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Volume 12

Constitutional Law, §§ 383 to End · to Contracts

A Comprehensive Text Statement of American Case Law
as Developed in the Cases and Annotations
in the Annotated Reports System

By the Editorial Staff of the Publishers

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XI. OBLIGATION OF CONTRACTS

A. GENERAL PRINCIPLES

§ 383. Terms and Scope of Constitutional Guaranties.—

The Federal Constitution provides particularly for the protection of the citizen in respect of his contractual rights by stating that no state shall pass any law impairing the obligation of contracts.1 This clause of the Constitution is, in terms, a limitation on the powers of the states only, and neither it nor any other clause forbids the Congress of the United States, when acting within the scope of its powers, to enact laws which may operate to impair the obligation of contracts.2

Not only the original thirteen states, but all the states, are bound by the prohibition as to the impairment of the obligation of contracts.[3]

Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably has authority to pass legislation pertinent to any of its powers conferred by the Constitution however such legislation may operate collaterally or incidentally to impair or destroy the obligation of private contracts.[4] Hence, the obligation of contract is not impaired by an act of

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[1] United States Const. Art. I, § 10.

[2] Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co. 294 U. S. 648, 79 L. ed. 1110, 55 S. Ct. 595; Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352; W. B. Worthen Co. v. Thomas, 292 U. S. 426, 78 L. ed. 1344, 54 S. Ct. 816, 93 A.L.R. 173; Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Gibbes v. Zimmerman, 290 U. S. 326, 78 L. ed. 342, 54 S. Ct. 140; Funkhouser v. J. B. Preston Co. 290 U. S. 163, 78 L. ed. 243, 54 S. Ct. 134, affirming 261 N. Y. 140, 639, 184 N. E. 737, 185 N. E. 772, 87 A.L.R. 459; Coolidge v. Long, 282 U. S. 582, 75 L. ed. 562, 51 S. Ct. 306; Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. ed. 382, 44 S. Ct. 197; Superior Water, Light & P. Co. v. Superior, 263 U. S. 125, 68 L. ed. 204, 44 S. Ct. 82; Crane v. Hahlo, 258 U. S. 142, 66 L. ed. 514, 42 S. Ct. 214; Louisville Bridge Co. v. United States, 242 U. S. 409, 61 L. ed. 395, 37 S. Ct. 158; Mitchell v. Clark, 110 U. S. 633, 28 L. ed. 279, 4 S. Ct. 170, 312; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Re Inland Dredging Corp. (C. C. A. 2d) 61 F. (2d) 765, 88 A.L.R. 254, writ of certiorari denied in 288 U. S. 611, 77 L. ed. 985, 53 S. Ct. 403; St. Louis Union Trust Co. v. Franklin-American Trust Co. (C. C. A. 8th) 52 F. (2d) 431, 87 A.L.R. 386, writ of certiorari dismissed in 286 U. S. 533, 76 L.

ed. 1274, 52 S. Ct. 642; Evans-Snider-Buel Co. v. McFadden (C. C. A. 8th) 105 F. 293, 52 L.R.A. 900, affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 753; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Golden Gate Bridge & Highway Dist. v. Filmer, 217 Cal. 754, 21 P. (2d) 112, 91 A.L.R. 1; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Federal Land Bank v. W., 218 Iowa, 339, 252 N. W. 507, 94 A.L.R. 1338; Nagel v. Ghlinger, 166 Md. 231, 171 A. 65, 92 A.L.R. 1391; Harsha v. Detroit, 261 Mich. 586, 246 N. W. 849, 90 A.L.R. 853; Detroit Trust Co. v. Stormfeltz-Lovely Co. 257 Mich. 655, 242 N. W. 227, 88 A.L.R. 1263; Vanderbilt v. Brunton Piano Co. 111 N. J. L. 596, 169 A. 177, 89 A.L.R. 1080; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; Haberlach v. Tillamook County Bank, 134 Or. 279, 293 P. 927, 72 A.L.R. 1245; Witt v. People's State Bank, 166 S. C. 1, 164 S. E. 306, 83 A.L.R. 1063; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836; Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802; Filipkowski v. Springfield F. & M. Ins. Co. 206 Wis. 39, 238 N. W. 828, 78 A.L.R. 613; Re Cranberry Creek Drainage Dist. 202 Wis. 64, 231 N. W. 538, 85 A.L.R. 242. See also Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287. Neither Congress nor the United States is in terms restricted by the provisions of the U. S. Const. Art. I, § 10, that no state shall pass a law impairing the obligation of a contract. New York v. United States, 257 U. S. 591, 66 L. ed. 385, 42 S. Ct. 239. Contracts, however express, dealing with a subject matter which lies within the control of the constitutional authority of Congress cannot fetter such authority. Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352, affirming 265 N. Y. 37, 191 N. E. 726, 92 A.L.R. 1523.

[3] De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 S. Ct. 743.

[4] Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co. 294 U. S. 648, 79 L. ed. 1110, 55 S. Ct. 595 (power to enact bankruptcy legislation); Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352 (power over money). "Contracts may create rights of property, but when contracts deal with subject matter which lies within the control of Congress they have a congenital infirmity." Holyoke Water Power Co. v. Ameri- 10

Congress passed pursuant to, and in accord with, the interstate commerce clause.[5] Furthermore, it is on this principle that Congress has the power to enact a bankruptcy law under which debtors may be discharged from debts existing at the time of the enactment of the law, while the power of the states in this respect is limited to the discharge of subsequent debts.[6]

The validity of the legislation of a foreign state cannot be tested by the Constitution of the United States, even if such foreign state subsequently becomes incorporated into the Union as one of the states, as was the case with Texas.[7] Hence, the extent to which the people of the State of Texas are bound to acknowledge contracts or titles repudiated by the former Republic of Texas is a question to be decided by their own tribunals and with which the Federal courts have no right to interfere.[8] The same conclusion was reached with respect to the original thirteen colonies. The Federal Constitution commenced its operation on the first Wednesday in March, 1789,[9] and it was early decided that the provision that no state should make any law impairing the obligation of contracts did not extend to a law enacted by a colony or state before that day, and operating upon rights of property vested before that time.[10] The clause as to the impairment of the obligation of contracts seems to be peculiar to the American system of constitutional government.[11] For example, there is no constitutional prohibition in Canada against the passage of laws impairing the obligation of contracts.[12]

§ 384. Obligation Defined and Scope of Rule.—

As between contracts, a subject elsewhere fully considered,[13] and the obligation of a contract, protected against impairment by constitutional provisions, a distinction has been repeatedly drawn. The obligation of a contract is defined as the law or duty which binds the parties to perform their agreement.[14] It is coeval with the

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can Writing Paper Co. 299 U. S. 526, 81 L. ed. 387, 57 S. Ct. 24. The Constitution does not prohibit Congress from taking any action which may indirectly have the effect of impairing the obligation of contracts. Contracts must be understood as made in reference to the possible exercise of the rightful authority of government; and no obligation of a contract can stand in the way of the exercise of legitimate government authority. Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287.

[5] See CARRIERS, Vol. 9, p. 483, § 80; COMMERCE, Vol. 11, §§ 9 et seq.

[6] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A.L.R. 1106, rehearing denied in 296 U. S. 661, 80 L. ed. 471, 56 S. Ct. 82; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 22 S. Ct. 857.

[7] See Vol. 11, p. 610, § 11.

[8] Herman v. Phalen, 14 How. (U. S.) 79, 14 L. ed. 334; League v. De Young, 11 How. (U. S.) 185, 13 L. ed. 657.

[9] See Vol. 11, p. 620, § 19.

[10] Owings v. Speed, 5 Wheat. (U. S.) 420, 5 L. ed. 124. The provision in the Constitution that no state shall make any law impairing the obligation of contracts does not extend to a state law enacted before the Constitution commenced its operation. Ibid.

[11] Except for the provision that laws impairing the obligation of contracts are forbidden, the obligation of contracts is subject to legislative control, and is not secured by any general principles of jurisprudence outside the constitutional guaranty. Canada S. R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020, 3 S. Ct. 363.

[12] Ibid.

[13] See CONTRACTS, infra.

[14] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Bank of Minden v. Clement, 256 U. S. 126, 65 L. ed. 857, 41 S. Ct. 408; Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Selover, B. & Co. v. Walsh, 226 U. S. 112, 57 L. ed. 146, 33 S. Ct. 69; Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 S. Ct. 597; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 S. Ct. 1042; Louisiana ex rel. Nelson v. Police Jury, 111 U. S. 716, 28 L. ed. 574, 4 S. Ct. 648; Louisiana v. New Orleans, 102 U. S. 203, 26 L. ed. 132; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; White v. Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; McCracken v. Hayward, 2 How. (U. S.) 608, 11 L. ed. 397; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Myers v. Knickerbocker Trust Co. (C. C.) 139 F. 111, 1 L.R.A. (N.S.) 1171; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Cook v. Gray, 2 Houst. (Del.) 455, 81 Am. Dec. 185; Bruce v. Schuyler, 9 Ill. 221, 46 11

undertaking to perform[15] and consists of the means which, at the time of the creation of the contract, the law affords for its enforcement,[16] or, as otherwise stated, in the effective force of the law which applies to, and compels performance of, the contract, or a compensatory equivalent in the way of damages for nonperformance.[17] The obligation of a contract, protected by

Federal and state Constitutions, is not derived solely from the acts and stipulations of the parties, independently of existing law, but has vitality and subsists apart from the stipulations expressed by the parties.[18] Viewed from another standpoint, it consists in that which a person has undertaken to perform,[19] and it is a legal, not a mere moral, obligation.[20] The Constitution makes no discrimination whatever between different kinds or classes of contracts. By its terms and its spirit, it comprehends and takes under its protection all that are valid of every description,[1] whether executed or executory.[2]

Am. Dec. 447; Larrabee v. Talbott, 5 Gill (Md.) 426, 46 Am. Dec. 637, overruled on another point in Pinckney v. Lanahan, 62 Md. 447, 80 Am. Dec. 311; Bailey v. Gentry, Miss. 164, 13 Am. Dec. 484; J. B. Preston

[1] Mo. 164, 13 Am. Dec. 484; J. B. Preston & Co. v. Funkhouser, 261 N. Y. 140, 639, 184 N. E. 737, 18 N. Y. 163, 78 L. ed. 243, affirmed 290 U. S. 163, 78 L. ed. 243,

[54] S. Ct. 134; Boswell v. Security Mut. L. Ins. Co. 193 N. Y. 465, 86 N. E. 532, 19 L.R.A.(N.S.) 948; Mather v. Bush, 16 Johns. (N. Y.) 233, 8 Am. Dec. 313; Graves v. Howard, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565; Goggans v. Turnipseed, 1 S. C. 80, 98 Am. Dec. 397, 7 Am. Rep. 23; State v. Carew, 47 S. C. L. (13 Rich.) 498; Howard v. Ross, 38 Wash. 67, 80 P. 318, 3 Ann. Cas. 1140; Bettman v. Cowley, 19 Wash. 207, 53 P. 53, 40 L.R.A. 815; Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L.R.A. 569. It is to the laws, whether part of the common law or found in the statutes of the state, that we look for the validity and extent of a contract between persons. They constitute its obligation. Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406,

[54] L. ed. 1088, 31 S. Ct. 59, 36 L.R.A.(N.S.) 220, 21 Ann. Cas. 815. "Obligation" is defined to be 'the act of obliging or binding, that which obligates; the binding power of a vow, promise, oath or contract.'" Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793.

[15] National Surety Co. v. Architectural Decorating Co. 226 U. S. 276, 57 L. ed. 221, 33 S. Ct. 17; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; State v. Citrus County, 116 Fla. 676, 157 So. 4, 97 A.L.R. 431; Green v. Asheville, 199 N. C. 516, 154 S. E. 852, citing R. C. L.

[16] Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164; Seibert v. Lewis, 122 U. S. 284,

[30] L. ed. 1161, 7 S. Ct. 1190; Nelson v. St. Martin's Parish, 111 U. S. 716, 28 L. ed. 574, 4 S. Ct. 648; Louisiana v. New Or- leans, 102 U. S. 203, 26 L. ed. 132; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; White v. Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685; Harrison v. Remington Paper Co. (C. C. A. 8th) 140 F. 385, 3 L.R.A.(N.S.) 954, 5 Ann. Cas. 314, writ of certiorari denied in 199 U. S. 607,

[50] L. ed. 331, 26 S. Ct. 747; Board of Rev- enue v. Farson, 197 Ala. 375, 72 So. 613, L.R.A.1918B, 881; Welsh v. Cross, 146 Cal. 621, 81 P. 229, 106 Am. St. Rep. 63, 2 Ann. Cas. 796; Phinney v. Phinney, 81 Me. 450,

[17] A. 405; Brearley School v. Ward, 201 N. Y. 265, 94 N. E. 1001, 40 L.R.A.(N.S.) 1215,

[35] Am. Cas. 1912B, 251; Bateman v. Sterrett,

[201] N. C. 59, 159 S. E. 14, citing R. C. L.; Green v. Asheville, 199 N. C. 516, 154 S. E. 852, citing R. C. L.; Blakemore v. Coop- er, 15 N. D. 5, 106 N. W. 566, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574; Goodale v. Fennell, 27 Ohio St. 426, 22 Am. Rep. 321; Swinburne v. Mills, 17 Wash. 611, 50 P. 489, 61 Am. St. Rep. 932. Annotation: 1 L.R.A. 356. The obligation of a contract, within the meaning of the constitutional prohibition against impairment of contracts, includes everything within its obligatory scope. Ed- wards v. Kearzey, 96 U. S. 595, 24 L. ed. 793. The obligation of a contract consists in what the obligor has undertaken to per- form, as measured by the standard of the laws in force at the time it was entered into. State v. Citrus County, 116 Fla. 676,

[157] So. 4, 97 A.L.R. 431. The obligation of a contract, including everything within its obligatory scope, em- braces the means provided for its enforce- ment. Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L.R.A. 569.

[17] Cook v. Gray, 2 Houst. (Del.) 455, 81 Am. Dec. 185; State v. Citrus County, 116 Fla. 676, 157 So. 4, 97 A.L.R. 431.

[18] Phinney v. Phinney, 81 Me. 450, 17 A. 405, 4 L.R.A. 348, 10 Am. St. Rep. 266.

[19] Smith v. Mead, 3 Conn. 253, 8 Am. Dec. 183; State v. Citrus County, 116 Fla. 676, 157 So. 4, 97 A.L.R. 431.

[20] Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Aycock v. Martin, 37 Ga. 124, 92 Am. Dec. 56; Larrabee v. Talbott, 5 Gill (Md.) 426, 46 Am. Dec. 637, overruled on another point in Pinckney v. Lanahan,

[62] Md. 447; Goggans v. Turnipseed, 1 S. C. 80, 98 Am. Dec. 397, 7 Am. Rep. 23; State v. Carew, 47 S. C. L. (13 Rich.) 498, 91 Am. Dec. 245.

[1] Long Island Water Supply Co. v. Brook- lyn, 166 U. S. 685, 41 L. ed. 1165, 17 S. Ct. 718; Stephens v. Southern P. Co. 109 Cal. 86, 41 P. 783, 29 L.R.A. 751, 50 Am. St. Rep. 17; Cook v. Gray, 2 Houst. (Del.) 455, 81 Am. Dec. 185; Lewis v. Brockenridge, 1 12

12 Am. Jur. CONSTITUTIONAL LAW § [385]

express or implied.[3] A distinction is also drawn between the obligation of a contract and the remedy given by the legislature to enforce that obligation. The rule is universally approved that without impairing the obligation of the contract the remedy may be modified at the discretion of the legislative body.[4] While a remedy may be modified, it cannot be taken away, for the right to property necessarily implies a right to process of law to protect it.[5] While it has been said that the motives for excepting a contract from the protection of the impairment clause must be very powerful to justify such an exception,[6] the constitutional prohibition of the passage of laws impairing the obligation of contracts cannot be construed to prohibit the exercise by the state legis- lature of its constitutional powers.[7]

§ 385. Principles as Affected by War.—

While as a general rule a mere change in remedy is open to no constitutional objection unless it amounts to the impairment of the obligation of a contract,[1] it has been generally held that war legislation, in the nature of a moratory law which suspends or delays the creditor's right to enforce his remedy against the debtor at maturity, is unconstitutional in its application to existing contracts, as being an impair- ment of their obligation.[2] Such legislation is, however, constitutional in its application to contracts entered into subsequent to its passage.[3] The Civil War Acts which suspended all actions until the ratification of peace between

Blackf. (Ind.) 220, 12 Am. Dec. 228; Home Teleph. Co. v. Sarcoxie Light & Teleph. Co. 236 Mo. 114, 139 S. W. 108, 36 L.R.A. (N.S.) 124. It has long been settled by decisions of the United States Supreme Court that the word "contracts" in U. S. Const. Art. I, § 10, forbidding a state to impair the ob- ligation of contracts, is used in its usual or popular sense as signifying an agree- ment of two or more minds, upon suf- ficient consideration, to do or not to do certain acts. Mutual assent, express or implied, to its terms is of its very essence. Crane v. Hahlo, 258 U. S. 142, 66 L. ed. 514, 42 S. Ct. 214. A contract valid when made is within the constitutional protection precluding the legislature from impairing contract obliga- tions. Filipkowski v. Springfield F. & M. Ins. Co. 206 Wis. 39, 238 N. W. 828, 78 A.L.R. 613.

[2] Farrington v. Tennessee, 95 U. S. 679,

[24] L. ed. 558; Dartmouth College v. Wood- ward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447. An executory contract within the mean- ing of the constitutional provision as to impairment of contracts is one in which a party binds himself to do or not to do a particular thing. Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162. It may be noted, however, that in a sub- sequent case it was said by Mr. Justice McLean that if it had not been otherwise laid down in the case of Fletcher v. Peck,

[6] Cranch (U. S.) 87, 3 L. ed. 162, he would have doubted whether the inhibition against impairment of the obligations of contracts did not apply exclusively to ex- ecutory contracts. Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773.

[3] Crane v. Hahlo, 258 U. S. 142, 66 L. ed. 514, 42 S. Ct. 214; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 S. Ct. 54; Seton v. Hoyt, 34 Or. 266, 55 P. 967, 43 L.R.A. 634, 75 Am. St. Rep. 641. The constitutional provision against the impairment of contracts is not limited to express contracts and specific agreements but includes all cases where the law com- pletes the contract by implying an obliga- tion upon the part of one of the parties thereto to make compensation. Seton v. Hoyt, 34 Or. 266, 55 P. 967, 43 L.R.A. 634,

[75] Am. St. Rep. 641.

[4] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 S. Ct. 755; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529. As to the modification of remedies, see infra, § 432.

[5] Cook v. Gray, 2 Houst. (Del.) 455, 81 Am. Dec. 185; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Wil- liams v. Johnson, 30 Md. 500, 96 Am. Dec. 613.

[6] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

[7] Harsha v. Detroit, 261 Mich. 586, 246 N. W. 849, 90 A.L.R. 853 (control by state over its subdivisions).

[1] See infra, § 432.

[2] Jones v. Crittenden, 4 N. C. (1 Car. Law Repos. 385) 6 Am. Dec. 531; State v. Carew, 47 S. C. L. (13 Rich.) 498, 91 Am. Dec. 245; Luter v. Hunter, 30 Tex. 688, 98 Am. Dec. 494. Annotation: 9 A.L.R. 7. As to moratorium legislation, see infra, § 423.

