. Sup. Ct.

1880, chap. 377, "in Relation to the Government of the City of Brooklyn." The act was complete in itself, and not obnoxious to this provision of the Constitution. *People ex rel. McLaughlin* v. *Partridge* (1884) 13 Abb. N. C. 410.

1882, chap. 259, "to Provide Additional Ferry Slips and Facilities in New York City." The lessees of specified ferries were authorized to acquire certain property by the right of eminent domain under the procedure prescribed by the railroad law. This application of a prior statute by a reference was sustained in *Re Union Ferry Co.* (1885) 98 N. Y. 139.

1884, chap. 546, closing Liberty street, Schenectady, for the purpose of erecting a railroad station. Damages were to be ascertained in a manner provided by the city charter in cases of property taken for a public improvement. It did not make the provision of the charter a part of this act, but left the law in relation to damages as it existed when the new act was passed. *Weinckie* v. *New York C. & H. R. R. Co.* (1891) 39 N. Y. S. R. 584, 15 N. Y. Supp. 689, affirmed in (1892) 133 N. Y. 656, 31 N. E. 625.

1885, chap. 499, the electrical subways act. It imposed on the commissioners the duty of enforcing the act of 1884, chap. 534, relating to telegraph and electric light companies, which was declared to be "amended and made to conform in all respects to the provisions of this act." The court say it is obvious that the Constitution "does not apply to an act purporting to amend existing laws, for in such a case no intelligent legislation could be had at all without a knowledge of the law intended to be amended." *People ex rel. New York Electric Lines Co.* v. *Squire* (1888) 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820.

1890, chap. 249, the Harlem river bridge. Compensation for

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damages was to be ascertained in the manner provided by the aqueduct law (1883, chap. 490). This furnished a rule of procedure and was valid. "There is no evil . . . to be apprehended by the mere reference to other acts and statutes for the forms of process and procedure for giving effect to a statute otherwise perfect and complete." *Re Lorillard* (1891) 36 N. Y. S. R. 231, 13 N. Y. Supp. 83, citing *People ex rel. Washington Park* v. *Banks* (1876) 67 N. Y. 576. See also *People ex rel. Everson* v. *Lorillard* (1892) 135 N. Y. 285, 31 N. E. 1011, where the court say it is somewhat difficult to give the constitutional provision a reasonable construction that would be applicable in every case. "A provision of the fundamental law which attempts to regulate the form in which the legislative will is to be expressed in the enactment of laws is difficult of a just and reasonable application in all cases, and is, at best, of very doubtful utility. . . . Since the incorporation of this section in the Constitution in 1875, hundreds of statutes have been passed that must be held to be in conflict with it" if the act under consideration should be condemned. "There are many general acts conferring very important powers, or imposing important duties to be exercised or performed according to some provision of the Code or some statute, general or local, which contains the appropriate procedure for such a case. There are also many local acts applicable to cities and other public corporations authorizing the issue of bonds or the raising of money according to the general provisions of the charter; still others may be found, both general and local, conferring powers upon private corporations to contract debts in the manner provided in some other law. To hold that all these acts are void, as in conflict with this provision of the Constitution, would be to disturb titles, promote litigation, and inflict widespread injury. The worst evils that the framers of the provision could have had in view would be multiplied a hundredfold by such a construction."

1892, chap. 182, Mount Vernon city charter. A provision continuing and applying various statutes relating to sewers was sustained in *People ex rel. Winfield* v. *Bruning* (1895) 89 Hun, 124, 34 N. Y. Supp. 1048.

1892, chap. 342, Syracuse municipal court. The application to this court of the provisions of the Code of Civil Procedure relative to the jurisdiction and procedure of justices' courts was sustained in *Curtin* v. *Barton* (1893) 139 N. Y. 505, 34 N. E. 1093.

1892, chap. 466, Buffalo parks. The application of various provisions of the charter and other statutes relating to the city was

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sustained. *Choate* v. *Buffalo* (1899) 39 App. Div. 379, 57 N. Y. Supp. 383.

1895, chap. 572, amending the Penal Code, § 351, poolselling, etc. A provision restricting the application of Penal Code, § 343, was valid. *People ex rel. Weaver* v. *Van De Carr* (1896) 150 N. Y. 439, 44 N. E. 1040.

1896, chap. 649, validating certain consents to street railroads in cities of the first and second classes. It authorized a street railroad company to construct its road upon obtaining the consent of adjoining owners "as provided by law." This was a matter of procedure, and valid. *Re Buffalo Traction Co.* (1898) 25 App. Div. 447, 49 N. Y. Supp. 1052, affirmed in (1898) 155 N. Y. 700, 50 N. E. 1115.

1896, chap. 727, which makes applicable the provisions of law relating to the taking of private property for public streets and places in the city of New York. It merely refers to local statutes to indicate the procedure necessary in taking property, and is valid. In *Re New York* (1904) 89 N. Y. Supp. 6.

1901, chap. 466, and previous charters of Greater New York. A provision declaring the sanitary code, as promulgated by the board of health, binding in the city, was not within the purview of this constitutional provision. The sanitary code was not a statute, but a body of ordinances made by local officers. *People* v. *Davis* (1903) 78 App. Div. 570, 79 N. Y. Supp. 747.

§ 18. [*Private and local bills limited; street railroads.*] —The legislature shall not pass a private or local bill in any of the following cases:

(1) Changing the names of persons.

(2) Laying out, opening, altering, working, or discontinuing roads, highways, or alleys, or for draining swamps or other low lands.

(3) Locating or changing county seats.

(4) Providing for changes of venue in civil or criminal cases.

(5) Incorporating villages.

(6) Providing for election of members of boards of supervisors.

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(7) Selecting, drawing, summoning, or impaneling grand or petit jurors.

(8) Regulating the rate of interest on money.

(9) The opening and conducting of elections or designating places of voting.

(10) Creating, increasing, or decreasing fees, percentage, or allowances of public officers, during the term for which said officers are elected or appointed.

(11) Granting to any corporation, association, or individual the right to lay down railroad tracks.

(12) Granting to any private corporation, association, or individual any exclusive privilege, immunity, or franchise whatever.

(13) Granting to any person, association, firm, or corporation, an exemption from taxation on real or personal property.

(14) Providing for building bridges, and chartering companies for such purposes, except on the Hudson river below Waterford, and on the East river, or over the waters forming a part of the boundaries of the state.

(15) The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which, in its judgment, may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or, in case the consent of such property owners cannot be obtained, the appellate division of the supreme court in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such

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railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.

[Am. 1874; Am. 1901. For convenience of reference the paragraphs have been numbered, and they are also repeated in connection with the notes. Par. 13 was added in 1901.]

The reader will find in preceding volumes numerous references to the subject of private and local laws, and a sketch of various attempts to limit the power of the legislature over such laws, including several propositions to require notice to the legislature of an intention to present a private or local bill. In notes to the last two sections I have quoted provisions in the instructions issued to Governor Tryon in 1771, relating to the enactment of laws. Paragraph 16 contains the following directions concerning private laws:

"You are to take care that no private act whereby the property of private persons may be affected be passed, in which there is not a saving of the right of us, our heirs and successors, all bodies politic or corporate, and of all other persons except such as are mentioned in the said act, and those claiming by, from, and under them, and further, you shall take care that no such private act be passed without a clause suspending the execution thereof until the same shall have received our royal approbation; it is likewise our will and pleasure that you do not give your assent to any private act until proof be made before you in council and entered in the council books, that public notification was made of the party's intention to apply for such act in the several churches where the premises in question lie for three Sundays at least successively before any such act shall be brought into the assembly, and that a certificate under your hand be transmitted with and annexed to every such private act, signi-



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fying that the same has passed through all the forms above mentioned."

The Constitution proposed by the Convention of 1867 included a section containing some of the following provisions, and also others which were omitted in the section as finally adopted. That Convention proposed the word "special" instead of "private" as applied to one class of prohibited laws. The Commission of 1872 renewed the consideration of this subject and reported a section which will be found in the second volume. The legislature carefully considered the proposed restrictive provisions and modified them in several important particulars. The Commission proposed the phrase "private, special, or local." The legislature struck out the word "special," leaving the restriction applicable only to private or local laws. In a note to § 16 I have cited authorities defining the terms "local" and "private."

The legislature shall not pass a private or local bill in any of the following cases:

**(1) Changing the names of persons.**

This prohibition does not apply to statutes changing the names of corporations. *Moran* v. *Lydecker* (1882) 27 Hun, 585.

**(2) Laying out, opening, altering, working, or discontinuing roads, highways, or alleys, or for draining swamps or other low lands.**

*Highways.*—This provision refers to the "ordinary roads, highways, or alleys, the manner of opening, working, altering, or discontinuing which can be readily provided for by general law," and not to an avenue in a city leading to or passing through a park, but such an avenue may be regulated by a special act "the provisions of which must always be in accordance with the particular plan in each case." *Hurlburt* v. *Banks* (1876) 52 How. Pr. 196; *People ex rel. Washington Park* v. *Banks* (1876) 67 N. Y. 568, where the court

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say that the constitutional provision was intended to prevent any interference with the general highway system of the state. *Re Woolsey* (1884) 95 N. Y. 135.

The same rule is declared in *Re Lexington Ave.* (1883) 29 Hun, 303, affirmed in (1883) 92 N. Y. 629, where the court say that "a street or avenue of a city is not a highway within the meaning of the section under consideration, or within the meaning of the statutes relating to the laying out, opening, etc., of the highways. . . . The distinction seems to be that lands taken for highways in this state are not taken in fee, but an easement only is acquired for the object in view, while lands taken for the purposes of a street or avenue are acquired in fee by the city."

In *People ex rel. Gage* v. *Lohnas* (1889) 54 Hun, 604, 8 N. Y. Supp. 104, it was held that the provision did not apply to streets in an incorporated village. Justice Landon calls attention to the fact that the Commission of 1872 included "streets" in the provision, and that this word was stricken out by the legislature, leaving the provision applicable only to roads, highways, and alleys.

A statute (1875, chap. 2) intended to cure defects in street proceedings under a city charter was held not obnoxious to this provision. *Tifft* v. *Buffalo* (1880) 82 N. Y. 204.

The power taken away from the legislature by this provision may be vested in the boards of supervisors under § 27. *People ex rel. Morrill* v. *Queens County* (1889) 112 N. Y. 585, 20 N. E. 549.

The act of 1886, chap. 312, conferring additional powers on the New York Arcade Railway Company, and authorizing it to construct an underground railway, was a private law under this provision of the Constitution, and void. *Astor* v. *Arcade R. Co.* (1889) 113 N. Y. 93, 2 L. R. A. 789, 20 N. E. 594.

An act conferring on city authorities power to close a certain street did not violate this provision. "At most it only enlarged the power theretofore existing in the common council, who were vested with power and control over the street by the provisions of the charter." *Weinckie* v. *New York C. & H. R. R. Co.* (1891) 39 N. Y. S. R. 584, 15 N. Y. Supp. 689, affirmed in (1892) 133 N. Y. 656, 31 N. E. 625.

The act of 1892, chap. 493, for the construction of highways and bridges upon highways running through two or more towns of the same county, and which, by its terms, applied only to counties adjoining cities of one million or more inhabitants, was not a local act. "An act embracing all things of a certain class is a general, and not a local act, although, by reason of a limitation based on

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population, only a single locality can receive its benefits." *Treanor* v. *Eichhorn* (1893) 74 Hun, 58, 26 N. Y. Supp. 314.

The act of 1897, chap. 286, relating to highways in certain towns, was held to be a local act, and void. *Re Henneberger* (1898) 155 N. Y. 420, 42 L. R. A. 132, 50 N. E. 61.

The term "highway" in its "ordinary and popular sense, refers to the country roads under the management and control of the local authorities of the several towns or counties of the state. It does not even include streets or avenues in cities. . . . The framers of the Constitution evidently used the term in its ordinary and popular sense, comprehending only the ordinary roads and highways under the care of local authorities." In a certain sense streams and water ways are highways. General laws regulate the opening and use of highways, but "there never was any general law under which a water way which was private property could be thrown open or dedicated to the use of the public." A statute which declares a natural water way (Roaring brook) to be a public highway "for the purpose of floating logs, timber, and lumber down said stream" was held valid under this constitutional provision. *Re Burns* (1898) 155 N. Y. 23, 49 N. E. 246. The rule in the *Burns Case* was applied in *Re Wilder* (1904) 90 App. Div. 262, 85 N. Y. Supp. 741, sustaining the Deer river highway act of 1903, chap. 565. But see *De Camp* v. *Dix* (1899) 159 N. Y. 436, 54 N. E. 63, where the act of 1851, chap. 207, making the New York branch of Moose river a public highway, was held to be unconstitutional. It did not provide for compensation to the owners of the land.

*Drainage.*—At the time of the adoption of this section general legislation in relation to drainage had been enacted by the Revised Statutes, the act of 1869, chap. 888, and the amendment of 1871, chap. 303, and several local statutes had also been passed on the same subject.

The prohibition against local drainage laws does not apply to statutes authorizing the construction of a sewer in a city. *Swikehard* v. *Michels* (1894) 81 Hun, 325, 29 N. Y. Supp. 777, 30 N. Y. Supp. 1135, affirmed in (1895) 144 N. Y. 684, 39 N. E. 859.

## (3) Locating or changing county seats.

An act assuming to legalize the invalid proceedings of a board of supervisors changing a county seat is within the prohibition of this clause. Such a validating statute would amount to a change of the county seat by the legislature; "the legislature would be

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enabled to defeat wholly the constitutional provision by the indirect method of a defective resolution, and then of a validating act. It would do indirectly what it could not do directly, and avoid the constitutional provision in form, while violating it in fact." *Williams* v. *Boynton* (1895) 147 N. Y. 426, 42 N. E. 184.

## (4) Providing for changes of venue in civil or criminal cases.

The act of 1884, chap. 522, providing for parks in the 23d and 24th wards in New York and the adjacent district in Westchester county, which included territory partly in the first and partly in the second judicial districts, and which required proceedings to be instituted in the first district, was not a local law changing the venue. The legislature may determine the venue of such proceedings. *Re New York* (1885) 99 N. Y. 569, 2 N. E. 642.

The provision in the act of 1893, chap. 416, for the removal of a cause from a justice's court to the city court, was not a change of venue. The Constitution does not prohibit statutes providing for the removal of causes from one court to another. *Doran* v. *Bussard* (1899) 38 App. Div. 30, 55 N. Y. Supp. 987.

The second class cities charter, 1898, chap. 182, as amended 1899, chap. 581, which provides that "the place of trial of all actions or proceedings against the city, or any of its officers, boards, or departments, shall be in the county in which the city is situated," relates only to transitory actions, and does not violate the constitutional provision against a local law changing the venue. *Czarnowsky* v. *Rochester* (1900) 55 App. Div. 388, 66 N. Y. Supp. 931, affirmed in (1901) 165 N. Y. 649, 59 N. E. 1121.

## (5) Incorporating villages.

This prohibition does not apply to an act amending the charter of a village previously incorporated. *Reed* v. *Schmit* (1886) 39 Hun, 223.

## (6) Providing for election of members of boards of supervisors.

The act of 1878, chap. 253, providing for the election of super-

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visors in the counties of Albany, Livingston, Rensselaer, and Monroe, and fixing the term of office at two years, was void under this clause. *People ex rel. Hassell* v. *Hoffman* (1881) 60 How. Pr. 324.

"It is not altogether easy to understand what this provision was intended to forbid. Members of the board of supervisors are never elected as such, but hold that office and perform its duties under a general law, and by force of their election as supervisors of separate towns or cities." The court cites the provision of the suffrage article requiring elections by ballot "except for such town officers as may by law be directed to be otherwise chosen," which latter clause authorized the election of supervisors by ballot or "after the old town meeting fashion of calling for ayes and noes, or by a show of hands, or other division. As to some town officers the statute still permits these ancient methods of choice." This was the situation as to town supervisors. The legislature had, in effect, by general laws provided for the election of supervisors by ballot. Great mischiefs would result if, by the operation of local laws, all uniformity should be lost, and each town be suffered to go its own independent way; and this section, adopted in 1874, imposed on the legislature the absolute duty of requiring the election of supervisors by general laws only. This provision "prevented the passage of local bills giving one town power to choose its supervisor by a different mode of voting, at a different dictation of time and place, and for different official terms from other towns of the state." But the constitutional provision does not relate to cities which are created by special laws, conferring varying charter privileges under peculiar and sometimes diverse conditions. They have never been created by general laws, "and cannot easily or prudently be organized in any other method than by special and local enactments." The internal arrangements of a city, including its division into wards or other districts for local purposes, are subjects of legislative discretion, to be applied in each case according to circumstances, and a law which creates and charters and organizes a city is not, within the constitutional meaning, a local law "providing for the election of members of the board of supervisors," because, as a local law for the organization of a city government, it divides the municipal area into wards and gives each its own supervisor. Any other view brings the constitutional provisions into discord and contradiction. "An act adopting or amending a city charter, although it provides for ward supervisors, is not an act providing for the election of members of the board of super-

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visors," notwithstanding the fact that, under a general law, such supervisors become *ex officio* members of such board. *People ex rel. Clancy* v. *Westchester County* (1893) 139 N. Y. 524, 34 N. E. 1106.

This provision did not affect the power of the legislature to erect new towns and to provide for their government. This power can scarcely be exercised except by special law. The inhibition contained in this clause applies to existing political subdivisions, and not to laws creating new ones. The provision for the election of town officers is a necessary part of a statute creating a new town, except that a special act may sometimes apply existing general laws. This, however, cannot always be done in adjusting temporary conditions produced by a change of territorial boundaries, and the arrangement of necessary official machinery. *Fort* v. *Cummings* (1895) 90 Hun, 481, 36 N. Y. Supp. 36.

**(7) Selecting, drawing, summoning, or impaneling grand or petit jurors.**

The act of 1881, chap. 532, amending § 1041 of the Code of Civil Procedure, providing for jurors in the city and county of Albany, is, so far as it relates to grand jurors, a local act, and void under this provision. *People* v. *Petrea* (1883) 92 N. Y. 128; *People* v. *Fitzpatrick* (1883) 30 Hun, 493.

The act of 1896, chap. 378, providing for special jurors in criminal cases, did not violate this provision. It was a general act. *People* v. *Dunn* (1899) 157 N. Y. 528, 43 L. R. A. 247, 52 N. E. 572.

See also *People* v. *Ebelt* (1905) 180 N. Y. 470, 73 N. E. 235, in which the court considers and assumes the validity of the Westchester county jury act, Laws 1892, chap. 491, as amended Laws 1893, chap. 269, which, among other things, provided for the office of commissioner of jurors in that county.

**(8) Regulating the rate of interest on money.**

**(9) The opening and conducting of elections or designating places of voting.**

**(10) Creating, increasing, or decreasing fees, percentage, or allowances of public officers, during the term for which said officers are elected or appointed.**

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"The prospective salary or other emoluments of a public office are not the property of the officer, nor the property of the state. . . . The right to the compensation grows out of the rendition of the services, and not out of any contract between the government and the officer that the services shall be rendered by him. They may be paid for in fees at one time, in salary at another, and either may be increased or diminished in amount at any time before they are earned." *Conner* v. *New York* (1851) 5 N. Y. 285.

The act of 1876, chap. 439, relating to the expenses of judicial sales in the county of Kings, and which fixed the sheriff's fees on certain sales, was held not to apply in terms to the sheriff then in office, that the statute might lawfully operate to affect the compensation of future sheriffs, and that the legislature must have presumed this result. *Kerrigan* v. *Force* (1877) 68 N. Y. 381.

The inhibition does not take away the power of the legislature to exempt taxpayers from the payment of fees on tax sales. *People ex rel. Gass* v. *Lee* (1882) 28 Hun, 469.

In *Shanley* v. *Brooklyn* (1883) 30 Hun, 396, it is said that a patrolman on the police force is not within this provision. It applies to public officers, and has "reference to those well-known state and county officers which were elective or filled by appointment for a certain time. Policemen were local, and not the subject of general laws, nor even of a fixed tenure in office," and it was not designed to continue their compensation unchangeable. The court sustained action by a common council reducing the compensation of a patrolman under authority conferred by statute.

The provision of § 1116 of the New York consolidation act of 1882, chap. 410, authorizing the board of apportionment to fix the compensation of the crier of the supreme court, was held applicable only to subsequent appointments, and did not affect a crier then in office. *Ricketts* v. *New York* (1884) 12 Daly, 504.

"The word 'allowance' is used in the Constitution in a sense entirely different and distinct from that of salary. . . . The generic term used to cover all forms of payments made to public officers for services is invariably that of 'compensation,' and the specific term used to denote payments to officers having a fixed, definite, and stated compensation is that of 'salary.'" This clause was not intended to include persons whose services were payable by a fixed and stated compensation. "The natural interpretation of these provisions is that they were intended to include only those irregular, indefinite, and uncertain modes of compensating public servants which were indicated by words of like character and mean-

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ing, as those of 'fees,' 'percentage,' etc." Salaries are not included in the constitutional inhibition. *Mangam* v. *Brooklyn* (1885) 98 N. Y. 585, 50 Am. Rep. 705. See *Cole* v. *State* (1886) 102 N. Y. 48, 6 N. E. 277.

The legislature has power to vest in a police justice exclusive jurisdiction to issue all criminal process within the corporate limits. The power to take away the jurisdiction of a justice of the peace in criminal cases follows by necessity from the power to create a police justice. An act conferring such exclusive jurisdiction does not violate the provision against diminishing the fees of public officers. *People ex rel. Lynch* v. *Duffy* (1888) 49 Hun, 276, 1 N. Y. Supp. 896.

The commissioners appointed in street opening proceedings are not constitutional officers, and their fees may be reduced during the pendency of the proceedings. *Re Wilkins Place* (1898) 54 N. Y. Supp. 65.

## (11) Granting to any corporation, association, or individual the right to lay down railroad tracks.

Prior to the adoption of this section of the Constitution the Gilbert Elevated Railroad Company had been incorporated, routes had been designated by commissioners, and the company was authorized to occupy certain streets in New York. "The city authorities were prohibited from giving permission to any other person or corporation to do any of the acts which were authorized by the act to be done by this corporation, and were expressly enjoined to aid the corporation in carrying out the purposes of the law." Then came the rapid transit act of 1875, chap. 606, at which time the company had already acquired the right to construct a railroad. "The rapid transit act authorized a comprehensive and independent system of rapid transit by elevated railroads through the city." Section 36 contained provisions intended to protect the rights acquired by the company under previous statutes, and also to authorize the construction of a road by another corporation. As to this company, the provisions did not constitute a fresh grant, but rather a confirmation and modification of rights already acquired. "The constitutional clause was designed . . . to prohibit an original and independent grant of the right to lay down railroad tracks, including the powers incident thereto. . . . The legislature cannot grant this right under the guise of an amendment to an existing charter, any more

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than by an original grant. It would be incompetent to grant this right to a corporation organized for a different purpose, . . . but an act restricting and regulating an existing right to lay down railroad tracks is not a grant of that right within the meaning of this clause." *Gilbert Elev. R. Co.* v. *Kobbe* (1877) 70 N. Y. 361.

This subject was also considered with substantially the same result in *Re New York Elev. R. Co.* (1877) 70 N. Y. 327; *Central Crosstown R. Co.* v. *23d Street R. Co.* (1877) 54 How. Pr. 168; *People* v. *Long Island R. Co.* (1881) 60 How. Pr. 395, where it is said that the act of 1876, chap. 187, "simply gave legislative permission to use steam as a motive power on railroad tracks already constructed, the right to relay and repair which was incident to the original grant." See also *Auchincloss* v. *Metropolitan Elev. R. Co.* (1902) 69 App. Div. 63, 74 N. Y. Supp. 534.

The legislature cannot, by a confirmatory statute, revive obsolete powers to lay down railroad tracks. It may confirm defective proceedings already taken, but it cannot authorize a company to lay down additional tracks. *Patten* v. *New York Elev. R. Co.* (1876) 3 Abb. N. C. 306, appeal dismissed in (1876) 67 N. Y. 484.

The act of 1878, chap. 206, extending the time for the construction of a railroad, was void under this clause. The time for such construction fixed by previous statutes had already expired. The corporation was extinct. The act of 1878 was not a "waiver by the legislature of a forfeiture incurred by an existing corporation, but it was the creation of a new corporation, under the guise of reviving and rehabilitating a defunct corporate body." *Re Brooklyn, W. & N. R. Co.* (1878) 75 N. Y. 335. The same rule was declared in *Farnham* v. *Benedict* (1887) 107 N. Y. 159, 13 N. E. 784, and in *Re New York & L. I. Bridge Co.* (1889) 54 Hun, 400, 7 N. Y. Supp. 445.

The power to change the route granted to a railroad company was annulled by this provision of the Constitution. *Negus* v. *Brooklyn* (1881) 62 How. Pr. 291.

This clause was violated by the act of 1885, chap. 554, authorizing the construction of an "illustrative section" of an elevated railroad. *People ex rel. Harvey* v. *Loew* (1886) 102 N. Y. 471, 7 N. E. 297.

This clause was not violated by the act of 1884, chap. 546, authorizing the city of Schenectady to close a certain street for the purpose of erecting a depot. *Weinckie* v. *New York C. & H. R. R. Co.* (1891) 39 N. Y. S. R. 584, 15 N. Y. Supp. 689, affirmed in (1892) 133 N. Y. 656, 31 N. E. 625.

The consolidation of railroad corporations resulting in the organ-

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ization of a new corporation therefrom is not prohibited by this provision, which was designed only "to prohibit an original and independent grant of that right." *Sandham* v. *Nye* (1894) 9 Misc. 541, 30 N. Y. Supp. 552.

The New York & Long Island Bridge Company act of 1892, chap. 411, did not grant the right to lay down railroad tracks. *New York & L. I. Bridge Co.* v. *Smith* (1896) 148 N. Y. 540, 42 N. E. 1088.

A county, city, town, or village is not included in this prohibition. It does not prevent a grant to a municipality. The New York rapid transit acts were sustained. *Sun Printing & Pub. Asso.* v. *New York* (1897) 152 N. Y. 257, 37 L. R. A. 788, 46 N. E. 499.

The constitutional restriction applies where one company, for the purpose of connecting parts of its lines, seeks to use the tracks of another company for a short distance. Such use cannot be had without first obtaining the consents required by the Constitution. The second company cannot avail itself of the consents granted for the existing road. *Colonial City Traction Co.* v. *Kingston City R. Co.* (1897) 153 N. Y. 540, 47 N. E. 810.

The act of 1896, chap. 649, validating certain proceedings relating to street railroads, was not a local act under this provision. *Re Buffalo Traction Co.* (1898) 25 App. Div. 447, 49 N. Y. Supp. 1052, affirmed in (1898) 155 N. Y. 700, 50 N. E. 1115.

## (12) Granting to any private corporation, association, or individual any exclusive privilege, immunity, or franchise whatever.

An instance of the exclusive franchise prohibited by this paragraph is found in the statutes (1798, 1803, 1807, 1808, and 1811) which granted to Livingston and Fulton the sole and exclusive right to navigate boats by steam within the state. This right was sustained in *Livingston* v. *Van Ingen* (1812) 9 Johns. 507.

An interesting question relating to an exclusive franchise was presented in *Hallock* v. *Dominy* (1876) 7 Hun, 52, where the court, construing an ordinance by the board of supervisors of Suffolk county, conferring on the inhabitants of East Hampton the exclusive right to catch certain fish in that town, say that "all laws creating privileged classes are contrary to the spirit of our institutions." That the waters included in the ordinance being navigable, an attempt to confer on such inhabitants an exclusive franchise

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was ineffectual and void, and that "the legislature itself could not enact any local bill giving to the individuals residing at East Hampton the exclusive privilege or franchise in question . . . and it is not to be presumed that it intended to confer the privilege upon the boards of supervisors." The judgment of the general term was reversed in (1877) 69 N. Y. 238, without considering the validity of the ordinance.

The franchise clause was considered in *Gilbert Elev. R. Co.* v. *Kobbe* (1877) 70 N. Y. 361, where the court say that it is not easy to understand precisely what was intended by it. "Every franchise granted by the legislature is, from its very nature, exclusive, in the sense that it does not belong to the citizens generally of common right. . . . It is not necessarily exclusive in the sense that others may not obtain a similar grant. The difficulty is in determining what force is to be given to the word 'exclusive' in this clause. We cannot say that it has no meaning. A patent right is an exclusive right; it is a monopoly. The owner may prevent the use of the article patented by every other person, unless the right is purchased of him. So, many franchises of an exclusive character, such as ferries and the like, have been granted by states. . . . It is difficult to construe this clause as meaning anything less than an absolute monopoly, but it is not deemed necessary to define its precise signification." The clause was not violated by the rapid transit act of 1875, chap. 606. See also *Re New York Elev. R. Co.* (1877) 70 N. Y. 327; *People* v. *Long Island R. Co.* (1881) 60 How. Pr. 395.

The act of 1879, chap. 89, authorizing a corporation (the trustees of the Exempt Firemen's Benevolent Fund) to collect from foreign insurance companies a percentage on premiums and apply them for purposes therein specified, did not confer on the corporation an exclusive privilege. *Exempt Firemen's Benev. Fund* v. *Rome* (1883) 93 N. Y. 313, 45 Am. Rep. 217.

The act of 1882, chap. 259, authorizing the lessees of certain ferries to acquire the right to use a pier specified therein, did not confer an exclusive privilege. *Re Union Ferry Co.* (1885) 98 N. Y. 139.

The amendment of 1874, taking effect January 1, 1875, did not have a retroactive effect. *Harper* v. *Brooklyn Elev. R. Co.*, N. Y. Daily Reg., Sept. 9, 1885.

The racing law of 1887, chap. 479, did not confer any exclusive privilege. *Reilly* v. *Gray* (1894) 77 Hun, 402, 28 N. Y. Supp. 811.

The act of 1887, chap. 716, relating to electrical subways, did not confer any exclusive privilege or franchise. *Western U. Teleg Co.*

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v. *New York* (1889) 3 L. R. A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 552.

The act of 1895, chap. 322, prohibiting the use of soft coal in Brooklyn by any factory, engine room, or electrical stations, except for the purpose of heating or welding iron or steel, did not grant an exclusive privilege. *Brooklyn* v. *Nassau Electric R. Co.* (1899) 44 App. Div. 462, 61 N. Y. Supp. 33.

"Under our state Constitution, it is doubtful whether any franchise can be granted except to promote the public welfare. . . . To grant to one person the exclusive right of fishing in any part of the Hudson river would be to deprive, without due process of law, every other person of his privilege of fishing there. The nature of the title of the state to the river does not admit of its subjection to a perpetual unconditional easement in favor of the upland." The court considered the nature and effect of a grant in 1714 by the governor of New York to Andries Pieters Coeymans of a tract of land on the west side of Hudson river, south of the manor of Rensselaerwyck. *Slingerland* v. *International Contracting Co.* (1899) 43 App. Div. 215, 60 N. Y. Supp. 12.

The act of 1889, chap. 385, "for the better protection of skilled labor, and for the registration of labels," etc., is a general law, and therefore not within this provision. *Perkins* v. *Heert* (1899) 158 N. Y. 306, 43 L. R. A. 858, 70 Am. St. Rep. 483, 53 N. E. 18.

The act of 1893, chap. 231, legalizing a contract between the city of Binghamton and certain street railroad companies in relation to the liability of such companies for street paving, cured all defects arising from lack of power, but it conferred no exclusive privilege or immunity. *Davidge* v. *Binghamton* (1901) 62 App. Div. 525, 71 N. Y. Supp. 282.

The act of 1896, chap. 448, so far as it empowers the Humane Society to appropriate, harbor, and keep dogs without paying any license, while every other citizen is obliged to pay such license fee, is the grant of an exclusive privilege or immunity. *Fox* v. *Mohawk & H. River Humane Soc.* (1901) 165 N. Y. 517, 51 L. R. A. 681, 80 Am. St. Rep. 767, 59 N. E. 353.

Section 351 of the Penal Code relating to poolselling, etc., does not violate this provision. *People* v. *Stedeker* (1902) 75 App. Div. 449, 78 N. Y. Supp. 316.

The act of 1883, chap. 278, did not confer on the Thousand Island Park Association an exclusive privilege of conducting the business therein mentioned. It only granted additional corporate powers, including the power to regulate trade in the park. "The power to reg-

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ulate a useful trade does not authorize its prohibition or the creation of a monopoly. An ordinance cannot be legally made which contravenes a common right, unless the power to do so be plainly conferred by legislative grant." Citing Dillon on Municipal Corporations, § 325; *Thousand Island Park Asso.* v. *Tucker* (1903) 173 N. Y. 203, 60 L. R. A. 786, 65 N. E. 975.

(13) Granting to any person, association, firm, or corporation, an exemption from taxation on real or personal property.

(14) Providing for building bridges, and chartering companies for such purposes, except on the Hudson river below Waterford, and on the East river, or over the waters forming a part of the boundaries of the state.

The act of 1887, chap. 205, legalizing the proceedings of town authorities and of a town meeting in Attica in relation to the erection of a certain bridge, and authorizing an action to recover the contract price, did not violate this constitutional provision. *Wrought Iron Bridge Co.* v. *Attica* (1890) 119 N. Y. 204, 23 N. E. 542.

The act of 1891, chap. 290, providing for a bridge across a navigable stream between Kings and Queens counties, violated this provision. *People ex rel. Keene* v. *Queens County* (1894) 142 N. Y. 271, 36 N. E. 1062.

(15) The legislature shall pass general laws providing for the cases enumerated in this section and for all other cases which, in its judgment, may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application,

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**appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.**

The street railroad provision relates to future legislation, and has no reference to previously existing laws. *People* v. *Brooklyn, F. & C. I. R. Co.* (1882) 89 N. Y. 75.

This constitutional provision is not retroactive. *Roddy* v. *Brooklyn City & N. R. Co.* (1898) 32 App. Div. 311, 52 N. Y. Supp. 1025; *Ingersoll* v. *Nassau Electric Co.* (1899) 157 N. Y. 453, 43 L. R. A. 236, 52 N. E. 545.

The constitutional provision in relation to consents by property owners in connection with the construction of a street railroad does not require that the consents be under seal, nor does it necessarily include a release of damages. It is a mere consent to the construction of the road. In default of such consent a court order may be obtained in lieu thereof, but "there is nothing which authorizes the court or the commissioners to assess damages, or to acquire rights of the owners." *Re Cortland & H. Horse R. Co.* (1883) 31 Hun, 72, (1885) 98 N. Y. 336.

The legislature by a general law intended to carry the constitutional provision into effect may impose on street railroad companies conditions in addition to those prescribed by the Constitution. "Except as restrained by the Constitution, the legislative power is untrammeled and supreme, and . . . a constitutional provision which withdraws from the cognizance of the legislature a particular subject, or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control. Nothing is subtracted from the sum of legislative power except that which is expressly or by necessary implication withdrawn. The legislature is prohibited from granting a franchise to construct a street railroad, except upon certain specified conditions. But it is not prohibited from annexing further conditions not inconsistent therewith, and whether other conditions are necessary or proper is a matter resting in the wisdom and discretion of the legislature." *Re 34th Street R. Co.* (1886) 102 N. Y. 343, 7 N. E. 172. In *Re Kings County Elev. R. Co.* (1887) 105 N. Y. 97, 59 Am. Rep. 478, 13 N. E. 18, certain conditions im-

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posed by the Brooklyn common council were held to be unreasonable and unlawful and repugnant to legislative requirements.

"Repealing legislation which should dispense with the existing requirement of consent by the property owners would be as unconstitutional as affirmative legislation assuming to authorize the building of street railroads without such consent." *Schaper* v. *Brooklyn & L. I. Cable R. Co.* (1886) 4 N. Y. S. R. 860, reversed in (1901) 124 N. Y. 630, 26 N. E. 311.

The legislature cannot substitute the orders of a commission for the consent of local authorities. A railroad beneath the surface of a street is a street railroad within the meaning of the Constitution. *Re New York District R. Co.* (1887) 107 N. Y. 42, 14 N. E. 187.

Local authorities may, at their pleasure, grant or refuse consent to construct a street railroad, and may grant consent upon such terms and conditions as they choose to impose, and the corporation may acquire the right by purchase. *People* v. *O'Brien* (1888) 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

This provision applies to a part of a road as well as to a complete road, and the legislature cannot, in any case, dispense with the consents required by the Constitution. *Re Metropolitan Transit Co.* (1889) 111 N. Y. 588, 19 N. E. 645.

The act of 1889, chap. 531, which provided that "any street surface railway company might in any case operate any portion of its railroad by cable or electricity, or by any power other than steam locomotive power, instead of by animal or horse power, which should be approved by the state board of railroad commissioners and consented to by the owners of one half in value of the property bounding on that portion of the road as to which a change of motive power was proposed," was unconstitutional, for the reason that it did not require the consent of local authorities. *People ex rel. Third Ave. R. Co.* v. *Gilroy* (1890) 9 N. Y. Supp. 833.

The powers and franchises of street railways existing prior to 1875 may be regulated without violating this constitutional provision, and that may be done by enlarging as well as restricting them. But the legislature cannot give to an existing street railroad company authority substantially to construct or operate a new road, or to make the road, in its construction and operation, a different one from what it before was. *Re Third Ave. R. Co.* (1890) 121 N. Y. 536, 9 L. R. A. 124, 24 N. E. 951.

"The power to grant or withhold consent to the construction of a street railroad does not emanate from the legislature, but is devolved upon the municipal authorities by the Constitution. . . . The

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provision of the Constitution is a restriction upon the legislature, and forbids the enactment of any law authorizing the construction or operation of a street railroad except upon the consent of the local authorities having control of the street or highway upon which it is proposed to construct the road." In administering this power the local authorities are clothed with sovereignty, and are as independent in its exercise as is any other department of the government. This is an important home rule provision, and even the courts cannot inquire into the motives which govern and control the lawful exercise of the power. But the provision which requires the consent of the local authorities to the construction and operation of a street railroad has not abridged the power of the legislature, which has absolute control of the streets, and the direction as to their use. "The legislature may still grant the use of the streets, subject only to the condition that the consent of the local authorities be obtained before the road is constructed or operated. The franchise proceeds from the legislature, and the obtaining of the consent of the local authorities is the performance of a condition without which the road cannot be constructed." *Adamson* v. *Nassau Electric R. Co.* (1895) 89 Hun, 261, 34 N. Y. Supp. 1073.

The jurisdiction of the general term under this provision was continued until January 1, 1896, when it became vested in the appellate division. *Re Rapid Transit R. Co.* (1895) 147 N. Y. 260, 41 N. E. 575.

In *Sea Beach R. Co.* v. *Coney Island & G. Electric R. Co.* (1897) 22 App. Div. 477, 47 N. Y. Supp. 981, it was held that the consent of an owner of a corner lot opposite the outer curve of a railroad to be built on two intersecting streets must be included in determining whether the number of consents required by the Constitution had been obtained.

The appellate division has power to confirm a report of commissioners appointed under this provision. *Re Port Chester Street R. Co.* (1899) 43 App. Div. 536, 60 N. Y. Supp. 160.

A street surface railroad which crosses a highway is built "upon" it within the meaning of the Constitution, and the consent of the local authorities must first be obtained. *Re Syracuse & S. B. R. Co.* (1900) 33 Misc. 510, 68 N. Y. Supp. 881.

As to the power of the court to condemn streets for street railroad purposes see *Schenectady R. Co.* v. *Peck* (1903) 84 N. Y. Supp. 759.

Where a bridge over a boundary stream between two towns is under their control and maintained at their joint expense the highway



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commissioners of the towns are the local authorities whose consent must be obtained under this constitutional provision, notwithstanding the fact that the bridge is also in two incorporated villages. *Wheatfield* v. *Tonawanda Street R. Co.* (1895) 92 Hun, 460, 36 N. Y. Supp. 744.

**§ 19. [*Private claims not to be audited by legislature.*] —The legislature shall neither audit nor allow any private claim or account against the state, but may appropriate money to pay such claims as shall have been audited and allowed according to law.**

[Am. 1874.]

The substance of this provision was recommended by the Convention of 1867, and included in the report of the Commission of 1872, which was adopted in 1874.

"The Constitution prohibits the legislature from exercising the power of itself auditing claims, which is in its nature judicial, but provides for the payment of claims which shall have been audited or allowed according to law; thus recognizing the power of the legislature to provide by law for the auditing and allowing by some appropriate tribunal of claims against the state." The act of 1885, chap. 238, authorizing the board of claims to hear and determine certain claims of the captain and harbor masters of the port of New York, did not violate this constitutional provision. It simply submitted the claims to a judicial body "established for the purpose of passing upon claims against the state. . . . The power to hear and determine includes power to reject as well as to allow." The statute was in no sense an exercise of judicial power. *Cole* v. *State* (1886) 102 N. Y. 48, 6 N. E. 277.

Only claims which had been regularly heard and determined by the board of audit could be paid or allowed by the legislature. *Swift* v. *State* (1881) 89 N. Y. 52.

"When individuals voluntarily furnish property or render valuable services to the state at the request of state officers for state purposes, but with the expectation of payment for the same, the legislature may ratify the acts of such officers, although previously unauthorized, and create a legal liability on the part of the state to pay for

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such property and services enforceable in its tribunals. The act of the legislature in supplying defects or omissions in pre-existing legislation, whereon a liability may be predicated against the state, is clearly not the audit of a claim, neither is it an allowance thereof." *O'Hara* v. *State* (1889) 112 N. Y. 146, 2 L. R. A. 603, 8 Am. St. Rep. 726, 19 N. E. 659.

The claim of Cayuga county for reimbursement on account of expenses incurred in the prosecution of persons charged with the commission of crimes in Auburn state prison was not a private claim against the state, and the legislature had power to authorize its payment. *Cayuga County* v. *State* (1897) 153 N. Y. 279, 47 N. E. 288.

The act of 1900, chap. 767, which authorized the court of claims to hear, audit, and determine a claim for damages arising from the cancelation of letters patent because of a defect in the title, and make an award therefor, was a proper exercise of legislative power under this section. The legislature had authority to recognize the justice of the claim, and to waive a technical defense of lack of warranty. It did not thereby audit or allow the claim. *Wheeler* v *State* (1904) 97 App. Div. 276, 90 N. Y. Supp. 18.

**§ 20. [*Two-thirds bills.*]—The assent of two thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes.**

[Const. 1821, art. 7, § 9; 1846, art. 1, § 9.]

This provision appears for the first time in the Constitution of 1821, and in its original form included statutes relating to corporations. This part of the section was omitted in 1846. For convenience the cases construing that part of the provision relating to corporations have been cited in a note to the section on two-thirds bills in the Constitution of 1821, which will be found in the Introduction. I have tried to include in the present note all cases involving the construction of the remainder of the section, although some of them construe statutes passed under the Constitution of 1821.

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"An appropriation of the public moneys to pay the debts of the state, or any single debt thereof, cannot be regarded as an appropriation for a private purpose;" such a provision is for the discharge of a public obligation, which is not a private purpose. *People* v. *Densmore* (1873) 1 Thomp. & C. 280; *People* v. *Canal Board* (1873) 1 Thomp. & C. 309 (1874) 55 N. Y. 390.

The decision of the legislature that a bill is private or local is not final nor conclusive. Under this section the purpose of a bill must be either private or local. It need not be both. It may be private and not local, or it may be local and not private. "An appropriation of money by the legislature must generally be regarded as for a local purpose when the money is to be expended in a particular locality and the people of that locality are to be directly and mainly benefited, notwithstanding the public are incidentally and remotely benefited." The act of 1896, chap. 880, making an appropriation for the improvement of Boquet river, did not receive a two-thirds vote and was therefore void. *People ex rel. Adsit* v. *Allen* (1870) 42 N. Y. 378. The same subject was considered in *Waterloo Woolen Mfg. Co.* v. *Shanahan* (1891) 128 N. Y. 345, 14 L. R. A. 481, 28 N. E. 358, where it is said that "the scrutiny which the courts have exercised in regard to legislation of this character has been confined to matters appearing on the face of the bill itself, and to things that are the subject of judicial notice." The act in question made an appropriation for dredging a part of Seneca river and a connecting race to facilitate the passage of canal boats. The trial court took testimony to show that the appropriation was really for a private purpose. The court of appeals say that the purpose expressed in the act is not private or local, but public, "inasmuch as the general improvement of the public highways of the state, whether canals or rivers that are navigable, is for the benefit of the state at large, though some locality or some individuals may be benefited more than others. The expenditure may, in fact, be improvident and the work may prove to be useless to the public, but the legislature, as the depository of the sovereign powers of the people, must necessarily be the judge of the propriety and utility of making it. . . . The judicial department cannot institute an inquiry concerning the motives and purposes of the legislature in order to attribute to it a design contrary to that clearly expressed or fairly implied in the bill, without disturbing or impairing in some measure the powers and functions assigned by the Constitution to each department of the government. The courts cannot determine upon the testimony of witnesses that the purpose of the legislature

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was to appropriate public money for the benefit of an individual, when it has expressed its purpose in the bill itself to be the enlargement or improvement of the canal. . . . Reason and authority, as well as the fitness of things, demand that when an act of the legislature appropriating money is assailed upon the ground that the purpose of such appropriation is local or private, and not public, the question shall be determined by the language and general scope of the act."

The general escheat laws of 1833, chap. 300, and 1834, chap. 37, which authorized the commissioners of the Land Office to release escheated lands under prescribed conditions, "did not require the assent of two thirds of the members elected to each branch of the legislature, in order to render them valid and effectual in respect to lands which escheated after their passage, as to which they are not to be regarded as acts appropriating public moneys or property for private purposes . . . but as statutes effecting a modification of the laws relating to escheats," which the legislature might enact by a majority vote. *Englishbe* v. *Helmuth* (1850) 3 N. Y. 294. The public lands law (1894, chap. 317) contains general provisions relating to escheats.

The act of 1850, chap. 283, which authorized the commissioners of the Land Office to grant to adjacent owners "so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this state," required a two-thirds vote. The secretary of state had certified in the session laws that the act was passed by a two-thirds vote, but the certificate of the presiding officer of the assembly accompanying the bill did not show that it had been so passed. The court said that, under the circumstances, the journal of the assembly might be examined for the purpose of ascertaining the fact. The examination showed that the bill had received more than a two-thirds vote. *Rumsey* v. *New York & N. E. R. Co.* (1891) 130 N. Y. 88, 28 N. E. 763.

*New York & L. I. Bridge Co.* v. *Smith* (1896) 148 N. Y. 540, 42 N. E. 1088, also holds that where the certificates are defective, recourse may be had to the legislative journals for the purpose of determining the fact as to the passage of a bill. "We think," the court say, "it would defeat the provisions of the Constitution and the statute if, in such an emergency as was here presented, recourse could not be had to the journals of the two houses."

The act of 1872, chap. 702, to improve and regulate the use of Fourth avenue in the city of New York, did not require a two-thirds vote. It did not appropriate public moneys for local purposes, but provided for local taxation for a local improvement. The court say

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the constitutional provision means that the "assent of two thirds of the members is necessary when money belonging to the whole state is to be appropriated for the benefit of a part;" the "public moneys" are those belonging to the state, and the provision "is no limitation on the power of the legislature to assess or tax the cost of a local improvement upon a locality." *People ex rel. New York & H. R. Co.* v. *Havemeyer* (1874) 4 Thomp. & C. 365.

The militia act of 1851, chap. 180, did not require a two-thirds vote. *People ex rel. Scott* v. *Chenango* (1853) 8 N. Y. 317.

The act of 1868, chap. 776, "to vest certain real estate belonging to the state in the town of Marlborough," to be used in the construction of a highway, appropriated public property for a local purpose, and, not having received the requisite two-thirds vote, it was void. *People ex rel. Purdy* v. *Highway Comrs.* (1873) 54 N. Y. 276, 13 Am. Rep. 581.

The act of 1879, chap. 213, which authorized the county treasurers of Seneca and Monroe counties to retain for the benefit of their counties the compensation for certain services, did not require a two-thirds vote. "The act does not appropriate any money of the state. It simply directs that the commissions, which, under former laws, were payable to the county treasurers as their own compensation, be retained by or allowed to them for the benefit of their respective counties, instead of being retained by them for their own benefit." *Seneca County* v. *Allen* (1885) 99 N. Y. 532, 2 N. E. 459.

The Syracuse water act of 1890, chap. 314, did not require a two-thirds vote. *Sweet* v. *Syracuse* (1891) 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289. The act permitted the city to take and conduct from Skaneateles lake (a canal feeder) a specified quantity of surplus water not needed for the Erie canal. The court say that it is a principle "recognized in the jurisprudence of every civilized people, from the earliest times, that no absolute property can be acquired in flowing water. Like air, light, or the heat of the sun, it has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion or control. . . . Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein, and in this case the state never acquired, or could acquire, the ownership of the aggregated drops that comprised the mass of flowing water in the lake and outlet, though it could and did acquire the right to its use." Subject to the paramount right of the state to use the water for canal purposes, "the riparian owners may use the waters of the lake and stream for domestic or manufacturing purposes, and the public as a highway for boats and other craft."

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The rights of the state were not affected by the act, and it did not appropriate public property for a local purpose.

The liquor tax law of 1896, chap. 112, did not require a two-thirds vote. The provision requiring the payment of two thirds of the proceeds of the liquor tax to localities was not an appropriation of public money. It was a continuation of the policy which had prevailed since the organization of the state to give to municipalities for local purposes the proceeds of excise licenses. By this act no money was drawn from the state treasury for local purposes. "The public moneys referred to in article 3, § 20, . . . are the public moneys of the state, as contradistinguished from public revenues levied for local purposes by towns, cities, and villages under state authority, or moneys which, by a long course of legislation, as in the case of excise moneys, have been treated as standing in the same situation." *People ex rel. Einsfeld* v. *Murray* (1896) 149 N. Y. 367, 32 L. R. A. 344, 44 N. E. 146.

§ 21. [*Appropriation bills*]—No money shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum.

[Const. 1846, art. 7, § 8.]

This section was a part of the financial reforms included in the Constitution of 1846.

An appropriation need not state the precise cost of the work to be done. A statement of the maximum amount for a specific object is sufficient under this section. *Hurlburt* v. *Banks* (1876) 52 How. Pr. 196.

Money collected by tax from railroad companies under the acts of 1869, chap. 907, and 1871, chap. 283, in municipalities which had is-

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sued railroad aid bonds, which was to be paid to the county treasurer and used by him for the redemption of such bonds, did not belong to the state, nor to any fund under its management. *Clark* v. *Sheldon* (1889) 106 N. Y. 104, 12 N. E. 341.

Money paid into the state treasury pursuant to § 2747 of the Code of Civil Procedure (legacies payable to unknown persons) is not the money of the state or money belonging to any of its funds or any of the funds under its management, within the meaning of this section, and such money may be drawn from the treasury in the manner provided by the Code, without an appropriation by the legislature. *People ex rel. Evans* v. *Chapin* (1886) 101 N. Y. 682.

Money deposited with the state treasurer under § 197 of the tax law as a prerequisite to proceedings by certiorari to review the comptroller's action in relation to a corporation tax cannot be paid out except by an appropriation. *Re L. E. Waterman Co.* (1901) 33 Misc. 569, 68 N. Y. Supp. 892.

§ 22. [*Appropriation bills not to embrace other subjects.*]—No provision or enactment shall be embraced in the annual appropriation or supply bill, unless it relates specifically to some particular appropriation in the bill; and any such provision or enactment shall be limited in its operation to such appropriation.

[New.]

A sketch of this provision, which was proposed by the Convention of 1894, will be found in the chapter on that Convention.

§ 23. [*Commission bills excepted from certain sections.*]—Sections seventeen and eighteen of this article shall not apply to any bill, or the amendments to any bill, which shall be reported to the legislature by commissioners who have been appointed pursuant to law to revise the statutes.

[Am. 1874.]

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In the chapter on the Commission of 1872 I have noted the origin of this section, and the reasons for its inclusion in the Constitution. The court of appeals in *People* v. *Petrea* (1883) 92 N. Y. 128, had occasion to consider this provision, and it is there said that "it is a part of the legislative history of the state that, prior to the adoption of the constitutional amendments of 1874, commissioners to revise the statutes had been appointed by the legislature, who had, from time to time, made reports of their proceedings to that body, and when the constitutional amendments were adopted they had not completed their labors, but were still engaged in the work of the revision." The plain object of this section "was to exempt from the operation of § 18 private or local bills which had been or should be reported by the commissioners. But, with the exception of bills originating with the commissioners, and reported by them to the legislature, the prohibition of § 18 is absolute." In the absence of proof to the contrary it will be presumed, in support of the constitutionality of an act, that it originated in a bill reported by commissioners.

**§ 24. [*Tax law to state amount and object of tax.*]—Every law which imposes, continues, or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object.**

[Const. 1846, art. 7, § 13.]

This was also one of the tax reform provisions proposed by the Convention of 1846.

A local assessment is not a tax within the meaning of this section. *Re Ford* (1872) 6 Lans. 92; *People ex rel. New York & H. R. Co.* v. *Havemeyer* (1874) 4 Thomp. & C. 365; *Guest* v. *Brooklyn*

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(1876) 8 Hun, 97, affirmed in (1877) 69 N. Y. 506; *Jones* v. *Chamberlain* (1888) 109 N. Y. 100, 16 N. E. 72.

The legislature has power to levy such tax for the general fund as it determines to be necessary, and though it fails to appropriate a part of the money which it may be supposed will be thereby raised, such failure does not make the law imposing the tax void. *Re Atty. Gen.* (1890) 58 Hun, 218, 12 N. Y. Supp. 754.

An act which limits an expenditure to a specified sum, and authorizes taxation to that amount, sufficiently states the tax under this section. *Hurlburt* v. *Banks* (1876) 52 How. Pr. 196.

Where the act states the rate of tax, and directs the payment of the proceeds into the state treasury to the credit of the general fund, it is a sufficient statement of the object of the tax. Such moneys can be drawn from the treasury only by specific appropriations, but the appropriations need not be stated in the tax law. *People ex rel. Burrows* v. *Orange County* (1858) 17 N. Y. 235.

The acts of 1869, chap. 262, and 1870, chap. 340, relating to a road in Yonkers and East Chester, sufficiently stated the tax and the object of it, and were valid. *People ex rel. McLean* v. *Flagg* (1871) 46 N. Y. 401.

The acts of 1869, chap. 907, and 1871, chap. 283, providing for the application of railroad taxes in certain municipalities to the redemption of railroad aid bonds, "simply specify what may be done with a tax which has been legally imposed," and do not violate this constitutional provision. *Clark* v. *Sheldon* (1887) 106 N. Y. 104, 12 N. E. 341.

In 1872 the legislature passed an act, chap. 734, imposing a tax of three and a half mills, "or so much thereof as may be necessary" to provide for the payment of the canal and general fund deficiencies directed to be paid by the act (chap. 700 of the Laws of 1872). "This is not a specific and distinct statement of the tax to be levied. It is simply a statement of the maximum tax . . . leaving it to the discretion of the administrative officers of the state to levy such tax as they shall find necessary up to the limit named." The legislature cannot thus delegate the power of taxation. "They must determine the amount necessary and adequate, and declare the amount to be levied absolutely." The law states neither the object nor the amount of the tax. It is also invalid because it assumes to fix the amount of the tax by reference to another statute. *People ex rel. Hopkins* v. *Kings County* (1873) 52 N. Y. 556.

A statute which directs commissioners in charge of a street improvement to determine the amount of taxation therefor is invalid

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under this provision. The legislature cannot delegate to commissioners the power to state a tax. The act did state the object of the tax, but not the tax itself. *Hanlon* v. *Westchester County* (1870) 57 Barb. 383.

The act of 1875, chap. 60, amending the act of 1865, relating to payments by foreign insurance companies, imposed a license fee, and not a tax, and therefore was not within the prohibition of this section. The tax covered by the constitutional provision is one general in its provisions and coextensive with the state. *People* v. *Fire Asso.* (1883) 92 N. Y. 311, 44 Am. Rep. 380, also *Exempt Firemen's Benev. Fund* v. *Roome* (1883) 93 N. Y. 313, 45 Am. Rep. 217, construing the act of 1879, chap. 89, and other statutes requiring foreign insurance companies doing business in the state to contribute a percentage of premiums for certain local purposes.

The acts of 1879, chap. 382, 1881, chap. 402, 1883, chap. 516, prescribing a special method for collecting taxes in certain counties, do not impose, continue, and revive a tax, and are not within the prohibition of this section. *People* v. *Ulster County* (1885) 36 Hun, 491.

The provision of the corporation tax law of 1880, chap. 542, making the taxes applicable to the payment of the ordinary and current expenses of the state, sufficiently states the object of the tax. *People* v. *National F. Ins. Co.* (1882) 27 Hun, 188; *People* v. *Home Ins. Co.* (1883) 92 N. Y. 328, affirmed in (1889) 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

This section does not apply to the collateral inheritance tax law of 1885, chap. 483. "In terms it applies to every tax which the legislature can impose, and is not confined to a property tax. It is not, even by its terms, confined to a general tax embracing the whole state; but the language, literally construed, is broad enough to embrace every local tax imposed for local purposes. . . . Taxes may be imposed upon a great variety of objects. They may be direct or indirect, special or general, and they may be imposed in the shape of excise and licenses upon hawkers, peddlers, auctioneers, insurance agents, liquor dealers, and others. All the contributions for the support of the government, enforced from individuals in the various ways mentioned, are, properly speaking, taxes. Notwithstanding the general language of the section referred to, we do not think it was intended to apply to every tax which the legislature could impose. . . . The object of the constitutional provision was to convey information to the members of the legislature and to the people, and it should have a practical construction with a view

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to accomplish its purpose so far as attainable, and to carry out the policy which we may assume dictated it." The collateral inheritance tax is permanent. "It is always uncertain upon whom it will fall and how much revenue it will produce." It would be impracticable for the legislature to specify the particular objects to which the tax should be applied, "and we are of opinion that this section . . . was intended to apply to the annual recurring taxes known at the time of the adoption of the Constitution, and imposed generally upon the entire property of the state." *Re McPherson* (1887) 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685.

§ 25. [*Three-fifths bills.*]—On the final passage, in either house of the legislature, of any act which imposes, continues, or revives a tax, or creates a debt or charge, or makes, continues, or revives any appropriation of public or trust money or property, or releases, discharges, or commutes any claim or demand of the state, the question shall be taken by yeas and nays, which shall be duly entered upon the journals, and three fifths of all the members elected to either house shall, in all such cases, be necessary to constitute a quorum therein.

[Const. 1846, art. 7, § 14.]

This belongs to the same class as § 24.

The provision for a commutation tax in the militia law of 1851 did not render the act subject to the requirement that three fifths of each house of the legislature must be present at its passage. The commutation is not a tax in the ordinary sense. *People ex rel. Scott* v. *Chenango* (1853) 8 N. Y. 317.

An act enlarging the territorial boundaries of a village did not require the presence of three fifths of the legislature on its final passage. *Pumpelly* v. *Owego* (1863) 45 How. Pr. 219.

The act of 1855, chap. 428, for compensating parties whose property may be destroyed in consequence of mobs and riots, did not require the presence of three fifths of the legislature on its final passage. *Darlington* v. *New York* (1865) 31 N. Y. 164, 88 Am. Dec. 248.

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The act of 1879, chap. 89, making the plaintiff in this case the recipient of the percentage of premiums received on business transacted in this state by foreign insurance companies, did not require the presence of three fifths. *Exempt Firemen's Benev. Fund* v. *Roome* (1883) 93 N. Y. 313, 45 Am. Rep. 217.

§ 26. [*Board of supervisors.*]—There shall be in each county, except in a county wholly included in a city, a board of supervisors, to be composed of such members and elected in such manner and for such period as is or may be provided by law. In a city which includes an entire county, or two or more entire counties, the powers and duties of a board of supervisors may be devolved upon the municipal assembly, common council, board of aldermen, or other legislative body of the city.

[As amended in 1899; for original, see amendments of 1874.]

In the chapter on the Commission of 1872, I have given a sketch of the origin of the provision requiring a board of supervisors in each county, including a reference to the discussion of the subject in the Convention of 1867. I have there noted the fact that the second part of the section relating to boards of aldermen was added by the legislature while the report of the Commission was under consideration. This provision then applied only to the city and county of New York, which were conterminous. By the New York charter of 1873, which was passed by the same legislature that recommended the constitutional amendments, the board of aldermen became the supervisors of the county. The constitutional provision was not changed by the Convention of 1894. The Greater New York charter of 1897, chap. 378, which, in general, took effect January 1, 1898, extended the boundaries of the city by including the counties of Kings and Richmond and a part of the county of Queens. This situation

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rendered inapplicable the second part of the above section, and the counties composing the new city, including the county of New York, became subject to the first part of the section, which required a board of supervisors in every county, except as therein indicated, and that exception then had no meaning. Accordingly the same legislature which passed the charter passed a supplemental act (1897, chap. 380) which provided that "in every county of the state wholly included within the limits of a city, but not comprising the whole of such city, there shall be a board of supervisors, to be composed of the members of the municipal assembly, board of aldermen, common council, or other legislative body of such city, who shall be elected as such, and also as supervisors within the territorial limits of the county," and certain duties were imposed on such board. This did not include Queens county, only a part of which was in the city, and whose supervisors therefore continued to exercise the powers vested in them before the charter. The unsatisfactory condition in Queens county resulting from the fact that a part of it was included in the city and a part remained subject to the ordinary county and town laws, suggested a division of that county and the legislature of 1898 accordingly erected the county of Nassau, comprising three towns, Oyster Bay, North Hempstead, and Hempstead, not included in the city of New York, and this act, as to most of its provisions, took effect on the 1st of January, 1899. This left all of Queens county in New York and subject to the provisions of the supplemental act of 1897, chap. 380, already cited. The legislature of 1899, by chap. 74, amended § 1586 of the New York charter by including Queens county, and by adding a provision which terminated the duties of the board of supervisors on the 31st of December, 1899. But subsequently, at the same session, chap. 416, the legislature

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extended the powers of such board until the end of the term for which the supervisors had been elected. As a result of these statutes, the city of New York comprised four entire counties,—New York, Kings, Richmond, and Queens,—and that part of Queens county not included in the city had become the county of Nassau. The necessity of re-establishing a board of supervisors in New York county consequent upon the enlargement of the city suggested a constitutional amendment which should relieve all the counties in the city from the operation of the requirement that each county must have a board of supervisors. An amendment was accordingly proposed in the legislature of 1898, and was approved and submitted to the legislature of 1899, by which it was again approved and submitted to the people and adopted at the November election in that year.

In construing the act of 1898, chap. 588, erecting the county of Nassau (*Re Noble* [1898] 34 App. Div. 55, 54 N. Y. Supp. 42), the court say that "although the board of supervisors is a county organization, its members are not elected by the body of electors of the county, but are chosen by the electors of their several towns respectively, and individually they are classed as town officers," and quote the provision of the county law that "the supervisors of the cities and towns in each county, when lawfully convened, shall be the board of supervisors of the county." By the Nassau act, the supervisors of three towns, Oyster Bay, North Hempstead, and Hempstead, then in office, were to constitute the board of supervisors of the new county, but the court suggest that by operation of the county law, these supervisors would constitute such board without any other legislative declaration. Supervisors are town officers, with specific powers and duties as such, and they are also made members of the legislative body of the county.

§ 27. [*Powers of boards of supervisors.*]—The legislature shall, by general laws, confer upon the boards of supervisors of the several counties of the state such further

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**powers of local legislation and administration as the legislature may, from time to time, deem expedient.**

[Const. 1846, art. 3, § 17; Am. 1874.]

This section, except as to the provision relating to general laws, was included in the Constitution by the Convention of 1846, and was one expression of the result of a discussion concerning the distribution of the powers of government which engaged the attention of the statesmen of that period, and was a reaction from the policy of centralized authority which was such a conspicuous feature in the first and second Constitutions. But it will be observed, as noted in the article on home rule in the third volume, that the provision, as it came from that Convention, conferred no authority on the legislature which it did not already possess, and imposed on that body no duty in respect to the powers which might be vested in boards of supervisors. The Commission of 1872 made the provision mandatory instead of permissive, and required powers to be conferred on boards of supervisors by general laws. The legislature had, before the Convention of 1846, conferred on boards of supervisors extensive powers of local legislation and administration, and that policy has since been continued in a large number of statutes, with the result that such boards have now become very important subordinate governmental agencies.

Within the limits of the power delegated to it under this section, a board of supervisors "is clothed with the sovereignty of the state, and is authorized to legislate as to all details precisely as the legislature might have done in the premises. The evident intent of the framers of the Constitution in permitting the legislature to delegate certain of its powers to the local boards was to carry out a public policy which assumes that the interests of a particular locality are best subserved by those who are familiar with its affairs. It would

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be quite impossible for a board of supervisors to properly legislate in regard to local affairs if it were not at liberty to resort to those implied powers within the limits of its jurisdiction vested in the legislature of the state." *People ex rel. Wakeley* v. *McIntyre* (1898) 154 N. Y. 628, 49 N. E. 70. A further illustration of this rule is found in *People ex rel. Oneida County* v. *Oneida County* (1902) 170 N. Y. 105, 62 N. E. 1092, in which the court sustained the act of 1901, chap. 89, appointing commissioners to erect a courthouse in that county. The legislature had power to provide in this manner for the erection of a courthouse, notwithstanding the general provisions of the county law under which the board of supervisors may provide for the erection of county buildings without special legislative action.

It is a "general theory of our legislation that, so far as practicable, matters of administration specially affecting the public interests of a particular locality should be controlled by the local government, subject to such general regulations as may be necessary for the common good. But the legislature, unless restrained by constitutional limitations, may resume powers delegated to localities, and assume the direct control of matters pertaining to local government." *People ex rel. Morrill* v. *Queens County* (1889) 112 N. Y. 585, 20 N. E. 549.

The same subject was considered in *Re Reddish* (1899) 45 App. Div. 37, 60 N. Y. Supp. 1111, where the court say that "the legislature may, by general laws, confer upon boards of supervisors powers of local legislation. . . . But when it does so it is not a surrender of its own power over the same subject. Its power only lies dormant; it may resume it at any time, and take direct control of the subjects theretofore committed to the boards of supervisors. . . . This it may do in specific terms, or by general laws inconsistent with those passed by the supervisors upon the same subject." The rule that a general law does not repeal a special law unless the intent to repeal it is clearly manifest does not apply when general statutes of the state come into conflict with local statutes passed by boards of supervisors. "The powers of legislation granted to boards of supervisors do not empower them to pass laws inconsistent with the laws of the state. When they have passed laws upon which no state legislation existed, and the state legislature thereafter passes laws upon the same subject, inconsistent with those passed by boards of supervisors, the state law supersedes those passed by the boards of supervisors upon the same subject."

There is nothing prohibitory in this section, but under it the legis-



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lature may confer on boards of supervisors general powers of local legislation and administration; the discretion of the legislature is not limited. *Seneca County* v. *Allen* (1885) 99 N. Y. 532, 2 N. E. 459, sustaining the act of 1875, chap. 605, relating to the salaries of the treasurers of the counties of Monroe and Seneca.

"Originally and as one of the attributes of sovereignty, the power to lay out highways and to build bridges connecting them over streams, for the use of the public, and to levy taxes for that purpose," inheres in the legislature, which may, "in the exercise of its own discretion, or under the direction of a written Constitution, delegate the exercise of such power to the board of supervisors, the subordinate local legislature of the several counties of the state." Our Constitution restrains the general legislature from passing any private or local bill for the building of a bridge, but powers of local legislation on this subject may be and have been conferred on boards of supervisors. *Kirkwood* v. *Newbury* (1890) 122 N. Y. 571, 20 N. E. 10.

The legislature, acting under this section, may confer on the board of supervisors powers of local legislation in regard to the opening, grading, construction, and improvement of streets and highways in towns, and when the local power of legislation is exercised by the board, a law regularly passed by it has the same force and effect as if passed by the legislature. *Roberts* v. *Kings County* (1896) 3 App. Div. 366, 38 N. Y. Supp. 521.

"Boards of supervisors, in auditing and allowing accounts, are limited to the powers conferred upon them by statute; but if the subject-matter of the account be within their jurisdiction and they allow it, the county treasurer has no right to refuse payment on the ground that the allowance was too much or was made upon insufficient evidence." *People ex rel. Martin* v. *Earle* (1873) 47 How. Pr. 458.

The Constitution permits the legislature to transfer powers of local legislation so far as it should deem necessary or prudent to the county boards, and what it may do as to all the counties, it may do as to a particular county. The court sustained the act of 1875, chap. 482, as amended in 1881, chap. 554, which conferred on the board of supervisors in any county containing a city of more than 100,000 inhabitants, power to open, grade, and construct streets and avenues which had been laid out in contiguous territory in the county. *Re Church* (1883) 92 N. Y. 1; *Hubbard* v. *Sadler* (1887) 104 N. Y. 223, 10 N. E. 426.

In *Queens County* v. *Petry* (1900) 54 App. Div. 115, 66 N. Y. Supp. 1142, 66 N. Y. Supp. 447, sustaining the provision of the act of

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1899, chap. 74, by which the general powers of the board of supervisors of Queens county were transferred to and vested in the municipal assembly of the city of New York, the court say: "The legislature has always had the undoubted right to take away statutory powers of boards of supervisors, as well as add to them."

The legislature had, as by the act of 1849, chap. 194, power to confer on boards of supervisors authority to provide for the protection of shell and other fish within the waters of their respective counties, although such waters may be navigable and under the general control of the legislature. *Smith* v. *Levinus* (1853) 8 N. Y. 472.

"When an act is to be done according to law, or a thing is to be established by law, we all understand that the law intended is a law passed by the legislature, and not by some inferior body acting under powers conferred by the legislature, unless, from the nature of the case, the act of the inferior body is obviously intended." The provision of the act of 1870, chap. 467, giving boards of supervisors power to fix the salaries of county judges, was unconstitutional; that power was vested exclusively in the legislature, and could not be delegated to such boards. The act was not local within the meaning of this section (27). "Legislation, to be local . . . must apply to and operate exclusively upon a portion of the territory of the state and upon the people living therein. . . . A law is not local that operates upon a subject in which the people at large are interested." The county court is not in all respects a local court, but has general jurisdiction. Any resident of the state may be plaintiff, but defendants must, as a rule, reside in the county. A county judge is not a local officer, but may, with certain limitations, exercise his powers in any part of the state. *Healey* v. *Dudley* (1871) 5 Lans. 115.

§ 28. [*Extra compensation prohibited.*]—**The legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent, or contractor.**

[Am. 1874.]

This subject was included in a section proposed by the Convention of 1867, and was finally incorporated in the

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Constitution in 1874, in connection with other amendments reported by the Commission of 1872.

"Extra compensation is compensation over and above that fixed by contract or by law when the services were rendered." The legislature could not, as attempted by the act of 1900, chap. 725, require the payment of pensions to teachers in public schools in the city of New York, who had retired from service prior to the enactment of the pension law of 1894, chap. 296. Such teachers were public servants in the employ of the city. "There was no moral obligation on the city of New York to establish a pension system in favor of teachers. . . . As to such persons [not then in service] the grant of a pension is a mere gratuity." *Mahon* v. *Board of Education* (1902) 171 N. Y. 263, 89 Am. St. Rep. 810, 63 N. E. 1107.

The legislature cannot authorize the payment of extra compensation to its clerks and employees, nor compensation prior to their appointment. "Where one is compensated by the day, this compensation is measured by the number of days during which he is in the employment for which he is paid. Anything beyond is a gratuity." *People ex rel. Kene* v. *Olcott* (1877) 11 Hun, 610.

The act of 1885, chap. 238, authorizing the board of claims to hear and determine the claims of the captain and harbor masters of the port of New York for services, did not grant extra compensation under this section. "It merely gives jurisdiction to hear and determine a claim for reasonable compensation for services rendered in a case where the compensation attempted to be provided by law failed by reason of the invalidity, under the Constitution of the United States, of the provision for such compensation, and the claimants had consequently rendered beneficial services, accepted and ratified by the legislature, without any valid provision for their compensation." *Cole* v. *State* (1886) 102 N. Y. 48, 6 N. E. 277.

Giving an officer a clerk does not constitute extra compensation. *People ex rel. Masterson* v. *Gallup* (1883) 65 How. Pr. 108.

In *Swift* v. *State* (1882) 89 N. Y. 52, and in *Gisel* v. *Buffalo* (1888) 15 N. Y. S. R. 561, it was held that the contractor was not entitled to extra compensation.

A resolution of the Rochester common council increasing the salary of the police justice during his term was sustained in *Truesdale* v. *Rochester* (1884) 33 Hun, 574. "No extra compensation was provided for or authorized by it. The salary unearned by the officer was fixed by this enactment." There is nothing in the Rochester charter requiring that the salary of a police justice shall

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be uniform during the entire year. He was to receive an annual salary which should be fixed from time to time. "The import of this is not that his salary must be uniform through the year, but that his compensation shall be a fixed one, termed 'salary,' and that shall be determined by the constituted authority designated as, in its judgment, the character, amount, and value of the official services may, from time to time, require."

If extra duty, however onerous, is imposed upon an officer, he is not entitled to additional compensation therefor. A public officer with a fixed salary is bound to perform the duties of his office for the compensation provided by law. If his powers or duties are increased, even by statute, and his salary is untouched, he must submit or resign. *Merzbach* v. *New York* (1900) 163 N. Y. 16, 22, 57 N. E. 96.

§ 29. [*Prison labor regulated.*]—The legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails, and reformatories in the state; and on and after the first day of January, in the year one thousand eight hundred and ninety-seven, no person in any such prison, penitentiary, jail, or reformatory, shall be required or allowed to work, while under sentence thereto, at any trade, industry, or occupation, wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given, or sold to any person, firm, association, or corporation. This section shall not be construed to prevent the legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political division thereof, or for or to any public institution owned or managed and controlled by the state, or any political division thereof.

[New.]

The history of this subject will be found in a general article on prison labor, in the third volume.

In *Bronk* v. *Barckley* (1897) 13 App. Div. 72, 43 N. Y. Supp. 400,

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the court suggest that the section does not affect an existing contract, and that if it could be construed as applicable to such a contract it would be void under the provision of the Federal Constitution which prohibits any law impairing the obligation of a contract.

In *People* v. *Hawkins* (1898) 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257, the court say that this section "does not forbid the sale of any article of property. It deals only with modes of employing convicts and with practices that had formerly existed, under which the labor of convicts had become a subject of bargain and sale. It simply abolished what was known as the contract system of labor in prisons, whereby the profits of the labor of convicts were secured by contractors or private parties." The act of 1896, chap. 931, which required goods made in penal institutions to be labeled "convict made," was unconstitutional.

## ARTICLE IV.

### [THE EXECUTIVE.]

§ 1. [*Governor and lieutenant governor; term of office.*]—The executive power shall be vested in a governor, who shall hold his office for two years; a lieutenant governor shall be chosen at the same time, and for the same term. The governor and lieutenant governor elected next preceding the time when this section shall take effect shall hold office until and including the thirty-first day of December, one thousand eight hundred and ninety-six, and their successors shall be chosen at the general election in that year.

[Const. 1777, arts. 17, 20; 1821, art. 3, § 1; 1846, art. 4, § 1; Am. 1874.]

#### GOVERNOR.

The governor, as the representative and embodiment of the executive power of the state, combines the general powers and functions of the colonial governor, of whom

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he is the immediate successor, and also of the King in his capacity as the executive head of the English nation. The people of the colony were familiar with the office of governor. The governor, however, was only partially independent, being subordinate to the authority of the Crown, but had been gradually vested with large executive powers, and, so far as home rule prevailed in the colony, was its executive head substantially in the same sense that the governor of the state afterwards became the executive head of the new commonwealth. The chief executive of the colony during the Dutch period was commissioned as the "director," although commonly known as the governor, for the Dutch West India Company, chartered in 1621, was given authority to appoint governors and other officers for the territory under its jurisdiction. After the English conquest of New Netherland in 1664, and during the proprietary government under the Duke of York, which terminated on his accession to the throne as James II. in 1685, the chief executive officer of the colony was commissioned as his "lieutenant and governor." After this time, when the colony became a royal province, the governor was commissioned as "captain general and governor in chief;" and at the beginning of the Revolution, which was the close of the colonial period, Governor William Tryon, in addition to these titles, was called "chancellor and vice admiral." The first Constitution continued the office of governor and he was *ex officio* "general and commander in chief of all the militia, and admiral of the navy." The title of "admiral" was continued until the Constitution of 1846, when it was omitted, and the governor was made commander in chief of the military and naval forces of the state.

The Constitution of 1821 expressly vested the "executive power" of the state in the governor, and this provision has been continued in subsequent Constitutions.