[3] Barry v. Iseman, 48 S. C. L. (14 Rich.) 129, 91 Am. Dec. 262. Annotation: 9 A.L.R. 7. 13

the Confederate States and the United States were held to violate the impairment clause of the Federal Constitution.[4]

As a general rule, a moratory law which stays all actions against persons in the military or naval service for a definite and reasonable time does not impair the obligation of a contract, since the application of the statute is solely to the remedy.[5]

§ [386]. Existing Laws as Establishing Obligations.—Conformably to the well-established rule that the laws which subsist at the time and place of making a contract enter into, and form a part of, it as if they were expressly referred to, or incorporated in, its terms,[6] the obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and

rules which they prescribe.[7] There can be no other standard by which to ascertain the extent

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4Luter v. Hunter, 30 Tex. 688, 98 Am. Dec. 494. Annotation: 9 A.L.R. 8. 5McCormick v. Rusch, 15 Iowa, 127, 83 Am. Dec. 401; Breitenbach v. Bush, 44 Pa. 313, 84 Am. Dec. 442. Annotation: 9 A.L.R. 11. For a detailed discussion of war moratory statutes, see WAR [Also 27 R. C. L. Perm. Supp. p. 6021]. 6W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 79 L. ed. 1298, 55 S. Ct. 555, 97 A.L.R. 905; Farmers & M. Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. ed. 1157, 43 S. Ct. 651, 30 A.L.R. 635; Oshkosh Waterworks v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 S. Ct. 234; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962; Louisiana ex rel. Nelson v. St. Martin's Parish, 111 U. S. 716, 28 L. ed. 574, 4 S. Ct. 65; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 463, 2 S. Ct. 91; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Head v. University of Mississippi, 19 Wall. (U. S.) 526, 22 L. ed. 160; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; White v. Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Gantley v. Ewing, 3 How. (U. S.) 707, 11 L. ed. 794; McCracken v. Hayward, 2 How. (U. S.) 608, 11 L. ed. 397; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Myers v. Knickerbocker Trust Co. (C. C.) 139 F. 111, 1 L.R.A.(N.S.) 1171; State ex rel. Sherrill v. Milam, 113 Fla. 491, 153 So. 100, 125, 136, citing R. C. L.; Hull v. State, 29 Fla. 79, 11 So. 97, 16 L.R.A. 308, 30 Am. St. Rep. 95; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 731; County Bd. of Edu. v. Littrell, 173 Ky. 78, 190 S. W. 465, citing R. C. L.; Phinney v. Phinney, 81 Me. 450, 17 A. 405, 4 L.R.A. 348, 10 Am. St. Rep. 266; Hubbard v. Hubbard (Mo. App.) 264 S. W. 422, citing R. C. L.; State ex rel. Public Serv. Commission v. Brannon, 86 Mont. 200, 283 P. 202, 67 A.L.R. 1020; Gagnon v. Butte, 75 Mont. 279, 243 P. 1085, 51 A.L.R. 966; Sovereign Camp, W. W. v. Lenoir, 208 N. C. 433, 181 S. E. 339, citing R. C. L.; Blakemore v. Cooper, 15 N. D. 5, 106 N. W. 566, 4 L.R.A. (N.S.) 1074, 125 Am. St. Rep. 574; Nelson v. Pitts, 126 Okla. 191, 259 P. 533, 53 A.L.R. 1187; Schramm v. Done, 135 Or. 16, 293 P. 931, citing R. C. L.; Haberlach v. Tillamook County Bank, 124 Or. 279, 293 P. 927, 72 A.L.R. 1245; Macartney v. Shipherd, 60 Or. 133, 117 P. 814, Ann. Cas. 1913D, 1257; Barry v. Iseman, 43 S. C. L. (14 Rich.) 129, 91 Am. Dec. 262; Frank v. State Bank & T. Co. (Tex.) 263 S. W. 255, citing R. C. L.; Barton v. Wichita River Oil Co. (Tex. Civ. App.) 187 S. W. 1043, citing R. C. L. Annotation: 6 Am. Dec. 540. To know the obligation of a contract, regard must be had to the laws in force at its making. W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 79 L. ed. 1298, 55 S. Ct. 555, 97 A.L.R. 905. 7W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 79 L. ed. 1298, 55 S. Ct. 555, 97 A.L.R. 905; Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Northwestern Mut. L. Ins. Co. v. McCue, 223 U. S. 234, 56 L. ed. 419, 32 S. Ct. 220, 38 L.R.A.(N.S.) 57; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Rees v. Watertown, 19 Wall. (U. S.) 107, 22 L. ed. 72; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; State Tax on Foreign-held Bonds, 15 Wall. (U. S.) 300, 21 L. ed. 179; McCracken v. Hayward, 2 How. (U. S.) 608, 11 L. ed. 397; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Faxon v. All Persons, 166 Cal. 707, 137 P. 919, L.R.A.1916B, 1209; Folks v. Marion County, 121 Fla. 17, 163 So. 298, 102 A.L.R. 659; State v. Citrus County, 116 Fla. 676, 157 So. 4, 97 A.L.R. 431; State ex rel. Sherrill v. Milam, 113 Fla. 491, 153 So. 100, 125, 136, citing R. C. L.; State ex rel. Buckwalter v. Lakeland, 112 Fla. 200, 150 So. 508, 90 A.L.R. 704; Morris v. Interstate Bond Co. 180 Ga. 689, 180 S. E. 819, 100 A.L.R. 415; Hubbard v. Hubbard (Mo. App.) 264 S. W. 422, citing R. C. L.; Gagnon v. Butte, 75 Mont. 279, 243 P. 1085, 51 A.L.R. 966, citing R. C. L.; Schramm v. Done, 135 Or. 16, 293 P. 931, citing R. C. L.; Macartney v. Shipherd, 60 Or. 133, 117 P. 814, Ann. Cas. 1913D, 1257; Goggans v. Turnipseed, 1 S. C. 80, 98 Am. Dec. 397, 7 Am. Rep. 23; Frank v. State Bank & T. Co. (Tex.) 263 S. W. 255; Barton v. Wichita River Oil Co. (Tex. Civ. App.) 187 S. W. 1043, citing R. C. L.; Bettman v. Cowley, 19 Wash. 207, 53 P. 53, 40 L.R.A. 815. The term "obligation of contracts" as used in the provision of the Federal Constitution that no state shall pass any law 14

of the obligation than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the existing law defines the duty

and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force.[8] The law which thus establishes the obligation of a contract is not general or universal law, but the law of the jurisdiction in reference to which the contract is made.[9]

If the parties assent to being bound by any subsequent amendments of an existing statute which may be pertinent and applicable to their contract, then the passage of such an amendment does not impair the obligation of their contract.[10]

§ 387. Laws as Operating on Future Contracts.—The provision of the Constitution which declares that no state shall pass any law impairing the obligation of contracts does not apply to a law enacted prior to the making of the contract, the obligation of which is claimed to be impaired,[11] but only to a statute of a state enacted after the making of the contract.[12] The obligation

impairing the obligation of contracts denotes the legal obligation of the parties to adhere to the agreement which at the time of contracting the law recognized and made enforceable. Preston Co. v. Funkhouser, 261 N. Y. 140, 184 N. E. 737, 185 N. E. 772, 87 A.L.R. 459.

Statutes in force at the time a contract is made by a municipality enter into, and become part of, the contract. Its obligation is to be measured, and performance is to be regulated, by the terms and rules which they prescribe. Cincinnati v. Public Utilities Commission, 98 Ohio St. 320, 121 N. E. 688, 3 A.L.R. 705, overruled on another point in United Fuel Gas Co. v. Ironton, 107 Ohio St. 173, 140 N. E. 884, 29 A.L.R. 342.

8Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; State v. Citrus County, 116 Fla. 676, 157 So. 4, 97 A.L.R. 431; State ex rel. Sherrill v. Milam, 113 Fla. 491, 153 So. 100, 125, 136, citing R. C. L.; Hull v. State, 29 Fla. 79, 11 So. 97, 16 L.R.A. 308, 30 Am. St. Rep. 95; Cattle Raisers Loan Co. v. Doan (Tex. Civ. App.) 86 S. W. (2d) 252, writ of error refused in 127 Tex. 1, 86 S. W. (2d) 1082; Salter v. Nelson, 85 Utah, 460, 39 P. (2d) 1061, citing R. C. L.; Bettman v. Cowley, 19 Wash. 207, 53 P. 53, 40 L.R.A. 815.

9Selover, B. & Co. v. Walsh, 226 U. S. 112, 57 L. ed. 146, 33 S. Ct. 69; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Boston Ice Co. v. Boston & M. R. Co. 77 N. H. 6, 86 A. 356, Ann. Cas. 1914A, 1090; State v. Carew, 47 S. C. L. (13 Rich.) 498, 91 Am. Dec. 245. See also Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793.

See generally CONFLICT OF LAWS, Vol. 11, p. 410, § 122.

10The obligation of a mortgage in which the mortgagor, conformably to a statute providing that where a mortgagor shall have assented thereto, a decree of foreclosure and sale may be passed upon the application of the mortgagee, assented to the passing of a decree in accordance with such statute "or any amendments or additions thereto" is not unconstitutionally impaired by a statute enacted subsequently to the mortgage, which provides that during the period of emergency therein declared such remedy shall not be available to the holder or holders of less than 25 per cent of the entire unpaid mortgage debt, where prior to the mortgage there has been no amendment or addition to which the words "or any amendments or additions thereto" could apply. United States Mortg. Co. v. Matthews, 293 U. S. 232, 79 L. ed. 299, 55 S. Ct. 168.

11Chicago, B. & Q. R. Co. v. Cram, [228] U. S. [70], [57] L. ed. [734], [33] S. Ct. [437]; Lehigh Water Co. v. Easton, [121] U. S. [388], [30] L. ed. 1059, [7] S. Ct. [916]; Schewe v. Glenn, [302] Ill. [462], [134] N. E. [809], citing R. C. L.; Anders v. Nicholson, [111] Fla. [849], [150] So. [639], citing R. C. L.; Dunseath v. Nevada Industrial Commission, [52] Nev. [104], [282] P. [879], [296] P. 1112, citing R. C. L.; Barton v. Wichita River Oil Co. (Tex. Civ. App.) [187] S. W. 1043, citing R. C. L.

A lease made subsequent to the enactment of a statute cannot be impaired by it. Edgar A. Levy Leasing Co. v. Siegel, [258] U. S. [242], [66] L. ed. [595], [42] S. Ct. [289].

The contract clause applies only to legislation subsequent in time to the contract alleged to have been impaired. Munday v. Wisconsin Trust Co. [252] U. S. [499], [64] L. ed. [684], [40] S. Ct. [365].

The inhibition of the Constitution against impairing the obligation of contracts is wholly prospective; the states may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect. Brown v. Smart, [145] U. S. [454], [36] L. ed. [773], [12] S. Ct. [958]; Denny v. Bennett, [128] U. S. [489], [32] L. ed. [491], [9] S. Ct. [134].

12Munday v. Wisconsin Trust Co. [252] U. S. [499], [64] L. ed. [684], [40] S. Ct. [365]; Oshkosh Waterworks Co. v. Oshkosh, [187] U. S. [437], [47] L. ed. [249], [23] S. Ct. [234]; Schewe v. Glenn, [302] Ill. [462], [134] N. E. [809], citing R. C. L.; Dunseath v. Nevada Industrial Commission, [52] Nev. [104], [282] P. [879], [296] P. 1112, citing R. C. L.; Bedard v. Mahoney, [30] R. I. [469], [76] A. [113], [136] Am. St. Rep. [965]; Barton v. Wichita River Oil Co.

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of a contract cannot properly be said to be impaired by a statute in force when the contract was made,[13] for in such cases it is presumed that it was made in contemplation of the existing law.[14] Hence, a lease made subsequent to the enactment of a statute cannot be unconstitutionally impaired by such statute.[15] The state, therefore, may legislate as to future contracts as it may see fit.[16] and, accordingly, if a law is prospective only, it is valid.[17] Although a statute tending to impair the obligation of a contract is inoperative as to contracts existing at the time of its passage, it may nevertheless be valid and operative as to future contracts.[18] Thus, a statute imposing additional license fees on merchants offering prizes or premiums with merchandise sold does not impair the obligation of contracts unless it is made applicable to sales already made.[19]

§ 388. Rule as to Invalid or Illegal Contracts.—

Since the obligations which the Constitution of the United States protects from impairment are such as exist by reason of contract, it follows that as a basis for invoking the rule, there must be a valid contract20 possessing the essential element of assent.1

(Tex. Civ. App.) 187 S. W. 1043, citing R. C. L. The law of the state to which the Federal Constitution refers when forbidding the impairment of the obligation of a contract must be one enacted after the

making of the contract, the obligation of which is claimed to be impaired. Pinney v. Nelson, 133 U. S. 144, 46 L. ed. 125, 22 S. Ct. 52.

[13] Chicago, B. & Q. R. Co. v. Kyle, 228 U. S. 85, 57 L. ed. 741, 33 S. Ct. 440; Chicago, B. & Q. R. Co. v. Cram, 228 U. S. 70, 57 L. ed. 734, 33 S. Ct. 437; Abilene Nat. Bank v. Dolley, 228 U. S. 1, 57 L. ed. 707, 33 S. Ct. 409; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277; Ouachita County v. Wolcott, 103 U. S. 559, 26 L. ed. 505; Schewe v. Glenn, 302 Ill. 462, 134 N. E. 809, citing R. C. L.; Corbin v. Houlehan, 100 Me. 246, 61 A. 131, 70 L.R.A. 568; Daggs v. Orient Ins. Co. 136 Mo. 382, 38 S. W. 85, 35 L.R.A. 227, 58 Am. St. Rep. 638, affirmed in 172 U. S. 557, 43 L. ed. 552, 19 S. Ct. 281; State ex rel. Public Serv. Commission v. Brannon, 86 Mont. 200, 283 P. 202, 67 A.L.R. 1020; Dunseath v. Nevada Industrial Commission, 52 Nev. 104, 282 P. 879, 296 P. 1112, citing R. C. L.; Barry v. Iseman, 48 S. C. L. (14 Rich.) 129, 91 Am. Dec. 262; Barton v. Wichita River Oil Co. (Tex. Civ. App.) 187 S. W. 1043, citing R. C. L. A law imposing upon the head of the department of chemistry of the state university the duty of analyzing and testing samples of gasoline and kerosene does not violate the contract between such head and the state, where he assumed the position after the law came into effect. State ex rel. Public Serv. Commission v. Brannon, 86 Mont. 200, 283 P. 202, 67 A.L.R. 1020. A state insolvency act cannot impair the obligations of a contract made after its enactment. Lace v. Smith, 34 R. I. 1, 82 A. 265, Ann. Cas. 1913E, 945.

[14] Abilene Nat. Bank v. Dolley, 228 U. S. 1, 57 L. ed. 707, 33 S. Ct. 409; Schewe v. Glenn, 302 Ill. 462, 134 N. E. 809, citing R. C. L.; Dunseath v. Nevada Industrial Commission, 52 Nev. 104, 282 P. 879, 296 P. 1112, citing R. C. L.; Barton v. Wichita River Oil Co. (Tex. Civ. App.) 187 S. W. 1043, citing R. C. L.; Smith v. Northern Neck Mut. F. Asso. 112 Va. 192, 70 S. E. 482, 33 L.R.A. (N.S.) 1016. See supra, § 386.

[15] Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, 66 L. ed. 595, 42 S. Ct. 289.

[16] Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Schewe v. Glenn, 302 Ill. 462, 134 N. E. 809, citing R. C. L. See also Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858. Annotation: 10 L.R.A. 405.

[17] United States v. Memphis, 97 U. S. 284, 24 L. ed. 947; Schewe v. Glenn, 302 Ill. 462, 134 N. E. 809, citing R. C. L.

[18] Schewe v. Glenn, 302 Ill. 462, 134 N. E. 809, citing R. C. L.; Burdick v. People, 149 Ill. 600, 36 N. E. 948, 24 L.R.A. 152, 41 Am. St. Rep. 329; Fry v. State, 63 Ind. 552, 30 Am. Rep. 238; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Cincinnati v. Public Utilities Commission, 98 Ohio St. 320, 121 N. E. 638, 3 A.L.R. 705, overruled on another point in United Fuel Gas Co. v. Ironton, 107 Ohio St. 173, 140 N. E. 884, 29 A.L.R. 342. Annotation: 61 Am. St. Rep. 940. A statute does not impair the obligation of contracts when it applies only to those contracts which are made subsequently. Daggs v. Orient Ins. Co. 136 Mo. 382, 38 S. W. 85, 35 L.R.A. 227, 58 Am. St. Rep. 638, affirmed in 172 U. S. 557, 43 L. ed. 552, 19 S. Ct. 281.

[19] Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 S. Ct. 379; Rast v. Van Demann & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421, Ann. Cas. 1917B, 455. See TRADING STAMPS [Also 26 R. C. L. p. 920, § 8].

[20] Dunne v. Rock Island County, 233 Ill. 628, 119 N. E. 591 (writ of error dismissed in 248 U. S. 532, 63 L. ed. 405, 39 S. Ct. 10) citing R. C. L.; Mexican Nat. R. Co. v. Mussette, 86 Tex. 708, 26 S. W. 1075, 24 L.R.A. 642. Annotation: L.R.A.1915C, 262. The constitutional prohibition against impairment of contract obligations com- 16

That class of obligations styled "quasi contracts" is not embraced within the constitutional guaranty against the passage of a law violating the obligation of a contract.[2]

Furthermore, the impairment of a contract cannot exist where the alleged contract is based on a proviso contained in a void statute.[3] Likewise, a contract based on an unconstitutional statute granting lands is not within the purview of the impairment of obligation clause;[4] and the protection of this clause does not extend to bonds of a

municipal corporation which have been illegally issued.[5] It is apparent that the Federal Constitution does not protect contracts which are invalid6 or illegal,[7] as, for example, a grant of privileges in excess of a city's powers,[8] an ultra vires contract of a corporation,[9] or a nudum pactum.[10]

Criminal statutes leveled against acts that would be frauds without such criminal enactments, and intended for the protection of the rights of citizens, cannot have the effect of impairing the obligation of contracts or of depriving any person of his property without due process of law.[11] Not every contract relating to a particular subject matter is rendered illegal by reason of a change in the attitude of the law whereby such matter comes under the ban of illegality. Thus, after the abolition of slavery in a state, existing contracts relating thereto were not necessarily rendered illegal and, accordingly, they were still deemed to be capable of enforcement so that no question of the impairment of their obligation was thereby raised.[12]

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prehends only those contracts which are founded on a good consideration. Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705.

[1] Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 S. Ct. 240; Fisk v. Jefferson Police Jury, 116 U. S. 131, 29 L. ed. 587, 6 S. Ct. 329; Louisiana v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 S. Ct. 211.

[2] Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 S. Ct. 763; Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 S. Ct. 211; Anders v. Nicholson, 111 Fla. 849, 150 So. 639, citing R. C. L.; State ex rel. Newgass v. New Orleans, 38 La. Ann. 119, 58 Am. Rep. 168; Mexican Nat. R. Co. v. Mussette, 86 Tex. 708, 26 S. W. 1075, 24 L.R.A. 642. The provision of the Constitution relating to the impairment of the obligation of contracts does not apply to a case where there is no assent given to a transaction, because where no assent is given, there can be no faith pledged in respect of it. Garrison v. New York, 21 Wall. (U. S.) 196, 22 L. ed. 612.

[3] New York v. Taxes & A. Comrs. 94 U. S. 415, 24 L. ed. 164.

[4] Long Sault Development Co. v. Call, 242 U. S. 272, 61 L. ed. 294, 37 S. Ct. 79. See also Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 S. Ct. 110.

[5] Zane v. Hamilton County, 189 U. S. 370, 47 L. ed. 858, 23 S. Ct. 538. See PUBLIC SECURITIES AND OBLIGATIONS.

[6] Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 S. Ct. 240; Ford v. Chicago Milk Shippers' Asso. 155 Ill. 166, 39 N. E. 651, 27 L.R.A. 298; Westminster Water Co. v. Westminster, 98 Md. 551, 56 A. 990, 64 L.R.A. 630, 103 Am. St. Rep. 424. In so far as the contracts of public service corporations conflict with public duties imposed upon them by law, they are not within the protection of the constitutional provision inhibiting impairment of the obligations of contracts. Baltimore & O. R. Co. v. Public Serv. Commission, 81 W. Va. 457, 94 S. E. 545, L.R.A.1918D, 268.

[7] Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 S. Ct. 132; Dunne v. Rock Island County, 233 Ill. 623, 119 N. E. 591 (writ of error dismissed in 248 U. S. 532, 63 L. ed. 405, 39 S. Ct. 10) citing R. C. L.; State v. Superior Ct. 67 Wash. 37, 120 P. 861, Ann. Cas. 1913D, 78. Forbidding the enforcement of contracts made in violation of a statute prohibiting the exacting of more than 15 per cent interest on loans or accepting a note for a greater amount than that actually loaned, with intent to evade this provision, does not impair the obligation of such contracts when made by those not within the exempted classes. Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 S. Ct. 132.

[8] Annotation: 3 Ann. Cas. 93.

[9] New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 S. Ct. 142.

[10] Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; Christ Church v. Philadelphia County, 20 How. (U. S.) 26, 15 L. ed. 802.

[11] State ex rel. Early v. Missouri Guarantee Sav. & Bldg. Asso. 167 Mo. 489, 67 S. W. 215, 90 Am. St. Rep. 426.