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This phrase seems less exact than the phrase used by the framers of the first Constitution, who said that "the supreme executive power and authority" should be vested in the governor, thus leaving room for the application of other elements of executive authority by means of other officers who were, by the Constitution itself, and by subsequent statutes, vested with large executive powers. The governor is the executive head of the state, but he does not possess all "executive power." Other administrative officers are created by the Constitution and vested with specific powers. Some of these officers are appointed by the governor and may be removed by him; others are elected by the people and may be removed by the governor; while others are chosen by the people and may be removed by the legislature. Many officers are beyond the governor's immediate control, for, as to them, he has no power of removal. In the chapter on the Commission of 1872 I have quoted from Governor Hoffman's message of that year numerous suggestions relating to constitutional reform, among them the recommendation that the principal state officers be appointed by the governor instead of being elected by the people. The Commission adopted the Governor's recommendation in substance, and reported a plan which took away from the people the right to elect most of these officers, and vested their appointment in the governor; but the legislature did not accept this change of policy, and the proposed plan was omitted in the amendments submitted to the people in 1874. Governor Hoffman, discussing this question, said that under the existing Constitution, the executive department of the state was "not so organized as to insure the most efficient administration of affairs, and the most complete and direct responsibility," and he urged that the chief executive ought to have a controlling voice "in the selection of the subordinate offi-

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cers upon whom, within their separate departments, the duty is devolved of executing the laws of the state and administering its affairs." He thought there should be a "single executive." "The governor ought to be held responsible for every branch of the actual administration of the state's affairs. Under our present Constitution, all the important departments are separated from his control." He thought that "all the heads of administrative departments should be subject to the supervision and the correcting power of the governor," to whom they would form a "valuable council." The suggestion of a council was practically applied by Governor Roosevelt, 1899–1900, who held frequent, and, during certain months, regular, consultations with the principal state officers, who formed what was then known as "the governor's cabinet." These consultations afforded the governor and also the other officers an opportunity to become familiar with the affairs of the state as thus variously administered, and the governor was able to obtain a more comprehensive view of public matters than could have been derived from official reports or occasional separate conferences with the state officers.

The situation as presented by Governor Hoffman emphasizes the suggestion already made that executive power is not all vested in the governor. A reference to other parts of the Constitution, and to numerous statutes, will show that while the governor is, by the Constitution, the general repository of executive power, other officers of a lower rank have been vested with large administrative powers, and are substantially independent of executive control, being amenable either directly to the people or to the legislature, or whose conduct may be subject to inquiry by the court for the trial of impeachments. Governor Hoffman substantially advised a return to the policy which had prevailed under the first Constitution, for it

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will be remembered that by that instrument more than by any subsequent Constitution the governor was in fact, as well as in name, the chief executive of the state. The Council of Appointment, of which he was a member, and in which, for the first few years of its existence, he exercised the exclusive power of nomination, possessed the power of appointment and removal of all public officers except the state treasurer and a few local officers who were elected by the people. The phrase "supreme executive power and authority" was significant under that Constitution, for the governor was the real executive head of the state, and the Constitution specifically charged him "to take care that the laws were faithfully executed, to the best of his ability." This made him responsible for the execution of all the laws unless excused from such responsibility by the law itself. That clause has been continued in subsequent Constitutions, and will be considered in a note to § 4.

By the first Constitution the governor's term was fixed at three years; by the second and third at two years; it was again fixed at three years by the amendments of 1874, and once more reduced to two years by the Constitution of 1894.

The governor of New York holds a very exalted position, second only to that of president of the United States. No state has gone farther than New York in vesting in the governor large and sometimes extraordinary powers. He is not only the executive head of the state, but he is an essential element of our legislative system, and by an exercise of executive authority he may wield an extensive and sometimes a dominating influence in respect to the judiciary, manifested by appointments to the highest courts to fill vacancies, by the designation of judges to constitute appellate divisions of the supreme court, and by the appointment of extraordinary trial, special, and

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appellate terms, and where, as in many cases, he does not possess the power of removal, he may initiate proceedings for that purpose by recommendations to the senate. Besides these functions he is charged with the direct power of appointment in some of the principal state departments, sometimes on his own responsibility, and sometimes subject to confirmation by the senate, and must, in many cases, exercise a like power to fill vacancies in local offices. The office is one of great influence, and has been so from the beginning. A former governor, speaking on this subject, recently said to me that "a governor can do almost anything that is reasonable." He is not only at the center of executive power, but he is also at the center of executive influence and knowledge. All sources of information are available to him and all storehouses of experience are open for his use. He touches, or may touch, not only all aspects of public affairs, but he must often consider and determine questions relating to the details of municipal administration; and political, commercial, educational, religious, and even personal matters frequently come under his observation and are subject to executive action. The early Dutch governors possessed very broad powers. They were called "directors;" and while there was nominally a governor's council, quite often, as shown in former volumes, these councils exercised little authority, and the director's power was practically supreme. He possessed not only the executive authority, but also judicial, military, and legislative power. Some of the early English governors were even more autocratic, and while they contended against the growth of the spirit of republicanism which constantly asserted itself in the declaration that the people ought to have a share in the government, they were unable to stem the tide, and a popular assembly was reluctantly established to aid the governor in administering colonial

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affairs. Even this was not independence, for the governor continued to be the royal representative in the colony, and the laws enacted by the colonial legislature were subject to approval by the governor and also by the Crown. The governor's transmission of the laws to England for consideration by the Crown was accompanied by explanatory reasons and recommendations relating to such laws, and not only on this subject, but on other subjects concerning colonial affairs, if information was needed by the home government it was sought from the colonial governor.

I suppose the official reports made by the colonial governors are not now often read, and perhaps are not accessible to the general reader, but a perusal of these reports will convince any student of our history that the colonial governors brought to their tasks and displayed in their administrations a wide and accurate knowledge of public affairs, a devoted loyalty to the interests of the mother country and of the colony, a keen sense of the relations which ought to exist between the several colonies, a careful study of questions relating to Indian tribes and Indian lands, an unremitting watchfulness of the encroachments by other nations, particularly by the French on the north, the commercial importance of New York, and a great faith in the destiny of the colony. This need not surprise us when we remember that many of the colonial governors were selected from the higher ranks of the English aristocracy, and brought to their duties qualities, capacities, and experience which would have fitted them to become members of the government at home. This inheritance of power and influence, developing through a century and a half of colonial experience, has become the possession of our chief magistrate, largely augmented in all directions by the growth and expansion of the interests which have been committed to the state as a

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member of a great nation. The governorship is a legitimate object of the aspiration of any citizen, and he may feel a just pride in being chosen to this high office, to take his place in a long line of distinguished statesmen who have done so much to establish and maintain the greatness of New York, many of whom have exerted an influence far beyond the boundaries of the state, in national and even international affairs.

### LIEUTENANT GOVERNOR.

The office of lieutenant governor existed in the colonial period, but it was not a necessary part of the executive branch of the government, and did not possess the permanent character which has been given to it under the Constitution. During the colonial period a lieutenant governor was sometimes appointed during the interregnum following the death of a governor, and in these cases the appointment of the lieutenant governor terminated on the accession of a regular governor. The appointment of George Clarke as lieutenant governor in 1736 is an instance of this class. Mr. Clarke was president of the council, and the duties of the executive devolved on him on the death of Governor Cosby. Mr. Clarke received a commission as lieutenant governor. A lieutenant governor was also sometimes appointed while a regular governor was in office, and as his subordinate or assistant. Thus, in 1697, John Nanfan was appointed lieutenant governor during the administration of Governor Bellomont, and the lieutenant governor was expressly commissioned to perform the duties of governor in case of the death or absence of that officer, and at other times to be under the direction and obey the orders of the governor.

There was not at all times a lieutenant governor during

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the colonial period, but there were numerous instances of the appointment of a lieutenant governor, either to fill an interregnum caused by the death of a governor, or as a subordinate to or substitute for that officer. In the latter case the lieutenant governor sustained to the administration substantially the relations which the same officer sustains under the Constitution. His powers were dormant while the governor was in the colony and able to perform his duties, but, like his constitutional successor, he assumed the duties of the office upon the death or absence of the governor. The practice in this respect is indicated in the communication from Governor Tryon to the home government in April, 1774, where he says that, in consequence of his expected temporary absence from the colony, he had delivered the great seal of the province to Lieutenant Governor Colden.

Without giving more details concerning this office, suffice it to say that when American independence was declared and a provincial congress was chosen in New York in the summer of 1776, to organize a state government, William Tryon was governor and Cadwallader Colden was lieutenant governor; the framers of the Constitution, therefore, simply continued the executive organization with which the colony had long been familiar. I have already referred to Lieutenant Governor Colden's long official service in the colony, which I think far exceeded that of any other person. He died September 21, 1776, near the end of his 89th year. He had been forty years surveyor general of the colony, fifty-four years a member of the council, and sixteen years lieutenant governor. His reports and letters furnish an abundance of valuable information concerning the details of colonial affairs.

In the chapter on the first Constitution I have given a brief account of the organization of the state government, and have there referred to the fact that, at the first

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election of governor and lieutenant governor, in the summer of 1777, George Clinton was elected to both offices. He quite naturally decided to accept the office of governor, and accordingly declined the other, and Pierre Van Cortlandt, as president of the first senate, became the first lieutenant governor.

§ 2. [*Qualifications of governor and lieutenant governor.*]—No person shall be eligible to the office of governor or lieutenant governor, except a citizen of the United States, of the age of not less than thirty years, and who shall have been five years next preceding his election a resident of this state.

[Const. 1777, art. 17; 1821, art. 3, § 2; 1846, art. 4, § 2; Am. 1874.]

The first Constitution required the governor to be a "wise and discreet freeholder." This requirement could have little mandatory or restrictive effect, for the people had the undoubted right to determine for themselves whether a candidate for governor was sufficiently wise and discreet; and there was no appeal from the tribunal of public opinion; but it was an expression of the first convention's idea of the dignity of the office, and a suggestion of the high character which should distinguish the person selected to fill it. During the forty-five years covered by the first Constitution, 1777–1822, only five persons were chosen to the office of governor. These governors were George Clinton, who was elected seven times, John Jay twice, Morgan Lewis once, Daniel D. Tompkins four times, and De Witt Clinton twice. The mere mention of their names is enough to convince any reader that not only did they possess the constitutional requirements, but that the people themselves displayed

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great wisdom and discretion in the choice of their chief magistrates.

The second Constitution continued the requirement that the governor must be a freeholder, but did not in terms require him to be "wise and discreet." Experience had shown that the people could be trusted to choose for this office men of high character and superior qualifications without the admonition contained in the first Constitution. A constitutional amendment adopted in 1845 abrogated property qualifications for any public office. This provision was not in terms continued in the Constitution of 1846, but its principle was applied in the omission of any requirement imposing property qualifications on public officers. Under the Constitution of 1821 the governor must have been a native citizen of the United States, thirty years of age, and five years a resident of the state. These qualifications were continued in the Constitution of 1846, except that the governor was not required to be a native. The Constitution of 1894 made no change in the governor's qualifications.

§ 3. [*Election of governor and lieutenant governor.*] —The governor and lieutenant governor shall be elected at the times and places of choosing members of the assembly. The persons respectively having the highest number of votes for governor and lieutenant governor shall be elected; but in case two or more shall have an equal and the highest number of votes for governor, or for lieutenant governor, the two houses of the legislature, at its next annual session, shall forthwith, by joint ballot, choose one of the said persons so having an equal and the highest number of votes for governor or lieutenant governor.

[Const. 1777, art. 17; 1821, art. 3, § 3; 1846, art. 4, § 3.]

The first Constitution did not prescribe any time for

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the election of governor and lieutenant governor, but by an act passed on the 27th of March, 1778, the last Tuesday in April was fixed as the time for electing these officers and also members of the legislature. The official term of the governor and lieutenant governor was to begin on the first Monday of July next following, and the legislature was also required to meet on that day. By a later statute (1787) the official term of the governor and lieutenant governor was to begin on the first day of July, but the date of meeting of the legislature was not changed. The second Constitution changed the date of the beginning of the political year from the first of July to the first of January, beginning in 1823, and the first election under that Constitution was held in November, 1822. The section substantially in its present form was included in the Constitution of 1821. The Convention of 1846 changed it by fixing the date of election at the time of choosing members of assembly instead of members of the legislature.

§ 4. [*Governor's general powers; compensation.*]—The governor shall be commander in chief of the military and naval forces of the state. He shall have power to convene the legislature, or the senate only, on extraordinary occasions. At extraordinary sessions no subject shall be acted upon, except such as the governor may recommend for consideration. He shall communicate by message to the legislature at every session the condition of the state, and recommend such matters to it as he shall judge expedient. He shall transact all necessary business with the officers of the government, civil and military. He shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed. He shall receive for his services an annual



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**salary of ten thousand dollars, and there shall be provided for his use a suitable and furnished executive residence.**

[Const. 1777, art. 18; 1821, art. 3, § 4; 1846, art. 4, § 4; Am. 1874.]

It will doubtless be most convenient to consider this section by topics:

*1. Military authority.*—The concentration of military as well as civil authority in a single executive head has been deemed essential to the integrity of the government by most of the great states and nations in the world's history. Attempts to carry on governments with a divided responsibility have usually been unsuccessful. The governor of New York, as the possessor of combined civil and military power, illustrates the general national policy, both ancient and modern. The lack of space will not permit any extended observations on this subject, but it may be pointed out that among the Hebrews, Joshua the leader, Samuel the judge, and David the king, all of whom possessed military genius of a high order, were examples of combined civil and military authority. The Greek and Roman republics, in which the public assemblies elected military commanders, sometimes two or more, for particular campaigns, were exceptions to the general rule, and often by military failures and confusion of administration emphasized the need of a more centralized authority in great national emergencies. Modern nations and states, both European and American, have adopted the general policy indicated in our Constitution, and this policy, so far as this state is concerned, was inherited from the colony. I have already pointed out in a note to § 1 that the colonial governor combined civil and military functions, and the first Constitution, which vested in the governor the supreme executive power and authority, and which made him an essential part of the

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legislative system and also commander in chief of the militia and admiral of the navy, only stated in constitutional form a long established policy which had been approved by experience. The present provision, making the governor commander in chief of the military and naval forces of the state, omitting the formal title of admiral of the navy, was incorporated in the Constitution of 1846, and has not since been changed. Provisions relating to particular duties imposed on the governor as commander in chief will be found in the article on the militia in the Constitution, and also in the military code enacted by the legislature, and in other statutes. Notes to judicial decisions relating to the governor's powers and duties as commander in chief will be found under appropriate sections in the article on the militia.

*2. Extraordinary sessions of the legislature.*—During the colonial period the governor's power in relation to sessions of the assembly, especially in connection with the council, was practically unlimited. The governor and council might prorogue an assembly, or dissolve it and call a new one at pleasure. All the meetings of the assembly, except upon temporary adjournments, were thus under the control of the executive power. There was no occasion, therefore, for special authority to call extraordinary sessions; every session was, in a sense, extraordinary, for it practically began and ended under the direction of the governor. Besides, the council, originally possessing chiefly executive powers, but in some cases also exercising judicial authority, became, after the institution of the assembly, a fixed and essential part of the legislative system, and this body might and did meet independently of the assembly, except for legislative purposes.

The provision included in the first Constitution, and which has been continued since, authorizing the governor

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to call extraordinary sessions of the legislature, was an application in another form of the power possessed by the governor before the Revolution. The necessity for this provision is apparent, and the power has been frequently exercised. The power to convene the senate only in extraordinary session was added by the Constitution of 1821. The Constitution proposed by the Convention of 1867 contained a clause requiring the governor to state in his proclamation the subjects intended to be submitted to the legislature at an extraordinary session and prohibiting the passage of any law relating to a subject not included in the proclamation. The existing provision on this subject was recommended by the Commission of 1872,and was included in the amendments adopted in 1874.

In 1851 an extraordinary session was called under peculiar circumstances. A partisan controversy arose in the senate, resulting in the resignation of twelve members. This left the senate with twenty members,—less than the two thirds required on the passage of certain bills, and with barely the three fifths required to be present on the passage of another class of bills. The appropriation bill and other general bills of an important nature were still pending. The legislature thereupon adopted concurrent resolutions reciting the resignation of the twelve senators, and requesting the governor to convene the legislature in extraordinary session, and then adjourned. An extra session was accordingly called. In the meantime special elections were held and new senators elected from the vacant districts. Governor Washington Hunt, in his message to the legislature at the opening of the special session in June, 1851, observed concerning this incident: "It is a subject of gratifying reflection, that, in the elections recently held, so large a portion of the people of the state, rising above party divisions, should have pro-

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claimed their adherence to the vital principle of our institutions which clothes a constitutional majority wth the power to decide public questions and control the action of our representative bodies. Temporary prostration of the legislative power by the secession of a majority was an event which could hardly fail to produce a deep impression upon the public mind. A proceeding of this character had never before occurred since the formation of a republican government in this state."

In *People ex rel. Carter* v. *Rice* (1892) 135 N. Y. 473, 16 L. R. A. 836, 31 N. E. 921, the court sustained the apportionment act of 1892, which was passed at an extraordinary session of the legislature. This subject has been considered in a previous note. The decision on this point has little interest now except historically, in view of the constitutional change made in 1894, requiring an apportionment to be made at a regular session.

*3. Messages and recommendations to the legislature.*— I have pointed out in the first volume the custom which prevailed during the colonial period, and was continued under the first Constitution, in relation to formal communications by the governor to the legislature. According to this custom the governor personally met the legislature at the opening of each session and read a speech similar to the speech from the throne in the English Parliament, in which he presented a statement of public affairs, including such recommendations as seemed to him pertinent. This custom was changed by the second Constitution, and, beginning with the legislature of 1823, the Constitution required the governor to communicate to the legislature by message. Special messages were frequently sent to the legislature under the first Constitution, but the formal communication at the opening of a session was made by the governor in person, in the presence of both houses. The duty here imposed upon the governor is imperative,

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and the authority implied in it is one of the highest attributes of his office. His position at the head of affairs enables him to obtain information relating to existing conditions, not readily available to members of the legislature. The annual message, therefore, becomes an important document, frequently containing a summary of the history of the state during the year, from the point of view of the executive office. The speeches, messages, and other communications by the governor to the legislature during our colonial and state history present, in an orderly series, the origin and development of every important condition of public affairs, and almost every aspect of social, educational, political, and commercial changes which have been suggested or accomplished during this long period. A history of the state could easily be written from these speeches and messages, especially in connection with the legislation which has so often resulted from the governors' recommendations.

*4. Transaction of public business.*—The clause requiring the governor "to transact all necessary business with the officers of government, civil and military," was added by the Convention while the first Constitution was under consideration, and it has not since been changed. It is general in terms and comprehensive in scope, and is appropriate to the chief executive, with whom all other officers, either state or local, may have occasion to transact business. It meant more under the first Constitution than it means now, for, as already pointed out, the governor was then more distinctively than now the executive head of the state, and possessed powers relating to the appointment of officers and their supervision which have not been continued under subsequent Constitutions.

*5. Expedite public measures.*—The clause requiring the governor to "expedite all such measures as may be resolved upon by the legislature," which was also included

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in the first Constitution, was a distinct recognition of the governor's executive authority. The legislature is to make the laws and the governor is to execute them, and to use all the means placed at his command to effectuate the legislative purpose. This does not make him subordinate to the legislature, for his influence has already been felt in the enactment of the laws which he is required to enforce, and, except in rare instances, where bills have been passed over his veto, the laws which he is to execute have already received his assent. He therefore occupies not a subordinate but a co-ordinate position in the government, being the means by which the legislative power, of which he is also a part, finds expression in an actual enforcement of the statute.

*6. "Take care that the laws are faithfully executed."*—This is a corollary to the two preceding clauses, and gives the governor general supervision of all officers, state or local, who may have any part in the administration of the law. Such important changes have been made since the first Constitution, which included this provision, by which changes large independent powers have been conferred on other officers, with a corresponding limitation of the governor's powers, that it is not always easy to make a practical application of this injunction. As pointed out by Governor Hoffman, whose observations have been quoted in the note to § 1, many officers are now outside the scope of the governor's jurisdiction and supervision, and whatever he may do to "take care that the laws are faithfully executed" must often be done by admonition or suggestion rather than by any action resulting from the possession of power to see that a given statute is enforced, or that a particular officer does his duty.

*7. Compensation.*—This clause was added by the amendments of 1874, which were adopted on the recommendation of the Commission of 1872. Constitutional

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conventions had already considered the subject of the governor's compensation, and they appreciated the importance of placing it beyond legislative control. The first Constitution contained no provision on this subject. The second and third Constitutions required the governor's compensation to be fixed by law, but it could not be increased or diminished during his term. The proposed Constitution of 1867 contained substantially the same provision, with the addition that the compensation could not be changed after the governor's election, even before the beginning of his term. In the chapter on the Commission of 1872, I have given a sketch of its action in adopting the provision fixing in the Constitution itself the compensation to be received by the governor and lieutenant governor.

§ 5. [*Pardons, reprieves, and commutations.*]—The governor shall have the power to grant reprieves, commutations, and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall annually communicate to the legislature each case of reprieve, commutation, or pardon granted, stating the name of the convict, the crime for which he was convicted, the sentence and its date, and the date of the commutation, pardon, or reprieve.

[Const. 1777, art. 18; 1821, art. 3, § 5; 1846, art. 4, § 5.]

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Under the first Constitution the governor had no power to pardon in cases of treason and murder, which cases were within the jurisdiction of the legislature. There are several early statutes in which the legislature exercised the pardoning power in murder cases. The Constitution of 1821 omitted cases of murder, but included impeachments. The power to grant commutations was added by the Constitution of 1846. The governor's pardoning power has been the subject of frequent consideration in constitutional conventions and commissions and in the legislature. A reference to these discussions and suggestions will be found in the index.

*Conditions.*—The first and second Constitutions did not expressly authorize the governor to impose conditions on granting a pardon. The power to impose conditions was considered and sustained by Judge Edmonds in *People* v. *Potter* (1846) 1 Park. Crim. Rep. 47, where a pardon was granted on condition that the person pardoned should, on or before a day named, "depart from and out of the United States, and never return to the same," and that if he violated the condition he should again be subject to arrest and imprisonment on the original sentence. "The word 'pardon' includes a remission of the offense, or of the penalties, forfeitures, or sentences growing out of it, and may be of a part or the whole of these things." The condition attached to the pardon is, in effect, a contract between the sovereign and the prisoner, that, on being released from the offense and its consequences, the prisoner will withdraw himself from the United States. By the act "Concerning Pardons," the legislature, in 1794, expressly authorized the governor to grant pardons "upon such conditions, and with such restrictions, and under such limitations as he may think proper." This statutory authority was continued by the revisions of 1801, 1813, and 1828. Judge Edmonds thought that by the common law the governor had an inherent right to grant conditional pardons, and that the statute was only a legislative expression of the same authority. The *Potter Case* was decided in March, 1846. The constitutional convention met on the 1st of June following, and on the 17th the committee on the executive department reported a section on the pardoning power, containing a provision authorizing the governor to impose conditions on granting a

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pardon. It was said afterwards in debate that this was intended to settle any doubt concerning the governor's power. It will be observed that the constitutional provision is a substantial transcript of the statutory provision included in the act of 1794.

Under the statute authorizing the governor to commute a sentence for good behavior, he may, on granting such commutation, impose a condition that, if the offender is again convicted during the term for which he was originally sentenced, he shall suffer the full penalty thereby imposed. *Re Whalen* (1892) 47 N. Y. S. R. 313, 19 N. Y. Supp. 915.

The effect of a pardon under peculiar conditions on the competency of a witness was considered in *People* v. *Pease* (1803) 3 Johns. Cas. 333. The pardon contained a proviso that it should not be "construed to remove the legal disabilites which attach to the offender on his conviction and condemnation." The proviso was rejected as incongruous. "The disabilities . . . form no part of the judgment against a convict, but are the legal marks of infamy which it fixes upon him. When, therefore, the judgment is pardoned, the legal infamy flowing from it is equally disposed of by the pardon." The judgment cannot be released and the consequential effects thereof remain.

*Judgment, how affected.*—A pardon and restoration to citizenship have no retroactive effect upon a judgment of conviction which remains unreversed and has not been set aside. "The effect of a pardon is to relieve the offender of all unenforced penalties annexed to the conviction; but what the party convicted has already endured or paid the pardon does not restore. When it takes effect it puts an end to any further infliction of punishment, but has no operation upon the portion of the sentence already executed." A pardon is granted "not as a matter of right, but of grace. . . . A party is acquitted on the ground of innocence; he is pardoned through favor." *Roberts* v. *State* (1899) 160 N. Y. 217, 54 N. E. 678.

*Parole.*—The provisions of the prison act of 1889, chap. 382, which authorized the board thereby created to parole or discharge persons sentenced to certain penal institutions, did not interfere with the governor's pardoning power. A release under the law is an additional favor, of which the offender cannot complain. "The prison officials whose duty it is to observe the daily life, study the character and traits, and investigate the life record of the prisoner" are especially qualified to decide questions relating to the propriety of his release. The governor's pardoning power, vested in him by the

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Constitution, is recognized by the act itself. *People ex rel. Clark* v. *Sing Sing Prison* (1902) 39 Misc. 113, 78 N. Y. Supp. 907.

*Procedure.*—In *Re Edymoin* (1853) 8 How. Pr. 478, it was held in substance that a statutory provision requiring notice of the application of the pardon to be given to the district attorney was directory, and that the governor had jurisdiction to grant the pardon without a strict compliance with the statute.

*Reprieve.*—"A reprieve by the governor to a day certain, granted in a capital case, authorizes the execution of sentence on the day on which the reprieve terminates, and . . . it is not necessary that the prisoner should be brought before the court to have the time of execution fixed. . . . The distinction between a reprieve and a suspension of sentence, although the words are sometimes used interchangeably, is that a reprieve postpones the execution of the sentence to a day certain, whereas the suspension is for an indefinite time." The right to execute the sentence on the day fixed by the reprieve inheres in the power to grant the reprieve. *Re Buchanan* (1895) 146 N. Y. 264, 40 N. E. 883, citing *People* v. *Enoch* (1834) 13 Wend. 160, 27 Am. Dec. 197, where the same rule is declared as to the effect of a respite of sentence.*

*Suspension of sentence.*—The amendment of the Penal Code in 1893, chap. 279, authorizing the suspension of sentence in certain cases, does not encroach upon the governor's pardoning power. "The power to suspend sentence and the power to grant reprieves and pardons, as understood when the Constitution was adopted, are totally distinct and different in their origin and nature. The former was always a part of the judicial power. The latter was always a part of the executive power. The suspension of the sentence simply postpones the judgment of the court. . . . A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that, in the eye of the law, the offender is as innocent as if he had never committed the offense. It removes the penalties and disabilities and restores him to all his civil rights." The Constitution expresses "the authority formerly exercised by the English Crown, or by its representatives in the colonies." *People ex rel. Forsyth* v. *Court of Sessions* (1894) 141 N. Y. 288, 23 L. R. A. 856, 36 N. E. 386.

The act for the establishment of a House of Refuge for Women (1881, chap. 187, as amended in 1887, chap. 17) did not interfere with the governor's pardoning power. *People ex rel. Duntz* v. *Coon* (1893) 67 Hun, 523, 22 N. Y. Supp. 865.

*See *Miller's Case* (1828) 9 Cow. 730, for a discussion (without result) between Gov. De Witt Clinton and Judge Ogden Edwards as to the power of the oyer and terminer to grant a reprieve.

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## EXTRADITION.

Another aspect of the governor's power in relation to crimes is presented under the provision of the Federal Constitution (art. 4, § 2, subd. 2) requiring the surrender of fugitives from justice on the demand of the executive of the state in which the offense was committed, and Congress has imposed on the executive of the state to which the person has fled the duty to cause his arrest and surrender, and the New York Code of Criminal Procedure prescribes regulations concerning the practice in such cases.

In *People ex rel. Corkran* v. *Hyatt* (1902) 172 N. Y. 177, 60 L. R. A. 774, 92 Am. St. Rep. 706, 64 N. E. 825, affirmed in (1903) 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, the court made some observations on this subject which may properly be quoted here. Extradition between the states of the Union is not "governed by international law, but depends solely on the provisions of the Constitution of the United States and the act of Congress made from it. The power of a state to punish a fugitive from justice after obtaining custody of his person depends in no way on how that custody was obtained. Even if the offender has been kidnapped in another state and brought within the territory of the prosecuting state, that fact does not affect the jurisdiction of the latter to punish him for the offense. . . . The condition of a citizen of one state surrendered to another for criminal prosecution has not the safeguards which exist in international extradition, for the surrendering state is without any standing to intervene in his behalf, however much its process may be abused. Therefore, it necessarily follows, that no person can or should be extradited from one state to another unless the case falls within the constitutional provision, and that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states. . . . To be a fugitive from justice a person must have been corporeally present in the demanding state at the time of the commission of the alleged crime. . . . No law gives a person sought to be extradited the right to a hearing before the governor, or to submit evidence in his behalf. Whatever in these respects may be accorded by the governor to the accused is a matter of favor, not of right." A person cannot be extradited without proof that he was personally present in the demanding state at the time the alleged offense was committed; his constructive presence therein is not sufficient. The court also held that the governor's action in an extradition case may be reviewed by the courts on a writ of habeas corpus, citing *People*

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*ex rel. Lawrence* v. *Brady* (1874) 56 N. Y. 182; *People ex rel. Draper* v. *Pinkerton* (1879) 77 N. Y. 245; *People ex rel. Jourdan* v. *Donohue* (1881) 84 N. Y. 438.

§ 6. [*When lieutenant governor to act as governor.*] —In case of the impeachment of the governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term, or until the disability shall cease. But when the governor shall, with the consent of the legislature, be out of the state, in time of war, at the head of a military force thereof, he shall continue commander in chief of all the military force of the state.

[Const. 1777, art. 20; 1821, art. 3, § 6; 1846, art. 4, § 6.]

There has been little interruption in the regular gubernatorial succession. De Witt Clinton, whose death occurred February 11, 1828, is the only governor who has died in office. Governor Daniel D. Tompkins vacated the office in 1817, on his accession to the vice presidency of the United States. Governor Martin Van Buren, whose term began January 1, 1829, resigned to become secretary of state in President Jackson's cabinet, and Grover Cleveland, who, in November, 1884, was elected president of the United States, resigned a few weeks before his inauguration in March, 1885. The lieutenant governors succeeded to the office in each of these cases.

The first instance occurred in 1817 when, as already stated, Governor Tompkins resigned to become vice president of the United States. On the presentation of his letter of resignation to the senate on the 24th of February, 1817, John Tayler, lieutenant governor and president of the senate, announced that it thereupon became his duty

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to retire from the presidency of the senate to assume the duties of the executive office. The first Constitution, which was then in force, provided that in case of such a vacancy "the lieutenant governor shall exercise all the power and authority appertaining to the office of governor, until another be chosen." De Witt Clinton was chosen governor at the regular election in the following April, and assumed the duties of the office on the 1st of July, 1817. Mr. Tayler was re-elected lieutenant governor, thus serving a little more than four months as governor. His status was evidently regarded as that of acting governor. The senate and assembly records describe him as lieutenant governor, and he appears also in the same capacity in the records of the Council of Revision and the Council of Appointment, of which he became *ex officio* the presiding officer. Communications from him to the legislature, and also bills passed by that body and approved by the Council of Revision, were signed without the addition of any official title. The second Constitution, 1821, changed the rule relating to the incumbency of the lieutenant governor as acting governor, and provided that, in case of a vacancy in the office of governor, the "powers and duties of the office shall devolve upon the lieutenant governor, for the residue of the term,"—no provision being made for filling a vacancy in the office of governor as under the first Constitution. Governor De Witt Clinton died on the 11th of February, 1828, and Nathaniel Pitcher, the lieutenant governor, succeeded to the executive office. The senate journal describes him as lieutenant governor, and the assembly journal as acting governor. The Council of Revision and the Council of Appointment were abolished by the second Constitution. Mr. Pitcher's approval of legislative bills was manifested by his signature only, without any official title.

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Governor Van Buren resigned on the 12th of March, 1829, and Enos T. Throop, lieutenant governor, became the acting governor. As in the case of Mr. Pitcher, the senate journal describes Mr. Throop as lieutenant governor, and the assembly journal describes him as acting governor. I do not find that any of these lieutenant governors—Mr. Tayler, Mr. Pitcher, or Mr. Throop—took the oath of office as governor. Governor Grover Cleveland resigned on the 6th of January, 1885. Lieutenant Governor David B. Hill took the oath of office as governor on the same day. It will be noticed that this was a departure from the practice which had prevailed in previous instances, though the constitutional provision was the same as that in force when Mr. Pitcher and Mr. Throop assumed the executive office. They would doubtless have been justified in taking the oath of office as governor, but they seemed to have contented themselves with performing the duties of the office while holding only the title of lieutenant governor. Under the Constitution of 1821, which in this respect has not since been changed, the lieutenant governor, in case of a vacancy, becomes the actual, and not simply the acting, governor, and may properly assume the full official title.

But the governor is sometimes absent from the state and the lieutenant governor is authorized to assume and perform the duties of the executive office during such absence. These instances have been quite rare, and when executive power has in this manner been left in the hands of the lieutenant governor it has usually been exercised only in minor matters. I am not aware that any question relating to the authority of the lieutenant governor to act as governor in the latter's absence has received judicial consideration in this state, but a similar provision in the Louisiana Constitution was construed by the supreme court of that state in *State ex rel. Warmoth* v.

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*Graham* (1874) 26 La. Ann. 568, 21 Am. Rep. 551. The governor had been absent from the 6th to the 19th of May, 1871, and from the 26th of June to the 17th of July, 1871. In a case involving the right of the governor to his salary during these absences, the court answered in the negative the question "Does the absence of the governor from the state for a few hours or a few days create a vacancy in this office, and authorize the assumption of the duties, prerogatives, and emoluments thereof by the lieutenant governor during said absence?" The court say that "the inability to discharge the duties of the office as well as the absence from the state, . . . are such as would affect injuriously the public interest. . . . Some public record should be made of the intended absence, or the governor should publicly place the lieutenant governor in charge of the government, so that the time of absence shall appear of record, and during such absence the acts of the acting governor would be of unquestionable validity."

Following this suggestion it is now the custom, when the governor of New York leaves the state, to make a note of the fact in the records of the executive chamber, and a like note upon his return. In addition to this record the governor usually informs the lieutenant governor of his intended absence, so that the latter may be prepared to do whatever routine business may be necessary while the governor is out of the state, and the records of the executive office show who performed these executive duties during the governor's absence.

The supreme court of Missouri in *State ex rel. Crittenden* v. *Walker* (1883) 78 Mo. 139, also had occasion to consider the lieutenant governor's right to act as governor in consequence of the temporary absence of the latter officer. The governor was absent from the state on public business from the 17th to the 27th of May, 1882.

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He was held entitled to his salary during this time. The court say that " 'absence from the state' does not mean either an absence from the state for the purpose of performing a duty imposed by law upon the governor, or a mere casual absence of a few days, but that it is necessarily implied from its connection with the other specified causes, that such absence must be of such a character as to indicate on the part of the governor an abdication for the time being of the duties of the office, and such as, in the opinion of the governor, would make it necessary for him to call upon the lieutenant governor to take his place and perform such duties as the condition of business in his office and the exigencies likely to arise might require during such absence, and when so called upon, his authority to act would neither be questioned nor his right to the emoluments of the office denied until the governor returned and resumed his place."

§ 7. [*Lieutenant governor to be president of senate; gubernatorial succession.*]—The lieutenant governor shall possess the same qualifications of eligibility for office as the governor. He shall be president of the senate, but shall have only a casting vote therein. If, during a vacancy of the office of governor, the lieutenant governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office, or be absent from the state, the president of the senate shall act as governor until the vacancy be filled or the disability shall cease; and if the president of the senate, for any of the above causes, shall become incapable of performing the duties pertaining to the office of governor, the speaker of the assembly shall act as governor until the vacancy be filled or the disability shall cease.

[Const. 1777, art. 20; 1821, art. 3, § 7; 1846, art. 4, § 7.]



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*Casting vote.*—The provision giving the lieutenant governor, as president of the senate, a casting vote, should be read in connection with § 15 of article 3, which requires the assent of a majority of each branch of the legislature on the passage of a bill. It is obvious that this majority cannot be made up by the addition of the lieutenant governor's vote. He is not a member of the senate, and legislative power is not vested in him, but in the senate and assembly. It is manifest, however, that in the orderly discharge of its duties, except in connection with the highest duty of all,—the making of laws,— business should not remain at a standstill in consequence of an equal division of the senate on an ordinary question within its jurisdiction. The power to dissolve a tie and decide the question has, therefore, been properly vested in the lieutenant governor. This power apparently extends to all matters not involving the passage of a bill, and requiring only a majority vote, including the determination of election contests, senate rules, the choice of its officers, including the temporary president, resolutions, either separate or concurrent, adjournments, confirmations of appointments by the governor, and removals from office.

The effect of a casting vote given by a mayor at a meeting of the common council, under a statute which authorized him to give such a vote, was considered in *New York, L. E. & W. R. Co.* v. *Dunkirk* (1892) 65 Hun, 494, 500, 20 N. Y. Supp. 596, sustaining a resolution which was declared adopted by the mayor's casting vote. The court said the mayor was not a member of the common council, but he was its presiding officer, and had a casting vote, and a resolution adopted by his vote must be deemed to have been adopted by a majority of the council. The Federal and state senates are cited as instances of a similar situation. The court say the case

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would probably have been otherwise if the statute had required a vote of a majority of the councilmen.

*Temporary president.*—The office of temporary president of the senate is a colonial inheritance, and is another instance of the adaptation of colonial customs to conditions presented by the organization of the state government. The senate succeeded to the general powers and functions of the colonial council. That council has been described in former pages, and it has there been shown that it was an essential part of the machinery of the colonial government. The council, as known at the close of the colonial period, had a Dutch original, for we find it at the very beginning of actual Dutch administration in the colony, with large legislative and executive authority, and also with extensive judicial powers. It was continued after the English conquest, at first without much change, but later, in a somewhat modified form, became one of the fixed institutions of the colony, with well defined powers. Governor Tryon in his report of June 11, 1774, from which I have already made several quotations, describing the government of the colony, says that the governor "has a council in imitation of his Majesty's Privy Council. This board, when full, consists of twelve members, who are also appointed by the Crown during will and pleasure; any three of whom make a Quorum;" and he further says that the council, in place of the House of Lords, is a part of the legislative system of the colony.

I have already, in the first volume, described the council as a branch of the colonial legislature. This function was devolved upon it when the legislative system was established by the creation of the assembly in 1683, and thereafter, and especially after the revival of the assembly in 1691, the council sustained a double relation to colonial affairs; namely, it was the executive council, participating with the governor in general colonial administration, and

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it also formed a part of the legislature, in connection with the assembly. During the first few years of the colonial legislative history the governor presided at the meetings of the council in both of its capacities. As president of the legislative council his presence and action sometimes produced curious results. He claimed the right to vote on each bill, and in case of a tie, also claimed the right to dissolve it by his casting vote. In addition to this he had, as governor, an absolute negative on all bills and thus might in some cases have three votes on a bill. This situation finally resulted in a protest to the home government, and as a consequence the governor was deprived of the right to preside in the council while sitting as a branch of the legislature, and thereupon, beginning in 1736, the council chose its own presiding officer. At first the chief justice acted in this capacity, but this was found to be inconvenient, and subsequently a general rule was adopted by which the oldest councilor was entitled to preside during the legislative sessions of the council, and in this capacity he was designated as the speaker. By long established custom, based on the powers conferred by commissions issued to successive governors, the oldest councilor was to preside in certain cases at meetings of the council while sitting in its executive capacity, and by the rule above mentioned the same councilor presided at meetings of the legislative council, and he was, therefore, president or temporary president of the council in both of its capacities.

The subject of the gubernatorial succession was considered by the convention which framed the first Constitution, with the result which appears in articles 20 and 21 of that instrument, and which provided a line of succession, including the governor, the lieutenant governor, and the temporary president of the senate. Unfortunately the debates of that convention have not been preserved

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and therefore we can only infer the reasons which prompted the action taken in particular cases. But, putting ourselves in their places, we may assume that the men who framed that Constitution acted with full knowledge of existing conditions. Thus, the colony had a governor, a lieutenant governor, an assembly, and a legislative body called the council, which possessed substantially the powers intended to be vested in the senate by the new Constitution, and this council had a temporary president. Several propositions relating to this subject were submitted to the convention but it may be noted that the original plan did not authorize the election of a temporary president of the senate, except where the lieutenant governor had become acting governor, but a provision was subsequently added authorizing the election of a temporary president not only when the lieutenant governor was administering the government, but also whenever he was unable to attend as president of the senate; and this provision continued without substantial change until modified by the Convention of 1894 by authorizing (article 3, § 10) the election of a temporary president not only when the lieutenant governor was acting as governor, but also in case of his absence, impeachment, or refusal to act as president.

The first convention, in providing for the gubernatorial succession, especially as applied to the temporary president, seems to have adopted a policy somewhat narrower than that which prevailed during the last half of the colonial period. In administering colonial affairs provision was made for carrying on the government in case of the death or absence of the governor. During the Dutch *régime* and a part of the English period the administration in such a case devolved on the council as a body. Without going into useless details it may be noted that Peter Stuyvesant, the last Dutch governor, during a tem-

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porary absence from the colony in 1654, left the government in the hands of the council. The instructions given by the Duke of York to Governor Andros in 1674 named a successor who was to take the office in case of the governor's death. So the instructions to Governor Dongan in 1683, the last governor appointed by the Duke of York under his proprietary government, provided that in case of the governor's death the "deputy governor," or he who should be the chief officer under the governor at the time of his decease, should become governor and perform the duties of the office until another was appointed. A distinct change of policy is indicated by the commission issued to Governor Dongan in 1686, the next year after the Duke of York became James II., and New York had become a royal province. By this commission it was provided that in case of the governor's death or absence the government should devolve on such person as the King might designate, and if no such designation were made, then the government was to be administered by the council; and the commission contained the further direction that the first councilor who should, at the time of such death or absence, be residing in the colony, "do preside in our said council, with such powers and pre-eminences as any former president hath used and enjoyed within our said province, or any other our planatations in America." This provision was repeated in the commission issued to Governor Andros, 1688, in which the office of lieutenant governor is named for the first time, again in the commission issued to Governor Sloughter, 1691, to Governor Fletcher, 1692, and also to the Earl of Bellomont in 1698, in whose commission it was expressly provided that in case of the governor's death or absence, the lieutenant governor should become acting governor, and if there was no lieutenant governor, or if he were absent, the

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council was to administer the government as under other commissions.

Governor Bellomont died in March, 1701. Lieutenant Governor Nanfan was then absent from the colony, and a controversy arose as to the authority of the council to carry on the government. The council was divided into two factions,—four to three,—the majority believing that by the Governor's commission the council was required to act as a body, while the minority claimed that the oldest councilor was *ex officio* entitled to assume the office of governor. The assembly, which was convened by the council, was requested to declare its judgment as to the devolution of executive power under the circumstances. The assembly accordingly adopted a resolution on the 16th of April, 1701, expressing the opinion that, by the Governor's death, and in the absence of the Lieutenant Governor, the powers of government had devolved on the council; that the eldest councilor was to preside at its meetings, and that the government was not vested in the eldest councilor nor in any other single member of the council. About a month later the Lieutenant Governor returned to the colony and at once assumed the office of governor. The question involved in the controversy was afterwards presented to the Lords of Trade, in London, and they sustained the claim of the majority of the council and the opinion expressed by the assembly. The incident was not of much practical significance, but, like many incidents that have occurred in recent years, it led to a change of policy. Lord Cornbury's commission as governor, which was issued in December, 1702, continued the provision that the council should act in the emergencies described in former commissions. But in the commission issued to Governor Lovelace in May, 1708, the government in the cases specified was expressly devolved on the oldest councilor. This provision became the Constitu-

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tion of the colony so far as the gubernatorial succession was concerned, and is stated in the commission, as follows:

"And in case of your death or absence out of our said province (all persons are) to be obedient, aiding and assisting unto such person as shall be appointed by us to be our lieutenant governor or commander in chief of our said province; to whom we do therefore by these presents Give and Grant all and singular the powers and Authorities herein granted, to be by him executed & enjoyed, During Our pleasure or until Your Arrival within our said Province and Territories. And if upon Your Death, or Absence out of Our said Province and Territories, there be no Person upon the place, commissionated or appointed by us to be our Lieutenant Governor or Commander in Chief of the said Province, Our Will and Pleasure is that the Eldest Councillor whose name is first placed in Our said Instructions to you, and who shall be at the time of Your Death or Absence residing within our said Province of New York, shall take upon him the Administration of the Government and Execute our said Commission and Instructions, and the several powers and Authorities therein contained, in the same manner and to all intents and purposes, as other our Governor or Commander in Chief should or ought to do, in case of Your Absence, until Your Return, or in all cases until our further pleasure be known therein."

I have examined several commissions issued to subsequent governors and they all contain this provision, but I do not find that on any occasion the president of the council became acting governor in consequence of the death or absence of both the governor and lieutenant governor. Sometimes there was no lieutenant governor, and the president then became acting governor upon that officer's death or departure from the colony. Sometimes

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the lieutenant governor was also a member of the council. The rule of succession devolved on the president of the council all the powers and duties of the governor whenever there was not in the colony either a governor or a lieutenant governor, and, under this rule, if the governor and lieutenant governor were both absent at the same time, the president of the council became acting governor.

It seems clear, however, that the framers of the first Constitution did not intend to adopt the colonial policy to its full extent, and that they did not intend to devolve on the temporary president of the senate the office of governor when the only occasion of his exercise of executive powers was the temporary absence of the governor and lieutenant governor. The vacancy mentioned in article 21 of the first Constitution does not seem to include a case where the governor is only absent from the state, for it is expressly provided that where the temporary president becomes entitled to act, he shall continue to act "until others shall be elected by the suffrage of the people at the succeeding election." If the governor and lieutenant governor were both only absent from the state, they or one of them might return and resume official functions, and it could scarcely have been intended that such an absence would create a vacancy which might be filled by an election by the people. The assumption of executive duties by the temporary president of the senate in case of the absence of the lieutenant governor does not seem to have been contemplated by the framers of the first Constitution, for if the temporary president became acting governor at all he was, at least by the letter of the provision, entitled to hold the office until there had been an election by the people.

The Convention of 1821 made an important change in the provision, by omitting the clause which entitled the

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president of the senate to perform the duties of the office of governor in the cases mentioned "until others shall be elected by the suffrage of the people, at the succeeding election," and substituting for it a provision that "if, during a vacancy of the office of governor," the lieutenant governor should become disqualified or be absent from the state, the president of the senate "shall act as governor, until the vacancy shall be filled or the disability shall cease." The vacancy here mentioned seems to be a vacancy in the office of governor, and the disability is apparently the disability of the lieutenant governor; hence, if the office of governor be vacant, and the lieutenant governor, while acting as governor, should be absent from the state, the president of the senate may act as governor until the lieutenant governor returns. If the absence of the governor creates a vacancy in his office, and the lieutenant governor assumes executive duties, his absence from the state entitles the president of the senate to act, and he would then be acting as governor during the absence of both the governor and the lieutenant governor. While it seems clear that the framers of the first Constitution did not intend to confer on the president of the senate the power to act as governor upon the mere absence from the state of both the governor and lieutenant governor, the practical construction of the present constitutional provision, which was adopted in 1821, gives the president of the senate the right to act in case of the absence from the state of both the governor and lieutenant governor, and this practical construction has been applied to the speaker of the assembly, who was added to the line of succession by the Constitution of 1894. In 1902, while the governor, lieutenant governor, and president of the senate were all absent from the state at the same time, the speaker performed executive functions, which, however, were limited to extradition cases, including either

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requisitions upon governors of other states or mandates issued on the requisitions of such governors for the surrender of fugitives from justice alleged to be in this state. This practical construction assumes that if the governor is absent from the state his office is vacant, at least so far as this provision is concerned, and that it is "filled," within the meaning of the Constitution, when he returns to the state.

A provision recommending the extension of the succession to the speaker of the assembly was suggested in the Convention of 1821. I have already, in the second volume, referred to the fact that in 1849 Governor Fish made the same recommendation, and that the legislatures of 1849 and 1850 agreed to an amendment intended to accomplish this result, but that it was not submitted to the people. I have also in the third volume quoted Mr. Vedder's statement in the Convention of 1894 when this subject was under consideration, that if by any contingency "the governor, lieutenant governor, and temporary president of the senate were either absent or incapable of acting as governor, the speaker of the assembly could, for the time being, assume and exercise the duties of the office." The question of the speaker's power to act as governor is not likely to arise very frequently, for it does not often happen that the three officers prior to him in the line of succession are all absent or incapable of acting as governor.

§ 8. [*Lieutenant governor's compensation.*]—The lieutenant governor shall receive for his services an annual salary of five thousand dollars, and shall not receive or be entitled to any other compensation, fee, or perquisite, for any duty or service he may be required to perform by the Constitution or by law.

[Const. 1846, art. 4, § 8; Am. 1874.]

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The office of lieutenant governor during the colonial period seems to have been honorary, though somewhat onerous. The colonial records show that a lieutenant governor was required to perform whatever duties might be demanded by the governor, and although the lieutenant governor was appointed by the Crown, he might be suspended by the governor, who was authorized to appoint another in his place pending a royal appointment. But it seems that the lieutenant governor received no compensation for his services, except while acting as governor. Lieutenant Governor Colden, in a letter to the Earl of Dartmouth, dated December 1, 1772, says: "There is no salary annexed to the office of lieutenant governor of this province; and when the governor is in the province, he has not a single perquisite." Referring to the case of Lieutenant Governor Oliver, of Massachusetts, who had recently been appointed with a salary of £300, Mr. Colden said that, in view of his own "services and losses," he was entitled to equal consideration, and he requested the grant of a salary, to begin on the accession of the governor (Lord Dunmore, October 18, 1770), and he suggested that it might be paid from customhouse duties and quit rents. The Earl of Dartmouth, replying to this letter February 3, 1773, said he had laid it before the King, but it was not the "King's intention to annex salaries to the office of lieutenant governor in the colonies;" that Mr. Oliver's case could not be taken as a precedent, because the grant to him was made in consideration of his having resigned a lucrative office, and not with the intention of attaching a salary to the office of lieutenant governor. The early state statutes gave the lieutenant governor fees for specified services. The subject of a fixed salary for this office was considered in the Convention of 1867, and it was there pointed out that the lieutenant governor received large compensation for

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"constructive" services. The Commission of 1872 recommended that the salary be fixed at $4,000; the legislature increased it to $5,000, and in this form the amendment was adopted in 1874.

§ 9. [*Governor's legislative powers.*]—Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it. If, after such reconsideration, two thirds of the members elected to that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two thirds of the members elected to that house, it shall become a law notwithstanding the objections of the governor. In all such cases, the votes in both houses shall be determined by yeas and nays, and the names of the members voting shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its return, in which case it shall not become a law without the approval of the governor. No bill shall become a law after the final adjournment of the legislature, unless approved by the governor within thirty days after such adjournment. If any bill presented to the governor contain several items of appropriation of money, he may object to one or more of such items while approving of the other portion of the bill. In such case, he shall append to the bill, at the time of signing it, a statement of the items to which he objects; and the appropriation so

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objected to shall not take effect. If the legislature be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items objected to shall be separately reconsidered. If, on reconsideration, one or more of such items be approved by two thirds of the members elected to each house, the same shall be part of the law, notwithstanding the objections of the governor. All the provisions of this section, in relation to bills not approved by the governor, shall apply in cases in which he shall withhold his approval from any item or items contained in a bill appropriating money.

[Const. 1777, art. 3; 1821, art. 1, § 12; 1846, art. 4, § 9; Am. 1874.]

This section makes the governor a part of our legislative system, and practically, though not theoretically, the controlling element in that system. The evolution of the present situation under American Constitutions from the conditions which existed in early English monarchies must be apparent to every reader of history. From the days of absolute sovereignty, when the will of the King was law, through the partial relaxation of that policy by grants of power or privilege, made in response to petitions, to the establishment of a parliamentary system, in which the lawmaking power was vested in the representatives of the people, the gradations have been obvious, even if the task of enlarging popular rights and restricting royal prerogatives has not always been easy. Through all this process of development the executive has kept its hand upon the legislative system, and by the veto power has controlled popular government. In the note to § 14 of article 3, on the enacting clause, I have called attention to the gradual growth of popular sovereignty and the corresponding diminution of royal power, as manifested by the process of making laws. When the parliamentary system was definitely established the sov-

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ereign was a constant member of it, with an absolute negative on all legislation; and I have shown by the form of the English enacting clause that the sovereign is theoretically present when laws are made. In the early days the King did actually sit with the council or Parliament during its deliberations, and was thus actually as well as theoretically an essential element of the system. I have shown in a former volume that when the legislature was established in New York by the election of the first assembly, in 1683, and the transformation of the executive council into a legislative council, in imitation of the House of Lords, and which council became the predecessor of our state senate, the governor, up to 1735, sat as the presiding officer of the council, and claimed the same right which any member possessed to vote on any bill. This rule was changed in 1735 by direction of the home government, and afterwards the governor did not sit with the council. If the governor were now to preside in the senate we should have a reproduction of the legislative conditions which existed prior to 1736. There was a double negative on colonial legislation, for every bill was subject to a veto by the governor, which was absolute, and if approved by him it was still subject to a veto by the Crown. I have already noted in the first volume the fact that the first constitutional convention once adopted a proposition that the legislature consist of three separate and distinct branches,—the governor, the senate, and the assembly,—but the governor was to have "no power to originate or amend any law, but simply to give his assent or dissent thereto;" and that afterwards, on motion of John Jay, who was not present when it was adopted, the proposition was stricken out.

The first Constitution did not continue in the governor the absolute negative which had been vested in colonial governors, but, by the device known as the Council of

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Revision, the governor exercised only a small part of the veto power. That council was composed of the governor, the chancellor, and the justices of the supreme court, and the governor had no more veto power than any other member of the council. A majority of the council controlled its action. The Council of Revision introduced the judiciary into the legislative system by giving that branch of the government power to determine the constitutionality or propriety of every bill. I have pointed out elsewhere the benefits resulting from this policy in a reduction of litigation involving the constitutionality of laws, which was due to the fact that the judges had already expressed their opinion concerning the validity of the statutes, and it was, therefore, hardly worth while to challenge their validity again before the same judges. The abolition of the Council of Revision, in 1821, and the transfer of all the veto power to the governor, was a radical reform, consistent with the general policy relating to the distribution of the powers of government, and it had the inevitable result of concentrating in one individual the entire responsibility for any control over legislation which it was thought proper to devolve upon any other branch of the government. All the state Constitutions have reserved to the legislature the right to pass a bill over a veto, and the records show that during the existence of the Council of Revision the legislature frequently exercised its privilege of disregarding the veto by again passing the bill. The legislature thereby refused to be controlled by the judicial opinion, as was the case in many instances, that the bill was unconstitutional. The function exercised by the judges as members of the council was practically executive, and if their opinion as to the constitutionality of a bill was ignored or overruled by the legislature, they might still have applied the ultimate judicial veto by declaring, in

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a proper case, that the law was unconstitutional. The Constitution of 1821 marked an important departure from the policy of the earlier Constitution, under which the judges might not only veto for constitutional reasons, but also on questions of policy. The power to veto on questions of policy was withdrawn from the courts, and vested exclusively in the governor; and the courts, in considering a statute, must now confine themselves to the question whether it contravenes any provision of the Constitution. The result is that, possessing the power to pass a law over the governor's veto, the legislature is absolute within constitutional limits, but a statute is subject to judicial veto if it violates the Constitution.

This section of the Constitution includes several important topics which demand special attention.

*1. Presenting bills to the governor.*—While the legislative power is vested in the senate and assembly, this power is not absolute in the first instance, but subject to executive supervision and control. Every bill passed by the legislature must be presented to the governor, and he must have an opportunity to express his judgment upon it before it can become a law. Upon the passage of a bill it must, according to the legislative law, be certified by the presiding officer of each house, showing that it was passed by a majority, and containing the statements necessary if it be a two-thirds or a three-fifths bill. The bill is then presented to the governor. Usually this presentation is not made personally, but to a clerk in the executive chamber designated to take charge of bills. Many governors have assigned the military secretary to this particular duty during the legislative session. The bill is delivered to the governor by the clerk of the house in which it originated, who keeps a record of such delivery, and takes a receipt for the bill. The records of each house thus show the disposition of bills as passed,



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and they also indicate the time when the constitutional ten days for executive consideration of bills begin to run. A record is kept in the executive chamber, showing the date of the receipt of the bill, whether from the senate or assembly, its general title, the date when the ten day limit expires, and whether the bill is recalled, vetoed, or approved, with some other minor details.

*2. Governor's consideration of bills.*—The first inquiry by the governor upon the consideration of a bill is whether he has jurisdiction of it. This jurisdiction depends upon the existence of several facts. The bill must have been passed by a constitutional majority in each house; in certain cases it must have received a two-thirds vote, and in certain other cases it must have been passed when three-fifths of each house were present. If it is a city bill, under article 12, § 2, it must first have been sent to the mayor of the city or cities to which it relates, and must have been returned within the constitutional period with a statement showing its acceptance by the city, or, if not accepted, or if not returned within the constitutional time, that it has been again passed by the legislature. If the legislature adjourns before a bill is so sent to a city, or after it is sent, and before its return, or before the expiration of the fifteen days allowed for its return, action by the city authorities on the bill is final; and if adverse, the governor has no jurisdiction to act upon it. This subject will be considered again in a note to the city bill section.

The bill must be sent to the governor properly certified in accordance with the requirements of the legislative law, and the general city law. A defective certificate may be corrected, or a missing certificate may be supplied, without actually returning the bill to the legislature; and in practice these corrections are usually made in the executive chamber.

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The governor must consider a bill from several points of view, including its constitutionality, its relation to other legislation, and also its policy or propriety, either general or particular. For the purpose of informing the governor as to the scope and meaning of bills, and to aid him in determining the question of their approval, facts are sought from all available sources, and numerous communications are presented, including briefs of counsel; and the governor also frequently gives public hearings on important measures.

*3. Recall of bills.*—It is sometimes discovered after a bill is sent to the governor that it is defective, or that it does not accomplish the purpose intended by it. It may conflict with some existing law, or may not be in proper form, or may have an effect quite different from that intended. Sometimes this situation is ascertained in the legislature, and sometimes in the executive chamber. If the governor finds that the bill is defective, that it is not objectionable for constitutional reasons or on questions of policy, and if the bill would probably be approved if in proper form, it is customary to inform the member who introduced the bill of its defective condition. If the bill can be amended to meet the objections suggested it may be recalled from the governor, which is done by a concurrent resolution reciting that "a respectful message be sent to the governor, requesting the return of the bill (stating its number and title) for the purposes of amendment." This resolution is delivered to the governor, who thereupon returns the bill to the house in which it originated.

In *People* v. *Devlin* (1865) 33 N. Y. 269, 88 Am. Dec. 377, the court, considering the right of the legislature to recall a bill from the governor, say that "when both houses have thus finally passed a bill and sent it to the governor, they have exhausted their powers upon it,

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except the power of sending it to the governor by the house in which it originated, according to parliamentary law." The bill has at this time become the act of both houses, and neither has any further control over it. Holding that one house could not alone recall a bill, the court say that if one house (in this case the assembly) "possessed the power of recalling bills from the governor, after being passed by both houses and sent to him, it is not found in parliamentary law, and no custom of that kind is shown. . . . By no rule or custom shown, or by the exercise of common reason, could one house, by their action, undo, annul, or change what both had solemnly done under their solemn legislative sanction, according to all constitutional forms, and according to their published rules and forms."

The legislature frequently requests the return of bills for amendment, and I know of no instance in which the governor has refused to return a bill when so requested.

There is no constitutional or statutory provision on this subject, but the legislature seems to have inherent power to withdraw a bill from the governor's consideration upon discovering any defect in it. The legislature has the power to perfect the measures which it desires to enact into law, and until a bill has passed beyond its control by the governor's approval, or the expiration of the ten days allowed for his consideration of it, the legislature seems to possess the undoubted right to recall it for correction. The governor, as already suggested, is a part of our legislative system, and the same power that he possesses to recommend by message to the legislature such measures as he thinks proper may be exercised in connection with a bill submitted by the legislature for his consideration. The recall of a bill, whether by the legislature, on its own motion, or at the suggestion of

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the governor, is, I think, an essential element of legislative power.

Bills are also sometimes recalled for the purpose of obtaining an extension of time for their consideration. Sometimes the large number of ten day bills on hand at the same time in the executive chamber makes it impracticable for the governor to give all of them the consideration they require, and, at his suggestion, bills needing special attention are recalled by the legislature, and afterwards sent to the governor again. This gives him additional time. This method of obtaining more time is quite often resorted to near the close of the session, with the result that a bill which would otherwise be a ten day bill becomes a thirty day bill, but with another result, not to be overlooked, that by becoming a thirty day bill it passes beyond legislative control, and cannot be amended even if, on consideration, an amendment would be practicable, and might save the bill. Usually, however, bills are not recalled for the purpose of making them thirty day bills, except where they are unobjectionable in form and need no amendment, but present to the executive only questions of policy.

*4. Governor's action on bills.*—If the governor approves a bill he must sign it; if not approved, the bill may be vetoed, or it may be permitted to become a law without the governor's signature at the expiration of the ten days limited by the Constitution, provided the legislature does not, in the meantime, adjourn. The first Constitution contained no positive requirement that a bill be formally approved by the Council of Revision; it provided that if, after consideration by the council, "it should appear improper to the said council, or a majority of them, that the said bill should become a law," it was to be returned to the house in which it originated. But it was customary for the council to adopt a resolution

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that "it does not appear improper to the council that the bill entitled [giving the title] should become a law of this state." This was indorsed on the bill and signed by the governor. According to the present practice, the governor's approval of a bill is manifested by his writing the word "approved," with the date, at the end of the bill, followed by the governor's signature. Sometimes a bill does not receive the governor's full assent, but he is unwilling to veto it; in such a case he may permit it to become a law by operation of the constitutional provision. Vetoes are either direct or indirect. Quite often, especially in later years, the governor resorts to an indirect veto. If he finds that he cannot approve a bill, and that it is not practicable to amend it to meet his objections, he suggests its withdrawal. The bill is usually recalled, nominally for purposes of amendment, but receives no further legislative attention. This action is generally understood to be equivalent to an executive disapproval.

A direct veto requires a message to the legislature, in which the governor states his reasons for the disapproval of the bill. The practice was similar to this under the first Constitution, except that one of the judicial members of the council usually prepared the statement containing the reasons for the disapproval of the bill. While the legislature is in session the governor has ten days, excluding Sundays, in which to consider a bill. A final adjournment of the legislature during this time makes the bill a thirty day bill; but a temporary adjournment or a recess does not affect the status of the bill, even if taken to a time beyond the expiration of the ten days. This was held in *Hequembourg* v. *Dunkirk* (1888) 49 Hun, 550, 2 N. Y. Supp. 447. The bill was sent to the governor on the 10th of February, 1888. The ten days expired February 22; on the 17th the legislature ad-

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journed to the 27th. The bill became a law without the governor's approval. The court, citing *Re Soldiers' Voting Bill* (1864) 45 N. H. 607, which presented the same question, say that the phrase in the Constitution, "unless the legislature by their adjournment prevent its return," does not mean "the ordinary recess or adjournment from time to time during the continuance of the session, but means the final adjournment at the close of the session."

The governor is entitled to the entire ten days for the consideration of a bill, and his time cannot be shortened by a temporary adjournment or recess. In the *Dunkirk Case* the legislature took a recess five days before the expiration of the governor's time for the consideration of the bill, and was not in session at the end of that time. It frequently happens that bills expire on Saturday, when the legislature is not usually in session. The governor's time does not expire until midnight. If the legislature is in session when the governor decides to veto a bill he may return the bill with his veto message directly to the legislature; but if it is not in session, his veto power is not affected, and he may deliver the bill with his veto message to any officer of the house in which the bill originated. In 1895, while I was legal adviser to the governor, a bill was vetoed on the last of the ten days and after the legislature had adjourned for the day. The bill with the veto message was delivered to an assistant clerk of the assembly, and was handed down by the speaker at its next session, though after the ten days had expired.

In 1864 the justices of the superior court of New Hampshire (*Re Soldiers' Voting Bill,* 45 N. H. 607), in response to a request by the legislature for an opinion as to the validity of the bill, made the following observations, among others, concerning the powers of the governor in vetoing bills: "If the governor returns the bill

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to the house in which it originated, and the house is properly notified that it is a message from the governor, neither the house nor the speaker can prevent its effect by refusing to receive it. The duty of the governor is performed when he returns the bill, with his objections, to the house in which the bill originated, and gives them proper notice, whether it is received or not. Nor are we by any means prepared to say that the legislative day was ended necessarily by the adjournment of the house, even though it might have been at the usual hour in the afternoon; or that the return of the bill at any convenient time during the day to the speaker, although after the house adjourned for the day, would not have been sufficient. The provision of the Constitution in relation to this subject should receive a reasonable construction, and it can hardly be supposed that the time limited for the return of the bill has expired because that branch of the legislature in which the bill originated has adjourned for the day, if the five days limited by the Constitution have not expired. The word 'day' in its common acceptation, means a civil day of twenty-four hours, beginning and ending at midnight."

The governor has absolute control of a bill during the ten days, subject only to its recall, with his permission, by the legislature. If a bill is inadvertently signed, or if, having signed it, the governor should conclude not to approve it, it is under his control until delivered to the secretary of state, and he may rescind his action or erase his signature. This subject was considered in *People ex rel. Lanphier* v. *Hatch* (1857) 19 Ill. 283, where the court say that "the governor may, within the period fixed by the Constitution, deliberate as to the propriety of approving an act of the general assembly, and may sign such act and erase his signature thereto at pleasure; and until it has passed his control by the constitutional and cus-

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tomary modes of legislation, he may reconsider and retract any approval previously made. . . . If the governor shall deposit an act of the general assembly, approved by him, with the secretary of state, it is then beyond his further action, although his approval was put to the act by mistake. The fact that the governor has inadvertently placed his approval and name to an act of the general assembly, which signing and approving has been announced by his private secretary in his routine of business, but without the knowledge of the governor, does not deprive the governor of his privilege of striking his approval from the act, if the bill remains in his custody. A power to rectify an error at the proper time exists with all departments of the government."

In the chapter on the Convention of 1867 I have given a summary of the discussion on the proposition submitted by Thomas G. Alvord to give the governor power to veto separate items in the appropriation and supply bills. That Convention did not adopt the proposition. It was renewed by Governor Hoffman in his message of 1872, and acted upon by the commission created that year to recommend constitutional amendments. The authority conferred on the governor to veto separate items in appropriation bills was included in the amendments of 1874. The constitutional provision is not limited to the regular appropriation and supply bills, but embraces any bill containing several appropriations of money.

The thirty day period was established by an amendment adopted in 1874. The history of the causes which led to the adoption of this rule will be found in an article on the thirty day period, in the chapter on the Convention of 1867. It will there be seen that, beginning soon after 1846, the governor gradually, and with increasing frequency, asserted the power to approve bills after the adjournment of the legislature. This power was sus-

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tained in *People* v. *Bowen* (1860) 21 N. Y. 517, which is also cited in the article above mentioned. The executive custom of prolonging the consideration of bills several months after the legislature adjourned suggested the establishment of a fixed rule, resulting in the thirty day period prescribed by the amendment of 1874. It will be observed that the provision relating to thirty day bills gives the governor absolute control of all such bills, and consequently he alone can determine whether a bill left in his hands by the legislature on its adjournment shall become a law; but no bill can become a law during this period without the governor's positive approval, thus reversing the situation which exists during the ten day period, for by his mere omission to act upon a bill it becomes a law at the expiration of that time. While the legislature is in session the governor's power over legislation is qualified, because the legislature may pass a bill over his veto; but after the adjournment his power is absolute. His failure to sign a thirty day bill is an implied veto, for it indicates his disapproval of the measure.

The governor sometimes deems it proper to state his reasons for the approval of a bill. This is done in the form of a memorandum accompanying the bill. A similar memorandum is sometimes made on a ten day bill which the governor is unwilling to approve, but which he permits to become a law without his approval. A veto memorandum is also often made in connection with a thirty day bill which is not approved: the legislature not being in session, the governor's reasons cannot be communicated to that body, but they are given to the public through the memorandum. Thus the governor, by veto messages and memorandums, communicates to the people of the state his views regarding particular bills, and endeavors to meet the responsibility and perform the duty

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devolved upon him by the Constitution as a part of the lawmaking power of the state.

The chapter number of a bill is usually assigned in the executive chamber when the bill is approved. The bill, when signed by the governor and finally acted upon by him, is delivered to the secretary of state, there to be kept as a part of the records of his office. The legislative law, § 42, provides that

"Every concurrent resolution upon its passage, and every bill upon its becoming a law, with the certificate of the presiding officer of each house appended thereto, shall be deposited with the secretary of state. The secretary of state shall forthwith upon such deposit indorse upon each bill his certificate of the day, month, and year it was filed in his office, and his certificate to such effect shall be presumptive evidence thereof. The secretary of state shall cause the original laws and concurrent resolutions passed at each session to be bound together in a volume of convenient size to be kept in his office. He shall compare with the original a volume of the printed laws, and having noted therein at the end of each law or resolution any error in the printed volume, shall deposit such printed volume with the original volume in his office. Each such volume shall be lettered on its back with its title and the session at which the laws were passed."

## ARTICLE V.

### [STATE OFFICERS; CIVIL SERVICE.]

§ 1. [*State officers, election and compensation.*]—The secretary of state, comptroller, treasurer, attorney general, and state engineer and surveyor shall be chosen at a general election, at the times and places of electing the

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governor and lieutenant governor, and shall hold their offices for two years, except as provided in section two of this article. Each of the officers in this article named, excepting the speaker of the assembly, shall, at stated times during his continuance in office, receive for his services a compensation which shall not be increased or diminished during the term for which he shall have been elected; nor shall he receive to his use any fees or perquisites of office or other compensation. No person shall be elected to the office of state engineer and surveyor who is not a practical civil engineer.

[Const. 1777, art. 23; 1821, art. 4, § 6; 1846, art. 5, §§ 1, 2.]

A sketch of the offices mentioned in this section will be found in the chapter on the Commission of 1872.

"The prohibition against fees, perquisites, or other compensation is absolute." The power to receive compensation is attached to the office and is a perquisite of the office. The Code of Civil Procedure, § 1986, which requires the attorney general to obtain security for costs in certain actions to be commenced by him, and which provides that "where security is so given, the attorney general is entitled to compensation for his services, to be paid by the relator, in like manner as the attorney and counsel for a private person," is unconstitutional. *People ex rel. Gould* v. *Mutual U. Teleg. Co.* (1882) 2 N. Y. Civ. Proc. Rep. 295, Special Term, per Arnoux, J.

§ 2. [*First election under this Constitution.*] — The first election of the secretary of state, comptroller, treasurer, attorney general, and state engineer and surveyor, pursuant to this article, shall be held in the year one thousand eight hundred and ninety-five, and their terms of office shall begin on the first day of January following, and shall be for three years. At the general election in the year one thousand eight hundred and ninety-eight, and every two years

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thereafter, their successors shall be chosen for the term of two years.

[New; temporary.]

The first part of this section was adopted for the purpose of bringing the election of state officers into the even-numbered years. Under the Constitution of 1846 they had been elected in the odd-numbered years, beginning in 1847. The term of three years is the same as that fixed by this Constitution for the first term of senators elected under it, and is part of the plan to separate city elections from state elections, under which state elections are required to be held in even-numbered years and city elections in odd-numbered years.

§ 3. [*Superintendent of public works.*]—A superintendent of public works shall be appointed by the governor, by and with the advice and consent of the senate, and hold his office until the end of the term of the governor by whom he was nominated, and until his successor is appointed and qualified. He shall receive a compensation to be fixed by law. He shall be required by law to give security for the faithful execution of his office before entering upon the duties thereof. He shall be charged with the execution of all laws relating to the repair and navigation of the canals, and also of those relating to the construction and improvement of the canals, except so far as the execution of the laws relating to such construction or improvement shall be confided to the state engineer and surveyor; subject to the control of the legislature, he shall make the rules and regulations for the navigation or use of the canals. He may be suspended or removed from office by the governor, whenever, in his judgment, the public interest shall so require; but in case of the removal

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of such superintendent of public works from office, the governor shall file with the secretary of state a statement of the cause of such removal, and shall report such removal and the cause thereof to the legislature at its next session. The superintendent of public works shall appoint not more than three assistant superintendents, whose duties shall be prescribed by him, subject to modification by the legislature, and who shall receive for their services a compensation to be fixed by law. They shall hold their office for three years, subject to suspension or removal by the superintendent of public works, whenever, in his judgment, the public interest shall so require. Any vacancy in the office of any such assistant superintendent shall be filled for the remainder of the term for which he was appointed, by the superintendent of public works; but in case of the suspension or removal of any such assistant superintendent by him, he shall at once report to the governor, in writing, the cause of such removal. All other persons employed in the care and management of the canals, except collectors of tolls, and those in the department of the state engineer and surveyor, shall be appointed by the superintendent of public works, and be subject to suspension or removal by him. The superintendent of public works shall perform all the duties of the former canal commissioners, and board of canal commissioners, as now declared by law, until otherwise provided by the legislature. The governor, by and with the advice and consent of the senate, shall have power to fill vacancies in the office of superintendent of public works; if the senate be not in session, he may grant commissions which shall expire at the end of the next succeeding session of the senate.

[Am. 1876.]

Historical notes relating to this subject will be found

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in the chapter on the Convention of 1867, and in the chapter on the Commission of 1872.

In *People ex rel. Killeen* v. *Angle* (1888) 109 N. Y. 564, 17 N. E. 413, the civil service act of 1883 was held inoperative as to the department of public works, for the reason that the Constitution, as then in force, vested in the head of the department the exclusive power and duty of appointment and removal; the court observing that "any provision of law . . . which materially interferes with the freedom of selection conferred upon the superintendent, and the exercise of his judgment in investigating and determining the fitness and propriety of contemplated appointments, seems to us not only to conflict with the terms of the Constitution, but plainly to violate its spirit and intent."

This subject was considered again in *People ex rel. McClelland* v. *Roberts* (1896) 148 N. Y. 360, 31 L. R. A. 399, 42 N. E. 1082, where it was held that the decision in the *Killeen Case* had been superseded by the civil service amendment of 1894, that the section relating to the department of public works was modified by the new civil service section, and that "the obstacles then found to exist to the full operation of the civil service law in every department of the state government had been entirely removed;" and the court say further that the intention of the Constitutional Convention of 1894 was declared in the most explicit terms to bring every department of the government within the operation of the civil service law, and to "remove every constitutional objection to the full operation of the law, and to its application to all appointments in the civil service in all the public departments of the state." The position in the department of public works affected by the case was held to be within the civil service law, and subject to the provisions of the civil service section of the Constitution.

In the exercise of the powers conferred and the duties imposed on the superintendent of public works under this section, he is not wholly independent of the legislature. "There is no express or implied restriction to be found in the Constitution upon the power of the legislature to fix and declare the rate of compensation to be paid for labor or services performed upon the public works of the state. . . . A general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract, was within the power of the legislature to enact, whatever may be said as to its wisdom or policy. . . . Where the compensation of an employee of the state is

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fixed by statute, it cannot be reduced by the state officer under whom he is employed, and the fact that the employee takes for a time the reduced compensation, does not estop him from subsequently claiming the residue." *Clark* v. *State* (1894) 142 N. Y. 101, 36 N. E. 817.

§ 4. [*Superintendent of state prisons.*]—A superintendent of state prisons shall be appointed by the governor, by and with the advice and consent of the senate, and hold his office for five years, unless sooner removed; he shall give security in such amount, and with such sureties, as shall be required by law for the faithful discharge of his duties; he shall have the superintendence, management, and control of state prisons, subject to such laws as now exist or may hereafter be enacted; he shall appoint the agents, wardens, physicians, and chaplains of the prisons. The agent and warden of each prison shall appoint all other officers of such prison, except the clerk, subject to the approval of the same by the superintendent. The comptroller shall appoint the clerks of the prisons. The superintendent shall have all the powers and perform all the duties not inconsistent herewith, which were formerly had and performed by the inspectors of state prisons. The governor may remove the superintendent for cause at any time, giving to him a copy of the charges against him, and an opportunity to be heard in his defense.

[Const. 1846, art. 5, § 4; Am. 1876.]

See note to preceding section.

The civil service act of 1887, chap. 464, giving preference to veterans, is repugnant to this provision of the Constitution which vests in the prison wardens the power to appoint subordinates, subject to the superintendent's approval. The legislature cannot prevent nor control the exercise of judgment and discretion by prison officials in the appointment or retention of subordinates. *People ex rel. Travis* v. *Durston* (1888) 3 N. Y. Supp. 522, Sp. T., Adams, J.,

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following *People ex rel. Killeen* v. *Angle* (1888) 109 N. Y. 564, 17 N. E. 413.

§ 5. [*Commissioners of the land office and canal fund; canal board.*]—The lieutenant governor, speaker of the assembly, secretary of state, comptroller, treasurer, attorney general, and state engineer and surveyor shall be the commissioners of the land office. The lieutenant governor, secretary of state, comptroller, treasurer, and attorney general shall be the commissioners of the canal fund. The canal board shall consist of the commissioners of the canal fund, the state engineer and surveyor, and the superintendent of public works.

[Const. 1846, art. 5, § 5.]

The only change made by the Constitution of 1894 was the substitution of the superintendent of public works for the canal commissioners, whose office had been abolished.