[12] Roundtree v. Baker, 52 Ill. 241, 4 Am. Rep. 597. Contracts relating to slaves, valid when made, were not impaired by the Thirteenth Amendment to the Constitution. Boyce v. Tabb, 18 Wall. (U. S.) 546, 21 L. ed. 757. A provision in the Constitution of one of the reconstructed states annulling contracts for the purchase and sale of slaves is in- 17

B. IMPAIRMENT OF OBLIGATION

1. IN GENERAL

§ 389. Generally.—It is a fundamental rule that a state by the act of its legislature cannot alter the nature and legal effect of an existing contract, to the prejudice of either party, or give to such contract a judicial construction binding on the parties or the courts,[13] nor can the legislature make a law for a particular case, between two contracting parties, contrary to existing law, and order the court to enforce it.[14] This rule is founded on two distinct principles of constitutional law: (1) That prohibiting the assumption of judicial power by the legislative department of government, and (2) that inhibiting the impairment by a state of the obligation of contracts. The first is based on the doctrine of the separation of the powers of government and is elsewhere considered in detail.[15] It is to the second of these principles that the present discussion has reference. The importance of protecting the obligation of contracts from all legislative action tending to its impairment has been emphasized by the Supreme Court of the United States. This high tribunal has stated that the inviolability of contracts and the duty of performing them, as made, are at the foundation of all well-ordered society, that to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed, and that it is one of the highest duties of this court to take care that the prohibition should neither be evaded nor frittered away.[16]

A state prohibited by the Federal Constitution from passing any laws impairing the obligation of contracts may not accomplish the same end by granting any permission necessary to enable Congress so to do.[17]

Since legislation of a state impairing the obligation of contracts made under its authority is void,[18] the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed.[19] A person, however, may not complain that a statute impairs the obligation of contract unless he is a party to that contract or has a beneficial interest therein.[20]

A workmen's compensation act is contractual in its nature,[1] and therefore any legislation which purports to change a substantial term of a contract operative at the time of the plaintiff's injury would impair the obligation of such contract and fall within the ban of the Constitution.[2]

2. TESTS OF IMPAIRMENT

§ 390. Generally.—The provision of the Federal Constitution prohibiting the impairment of the obligation of contracts is intended to prohibit every mode or device having such purpose. The prohibition is universal and there-

valid as to existing contracts as violating the provision of the Federal Constitution forbidding the impairment of the obligation of contracts. Osborn v. Nicholson, 13 Wall. (U. S.) 654, 20 L. ed. 689.

[13] King v. Dedham Bank, 15 Mass. 447, 8 Am. Dec. 112. Annotation: 3 L. ed. 162.

[14] Ervine's Appeal, 16 Pa. 256, 55 Am. Dec. 499.

[15] See Vol. 11, p. 912, §§ 208 et seq.

[16] Murray v. Charleston, 96 U. S. 449, 24 L. ed. 760.

[17] Ashton v. Cameron County Water Improv. Dist. 298 U. S. 513, 80 L. ed. 1309, 56 S. Ct. 892, rehearing denied in 299 U. S. 619, 81 L. ed. 457, 57 S. Ct. 5.

[18] See infra, § 396.

[19] Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090.

[20] Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 S. Ct. 617.

[1] See WORKMEN'S COMPENSATION ACTS [Also 28 R. C. L. p. 748, § 43].

[2] Preveslin v. Derby & A. Developing Co. 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426. 18

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fore no attempt is made in that instrument to enumerate the modes by which contracts may be impaired.[3] The courts from time to time, however, have announced certain tests and principles serving as guides in determining the validity of statutes attacked as impairing the obligation of contracts, such as the fact that a party is deprived of the benefits of his contract4 or that the statute takes from the party his whole contract and all the rights which it was intended to confer.[5] A statute to be within the scope of this clause, however, must act on the contract itself as distinguished from the property which is the subject of the contract.[6] The repeal of a law which constitutes a contract is an impairment of its obligation.[7] The obligation of a contract is impaired by a statute which alters its terms by imposing new conditions8 or dispensing with conditions,[9] or which adds new duties,[10] releases or lessens any part of the contract obligation,[11] or substantially defeats its end.[12] A law may be within the constitutional inhibition against impairment of contract obligations by implication, as well as by expression.[13] It may also be stated that this constitutional provision is considered as rendering void any statute which is retrospective and which destroys a vested right of action arising ex contractu.[14]

[3] Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 58 L. ed. 1001, 34 S. Ct. 627.

[4] Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341. **Legislation which deprives one of the benefit of a contract** or adds new duties or obligations thereto necessarily impairs the obligation of the contract; and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit and to make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of the Federal Supreme Court. Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341.

[5] Poindexter v. Greenhow, 114 U. S. 301, 29 L. ed. 185, 5 S. Ct. 903, 962. **The obligations of a contract** are impaired by a law which renders them invalid, releases or extinguishes them, or derogates from substantial contractual rights. Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507.

[6] State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31.

[7] Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 58 L. ed. 1001, 34 S. Ct. 627.

[8] Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 S. Ct. 1042; Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760; Cleveland, P. & A. R. Co. v. Pennsylvania, 15 Wall. (U. S.) 300, 21 L. ed. 179; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. ed. 793; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547; Robinson v. Magee, 9 Cal. 81, 70 Am. Dec. 638; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Hubbard v. Hubbard (Mo. App.) 264 S. W. 422, citing R. C. L.; Schuster v. Weiss, 114 Mo. 158, 21 S. W. 438, 19 L.R.A. 182; Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802. **A statute converting a covenant in a state grant into a condition subsequent and imposing a forfeiture for its violation** unconstitutionally impairs the obligation of the contract. Columbia R. Gas & E. Co. v. South Carolina, 261 U. S. 236, 67 L. ed. 629, 43 S. Ct. 306.

[9] Columbia R. Gas & E. Co. v. South Carolina, 261 U. S. 236, 67 L. ed. 629, 43 S. Ct. 306; Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760; State Tax on Foreign-held Bonds, 15 Wall. (U. S.) 300, 21 L. ed. 179; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Hubbard v. Hubbard (Mo. App.) 264 S. W. 422, citing R. C. L.

[10] Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Hubbard v. Hubbard (Mo. App.) 264 S. W. 422, citing R. C. L.; Smith v. Northern Neck Mut. Fire Asso. 112 Va. 192, 70 S. E. 482, 38 L.R.A.(N.S.) 1016.

[11] Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Smith v. Mead, 3 Conn. 253, 8 Am. Dec. 183; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Indianapolis v. Robison, 186 Ind. 660, 117 N. E. 861, citing R. C. L.; Hubbard v. Hubbard (Mo. App.) 264 S. W. 422, citing R. C. L.; Luter v. Hunter, 30 Tex. 689, 98 Am. Dec. 494.

[12] McKeon v. Bisbee, 9 Cal. 137, 70 Am. Dec. 642; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Indianapolis v. Robison, 186 Ind. 660, 117 N. E. 861, citing R. C. L.

[13] State ex rel. White v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L.R.A. 244, 93 Am. St. Rep. 222.

[14] Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 58 L. ed. 1001, 34 S. Ct. 627; Lewis v. Brackenridge, 1 Blackf. (Ind.) 220, 12 Am. Dec. 228. 19

In very recent years strict construction of the impairment clause has been eased and courts have adopted a tendency to construe it more liberally. The prohibition is said not to be an absolute one and is not to be read with literal exactness like a mathematical formula;[16] it prohibits unreasonable impairment only.[16] Thus, it has been aptly said that in determining whether state legislation unconstitutionally impairs contract obligations, no unchanging yardstick can be fashioned, applicable at all times and under all circumstances, by which the validity of each statute may be measured and determined, but every case must be determined upon its own circumstances.[17]

§ 391. Degree of Impairment.—

Since the prohibition as to the impairment of the obligation of contracts is absolute, the amount and extent of the impairment is immaterial.18 An act which in any degree, no matter how slightly, modifies the obligation of a contract, by attempting to relieve one party from any duty under the contract, is repugnant to the constitutional prohibition against the impairment of the obligation of contracts.19 Any act, therefore, which changes the expressed intention of the parties to a contract, or such as results from their stipulations, is held to impair its validity, and it is immaterial as to the degree or nature of the change,20 whether it relates to the validity, construction, duration, discharge, or evidence of the contract; in all cases the conclusion is the same.1

§ 392. Diminution of Value of Contract.—

One of the tests of impairment is that the value of a contract has been diminished.[2] New burdens cannot be

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[15] See supra, § 59.

[16] Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297. In the determination of whether legislation violates the contract clause of the Federal Constitution, the question is not whether the legislation affects contracts incidentally, or directly or indirectly, but whether it is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507.

[17] Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297.

[18] Bank of Minden v. Clement, 256 U. S. 126, 65 L. ed. 857, 41 S. Ct. 408; Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Planters' Bank v. Sharp, 6 How. (U. S.) 301, 12 L. ed. 447; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Helena Light & R. Co. v. Northern P. R. Co. 57 Mont. 93, 186 P. 702, citing R. C. L.; Re Cranberry Creek Drainage Dist. 202 Wis. 64, 231 N. W. 538, 85 A.L.R. 242. Any alteration of a contract, however unimportant, and even though favorable for the interest of the objecting party, impairs its obligation. Per Washington, J., in Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

[19] Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547; County Bd. of Edu. v. Littrell, 173 Ky. 78, 190 S. W. 465, citing R. C. L.; Helena Light & R. Co. v. Northern P. R. Co. 57 Mont. 93, 186 P. 702; Smith v. Northern Neck Mut. F. Asso. 112 Va. 192, 70 S. E. 482, 38 L.R.A.(N.S.) 1016; Jones v. La Vigne, 202 Wis. 64, 231 N. W. 538, 85 A.L.R. 242; Oshkosh Waterworks Co. v. Oshkosh, 109 Wis. 208, 85 N. W. 376, 95 Am. St. Rep. 870.

[20] Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Boswell v. Security Mut. L. Ins. Co. 193 N. Y. 465, 86 N. E. 532, 19 L.R.A. (N.S.) 946.

[1] Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; Per Washington, J., in Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547; State ex rel. Buckwalter v. Lakeland, 112 Fla. 200, 150 So. 508, 90 A.L.R. 704; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Storen v. Sexton, — Ind. —, 200 N. E. 251, 104 A.L.R. 1359; Indianapolis v. Robison, 186 Ind. 660, 117 N. E. 861, citing R. C. L.; County Bd. of Edu. v. Littrell, 173 Ky. 78, 190 S. W. 465, citing R. C. L.; Schuster v. Weiss, 114 Mo 158 21 S. W. 438, 19 L.R.A. 182; Smith v. Northern Neck Mut. Fire Asso. 112 Va. 192, 70 S. E. 482, 38 L.R.A.(N.S.) 1016.

[2] Bank of Minden v. Clement, 256 U. S. 126, 65 L. ed. 857, 41 S. Ct. 408; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Edwards v Kearzey, 96 U. S. 595, 24 L. ed. 793; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Planters' Bank v. Sharp, 6 How. (U. S.) 301, 12 L. ed. 447; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; 20

imposed so as to decrease materially the value and benefit of a contract.[3] As will subsequently be shown, a state may alter laws governing remedy on contract as long as an effective remedy is preserved,[4] but where it so lessens or impairs the value of the remedy as to lessen and impair the value of the contract, the law is void as impairing the obligation of contract,[5] although a statute does not necessarily impair the obligation of a contract merely because it affects its value either by making performance more difficult or expensive or by diminishing the value of performance to the other party.[6]

§ 393. Diminishing Means of Enforcement.—

Whenever the law is so changed that the means of enforcing the duty imposed by the contract are materially impaired, the obligation of the contract no longer remains the same.[7] Therefore, a Constitution[8] or a statute impairs the obligation of a contract if it prevents enforcement,[9] tends to postpone or retard enforcement,[10] or seriously

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Storen v. Sexton, — Ind. —, 200 N. E. 251, 104 A.L.R. 1359; Blakemore v. Cooper, 15 N. D. 5, 106 N. W. 566, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574; Skinner v. Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836; Dallas County Levee Improv. Dist. v. Rugel (Tex. Com. App.) 36 S. W. (2d) 188, citing R. C. L.; Salter v. Nelson, 85 Utah, 460, 39 P. (2d) 1061, citing R. C. L.; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; Swinburne v. Mills, 17 Wash. 611, 50 P. 489, 61 Am. St. Rep. 932; Peninsular Lead & Color Works v. Union Oil & Paint Co. 100 Wis. 488, 76 N. W. 359, 42 L.R.A. 331, 69 Am. St. Rep. 934; Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L.R.A. 569. Annotation: 26 L. ed. 132; 3 Ann. Cas. 91.

[3] Penniman's Case, 103 U. S. 714, 26 L. ed. 602; Briscoe v. Auketell, 28 Miss. 361, 61 Am. Dec. 553; Salter v. Nelson, 85 Utah, 460, 39 P. (2d) 1061, citing R. C. L.

[4] See infra, § 432.

[5] Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Cattle Raisers Loan Co. v. Doan (Tex. Civ. App.) 86 S. W. (2d) 252 (writ of error refused in 127 Tex. 1, 86 S. W. (2d) 1082) citing R. C. L. Annotation: 3 L. ed. 162; 26 L. ed. 132; 3 Ann. Cas. 91. **The remedy to enforce a contract is a part of the contract,** and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is such an impairment of the obligation of a contract as to bring it within the inhibition of the U. S. Const. Art. 1, § 10. Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781.

[6] Curtis v. Whitney, 13 Wall. (U. S.) 68, 20 L. ed. 513.

[7] Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 54 L. ed. 144, 30 S. Ct. 40; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; White v. Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685; Butz v. Muscatine, 8 Wall. (U. S.) 575, 19 L. ed. 490; Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; Planters' Bank v. Sharp, 6 How. (U. S.) 301, 12 L. ed. 447; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; State ex rel. Buckwalter v. Lakeland, 112 Fla. 200, 150 So. 508, 90 A.L.R. 704; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Coffman v. Bank of Kentucky, 40 Miss. 29, 90 Am. Dec. 311; Brearley School v. Ward, 201 N. Y. 353, 94 N. E. 1001, 40 L.R.A.(N.S.) 1215, Ann. Cas. 1912B, 251; Swinburne v. Mills, 17 Wash. 611, 50 P. 489, 61 Am. St. Rep. 932. Annotation: 26 L. ed. 132. Contracts between individuals or corporations are impaired within the meaning of the due process provision of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened, although a different rule prevails in respect to contracts of sovereigns. Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840.

[8] Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 S. Ct. 210; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; White v. Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685. Annotation: 28 L. ed. 331.

[9] International Steel & I. Co. v. National Surety Co. 297 U. S. 657, 80 L. ed. 961, 56 S. Ct. 619; McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 S. Ct. 972; Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 S. Ct. 210; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781. Annotation: 26 L. ed. 132. The existing remedy for the enforcement of a contract is a part of its obligation, which cannot be destroyed without violating the contract clause of the Federal Constitution. White v. Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685.

[10] Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 54 L. ed. 144, 30 S. Ct. 40; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Louisiana v. New Orleans, 102 U. S. 203, 26 L. ed. 132; Harrison v. Remington Paper Co. (C. C. A. 8th) 140 F. 385, 3 L.R.A.(N.S.) 954, 5

Ann. Cas. 314, writ of certiorari denied in 199 U. S. 607, 50 L. ed. 331, 26 S. Ct. 747; State ex rel. Buckwalter v. Lakeland, 112 Fla. 200, 150 So. 508, 90 A.L.R. 704; Storen v. Sexton, — Ind. —, 200 N. E. 251, 104 A.L.R. 21

interferes with the enforcement of the contract.[11] While it is undoubted that the legislature may make changes in the remedy,[12] it is necessary that the contract be left with the same force and effect, including the substantial means of enforcement, which existed when it was made.[13]

3. EXERCISE OF POWER OF EMINENT DOMAIN

§ 394. Generally.—

The power of eminent domain is paramount to the right secured by the obligation of contract clause, and its exercise in no wise interferes with the inviolability of contracts.[14] In other words, the constitutional inhibition on any state law impairing the obligation of contracts is not a limitation on the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. It is a taking, and not an impairment of its obligation.[15]

1359; Phinney v. Phinney, 81 Me. 450, 17 A. 405, 4 L.R.A. 348, 10 Am. St. Rep. 266; Goodwin v. Fennell, 27 Ohio St. 426, 22 Am. Rep. 321. Annotation: 26 L. ed. 132. A change of the law which hinders or delays a creditor in the collection of his debt impairs the obligation of the contract within the meaning of the Constitution, although it relates only to the remedy or mode of procedure by which that debt was to be collected. Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443. The constitutional prohibition against laws impairing the obligation of contracts secures from attack, not merely the con- tract itself, but all the essential incidents which render it valuable and enable its owner to enforce it. Phinney v. Phinney,

[81] Me. 450, 17 A. 405, 4 L.R.A. 348, 10 Am. St. Rep. 266.

[11] Oshkosh Waterworks v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 S. Ct. 234; Barn- itz v. Beverly, 163 U. S. 118, 41 L. ed. 93,

[16] S. Ct. 1042; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143. Annotation: 26 L. ed. 132.

[12] Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Hill v. Merchants Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 S. Ct. 589; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Edwards v. Kear- zey, 96 U. S. 595, 24 L. ed. 793; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; Cairo & F. R. Co. v. Hecht, 95 U. S. 168, 24 L. ed. 423; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Sturges v. Crownin- shield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Board of Revenue v. Farson, Son & Co. 197 Ala. 375, 72 So. 613, L.R.A.1918B, 881; Dal- las County Levee Improv. Dist. v. Rugel (Tex. Com. App.) 36 S. W. (2d) 188, citing R. C. L.; Cattle Raisers Loan Co. v. Doan (Tex. Civ. App.) 86 S. W. (2d) 252, writ of error refused in 127 Tex. 1, 86 S. W. (2d) 1082. See infra, §§ 432, 433.

[13] South Carolina v. Gaillard, 101 U. S. 437, 25 L. ed. 937; Walker v. Whitehead, 95 U. S. 628, 24 L. ed. 365; Walker v. Ander- head, 16 Wall. (U. S.) 314, 21 L. ed. 357; Von Hoffman v. Quincy, 4

Wall. (U. S.) 535, 18 L. ed. 403; Board of Revenue v. Farson, Son & Co. 197 Ala. 375, 72 So. 613, L.R.A.1918B, 881; Langeyer v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836; Dallas County Levee Improv. Dist. v. Rugel (Tex. Com. App.) 36 S. W. (2d) 188, citing R. C. L.; Cattle Raisers Loan Co. v. Doan (Tex. Civ. App.) 86 S. W. (2d) 252, writ of error refused in 127 Tex. 1, 86 S. W. (2d) 1082; Life Ins. Co. v. Sanders (Tex. Civ. App.) 62 S. W. (2d) 348, citing R. C. L.; Smith v. Northern Neck Mut. F. Asso. 112 Va. 192, 70 S. E. 482, 38 L.R.A. (N.S.) 1016. A repeal or change of remedies which does not substantially diminish the value of the agreement or seriously retard or obstruct its enforcement escapes the in- hibition of the Constitution and is valid. Harrison v. Remington Paper Co. (C. C. A. 8th) 140 F. 385, 3 L.R.A.(N.S.) 954, 5 Ann. Cas. 314, writ of certiorari denied in 199 U. S. 607, 50 L. ed. 331, 26 S. Ct. 747. The legal remedies for the enforcement of a contract which belong to it at the time and place where it is made are a part of its obligations and can be changed only if the change involves no impairment of a substantial right. Peninsular Lead & Color Works v. Union Oil & Paint Co. 100 Wis. 488, 76 N. W. 359, 42 L.R.A. 331, 69 Am. St. Rep. 934.

[14] Pennsylvania Hospital v. Philadelphia,

[245] U. S. 20, 62 L. ed. 124, 38 S. Ct. 35; Cincinnati v. Louisville & N. R. Co. 223 U. S. 390, 56 L. ed. 481, 32 S. Ct. 267; Rich- mond, F. & P. R. Co. v. Louisa R. Co. 13 How. (U. S.) 71, 14 L. ed. 55; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. ed. 535; Spencer v. Seaboard Air Line R. Co. 137 N. C. 107, 49 S. E. 96, 1 L.R.A. (N.S.) 604.

[15] Cincinnati v. Louisville & N. R. Co.

[223] U. S. 390, 56 L. ed. 481, 32 S. Ct. 267; Long Island Water-Supply Co. v. Brook- lyn, 166 U. S. 685, 41 L. ed. 1165, 17 S. Ct. 718; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. ed. 535; Planters Bank v. Sharp, 6 How. (U. S.) 301, 12 L. ed. 447. Contract obligations are property and as such may be taken under the power of eminent domain. Narragansett Electric Lighting Co. v. Sabre, 50 R. I. 288, 146 A. 777, 66 A.L.R. 1553. 22

It appears that even an abuse of the power of eminent domain under the sanction of a state statute does not impair the obligation of contract.[16]

The power of eminent domain is so inherently governmental and so essential to the public welfare that it cannot be abridged by agreement,[17] and a contract executed by the state which barters away this right is not within the protection of the impairment clause.[18] The foregoing principle applies alike to contracts between the state and an individual or corporation.[19]

The property of a corporation, including its franchise, may be taken for public use if the public exigencies require it for that purpose,[20] even if such taking incidentally puts an end to the corporate powers by leaving nothing with respect to which they may be exercised.[1] The grant of a franchise confers no more sacred title than a grant of land to an individual; and when the public necessities require it, the one, as well as the other, may be taken for public purposes on making suitable compensation. Furthermore, such an exercise of the right of eminent domain does not interfere with the inviolability of contracts.[2] Hence, by exercising its power of eminent domain, a second railroad may cross another without impairing the obligation of a

provision in the charter of the latter giving it an exclusive right to its roadbed and line.[3] Furthermore, a leasehold interest acquired from the state is as completely subject to condemnation for public use as a title derived from any other source,[4] and the exercise of the power with respect to such an estate does not cause an impairment of contract within the meaning of the Federal Constitution.[5]

C. MEANS OF IMPAIRMENT

§ 395. Federal Laws.—

As pointed out above, the impairment clause in the Federal Constitution is not a limitation on the powers of Congress.[6] Nevertheless, the due process clause prohibits Federal legislation which impairs rights vested under contracts.[7] It has been said further that a law of Congress not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.[8] On the other hand, contracts, however express, which deal with a subject matter which lies within the control of the constitutional

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[16] Mills v. St. Clair County, 8 How. (U. S.) 569, 12 L. ed. 1201, holding that the obligation of the contract, if any, under which the owner of lands holds under a grant in fee simple, is not impaired by an abuse of the right of eminent domain un- der the sanction of a state statute.

[17] See EMINENT DOMAIN [Also 10 R. C. L. p. 11, § 9].

[18] Pennsylvania Hospital v. Philadelphia,

[245] U. S. 20, 62 L. ed. 124, 38 S. Ct. 35.

[19] There enters into every contract whether between the state and an individ- ual or between individuals only the un- written condition that it is subordinate to the right of appropriation to a public use. Cincinnati v. Louisville & N. R. Co. 223 U. S. 390, 56 L. ed. 481, 32 S. Ct. 267. The exercise of the power of eminent domain by a state, or under its authority, is not an interference with the inviolabil- ity of contracts with the state, for the rea- son that all contracts are made subject to the right of eminent domain. Terre Haute v. Evansville & T. H. R. Co. 149 Ind. 174,

[46] N. E. 77, 37 L.R.A. 189.

[20] New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. ed. 535; Enfield Toll Bridge Co. v. Hartford & N. H. R. Co. 17 Conn. 40, 42 Am. Dec. 716; Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Narragansett Electric Lighting Co. v. Sabre, 50 R. I. 288, 146 A. 777, 66 A.L.R. 1553.

[1] West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. ed. 535; Backus v. Le- banon, 11 N. H. 19, 35 Am. Dec. 466. Annotation: 35 Am. Dec. 471.

[2] West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. ed. 535; Richmond, F. & P. R. Co. v. Louisa R. Co. 13 How. (U. S.) 71, 14 L. ed. 55.

[3] Richmond, F. & P. R. Co. v. Louisa R. Co. 5 How. (U. S.) 71, 14 L. ed. 55.

[4] Cox v. Revelle, 125 Md. 579, 94 A. 203, L.R.A.1915E, 443.

[5] Ibid.
[6] See supra, § 383.
[7] See infra, § 650.
[8] Hepburn v. Griswold, 8 Wall. (U. S.) 603, 19 L. ed. 513. 23

authority of Congress cannot fetter such authority.[9] Hence, the obligation of private contracts for the payment of money is subject to the exercise of the power vested in Congress over the monetary system.[10] Congress has power to invalidate the provisions of private contracts calling for the payment of gold coin.[11] Furthermore, Congress may deal with public lands or Indian territories as it may choose, subject, however, to other constitutional limitations.[12] On the other hand, Congress by authorizing or ratifying the adoption of a state Constitution on the admission of a state into the United States cannot give the slightest effect to a provision in conflict with the impairment clause of the Federal Constitution.[13]

§ 396. State Laws, Constitutions, and Agencies.—

It may be said generally

that in order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract be impaired, but it must be impaired by an enactment of the state after the contract has been entered into. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, the acts of administrative or executive boards or officers, or the doings of corporations or individuals.[14] Any enactment, regardless of its source, to which a state gives the force of law is a law within the meaning of this provision, and this includes acts of the legislature,[15] municipal ordinances passed pursuant to legislative authority,[16] an

[9] Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352.
[10] Norwich & W. R. Co. v. Johnson, 15 Wall. (U. S.) 195, 21 L. ed. 178; Bigler v. Waller, 14 Wall. (U. S.) 297, 20 L. ed. 891; Dooley v. Smith, 13 Wall. (U. S.) 604, 20 L. ed. 547. The acts of Congress known as the "Le- gal Tender Acts" are constitutional when applied to contracts made before their pas- sage, as well as to debts contracted since their passage. Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287.
[11] Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352.
[12] Egan v. McDonald, 246 U. S. 227, 62 L. ed. 680, 38 S. Ct. 223. See PUBLIC LANDS [Also 22 R. C. L. p. 246, § 8 et seq.].

[13] Gunn v. Barry, 15 Wall. (U. S.) 610,

[21] L. ed. 212. See also Kener v. La Grange Mills, 231 U. S. 215, 58 L. ed. 189, 34 S. Ct. 83.

[14] Fleming v. Fleming, 264 U. S. 29, 68 L. ed. 547, 44 S. Ct. 246; Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. ed. 382, 44 S. Ct. 197; McCoy v. Union Elev. R. Co. 247 U. S. 354, 62 L. ed. 1156, 38 S. Ct. 504; Kryger v. Wilson, 242 U. S. 171, 61 L. ed. 229, 37 S. Ct. 34; Ross v. Oregon, 227 U. S. 150, 57 L. ed. 458, 33 S. Ct. 220, Ann. Cas. 1914C, 224; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 56 L. ed. 924, 32 S. Ct. 577; Fisher v. New Orleans,

[218] U. S. 438, 54 L. ed. 1099, 31 S. Ct. 57; Weber v. Rogan, 188 U. S. 10, 47 L. ed. 363,

[23] S. Ct. 263; Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 S. Ct. 1051; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 S. Ct. 80; New Orleans Water- works Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 S. Ct. 741; Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 S. Ct. 916; State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298; King v. Phoenix Ins. Co. 195 Mo. 290,

[92] S. W. 892, 113 Am. St. Rep. 678, 6 Ann. Cas. 618; Sedalia v. Donohue, 190 Mo. 407,

[89] S. W. 386, 4 Ann. Cas. 89; Re First Nat. Bank, 93 Okla. 233, 220 P. 909, 57 A.L.R. 890; Ray v. Western Pennsylvania Natu- ral Gas Co. 138 Pa. 576, 20 A. 1065, 12 L.R.A. 290, 21 Am. St. Rep. 922; Nickoll v. Racine Cloak & Suit Co. 194 Wis. 298,

[216] N. W. 502, citing R. C. L. Annotation: 4 Ann. Cas. 93; Ann. Cas. 1915C, 579. "The contract clause of the Constitu- tion of the United States has reference only to a statute of a state enacted after the making of the contract whose obliga- tion is alleged to have been impaired." Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 S. Ct. 234.

[15] Fleming v. Fleming, 264 U. S. 29, 68 L. ed. 547, 44 S. Ct. 246; Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. ed. 382, 44 S. Ct. 197; McCoy v. Union Elev. R. Co.

[247] U. S. 354, 62 L. ed. 1156, 38 S. Ct. 504; New Orleans Waterworks Co. v. Louisi- ana, 185 U. S. 336, 46 L. ed. 936, 22 S. Ct. 691; New Orleans Waterworks Co. v. Lou- isiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 S. Ct. 741; Williams v. Bruffy, 96 U. S. 176, 24 L. ed. 716; Folks v. Marion County, 121 Fla. 17, 163 So. 298, 102 A.L.R. 659; St. John v. Iowa Business Men's Bldg. & L. Asso. 136 Iowa, 448, 113 N. W. 863, 15 L.R.A.(N.S.) 503; Furlong v. Na- tional Life & Acci. Ins. Co. 185 La. 352,

[169] So. 431, 106 A.L.R. 40; Re First Nat. Bank, 93 Okla. 233, 220 P. 909, 57 A.L.R. 890. A law enacted by the Confederate States sequestrating the property and credits within such states of loyal citizens of the United States, if enforced as the law of 24

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order by an instrumentality of the state exercising delegated authority,[17] and state Constitutions and constitutional amendments.[18] Hence, a change in a state Constitution relating to the power of municipal corporations to incur obligations cannot be retroactive so as to affect contracts already made.[19] Since the provision of the Federal Constitution against the impairment of the obligation of contracts was intended to prohibit every mode or device having such purpose,[20] the action of public officials in exercising their authority, if such authority makes their action equivalent to a statute of the state, is void as impairing obligation of contracts, if in conflict with private contract rights.[1] Furthermore, the repeal of a law which constitutes a contract is an impairment of its obligation.[2] On the other hand, a mere legislative statement of an intent not to be bound by its obligations, however, is not legislation impairing the obligation of contract because it is merely a statement that

the state has broken its contract.[3]

§ 397. Municipal Ordinances and Agencies.—

Generally speaking, a municipal ordinance is a legislative act within the purview of the impairment clause of the Federal Constitution.[4] Resolutions adopted by a city council which

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a state, is invalid as impairing the obli- gation of contracts. Williams v. Bruffy,

[96] U. S. 176, 24 L. ed. 716.

[16] See infra, § 397.

[17] Grand Trunk W. R. Co. v. Railroad Commission, 221 U. S. 400, 55 L. ed. 786,

[31] S. Ct. 537. Laws passed by a state impairing the obligation of a contract are void, and if a state cannot pass such a law, it follows that no agency which acts under the state with delegated authority can do so. Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699.

[18] Russell v. Sebastian, 233 U. S. 195,

[58] L. ed. 912, 34 S. Ct. 517, L.R.A.1918E, 832, Ann. Cas. 1914C, 1282; Bier v. Mc- Gehee, 148 U. S. 137, 37 L. ed. 397, 13 S. Ct. 580; Shreveport v. Cole, 129 U. S. 36,

[32] L. ed. 589, 9 S. Ct. 210; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 S. Ct. 741; Fisk v. Jefferson, 116 U. S. 131, 29 L. ed. 587, 6 S. Ct. 329; Louisville Gas Co. v. Citizens Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 S. Ct. 265; New Orleans Water- works Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 S. Ct. 273; New Orleans Gas- light Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Butchers' Union S.-H. & L. S. L. Co. v. Crescent City L.-S. L. & S. H. Co.

[111] U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Clay County v. Society for Savings, 104 U. S. 579, 26 L. ed. 856; Moultrie County v. Rockingham Ten-Cent Sav. Bank, 92 U. S. 631, 23 L. ed. 631; Ochiltree v. Iowa R. Contracting Co. 21 Wall. (U. S.) 249, 22 L. ed. 546; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; Delmas v. Merchants' Mut. Ins. Co. 14 Wall. (U. S.) 661, 20 L. ed. 757; Osborn v. Nicholson, 13 Wall. (U. S.) 654, 20 L. ed. 689; White v. Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685; Mississippi & M. R. Co. v. McClure, 10 Wall. (U. S.) 511, 19 L. ed. 997; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Allen v. Railroad Commission, 179 Cal. 68, 175 P. 466, 8 A.L.R. 249, P.U.R.1919A, 398; Folks v. Marion County, 121 Fla. 17, 163 So. 298,

[102] A.L.R. 659; Columbus Waterworks Co. v. Columbus, 48 Kan. 99, 28 P. 1097, 15 L.R.A. 354; Slade v. Lexington, 141 Ky. 214, 132 S. W. 404, 32 L.R.A.(N.S.) 201; Haberlach v. Tillamook County Bank, 134 Or. 279, 293 P. 927, 72 A.L.R. 1245; Lang- ever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836; Simpson v. Pontotoc Common County Line School Dist. (Tex. Civ. App.) 275 S. W. 449, citing R. C. L.; Peninsular Lead & Color Works v. Union Oil & Paint Co. 100 Wis. 488, 76 N. W. 359,

[42] L.R.A. 331, 69 Am. St. Rep. 934. Annotation: 3 L. ed. 162; 28 L. ed. 331;

[10] L.R.A. 406. A constitutional provision prohibiting the enactment of laws impairing the ob- ligation of contracts becomes a part of each contract protecting it to the extent of the meaning of that clause from impair- ment even by constitutional amendment. Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836.

[19] Dallas County v. McKenzie, 110 U. S. 686, 28 L. ed. 285, 4 S. Ct. 184; Jonesboro v. Cairo & St. L. R. Co. 110 U. S. 192, 28 L. ed. 116, 4 S. Ct. 67; Louisiana v. Taylor, 105 U. S. 454, 26 L. ed. 1133; Schuyler County v. Thomas, 98 U. S. 169, 25 L. ed. 88; Moultrie County v. Rockingham Ten-Cent Sav. Bank, 92 U. S. 631, 23 L. ed. 631.

[20] Carondelet Canal & Nav. Co. v. Loui- siana, 233 U. S. 362, 58 L. ed. 1001, 34 S. Ct. 627.

[1] Appleby v. Delaney, 271 U. S. 403, 70 L. ed. 1009, 46 S. Ct. 581.

[2] Carondelet Canal & Nav. Co. v. Loui- siana, 233 U. S. 362, 58 L. ed. 1001, 34 S. Ct. 627.

[3] Mercantile Trust & D. Co. v. Colum- bus, 203 U. S. 311, 51 L. ed. 198, 27 S. Ct. 83; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 S. Ct. 575.

[4] Atlantic Coast Line R. Co. v. Goldsboro,

[232] U. S. 548, 58 L. ed. 721, 34 S. Ct. 364; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; Mercan- tile Trust & D. Co. v. Columbus, 203 U. S. 311, 51 L. ed. 198, 27 S. Ct. 83; New Or- leans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 S. Ct. 691; St. Paul 25

have the force of ordinances constitute laws within the meaning of the constitutional provision.[4] Municipal ordinances, however, which are not passed under, and pursuant to, legislative authority cannot be regarded as laws of the state within the meaning of this clause.[5] A municipal ordinance the effect of which is merely to deny liability on a contract or to declare the repudiation thereof and which prescribes no antagonistic rights or duties is not legislation impairing its obligation, although the obligation so repudiated is binding and valid.[7] Such a repudiation presents a naked case of breach, and the fact that the city is a municipal corporation does not give to its refusal the character of a law impairing the obligation of contracts.[8]

§ [398]. Judicial Decisions.—The provision of the Federal Constitution is that no state "shall pass any . . . law" impairing the obligation of contracts.[9] This prohibition, according to the rule of the Federal courts and most state courts, is directed only against impairment by legislation, and not by judgments of courts. Although a contract may, according to the decisions, at the time it is entered into, be valid by virtue of the construction of a statute or otherwise, it is not unconstitutionally impaired, in violation of this provision of the Federal Constitution or like provisions in state Constitutions, by a change in those decisions rendering it invalid.[10] There is no vested right in

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[4] Gaslight Co. v. St. Paul, 181 U. S. 142,

[45] L. ed. 788, 21 S. Ct. 575; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132,

[16] S. Ct. 1023; United States v. New Orleans, 98 U. S. 381, 25 L. ed. 225; Mur- ray v. Charleston, 96 U. S. 432, 24 L. ed. 760; Louisville v. Cumberland Teleph. & Teleg. Co. (C. C. A. 6th) 155 F. 725, 12 Ann. Cas. 500. Annotation: 12 Ann. Cas. 503; Ann. Cas. 1915A, 991; Ann. Cas. 1917C, 638. The alleged action of a city in appro- priating a power company's asserted par- amount rights through the enforcement of an ordinance for the appropriation of the waters of a stream without constitution- al authority and without giving compen- sation therefor, thereby violating the contract clause of the Federal Constitu- tion, is to be regarded as the action of the state. Cuyahoga River Power Co. v. Ak- ron, 240 U. S. 462, 60 L. ed. 743, 36 S. Ct. 402. A bylaw or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legis- lature to the corporation that it may prop- erly be considered a law within the mean- ing of the clause of the United States Con- stitution forbidding the impairment of contracts. New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18,

[31] L. ed. 607, 8 S. Ct. 741.

[5] Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 S. Ct. 660, 6 Ann. Cas. 253; Pacific Electric R. Co. v. Los Angeles, 194 U. S. 112, 48 L. ed. 896, 24 S. Ct. 586; Vicksburg Water- works Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808, 22 S. Ct. 585. Annotation: 12 Ann. Cas. 503.

[6] Hamilton Gaslight & Coke Co. v. Ham- ilton, 146 U. S. 258, 36 L. ed. 963, 13 S. Ct. 90; Murray v. Charleston, 96 U. S. 432,

[24] L. ed. 760; Louisville v. Cumberland Teleph. & Teleg. Co. (C. C. A. 6th) 155 F. 725, 12 Ann. Cas. 500. See also New Or- leans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 S. Ct. 741.

[7] McCormick v. Oklahoma City, 236 U. S. 657, 59 L. ed. 771, 35 S. Ct. 455; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142,

[45] L. ed. 788, 21 S. Ct. 575. Annotation: 45 L.R.A.(N.S.) 723. Impairment of contract obligations of a county does not result from the action of its board of county commissioners in refusing to perform a contract entered in- to by them on behalf of the county. State ex rel. Robertson Invest. Co. v. Patter- son, 47 Wyo. 416, 38 P. (2d) 617, 98 A.L.R. 428.

[8] Dawson v. Columbus Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 S. Ct. 420.

[9] Art. I, § 10.

[10] People's Bkg. Co. v. Sterling, 300 U. S. 175, 81 L. ed. 586, 57 S. Ct. 386; Hawks v. Hamill, 288 U. S. 52, 77 L. ed. 610, 53 S. Ct. 240; Guaranty Trust Co. v. Blodgett,

[287] U. S. 509, 77 L. ed. 463, 53 S. Ct. 244; Fleming v. Fleming, 264 U. S. 29, 68 L. ed. 547, 44 S. Ct. 246; Tidal Oil Co. v. Flan- agan, 263 U. S. 444, 68 L. ed. 382, 44 S. Ct. 197; Columbia R. Gas & E. Co. v. South Carolina, 261 U. S. 236, 67 L. ed. 629, 43 S. Ct. 306; McCoy v. Union Elev. R. Co. 247 U. S. 354, 62 L. ed. 1156, 38 S. Ct. 504; Long Sault Development Co. v. Call, 242 U. S. 272, 61 L. ed. 294, 37 S. Ct. 79; Detroit United R. Co. v. Michigan, 242 U. S. 238,

[61] L. ed. 268, 37 S. Ct. 87; Kryger v. Wilson, 242 U. S. 171, 61 L. ed. 229, 37 S. Ct. 34; Cleveland & P. R. Co. v. Cleveland,

[235] U. S. 50, 59 L. ed. 127, 35 S. Ct. 21; Willoughby v. Chicago, 235 U. S. 45, 59 L. ed. 123, 35 S. Ct. 23; Moore-Mansfield Constr. Co. v. Electrical Installation Co. 234 U. S. 619, 58 L. ed. 1503, 34 S. Ct. 941; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 635, 48 L. ed. 823,

[24] S. Ct. 532; Weber v. Rogan, 188 U. S. 10,

[47] L. ed. 363, 23 S. Ct. 263; Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 L. ed. 266, 23 S. Ct. 170; New Orleans Water- 26

the decisions of a court, and a change of decisions of a state court does not constitute the passing of a law, although the effect of such change is to impair the validity of a contract made in reliance on prior decisions.[11] Furthermore, no element of estoppel can be successfully invoked to prevent a change in judicial decision.[12]

Some of the early Federal cases[13] and some state cases following them[14]

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works Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 S. Ct. 691; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 S. Ct. 26; Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 S. Ct. 1051; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 S. Ct. 1023; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 S. Ct. 80; Brown v. Smart, 145 U. S. 454, 36 L. ed. 773, 12 S. Ct. 958; Winona & St. P. R. Co. v. Plain- view, 143 U. S. 371, 36 L. ed. 191, 12 S. Ct. 530; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 S. Ct. 741; Knox v. Exchange Bank, 12 Wall. (U. S.) 379, 20 L. ed. 414; Mississippi & M. R. Co. v. McClure, 10 Wall. (U. S.) 511, 19 L. ed. 997; Missis- sippi & M. R. Co. v. Rock, 4 Wall. (U. S.)