The act of 1850, chap. 283, which conferred on the commissioners of the land office power to "grant in perpetuity or otherwise, so much of the lands under the waters of navigable rivers or lakes as they shall deem necessary to promote the commerce of this state, or proper for the purpose of beneficial enjoyment of the same by the adjacent owner," was not an unconstitutional delegation of power to the commissioners. The legislature has power "to prescribe the powers and duties of the commissioners of the land office." *Rumsey* v. *New York & N. E. R. Co.* (1891) 130 N. Y. 88, 28 N. E. 763.

§ 6. [*Powers and duties of boards.*]—The powers and duties of the respective boards, and of the several officers in this article mentioned, shall be such as now are or hereafter may be prescribed by law.

[Const. 1846, art. 5, § 6.]



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The Convention of 1894 made no change in this section.

§ 7. [*Suspension of treasurer.*]—The treasurer may be suspended from office by the governor, during the recess of the legislature, and until thirty days after the commencement of the next session of the legislature, whenever it shall appear to him that such treasurer has, in any particular, violated his duty. The governor shall appoint a competent person to discharge the duties of the office during such suspension of the treasurer.

[Const. 1846, art. 5, § 7.]

Continued from previous Constitution without change.

§ 8. [*Certain offices abolished.*]—All offices for the weighing, gauging, measuring, culling, or inspecting any merchandise, produce, manufacture, or commodity whatever, are hereby abolished; and no such office shall hereafter be created by law; but nothing in this section contained shall abrogate any office created for the purpose of protecting the public health or the interests of the state in its property, revenue, tolls, or purchases, or of supplying the people with correct standards of weights and measures, or shall prevent the creation of any office for such purposes hereafter.

[Const. 1846, art. 5, § 8.]

In *Tinkham* v. *Tapscott* (1858) 17 N. Y. 141, the court, commenting on this section, say that the restraint on legislative power imposed by it was "without doubt suggested by, and was primarily aimed at, a system of laws which had grown up in this state, which required a very large class of the productions of the soil and of manufacture and mechanical industry to undergo an inspection, or the determination by weighing, measuring, or gauging, of the quantity con-

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tained in the parcels in which they are usually sold, by public officers, preliminary to their being sold for the purpose of exportation, and, in regard to some articles, as a condition to being sold and trafficked in in the state. . . . The system itself is condemned as originating in a false and pernicious, or at least, mistaken, theory of political economy. . . . Among the mass of governmental powers there is not remaining any authority to continue or reproduce a system in substance like this in its distinguishing characteristics in any form whatever." The act of 1857, chap. 405, "to Reorganize the Warden's Office of the Port of New York," did not effect a restoration of the policy prohibited by this section, nor create offices thereby prohibited. The duties imposed on port wardens do not belong to the class of duties previously performed by inspectors.

§ 9. [*Civil service.*]—Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the Army and Navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section.

[New.]

*In general.*—The validity of the original civil service act of 1883, chap. 354, as amended by chap. 410, 1884, was sustained in *Rogers* v. *Buffalo* (1890) 123 N. Y. 173, 9 L. R. A. 579, 25 N. E. 274. The legislature has power to provide for the appointment of commissioners from different political parties.

In *People ex rel. Griffin* v. *Lathrop* (1894) 142 N. Y. 113, 36 N. E. 805, it was held that while the civil service acts regulated the discretion of the appointing officer, they did not affect the power of removal. "In the absence of restraints imposed by the Constitution or by statute, the power of appointment implies the power of removal when no definite term is attached to the office by law." Cit-

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ing *People ex rel. Cline* v. *Robb* (1891) 126 N. Y. 180, 27 N. E. 267. The civil service statutes are silent on the subject of the power of removal.

In a note to § 3 of this article, I have cited *People ex rel. McClelland* v. *Roberts* (1896) 148 N. Y. 360, 31 L. R. A. 399, 42 N. E. 1082, where it was held in substance that by the civil service section the department of public works had been brought within the operation of existing civil service statutes. Considering the general effect of these statutes and the constitutional provision, the court say: "It is quite clear also that the civil service statutes constitute a general system of statute law applicable to appointments and promotions in every department of the civil service of the state, with such exceptions only as are specified in the statute itself;" that "statutes of this character, framed in general terms, apply to new cases as they arise from time to time that fall within their general scope and policy;" that the constitutional provision "was framed and adopted with reference to existing laws which were intended to give to it immediate practical operation;" that it was "the intention to put all the new provisions of the Constitution into operation through the instrumentality of such laws as were then in force so far as practicable, and if in practice they were found to be in any respect insufficient for that purpose, they were to be replaced or supplemented by new ones;" that in addition to this principle of construction it was expressly provided by § 16 of article 1 that existing statutes should continue in force subject to legislative alteration, and that "if the legislature should repeal all the statutes and regulations on the subject of appointments in the civil service, the mandate of the Constitution would still remain, and would so far execute itself as to require the courts, in a proper case, to pronounce appointments made without compliance with its requirements illegal." The last remark doubtless has reference to the mandatory provisions of the section, and not to the necessary machinery for conducting a competitive examination.

The continuance of the civil service statutes under the new Constitution was again declared in *People ex rel. Sweet* v. *Lyman* (1898) 157 N. Y. 368, 52 N. E. 132, including the provision for a probationary appointment.

This section does not embrace the military service of the state; armorers and janitors of armories are therefore not subject to civil service regulations. *Bryant* v. *Palmer* (1897) 152 N. Y. 412, 46 N. E. 851.

The legislature cannot confer on the civil service commission

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power to prescribe the term of a public officer who holds under an indefinite tenure; such tenure is under the exclusive control of the authority making the appointment. *People ex rel. Percival* v. *Cram* (1900) 164 N. Y. 166, 58 N. E. 112.

This section must be construed in connection with § 2 of article 10 relating to the appointment of local officers. The power of appointment is not restricted, but appointments must be made in accordance with the civil service section, which requires local authorities to make appointments "according to merit and fitness, to be ascertained by examinations, competitive or otherwise," and relates "only to the qualifications which appointees shall have to justify their appointment under § 2, and the manner in which they shall be ascertained." The provision of the civil service act of 1899, chap. 370, § 13, requiring the appointment "of those graded highest in open competitive examinations," was held to be unconstitutional. "The right of appointment of necessity involves the power of selection and the exercise of discretion and judgment." A statutory provision which absolutely requires appointing officers to appoint a person graded highest by a civil service commission deprives such officers of any power of selection, and transfers from them to such commission the appointing power conferred by the Constitution. The appointing power had a right to select either of two veterans certified by the commission, and was not bound to appoint the one graded highest. *People ex rel. Balcom* v. *Mosher* (1900) 163 N. Y. 32, 79 Am. St. Rep. 552, 57 N. E. 88.

Legislation prior to the civil service amendment of 1894 has been noticed in the article on civil service in the chapter on the Convention of 1894. Numerous statutes have since been enacted, and the courts have had frequent occasion to consider these statutes and the provisions of the Constitution. The subject will doubtless be most conveniently elucidated by giving a summary of the statutes and decisions since the adoption of the Constitution of 1894.

In 1895 the legislature, by chap. 344, enacted that, as to veterans, "competitive examinations shall not be deemed practicable or necessary in cases where the compensation or other emolument of the office does not exceed $4 per day, but the examination shall be such as is calculated only to ascertain the merit and fitness of the applicant for the position for which he applies, and if found fitted to fill such position, the applicant's name shall be placed on the eligible list, and he shall be certified therefrom."

The act of 1896, chap. 821, prohibited the removal of veterans from positions under the civil service except for incompetency or miscon-

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duct, after a hearing, gave a right of review by certiorari, a right of action for damages in specified cases, and also a remedy by mandamus.

The act of 1897, chap. 428, provided for two examinations; namely, one by a civil service commission, to determine the merit of the applicant, and his fitness was to be determined by the appointing officer or board, or under his or its direction. The maximum rating on each examination was fixed at 50 per cent, and the two ratings were to be combined for the purpose of determining the applicant's standing on the eligible list.

In 1898, chap. 186, the original civil service act of 1883 was amended in relation to examinations, appointments, promotions, and removals in cities. The act also provided that in case of a removal or reduction a written statement of the reasons therefor should be filed with the head of the department or other appointing officer, and the person so removed or reduced should be given an opportunity to make an explanation.

In 1899 the legislature passed a new civil service law (chap. 370), containing a general revision of the subject, and repealing the original act of 1883 and subsequent statutes.

*Confidential position.*—The position of deputy superintendent of public buildings is confidential. *Re Ostrander* (1895) 12 Misc. 476, 34 N. Y. Supp. 295, affirmed in (1895) 146 N. Y. 404, 42 N. E. 543.

It was held in *People ex rel. Jones* v. *Baker* (1895) 12 Misc. 389, 34 N. Y. Supp. 49, that a superintendent of streets, appointed by the street commissioner of Albany, under the act of 1883, chap. 298, was practically a deputy, and held a confidential relation towards the commissioner, and that if such superintendent had served in the volunteer fire department, as required by chap. 577 of the laws of 1892, he could not be removed except for cause and after a hearing.

The position of assistant warrant clerk in the office of the comptroller of the city of Brooklyn was held to be confidential by reason of the fact that a greater portion of the duties devolving upon his position involve skill and integrity, which duties, if carelessly or negligently performed, might result in great loss to the comptroller or the city. *People ex rel. Crummey* v. *Palmer* (1897) 152 N. Y. 217, 46 N. E. 328.

"Where the duties of the position were not merely clerical, and were such as especially devolved upon the head of the office, which, by reason of his numerous duties, he is compelled to delegate to others, the performance of which required skill, judgment, trust,

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and confidence, and involved the responsibility of the officer of the municipality which he represents, the position should be treated as confidential." *Chittenden* v. *Wurster* (1897) 152 N. Y. 345, 360, 37 L. R. A. 809, 46 N. E. 857.

The office of clerk of the police court of Syracuse is not confidential. He is appointed by the police justice, but his duties are defined by statutes. He is required to give a bond to the city, and is treated as an independent officer. *People ex rel. Sears* v. *Tobey* (1897) 153 N. Y. 381, 47 N. E. 800.

A special agent appointed under the liquor tax law sustains, by § 10, a confidential relation to the state commissioner of excise. "His acts are official acts, performed for and in the name of the commissioner, and are not only secret, but they also involve trust and confidence which are personal to the appointing officer. The duties cast upon the special agent involve skill, integrity, and liability personal to the officer he represents." *People ex rel. Sweet* v. *Lyman* (1898) 157 N. Y. 368, 52 N. E. 132.

The assistant sergeant at arms of the New York board of aldermen holds a confidential position. *Shaughnessy* v. *Fornes* (1902) 73 App. Div. 462, 77 N. Y. Supp. 223.

*Local subdivisions.*—The original civil service statutes were applicable to the state and also to cities. The constitutional provision was, by its terms, made applicable to all the civil divisions of the state, including villages, and it necessarily includes counties and towns. "The Constitution has made no provision with reference to the appointing of examiners, or for the manner in which the examinations shall be made, or how the qualifications of the applicants shall be determined. This it has left to the legislature." *Chittenden* v. *Wurster* (1897) 152 N. Y. 345, 37 L. R. A. 809, 46 N. E. 857.

*Practicability of examination.*—In *Re Keymer* (1896) 148 N. Y. 219, 35 L. R. A. 447, 42 N. E. 667, holding unconstitutional the act of 1895, chap. 344, above cited, the court say that the constitutional provision clearly presents three points; namely, 1. "Merit and fitness are to be ascertained, so far as practicable, by examinations; 2. Examinations, so far as practicable, shall be competitive; and 3. The honorably discharged soldiers and sailors of the Civil War are only entitled to preference in appointment and promotion after their names appear on the list from which appointments and promotions may be made." The act of 1895 refers "only to veterans of the Civil War, and creates a favored class." It establishes an arbitrary classification, and excuses or requires examinations ac-

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cording to the rate of compensation. The provision that "as to veterans, competitive examinations shall not be deemed practicable or necessary in cases where the compensation does not exceed $4 per day," is also obnoxious to the Constitution. "A mere arbitrary declaration in an act of the legislature that competitive examinations of veterans are impracticable in cases where the compensation does not exceed $4 per day is in plain violation of the provisions of the Constitution making competitive examinations necessary." The rate of compensation is no test "of the practicability of subjecting the applicant for the position to a competitive examination." Without defining or limiting the power of the legislature to determine when examinations are practicable, the court say: "It is quite possible there are or will be offices and positions, by reason of peculiar duties, which experience will demonstrate cannot be filled by competition, and when such a case arises it will be competent for the legislature to provide for it by an appropriate act disclosing the circumstances which justify its intervention."

"In order to determine whether the examination of a candidate for an office is practicable, we must first ascertain the nature and character of the duties of his position. Having ascertained the facts, the question of exemption then doubtless becomes one of law." Referring to the question whether an examination ought to be required for a confidential position, the court say that there is no evidence to show "that a competitive examination is practicable for a position where the appointee is to receive, open, read, and answer the letters of his chief, where he is to counsel and advise him with reference to the conduct and management of his office, sign his name to checks or warrants, collect and pay out his money, and have the combination of his safe and the custody and control of its contents. A candidate may be ever so competent, and still lack many of the necessary elements of a trustworthy officer; he may be ever so learned, and still lacking in judgment and discretion; he may be discreet, and still without character; he may be honest, and yet be meddlesome, and a person in whom you could not confide." The court declined to limit confidential positions to those which are strictly secret. *Chittenden* v. *Wurster* (1897) 152 N. Y. 345, 37 L. R. A. 809, 46 N. E. 87.

The language of the Constitution clearly implies that it is not entirely practicable fully to determine merit and fitness by examination. The Constitution declares a principle, but its application is left to the direction of the legislature. The framers of this provision "did not intend to determine absolutely how the merit and

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fitness of appointees were to be ascertained and determined. . . . The words 'so far as practicable' plainly relate to the degree or extent to which the examination should control. . . . The qualifications of the candidate shall be ascertained in each case by an examination to the extent and only so far as it is practicable, and consequently sufficient to insure the selection of proper and competent employees. The Constitution plainly implies that other methods and tests are to be employed when necessary and calculated to fully ascertain the merit and fitness of the applicant." A probationary term may be one of the means employed to determine the applicant's qualifications. *People ex rel. Sweet* v. *Lyman* (1898) 157 N. Y. 368, 52 N. E. 132.

The provision in the amended charter of New York, 1901, chap. 466, § 290, in effect continuing in office detective sergeants previously appointed without competitive examination, did not violate the civil service section of the Constitution, and the status of a person so appointed was not affected by a subsequent rule requiring competitive examinations. *Sugden* v. *Partridge* (1903) 174 N. Y. 87, 66 N. E. 655.

*Veterans.*—No officer or appointing power has authority to deny to veterans a preference in appointments given by the statute. The right to such preference may be enforced by mandamus. *Re Wortman* (1888) 22 Abb. N. C. 137, 2 N. Y. Supp. 324; *Re Sullivan* (1890) 55 Hun, 285, 8 N. Y. Supp. 401.

In *Re Sweeley* (1895) 12 Misc. 174, 33 N. Y. Supp. 369 (affirmed in [1895] 146 N. Y. 401, 42 N. E. 543), Justice Herrick, construing the constitutional provision in connection with the act of 1894, chap. 717, which exempted veterans from the operation of the civil service laws where the compensation did not exceed $4 per day, said: "It was the evident intention by this amendment to engraft into the organic law of the state the principle of ascertaining the merit and fitness of applicants for appointment in the civil service of the state by examination, and also to provide for the extension of such principle beyond what was provided for in then existing laws or permitted by the old Constitution," and it was not intended to relieve veterans "from demonstrating their fitness for official positions by submitting to an examination, but simply to give them a preference over those not soldiers who had also had their fitness tested by examination."

If a position is transferred from one schedule to another, appointments must thereafter be made from the new schedule. A veteran whose name had been placed on the eligible list under the new schedule was held entitled to preference and appointment with-

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out regard to his standing on the list, and his right was not affected by the fact that there was still an eligible list under the former schedule. *People ex rel. Carroll* v. *New York City Civil Service* (1896) 5 App. Div. 164, 39 N. Y. Supp. 75.

In *People ex rel. Drake* v. *Syracuse* (1899) 26 Misc. 522, 57 N. Y. Supp. 617, Justice Hiscock says the practical interpretation and purpose of the exception relating to veterans "is that the soldier whose name is upon the list shall have preference in appointment before a civilian, even though the latter has the higher standing. But it is necessary for the veteran in the first instance to secure under the law a place upon the list for his name. And when, two or three veterans having obtained places for their names upon the list, it is to be decided which one shall obtain the preference secured by the Constitution, I see no reason why the principle of competition as amongst themselves should not apply, and why that one of the veterans having the highest rating should not secure the preference and the appointment rather than that three names should be transmitted to the appointing body, giving it the power of selection, and destroying, to that extent, the principle of competition." It applies to veterans themselves the principle of competition which is the fundamental idea of the Constitution. The name of the person first on the list should be certified, rather than the three highest names. In *People ex rel. Balcom* v. *Mosher* (1900) 163 N. Y. 32, 79 Am. St. Rep. 552, 57 N. E. 88, cited above, it was held that the appointing power was not bound to appoint the veteran graded highest.

Section 21 of the civil service act of 1899, chap. 370, prohibits the removal of a veteran "except for incompetency or misconduct shown, after a hearing, upon due notice, upon stated charges." A veteran, who, with others, was removed because of an insufficiency of funds, and also because he was the least efficient man in the office, but without charges, was held entitled to reinstatement, although the fact that he was a veteran was not known by the appointing officer at the time of his discharge. The legislature had power to extend to veterans a preference beyond their appointment and promotion, and protect them from removal except under specified conditions. *Stutzbach* v. *Coler* (1901) 168 N. Y. 416, 61 N. E. 697.

A veteran who intends to avail himself of the preference given by the Constitution and civil service statutes must give time and notice thereof to the appointing authority. A notice after his dismissal is too late. "The granting of a special privilege by the state to a particular class of citizens carries with it, by fair implication,

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the duty on the part of the individual to show that he is within the provision if he is to be given its benefits." *People ex rel. Dixon* v. *Simonson* (1901) 64 App. Div. 312, 72 N. Y. Supp. 84.

The determination of a civil service commission after a competitive examination is conclusive as to the fitness for the appointment, in so far as regards the competency of the applicant. A veteran whose name was among the three highest certified by the commission was held entitled to the appointment. *People ex rel. Hamilton* v. *Stratton* (1903) 79 App. Div. 149, 80 N. Y. Supp. 269; *People ex rel. Weintz* v. *Burch* (1903) 79 App. Div. 157, 80 N. Y. Supp. 274.

It was held in *People ex rel. Sears* v. *Tobey* (1897) 153 N. Y. 381, 47 N. E. 800, that the clerk of the police force was in the city service, and not in the state civil service.

The civil service law of 1899, chap. 370, as amended in 1902, chap. 270, which prohibits the removal of veterans "except for incompetency or misconduct shown, after a hearing," is constitutional. *People ex rel. Kenny* v. *Folks* (1903) 89 App. Div. 171, 85 N. Y. Supp. 1100.

Several interesting decisions involving civil service questions are omitted here for the reason that they relate chiefly to procedure, or to the construction of statutes without special reference to the Constitution.

## ARTICLE VI.

### [JUDICIARY.]

§ 1. [*Supreme court; how constituted; judicial districts.*]—The supreme court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the court of appeals as now is or may be prescribed by law, not inconsistent with this article. The existing judicial districts of the state are continued until changed as hereinafter provided. The supreme court shall consist of the justices now in office, and of the judges transferred thereto by the fifth section of this article, all of whom shall continue to be justices of the supreme court during their respective terms, and of twelve additional jus-

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tices who shall reside in, and be chosen by the electors of, the several existing judicial districts, three in the first district, three in the second, and one in each of the other districts, and of their successors. The successors of said justices shall be chosen by the electors of their respective judicial districts. The legislature may alter the judicial districts once after every enumeration under the Constitution of the inhabitants of the state, and thereupon reapportion the justices to be thereafter elected in the districts so altered.

[Const. 1821, art. 5, § 4; 1846, art. 6, § 3; Jud. Art. 1869, § 6; Am. 1882, § 28.]

The legislature of 1903 adopted an amendment to the foregoing section, adding the following provision, and directing its submission to the people at the general election in November, 1905.

The legislature may, from time to time, increase the number of justices in any judicial district, except that the number of justices in the first and second district or in any of the districts into which the second district may be divided, shall not be increased to exceed one justice for each eighty thousand or fraction over forty thousand of the population thereof, as shown by the last state or Federal census or enumeration, and except that the number of justices in any other district shall not be increased to exceed one justice for each sixty thousand or fraction over thirty-five thousand of the population thereof, as shown by the last state or Federal census or enumeration. The legislature may erect out of the second judicial district, as now constituted, another judicial district, and apportion the justices in office between the districts, and provide for

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**the election of additional justices in the new district not exceeding the limit herein provided.**

See last paragraph of preface to this volume.

*In general.*—The merger of legal and equitable jurisdiction in the supreme court by the Constitution of 1846, in consequence of the abolition of the court of chancery, was considered in *Phillips* v. *Gorham* (1858) 17 N. Y. 270, where the court say: "The supreme original civil jurisdiction at law was, under the preceding Constitution, in the supreme court; the equitable jurisdiction was in the court of chancery. The new Constitution conferred the whole jurisdiction upon a single court. The subject to be acted about was the vesting of judicial authority, not the regulating of judicial procedure. This juridical authority had existed in two distinct branches, and both are named with the purpose of conferring both upon the new supreme court."

The act of 1868, chap. 853, which vested in the supreme court in the first judicial district, the court of common pleas, and the superior court of the city of New York, exclusive jurisdiction of actions against the city, did not restrict the general jurisdiction of the supreme court. The legislature has power to prescribe the county in which particular actions shall be brought and tried. *Brooklyn* v. *New York* (1881) 25 Hun, 612.

A similar provision in the New York charter of 1882, chap. 410, was considered in *Mussen* v. *Ausable Granite Works* (1892) 63 Hun, 367, 18 N. Y. Supp. 267, sustaining an action brought in the fourth judicial district to enforce a lien on funds belonging to the city of New York. The jurisdiction of the supreme court "is as wide as the boundaries of the state, and every person, natural or artificial, within such boundaries, is subject to that jurisdiction. For convenience in the transaction of business, the state has been divided up into districts, but the court in each district is the supreme court of the state, and each has the same power, no more or less than the other. . . . The jurisdiction is given to each and every part of the supreme court, each possessing all the power granted to the court, and to confine jurisdiction in certain classes of cases to one part of the court is to deprive the rest of the court of its jurisdiction, or to limit or qualify it. . . . The suitor also has rights under this section of the Constitution that cannot be taken away from him. He has a right to go into the supreme court any-

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where for relief. To apply to the court, not to a particular member or territorial division of it. He cannot, by legislative enactment, be compelled to go before a particular member of it or to a specific county, although the court, in the exercise of its power, may, in furtherance of justice, subsequently send him there; but he has a right to apply to it for relief wherever, within the limits of the state, he finds it exercising its functions. . . . The term 'jurisdiction' as used in the Constitution . . . means jurisdiction of every kind that a court can possess, of the person, subject-matter, territorial, and generally the power of the court in the discharge of its judicial duties."

The same charter provision was considered in *Getman* v. *New York* (1892) 66 Hun, 236, 21 N. Y. Supp. 116, where it was held that the attempt to limit the jurisdiction of the supreme court was unconstitutional, but that the act was valid as regulating local actions and fixing the place of trial; and that the place of trial of an action commenced elsewhere should be changed to the city of New York.

The jurisdiction of the supreme court cannot be limited by the legislature nor by any power conferred by it upon the court itself. *People ex rel. New York* v. *Nichols* (1880) 79 N. Y. 582. See *De Hart* v. *Hatch* (1875) 3 Hun, 375; *People ex rel. Hill* v. *Wayne County* (1888) 49 Hun, 476, 2 N. Y. Supp. 555, sustaining § 2122 of the Code of Civil Procedure, denying the writ of certiorari where an adequate remedy by appeal is provided by law; applied in a case where the supervisors of a town might have appealed to the state assessors from the action of the board of supervisors in the equalization of assessments.

The jurisdiction of the supreme court is not restricted by the provision of the railroad law which makes the second report of commissioners final and conclusive. *Re Prospect Park & C. I. R. Co.* (1881) 85 N. Y. 489.

Section 184 of the second class cities charter of 1898, chap. 182, providing in specified cases for the removal of members of the police force, and that the decision of the commissioner of public safety "shall be final and conclusive, and not subject to review by any court," does not affect the jurisdiction conferred on the supreme court by the Constitution. A proceeding under the statute is not judicial. *People ex rel. Graveline* v. *Ham* (1901) 59 App. Div. 314, 69 N. Y. Supp. 283.

Buffalo police commissioners were by the act of 1899, chap. 587, amending the Buffalo charter, made subject to removal by the jus-

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tices of the supreme court resident in Erie county, and they were constituted a tribunal for that purpose. In *Re Rupp* (1899) 28 Misc. 703, 59 N. Y. Supp. 997, affirmed without opinion in (1899) 45 App. Div. 631, 61 N. Y. Supp. 1147, Justice Laughlin held this statute unconstitutional, saying that "it was not competent for the legislature to create a special tribunal of justices and to name or select practically by name the justices of a particular locality who are to compose the court. The orderly administration of justice should be general and uniform. This statute imposes judicial duties upon particular justices to the exclusion of all the other justices of the same judicial district and of the state, and tends to disorganize the established judicial tribunals." Justice Laughlin, who resided in the county of Erie, said he had conferred with his four associates residing in that county and had submitted the opinion to them; that they all concurred in his views and deemed it proper that the resident justices should decline to proceed under this statute.

*Administrative functions.*—In *People ex rel. Decker* v. *Waters* (1893) 4 Misc. 1, 23 N. Y. Supp. 691, Justice Parker considered the validity of the provision of the excise act of 1892, chap. 401, as amended in 1893, chap. 481, authorizing the supreme court, among others, to review by certiorari the action of a local board of excise in refusing to grant a license, and conferring on the court power to require the excise board to issue a license to the applicant, and said the legislature could not have intended to vest the supreme court with administrative functions, "for it was without power to require the supreme court or the justices thereof to perform other than judicial duties;" citing Federal authorities to the effect that "neither the legislative nor the executive branches can constitutionally assign to the judiciary any duties but such as are properly judicial, and to be performed in a judicial manner."

*Admiralty.*—The jurisdiction of the state supreme court to entertain an action to enforce a lien for repairs to a canal boat used on the Erie canal and Hudson river was considered in *The Robert W. Parsons* (1903) 191 U. S. 17, *sub nom. Perry* v. *Haines*, 48 L. ed. 73, 24 Sup. Ct. Rep. 8, reversing (1901) 168 N. Y. 586, 60 N. E. 1112. The court say that "not the ebb and flow of the tide, but the actual navigability of the waters, is the test of the jurisdiction" as between the state courts and the Federal admiralty courts. "The only distinction between canals and other navigable waters is that they are rendered navigable by artificial means, and sometimes, though by no means always, are wholly within the limits of a particular state. . . . They are usually constructed to connect

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waters navigable by nature, and to avoid the portage of property from one navigable lake or river to another. . . . The Erie canal . . . is a great highway of commerce between ports in different states and foreign countries, and is navigated by vessels which also traverse the waters of Hudson river from the head of navigation to its mouth." The exclusive admiralty and maritime jurisdiction of the Federal courts attaches to canal boats used on the Erie canal, for the reason that they are ships or vessels within the meaning of the admiralty law. "Neither size, form, equipment, nor the means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged. . . . So far as the Congress of the United States and the Parliament of England have incidentally spoken upon the subject, they have fixed a criterion of size as to what shall be considered a vessel within the admiralty jurisdiction far below the tonnage of an ordinary canal boat." Thus, by the original judiciary act of 1789, vessels of ten tons or more burden were under admiralty jurisdiction; by the act of 1845 vessels of twenty tons burden and upwards used on the Great Lakes and connecting waters were under maritime jurisdiction, and the standard was fixed at twenty tons by the United States Revised Statutes; and the court cites the English act of 1854, by which a ship is described as including "every description of vessel not propelled by oars." Replying to the suggestion that because canal boats were drawn by horses they could not be subject to admiralty jurisdiction, the court say that it is difficult to see how the jurisdiction is affected by the means of propulsion, and the fact is noted that canal boats, upon reaching Albany, are relieved of their horses and towed to New York. It is well settled that vessels navigating the Hudson river are subject to the admiralty jurisdiction of the Federal courts.

*Anti-monopoly act.*—The power devolved on a justice of the supreme court by the anti-monopoly act of 1897, chap. 383, to issue an order for the examination of witnesses for the purpose of determining whether an action should be commenced under the act, is judicial. *Re Atty. Gen.* (1897) 22 App. Div. 285, 47 N. Y. Supp. 883. The same rule was declared in *Re Davies* (1901) 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 118, construing the anti-monopoly act of 1899, chap. 690, which was a substantial re-enactment of the former statute.

*Charitable uses.*—The court of chancery had jurisdiction of actions involving charitable uses. *Williams* v. *Williams* (1853) 8 N. Y. 525.

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*Consuls.*—In *Davis* v. *Packard* (1834) 8 Pet. 312, 8 L. ed. 957, reported also (1833) 7 Pet. 276, 8 L. ed. 684 and (1832) 6 Pet. 41, 8 L. ed. 312, it was held that the supreme court of New York had no jurisdiction of an action against a consul general of Saxony.

*Equity.*—In *Sherman* v. *Felt* (1849) 2 N. Y. 186, the court expressed the opinion that the supreme court, under the Constitution of 1846, had "the same jurisdiction as that court formerly had, with the addition of the equity jurisdiction of the late court of chancery," and might therefore entertain a motion to set aside a decree of the latter court.

The Constitution of 1846 and the Code of Procedure abrogated all limitations of amount in equity actions which had previously applied to the jurisdiction of the court of chancery. *Sarsfield* v. *Van Vaughner* (1862) 15 Abb. Pr. 65.

The jurisdiction conferred on the supreme court by this section "includes all cases which may be properly comprehended by established and existing equitable principles. The test of jurisdiction cannot be restricted to the existence of some definite precedent for the action which may be brought. That would destroy the flexibility required to maintain the utility of the court in the demands necessarily made for the exercise of its authority in new cases always arising out of the enterprises and progress of society. . . . Those principles are as broad as the just wants and necessities of civilized society require; and it is scarcely possible to imagine a case in which equitable relief may be proper which they do not include." *Youngs* v. *Carter* (1877) 10 Hun, 194.

*Foreign corporations.*—"It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him, or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service." *Goldey* v. *Morning News* (1895) 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559. "The residence of an officer of a corporation does not necessarily give the corporation a domicil in the state. He must be there officially,—there representing the corporation in its business;" and if the corporation is not doing business in the state, service therein of a summons upon such an officer does not give the state court jurisdiction. The supreme court of New York could not acquire jurisdiction of a foreign corporation by such a service. *Conley* v. *Mathieson Alkali Works* (1903) 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728. See also *Geer* v.



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*Mathieson Alkali Works* (1903) 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807. The subject of the service of a summons on a foreign corporation is also considered under "Procedure," in the note on legislative power, in article 3.

*Foreign judgment.*—"The judgment of a court of a sister state has no binding effect in this state, unless the court had jurisdiction of the subject-matter and of the persons of the parties. Want of jurisdiction is a matter which may always be interposed against a judgment when sought to be enforced, or when any benefit is claimed for it; the want of jurisdiction, either of the subject-matter or of the person of either party, renders a judgment a mere nullity." *Kerr* v. *Kerr* (1869) 41 N. Y. 272.

*Foreign real property.*—While, as a general rule, actions relating to real property must be brought where the property is situated, this rule may be waived, and the supreme court may, if the defendant does not object, entertain jurisdiction of an action to recover damages for an injury to real property situated outside the state. *Sentenis* v. *Ladew* (1893) 140 N. Y. 463, 37 Am. St. Rep. 569, 35 N. E. 650.

*Forts and arsenals.*—In the absence of Federal legislation on the subject state courts have jurisdiction of actions to recover damages for injuries sustained in portions of the state, like forts and arsenals, ceded to the United States. Congress might vest in Federal courts exclusive jurisdiction in such cases, but until it does so the supreme court may entertain the same jurisdiction of a personal action arising in such ceded territory that it might entertain of a similar action arising in another state. The effect of a cession to the United States "is merely to create, so to speak, within our territory, a foreign state or territory." *Madden* v. *Arnold* (1897) 22 App. Div. 240, 47 N. Y. Supp. 757, affirmed in (1900) 162 N. Y. 638, 57 N. E. 1127.

*Inferior courts.*—"It is quite certain that the legislature has not the right to authorize the city judge of Brooklyn to exercise complete jurisdiction in a cause pending in the supreme court, or a judge of any one court to exercise complete jurisdiction in a cause pending in another court, except where expressly directed by the Constitution; . . . such a power would be of the essence of judicial functions, and can be conferred only upon the judges of the court in which the action is pending." *Cushman* v. *Johnson* (1857) 13 How. Pr. 495, per Clerke, J.

In *Boyd* v. *Stewart* (1893) 30 Abb. N. C. 127, 24 N. Y. Supp. 830, the city court of New York asserted and exercised jurisdiction to

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consolidate two actions for the foreclosure of a mechanic's lien, one of which had been commenced in that court and one in the supreme court. It was said that such an action was neither a common law nor an equity action, "but purely of statutory creation."

"The exercise of authority generally by the former court of chancery and subsequently by the supreme court over inferior courts, including probate courts, has always been recognized and has been continually exercised, except so far as it has been changed either by constitutional provision or by legislative enactment." The appellate division has general jurisdiction of a matter brought into it by appeal from the surrogate's court. Limitation upon the jurisdiction of the supreme court is beyond legislative power, but methods of procedure are subject to legislative control. The supreme court may stay proceedings in the surrogate's court. *Re Pye* (1897) 21 App. Div. 266, 47 N. Y. Supp. 689.

*Judicial districts.*—The provision at the end of the section, relating to the apportionment of justices on the alteration of judicial districts, was added by the Convention of 1894. The power to alter judicial districts was considered in *Rumsey* v. *People* (1859) 19 N. Y. 41, where it was held that the creation of a new county could not affect existing judicial districts.

The act of 1895, chap. 934, annexing to New York a part of Westchester county, did not affect judicial districts. *People ex rel. Henderson* v. *Westchester County* (1895) 147 N. Y. 1, 30 L. R. A. 74, 41 N. E. 563.

*Jurisdiction, how limited.*—In *Carleton* v. *Darcy* (1880) 14 Jones & S. 484, it was suggested that in proceedings under the act of 1839, chap. 246, for the acquisition of certain property for city purposes in New York, and which applied the procedure prescribed by the act of 1834, chap. 150, the supreme court had only limited and special jurisdiction, and therefore that it was necessary to show that all requisite steps had been taken.

While the legislature cannot limit or abridge the general jurisdiction of the supreme court as conferred by the Constitution, it may, without restricting its general jurisdiction, designate the place for the deposit of surplus moneys arising from the sale of lands in foreclosure or partition actions where the owner is dead. Sections 2798 and 2799 of the Code of Civil Procedure, requiring the deposit of such surplus moneys in the surrogate's court, and authorizing their distribution by that court, are valid, and do not affect the jurisdiction of the supreme court to entertain and determine the action and to execute its judgment. These sections deal only with

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a fund arising from the execution of the judgment, not disposed of by the decree, and commit that fund to the custody and control of a court which, at the time the Constitution was adopted, had extensive jurisdiction over the estates of deceased persons, and this jurisdiction was recognized by that instrument in various provisions for its future organization and existence. "The general jurisdiction conferred upon the supreme court by the Constitution does not operate to prevent the legislature from giving additional jurisdiction to other tribunals, or from changing the common law, or from regulating and altering the jurisdiction and proceedings in law and equity in the same manner and to the same extent as had been exercised by it before the Constitution of 1846 was adopted." *Re Stilwell* (1893) 139 N. Y. 337, 34 N. E. 777.

"The supreme court, under the Constitution of the state, has general jurisdiction in law and equity, but the exercise of its power is subject to the limitations and regulations of the Code of Civil Procedure." *Clapp* v. *McCabe* (1895) 84 Hun, 379, 32 N. Y. Supp. 425.

*Militia.*—In *People ex rel. Weeks* v. *Ewen* (1859) 17 How. Pr. 375, Justice Clerke says the supreme court undoubtedly has "the power of redressing or remedying any usurpation or abuse of authority committed by any individual or association of individuals within the state. This power extends to all and over all; and certainly the military organization of the state is not exempt from it. To place that branch of the public service beyond the control and supervision of the tribunal possessing supreme original civil jurisdiction would be jeopardizing the civil rights of the citizens, and may, in the course of time, terminate in the ascendancy of the military power, and the subversion of constitutional government;" but "this court has no power to interfere with the legitimate exercise of authority, and will refrain from employing the power which it does possess, particularly by mandamus in doubtful cases or on inexpedient occasions." The governor, as commander in chief, had ordered the consolidation of certain militia companies. The court sustained his authority, and declined to inquire into the propriety of his action.

*Pardons.*—Where a pardoned convict violates the condition of the pardon, he is again subject to punishment as if the pardon had not been granted; and the supreme court has jurisdiction to pronounce whatever judgment the circumstances may require. *People* v. *Potter* (1846) 1 Edm. Sel. Cas. 235.

*Patents.*—The court of chancery had jurisdiction of an action to

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recover damages for a fraud in a sale of a patent right. The court say that an action for the infringement of a patent should be brought in the United States circuit court, but that, on general questions relating to patents, that court and the state courts have concurrent jurisdiction. *Burrall* v. *Jewett* (1830) 2 Paige, 134, citing *Parsons* v. *Barnard* (1810) 7 Johns. 144, where it was held that state courts had no jurisdiction of an action for the infringement of a patent. See also *Dudley* v. *Mayhew* (1849) 3 N. Y. 9.

*Place of trial.*—The jurisdiction of the supreme court to change the place of trial of an action in a proper case was not affected by the act of 1888, chap. 577, requiring certain actions for the recovery of penalties for the violation of the game laws to be prosecuted in the county where commenced. *People* v. *Coughtry* (1890) 58 Hun. 245, 12 N. Y. Supp. 259; *People* v. *Rouse* (1891) 39 N. Y. S. R. 656, 15 N. Y. Supp. 414.

The provision of the domestic commerce law of 1896, chap. 376, § 29, relating to actions for penalties imposed for the unlawful use of milk cans, and prohibiting a change of the place of trial of an action brought as therein specified, is an unconstitutional limitation of the jurisdiction of the supreme court. *Bell* v. *Niewahner* (1900) 54 App. Div. 530, 66 N. Y. Supp. 1096; *Warner* v. *Palmer* (1901) 66 App. Div. 127, 72 N. Y. Supp. 703.

*Preferences in civil actions.*—The legislature has no power to control or limit the discretion of the court as to the order of its business. "One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers and jurisdiction by constitutional provisions, has been the right to control its order of business and to so conduct the same that the rights of all suitors before them may be safeguarded. This power has been recognized as judicial in its nature, and as being a necessary appendage to a court organized to enforce rights and redress wrongs. . . . Under the Constitution the legislature has the power to alter and regulate the proceedings in law and equity," but it cannot "compel the courts to give a hearing to a particular suitor to the absolute exclusion of others who have an equal claim upon its attention." The act of 1904, chap. 173, amending § 793 of the Code of Civil Procedure by requiring the court to designate a day certain for the trial of a preferred cause, and to try the cause on that day, was an unconstitutional limitation of judicial discretion. *Riglander* v. *Star Co.* (1904) 98 App. Div. 101, 90 N. Y. Supp. 772; *Martin's Bank* v. *Amazonas Co.* (1904) 98 App. Div. 146, 90 N. Y. Supp. 734.

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*Public officers.*—"A court of equity exercises its peculiar jurisdiction over public officers to control their action only to prevent a breach of trust affecting public franchises, or some illegal act under color or claim of right affecting injuriously the property rights of individuals. A court of equity has, as such, no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made, coming within one of the acknowledged heads of equity jurisdiction. . . . The courts will not and cannot restrain the legislature, either directly or indirectly; and an injunction based upon the assumption that the legislature may, by an appropriation of the public moneys, give effect to an unauthorized or illegal act of a public body, is without precedent and would be absurd." *People* v. *Canal Board* (1874) 55 N. Y. 390.

*Removal to Federal court.*—Questions relating to removal were presented in the following cases: *Jones* v. *Seward* (1864) 41 Barb. 269 (Federal habeas corpus act passed March 3, 1863); *Stephens* v. *Howe* (1872) 43 How. Pr. 134 (Federal acts of 1866–7, authorizing removal on ground of prejudice, etc.).

*Salvage cases.*—State courts have, concurrently with Federal courts, jurisdiction in salvage cases. *Cashmere* v. *De Wolf* (1849) 2 Sandf. 379.

*Trusts.*—The supreme court has jurisdiction of an action in relation to the disposition of a trust fund where the trustee is a New York corporation, and the court acquires jurisdiction of the parties. *Farmers' Loan & T. Co.* v. *Ferris* (1901) 67 App. Div. 1, 73 N. Y. Supp. 475.

§ 2. [*Appellate Division.*]—The legislature shall divide the state into four judicial departments. The first department shall consist of the county of New York; the others shall be bounded by county lines, and be compact and equal in population as nearly as may be. Once every ten years the legislature may alter the judicial departments, but without increasing the number thereof.

There shall be an appellate division of the supreme court, consisting of seven justices in the first department, and of five justices in each of the other departments. In each department four shall constitute a quorum, and the

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concurrence of three shall be necessary to a decision. No more than five justices shall sit in any case.

From all the justices elected to the supreme court the governor shall designate those who shall constitute the appellate division in each department; and he shall designate the presiding justice thereof, who shall act as such during his term of office, and shall be a resident of the department. The other justices shall be designated for terms of five years, or the unexpired portions of their respective terms of office, if less than five years. From time to time, as the terms of such designations expire, or vacancies occur, he shall make new designations. A majority of the justices so designated to sit in the appellate division in each department shall be residents of the department. He may also make temporary designations in case of the absence or inability to act of any justice in the appellate division, or in case the presiding justice of any appellate division shall certify to him that one or more additional justices are needed for the speedy disposition of the business before it. Whenever the appellate division in any department shall be unable to dispose of its business within a reasonable time, a majority of the presiding justices of the several departments, at a meeting called by the presiding justice of the department in arrears, may transfer any pending appeals from such department to any other department for hearing and determination. No justice of the appellate division shall exercise any of the powers of a justice of the supreme court, other than those of a justice out of court, and those pertaining to the appellate division, or to the hearing and decision of motions submitted by consent of counsel. From and after the last day of December, one thousand eight hundred and ninety-five, the appellate division shall have the jurisdiction now exercised by the supreme court at its general terms, and by the general terms of the court of common pleas for the city and county of

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New York, the superior court of the city of New York, the superior court of Buffalo, and the city of Brooklyn, and such additional jurisdiction as may be conferred by the legislature. It shall have power to appoint and remove a reporter.

The justices of the appellate division in each department shall have power to fix the times and places for holding special and trial terms therein, and to assign the justices in the departments to hold such terms, or to make rules therefor.

[As amended in 1899. Const. 1846, art. 6, § 6; Jud. Art. 1869, § 7; Const. 1894, art. 6, § 2. The amendment of 1899 omits "court" in the reference to the city court of Brooklyn. The original form of the section will be found in the Constitution of 1894 in the Introduction. The amendment authorizes the designation of additional justices to the appellate division on the certificate of the presiding justice.]

The legislature of 1905 submitted to the people a proposed amendment changing the thirteenth sentence of this section, relative to the powers of justices of the appellate division, to read as follows:

No justice of the appellate division shall, within the department to which he may be designated to perform the duties of an appellate justice, exercise any of the powers of a justice of the supreme court, other than those of a justice out of court, and those pertaining to the appellate division, or to the hearing and decision of motions submitted by consent of counsel, but any such justice, when not actually engaged in performing the duties of such appellate justice in the department to which he is designated, may hold any term of the supreme court and exercise any of the powers of a justice of the supreme court in any county or judicial district in any other department of the state.

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The amendment also omits from the existing section the words "and trial" after "special," in the last sentence; the effect of which is to abrogate the constitutional power of the appellate division as to trial terms. The Code of Civil Procedure, § 232, contains the original constitutional provision as to appointments of special and trial terms, and also requires the trial justices to make such appointments if they are not made at regular intervals by the justices of the appellate division. The right of the justices of the appellate division to make such appointments becomes, by this amendment, a statutory instead of a constitutional right, and subject to modification or repeal by the legislature. See last paragraph of preface to this volume.

*In general.*—"The appellate divisions are a continuance of the former general terms, exercising the same appellate jurisdiction, but remaining, as did the former court, a part of the supreme court of the state. So far as the exercise of jurisdiction is concerned in matters which are brought before it, it possesses the same power and authority as was formerly possessed by the general terms, and the provisions of law which provide for remitting its records, orders, and judgments to inferior tribunals for their action and to carry out its orders and judgments, relate to methods of procedure, and are not limitations upon its original jurisdiction." *Re Pye* (1897) 21 App. Div. 266, 47 N. Y. Supp. 689.

The appellate division succeeds to the jurisdiction possessed by the late general term of the supreme court. *Re Barkley* (1899) 42 App. Div. 597, 61 N. Y. Supp. 1132, appeal dismissed (1900) 161 N. Y. 647, 57 N. E. 1103.

While the jurisdiction of the appellate division under this section was not complete until January 1, 1896, the justices previously designated to this court might meet before that date and designate the terms of the court and assign the justices who were to preside therein. The Constitution did not fix the time for the performance of this act. Section 232 of the Code of Civil Procedure, which required such designations to be made before December 1, 1895, was directory. *People* v. *Youngs* (1896) 151 N. Y. 210, 45 N. E. 460.

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This section does not conflict with the provision in § 5 of this article relating to appeals from the Buffalo municipal court. *Boechat* v. *Brown* (1896) 9 App. Div. 369, 41 N. Y. Supp. 467.

The act of 1896, chap. 378, providing for special jury commissioners in New York to be appointed by the justices of the appellate division, did not violate this section of the Constitution. *People* v. *Hall* (1901) 169 N. Y. 184, 62 N. E. 170.

*Other powers of justices.*—A justice of the appellate division cannot receive a verdict, even by consent of counsel. "The purpose of the Constitution was to absolutely divorce the justices of the appellate division from all connection with the trial courts, except as to motions submitted by consent of counsel, and the command of the Constitution is clear and imperative. The jurisdiction exercised by justices of the supreme court as to proceedings in trial courts ceased upon their becoming justices of the appellate division." *French* v. *Merrill* (1898) 27 App. Div. 612, 50 N. Y. Supp. 776.

A justice of the supreme court, before whom an action had been tried but not decided, was temporarily designated to the appellate division. This suspended his powers as a trial justice, but it was held that upon the revocation of the designation he again became fully vested with jurisdiction of the case, and might decide it with the same effect as if the designation to the appellate division had not been made. *Irving Nat. Bank* v. *Moynihan* (1903) 78 App. Div. 141, 79 N. Y. Supp. 528; *Kane* v. *Hutkoff* (1902) 38 Misc. 678, 78 N. Y. Supp. 262.

*Presiding justice.*—The presiding justice of the appellate division succeeds to the jurisdiction previously exercised by the presiding judge of the general term of the New York court of common pleas in relation to the examination of accounts of committees of incompetent persons. *Re Arnold* (1902) 76 App. Div. 126, 78 N. Y. Supp. 772.

*Quorum.*—"A quorum of four justices, holding an appellate division, are, in contemplation of law, the appellate division, and . . . their unanimous vote of affirmance is a compliance with the provisions of the Constitution and Code. . . . A quorum is the number of the members of a body competent to transact business." A constitutional provision that four justices shall constitute a quorum in effect confers on four the powers with which five are invested. "A judicial or legislative body having a quorum present proceeds ordinarily as if every member was sitting in his place, and exercises all the powers with which it is invested. Any other rule would greatly embarrass the transaction of business in case

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of illness or voluntary or enforced absence among the members." *Harroun* v. *Brush Electric Light Co.* (1897) 152 N. Y. 212, 38 L. R. A. 615, 46 N. E. 291.

*Terms and assignments.*—This section does not in terms confer on the justices of the appellate division power to assign to duty in their department a justice of the supreme court residing in another department, and such an assignment cannot be regarded as made under the provisions of the Constitution and of § 232 of the Code of Civil Procedure; yet it may be treated as an invitation to hold such term, and if the justice so assigned accepts the invitation he has full authority to hold such term. Section 6 confers on each justice of the supreme court general authority to hold court in any county. *People* v. *Herrmann* (1896) 149 N. Y. 190, 43 N. E. 546.

The jurisdiction conferred on the justices of the appellate division to appoint terms and designate justices therefor is not exclusive, and does not conflict with the power conferred on the governor by the Code of Civil Procedure to appoint extraordinary terms of the different branches of the supreme court. *People* v. *Young* (1897) 18 App. Div. 166, 45 N. Y. Supp. 772.

§ 3. [*Judge not to sit in review of his own decision; proceedings in law and equity.*]—No judge or justice shall sit in the appellate division or in the court of appeals in review of a decision made by him or by any court of which he was at the time a sitting member. The testimony in equity cases shall be taken in like manner as in cases at law; and, except as herein otherwise provided, the legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised.

[Const. 1846, art. 6, § 10; Jud. Art. 1869, § 8.]

The rule that a judge shall not sit in review of a decision rendered by him had a colonial origin. The instructions from the home government to Sir Henry Moore, who became governor of New York in November, 1765, contained a provision which had long

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been in force in the colony, authorizing an appeal from local courts to the governor and council in cases involving large amounts, with the further right of appeal to the King in council. Judges were sometimes members of the colonial council and the instructions specifically provided that in case of appeals from courts of which such judges were members they "shall not be permitted to vote upon the said appeal, but they may nevertheless be present at the hearing thereof to give the reasons of the judgment given by them in the causes wherein such appeals shall be made." I have not had access to all the instructions issued to all the colonial governors, but this is the earliest instance I have found in which members of the council were prohibited from sitting in review of decisions rendered by them while members of a judicial tribunal. The above rule was repeated in the instructions to Governor Tryon in 1771, and was continued in substance in article 32 of the first Constitution, relating to the court for the correction of errors, where the chancellor and judges of the supreme court were required to give the reasons for their decisions from which an appeal had been taken, but they had no voice in determining the appeal. The Constitution of 1821, article 5, § 1, contained the same provision.

In *Re Members of Court of Errors* (Chancellor's Case) (1830) 6 Wend. 158, the court for the correction of errors held that the chancellor might sit in review of a decision rendered by him while acting as circuit judge, and that the provision of the Revised Statutes, 2 Rev. Stat. 275, § 3, prohibiting a judge of an appellate court from sitting in review of a decision rendered by him while a member of another court, was unconstitutional as applied to a judge who afterwards became chancellor.

The Constitution of 1846 did not continue the prohibition contained in former Constitutions. This abroga-

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tion of the prohibition was considered in *Pierce* v. *Delamater* (1847) 1 N. Y. 17, where it was held that it was the right and the duty of a judge of the court of appeals to take part in the determination of causes brought up for review from a subordinate court of which he was a member, and in the decision of which he took part in the court below. Judge Bronson, who had come into the court from the supreme court, and who wrote the opinion, expressed some views quite different from those which prevailed in earlier days, and which are now deemed controlling on this subject. He said:

"There is nothing in the nature of the thing which makes it improper for a judge to sit in review upon his own judgments. If he is what a judge ought to be,—wise enough to know that he is fallible, and therefore ever ready to learn; great and honest enough to discard all mere pride of opinion, and follow truth wherever it may lead; and courageous enough to acknowledge his errors,—he is then the very best man to sit in review upon his own judgments. He will have the benefit of a double discussion. If right at the first, he will be confirmed in his opinion; and if wrong, he will be quite as likely to find it out as any one else."

Judge Bronson and three other judges took part in reviewing appeals from decisions rendered by other courts of which they were members.

The Convention of 1867 restored the prohibition, and it was included in the judiciary article adopted in 1869.

The rule prohibiting a judge from sitting in review of his own decision was construed and affirmed in *Real* v. *People* (1870) 42 N. Y. 270; *Pistor* v. *Hatfield* (1871) 46 N. Y. 249; *Duryea* v. *Traphagen* (1881) 84 N. Y. 652; and also in *Van Arsdale* v. *King* (1897) 152 N. Y. 69, 46 N. E. 179, where it is said that "litigants are entitled to have their appeals heard and determined by a constitutional court."

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This rule was held not to apply where the justice who sat in the general term had made an *ex parte* order which had been vacated by another judge and the appeal was from the latter order. The first order was not under review by the general term. *Philips* v. *Germania Bank* (1887) 107 N. Y. 630, 13 N. E. 923.

In *Farmers' Nat. Bank* v. *Houston* (1887) 44 Hun, 567, the court considered the provision relating to the method of taking testimony in equity cases, and said: "This does not mean that equity cases shall be tried by a jury. The difference in the two courts as to the manner of taking testimony had previously been this: In courts of law the witnesses were produced, sworn, and examined before the tribunal which was to decide. In courts of equity witnesses were examined before an examiner, and only their written testimony was presented to the tribunal. It was this difference which was abolished by the Constitution." The court has no power to direct that testimony taken before a referee in a foreclosure action be used upon the trial.

The legislature has power to regulate the issues in equity cases. *Eggers* v. *Manhattan R. Co.* (1891) 21 N. Y. Civ. Proc. Rep. 403, 42 N. Y. S. R. 123, 18 N. Y. Supp. 181.

§ 4. [*Vacancies in supreme court.*]—The official terms of the justices of the supreme court shall be fourteen years from and including the first day of January next after their election. When a vacancy shall occur otherwise than by expiration of term in the office of justice of the supreme court the same shall be filled for a full term, at the next general election happening not less than three months after such vacancy occurs; and, until the vacancy shall be so filled, the governor, by and with the advice and consent of the senate, if the senate shall be in session, or, if not in session, the governor, may fill such vacancy by appointment, which shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

[Const. 1821, art. 4, § 7; 1846, art. 6, § 13; Jud. Art. 1869, § 9.]

A justice of the supreme court resigned the day before election

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in 1871. His term would have expired on the 31st of the following December. A successor was elected at that election, pursuant to regular notice. After election the governor made an appointment to fill the vacancy. It was held that this appointment was only for the remainder of the unexpired term, namely, to December 31, 1871, and that the person elected at the general election was entitled to hold the office for the full term of fourteen years, beginning January 1, 1872. *People ex rel. Jackson* v. *Potter* (1872) 47 N. Y. 375.

On the 10th of September, 1872, the senate, being then in session, adjourned to meet again on the 20th of November, 1872. On the 21st of September the governor appointed a justice of the supreme court to fill a vacancy which occurred on the 13th. It was held that the senate was not in session at this time within the meaning of the Constitution. The words "in session" "indicate a present acting or being of the senate as a body," and the members are then assembled for business. *People* v. *Fancher* (1872) 50 N. Y. 288.

In *People ex rel. Hart* v. *Goodrich* (1904) 92 App. Div. 445, 87 N. Y. Supp. 114, it was held that where a vacancy in the office of justice of the supreme court occurred on the 3d of August, 1896, an election on the 3d of November to fill such vacancy was constitutional. It was precisely three months.

§ 5. [*Certain local courts abolished.*]—The superior court of the city of New York, the court of common pleas for the city and county of New York, the superior court of Buffalo, and the city court of Brooklyn, are abolished from and after the first day of January, one thousand eight hundred and ninety-six, and thereupon the seals, records, papers, and documents of or belonging to such courts shall be deposited in the offices of the clerks of the several counties in which said courts now exist; and all actions and proceedings then pending in such courts shall be transferred to the supreme court for hearing and determination. The judges of said courts in office on the first day of January, one thousand eight hundred and ninety-six, shall, for the remainder of the term for which they were elected or appointed, be justices of the supreme court; but they shall sit only in the counties in which they were elected or ap-

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pointed. Their salaries shall be paid by the said counties respectively, and shall be the same as the salaries of the other justices of the supreme court residing in the same counties. Their successors shall be elected as justices of the supreme court by the electors of the judicial districts in which they respectively reside.

The jurisdiction now exercised by the several courts hereby abolished shall be vested in the supreme court. Appeals from inferior and local courts now heard in the court of common pleas for the city and county of New York, and the superior court of Buffalo, shall be heard in the supreme court in such manner and by such justice or justices as the appellate divisions in the respective departments which include New York and Buffalo shall direct, unless otherwise provided by the legislature.

[Jud. Art. 1869, § 12; Am. 1880.]

A party who had availed himself of the statutory right to appeal from a judgment of the Buffalo municipal court to the special term of the supreme court could not afterwards appeal to the general term of that court. The right to appeal to either court was in the alternative, and having made his election, the party was bound by it. This right of appeal was conferred by the act of 1895, chap. 805, as a substitute for the former appeal from the municipal court to the Buffalo superior court, and followed the abolition of the latter court by the Constitution of 1894. *Boechat* v. *Brown* (1896) 9 App. Div. 369, 41 N. Y. Supp. 467.

§ 6. [*Circuit courts and courts of oyer and terminer abolished.*]—Circuit courts and courts of oyer and terminer are abolished from and after the last day of December, one thousand eight hundred and ninety-five. All their jurisdiction shall thereupon be vested in the supreme court, and all actions and proceedings then pending in such courts shall be transferred to the supreme court for hearing and determination. Any justice of the supreme court, except

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as otherwise provided in this article, may hold court in any county.

[New.]

The Constitution of 1821 authorized a circuit judge to hold circuits anywhere in the state, and this right was not restricted by the fact that another judge was holding an equity term in the same circuit at the same time. *Child* v. *Fulton Bank* (1827) 7 Cow. 513.

The right of a justice of the supreme court to hold court in any county is not limited by the fact that he had been assigned to hold a term in another department by the justices thereof. Although such justices did not, in terms, possess the right to make such assignment, it was at least an invitation, which the justice might accept or decline, and having accepted it his jurisdiction was complete. *People* v. *Herrmann* (1896) 149 N. Y. 190, 43 N. E. 546.

The provision abolishing the court of oyer and terminer, and transferring its jurisdiction and pending proceedings to the supreme court, was self-executing, and no order was necessary to vest in the supreme court complete authority to hear and determine any criminal action or proceeding pending in the court of oyer and terminer on the last day of December, 1895. *People* v. *Hoch* (1896) 150 N. Y. 291, 44 N. E. 976.

§ 7. [*Court of appeals.*]—The court of appeals is continued. It shall consist of the chief judge and associate judges now in office, who shall hold their offices until the expiration of their respective terms, and their successors, who shall be chosen by the electors of the state. The official terms of the chief judge and associate judges shall be fourteen years from and including the first day of January next after their election. Five members of the court shall form a quorum, and the concurrence of four shall be necessary to a decision. The court shall have power to appoint and to remove its reporter, clerk, and attendants. Whenever and as often as a majority of the judges of the court of appeals shall certify to the governor that said court is unable, by reason of the accumulation of causes pending therein, to hear and dispose of the same with reasonable



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speed, the governor shall designate not more than four justices of the supreme court to serve as associate judges of the court of appeals. The justices so designated shall be relieved from their duties as justices of the supreme court and shall serve as associate judges of the court of appeals until the causes undisposed of in said court are reduced to two hundred, when they shall return to the supreme court. The governor may designate justices of the supreme court to fill vacancies. No justice shall serve as associate judge of the court of appeals except while holding the office of justice of the supreme court, and no more than seven judges shall sit in any case.

[As amended in 1899; Const. 1846, art. 6, § 2; Jud. Art. 1869, § 2; Const. 1894, art. 6, § 7. The last four sentences were added by the amendment of 1899.]

A judge must be wholly disinterested between the parties. Partiality and bias are presumed from the relationship or consanguinity of a judge to the party. "He is first excluded by the moral sense of all mankind; the common law next denies him the right to sit," and then the legislature has embodied this universal sentiment in the form of a statutory prohibition. If a judge is disqualified he cannot sit in the cause, even by consent of parties; his disqualification is absolute and cannot be waived. The court ordered a reargument of a cause in which a judge had taken part after notice by him that he was disqualified by relationship, but who had consented to sit at the solicitation of the counsel for both parties. *Oakley* v. *Aspinwall* (1850) 3 N. Y. 547.

§ 8. [*Vacancies in court of appeals.*]—When a vacancy shall occur otherwise than by expiration of term, in the office of chief or associate judge of the court of appeals, the same shall be filled, for a full term, at the next general election happening not less than three months after such vacancy occurs; and until the vacancy shall be so filled, the governor, by and with the advice and consent of the senate, if the senate shall be in session, or, if not in

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session, the governor, may fill such vacancy by appointment. If any such appointment of chief judge shall be made from among the associate judges, a temporary appointment of associate judge shall be made in like manner; but in such case, the person appointed chief judge shall not be deemed to vacate his office of associate judge any longer than until the expiration of his appointment as chief judge. The powers and jurisdiction of the court shall not be suspended for want of appointment or election, when the number of judges is sufficient to constitute a quorum. All appointments under this section shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

[Const. 1821, art. 4, § 7; 1846, art. 6, § 13; Jud. Art. 1869, § 3.]

The history of this section will be found in the article on the judiciary, in the chapter on the Convention of 1867.

§ 9. [*Jurisdiction of court of appeals.*]—After the last day of December, one thousand eight hundred and ninety-five, the jurisdiction of the court of appeals, except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court shall be reviewed by the court of appeals, except where the judgment is of death; appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the appellate division of the supreme court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them. The appellate division in any department may, however, allow

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an appeal upon any question of law which, in its opinion, ought to be reviewed by the court of appeals.

The legislature may further restrict the jurisdiction of the court of appeals and the right of appeal thereto, but the right to appeal shall not depend upon the amount involved.

The provisions of this section shall not apply to orders made or judgments rendered by any general term before the last day of December, one thousand eight hundred and ninety-five, but appeals therefrom may be taken under existing provisions of law.

[New.]

The Constitution does not "affirmatively define the jurisdiction of the court of appeals beyond confining it to a review of questions of law, except that it prescribes that appeals as of right (save where the judgment is of death or where the appeal is from an order granting a new trial) can only be taken to the court from judgments or orders entered upon decisions of an appellate division 'finally determining actions or special proceedings.'" It was not the intention "to establish a constitutional right of appeal to the court of appeals from every final judgment or order made by an appellate division, and place it beyond the power of the legislature to abridge it or take it away." Construing the provision that "the legislature may further restrict the jurisdiction of the court of appeals and the right of appeal thereto, but the right to appeal shall not depend upon the amount involved," the court say that "under the general grant of legislative power, it is competent for the legislature to deny the right of appeal to the court of appeals in any class or classes of actions, in its discretion, the only restriction upon the legislative power being that the right shall not be made to depend upon the amount involved;" and the court sustained the amendment of 1896 to § 191 of the Code of Civil Procedure, limiting the right of appeal in actions to recover damages for personal injury. *Sciolina* v. *Erie Preserving Co.* (1896) 151 N. Y. 50, 45 N. E. 371.

In *Crovcno* v. *Atlantic Ave. R. Co.* (1896) 150 N. Y. 225, 44 N. E. 968, the court, sustaining the Code amendment of 1896, say that the "right of appeal . . . is not a natural or inherent right, but

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rests upon the statute alone, and may be taken away by the legislature, unless conferred by the organic law of the state." In this case the judgment was entered on the 12th of May at 1:50 p. m., and the Code amendment limiting the right of appeal was approved by the governor on the same day, but there was nothing to show at what time on that day the bill was approved. The act took effect immediately. The court say "it seems to be settled by the weight of authority that, in the absence of evidence as to the precise time when approved, an act operates during the entire day of its approval" (citing numerous decisions), and the act amending the Code was therefore held to have taken effect at the commencement of the day on which it was approved by the governor, and was in force in the afternoon when the judgment was entered.

See also *People ex rel. Public Charities & C. Comrs.* v. *Cullen* (1897) 153 N. Y. 629, 44 L. R. A. 420, 47 N. E. 894, sustaining the act of 1895, chap. 601, enlarging the jurisdiction of the court of appeals by authorizing it to hear and determine an appeal from an order made by a New York city magistrate convicting a party as a disorderly person. Subject to the limitations that the jurisdiction of the court of appeals must be confined to questions of law, and that in some cases the unanimous decision of the appellate division is made final, "it is entirely competent for the legislature to provide for a review in this court of any question of law involved in a judgment after a hearing in the appellate division. The power to further restrict appeals does not, by any fair or reasonable implication, exclude the power to enlarge the jurisdiction by providing for a review of certain judgments of inferior courts that were not reviewable before."

Prior to the revised Constitution of 1894 the legislature had power to regulate the appellate jurisdiction of the court of appeals. *Butterfield* v. *Rudde* (1874) 58 N. Y. 489; *People ex rel. Grissler* v. *Fowler* (1874) 55 N. Y. 675.

The following cases relate to the jurisdiction of the court as declared by this section. Many of them include questions of procedure, and should be consulted for further details: *People* v. *Schoonmaker* (1872) 50 N. Y. 499 (order dissolving injunction); *People* v. *American Loan & T. Co.* (1896) 150 N. Y. 117, 44 N. E. 949 (order directing the payment of a claim by a receiver of an insolvent domestic corporation); *Szuchy* v. *Hillside Coal & I. Co.* (1896) 150 N. Y. 219, 44 N. E. 974 (unanimous decision of the appellate division affirming order denying motion for nonsuit); *Otten* v. *Manhattan R. Co.* (1896) 150 N. Y. 395, 44 N. E. 1033( appeal

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involving questions of fact); *People ex rel. Manhattan R. Co.* v. *Barker* (1897) 152 N. Y. 417, 46 N. E. 875 (special proceedings); *Peri* v. *New York C. & H. R. R. Co.* (1897) 152 N. Y. 521, 46 N. E. 849 (attorney's lien); *Re Green* (1897) 153 N. Y. 223, 47 N. E. 292 (transfer tax); *People* v. *Helmer* (1897) 154 N. Y. 596, 49 N. E. 249 (review only questions of law); *Re Kimball* (1898) 155 N. Y. 62, 49 N. E. 331 (foreign divorce); *People ex rel. Broadway Improv. Co.* v. *Barker* (1898) 155 N. Y. 322, 49 N. E. 884 (tax assessment); *Hirshfeld* v. *Fitzgerald* (1898) 157 N. Y. 166, 46 L. R. A. 839, 51 N. E. 997 (reversal by appellate division on question of law and of fact); *Johnstown* v. *Wade* (1898) 157 N. Y. 50, 51 N. E. 397 (condemnation); *Ayres* v. *Delaware, L. & W. R. Co.* (1899) 158 N. Y. 260, 53 N. E. 22 (presumption of sufficient evidence on unanimous affirmance by appellate division); *Steamship Richmond Hill Co.* v. *Seager* (1899) 160 N. Y. 312, 54 N. E. 574 (reversal of order vacating execution against the person); *Reed* v. *McCord* (1899) 160 N. Y. 330, 54 N. E. 737; *Marden* v. *Dorthy* (1899) 160 N. Y. 39, 46 L. R. A. 694, 54 N. E. 726; *Meserole* v. *Hoyt* (1899) 161 N. Y. 59, 55 N. E. 274 (questions of evidence not reviewable); *Mundt* v. *Glokner* (1899) 160 N. Y. 571, 55 N. E. 297 (stipulation for judgment absolute); *Malone* v. *Saints Peter & Paul's Church* (1902) 172 N. Y. 269, 64 N. E. 961 (compulsory reference in action by administrator).

"Where the appellate division allows an appeal and certifies a question of law for us to review, the presumption is that its determination was made upon the merits, unless it expressly appears by the record that it was made in the exercise of discretion." *Re Davies* (1901) 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 118.

Appeals to the court of appeals are limited to three classes of cases; namely, "final judgments in actions, final orders in special proceedings, and orders granting new trials on exceptions where the appellant stipulates that on affirmance judgment absolute shall be rendered against him." This limitation manifestly applies to civil cases only. The court sustained an appeal by the people from an order of the appellate division reversing a conviction for grand larceny. *People* v. *Miller* (1901) 169 N. Y. 339, 88 Am. St. Rep. 546, 62 N. E. 418.

§ 10. [*Judges not to hold any other office.*]—The judges of the court of appeals and the justices of the su-

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**preme court shall not hold any other office or public trust. All votes for any of them, for any other than a judicial office, given by the legislature or the people, shall be void.**

[Const. 1777, art. 28; 1821, art. 5, § 7; 1846, art. 6, § 8; Jud. Art. 1869, § 10.]

"The terms 'office' and 'public trust' have no legal or technical meaning distinct from their ordinary signification. An office is a public charge or employment, and the terms seems to comprehend every charge or employment in which the public are interested. The words 'public trust,' still more comprehensive, appear to include every agency in which the public, reposing special confidence in particular persons, appoint them for the performance of some duty or service." *Re Wood* (1823) 2 Cow. 29, note; *Re Attorneys* (1823) 20 Johns. 492, states a similar definition, and holds that lawyers are not public officers.

In *Re Hathaway* (1877) 71 N. Y. 238, the court defined the term "office" as "that function by virtue whereof a person has some employment in the affairs of another, and it may be public or private, or quasi public, as exercised under public authority, but yet affecting only the affairs of particular individuals. . . . 'Public office,' as used in the Constitution, has respect to a permanent trust to be exercised in behalf of the government or of all citizens who may need the intervention of a public functionary or officer, and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law." A commissioner appointed in a probate proceeding to act in the place of the surrogate, who was disqualified, did not hold a public office.

A commissioner appointed by the supreme court for the appraisal of certain lands, and who took the oath of office as such, held a public office, and, upon his subsequent election as a justice of the supreme court, was disqualified from further acting as commissioner. The position of commissioner was clearly a public trust. His election as a judge created a vacancy in the land commission, and the two other commissioners could not proceed until the

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vacancy had been filled. *Re Gilroy* (1896) 11 App. Div. 65, 42 N. Y. Supp. 640.

The statutes conferring on the supreme court power to appoint commissioners of estimate and assessment in street opening cases in New York did not violate this section. The statutes do not confer on the members of the court any office, new or old. The powers are vested in the court, and not in the justices individually. The Constitution does not restrain the legislature from enlarging the powers of the court. The chancellor and circuit judges had frequently been vested with power to appoint commissioners, and similar duties have often been imposed upon the supreme court. *Striker* v. *Kelly* (1844) 7 Hill, 9. See also *Embury* v. *Conner* (1850) 3 N. Y. 511, 53 Am. Dec. 325.

In *Re Cooper* (1860) 22 N. Y. 67, the court considered the nature of the power exercised by the supreme court upon the admission of attorneys and counselors, saying that it had been suggested that such power was executive rather than judicial, and might be conferred upon any other branch of the government as well as upon the judiciary. Replying to this suggestion the court say that the "lines between the various departments [of government] are not and cannot well be very precisely defined, and there are many duties which may be with equal propriety referred to either. . . . The same power which, when exercised by one class of officers not connected with the judiciary, would be regarded and treated as purely administrative, becomes at once judicial when exercised by a court of justice. . . . The principle to be deduced . . . is that where any power is conferred upon a court of justice to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power."

The act of 1858, chap. 338, which authorized a justice of the supreme court at special term or in vacation to take proof as to frauds in assessments for local improvements in New York, and vacate the assessment, did not confer on the justices any additional office or public trust. The jurisdiction was summary, but not new. *Re Beekman* (1860) 19 How. Pr. 518.

The designation of a judge of the court of appeals as a member of a commission to appraise certain relics of the late General George Washington, which had been offered for sale to the state, did not confer upon him an additional office or public trust within the meaning of the Constitution. The other members of the commission

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executed a certificate of appraisal, in which the judge did not join. The certificate was held valid as the act of the commission, without the judge's signature. *People ex rel. Washington* v. *Nichols* (1873) 52 N. Y. 478, 11 Am. Rep. 734.

The act of 1874, chap. 657 (preface to laws of 1875), which required the presiding justice of the supreme court in the first department and other judges of local courts to designate a daily law journal for the publication of court calendars, did not confer on the judges any additional office or public trust. It is only an additional duty attached to the judicial office. *Daily Register Printing & Pub. Co.* v. *New York* (1889) 52 Hun, 542, 6 N. Y. Supp. 10.

The act of 1884, chap. 439, which authorized the supreme court and the county court, on the application of local authorities, to direct the erection of gates at the intersections of streets and railroads, did not confer on the courts any legislative power. The exercise of the power thus conferred was judicial. *People* v. *Long Island R. Co.* (1892) 134 N. Y. 506, 31 N. E. 873.

The legislature cannot require the supreme court or a justice thereof to perform other than judicial duties. *People ex rel. Decker* v. *Waters* (1893) 4 Misc. 1, 23 N. Y. Supp. 691.

"While the performance of administrative duties cannot be imposed by the legislature upon the supreme court as such, except as to matters incidental to the exercise of judicial powers, yet for many years, and without serious question, acts have been passed conferring upon the justices of that court authority, out of term, to perform a variety of functions, administrative or semi-administrative in character, such as the approval of certificates of incorporation, the acknowledgment of conveyances, the solemnization of marriages, the appointment of commissioners of jurors, the investigation of the financial affairs of villages, and the like." Vann, J., in *Re Davies* (1901) 168 N. Y. 102, 56 L. R. A. 855, 61 N. E. 118, construing the anti-monopoly act of 1899, chap. 690.

The special commissioner of jurors' act of 1896, chap. 378, providing for the appointment of a commissioner by a majority of the justices of the appellate division, did not confer on them an additional office or public trust. "The power to appoint a special jury commissioner is a public trust, because it is intrusted to public officers, to be exercised in behalf of the public, by clothing a private citizen with the powers and duties of public office. Unless, therefore, it has some reasonable connection with a judicial purpose, it is not a part of a judicial office, and cannot be imposed upon a justice of the supreme court." But the selection of proper jurors

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to aid in the administration of justice is germane to the judicial functions. The selection of jurors is a judicial purpose of the highest importance. "It is an invaluable aid to the discharge of judicial duties, and hence may be attached by the legislature to the judicial office as incidental to the exercise of the usual powers of that office. The appointment of a jury commissioner rests on the same principle as that of stenographers, judges' clerks, and the like. The appointment of such officers is authorized because the discharge of their duties aids the judges in the performance of their judicial functions; and so the appointment of a special jury commissioner to select jurors aids the judges in transacting the usual business of their courts." *People* v. *Hall* (1901) 169 N. Y. 184, 62 N. E. 170.

§ 11. [*Removal of judges.*]—Judges of the court of appeals and justices of the supreme court may be removed by concurrent resolution of both houses of the legislature, if two thirds of all the members elected to each house concur therein. All other judicial officers, except justices of the peace and judges or justices of inferior courts not of record, may be removed by the senate, on the recommendation of the governor, if two thirds of all the members elected to the senate concur therein. But no officer shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal.

[Const. 1821, art. 1, § 13; Am. 1845; Const. 1846, art. 6, § 11; Jud. Art. 1869, § 11.]

LEGISLATURE'S POWER OF REMOVAL.

*Origin of section.*—The provision authorizing the removal of judges by the legislature was included in the Constitution for the first time in 1821. It was the manifest purpose of the framers of the first Constitution to

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establish the judiciary on a permanent foundation, free from partisan interference or control, and subject to removal only by the process of impeachment. Article 24 of that instrument provided that the "chancellor, the judges of the supreme court, and first judge of the county court in every county, hold their offices during good behavior, or until they shall have respectively attained the age of sixty years."

The chancellor and judges of the supreme court were made members of the Council of Revision, which was required to consider and pass upon all legislation. It has already been pointed out that by this piece of machinery the judges not only constituted the judicial branch of the government, but they also became very powerful factors in the legislative department, possessing, as they did, authority to determine both the validity and the propriety of all laws passed by the legislature. Therefore the judges, holding office during good behavior, exercised a controlling influence on the executive consideration of legislation. Each governor, coming to his place as the nominal executive head of the state, became a member of the Council of Revision, in which each judicial member possessed an authority equal to his own. The permanent character of the judicial side of this council becomes apparent when we recall the fact that Robert R. Livingston, as the first chancellor, was a member of it twenty-four years, that James Kent, as judge and chancellor, was a member of the council nearly twenty-five years, that Ambrose Spencer, as associate and chief justice, was a member of the council nearly nineteen years, that William W. Van Ness was a member fifteen years, and other judges for shorter terms.

The power of appointment of the judges was vested in the Council of Appointment, but that council had no power of removal of these particular officers. The

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Council of Appointment possessed the power to appoint and remove at pleasure nearly all state officers and many local officers, and this power was exercised with a free hand, especially after the Convention of 1801 declared that the senate members of the council might constitutionally exercise the right of nomination. The senate members of the council were chosen annually by the assembly, and were, therefore, subject to the annual partisan fluctuations of that body. The history of the council shows that it was no respecter of offices. Every office was deemed a legitimate subject of its attention, and we find that the secretary of state, comptroller, attorney general, mayor and recorder of New York, and other high officers, as well as numerous local officers, were removed at pleasure, to make way for friends of the council, or of the dominant political party or faction. Obviously there could have been no permanency in a judicial system based on such a power of appointment and removal. The framers of the first Constitution, therefore, wisely vested the power of removal of the chancellor and judges in the court for the trial of impeachments, and a removal could not have been made until the officer had been duly convicted of misconduct in office.

I think the only instance of an impeachment proceeding under the first Constitution was in the case of William W. Van Ness, a justice of the supreme court, against whom charges were made in 1820, but the assembly committee which investigated the charges declined to recommend an impeachment.

*Convention of 1821.*—The limitation of the power of removal of the judges to the single method of impeachment was evidently deemed too rigid by the Convention of 1821. In that convention the committee on the legislative department proposed a section providing not only for impeachment, but also authorizing the legislature, by

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joint resolution of the two houses, to remove any officer holding during good behavior; but the resolution must have received the assent of two thirds of the members elected to each house. This applied to the judges. Before this subject was taken up for consideration, the judiciary committee presented its report, including a provision authorizing the removal of judicial officers by the governor "upon the address of both houses of the legislature, two thirds of all the senators and members of assembly elected concurring therein." The report of the committee on the legislative department was considered first, and the policy of authorizing a removal of the higher judicial officers by the legislature was settled before the judiciary committee's report was reached. During the debate Mr. Munro, chairman of the judiciary committee, proposed to amend the pending section by vesting the power of removal in the governor, upon the address of the legislature, as recommended by the committee; but the plan received little attention.

Mr. Rufus King, chairman of the committee on the legislative department, presenting the proposition, said that, in relation to the independence of the judiciary, public opinion had undergone and was undergoing somewhat of a change in this country. He thought there was danger of pushing the principle of the independence of the judiciary so far as to destroy the institution itself. He said "there was, throughout the country, a universal respect and love for those venerated men who administered its justice. So long as they behave well no class of men would be more secure of the public esteem and confidence." He would "preserve them that confidence by abstracting them from all other concerns, and giving them fixed and adequate salaries, so as to relieve them from all solicitude except for the faithful performance of their duty;" but he thought it

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was "the part of true wisdom to follow, and sometimes to anticipate, the progress of public opinion on this and other subjects connected with our establishment; and it could not be concealed that the people of this state were dissatisfied with the existing means of enforcing the responsibility of the judges for the possible abuse of their great powers." Remarking that the people have no direct control over the judiciary as they have over the legislative and executive departments, and admitting "the necessity of giving to the judges an independent tenure for life, or for a term somewhat approaching the ordinary life of man," he doubted whether the people were "secure in the delegation of the judicial power, which is the most important in the state, and which touches life, character, and property." While the duration of their office might be supposed to render the judges independent of any unworthy bias, Mr. King thought there should be a "supervisory authority over them, which should always be vigilant, and sometimes even vindictive; which should be swift to punish their offenses, and to preserve the purity of the judicial character from contamination by the misconduct of its members. The time may come when this authority ought to be exercised."

The proposition for removal did not require any cause to be stated, but the removal might have been made at pleasure, and without assigning any reason. The possibilities of the new method of removal were suggested by Mr. King, who, referring to the English judicial system, said he believed no application had been made to the Crown for the removal of a judge since the reign of William and Mary, "but it had frequently happened that Parliament had addressed the Crown for the removal of other great men; and there was a memorable instance where the House of Commons demanded the dismissal

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of the younger Pitt, in the beginning of his career. They then asked his removal from his Majesty's councils and presence forever. What was the King's reply? That they had preferred no specific charges against the minister. To which the Commons replied that he had lost their confidence, and it was the undoubted right of the people of England to demand it on that ground alone."

Mr. King probably referred to the resolutions adopted by the House of Commons on the 3d of February, 1784, which recited that the existing condition of public affairs required a firm, efficient, and united administration, entitled to the confidence of the people, and which declared that the "continuance of the present ministers in their offices is an obstacle to the forming of such an administration as may enjoy the confidence of this House, and tend to put an end to the unfortunate divisions and distractions of the country." Mr. Pitt's biographers inform us that he refused to resign, saying that the House of Commons had no right of dismissal, and that a "minister might constitutionally retain office against the will of the House. He denied its right to express a general want of confidence without specific charges."

Mr. King thought "it ought to be the right of the representatives of the people to remove without being required to prefer specific charges," and when it was evident that the judge "had justly forfeited public confidence, there ought to be somewhere a power of removal." He would "give them all power to perform their duty, but no power to depart from it. . . . They ought not to be lifted above responsibility." He said the provision for removal had been reported "with a view of securing their responsibility in cases where they were not liable to impeachment."

Mr. Radcliff, supporting the proposition, said the provisions of the existing Constitution had led to injurious

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consequences; that it was altogether nugatory; "for no man connected with a party can be expected to be successfully impeached if the existing impediments are continued. . . . One third of the legislature may always be found to sustain an individual of eminence and standing."

Mr. Erastus Root, discussing particularly the part of the section relating to impeachment, said that "if an unjustifiable measure is about to be perpetrated by a party, it will be more likely to be done under that part of the section which authorizes a removal on the concurrent resolution of two thirds of both houses of the legislature without the cause being assigned."

Chancellor Kent supported the proposition for removal, saying that "there were many causes that might render the removal of a judge expedient, without affording a proper ground for impeachment,—where his faculties were impaired by casualty or sickness, infirmity, intemperance, etc." He would "be glad to interpose a barrier against the effects of party spirit, but, on the whole, he believed there could be but little danger that two thirds of a legislature would deprive a judge of his office without sufficient cause."

Mr. Wheaton, opposing a motion to amend so as to permit a resolution for removal to be adopted by a majority of the senate, said the original proposition requiring two thirds of each house went quite far enough in subjecting the judges to the supervising authority of the legislature. The proposition authorized the removal of a judge "without notice to the accused, without assigning cause, and without a hearing." He thought this would destroy the reasonable independence of the judiciary. He objected to "laying the judiciary at the feet of the legislature."

Mr. Young, referring to the fact that the constitu-

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tions of several other states authorized the removal of judges by a bare majority of the legislature, said the power had not been abused, and that the judges "would always be secure if they do not mingle in the conflicts of party, and confine themselves to the proper duties of their office."

Mr. Edwards favored the committee's proposition, and was apprehensive that to permit the removal by a bare majority of the senate would push "accountability to a pernicious extremity." "We have heretofore suffered in consequence of judges being placed upon too independent a footing; but, in our solicitude to avoid evils arising from this source, we must be cautious that we do not involve ourselves in the consequences arising from rendering the judiciary too dependent;" but, said he, "if you intend that your judges shall be firm and upright magistrates, faithful guardians of the Constitution and of the rights of the people, you must place them upon so stable a footing that they cannot be blown away by every party impulse in your legislature." Observing that the removal of a judge without assigning any reason seemed to be a very arbitrary proceeding, Mr. Edwards said he could readily imagine cases in which it might be proper to adopt it, but he thought no such removal should be permitted without the assent of two thirds of both branches of the legislature. He further remarked that the "regulations which may be adopted for the government of the judiciary are not made for the good of the judges, but for the good of the people."

The Convention, by a vote of 58 to 43, amended the proposition so as to require only a majority vote in the senate on a resolution for the removal of a judge, and as finally adopted such a resolution must have received a two-thirds vote in the assembly and a majority vote in the senate.



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*Scope of provision.*—It seems clear from the language of the section, and from the debate, that the Convention intended to vest in the legislature general power to remove a judge without assigning any reason therefor, or giving him any opportunity to be heard. The legislature, therefore, had the sole power to determine when an alleged cause was sufficient to justify the removal of a judge, and from its determination there was manifestly no appeal. Further evidence of the intention of the Convention to leave the question to the discretion of the legislature is found in the rejection of a motion by General Tallmadge that "the cause or causes for which such removal may be required shall be stated at length, and inserted on the journals of the respective houses of the legislature."

*Removal of De Witt Clinton.*—So far as I have been able to discover there was no practical application of this power of removal under the second or third Constitution. The possibilities of the new rule found a conspicuous and significant illustration in the removal of De Witt Clinton from the office of canal commissioner by the legislature of 1824. The power of the legislature to remove a canal commissioner was no broader than its power to remove a judge. By the act of 1821, chap. 36, a canal commissioner held his office "during the pleasure of the two houses of the legislature, subject to be removed by concurrent resolution of the two houses." Under the Constitution of 1821 a judge was also removable by concurrent resolution of the two houses, but the legislature was not, in either case, required to assign any reason for the removal. The legislature of 1824, on the last day of the session, and just before its close, adopted a resolution removing Mr. Clinton. The resolution assigned no cause for removal. It was adopted in the senate without debate by a vote of 21 to

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3, and in the assembly, after one very emphatic speech against it, by a vote of 64 to 34. It was a party measure. Mr. Clinton had already rendered eminent service as governor, and had devoted his energies and great talents to the success of the canal project, which was then very near completion. It is a matter of history that his removal so aroused the indignation of the people that they elected him governor again the same year, and he was therefore occupying that high office when the Erie canal was completed, in the autumn of 1825.

The legislature exercised here the same kind of power that had become so obnoxious in the hands of the Council of Appointment under the first Constitution. If the legislature, without any assigned cause, and without any pretended excuse, could remove a man like De Witt Clinton from the office of canal commissioner, it is not easy to see what protection the new constitutional rule afforded a judge against a legislative removal which might have been instigated by party passion or malice or caprice, and when the legislature by its resolution was required to make no further declaration than that the judge was thereby removed.

*Amendment of 1845.*—In Chapter V., in the second volume, I have given an account of the inception and adoption of the amendment of 1845, the text of which will be found in the Introduction, and which gave to the judge against whom proceedings were to be taken for removal an opportunity to be heard, and which required a copy of the alleged causes to be served upon him at least twenty days before action thereon by the legislature. The cause of removal was also to be entered on the legislative journals.

*Convention of 1846.*—The subject of the removal of judges received some attention in the Convention of 1846. The judiciary committee presented a section in

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substance continuing the existing provision in the Constitution of 1821, and combining the amendment of 1845, requiring notice to the judge, and giving him an opportunity to be heard, but without specifying any time for the service of the complaint. Mr. Loomis objected to this mode of trial and removal, and thought that "charges against judicial officers, like all others, should be tried in the tribunals of the country." He proposed the following section:

"The legislature shall define by law offense, misconduct, and negligence in office, which shall be deemed cause of removal. Any officer who may be indicted, tried, and convicted of any such offense, misconduct, or negligence in office, or for any offense committed while holding any public office, the punishment for which by law may be imprisonment, shall, by such conviction and judgment thereon, be ousted from office."

This was rejected. The last part of the Loomis proposition now appears in substance in § 20 of the public officers law, which declares that an office shall be vacant if the incumbent be convicted of a "felony, or a crime involving a violation of his oath of office."

Mr. Morris said the intention of this section of the Constitution, "which was in part copied from the old Constitution, was originally to reach and remove officers who had become broken in mental vigor, or imbecile; but it had been perverted and used to justify removals on grounds that, if true, would have justified an impeachment." This provision for removal had all "the effect of an impeachment, without the opportunity being given to the incumbent to meet the charge." He proposed an amendment, the effect of which was to prevent the removal of a judge except "for inability to discharge the duties of his office, arising since his election."

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Mr. Patterson objected that under this amendment a judge could not be removed for gross immorality or neglect of duty. Mr. Morris thought he might be impeached for this offense. The Morris amendment was rejected. On Mr. Patterson's motion "joint" was changed to "concurrent." A motion by Mr. Crooker that all judicial officers except justices of the peace be made subject to removal in one and the same manner by the legislature for causes for which they could not be impeached was lost by a vote of 34 to 39. A motion by Mr. Morris to authorize the accused judge to introduce witnesses in his defense was lost by a vote of 31 to 32, no quorum being present. This motion was afterwards reconsidered, and again rejected by a vote of 28 to 60.

Mr. Loomis offered another substitute providing for the removal of an officer by the governor "after trial and conviction of any crime, gross immorality, misconduct or negligence in office, or inability to discharge its duties." He considered the existing provision impracticable, "giving, as it did, a party a trial before each house, and converting the legislature into a sort of criminal tribunal." Mr. Marvin doubted the propriety of placing "all judges of the state in the power of any twelve men in the country to pass upon their incompetency." The Loomis amendment was rejected by a vote of 5 to 75. The section was then approved by a vote of 86 to 11, and will be found in the Constitution of 1846, in the Introduction.

*Convention of 1867.*—The judiciary article of 1869, proposed by the Convention of 1867, required the assent of two thirds of each house on a resolution for the removal of a judge. This was in accordance with the original proposition submitted to the Convention of 1821, but which, as already pointed out, was amended by requiring only a majority vote in the senate. This judi-

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ciary article also required a copy of the "charges" to be served on the judge, instead of the "complaint," as provided by the Constitution of 1846. I do not find in the debates any reason assigned for this change.

*Convention of 1894.*—The Convention of 1894 changed the word "charges" to "statement of the cause alleged," and concerning this change Mr. Elihu Root, chairman of the judiciary committee, said: "Under the existing provision of the Constitution, in order that a judicial officer should be removed, it is necessary that there should be something to justify charges against him, and that he should be put in the attitude of a party complained of, served with a copy of the charges against him. Now, there have been a number of instances in this state where judicial officers, through no fault or dereliction of their own, have been unable to perform their duties,—justices who had had softening of the brain, who have, through illness, been entirely incapable of performing their duties,—and when the suggestion was made that they ought not to remain in the receipt of the large salaries which were attached to their offices while they were not doing anything, the answer was that they could be removed only for some dereliction of duty. Charges must be made against them; culpability must be established; they must be branded with some malfeasance or misfeasance in office; and, therefore, nothing has been done. We have now taken and substituted merely the word 'cause.' They may be removed for cause. A statement of the cause shall be served and an opportunity given to be heard; and that is language which has been construed by the court of appeals, and the court of appeals has said that this very language means incapacity to perform the duties of an office."

Mr. Root's suggestion that there ought to be authority for the removal of a judge without specific charges was

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perhaps based, at least in part, upon the situation presented by an order made by Governor Hill, December 31, 1889, suspending from office a city judge in New York, and directing the discontinuance of his salary, on the ground that he had become incapable of performing his judicial duties by reason of the fact that he was stricken with paralysis in November, 1888, and his illness had continued since that time.

*Summary.*—Summarizing the constitutional provisions relating to the removal of judges by the legislature, we find that, by the Constitution of 1821, such a removal might have been made without assigning any reason, without notice, and without giving the judge any opportunity to be heard; that by the amendment of 1845 the cause of removal was to be entered on the legislative journals, and a copy of the cause alleged was to be served on the accused judge twenty days before action by the legislature thereon; that by the Constitution of 1846 the party complained of was to be served with a copy of the "complaint" against him; that by the judiciary article of 1869 "complaint" was changed to "charges;" and that by the Constitution of 1894 the word "charges" was changed to "statement of the cause alleged." Beginning with 1845 the legislature has been required to enter the cause on its journals; but there has been some fluctuation as to notice to the judge, and as to the procedure giving him an opportunity to be heard. It is doubtless true now, as under the first provision, that the determination of the legislature as to the sufficiency of an alleged cause is final.

It has already been pointed out that under the first constitutional provision, 1821, a removal must have been by joint resolution, and that the Convention of 1846 changed "joint" to "concurrent." Probably this change should not be deemed to make any substantial difference

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in the procedure on a complaint against a judge, for while a joint resolution would recite that it be resolved by the senate and assembly, and while a concurrent resolution is primarily the action of one house, if the other house concur therein, the resolution, in either case, must be adopted by both houses. It seems clear, however, that if the Constitution had continued to require a joint resolution, the two houses might have met together, heard the case, and then, as one body, might have adopted a resolution, or might have done so separately. Under the present rules of the legislature "joint or concurrent resolutions are offered under the order of motions and resolutions. After lying over one day, they may be called up for action whenever the same order of business is reached. If passed, they are delivered by the clerk to the other house, and after being acted upon, are returned to the house in which they originated, with an appropriate message."

But a legislature convened to consider a complaint under this section may make its own rules and prescribe the procedure for the trial, except that, by the terms of the Constitution, a resolution for the removal of a judge must originate in one house and be formally concurred in by the other.

*The Hooker case.*—After the other parts of the note to section eleven and the note to section thirteen of this article had been written, the legislature was convened in extraordinary session to consider complaints against Warren B. Hooker, a justice of the supreme court.

The formal complaint, at least, so far as the legislative investigation was concerned, originated in a communication from the Jamestown Bar Association, which was presented to the State Bar Association at its annual meeting in January, 1904. This communication contained statements to the effect that Justice Hooker had

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used his influence to procure the appointment of persons to positions in the postoffices at Fredonia and Dunkirk, N. Y., which were unnecessary, and in which the appointees performed little or no service, although receiving full compensation therefor, and also that there had been some irregularities in relation to a lease to the Federal government of a postoffice in Dunkirk, N. Y., which was located in a building in which Justice Hooker had a pecuniary interest. The communication contained extracts from the report of the Fourth Assistant Postmaster General, and also cited a memorandum by the President of the United States, approving the report. Concluding the communication, the Jamestown Bar Association said it made no charges against Justice Hooker, but expressed the belief that the situation demanded an investigation, and the subject was therefore committed to the State Bar Association for such action as it might deem proper. The latter association, at the same meeting, referred the subject to its standing committee on grievances, which was directed to proceed in accordance with the constitution and by-laws of the association. The standing committee appointed a subcommittee to proceed with the investigation. Justice Hooker appeared before the subcommittee in person and also by counsel.

The subcommittee made a report bearing date November 12, 1904, and which contained a detailed statement of the facts and circumstances relating to appointments in the postoffices at Fredonia and Dunkirk, N. Y., and also in relation to the lease of the Dunkirk postoffice. The subcommittee recommended "that a further investigation be had by the legislature, before a tribunal having compulsory process."

The committee on grievances approved the findings of fact of the subcommittee, and, without passing on its recommendations, submitted the whole matter to the

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State Bar Association for its action. The association considered the matter at its annual meeting in January, 1905, and on the 18th, by a vote of 97 to 101, rejected a resolution to transmit to the legislature the report and record of the grievance committee, with a recommendation that a "further investigation be had by the legislature." The association unanimously approved the findings of fact of the subcommittee, and adopted a resolution in which the association declared its disapproval of "all such political practices as are disclosed by the record in this case;" it was further resolved that the report of the grievance committee be received and filed; and that "no further action be taken by this association thereon or with reference thereto."

On the 23d of January, 1905, Justice Hooker transmitted to the speaker of the assembly a communication, referring briefly to the action taken by the Jamestown Association and the State Bar Association, and in which he said: "Notwithstanding such action by the State Bar Association, a number of prominent lawyers and a portion of the public press have insisted that legislative investigation should be had. These demands must have impressed the public. Therefore, I respectfully but earnestly urge, as due to the public, my office, and myself, that my conduct be made the subject of legislative inquiry." Justice Hooker also transmitted to the assembly with his letter a copy of the report of the subcommittee of the grievance committee, and of the evidence taken by it. The communication, report, and evidence were referred to the assembly judiciary committee, with instructions to investigate the matter, and report to the assembly with its opinion and such recommendations as it might deem proper.

The assembly committee made an investigation, as directed, and on the first day of May submitted its report,

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containing various findings of fact and conclusions of law relating to matters involved in the investigation, and recommended that "proceedings be taken by the legislature for the removal of said Warren B. Hooker from the office of justice of the supreme court, in pursuance of, and in accordance with, the provisions of section eleven of article six of the Constitution of this state." The assembly adopted the report, and, on the 5th,—the day of final adjournment,—passed a resolution directing its judiciary committee to "formulate rules of practice and procedure in the matter of the proceedings in pursuance of section eleven of article six of the Constitution, for the removal of Warren B. Hooker from the office of justice of the supreme court, with a statement of the cause alleged for such removal;" and the committee was authorized to sit during the recess.

On the 15th of June, 1905, Governor Higgins issued a proclamation convening the legislature in extraordinary session on the 21st of June. The legislature met on that day, and received from the Governor a message, in which he stated the action already taken by the assembly, and recommended for the consideration of the legislature "the conduct of said Warren B. Hooker, and the question of his removal from the office of justice of the supreme court."

The assembly judiciary committee, as required by the resolution of the 5th of May, presented a statement of the cause alleged for the removal of Justice Hooker. The statement contained several allegations and specifications which were set forth with considerable detail. They may be summarized as follows:

That Justice Hooker procured the appointment of a person in the Fredonia postoffice, at first as a laborer, and afterwards as a clerk, who received a large sum as compensation for service which was not needed and was

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never performed. That nearly all of the sum so received by the appointee was used by him in reducing the amount of an obligation held against him by Justice Hooker's wife.

That Justice Hooker procured the appointment of his nephew, a youth about sixteen years of age, as a laborer in the Fredonia postoffice, while such nephew was attending the Fredonia Normal School; that the position was not necessary in the office, and that no service was rendered therein on account of such appointment, except for a short time, and at irregular intervals, by a substitute.

That a resident of Fredonia was, by Justice Hooker's procurement, appointed a clerk in the postoffice at Fort Plain, N. Y., and afterwards transferred to Fredonia. That Fort Plain, at the time of such appointment, was unclassified, while Fredonia was in the classified service. That the appointee rendered no service at the Fort Plain office. That such appointment was made for the purpose of evading the civil service laws and regulations of the United States.

That other persons were appointed in and about the Fredonia postoffice whose services were not needed, and who did not perform the service for which they received compensation.

That Justice Hooker used his influence to procure an illegal judgment in the supreme court against the city of Dunkirk, restraining the city from using a portion of its city hall park property, which use, it was alleged, might interfere with the enjoyment of adjoining property in which Justice Hooker had an interest, and a part of which had been leased to the government of the United States for a postoffice; which judgment was afterwards vacated by the order, and at the suggestion, of the judge who granted it.

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The statement was adopted by the assembly, and transmitted to the senate for its action. In that body the question was raised whether the legislature had power to remove a justice of the supreme court for the reasons set forth in the statement of cause prepared by the assembly judiciary committee. The subject was referred to the senate judiciary committee, which, at an adjourned session, on the 28th of June, submitted a report in which it was declared that the legislature had full power to determine the sufficiency of the cause of removal of a judicial officer. The report was prepared by Senator Brackett, chairman of the committee, and is an able, clear, and interesting exposition of the principles underlying the policy of a legislative removal of judicial officers. The statement of cause received from the assembly was approved. It was directed to be served on Justice Hooker, and the legislature adjourned until the 10th of July. On that day the legislature met in joint session in the assembly chamber, and began the consideration of the case. Rules of order and of procedure were adopted. The legislature was represented by counsel. Justice Hooker appeared in person and also by counsel, and representatives of the State Bar Association and of the Bar Associations of New York, Brooklyn, and Jamestown were assigned seats within the bar.

Justice Hooker submitted his answer to the statement of cause, in which he denied the charges therein set forth, and alleged that none of such charges constituted an offense for which he could be removed under the foregoing section of the Constitution. He also denied the jurisdiction of the legislature to proceed for his removal upon the facts set forth in the statement of cause.

Justice Hooker challenged the right of the members of the assembly judiciary committee to take any part in the proceeding, on the ground that they had heard the

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accusations and evidence, had reported thereon to the assembly, and had recommended proceedings for removal, and had therefore disqualified themselves in law and equity from taking any part in the present proceeding. The challenge was overruled. By mutual consent of the prosecution and Justice Hooker, the evidence taken before the assembly judiciary committee at the regular session was read on the trial before the joint session. Other testimony was also adduced.

Lieutenant Governor Bruce presided at the joint session and determined questions of order and questions relating to evidence. The trial was concluded on the 19th of July, and the joint session was thereupon dissolved. On the 20th the two houses met separately, and in the assembly a concurrent resolution was introduced for the removal of Justice Hooker. The vote on the resolution was 76 to 67. One hundred votes were necessary for the adoption of the resolution. Speaker Nixon declared that the resolution had not received the constitutional two-thirds vote, and was therefore defeated. The senate took no separate action on the question of removal.

I believe this is the first instance in which the legislature's power of removal under this section has been invoked. The scope of the power was considered both before and during the trial. The legislature asserted the power to its fullest extent, and the case therefore stands as an expression of legislative opinion in favor of removal for any cause which the legislature may deem sufficient; but the assembly, which took the initiative in the preliminary investigation, and also in the final action represented by the resolution for removal, did not deem the facts which were presented in the case a sufficient basis for the exercise of the extreme power contemplated by the Constitution. The case is clearly under section 11. It has already been shown in a former part of this note that

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the Convention of 1821 intended to provide for removals where no impeachable offense had been committed.

The case presents some difficulties of procedure which will doubtless receive legislative attention. The Constitution is silent as to procedure, and no legislation has been enacted for such cases. The two houses determined, by a concurrent resolution, to meet together as one body, in joint session, for the purpose of hearing the evidence and arguments in the case. The power so to meet was not universally conceded; it was urged that the two houses could not combine for the purpose of such a trial, but that the action was to be concurrent; and perhaps it was a reasonable corollary to this position that a hearing should be had before each branch of the legislature. It seems clear that the legislature had power to meet in joint session, and to provide for such a meeting by concurrent resolution. It might have enacted a statute for that purpose at the beginning of the extraordinary session, but it chose to act by concurrent resolution, which was clearly within its power.

If the Constitution is to remain in its present form, requiring action in these cases to be concurrent, a brief section added either to the legislative law or to the public officers law may be needed to prescribe the procedure in proceedings for the removal of judicial officers by the legislature. The public officers law already contains provisions relating to procedure in proceedings for removal by the senate.

But it is worthy of consideration whether section 11 should not be reconstructed, at least so far as relates to removals by the legislature. There is an apparent incongruity in the proceeding as worked out in the Hooker case. Thus, both houses meet in joint session to hear the case, but, after the trial is concluded, the joint session dissolves, and the two houses resume their original status.

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This separation seems to be necessary, for the reason that the final resolution for removal must be concurrent. One house must take the initiative, and the functions of the other house remain dormant, so far as the question of removal is concerned, until it receives for concurrence a resolution adopted by the house in which it was introduced.

According to the rule applied in the Hooker case, the two houses become one body for the purposes of the trial, but in the final decision they act separately. This makes a judicial tribunal composed of two parts, each possessing the same power, and, while they may sit together during the trial, each house must pronounce an independent judgment; and one may not pronounce judgment at all, and may be relieved from responsibility, for the reason that no affirmative resolution is presented for its concurrence.

The analogy of the court of impeachments might properly be adopted in a proceeding for removal by the legislature under this section. That court is composed of three parts; namely, the lieutenant governor, the senate, and the court of appeals; and when the court is organized, each part loses its identity in the tribunal thus formed. The lieutenant governor, if present, presides, and is a member of the court to the same extent as a senator or a judge, and may vote on any question, including the final resolution for impeachment; and he must be counted in determining whether such a resolution has been adopted by two thirds of the members of the court. But the court, composed of these three parts, is a unit, and neither part can act separately.

The court of impeachments may limit its judgment to a removal from office, or it may add a disqualification to hold the same or any other office in the future. If limited to removal, the effect of a judgment is identical with the

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effect of a resolution of removal by the legislature. It has been pointed out that, under the original provision, included in the Constitution of 1821, the removal was to be by joint resolution of the two houses, but without notice to the officer, and without giving him an opportunity to be heard. When the policy of giving a hearing was introduced by the amendment of 1845, the situation was changed, and the legislature became essentially a judicial tribunal, with power to determine all questions of law and of fact relating to the proposed removal. But, under the Constitution, it continues to be two tribunals, whose action is sometimes joint and sometimes several. The parliamentary principle that two houses are needed, one to be a check on the other, has no application in proceedings for removal under the modern Constitution. That principle was properly applied under the earlier Constitution, when the removal was to be by resolution, without a hearing, and, as in the case of De Witt Clinton, without evidence, and without any assigned reason. In such a case it might become necessary for the house whose concurrence was asked, to impose its check to prevent the adoption of a resolution which might be deemed improper or unjust. It may be doubted whether the separate power of the two houses should longer continue, and whether it would not be more consistent with the general policy of our political system to make the legislature, in proceedings for removal, a single tribunal, composed of all the members of both houses, sitting and voting together without any separate identity.

### SENATE'S POWER OF REMOVAL.

This section is in two parts,—one relating to removals by the legislature, which applies only to judges of the court of appeals and justices of the supreme court, and



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the other, to removals of certain other judicial officers by the senate on the recommendation of the governor.

The Constitution of 1821 expressed the power of removal of judicial officers in three sections. One provided for the removal by the legislature of all officers holding during good behavior, which included the chancellor, judges of the supreme court, and circuit judges; two other sections provided for the removal of county judges, city recorders, and masters and examiners in chancery by the senate, on the recommendation of the governor. These three sections were combined, and the subject was included in one section by the Convention of 1846.

The public officers law, § 22, contains some regulations concerning procedure under this section. It is provided that "the governor, before making a recommendation to the senate for the removal of any officer, may, in his discretion, take proofs, for the purpose of determining whether such recommendation shall be made." This course was adopted in some of the following cases. This section of the law also vests in the senate jurisdiction to remove "the secretary of state, comptroller, treasurer, attorney general, and state engineer and surveyor, on the recommendation of the governor, for misconduct or malversation in office, if two thirds of all the members elected to the senate shall concur therein." It will be observed that this power is not so broad as that conferred on the senate by the Constitution in the case of judicial officers.

The law prescribes procedure relative to notice and opportunity to be heard, substantially following the section of the Constitution, and also authorizes an extra session of the senate for the purpose of investigating the charges. The law gives the senate the power to make rules regulating its own practice in these cases. That power was doubtless already conferred by the Constitution. The senate has power to take proofs on any such

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charge. This section of the law extends the senate's power of removal to officers appointed by the governor by and with the advice and consent of the senate. The statute provides that "if the senate shall reject a recommendation of removal, the clerk of the senate shall, by a writing signed by him and by the president and clerk of the senate, communicate the fact of such rejection to the governor. If the senate shall concur in such a recommendation, the removal shall take effect upon the passage of the resolution of concurrence, and duplicate copies of such resolution, certified by the clerk and president of the senate, shall be executed, and delivered by the clerk to the secretary of state."

The senate has, in several instances, investigated the conduct of judicial officers on complaints or charges presented by the governor, with an accompanying recommendation for the removal of the accused judge. An examination of the cases shows that the procedure in these investigations has not been uniform, and that there have been some differences of opinion among governors as to their powers and the extent of their jurisdiction.

*George W. Smith.*—The first case was that of George W. Smith, county judge of Oneida county. Governor Fenton, on the 14th of February, 1866, sent a message to the senate, transmitting charges and specifications alleging official misconduct on the part of Judge Smith. According to the message, as printed, the Governor said:

"I recommend that inquiry as to the truth of the charges be immediately made in accordance with the provisions of section 11, article 6, of the Constitution. This section does not clearly define the details of procedure prior to final action upon the question of the removal of judicial officers, and there are no precedents within my knowledge to guide the action of the senate in this instance. I have presumed, however, to refer the entire case

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to your consideration, without any preliminary examination on my part, with a view of forming correct conclusions as to the guilt of the party charged with malversation in office, or learning his defense, believing that this proceeding is wholly within your jurisdiction. In my judgment this section of the Constitution, by reasonable construction, invests the governor with the duty of making a recommendation based upon an *ex parte* presentation of the case, and this course would seem essential to confer jurisdiction upon your body.

"I do, therefore, recommend that the said George W. Smith be removed from his said office if, in the judgment of the senate, he shall, upon a full and fair investigation, be convicted of the charges made against him."

The judiciary committee, to whom was submitted the Governor's message recommending the removal of Judge Smith, reported that it did not know of any precedent for the proceeding, "it being entirely novel." Referring to the procedure on an impeachment in which both branches of the legislature took a part, "the assembly as the accusers and prosecutors, and the senate as the judges," the committee say: "In the present case, however, as the senate are the judges, no members of it can properly be the prosecutors; and as it is evidently necessary that the part of prosecutor must rest somewhere, in order to a vigorous and full presentation of the charges and of the evidence in support of them, so it is necessary that the complainant and his counsel should be admitted before the senate or its committee, with the usual privileges of counsel. The like privilege must be awarded to the accused and his counsel." The committee further expressed the opinion that the proceeding might be prosecuted in either of two methods: "Either by a committee of the senate, who shall take testimony upon the subject, and report the same to the senate with their opinion upon the

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case, or before the senate. It is submitted that the choice of these two methods should be left to the accused, as the party the most intimately affected by any result which shall be arrived at." Judge Smith elected to be tried before the senate.

The case was tried at an extra session of the senate, which convened June 12, 1866. At the opening of the trial, after the Governor's message had been read, Judge Smith, by counsel, moved that the proceeding be dismissed on the ground that the senate had no jurisdiction, "the Governor not having recommended the removal of the accused," that the "message in no wise indicates the opinion entertained by the Governor, but makes his recommendation for removal depend entirely upon the judgment of the senate, and upon its convicting the accused of the charges." The senate unanimously denied this motion.

The next day Judge Smith raised another question of jurisdiction, alleging that no recommendation whatever had been made by the Governor for the removal of the respondent, that "no such paper writing as that purporting to be a message from the Governor to the senate, and printed and set forth in senate document No. 48, has ever been communicated to the senate by the Governor, but the said writing, purporting to be a message, as aforesaid, is not a genuine message from the Governor;" and he offered to prove "that the message which was in truth and fact communicated or transmitted by the Governor to the senate, relating to the charges against him, was, on the day it was communicated to the senate, wrongfully and unlawfully abstracted from its files, and destroyed, or altered, and the said pretended message, upon which the jurisdiction of the senate is now claimed, was wrongfully and unlawfully substituted in the place thereof, and which said substituted paper writing, in so far as it rec-

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ommends the removal of this respondent, and in other respects, materially differs from that communicated by the Governor to the senate."

The counsel for the prosecution denied the right of the accused to impeach the journal of the senate, but the senate decided to take proof as to the genuineness of the message. Governor Fenton, Lieutenant Governor Thomas G. Alvord, James Terwilliger, clerk of the senate, George S. Hastings, the governor's private secretary, and George W. Demers, a reporter for the Albany Evening Journal, were examined as witnesses.

From the testimony it seems that the message transmitting the charges against Judge Smith was presented in the usual way by the private secretary and read by the clerk, that the Lieutenant Governor immediately took the message to the executive chamber, and suggested to the Governor that he make certain alterations in its form. A few words were erased, for which no others were substituted, and others were erased, and a substitution made. One sentence originally read as follows: "In my judgment this section of the Constitution, by reasonable construction, invests the governor with the duty of making a recommendation based upon an *ex parte* presentation of the case, and as this course would seem essential to confer jurisdiction upon your body, I must assume that the charges presented to me, and duly verified, are true." In the corrected draft the word "as" is omitted, and also the last clause,—" I must assume that the charges presented to me, and duly verified, are true."

According to the testimony of the private secretary, the last sentence originally read as follows: "I do, therefore, recommend that the said George W. Smith be removed from his said office if, in the judgment of the senate, he shall fail to disprove said charges or establish a satisfactory defense thereto." In its final form the sentence, as

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already quoted, reads as follows: "I do, therefore, recommend that the said George W. Smith be removed from his said office if, in the judgment of the senate, he shall, upon a full and fair investigation, be convicted of the charges made against him." The message so corrected was returned to the senate by the Lieutenant Governor. It was not again read, but was published in its corrected form the same day in the Albany Journal, and was entered in that form in the records of the senate. Judge Smith's counsel contended that this alteration of the message deprived the senate of its jurisdiction.

On Senator Folger's motion the senate, by a vote of 13 to 12, adopted the following: "Resolved, That by virtue of the message of the Governor, read at the desk of the clerk on the 14th day of February last, this senate has jurisdiction of the subject-matter, and has (the) right, at a proper time, to hear and determine the question of the removal of the respondent from his office;" and afterwards, on Senator Gibson's motion, amended the message by restoring "as" and the clause "I must assume that the charges presented to me, and duly verified, are true," and also by striking out the substituted clause at the end of the message, and inserting the clause "upon trial he shall fail to disprove the charges which are made against him," thus ignoring the Governor's alterations in the message.

On the question whether Judge Smith should be removed from office, the vote was 20 to 3,—not the two thirds required by the Constitution.

*Horace G. Prindle.*—The next case was that of Horace G. Prindle, county judge and surrogate of Chenango county. On the 20th of March, 1872, Governor Hoffman sent a special message to the senate, transmitting papers relating to charges against Judge Prindle. The Governor said he had heard the counsel for the petitioners

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and for the judge in relation to the charges, some of which referred to alleged official misconduct during the judge's previous terms, and others to alleged official misconduct during his present term. "The Constitution evidently contemplates that the truth and sufficiency of the charges in such cases as this shall be tried by your honorable body, and not by the governor. The final decision is to be made by you, and not by me. My recommendation is nevertheless necessary to bring the case within your jurisdiction. It would seem, therefore, to be the duty of the governor, if a prima facie case be made out before him, to send it to you for adjudication. . . . I therefore recommend that you inquire into the charges so made, and if the truth and sufficiency thereof shall be established, that the said Horace G. Prindle be then removed from the office of county judge and surrogate of said county."

The charges included various acts of alleged official misconduct. The senate met in extra session May 14, 1872. Following the precedent established in the case of George W. Smith, the accused judge was offered his election whether to be tried before the senate or before a committee of that body. He elected to be tried before the senate.

Judge Prindle had already held office two terms as county judge and surrogate, and had been re-elected in 1871 for a term which began on the 1st of January, 1872. He demurred to the charges, particularly on the ground that all of them except one related to alleged misconduct during the first and second terms. He denied the jurisdiction of the senate to remove him therefor, and claimed that he could be removed, if at all, only for misconduct during his present incumbency. The senate, by a vote of 18 to 3, overruled the demurrer, and thereupon proceeded to hear the case on all the charges. The proposi-

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tion for removal did not receive the necessary two-thirds vote in the senate, and the charges were thereupon dismissed.

The rule adopted by the senate in this case, that it had jurisdiction to entertain complaints of misconduct during a preceding official term, differed from the opinion expressed by the assembly judiciary committee in 1853, who held that an officer could not be impeached for offenses alleged to have been committed while holding the same or any other office under a previous election; but the reader cannot fail to observe that the difference between the two rules thus enunciated accentuates the policy intended to be established by the removal section, —namely, that an officer might be removed for causes which would not be the subject of impeachment. Impeachment, according to the assembly judiciary committee, is a proceeding by which an officer is removed for actual misconduct during an existing incumbency, and while he is still in office. A proceeding for removal under section 11 involves the question of general fitness for the office, and the cause need not be confined to official misconduct.

*John H. McCunn.*—In 1872 the assembly judiciary committee investigated charges against John H. McCunn, a justice of the superior court of the city of New York. The committee transmitted to the Governor its report, including the charges and testimony, with a request that "it be recommended to the senate to take proceedings for the removal of said John H. McCunn from his office of justice of the superior court of the city of New York." Governor Hoffman thereupon convened the senate in extra session on the 14th of May, 1872. On the same day he transmitted to the senate a copy of the charges and testimony, and said: "I recommend that you inquire into the truth and sufficiency of the charges

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so made, and, if the same shall be established, that the said John H. McCunn be then removed from office."

The proposition for removal received twenty-eight affirmative votes, and there were no votes in the negative.

*George M. Curtis.*—Governor Hoffman, on the 18th of June, 1872, sent the following message to the senate:

"I respectfully transmit, herewith, charges and specifications presented to me by a committee of the Bar Association of the city of New York, alleging official misconduct on the part of George M. Curtis, a justice of the marine court of the city of New York, and asking his removal from office, in accordance with section 11 of article 6 of the Constitution of this state; also, the documentary proof submitted to me in support of the charges, together with the answer of Judge Curtis thereto, and the proofs submitted in support of such answer.

"After examining the same and hearing counsel, I deem it my duty to present the same to the senate; and I recommend that you inquire into the charges so made, and if the truth and sufficiency thereof shall be established to the satisfaction of the senate, that the said George M. Curtis be then removed from the office of justice of the said marine court."

The matter was referred to the judiciary committee with instructions to serve copies of the charges and specifications on Judge Curtis, require his attendance before the committee on a day to be specified, and to settle the issues in the proceeding. This course was adopted, and Judge Curtis elected to be tried before the senate, rather than before a committee.

The prosecution asked to amend certain specifications, but the request was denied by the senate on the ground that no charges or specifications could be considered except those presented by the Governor. Judge Curtis asked that the proceedings be dismissed for lack of juris-

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diction, because the marine court was not a court of record. The senate held that the court was not "an inferior court not of record" within the meaning of the Constitution, and that it therefore had jurisdiction of the proceeding.

The senate voted "not proven" on all the charges against Judge Curtis, and the case was accordingly dismissed.

*De Witt C. Ellis.*—In the case of De Witt C. Ellis, superintendent of the bank department, 1877, charges were transmitted to the senate by Governor Robinson, accompanied by documentary evidence relative to the official conduct of the superintendent in relation to a certain bank alleged to be insolvent. Concluding his message, the Governor said:

"Upon these charges, and the proofs in support of them, which I transmit to you herewith, it becomes my duty to recommend to you, as I now do, the removal from office of De Witt C. Ellis, superintendent of the bank department. This recommendation is made as a basis of action on the part of the senate, upon the assumption that the depositions annexed to the charges are true, and make out a prima facie case. It is due to Mr. Ellis to say that, upon my invitation, he has appeared before me and made explanations which seem to acquit him of any intentional wrong, but not, in my judgment, of culpable negligence. I submit the whole matter to the senate for such investigation and action as it may think proper for the protection of public interests."

The proposition for removal was adopted by a vote of 21 to 10. Following this vote, the senate, adopting Governor Robinson's view, passed a resolution expressing the opinion that Mr. Ellis had not been guilty of any intentional wrong.

*John F. Smyth.*—Governor Robinson in a special mes-

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sage to the senate, dated February 21, 1878, transmitted charges of official misconduct against John F. Smyth, superintendent of insurance, in which, after giving a sketch of the misconduct alleged, the Governor says: "I, therefore, recommend the removal of the said John F. Smyth from the office of superintendent of the insurance department." Mr. Smyth was not removed, but the record does not give the vote.

*Governor's recommendation.*—This part of section 11 authorizes the senate to remove a judicial officer on the recommendation of the governor. This necessarily requires a preliminary proceeding before the governor, as the foundation of his recommendation. A complaint should be presented to the governor, and he should give the accused officer an opportunity to be heard in this preliminary proceeding, for the purpose of determining whether a case has been established, and whether a removal should be recommended. The senate has no original authority in the matter, and can only act on charges presented by the governor.

There has been some difference of opinion among the governors as to procedure, and as to the question whether the governor's recommendation should be absolute or only contingent. Thus, in the case of Judge Smith, Governor Fenton, in the original message, recommended his removal unless he disproved the charges against him. In the cases of Judge Prindle, Judge McCunn, and Judge Curtis, Governor Hoffman recommended only that the senate inquire into the charges, and if they should be established, that the judge be removed. He did not recommend a removal, except as a possible result of an investigation by the senate.

Governor Robinson took a different view of executive jurisdiction, and in the case of Mr. Ellis, and again, in the case of Mr. Smyth, made a positive recommendation

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that the officer be removed. This recommendation required the concurrence of the senate, after an investigation by that body. Governor Robinson seems to have reached a more accurate result than his predecessors in construing the power conferred upon the governor by this section of the Constitution. The senate is required to "concur" in the recommendation of the governor, who should first be satisfied, after such investigation as he thinks proper, that the officer ought to be removed. The Constitution seems to require an absolute, rather than a contingent, recommendation. The removal is by the senate, but only on its concurrence by the required vote in the governor's recommendation.

*Review of legislative action.*—The power of removal vested in the legislature or the senate by this section, like the power of removal vested in the governor by other provisions of the Constitution, is executive, and is also political in the highest sense, for it is an exercise of the sovereignty of the people, acting through their chosen representatives. Originally, as already pointed out, the power possessed no judicial characteristics. The removal was to be by resolution, and need not have been supported by any expressed reason, nor was the accused officer entitled to a hearing; but since the amendment of 1845 a removal by the legislature or the senate must have been based upon a judicial investigation. It has already been observed that there is no appeal from an order of removal by the legislature or the senate, and while the legislature or the senate in a given case is the sole judge of the sufficiency of an alleged reason for removal, and its determination of this question is not subject to judicial review, the courts, nevertheless, undoubtedly possess power to inquire into the validity of the removal, and may determine whether the legislature or the senate, in a particular case, has jurisdiction, and whether the power of removal was exercised in accordance with the requirements of the Constitution and the law. The power of removal is not absolute

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and unconditional, but must be exercised in the manner prescribed by the Constitution and the statutes.

This subject is also considered in a note to article 10, section 1, on the governor's power of removal.

§ 12. [*Compensation; age limit.*]—The judges and justices hereinbefore mentioned shall receive for their services a compensation established by law, which shall not be increased or diminished during their official terms, except as provided in section five of this article. No person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age. No judge or justice elected after the first day of January, one thousand eight hundred and ninety-four, shall be entitled to receive any compensation after the last day of December next after he shall be seventy years of age; but the compensation of every judge of the court of appeals or justice of the supreme court elected prior to the first day of January, one thousand eight hundred and ninety-four, whose term of office has been, or whose present term of office shall be, so abridged, and who shall have served as such judge or justice ten years or more, shall be continued during the remainder of the term for which he was elected; but any such judge or justice may, with his consent, be assigned by the governor, from time to time, to any duty in the supreme court while his compensation is so continued.

[Const. 1846, art. 6, § 7; Jud. Art. 1869, §§ 13, 14; Am. 1880.]

COMPENSATION.

In 1835 the salary of the chancellor and of judges of the supreme court was fixed at $2,500. In 1839 it was increased to $3,000, and this was the salary received by these officers when they closed their business under the Constitution of 1846, and went out of office on the 1st of July, 1848.

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*Court of appeals.*—The legislature of 1847 established the salary of the judges of the court of appeals under the new Constitution at $2,500. In 1857 the salary was increased to $3,500, and in 1869 to $6,000. The legislature of 1870, acting under the new judiciary article of 1869, fixed the salary of the chief judge of the court of appeals at $7,500, and of the associate judges at $7,000, and the members of the commission of appeals, created by the judiciary article, were to receive the same compensation as associate judges. Two acts were passed at the same session authorizing an allowance to judges of the court of appeals for their expenses. The first act, chap. 203, did not fix any limit, but subsequently, by chap. 408, the maximum allowance was fixed at $5 a day. The legislature of 1871 again modified the provision relating to the allowance for expenses by prescribing the payment of $2,000 annually to each judge in lieu of other expenses then allowed by law. In 1887 the salary of the chief judge was increased to $10,500, and of the associate judges to $10,000. In 1898 a further allowance of $1,700 was made to each judge for expenses. This makes the aggregate amount payable to the chief judge $14,200, and to each associate judge $13,700.

*Supreme Court.*—The legislature of 1847 established the salary of justices of the supreme court at $2,500. This was increased to $3,500 in 1857, and in 1869 the salary was further increased to $5,000. In 1870 the compensation of justices of the supreme court was fixed at $6,000 per year, and an allowance of $5 a day "for their reasonable expenses when absent from their homes and engaged in holding any general or special term, circuit court, or court of oyer and terminer, or in attending any convention to revise the rules of said court." In 1872 the allowance for expenses for justices of the supreme court, except in the first district, was fixed at $1,200.

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This provision was construed in *People ex rel. Bockes* v. *Wemple* (1889) 115 N. Y. 302, 22 N. E. 272, where it was held that the grant of a fixed sum for expenses was a part of the judge's compensation. The court say that the term "compensation" means the sum which a judicial officer is entitled to receive from the state, and by this statute the judge became entitled to the whole of the $1,200, whether he incurred any expenses or not. Considering the substitution of a fixed sum for the *per diem* allowance previously allowed, the court say: "The law operated to increase the fixed compensation of the justices, while withdrawing any compensation measured and determined by time occupied." A judge whose term had been abridged by the age limit provision of the Constitution was held entitled to the $1,200 in addition to the $6,000 specifically described as compensation.

In 1900 a further provision for the expenses of trial justices was made, and each judge became entitled to receive his expenses, not exceeding $1,000, annually, incurred by him in holding court outside his home county, except in the counties of New York and Kings. Outside justices holding courts in these two counties received extra compensation under other statutes. Trial justices generally, except in the first and second districts, are entitled to receive $7,200 as a fixed sum, with a possible additional $1,000 for actual expenses while away from home.

*Appellate division.*—I do not find that members of the old general term received extra compensation for services in that court, except in the first district. The legislature of 1852 authorized the board of supervisors of New York county to pay the expenses of outside judges assigned to duty in the first district. This included the general term. The act of 1855 fixed the allowance for expenses at $10 a day, and in 1875 this was extended by giving members

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of the general term a *per diem* allowance "for each day necessarily devoted to the examination and decision of cases heard by such court, while he may be a member thereof, as well as for the time said justice shall be a member of such court." In 1893 the *per diem* allowance was changed by authorizing the presiding justice of the New York general term to certify not exceeding $5,000 per annum for the expenses of such outside justices.

This statute was sustained in *People ex rel. Follett* v. *Fitch* (1895) 145 N. Y. 261, 39 N. E. 972. "It is competent for the legislature to allow its designated representative [the presiding justice of the general term] to certify such reasonable sum as shall be sufficient to reimburse the expenses and disbursements of the justices required to serve in the general term of the first judicial department. . . . The fact that a reasonable gross sum, instead of items, is certified to cover expenses and disbursements, does not make it any the less compensation for that purpose, as it is only when these expenses and disbursements have been incurred that the presiding justice will be called upon to act."

In 1896 outside justices assigned to the appellate division in the first department became entitled to receive, in addition to the general compensation allowed to them by law, a sum for expenses sufficient to make the aggregate allowance equal to the compensation of resident justices of the first department, which was then and is now $17,500. The same legislature (1896) also provided for paying the expenses of members of the appellate division in other departments, except in their home county, not exceeding $2,500 per year. In 1901 this allowance was changed to the fixed sum of $2,500. The second department was included in the act of 1896, chap. 390, making an allowance not exceeding $2,500 for the expenses of the appellate division justices, but in



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1898, following the rule already established as to the first department, the presiding justice of the appellate division in the second department was authorized to certify the expenses of outside justices assigned to that department in a sum which, added to $7,200 already received by such justices, would equal the compensation and allowances received by a justice of the supreme court residing in the county of Kings.

The act of 1858, providing for a commissioner of jurors in Kings county, required in its administration in certain cases the participation of the justices of the supreme court. The act of 1866, chap. 821, devolved certain other duties on the justices of the supreme court in relation to jurors in the county of Kings, and authorized the board of supervisors of that county to make compensation for such services. This provision has been continued in the Code of Civil Procedure, § 1151. Acting under this authority the board of supervisors, on the 8th of March, 1871, fixed the additional allowance to resident justices at $6,000, which, with the $7,200 already allowed by the general law, made an aggregate compensation of $13,200 to justices residing in Kings county, and this amount, under the above act of 1898, became payable to outside justices assigned to the appellate division in the second department.

The legislature of 1901, chap. 299, authorized an increase in the allowance to Kings county justices to an amount not exceeding the sum payable to justices in the first district. Acting on this authority the board of estimate and apportionment of New York made an additional allowance of $4,300 each to resident Kings county justices, making the total compensation $17,500, the same as that payable to justices in the first district, and by the terms of the act and the certificate of the board, this increase took effect July 1, 1901. The legislature of

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1901 also, by chap. 597, authorized nonresident justices designated to the appellate division in the second department to receive the same compensation as justices residing in the county of Kings. Thus, after much fluctuation, the compensation of appellate division justices in the first and second departments was equalized at $17,500.

The effect of the allowance of $6,000 made by the Kings county board of supervisors of 1871 under the authority of the act of 1866 was considered in *Gilbert* v. *Kings County* (1892) 136 N. Y. 180, 32 N. E. 554, where it was held that a judge whose term had been abridged by the age limit was not afterwards entitled to receive this allowance. It was not compensation in the sense in which that word is used in relation to remuneration for judicial service; it was an allowance made for special local services which the judge could not perform after the abridgment of his term. A resolution of the board of supervisors making the allowance could not bind a future board, which might reduce the amount allowed even to a nominal sum.

*First judicial district.*—The judiciary act of 1847, already cited, which fixed the salary of justices of the supreme court at $2,500, made no distinction among the several districts, but the legislature of 1852 authorized the board of supervisors of New York county to raise by tax and pay to resident justices "such additional annual compensation as they may deem proper." The board of supervisors, acting under this authority, adopted a resolution in December, 1852, fixing the additional compensation of justices at $1,500.

In *People ex rel. Morris* v. *Edmonds* (1853) 15 Barb. 529, it was held that the additional compensation was "established by law" within the meaning of the Constitution. The power was expressly conferred on the board by the legislature, and the resolution either had the attributes

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of a local law, or it was a legitimate exercise of power delegated by the legislature; and in either case it was valid as to a justice of the supreme court who took office after the resolution was adopted. "An act is as essentially accomplished by law when performed pursuant to a statute, as if consummated by the statute itself." In this case it is said that the reason for allowing extra compensation to these judges "undoubtedly is that their necessary expenses exceed those of their brethren in other parts of the state. . . . The greater expense attendant upon a residence in the city is, of course, from local causes, and must necessarily be incurred by all who constantly perform judicial labor there. That calls for additional remuneration, and is sufficient to legalize a local charge. . . . A similar consideration no doubt induced the legislature of 1818 to pass an act giving to any justice of the supreme court who might reside in the city of New York, in addition to his salary, fees for chamber business and for other services (out of court) appertaining to his office."

In *People ex rel. Mitchell* v. *Haws* (1860) 32 Barb. 207, Justice Sutherland held that the act of 1852 did not authorize an increase in the compensation of justices then in office, and that the resolution above cited was invalid as to them.

The act of 1852 also authorized the board of supervisors to pay "the proper and necessary expenses" of outside justices assigned to duty in the first district. The act of 1855 limited such expenses to a sum not exceeding $10 "for every day such justices shall sit and perform such judicial duties." By the New York charter of 1882, chap. 410, the power to increase the compensation of resident justices was vested in the board of estimate and apportionment, and as to the allowance for expenses to outside justices, the board of aldermen was vested with

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the authority which had previously been possessed by the board of supervisors. By the act of 1893 the *per diem* allowance was extended by including not only the time spent by the judge in court, but also "the time necessarily devoted to the examination and decision of cases heard by such court while he was a member thereof;" but this provision excluded justices assigned to the general term. In 1898 the *per diem* allowance was increased to $20, payable under the same conditions.

*Second judicial district.*—I have already cited the act of 1866 authorizing an increased allowance to justices residing in the county of Kings as compensation for certain services under the jury law. Following this increase the legislature of 1868 authorized the remaining counties in the second district to raise annually $5,000, to be divided equally between the two justices not residing in Kings county, thus adding $2,500 to the salary ($2,500) already allowed by the general act of 1847. This policy was continued under acts passed in 1872, 1883, and 1894, and the compensation already established under the judiciary article of 1869 ($7,200) was augmented by the additional allowance paid under the act of 1868, making a total compensation of $9,700 to justices in the second district not residing in Kings county. The legislature of 1898 equalized the compensation of justices in the second district, and thereafter justices not residing in Kings county were to receive the same compensation as justices residing in that county, which was then $13,200. In 1901, as already noted in the paragraph on the appellate division, the compensation of justices resident in Kings county was increased to $17,500, and this became the compensation afterwards payable to other justices residing in the district.

I have already quoted from the act of 1852 and later statutes authorizing the county of New York to contrib-

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ute to the expenses of outside justices designated to hold courts in that county. This policy was also adopted as to Kings county in 1892, and justices not residing in the second district, performing judicial service in Kings county, were entitled to receive $10 a day for expenses, to be paid by that county under the conditions applicable to New York county. In 1898 this *per diem* allowance in Kings county was increased to $20.

AGE LIMIT.

The age limit provision of this section applies to county judges. *People ex rel. Davis* v. *Gardner* (1871) 45 N. Y. 812; *People ex rel. Joyce* v. *Brundage* (1879) 78 N. Y. 403.

In *Dohring* v. *People* (1873) 2 Thomp. & C. 458, it was held that the age limit provision did not apply to justices of the peace. This view was sustained in *People ex rel. Lawrence* v. *Mann* (1885) 97 N. Y. 530, 49 Am. Rep. 556, where it is said that a justice of the peace is not a judge or justice within the meaning of this section. While he possesses and exercises judicial powers, he also performs numerous administrative duties in connection with the local government of the town, and it seems clear that the framers of the Constitution did not intend to apply to this office the limitation of age imposed on judges of courts of record.

In *People ex rel. Lent* v. *Carr*, 100 N. Y. 236, 53 Am. Rep. 161, 3 N. E. 82, decided in 1885 under the judiciary article of 1869, it was held that the age limit provision did not apply to surrogates, but it will be noted that § 15 of this article specifically applies the age limit to county judges and surrogates.

In *People ex rel. Gilbert* v. *Wemple* (1891) 125 N. Y. 485, 26 N. E. 921, it was held that the provision authorizing the continuance of compensation after judicial service had been terminated by the age limit did not mean ten years on a single term, but might include parts of two terms; the judge must have served ten or more successive years.

**§ 13. [*Impeachment.*]—The assembly shall have the power of impeachment, by a vote of a majority of all the members elected. The court for the trial of impeachments**

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shall be composed of the president of the senate, the senators, or the major part of them, and the judges of the court of appeals, or the major part of them. On the trial of an impeachment against the governor or lieutenant governor, the lieutenant governor shall not act as a member of the court. No judicial officer shall exercise his office after articles of impeachment against him shall have been preferred to the senate, until he shall have been acquitted. Before the trial of an impeachment the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under this state; but the party impeached shall be liable to indictment and punishment according to law.

[Const. 1777, art. 33; 1821, art. 5, § 2; 1846, art. 6, § 1; Jud. Art. 1869, § 1.]

The origin of the impeachment section will be found in Chapter II., in the first volume, in the history of the first Convention. It will be remembered that under the first and second Constitutions the court for the trial of impeachments was also the court for the correction of errors, and the general powers and functions of the two courts were considered together. The abolition of the court for the correction of errors, in 1846, left the court for the trial of impeachments as the only judicial tribunal composed of the lieutenant governor, the senators, and the judges of the highest court.

The legislature of 1784, by chapter 11, instituted the court for the trial of impeachments and the correction of errors, as required by the Constitution. The statute

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enacted the substance of articles 32 and 33, with details relating to procedure. Impeachment proceedings were to be delivered to the president of the senate, who was required to cause the court to be summoned, and the court was required to cause the person impeached to appear or be brought before it to answer the charge against him. The person impeached was entitled to a copy of the impeachment and a reasonable time to plead or answer, and, on the joinder of issue, the court was required to fix a time for the trial. The statute further provided that if the president of the senate should at any time be impeached, notice thereof should be immediately given by the assembly to the senate, that another president might be appointed. These statutory provisions relating to impeachments are substantially continued, but with some additions, in the Code of Criminal Procedure, §§ 12–20, and §§ 119–131.

Under the first Constitution a proposition for impeachment by the assembly must have received the assent of two thirds of the members present. In the Convention of 1821 the committee on the legislative department presented a section which vested the power of impeachment in a majority of the assembly.

General Tallmadge opposed the proposition to reduce the vote required for an impeachment. He said impeachments were usually from political motives, and he thought it not safe to vest this power in a bare majority. Mr. Munro moved to amend by requiring a majority of all the members elected.

Chancellor Kent supported this amendment, pointing out that by the committee's section an impeachment might be presented by thirty-three members of assembly: but he would have no objection to the section if it required a majority of all the members elected. He said he "had no sins to answer for; and as far as he was per-

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sonally concerned, he did not care if the power to impeach should be vested in ten men." He thought there was no necessity for the amendment proposed by the committee, and protested against "sharpening the edge of this penal power."

Mr. Root favored the committee's plan because it was substantially in accordance with the English rule which permitted an impeachment by a bare majority of the House of Commons.

Mr. Jay thought the whole doctrine of impeachment was an anomaly in our government. "We give the whole power of accusing, trying, convicting, and punishing to the legislative department. In England it was given to guard the people from the encroachments of the Crown. The King is there the great fountain of justice, and supposed to preside in his courts; but the maxim that the King can do no wrong required that his ministers of justice, on whom fall the responsibility of his acts, should be amenable for their conduct." Mr. Jay also "contended that there was no necessity for this power. Adequate remedy could be had in the courts of law for those offenses that were not susceptible of sufficient punishment from the frown of public opinion."

Mr. Van Vechten said: "The judiciary were a barrier between the other branches of the government, and it was indispensable that their duty be discharged with fidelity and promptness; but he was not disposed to put the rod into the hand of one branch of the government, unless there was some limit set to the exercise of their power. . . . A trifle will impeach a judge, and when once impeached, his removal is inevitable, if upon no other ground than that his character has been destroyed by impeachment. However fair it may appear afterwards, the impeachment is sufficient ground of argument against him."

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Mr. Munro's amendment to require, on an impeachment, the assent of a majority of all the members elected to the assembly, was adopted by a vote of 87 to 15.

The Constitution of 1846 abolished the court for the correction of errors, and substituted the court of appeals in its place. This necessitated a reconstruction of the section relating to impeachments, and the judges of the court of appeals were substituted for the chancellor and judges of the supreme court, who were members of the original court for the trial of impeachments. An effort was made to exclude the judges from membership in the court, requiring impeachments to be tried by the senate only, but the Convention declined to adopt this proposition.

Mr. Flanders proposed a section similar to that presented by Mr. Loomis during the discussion of the provision relating to removals by the legislature. The Loomis amendment appears in the note to section 11 of article 6. The Flanders amendment required the legislature to define offenses in office, and prescribed the consequences of indictment and conviction. Mr. Worden thought it would be unsafe "to define in a law what offenses should be punishable, for it was beyond the power of human ingenuity to think of everything that would be punishable." The amendment was rejected.

The new section provided specifically that, on an impeachment of the governor, the lieutenant governor could not be a member of the court. This provision is also in the statute relating to impeachments. The judiciary article of 1869 made no change in the provisions relating to impeachments.

The Convention of 1894 modified the section by providing specifically that on an impeachment of the lieutenant governor, he could not act as a member of the

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court. This transferred to the Constitution a similar provision in the Code of Criminal Procedure.

### IMPEACHMENT TRIALS.

In the Convention of 1846 Mr. Stetson, discussing the impeachment section, said it was a "proud tribute to our state that hitherto there had been no impeachments;" he trusted there would be none, and he wanted the section more as a warning to officers than from the probability of conviction.

The jurisdiction of the court for the trial of impeachments was made the subject of an inquiry and report by the assembly judiciary committee in 1853. The committee was asked to report:

First. "Whether a person could be impeached who, at the time of his impeachment, was not the holder of an office under the laws of this state."

And second. "Whether a person could be impeached and deprived of his office for malconduct or offenses done or committed under a prior term of the same or any other office."

The committee answered both questions in the negative. On the first question the committee say it is manifest, under the theory of our government, that an impeachment proceeding applies only to a person while in office, because the judgment of the court affects only his official status, and that the criminal law covers any offenses of which he may have been guilty while in office. "The courts are the only tribunals that have jurisdiction over a delinquent after his term of office has expired, to punish him for offenses committed in the discharge of the duties of his office. . . . All power is with the people, who, if they saw fit, might elect a man to office guilty of every moral turpitude, and no court has the

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power to thwart their will, and say he shall not hold the office to which they have elected him; a contrary doctrine would subvert the spirit of our Constitution."

On the second question the committee say that "neither by the Constitution nor by our laws is there any period limited in which an impeachment may be found; it is but fair, therefore, to infer that the intention was to confine the time to the term of office during which the offenses were alleged to have been committed; indeed, any other conclusion would lead to results which could not be sustained; for who can say but that the people knew of this malconduct,—these offenses,—and elected the individual notwithstanding? . . . However much it may be desired to have men of high integrity and honesty fill our public offices of trust and honor, yet, by our Constitution and the fundamental principles of our government, no particular scale of integrity, honesty, or morality is fixed. No inquisition as to what character had been can be held; it is enough that the people have willed that the person should hold the office; and the courts, which are but the mere creatures of the public, will have no power to interfere."

The committee submitted the following resolution, which was adopted by the assembly:

"*Resolved*, That the committee of investigation into the official conduct of state officers and of persons lately, but not now, holding office, be instructed:

"1. That a person whose term of office has expired is not liable to impeachment for any misconduct under section 1 of article 6 of the Constitution.

"2. That a person holding an elective office is not liable to be impeached under section 1, article 6 of the Constitution, for any misconduct before the commencement of his term, although such misconduct occurred while he held the same or another office, under a previous election."

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A legislative construction of the jurisdiction conferred by this section is found in section 12 of the Code of Criminal Procedure, which declares that every civil officer, except certain inferior judicial officers, may be impeached "for wilful and corrupt misconduct in office," thereby apparently intending to limit jurisdiction only to actual official misconduct, and exclude the consideration of questions involving personal misconduct prior to induction into office. This section of the Code of Criminal Procedure was a substantial re-enactment of the provision in the Revised Statutes (1 Rev. Stat. 155, § 15, 1 Edm. 153) which vested in the assembly power to impeach "for mal and corrupt conduct in office, and for high crimes and misdemeanors."

The articles of impeachment against Justice George G. Barnard, in 1872, included charges of official misconduct during his first term, which ended December 31, 1868. That year he was elected for another term, which commenced January 1, 1869, and at the time of his impeachment was holding office under such second election. On the trial he objected to the jurisdiction of the court to consider charges involving misconduct during his first term, but the court overruled the objection, and considered all the charges, which included alleged misconduct during parts of both terms, and the judge was convicted on several of the charges involving misconduct during the first term, and also on charges involving misconduct during his second term.

The assembly judiciary committee, which made the preliminary investigation of complaints against several judges in 1872, resulting in the impeachment of Judge Barnard, say that testimony relating to alleged misconduct during the judge's first term was objected to, but that the committee decided to take all the testimony, "leaving it to the house to determine as to its availability

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in further proceedings." The committee also say that the scope of the resolution under which they were acting, which permitted them to report "by bill" such amendments to existing laws as might, from the developments of the investigation, appear desirable, did not allow them to limit the range of inquiry in the manner indicated. Such testimony was accordingly taken without regard to the date of the occurrences, so long as it related to the official acts of the judges as such.

This was manifestly proper, not only for the reasons indicated in the report, but also for the reason that if the judge's alleged misconduct during his first term could not be made the basis of articles of impeachment, it might be made the ground of a proceeding for his removal under section 11 of this article, and the assembly had the power to determine in the first instance whether the judge should be proceeded against by impeachment, or by a concurrent resolution for his removal.

The course adopted by the court in this case can scarcely be deemed an authority for an impeachment where all the alleged misconduct occurred during a previous term, for the reason that some of the charges on which the judge was convicted related to misconduct during his present term, and these charges were obviously within the jurisdiction of the court, and a conviction on them was sufficient to sustain its judgment. The opinion expressed by the assembly judiciary committee in 1853 has not yet been overruled, so far as it relates to the jurisdiction to impeach for misconduct wholly occurring during a previous official term.

The first impeachment trial in the history of the state was that of John C. Mather, canal commissioner, in 1853. The court convened on the 27th of July, and adjourned on the 16th of September. I have not had access to a complete official record of the trial. There is, in the State

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Library, a compilation of documents and the arguments of counsel, together with the testimony; but this record does not show the result of the trial. According to the Albany Argus and the Albany Evening Journal of September 17, 1853, the trial closed on the preceding day, the 16th, and Mr. Mather was acquitted on all the charges.

Robert C. Dorn, canal commissioner, was tried before the court for the trial of impeachments in 1868, and acquitted. George G. Barnard, a justice of the supreme court, was tried in 1872. He was found guilty, removed from office, and declared to be disqualified from holding any office of honor, trust, or profit.

So far as I have been able to discover, these are all the impeachment trials. It has already been stated that impeachment proceedings were instituted in January, 1820, against William W. Van Ness, a justice of the supreme court. The charges were investigated by an assembly committee, which declined to recommend an impeachment. The investigation by the assembly committee was quite like a trial, and the result was deemed an acquittal of Judge Van Ness.

### A QUESTION OF PRIVILEGE.

A question involving the relations between the legislative and judicial departments of the government occurred in 1870, when Justice Platt Potter, of the supreme court, was summoned to the bar of the assembly to answer for an alleged breach of privilege in causing an attachment to be issued against Henry Ray, a member of the assembly, and requiring him to appear before the grand jury at the Saratoga oyer and terminer, in January, 1870. Mr. Ray had been subpœnaed to attend as a witness before the grand jury, but had not obeyed the subpœna,

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whereupon the attachment was issued, and he was compelled to attend the grand jury, and give evidence as a witness in a pending criminal proceeding. This was deemed by the assembly a breach of the privilege of its members, and a select committee was appointed to inquire into the matter.

In its report the committee gave a history of parliamentary privilege, and claimed that the attachment against Mr. Ray was unauthorized and invalid, for the reason that he was exempt from arrest under the provisions of an act passed February 20, 1788, which declared that "every member of the legislature shall be privileged from arrest on civil process during his attendance at the session of the house to which he shall belong, except on process issued on any suit brought against him for any forfeiture, misdemeanor, or breach of trust in any office or place of public trust held by him." The committee asserted that a member of the assembly was not bound to obey a subpœna to attend before the grand jury, that his disobedience was not a contempt, for he had committed no offense. In conclusion the committee say that the arrest of the member was a high breach of privilege, and deserved the censure of the assembly. This result was applied not only to Judge Potter, but also to the district attorney who procured the attachment, and the officer who served it.

On the 16th of February, Judge Potter appeared at the bar of the house, in response to its summons, and presented his defense. He denied the power or authority of the assembly to call him to an account. He said he appeared only by courtesy and out of respect to the assembly, but without waiving any objection to its jurisdiction. He protested against the power of the assembly to inquire into his judicial acts, claiming that the judicial department was vested with an equal portion of the sovereign

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power of the state, entirely independent of the legislative power. Continuing, he said: "I protest, and claim that there is no way known to the Constitution or laws of this state by which a judge can be called to account, be tried, degraded, or the dignity of the judicial office impaired, except by the only method known to the Constitution,—by way of impeachment for corruption in office." He said he came not as an individual, but as a judge, to defend his judicial action. He denied the power of the assembly "to punish, by censure or otherwise, the individual for acts performed while exercising the functions of a magistrate of the highest court of original jurisdiction of this state." He characterized the act of the assembly as an "aggressive assumption of power," and said that "if one department of this government possess the power to command obedience of another of coextensive and equal power,—if the legislative can usurp the authority to hold in awe or punish the judicial,—then indeed have we a despotism, and not a government of freedom. If for an official act, if for a judicial act of a judge, this house possess the power to punish, even for mistaken judgment, where is the boasted protection to an independent judiciary?" He contended that his application of the law had been accurate; that the process against Mr. Ray was valid; and said that notwithstanding any action the assembly might deem it proper to take, he would follow the same course, if called upon in a like case, the next day. He asserted that, in so acting as a judicial officer, he could commit no contempt for which he could be held responsible. He said the proceeding which had been instituted by the assembly was an anomaly in every civilized government, and was an unauthorized assumption of preeminence of the assembly over the judicial department.

Judge Potter denied that Mr. Ray had been arrested on civil process; he had been arrested on process issued out



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of the court of oyer and terminer, which was a court of criminal jurisdiction only. Its process, therefore, was not civil process, but criminal process, issued on behalf of the people to enforce the criminal law. He denied that a member of the assembly was privileged from a service of a subpœna to appear before the grand jury.

Judge Potter made a very interesting and instructive argument in defense of the powers and rights of the judiciary as an independent branch of the government, and showed that the privilege of members of the English House of Commons had been limited by statute, and was no broader than that conferred on members of the legislature by the New York act of 1788, which, in many particulars, was manifestly copied from English statutes.

At the close of his argument a resolution was offered declaring that he had been guilty of a high breach of the privileges of the assembly, and was censurable therefor, and that he be reprimanded by the speaker. This was withdrawn. The assembly rejected a resolution requesting the opinion of the attorney general as to the meaning of the term "civil process," and adopted, by a vote of 92 to 15, the following resolution offered by Thomas G. Alvord:

"*Resolved*, That the Hon. Platt Potter was mistaken as to the privileges of this house, in the action taken by him in the arrest of Hon. Henry Ray, and did commit a breach of its privileges in so doing; but this house do not believe that any intention or desire to interfere with the independence or dignity of the house actuated him in the performance of that which he deemed his official duty."

This closed the incident so far as Judge Potter was concerned. The assembly declined to censure the judge, but expressed the opinion that he was mistaken, and asserted the privilege of its members. It may be inferred from the judge's argument that he continued to be of the

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same opinion still. If there was any doubt as to the privilege under earlier statutes, that doubt has been removed by section 2 of the legislative law (Laws 1892, chap. 682), which declares that

"A member of the legislature shall be privileged from arrest in a civil action or proceeding other than for a forfeiture or breach of trust in public office or employment, while attending upon its session, and for fourteen days before and after each session, or while absent for not more than fourteen days during the session, with the leave of the house of which he is a member.

"An officer of either house shall be privileged from arrest in such a civil action or proceeding while in actual attendance upon the house. Either house shall have the power to discharge from arrest any of its members or officers arrested in violation of his privilege from arrest."

Section 4 authorizes each house to punish by imprisonment, not extending beyond the same session of the legislature, as for a contempt, the offense of "arresting a member or officer of either house in violation of his privilege from arrest;" and section 564 of the Code of Civil Procedure provides for the discharge of a person arrested on civil process in violation of his privilege. The section of the legislative law clearly excludes a subpœna to appear before a grand jury. The people must have the right to enforce the criminal law, and for that purpose to compel any person to appear before the proper tribunal.

The assembly took the same action as to the district attorney. This case will be found in 55 Barb. 625.

In the first volume, in the chapter on the first Constitution, I have recounted the proceedings in the legislature relative to the *Hadden Case,* when Chief Justice John Jay and his associates were summoned to the bar of the assembly, at its first session, in 1777, to show why they had refused to grant a writ of habeas corpus, and it has

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there been noted that they refused to act because they had no jurisdiction. They declined to exercise a judicial authority which they believed they did not possess, and they were sustained by the assembly. In the later case, Judge Potter was charged with having exercised too much judicial power, or power which he did not possess. While not fully sustaining the judge, the assembly did not feel sure enough of its position to adopt a resolution of censure. Both instances illustrate the general supervisory power vested in the assembly as the primary representative of the people, with authority to inquire into the conduct of every officer in every department, and, either by the exercise of the power of removal, or of the power of impeachment, to maintain the very highest standards of official character.

The provision defining the extent of punishment in cases of impeachment is "a restriction, not an authority, . . . a mere limitation of a greater power, a power to inflict other punishments, as well as removal and disqualification. Impeachments of public officers, a peculiar species of accusation, made and tried in a peculiar manner, are to extend no farther in their effect than to discharge an officer from his trust, and to render him incapable of holding office; but if the cause for which the officer is thus punished is a public offense, he may also be indicted, tried, and punished according to law; the Constitution leaving the definition of the offense and its particular punishment, in this case as in all others, to the general power of the legislature. This part of the Constitution concerning judgment on impeachments is therefore a limitation of the power of the court for the trial of impeachments, and not a restriction upon the general power of the legislature over crimes." *Barker* v. *People* (1824) 3 Cow. 686, 15 Am. Dec. 322.

§ 14. [*County courts.*]—The existing county courts are continued, and the judges thereof now in office shall hold their offices until the expiration of their respective terms. In the county of Kings there shall be two county

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judges, and the additional county judge shall be chosen at the next general election held after the adoption of this article. The successors of the several county judges shall be chosen by the electors of the counties for the term of six years. County courts shall have the powers and jurisdiction they now possess, and also original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and in which the complaint demands judgment for a sum not exceeding two thousand dollars. The legislature may hereafter enlarge or restrict the jurisdiction of the county courts, provided, however, that their jurisdiction shall not be so extended as to authorize an action therein for the recovery of money only, in which the sum demanded exceeds two thousand dollars, or in which any person not a resident of the county is a defendant.

Courts of sessions, except in the county of New York, are abolished from and after the last day of December, one thousand eight hundred and ninety-five. All the jurisdiction of the court of sessions in each county, except the county of New York, shall thereupon be vested in the county court thereof, and all actions and proceedings then pending in such courts of sessions shall be transferred to said county courts for hearing and determination. Every county judge shall perform such duties as may be required by law. His salary shall be established by law, payable out of the county treasury. A county judge of any county may hold county courts in any other county when requested by the judge of such other county.

[Const. 1777, art. 24; 1821, art. 5, § 6; 1846, art. 6, § 14; Jud. Art. 1869, § 15.]

Several decisions under the Constitution of 1846, construing statutes intended to confer on the county court jurisdiction in certain cases, have already been cited in the

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chapter on that Constitution. The scope of the section was materially enlarged by the judiciary article of 1869, and the earlier decisions are therefore in many respects obsolete, and do not elucidate any principle now embraced in the section. The following note is limited chiefly to decisions under the later Constitutions.

The legislature has power to confer on the county court jurisdiction to make an order for the examination of a judgment debtor after the return of an execution. *Sale* v. *Lawson* (1852) 4 Sandf. 718.