181, 18 L. ed. 381; Allen v. Allen, 95 Cal. 184, 30 P. 213, 16 L.R.A. 646; State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739,

[37] A.L.R. 1298; Prall v. Burckhartt, 299 Ill. 19, 132 N. E. 280, 18 A.L.R. 992; Swan- son v. Ottumwa, 131 Iowa, 540, 106 N. W. 9, 5 L.R.A.(N.S.) 860, 9 Ann. Cas. 1117; Crigler v. Shepler, 79 Kan. 834, 101 P. 619, 23 L.R.A.(N.S.) 500; Pfister v. St. Bernard Cypress Co. 155 La. 575, 99 So. 454, citing R. C. L.; King v. Phoenix Ins. Co.

[195] Mo. 290, 92 S. W. 892, 113 Am. St. Rep. 678, 6 Ann. Cas. 618; Re First Nat. Bank,

[93] Okla. 233, 220 P. 909, 57 A.L.R. 890; Mc- Cray v. Miller, 78 Okla. 16, 186 P. 1089, cit- ing R. C. L.; Commissioners of Sinking Fund of Philadelphia v. Philadelphia, 324 Pa. 129, 188 A. 314, 113 A.L.R. 202; Storrie v. Cortes, 90 Tex. 283, 38 S. W. 154, 35 L.R.A. 666; Nickoll v. Racine Cloak & Suit Co. 194 Wis. 298, 216 N. W. 502, citing R. C. L. Annotation: 44 L. ed. 886; 16 L.R.A. 646, s. 5 L.R.A.(N.S.) 860, and 23 L.R.A.(N.S.) 500. A judicial construction by which a state constitutional provision is given a new meaning does not amount to an unconsti- tutional impairment of any contract obli- gation if the new meaning is not due to the compulsion of a statute, but is the product of the independent judgment of the court. People's Bkg. Co. v. Sterling, 300 U. S. 175, 81 L. ed. 586, 57 S. Ct. 386. No impairment of contract obligation in violation of the Federal Constitution is effected by a state court's decision that a grant of perpetual franchise is beyond the powers of the legislature, even though it overrules a contrary decision previously rendered. Hawks v. Hamill, 288 U. S. 52,

[77] L. ed. 610, 53 S. Ct. 240. A change by the highest court of a state of its construction of a state statute, even if its former construction had become a rule of property, cannot constitute a Fed- eral question as to the impairment of the obligation of a contract, for which a writ of error will lie from the Supreme Court of the United States to the state court. Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 S. Ct. 1023. "Whether holding such contract valid or void is made upon the general principles by which courts determine whether a con- sideration is good or bad on principles of public policy, the decision is one we are not authorized to review." Dittmas v. Mer- chants' Mut. Ins. Co. 14 Wall. (U. S.) 661,

[20] L. ed. 757. The provisions of the Constitution of the United States for the protection of con- tract rights are directed only against the impairment of them by Constitutions or laws adopted or passed subsequent to the date of the contract from which such rights spring, and do not reach decisions of courts construing Constitutions or laws which were in effect when the contract was entered into. Long Sault Development Co. v. Call, 242 U. S. 272, 61 L. ed. 294, 37 S. Ct. 79. A change of decision with respect to the constitutionality of a statute vesting in abutting owners the title to dedicated streets when vacated, rather than in the dedicator, does not unconstitutionally im- pair the obligation of a contract. Prall v. Burckhartt, 299 Ill. 19, 132 N. E. 280, 18 A.L.R. 992. The provision of the Federal Constitu- tion forbidding the enactment of laws im- pairing the obligation of contracts does not apply to a judicial decision overruling a former adjudication, so as to permit a re- covery for services performed subsequent to the former decision, by a person not a party or privy thereto, when such serv- ices are rendered illegal by the subse- quent decision. Crigler v. Shepler, 79 Kan. 834, 101 P. 619, 23 L.R.A.(N.S.) 500.

[11] Brown v. Grand Rapids Parlor Furni- ture Co. (C. C. A. 6th) 58 F. 286, 22 L.R.A. 817; State v. O'Neil, 147 Iowa, 513, 126 N. W. 454, 33 L.R.A.(N.S.) 788, Ann. Cas. 1912B, 691; Pfister v. St. Bernard Cypress Co.

[155] La. 575, 99 So. 454 (writ of certiorari denied in 266 U. S. 625, 69 L. ed. 474, 45 S. Ct. 125) citing R. C. L.; McCray v. Miller, 78 Okla. 16, 186 P. 1089, citing R. C. L.; Nickoll v. Racine Cloak & Suit Co.

[194] Wis. 298, 216 N. W. 502, citing R. C. L. There is no constitutional right to have all general propositions of law once adopt- ed remain unchanged. Patterson v. Col- orado, 205 U. S. 454, 51 L. ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689.

[12] Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302; Oliver Co. v. Louisville Realty Co.

[156] Ky. 628, 161 S. W. 570, 51 L.R.A.(N.S.) 293, Ann. Cas. 1915C, 565; Smith v. Robert- son, 106 Ky. 472, 50 S. W. 852, 45 L.R.A. 510; Adams v. Yazoo & M. Valley R. Co.

[77] Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L.R.A. 33, affirmed in 180 U. S. 1, 45 L. ed. 395, 21 S. Ct. 240.

[13] Los Angeles v. Los Angeles City Wa- ter Co. 177 U. S. 558, 44 L. ed. 886, 20 S. St. 736; Schell v. Fauché, 138 U. S. 562,

[34] L. ed. 1040, 11 S. Ct. 376; German Sav. Bank v. Franklin County, 128 U. S. 526,

[32] L. ed. 519, 9 S. Ct. 159; Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Douglass v. Pike Coun- ty, 101 U. S. 677, 25 L. ed. 968; Pine Grove 27

hold that a change in decision does impair the obligation of contract, at least if the change involves a change in the construction of a statute or constitutional provision. Some cases make a distinction between changes in common-law rules and those involving the construction of a statute or a constitutional provision holding that a decision of the former kind does not involve an impairment of contract obligations, but that a decision in the latter case does.[13]

The Federal Supreme Court cases adhering to the early rule were not on writs of error to the supreme court of a state, but were on appeals or writs of error from lower Federal courts in cases in which recovery was sought upon a contract which was valid according to the rule sustained by decisions of the supreme court of the state prior to its execution and invalid according to a rule adopted after the contract was entered into.[16] In such cases the Federal Supreme Court exercising jurisdiction between citizens of different states held itself free to decide what the state law is and to enforce it as laid down by the state supreme court before the contracts were made, rather than to follow the rule of later decisions.[17] In so far as these Federal cases announced broader rules, they are said to have used "unguarded language" which has caused some confusion, since they did not really involve the contract impairment clause of the Constitution.[18]

In general, it must be a decision construing a state Constitution or statute enacted subsequently to the contract, which impairs the obligation thereof, in order to be within the prohibition of the provision.[19] The construction of

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Twp. v. Talcott, 19 Wall. (U. S.) 666, 22 L. ed. 227; Chicago v. Sheldon, 9 Wall. (U. S.) 50, 19 L. ed. 594; Havemeyer v. Iowa County, 3 Wall. (U. S.) 294, 18 L. ed. 38; Gelpcke v. Dubuque, 1 Wall. (U. S.) 175,

[17] L. ed. 520 (see Rose's notes, p. 743); Ohio L. Ins. & T. Co. v. Debolt, 16 How. (U. S.) 416, 14 L. ed. 997; Caldwell v. Carrington,

[9] Pet. (U. S.) 86, 9 L. ed. 60. Annotation: 18 L. ed. 350; 44 L. ed. 886;

[16] L.R.A. 646, s. 5 L.R.A.(N.S.) 860, and 23 L.R.A.(N.S.) 500. After a statute has been settled by judicial construction, the construction be- comes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decisions is the same in its ef- fect on contracts as an amendment of the law by means of a legislative enactment. Douglass v. Pike County, 101 U. S. 677,

[25] L. ed. 968. "The same principle applies where there is a change of judicial decision, as to the constitutional power of the legislature to enact the law." Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520. The rights of a purchaser of municipal bonds are not affected by a judicial decision against their validity, which decision is in conflict with the law as declared, not only by the Supreme Court of the Unit- ed States, but by the highest court of the state, at and before the time of his pur- chase. Thompson v. Perrine, 103 U. S. 806,

[26] L. ed. 612.

[14] Farrior v. New England Mortg. Secur. Co. 92 Ala. 176, 9 So. 532, 12 L.R.A. 956; Harmon v. Auditor, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502, overruled in Prall v. Burckhartt, 299 Ill. 19, 132 N. E. 280,

[18] A.L.R. 992; Oliver Co. v. Louisville Re- alty Co. 156 Ky. 628, 161 S. W. 570, 51 L.R.A.(N.S.) 293, Ann. Cas. 1915C, 565 (dicta); Mason v. A. E. Nelson Cotton Co.

[148] N. C. 492, 62 S. E. 625, 18 L.R.A.(N.S.) 1221, 128 Am. St. Rep. 635; Thomas v. State, 76 Ohio St. 341, 81 N. E. 437, 10 L.R.A.(N.S.) 1112, 118 Am. St. Rep. 884. Annotation: 44 L. ed. 886; 16 L.R.A. 646, s. 5 L.R.A.(N.S.) 860, and 23 L.R.A.(N.S.) 500; Ann. Cas. 1915C, 579. A decision of a court of supreme juris- diction overruling a former decision is ret- rospective in its operation except that where a Constitution or statute has re- ceived a given construction by the courts of last resort and contracts have been made and rights acquired in accordance therewith, such contracts may not be in- validated or vested rights acquired un- der them impaired by a change of construction made by a subsequent decision. Mason v. A. E. Nelson Co. 148 N. C. 492, 62 S. E. 625, 18 L.R.A.(N.S.) 1221, 128 Am. St. Rep. 635. After a statute has been settled by ju- dicial construction, the construction be- comes, so far as contract rights are con- cerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in effect on contracts as an amendment of the law by means of a legislative enact- ment. Ray v. Western Pennsylvania Nat- ural Gas Co. 138 Pa. 576, 20 A. 1065, 12 L.R.A. 290, 21 Am. St. Rep. 922.

[15] Ray v. Western Pennsylvania Natural Gas Co. 138 Pa. 576, 20 A. 1065, 12 L.R.A. 290, 21 Am. St. Rep. 922. This distinction is not referred to in Commissioners of Sinking Fund of Phila- delphia v. Philadelphia, 324 Pa. 129, 188 A. 314, 113 A.L.R. 202.

[16] See, for example, Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 S. Ct. 736.

[17] Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. ed. 382, 44 S. Ct. 197.

[18] Ibid.

[19] Tidal Oil Co. v. Flanagan, 263 U. S. 28

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a subsequent municipal ordinance is included within this rule.[20] Unless some legislative act of a state has been construed by the judgment sought to be reviewed, the Supreme Court of the United States has no jurisdiction to review a judgment of a state court.[21] Mere errors committed by a state court when passing upon the validity and effect of a contract under the laws in existence when it was made cannot give rise to a question of the impairment of contract obligations, reviewable in the Federal Supreme Court.[1] It is equally well settled that the Federal Supreme Court may hold that a decision of a state supreme court impairs the obligation in the event such decision interprets a subsequent statute as not repealing or impairing the obligations of contract contained in a former statute.[2] When a state court gives no effect to a subsequent law, but decides on grounds independent of that law that the

right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed and the Federal Supreme Court has no jurisdiction.[3] The Federal Supreme Court is not limited to the consideration of the language of the opinion, but will examine the substance and effect of the decision,[4] since a decision of a state court may impliedly give effect to a

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444, 68 L. ed. 382, 44 S. Ct. 197; Los Ange- les v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 S. Ct. 736; Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 S. Ct. 1051; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 S. Ct. 1023; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 S. Ct. 80; Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 S. Ct. 210; New Orleans Wa- terworks Co. v. Louisiana Sugar Ref. Co.

[125] U. S. 18, 31 L. ed. 607, 8 S. Ct. 741; Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 1 S. Ct. 916; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 S. Ct. 681; Northwestern Uni- versity v. Illinois, 99 U. S. 309, 25 L. ed. 387; Delmas v. Merchants Mut. Ins. Co. 14 Wall. (U. S.) 661, 20 L. ed. 757; Knox v. Exchange Bank, 12 Wall. (U. S.) 379, 20 L. ed. 414; Mississippi & M. R. Co. v. Mc- Clure, 10 Wall. (U. S.) 511, 19 L. ed. 997; Missouri & M. R. Co. v. Rock, 4 Wall. (U. S.) 177, 18 L. ed. 381. "Any enactment from whatever source originating to which a state gives the force of law is a statute of the state with- in the meaning of the clause cited relating to the jurisdiction of this court." Wil- liams v. Bruffy, 96 U. S. 176, 24 L. ed. 716. The Federal Supreme Court has juris- diction only when the state court has giv- en effect to a legislative enactment which impairs the obligation of contract. Winona & St. P. R. Co. v. Plainview, 143 U. S. 371,

[36] L. ed. 191, 12 S. Ct. 530; State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739,

[37] A.L.R. 1298.

[20] Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 S. Ct. 575; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 S. Ct. 1023.

[21] Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 S. Ct. 180; New Or- leans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 S. Ct. 741; Knox v. Exchange Bank, 12 Wall. (U. S.) 379, 20 L. ed. 414; McCray v. Miller, 78 Okla. 16, 186 P. 1089, citing R. C. L.

[1] Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 56 L. ed. 924, 32 S. Ct. 577; Lehigh Water Co. v. Easton, 121 U. S. 392, 30 L. ed. 1059, 7 S. Ct. 916; Chi- cago L. Ins. Co. v. Needles, 113 U. S. 574,

[28] L. ed. 1084, 5 S. Ct. 681; Delmas v. Mer- chants' Mut. Ins. Co. 14 Wall. (U. S.) 661,

[20] L. ed. 757.

[2] Tidal Oil Co. v. Flanagan, 263 U. S. 444,

[68] L. ed. 382, 44 S. Ct. 197; Columbia R. Gas & E. Co. v. South Carolina, 261 U. S. 236, 67 L. ed. 625, 43 S. Ct. 306; Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 54 L. ed. 144, 30 S. Ct. 40; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 635, 48 L. ed. 823, 24 S. Ct. 532; Northern C. R. Co. v. Maryland, 187 U. S. 258, 47 L. ed. 167, 23 S. Ct. 62; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 S. Ct. 691; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 S. Ct. 26; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 S. Ct. 545; Douglas v. Kentucky,

[168] U. S. 488, 42 L. ed. 553, 18 S. Ct. 199; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 S. Ct. 1023; Mobile & O. R. Co. v. Tennessee, 153 U. S. 485, 38 L. ed. 793, 14 S. Ct. 968; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 S. Ct. 741; Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 S. Ct. 916; Northwestern University v. Il- linois, 99 U. S. 309, 25 L. ed. 387; Mis- sissippi & M. R. Co. v. McClure, 10 Wall. (U. S.) 511, 19

L. ed. 997; Mississippi & M. R. Co. v. Rock, 4 Wall. (U. S.) 177, 18 L. ed. 381; Jefferson Bank v. Skelly, 1 Black (U. S.) 436, 17 L. ed. 173.

[3] New Orleans Waterworks Co. v. Louisi- ana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 627, 8 S. Ct. 741.

[4] Long Sault Development Co. v. Call, 242 U. S. 272, 61 L. ed. 294, 37 S. Ct. 79; De- troit United R. Co. v. Michigan, 242 U. S. 238, 61 L. ed. 268, 37 S. Ct. 87; Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 54 L. ed. 144, 30 S. Ct. 40; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 S. Ct. 545; McCullough v. Vir- ginia, 172 U. S. 102, 43 L. ed. 387, 19 S. Ct. 134. 29

state statute and thereby impair the obligation of contract, although the court does not expressly mention the statute.[5]

In many jurisdictions adhering to the minority rule, although the law must be taken to be as expounded by the last decision on the subject and prior inconsistent decisions must be considered as overruled, yet a change in the construction of the law will not be so applied as to invade rights which have become vested under the prior decisions. A court, however, will refuse to apply this limitation when the party invoking the benefit of the rule comes into court as a self-confessed violator of the law and is in no position to raise an equitable issue.[6] Notwithstanding the general unanimity of opinion that a change of a judicial decision does not amount to a law within the meaning of the constitutional prohibition as to the impairment of the obligation of contracts, under certain circumstances a moral, and it seems a legal, obligation may arise against a state for services rendered to it in reliance upon a statute the constitutionality of which had previously been affirmed by the court of last resort of such state. Thus, a person who renders services to the public in performance of a contract authorized by statute the constitutional validity of which had been affirmed by the supreme court is entitled, notwithstanding a subsequent decision that the act is constitutionally void, to receive the stipulated compensation for such services as he had performed before the filing of the petition in the action which challenged the validity of the contract.[7]

D. STATE CONTRACTS

§ 399. Generally.—

Not only private contracts are protected from impairment by state laws, but also contracts made by a state with individuals and corporations8 and also with other states.[9] The legislature of a state may make

[5] Columbia R. Gas & E. Co. v. South Carolina, 261 U. S. 236, 67 L. ed. 629, 43 S. Ct. 305; Long Sault Development Co. v. Call,

[242] U. S. 272, 61 L. ed. 294, 37 S. Ct. 79; Detroit United R. Co. v. Michigan, 242 U. S. 238, 61 L. ed. 268, 37 S. Ct. 87; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 56 L. ed. 924, 32 S. Ct. 577; Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 S. Ct. 686; Muhlker v. New York & H. R. Co. 197 U. S. 570, 49 L. ed. 872, 25 S. Ct. 522; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673,

[20] S. Ct. 545. Annotation: 23 L.R.A.(N.S.) 500. If the real substance and effect of a state decision denying rights under a contract is to give force to a later statute impairing the effect of the contract, the Supreme Court of the United States has jurisdiction to review the decision, although the decision is placed by the lower court distinctly on its own construction of the contract. Columbia R. Gas & E. Co. v. South Carolina, 261 U. S. 236, 67 L. ed. 629, 43 S. Ct. 305. A construction by a state court of a state statute, whereby a cause of action under the statute for default of payments is enforced on the ground that payments previously made and accepted by the state are void, operates to impair the obligation of the implied contract arising out of the acceptance of the payments, and therefore violates the Federal Constitution, although the state court does not mention the statute. Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 S. Ct. 545.

[6] Oliver Co. v. Louisville Realty Co. 156 Ky. 628, 161 S. W. 570, 51 L.R.A.(N.S.) 293, Ann. Cas. 1915C, 565. Annotation: Ann. Cas. 1915C, 579. The doctrine that if a contract when made was valid by the laws of the state, as then administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent decision of the courts of the state, altering the construction of the law, does not apply where the making of the contract is in itself a violation of law. Therefore, such doctrine has no application where a corporation which has failed to comply with a statute subjecting to a penalty any corporation undertaking to transact any business in the state without filing a statement of the location of its place of business within the state and the name of an agent thereat, upon whom process may be served, seeks to enforce a contract entered into subsequently to an earlier decision of the court to the effect that failure to comply with such statutory requirements will not prevent the enforcement of a contract. Oliver Co. v. Louisville Realty Asso. 156 Ky. 628,

[161] S. W. 570, 51 L.R.A.(N.S.) 293, Ann. Cas. 1915C, 565.

[7] Thomas v. State, 76 Ohio St. 341, 81 N. E. 437, 10 L.R.A.(N.S.) 1112, 118 Am. St. Rep. 884.