The county court has jurisdiction of an action for the partition of land. *Doubleday* v. *Heath* (1857) 16 N. Y. 80, also of an action to foreclose a mortgage. *Benson* v. *Cromwell* (1857) 26 Barb. 218. The jurisdiction in a foreclosure action is not affected by the fact that there may be a deficiency judgment exceeding $1,000. The Constitution authorized the legislature to confer on this court general jurisdiction in this class of actions without regard to the amount involved. *Hawley* v. *Whalen* (1892) 64 Hun, 550, 19 N. Y. Supp. 521.

The provision in the Constitution of 1846, that the county court shall have such jurisdiction in cases arising in justices' courts as the legislature may prescribe, was sufficient authority for the enactment of § 60 of the Code of Procedure, providing for an action in the county court after a plea of title to land in a justice's court. *Cook* v. *Nellis* (1858) 18 N. Y. 126.

The salary of the county judge must be fixed by the legislature, and that body cannot devolve this power on the board of supervisors. *Healey* v. *Dudley* (1871) 5 Lans. 115.

The judiciary article of 1869 took effect January 1, 1870, and the official term of a county judge elected at the general election in 1869 began on the 1st of January, 1870. *People ex rel. Clark* v. *Norton* (1871) 59 Barb. 169.

Where the summons and complaint in an action in the county court demanded a judgment exceeding $1,000, the jurisdictional limit of the county court, it was held that the court could not bring the case within its jurisdiction by permitting an amendment of the summons and complaint. *McIntyre* v. *Carriere* (1879) 17 Hun, 64. The same rule was applied in *Heffron* v. *Jennings* (1901) 66 App. Div. 443, 73 N. Y. Supp. 410.

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The legislature cannot confer on the county court money jurisdiction above the amount limited by the Constitution. *Buckhout* v. *Rall* (1882) 28 Hun, 484.

The legislature may constitutionally confer on the county court jurisdiction of a proceeding for the assessment of damages caused by opening a street, although the principal office of a corporation whose property may be affected thereby is not within the county. *Re Folts Street* (1897) 18 App. Div. 568, 46 N. Y. Supp. 43.

The legislature could not, under this section, confer on the county court jurisdiction of an action for money only against a foreign corporation. *Rieser* v. *Parker* (1899) 27 Misc. 205, 57 N. Y. Supp. 745, holding unconstitutional the section of the Greater New York charter (1364) conferring on the municipal court jurisdiction in such actions. See also note to § 18, and *Tyroler* v. *Gummersbach* (1899) 28 Misc. 151, 59 N. Y. Supp. 226, 319.

The money limit prescribed by § 14 applies to counterclaims as well as to complaints. The plaintiff who seeks relief in a court of limited jurisdiction ought not to be compelled to litigate there adverse claims by the defendant of an unlimited amount or character, and the defendant cannot in this manner avail himself of a demand which could not be made the basis of an action in the same court. *Howard Iron Works* v. *Buffalo Elevating Co.* (1903) 81 App. Div. 386, 81 N. Y. Supp. 452.

§ 15. [*Surrogates' courts.*]—The existing surrogates' courts are continued, and the surrogates now in office shall hold their offices until the expiration of their terms. Their successors shall be chosen by the electors of their respective counties, and their terms of office shall be six years, except in the county of New York, where they shall continue to be fourteen years. Surrogates and surrogates' courts shall have the jurisdiction and powers which the surrogates and existing surrogates' courts now possess, until otherwise provided by the legislature. The county judge shall be surrogate of his county, except where a separate surrogate has been or shall be elected. In counties having a population exceeding forty thousand, wherein there is no separate surrogate, the legislature may provide for the election of a separate officer to be surrogate, whose term

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of office shall be six years. When the surrogate shall be elected as a separate officer his salary shall be established by law, payable out of the county treasury. No county judge or surrogate shall hold office longer than until and including the last day of December next after he shall be seventy years of age. Vacancies occurring in the office of county judge or surrogate shall be filled in the same manner as like vacancies occurring in the supreme court. The compensation of any county judge or surrogate shall not be increased or diminished during his term of office. For the relief of surrogates' courts the legislature may confer upon the supreme court in any county having a population exceeding four hundred thousand, the powers and jurisdiction of surrogates, with authority to try issues of fact by jury in probate cases.

[Const. 1777, art. 24; 1821, art. 5, § 6; 1846, art. 6, § 14; Jud. Art. 1869, § 15.]

"There is nothing in the Constitution which in any way specifies or defines the powers or duties of surrogates. They are recognized in various sections of the Constitution, and they have been known to the laws of the state since the foundation of our government. Their jurisdiction has, from time to time, been defined in the statutes, and from time to time extended and enlarged. Surrogates' courts have always had jurisdiction of the administration, adjustment, and settlement of the estates of deceased persons, and the imposition and collection of this tax are simply incidents in the final settlement and adjustment of such estates, and are in no way foreign to the jurisdiction which has generally been exercised by such courts: certainly not so foreign as to make the act obnoxious to any constitutional objection." *Re McPherson* (1887) 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685, sustaining the collateral inheritance tax act of 1885, chap. 483.

Where the county judge is also surrogate a bond given by an administrator, conditioned that he will obey the orders of the county judge, is valid. The office of county judge is the principal one, and in the smaller counties he is *ex officio* surrogate. *Farley* v. *McConnell* (1873) 52 N. Y. 630.

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The legislature had power, by the act of 1870, chap. 359, to vest in surrogates' courts jurisdiction to accept the resignation of a trustee. The fact that the supreme court had general jurisdiction in law and equity did not prevent the legislature from conferring equitable jurisdiction on other courts. The Constitution is not exclusive and the powers conferred upon the supreme court may be conferred upon any other court. *Re Bernstein* (1877) 3 Redf. 20. The general rule expressed in this case has since been limited by § 18 of this article, prohibiting the legislature from conferring equity jurisdiction on inferior local courts.

The provision in this section authorizing the election of a separate surrogate in certain counties does not apply to the county of New York. The surrogate's court existed in that county long prior to the Constitution of 1846, and was expressly recognized in that Constitution. *People ex rel. Rosenkranz* v. *Carr* (1881) 86 N. Y. 512.

Under the former Constitution it was held in *People ex rel. Weller* v. *Townsend* (1886) 102 N. Y. 430, 7 N. E. 360, that a surrogate elected in case of a vacancy was chosen for a full term of six years, and not for the remainder of the unexpired term. This rule is now specifically prescribed in § 15.

The legislature has power to require the payment into the surrogate's court of surplus moneys arising in actions of foreclosure or partition, and the general jurisdiction of the supreme court in which such actions may have been brought is not thereby affected. *Re Stilwell* (1893) 139 N. Y. 337, 34 N. E. 777.

**§ 16. [*Special county judge and surrogate.*]—The legislature may, on application of the board of supervisors, provide for the election of local officers, not to exceed two in any county, to discharge the duties of county judge and of surrogate, in cases of their inability or of a vacancy, and in such other cases as may be provided by law, and to exercise such other powers in special cases as are or may be provided by law.**

[Const. 1846, art. 6, § 15; Jud. Art. 1869, § 16.]

Discussing a question relating to a vacancy in the office of surrogate, Chief Judge Ruger in *People ex rel. Weller* v. *Townsend*

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(1886) 102 N. Y. 430, 7 N. E. 360, says of § 16 that " in the case of elective officers the necessity for the existence of some continuous authority to fill vacancies temporarily, in order that the performance of their duties may not be too seriously interrupted, and the inconvenience and inadequacy of any system by which such power could be exercised by the people through the medium of popular elections except at regular periods, led to the adoption of that clause of the Constitution which delegated to the legislature power to make provision for such cases."

Under an act creating the office of special county judge, with such compensation as might be allowed by the board of supervisors, it was held that such a special county judge, acting as surrogate without proof of the authority required by § 2487 of the Code of Civil Procedure, was not entitled to compensation as provided by § 2493, but only to such compensation as might be allowed by the board of supervisors. *Re Tyler* (1891) 60 Hun, 566, 15 N. Y. Supp. 366.

What are "special cases" under this section was considered in *People* v. *Main* (1859) 20 N. Y. 434, and it was there said—quoting previous decisions in *Kundolf* v. *Thalheimer* (1855) 12 N. Y. 593, and *Doubleday* v. *Heath* (1857) 16 N. Y. 80—that "the qualifying word 'special' is considered as having been used in opposition to ordinary or common, and as denoting some legal proceeding other than a regular action at law or in equity;" and that taking bail out of court is within this definition. "It is an act aside from the general jurisdiction of criminal courts, and has always been authorized to be done by magistrates other than the judges of the court in which the offenders were to be tried." The court sustained an act authorizing a special county judge to perform the same duties out of court that might have been performed by a county judge.

§ 17. [*Justices of the peace.*]—The electors of the several towns shall, at their annual town meetings, or at such other time and in such manner as the legislature may direct, elect justices of the peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. Justices of the peace and judges or justices of inferior courts not of rec-

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ord, and their clerks, may be removed for cause, after due notice and an opportunity of being heard, by such courts as are or may be prescribed by law. Justices of the peace and district court justices may be elected in the different cities of this state in such manner, and with such powers, and for such terms, respectively, as are or shall be prescribed by law; all other judicial officers in cities, whose election or appointment is not otherwise provided for in this article, shall be chosen by the electors of such cities, or appointed by some local authorities thereof.

[Const. 1777, art. 24; 1821, art. 4, § 7; Am. 1826; Const. 1846, art. 6, § 7; Jud. Art. 1869, § 18.]

*Justices of the peace in towns.*—A justice of the peace is defined by the court of appeals in *People ex rel. Burby* v. *Howland* (1898) 155 N. Y. 270, 41 L. R. A. 838, 49 N. E. 775, as "a constitutional judge, elected by the people for a fixed term, protected from removal except by a judicial tribunal, on notice and for cause, with civil jurisdiction in most actions where the sum claimed does not exceed $200, and with criminal jurisdiction to apprehend and commit for all crimes, and to try and convict in cases of misdemeanor." The provision in the act of 1896, chap. 22, limiting criminal jurisdiction of justices of the peace in the town of Fort Edward, and prohibiting them from receiving any fees for services in such cases, was an unconstitutional restriction on the powers conferred and duties imposed on these officers. "Any legislation that hampers judicial action or interferes with the discharge of judicial functions is in conflict with the principles of the Constitution. Whenever a judge, however humble, is authorized by law to hold a criminal court established by the Constitution, and to require executive officers to serve his warrants and enforce his judgments, the legislature cannot leave him the power to act, and withdraw from him the power of compelling obedience to his lawful mandates, without affecting his independence and depriving him of the essential powers of a judge." The Fort Edward act received a similar construction in *People ex rel. Ryan* v. *Washington County* (1898) 155 N. Y. 295, 49 N. E. 779, with special reference to a deputy sheriff's right to fees.

The same principle was asserted in *People ex rel. Holmes* v.

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*Lane* (1900) 53 App. Div. 531, 65 N. Y. Supp. 1004, where it is said that the "office of justice of the peace is a constitutional one, . . . and the legislature possesses no power to abridge the scope of that functionary or, by indirection, to supplant him by another officer." A police justice elected under the act of 1899, chap. 34, creating this office in the town of Sweden, could not be vested with exclusive jurisdiction as against justices of the peace.

The legislature may enlarge or restrict the territorial jurisdiction of justices of the peace; their jurisdiction rests in legislative discretion, and is subject to legislative control. By the erection of a new county out of parts of other counties the jurisdiction of justices is necessarily restricted, but the office cannot be abolished nor the term abridged; they are entitled to continue in office for the term for which they were chosen. *Ex parte M'Collum* (1823) 1 Cow. 550. The same principle was declared in *Garey* v. *People* (1827) 9 Cow. 640, and it was there held that the constitutional term of office of a justice of the peace could not be affected by the transfer of a town from one county to another, or the erection of a new county.

The jurisdiction of a justice of the peace depends upon the general statutes of the state. He has jurisdiction to pass upon every question involved in the action, including the validity of the law under which the action was brought. "The judgment, so long as it remained unreversed, was for every purpose as conclusive between the parties and upon every question necessarily embraced in the judgment as would have been that of the highest court of record in the state." Such a judgment cannot be ignored by the defendant therein, and he cannot maintain an independent action for damages caused by the judgment, even if the act under which the judgment is rendered may be deemed unconstitutional. The defendant must seek relief by an appeal, instead of by another action. *Hallock* v. *Dominy* (1877) 69 N. Y. 238.

A person elected to the office of justice of the peace to fill a vacancy enters upon the duties of the office at once, and the person previously appointed to fill the same vacancy can hold only until such election. *People* v. *Keeler* (1858) 17 N. Y. 370.

In *Re Eliott* (1886) 6 N. Y. S. R. 8, the court sustained the act of 1875, chap. 166, authorizing the town board to make an appointment to fill a vacancy in the office of a justice of the peace, and providing that the appointee should hold during the residue of the term if it expired at the end of the calendar year in which the ap-

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pointment was made, even if a town meeting might be held in the meantime.

Justices of the peace must be elected at a town meeting, and the legislature cannot provide for their election at any other time. *People ex rel. Smith* v. *Schiellein* (1884) 95 N. Y. 124.

The prohibition against abolishing the office of justice of the peace in towns does not affect the power of the legislature to create cities. "Such officers are the incidents only of the political existence of towns." The town as an independent organization may be destroyed and its territory merged in the city, and justices of the peace do not continue in office after the town has ceased to exist. *Gertum* v. *Kings County* (1888) 109 N. Y. 170, 16 N. E. 328.

"The office of justice of the peace is a constitutional one and stands on a different basis from inferior local courts. . . . The general rule is that the territorial limits of a justice's jurisdiction are coextensive with the limits of the county in which he resides. . . . The ordinary process issued by him in a civil case may be served at any place within his county." *Beach* v. *Baker* (1898) 25 App. Div. 9, 48 N. Y. Supp. 1042.

A justice's court has jurisdiction of an action against the postmaster for the conversion of a newspaper. It is an ordinary action of trover, and the Federal courts have no exclusive jurisdiction. *Teal* v. *Felton* (1851) 12 How. 284, 13 L. ed. 990, affirming (1848) 1 N. Y. 537, 49 Am. Dec. 352.

*Justices of the peace in cities.*—The legislature may fix the times and places for the election of justices of the peace in cities, but it cannot extend the term of office of an incumbent. *People ex rel. Fowler* v. *Bull* (1871) 46 N. Y. 57, 7 Am. Rep. 302.

Police justices in New York are not included in the terms "justices of the peace in cities" and "district court justices," used in this section, and the legislature may constitutionally provide that such police justices may be appointed instead of elected, as required by the Constitution in the case of the other officers named. *Wenzler* v. *People* (1874) 58 N. Y. 516. See *People ex rel. Joyce* v. *Guden* (1902) 75 N. Y. Supp. 347; *People* v. *Morgan* (1874) 5 Daly, 161, affirmed in (1874) 58 N. Y. 679; *Coulter* v. *Murray* (1873) 15 Abb. Pr. N. S. 129.

Justices of the peace in Rochester, chosen under the act of 1861, chap. 143, are not justices of the peace within the meaning of this section. The office may therefore be abolished by the legislature. *People ex rel. White* v. *Rochester* (1877) 11 Hun, 241.

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The municipal court of Rochester is not a court of general jurisdiction, but of local and inferior jurisdiction, and limited to the territory embraced within the locality for which the court is constituted; the legislature could not give it jurisdiction outside the city. The two classes of justices mentioned in § 17, namely, justices in towns and justices in cities, cannot be blended. *Ziegler* v. *Corwin* (1896) 12 App. Div. 60, 42 N. Y. Supp. 855. But in *Armstrong* v. *Kennedy* (1898) 23 Misc. 47, 51 N. Y. Supp. 509, and in *Desmond* v. *Crane* (1899) 39 App. Div. 190, 57 N. Y. Supp. 266, it was held that the legislature had power to confer on a justice of the peace elected in the city of Auburn the jurisdiction in civil actions possessed by justices of the peace in towns, although the city court had within the city exclusive jurisdiction as against such justices. Section 17 expressly confers on the legislature discretion as to the powers which may be vested in justices of the peace in cities.

The provision in the revised charter of Lockport (1886, chap. 120), giving city justices of the peace the same jurisdiction as town justices, was unconstitutional. The legislature may create "courts of justices of the peace in cities, with jurisdiction coincident with the county." *Gould* v. *Mahaney* (1899) 39 App. Div. 426, 57 N. Y. Supp. 363. The same rule was declared in *Ostrander* v. *People* (1883) 29 Hun, 513, as to justices elected in the city of Rome.

Recorders and city judges in cities are not provided for in the Constitution, and therefore their terms of office are within the control of the legislature. *People ex rel. Stupp* v. *Kent* (1903) 83 App. Div. 554, 82 N. Y. Supp. 172.

*Uniformity in method of selection.*—The provision in this section that "all other judicial officers in cities, whose election or appointment is not otherwise provided for in this article, shall be chosen by the electors of such cities, or appointed by some local authorities thereof," was construed in *People* v. *Dooley* (1902) 171 N. Y. 74, 63 N. E. 815, and it was there held that the method of selection must be uniform throughout the city, that an election by the people could not be authorized in one part of the city, and an appointment by the mayor in another part. "All public officers must be elected by constituencies coextensive with their jurisdiction, unless express provision is made to the contrary, as in the instance of justices of the supreme court." The New York charter amendments of 1901, providing for the election of city magistrates in one part of the city, and their appointment in other parts, was unconstitutional.

§ 18. [*Inferior local courts.*]—Inferior local courts of

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civil and criminal jurisdiction may be established by the legislature, but no inferior local court hereafter created shall be a court of record. The legislature shall not hereafter confer upon any inferior or local court of its creation, any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon county courts by or under this article. Except as herein otherwise provided, all judicial officers shall be elected or appointed at such times and in such manner as the legislature may direct.

[Const. 1777, art. 24; 1821, art. 5, § 6; 1846, art. 6, § 14; Jud. Art. 1869, § 19.]

In previous volumes a sketch has been given of the evolution of this section, from which it appears that the original provision was incorporated in the Constitution by the Convention of 1846, and the authority conferred by it was limited to the creation of inferior local courts in cities. The limitation was omitted by the judiciary article of 1869, and the provision was made general and applicable to all subordinate territorial divisions of the state. The scope of the section was further modified by the Convention of 1894. The discussion relating to this subject has been given in the chapter on that Convention.

The power of the legislature to create new judicial tribunals received early consideration by the court of appeals. In *Sill* v. *Corning* (1857) 15 N. Y. 297, construing this provision of the Constitution of 1846 as to its effect upon the act of 1852, chap. 53, creating the office of police justice in the village of Corning, Judge Denio says that "the provision respecting the higher courts whose jurisdiction pervades the whole state is exclusive in its character, and that no other courts of the same jurisdiction can be added by the legislature. . . . But there is nothing in terms prohibitory of new courts in the Constitution. It is not anywhere said that the judicial authority of the state shall be vested in the courts for which the

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Constitution provides, though such phraseology is made use of in regard to the legislative power. . . . It is by the application of reasonable principles of construction that we are able to say that no tribunals fulfilling the general purposes of the constitutional courts expressly provided for can be erected." There is no principle of construction which prevents the creation of "local tribunals established for the purpose of redressing a certain description of grievances in particular limited localities. The state, as to subjects of a domestic nature, is a sovereign political power, and the legislature can provide such agencies for the administration of the law and the maintenance of public order as it shall judge suitable, where no prohibition, expressly made or necessarily implied, is found in the Constitution." The legislature therefore had power to create this local court in the village of Corning and confer upon it jurisdiction to hear and determine actions for penalties for violations of the village by-laws.

The act providing for a police justice in the village of Ilion, 1854, chap. 127, went much farther than the Corning statute, and expressly conferred on the police justice "all the jurisdiction, power, and authority" possessed by justices of the peace of the town of German Flats, in which the village of Ilion was situated. This act was sustained in *Brandon* v. *Avery* (1860) 22 N. Y. 469, and it was held that the police justice had jurisdiction of an action commenced before him between residents of another town. Judge Comstock, who wrote the opinion in this case, said he dissented in the *Corning Case*, but had since become satisfied that the decision was right.

This decision was followed in *People ex rel. Creegan* v. *Dutcher* (1874) 4 Thomp. & C. 391, sustaining the act of 1873, chap. 370, creating the office of police justice in the village of Port Jervis, which act was substantially identical with the Ilion statute, and especially conferred on the police justice jurisdiction of actions arising under village ordinances. The act created an inferior and local court within the meaning of this section. See also *Deposit* v. *Vail* (1875) 5 Hun, 310, limiting to the village jurisdiction conferred on the police justice which in form was coextensive with two counties, a part of each being included in the village.

In *Bocock* v. *Cochran* (1884) 32 Hun, 521, the jurisdiction of the police justice of Coxsackie in criminal cases was limited to the village.

The legislature had power, as by the act of 1854, chap. 96, to transform the recorder's court of Buffalo into the superior court of that city. *International Bank* v. *Bradley* (1859) 19 N. Y. 245.

The act of 1849, chap. 125, to organize the city court of Brooklyn,

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and which in terms authorized the city judge to exercise in the county of Kings all the powers of a justice of the supreme court at chambers, did not have the effect to confer on the city judge jurisdiction in supplementary proceedings upon a judgment recovered in the supreme court. The legislature has not power to authorize a judge of any one court to exercise complete jurisdiction in a cause pending in another court, except where expressly directed by the Constitution. It would be repugnant to the general scheme of the judiciary article. *Cashman* v. *Johnson* (1857) 4 Abb. Pr. 256.

The courts authorized by § 18 must, by the act creating them, be in effect limited to the exercise of jurisdiction in the locality where they exist. Construing the Mount Vernon city court act of 1892, chap. 182, which authorized the court to send its process into any part of Westchester county, and conferred on the city court concurrent jurisdiction with the county court in supplementary proceedings to enforce a judgment of the city court where a transcript had been filed in the county clerk's office, the court say that "the act, in attempting to vest the court with power to cause its process to run into any place in the county of Westchester, and to authorize its order in supplementary proceedings to be served in like manner, is in clear conflict with the constitutional provision, and is therefore to that extent void." *Pierson* v. *Fries* (1896) 3 App. Div. 418, 38 N. Y. Supp. 765, citing *Carroll* v. *Langan* (1892) 63 Hun, 380, 18 N. Y. Supp. 290, in which it was held that the legislature could not vest in the recorder of Albany power in supplementary proceedings to be exercised outside the city. His jurisdiction must be local.

In *Dawson* v. *Horan* (1868) 51 Barb. 459, the court sustained the provision of the Rochester charter providing for the election of three justices of the peace in the city, and conferring on them all the powers and jurisdiction of justices of the peace of towns, and providing that they should be deemed justices of the peace of the county of Monroe.

The legislature had no power to extend the territorial jurisdiction of the municipal court of Rochester beyond the city limits. *Baird* v. *Helfer* (1896) 12 App. Div. 23, 42 N. Y. Supp. 484; *Ziegler* v. *Corwin* (1896) 12 App. Div. 60, 42 N. Y. Supp. 855.

The act establishing the municipal court of Syracuse, Laws 1892, chap. 342, which conferred upon it the general powers possessed by justices of the peace under the Code of Civil Procedure, § 2869, was sustained in *Curtin* v. *Barton* (1893) 139 N. Y. 505, 34 N. E. 1093, the court observing that "there is no doubt of the power of the leg-



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islature to establish an inferior local court of civil and criminal jurisdiction in a city," but that, in an action in the court, and within its jurisdiction, a party could not attack the title of a judge of the court on the ground that the legislature could not vest in the governor the power of appointment of the first judges. They were officers *de facto*, and their title could not be questioned except in a direct proceeding by the state.

The act of 1859, chap. 10, which conferred on the police justice of the village of Whitesborough all the powers and jurisdiction possessed by justices of the peace in the town of Whitestown, in which the village was situated, was unconstitutional. *Waters* v. *Langdon* (1863) 40 Barb. 408.

In *People ex rel. Sinkler* v. *Terry* (1888) 108 N. Y. 1, 14 N. E. 815, the court construed the act of 1870, chap. 263, amending previous statutes, which created the office of justice of the peace in the village of Canton, and conferred on him the jurisdiction possessed by justices of the peace in towns in criminal cases, and also jurisdiction in civil actions where the parties were all residents or inhabitants of the village. His jurisdiction was limited to the village, and his court was local within the meaning of the Constitution, and his jurisdiction inferior to that of a justice of the peace of a town. "The Constitution does permit of the election in villages of a judicial officer with inferior and local jurisdiction, even though he be named a justice of the peace." The Constitution does not prohibit the election of a justice of the peace in a village, so long as the officer thus elected by a reduced constituency is not in reality a justice of the peace of the town, and exercising, in all respects, the same jurisdiction. Inferior local courts may be established in any part of the state, and such legislation is not void because the magistrate is called in the statute a justice of the peace of the village. "A local and inferior court established in a village for the purpose of therein redressing a certain description of grievances is not an unconstitutional tribunal, although the officer who is to preside in it is called a justice of the peace."

A court-martial is not an inferior local court within the meaning of this section. Courts-martial had existed from the colonial period, and were not expressly abolished or prohibited by any Constitution. *People ex rel. Underwood* v. *Daniell* (1872) 50 N. Y. 274.

"The terms 'civil' and 'criminal,' when used, whether in reference to jurisdiction or judicial proceedings generally, have respect to the nature and form of the remedy, and the cause of action or occasion for instituting legal proceedings. Civil stands for the opposite of

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criminal, and hence we have courts known as courts of civil jurisdiction and of criminal jurisdiction, distinguished by the character of the prosecutions in each. . . . A competent court for the prosecution of either class of actions is one having lawful jurisdiction; and civil jurisdiction simply means jurisdiction to hear and determine civil actions; and to enlarge the civil jurisdiction of a court already having jurisdiction of that class of actions is merely to give jurisdiction over other actions for the recovery of a right or the redress of a wrong, and has no respect whatever to the territorial limit of the jurisdiction or the jurisdiction over persons." *Landers* v. *Staten Island R. Co.* (1873) 53 N. Y. 450.

The provision relating to judicial officers in cities does not apply to vacancies, but to supplying the incumbent of the term. *People ex rel. Sinnott* v. *Shea* (1876) 7 Hun, 303.

"The jurisdiction of a strictly local court . . . cannot be extended to persons and subjects without the jurisdiction by the mere circumstance that some one or more of those jointly liable chance to reside or be within the jurisdiction. Vitality and effect cannot be given to the process of the court beyond the territorial limits of the jurisdiction, merely because there are some of the joint obligors or parties liable within those limits and subject to its process. There is no legal efficacy in the joint liability of several debtors which can give an actual or constructive jurisdiction over the persons of those without the jurisdiction, or make the court one of general jurisdiction, when these circumstances, to wit, a joint liability of several, and the residence of some within and of others without the jurisdiction, concur." *Hoag* v. *Lamont* (1875) 60 N. Y. 96.

The legislature has power to abolish all local courts in cities and villages as well as to establish them. *People ex rel. White* v. *Rochester* (1877) 11 Hun, 241.

It was held in *Conor* v. *Hilton* (1883) 66 How. Pr. 144, that the Albany city court could not send its process outside the city.

Under the Constitution of 1846, which provided for the election of justices of the peace in towns, it was not competent for the legislature to create the office and provide for an election in a different manner, or by any other locality. "The only authority conferred is to establish local and inferior courts. The jurisdiction of a local court must be exercised within the locality, and its process cannot be executed outside of it. Whatever power constitutional justices of the peace may possess to send their process into adjoining towns, no local court created under the clause referred to could be vested with that power." Its jurisdiction must be confined to the

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locality. *Geraty* v. *Reid* (1879) 78 N. Y. 64, construing the act of 1849, providing for the election of justices of the peace in Brooklyn. The same rule was declared in *Tobias* v. *Perry* (1898) 25 Misc. 74, 54 N. Y. Supp. 716, as to the jurisdiction of justices of the peace elected in the city of Corning.

The provision of the general village law of 1897, chap. 414, § 182, vesting in police justices exclusive jurisdiction of misdemeanors committed in the village, is constitutional. *People ex rel. Saloom* v. *Whitney* (1898) 32 App. Div. 144, 52 N. Y. Supp. 695.

The establishment of courts of justice, in the absence of constitutional restriction, is a part of the power and prerogative of the legislature. "While the legislature cannot exercise judicial power, it may, unless prohibited by the express or implied provisions of the Constitution, create judicial tribunals for the whole or any part of the state, and determine their power and jurisdiction in matters of state and local cognizance. . . . In ascertaining the validity of a legislative act creating a judicial tribunal for a part of the state, the test is whether it is an inferior and local court within the meaning of the Constitution." The Constitution does not define the term "local" as used in reference to inferior local courts, but "the separation of the state into counties, towns, cities, and villages, for the purpose of local government, is an essential part of the framework of the state government, and . . . these were the only divisions for the purpose of local government contemplated by the framers of that instrument." The only local courts known at the time of the adoption of the Constitution of 1846 and the amendment of 1869 were courts in counties, towns, cities, and villages. Section 18 refers to local courts as historically known, "that is, courts established for and within one of the recognized territorial divisions of the state, and as a part of the system of local government, and it cannot be so construed as to authorize the legislature to carve out from the territory of the state a district for judicial purposes not bounded by town or county, city or village lines, and erect therein a local court." The legislature had no power as attempted by the Niagara police district act of 1881, chap. 415, to establish a police court in such district. *People ex rel. Townsend* v. *Porter* (1882) 90 N. Y. 68.

The legislature may confer on a police justice exclusive power to issue all criminal process within the corporate limits. "The power to take away the jurisdiction of a justice of the peace in criminal cases follows by necessity from the powers to create a police justice." *People ex rel. Lynch* v. *Duffy* (1888) 49 Hun, 276, 1

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N. Y. Supp. 896, sustaining an act conferring exclusive jurisdiction in criminal cases on a police justice in Mt. Vernon.

Power conferred upon a city officer to audit claims against the city does not make him a court within the meaning of this section. *Syracuse* v. *Hubbard* (1901) 64 App. Div. 587, 72 N. Y. Supp. 802.

*New York.*—The act of 1866, chap. 74, creating the metropolitan sanitary district and a board of health therein, did not establish an inferior local court within the meaning of this section. *Coe* v. *Schultz* (1866) 47 Barb. 64; *Cooper* v. *Schultz* (1866) 32 How. Pr. 107.

It was competent for the legislature to confer on the New York marine court "whatever civil or criminal jurisdiction it might deem best, subject only to the restriction that its character, as a local court, should be preserved." *Anderson* v. *Reilly* (1876) 66 N. Y. 189.

The legislature had power to establish the municipal court of New York with the powers and jurisdiction conferred upon it by the Greater New York charter of 1897. *Re Schultes* (1898) 33 App. Div. 524, 54 N. Y. Supp. 34. This court was again under consideration in *Tyroler* v. *Gummersbach* (1899) 28 Misc. 151, 59 N. Y. Supp. 266, 319, where it was held to be an inferior local court under § 18, and that in an action for money only its jurisdiction was limited to the city.

In *Ricser* v. *Parker* (1899) 27 Misc. 205, 57 N. Y. Supp. 745, it was held that the municipal court had no jurisdiction of an action for the recovery of money only against a foreign corporation.

The court in *McConologue* v. *McCaffrey* (1899) 29 Misc. 139, 60 N. Y. Supp. 279, and in *Smith* v. *Silsbee* (1900) 53 App. Div. 462, 65 N. Y. Supp. 1083, held that the municipal court of New York had no jurisdiction of an action to foreclose a mechanic's lien, for the reason that such an action involved the exercise of equity jurisdiction, and the Constitution prohibits the legislature from conferring equity jurisdiction on inferior local courts.

The legislature had power to make the jurisdiction of the municipal court of New York coextensive with the city, and it was not required to limit such jurisdiction within a county. The power as to inferior local courts was not restricted by reference to county courts as the territorial standard, but it was intended rather to "restrict their jurisdiction as to subject-matter and persons, and not as to locality." *Irwin* v. *Metropolitan Street R. Co.* (1899) 38 App. Div. 253, 57 N. Y. Supp. 21; *Kantro* v. *Armstrong* (1899) 44 App. Div. 506, 60 N. Y. Supp. 970.

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In the article on the judiciary, in the chapter on the Convention of 1894, I have quoted from the report of the judiciary committee, and also from the remarks of Mr. Root relative to the limitations on the power of the legislature as to the jurisdiction which might be conferred on inferior local courts, from which it will be seen that it was the intention of the committee, as expressed by Mr. Root, to "prohibit the legislature from ever enlarging the jurisdiction of local and inferior courts so that they shall exceed, as to the courts now existing, the jurisdiction they now have, and as to any court they may hereafter create, the jurisdiction of the county courts. We thus keep down to the level of the county court, the local tribunals and useful tribunals, adapted to the performance of specific functions, all courts except the one supreme court."

In *Dodge Mfg. Co.* v. *Nassau Show Case Co.* (1899) 44 App. Div. 603, 61 N. Y. Supp. 111, it was said that the municipal court had jurisdiction of an action against a domestic corporation, although there was no evidence as to the county in which the corporation had its principal office or place of business. The court declined to concur in the views expressed by the appellate division in the first department in the *Rieser Case* above, to the effect that the municipal court had no jurisdiction of an action against a foreign corporation.

In *Worthington* v. *London Guarantee & Acci. Co.* (1900) 164 N. Y. 81, 58 N. E. 102, the court of appeals had occasion to consider the jurisdiction of the municipal court, especially as to foreign corporations, and it sustained the section of the New York charter (1364) which conferred on the municipal court jurisdiction of a foreign corporation having an office in the city. The court said the municipal court was not a new inferior local court, but a merger and continuation of the former district courts in New York and the justices' courts in certain parts of Brooklyn. The former district courts had jurisdiction of actions against foreign corporations, and this jurisdiction survived and was continued after the consolidation of former local courts in the new municipal court. The principle of this decision was applied in *Routenberg* v. *Schweitzer* (1900) 165 N. Y. 175, 58 N. E. 880, where it was held that the legislature had power to confer on the municipal court jurisdiction of actions against nonresidents who have a place of business in the city. See also *Meuthen* v. *Eyelis* (1900) 33 Misc. 98, 67 N. Y. Supp. 246; *Lehigh & N. E. R. Co.* v. *American Bonding & T. Co.* (1903) 40 Misc. 698, 83 N. Y. Supp. 191.

## § 19. [*Clerks of courts.*]—Clerks of the several coun-

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ties shall be clerks of the supreme court, with such powers and duties as shall be prescribed by law. The justices of the appellate division in each department shall have power to appoint and to remove a clerk, who shall keep his office at a place to be designated by said justices. The clerk of the court of appeals shall keep his office at the seat of government. The clerk of the court of appeals and the clerks of the appellate division shall receive compensation to be established by law and paid out of the public treasury.

[Const. 1821, art. 4, § 9; 1846, art. 6, § 19; Jud. Art. 1869, § 20.]

The office of county clerk is considered in a note to § 1 of article 10.

§ 20. [*Certain judicial officers not to receive fees; eligibility.*]—No judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office; nor shall any judge of the court of appeals, or justice of the supreme court, or any county judge or surrogate hereafter elected in a county having a population exceeding one hundred and twenty thousand, practise as an attorney or counselor in any court of record in this state, or act as referee. The legislature may impose a similar prohibition upon county judges and surrogates in other counties. No one shall be eligible to the office of judge of the court of appeals, justice of the supreme court, or, except in the county of Hamilton, to the office of county judge or surrogate, who is not an attorney and counselor of this state.

[Const. 1846, art. 6, § 20; Jud. Art. 1869, § 21.]

In *Settle* v. *Van Evrea* (1872) 49 N. Y. 280, it was held that a member of the commission of appeals was not a judge of the court of appeals, and therefore was not prohibited from acting as referee.

In *Countryman* v. *Norton* (1880) 21 Hun, 17, it was held that the

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power of a referee terminated upon his acceptance of the office of justice of the supreme court, and that he could not, while holding such office, act as referee and decide the issues which had been referred to him.

*Brown* v. *Brown* (1901) 64 App. Div. 544, 72 N. Y. Supp. 309, considers but does not decide an interesting question relative to the right of the surrogate of Westchester county, elected in 1900, to act as referee; namely, whether the population, as ascertained by the state census of 1892, should determine the application of the constitutional provision, in view of the fact that, by the annexation act of 1895, a considerable portion of the county was attached to the county of New York; or whether resort may be had to the Federal census of 1900 to ascertain the population at the beginning of the surrogate's term, January 1, 1901.

The mandate of the Constitution prohibiting a surrogate in certain counties from practising as an attorney and counselor operates immediately, by virtue of his election, and an order of a court is not necessary. *Re Silkman* (1903) 88 App. Div. 102, 84 N. Y. Supp. 1024.

§ 21. [*Publication of statutes; court reports.*]—The legislature shall provide for the speedy publication of all statutes, and shall regulate the reporting of the decisions of the courts; but all laws and judicial decisions shall be free for publication by any person.

[Const. 1846, art. 6, § 22; Jud. Art. 1869, § 23.]

A section on this subject first appeared in the Constitution of 1846; it was modified by the Convention of 1867, and again by the Convention of 1894.

§ 22. [*Local judicial officers, terms not abridged.*]—Justices of the peace and other local judicial officers provided for in sections seventeen and eighteen, in office when this article takes effect, shall hold their offices until the expiration of their respective terms.

[Temporary; Jud. Art. 1869, § 25.]

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The act of 1895, chap. 601, which abolished the office of police justice in the city of New York, and provided for certain officers with power to hold courts of special sessions, did not violate this section. *People ex rel. Thornton* v. *Hogan* (1895) 14 Misc. 48, 35 N. Y. Supp. 226.

In *Petterson* v. *Welles* (1896) 1 App. Div. 8, 36 N. Y. Supp. 1009, relating to the office of justice of the peace in the city of Brooklyn, it is said that this section should be read with § 3 of article 12, which abridged the term of such a justice.

This section did not prevent the abolition of the office of police justice in the city of New York. "The word 'terms,' as used in § 22, refers not to constitutional, but to statutory officers, justices of the peace excepted. It does not necessarily mean a tenure so fixed as to prevent the abolition of the office, but simply that the tenure for the period fixed by the statute continues, unless the office is abolished or the incumbent dies, resigns, or is removed." The act of 1895, chap. 601, was sustained. *Koch* v. *New York* (1897) 152 N. Y. 72, 46 N. E. 170.

## § 23. [*Courts of special sessions.*]—Courts of special sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law.

[Jud. Art. 1869, § 26.]

The term "misdemeanor" includes petit larceny not charged as a second offense, and where the statute gives the court of special sessions exclusive jurisdiction, it is bound to try the case, and cannot take bail. *People ex rel. Stetzer* v. *Rawson* (1872) 61 Barb. 619.

The same rule as to bail was declared in *People ex rel. Comaford* v. *Dutcher* (1880) 83 N. Y. 240, sustaining the act of 1879, chap. 390, conferring on courts of special sessions exclusive jurisdiction in certain cases.

Under a previous statute (the prohibitory liquor law of 1855), it was held that the magistrate must examine the defendant and admit him to bail if bail were offered. *People ex rel. Vassar* v. *Berberrich* (1855) 20 Barb. 224. *People* v. *Austin* (1888) 49 Hun, 396, 3 N. Y. Supp. 578, where the defendant was charged with selling diluted milk, contrary to the act of 1885, chap. 183, is to the same effect.

The right to give bail may be lost by not demanding it in time. *Devine* v. *People* (1880) 20 Hun, 98.

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## ARTICLE VII.

[STATE FINANCE; FOREST PRESERVE; CANALS.]

§ 1. [*State credit limited.*]—The credit of the state shall not in any manner be given or loaned to or in aid of any individual, association, or corporation.

[Const. 1846, art. 7, § 9.]

The acts of 1866, chap. 576, 1867, chap. 708, and 1869, chap. 90, authorizing and regulating deposits with the superintendent of insurance by the North America Life Insurance Company for the benefit of certain policy-holders did not violate this section. The state simply became "the custodian of the securities deposited with it. It incurred or assumed no responsibility except as a depositary." Comparing these statutes with the safety fund acts, the banking law of 1838, and the general insurance law of 1853, which required deposits with the comptroller for certain purposes, the court say: "It was never before supposed that the constitutional provision cited was intended to prohibit the assumption by the state of the responsibility imposed by such acts." *Atty. Gen.* v. *North America L. Ins. Co.* (1880) 82 N. Y. 172.

§ 2. [*When state may contract debt.*]—The state may, to meet casual deficits or failures in revenues, or for expenses not provided for, contract debts; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed one million of dollars; and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debt so contracted, and to no other purpose whatever.

[Const. 1846, art. 7, § 10.]

A history of this section will be found in the chapter on the Convention of 1846.

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§ 3. [*Debts for state defense.*]—In addition to the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or defend the state in war; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

[Const. 1846, art. 7, § 11.]

See the article on "Limiting State Debts," in the chapter on the Convention of 1846, for a history of this provision. In 1898 the legislature provided for the expenses of the national guard and naval militia when called into service for the public defense by the President of the United States, and appropriated $1,000,000 for this purpose, to be expended on the governor's certificate and the warrant of the comptroller. This sum was used during the Spanish-American war of 1898.

§ 4. [*How other debts authorized*]—Except the debts specified in sections two and three of this article, no debts shall be hereafter contracted by or on behalf of this state, unless such debt shall be authorized by a law, for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within eighteen years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either house of the legislature, the question shall be taken by ayes and noes,

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to be duly entered on the journals thereof, and shall be: "Shall this bill pass, and ought the same to receive the sanction of the people?"

The legislature may, at any time after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time, by law, forbid the contracting of any further debt or liability under such law; but the tax imposed by such act, in proportion to the debt and liability which may have been contracted in pursuance of such law, shall remain in force and be irrepealable, and be annually collected, until the proceeds thereof shall have made the provision hereinbefore specified to pay and discharge the interest and principal of such debt and liability. The money arising from any loan or stock creating such debt or liability shall be applied to the work or object specified in the act authorizing such debt or liability, or for the repayment of such debt or liability, and for no other purpose whatever. No such law shall be submitted to be voted on within three months after its passage, or at any general election when any other law, or any bill, or any amendment to the Constitution, shall be submitted to be voted for or against.

[Const. 1846, art. 7, § 12.]

The legislature of 1905 adopted, for the second time, a concurrent resolution amending this section, and directed its submission to the people at the general election in that year. The amendment changes "eighteen" to "fifty," thus extending the time limit on state debts from eighteen years to fifty years. The amendment also strikes from the last sentence the clause "or any amendment to the Constitution," thus permitting the submission of a debt law and a constitutional amendment at the same time.

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The amendment also adds to the section the following:

**The legislature may provide for the issue of bonds of the state to run for a period not exceeding fifty years in lieu of bonds heretofore authorized, but not issued, and shall impose and provide for the collection of a direct annual tax for the payment of the same, as hereinbefore required. When any sinking fund created under this section shall equal in amount the debt for which it was created, no further direct tax shall be levied on account of said sinking fund, and the legislature shall reduce the tax to an amount equal to the accruing interest on such debt.**

See last paragraph of preface to this volume.

The origin and evolution of conditions which resulted in the policy expressed in this section have been sufficiently elucidated in the preliminary article on "Limiting State Debts" in the chapter on the Convention of 1846, and in the article under the same title in the history of that Convention. According to the comptroller's report, the total state debt September 30, 1845, was $27,288,570.10; much the larger part of this amount—nearly twenty millions—was for canal purposes, and the state was then engaged in the great work of enlarging the Erie canal. The average annual canal revenues during the ten years immediately following the Convention exceeded three millions; but the necessary expenditures for maintenance and improvements were very large. In 1859 canal revenues had fallen below two millions, but soon rapidly increased again, exceeding five millions in 1863; after that time there was a gradual decrease until tolls were finally abolished, in 1882.

The statesmen who framed the restrictive policy concerning state debts fixed the limit at one million dollars.

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Possibly if they could have foreseen the accumulation of wealth and the extraordinary expansion of financial operations during the next sixty years, they would have established a much higher limit. Items of one million dollars in our present financial administration are too common to attract special notice, and several items in our annual state budget are larger than the sum expended for state purposes in 1845, which, according to the comptroller's report, was $3,151,928.61. This item seems small in comparison with the estimate of $26,735,457.70 for 1905. But the statesmen of sixty years ago were dealing with financial problems on the basis of an aggregate valuation of property in round numbers of six hundred millions, while the statesmen of 1905 may make computations for taxation and public expenditures on an aggregate valuation of property amounting to seventy-five hundred millions,—$7,500,000,000.

The one million dollar limitation on indebtedness has not prevented extensive public improvements, nor has it seriously embarrassed the administration of state affairs. The magnitude of our financial operations clearly appears when we remember that during the sixty years that have elapsed since it became manifest to the men in charge of public affairs that a more restrictive policy was necessary for the safety of the state, nearly eleven hundred millions of dollars have been raised and used for ordinary state expenses and for various public enterprises by the usual processes of administration, and without requesting popular approval; and the elasticity of our financial system finds a significant illustration in the fact that in this period, during which such large demands were made upon the treasury, the total effective indebtedness authorized by the people, prior to the barge canal law of 1903, was less than forty million dollars. Revenue not received from indirect sources has been raised by taxation, and

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with a few exceptions all obligations have been met without creating a state debt.

The influence of the canals on our financial policy has been noted in previous volumes; that influence again becomes manifest when we remember that four out of six statutes that have been submitted to the people for their approval under this section have related directly to canals, and that one other was chiefly concerned with this department of public affairs. The remaining statute, the bounty law of 1865, presented an extraordinary situation resulting from the Civil War, and is entirely outside the ordinary range of administration. These statutes will be considered in their order.

*1859. Canal bonding act.*—It seems that the financial habits formed before the restrictive policy was established were not readily changed, and that notwithstanding the prohibitions of this section obligations were created without popular approval. At the end of the last fiscal year, —September 30, 1858,—the funded debt exceeded thirty millions; but according to Governor Morgan's message to the legislature of 1859, there was a floating debt of more than four millions, a large part of which had been created regardless of the constitutional prohibition. "Without this power to create a debt, unless first submitted to the people, a debt has been created for canal purposes without the means of payment in the treasury, or at the command of those who made it; and it requires your early and deliberate consideration as to the measures necessary and proper to be adopted, to save unimpaired the public faith; for under no circumstances will the state of New York ever refuse to acknowledge and pay any and all just claims that exist against her, or that may have been contracted by any of her authorized agents."

These were plain words, but Comptroller Sanford E. Church, in his report of 1859, used equally vigorous lan-

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guage concerning some aspects of financial administration. Condemning the practice of making appropriations beyond available revenues, which "should never be indulged in, except under the most absolute necessity," and "can never be done without a violation of good faith and constitutional obligations," he said obligations were often "created by this indirect mode without providing means to discharge them;" and that the creation of a floating debt "had been more the result of that loose and irresponsible system which has obtained in the management of the finances and the prosecution of the public works of this state, than from any affirmative intention on the part of public officers to commit the offense of violating the fundamental law; but its effect is nevertheless equally injurious and pernicious. . . . The circumstances under which this large liability has grown up, and the strong equity of those who hold the evidences of it, ought to be deemed a justification for its assumption and prompt payment by the state; but as a precedent it should be repudiated and its repetition in future prevented by penal laws."

Acting on the foregoing suggestions, the legislature determined to provide for the payment of the floating debt by a loan of two and a half millions; and an act was accordingly passed (chapter 271) submitting to the people the question of creating a state debt for this purpose. The law was accordingly submitted at the general election in November, 1859, and approved by a vote of 125,370 to 77,466.

The large negative vote justified Governor Morgan's observation in his message of 1860 that "the popular vote by which this new loan was authorized is such as to show that, while the people of New York have ever been prompt to meet all just obligations, they will not be likely again to sanction the payment of any debt not author-

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ized by the Constitution and the laws, no matter for what purpose, or under what circumstances incurred." Commenting on another act passed on the 6th of April, 1859, which prohibited the creation of any similar obligations in future, the Governor said this statute "doubtless contributed much to induce the people to authorize the payment of those which existed." Following Comptroller Church's suggestion in 1859, the Governor said further that, in his opinion, the provisions of that act "might properly be extended so as to affix a penalty to the creation of any such indebtedness in future. This would effectually carry out the constitutional prohibition, and prevent the people of the state from ever again being placed in the dilemma of paying an unauthorized debt, or seemingly incurring the stain of repudiation."

*1865. Civil War bounties.*—The origin of military bounties during the Civil War (1861–5) is described by Governor Seymour in his message to the legislature of 1863. The President's two calls for troops in the summer of 1862—each for 300,000 men—required the enlistment of 120,000 men in New York. Referring to the situation presented by these calls, which were made during the last year of Governor Morgan's administration, Governor Seymour said: "It was believed that if suitable bounties were offered, a conscription could be avoided. But no payment could be made from the state treasury without legislative authority;" and this authority could not be obtained without a special session of the legislature. "The Commercial Bank of Albany offered to advance the requisite sum for bounties, and to assume the risk of reimbursement by the legislature at its annual session." This offer was accepted, and Governor Morgan issued a proclamation on the 17th of July, 1862, offering a bounty of $50 to each volunteer private soldier. Governor Seymour recommended the passage of a law ratify-



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ing Governor Morgan's action, and making appropriations for the payment of bounties. The act of 1863 (chap. 14) appropriated $3,600,000 for the payment of bounties to volunteers under Governor Morgan's proclamation, and directed the comptroller to reimburse the Commercial Bank of Albany for its advances. Governor Seymour also said that large local bounties had been offered for volunteers, and recommended legislation ratifying this action by municipalities. Several statutes were passed in 1863 charging these bounties on the municipalities affected, and providing for their payment by taxation.

The legislature of 1864 passed several statutes relative to bounties, both state and local, and also, by separate concurrent resolutions, authorized the comptroller and the Governor to borrow money for the payment of bounties, but without limiting the amount.

The bounty system was in many respects unsatisfactory. Under the law, bounties to an unlimited amount might have been offered by municipalities in response to a call for troops, but no bounties could have been paid for volunteers in anticipation of future calls. Governor Fenton, discussing this situation in his message of 1865, says: "The result is that large numbers of men have to be raised in a very limited time, and, under the excitement and competition, localities are constantly overbidding each other, while the men who intend to volunteer hold back until this competition shall have realized for them the highest possible offers. The bounties thus actually paid to volunteers are very unequal, and are often the cause of dissatisfaction among the recruits after they have entered the service." The Governor suggested legislation fixing the maximum amount of bounties payable by taxation, and authorizing localities to provide for future contingencies.

The Governor's suggestion that the maximum amount

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payable for bounties should be limited by law evidently reflected a growing popular opinion. The latter part of 1864 and the beginning of 1865 were marked by considerable discussion in different parts of the state concerning the policy of paying bounties, and the proper adjustment of the system. The legislature of 1865 received numerous petitions early in the session for the enactment of laws fixing the maximum amount payable for bounties. There was also a movement to make all bounties payable by the state. In December, 1864, the board of supervisors of Steuben county adopted resolutions recommending the maximum limit of bounties, and also that bounties be payable by the state. This suggestion was apparently received with favor, and in January, 1865, a convention of representatives of boards of supervisors was held at Albany, and considered various questions relating to the payment of bounties. This convention adopted a series of resolutions containing recommendations that "all bounties to volunteers should be paid by the state, and ultimately by the United States," that the maximum amount of bounties be limited by law, according to the length of service; that provision be made by law for raising money on the bonds of the state for the payment of bounties; and that the legislature be requested to enact appropriate legislation for the purpose of carrying the recommendations into effect. These resolutions were duly transmitted to the legislature of 1865, which thus had before it the situation presented by the operation of existing bounty laws, and also the suggestions contained in the Governor's message, in petitions presented by many citizens, and in the resolutions adopted by representatives of boards of supervisors.

Here was ample warrant for legislative consideration of a most important public question. Legislation limiting the maximum amount of bounties was manifestly

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within the ordinary jurisdiction of the legislature, but, if the state were to assume the payment of all local bounties, the amount would be too large for present taxation. The only alternative was a state debt, to be first approved by the people.

The legislature acted promptly, and on the 10th of February passed a bonding act,—chapter 29. Bounties were to be paid by the state, and provision was made for refunding local bounties. The comptroller was authorized to issue bonds to an amount not exceeding $30,000,000. The act also limited the amount payable for bounties by any municipality or individual. The act was to be submitted to the people at the general election in November, 1865. Two supplemental acts were passed on the same subject. One, chapter 41, passed February 24, amended previous statutes in relation to the payment of bounties, appropriated thirty millions for that purpose, and imposed a tax of two per cent on the property of the state. The act was declared to be a law from the time of its passage, but was not to take effect until after the people had voted on chapter 29. The Governor was required to issue a proclamation showing the result of the vote, and if the vote was adverse, then the later act (chapter 41) was to take effect immediately; and if the bonding act was approved, then the later act was not to take effect until after the adjournment of the legislature of 1866. The legislature seems to have determined on the policy of making bounties a charge against the state, even if that policy should not be directly approved by the people. Another supplemental act (chapter 56) was passed on the 27th of February, which imposed a tax of two per cent, and authorized the comptroller to issue bonds in anticipation of the tax; but, if the people approved chapter 29, the tax was not to be levied, and the bonds were to be paid from the proceeds of state stocks issued under that act. The bond-

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ing act was approved by a vote of 393,113 to 48,665. According to the comptroller's records the total amount of bonds issued under this act was $27,644,000.

The constitutionality of one feature of the act was questioned in *Powers* v. *Shepard* (1865) 45 Barb. 524, where it was held that the legislature could not limit the amount payable by an individual for bounties; but the court, on appeal, took an opposite view, and in (1872) 48 N. Y. 540, the validity of the act was sustained. This case has already been cited in this volume in notes to the Preamble, and also in the notes on Legislative Power.

*1870. Canal and general fund debts.*—According to the comptroller's report the canal debt on the 30th of September, 1869, was $12,564,780, and the general fund debt was $4,694,526.40, making a total of $17,259,306.40. The canal revenues were, by the Constitution, pledged for these debts, after paying the expenses of collection, maintenance, and ordinary repairs. The interest was a large item, and while the canal tolls were $4,112,878.52 in 1869, the amount really available for the reduction of the principal of the debts was small; consequently the payment of these debts was quite slow. The legislature of 1870 proposed a change of policy, and submitted to the people a law (chapter 379) providing for the payment of these debts by issuing bonds running eighteen years, instead of waiting for the slow accumulation of a sinking fund from canal revenues, which were almost certain to continue to decline as a result of increasing railroad competition. The act also provided for general taxation to pay the interest on the bonds and create a sinking fund for their ultimate redemption, but canal revenues were to be used so far as available. This was an abandonment of the policy of relying on canal revenues for the payment of these debts. The act seems also to have been a part of the movement for free canals, for by it the canal

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board was vested with full power "to fix, regulate, and reduce the rates of toll upon the canals of this state, in such manner and to such extent as they may deem expedient to promote the trade and commerce of the state, and to prevent a diversion thereof. And it shall be the duty of the said board to exercise this authority in such way as to secure to the canals of this state the greatest practicable amount of tonnage and transportation." The legislature declared in advance its concurrence in the action of the canal board relating to tolls. Under this authority canal tolls might have been made merely nominal, or might have been altogether abolished.

The people were not ready for this change of policy, and the act was rejected at the general election in 1870 by a vote of 253,992 to 329,237. The rejection of this act has been briefly noticed in the article on free canals in the chapter on the period from 1874 to 1894, and also the presentation in 1871 of a constitutional amendment changing the canal policy by providing for the payment of the canal and general fund debts from the proceeds of bonds running forty years, and in effect requiring tolls to be maintained at a rate sufficient to provide a sinking fund for the payment of the bonds and to keep the canals in repair.

*1872. Debt for general deficiencies.*—The legislature of 1872, by chapter 700, submitted to the people a law providing for the creation of a debt not exceeding $6,600,000 to provide the means for paying several appropriations for canals under the act, "and to pay the floating indebtedness of the state and estimated liabilities for the present fiscal year." The statute included nineteen items, covering ordinary canal expenditures for repairs, canal awards, interest on various canal debts, deficiencies on appropriations made by former statutes, and estimated deficiencies for the current year; but the stat-

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ute says that the debt authorized is to be "for the single object of raising money to pay the appropriation herein named." The act was approved at the general election in 1872 by a vote of 86,082 to 32,758,—a total of 118,840. The people evidently showed little interest in this subject, especially as compared with the canal bonding act of 1870, for the record shows that 583,229 electors voted on that act.

But while the proposed bonding act was approved by the people, it never went into operation. The comptroller refused to take any action under it, on the ground that it was void because submitted to the people at a time when a constitutional amendment was also submitted. Questions growing out of the comptroller's refusal to act came before the court of appeals in *People ex rel. Hopkins* v. *Kings County* (1873) 52 N. Y. 556, and it was there held that the act was void for two reasons: First, because it was not submitted alone, as required by the Constitution, and also because it was not for a single object, but for several distinct objects. On the question of the validity of the submission the court say that the prohibition in the Constitution against submitting such an act with other propositions is absolute, and that such a submission is a nullity. On the other question the court say that the "law itself was, upon its face, and by its terms, a palpable and gross violation of one of the most essential and vital provisions of the Constitution. . . . No law authorizing a debt to be contracted can take effect until assented to by the people, and but one law for that purpose can be submitted at the same general election or within three months of its passage, and the debt to be created must be for some single work or object, to be distinctly specified in the law. No more stringent or judicious provision could be devised to secure to the electors the information necessary to an intelligent expression of

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their will, and to enable them to act upon the merits of the proposition unembarrassed and undisturbed by interests and influences other than those connected with the character and importance of the single work or object for which it should be proposed to contract the debt. . . . The 'work or object' contemplated by the Constitution is the public work or object to be accomplished by the expenditure of the money to be borrowed. . . . The design of the Constitution was that the specific purpose of the debt should be specified in the act, that the legislature and the people, who were to vote upon it, could read it there; and a departure from the letter of the provision may frustrate its intent. . . . The Constitution would be of little value as a restraint upon the debt-creating power if it could be evaded by bringing together in one law distinct appropriations of different amounts,—for a canal in one part of the state, in aid of a railroad in another, building a lunatic asylum in another, and a state prison and normal school building in still other parts; and then a debt could be authorized for the single object of raising the money to pay the 'said appropriation.' . . . There can be no floating debt under the present Constitution; neither can a debt be created by making appropriations, and directing expenditures in excess of taxes levied and means provided. . . . Neither the legislature nor the officers and agents of the state, or all combined, can create a debt or incur an obligation for or in behalf of the state, except to the amount and in the manner provided for in the Constitution. . . . The acts of the legislature in making these appropriations are supreme to the limit of the funds and moneys at their disposal, but nullities in excess of that amount. The credit of the state is beyond its control. . . . It is not in the power of a legislature to add to the debt of the state by extravagant and excessive appropriations, and at the same

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time keeping up a show of economy by imposing minimum taxes."

Comptroller Asher P. Nichols makes a similar observation in his report of 1872. He says: "There is no magic which can transmute the words of appropriation bills into gold, thus enabling them to pay themselves. Appropriations mean actual money, and this can only be realized by the practical process of taxation."

The legislature of 1872, like the legislature of 1865, passed a supplemental act (chapter 734) intended to provide for the payment of the deficiencies described in chapter 700 if that act should not be approved by the people. This supplemental act is also considered in the foregoing case, and is there held to be unconstitutional because it did not distinctly specify the tax to be imposed, as required by article 7, § 13, now article 3, § 24.

*1895. Canal enlargement.*—The legislature of 1895, by chapter 79, submitted to the people a proposition to create a debt of nine millions for the purpose of improving the Erie and Oswego canals by making them 9 feet in depth, and the Champlain canal by making it 7 feet in depth. This law was approved at the November election in 1895 by a vote of 509,770 to 322,884.

In *Baker* v. *State* (1902) 77 App. Div. 528, 78 N. Y. Supp. 922, the court considered the effect of an abandonment by the state of the work specified in a contract under this act, and said "the superintendent of public works had no power to create a contract debt on the part of the state beyond the nine million dollars voted by the people; . . . nor had the state the power to authorize the creation of a debt beyond that sum."

*1903. Barge canal.*—Work under the nine million dollar act of 1895 had not progressed far before it became apparent that the amount voted for the improvement was insufficient, and the project was discontinued. Discus-

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sion of plans for a larger canal was then resumed, culminating in the proposition embodied in the act of 1903 (chapter 147) to create a debt of $101,000,000 for the purpose of a general enlargement of the canals. This proposed improvement has already been described in the article on free canals in the chapter on the period from 1874 to 1894. The act was approved at the November election in 1903 by a vote of 673,010 to 427,698.

*Scope of constitutional provision.*—This is the only exception to the general policy that legislative power is vested in the senate and assembly, as declared by § 1 of article 3, and is the only instance in which the people have reserved to themselves the right to determine whether a given law shall become operative. Yet this is only a partial expression of the idea of the initiative and referendum, for the people cannot initiate legislation for the purpose of creating a state debt. The legislature may initiate, but the people must approve. The provision in § 2 of article 12, requiring the submission of a special city law to the city affected, is an apparent, but not a real, exception to the foregoing rule as to legislative power, for in the case of a city bill the power of the legislature is only suspended while the bill is under consideration by the city; and the power may be resumed and is absolute if the legislature determines to pass the bill notwithstanding local objections. It should also be noted that this reference to a city is not to the people, who have no vote on the bill, but all questions concerning it must be determined by their authorized representatives.

Absolute and final legislative power still remains in the legislature. This subject has been considered in the notes to § 1 of article 3, under the topic "Delegation of Legislative Power," and it has there been shown that the power to make laws cannot be delegated to the people of the state, nor to the people of a locality; but that the peo-

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ple of a municipality may be authorized to determine whether particular provisions of a law shall there be applicable. Obviously the right to approve constitutional provisions is not an exception to the general rule; such action by the people is fundamental, and not legislative in the ordinary sense.

The limitation imposed by this section is not a limitation on the power of taxation. The legislature may, at its pleasure, make appropriations and provide for their payment by taxation for any purpose not prohibited by the Constitution; and in this respect its power is absolute. The constitutional restraints do not affect the general power, but they modify the exercise of it in a few specified cases.

The prohibition of the section applies only to debts against the state; the power to create municipal indebtedness is not affected by it. *People ex rel. McLean* v. *Flagg* (1871) 46 N. Y. 401.

*Debt must be for a single object.*—The policy of the limitation to one object is clearly elucidated in the foregoing case of *People ex rel. Hopkins* v. *Kings County* (1873) 52 N. Y. 556.

*Annual tax.*—A bonding law must "impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within eighteen years from the time of the contracting thereof." This provision has not received a uniform construction by the legislatures which have submitted bonding acts. The earlier legislatures did not fix the rate of tax in the act, but later legislatures have proceeded on the supposition that the Constitution required a computation of the annual tax rate necessary to provide for the payment of the debt, and the statement of this rate in the law.

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The act of 1859 imposed an annual tax for the payment of the bonds, but did not fix the rate, and the comptroller was charged with the duty of adjusting and levying the tax each year.

The act of 1865, like its predecessor, simply required an annual tax, but did not fix the rate. One third of the principal of the debt was to be paid in six years, one third in twelve years, and one third in eighteen years.

The act of 1870 followed the same course, but in addition provided for a possible use of canal tolls or other moneys in payment of interest, or as a contribution to the sinking fund.

The tax provisions in the act of 1872 were similar to those contained in previous statutes. No rate was fixed, but the statute required an annual tax sufficient to pay the interest, and also the principal, which was to be paid in three equal instalments,—one third in four years, one third in eight years, and one third in twelve years.

The act of 1895 fixed the annual tax rate at thirteen hundredths mills, to be used in paying the interest on the bonds, and accumulating a sinking fund for the payment of the principal. The bonds could not run more than seventeen years.

The legislature of 1903 evidently appreciated the difficulty of fixing a tax rate for the payment of a debt, the amount of which could not then be determined. The bonding act required an annual tax of twelve one-thousandths of a mill for each one million of dollars of bonds outstanding in any year, and the tax was to be adjusted and levied by the comptroller.

*Whole law must be submitted.*—It is the "law," as prescribed by this section, which is submitted to the people, and not simply the proposition to create a debt. While the creation of a debt is the principal thing, the debt is for a specific object, and cannot be separated from

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it. So the people must be asked to approve the object of the law as well as the debt which may be deemed necessary to consummate that object. But the people also have the right to consider the method by which the object is to be accomplished, including the general plan embodied in the project. That the entire law must be submitted to the people is further manifest from the provision in the section that, on its final passage, the question be presented to the legislature in the following form: "Shall this bill pass, and ought the same to receive the sanction of the people?" By an affirmative answer to this question the legislature passes the bill and declares that it ought to receive the sanction of the people. The bill is a unit, and must be submitted as such, and not in sections or parts.

The following statement shows the affirmative form of the proposition submitted in each of the foregoing bonding acts. A negative form was also prescribed, but need not be given here.

1859. "For a loan of two million five hundred thousand dollars, to pay the floating debt of the state."

1865. "For the act to create a state debt to pay bounties."

1870. "For the act to create a state debt to provide for the payment of the canal and general fund debts."

1872. "For the act to create a state debt to pay the canal and general fund deficiencies."

1895. "For the proposition to issue bonds for the improvement of the Erie canal, the Champlain canal, and the Oswego canal."

This was a variation from the preceding forms, in which the entire act was submitted to the people, but the legislature of 1895 evidently thought that the bonding proposition included all other parts of the act, and that a vote on the issue of bonds would be deemed a vote in

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favor of the whole act. There was some doubt, however, whether this form of submission was sufficient under the Constitution, and the proposition was actually submitted to the people and voted on in the following form, as appears by the certificate of the state board of canvassers:

"Shall chapter 79 of the Laws of 1895, which provides for issuing bonds to the amount of not to exceed nine million of dollars, for the improvement of the Erie canal, Champlain canal, and the Oswego canal, be approved?"

This was manifestly a compliance with the Constitution, and the people thus considered and approved the law as a whole.

1903. "Shall chapter 147 of the Laws of one thousand nine hundred and three, entitled 'An Act Making Provision for Issuing Bonds to the Amount of not to Exceed One Hundred and One Millions for the Improvement of the Erie Canal, the Oswego Canal, and the Champlain Canal, and Providing for a Submission of the Same to the People, to be Voted upon at the General Election, to be Held in the Year One Thousand Nine Hundred and Three' be approved?"

*Submission with other propositions.*—The original section required a bonding act to be submitted alone; and the foregoing act of 1872 was declared to be invalid because a constitutional amendment was voted on at the same election; but the amendment submitted in 1905 abrogated this limitation.

*When act takes effect.*—By the terms of the section a bonding act does not take effect until approved by the people.

The act of 1859 expressly declared that it should take effect on its approval by the people, and that it should be inoperative if not so approved.

By the bounty law of 1865 eleven sections were to take effect immediately, but the other three—the debt sections

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—were not to take effect until approved by the people. This act contained provisions somewhat independent of its main purpose, although closely related to it, and therefore parts of the act would have become operative even if the bonding provisions had been rejected.

The validity in a bonding law of provisions which shall take effect immediately seems to have been conceded in *Powers* v. *Shepard* (1872) 48 N. Y. 540, although the power of the legislature to enact a statute in this form was not directly considered.

The bonding act of 1870 expressed a somewhat different view, for it specifically provided that the sections relating to the submission of the bonding proposition should take effect immediately, but that the other sections, authorizing the issue of bonds, and providing for their payment, should not take effect until the act was approved by the people.

The bonding act of 1872 substantially followed the act of 1870 as to the time when different parts should take effect.

The bonding act of 1895 by its terms took effect immediately; but it is manifest that the act could not have become operative without its approval by the people.

The legislature of 1903, in submitting the canal bonding act, followed the precedent established by the act of 1859, and provided specifically that the act should not take effect until approved by the people.

I am not aware of any judicial determination of the question when a bonding act takes effect. The legislature of 1859 apparently did not think the act would take effect until the votes had been canvassed, for the act expressly provided that votes upon it should be returned, canvassed, and certified in the same manner as votes for the office of governor. This would seem to refer to the final certificate by the state board of canvassers.

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The bounty law of 1865 (chapter 29) contained substantially the same provision in relation to the canvass, but it should be noted that the supplemental act (chapter 41) expressly provided that it should not take effect "until after the canvass of the votes by the state board of canvassers," showing the result of the vote on chapter 29. The other supplemental act (chapter 56) required the comptroller to take a certain proceeding "so soon as such approval shall be known to his satisfaction from the official returns received by him or by either of the state canvassers."

The acts of 1870 and 1872 adopted the procedure prescribed in the earlier statutes.

The acts of 1895 and 1903 contained no provision relating to the canvass of the votes. This omission is doubtless due to the fact that the general election law now provides ample machinery for ascertaining the result on any proposition or question submitted to the people.

The court of appeals in *Real* v. *People* (1870) 42 N. Y. 270, was required to determine when the judiciary article of 1869 took effect, and held that, by the terms of the Constitution, the article took effect January 1, 1870. In the course of the opinion the court, considering the argument that the provision involved in the case took effect "upon the result of the canvass being announced by the state board," say "the canvass of the votes cast by the various boards of canvassers as required by law, and announcing the result, and certifying the same, as required by law, is as much a part of the election as the casting of the votes by the electors. The election is not deemed complete until the result is declared by the canvassers, as required by law. When the result was declared by the state board of canvassers, the article was adopted, and, under the rule, became operative at once, unless, from the nature of the provisions themselves, or those of some

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other law, it appears that it was to take effect at some future period, or unless it clearly appears that the intention of the framers of the article, and of those by whom it was adopted, was that it should not take effect until some definite future time."

Applying this rule to bonding acts it seems clear that they take effect on the final announcement of the vote by the state board of canvassers.

*Repeal.*—A bonding act may be repealed before a debt is contracted under it, and further debts may be prohibited at any time; but existing obligations cannot be affected by an abandonment of the project, and as to them the act is irrepealable. Such contracts are expressly protected by this section, and the section itself is consistent with the provision in the Federal Constitution that no state shall pass any law impairing the obligation of contracts.

§ 5. [*Sinking funds.*]—The sinking funds provided for the payment of interest and the extinguishment of the principal of the debts of the state shall be separately kept and safely invested, and neither of them shall be appropriated or used in any manner other than for the specific purpose for which it shall have been provided.

[Am. 1874.]

See the chapter on the Commission of 1872 for the origin of this section.

§ 6. [*Claims barred by statute of limitations.*]—Neither the legislature, canal board, nor any person or persons acting in behalf of the state, shall audit, allow, or pay any claim which, as between citizens of the state, would be barred by lapse of time. This provision shall not be con-



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**strued to repeal any statute fixing the time within which claims shall be presented or allowed, nor shall it extend to any claims duly presented within the time allowed by law, and prosecuted with due diligence from the time of such presentment. But if the claimant shall be under legal disability, the claim may be presented within two years after such disability is removed.**

[Am. 1874.]

This section excludes from the power of audit claims which, "as between citizens of the state, would be barred by lapse of time." In *O'Hara* v. *State* (1889) 112 N. Y. 146, 2 L. R. A. 603, 8 Am. St. Rep. 726, 19 N. E. 659, the court say: "It is not clear precisely what the framers of the amendment intended by this phrase; because there is but little analogy between the position of a state in reference to the prosecution of claims against it and the condition of a citizen, subject at all times and in numerous tribunals, to be brought into court and prosecuted for his liabilities." O'Hara had, in 1875 and 1876, at the request of the quarantine officials, furnished materials and performed labor in repairing and fitting up vessels and property used in quarantine affairs. In 1878 he filed a claim against the state which was rejected on the ground that the health officer was liable for the claim instead of the quarantine officials. "Applications were thereafter made on behalf of the claimant to successive legislatures in each year, excepting that of 1880, with unavailing effect." In 1886 an act was passed authorizing the board of claims to rehear and audit the O'Hara and other claims for quarantine repairs. This was a ratification and approval by the legislature of the action of the quarantine officials, "and the claim for compensation therefor then had for the first time a legal existence against the state." Obviously, a claim against the state did not arise until the legislative recognition, and the claim in question then had its origin. The court say further that, "in the case of an imperfect claim or obligation which is unenforceable by reason of some vice or defect therein which may be cured or waived by the debtor, . . . a right of action thereon arises at the time the claim becomes purged of the vice by the action of the debtor, and not before." A debtor may create a new obligation after a claim is outlawed.

This subject had been considered in *Cole* v. *State* (1886) 102 N. Y. 48, 6 N. E. 277, and it was there said that "the statute of limita-

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tions and other legal defenses are, under the general law, available to the state as against a private claim preferred to the board of claims, and, as a general rule, it has been considered that the authority of the board is confined to the allowance of legal claims." The court say there is nothing in the Constitution "which deprives the legislature of the power of giving to the board of claims, or any other proper tribunal, jurisdiction to hear and determine claims against the state which are founded in right and justice, solely for the reason that they could not be enforced against an individual in the courts. . . . Where the creation of a particular class of liabilities is prohibited by the Constitution, it would, of course, be an infraction of that instrument to pass any law authorizing their enforcement; but, in the absence of any such prohibition, there is no good reason why the state should be powerless to do justice, or to recognize obligations which are meritorious and honorary, and to provide tribunals to pass upon them. The legislative power is sufficient, even as between individuals, to afford new remedies and to create liabilities not before existing, where they are based upon general principles of justice." Where the legislature is dealing with imperfect obligations "it does not transcend its powers by passing a law affording a remedy even in respect to past transactions, where the state adopts the acts and is the party to make the compensation, and no rights of individuals which are protected by the Constitution are invaded."

In *McDougall* v. *State* (1888) 109 N. Y. 73, 16 N. E. 78, a claim which arose in 1869, and which was presented to the canal appraisers, who, in 1875, rejected it, was made the subject of an act passed in 1886, which authorized the board of claims to rehear the claim with like power and effect as if the claim had been presented within the time prescribed by the board of claims law of 1883. The claim was for damages to property caused by the negligence of canal officers. The action of the canal appraisers in 1875, in rejecting the claim, was without notice to the claimant, who, it seems, had withdrawn the claim in 1873. The court say that, "having withdrawn his claim in 1873 from the board of appraisers, the statute of limitations then began to run against it, and that the subsequent ineffectual proceedings therein did not revive the claim, or suspend the running of the statute. They would certainly have constituted no bar to an action by one citizen against another, and by the express language of the Constitution would therefore be inoperative as a bar in favor of the state." Observing that "if the act intended to authorize, directly or indirectly, the audit or allowance of a claim against which the stat-

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ute had once run, . . . it exceeded the constitutional power of the legislature to enact it," the court say that "it would seem to be the obvious intention of this constitutional amendment to place in the fundamental law of the land an effectual bar against the prosecution of any claim against the state, unless it was preferred and presented within the periods of limitation applicable to claims between citizens." The board of claims rejected the claim on the ground that it was barred by the statute of limitations, and its award was sustained by the court of appeals. It was also held in this case that the claim had not been diligently prosecuted, and could not, therefore, on that ground be saved from the operation of the constitutional provision.

In *Corkings* v. *State* (1885) 99 N. Y. 491, 2 N. E. 454, 3 N. E. 660, the court say that "the object of this section was to prevent the allowance against the state of stale claims which had long lain dormant. But, as the state could not be sued, it was not intended to bar claims which had been duly presented for payment or allowance." A contractor had made a deposit as security for the performance of two contracts. On the 10th day of August, 1874, the plaintiff became entitled to a return of the money. The court say that "if this were an action between individuals, the limitation of time would have to be computed from that day." Several attempts were made by the plaintiff to procure from the canal board and other state officers a repayment of the money, and several acts were passed authorizing its repayment, but it was not paid, and it was finally rejected by the board of claims, in 1884. It was held that the claim had been diligently prosecuted within the meaning of the Constitution, and the award of the board of claims was reversed.

"The liability of the state for this or any other claim must be founded in its own consent, expressed through some act of the legislature. The sovereign cannot be impleaded nor made liable in damages for any cause whatever in the courts of justice, save in such cases as it has itself consented to be made liable. . . . As to every claim or class of claims not expressly, or by fair implication, included within the language of the statute [creating the board of claims] the state, as the sovereign, is still exempt from liability in any judicial tribunal." *Locke* v. *State* (1894) 140 N. Y. 480, 35 N. E. 1076; *Lewis* v. *State* (1884) 96 N. Y. 71, 48 Am. Rep. 607. See also *Splittorf* v. *State* (1888) 108 N. Y. 205, 15 N. E. 322.

"The state can only be sued by its own consent and for liabilities which it chooses to assume; . . . and whoever presents a claim against it must show some statute which involves the consent of the

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state to be answerable before its own tribunals for such claim or those of a class to which it belongs." *Rexford* v. *State* (1887) 105 N. Y. 229, 11 N. E. 514.

The state may, by an act of the legislature, subject itself to prospective profits upon a contract made by its agents. *Danolds* v. *State* (1882) 89 N. Y. 36, 42 Am. Rep. 277.

A laborer for the state upon the canals was injured in 1877. In 1879 he attempted to file a claim with the canal appraisers, but it seems that his claim was not in fact filed and never came to the board of claims afterwards created. The legislature of 1886 passed an act authorizing and directing the board of claims to hear this claim. This act was held to be invalid, for the reason that the statute of limitations had already run, and the state could not afterwards be made liable. The court said the claim was barred after the lapse of three years from the time the injury occurred; that is to say, an action as between individuals must have been brought within that time, and this rule was applicable to claims against the state under this section of the Constitution. *Gates* v. *State* (1891) 128 N. Y. 221, 28 N. E. 373.

"If there never had been any tribunal created by the state before which the claimant could have pressed his claim, the statute of limitations would not have commenced to run, because it would have been absurd to hold there was a statute of limitations within which a claim must be sued when there had been neither a person to be sued, nor any court or tribunal before which the state could be summoned to answer the suit." The legislature has the right to enlarge the time within which a claim may be filed in any particular case, provided it does not itself audit or permit any other body to audit or allow a claim which, as between citizens, is already outlawed. *Parmenter* v. *State* (1892) 135 N. Y. 154, 31 N. E. 1035.

In *Cayuga County* v. *State* (1897) 153 N. Y. 279, 47 N. E. 288, the court considered the effect of two sections relating to claims against the state, which were incorporated in the Constitution in 1874; namely, article 3, § 19, prohibiting the legislative audit of such claims, and article 7, § 6 (formerly § 14), prohibiting the audit by any tribunal of any claim which, as between citizens, would be barred by lapse of time. "These sections," the court say, "established two cardinal rules upon the subject: First, that the audit and allowance of private claims should be made by some body or authority designated by the legislature, and not by the legislature itself; second, that neither the legislature nor any other authority should have power to audit, allow, or pay any claim which, as between citizens, would

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be barred by lapse of time, excluding from the operation of the section existing claims not already barred by existing statutes, duly presented within the time allowed by law, and diligently prosecuted, and, as to such claims, the limitation of time commenced to run from the adoption of the amendments." In this case Cayuga county had expended large sums in the prosecution of crimes committed in Auburn state prison. The last of these items was in 1877. Eight years afterwards,—1885,—the legislature passed an act authorizing the county to present its claim to the board of claims. The court say that this act "for the first time created a tribunal having jurisdiction to hear the claim." The claim could not have been presented either to the canal appraisers, the board of audit, or the board of claims, for the reason that these tribunals had jurisdiction only of private claims against the state, and the claim of Cayuga county was a public claim. "It is, we think, the reasonable and just construction of § 14 [now § 6], article 7, that the limitation prescribed thereby only applies in a case where a tribunal has been constituted by the legislature to hear and determine the claim in controversy, and that the limitation only commences to run from that time. It is clear that, as between individuals, a statute of limitations attaches only from the time when an action to enforce the right asserted may be commenced. . . . The presentation of claims mentioned in the section did not refer to the common right of every citizen to apply to the legislature for relief, but to statutes enacted under which claims could be 'presented,' and where the right of prosecution existed. . . . By necessary implication the legislature by the act assumed liability to the extent of the money paid by the county for the purposes mentioned, and it was left to the board of claims to fix the amount as should appear on the hearing to be equitable and just."

A claim for reimbursement on account of an invalid state tax sale is a claim for the refunding of purchase money received by the state. Where such a claim arose in 1848 and 1852, it was an "existing claim" within the meaning of this section of the Constitution, at the time of its adoption. "Such a claim is one that frequently arises as between citizens, and one to which the statute of limitations is constantly applied. The plain purpose of this constitutional provision . . . is to place the citizen, with reference to any claim he may have against the state, in the same position in which he would be were the claim against a fellow citizen. In short, it makes the statute of limitations available to the state to the same extent that it is available between the citizens." Section 132 of the tax law,

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authorizing the presentation to the comptroller of claims for cancelation of tax sales in certain cases, could not have the effect to revive claims which had already been barred by lapse of time. *People ex rel. Sudam* v. *Morgan* (1899) 45 App. Div. 19, 60 N. Y. Supp. 898.

A statute of limitations applies from the time when an action or proceeding to enforce the right asserted may be commenced. "If a tribunal has existed before which the relator's claim could have been determined and enforced for the limited time stated in our statute of limitations, in which an action or proceeding must be commenced upon an equitable claim between citizens of the state," the claim cannot be allowed by any state officer or tribunal. *People ex rel. Essex County* v. *Miller* (1903) 85 App. Div. 145, 83 N. Y. Supp. 559.

The large number of claim bills annually introduced in the legislature prompted the senate judiciary committee in 1897 to appoint a subcommittee to investigate the subject of claims against the state with special reference to this section of the Constitution. This subcommittee gave the subject careful examination and submitted its report to the general committee early in February, 1898. The judiciary committee soon afterwards submitted to the legislature the report of the subcommittee. The subcommittee went over the ground covered by this constitutional provision, reviewed the judicial authorities relating to the liability of the state as affected by statutes of limitation, and recommended that thereafter all claim bills contain the following clause:

"No award shall be made, or judgment rendered herein, against the state unless the facts proved shall make out a case against the state which would create a liability were the same established in evidence in a court of law or equity against an individual or corporation; and in case such liability shall be satisfactorily established, then the court of claims shall award to, and render judgment for, the claimant for such sum as shall be just and equitable, notwithstanding the lapse of time since the accruing of said damages, provided the claim hereunder is filed with the court of claims within one year after the passage of this act."

The judiciary committee, in a report dated February 8, 1898, adopted the subcommittee's recommendation. These reports appear as senate documents No. 31 and No. 33 of 1898. I think that since the presentation of these reports all claim bills have contained the clause above quoted.

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§ 7. [*Forest preserve.*]—The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold, or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed, or destroyed.

[New.]

"The declaration of the state, through its Constitution and by legislative acts, indicates very clearly . . . that the use and occupation of these lands, within the forest preserve of the Adirondack park, is intended to be exclusive," and the state cannot take forest preserve lands, subject to their use by a railroad company. The use of lands for railroad purposes is inconsistent with devoting and preserving it for park purposes as wild forest lands; the state intended to take and hold the lands in the Adirondack park free and clear from all encumbrances. *Adirondack R. Co.* v. *Indian River Co.* (1898) 27 App. Div. 326, 50 N. Y. Supp. 245. See also *People* v. *Adirondack R. Co.* (1899) 160 N. Y. 225, 54 N. E. 689, affirmed in (1900) 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460.

A general article on the forest preserve will be found in the third volume in connection with the work of the Convention of 1894.

§ 8. [*Certain canals not to be sold.*]—The legislature shall not sell, lease, or otherwise dispose of the Erie canal, the Oswego canal, the Champlain canal, the Cayuga and Seneca canal, or the Black River canal; but they shall remain the property of the state, and under its management forever. The prohibition of lease, sale, or other disposition herein contained shall not apply to the canal known as the Main and Hamburg street canal, situated in the city of Buffalo, and which extends easterly from the westerly line of Main street to the westerly line of Hamburg street. All funds that may be derived from any lease, sale, or other disposition of any canal shall be applied to the

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**improvement, superintendence, or repair of the remaining portion of the canals.**

[Const. 1846, art. 7, § 6; Am. 1874; Am. 1882.]

In *People* v. *Stephens* (1878) 13 Hun, 17, the court say that the "clear and obvious meaning of this section of the Constitution is that the state will not lease and sell the canals while they continue to be canals." In *Elwood* v. *Rochester* (1887) 43 Hun, 103, the court say that the legislature cannot authorize the imposition of a tax or assessment upon the Erie canal which may result in its being sold or leased.

The provision against disposing of the canals was not violated by the act of 1889, chap. 291, as amended by chap. 314, Laws 1890, which permitted the city of Syracuse to take surplus water from Skaneateles lake which had been appropriated by the state as a feeder to the Erie canal. This subject was fully considered in *Sweet* v. *Syracuse* (1891) 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289, where the court say that, applying a fair and reasonable construction to this limitation, the statute is not within the letter or spirit of the constitutional prohibition. 'The management of the canal must, under this provision, devolve upon the legislature and such officers of the state as are charged with duties in that regard by the Constitution. This power of management implies discretion in many matters of detail. What the framers of the Constitution intended by this provision was that the canal, as a highway of communication, should not be sold or leased, but remain the property of the state, and forever under its management, in order to promote the commercial prosperity of the people." The use of the waters of canal feeders "by riparian owners, and even by cities that have grown up upon the line of the canal, for domestic or manufacturing purposes, subject to the paramount rights of the state, is entirely consistent with the public use to which they had been devoted, and this must have been contemplated when the appropriation was made."

The same view of the Syracuse water act had been expressed by Justice Kennedy at special term in *Re Comstock* (1889) 25 N. Y. S. R. 611, 5 N. Y. Supp. 874, and he there pointed out that, as early as 1825, the legislature authorized the canal board to sell surplus water from the canals or feeders, if such water could be spared without injury to canal navigation, and the legislative policy was continued by subsequent statutes.

By the canal law of 1894, chap. 388, the term "canal" as used in

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that chapter "includes all the side cuts, feeders, and other works belonging to the state connected therewith." In *Lynch* v. *Partridge* (1901) 36 Misc. 302, 73 N. Y. Supp. 469, Justice Andrews considered this constitutional prohibition with reference to the action of the superintendent of public works under the authority of Laws 1901, chap. 645, in closing up the north side cut of the Oswego canal at Syracuse. Justice Andrews made some observations which were not only pertinent to the question then under consideration, but are pertinent under the barge canal act of 1903. "The Constitution," he said, "does not protect, and was not intended to protect, the Oswego canal in the precise form and in the precise condition in which it existed at the time the Constitution was adopted. It would not prevent the narrowing of the prism at this or that point, if such a course were deemed advisable. It would not prevent a change of route and the sale or lease of the former channel. It would not prevent the sale of a feeder which had become useless. The object was not to preserve intact every side cut, every dock basin, every widening of the canal. Such accessories did not constitute 'the Oswego canal' as the phrase is used in the Constitution. They are merely accessories and appurtenances, connected with the canal, it is true, but not actually necessary to its use." Referring to the foregoing definition in the canal law, Justice Andrews says it is "a description of the canals for administrative purposes, and is intended to define what public works of the state shall, for such purpose, be classified with canals;" but it is of no assistance in determining the meaning of the language used in the Constitution.

In *McCarty* v. *New York C. & H. R. R. Co.* (1902) 73 App. Div. 34, 76 N. Y. Supp. 321, the court had occasion to consider the status of a railroad built on canal land in Syracuse. It did not appear by what authority the railroad had been built on canal land, but it had been there many years. The court say that "while the Constitution prohibits the legislature from selling or leasing the Erie canal, . . . yet the superintendent of public works is given supervisory power over these lands, and of any railroad within ten rods of the canal 'to preserve the free and perfect use' of the canal, . . . which implies that a license or privilege may be accorded to a railroad company to construct its tracks and operate its cars within the blue line, but under the direction of the state authorities."

Questions relating to the disposition of abandoned canal lands and to the acquisition of such lands by the state are considered in *De Witt* v. *Elmira Transfer R. Co.* (1892) 134 N. Y. 495, 32 N. E. 42; *Eldridge* v. *Binghamton* (1890) 120 N. Y. 309, 24 N. E. 462;

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*Burbank* v. *Fay* (1871) 5 Lans. 397; *Waller* v. *State* (1895) 144 N. Y. 579, 39 N. E. 680, but they have no special bearing on the constitutional prohibition against disposing of the canals.

§ 9. [*Tolls prohibited; contracts.*]—No tolls shall hereafter be imposed on persons or property transported on the canals, but all boats navigating the canals, and the owners and masters thereof, shall be subject to such laws and regulations as have been or may hereafter be enacted concerning the navigation of the canals. The legislature shall annually, by equitable taxes, make provision for the expenses of the superintendence and repairs of the canals. All contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest price, with adequate security for their performance. No extra compensation shall be made to any contractor; but if, from any unforeseen cause, the terms of any contract shall prove to be unjust and oppressive, the canal board may, upon the application of the contractor, cancel such contract.

[Const. 1846, art. 7, § 3; Am. 1854; Am. 1874; Am. 1882.]

The canal board cannot increase the price fixed by the contract, even if authorized so to do by an act of the legislature. *People ex rel. Sherrill* v. *Canal Board* (1871) 4 Lans. 272.

The constitutional provision requiring canal contracts to be let to the lowest bidder "is a declaration of a broad and general principle. . . . It is necessary, therefore, that in carrying out this constitutional provision some regulations shall be adopted by which it may be decided, and some tribunal established which may decide, who is the lowest bidder. There must be reposed in some officers of the state a discretion on this subject; and they must apply this constitutional provision in its spirit, not in its letter." *People ex rel. Frost* v. *Fay* (1871) 3 Lans. 398, citing *People ex rel. Belden* v. *Contracting Board* (1863) 27 N. Y. 378, which construes a similar provision in a statute enacted in 1857, and applies the same rule as to the exercise of discretion in letting canal contracts.

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The provision relating to the letting of contracts does not prohibit the legislature from relieving a contractor from the effects of a hard bargain with the state, nor from liquidating and paying a just claim upon the state, for damages accruing to a canal contractor in the performance of his contract, under circumstances raising an obligation on the part of the state to pay them. *People* v. *Densmore* (1873) 1 Thomp. & C. 280.

This provision does not prevent the legislature from modifying the contract, with the consent of the contractor. *People ex rel. Williams* v. *Dayton* (1874) 55 N. Y. 367; *People* v. *Canal Board* (1874) 55 N. Y. 390. It should be observed that these cases were decided before the Constitution was amended prohibiting an allowance of extra compensation to contractors. These amendments were adopted in 1874, and now appear in this section, and also in § 28 of article 3.

**§ 10. [*Canal improvement.*]—The canals may be improved in such manner as the legislature shall provide by law. A debt may be authorized for that purpose in the mode prescribed by section four of this article, or the cost of such improvement may be defrayed by the appropriation of funds from the state treasury, or by equitable annual tax.**

[New.]

At the November election in 1895 the people approved an act, chap. 79, authorizing the expenditure of $9,000,000 for the improvement of the canals. Questions relating to this expenditure were considered in *Baker* v. *State* (1902) 77 App. Div. 528, 78 N. Y. Supp. 922, which has been cited under § 4 of this article. The people again, in 1903, approved a law authorizing the expenditure of $101,000,000 for canal improvement, embodying a plan for a barge canal.

The origin of this section will be found in the history of the Convention of 1894, in the third volume.

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The legislature of 1903 proposed an amendment to this article, adding the following section, numbered eleven, and directed its submission to the people at the general election in 1905.

§ 11. [*State debts, how paid; sinking funds.*]— The legislature may appropriate out of any funds in the treasury, moneys to pay the accruing interest and principal of any debt heretofore or hereafter created, or any part thereof, and may set apart in each fiscal year, moneys in the state treasury as a sinking fund to pay the interest as it falls due, and to pay and discharge the principal of any debt heretofore or hereafter created under section four of article seven of the Constitution until the same shall be wholly paid, and the principal and income of such sinking fund shall be applied to the purpose for which said sinking fund is created, and to no other purpose whatever; and in the event such moneys so set apart in any fiscal year be sufficient to provide such sinking fund, a direct annual tax for such year need not be imposed and collected, as required by the provisions of said section four of article seven, or of any law enacted in pursuance thereof.

See last paragraph of preface to this volume.

The legislature of 1905 submitted to the people at the general election in that year an amendment adding to this article the following section, numbered twelve. It seems to have been assumed that the preceding new section, eleven, would be approved by the people.

§ 12. [*Improvement of highways.*] — A debt or debts of the state may be authorized by law for the improvement of highways. Such highways shall be determined under general laws, which shall also provide for the equitable apportionment thereof among the counties. The

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aggregate of the debts authorized by this section shall not at any one time exceed the sum of fifty millions of dollars. The payment of the annual interest on such debt, and the creation of a sinking fund of at least two per centum per annum to discharge the principal at maturity, shall be provided by general laws, whose force and effect shall not be diminished during the existence of any debt created thereunder. The legislature may, by general laws, require the county or town or both to pay to the sinking fund the proportionate part of the cost of any such highway within the boundaries of such county or town, and the proportionate part of the interest thereon, but no county shall, at any time, for any highway, be required to pay more than thirty-five hundredths of the cost of such highway, and no town more than fifteen hundredths. None of the provisions of the fourth section of this article shall apply to debts for the improvement of highways hereby authorized.

See last paragraph of preface to this volume.

## ARTICLE VIII.

### [CORPORATIONS AND CHARITIES.]

§ 1. [*Corporations, how formed.*]—Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

[Const. 1821, art. 7, § 9; 1846, art. 8, § 1.]

The history of this subject will be found in the chapter on the Convention of 1846, where I have tried to show

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the evolution of the policy of constitutional control of corporations. The corporation article, except that portion added in 1894, was substantially worked out by that Convention, and it has already been noted that the essential provisions of the article have not since been changed.

The general scope and purpose of this section are pointed out by the court in *Bank of Chenango* v. *Brown* (1863) 26 N. Y. 467, where Judge Emott says that "the new Constitution intended to introduce a system of general, and not special, legislation. To this end any barriers which existed in or under the former Constitution, in the way of such general legislation in respect to corporations, were abolished, and the legislative power was left free to act by general enactments upon this class of subjects. But the power to pass such laws resulted from the grant of the legislative power of the people to the legislature, and not from the provision which either indicated the general system which the Constitution was intended to favor, and in some cases to direct, or from the removal of the restrictions in former Constitutions in the way of such legislation. Such provisions were merely directions for the exercise of an existing authority, and not its creation, and the removal of restrictions upon it indicated that, but for such restrictions, it might even before have been exercised."

Denying the power of the legislature to destroy property rights by the repeal of a corporate charter, the court, in *People* v. *O'Brien* (1888) 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692, say that "whatever might have been the intention of the legislature, or even of the framers of our Constitution, in respect to the effect of the power of repeal reserved in acts of incorporation, upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution." Property invested in corporate securities is not beyond the pale of the protection afforded by the fundamental law. "We think that there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation."

Discussing the reserved power of the legislature over corporations, Judge Earl, in *New York* v. *Twenty-third Street R. Co.* (1889) 113 N. Y. 311, 21 N. E. 60, says: "It is difficult to put precise

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limits upon the power of the legislature thus reserved over corporations created by it or under its authority. Under its reserved power it cannot deprive a corporation of its property or interfere with or annul its contracts with third persons. . . . But it may take away its franchise to be a corporation, and may regulate the exercise of its corporate powers. As it has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchise." The court sustained the act of 1873, chap. 647, requiring the company to pay into the city treasury one per cent of its gross receipts instead of a car license fee of $50. The legislature had power thus to change the public obligations of the corporation.

The effect of the amendment of 1874, which went into operation January 1, 1875 (article 3, § 18), relating to street railroads, was considered in *Re Third Ave. R. Co.* (1890) 121 N. Y. 536, 9 L. R. A. 124, 24 N. E. 951, where the court say that "the powers and franchises of street railways existing prior to 1875 may be regulated without violating the constitutional provision referred to, and that may be done by enlarging as well as restricting them." The act of 1889, chap. 531, relating to a change of motive power, was sustained.

The reserved legislative power was also considered in *Geneva & W. R. Co.* v. *New York C. & H. R. R. Co.* (1895) 90 Hun, 9, 35 N. Y. Supp. 339, affirmed in (1897) 152 N. Y. 632, 46 N. E. 1147, where it was declared that under this power additional burdens and obligations may be imposed on a corporation. *Re Brooklyn* (1894) 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983, affirmed in (1897) 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Roddy* v. *Brooklyn City & N. R. Co.* (1898) 32 App. Div. 311, 52 N. Y. Supp. 1025; *Rochester & C. Turnp. Road Co.* v. *Joel* (1899) 41 App. Div. 43, 58 N. Y. Supp. 346.

Another view of the subject is presented in *Palmer* v. *Hickory Grove Cemetery* (1903) 84 App. Div. 600, 82 N. Y. Supp. 973, construing the act of 1902, chap. 73, limiting, in certain counties, the right of cemetery associations to hold lands.

A general act affecting all railroad corporations was held to amend a railroad charter granted by special law, and was constitutional within this section. Accordingly the court sustained the act of 1851, chap. 157, authorizing any railroad corporation, with the assent of two thirds of its stockholders, to loan its credit or subscribe for the stock of a Canadian railroad corporation with a terminus at the Niagara river. *White* v. *Syracuse & U. R. Co.* (1853) 14 Barb. 559. This corporation was organized in 1836 (chap. 292) and was

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made subject to the powers and restrictions conferred by another railroad act passed at the same session (chap. 242) by which the legislature expressly reserved the right to "alter, modify, or repeal" the act. The corporation was therefore in existence, exercising its franchises under this reserved power, when the Constitution of 1846 was adopted, containing the general provision authorizing the amendment of corporate charters. Discussing the reserved power to alter the charter, which the court deemed a contract between the corporation and the state, it was said that it must have been understood between the parties that "the sovereign power of the state might change the fundamental law at any time. And it would necessarily become a part of the contract that any future legislature might alter the charter of the company, provided that it did not violate any provision of the Constitution in force at the time of the alteration. . . . The charter of the company remained precisely the same immediately after the adoption of the Constitution as it was immediately before. It was never intended that all charters, so far as regarded the instruments of external control to which they were subject, should remain the same as before." See also *Fort Plain Bridge Co.* v. *Smith* (1864) 30 N. Y. 44.

The clause in this section authorizing the creation of corporations by special act "where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws," is construed in *Mosier* v. *Hilton* (1853) 15 Barb. 657, where it is said that the courts have no power to review the discretion or judgment of the legislature, exercised through a special charter; nor is the power of the legislature affected by the fact that it has enacted a general law authorizing the formation of corporations. The legislature may change its opinion or judgment, and the courts cannot inquire into the motive or reason of the change.

The same rule is declared in *United States Trust Co.* v. *Brady* (1855) 20 Barb. 119; *People* v. *Bowen* (1860) 21 N. Y. 517; *Re Prospect Park & C. I. R. Co.* (1876) 67 N. Y. 372; *Sandham* v. *Nye* (1894) 9 Misc. 541, 30 N. Y. Supp. 552; *Berwind-White Coal Min. Co.* v. *Ewart* (1895) 11 Misc. 490, 32 N. Y. Supp. 716, 90 Hun, 60, 35 N. Y. Supp. 573; *Re Kingston Taxpayers* (1870) 40 How. Pr. 444.

The act of 1867, chap. 59, modifying a previous statute concerning subscriptions by the city of Rochester to the stock of a railroad company, and authorizing the city to appoint a specified number of directors, was valid. The previous statute did not create a contract fixing the number of directors, and depriving the legislature of



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authority to increase or reduce the number. *Miller* v. *New York* (1872) 15 Wall. 478, 21 L. ed. 98.

In *People ex rel. Kimball* v. *Boston & A. R. Co.* (1877) 70 N. Y. 569, the court, discussing the authority of the legislature over corporations created by it, say that, "under this reserved power, the legislature may impose upon railroad corporations such additional restrictions and burdens as the public good requires."

Various questions affecting the power of the legislature over corporations, relating chiefly to the enactment of private or local bills, are considered in *Re New York Elev. R. Co.* (1877) 70 N. Y. 327, but without special reference to the original creation of corporations. *Atty. Gen.* v. *North America L. Ins. Co.* (1880) 82 N. Y. 172, holds that the act of 1866, chap. 576, conferring certain powers on this company, did not violate the constitutional provision against special charters. "The act did not create a corporation, but simply regulated a corporation previously in existence." *Re New York Cable R. Co.* (1886) 40 Hun, 1.

See *Pratt Institute* v. *New York* (1904) 99 App. Div. 525, 91 N. Y. Supp. 136, as to repeal of tax exemption; also *Hinckley* v. *Schwarzschild & S. Co.* (1904) 45 Misc. 176, 91 N. Y. Supp. 893, as to statutes regulating the issue of preferred stock.

§ 2. [*Dues of corporations, how secured.*] — Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law.

[Const. 1846, art. 8, § 12.]

See note to § 1.

"The Constitution plainly designed to abolish the former mode or system of creating corporations, and to adopt an entire new system, under which, by general and uniform rules, the individual liability of corporators for all debts of their respective corporations should be regulated and prescribed." *Rochester* v. *Barnes* (1858) 26 Barb. 657.

The public policy expressed by this section "plainly had reference to outside creditors of a corporation, dealing with and trusting it, and generally ignorant of its precise financial condition. It could have no relation to the directors of a corporation, who manage its

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affairs and can generally know its condition, who create the debts and can generally protect themselves, if creditors, before disaster overtakes them." *McDowall* v. *Sheehan* (1891) 129 N. Y. 200, 29 N. E. 299.

§ 3. [*Corporation defined.*]—The term "corporations" as used in this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons.

[Const. 1846, art. 8, § 3.]

The provision relating to suits by and against corporations "is an enabling, and not a restrictive, provision, and it permits corporations to be parties to suits in justices' courts, contrary to the rule which formerly prevailed." This liability is now declared by various statutes. *United States Trust Co.* v. *United States F. Ins. Co.* (*Empire City Bank*) (1858) 18 N. Y. 199.

Considering the provision relative to actions against corporations, the court, in *Gray* v. *Brooklyn* (1869) 2 Abb. App. Dec. 267, say: "It was no part of the intention of that provision to render corporations liable upon all causes of action, the same as natural persons were, but merely to provide that actions might be maintained against them the same as they could against natural persons, provided the legal causes for doing so were found to exist. It was to confer the capacity of being sued, not to define the cases in which suits might be maintained against them." The court sustained the act of 1862, chap. 63, prohibiting actions against the city of Brooklyn for damages caused by the misfeasance or nonfeasance of its officers, and requiring proceedings in such cases to be taken by mandatory process against the city, or by action against the officer. See also *Van Vranken* v. *Schenectady* (1884) 31 Hun, 516, prohibiting actions for injuries caused by defective sidewalks, except under prescribed conditions. *McNally* v. *Cohoes* (1891) 127 N. Y. 350, 27 N. E. 1043; *Smith* v. *Rochester* (1892) 46 N. Y. S. R. 727, 19 N. Y. Supp. 459.

The legislature had no power, as attempted by the act of 1867, chap. 489, to limit the right to equitable relief by way of injunction

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against the West Side & Yonkers Patent Railway Company to the supreme court, and interdict the New York common pleas and other courts from exercising the power of a court of equity. This is a violation of the constitutional provision relating to suits against corporations, which may be sued in all courts in like cases as natural persons. *Story* v. *New York Elev. R. Co.* (1877) 3 Abb. N. C. 478, Robinson, J. This case appears in (1882) 90 N. Y. 122, 43 Am. Rep. 146, where the judgments of the lower courts are reversed, but without considering this point.

In *Kennedy* v. *Queens County* (1900) 47 App. Div. 250, 62 N. Y. Supp. 276, the court had occasion to consider actions against a county, and said that, prior to the county law (1892, chap. 686) which, for the first time, declared a county to be a municipal corporation, actions against a county were brought against the board of supervisors, and this rule was applied notwithstanding the provision of the foregoing section relative to actions by and against corporations. The court observes that it follows "as a necessary deduction that the courts of this state did not consider a county to be a corporation" within the meaning of this section.

The authority conferred on corporations to sue in all courts in like cases as natural persons does not give them the right to sue in all kinds of actions, "but only in those which relate to their corporate rights, just as the citizen is confined to actions in which he has a real interest." A board of education of a union free school district cannot maintain an action to test the validity of a statute changing the district and transferring a part of its territory to another district. Its corporate powers and territorial limits are subject to legislative control, "and it can have no standing in the courts of this state except for the purpose of protecting and maintaining its corporate powers and in carrying out the objects for which it was created." *Board of Education* v. *Board of Education* (1902) 76 App. Div. 355, 78 N. Y. Supp. 522.

§ 4. [*Banking corporations.*]—The legislature shall, by general law, conform all charters of savings banks, or institutions for savings, to a uniformity of powers, rights, and liabilities, and all charters hereafter granted for such corporations shall be made to conform to such general law, and to such amendments as may be made thereto. And no such corporation shall have any capital stock nor shall

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the trustees thereof, or any of them, have any interest whatever, direct or indirect, in the profits of such corporation; and no director or trustee of any such bank or institution shall be interested in any loan or use of any money or property of such bank or institution for savings. The legislature shall have no power to pass any act granting any special charter for banking purposes; but corporations or associations may be formed for such purposes under general laws.

[Const. 1846, art. 8, § 4; Am. 1874.]

See note to § 1 for reference to historical sketch.

The term "banking," as used in this section, means "that business which might be carried on by banking associations under the law to authorize the business of banking, passed April 18, 1838." By various subsequent amendments to the statute the meaning of the term has become fixed by legislative usage. The United States Trust Company is not a corporation created for banking purposes, and a special charter was therefore constitutional. *United States Trust Co.* v. *Brady* (1855) 20 Barb. 119. See also *Pardee* v. *Fish* (1875) 60 N. Y. 265, 19 Am. Rep. 176, involving the status of the People's Safe Deposit Company of the city of New York, incorporated by special act in 1868, chap. 816, and which act was held to be constitutional.

The provision requiring banks to be organized under general laws does not prevent the legislature from enacting a statute to remedy defects in the organization of a bank under such a general law. "The institution may be said to have the power and the rights of a bank doing business *de facto*, while its rights were imperfect *de jure*." *Syracuse City Bank* v. *Davis* (1853) 16 Barb. 188.

In *New York State Loan & T. Co.* v. *Helmer* (1879) 77 N. Y. 64, it was held that the plaintiff company had no power to discount notes.

§ 5. [ *Specie payments not to be suspended.* ]—The legislature shall have no power to pass any law sanctioning in any manner, directly or indirectly, the suspension of spe-

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**cie payments by any person, association, or corporation issuing bank notes of any description.**

[Const. 1846, art. 8, § 5.]

This subject has been treated in a former volume, under the head of "Banking and Currency," in connection with the work of the Convention of 1846.

**§ 6. [*Registry of bills and notes.*]—The legislature shall provide by law for the registry of all bills or notes issued or put in circulation as money, and shall require ample security for the redemption of the same in specie.**

[Const. 1846, art. 8, § 6.]

This section was one of the results of the financial agitation and business conditions which prevailed during several years prior to the Convention of 1846. That convention sought to prevent a repetition of those conditions by adopting a plan intended to protect the credit of the state and of its financial institutions. The subsequent national banking law, which, in effect, though not in terms, prohibits the issue of bills by state banks, has rendered this section temporarily dormant, but its efficacy would doubtless be revived if state banks should again issue bills to circulate as money.

This section is not self-executing, and in the absence of a statute requiring the redemption of bank notes in specie, such redemption may be in lawful money of the United States. *Metropolitan Bank* v. *Van Dyck* (1863) 27 N. Y. 400.

**§ 7. [*Liability of stockholders.*]—The stockholders of every corporation and joint-stock association for banking purposes shall be individually responsible to the amount**

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**of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind.**

[Const. 1846, art. 8, § 7.]

This section was originally adopted in 1846, but was modified in important particulars by the Convention of 1894.

The measure of the liability of stockholders prescribed by this section "is the amount, or, as it would be better expressed, a sum equal to the amount of their respective shares of stock." This additional security is necessary for the protection of the public. *United States Trust Co.* v. *United States F. Ins. Co.* (*Empire City Bank*) (1858) 18 N. Y. 199, citing *Briggs* v. *Penniman* (1826) 8 Cow. 387, 18 Am. Dec. 454; *Bank of Poughkeepsie* v. *Ibbotson* (1840) 24 Wend. 473.

This section applies to existing banks as well as to those organized after its adoption. *Re Gibson* (*Oliver Lee & Co.'s Bank*) (1860) 21 N. Y. 9. "The existing banks were numerous, and, if they were exempted from the principle of personal liability, it would be a long time before it would be generally established. By the general banking law the associations had the power to prescribe for themselves the duration of their corporate existence, and a long term had generally been named. Hence, if the rule of personal liability only reached the case of future banks, there would continue to be two classes of banking institutions for many years to come." The convention which framed the Constitution "was not obliged, like the legislative bodies, to look carefully to the preservation of vested rights. It was competent to deal, subject to ratification by the people, and to the Constitution of the Federal government, with all private and social rights, and with all the existing laws and institutions of the state." Affirmed as *Sherman* v. *Smith* (1861) 1 Black, 587, 17 L. ed. 163.

The section applies to banks chartered by special law. *Re Reciprocity Bank* (1860) 22 N. Y. 9.

The liability imposed by this section "is limited to stockholders in banking corporations or associations 'issuing bank notes or any kind of paper credits to circulate as money.' It is well known that state banks, while invested with the power of banks of issue on

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complying with certain conditions, are, by the operation of the provisions of the United States laws relating to national banks, practically prohibited from the exercise of this power." The liability of stockholders in such banks is fixed by statute. *Hirshfeld* v. *Bopp* (1895) 145 N. Y. 84, 39 N. E. 817; *Persons* v. *Gardner* (1899) 42 App. Div. 490, 56 N. Y. Supp. 822, 59 N. Y. Supp. 463.

§ 8. [*Preference of billholders.*]—In case of the insolvency of any bank or banking association, the billholders thereof shall be entitled to preference in payment over all other creditors of such bank or association.

[Const. 1846, art. 8, § 8.]

This is a part of the plan to protect the holders of bank bills, but is of little practical effect under present banking conditions.

§ 9. [*No state aid to individuals or corporations.*] Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation, or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held, by the state for educational purposes.

[Const. 1846, art. 7, § 9; Am. 1874; Const. 1894, art. 7, § 1.]

I have given in previous chapters a sketch of the conditions which led to the adoption of the policy indicated by this section. The first part of this section was adopted in 1846, and was then § 9 of article 7. It was modified in 1874 by striking out the word "individual" and substituting the words "private undertaking" in the first part, and by the addition of the second part, relating to

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appropriations for charitable and educational purposes, and also making the prohibition applicable to the money of the state, which was not included in the original section.

By the act of 1840, chap. 193, the comptroller was authorized to loan to the Long Island Railroad Company $100,000 on "special certificates of stock," to be "reimbursable at the pleasure of the legislature, at any time after twenty years." The act of 1858, chap. 36, made the stock absolutely payable on the 1st of August, 1876, but authorized its redemption in 1861 on specified conditions, and also provided a sinking fund for the payment of the stock. The legislature had power thus to fix the date for the payment of the stock, and this was not a loan of the credit of the state. The loan had already been made under the act of 1840, and the Constitution of 1846 did not prevent the legislature from taking such steps as might be necessary to secure the payment of the loan. *People ex rel. De Forest* v. *Denniston* (1861) 23 N. Y. 247.

In *People ex rel. Schenectady Astronomical Observatory* v. *Allen* (1870) 42 N. Y. 404, the court denied the power of the legislature to authorize the comptroller to loan a portion of the principal of the common school fund for the purpose of establishing an astronomical observatory in Schenectady, chiefly for the reason that it would impair that fund, contrary to the provisions of article 9, § 1, now, § 3. In the opinion the court say that "the legislature may donate any portion of the general fund of the state, or loan it upon any kind of security which it chooses, and such donation or loan will be valid, provided the act be framed and passed pursuant to the requirement of the Constitution." But the legislature cannot make a donation which would impair the capital of the common school fund, nor authorize a loan of it upon inadequate security.

The acts of 1866, chap. 576, 1867, chap. 708, and 1869, chap. 90, authorizing the North America Life Insurance Company to deposit with the superintendent of insurance securities for the protection of registered policy holders, and providing a special fund for the same purpose, did not constitute a loan of the credit of the state. The state "simply became the custodian of the securities deposited with it. It incurred or assumed no responsibility, except as a depositary." *Atty. Gen.* v. *North America L. Ins. Co.* (1880) 82 N. Y. 172.

The phrase "money of the state" means "money raised by general

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taxation throughout the state, or revenues of the state, or moneys otherwise belonging in the state treasury or payable out of it . . . and not money raised by ordinary local taxation for local purposes, and to be disbursed by the local authorities." The fact that money is raised by local taxation by the supervisors of a county, pursuant to an act of the legislature, does not make it money of the state. (Citing *People* v. *Ingersoll* [1874] 58 N. Y. 1, 17 Am. Rep. 178, and *People* v. *Fields* [1874] 58 N. Y. 491.) Construing together §§ 9 and 10 (formerly 10 and 11), the court say that "the general scheme of the constitutional provision referred to seems to be that the general funds of the state shall not be given to local charitable institutions, except in aid of the blind, the deaf and dumb, and juvenile delinquents, and that the poor are to be provided for in their localities: counties, cities, towns, and villages being allowed to make any provision for the support of their poor which may be authorized by law. Carrying out the designated charities through the instrumentality of private corporations is not prohibited by the Constitution, but the giving away of the money, either of the state or of its counties or other local divisions, to individuals or private corporations, except for the designated purposes for which each is authorized to provide, is forbidden." The plaintiff was an institution authorized to receive and care for certain classes of children in New York, and therefore city money raised by taxation might lawfully be paid to it for such care. *Shepherd's Fold* v. *New York* (1884) 96 N. Y. 137.

What is the money of the state was considered in *People ex rel. Einsfeld* v. *Murray* (1896) 149 N. Y. 367, 375, 32 L. R. A. 344, 44 N. E. 146, where the court, construing the liquor tax law of 1896, providing for the distribution of excise moneys between the state and local communities, say: "There is a well-settled distinction between the money of the state and money levied under corporate powers conferred upon cities, villages, and towns for local and corporate purposes. In the latter case money levied and collected is not the money of the state. It is the money of the town, city, or village in which, under the exercise of corporate powers, it was levied and collected, and to it the state has no title."

The same court, in *Fox* v. *Mohawk & H. R. Humane Soc.* (1901) 165 N. Y. 517, 51 L. R. A. 681, 80 Am. St. Rep. 767, 59 N. E. 353, say that, from the enumeration in this article of the money "of the state, of a county, city, town, and village, it is plain that the Constitution meant to include all public moneys which are raised in any manner throughout the state as an exaction from the citizen by

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the taxing or licensing power of government." The court held to be unconstitutional the act of 1896, chap. 448, which, among other things, required every owner of a dog in specified cities to pay to an incorporated society for the prevention of cruelty to animals an annual license fee. "If the appropriation to the defendant of license fees prescribed by this statute is a gift of money to, or in aid of, an association, corporation, or private undertaking, then it is in conflict with the constitutional provision." The society is not a subordinate governmental agency, and the statute, "so far as it compels the owners of dogs to pay license fees to the defendant for the purposes prescribed in the statute, is an unauthorized appropriation of public moneys, and is in conflict with the Constitution."

In *People ex rel. New York Inst. for Blind* v. *Fitch* (1897) 154 N. Y. 14, 38 L. R. A. 591, 47 N. E. 983, it was held that "the state could appropriate its funds for the education and support of the blind, and that counties might appropriate the sum required for clothing the indigent pupils therein who were residents of the county making the appropriation."

§ 10. [ *Counties, cities, and towns not to give or loan money or credit; limitation of indebtedness.* ]—No county, city, town, or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association, or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town, or village be allowed to incur any indebtedness except for county, city, town, or village purposes. This section shall not prevent such county, city, town, or village from making such provision for the aid or support of its poor as may be authorized by law. No county or city shall be allowed to become indebted for any purpose or in any manner to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of the real estate of such county or city subject to taxation, as it appeared by the assessment-rolls of said county or city on the last assessment for state or county taxes prior to the incurring of such indebtedness; and all indebt-

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edness in excess of such limitation, except such as may now exist, shall be absolutely void, except as herein otherwise provided. No county or city whose present indebtedness exceeds ten per centum of the assessed valuation of its real estate subject to taxation shall be allowed to become indebted in any further amount until such indebtedness shall be reduced within such limit. This section shall not be construed to prevent the issuing of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained, or to be contained, in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes. Nor shall this section be construed to prevent the issue of bonds to provide for the supply of water; but the term of the bonds issued to provide the supply of water shall not exceed twenty years, and a sinking fund shall be created on the issuing of the said bonds for their redemption, by raising annually a sum which will produce an amount equal to the sum of the principal and interest of said bonds at their maturity. All certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes, which are not retired within five years after their date of issue, and bonds issued to provide for the supply of water, and any debt hereafter incurred by any portion or part of a city, if there shall be any such debt, shall be included in ascertaining the power of the city to become otherwise indebted. Whenever the boundaries of any city are the same as those of a county, or when any city shall include within its boundaries more than one county, the power of any county wholly included within such city to become indebted shall cease, but the debt of the county, heretofore existing, shall not, for the purposes of this section, be reckoned as a part of the city debt. The amount hereafter to be raised by tax for county or city purposes, in any county containing a city of over one hundred thousand in-

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habitants, or any such city of this state, in addition to providing for the principal and interest of existing debt, shall not, in the aggregate, exceed in any one year two per centum of the assessed valuation of the real and personal estate of such county or city, to be ascertained as prescribed in this section in respect to county or city debt.

[As amended in 1899, Am. 1874; Am. 1884; Const. 1894, art. 8, § 10.]

The legislature of 1903 adopted an amendment to be submitted in 1905, adding to the seventh sentence of this section a provision relating to water debts in the city of New York.

The amended sentence reads as follows:

All certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes, which are not retired within five years after their date of issue, and bonds to provide for the supply of water, and any debt hereafter incurred by any portion or part of a city, if there shall be any such debt, shall be included in ascertaining the power of the city to become otherwise indebted; except that debts incurred by the city of New York after the first day of January, nineteen hundred and four, to provide for the supply of water, shall not be so included.

The remainder of the section was not changed. See last paragraph of preface to this volume.

In the chapters on the Convention of 1867 and on the Commission of 1872, I have given a sketch of the history of this provision, which was proposed in the Convention, once agreed to, and afterwards abandoned, and which was considered again and recommended by the Commission, and included in the amendments adopted in 1874. The second part of the section, relating to the limitation of local indebtedness, was added in 1884, by legislative

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amendment. This provision was further modified by the Convention of 1894, and by a legislative amendment adopted in 1899.

This section has no retroactive effect. *Rogers* v. *Smith* (1875) 5 Hun, 475.

This section, adopted in 1874, had the effect to abrogate all provisions of law authorizing the bonding of towns for railroad purposes, and took away the power of railroad commissioners to subscribe for stock; but the amendment did not affect existing contracts. *Buffalo & J. R. Co.* v. *Railroad Comrs.* (1875) 5 Hun, 485; *People ex rel. Hetfield* v. *Ft. Edward* (1877) 70 N. Y. 28; *Falconer* v. *Buffalo & J. R. Co.* (1877) 69 N. Y. 491, affirmed in (1880) 103 U. S. 821, 26 L. ed. 471; *Cherry Creek* v. *Becker* (1890) 123 N. Y. 161, 25 N. E. 369.

A municipal corporation cannot, against its consent, be compelled to take stock in a railroad corporation. *People ex rel. Dunkirk, W. & P. R. Co.* v. *Batchellor* (1873) 53 N. Y. 128, 13 Am. Rep. 480.

GRATUITIES.

The act of 1876, chap. 445, directing the issue of bonds by the city of Albany for a specified street improvement, and providing for the reimbursement of the city by taxation of the property benefited, was not a loan of the city's credit. The primary liability was upon the city, but the ultimate liability was upon the property and persons benefited by the improvement. *People ex rel. Washington Park* v. *Banks* (1876) 67 N. Y. 568. The same statute was also considered in *Hurlburt* v. *Banks* (1876) 52 How. Pr. 196.

The act (1876, chap. 66) authorizing municipalities to exchange railroad bonds for stock of the company, which bonds had been exchanged for municipal bonds given to aid in the construction of the road, was held to be a violation of the provision against loaning municipal credit to private corporations. *Wheatland* v. *Taylor* (1883) 29 Hun, 70.

A town collector deposited a part of the taxes collected by him in a bank which afterwards failed, and the money so deposited was lost. The collector was not relieved from liability by the failure of the bank and the loss of the money. "The legislature can not authorize, and the county and town authorities cannot make, a levy and take the property of the taxpayer to relieve the collector from his loss." Such taxation was an appropriation of private

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property for a private purpose, and was a mere gratuity. The collector had no equitable claim against the town. *Mercer* v. *Floyd* (1898) 24 Misc. 164, 53 N. Y. Supp. 433.

The act of 1900, chap. 614, authorizing the rehearing of a case which had passed to final judgment, and directing the payment of the amount which might be found due on such a rehearing, was an unconstitutional interference with the rights of parties as determined by the judgment. Where a final judgment "is upon the merits, for the legislature to vacate or disregard it, and direct the levy of a tax to pay it, either without a new trial or with judgment upon it, would be the bestowal of a gratuity. But where such judgment is not upon the merits, but because of some defect in the authority of the officers to bind the municipal body for which they assume to act, and thus in good conscience is not decisive against the justice of the claim, the legislature may, in order that justice shall prevail, direct its re-examination and determination, and, if found to be just, direct that it be provided for by taxation." In this case the judgment passed against the receiver upon a full examination of the merits, and not because of any disability of the county to do right, or lack of liability to respond, as the merits might require. The legislature had no power to open the judgment. *Re Greene* (1901) 166 N. Y. 485, 60 N. E. 183.

A contract for a street improvement which requires a city to raise the amount of the contract price by assessment upon property benefited, and pay it to the contractors, does not violate the provision against aiding corporations or individuals. *Kronsbein* v. *Rochester* (1902) 76 App. Div. 494, 78 N. Y. Supp. 813.

The act of 1899, chap. 711, authorizing the board of revision and assessments of the city of New York to ascertain and determine the damages caused by the change of grade of certain streets, did not authorize the payment of damages to a person who acquired title to adjoining property after the change had been made. The municipality was under no legal or moral obligation to pay to him damages which may have accrued to his predecessor. Payment to the present owner in such a case would be a mere gratuity. *People ex rel. Stephens* v. *Phillips* (1903) 88 App. Div. 560, 85 N. Y. Supp. 200.

The grants to the Mount Sinai hospital of certain lands in the city of New York, pursuant to Laws 1898, chap. 257, and Laws 1900, chap. 166, were "in all essential respects gifts and endowments," and operated "in legal effect as a gift of public property for a

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private use." *Mount Sinai Hospital* v. *Hyman* (1904) 92 App. Div. 270, 87 N. Y. Supp. 276.

## LIMITATION OF INDEBTEDNESS.

The stock or fund created by the corporation of the city of New York and held by the commissioners of the sinking fund is not to be included in a computation made for the purpose of determining whether a city has reached the debt limit prescribed in this section. "We think it plain that the indebtedness here referred to is an indebtedness to be met in the future by taxation, for (1) before its possible limit can be defined the value of the real estate subject thereto must be ascertained. (2) By the express words of the provision, water bonds issued for a fixed term are not to be included, but a sinking fund must be created 'for their redemption.' (3) So the issue of certificates of indebtedness or revenue bonds in anticipation of, and payable out of, the taxes for the current year, is permitted." *Bank for Savings* v. *Grace* (1886) 102 N. Y. 313, 7 N. E. 162.

The provision relating to the indebtedness of cities containing a population exceeding 100,000 was construed in *Sweet* v. *Syracuse* (1891) 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289, where it was held that the sinking fund requirement applies only to such cities, and a statute was sustained which authorized city water bonds running more than twenty years without any provision for a sinking fund in a city which contained a population of less than 100,000.

The same provision was again considered in *Rochester* v. *Quintard* (1892) 136 N. Y. 221, 32 N. E. 760, and it was there held that the exception limiting water bonds to a term of twenty years, with provision for a sinking fund, does not apply where the aggregate indebtedness, including the new bonds, does not exceed the constitutional limit, and the Rochester water act of 1892, chap. 358, authorizing bonds running fifty years, was sustained, the court saying that the twenty years' limitation, with the sinking fund accompaniment, applies only where the debt limit has already been passed. Judge Finch, discussing the constitutional restriction, makes some observations which may profitably be quoted here:

"The obvious theory of the constitutional provision is that the smaller cities of the state needed but one restraint, and that relating to the purpose and occasion of their indebtedness, and not to its amount. Such cities were not likely, with their smaller necessities, to make large loans and contract heavy debts, and so were left without restriction upon amounts or terms, save such as the citizens

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might themselves impose. But the larger cities, with their greater needs and the pressure of much more numerous non-taxpayers, and their swarm of claimants on the public treasury, did need restraint, not only as to the purposes of the municipal indebtedness, but as to its amount; and so the restriction in that respect also was imposed; and yet, to prevent a greater evil which might result, and open the door to a necessity of the gravest character, it was enacted that even that restraint should not bar the further issue of bonds for a water supply; but since these would add to a debt already crowded to the extreme limit of prudence and safety, it was provided that such added debt should run for a moderate term of credit and be guarded by a sinking fund so as to reduce to the lowest reasonable point the continuance and menace of the debt already too large. The city which availed itself of the exceptional permission could do so only upon the conditions which were attached with a view to making the added debt as little harmful as possible. Of course, the line between the smaller and the larger cities, those which did not and those which did call for a limit of permitted debt, had to be drawn somewhat arbitrarily, and was fixed at a population of one hundred thousand inhabitants as the most reasonable test capable of application."

The debt restriction was again considered in *Adams* v. *East River Sav. Inst.* (1892) 136 N. Y. 52, 32 N. E. 622, and it was there held that the debt of the city could not be added to the debt of the county for the purpose of determining whether the latter had already reached the constitutional limit. The restriction is to be applied distributively. "The indebtedness of the county of which the city forms a part does not play any part in the process of determining when the limitation is applicable, as it is wholly immaterial." So, in a like case, a debt of a city cannot be charged against the county. Each municipal corporation must be treated separately, and their debts cannot be aggregated.

The amendment of 1894, which took effect January 1, 1895, did not affect existing contracts for public improvements made under a statute which authorized the issue of city bonds from time to time in connection with the work. The obligation of the contract could not be impaired by a subsequent amendment of the Constitution. *Sheehan* v. *Long Island City* (1895) 11 Misc. 487, 33 N. Y. Supp. 428, Gaynor, J.

Courts will be guided by official figures in determining the amount of local indebtedness under this section, and, in a case involving a specific item of proposed indebtedness, other items of possible in-



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debtedness or projected public improvements need not necessarily be considered. *Re New York* (1895) 72 N. Y. Supp. 378, Patterson, J. See *Cahill* v. *Hogan* (1905) 180 N. Y. 304, 73 N. E. 39.

The authority to construct the rapid transit system in New York is subject to this constitutional restriction as to indebtedness. *Re Rapid Transit R. Comrs.* (1896) 5 App. Div. 290, 39 N. Y. Supp. 750.

Certain revenue bonds issued by Long Island City were held not to be revenue bonds within the meaning of the exception in the foregoing section, because not issued as therein prescribed. Such bonds became a part of the permanent debt of the city. The test of the validity of the bonds is to be applied when they are issued, and not when they mature. *Gibson* v. *Knapp* (1897) 21 Misc. 499, 47 N. Y. Supp. 446.

The contract price for a street improvement, the expense of which is to be borne by adjoining property owners, is not a part of the city's indebtedness under this section. A special franchise is to be assessed as real property, and its value included in the amount of the city's assessment for the purpose of determining whether the debt limit has been reached. *Kronsbein* v. *Rochester* (1902) 76 App. Div. 494, 78 N. Y. Supp. 813.

The provision relating to indebtedness where a city embraces an entire county or two or more entire counties, which was added in 1899, taking effect January 1, 1900, and which at present is applicable only to counties included in the city of New York, is considered in *McGrath* v. *Grout* (1902) 171 N. Y. 7, 63 N. E. 547, and the court there say that "the indebtedness which a county is inhibited from incurring means one which is created for purposes other than for the maintenance of the political organization." It has no reference to the obligations of the county for current expenses of such a nature. "Indebtedness for the current expenses of the county organization is necessarily incidental, and it is made payable from moneys raised annually by taxation upon the taxable property within the county, through the municipal agencies designated by the legislature for the purpose." The court accordingly sustained the acts of 1901, chaps. 704, 705, and 706, making the offices of clerk, register, and sheriff of Kings county salaried offices, and providing for paying the salaries and office expenses by the city of New York.

## PUBLIC PURPOSE.

*Brooklyn bridge.*—The acts of 1867, chap. 399, and 1875, chap. 300,

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providing for the erection of the East river bridge between New York and Brooklyn, the subscription to the stock thereof by the two cities, and their ultimate acquisition of the bridge, authorize an expenditure for a public purpose within the meaning of this section. "It is impossible to define in a general way with entire accuracy, what a city purpose is, within the meaning of the Constitution. Each case must largely depend upon its own facts, and the meaning of these words must be evolved by a process of exclusion and inclusion in judicial construction." Public funds may constitutionally be expended for a supply of water for the city, for public parks, and for the improvement, within reasonable limits, of highways and streets leading into the city. A city purpose does not mean simply some work or expenditure within the city limits. "The bridge will be for the common benefit of all the citizens of both cities, and each citizen will have the same right to use it as every other citizen. It would have been a city purpose if either city had been authorized to build the whole of the bridge, and it is no less so that both are to unite in building it." The court cited the statutes authorizing the joint construction of bridges between two towns.

"The legislature, when legislating in view of this constitutional limitation, must determine in the first instance what is a municipal purpose;" but its action is not conclusive, and may be reviewed by the courts. *People ex rel. Murphy* v. *Kelly* (1879) 76 N. Y. 475. This decision has lost much of its local importance by the recent consolidation of New York and Brooklyn and other municipalities in Greater New York, but the principles apply with equal force to all municipalities between which bridges or highways are jointly constructed.

*Compromising claim.*—The payment of an acknowledged debt is a city purpose. "The Constitution does not deprive municipalities of the right to compromise a claim which they dispute, but which, in the end, they deem it wise and prudent to acknowledge in part, and pay as acknowledged; and which might, by judicial decision, but for the compromise, become a charge upon them to its full extent." *Hills* v. *Peekskill Sav. Bank* (1886) 101 N. Y. 490, 5 N. E. 327.

*Counsel for defendant in criminal cases.*—An allowance under § 308 of the Code of Criminal Procedure to counsel assigned to aid the defendant in a capital case is for a public purpose, and does not violate the prohibition against appropriating public money in aid of an individual. "The administration of the criminal law is a governmental function, the expense of which is charged upon the

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respective counties in which violations of the law are committed, and public moneys appropriated to the payment of obligations incurred in such administration are so appropriated for a public purpose." By the common law in force at the adoption of the state Constitution defendants in criminal cases were entitled to counsel, to be assigned by the court. The assignment of counsel is a public duty, performed by the trial court in the administration of justice. The state will not permit a plea of guilty in a capital case. The state is under a "supreme obligation . . . to see that no citizen's life is taken under any circumstances, save as he has forfeited the same to the state through some felonious act, or his continued existence imperils the stability of the government." But aside from the interests of the individual, the interests of the state may require protection, and in such a case the Constitution authorizes an appropriation of public funds for the purpose. The interest of the individual is only incidental "to the discharge of the obligation which the state owes to all of its citizens and inhabitants that human life and property shall be made safe, and that neither the one nor the other shall be taken away except by due process of law." The state is burdened with the responsibility and duty of conducting a criminal trial, "and money appropriated therefor is necessarily appropriated for a public purpose, and there can be no difference in principle between authorized expenditure of money for such purpose by the public prosecutor, and the appropriation of it by the legislature in order to secure to the defendant a fair trial." Counsel for the defendant is engaged in a public service for the benefit of the state, and has an equitable claim against the state for compensation. *People ex rel. Acritelli* v. *Grout* (1903) 87 App. Div. 193, 84 N. Y. Supp. 97, citing *People ex rel. Brown* v. *Onondaga County* (1886) 3 How. Pr. N. S. 1, 4 N. Y. Crim. Rep. 102; affirmed in (1886) 102 N. Y. 691, where it is said that the public have the same interest in the acquittal of the innocent as in the conviction of the guilty.

*County expenses in criminal cases.*—The act of 1885, chap. 428, which provided for reimbursing the county of Cayuga for expenses incurred by it in the prosecution and trial of convicts in Auburn state prison, was intended as a discharge of an equitable obligation, although unenforceable, which, in the judgment of the legislature, rested upon the state. Such reimbursement was not a gift of money of the state. The county of Cayuga was not a corporation within the meaning of this section. "The word 'corporation' plainly refers to private and business corporations, and does not

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include governmental agencies, such as counties or towns." *Cayuga County* v. *State* (1897) 153 N. Y. 279, 47 N. E. 288.

A somewhat different view as to the meaning of the term "corporation" will be found in *Deady* v. *Lyons* (1899) 39 App. Div. 139, 57 N. Y. Supp. 448, and it is there suggested that it should include public as well as private corporations; but this suggestion by the trial court was not considered on appeal.

*Delegates to convention.*—In *Wright* v. *Rosenbloom* (1900) 52 App. Div. 579, 66 N. Y. Supp. 165, the board of education of Syracuse was restrained from paying the expenses incurred by the clerk and two members of the board in attending the annual convention of the National Educational Association, which was held at Los Angeles, Cal., in July, 1899. The statutory authority to pay contingent expenses is not broad enough to include attendance at such a convention. "The contingent expenses which the board may pay are expenses relating to the school system of the city, incurred for its benefit, and necessary for its maintenance." No constitutional objection was suggested, but the decision was placed on the ground that the statute did not authorize such an expenditure.

*Drafted men.*—The reimbursement of drafted men, under the act of 1892, chap. 664, was not a public purpose. There was no legal or moral obligation on the part of towns to pay such claims. The act also violates the prohibition against giving any money to or in aid of an individual. *Bush* v. *Orange County* (1899) 159 N. Y. 212, 45 L. R. A. 556, 70 Am. St. Rep. 538, 53 N. E. 1121.

*Elevating railroad tracks.*—The legislature had power to authorize the city of New York to share in the expense of elevating the tracks of the Harlem and New York Central railroad companies in the northern part of the city so as to permit the uninterrupted use of city streets theretofore occupied by such companies, and by which such streets were abandoned in connection with the change of grade. Such change was for the benefit of the city, and was a city purpose, and a payment under the statute (1892, chap. 339) did not constitute a gift of the money of the city to the railroad companies. *Tocci* v. *New York* (1893) 73 Hun, 46, 25 N. Y. Supp. 1089.

*Entertainment of visitors.*—In *Hodges* v. *Buffalo* (1846), 2 Denio, 110, it was held that the common council had no power to contract for the entertainment of citizens and guests of the city on Independence Day at public expense. The power was denied because the charter did not authorize such an expenditure; the court intimating that the legislature might have conferred such power on the

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city. There was then no constitutional prohibition against such an expenditure of public money.

This case was cited and followed in *Gamble* v. *Watkins* (1876) 7 Hun, 448, where it was held that the village had no power to provide, at public expense, for the entertainment of representatives of the press; but the court did not suggest that the payment of village money for such a purpose would have been a violation of the Constitution.

*Exempt firemen's fund.*—The act of 1866, chap. 633 (afterwards several times amended), requiring certain insurance companies to pay a percentage of their premiums to the trustees of the exempt firemen's fund, to be used in the support of indigent discharged volunteer firemen and their families, did not violate this section. The state was under moral obligation to provide for these persons. "The constitutional provision was not intended and should not be construed to make impossible the performance of an honorable obligation, founded upon a public service, invited by the state, adopted as its agency for doing its work, and induced by exemptions and rewards which good faith and justice require should last so long as the occasion demands." The plaintiff was a subordinate governmental agency and might lawfully be used for the purpose of carrying into effect the beneficent objects of the statute. *Exempt Firemen's Benev. Fund* v. *Roome* (1883) 93 N. Y. 313, 45 Am. Rep. 217.

*Grade crossings.*—An expenditure under the grade crossing law (1897, chap. 754, and amendments) is for a public purpose, and is not a gift to a corporation. *Re Boston & A. R. Co.* (1901) 64 App. Div. 257, 72 N. Y. Supp. 32.

*Highway damages.*—The act of 1881, chap. 700, providing for actions against towns to recover damages caused by defective highways or bridges, does not impose on a town a liability which constitutes a gift to an individual who sustains such damages. "It has no relation to any individual, but concerns the public, and is for the common benefit." *Bidwell* v. *Murray* (1886) 40 Hun, 190. *Re Borup* (1905) 182 N. Y. 222, 74 N. E. 838, sustaining Laws 1903, chap. 610, adding to the highway law § 11*a*, providing for damages on change of grade.

*Inebriates' home.*—Payments to the Inebriates' Home for Kings county of a portion of the excise moneys received in the city of Brooklyn and the county of Kings were declared to be for a city purpose. The Home was entitled to receive inebriates committed by magistrates, and it was therefore authorized to receive public

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funds for the care and support of persons so committed. *White* v. *Inebriates' Home* (1894) 141 N. Y. 123, 35 N. E. 1092.

*Labor law.*—The provision of the labor law that the wages to be paid laborers on public works shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about, or in connection with which such labor is performed, in its final or completed form is to be situated, erected, or used, denies to a municipality and its contractors the right to agree with their employees on the measure of their compensation, and by fixing the rate of wages at an amount which may be above the rate that might have been determined by agreement, requires the payment of an excess which is, in effect, a gift to individuals, and is not a public purpose under this section. "If the legislature should, by statute, require a city to enter into contracts which directly or indirectly secure benefits to private individuals, or particular classes of citizens, and not for purely city purposes, the statute would be void as in conflict with the spirit, if not the letter, of the Constitution. All expenditures of money must be for city purposes, and that alone, except so far as it is authorized to devote funds to the relief of the poor or to charity, which may be said to be a city purpose in the largest sense. A statute which tends to divert the money or property of the city, or that of the local property owners, from strictly city purposes, and devotes it directly or indirectly to private interests, or to the interests of some class of persons as distinguished from the whole body, whether the transaction is made to assume the form of payments of wages or something else, is in conflict with the spirit and policy of these provisions of the Constitution." The legislature cannot fix by statute the price which a city must pay for materials or property that it may need, or the compensation that it must pay for labor or other services that it may be obliged to employ; at least, when such regulations increase the cost beyond that which it would be obliged to pay in the ordinary course of business. *People ex rel. Rodgers* v. *Coler* (1901) 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716.

*Lighting streets.*—"The lighting of the streets and public places is one of the duties devolving upon the municipal government, and is a city purpose within the provisions of the Constitution. The care, management, and control of the public streets devolve upon the city government, and it is the duty of the city to maintain them in such condition that the public, by the exercise of due care, may pass safely thereon." A city may, in connection with a street-

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lighting system, furnish light for dwellings or other private buildings, and such combination of a public and private purpose is not objectionable under this provision of the Constitution. Systems for supplying municipalities and their inhabitants with pure and wholesome water are cited as instances of a familiar and proper exercise of power under this section. *Hequembourg* v. *Dunkirk* (1888) 49 Hun, 550, 2 N. Y. Supp. 447.

*Manufacturing corporation.*—It is not always easy to determine what is a public purpose under this section, but the words should not be given a pinched or meager sense, and "if the purpose designated by the legislature lies so near the border line as that it may be doubtful on which side of it it is domiciled, the courts may not set their judgment against that of the lawmakers. . . . It may also be conceded that that is a public purpose, from the attainment of which will flow some benefit or convenience to the public, whether of the whole commonwealth or of a circumscribed community." But "the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote, or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own hand to in his own right, and take unto his own use at his own option, upon the same reasonable terms and conditions as any other citizen thereof." The legislature has no power to authorize a municipal corporation to tax itself for the purpose of raising money to be used in subscribing to the stock of a private corporation, organized for the purpose of manufacturing lumber. The business is private, "to be carried on for private profit, to be controlled by private rules, or even private caprice, into which the public or any member of it could not enter, the direct conveniences and benefits whereof neither the public nor any member of it could demand as of right." *Weismer* v. *Douglas* (1876) 64 N. Y. 91, 21 Am. Rep. 586.

*Monuments.*—A memorial arch or monument erected in Riverside park, in the city of New York, under the act of 1893, chap. 522, was held to be for a city purpose (*Parsons* v. *Van Wyck* [1900] 56 App. Div. 329, 67 N. Y. Supp. 1054), the court observing that "the difficulty of defining what is a city purpose lies in the fact that the government of a city extends not alone to furnishing necessities of a public character, but also to providing parks, with their necessary adornments, and resorts of health and recreation, and museums, botanical and zoölogical gardens intended for educational purposes, and many other objects that might be mentioned which tend to beautify the city, and to contribute to the comfort, health, and

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convenience of the entire people. . . . Monuments and statues may rightly be erected by municipalities in the public streets, avenues, places, squares, and parks. . . . We think the erection of a beautiful monument or memorial is serving a public purpose. It is not only an expression of patriotism: it contributes to the education, the pleasure, and the cultivation of the artistic sense of the citizens of the municipality." The court cites *Tompkins* v. *Hodgson* (1874) 2 Hun, 146, where it is held that the law "will sanction the erection of a work of art, such as an ornamental statue, in the public highway, when it does not obstruct travel, and such erection is not a trespass on the right of the owner of the soil in such highway."

*Official badges.*—In *Sillcocks* v. *New York* (1877) 11 Hun, 431, it was held that the common council of New York had no power to authorize the purchase of gold badges for members of the council as insignia of office.

*Parks.*—After stating the general rule that "the acquisition and maintenance of public parks, securing pure air and healthful rest and recreation to the people, is a city purpose when executed within the corporate limits," the court, in *Re New York* (1885) 99 N. Y. 569, 2 N. E. 642, say that a city purpose must have two characteristics; namely, "the purpose must be primarily the benefit, use, or convenience of the city, as distinguished from that of the public outside of it, although they may be incidentally benefited, and the work be of such a character as to show plainly the predominance of that purpose. And then, the thing to be done must be within the ordinary range of municipal action." Acquiring and maintaining parks so near the city "as to make them convenient and accessible and likely to be overtaken and surrounded by the city's growth, satisfies the first condition. . . . An ordinary city purpose may be, and often should be, planned and executed with reference as well to future as to present needs." The court sustained the act of 1884, chap. 522, providing for laying out certain parks in the 23d and 24th wards in the city of New York and in adjacent districts in Westchester county.

*Rapid transit.*—Discussing the meaning of a city purpose, the court, in *Sun Printing & Pub. Asso.* v. *New York* (1897) 152 N. Y. 257, 37 L. R. A. 788, 46 N. E. 499, say: "The purpose must be necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character, and authorized by the legislature." Railroads are not common "highways in the sense that they are under the care and manage-

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ment of the municipality, but as to their purpose, which is the transportation of persons and property for the public, they are as distinctly highways as the ordinary street. . . . When constructed and owned by the city [they] are for a 'city purpose' within the meaning of the Constitution." A city may be authorized to build and operate a railroad. The rapid transit acts of 1891, chap. 4, 1894, chap. 752, and 1895, chap. 519, were sustained.

*Reimbursement of officers.*—The reimbursement of an officer for his reasonable counsel fees and expenses paid or incurred by him "in any trial or proceeding to remove him from office, or any prosecution for a crime alleged to have been committed in the performance of his official duties or in connection therewith, in which trial or proceeding the prosecuted officer has been successful," is not a public purpose under this section, and a statute (1899, chap. 700) authorizing such reimbursement is void. *Re Jensen* (1899) 44 App. Div. 509, 60 N. Y. Supp. 933; *Re Straus* (1899) 44 App. Div. 425, 61 N. Y. Supp. 37; *Chapman* v. *New York* (1901) 168 N. Y. 80, 56 L. R. A. 846, 85 Am. St. Rep. 665, 61 N. E. 108; *Re Fallon* (1899) 28 Misc. 748, 59 N. Y. Supp. 849; *Re Labrake* (1899) 29 Misc. 87, 60 N. Y. Supp. 571.

*Shepherd's Fold.*—The main corporate purpose of the Shepherd's Fold "was to support orphans and other friendless children;" and certain destitute children might be committed to it by specified city officers. The legislature had power to authorize the city to provide for the burden thus cast upon the institution by the payment of a gross annual sum "instead of keeping a separate account of the expense of supporting each child who might be committed or transferred to it under that act, or of each destitute child, living in the city, who might be received by the plaintiff, and who otherwise would have become a county charge." This was a matter of legislative discretion. "The gross compensation . . . would necessarily become its property, and applicable to its general corporate purpose, and we do not think it essential to the validity of such an appropriation of city money that the corporation to whom the payment is authorized should be one whose corporate powers are restricted to the receipt and support of city or county poor." *Shepherd's Fold* v. *New York* (1884) 96 N. Y. 137.

*Spuyten Duyvil creek.*—The improvement of Spuyten Duyvil creek and Harlem kills under the act of 1879, chap. 345, was a public purpose within the meaning of this section, even though the United States participated in the improvement, and became a petitioner for the acquisition of land needed therefor. An expenditure

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of city funds for the improvement was proper. *Re United States* (1884) 67 How. Pr. 121, citing *Re Townsend* (1868) 39 N. Y. 171, sustaining an act for the construction of a canal in Pennsylvania.

*Volunteer firemen.*—"Volunteer fire companies are recognized as discharging a municipal function, and it is a legitimate use of municipal funds to pay such organizations, the same as it is to pay for fire protection afforded by a paid department." *People ex rel. Richmond Hook & Ladder Co. No. 4* v. *Grout* (1903) 79 App. Div. 61, 79 N. Y. Supp. 1027.

*Water district.*—Water districts created under the act of 1900, chap. 451, "remain integral parts of the town," and the provision prohibiting the legislature from authorizing a town to incur indebtedness for any except town purposes does not prevent the town from incurring indebtedness for the purpose of establishing and maintaining such a water district. "A town may incur indebtedness for any local improvement that may be for the general welfare, although the direct benefits therefrom accrue more particularly to the residents of a designated district within the town; [and it is not] a diversion of the money or property of the town for it to become primarily liable for the expense of such a local improvement, although payment of the expense is ultimately to be made by the residents of a particular district within the town." *Holroyd* v. *Indian Lake* (1903) 40 Misc. 75, 77, 81 N. Y. Supp. 268, Spencer, J.

*Water supply.*—The supply of water for a city is a city purpose, and municipal bonds may constitutionally be authorized and issued for that purpose. *Re Comstock* (1889) 25 N. Y. S. R. 612, 5 N. Y. Supp. 874.

§ 11. [*State board of charities; lunacy and prison commissions.*]—The legislature shall provide for a state board of charities, which shall visit and inspect all institutions, whether state, county, municipal, incorporated or not incorporated, which are of a charitable, eleemosynary, correctional, or reformatory character, excepting only such institutions as are hereby made subject to the visitation and inspection of either of the commissions hereinafter mentioned, but including all reformatories except those in which adult males convicted of felony shall be confined; a state commission in lunacy, which shall visit and inspect

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all institutions, either public or private, used for the care and treatment of the insane (not including institutions for epileptics or idiots); a state commission of prisons, which shall visit and inspect all institutions used for the detention of sane adults charged with or convicted of crime, or detained as witnesses or debtors.

[New.]

The Convention of 1867 gave the subject of charities serious consideration, and I have already recounted the efforts made in that body to establish a constitutional policy of supervision of charitable institutions. The subject developed rapidly during the next few years, and the Convention of 1894 was therefore able to formulate a policy which should provide adequate supervision of these institutions, and at the same time protect the state and local communities from unwise appropriations. As often happens in such cases, the original propositions were materially modified. The final result appears in the last five sections of this article. The importance of the subject is manifest from the large number of judicial decisions which have been rendered during the ten years since the charity provisions were adopted.

The New York Institution for the Blind is an educational and also a charitable institution, and falls within the provisions of the Constitution and statutes relating to charitable institutions. It is not necessary that the institution be wholly charitable; "it need only be an institution which is wholly or partly charitable in its character and purpose." The jurisdiction of the state board of charities over such an institution is not affected by the fact that it is also subject to supervision by school authorities. *People ex rel. New York Inst. for Blind* v. *Fitch* (1897) 154 N. Y. 14, 38 L. R. A. 591, 47 N. E. 983.

Considering the status of the New York Society for the Preven-

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tion of Cruelty to Children, as affected by the constitutional provision relating to charitable institutions, the court, in *People ex rel. State Charities* v. *New York Soc. for Prevention of Cruelty to Children* (1900) 161 N. Y. 233, 55 N. E. 1063, say that "a corporation cannot be classified by what its friends or promoters may say about it, but only from the nature of the powers which it may lawfully exercise and the business in which it is lawfully engaged. It is manifest, therefore, that in any inquiry concerning the nature, character, or classification of any particular corporation, the only safe guide is the charter or law of its creation, prescribing the powers that it may exercise, and defining the nature of the business or the duties for which it was created." Referring to the suggestion that "this corporation, in order to promote the objects of its incorporation, has been given legal capacity to take and administer gifts and bequests that would be called charitable under the statute of Elizabeth, and under general rules of law applicable to trusts," the court say that "colleges, academies, and nearly all institutions of learning or of a literary character, and even cities, villages, and other municipal corporations, may take and administer such gifts, but that fact cannot in the least affect their true character, or convert them into charitable institutions. . . . The charitable institutions referred to in the Constitution and the statute are those that have long been known and recognized as such by legislators and other officers engaged in the administration of the state government." The present Constitution added nothing to the powers of the state board of charities, "except the right to make rules for the government of such institutions as were subject to visitation. . . . The scheme of state supervision was not intended to apply to every institution engaged in some good or commendable work for the relief of humanity from some of the various ills with which it is afflicted, but only to those maintained in whole or in part by the state or some of its political divisions, through which charity, as such, was dispensed by public authority to those having a claim upon the generosity or bounty of the state. . . . It will apply to all institutions, public or private, that give public pecuniary relief in that form commonly called charity when we refer to the administration of government, and it will exclude only those institutions that ask nothing in the form of charity from the state, though they may be engaged in some good work in their own way that might be called charitable in the sense that it is unselfish and voluntarily assumed. . . . The charity with which the state is concerned . . . consists in the distribution

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of relief or public aid, the fruit of taxation, levied alike upon the willing and the unwilling. The right of visitation and regulation applies only to those institutions, public or private, through which the state fulfils this function. . . . If the particular institution, whether public or private, receives public money for use or distribution as charity, and not for some other reason or some other purpose, that institution is subject to visitation by the board; but this system of state supervision does not extend to the efforts of private benevolence. That may flow in various channels not subject to state regulation, since the government is in no way concerned with it." The sum received by this society from the city of New York was not paid or received as a charitable contribution, but for the enforcement of the criminal law relating to cruelty to children. The society was held not to be subject to visitation by the state board of charities.

On a motion for reargument ([1900] 162 N. Y. 429, 56 N. E. 1004) the court reiterates in substance the views expressed in the original decision. After observing that it is "somewhat remarkable that in all the discussion upon the only question in the case the counsel have not attempted to furnish a definition of a charitable institution," the court say that such an institution "must be one that, in some form or to some extent, receives public money for the support and maintenance of indigent persons. By public money is meant money raised by taxation, not only in the state at large, but in any city, county, or town. The adoption of this principle will permit the board to visit, inspect, and regulate every institution in the state, public or private, where children or adults are supported or maintained, in whole or in part, by the use of public money, and every institution, public or private, where children or adults are sent or detained for support or maintenance in pursuance of any law."

§ 12. [*Commissioners, how appointed.*]—The members of the said board and of the said commissions shall be appointed by the governor, by and with the advice and consent of the senate; and any member may be removed from office by the governor for cause, an opportunity having been given him to be heard in his defense.

[New.]

See note to § 11.

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§ 13. [*Existing laws continued.*]—Existing laws relating to institutions referred to in the foregoing sections, and to their supervision and inspection, in so far as such laws are not inconsistent with the provisions of the Constitution, shall remain in force until amended or repealed by the legislature. The visitation and inspection herein provided for shall not be exclusive of other visitation and inspection now authorized by law.

[New.]

§ 14. [*Maintenance of defectives and delinquents, institutions and inmates.*]—Nothing in this Constitution contained shall prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town, or village from providing for the care, support, maintenance, and secular education of inmates of orphan asylums, homes for dependent children, or correctional institutions, whether under public or private control. Payments by counties, cities, towns, and villages to charitable, eleemosynary, correctional, and reformatory institutions, wholly or partly under private control, for care, support, and maintenance, may be authorized, but shall not be required, by the legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the state board of charities. Such rules shall be subject to the control of the legislature by general laws.

[New.]

In *People ex rel. Wayside Home* v. *Kings County* (1895) 12 Misc. 187, 33 N. Y. Supp. 602, Justice Bartlett expressed the opinion that "after January 1, 1895, payments by municipalities for the support of the inmates of charitable and reformatory institutions,

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not wholly public, should, under no circumstances be compellable, but should be permissible, provided the inmates were received and retained under the rules of the state board of charities," and that this section "acts directly upon existing laws of the same character as the statute which provides for payments by Kings county to the Wayside Home. It does not repeal those laws except to this extent, —the command to pay is changed into a permission to pay, always provided that the inmates of the institution are received and retained under rules prescribed by the state board of charities."

The scope of this section was fully considered by the court of appeals in *People ex rel. Inebriates' Home* v. *Brooklyn* (1897) 152 N. Y. 399, 46 N. E. 852. Chief Judge Andrews, after giving an instructive historical sketch of charities in New York, says that "the purpose of the Constitution on the subject of charities was to inaugurate a new system in respect to the appropriation of public moneys in aid of organized charities partly or wholly under private control. The state legislature was deprived of the power to make a mandatory direction binding upon the local government. It could authorize, but it could not command. . . . The existing system of statutory law for the sustentation of charities administered by private incorporated institutions did not fall with the taking effect of the new Constitution." But a mandamus against the comptroller to pay to the Inebriates' Home a large accumulated sum representing a percentage of excise moneys was denied on the ground that the court could not compel "the payment of public moneys to a private corporation under an appropriation made for a special and limited public purpose, where the application to such purpose has become impossible, and the consideration for the appropriation has failed."