[8] Re Ayers, 123 U. S. 443, 31 L. ed. 216,

[8] S. Ct. 164; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Davis 30

contracts on many subjects which will bind it and will bind succeeding legislatures for the time the contract has to run.[10] The commonest form of obligations of a state consists of bonds issued by it. The provisions of the laws existing at the time of their issue and regulating their payment are generally considered as forming part of the contract of the state in reference to its bonds.[11] Hence, a statute requiring taxes to be paid in currency impairs the obligation of the contract contained in governmental obligations making them receivable as payment for taxes.[12] If it is provided in the charter of a bank that the bills and notes of the institution shall be received in payment of taxes or of debts due to the state, such undertaking on the part of the state constitutes a

contract between the state and holders of the notes, which the state is not at liberty to break.[13] A bank, incorporated and operated by a state, has a contract with its billholders and depositors to the effect that its funds are to be used in payment of their claims, so that a statute which transfers those funds to other uses is void as impairing the obligation of this contract.[14]

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v. Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447; Jefferson Bank v. Skelly, 1 Black (U. S.) 436, 17 L. ed. 173; Piqua State Bank v. Knoop, 16 How. (U. S.) 369, 14 L. ed. 977; Woodruff v. Trapnall, 10 How. (U. S.) 190,

[13] L. ed. 383; Providence Bank v. Billings,

[4] Pet. (U. S.) 514, 7 L. ed. 939; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547; New Jersey v. Wilson, 7 Cranch (U. S.) 164, 3 L. ed. 303; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Bauer v. North Arkansas Highway Improv. Dist. 168 Ark. 220, 270 S. W. 533, 38 A.L.R. 1507; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; State ex rel. Tipton v. Erickson, 93 Mont. 466,

[19] P. (2d) 227, citing R. C. L.; Visor v. Waters, 320 Pa. 406, 82 A. 241, citing R. C. L. While the state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void. Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 S. Ct. 504. A contract made by the state as one of the parties, although injudicious, cannot be impaired by legislative action or otherwise. Ohio L. Ins. & T. Co. v. Debolt, 16 How. (U. S.) 416, 14 L. ed. 997. It is within the power of the legislature to bind the state by a contract, and such contract is within the protection of the Constitution of the United States, so that the act containing it cannot be repealed or the rights conferred or obligations assumed by it impaired, by subsequent legislation. Richmond, F. & P. R. Co. v. Louisa R. Co.

[13] How. (U. S.) 71, 14 L. ed. 55. The inhibitions of the state and Federal Constitutions with regard to impairing the obligations of contracts apply to contracts made by a state or municipal corporation. Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781. Contracts between individuals and a state, as well as those between individuals, are within the provisions of the Federal Constitution forbidding the passing of laws impairing the obligation of contracts. Jones Hollow Ware Co. v. Crane, 134 Md. 103, 106 A. 274, 3 A.L.R. 1658.

[9] Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547.

[10] Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652.

[11] McCullough v. Virginia, 172 U. S. 102,

[43] L. ed. 382, 19 S. Ct. 134; McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 S. Ct. 972; Sands v. Edmunds, 116 U. S. 585,

[29] L. ed. 739, 6 S. Ct. 516; Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735, 6 S. Ct. 510; White v. Greenhow, 114 U. S. 307, 29 L. ed. 199, 5 S. Ct. 923, 962; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962; Antoni v. Greenhow,

[107] U. S. 769, 27 L. ed. 468, 2 S. Ct. 91; Hartman v. Greenhow, 102 U. S. 672, 26 L. ed. 271; Woodruff v. Trapnall, 10 How. (U. S.) 190, 13 L. ed. 383; State ex rel. Tipton v. Erickson, 93 Mont. 466, 19 P. (2d) 227, citing R. C. L.; State ex rel. McKinlay v. Cardozo, 8 S. C. 71, 28 Am. Rep. 275.

[12] McCullough v. Virginia, 172 U. S. 102,

[43] L. ed. 382, 19 S. Ct. 134; Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735, 6 S. Ct. 510. Annotation: 100 A.L.R. 1345. The right to pay taxes in coupons issued by the state cannot be treated as a mere right of setoff, which, when given by the general law, is part of the remedy merely, and therefore subject to modification or repeal; because the law which gave it is also a contract, and therefore cannot be changed without mutual consent. Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962. A provision in bonds that its coupons should be receivable "at and after maturity for all taxes due the state" constitutes a contract within the constitutional provision against its impairment by subsequent legislation. Antoni v. Greenhow,

[107] U. S. 769, 27 L. ed. 468, 2 S. Ct. 91. See PUBLIC SECURITIES AND OBLIGATIONS: TAXATION [Also 26 R. C. L. p. 378, § 337].

[13] Hartman v. Greenhow, 102 U. S. 672, 26 L. ed. 271; Furman v. Nichol, 8 Wall. (U. S.) 44, 19 L. ed. 370; Woodruff v. Trapnall, 10 How. (U. S.) 190, 13 L. ed. 383.

[14] Baring v. Dabney, 19 Wall. (U. S.) 1,

[22] L. ed. 90; Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705. 31

§ [400] CONSTITUTIONAL LAW [12] Am. Jur.

A contract entered into between the state and an individual "subject to

law" permits the state to rescind such contract without impairing the obligation thereof.[15]

A state Constitution is not a contract within the meaning of that clause of

the Constitution of the United States which prohibits the states from passing

laws impairing the obligation of contracts.[16]

§ [400]. Violation and Impairment.—A state entering into contracts lays

aside its attributes of sovereignty and binds itself, substantially, as one of its

citizens does when he enters into a contract. While a state has no power to

annul its own contracts,[17] under certain circumstances it has the power of

defeating a contract because of its immunity from suit instituted by individuals.[18] The legislature may avoid payment of the obligations of the state by

failure or refusal to make the necessary appropriation, notwithstanding that

body cannot impair the obligation of the contract; but after an appropriation

has been made, the state cannot withdraw such appropriation where this

would amount to the impairment of the obligation of its contract.[19] A state

cannot impair any of the substantial rights secured to the holder of a tax certificate by the existing laws20 or impose a license tax for the sale of coupons

belonging to bonds issued by the state.[1] A state has the same right as an

individual to break its contracts, and although it has made a contract to do a

particular thing, it may abandon it and in such case the obligation of the contract would not be impaired by the refusal of the state to perform it. The

other party to the agreement would have a just claim against the state for

any damages sustained in like manner as if the contract had been between individuals.[2] This principle is justified on the basis that the breach of a contract by the state does not impair its obligation, but that the state merely has

immunity from suit.[3] The only remedy available in the absence of statute is

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[15] Head v. University of Missouri, 19 Wall. (U. S.) 526, 22 L. ed. 160.

[16] Church v. Kelsey, 121 U. S. 282, 30 L. ed. 960, 7 S. Ct. 897. Annotation: 33 L. ed. 836. No rights of contract can be vested under a constitutional provision which a subsequent Constitution may not

destroy without impairing the obligation of contract. New Orleans v. Houston, 119 U. S. 265, 30 L. ed. 411, 7 S. Ct. 198.

[17] Woodruff v. Trapnall, 10 How. (U. S.) 190, 13 L. ed. 383; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Carr v. State, 127 Ind. 204, 26 N. E. 778, 11 L.R.A. 370, 22 Am. St. Rep. 624. The immunity given to states from suits at law and in equity by the Federal Constitution while of equal authority with every other provision of that instrument and to be construed and applied in harmony with all its provisions does not exempt the state from the operation and effect of the constitutional prohibition against passing any law impairing the obligation of contracts. Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962.

[18] Hays v. Seattle, 251 U. S. 233, 64 L. ed. 243, 40 S. Ct. 125; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164; Caldwell v. Donaghey, 108 Ark. 60, 156 S. W. 839, 45 L.R.A.(N.S.) 721, Ann. Cas. 1915B, 133. Annotation: 45 L.R.A.(N.S.) 721, 723. The constitutional provision against the impairment of the obligations of contracts by laws enacted after they have been entered into, although its protection extends to contracts between an individual and a state, is nevertheless subject to the other constitutional provision of equal authority contained in the Eleventh Amendment giving immunity to a state from suit. Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164. As to the liability of a state to be sued, see STATES [Also 25 R. C. L. p. 412, § 49].

[19] Rorick v. Everglades Drainage Dist. (D. C.) 57 F. (2d) 1048, citing R. C. L.; Carr v. State, 127 Ind. 204, 26 N. E. 778, 11 L.R.A. 370, 22 Am. St. Rep. 624.

[20] State v. Krahmer, 105 Minn. 422, 117 N. W. 780, 21 L.R.A.(N.S.) 157.

[1] McGahey v. Virginia, 135 U. S. 662, 685,

[34] L. ed. 304, 312, 10 S. Ct. 972.

[2] Hays v. Seattle, 251 U. S. 233, 64 L. ed. 243, 40 S. Ct. 125; Brown v. Colorado,

[106] U. S. 95, 27 L. ed. 132, 1 S. Ct. 175; Caldwell v. Donaghey, 108 Ark. 60, 156 S. W. 839, 45 L.R.A. (N.S.) 721, Ann. Cas. 1915B, 133. Annotation: 45 L.R.A.(N.S.) 721.

[3] Brown v. Colorado, 106 U. S. 95, 27 L. ed. 132, 1 S. Ct. 175; Caldwell v. Donaghey, 108 Ark. 60, 156 S. W. 839, 45 L.R.A. (N.S.) 721, Ann. Cas. 1915B, 133; Donolds v. State, 89 N. Y. 36, 42 Am. Rep. 277. Annotation: 45 L.R.A.(N.S.) 721. 32

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through an appeal to the legislature, which fact is known to the claimant at the time of entering into the contract with the state.[4]

A law authorizing suits in behalf of the state for the assertion of its title to property does not impair any contract rights that a party thus proceeded against may have in the subject matter.[5] Consequently, an adjudication for the state is not reviewable in the United States Supreme Court by the defendant on the ground that the statute authorizing the suit violated the contract clause of the Constitution.[6]

A state statute directing the bringing of suit against any taxpayer who should tender coupons of state bonds in payment of taxes impairs the obligation of the contract, provided no discrimination is made in its provisions between genuine and spurious coupons.[7]

§ [401]. Withdrawal of Right of Action against State as Impairment.—By virtue of the Eleventh Amendment to the Constitution of the United States, no action can be brought by an individual against a sovereign state without

its consent. Accordingly, although a state is forbidden to impair the obligation of a contract entered into by it, a private citizen cannot bring suit against the state.[8] Even if the state, at the inception of the contract, consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity9 or may subsequently prescribe additional conditions in order that the party may bring suit against it.[10] A law by which the state consents to be sued does not constitute a contract, and the state may repeal or alter such a law at its will.[11]

A rightful judgment against a state, on the other hand, gives a vested right which cannot be taken away, pending writ of error, by a repeal of the statute which authorized the state to be sued.[12] In those cases where a state permits an action against itself, the court is practically acting as an auditing board; and if funds are not voluntarily provided to meet the judgment, the courts are not invested with power to supply them. There is no remedy for the enforcement of the contracts of the state that may not, under the Constitution of the United States, be taken away by a law of the state.[13] In exercising this power,

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[4] Caldwell v. Donaghey, 108 Ark. 60, 156 S. W. 839, 45 L.R.A.(N.S.) 721, Ann. Cas. 1915B, 133.

[5] Western U. Teleg. Co. v. Georgia, 269 U. S. 67, 70 L. ed. 166, 46 S. Ct. 36.

[6] Ibid.

[7] McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 S. Ct. 972.

[8] Carolina Glass Co. v. South Carolina,

[240] U. S. 305, 60 L. ed. 658, 36 S. Ct. 293; Baltzer v. North Carolina, 161 U. S. 240,

[40] L. ed. 684, 16 S. Ct. 500; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164; Memphis & C. R. Co. v. Tennessee, 101 U. S. 337, 25 L. ed. 960; Beers v. Arkansas, 20 How. (U. S.) 527, 15 L. ed. 991. As to a state's immunity from suit, see STATES [Also 25 R. C. L. p. 412, § 49].

[9] Baltzer v. North Carolina, 161 U. S. 240,

[40] L. ed. 684, 16 S. Ct. 500; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164; Memphis & C. R. Co. v. Tennessee, 101 U. S. 337, 25 L. ed. 960. Annotation: 15 L. ed. 992.

[10] Beers v. Arkansas, 20 How. (U. S.) 527,

[15] L. ed. 991. Annotation: 15 L. ed. 992.

[11] Beers v. Arkansas, 20 How. (U. S.) 527, 15 L. ed. 991. A state law authorizing suits against the state is not a contract, and a subsequent law prescribing new conditions or taking away such right of action is not invalid even as to pending suits. Bank of Washington v. Arkansas, 20 How. (U. S.) 530,

[15] L. ed. 993.

[12] McCullough v. Virginia, 172 U. S. 102,

[43] L. ed. 382, 19 S. Ct. 134.

[13] Baltzer v. North Carolina, 161 U. S. 240, 40 L. ed. 684, 16 S. Ct. 500; South & North Ala. R. Co. v. Alabama, 101 U. S. 832, 25 L. ed. 973; Memphis & C. R. Co. v. Tennessee, 101 U. S. 337, 25 L. ed. 960. The repeal of a constitutional provision giving a court jurisdiction to hear claims against the state, making the decision merely recommendatory to the legislature, and denying the right to

an execution thereon does not impair the obligation of a contract with persons holding claims against the state. Baltzer v. North Carolina, 161 U. S. 240, 40 L. ed. 684, 16 S. Ct. 500. 33

the state violates no contract with the parties; it merely regulates the proceedings in its own courts.[14]

An erroneous decision to the effect that a constitutional provision giving a court power to hear claims against the state has been repealed does not impair the obligation of a contract, if it would not be impaired by the actual repeal of the provision.[15]

§ 402. Modification of Remedies as to State Contracts.—The general principles permitting the modification of remedies may be applied with respect to attempts by a state to alter the procedure available for the enforcement of the rights of holders of state coupons and bonds. The state clearly may make all such changes in the remedy as do not substantially impair or obstruct the rights of the other party to the contract. It may deprive the holder of a state bond of the right to use his bond in payment of the purchase price of a certain class of public lands, if it provides for the payment by the state of the bond in money on due presentation.[16] It may also modify the statutory proceedings in reference to mandamus; and instead of permitting the issuing of the writ to a tax collector to compel him to accept state bonds and coupons in payment of taxes when tendered, the remedy may be altered so as to require the taxpayer first to pay his taxes in money, and then to require such bonds and coupons to be received in payment of the taxes and the money previously paid refunded.[17] Special courts may be created for the determination of the legality and genuineness of bonds purported to have been issued by the state.[18] On the other hand, in regulating the bringing of actions on bonds or coupons issued by a state, the imposition of a duty on the holder of producing the bonds from which the coupons tendered by him were cut, at the time of offering the same in evidence in court, is an unreasonable condition. Such requirement is unconstitutional, since in many cases its performance would be impossible and it would render valueless all coupons which have been separated from the bonds to which they were attached and have been sold in the open market.[19] The established principles dealing with the shortening of the period of statutes of limitation20 may be applied in determining the legality of such statutes attempting to curtail the time for bringing suit on state obligations. A reasonable time must be afforded within which actions may be brought.[1] Hence, a state statute prohibiting the institution of proceedings to try the genuineness of state bonds and coupons after one year from the time they are due is unreasonable and therefore impairs their obligation.[2] On the other hand, no impairment of a contract right to use state bonds in payment for state lands is effected by a statute providing for the payment of the bonds in cash and limiting the time for presentation to six months after publication of notice, after the expiration of which the bonds are not to be recognized as valid for any purpose.[3] Furthermore, the state may prescribe a reasonable

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[14] Baltzer v. North Carolina, 161 U. S. 240, 40 L. ed. 684, 16 S. Ct. 500; Beers v. Arkansas, 20 How. (U. S.) 527, 15 L. ed. 991.

[15] Baltzer v. North Carolina, 161 U. S. 240, 40 L. ed. 684, 16 S. Ct. 500.

[16] Tipton v. Smythe, 78 Ark. 392, 94 S. W. 678, 7 L.R.A.(N.S.) 714, 115 Am. St. Rep. 44, 8 Ann. Cas. 521.

[17] McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 S. Ct. 972.

[18] Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 S. Ct. 91.

[19] McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 S. Ct. 972.

[20] See infra, § 445.

[1] McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 S. Ct. 972.

[2] Ibid.

[3] Tipton v. Smythe, 78 Ark. 392, 94 S. W. 678, 7 L.R.A.(N.S.) 714, 115 Am. St. Rep. 44, 8 Ann. Cas. 521. 34

period of redemption by those in default of a contract to purchase public lands.[4]

E. MATTERS CONSTITUTING CONTRACTS

1. IN GENERAL

§ [403]. Generally.—The term "contract" is generally used in its ordinary sense in the clause of the United States Constitution forbidding state legislation impairing the obligation of contracts.[5] The provision prohibiting the states from passing laws impairing obligation of contracts has never been understood to embrace contracts other than those which respect property or some other object of value and confer rights which may be asserted in courts of justice.[6] Only those contracts the parties to which have a vested beneficial interest are the objects afforded protection by the impairment clause of the Federal Constitution.[7] The term "contracts," however, comprehends a variety of instruments.[8]

A contract should be clearly proved before it invokes the protection of the Federal Constitution,[9] and to be afforded the protection of this clause, the contract must be complete.[10] Furthermore, the contracts which the Constitution protects relate to property rights, and not those rights which are governmental.[11] Hence, a contract which is not contrary to public policy and is formed between parties competent to contract is a contract which is constitutionally protected against hostile legislation.[12]

An immunity from a change of general rules of law will not ordinarily be implied as an unexpressed term of an express contract.[13]

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[4] Atkins v. Kingsbury, 247 U. S. 484, 62 L. ed. 1226, 38 S. Ct. 558.

[5] Chase v. Curtis, 113 U. S. 452, 28 L. ed. 1038, 5 S. Ct. 554. The term "contract" is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do or not to do certain acts. Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 S. Ct. 54. The word "contracts" in U. S. Const. Art. 1, § 10, forbidding a state to impair the obligation of contracts, is used in its usual or popular sense, as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. Mutual assent, express or implied, to its terms, is of its very essence. Crane v. Hahlo, 258 U. S. 142, 66 L. ed. 514, 42 S. Ct. 214. As to essentials of valid contracts, see generally CONTRACTS, infra, §§ 12 et seq.

[6] Hunt v. Hunt, 131 U. S. clxv, Appx., and 24 L. ed. 1109; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

[7] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

[8] See infra, § 404.

[9] Moultrie County v. Rockingham Tencent Sav. Bank, 92 U. S. 631, 23 L. ed. 631; Concord v. Portsmouth Sav. Bank, 92 U. S. 625, 23 L. ed. 628.

[10] The constitutional guaranty against the impairment of contracts refers to valid, subsisting obligations, and not to contingent or speculative ones. Ochiltree v. Iowa Railroad Contracting Co. 21 Wall. (U. S.) 249, 22 L. ed. 546.

[11] Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Newton v. Mahoning County, 100 U. S. 548, 25 L. ed. 710; State v. Canal & C. R. Co. 50 La. Ann. 1189, 24 So. 265, 56 L.R.A. 287, writ of error dismissed in (U. S.) 44 L. ed. 1221, 20 S. Ct. 1027. The provisions of the Federal Constitution in reference to contracts only inhibit the states from passing laws impairing the obligations of such contracts as relate to property rights, but not to subjects that are purely governmental. Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199. A grant of a public right or privilege is not a contract within the prohibition of the impairment of contract clause. Crenshaw v. United States, 134 U. S. 99, 33 L. ed. 825, 10 S. Ct. 431.

[12] Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513.

[13] Annotation: 85 A.L.R. 469. The court, in refusing to hold a change of the general rules relating to surface waters an impairment of the obligation of contract, said in Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678: "The previous immunity from responsibility for such injury was nothing more than a general rule of law, which was not in terms or by necessary intendment imported into the contract. For just as no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit . . . so an immunity from a change of the general rules of law will not ordinarily be implied as an unexpressed term of an express contract." 35

§§ [404], [405] CONSTITUTIONAL LAW [12] Am. Jur.