"Cities may be authorized to make donations to charitable institutions, but they must be left free to exercise their own judgment as to the amount and character of the charities they shall bestow; but no payments shall be made for any inmate of a charitable institution under private control who is not received and retained therein pursuant to the rules established by the state board of charities." *Re New York Juvenile Asylum* (1902) 172 N. Y. 50, 64 N. E. 764. See also *Mount Sinai Hospital* v. *Hyman* (1904) 92 App. Div. 270, 87 N. Y. Supp. 276.

A defense that a municipal corporation exceeded its authority in making contracts for the maintenance of inmates of charitable institutions should be pleaded by answer, and cannot be determined on a demurrer to a complaint in an action to recover for such

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maintenance. *Richmond County Soc. for Prevention of Cruelty to Children* v. *New York* (1902) 73 App. Div. 607, 77 N. Y. Supp. 41.

In *Corbett* v. *St. Vincent's Industrial School* (1903) 79 App. Div. 345, 79 N. Y. Supp. 369, it was held that the defendant was a charitable institution and a subordinate governmental agency, and that it was not liable in an action for damages by an inmate who had received an injury while operating certain machinery.

The provision of this section relating to secular education of inmates of orphan asylums was considered in *Sargent* v. *Board of Education* (1904) 177 N. Y. 317, 69 N. E. 722, and an appropriation by the board of education of Rochester to pay the wages of teachers employed in an asylum was sustained. The act of 1850, chap. 261, which provided that the several incorporated orphan asylums in the state, other than those in the city of New York, should participate in the distribution of the school moneys in the same manner and to the same extent, in proportion to the number of children educated therein, as the common schools in their respective cities or districts, was cited as original legislative authority for such an expenditure, and which had been confirmed by the new Constitution. See note to article 9, § 4.

§ 15. [*Commissioners continued in office.*]—Commissioners of the state board of charities and commissioners of the state commission in lunacy, now holding office, shall be continued in office for the term for which they were appointed, respectively, unless the legislature shall otherwise provide. The legislature may confer upon the commissions and upon the board mentioned in the foregoing sections any additional powers that are not inconsistent with other provisions of the Constitution.

[New.]

## ARTICLE IX.

### [EDUCATION.]

§ 1. [*Common schools.*]—The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

[New.]



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This is the children's Bill of Rights. In previous volumes I have given a sketch of the development of the policy which resulted in the incorporation of this section in the Constitution. As there noted it received the attention of three constitutional conventions, and the subject was also several times presented to the legislature. During the progress of the discussion which finally led to the Constitutional amendment the subject received judicial attention, and the courts had occasion to consider questions relating to the right to an education at public expense.

Thus, in *Dallas* v. *Fosdick* (1869) 40 How. Pr. 249, involving the right of a colored child to attend a school provided by the city authorities of Buffalo for the education of white children, the court say: "The right to be educated in the common schools of the state is one derived entirely from the legislation of the state; and as such, it has at all times been subject to such restrictions and qualifications as the legislature have, from time to time, deemed it proper to impose upon its enjoyment. It is not one of those inherent and paramount rights which the people, by constitutional provisions, have placed beyond the reach and control of legislation." Under the restrictions imposed upon the education funds and revenue derived from them by the Constitution, article 9 (now § 3), "the legislature have ample and complete authority to prescribe and regulate the manner in which the revenue of the funds shall be applied towards the promotion of the objects for which they have been secured. . . . The right of a person to attend a public school is nowhere made to depend upon the circumstance whether or not the school is in whole or in part maintained by the revenue derived from the common school fund. If public schools are provided and maintained by taxation, without receiving for that purpose any part of the revenue of the common school fund, it is difficult to see how the rights or privileges of the person attending such a school can be in any manner prejudiced thereby." It was held that a colored child was not entitled to attend a school provided for white children.

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In *People ex rel. Dietz* v. *Easton* (1872) 13 Abb. Pr. N. S. 159, Justice Learned held that an inhabitant of Albany could not select for his children such school as he pleased, in defiance of the regulations of the board of education, and sustained an order of the board providing separate schools for white and for colored children.

In *People ex rel. King* v. *Gallagher* (1883) 93 N. Y. 438, 45 Am. Rep. 232, the same rule was applied as to separate schools for white and for colored children in Brooklyn, where it is said that the "system of authorizing the education of the two races separately has been for many years the settled policy of all departments of the state government, and it is believed obtains very generally in the states of the Union. . . . The design of the common school system of this state is to instruct the citizen; and where, for this purpose, they have placed within his reach equal means of acquiring an education with other persons, they have discharged their duty to him, and he has received all that he is entitled to ask of the government with respect to such privileges."

While this section of the Constitution imposes on the legislature the duty of providing a system of free common schools, the right to an education does not seem to be absolute. In the case last cited Chief Judge Ruger says it is a plain deduction from the *Slaughter-House Cases* (1872) 16 Wall. 36, 21 L. ed. 394, "that the privilege of receiving an education at the expense of the state, being created and conferred solely by the laws of the state, and always subject to its discretionary regulation, might be granted or refused to any individual or class, at the pleasure of the state;" and in *Re Walters* (1895) 84 Hun, 457, 32 N. Y. Supp. 322, Justice Bartlett says that "a common school education under the existing Constitution of the state of New York is a privilege rather than a right. It is created by legislation, and subject to legislative regulation." The court sustained the rule adopted by a board of education excluding unvaccinated children from public schools.

The same subject was considered in *Viemeister* v. *White* (1904) 179 N. Y. 235, 72 N. E. 97, affirming (1903) 88 App. Div. 44, 84 N. Y. Supp. 712, where the court again sustained an order requiring the vaccination of school children. Replying to the argument that this section of the Constitution "operates to make an education a constitutional right, rather than a privilege," the appellate division expressed the opinion, citing the *Walters Case* (1895) 84 Hun, 457, 32 N. Y. Supp. 322, "that the Constitution did not intend to change the practice and policy of the state in reference to the

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schools, but merely to insure a continuance and an extension of the privileges of citizens of this state, and that the legislature has a right to impose any reasonable regulations upon this privilege which operate equally upon all persons in the same class and under the same conditions."

In *People ex rel. New York Inst. for Blind* v. *Fitch* (1897) 154 N. Y. 14, 34, 38 L. R. A. 591, 47 N. E. 983, Judge Martin says this section "manifestly . . . has no application whatever to the appropriations made by the state for the support and education of the indigent blind who have been inmates of the institution. . . . That provision relates only to the public or common schools of the state, and has no application to an institution wholly or partly under private control. . . . Again, the provision of the Constitution as to the education of all the children of the state in its common schools is a general one, while the provisions for the education and support of the blind, the deaf and dumb, and juvenile delinquents are special, relating only to the classes enumerated. Therefore, it is obvious that, as to persons belonging to those classes, the special provisions must govern to the exclusion of the general one, and the former must be regarded as exceptions to the latter."

This section requires the legislature to maintain a system of free common schools: "Not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument." Sustaining an order by the school board of the borough of Queens, providing for separate schools for white and for colored children, the court say they find "nothing in the Constitution which deprived the school board of the proper management of the schools in its charge, or from determining where different classes of pupils should be educated, always providing, however, that the accommodations and facilities were equal for all. Nor is there anything in this provision of the Constitution which prevented the legislature from exercising its discretion as to the best method of educating the different classes of children in the state, whether it relates to separate classes, as determined by nationality, color, or ability, so long as it provides for all alike in the character and extent of the education which it furnishes and the facilities for its acquirement." *People ex rel. Cisco* v. *School Board* (1900) 161 N. Y. 598, 48 L. R. A. 113, 56 N. E. 81.

The schools maintained by the Roman Catholic Orphan Asylum

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Society of Brooklyn, are not common schools within the meaning of this section, and are not entitled to share in the revenue of the common school fund. "Our common schools are not confined to any class, but are open to all; the trustees have no power to admit or reject pupils arbitrarily; they have no authority to make rules and regulations fixing a standard of admission for members. They are bound to instruct all the children who present themselves, without regard to their social relations, their station in life, or their religious faith. . . . The word 'common,' as applied to our schools, bears the broadest and most comprehensive signification. It is equivalent to public, universal, open to all; for such is their character, subject only to such general statutory regulations as are prescribed by the legislature." *People ex rel. Roman Catholic Orphan Asylum Soc.* v. *Board of Education* (1851) 13 Barb. 400.

In *People ex rel. Hill* v. *Crissey* (1887) 45 Hun, 19, construing the provision in the Cornell University act (1865, chap. 585, as amended ) authorizing the designation of scholars from the public schools to receive free instruction in the university, the court expressed the opinion that, by the term "public schools" "the legislature intended 'common' schools only, and that 'normal' schools were not included."

§ 2. [*University.*]—The corporation created in the year one thousand seven hundred and eighty-four, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed, and its corporate powers, which may be increased, modified, or diminished by the legislature, shall be exercised, by not less than nine Regents.

[New.]

After the third volume of this work had been written, and while the notes to the Constitution, intended for the fourth volume, were being prepared, the legislature passed a statute which radically changed the educational policy of the state. This was the act of 1904, chap. 40, providing for a unification of all our educational interests.

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In the article on education, in the third volume, I have recounted, more or less fully, the various steps that have been taken in the development of our educational system, and have there described two lines of educational supervision, beginning with the University established in 1784, and followed by the common school system inaugurated in 1795, and which was subsequently discontinued, and finally re-established in 1812. In that article I have considered the subject of dual supervision, and have suggested some reasons why the establishment of a single educational system was not originally practicable. I have quoted from the report of the assembly committee on education in 1835 its plan for a department of public instruction under the immediate charge of a secretary of public instruction, who, besides being superintendent of the common schools, was also to be *ex officio* chancellor of the University, and hold other *ex officio* positions. He was to have the right of visitation of all colleges under the supervision of the Regents, and colleges and academies were required to report to him. The general idea embodied in this plan appears in tangible form in the act of 1904. I have also quoted Governor Seward's recommendation in 1839 that a department of education be established, to consist of a superintendent, appointed by the legislature, and a board, to be composed of delegates from subordinate boards of education, to be established in the several counties. I have also noted the act of 1854, creating the office of superintendent of public instruction, and which conferred on that officer the right of visitation of literary institutions under the immediate supervision of the Regents. This statute and subsequent legislation on the same subject seemed to establish the common school department on a permanent basis, and for half a century it has performed the task committed to it with a high degree of efficiency. But during all this time there

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has been a growing belief that the best interests of the state would be conserved by uniting the two great educational departments. This opinion was founded chiefly on the situation produced by the statute authorizing, in union schools, the establishment of academic departments with some supervision by the Regents. The large increase in the number of such departments naturally increased the number of instances in which double supervision prevailed, including not only inspections and examinations, but also the double distribution of moneys appropriated for educational purposes.

It is impracticable in this note to review the entire subject of unification which has been such a conspicuous feature of our educational matters for many years; but, as a prelude to the examination of the new unification law, a brief reference to some of the most prominent aspects of recent discussion will probably be found useful in elucidating the policy represented in this law.

In the first place it should be observed that while the University has had a continuous existence since its creation in 1784, its position has not always been clearly defined, and its right to exist has not always been admitted. In the chapter on the Convention of 1867 I have referred to the fact that it was there proposed to abolish the University, and that the proposition provoked serious discussion. The friends of the University prevented the adoption of the abolition proposition, and the Regents continued to do the work assigned to them by the legislature. But while the University escaped destruction by the Convention, its position was still insecure. Thus, in 1886, Governor Hill, in his annual message, recommended the abolition of the University, and the transfer of its educational powers to the department of public instruction. He thought there was no necessity for the official existence of the board of Regents, and expressed

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the opinion that all the duties then imposed upon it by law could be performed by other officers and departments. He said the Regents were "generally regarded as a purely ornamental body, and membership a sort of a pleasant retreat for respectable gentlemen of literary tendencies." The Governor's recommendation was renewed in 1887 and again in his message of 1888, in which he said the object sought was "the unification of the supervision of the educational interests of the state, and the abolition of unnecessary and ornamental offices." In 1889 Governor Hill renewed the recommendation for the abolition of the Regents, but, instead of abolishing this department, the legislature passed an act (chap. 529) to revise and consolidate the laws relating to the University, continuing the Regents substantially with the powers vested in them by the early statutes, with some modification and enlargement; and this law was approved by the Governor. This law and the University law of 1892 would seem to have settled and established the University as a permanent department of our government; but the Regents evidently regarded their situation as still precarious, as appears by the fact that they requested the Convention of 1894 to incorporate in the Constitution a provision perpetuating the Regents. This subject has already been considered in the article on education, and is only referred to here as an incident of the situation which every year made unification more desirable, and which reached its consummation in the act of 1904.

In 1898 the Statutory Revision Commission presented to the legislature a bill to revise all the general educational laws of the state and bring all the departments and educational interests under one statute, to be known as the education law. The bill did not propose direct unification, but it was believed that the law, if enacted, would be a step toward unification by combining all the

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educational interests in one statute. This bill was again presented to the legislature in 1899 and in 1900, but it was not passed, and its enactment would now be impracticable without further revision, because of the unification law of 1904.

While there was no legislation of importance during these few years, and apparently no practical progress toward unification, the agitation continued. The subject of unification of educational supervision was made a special topic of discussion at the University Convocation in June, 1899, at which there was a symposium of addresses by several persons interested in education. I had given my personal attention to the preparation of the proposed education law, and by request presented the scheme of the bill at this convocation, in connection with the general discussion on unification. One result of the discussion was the adoption of a resolution by the convocation, requesting the Governor to appoint an honorary commission "to consider ways and means of unifying the present educational systems, and give such assistance as the Statutory Revision Commission may desire in the preparation of a bill to be submitted to the legislature at the opening of the next session." The appointment of this commission was without legal authority, but the Governor readily found seven men who were willing, without compensation, to devote their time to the consideration of this important subject. The lamented Frederick W. Holls, who had been one of the conspicuous figures in the Convention of 1894, and chairman of the committee on education in that body, was made chairman of the new commission. The other members of the commission were Daniel H. McMillan, a former state senator, and who had also been a prominent member of the Convention of 1894, Melvil Dewey, then secretary of the University, Danforth E. Ainsworth, deputy superinten-

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dent of public instruction, Joseph F. Daly, a former justice of the supreme court in the first district, Robert F. Wilkinson, and William Kernan. At the request of the commission I attended its meetings and prepared the bill embodying its proposed plan of unification. The commission held several consultations with Governor Roosevelt, who gave the subject careful consideration and referred to it at some length in his annual message of 1900, saying, among other things, that "it has, for a long time, been the well-nigh unanimous opinion of all those conversant with the history and practical working of the educational system of this state that the laws in reference to the official oversight and superintendence of education by the state government ought to be revised and unified for the sake of greater general efficiency, economy, and entire harmony wherever there may be confusion and friction resulting from the needless overlapping of jurisdictions;" and, after referring to the work then being done by the two great departments, said "that their work could be done better if the two systems were unified." He informed the legislature of the action of the Convocation of 1899, and the appointment of a commission by him to consider the subject of unification, and commended to the favorable consideration of the legislature the plan proposed by the commission, which he said "deserves the cordial support of all friends of public education; and this means, of every patriotic citizen of the state."

A few days after this message was sent to the legislature the commission presented its report to the Governor, which was by him transmitted to the legislature in due course. The bill proposed by the commission was subsequently introduced, but no action was taken upon it by the legislature. The bill provided for a new department, to be known as "the state department of education," to

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include the University and public schools, and to be in charge of an officer, to be known as the chancellor, who was to be appointed by the Governor and senate, and hold office eight years. His successor was to be chosen by the Regents. The bill proposed five bureaus, including respectively public instruction, higher education, home education, law, and administration and finance, each to be under the immediate supervision of a director, to be appointed by the chancellor, and the office of superintendent of public instruction was to cease after the expiration of the term of the incumbent. The plan continued the Regents, but provided for a gradual reduction of the number of active Regents to fourteen and abolished the *ex officio* Regents except the Governor. The powers, duties, and responsibilities of the superintendent of public instruction under existing law were to be transferred to the chancellor. It will be observed that this bill, while proposing a state department of education, continued the University, and to a high degree vested the Regents with the control of the department which had formerly been under the supervision of the state superintendent of public instruction; and I may here quote Governor Roosevelt's remark in his message of 1900, that "the University is continued, and has its oversight extended to cover the entire field of education, so that its real authority and opportunity for public service will be much increased."

While the legislature of 1900 gave no special consideration to the plan of unification proposed by the commission, the study of the subject by the commission and the Governor and other friends of education, and the consequent public discussion incident to the renewal of the agitation concerning unification, were not in vain, and the work of the commission bore fruit much sooner than might have been expected from the apparent lack of interest in the subject manifested by the legislature of 1900.

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This lack of interest, however, was more apparent than real, for, while nothing was actually accomplished until 1904, several bills relating to the subject were introduced during the preceding years and the legislature was rapidly coming to the conclusion that the time was ripe for practical unification. The legislature of 1903 appointed a joint committee of the two houses to consider this subject. That committee presented its report to the legislature of 1904, recommending a bill which, with modifications, became the new unification law now in force. It seems clear from a comparison of the new bill with the bill presented by the unification commission in 1900 that the legislative committee made free use of the commission bill and approved its general policy.

The new law provides for a commissioner of education and abolishes the office of superintendent of public instruction and secretary of the University, making the new commissioner the chief executive officer of the entire educational system. The new commissioner was to be elected by the legislature for six years; but, after the first six years, he is to be chosen by the Regents, and hold office during their pleasure. The number of Regents is reduced to eleven, and the law required a new board to be chosen from the Regents in office, and the Regents thus chosen and the commissioner were to take office on the 1st of April, 1904. The new bill became a law on the 8th of March. On the 10th, the legislature elected the new Regents and the commissioner. Andrew S. Draper was elected as the first commissioner. He had formerly been a resident of this state, and had held the office of superintendent of public instruction; but, at the time of his election as commissioner, he was president of the University of Illinois. The act authorizes the commissioner to create such departments as he may deem necessary, and appoint deputies or heads of departments, sub-

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ject to the approval of the Regents. Under this authority three assistant commissioners have been appointed. The first assistant to have charge of universities, colleges, professional and technical schools, and of the execution of the laws concerning the professions; the second to have charge of high schools and academies and of the training of teachers therefor; and the third to have charge of elementary schools and of the training of teachers therefor. Several subordinate divisions were organized, to be under the supervision of directors or chiefs of divisions. The plan of organization recommended by the commissioner has been approved by the Regents, and the new department is now in full operation.

The consolidation of the two great educational departments has become complete under the new law. The result of the new statute is more than unification, or, rather, it is unification by a process of absorption; for under it the University has absorbed the department of public instruction, and the University has been charged with the duty and responsibility of administering, through the commissioner of education and otherwise, the entire educational system of the state. In the article on education I have called attention to the provision in the revised university law of 1787 which vested in the Regents authority to "visit and inspect all the colleges, academies, and schools which are or may be established in this state, examine into the state and system of education and discipline therein, and make a yearly report thereof to the legislature." The meaning of the term "schools" was originally somewhat uncertain; but in view of the fact that there were then no public schools, it was doubtless intended to include schools other than colleges and academies which might be thereafter established; but, by the new legislation, the term has been given an enlarged

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meaning, and by legislative construction is made to include all schools, public or private, which are subject to state supervision. The desire of the friends of the University, that it become the head of the entire system, has at last been realized; but it is a curious fact in our educational history that many of the Regents vigorously opposed the bill which was enacted by the legislature of 1904, partly on alleged constitutional grounds, because it legislated out of office the existing board of Regents, but also because the bill was supposed to have been prompted by improper political motives. The legislature ignored these objections, and, almost in spite of themselves, the Regents have been clothed with the largest administrative powers, and have become the governing body of the greatest educational system in the Union. The care of the common schools represented in some 11,000 school districts and in scores of cities and villages, involving an increasing annual expenditure which already amounts to $42,000,000 and the instruction of nearly two millions of children, has been transferred to the Regents, and they have become the active agents of the state in fostering the common school system, which, by § 1 of this article, the legislature is commanded to maintain, and they must also encourage all institutions for higher education.

§ 3. [*Education funds.*]—The capital of the common school fund, the capital of the literature fund, and the capital of the United States deposit fund, shall be respectively preserved inviolate. The revenue of the said common school fund shall be applied to the support of common schools; the revenue of the said literature fund shall be applied to the support of academies; and the sum of twenty-five thousand dollars of the revenues of the United States deposit fund shall each year be appropriated

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to, and made part of the capital of, the said common-school fund.

[Const. 1821, art. 7, § 10; 1846, art. 9, § 1.]

The history of this provision will be found in the previous volumes.

The legislature had no power to authorize the comptroller to loan a portion of the capital of the common school fund for the purpose of establishing an astronomical observatory at Schenectady. *People ex rel. Schenectady Astronomical Observatory* v. *Allen* (1870) 42 N. Y. 404.

The same principle was applied in *Gordon* v. *Cornes* (1872) 47 N. Y. 608, where it was held that the legislature had no power to appropriate the revenue of the common school fund for the support of normal schools.

§ 4. [*Sectarian aid prohibited.*]—Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

[New.]

See the article on education, in the chapter on the Fourth Constitution, 1894, for a sketch of the history of this section.

This section was construed in *Sargent* v. *Board of Education* (1904) 177 N. Y. 317, 69 N. E. 722, in which the court sustained appropriations by the board of education of Rochester for the secular education of inmates of St. Mary's Boys' Orphan Asylum. It is stated in the opinion that the institution "gave secular education

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the same as that furnished the children of like age in the public schools, and the same system of grades, the same course of studies, the same text books, examinations, and hours of study were followed therein and made use of in the teaching of the inmates; that no denominational tenet or doctrine is taught or religious instruction imparted in the asylum during the hours of school prescribed by the rules and regulations of the board of education, but religious instruction is given in the evening at seven o'clock." The court say that § 4 should be construed in connection with that part of § 14 of article 8 which provides for secular education in orphan asylums and other charitable institutions. Replying to the suggestion that "public moneys ought not to be used for the education of children in an orphan asylum maintained by any church or religious organization," the court say: "It is perfectly obvious that these children could not receive instruction in any other place. They were under the exclusive control of the managers of the asylum. . . . The statute [1850, chap. 261] clearly recognizes the fact that the instruction was to be had or given . . . in the asylum where the boys were detained."

## ARTICLE X.

### [Local Officers; General Provisions.]

§ 1. [*Election and removal of certain county officers.*] —Sheriffs, clerks of counties, district attorneys, and registers in counties having registers, shall be chosen by the electors of the respective counties, once in every three years and as often as vacancies shall happen, except in the counties of New York and Kings and in counties whose boundaries are the same as those of a city, where such officers shall be chosen by the electors once in every two or four years, as the legislature shall direct. Sheriffs shall hold no other office, and be ineligible for the next term ofter the termination of their offices. They may be required by law to renew their security, from time to time; and in default of giving such new security, their offices shall be deemed vacant. But the county shall never be made responsible for the acts of the sheriff. The governor

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**may remove any officer, in this section mentioned, within the term for which he shall have been elected; giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense.**

[Const. 1777, arts. 26, 28; 1821, art. 4, § 8; 1846, art. 10, § 1.]

Under the first Constitution county officers were appointed by the Council of Appointment, and the sheriff's term was limited to one year. This section, substantially in its present form, was incorporated in the Constitution of 1821. It was modified in 1894 by omitting the office of coroner, and by providing for a different term for county officers in the counties of New York and Kings. The reader is referred to the preceding volumes for various notes relating to the subject of this section.

The provision requiring a copy of the charges to be given to the officer, with an opportunity to be heard, was apparently borrowed from colonial procedure. Thus, without giving numerous instances, we find that in September, 1771, charges were preferred against the sheriff of Dutchess county, and that a copy of the charges was served on the sheriff and an order requiring him to appear before the Governor and Council on a day specified to answer the complaint. On the day named the parties appeared, and on the defendant's application the complainant was required to give a bond for costs. Then the Council, the Governor presiding, heard the evidence and disposed of the matter. The public officers law (1892, chap. 681, § 24) authorizes the governor to take the evidence himself, or appoint a commissioner for that purpose.

COUNTY CLERK.

"By the common law there were no officers who were properly denominated clerks of counties; nor was there any statute in this



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state providing for the appointment of officers by that name. In England, there was in each county a clerk of the peace, who was appointed by the *custos rotulorum* of the county, and was clerk of the court of general sessions of the peace. The sheriffs also held courts which were called county courts, and such sheriffs had the appointment of the clerks of such courts, who were sometimes called county clerks, though they were more properly styled clerks of county courts. By the ordinance of May 15, 1699, for the establishing of courts of judicature in the province of New York, inferior courts of common pleas and courts of general sessions of the peace were appointed to be holden in the several counties. The establishment of courts of justice in the colonies was a prerogative of the Crown, as well as the appointment of the judges and officers of such courts. And as these courts of common pleas were called county courts, the clerks appointed for them by the colonial governors in the course of time acquired the name of county clerks." At the time of the adoption of the second Constitution "the clerk of the city and county of New York was the clerk of the court of common pleas, which had then recently been reorganized." The legislature had no power, as attempted by the act of 1843, chap. 88, to provide for the appointment of the clerk of the court of common pleas by the first and associate judges of that court. This statute deprived the electors of the city and county of the right to choose a county clerk in the manner prescribed by the Constitution. It was an unconstitutional exercise of power for the legislature "to take from a constitutional officer the substance of the office itself, and transfer it to another, who is to be appointed in a different manner, and to hold the office by a different tenure than that which was provided for by the Constitution." *Warner* v. *People* (1845) 2 Denio, 272, 43 Am. Dec. 740.

## DISTRICT ATTORNEY.

The district attorney is a state officer and an assistant appointed by him is also a state officer. The district attorney is an officer of the state connected with its judicial system. The fact that the salaries of the district attorney and assistants are paid by the county does not make them county officers. *Fellows* v. *New York* (1876) 8 Hun, 484. In a sketch of the office of attorney general, in the chapter on the Commission of 1872, it has been shown that the ordinary functions of the district attorney were originally per-

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formed by the attorney general, either directly or through assistants appointed in the several counties.

A district attorney was elected in Kings county in 1895. In 1896 the legislature, by chap. 772, provided that district attorneys in Kings county should be elected once in every four years, and specifically declared that the incumbent should hold office until the 31st of December, 1899. Construing the provision providing for a different term for certain officers in the counties of New York and Kings, the court say that until the legislature acted, the terms of county officers elected in those counties "must be deemed to be two years, which, as to future cases, may be extended to four years if the legislature shall so prescribe;" and in the absence of legislation the minimum period should be taken as the duration of the term. *People ex rel. Eldred* v. *Palmer* (1897) 154 N. Y. 133, 47 N. E. 1084.

The same rule was applied as to coroners, construing Laws 1896, chap. 424; *Re Burger* (1897) 21 Misc. 370, 47 N. Y. Supp. 292.

## SHERIFFS.

A sheriff elected to fill a vacancy holds for three years, and not simply for the remainder of the unexpired term. *People ex rel. Gallup* v. *Green* (1829) 2 Wend. 266.

The same rule was applied to a register elected to fill a vacancy in New York. *Coutant* v. *People* (1833) 11 Wend. 512.

Governor Seward in 1842 removed a sheriff and appointed a successor. In 1843 Governor Bouck removed this successor without charges, and appointed another person to fill the vacancy. In *People ex rel. Faxton* v. *Parker* (1843) 6 Hill, 49, it was held that the appointment by Governor Bouck was regular, and that he could remove Governor Seward's appointee without charges under the authority conferred by 1 Rev. Stat. 122, § 38, which provided that "all officers who are or shall be appointed by the governor for a certain time, or to supply a vacancy, may be removed by him." It will be observed that the constitutional provision requiring a copy of the charges to be delivered to an accused officer, and giving him an opportunity to be heard, applies only to officers elected by the people. The present statutory provision on this subject is found in the public officers law, § 23, which requires notice and an opportunity to be heard before removal in the case of officers appointed to fill a vacancy as well as to those appointed for a full term.

Construing the provision relating to the liability of the county for the sheriff's acts, Justice Ingraham, in *Wolfe* v. *Richmond County*

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(1860) 19 How. Pr. 370, says that the true construction of this provision is that "for anything done by the sheriff in the discharge of his official duties, the county should not be liable." It has no application to an action for damages under the act of 1855, chap. 428, making the county liable for damages caused by mobs. *Ely* v. *Niagara County* (1867) 36 N. Y. 297.

The act of 1882, chap. 251, in substance made the Albany county penitentiary the county jail of that county, and the superintendent of the penitentiary was made the jailer. The superintendent was given the custody and control of all persons confined in the penitentiary. In *People ex rel. McEwan* v. *Keeler* (1883) 29 Hun, 175, this act was held unconstitutional. The superintendent was to be appointed by the board of supervisors. The court say that the Constitution does not permit the legislature to evade its provisions by taking away the powers and duties of an officer made elective by that instrument and giving them to some appointee, leaving the people the poor privilege of electing an officer who is such only in name. "The common law powers and duties pertaining to the office of sheriff could not be transferred to an appointed officer. . . . The custody of the jail and of the prisoners confined therein is one of those powers and duties which, by common law, belonged to the sheriff, and which continued to belong to him down to the adoption of the Constitution."

In *Pearce* v. *Stephens* (1897) 18 App. Div. 101, 45 N. Y. Supp. 422, the court sustained the act of 1897, chap. 108, creating a board for the appointment of police commissioners in Richmond county, and making the sheriff a member of the board. The statute did not violate the provision prohibiting the sheriff from holding any other office. He was not, by the statute, invested with another office, but was only charged with the performance of an additional duty which might be imposed on him as one of the authorities of the county. "Although the sheriff may hold no other office, he may and is, by constitutional requirement, obligated to perform such duties as may be constitutionally imposed in his capacity as county officer, which are as clearly imposed and enjoined as is the obligation to perform the duties of sheriff."

## GOVERNOR'S POWER OF REMOVAL.

*Re Gudeon* (1902) 171 N. Y. 529, 64 N. E. 451, involves an extraordinary exercise of the power of removal

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by the governor, and establishes a new principle of executive jurisdiction under this section. At the general election in 1901 Charles Guden was chosen sheriff of Kings county, and entered on the duties of his office on the 1st of January, 1902. Soon afterwards charges against him were presented to the Governor, based upon acts alleged to have been committed by Mr. Guden prior to his election. The Governor entertained the charges, and on one of them the sheriff was removed. It appeared from the Governor's findings that, prior to his election, Mr. Guden had made an agreement with a third person to appoint the latter his official counsel in the event of his election, in consideration of his political support during the campaign, and this was deemed a sufficient reason for his removal. Justice Gaynor at Special Term ([1902] 37 Misc. 390, 75 N. Y. Supp. 786) held that the Governor had no jurisdiction to remove the sheriff on charges involving acts committed before the beginning of his term. The appellate division ([1902] 71 App. Div. 422, 75 N. Y. Supp. 794) held that Mr. Guden's agreement in relation to the appointment of counsel was a sufficient justification for the exercise of the Governor's power of removal, especially as it appeared that the agreement could not be performed until the sheriff had become vested with the title to his office.

It was conceded by counsel for both parties, and assumed by the court when the case was in the appellate division, that the Governor's power of removal was not absolute, but might be reviewed by the courts. Justice Willard Bartlett, writing the opinion of the appellate division, says he thinks "the charges to which this constitutional provision refers must be such acts of commission or omission as affect the usefulness of the incumbent as a public officer;" and expresses the opinion that "a corrupt promise, made before election, to exercise his official powers in

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a particular way, affords a sufficient basis in law for the removal of the officer by the Governor." This decision is close to the border line, and it seems to be sustained only by the consideration that the usefulness of the sheriff was seriously impaired by the fact that his action as a public officer had already been discounted by the agreement made by him while a candidate, and also by the consideration that, by such agreement, the sheriff had deprived himself of the power to appoint the subordinates after coming into office. The court of appeals held that the Governor had jurisdiction, and therefore sustained the removal, but declined to consider the case on the merits, holding that the power of removal is executive, and therefore not subject to judicial review. What the decision of the court might have been if the act complained of related only to conduct prior to election, and which was not and could not be connected with the performance of any official duty after his induction into office, is not suggested.

In the chapter on the Commission of 1872, I have quoted the proposition submitted by Mr. Dudley to add to the section relating to the official oath a provision that any person who should swear or affirm falsely in his official oath should be removed from office, and have there suggested that the Governor, in the *Guden Case,* asserted the principle of the clause by removing a sheriff who was alleged to have taken a false oath. The power asserted by the Governor in this case, and sustained by the courts, is not likely to be exercised or invoked very frequently, for the Governor will doubtless be slow to act in a case where a removal would in effect nullify the decision of the people in their sovereign capacity in making choice of a citizen to perform the duties of a public office.

That the final act by which the governor removes a public officer is executive must be conceded. It is an ex-

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ercise of one of the highest prerogatives of government and one which, in a monarchy, is possessed and exercised by the Crown. Thus, during the colonial period the governor and executive council representing the Crown frequently exercised the power of removal, and it was the same kind of power that was exercised by the King in appointing and removing colonial officers. It was executive. The framers of the first Constitution were unwilling to vest in the governor of the new state all the powers possessed by the colonial governor, and as a substitute created the Council of Appointment and vested it with the power to appoint nearly all public officers. I believe, as I have tried to show, that it was the original design in creating the Council of Appointment to give the governor the exclusive power of nomination, subject to confirmation by the senate members of the Council. But the Convention of 1801 gave all the members of the Council equal power of nomination, and thereafter this power was freely exercised. The Council could remove without charges. I have elsewhere shown that, under the peculiar political conditions of that time, the Council finally became an obnoxious and intolerable political machine. But it exercised an executive power and was substantially the only appointing power in the state. When the destruction of this council was decreed, not only by popular opinion, but expressly, by the Convention of 1821, it became necessary to devise a substitute, or else distribute its powers among different departments of the government. The power of choice of the officers named in this section was transferred to the people; but it became necessary to prescribe a method by which such officers might be promptly removed in a proper case without the slow process of an ordinary impeachment; and the governor, as the executive head of the state, was vested with this

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power. It is clearly executive, and is a continuation of the power originally possessed by the Crown.

While the power of removal as an ultimate act is executive, it also involves a judicial element. A judicial determination that a removal is proper must precede the order of removal, and in this determination the governor acts judicially. This is clearly pointed out by Judge O'Brien in his opinion in the *Guden Case*, where he concurs in the result reached by Chief Judge Parker, though for somewhat different reasons. This double aspect of the power of removal appears not only in proceedings before the governor, but in a proceeding before a court for the trial of impeachments, or where a removal may be made by the legislature or the senate, as authorized by § 11 of article 6, or as in the case of a removal of an inferior judicial officer by the appellate division, under the authority conferred by § 17 of the same article. In all these cases, and in others which might be mentioned, the court, body, or officer possessing the power of removal must first judicially determine that a removal is proper. In a note to § 13 of article 6 I have quoted from the report of the assembly judiciary committee, in 1853, in which the opinion is expressed that a person holding an elective office is not liable to be impeached for any misconduct before the commencement of his term. If this view is correct, Sheriff Guden could not have been impeached for alleged misconduct during his candidacy for the office, and the only remaining method of inquiring into his conduct was a proceeding for his removal by the governor. A proceeding before the governor for the removal of an officer is, in effect, an impeachment, and there is no difference in principle between this proceeding and a proceeding before the court for the trial of impeachments, or a proceeding before the

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legislature or senate where that body has jurisdiction, and in all these cases the power exercised is both executive and judicial. But it is more: the power is political in the highest sense, for it relates directly to the stability and administration of the government. The government must be administered through public officers, and if they prove to be incompetent or corrupt and unfit for the trust reposed in them, the sovereign power (in our case, the people) may, in the interest of self-preservation, demand the removal of the delinquent officers, and the substitution of others who will properly perform the official duties which may have been imposed upon them. The power of removal is an exercise of sovereignty, only a part of which has been vested in the governor.

The refusal of the court of appeals to review the governor's action on the merits is perfectly consistent with the assertion of judicial power under other cases of like high degree. Thus, while the constitutionality of laws enacted by the legislature has frequently been the subject of judicial attention, and many laws have been declared invalid for constitutional reasons, the power of the legislature has always been considered as involving primarily a question of jurisdiction, and its action in enacting a particular statute has always been considered from this point of view only. The courts have uniformly and consistently disclaimed any power to consider the propriety of proposed legislation, or the wisdom or policy of statutes. The rule is often asserted that the legislature has the sole power to determine questions of policy, but that the courts may inquire and determine whether the legislature has acted within the authority conferred upon it by the Constitution. The same principle is applied to the executive department; and while the executive power is not ab-

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solute, and its exercise is not wholly free from judicial scrutiny, such scrutiny, as in the case of the legislature, must usually be confined to questions of jurisdiction. Thus, the governor's jurisdiction to approve a bill passed by the legislature is subject to judicial examination, and a law may be declared unconstitutional not only because improperly passed by the legislature, but because not properly approved by the governor.

So, the exercise of the governor's pardoning power has been subjected to judicial review. *People* v. *Potter* (1846) 1 Park. Crim. Rep. 47; *Re Whalen* (1892) 47 N. Y. S. R. 313, 19 N. Y. Supp. 915; *People* v. *Pease* (1803) 3 Johns. Cas. 333, 27 Am. Dec. 104; *Re Buchanan* (1895) 146 N. Y. 264, 40 N. E. 883; *People ex rel. Forsyth* v. *Monroe Court of Sessions* (1894) 141 N. Y. 288, 23 L. R. A. 856, 36 N. E. 386; and in extradition cases. *People ex rel. Corkran* v. *Hyatt* (1902) 172 N. Y. 177, 60 L. R. A. 774, 92 Am. St. Rep. 706, 64 N. E. 825, affirmed in (1903) 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456.

*People ex rel. Faxton* v. *Parker* (1843) 6 Hill, 49, involved the power of Governor Bouck to remove a sheriff appointed by Governor Seward, who had removed the sheriff elected by the people, and appointed a successor. It was held that Governor Bouck had jurisdiction to remove Governor Seward's appointee, but there was no inquiry into the merits, for the reason that the removal by Governor Bouck was without charges, which was authorized by the statute.

The extent of the authority which the courts may exercise over the governor's official action was considered in *People ex rel. Broderick* v. *Morton* (1898) 156 N. Y. 136, 41 L. R. A. 231, 66 Am. St. Rep. 547, 50 N. E. 791, involving the dismissal of a person employed in the de-

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partment of public buildings, and in which the court was asked to direct that a mandamus issue against the governor and the other trustees of public buildings, to compel the reinstatement of the person dismissed. It was held that a writ of mandamus could not be issued to the governor to compel the performance of a ministerial or executive duty. "The writ never issues to the executive or legislative branches of the government, nor to the judicial branch having general and final jurisdiction. . . . The only way in which a mandamus can be enforced is by the commitment of the party who refuses to obey its commands as for a contempt. But the courts have no power to commit the governor for a contempt. They have no power over his person. He may be impeached, but there is no other way in which he may be deprived of his executive office."

A similar view was taken in *People ex rel. Smith* v. *Hoffman* (1901) 166 N. Y. 462, 54 L. R. A. 597, 60 N. E. 187, involving the validity of the removal of a military officer by the governor's order, based on the decision of an examining board, and it was there held that the supreme court had power to review the action of the examining board by the writ of certiorari, but that the governor was not a proper party to the proceeding, for the reason that his action was executive, and therefore not subject to review by the writ of certiorari, which is only directed to inferior judicial tribunals. The court say that, "while we cannot touch the person of the governor, we can pass upon the effect of his acts, and decide whether they are valid or invalid." As already pointed out, this judicial examination of the governor's action would doubtless be limited to questions relating to his jurisdiction, and would not embrace questions relating to the merits.

There is no appeal from a judgment of the court for the

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trial of impeachments, nor from the action of the legislature or the senate in removing a public officer, but doubtless the courts may, even in these cases, where the title to an office is involved, determine that the judgment or order of removal was without jurisdiction. The exercise of this judicial power may be as necessary in these cases as in the case of a removal by the governor, and, in any case, an appeal to the courts may be the only means of preventing an arbitrary and unconstitutional exclusion from office. The governor's determination should be as conclusive on the merits as the determination of the court of impeachments, the legislature, or the senate under similar circumstances. This power of removal, when constitutionally exercised by the department of government possessing undoubted jurisdiction, must be conclusive on all other departments and on all the people; but jurisdiction must be established as the fundamental fact,—upon that the whole power rests.

The rule enunciated in the *Guden Case*—that the power of removal is executive, and not subject to judicial review on the merits—applies to all cases, not only where the charges have their origin in circumstances occurring prior to the beginning of the official term, but to charges of actual official misconduct; and as to such prior causes the assertion of executive jurisdiction would probably be limited to conditions which, for their consummation, reach forward into the term; or which, as determined by Governor Odell, substantially vitiate the official oath, and, in effect, convict the officer of having taken a false oath.

I think the rule in this class of cases may be stated as follows: The governor's power of removal is executive, and he possesses exclusive authority to determine the sufficiency of the reasons which, in his judgment, justify the removal; and such determination is not subject to judicial review; but the courts may inquire into the proceedings

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for the purpose only of ascertaining whether the governor had jurisdiction in the particular case, and whether the procedure was such as the Constitution and statutes require, especially whether the accused officer had notice of the charges against him and an opportunity to be heard in his defense.

§ 2. [*Local officers, how chosen.*]—All county officers whose election or appointment is not provided for by this Constitution shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct. All city, town, and village officers whose election or appointment is not provided for by this Constitution shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct.

[Const. 1777, arts. 22, 29; 1821, art. 4, § 15; Am. 1826, relative to election of justices; Ams. 1833 and 1838, relative to mayors; Const. 1846, art. 10, § 2.]

This is known as the home rule section of the Constitution for the reason that it preserves the right of local self-government, especially as applied to the choice of local officers. The subject of home rule received a new development in the Constitution of 1894 by the addition of § 2 of article 12, relating especially to cities, which were vested with the power to approve or reject proposed legislation. In connection with the history of that section I have prepared an article on home rule which ap-

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pears in the third volume. The subject has there been considered in two parts; namely, the choice of local officers, and the powers of local government, including not only constitutional provisions, but also various statutes showing the development of the policy relating to each class of subjects. Home rule was an important subject of discussion in the Convention of 1894, but was limited to the consideration of propositions which were finally stated in § 2 of article 12. It was not proposed to change § 2 of article 10, consequently there was no discussion of that section.

This section has been a fruitful source of judicial discussion in construing numerous statutes relating to the election of local officers, and several judges have taken occasion to express their views concerning the scope and purpose of the section. These views may profitably be examined in considering the validity of statutes creating offices, and in distributing the power of appointment.

One of the most valuable contributions to the judicial literature on this subject will be found in the opinion by Judge Vann in *People ex rel. Metropolitan Street R. Co.* v. *State Tax Comrs.* (1903) 174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69 (affirmed [1905] 199 U. S. 1, 50 L. ed 65, 25 Sup. Ct. Rep. 705), construing the special franchise tax law of 1899, with particular reference to its effect upon the powers of local assessors. The judgment of the court is fortified by a strong array of historical facts bearing upon the evolution of popular government, and intended to elucidate the policy which has been crystallized in this section of the Constitution. The opinion deserves to be widely read, not only by lawyers, but by laymen; for it expresses with great force and clearness the principles underlying our representative form of government. Among other things Judge Vann says:

"The principle of home rule, or the right of self-gov-

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ernment as to local affairs, existed before we had a Constitution. Even prior to Magna Charta some cities, boroughs, and towns had various customs and liberties which had been granted by the Crown or had subsisted through long user, and among them was the right to elect certain local officers from their own citizens, and, with some restrictions, to manage their own purely local affairs." Many of these rights and privileges were specifically protected by Magna Charta and are set forth in the opinion by extracts from that famous instrument which will be found in another part of this work. "The rights thus secured after a long struggle and by great pressure, although at times denied and violated by the ruling monarch, were never lost, but were brought over by the colonists the same as they brought the right to breathe; and they would have parted with the one as soon as the other." They were expressed in various rights, privileges, and customs exercised by the people at town meetings. The various provisions relating to home rule incorporated in the Constitutions of New York "show that the object of the people in enacting them was to prevent centralization of power in the state, and to continue, preserve, and expand local self-government."

The following notes of other cases present the views of several courts concerning the scope of this section:

"The obvious purpose of the provision . . . was to secure to the people of the cities, towns, or villages of the state the right to have their local offices administered by officers selected by themselves, and in no case was it to be done by officers appointed by the direct action of the legislature. . . . It was left to the legislature to decide as to which of the two modes of selection should be adopted. It could change the mode of selection from an election to an appointment by local authorities, or from an appointment to an election. It could declare the duration of the term of office in cases where the Constitution was silent; it could shorten the term of the incumbent of the office, and could abolish the office

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itself unless it existed by force of the Constitution. But it could not appoint a city, town, or village officer in any case where the office existed at the adoption of the Constitution." *People ex rel. Williamson* v. *McKinney* (1873) 52 N. Y. 374.

The purpose and object of this section "was to secure to the several recognized civil and political divisions of the state the right to local self-government, by requiring that all county, city, town, and village officers whose election or appointment was not provided for by the Constitution, save those whose offices might thereafter be created by law, should be elected by the electors of the respective municipalities, or appointed by such authorities thereof as the legislature should designate. . . . Faithfully observed, and effect given to it in its spirit as well as in its letter, it effectually secures to each of the governmental divisions of the state the right of choosing or appointing its own local officers, without let or hindrance from the state government, and none can be deprived of the rights and franchises thus guaranteed to all. The theory of the Constitution is that the several counties, cities, towns, and villages are of right entitled to choose whom they will have to rule over them; and that this right cannot be taken from them and the electors and inhabitants disfranchised by any act of the legislature, or of any or all departments of the state government combined." *People ex rel. Bolton* v. *Albertson* (1873) 55 N. Y. 50.

An interesting discussion of several questions relating to the power of appointment and removal of city officers will be found in Judge Cullen's opinion in *People ex rel. Devery* v. *Coler* (1903) 173 N. Y. 103, 116, 65 N. E. 956, where it is said that the governor cannot be constitutionally vested with the absolute power to remove without charges a city officer whose appointment must be made in one of the modes prescribed by this section, namely, by popular election or appointment by city authorities; but it is intimated that the same rule would not be applied where the governor's power of removal is based upon charges of official misconduct.

*Appointments by state authority.*—A loan commissioner is a county officer. Prior to the adoption of the Constitution of 1846 this officer was appointed by the governor and senate. That power of appointment was changed by the Constitution, which required county officers to be chosen either by the people or by county authorities, and even without action by the legislature to carry the new constitutional provisions into effect, incumbents of this office could not, after the adoption of the new Constitution, be appointed by the governor and senate, and commissioners in office when the Con-

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stitution was adopted would either hold over or their offices would be vacant. *Re Carpenter* (1849) 7 Barb. 30.

The legislature had power to prescribe the method of choosing justices of sessions. *Nelson* v. *People* (1861) 23 N. Y. 293. This office was abolished by the Constitution of 1894.

In 1869 the legislature, by chap. 850, appointed commissioners "to lay out and work" Madison avenue in the town of West Farms, Westchester county. In *Hanlon* v. *Westchester County* (1870) 57 Barb. 397, this appointment was sustained on the authority of the *People ex rel. Wood* v. *Draper* (1857) 15 N. Y. 532, and it is said that the commissioners were not town officers, but had a limited and special jurisdiction, and "it was competent for the legislature to appoint them for the purposes of the act."

Legislation establishing official terms cannot apply to the term of a town officer already elected. It operates only upon future elections. "The legislature has no power to appoint a town officer. The Constitution requires that they shall be either elected by the electors, or appointed by some local authority." A change in an official term must precede the election. *People ex rel. Lovett* v. *Randall* (1897) 151 N. Y. 497, 45 N. E. 841.

The legislature had no power, as attempted by the act of 1898, chap. 398, to fix the status of a member of the police force of the town of New Utrecht at the time of its consolidation with Brooklyn, in 1894, and then grade him upon the force in Greater New York. "This in effect names the relator as an officer upon the police force of the town, and then appoints him to office in the city of New York." A police captain is a city officer. "The clear effect of the act is to create an office not existing at the time of its passage, and provide that the relator shall occupy the same." *People ex rel. White* v. *York* (1898) 35 App. Div. 300, 55 N. Y. Supp. 10, affirmed in (1899) 158 N. Y. 670, 52 N. E. 1125.

The legislature had no power, as attempted by the New York amended charter of 1901, chap. 466, § 290, to fix the status of detective sergeants as it existed on the 1st of April, 1901, and prescribe the conditions of appointment and promotion of such officers. The legislature could not directly appoint persons to fill that position, nor could they vest the power to make such appointment in any state board or officer. *People ex rel. Lahey* v. *Partridge* (1902) 74 App. Div. 291, 77 N. Y. Supp. 691. Followed in *People ex rel. Burns* v. *Partridge* (1902) 38 Misc. 697, 78 N. Y. Supp. 249.

This act was under review again in *Sugden* v. *Partridge* (1903) 174 N. Y. 87, 66 N. E. 655, with a result quite different from that



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presented by the decisions in the two cases above cited. It was held by the court of appeals that the "office of detective sergeant was created and existed long before the adoption of the Greater New York charter, and that it was continued in the provisions of that act. The manner of selecting and designating the persons to fill the position remained the same, with the exception that, under the last act the selection may be made from the roundsmen as well as from the patrolmen." Their duties and compensation were unchanged, but the act of 1901 effected a substantial change by making the tenure permanent, "except in case of removal, in the manner provided by law for sergeants and other officers of the police force. . . . The act is clearly a continuation of an existing statute upon the subject, maintaining the same general scheme with the single exception alluded to, and as to that it harmonizes the position with that of the other offices of the police force by creating the same tenure of office. The legislature has not, therefore, created a new position or office, and it has not filled that position with new men; but it has continued an old office, existing under prior statutes, with the persons who, at that time, filled the office under appointment or designation from city officers designated by the legislature." The provision in relation to detective sergeants in the act of 1901 is valid.

The act of 1901, chap. 89, designated certain persons commissioners for the erection of a new courthouse in the county of Oneida. By the county law, chap. 686, Laws 1892, boards of supervisors have power to erect courthouses and purchase land for that purpose. The act of 1901 was sustained in *People ex rel. Oneida Court House* v. *Oneida County* (1902) 170 N. Y. 105, 62 N. E. 1092. The court say that the "legislature has the power to provide buildings and court rooms in which the courts of the state may hold sessions and dispose of the civil and criminal cases that may be brought to trial. The power to construct these buildings may be delegated to the cities or the counties of the state, or it may be done through such agents of the state as the legislature shall provide." The commissioners are not deemed county officers within the meaning of this section.

The office of commissioner of jurors in Kings county was created by statute in 1858. It became a county office, and when the Constitution of 1894 went into effect this office was in existence and its incumbents were appointed by county authorities. The act of 1901, chap. 602, vested the power of appointment in the justices of the appellate division in the second department. In *Re Brenner*

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(1902) 170 N. Y. 185, 63 N. E. 133, this transfer of the power of appointment was held to be unconstitutional.

The act of 1901, cited in the preceding note, also included the county of New York, and the validity of the statute as applied to that county was considered in *Allison* v. *Welde* (1902) 172 N. Y. 421, 65 N. E. 263. The status of the commissioner of jurors received judicial attention in *People ex rel. Taylor* v. *Dunlap* (1876) 66 N. Y. 162, which has been reviewed in a previous note, and it was there decided that the legislature had power to make the office either a county or a city office, or transfer it from one class to the other. The *Welde Case* involved the power of the legislature to abolish the office of commissioner of jurors as a city office and make it a county office, vesting the power of appointment in the appellate division judges of the supreme court. The court say the office is not a constitutional office, and is therefore subject to legislative control; that whatever might have been the limitation on the power of the legislature when the county and city of New York were coterminous, a new rule must be applied under conditions produced by the Greater New York charter, by which the city was enlarged so as to include three entire counties and parts of two others; that, treating the commissioner as a county officer, it is an incongruity to provide for his appointment by the mayor of a city including a large territory beyond county limits, and thus, in effect, giving outside inhabitants a right to participate in county affairs; the mayor himself might be a resident of another county. At the time of the adoption of the Constitution of 1894 there was no commissioner of jurors of the county of New York. The act of 1901 therefore creates a new office in that county, and it may be filled by appointment in such manner as the legislature may direct, and the designation of the judges of the appellate division as the appointing power was valid.

*Bi-partisan board.*—By the act of 1896, chap. 427, the legislature proposed to reorganize the Albany police department by providing among other things for a bi-partisan board of four police commissioners, to be chosen by members of the common council, but no member of the council could vote for more than two commissioners, and, in case of a vacancy, it was to be filled by appointment by the mayor, on the recommendation of the members of the council belonging to the same political party as the commissioner whose office had become vacant. No person was eligible to the office unless he was a member of the political party or organization having the highest or the next highest representation in the common council.

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In *Rathbone* v. *Wirth* (1896) 150 N. Y. 459, 34 L. R. A. 408, 45 N. E. 15, this limitation of the power of appointment was held to be unconstitutional. The bi-partisan feature of the law was a clear violation of the Constitution. The act goes beyond "the power to designate the local authority who, under the new system, shall appoint police commissioners. It designates the class of persons from whom the selection must be made, and excludes all others; and it precludes the majority in the common council from naming the majority of the board." (Gray, J.) "To act validly, the vote of a majority of the members was required, both at common law and under the charter;" a smaller number would not constitute a local authority under this section of the Constitution, and the legislature cannot authorize a minority to bind the city.

Bi-partisan police commissioners for Richmond county were provided by the act of 1897, chap. 108, which vested the power of appointment in the county judge, sheriff, and district attorney, but with the limitation that not more than one of the commissioners appointed should belong to the same political party. The commissioners were county officers whose election or appointment had not been provided for in the Constitution. The manner of their choice was therefore subject to legislative discretion. The appointing officers are county authorities within the meaning of this section. The bi-partisan feature of the act was sustained on the authority of *Rogers* v. *Buffalo* (1890) 123 N. Y. 173, 9 L. R. A. 579, 25 N. E. 274; *Pearce* v. *Stephens* (1897) 18 App. Div. 103, 45 N. Y. Supp. 422.

*Civil service.*—The provision in the civil service acts, 1883, chap. 354, am. 1884, chap. 410, requiring city civil service regulations to be approved by the state civil service commission, does not violate this provision of the Constitution. Local authorities still possess the power of appointment. *Rogers* v. *Buffalo* (1890) 123 N. Y. 173, 9 L. R. A. 579, 25 N. E. 274.

This section should be read in connection with the civil service provisions in article 5, § 9. Notwithstanding the requirements of the latter section, the power of appointment still remains in such local authorities as the legislature has designated for that purpose. But such local authorities must make appointments according to merit and fitness. *People ex rel. Balcom* v. *Mosher* (1900) 163 N. Y. 32, 79 Am. St. Rep. 552, 57 N. E. 88.

The same subject was considered with special reference to veterans in *People ex rel. Weintz* v. *Burch* (1903) 79 App. Div. 157, 80 N. Y. Supp. 274, where it is said that this section, relating to the power of appointment, must be read "in connection with the new [civil

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service] provision that in such appointment veterans shall have a preference without regard to their standing, which new provision is *pro tanto* a limitation upon the power of appointment; the limitation, however, not being made by a creature of the Constitution, but by the Constitution itself, and, as such, not to be ignored or disregarded."

*Extension of term.*—By the act of 1851, chap. 147, clerks of the district courts in New York were appointed for a term of four years from the 31st of December, 1851. Another act, chap. 514, passed at the same session, providing for the election of justices of such courts, contained a provision making the term of the several clerks of these courts correspond with that of the justices. "The effect of this provision was to extend the terms of the clerks appointed under the act of April 11, 1851, from the second Tuesday of May, 1856, when they would otherwise have expired, to the 31st day of December, 1857." The act of 1857, chap. 344, provided "that the clerks of the district courts of the city of New York who should be in office at the then next ensuing election of the judges of said courts should hold their offices for the same time as the judges then to be elected." Judges were elected in December, 1857. The validity of the provision in the act of 1857, relating to the terms of the clerks, was challenged in *People ex rel. Loew* v. *Batchelor* (1860) 22 N. Y. 128, and it was there held that the statute did not effect an unconstitutional extension of the term of office of such clerks. There was no constitutional limitation on the term, such limitation being purely legislative. "There is nothing in the Constitution which either expressly or by implication restrains the legislature from altering or changing the term of any office which it has once fixed." Citing the provision of the Revised Statutes that officers hold over after the expiration of their terms until their successors are chosen, Judge Selden says that "if, therefore, the legislature in 1857 had, in direct and explicit terms, provided that no action should be had under the laws of 1851 or 1855, authorizing the mayor and aldermen to appoint until December, 1863, these clerks would have continued to hold their offices by virtue of their original appointment until that period. This is precisely what the legislature has in effect done by the present law. They have said the clerks now in office shall hold over until a certain time. This is simply saying that no new clerks shall be appointed until that time."

The legislature in 1860, by chap. 300, created a new (the eighth) judicial district in the city of New York, and provided for the election of a justice therefor to hold office six years from the 1st of

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January, 1861. By the act of 1866, chap. 217, the legislature extended the term of the justice three years, providing that it should expire on the 31st of December, 1869. Such extension was equivalent to an appointment by the legislature. "As the term fixed for this office by the legislature was to be filled by an election to it, the legislature had not the power, by changing the term, to put or keep one in the office otherwise than by an election. The officer must be elected, and the legislature could not, by changing the term after one election, take from the people the right, which they had reserved, to choose who should be the officer. . . . If the legislature can, by extending the term of such an office, continue in it the holder thereof for one year, it may for any number of years; and thus the duration of the term thereof may be perpetuated by legislative power, and the people, after one exercise of the constitutional power of choosing certain of their own officers, be ever after that deprived of it. . . . When the Constitution reserves the power to the people of electing an officer, and thus impliedly forbids the legislature to appoint him, it means that he, and the filling of his office, shall be subject to the will of the people, and to it alone." The court held that "the defendant had no right or title to the office of justice of the eighth judicial district after the expiration of his term of six years, for the reason that the act of 1866, so far as it sought to continue him in office thereafter, was unconstitutional and void." *People ex rel. Fowler* v. *Bull* (1871) 46 N. Y. 57, 7 Am. Rep. 302.

On the 5th of April, 1870, collectors were elected in the several towns of Kings county. On the 22d of the same month the legislature passed an act (chap. 374) "for the extension of the term of office of the collector of taxes in the several towns of Kings county," and providing that such collectors should hold their office for the term of three years. The office of town collector was an ancient office, and was in existence at the adoption of the first state Constitution. It could be filled only "by election by electors of the town, or by appointment made by local authorities of the town, to be designated by the legislature." The legislature could not, by extending the term from one year to three years, appoint a collector for the additional two years. A person elected collector in 1871 was held entitled to the office. *People ex rel. Williamson* v. *McKinney* (1873) 52 N. Y. 374.

The status of town collectors was again considered in *People ex rel. Lord* v. *Crooks* (1873) 53 N. Y. 648. The act of 1871, chap. 385, abolished the office of town collector in Newtown and created the office of receiver of taxes, and the person elected collector at the annual town meeting in that year was declared to be the receiver

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of taxes under the new law from December 1, 1871, until December 1, 1874. It was held that the office of receiver of taxes was not a new office, but was in substance the office of town collector. The legislature had no power to extend the term of the incumbent, nor to appoint a receiver of taxes.

"The legislature cannot extend the term of a town officer after his election, since that would virtually be an appointment to the office during the period of extension. The legislature cannot appoint town officers; they must either be elected by the people of the town or appointed by such town authorities as the legislature may designate for that purpose. . . . Where the office is to be filled by one authority and the duration of the term is to be determined by another, the declaration of such duration must go before the filling, so that each authority may have its legitimate exercise." By a special law elections of town officers in Watervliet were required to be held on the day preceding the annual town meeting. Such an election was held on the 10th of April, 1893, and the relator was chosen town clerk. The regular town meeting was held the next day, the 11th, and on that day chap. 344 became a law which fixed the term of office of town clerks at two years. This was held not to affect the term of the town clerk chosen the preceding day, and he could therefore hold the office only one year. *People ex rel. Leroy* v. *Foley* (1896) 148 N. Y. 677, 43 N. E. 171.

Coroners in Kings county were chosen in 1895 under a statute which fixed the term at three years, and whose terms would therefore expire December 31, 1898. Article 12, § 3, required official terms in this county to expire at the end of an odd-numbered year. This was deemed to modify existing statutes by reducing to two years the term of the persons elected in 1895, so that such term would expire December 31, 1897. The act of 1896, chap. 424, provided that "the present coroners of the county of Kings shall continue in said office until the 31st day of December, 1899," and fixed the regular official term at four years. This act was void for the reason that it prolonged to four years terms of officers who had been chosen for two years. *Re Burger* (1897) 21 Misc. 370, 47 N. Y. Supp. 292.

In *People ex rel. Eldred* v. *Palmer* (1897) 154 N. Y. 133, 47 N. E. 1084, it was held that the legislature could not prolong to four years the term of the district attorney of Kings county, who had been chosen before the term of office was definitely fixed as re quired by § 1 of article 10. He was entitled to hold office only two years, and the legislature could not fix his term at four years. The act of

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1896, chap. 772, so far as it related to the term of office, was unconstitutional.

Certain city magistrates in New York were in office for terms expiring on the 30th of April, 1901. The amended city charter, which became a law on the 22d of the same month, provided that the official terms of these magistrates should expire on the 31st of December, 1901. In *Kelly* v. *Van Wyck* (1901) 35 Misc. 210, 71 N. Y. Supp. 814, Justice Gaynor held this provision of the charter unconstitutional, for the reason that the extension of term was, in effect, an attempt by the legislature to exercise the power of appointment to a city office, stating the rule that the Constitution "covers and protects the duties of the office in all their transfers by the legislature to newly created officials, and such officials have to be elected or appointed in the said manner prescribed therein; *i. e.*, by the electors of the city or some official or officials thereof."

When the act of 1903, chap. 8, amending the charter of Elmira, became a law, February 27, 1903, a city chamberlain was in office for a term of three years, expiring March 12, 1903. The charter amendments changed the date of city elections from spring to fall, and provided specifically that "the city chamberlain in office when this act takes effect shall hold his office until the expiration of the term for which he was appointed, and until the 31st day of December, 1903, and his successor shall have been chosen as in this section provided, and qualifies." March 23, 1903, the common council appointed a city chamberlain in place of the prior incumbent, whose term expired on the 12th. This appointment was sustained, and the provision extending the chamberlain's term was declared invalid on the familiar ground that it was equivalent to an appointment by the legislature. *Re Haase* (1903) 88 App. Div. 242, 85 N. Y. Supp. 462.

*Firemen.*—Firemen are not civil or public officers, although receiving their appointment from city authorities, but are best described as a subordinate governmental agency. *Exempt Firemen's Benev. Fund* v. *Roome* (1883) 93 N. Y. 313, 320, 45 Am. Rep. 217.

*Health officer.*—County officers and city officers are not defined in the Constitution. "They are unknown to our former Constitutions, and they are unknown even to the Revised Statutes, except in the index." In *Re Whiting* (1848) 2 Barb. 513, Justice Edmonds held that the health officer of the city and county of New York was neither a city nor a county officer; that he was not necessarily, under the Constitution, to be elected or appointed by local authorities, but was one that was to be elected or appointed as the legislature might direct, and an appointment by the governor and senate was sus-

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tained. In *People ex rel. Bush* v. *Houghton* (1905) 102 App. Div. 209, 92 N. Y. Supp. 661, it was held (construing Laws 1903, chap. 383, amending § 20 of the public health law) that the county judge could not be authorized to fill vacancies in city boards of health; appointments must be made by local authorities.

*Justices of the peace.*—Construing § 15 of article 4 of the Constitution of 1821, which was more comprehensive in some respects than the present section, the court, in *Clark* v. *People* (1841) 26 Wend. 599, said the legislature could direct the mode of appointment of justices of the peace for cities.

As to justices of the peace, this provision must be read in connection with § 17 of article 6, which provides for the election of these officers at town meetings. The legislature has no power to provide for their selection at any other time, or in any other manner. *People ex rel. Smith* v. *Schiellein* (1884) 95 N. Y. 124.

In *Re Eliott* (1886) 6 N. Y. S. R. 8, the court sustained an appointment of a justice of the peace to fill a vacancy in a term which expired at the end of the year, and it was held that an election to fill such vacancy was not necessary at the preceding town meeting. The legislature had power to provide for filling the vacancy by such an election, but it also had the power to authorize an appointment to fill the vacancy.

*New civil divisions.*—The legislature of 1857, by chapter 569, created a metropolitan police district consisting of the counties of New York, Kings, Richmond, and Westchester, and provided for the appointment of five commissioners by the governor and senate, who, with the mayors of New York and Brooklyn, were to form a board of police for the district, with the powers of the board of commissioners of police of New York, and all the powers of the mayors of New York and Brooklyn as the heads of the police departments of their respective cities. The validity of this act was considered and sustained in *People ex rel. Wood* v. *Draper* (1857) 15 N. Y. 532. Discussing the subject Judge Denio says that the last clause of the section providing that "all officers whose offices may hereafter be created by law shall be elected by the people or appointed, as the legislature may direct . . . embraces all offices thereafter to be created, whether their functions are local or general;" and that "if the offices mentioned in the municipal police bill have been created since the adoption of the Constitution, the fact that they are filled by appointment by the governor and senate is not a violation of that instrument." There is no prohibition in the Constitution forbidding the abolition of the local police arrangements of the city of New York.

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"When it is determined by the authority to which the Constitution has committed the solution of such questions that the offices, as county offices, are no longer necessary or expedient, we cannot say that they must be continued as county offices." The legislature had authority to create new civil divisions of the state, embracing more than one county, for purposes of temporary or permanent civil government, not impairing, however, the county organizations, and officers over such newly created district could legally be appointed by the governor and senate. See also *People ex rel. McCune* v. *Board of Police* (1859) 19 N. Y. 188.

The creation of the metropolitan fire district (1865, chap. 249) was sustained in *People* v. *Pinckney* (1865) 32 N. Y. 377. The act created the office of metropolitan fire commissioners, who were appointed by the governor and senate. "It would not be competent . . . for the legislature to create a new civil division of the state, and abrogate the local offices of the several counties that might compose it, and direct the appointment by the governor and senate of other officers limited to perform the same local functions only, although distinguished by new and more extended titles. . . . The test therefore, must be whether the functions conferred are substantially new in the sense that they were not exercised by public civil officers at the time the Constitution was adopted." Referring to the organization and incorporation of the New York fire department, the court say that "neither the corporation itself nor the officers elected under the provisions of its charter were, at any time, by reason of any power derived through the charter, public or civil officers within the meaning of the Constitution. The corporation was not a municipal or political body," and its officers were subject to legislative control. The officers of the fire department were not public officers in the sense in which that term is used in the Constitution of 1846. "The corporation of the city [New York] is not an officer within the meaning of the 10th article. To diminish or restrict its general legislative or administrative power as a body corporate is not to abrogate or change a public office in the sense of the constitutional restriction. . . . To transfer to a new board a portion of the administrative functions of the common council is not obnoxious to any prohibition expressed or implied in . . . [this section]."

The legislature, in 1865 (chap. 554), created a district under the name of the Capital police district, to be composed of the city of Albany, that part of the town of Bethlehem adjoining said city, and lying northerly of the Normanskill, the town of Watervliet, in the

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county of Albany, including therein the villages of West Troy, Green Island, and Cohoes, in the county of Rensselaer the village of Lansingburgh, the city of Troy, and the towns of North Greenbush and Greenbush. In 1866, chap. 483, the legislature added to the district "all that territory covered by and included within the lines of the property of the New York Central Railroad, between the cities of Albany and Schenectady and the city of Schenectady." The act of 1865 provided for the appointment of police commissioners for the new district by the governor and senate. This legislation was sustained in *People ex rel. McMullen* v. *Shepard* (1867) 36 N. Y. 285.

The legislature had power, by the act of 1866, chap. 74, to create the metropolitan sanitary district, which was to be composed of the same territory embraced in the metropolitan police district, created by the act of 1857, chap. 569, and provide for the appointment by the governor of sanitary commissioners. The court reiterated the rule stated in the *Draper Case*, that the legislature might create new civil divisions and authorize the governor to appoint officers therefor. *Metropolitan Bd. of Health* v. *Heister* (1868) 37 N. Y. 661.

By the act of 1866, chap. 578, commissioners of the metropolitan board of health were declared to be a board of excise for the metropolitan police district, excluding the county of Westchester, and were vested with exclusive authority as commissioners of excise in that district. The act was sustained in *Metropolitan Bd. of Excise* v. *Barrie* (1866) 34 N. Y. 657.

The Rensselaer police district was established by the act of 1873, chap. 638, to include the city of Troy and parts of the towns of Brunswick and North Greenbush, and also Center island, in the Hudson river, and all territory between that island and the city. The act provided for three police commissioners for the new district, to be appointed by the governor and senate. There were, at the time of the adoption of the Constitution, officers performing the same duties within the city of Troy as, by the act of 1873, were devolved upon the police force and magistrates of the proposed district. This act was construed in *People ex rel. Bolton* v. *Albertson* (1873) 55 N. Y. 50, and the court there say that the "Constitution cannot be evaded by a change in the name of an office, nor can an office be divided and the duties assigned to two or more officers under different names, and the appointment to the offices made in any manner except as authorized by the Constitution." It appears from the opinion that the annexed portion of the town of Brunswick contained between 500 and 600 acres of land and 69 dwelling houses;

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that the portion of North Greenbush annexed to the city contained about 4 acres and one dwelling house; and that Center island, which was said to have belonged to Albany county, contained about a dozen acres with a foundry thereon and tenements for twenty families. While these fragments of territory might have been properly annexed to the city, the evident purpose of the statute was to reorganize the police system of Troy, and these additions were made "to give the territory the name and form of a police district, as distinct from the ordinary civil divisions of the state." There is an absence of any evidence of necessity for the creation of a new district for police purposes or for any other purpose connected with the ordinary administration of municipal affairs. "The entire scheme was intended for the city of Troy," and was uncalled for and unsuitable for the rural portions of territory included in the act, which continued to be a part of their respective towns and town organizations. "The act does not create for any purpose a new civil division of the state, and new offices for such district which may be filled as the legislature may direct." Commenting on the difference between this act and the metropolitan police acts and other statutes of a similar character which have already been examined in these notes, the court say that the new civil divisions created by those statutes "are a recent device, and were not and could not have been in the minds of the framers of the Constitution, and, in the absence of an actual and evident necessity, they must, within every principle of interpretation, be held to be forbidden." In this case there was no necessity for the creation of a new civil division. The act was held to be unconstitutional.

The act of 1881, chap. 415, erected the Niagara police district out of a portion of the town of Niagara, and authorized the governor and senate to appoint three police commissioners and a police justice. The act was condemned as obnoxious to the provisions of article 6, § 19, now 18, relating to the establishment of inferior courts, the court holding in substance that the legislature had no power to create such a district for judicial purposes. The police aspect of the statute was not considered, but the case is cited here because the statute involved is one of a group providing for the creation of civil divisions differing from those recognized by the Constitution. *People ex rel. Townsend* v. *Porter* (1882) 90 N. Y. 68.

*New office.*—The office of commissioner of jurors in New York was created by the act of 1847, chap. 495, to be appointed by the supervisors (aldermen) of the city and the judges of the superior court and court of common pleas. The act did not in terms make

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the commissioner a county officer. The act created a new office and provided for the appointment, by local authorities, of an officer to discharge its duties, which were to be performed in the county whose boundaries were identical with those of the city. "It was competent for the legislature to make it a city or county office, and to vest the power of appointment in city or county authorities. . . . It could thereafter abolish the office, or change its character from a county to a city office, and provide for a different mode of appointment." The legislature had power to make the office distinctly a city office, and this was done by the revised charter of 1873, chap. 335, which vested the power of appointment of the commissioner in the mayor and common council. *People ex rel. Taylor* v. *Dunlap* (1876) 66 N. Y. 162.

In *People ex rel. Bradley* v. *Stevens* (1869) 51 How. Pr. 103, there is a discussion of the status of Croton aqueduct commissioners provided by the acts of 1849, as the result of which it was originally held that these were new officers under the Constitution, and that the legislature might itself appoint them, or from time to time fix the terms of incumbents, but it seems that the judgment originally appealed from was reversed, and on a new trial the judge at circuit held that the office was in existence at the adoption of the Constitution. No appeal was taken from this judgment.

The act of 1853, chap. 467, provided for the election of three pilot commissioners by the chamber of commerce and two by the presidents and vice presidents of the marine insurance companies of the city of New York, represented in the board of underwriters of said city. "The offices of commissioners of pilots had no existence at the time of the adoption of the Constitution of 1846, and there were no officers authorized by law existing at that time who exercised the same or similar functions." These offices were created by the legislature. The power of appointment is not restricted to some body or officer representing or responsible to the people. The pilot commissioners were not local officers, "but are officers of the state, and relate to the exercise of national power in protecting commerce and providing means for averting the dangers of ocean navigation," and the legislature might constitutionally vest their appointment in the chamber of commerce and heads of insurance companies. *Sturgis* v. *Spofford* (1871) 45 N. Y. 446.

The duties devolved upon the commissioners of records of New York by the act of 1855, chap. 407, were new duties, "such as did not pertain to any office theretofore existing, and were special and temporary in their character." The legislature therefore had power to

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appoint the commissioners. *People ex rel. Kingsland* v. *Palmer* (1873) 52 N. Y. 83.

The office of police court clerk in the city of New York existed at the time of the adoption of the Constitution of 1846. It is not a new creation of the law-making power. The clause in the metropolitan police act of 1857, chap. 569, § 20, transferring the power of appointing the police court clerks to the board created by that act, was held to be unconstitutional. *Devoy* v. *New York* (1867) 36 N. Y. 449.

The act of 1859, chap. 484, authorized the supreme court to appoint commissioners to act in relation to a proposed public improvement in Brooklyn, and these commissioners were authorized to appoint a collector to collect the assessments levied under the act. By an amendment to this act, passed in 1860, chap. 100, the Long Island Railroad Company was authorized to appoint a collector to collect certain unpaid assessments. In *Litchfield* v. *McComber* (1864) 42 Barb. 288, this appointment was sustained on the authority of the *Draper Case* (1857) 15 N. Y. 532. The office of collector in this instance was a new one and the legislature might constitutionally vest the power of appointment in the Long Island Railroad Company, which was specially interested in the matter.

It was competent for the legislature, by the act of 1865, chap. 565, to authorize the Central Park commissioners to open certain streets and take proceedings for the acquisition of land therefor, and it was not necessary to vest this power in the common council. The common council had not been given jurisdiction of the subject in the part of the city covered by this act. "The authority conferred on the commissioners is not that of any local officers, nor does it authorize them to discharge the duties of any office, but it provides for a discharge of a mere ministerial act; *viz.*, presenting to the court a petition for the opening of a street." *Re Central Park* (1868) 51 Barb. 277, citing *Re Central Park Extension* (1863) 16 Abb. Pr. 56.

The legislature could not, as attempted by the act of 1866, chap. 214, incorporating the village of Edgewater, appoint the first trustees for the new village. The provision of the Constitution in relation to local officers "embraces officers of newly incorporated villages as well as those of villages which had been created previous to the adoption of that instrument." *People ex rel. Brown* v. *Blake* (1867) 49 Barb. 9.

Members of the board of education of Saratoga Springs, which board was created and appointed by the act of 1867, chap. 353, were

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neither town nor village officers under this clause. They were new officers, authorized by the last sentence of the section, and their appointment by the legislature was valid. *People ex rel. Board of Education* v. *Bennett* (1867) 54 Barb. 480. School trustees and boards of education are within the scope of this clause.

The power of appointment of drainage commissioners under the general act of 1869, chap. 888, may properly be vested in the county judge. *Re Ryers* (1878) 72 N. Y. 1, 28 Am. Rep. 88.

The act of 1870, chap. 623, creating avenue commissioners in Saratoga Springs, so far, at least, as the act relates to the widening of Union avenue, is not in conflict with this section. "These commissioners do not take the place of the commissioners of highways, but are appointed for the special purpose of executing a power, which is undoubtedly possessed by the legislature, of widening a certain designated avenue by proceedings different from those which could be taken by the commissioners of highways under the existing general laws of the state. The commissioners of highways still continue in office, and the charge of the avenue thus widened devolves upon them after the fulfilment of the office of avenue commissioners." *People ex rel. Kilmer* v. *McDonald* (1877) 69 N. Y. 362.

The act of 1871, chap. 485, named eight persons as water commissioners of the village of Dunkirk. This appointment by the legislature was sustained in *Hequembourg* v. *Dunkirk* (1888)) 49 Hun, 550, 2 N. Y. Supp. 447. The act created a new office, the duties of which did not devolve upon any one of the municipal officers previously existing.