§ [404]. Included Matters.—The provision of the Federal Constitution forbidding any state to pass laws impairing the obligation of contracts applies not only to contracts as ordinarily understood but to all instruments, ordinances, and measures, by whatever name known, which embody the inherent qualities or purposes of contracts and carry, like them, their reciprocal obligations of good faith.[14] Within the meaning of the term "contract" as thus protected may be included, therefore, besides contracts of franchises by municipal utes and legislative grants and franchises,[15] grants of franchises by municipal corporations,[16] judgments founded upon contract,[17] contracts contained in public securities representatives18 and public officers,[19] contracts contained in charitable trusts,[1] and trust deeds and obligations,[20] contracts establishing charitable trusts,[1] and trust deeds generally.[2]

A grant upon certain conditions to a state by the United States on acceptance by the state amounts to a contract binding on both, and the state may not dispense with any of the conditions imposed without impairing the obligation of such grant.[3]

§ [405]. Excluded Matters.—The protection of the impairment clause does not extend to public officers or to the salary affixed to such offices, since these do not come within the import of the term "contracts;"[4] nor does it extend to contracts of marriage,[5] judgments not founded in contract,[6] privileges,[7] or statutes providing for other and distinct remedies, such as those prescribing penalties or forfeitures.[8] Furthermore, the inhibition as to the impairment of the obligations of contract does not extend to licenses,[9] as, for example, the

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[14] See generally supra, § 384.

[15] See infra, § 406.

[16] See infra, § 408.

[17] See infra, § 415.

[18] Dunham v. Elford, 34 S. C. Eq. (13 Rich.) 190, 94 Am. Dec. 162.

[19] Tracy v. Reed (C. C.) 13 Sawy. 622, 38 F. 69, 2 L.R.A. 773; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Blakemore v. Cooper, 15 N. D. 5, 106 N. W. 566, 4 L.R.A. (N.S.) 1074, 125 Am. St. Rep. 574.

[20] See PUBLIC SECURITIES AND OBLIGATIONS.

[1] The prohibition against impairing the obligation of contracts, contained in U. S. Const. Art. 1, § 10, applies to contracts establishing charitable trusts. Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L.R.A. 765.

[2] Coolidge v. Long, 282 U. S. 582, 75 L. ed. 562, 51 S. Ct. 306. See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 766, § 72]; TRUSTS [Also 26 R. C. L. p. 1160].

[3] McGee v. Mathis, 4 Wall. (U. S.) 143, 18 L. ed. 314.

[4] See infra, § 420. See also PUBLIC OFFICERS [Also 22 R. C. L. p. 379, § 11].

[5] See infra, § 416.

[6] See infra, § 415.

[7] See infra, § 413.

[8] State v. Baltimore & O. R. Co. 12 Gill & J. (Md.) 399, 38 Am. Dec. 317, affirmed in 3 How. (U. S.) 534, 11 L. ed. 714. A penalty provided for in the charter of a railroad company, for failure to lay its road through a certain county, is not in the nature of a contract, but is a mere penalty which the legislature can remit by a subsequent statute, although the penalty was for the benefit of the county. Maryland use of Washington County v. Baltimore & O. Co. 3 How. (U. S.) 534, 11 L. ed. 714. See also FORFEITURES AND PENALTIES [Also PENALTIES, 21 R. C. L. p. 210, § 5].

[9] Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Stone v. Fritts, 169 Ind. 361, 82 N. E. 792, 15 L.R.A.(N.S.) 1147, 14 Ann. Cas. 295; Moran v. Goodwin, 130 Mass. 158, 39 Am. Rep. 443; State v. Hovorka, 100 Minn. 249, 10 N. W. 870, 8 L.R.A. (N.S.) 1272, 10 Ann. Cas. 398; Simmons v. State, 12 Mo. 268, 49 Am. Dec. 131; State v. American Surety Co. 90 Neb. 154, 91 Neb. 22, 133 N. W. 235, 135 N. W. 365, Ann. Cas. 1913B, 973; Wallace v. Reno, 27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am. St. Rep. 747; Ex parte Williams, 31 Tex. Crim. Rep. 262, 20 S. W. 580, 21 L.R.A. 783; State v. Woodard, 68 W. Va. 66, 69 S. E. 385, 30 L.R.A.(N.S.) 1004. Annotation: 8 L.R.A.(N.S.) 1272; 15 L.R.A.(N.S.) 929; 30 L.R.A.(N.S.) 1004. Contract obligations are not unconstitutionally impaired by the imposition of an additional license fee upon merchants offering with merchandise bargained or sold coupons, profit-sharing certificates, or other evidence of indebtedness or liability redeemable in premiums, where the statute may be deemed to be prospective in its operation, and not to affect sales completed before its enactment. Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421, Ann. Cas. 1917B, 455. 36

license to sell intoxicating liquor,[10] to conduct a lottery,[11] or even to practice a profession.[12] In any event an ordinance cannot amount to a contract to the extent of nullifying the police powers of the state acting either directly or indirectly through the municipality.[13] Likewise, the inhibition as to the impairment clause of the Constitution is not directed against changes in the law affecting remedies14 or purely statutory rights,[15] as, for instance, a right of action against a city for damages caused by a mob,[16] rights to pensions and benefits accruing thereunder,[17] or certain of the laws relating to the custody,[18] disposition,[19] or escheat of the estates of deceased persons.[20]

Of course, a mere grant of a license to use public ways does not constitute a contract within the protection of the obligation of contract clause.[1]

2. LEGISLATIVE GRANTS

§ [406]. Statutes and Legislative Grants.—It has become the established law that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause of the Federal Constitution forbidding impairment of contract obligations;[2] and when such a right has arisen, the repeal of the statute does

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[10] La Croix v. Fairfield County, 50 Conn. 321, 47 Am. Rep. 648; People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; Moran v. Goodwin, 130 Mass. 158, 39 Am. Rep. 443; Wallace v. Reno, 27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am. St. Rep. 747; People ex rel. Lodes v. Health Dept. 189 N. Y. 187, 82 N. E. 187, 13 L.R.A.(N.S.) 894. A license to sell liquor is not a contract between the state and the licensee, giving the latter vested rights, and it cannot be so granted as to be irrevocable. State v. Gibbs, 82 Vt. 526, 74 A. 229, 24 L.R.A.(N.S.) 555, 18 Ann. Cas. 525.

[11] Com. v. Douglass, 100 Ky. 116, 24 S. W. 233, 66 Am. St. Rep. 328, affirmed in 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199; Bass v. Nashville, Meigs (Tenn.) 421, 33 Am. Dec. 154.

[12] A tax upon the exercise of the profession of a lawyer is not unconstitutional as impairing the obligation of a contract. Odlin v. Woodruff, 31 Fla. 160, 12 So. 227, 22 L.R.A. 699. The obligation of the state's contract with one to whom it grants a license to practice law is not impaired by a subsequent statute requiring him to procure a further license from the county clerk as a means of compelling him to pay an occupation tax. Ex parte Williams, 31 Tex. Crim. Rep. 262, 20 S. W. 580, 21 L.R.A. 783. See ATTORNEYS AT LAW, Vol. 5, p. 268, § 12; LICENSES [Also 17 R. C. L. p. 476, § 5].

[13] Grand Trunk Western R. Co. v. South Bend, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809, 36 L.R.A. (N.S.) 850, reversed because of the extent of the regulation in 227 U. S. 544, 57 L. ed. 633, 33 S. Ct. 303, 44 L.R.A. (N.S.) 405. See Vol. 11, p. 983, § 254; infra, § 422.

[14] See infra, § 432.

[15] Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 S. Ct. 428; Louisiana ex rel. Nelson v. St. Martin's Parish, 111 U. S. 716, 28 L. ed. 574, 4 S. Ct. 648; Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 235, 27 L. ed. 936, 3 S. Ct. 211; Sherman v. Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L.R.A. 258. An abutting owner's vested property right, of statutory origin, to compensation after the completion of an elevated viaduct effecting a change of grade in a street, is not a contract right in the sense of the prohibition of U. S. Const. Art. 1, § 10, against the impairment of contract obligations. Crane v. Hahlo, 258 U. S. 142, 66 L. ed. 514, 42 S. Ct. 214.

[16] Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 S. Ct. 428; Louisiana ex rel. Nelson v. St. Martin's Parish, 111 U. S. 716, 28 L. ed. 574, 4 S. Ct. 648; Louisiana v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 S. Ct. 211; Sherman v. Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L.R.A. 258.

[17] See PENSIONS [Also 21 R. C. L. p. 242, § 7].

[18] Provident Inst. for Sav. v. Malone, 221 U. S. 660, 55 L. ed. 899, 31 S. Ct. 661, 34 L.R.A.(N.S.) 1129.

[19] McLure v. Melton, 24 S. C. 559, 58 Am. Rep. 272.

[20] Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 S. Ct. 585. No unconstitutional impairment of the obligation of a contract exists by taking an old unclaimed bank deposit into the state treasury, where it was made after the passage of the statute providing for such course. Com. v. Dollar Sav. Bank, 259 Pa. 138, 102 A. 569, 1 A.L.R. 1048.

[1] Seaboard Air Line R. Co. v. Raleigh, 242 U. S. 15, 61 L. ed. 121, 37 S. Ct. 8. Consent by a state highway commission to the use of trucks with a specified load by common carriers on public highways is not a contract protected by the Federal Constitution. Morris v. Duby, 274 U. S. 135, 71 L. ed. 966, 47 S. Ct. 548.

[2] New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 59 L. ed. 184, 35 S. Ct. 72, L.R.A.1918E, 874, Ann. Cas. 1915A, 906; Russell v. Sebastian, 233 37

not affect the right or an action for its enforcement.[3] The principle that a contract may arise from a legislative enactment must always rest for its support in the particular case upon the construction to be given the act.[4] Furthermore, the acceptance of a grant offered by a state Constitution and part performance thereunder constitute a contract which may not be impaired by subsequent constitutional amendment,[5] although in the cases where contracts arise under state Constitutions nothing will be implied and the grant is to be construed most strongly against the grantee.[6]

The general principle is established in American jurisprudence that a grant under which rights have vested amounts to a contract and that a subsequent statute attempting to impair or annul such grant is unconstitutional, because it is a law impairing the obligation of contracts.[7] Thus, if a state makes a grant absolute in terms and without any reservation of a right to alter, modify, or repeal it, this constitutes an executed contract, and the states are forbidden to pass laws impairing the obligation arising therefrom.[8] The state

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U. S. 195, 58 L. ed. 912, 34 S. Ct. 517, L.R.A. 1915E, 882; Ann. Cas. 1914C, 1282; Houston & T. C. R. Co. v. Texas, 170 U. S. 243, 42 L. ed. 1022, 18 S. Ct. 610; New Jersey v. Yard, 95 U. S. 104, 24 L. ed. 352; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805; Mobile Gas Co. v. Patterson (D. C.) 290 F. 476, citing R. C. L. A contract is created by the acceptance, on the part of holders of claims against a levee board of the proposition made by a statute for the liquidation of the liabilities incurred for levee purposes by the issue of bonds and assessments on the lands benefited, and therefore the rights acquired under that statute cannot be impaired by subsequent legislation. Ford v. Delta & P. Land Co. 164 U. S. 662, 41 L. ed. 590, 17 S. Ct. 230. In Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 S. Ct. 699, it was held that a statute offering swamp lands for sale upon compliance with the terms contained therein constituted a contract upon acceptance which could not be impaired by a subsequent statute. One who, under authority of the legislature, which reserves no power of repeal, constructs a dam for the improvement of the navigation of a stream in order to secure the power to be developed by the dam has a contract right which is not subject to repeal. State ex rel. Wausau Street R. Co. v. Bancroft, 148 Wis. 124, 134 N. W. 330, 33 L.R.A.(N.S.) 526. As to grants of franchises by municipal corporations, see infra, § 408.

[3] Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805; Mobile Gas Co. v. Patterson (D. C.) 290 F. 476, citing R. C. L.

[4] American Smelting & Ref. Co. v. Colorado, 204 U. S. 103, 51 L. ed. 393, 27 S. Ct. 198, 9 Ann. Cas. 978.

[5] Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, 34 S. Ct. 517, L.R.A.1915E, 882, Ann. Cas. 1914C, 1282; Clay County v. Society for Savings, 104 U. S. 579, 26 L. ed. 856. Annotation: Ann. Cas. 1914C, 1287.

[6] Madera Waterworks v. Madera, 228 U. S. 454, 57 L. ed. 915, 33 S. Madera, 228 U. S. Ct. 571.

[7] Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Yarmouth v. North Yarmouth, 34 Me. 411, 56 Am. Dec. 666; Pingree v. Michigan Central R. Co. 118 Mich. 314, 76 N. W. 635, 53 L.R.A. 274; People v. Platt, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382; Monongahela Nav. Co. v. Coon, 6 Pa. 379, 47 Am. Dec. 474; Allen v. Forrest, 8 Wash. 700, 36 P. 971, 24 L.R.A. 606. Annotation: 47 Am. Dec. 478; 56 Am. Dec. 671. The doctrine of the common law is that when a contract has once passed bona fide into grant, neither the King nor any private person who might be the grantor can recall the grant of the property, although the conveyance may have been purely voluntary, and that a grant of franchises is not, in point of principle, distinguishable from a grant of any other property. Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Com. v. Mobile & O. R. Co. (Ky.) 64 S. W. 451, 54 L.R.A. 916. After a grant in fee by a state for a valuable consideration of land under tidewater, a statute providing for the fixing of a bulkhead line and forbidding improvement beyond such line or the placing of any pier within a specified distance of city piers is an unconstitutional

impairment of the contract, if the line is fixed across the property granted and the space beyond the bulkhead line is treated as tidewater subject to dredging for public use without compensation to the grantee. Appleby v. New York, 271 U. S. 364, 70 L. ed. 992, 46 S. Ct. 569. Vested rights under an unrestricted grant to an individual or private corporation when a law is in the nature of a contract cannot be divested by a subsequent change or repeal of the law, since to do so would impair the obligation of an executed contract. Smith v. Westcott, 17 R. I. 366, 22 A. 280, 13 L.R.A. 217.

[8] Terrett v. Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650; Franklin County Grammar School v. Bailey, 62 Vt. 467, 20 A. 820, 10 L.R.A. 405. Annotation: 10 L.R.A. 405. The government has no power to revoke a grant, even of its own funds, when given to a private person or a corporation for special purposes. Dartmouth College 38

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cannot afterwards recall the grant even though it was originally executed without consideration.[9]

A grant of public lands is an executed contract which may not be rescinded by a subsequent act of the state legislature under the impairment clause,[10] provided that all conditions of such a grant are complied with.[11] A law passed subsequent to a state grant of lands, which requires the recording of deeds, does not impair the obligation of contract.[12] It should be remembered, however, that grants made by a legislature are not warranties, and that in determining their effect, if the thing granted was not in the grantor at the time of the grant, no estate passes. In such cases there is no room for the application of the doctrine as to the impairment of the obligation of contracts.[13]

Generally, when the legislature confers a franchise, it retains the right to control the recipient in its exercise so far as it does not surrender its authority to do so; this right of control includes the fixing of rates within certain limits14 in order to prevent unjust discrimination and to enforce such reasonable regulations as the state may deem necessary.[15] Furthermore, statutes which operate only to regulate the manner in which the franchises are to be exercised and which do not interfere substantially with the enjoyment of the main object of the grant made by a corporate charter do not impair the contract contained therein.[16] Where, however, the exclusive power to fix rates within a certain maximum is conferred on the recipient of the franchise, a subsequent attempt by the state to fix such rates is invalid as an impairment of the obligation of a contract.[17] For the very reason that such a contract has the effect

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v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

[9] Terrett v. Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650; Franklin County Grammar School v. Bailey, 62 Vt. 467, 20 A. 820, 10 L.R.A. 405. See also Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629. Annotation: 10 L.R.A. 405.

[10] McGee v. Mathis, 4 Wall. (U. S.) 143, 18 L. ed. 314; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162. Annotation: 10 L.R.A. 406. A grant of rights in public property accepted by the beneficiary amounts to a contract entitled to protection against impairment by action of the state or municipalities acting under state authority. Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 S. Ct. 427.

[11] Compliance with the provisions of a state statute governing the sale of tidelands of the state by making an application for their purchase, taking the required oath, and expending money for a survey cannot be said to consummate, without the payment of some installment of the purchase price, a binding contract between the purchaser and the state protected against impairment by subsequent legislation. Banning Co. v. California, 240 U. S. 142, 60 L. ed. 569, 36 S. Ct. 338.

[12] Jackson ex dem. Hart v. Lamphire, 3 Pet. (U. S.) 280, 7 L. ed. 679. See RECORDS AND RECORDING LAWS [Also 23 R. C. L. p. 172, § 26].

[13] Rice v. Minnesota & N. W. R. Co. 1 Black (U. S.) 358, 17 L. ed. 147.

[14] Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. ed. 594, 32 S. Ct. 389; Owensboro v. Owensboro Waterworks Co. 191 U. S. 358, 48 L. ed. 217, 24 S. Ct. 82; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. ed. 702, 21 S. Ct. 490; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 S. Ct. 198; Ruggles v. Illinois, 108 U. S. 526, 27 L. ed. 812, 2 S. Ct. 832; Winona & St. Peter R. Co. v. Blake, 94 U. S. 180, 24 L. ed. 99; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. ed. 99; Pelk v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 142 Ga. 841, 83 S. E. 946, L.R.A. 1916E, 358; Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 48 N. W. 98, 12 L.R.A. 436, 31 Am. St. Rep. 477; Pingree v. Michigan C. R. Co. 118 Mich. 314, 76 N. W. 635, 53 L.R.A. 274; Blake v. Winona & St. P. R. Co. 19 Minn. 418, Gil. 362, 18 Am. Rep. 345, affirmed in 94 U. S. 180, 24 L. ed. 99; Minneapolis, St. P. & S. Ste. M. R. Co. v. Menasha Wooden Ware Co. 159 Wis. 130, 150 N. W. 411, L.R.A.1915F, 732, affirmed in 245 U. S. 633, 62 L. ed. 522, 38 S. Ct. 133; Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, 142 N. W. 491, L.R.A. 1915F, 744, Ann. Cas. 1915A, 911, affirmed in 238 U. S. 174, 59 L. ed. 1254, 35 S. Ct. 820. For detailed discussion as to power over rates, see PUBLIC UTILITIES AND SERVICES.

[15] Stone v. Yazoo & M. Valley R. Co. 62 Miss. 607, 52 Am. Rep. 193.

[16] Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705.

[17] Pingree v. Michigan C. R. Co. 118 Mich. 314, 76 N. W. 635, 53 L.R.A. 274. Annotation: Ann. Cas. 1913D, 89. The power to fix rates, if exercised by a city, unless that power is clearly expressed by legislative grant, is in the nature of a license and is revocable at the 39

of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power of the government,[18] for an agreement as to the surrender or suspension of legislative control will not be raised by mere implication.[19]

§ 407. Corporate Charters; Statutory Liability of Stockholders.—

While the charter of a corporation is a law in that it is an act of the legislature, it is also something more than a law. It is a grant of powers and privileges, a contract between the corporation and the state by the terms of which the corporation is to enjoy the rights and privileges granted; and like other contracts, it is protected by the Federal Constitution from legislation impairing its obligation. Consequently, the legislature has no authority, after making such a grant, to restrain, control, or destroy the powers, privileges, and franchises so granted, unless the authority is reserved by the act of incorporation or some prior general law. Since the reserve power to alter, amend, or repeal corporate charters is now reserved by general law in most states, this question has become dead as a practical matter. However, the status of the charter of a corporation as a contract, the obligation of which may not be impaired by any state law, does not affect the power of a state to regulate corporations created by it, for it is a well-recognized principle that this power is implied in every grant of corporate existence. The statutory liability of the stockholders of corporations for corporate debts is a contractual right of creditors, and therefore it cannot be abrogated or impaired in any way so as to affect persons whose claims had previously accrued. These matters are treated in full in another part of this work.20

§ 408. Grants of Franchises by Municipal Corporations.—

A franchise is included within the broader term "grant," and the same general principles are applicable to it in reference to the constitutional inhibition as to the impairment of the obligation of contracts.1 The well-established rule as to fran-

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will of the legislature when, in its judgment, the common good demands its reassertion. State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A. 1915C, 287, Ann. Cas. 1913D, 78. See also infra, § 412.