The act of 1872, chap. 702, relating to the improvement and use of Fourth avenue in New York for railroad purposes, provided for a board of engineers, the members of which were appointed by the act. This was sustained in *People ex rel. New York & H. R. R. Co.* v. *Haxemeyer* (1874) 4 Thomp. & C. 365, on the authority of *Guilford* v. *Chenango County* (1855) 13 N. Y. 143; *Litchfield* v. *Vernon* (1869) 41 N. Y. 123; and *People ex rel. Crowell* v. *Lawrence* (1869) 41 N. Y. 137.

The act of 1874, chap. 547, § 8, providing for a board of examiners consisting of the superintendent of buildings, a member of the examining committee of the New York chapter of the American Institute of Architects, one of the ex-presidents of the New York board of underwriters, and two members of the mechanics' and traders' exchange, of said city, "one of the latter of whom shall be a master carpenter and one a master mason, all of whom, except said superintendent, shall be selected by their respective organizations, and so

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certified by the proper officers to the said superintendent," did not violate this provision. The members of the board were not city officers; but even if they were, their offices were created subsequent to the adoption of the Constitution, and hence they do not come within its purview. "We do not find that prior to 1846 there were any city officers with the powers or even substantial functions devolved upon these examiners." *Fire Department* v. *Atlas S. S. Co.* (1887) 106 N. Y. 566, 13 N. E. 329.

"The office of school commissioner is not an office provided for by the Constitution, nor was it an office in existence at the time the Constitution was adopted. It is, therefore, an office created by law after the adoption of the Constitution." The statutes relating to the office made it elective by the people, which, under article 2, § 1 of the Constitution means qualified electors, and does not include women. The act of 1892, chap. 214, conferring on women the right to vote for school commissioner, was, therefore, unconstitutional. *Re Cancellation of Names* (1893) 5 Misc. 375, 26 N. Y. Supp. 167. The same statute was construed with the same result in *Re Gage* (1894) 141 N. Y. 112, 25 L. R. A. 781, 35 N. E. 1094. See also *Re Inspectors of Election* (1893) 25 N. Y. Supp. 1063.

The municipal court of Syracuse was created by the act of 1892, chap. 342, and the judges were appointed by the governor. They were, at the time of this suit, in possession of the office, engaged in discharging the duties under color of such appointment. "They were, therefore, officers *de facto*, discharging judicial duties under color of legal title, and such title can be questioned only by the state under whose authority they were invested with the character, at least, of *de facto* officers. . . . When a court with competent jurisdiction is duly established, a suitor who resorts to it for the administration of justice and the protection of private rights should not be defeated or embarrassed by questions relating to the title of the judge, who presides in the court, to his office. If the court exists under the Constitution and laws, and it had jurisdiction of the case, any defect in the election or mode of appointing the judge is not available to litigants. Such questions must be raised by some action or proceeding to which the judge himself is a party, and where the issue as to the validity of his election or appointment is directly involved." *Curtin* v. *Barton* (1893) 139 N. Y. 505, 34 N. E. 1093.

The office of president of the village of Saratoga Springs is not provided for by the Constitution, and therefore the manner of filling it is subject to the discretion of the legislature. The legislature

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had power, by the act of 1895, chap. 247, to transfer the selection of the president from the people to the board of trustees. *People ex rel. Mitchell* v. *Sturges* (1898) 27 App. Div. 387, 50 N. Y. Supp. 5, affirmed in (1898) 156 N. Y. 580, 51 N. E. 295.

A commissioner appointed by the court to act in the place of the surrogate, in case of that officer's inability or incapacity, is not a public officer under this section, but is an officer of the court, appointed for a special purpose. The commissioner has no power outside of the matter committed to him. *Re Hathaway* (1876) 9 Hun, 79, affirmed in (1877) 71 N. Y. 238.

*Transfer of powers.—Warner* v. *People* (1845) 2 Denio, 272, 43 Am. Dec. 740, has been cited under the note to the last section on the point that the legislature could not authorize the appointment of a clerk to the New York court of common pleas by the chief and associate judges thereof, for the reason, in part, that it deprived the people of the right to elect the county clerk, who was clerk of this court. The Constitution having provided for the election of the clerk, the legislature had no power to create a new office and provide for the appointment of an incumbent by a mode not authorized by the Constitution, and it exceeded its power in enacting the act of 1843, chap. 88, providing for the appointment of a clerk of the court by the judges.

The Central Park commissioners were, by the act of 1865, chap. 564, given exclusive charge of certain streets for the purpose of making improvements. In *Astor* v. *New York* (1875) 62 N. Y. 567, it was objected that this provision was unconstitutional, for the reason that, "as the power to make the improvement in question was vested in the mayor and aldermen of the city, who were elective officers at the time of the adoption of the Constitution of 1846, their authority could not be transferred to officers holding by appointment under an act subsequently passed." The court said the provision did not transfer the general powers of local officers elected by the people, but conferred on the board of commissioners authority to carry out the special purpose for which it was organized. The act was sustained.

The act of 1867, chap. 410, amending previous statutes, authorized the governor, with the consent of the senate, to appoint three commissioners of taxes and assessments for the city of New York, and prescribed their duties, which were substantially those of commissioners of taxes under earlier statutes, with some additions. In *People* v. *Raymond* (1868) 37 N. Y. 428, the court said the powers, duties, and functions devolved upon the new commissioners were



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substantially vested in city officers at the time of the adoption of the Constitution, and that therefore the power of appointment could not be vested in the governor. The plain intention of the Constitution "was to preserve to localities the control of the official functions of which they were then possessed, and this control was carefully preserved, consistent with the power of the legislature to make needful changes, by restricting the power of appointment of other officers to perform the same functions to the people or some authority of the locality. . . . It is not enough that the name of the officer is changed or the powers enlarged to authorize the legislature to confer upon the governor the appointment of officers to discharge the duties performed by city officers at the adoption of the Constitution."

In 1867 the legislature, by chap. 806, extended to the board of metropolitan police a large number of powers then exercised by the mayor, common council, and other officers of the city of New York in relation to a great variety of subjects. In *People* v. *Acton* (1867) 48 Barb. 524, the court say that "the powers and duties which, by this act, are taken from the municipal authorities and are intrusted to the board of police, have been exercised by these authorities alone since there was any authority for the execution of them by any public body." The legislature cannot confer the power to discharge duties, and make regulations and pass laws relating thereto, upon state officers, no matter how appointed, whether by the governor and senate or by the legislature; and, although the legislature might have the power to take the discharge of such duties from the mayor or common council, they were required to place the performance of them with local officers or boards, and could not vest officers appointed under authority of the state with the performance of such duties.

The act of 1870, chap. 382, authorized the mayor of New York to appoint four commissioners to take charge of the completion of the new county courthouse, and these commissioners were to supersede the board of supervisors. In *New York* v. *Tenth Nat. Bank* (1888) 111 N. Y. 446, 18 N. E. 618, it was held that the courthouse was a county building, and the persons appointed were county commissioners, "engaged in disbursing county moneys, and discharging functions devolved upon them as county officials or agents." The court say "it matters not that they were appointed by the mayor of the city. It was for the legislature to determine how they should be appointed. It could have named them in some act, or could have

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devolved their appointment upon the board of supervisors, or the sheriff, or some other local officer."

The act of 1884, chap. 522, extended the jurisdiction of the New York department of parks over certain newly acquired territory in Westchester county. The park police did not thereby become Westchester county officers, but remained New York officers. The act did not affect the powers and jurisdiction of Westchester county officers, nor abridge the local government of that county. *Re New York* (1885) 99 N. Y. 569, 2 N. E. 642.

"Local functions . . . cannot be transferred to a state officer. The legislature has the power to regulate, increase, or diminish the duties of the local officer, but it has been steadfastly held that this power is subject to the limitation that no essential or exclusive function belonging to the office can be transferred to an officer appointed by central authority." The special franchise tax act of 1899, chap. 712, authorizes "the assessment or valuation, for the purpose of general taxation, of all special franchises by a state board of taxing commissioners appointed by the governor." The new law "created a new system of taxation, brought within its range a new character of property, and assigned the duty of making the valuation to the state board of tax commissioners, composed of tax experts already in office, whose sole duty related to the subject of taxation in all its phases throughout the entire state." It required the exercise of functions that had never belonged to local assessors. The valuation of special franchises had never been attempted before, but presented a new field of action and called for the exercise of new and different functions. This function "is no part of local self-government as known to history. . . . It did not come within the experience of former times, and was not contemplated by the framers of our Constitutions." The supreme power of taxation which belongs to the legislature should be considered in connection "with the home rule provision of the Constitution, and neither should be so construed as to embarrass or cripple the other, . . . and the right to create a new system of taxation and bring in property of a new character, hitherto untaxed, with some other property incidental thereto, and worthless without it, cannot, as we think, be denied upon principle, and should not be withheld from the legislature." The act was valid and did not infringe upon the home rule provisions of this section. *People ex rel. Metropolitan Street R. Co.* v. *State Tax Comrs.* (1903) 174 N. Y. 417, 63 L. R. A. 884, 67 N. E. 69.

The same construction had been given to the statute by Justice

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Kenefick at special term (*Buffalo Gas Co.* v. *Volz* [1900] 31 Misc. 160, 64 N. Y. Supp. 534).

By the act of 1901, chap. 178, certain municipal boards in Saratoga Springs were consolidated and combined in one board and commissioners were designated for the first year. This was unconstitutional. The functions of the new commissioners were "functions which had theretofore existed and had been exercised by local officers appointed by local authority." The legislature could not appoint the commissioners. *Saratoga Springs* v. *Van Norder* (1902) 75 App. Div. 204, 77 N. Y. Supp. 1020.

In 1901 the legislature, by chap. 402, authorized and directed several persons therein named to determine the deficiency in certain city funds and audit all outstanding claims against the city of Syracuse which the city was legally or equitably obligated to pay, and which were incurred between the 1st day of January, 1899, and the 1st day of January, 1900. The validity of this statute was considered in *Syracuse* v. *Hubbard* (1901) 64 App. Div. 587, 72 N. Y. Supp. 802, where the court, replying to the argument that the persons designated became city officers, say the power of audit conferred by the act, "and which, if anything, made them city officers, was beyond the auditing power possessed by the common council in 1899, or at the time of the adoption of the Constitution. . . . If the legislature, in providing for the accomplishment of a particular specific object which it has power to accomplish, designates some person to perform a specific duty that might be performed by a local city or town officer, the fact that such person is charged with that duty does not make him a city or town officer within the meaning of the Constitution, so long as the general duty or functions of the local officers are not interfered with." There is no constitutional requirement that a claim against a city must be audited by its own auditing officer.

The transfer of power from one local board to another is not a violation of this section. *Re Zborowski* (1877) 68 N. Y. 88; *Re Roberts* (1879) 17 Hun, 559; *Re Lester* (1880) 21 Hun, 130.

The legislature had power to transfer the choice of the commissioners of charities of the county of Kings from the people to county authorities, and to provide for their appointment by the president *pro tem.* of the board of supervisors and by the supervisor at large. Such president is a county authority. *Re Carboy* (1882) 27 Hun, 82.

*Uniformity.*—Section 1392 of the revised New York charter of 1901, chap. 466, provided for the election of city magistrates in the borough of Brooklyn by congressional districts, but in the boroughs

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of Manhattan and the Bronx such magistrates were to be appointed by the mayor, as before. In *People* v. *Dooley* (1902) 171 N. Y. 74, 63 N. E. 815, it was held that the legislature could not prescribe both methods of selection in the same city. Officers may be elected or appointed, but the same system must be applied in all parts of the city. The method of selection must be uniform.

*Vacancies.*—This section grants to the legislature complete power as to filling vacancies in office other than the offices mentioned in § 1. *People ex rel. Kehoe* v. *Fitchie* (1894) 76 Hun, 80, 28 N. Y. Supp. 600.

The appointment of superintendents of the poor, including the filling of vacancies, might properly be devolved upon boards of supervisors, as was done by the act of 1847, chap. 498. *People ex rel. Hatfield* v. *Comstock* (1879) 78 N. Y. 356.

The office of police justice of Wappingers Falls is a local office. By the Constitution it must be filled by election or appointment, as the legislature shall direct. The right to vote for candidates for this office cannot be made to depend upon the action of political conventions or primaries, and the right of an elector cannot be affected by the failure of nominating conventions, nor of the local officers whose duty it is to distribute ballots. *People ex rel. Goring* v. *Wappingers Falls* (1894) 83 Hun, 135, 31 N. Y. Supp. 758.

**§ 3. [*Duration of certain offices; how fixed.*]—When the duration of any office is not provided by this Constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment.**

[Const. 1777, art. 28; 1821, art. 4, § 16; 1846, art. 10, § 3.]

This section was first included in the Constitution in 1821 and has been continued without change, except that "provided" has been substituted for "prescribed." The first Constitution contained a similar provision, though less general in its application. It was declared in § 28 of that instrument that "where, by this Constitution, the duration of any office shall not be ascertained, such office shall be construed to be held during the pleasure of the

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Council of Appointment." That council, as already pointed out, had practically the absolute power of appointment and removal of nearly all public officers, both civil and military. The principle of the provision was retained in later Constitutions, substituting for the Council of Appointment the authority making the appointment, which is now various and widely distributed.

In *People ex rel. Lyndes* v. *Comptroller* (1839) 20 Wend. 595. Chief Justice Nelson says that the "duration of office here obviously refers to the period of time the incumbent shall hold, that being the proper measure of it. This period has been previously prescribed in the Constitution in respect to many of the officers, and the scope of the section is to provide for the case of officers whose term of office is left at large, as well those that might be created by statute as those to be found in the Constitution." If there is no fixed time during which officers are to hold, they are removable at the pleasure of the appointing power.

*Application of section.*—This section applies "not only to offices existing at the time of its enactment, but also to offices created since. . . . It does not apply to cases where the tenure of office is fixed by the statute." The act of 1889, chap. 453, provided for a board of commissioners of improvements of the town of Westchester, to be appointed by the supervisor after sixty days. The statute fixed the duration of the office, which was unlimited. After the original creation of the board the supervisor had no power of appointment, except to fill vacancies. *Re Jarvis* v. *Waterbury* (1895) 84 Hun, 462, 32 N. Y. Supp. 389.

*Assessors of New York.*—The New York consolidation act (1882, chap. 410) authorized the board of tax commissioners to appoint four assessors. Appointments were made and afterwards incumbents of the office were removed by resolution, without notice and without charges. The duration of the office was not fixed by the Constitution nor by statute. The assessors were subject to removal at pleasure by the tax commissioners. *People ex rel. Cahill* v. *Barker* (1896) 5 App. Div. 227, 39 N. Y. Supp. 140, affirmed in (1896) 150 N. Y. 570, 44 N. E. 1127.

*Assistant aldermen.*—The New York revised charter of 1873, chap. 335, abolished the board of assistant aldermen and transferred

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its powers to the board of aldermen as the common council of the city. This legislation was sustained in *Demarest* v. *Wickham* (1875) 67 Barb. 312, where it was held that the office "was one whose duration was not provided for by the Constitution, and for that reason it could be declared and controlled by law" under this section. Other points were involved in the general term, and its judgment was affirmed in (1875) 63 N. Y. 320, but without considering this point.

*Civil service commission.*—The legislature cannot delegate to the civil service commission the power to prescribe the duration of a term of office, nor can such a commission, by its rules, require the removal of a public officer to be only upon charges and an opportunity to be heard, where no such limitation is imposed by statute. *People ex rel. Percival* v. *Cram* (1900) 164 N. Y. 166, 58 N. E. 112, in which it was held that dockmasters in New York did not, under the charter of 1897, hold office for a fixed term, and were subject to removal at pleasure by the commissioners of the dock department.

*Delegation to municipality.*—Another view of this provision was presented in *People ex rel. Seward* v. *Sing Sing* (1900) 54 App. Div. 555, 66 N. Y. Supp. 1094, where the court say in substance that the legislature may delegate to a municipal board the power to fix the terms of local officers, and that a resolution so fixing the official term has the same effect as a statute. A resolution by the board of trustees of the village of Sing Sing, declaring that the term of policemen should expire on a specified day in each year, which was the day on which the resolution was adopted, was sustained, although its effect was to deprive the incumbent of his office, the court holding that without such resolution the power of removal was absolute, and that from either point of view the incumbent ceased to be entitled to hold the office after the adoption of the resolution.

*Foreman of repairs.*—In *People ex rel. Bowers* v. *Dalton* (1898) 23 Misc. 294, 50 N. Y. Supp. 1028, affirmed in (1898) 31 App. Div. 630, 54 N. Y. Supp. 1112, a foreman of repairs in the water department in New York was held to be subject to removal by the commissioner at pleasure. The term of employment was not fixed by the charter.

*House of Refuge, general supervisor.*—The term of the general supervisor of the House of Refuge at Hudson is not fixed by statute (1896, chap. 546), and such officer may be removed by the superintendent of the institution, subject to the approval of the board of managers. *People ex rel. Ray* v. *Henry* (1900) 47 App. Div. 133, 62 N. Y. Supp. 102. Justice Herrick, writing the opinion in this case,

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says "it may be that a law making the term of office to last during good behavior, as is frequently done, would be a compliance with this section of the Constitution," and that it must be obvious that civil service rules cannot, in any way, limit or restrain the power of removal conferred by the Constitution.

*Power must be continuous.*—The provision in this section that when the duration of an office is not declared by law "such office shall be held during the pleasure of the authority making the appointment" applies only where the authority is continuous. Thus, where the power to make the first appointment was vested in certain local officers, such power could apply only to the persons who, at the time specified, answered that description, and not to those who, at some future time, might be incumbents of the offices. The authority embraced a single act, and was exhausted with its performance. *Bergen* v. *Powell* (1884) 94 N. Y. 591.

*President of village.*—Prior to 1895 the office of president of the village of Saratoga Springs was filled by election by the people. In 1895, by chap. 247, the power to select the president was transferred from the people to the village board of trustees, and the term of the incumbent was to cease on the election of the first president by the trustees. The term of the president was not fixed by the Constitution, and might therefore be shortened by the legislature. *People ex rel. Mitchell* v. *Sturges* (1898) 27 App. Div. 387, 50 N. Y. Supp. 5, affirmed in (1898) 156 N. Y. 581, 51 N. E. 295.

*Removal.*—"The general rule is that where the power of appointment is conferred in general terms and without restriction, the power of removal, in the discretion and at the will of the appointing power, is implied and always exists, unless restrained and limited by some other provision of law." *People ex rel. Cline* v. *Robb* (1891) 126 N. Y. 180, 27 N. E. 267, where it was held that a member of the park police of New York might be dismissed without charges.

§ 4. [*Legislature to prescribe time of elections.*]—The time of electing all officers named in this article shall be prescribed by law.

[Const. 1777, art. 29; 1821, art. 1, § 15, art. 4, §§ 10, 15; Am. 1826 (justices of the peace); Ams. 1833, 1838 (mayors); Const. 1846, art. 10, § 4; 1894, art. 12, § 3.]

The legislature has complied with this section by en-

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acting general and local election laws, special municipal charters, and other statutes which provide for the election of local officers.

**§ 5. [*Vacancies.*]—The legislature shall provide for filling vacancies in office, and, in case of elective officers, no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy.**

[Const. 1846, art. 10, § 5; also provisions in this Constitution relative to particular offices.]

*Appointment by governor.*—The act of 1849, chap. 28, authorizing the governor in certain cases to make appointments to fill vacancies in office, applies only to elective offices, and not to offices filled originally by appointment. *People ex rel. Devlin* v. *Conover* (1858) 17 N. Y. 64.

*Buffalo commissioner of public works.*—This office is not elective under the Constitution, and the legislature may therefore in its discretion provide for the method of filling vacancies in such office. In September, 1900, the mayor appointed a commissioner to fill a vacancy, the appointment to take effect at once and to continue until January 1, 1902. The mayor's appointee was held entitled to the office as against the person chosen to fill the vacancy at the city election in 1900, and the charter provision authorizing such an appointment was sustained. *People ex rel. Ward* v. *Scheu* (1901) 167 N. Y. 292, 60 N. E. 650.

*Deputy county clerk.*—A deputy clerk, in case of a vacancy in the office of county clerk, may perform the duties of that office until the election and qualification of a successor, or the appointment by the governor of a person to fill the vacancy, and the authority of the deputy ceases on the happening of either event. *People ex rel. Smith* v. *Fisher* (1840) 24 Wend. 215.

*Holding over.*—Under the statutory provision authorizing the incumbent of an office to continue to discharge the duties of the office until his successor is appointed and has qualified, the office, after the expiration of the regular term, was held not to be vacant so as to permit the governor to fill it by appointment during the recess

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of the senate. In case of a vacancy the legislature may provide for the temporary discharge of the duties of the office until it can be filled in the manner described by the Constitution. *Tappan* v. *Gray* (1842) 9 Paige, 507, citing *People ex rel. Simpson* v. *Van Horne* (1835) 18 Wend. 518.

*Justice of the peace.*—A justice of the peace elected at an annual town meeting to fill a vacancy enters immediately upon the duties of his office. The legislature may provide for an executive appointment to fill a vacancy, but the term of an incumbent so appointed would expire upon the election of an officer to fill the vacancy at the next town meeting. *People* v. *Keeler* (1858) 17 N. Y. 370.

*Legislative discretion.*—The Constitution does not require an election in all cases to fill a vacancy in an elective office, and the vacancy may be filled in such manner as the legislature directs; but if the legislature provides for an election in such a case, the person elected to fill the vacancy takes the office immediately and holds for the residue of the unexpired term. *Re Eliott* (1886) 6 N. Y. S. R. 8.

*New York justice of special sessions.*—By § 1401 of the Greater New York charter the justices of the court of special sessions of the second division of the city of New York are to hold office until the 31st day of December. By § 1406 a vacancy in such office is to be filled by the mayor within thirty days after its occurrence. In *People* v. *Fitzgerald* (1904) 96 App. Div. 242, 89 N. Y. Supp. 268, affirmed in (1905) 180 N. Y. 269, 73 N. E. 55, it was held that an appointment to fill such a vacancy, made prior to the 31st of December, was invalid; the appointment could not be made until after the expiration of the term. In this instance the term of the justice expired December 31, 1903. By § 94 of the charter, as amended in 1901, chap. 466, the mayor's term expired at noon on the 1st of January, 1904. The outgoing mayor attempted to fill the vacancy, first by an appointment dated December 29, 1903, and again by another appointment made in the forenoon of January 1, 1904. It was held that, by operation of the Constitution, article 12, § 3, the mayor's term expired at midnight on the 31st of December, 1903, and that the charter could not be construed as extending the term until noon of the following day. It was accordingly held that both appointments were invalid, the first because it was made before the expiration of the justice's term, and the second because it was made after the expiration of the mayor's term. I venture to suggest another reason for the invalidity of the first appointment; namely, that the outgoing mayor could not make an appointment

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for a term which would not begin until after the expiration of his own term.

*Superintendent of the poor.*—The clause in this section relating to appointments to fill vacancies in elective offices applies only to offices made elective by the Constitution, and does not apply to offices which, under § 2 of this article, may be made elective or appointive at the discretion of the legislature. The clause does not apply to an appointment to fill a vacancy in the office of superintendent of the poor. *People ex rel. Hatfield* v. *Comstock* (1879) 78 N. Y. 356.

*Supervisor.*—A supervisor is an elective officer under the Constitution (article 3, § 26), and the office is therefore within the provision of § 5 relative to the tenure of an elective officer appointed to fill a vacancy. Accordingly it was held in *People ex rel. Howard* v. *Erie County* (1899) 42 App. Div. 510, 59 N. Y. Supp. 476, affirmed in (1899) 160 N. Y. 687, 55 N. E. 1099, that the term of a supervisor of a ward in Buffalo, appointed to fill a vacancy, expired at the end of the calendar year in which the vacancy might have been filled by election, and that a person chosen at such election was entitled to the office as against the appointee. *People ex rel. Howard* v. *Wende* (1898) 25 Misc. 330, 53 N. Y. Supp. 1039, Spring, J.

*Surrogate.*—Construing the provision in the act of 1871, chap. 859, that a separate surrogate elected to fill a vacancy shall enter upon the duties of his office immediately upon receiving the certificate of his election, the court, in *People ex rel. Weller* v. *Townsend* (1886) 102 N. Y. 430, 7 N. E. 360, held that a person elected to fill such a vacancy was entitled to assume the duties of the office immediately, and to discharge the duties thereof until the 1st of January following, when his regular term of six years would begin. "The entire scope and theory of the Constitution, . . . requires those [elective] offices when vacant to be filled by the people at their regular annual election when it is possible to do so, but when a departure from that mode is rendered necessary by any circumstance, the power of selection is limited to the shortest space of time possible, and a return to the elective principle at the earliest opportunity is necessitated."

**§ 6. [*Political year.*]—The political year and legislative term shall begin on the first day of January; and the**

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legislature shall, every year, assemble on the first Wednesday in January.

[Const. 1821, art. 1, § 14; 1846, art. 10, § 6.]

In *People ex rel. Pond* v. *Monroe County* (1892) 65 Hun, 263, 281, 19 N. Y. Supp. 978, the court, quoting this section, say that "the legislative term . . . may begin before the meeting of the legislature. It begins and ends with the year, and the life of a legislature also ends with the year." This subject has already been considered from another point of view in a note to article 3, § 7, relating to appointments of members of the legislature to civil offices.

§ 7. [*Removals.*]—Provision shall be made by law for the removal for misconduct or malversation in office of all officers, except judicial, whose powers and duties are not local or legislative, and who shall be elected at general elections, and also for supplying vacancies created by such removal.

[Const. 1846, art. 10, § 7.]

Various statutes, which should be consulted, have been passed for the purpose of complying with this section.

§ 8. [*Legislature may determine vacancies.*] — The legislature may declare the cases in which any office shall be deemed vacant when no provision is made for that purpose in this Constitution.

[Const. 1846, art. 10, § 8.]

It was a legitimate exercise of power under this section for the legislature to declare in the act of 1895, chap. 247, that, on the appointment of a president of the village of Saratoga Springs by the board of trustees, the term of a president previously elected by the people should cease and his office should thereupon become

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vacant. *People ex rel. Mitchell* v. *Sturges* (1898) 27 App. Div. 387, 50 N. Y. Supp. 5, affirmed in (1898) 156 N. Y. 580, 51 N. E. 295.

§ 9. [*Compensation.*]—No officer whose salary is fixed by the Constitution shall receive any additional compensation. Each of the other state officers named in the Constitution shall, during his continuance in office, receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed; nor shall he receive to his use any fees or perquisites of office or other compensation.

[Am. 1874.]

The salary of the governor, lieutenant governor, senators, and members of assembly is fixed by the Constitution. All other salaries are subject to statutory regulation within the limitations prescribed by the Constitution.

## ARTICLE XI.

### [MILITIA.]

§ 1. [*Militia; how constituted.*] — All able-bodied male citizens between the ages of eighteen and forty-five years, who are residents of the state, shall constitute the militia, subject, however, to such exemptions as are now or may be hereafter created by the laws of the United States, or by the legislature of this state.

[Const. 1777, art. 24; 1821, art. 7, § 5; 1846, art. 11, § 1.]

A general historical sketch of the militia will be found in the third volume, in connection with the revision of article 11 by the Convention of 1894. Questions relating to the militia are not often presented to the civil courts; the military tribunals possess ample jurisdiction, and their determinations are usually acquiesced in by the persons im-

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mediately interested and by the public. The governor, as commander in chief, has large executive powers in connection with the militia, and his decisions and orders relating to this subject are usually considered final, but the civil courts may and sometimes do assert jurisdiction in these cases.

Thus, in *People ex rel. Weeks* v. *Ewen* (1859) 17 How. Pr. 375, it is said (Clerke, J.) that the supreme court "has undoubtedly the power of redressing or remedying any usurpation or abuse of authority committed by any individual or association of individuals within the state. This power extends to all and over all, and certainly the military organization of the state is not exempt from it. To place that branch of the public service beyond the control and supervision of the tribunal possessing supreme original civil jurisdiction would be jeopardizing the civil rights of the citizens, and may, in the course of time, terminate in the ascendency of the military power and the subversion of constitutional government." The governor's power to consolidate military organizations was reviewed and sustained, and it was held that the consolidation did not impair the constitutional rights of any officer in such an organization.

*People ex rel. Sears* v. *Assessors* (1881) 84 N. Y. 610, holding that a statutory exemption of a member of the militia from jury duty and from certain tax assessments during his service does not create a contract, and that the legislature may repeal such exemptions without impairing any constitutional right, has already been cited in the note to article 3, § 1, under Obligation of Contracts.

Courts-martial are necessary incidents to the discipline of the militia, though not regarded as courts of justice within the prohibition of the Constitution. The provision in each Constitution requiring the militia to be disciplined implies that there must be some tribunal to enforce it. "These provisions in the Constitution are very ancient, and have always been the law of our state. . . . No court has ever questioned the right of these tribunals to exist and to exercise their authority within its proper limits." *People ex rel. Underwood* v. *Daniell* (1872) 50 N. Y. 274.

Considering, but not deciding, the question whether proceedings before a court-martial must be public, the court say that "it would be very inconvenient and produce great delay in the proceedings of courts-martial should they be required to hold their sittings in public. They pass upon each case as presented, and their delibera-

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tions must necessarily be in private." *Rathbun* v. *Sawyer* (1836) 15 Wend. 451.

§ 2. [*Active force, how enlarged.*] — The legislature may provide for the enlistment into the active force of such other persons as may make application to be so enlisted.

[New.]

The legislature of 1898 made a practical application of this section in the provisions contained in the Military Code, chap. 212, authorizing the enlistment of persons not included in the ordinary military class.

§ 3. [*Organization and maintenance.*] — The militia shall be organized and divided into such land and naval and active and reserve forces as the legislature may deem proper, provided, however, that there shall be maintained at all times a force of not less than ten thousand enlisted men, fully uniformed, armed, equipped, disciplined, and ready for active service. And it shall be the duty of the legislature at each session to make sufficient appropriations for the maintenance thereof.

[New.]

The provision in this section requiring the legislature to make sufficient annual appropriations for the maintenance of the militia is not exclusive, and does not prevent the legislature from charging upon counties the expense of maintaining armories. The militia of the state does not benefit all localities alike, and "the legislation making a part of its maintenance a local charge is a legitimate exercise of the power of taxation vested in the legislature." *Bryant* v. *Palmer* (1897) 152 N. Y. 412, 46 N. E. 851, affirming also *Goedel* v. *Palmer* (1897) 15 App. Div. 86, 44 N. Y. Supp. 301.

§ 4. [*Governor to appoint certain militia officers.*]— The governor shall appoint the chiefs of the several staff

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departments, his aides-de-camp and military secretary, all of whom shall hold office during his pleasure, their commissions to expire with the term for which the governor shall have been elected; he shall also nominate, and with the consent of the senate appoint, all major generals.

[Const. 1777, art. 24; 1821, art. 4, § 2; 1846, art. 11, § 3.]

The governor has no power to appoint a major general during the recess of the senate, except in time of war. *People* v. *Molyneux* (1869) 40 N. Y. 113.

§ 5. [*Other officers, how chosen.*] — All other commissioned and noncommissioned officers shall be chosen or appointed in such manner as the legislature may deem most conducive to the improvement of the militia, provided, however, that no law shall be passed changing the existing mode of election and appointment unless two thirds of the members present in each house shall concur therein.

[Const. 1777, art. 24; 1821, art. 4, § 3; 1846, art. 11, §§ 4, 6.]

The disbandment of a militia company by the governor's order does not work a removal of a commissioned officer of the company. "The deprivation of an officer of command is not a removal from his office. An officer rendered supernumerary by the disbandment of the organization in which he holds command does not thereby lose his rank or commission. He is relieved from active service until he shall be assigned to duty again by the commander in chief, or is appointed or elected to another command." An officer retains his office so long as he retains his commission. *People ex rel. Leo* v. *Hill* (1891) 126 N. Y. 497, 27 N. E. 789, citing *People ex rel. Lockwood* v. *Scrugham* (1857) 25 Barb. 217; *People ex rel. Weeks* v. *Ewen* (1859) 17 How. Pr. 375.

§ 6. [*Removals.*]—The commissioned officers shall be commissioned by the governor as commander in chief. No commissioned officer shall be removed from office dur-

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ing the term for which he shall have been appointed or elected, unless by the senate, on the recommendation of the governor, stating the grounds on which such removal is recommended, or by the sentence of a court-martial, or upon the findings of an examining board organized pursuant to law, or for absence without leave for a period of six months or more.

[Const. 1777, arts. 23, 24; 1821, art. 4, § 4; 1846, art. 11, § 5.]

This section was considered in *People ex rel. Lockwood* v. *Schrugham* (1855) 12 How. Pr. 125 (Sp. T.) where it was held by S. B. Strong, J., that the governor could not, under the act of 1854, chap. 398, by issuing a commission to a brigadier general, thereby effect the removal of an incumbent lawfully chosen and in office under previous statutes. The officer could be removed only in the manner prescribed by the Constitution.

"With all his powers as commander in chief, the governor cannot remove a commissioned officer of the national guard in time of peace without the findings of an examining board, except for absence without leave, although the senate may remove upon his recommendation. When judgment of removal is pronounced by a court-martial, it takes effect *ex proprio vigore*, upon the simple approval of the governor, without further action on his part. The Constitution surrounds every commissioned officer with these safeguards against the exercise of arbitrary power, and protects him until he is adjudged guilty either . . . of a want of moral character, capacity, or general fitness for the service, cognizable by a board of examination. . . . No appeal is authorized by the Military Code, and the judgments of all military tribunals are kept secret until published in orders as approved, modified, or disapproved, by the officer directing the investigation." The determinations of military tribunals are subject to review by means of the "ancient and important" writ of certiorari. This review "does not substitute the judgment of the civil court for that of the military court upon the evidence or the merits, but inquires into the jurisdiction of the subject-matter, the exercise of authority in relation to the subject-matter, according to law, the violation of any rule of law to the prejudice of the relator, and the like." The relator had been removed by the governor's order, based upon the decision of an examining board. The court say that the governor is not a



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proper party to the certiorari proceedings, that the writ should be directed to the officer or body whose decision is to be reviewed, which in this case was the examining board; that the action of the governor was executive, while that of the board was judicial, and that a reversal of the decision of the examining board would render the order of removal void. *People ex rel. Smith* v. *Hoffman* (1901) 166 N. Y. 462, 54 L. R. A. 597, 60 N. E. 187.

## ARTICLE XII.

### [CITIES AND VILLAGES.]

§ 1. [*Organization; restriction of powers.*] — **It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations.**

[Const. 1846, art. 8, § 9.]

The legislature of 1903 adopted an amendment to this section, adding the following provision, and directed its submission in 1905:

**And the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare, and safety of persons employed by the state or by any county, city, town, village, or other civil division of the state, or by any contractor or subcontractor performing work, labor, or services for the state, or for any county, city, town, village, or other civil division thereof.**

See last paragraph of preface to this volume.

In the chapter on the Convention of 1846 will be found a sketch of the discussion relating to propositions to incorporate cities and villages by general laws, and also

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the proposition to regulate municipal assessments, which discussion finally resulted in the adoption of this section, which became § 9 of article 8. These subjects have frequently received legislative and judicial attention. The general village laws of 1847, 1870 and 1897 are expressions of legislative opinion in the direction of the organization of this class of municipal corporations by general laws, but it has not seemed practicable to apply the same rule to the organization of cities, except in a limited degree, as expressed in the charter for second class cities, passed in 1898. This section of the Constitution is little more than an admonition to the legislature, especially so far as relates to the organization of cities and villages, for it imposes no restriction on the method or details of organization, and the legislature is left free to use its discretion as to their form of government and the powers and functions to be vested in them, with such variety as local circumstances may suggest. Municipal organization has been a fruitful source of discussion since 1846, more particularly as to cities, for villages were removed from the field of debate by the amendment of 1874, prohibiting the incorporation of villages by special law.

This section relates not only to organization, but imposes upon the legislature the duty of regulating municipal affairs, with special reference to taxation and the creation of municipal obligations. In *People ex rel. Griffin* v. *Brooklyn* (1851) 4 N. Y. 419, 440, 55 Am. Dec. 266, Judge Ruggles, who had been a member of the Convention of 1846, referred to the action of the Convention resulting in the adoption of this section, and said that "the direction given to restrict the power of cities and villages to make assessments presupposes and admits the existence of a power to be restricted. The Constitution, therefore, in this section recognizes and affirms the validity of the legislation by which city and village assessments for local purposes . . . are authorized."

In *Clark* v. *Rochester* (1856) 13 How. Pr. 204, Justice W. F. Allen, considering a question of municipal power, says that a muni-

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cipal corporation can only be formed for political purposes, and invested with such powers as are necessary or incidental to the purposes of a local government; that "the sovereign power by which the corporation is created may repeal, alter, or modify the charter;" and that this section of the Constitution "was designed for the protection of the taxpayers in cities and villages against unwise and inexpedient taxation, for purposes within the scope of the ordinary municipal legislature, and imposes a duty upon the legislature in respect to it. . . . A discretion is vested in the legislature as to the restriction, but none whatever in regard to the granting of new and enlarged powers in respect to taxation and the creation of debts." See also *Grant* v. *Courter* (1857) 24 Barb. 232, 241.

A similar view of the relation sustained by a municipal corporation to the state was expressed in *People ex rel. Rochester* v. *Briggs* (1872) 50 N. Y. 553, 558, where Chief Judge Church says that "a municipal corporation is a part of the governmental machinery of the state, organized not for the purpose of private gain, like private corporations, but for the purpose of exercising certain functions of government within a specified locality; and it possesses such powers, and such only, as are conferred upon it by the legislature; and they are to be exercised in such form, mode, and manner, and by such agencies as the legislature may, from time to time, prescribe, within the limits of the Constitution."

This section should be read in connection with § 10 of article 8, restricting local indebtedness. In *Benson* v. *Albany* (1857) 24 Barb. 248, the opinion is expressed that "the character and extent of the restrictions to be imposed is, from the very nature of the case, entirely a matter of legislative discretion, and, like all discretionary power, not the subject of review or reversal by any judicial tribunal. . . . To restrict means to limit, to confine. The question then presented is between conferring limited or unlimited, restricted or unrestricted, power."

The court of appeals had occasion to consider this section in *Bank of Rome* v. *Rome* (1858) 18 N. Y. 38, where it is said that it is manifest from the terms of the provision that the powers specified in the section were, "in some cases, at least, and to some extent, still to exist, for the direction is neither to abrogate existing powers, nor to abstain from creating new ones; but only to restrict them so as to prevent abuses in assessments and contracting debts. Indefinite as is the rule of restriction prescribed by this provision, and ill-suited in its terms to be judicially applied, it is still both salutary and well-suited to be the guide of legislative discretion."

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The provision "does not set forth any rule by which a court can adjudge an act of the legislature to be void."

The same court considered this subject again in *Bank of Chenango* v. *Brown* (1863) 26 N. Y. 467, and there said that "the power to pass a general act for the incorporation of villages does not result from the directions contained in the Constitution that the legislature 'shall provide for the organization of cities and incorporated villages,' or that 'corporations may be formed under general laws,' but from the general authority of the legislative body."

The authority of the legislature in relation to local municipal administration was involved in *Clarke* v. *Rochester* (1864) 28 N. Y. 605, 634, in which the court construed the same statute that was the subject of consideration by Justice W. F. Allen in the case above cited, but with an opposite result. The court of appeals, sustaining the statute authorizing the city of Rochester to subscribe for railroad stock, say that "while general statutes must be enacted by the legislature, it is plain the power to make local regulations, having the force of law in limited localities, may be committed to other bodies representing the people in their local divisions, or to the people of those districts themselves. Our whole system of local government in cities, villages, counties, and towns depends upon that distinction. The practice has existed from the foundation of the state, and has always been considered a prominent feature in the American system of government." This section contains "an irresistible implication that the authority to lay local taxes and to borrow money for local objects may be constitutionally committed to local boards or councils within the cities and villages."

A statute (1870, chap. 383) authorizing the mayor and comptroller of New York to fix the salaries of justices of district courts was sustained in *Quinn* v. *New York* (1872) 63 Barb. 596, affirmed in (1873) 53 N. Y. 627, as a valid delegation of legislative power.

"It is a general rule that the legitimate object of raising money by taxation is for public purposes and the proper needs of government, general and local, state and municipal. . . . The legislature may not empower a majority to compel a minority to enter into a private business, whether the form of effecting the end be by a direct statute, or through the operation of taxation." *Weismer* v. *Douglas* (1876) 64 N. Y. 91, 21 Am. Rep. 586.

The legislature has power to repeal a village charter. *Blauvelt* v. *Nyack* (1876) 9 Hun, 153.

The provision in this section authorizing the legislature to restrict a city's power of taxation and assessment, and to prevent abuses

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in assessments, does not prevent the legislature from restricting "the power of the courts to disturb assessments when made by a provision in a city charter." *Re Mead* (1878) 74 N. Y. 216.

"There is no limitation in the Constitution which at all affects the right of the legislature to place the power of determining the amounts to be raised for municipal purposes in the hands of such municipal officers as they may see fit, and their power, unless so limited, has been held to be, . . . in all respects relating to taxation, supreme." *Townsend* v. *New York* (1878) 16 Hun, 362, affirmed in (1879) 77 N. Y. 542, sustaining the act of 1873, chap. 779, creating a board of estimate and apportionment for the city of New York.

The act of 1875, chap. 2, which ratifies and confirms the proceedings of the common council in the matter of the repairs of the Hamburg turnpike, does not violate the provision of this section requiring the legislature to restrict local assessments. This section "is not a limitation upon the legislature in the exercise of the legislative discretion and power to tax and assess; it is a limitation only upon its power to delegate authority to cities and villages to tax and assess." *Tifft* v. *Buffalo* (1880) 82 N. Y. 204. See also *Re Livingston Street* (1880) 82 N. Y. 621; *Sweet* v. *Syracuse* (1891) 129 N. Y. 316, 331, 27 N. E. 1081, 29 N. E. 289.

"A municipal corporation possesses not only the powers specifically conferred upon it by its charter, but also such as are necessarily incident to, or may fairly be implied from, those powers, including all that are essential to the declared object of its existence. . . . An ordinance adopted by such a corporation, pursuant to authority expressly delegated by the legislature, has the same force within the corporate limits as a statute passed by the legislature itself." *Carthage* v. *Frederick* (1890) 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; *People ex rel. Oak Hill Cemetery Asso.* v. *Pratt* (1891) 129 N. Y. 68, 29 N. E. 7, as to ordinances regulating the use of cemeteries; *Consumers' Gas & Electric Light Co.* v. *Congress Spring Co.* (1891) 61 Hun, 133, 15 N. Y. Supp. 624.

The power of the legislature to prescribe the qualifications of voters on propositions involving municipal taxation was considered by the court of appeals in *Spitzer* v. *Fulton* (1902) 172 N. Y. 285, 92 Am. St. Rep. 736, 64 N. E. 957. It is there said that article 2, relating to suffrage, and this section, relating to restrictions on municipal taxation, should be read together. "By the latter section the manner of restraining municipal corporations from contracting

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debts and of preventing abuses in that regard is left to the sound discretion of the legislature, and was to be controlled by such legislation as it should deem proper, and which tended to secure that end. What better or more effective method of preventing such abuses and protecting such taxpayers could be devised than to restrict the right of voting upon propositions for borrowing money or for contracting debts to the persons who are liable to be taxed for the payment of such debts? Indeed, the proposition that the incurring of such indebtedness shall be sustained only when a majority of the taxable inhabitants shall vote in its favor seems not only to be pre-eminently just, but such has been the method which has hitherto been generally, if not universally, adopted by the legislature to restrain the various villages of the state in their power of borrowing money or contracting debts so as to prevent such abuses. . . . The established policy of this state has been to limit the right of suffrage as to the business or financial affairs of its various villages to the taxpayers of the municipality, and it has never been its policy to confide their financial affairs to the general voters therein."

The legislature may authorize the remission of a portion of a municipal tax. *Wallerstein* v. *Bohanna* (1889) 1 Silv. Sup. Ct. 363, 24 N. Y. S. R. 814, 5 N. Y. Supp. 319, affirmed in (1890) 125 N. Y. 696, 26 N. E. 141.

§ 2. [*City laws; referendum.*] — All cities are classified according to the latest state enumeration, as from time to time made, as follows: The first class includes all cities having a population of two hundred and fifty thousand, or more; the second class, all cities having a population of fifty thousand and less than two hundred and fifty thousand; the third class, all other cities. Laws relating to the property, affairs, or government of cities, and the several departments thereof, are divided into general and special city laws; general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a class. Special city laws shall not be passed except in conformity with the provisions of this section. After any bill for a special city law, relating to a city, has been

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passed by both branches of the legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of such city, and, within fifteen days thereafter, the mayor shall return such bill to the house from which it was sent, or, if the session of the legislature at which such bill was passed has terminated, to the governor, with the mayor's certificate thereon, stating whether the city has or has not accepted the same.

In every city of the first class, the mayor, and in every other city, the mayor and the legislative body thereof concurrently, shall act for such city as to such bill; but the legislature may provide for the concurrence of the legislative body in cities of the first class. The legislature shall provide for a public notice and opportunity for a public hearing concerning any such bill in every city to which it relates, before action thereon. Such a bill, if it relates to more than one city, shall be transmitted to the mayor of each city to which it relates, and shall not be deemed accepted unless accepted as herein provided by every such city. Whenever any such bill is accepted as herein provided, it shall be subject, as are other bills, to the action of the governor. Whenever, during the session at which it was passed, any such bill is returned without the acceptance of the city or cities to which it relates, or within such fifteen days is not returned, it may nevertheless again be passed by both branches of the legislature, and it shall then be subject, as are other bills, to the action of the governor. In every special city law which has been accepted by the city or cities to which it relates, the title shall be followed by the words "accepted by the city," or "cities," as the case may be; in every such law which is passed without such acceptance, by the words "passed without the acceptance of the city," or "cities," as the case may be.

[New.]

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The history of this section will be found in the chapter on the Fourth Constitution, 1894. The scope and purpose of the new provision are there fully set forth both in the debates and in various propositions submitted to the consideration of the Convention. The new provisions seem to be clearly stated, and the courts have apparently had no difficulty in construing them. The questions that have received judicial attention relate substantially to the application of the section to particular legislation with a view of determining whether, in a given case, a bill should or should not have been submitted to the city, and, in the course of their opinions, the judges have taken occasion to make some general observations concerning the section.

Thus, in the *Einsfeld Case* (1896) 149 N. Y. 367, 32 L. R. A. 344, 44 N. E. 146, Chief Judge Andrews says that the "manifest purpose" of the new provision "is to give some measure of protection to cities against the evils of special city legislation."

In *Chrystal* v. *New York* (1901) 63 App. Div. 93, 71 N. Y. Supp. 352, Justice Ingraham says the object of the section is "to allow a city of the state information of acts before the legislature solely affecting its interest, and an opportunity to communicate to the legislature any objection which existed to the passage of the proposed act. It provided that, before the legislature passed such an act, it should be communicated to the city authorities, so that they could communicate to the legislature any objection that existed to the passage of the act. Many acts had been passed imposing obligations upon the cities of the state without the cities affected having an opportunity to protest against the legislation."

In *Sun Printing & Pub. Asso.* v. *New York* (1896) 8 App. Div. 230, 40 N. Y. Supp. 607, Justice Barrett expresses the opinion that the classification of cities "has

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no relation to general, private, and local laws, as these terms are used in other provisions of the Constitution. The classification was simply for the purpose of regulating the passage of special city laws, and of giving the local authorities a proper opportunity of asserting themselves with regard thereto. The division in this section of laws relating to cities into general city laws and special city laws was certainly not intended to affect the well-established meaning of general, private, and local laws under existing adjudications."

Coming to the position of legal adviser to the governor at the beginning of the year 1895, when the new Constitution took effect, it became my duty to assist in establishing a policy concerning the treatment of bills relating to cities. The Statutory Revision Commission, of which I was chairman, was required to advise the legislature whenever requested, and so, between the two positions, I was brought into close relation with the subject of city legislation, particularly so far as it concerned the governor's action on bills. The first question to be considered by the governor is whether he has jurisdiction to act on a bill, and this, in the case of a bill affecting a city, requires him to determine whether such a bill should have been or has been submitted to the particular city supposed to be affected by it. In the great majority of city bills the question is clear; but in doubtful cases it was customary for the legislature through its officers to obtain the opinion of the revision commission whether the bill should be transmitted to a city, and, after adjournment, the clerks of the two houses attended to this matter, and transmitted bills if this course was deemed necessary.

My service in the positions mentioned covered six legislative sessions,—from 1895 to 1900, inclusive. A policy which might be called rather rigid was adopted in reference to this class of bills, and usually the city was given

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the benefit of the doubt, and the bill was transmitted for the action of the city authorities, which, if favorable, would obviate any possible question as to the governor's jurisdiction; or, if the city's action was adverse, the legislature could pass the bill again with the same result as to the governor's jurisdiction.

City legislation during the period of my official service covered almost every possible aspect of city affairs. Greater New York was created, several cities were incorporated, many charters were revised, and there was a large body of laws relating to cities, sometimes appearing in independent statutes and sometimes in connection with general legislation. I think the following rules are fairly deducible from this section of the Constitution and from the judicial decisions applying its provisions in particular cases.

*Rule one.*—A bill amending or revising a city charter is a city bill under this section, and its transmission to the city is a prerequisite to the governor's jurisdiction. This manifestly does not include original charters, for until the bill becomes a law there is no charter and no city to which a bill may be sent.

In *People ex rel. Rochester* v. *Briggs* (1872) 50 N. Y. 553, Chief Judge Church formulates a definition of a charter which may be useful in connection with this rule and the next. He says "the charter, as it is called, consists of the creative act and all laws in force relating to the corporation, whether in defining its powers or regulating their mode of exercise;" and that "laws relating to any specified municipal corporation are those which create the body, or define and regulate its powers and prescribe the mode of their exercise, and, taken together, constitute, in a practical sense, its charter."

*Rule two.*—A bill directly affecting a city, although not a charter amendment, but appearing in an independent

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form, is a city bill. The act of 1895, chap. 235, providing for the erection of an addition to the American Museum of Natural History in New York, under city supervision, belongs to this class. It is not a charter amendment, but imposes duties on city officers and requires the issue of city bonds.

The act of 1895, chap. 167, authorizing an action against the city of New York to recover sums alleged to be due on account of the erection of a city market, and containing various provisions concerning the rights of the parties, comes under this rule. It was not transmitted to the city, but in *Chrystal* v. *New York* (1901) 63 App. Div. 93, 71 N. Y. Supp. 352, it was said to be a special city law, and should have been transmitted to the city for the reason, as stated by the court, that it related to the property, affairs, or government of the city.

In *Exempt Firemen Asso.* v. *Exempt Firemen's Benev. Fund* (1898) 34 App. Div. 138, 54 N. Y. Supp. 621, it was held that the act of 1896, chap. 141, relating to the disposition of the percentage of premiums collected on foreign insurance in Long Island City, was a special city law and should have been transmitted to the city. It related to the property and affairs of the city, and devoted the money collected from such insurance to the use of a special department of the city.

*Rule three.*—A bill amending a general law is a city bill if the new matter relates exclusively to a city, or to less than all the cities of a class.

The act of 1896, chap. 598, amending the acts of 1887 and 1888 relating to the relief of veterans, which added a new section covering cities with a population of less than 100,000, is an illustration of this rule. This affected all the cities of the third class, but, by the provision of this section of the Constitution, it was not necessary to send the bill to any city in that class. The bill was deemed to

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affect a part of the cities in the second class,—those having a population less than 100,000,—and it was therefore sent to those cities. Several instances of this class of legislation may be found, including a few Code amendments.

*Rule four.*—A bill enacting or amending a general law affecting all parts of the state, or various parts not included in cities, but containing provisions relating to particular cities, need not be sent to any city.

An illustration of this rule is the act of 1895, chap. 811, amending the excise law of 1892, chap. 401, providing for a graduated compensation of excise commissioners in cities according to a scale of population different from that prescribed in the classification of cities under this section. The act affected the entire state, including the compensation of commissioners in towns, and was therefore a general law, and not a city bill, although different cities were differently affected by it.

The liquor tax law of 1896, chap. 112, belongs to this class. It affected the whole state, but in different parts of the state established a varying fee for liquor tax certificates. In *People ex rel. Einsfeld* v. *Murray* (1896) 149 N. Y. 367, 32 L. R. A. 344, 44 N. E. 146, it was held that this was not a general or special city law under this section, and that it was not necessary to send it to any city. The court say that "whether the law should be uniform in its application to the cities of the state, or whether a discrimination should be made in the excise tax as between New York and any other city, and the extent of the discrimination, was in the discretion of the legislature. In enacting a general law under the police power, the legislature is not hampered or restrained by the classification of cities in the Constitution. It may adjust details to meet varying conditions. . . . The constitutional limitation relates to city laws, either general or special, and not to general laws for the government of the state,

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including the cities therein." It may be added that the governor's jurisdiction is a unit, and cannot be divided. Except appropriation bills, the governor must approve or reject a bill as a whole. He cannot, therefore, have jurisdiction of a part of a bill and no jurisdiction of the remainder.

The act of 1896, chap. 823, to regulate barbering on Sunday, in which New York and Saratoga Springs were excepted from its operation during certain hours, was deemed sufficiently doubtful to warrant its transmission to the city, so that no question might be raised under this section. But, in *People ex rel. Hobach* v. *Kings County* (1895) 13 Misc. 587, 35 N. Y. Supp. 19, Justice Brown held that it was not a special city law, and need not have been sent to the city. He says "the legislature, in passing laws that affect cities, are not confined to the enactment of city laws. It is only when a bill relates to the property, affairs, or government of cities, or some department thereof, that it falls within the classification" of this section.

*Rule five.*—A bill relating primarily to a county embraced in the city of New York, and affecting the city government only incidentally, is not a special city law, and need not be sent to the city.

This rule seems to be established by *McGrath* v. *Grout* (1902) 171 N. Y. 7, 63 N. E. 547, in which it is held that the acts of 1901, chapters 704, 705, and 706, providing that the sheriff, register, and county clerk of Kings county should thereafter receive salaries in lieu of fees, are not special city laws under this section. The fees received by these officers in the course of business were to be paid into the city treasury, and the salaries were to be paid by the city from taxes collected by city machinery. The court deems the city a state agency for the purpose of carrying the act into effect and administering its provi-

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sions. The primary object of the bill is the regulation of the compensation of certain county officers who are not in any way connected with the city government. The state has a right to employ a city as an agency in such a case, and the act does not thereby become one which, under this section, relates to the property, affairs, or government of the city.

*Rule six.*—A bill must be returned to the legislature or to the governor within fifteen days from the date of its transmission by the clerk.

Thus, if a bill is transmitted on the first day of the month it must be returned to the legislature or to the governor not later than the 16th. I am not aware of any judicial construction of this provision, but the rule is perfectly clear. The Constitution requires the bill to be transmitted by the clerk, and requires its return within fifteen days "thereafter," which means after that time; namely, after the date of transmission.

"Return" means to deliver back into the possession of the clerk who sent the bill, or, after adjournment, into the possession of the governor, and, by strict construction of the Constitution, possession of the bill by the clerk or the governor should be actual and complete before the expiration of the fifteen days. It sometimes happens, however, that a bill transmitted by the mayor in time is delayed in transit, and does not reach the clerk or governor within the fifteen days. Thus, a bill may be received at the postoffice or express office in Albany on the last day, but too late to be delivered at the capitol. Under these circumstances a rule, which seems reasonable, has been adopted that the postmaster or express company shall be deemed the agent of the clerk or governor for the purpose of receiving the bill, and that such receipt by the postmaster or express company within the fifteen days, but not afterwards, shall be deemed a receipt by the clerk or

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the governor, and a compliance with the provision of the Constitution relating to the return of bills. Sometimes a bill is returned by messenger, and in such cases it must, within the fifteen days, be actually delivered to the clerk or the governor.

This construction of the provision relative to returning a bill within fifteen days is expressed in § 33 of the general city law (Laws 1900, chap. 327) which provides that the mayor, after a hearing on the bill, and "within fifteen days after the transmission to him of a certified copy of such bill, shall return the same" to the legislature or the governor; making the computation of time begin with the date of transmission. The Constitution and the statute both require a certificate by the mayor to accompany the returned bill, showing the action taken thereon by the city authorities. Sometimes this certificate is inadvertently omitted or defectively executed. In such cases, if the bill is actually returned within the prescribed time, defects in certificates may be supplied for the purpose of perfecting the evidence relating to the bill. The statute requires city certificates to be under the seal of the city. This is not required by the Constitution, and the statute provision would probably be deemed directory.

*Rule seven.*—If a bill is returned within the fifteen days not accepted, or if it is returned after the expiration of the fifteen days, it may, in either case, be passed again by the legislature, and the governor can acquire no jurisdiction of it without such second passage.

*Rule eight.*—If the legislature adjourns after a bill has been transmitted to a city, and before the expiration of the fifteen days, or before the bill has been returned, the bill must, in either case, be returned to the governor.

*Rule nine.*—If a bill is returned to the governor within the fifteen days, accepted by the city, his jurisdiction is complete; but if it is returned not accepted, or without

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action by the city, or is not returned within the fifteen days, he has no jurisdiction to act upon it.

In 1895 Governor Morton was strongly urged to approve a bill which, after adjournment, was returned within the fifteen days, but without any certificate showing the action, if any, which had been taken upon it by the city authorities. He declined to approve the bill on the ground that he had no jurisdiction of a bill returned after adjournment, unless it had been actually accepted by the city.

*Rule ten.*—The governor's time (thirty days) for the consideration of bills after adjournment of the legislature is not extended by the fact that city bills may not be sent to the cities affected until after such adjournment. The legislature usually passes a large number of bills during the last few days of the session, and it is often not practicable to transmit city bills until after adjournment. The time occupied by city authorities in considering a bill under these circumstances may materially reduce the thirty-day period. It frequently happens that several days after adjournment a bill is found in the executive chamber which should have been sent to a city. It is then sent, although late, and sometimes is not returned until near the close of the thirty day period. Practically the governor need not be seriously embarrassed by this situation, for he may anticipate favorable action by the city and examine the bill pending its local consideration, and be prepared to pass upon it when it is returned.

*Rule eleven.*—The court may, in the absence of other evidence, rely upon the indorsement on a statute as printed in the session laws in determining whether a bill has been sent to a city. This rule seems to be sustained by *Exempt Firemen Asso.* v. *Exempt Firemen's Benev. Fund* (1898) 34 App. Div. 138, 54 N. Y. Supp. 621, where the court say that, in the absence of the indorse-



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ment required by the Constitution, "we must assume that the act was never transmitted to the mayor of the city," and "as it appears by the session laws that there was no such transmission, and neither acceptance nor nonacceptance by the city, we hold that the act was not passed in accordance" with this section. But the evidence of nontransmission appearing on the face of the act must be deemed only presumptive, and not conclusive, and the court would doubtless receive proof to show that a bill had actually been accepted by the city, and that the statement of that fact had been inadvertently omitted. The certificate of acceptance or nonacceptance is attached to the bill, and goes with it to the office of the secretary of state. The evidence of transmission and the subsequent action is therefore available. Evidence is also admissible to show that a statement that the city has accepted a law is erroneous, and that the bill was in fact rejected. The statements required by the Constitution to be indorsed on city bills are not conclusive. Errors on both sides of the proposition occurred during my official experience, but there was no occasion to submit the matter to the courts, and the validity of the statutes was not questioned by those familiar with the facts.

§ 3. [*City officers, when to be elected.*]—All elections of city officers, including supervisors and judicial officers of inferior local courts, elected in any city or part of a city, and of county officers elected in the counties of New York and Kings, and in all counties whose boundaries are the same as those of a city, except to fill vacancies, shall be held on the Tuesday succeeding the first Monday in November in an odd-numbered year, and the term of every such officer shall expire at the end of an odd-numbered year. The terms of office of all such officers elected before the first day of January, one thousand eight hundred and ninety-five, whose successors have not then been

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elected, which, under existing laws, would expire with an even-numbered year, or in an odd-numbered year and before the end thereof, are extended to and including the last day of December next following the time when such terms would otherwise expire; the terms of office of all such officers which, under existing laws, would expire in an even-numbered year, and before the end thereof, are abridged so as to expire at the end of the preceding year. This section shall not apply to any city of the third class, or to elections of any judicial officer, except judges and justices of inferior local courts.

[New.]

A justice of the peace in Brooklyn is a judicial officer of an inferior local court within the meaning of this section, and his term of office is therefore controlled by the provision requiring it to expire in an odd-numbered year. The term of such a justice, which, by the statutes in force at the time of his election, would have expired April 30, 1896, was held to have been abridged by this section, and to have expired on the 31st day of December, 1895. *Petterson* v. *Welles* (1896) 1 App. Div. 8, 36 N. Y. Supp. 1009; *Murphy* v. *Snitzpan* (1896) 15 Misc. 496, 36 N. Y. Supp. 1013.

The provision requiring county officers in the counties of New York and Kings to be elected in odd-numbered years was considered in *People ex rel. Eldred* v. *Palmer* (1897) 154 N. Y. 133, 47 N. E. 1084, involving the validity of the act of 1896, chap. 772, fixing the term of the district attorney of Kings county at four years, and it was there held that the provision in article 10, § 1, prescribing a term of two or four years for county officers in these counties, was necessary to carry into effect the mandate of this section.

In *Re Schultes* (1898) 33 App. Div. 524, 54 N. Y. Supp. 34, it was held that the legislature had power, by the Greater New York charter of 1897, to consolidate various local courts creating the municipal court, and provide for the appointment of additional justices whose terms of office should expire at the end of the year 1899, and that an election for the successors of these appointees could not be held in 1898.

Vacancies in office may be filled in even-numbered years. This section specifically excepts elections to fill vacancies from the re-

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quirement that officers included in it must be elected in odd-numbered years. *People ex rel. Howard* v. *Wende* (1898) 25 Misc. 330, 53 N. Y. Supp. 1039; *People ex rel. Howard* v. *Erie County* (1899) 42 App. Div. 510, 59 N. Y. Supp. 476, affirmed in (1899) 160 N. Y. 687, 55 N. E. 1099. See also *People ex rel. Ward* v. *Scheu* (1901) 167 N. Y. 292, 60 N. E. 650, in which it is held that the provision relating to elections to fill vacancies is not mandatory, but permissive.

The provision in this section that the term of city officers shall expire at the end of an odd-numbered year was considered in *People* v. *Fitzgerald* (1904) 96 App. Div. 242, 89 N. Y. Supp. 268, affirmed in (1905) 180 N. Y. 269, 73 N. E. 55, and it was there said that the term of such an office expires at midnight on the last day of December. It was accordingly held that § 94 of the Greater New York charter (1901, chap. 466), which provides that the mayor shall hold office for two years, commencing at noon on the first day of January following his election, could not be construed to carry the term beyond midnight of the last day of December.

## ARTICLE XIII.

### [Official Oath; Bribery; Passes.]

§ 1. [*Oath of office.*]—Members of the legislature, and all officers, executive and judicial, except such inferior officers as shall be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the state of New York, and that I will faithfully discharge the duties of the office of ————, according to the best of my ability;" and all such officers who shall have been chosen at any election shall, before they enter on the duties of their respective offices, take and subscribe the oath or affirmation above prescribed, together with the following addition thereto, as part thereof:

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**"And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered, or promised to pay, contributed or offered or promised to contribute, any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote;" and no other oath, declaration, or test shall be required as a qualification for any office of public trust.**

[Const. 1821, art. 6, § 1; 1846, art. 12, § 1; Am. 1874.]

In the chapter on the Commission of 1872 I have quoted Mr. Dudley's proposition, amending this section by providing, among other things, that a false official oath should be deemed sufficient cause for removal, and, in a note to § 1 of article 10, have called attention to the fact that Governor Odell, in 1902, removed a sheriff substantially on the ground that he had taken a false oath.

The civil service acts (1884, chap. 410, and 1887, chap. 464) giving a preference to veterans are not a violation of the prohibition against any other oath or test. Qualifications relating only to fitness do not constitute a "test," nor can the preference given to veterans be deemed a "test" within the meaning of this provision. *Re Wortman* (1888) 22 Abb. N. C. 137, 2 N. Y. Supp. 324, Daniels, J., who gives an interesting sketch of the origin of the test oath imposed by the statute of Charles II., which is cited in the chapter on the Colonial Period.

The civil service act of 1883, chap. 354, Am. 1884, chap. 410, provided for a state civil service commission, to be composed of three members appointed by the governor, but not more than two of whom should be adherents of the same party. This provision was challenged as imposing an unconstitutional test under this section, but it was sustained in *Rogers* v. *Buffalo* (1890) 123 N. Y. 173, 9 L. R. A. 579, 25 N. E. 274, the court holding that "the imposing of a test, by means of which to secure the qualifications of a candidate for an appointive office, of a nature to enable him properly and intelligently to perform the duties of such office, violates no provi-

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sion of our Constitution." The court say that, looking at the question "as a matter of common sense, we are quite sure that the framers of our organic law never intended to oppose a constitutional barrier to the right of the people, through their legislature, to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office."

The provision of this section that no other oath, declaration, or test shall be required as a qualification for any office of public trust, was violated by the act of 1890, chap. 163, requiring an excise commissioner to file an oath that he had not been directly or indirectly engaged in the manufacture or sale of intoxicating liquors, and depriving him of his office unless he should take such oath. The constitutional provision does not "prohibit the legislature from prescribing qualifications as to fitness for office, but does prohibit requiring the candidate to take any oath or declaration as to such qualification or fitness; it may undoubtedly prescribe tests by which the candidate's fitness for the position aspired to may be demonstrated, and it may impose certain conditions as to experience or fitness, as in requiring that the holder of certain offices shall be above the age of twenty-one years, that inspectors of election shall be able to read and write, that the holders of specific offices shall be civil engineers, or attorneys and counselors at law, but it prohibits the requiring of any qualifications which are measured or determined by the oath or declaration of the candidate for office himself." *People ex rel. Bishop* v. *Palen* (1893) 74 Hun, 289, 26 N. Y. Supp. 225.

Section 41*x* of the Penal Code, which requires a candidate for office to file a sworn itemized statement of his election expenses, is repugnant to the provision prohibiting any additional oath, declaration, or test as a qualification for office. *Stryker* v. *Churchill* (1903) 39 Misc. 578, 80 N. Y. Supp. 588.

§ 2. [*Bribery of public officers.*]—Any person holding office under the laws of this state who, except in payment of his legal salary, fees, or perquisites, shall receive or consent to receive, directly or indirectly, anything of value or of personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action

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or omission to act is to be in any degree influenced thereby, shall be deemed guilty of a felony. This section shall not affect the validity of any existing statute in relation to the offense of bribery.

[Am. 1874, art. 15, § 1.]

The history of the bribery provisions of the Constitution will be found in former volumes. The subject engaged the attention of several conventions and legislatures, resulting in a new article which was included in the amendments adopted on the recommendation of the Commission of 1872.

§ 3. [*Bribery, how punished.*] — Any person who shall offer or promise a bribe to an officer, if it shall be received, shall be deemed guilty of a felony, and liable to punishment, except as herein provided. No person offering a bribe shall, upon any prosecution of the officer for receiving such bribe, be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor, if he shall testify to the giving or offering of such bribe. Any person who shall offer or promise a bribe, if it be rejected by the officer to whom it was tendered, shall be deemed guilty of an attempt to bribe, which is hereby declared to be a felony.

[Am. 1874, art. 15, § 2.]

In *People* v. *Sharp* (1887) 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319, will be found an interesting discussion of the question whether a witness may refuse to answer before a committee of the state senate appointed to investigate certain charges of bribery in the city of New York, but the case in the court of appeals does not directly involve this section. The general term ([1887]

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45 Hun, 461) had held that the section did not apply under the circumstances disclosed by the evidence.

§ 4. [*Witnesses.*]—Any person charged with receiving a bribe, or with offering or promising a bribe, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor.

[Am. 1874, art. 15, § 3.]

See note to § 2.

§ 5. [*Passes.*]—No public officer, or person elected or appointed to a public office, under the laws of this state, shall directly or indirectly ask, demand, accept, receive, or consent to receive for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege, or discrimination in passenger, telegraph, or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another. A person who violates any provision of this section shall be deemed guilty of a misdemeanor, and shall forfeit his office at the suit of the attorney general. Any corporation, or officer or agent thereof, who shall offer or promise to a public officer, or person elected or appointed to a public office, any such free pass, free transportation, franking privilege, or discrimination, shall also be deemed guilty of a misdemeanor, and liable to punishment except as herein provided. No person or officer or agent of a corporation giving any such free pass, free transportation, franking privilege, or discrimination hereby prohibited, shall be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor if he shall testify to the giving of the same.

[New.]

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This subject was considered in its relation to judicial officers by the Commission of 1890. Its consideration was renewed in the Convention of 1894, and the scope of the original proposition was greatly enlarged. A sketch of the discussion relating to it will be found in the chapter on that convention.

The term "public officer" as used in this section, includes a notary public, and he is subject to the prohibition against receiving or using passes. *People* v. *Rathbone* (1895) 145 N. Y. 434, 28 L. R. A. 384, 40 N. E. 395.

The prohibition applies also to a railroad policeman appointed under the provisions of the railroad law. *Dempsey* v. *New York C. & H. R. R. Co.* (1895) 146 N. Y. 290, 40 N. E. 867, but it was there held that a pass issued to a railroad policeman as part compensation for his services to the company was not a free pass within the meaning of this provision. It was not a favor or gift from the corporation. The action was by a policeman to compel the corporation to issue an annual pass as provided by the contract, and his right to the pass was sustained.

The state railroad commissioners are prohibited from accepting passes for their own private use, but they are entitled to transportation over the railroads of the state under § 169 of the railroad law, and for that purpose may accept passes signed by the secretary of state, as provided by the act. *Re Railroad Comrs.* (1895) 11 Misc. 103, 32 N. Y. Supp. 1115, Parker, J.

The prohibition of the Constitution applies to palace or sleeping cars. *People* v. *Wadhams* (1903) 176 N. Y. 9, 68 N. E. 65.

§ 6. [*District attorney's duty; expenses.*] — Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his county of any provision of this article which may come to his knowledge shall be removed from office by the governor, after due notice and an opportunity of being heard in his defense. The expenses which shall be incurred by any county in investigating and prosecuting any charge of bribery or attempting to bribe any person holding office under the laws of this state, within such county, or of receiving bribes by any

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such person in said county, shall be a charge against the state, and their payment by the state shall be provided for by law.

[Am. 1874, art. 15, § 4.]

The provision making the expenses in bribery cases a charge against the state does not apply to investigations of the character included in chapter 323, Laws of 1874, under which the expenses incurred in proceedings before the governor for the removal of a county officer are made a county charge, payable on the audit of the board of supervisors. *People ex rel. Benner* v. *Queens County* (1886) 39 Hun, 442. This provision in the act of 1874 has been continued in § 230, subd. 16 of the county law (1892, chap. 686).

## ARTICLE XIV.

### [AMENDMENTS AND CONVENTIONS.]

§ 1. [*Legislative amendments.*]—Any amendment or amendments to this Constitution may be proposed in the senate and assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election of senators, and shall be published for three months previous to the time of making such choice; and if, in the legislature so next chosen, as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of

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**the electors voting thereon, such amendment or amendments shall become a part of the Constitution from and after the first day of January next after such approval.**

[Const. 1821, art. 8, § 1; 1846, art. 13, § 1.]

It has been pointed out in former volumes that the first Constitution contained no provision for its own amendment, nor any provision authorizing a constitutional convention. The difficulties of the situation were appreciated when the Convention of 1801 was called, and again while the legislature was considering the question of holding a convention to revise the Constitution, which became the Convention of 1821. The latter convention authorized legislative amendments, but made no provision for future conventions. This section does not limit the number or character of legislative amendments, and the legislature may undoubtedly propose a new or revised constitution. This result was possible under the authority conferred on the Commission of 1872, which had general power to propose amendments to any part of the Constitution. It might have proposed a new constitution, and did propose numerous amendments to existing provisions, together with several additional sections which introduced new subjects. In the history of that commission the fact has been noted that the legislature considered the propriety of an extra session for the purpose of considering the amendments. Such a session would have been equivalent to a constitutional convention; for while the primary purpose of the session would have been the consideration of amendments proposed by the Commission, the legislature itself might have recommended amendments which did not originate in the Commission. While the legislature might make and propose a new constitution which the people would be bound to accept or reject, such legislative action would not be like-

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ly to receive popular approval, for the reason that the Constitution provides by the next section a means by which the people have the right to choose a convention for the express purpose of framing a constitution by delegates who would not possess any ordinary legislative power. The legislature is chosen for the purpose of making laws, and the power to propose constitutional amendments is only incidental.

The provision authorizing legislative amendments has now (1905) been in force eighty-two years. Many amendments have been proposed in the legislature; a few have been adopted by two legislatures, and not submitted to the people. Prior to 1905 thirty-four were submitted, besides the amendments of 1874, twenty-eight of which were approved; these appear in the Introduction. Six were rejected; namely, 1860, extending equal suffrage to colored persons; 1865, commission of appeals; 1892, transferring to courts the power to determine elections of members of the legislature; 1892, additional justices of the supreme court; 1892, authorizing the sale of the salt springs; and 1896, forest preserve.

A legislative amendment may be submitted at a general or a special election, and its submission may be postponed to a subsequent year, in the discretion of the legislature, but by § 6 of the election law it must be submitted at the first general election after its final adoption by the legislature, unless the legislature directs its submission at another time.

The legislature of 1903 adopted four amendments, all of which were to be submitted in 1905. The legislature of 1905 adopted three amendments, to be submitted at the general election in that year. These seven amendments, which may be found in this volume, affect respectively article 6, §§ 1 and 2, article 7, § 4, article 7, adding §§ 11 and 12, article 8, § 10, and article 12, § 1.

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§ 2. [*Conventions.*] — At the general election to be held in the year one thousand nine hundred and sixteen, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question, "Shall there be a convention to revise the Constitution and amend the same?" shall be decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election at which members of the assembly shall be chosen, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. Every delegate shall receive for his services the same compensation and the same mileage as shall then be annually payable to the members of the assembly. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the Constitution shall be submitted for approval to the electors as hereinafter provided, unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal to be kept. The convention shall have the power to appoint such officers, employees, and assistants as it may deem necessary, and fix their compensation, and to provide for the printing of its documents, journal, and proceedings. The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns, and qualifications of its members. In case of a vacancy by death, resignation, or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining

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delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large. Any proposed constitution or constitutional amendment which shall have been adopted by such convention shall be submitted to a vote of the electors of the state at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, in the manner provided in the last preceding section, such constitution or constitutional amendment shall go into effect on the first day of January next after such approval.

[Const. 1846, art. 13, § 2; Am. 1874, art. 16, § 1.]

The plan of holding a convention once every twenty years was included in the Constitution by the Convention of 1846. The subject is considered in the chapter on that convention. A proposition for a convention was accordingly submitted to the people in 1866 and adopted, and it was followed by the Convention of 1867. A similar proposition was submitted and adopted in 1886, but the convention was not held until 1894. The history of the intervening period will be found in previous volumes, and in the first part of the chapter on that convention some of the causes which led to the delay in holding the convention have been noticed. The work of the convention in revising this section, with the general purpose of making it self-executing so far as practicable, has also been described in that chapter.

The legislature may at any time submit to the people the question of holding a constitutional convention, but with the power to submit amendments, conferred on the legislature by the last section, it is not probable that an

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exigency will arise which will make an extraordinary convention necessary. Under this section the question of holding a convention will be submitted to the people in 1916; if the question is determined in the affirmative, delegates to a convention will be chosen at the general election in 1917, and the convention will be held in 1918.

If the convention should adjourn at least six weeks before the day of the general election in that year, its work would probably be submitted to the people at that election, and the new constitution or amendments would take effect on the first day of January, 1919. It is therefore probable that the present Constitution will, for the most part, continue in force until that time, and in its general features for a much longer period, for our constitutional policy is now so well established that the people are not likely to make many changes in its fundamental provisions, at least, so long as the chief characteristics of our political society continue in their present form.

§ 3. [*Coincident legislative and convention amendments.*]—**Any amendment proposed by a constitutional convention relating to the same subject as an amendment proposed by the legislature, coincidently submitted to the people for approval at the general election held in the year one thousand eight hundred and ninety-four, or at any subsequent election, shall, if approved, be deemed to supersede the amendment so proposed by the legislature.**

[New.]

This section originated in a peculiar situation presented in 1894. The legislature of that year, which adjourned before the Convention met, had submitted to the people an amendment relating to the county court in Kings county, and this amendment was to be voted on at the next general election. The Convention included the

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same proposition in the new Constitution. It could not prevent the submission of the independent amendment, but decided to nullify its effect by providing that the constitutional provision on the same subject should supersede such amendment. The provision relating to coincident amendments was also made general, and applicable to future cases.

## ARTICLE XV.

### [When Constitution to take Effect.]

§ 1. [*Time of taking effect.*]—This Constitution shall be in force from and including the first day of January, one thousand eight hundred and ninety-five, except as herein otherwise provided.

[New; temporary.]

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