[18] Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 S. Ct. 224; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 S. Ct. 198; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Minot v. Philadelphia, W. & B. R. Co. 18 Wall. (U. S.) 206, 21 L. ed. 888; Holyoke Water-Power Co. v. Lyman, 15 Wall. (U. S.) 500, 21 L. ed. 133; Omaha Water Co. v. Omaha (C. C. A. 8th) 147 P. 1, 12 L.R.A.(N.S.) 736, 8 Ann. Cas. 614, appeal dismissed in 207 U. S. 584, 52 L. ed. 352, 28 S. Ct. 262; Woodburn v. Public Serv. Commission, 82 Or. 114, 161 P. 391, L.R.A.1917C, 98, Ann. Cas. 1917E, 996; Victoria v. Victoria Ice, Light & P. Co. 134 Va. 134, 114 S. E. 92, 28 A.L.R. 562; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78. Every reasonable doubt should be resolved against the existence of a contract on the part of the state and there must be shown a deliberate intention clearly manifested on the part of the state to grant what is claimed. Newton v. Mahoning County, 100 U. S. 548, 25 L. ed. 710.

[19] Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 S. Ct. 198; St. Clair County Turnp. Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Minot v. Philadelphia, W. & B. R. Co. 18 Wall. (U. S.) 206, 21 L. ed. 888; Holyoke Water-Power Co. v. Lyman, 15 Wall. (U. S.) 500, 21 L. ed. 133; Omaha Water Co. v. Omaha (C. C. A. 8th) 147 F. 1, 12 L.R.A.(N.S.) 736, 8 Ann. Cas. 614, appeal dismissed in 207 U. S. 584, 52 L. ed. 352, 28 S. Ct. 262; Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L.R.A. 337. A grant by the state to operate a ferry and a prohibition on the state to grant another ferry lease within a certain area do not constitute an implied contract by the state that it will not permit a bridge to be built. Larson v. South Dakota, 278 U. S. 429, 73 L. ed. 441, 49 S. Ct. 196.

[20] See CORPORATIONS generally [Also 7 R. C. L. p. 1].

[1] New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 S. Ct. 273; People v. State Tax Comrs. 174 N. Y. 417, 67 N. E. 69, 63 L.R.A. 884, 105 Am. St. Rep. 674; Wyoming v. Ohio Traction Co. 104 Ohio St. 325, 135 N. E. 675, citing R. C. L.; Cincinnati v. Public Utilities Commission, 40

chises is that where a municipal corporation, acting within its powers, enacts an ordinance conferring rights and privileges on a person or corporation, and the grantee accepts the ordinance and expends money in availing itself of the rights and privileges so conferred, a contract is thereby created which, in the absence of a reserved power to amend or repeal the ordinance, cannot be impaired by subsequent municipal enactment.[2] The equivalent of a municipal grant or franchise may result from the acceptance of an offer contained in a state statute3 or in the Constitution of the state.[4] The great weight of au-

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[98] Ohio St. 320, 121 N. E. 688, 3 A.L.R. 705 (overruled on other grounds in United Fuel Gas Co. v. Ironton, 107 Ohio St. 173, 140 N. E. 884, 29 A.L.R. 342); Allen v. Forrest, 8 Wash. 700, 36 P. 971, 24 L.R.A. 606. Annotation: 50 L.R.A. 142. See FRANCHISES [Also 12 R. C. L. p. 179, § 6].

[2] New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 59 L. ed. 184, 35 S. Ct. 72, L.R.A.1918E, 874, Ann. Cas. 1915A, 906; Boise Artesian Hot & Cold Water Co. v. Boise City,

230 U. S. 84, 57 L. ed. 1400, 33 S. Ct. 997; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1339, 33 S. Ct. 988; Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 33 S. Ct. 303, 44 L.R.A. (N.S.) 405; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 S. Ct. 572; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 S. Ct. 118; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 S. Ct. 762; Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 S. Ct. 660, 6 Ann. Cas. 253; Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 50 L. ed. 854, 26 S. Ct. 513; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 S. Ct. 410; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 S. Ct. 77; St. Tammany Waterworks Co. v. New Orleans Waterworks Co. 120 U. S. 64, 30 L. ed. 563, 7 S. Ct. 405; Louisiana ex rel. Fisk v. Jefferson, 116 U. S. 131, 29 L. ed. 587, 6 S. Ct. 329; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 S. Ct. 273; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Broughton v. Pensacola, 93 U. S. 266, 23 L. ed. 896; Omaha Water Co. v. Omaha (C. C. A. 8th) 147 F. 1, 12 L.R.A.(N.S.) 736, 8 Ann. Cas. 614, appeal dismissed in 207 U. S. 584, 52 L. ed. 352, 28 S. Ct. 262; Colorado & S. R. Co. v. Ft. Collins, 52 Colo. 281, 121 P. 747, Ann. Cas. 1913D, 646; Washington v. Atlantic Coast Line R. Co. 136 Ga. 638, 71 S. E. 1066, 38 L.R.A.(N.S.) 867; Rushville v. Rushville Natural Gas Co. 164 Ind. 162, 73 N. E. 87, 3 Ann. Cas. 86; Michigan Teleph. Co. v. St. Joseph, 121 Mich. 502, 80 N. W. 383, 47 L.R.A. 87, 80 Am. St. Rep. 520; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L.R.A. 175; Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Northwestern Teleph. Exch. Co. v. Anderson, 12 N. D. 585, 98 N. W. 706, 65 L.R.A. 771, 102 Am. St. Rep. 580, 1 Ann. Cas. 110; Elliott v. Eugene, 135 Or. 108, 294 P. 358, citing R. C. L.; Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, 142 N. W. 491, L.R.A.1915F, 744, Ann. Cas. 1915A, 911, affirmed in 238 U. S. 174, 59 L. ed. 1254, 35 S. Ct. 820. Annotation: 3 A.L.R. 730, s. 9 A.L.R. 1165, 23 A.L.R. 609, and 29 A.L.R. 356; 50 L.R.A. 145; 3 Ann. Cas. 90; 6 Ann. Cas. 259; Ann. Cas. 1915A, 899. The acceptance of a permit granted by a municipal corporation under legislative authority to place wires in the city streets creates a contract which cannot thereafter constitutionally be revoked or impaired by municipal resolution or ordinance, unless such franchise is lost by misuser or nonuser. New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 59 L. ed. 184, 35 S. Ct. 72, L.R.A.1918E, 874, Ann. Cas. 1915A, 906. When a municipal corporation, by ordinance, gives its consent that a natural gas company may enter the municipality and lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by the ordinance which is accepted in writing by the corporation, such action by both parties constitutes a contract, and the rights of the parties therein are to be determined by the contract itself. Cincinnati v. Public Utilities Commission, 98 Ohio St. 320, 121 N. E. 688, 3 A.L.R. 705, overruled in United Fuel Gas Co. v. Ironton, 107 Ohio St. 173, 140 N. E. 884, 29 A.L.R. 342; Salt Lake City v. Utah Light & Traction Co. 52 Utah, 210, 173 P. 556, 3 A.L.R. 715. It is a familiar law that when the terms of a valid ordinance are accepted by a grantee, such action constitutes a valid contract and the rights of the parties are determined by the contract itself. Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, 3 A.L.R. 596. For a detailed discussion of the general principles above stated, see FRANCHISES [Also 12 R. C. L. p. 192, § 19]; MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 1149, §§ 424-437].

[3] The grant resulting from the acceptance by the establishment of a plant devoted to the prescribed public use of the state's offer to permit persons or corporations duly incorporated for the purpose "in any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light" to lay pipes in the city streets for the purpose specified constitutes a contract and vests in the accepting individual or corporation a property right protected by the Federal Constitution against impairment. Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, 34 S. Ct. 517, L.R.A.1918E, 882, Ann. Cas. 1914C, 1282.

[4] Madera Waterworks v. Madera, 228 U. S. 454, 57 L. ed. 915, 33 S. Ct. 571. 41

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thority accepts the view that a grant by a municipality of a franchise without specifying a time limit constitutes a perpetual provision in the state impairment clause, provided there is no controlling provision in the state Constitution or statutes or a prior

adjudication by its courts to the contrary.[5] If, however, the duration of public franchises is limited by the state Constitution to a definite period, contracts for rates to exceed that period are not protected by the impairment of contract clause as that which protects vested rights principle of these cases is closely akin to that which protects vested rights from divestment, and it is not uncommon to treat the franchise itself as a vested right.[7] It is necessary though that the power to grant such a franchise reside in the municipality, for if the power in question does not exist, then a grant would not be binding or within the protection of the Federal Constitution to the extent that it purports to be irrevocable and exclusive.[8] A municipal corporation may by an express contract confer an exclusive franchise or privilege, excluding even itself from competition during the period of the contract.[9] It seems to be generally recognized that a franchise when granted by a municipality must be accepted and acted upon in order to give it the character of a contract;[10] after this is done, it becomes an irrevocable contract which cannot be amended or diminished without the consent of the grantee.[11] It would seem, however, that such acceptance and action upon the offer must be substantial.[12] The mere granting of a franchise does not amount to an implied contract on the part of the grantor that it will do nothing to impair its value,[13] that it will not grant a rival franchise to a competing corpora-

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[5] Northern Ohio Traction & L. Co. v. Ohio, 245 U. S. 574, 62 L. ed. 481, 38 S. Ct. 196, L.R.A.1918E, 865. Annotation: 71 A.L.R. 121. See FRANCHISES [Also 12 R. C. L. p. 172]; MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 678].

[6] Mobile Electric Co. v. Mobile, 201 Ala. 607, 79 So. 39, L.R.A.1918F, 667.

[7] Benton Harbor v. Michigan Fuel & Light Co. 250 Mich. 614, 231 N. W. 52, 71 A.L.R. 114; Ingersoll v. Nassau Electric R. Co. 157 N. Y. 453, 52 N. E. 545, 43 L.R.A. 236.

[8] Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 S. Ct. 50; People's Pass. R. Co. v. Memphis City R. Co. 10 Wall. (U. S.) 38, 19 L. ed. 844; Birmingham & P. M. Street R. Co. v. Birmingham Street R. Co. 79 Ala. 465, 58 Am. Rep. 615; Westminster Water Co. v. Westminster, 98 Md. 551, 56 A. 990, 64 L.R.A. 630, 103 Am. St. Rep. 424; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78; Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L.R.A. 142, writ of error dismissed in — U. S. —, 46 L. ed. 1267, 22 S. Ct. 942; Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, 142 N. W. 491, L.R.A.1915F, 744, Ann. Cas. 1915A, 911, affirmed in 238 U. S. 174, 59 L. ed. 1254, 35 S. Ct. 820. And see Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 S. Ct. 660, 6 Ann. Cas. 253; Victoria v. Victoria Ice, Light & P. Co. 134 Va. 134, 114 S. E. 92, 28 A.L.R. 562; Virginia-Western Power Co. v. Clifton Forge (Virginia-Western Power Co. v. Com.) 125 Va. 469, 99 S. E. 723, 9 A.L.R. 1148, writ of certiorari denied in 251 U. S. 557, 64 L. ed. 413, 40 S. Ct. 179. Annotation: 50 L.R.A. 143.

[9] Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 S. Ct. 660, 6 Ann. Cas. 253; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 S. Ct. 77.

[10] Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 401, 46 L. ed. 1219, 22 S. Ct. 866; Re Russell, 163 Cal. 668, 126 P. 875, Ann. Cas. 1914A, 152, reversed on other grounds in 233 U. S. 195, 58 L. ed. 912, 34 S. Ct. 517, Ann. Cas. 1914C, 1282; Stockton Gas & E. Co. v. San Joaquin County, 148 Cal. 313, 83 P. 54, 5 L.R.A.(N.S.) 174, 7 Ann. Cas. 511; Pennsylvania R. Co. v. Bowers, 124 Pa. 183, 16 A. 836, 2 L.R.A. 621. Annotation: 50 L.R.A. 148; Ann. Cas. 1915A, 899.

[11] Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U. S. 84, 57 L. ed. 1400, 33 S. Ct. 997; Shreveport Traction Co. v. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345; Michigan Teleph. Co. v. St. Joseph, 121 Mich. 502, 80 N. W. 383, 47 L.R.A. 87, 80 Am. St. Rep. 520; Westport v. Mulholland, 159 Mo. 86, 60 S. W. 77, 53 L.R.A. 442. Annotation: 50 L.R.A. 145.

[12] The appointment of agents to subscribe for stock of a railroad company upon the happening of a certain event, before a new state Constitution went into effect, prohibiting municipal aid, does not create a contract to make the subscription and issue bonds. Buffalo & J. R. Co. v. Falconer, 103 U. S. 821, 26 L. ed. 471.

[13] Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 48 L. ed. 127, 24 S. Ct. 43; Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 354, 46 L. ed. 585, 22 S. Ct. 400; 42

tion,[14] or enter into competition itself in reference to the subject of the franchise.[15] It is to be remembered that franchises granted by cities affecting subjects and matters coming within the police power of the state must be considered as having been granted or passed with reference to the power of the state to legislate in regard to such matters unfettered by provisions of such franchises.[16]

§ 409. —

What Constitutes Impairment within Rule.—The repeal of an ordinance granting a privilege which has been accepted or acted upon is, of course, an impairment of the contract where no power of repeal is reserved.17 An attempted reduction of the rates prescribed in a franchise, by subsequent ordinance, is an impairment of the obligation of the contract.18 An ordinance which declares acts unlawful which by contract or franchise were permitted is invalid as impairing the obligation of contract, provided it is not justified under the police power.19 A contract granting an exclusive right and privilege to operate a waterworks for a specified number of years is impaired by the construction of a waterworks system by the municipality.20 After the expiration of the time for which a street railway franchise is granted, no contract obligation is impaired by requiring the removal of its tracks from the streets.1

§ 410. Ultra Vires Grants as Exception to Rule.—

The protection of the constitutional provision as to impairment of obligation of contract does not extend to privileges, franchises, and grants given by a municipality in excess of its powers.2 However, where the original ordinance is beyond the powers

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Tuckahoe Canal Co. v. Tuckahoe, J. R. Co. 11 Leigh (Va.) 42, 36 Am. Dec. 374.

[14] Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 S. Ct. 224; Helena Waterworks Co. v. Helena, 195 U. S. 383, 49 L. ed. 245, 25 S. Ct. 40; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 48 L. ed. 127, 24 S. Ct. 43; Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 46 L. ed. 1132, 22 S. Ct. 820; Bienville Water Supply Co. v. Mobile, 175 U. S. 109, 44 L. ed. 92, 20 S. Ct. 40; Stein v. Bienville Water Supply Co. 141 U. S. 67, 35 L. ed. 622, 11 S. Ct. 892; Richmond, F. & P. R. Co. v. Louisa R. Co. 13 How. (U. S.) 71, 14 L. ed. 55; Omaha Water Co. v. Omaha (C. C. A. 8th) 147 F. 1, 12 L.R.A. (N.S.) 736, 8 Ann. Cas. 614, appeal dismissed in 207 U. S. 584, 52 L. ed. 352, 28 S. Ct. 262; Rockland Water Co. v. Camden & R. Water Co. 80 Me. 544, 15 A. 785, 1 L.R.A. 388.

[15] Helena Waterworks v. Helena, 195 U. S. 383, 49 L. ed. 245, 25 S. Ct. 40; Joplin v. Southwest Missouri Light Co. 191 U. S. 150, 48 L. ed. 127, 24 S. Ct. 43; Bienville Water Supply Co. v. Mobile, 175 U. S. 109, 44 L. ed. 92, 20 S. Ct. 40; Meridian v. Farmer's Loan & T. Co. (C. C. A. 5th) 143 F. 67, 6 Ann. Cas. 599. A Constitution providing that a private corporation may, in any city not having its own public works, use the streets to lay pipes, etc., subject to regulations as to rates by the municipal corporation, does not give such private corporation an exclusive grant and prevent the city from competing, nor will such provision be implied. Madera Waterworks v. Madera, 228 U. S. 454, 57 L. ed. 915, 33 S. Ct. 571.

[16] See infra, § 421.

[17] Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 S. Ct. 988; Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 33 S. Ct. 303, 44 L.R.A.(N.S.) 405; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 56 L. ed. 934, 32 S. Ct. 572. Annotation: Ann. Cas. 1915A, 901.

[18] Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 S. Ct. 118; Omaha Water Co. v. Omaha (C. C. A. 8th) 147 F. 1, 12 L.R.A.(N.S.) 736, 8 Ann. Cas. 614, appeal dismissed in 207 U. S. 584, 52 L. ed. 352, 28 S. Ct. 262. Annotation: Ann. Cas. 1915A, 902.

[19] Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18. Annotation: Ann. Cas. 1915A, 902.

[20] Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 S. Ct. 660, 6 Ann. Cas. 253. Annotation: Ann. Cas. 1915A, 902.

[1] Detroit United R. Co. v. Detroit, 229 U. S. 39, 57 L. ed. 1056, 33 S. Ct. 697. Annotation: Ann. Cas. 1915A, 902.

[2] Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 33 S. Ct. 303, 44 L.R.A.(N.S.) 405; Murray v. Pocatello, 226 U. S. 318, 57 L. ed. 239, 33 S. Ct. 107; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 S. Ct. 50; Elizabeth City v. Bank, 150 N. C. 407, 64 S. E. 189, 22 L.R.A.(N.S.) 925; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78; Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, 142 N. W. 491, L.R.A.1915F, 744, Ann. Cas. 1915A, 911, affirmed in 238 U. S. 174, 59 L. ed. 1254, 35 S. Ct. 820. Annotation: Ann. Cas. 1915A, 904 43

of the municipal corporation, if it is subsequently ratified by the legislature, it constitutes a contract which cannot be impaired.[3]

§ 411. Effect of Reserved Power to Amend or Repeal.—

An ordinance, granting privileges, which reserves the right of repeal, is not impaired by a repealing ordinance,[4] but the general power of a city to repeal ordinances does not authorize the repeal of a franchise ordinance which has become a contract,[5] on the faith of which money has been spent and rights vested.[6]

§ 412. Rate Fixing by Municipality.—

In accord with the general rule that a municipality may make a binding franchise or contract which is protected against impairment,[7] a municipality may establish fixed rates by agreement or confer on the grantee of the franchise the right to fix rates.[9] Such a franchise may not, however, impair or hamper the paramount power of the state to regulate such rates.[10] Hence, while the municipal corporation may make contracts as to rates subject to the reserved police power of the state to change such rates, until this power is exerted by the state, a binding contract entered into is obligatory on both parties.[11] This principle rests on two general grounds, either that such contract must be deemed to have been entered into

with the knowledge of the inherent reserved power of the state to alter contracts for rates or that the state itself may at any time waive the rights of the

municipalities in the contracts, such municipalities being mere agents of the

state.[12] It is generally held that the clause in the Federal Constitution forbidding the passage of laws impairing the obligation of contracts does not

apply to a statute empowering a public service commission to regulate the

rates of public service corporations and that a contract between a municipality and a public service corporation whereby the latter is permitted to

charge certain rates is not impaired by a statute empowering a commission to

fix rates to be charged by corporations of that kind.[13] This does not mean,

necessarily, that the state may not authorize the making of a contract with a

public utility for a limited period, with which it could not interfere without

unconstitutional impairment of contracts, but it does mean that such author-

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[3] Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 S. Ct. 118. Annotation: Ann. Cas. 1915A, 904.

[4] Annotation: Ann. Cas. 1915A, 904.

[5] Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 S. Ct. 988. Annotation: Ann. Cas. 1915A, 904.

[6] Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 S. Ct. 988. Annotation: Ann. Cas. 1915A, 904.

[7] See supra, § 408.

[8] Detroit United R. Co. v. Michigan, 242 U. S. 238, 61 L. ed. 268, 37 S. Ct. 87; Cleveland v. Cleveland City R. Co. 194 U. S. 517,

[48] L. ed. 1102, 24 S. Ct. 764; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368,

[46] L. ed. 592, 22 S. Ct. 410; Omaha Water Co. v. Omaha, (C. C. A. 8th) 147 F. 1, 12 L.R.A.(N.S.) 736, 8 Ann. Cas. 614, appeal dismissed in 207 U. S. 584, 52 L. ed. 352,

[28] S. Ct. 262. A contract entered into by a municipal corporation fixing the rates for furnishing electricity to its inhabitants under a statute empowering it to contract for a supply of electricity is within the constitu- tional protection against impairment of obligation of contract. Mobile Electric Co. v. Mobile, 201 Ala. 607, 79 So. 39, L.R.A. 1918F, 667.

[9] Sloan v. Pacific R. Co. 61 Mo. 24, 21 Am. Rep. 397.

[10] Puget Sound Traction, Light & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1325,

[37] S. Ct. 705, 5 A.L.R. 1; Idaho Power & L. Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; Woodburn v. Public Serv. Corp. 82 Or. 114, 161 P. 391, L.R.A.1917C, 98, Ann. Cas. 1917E, 996; Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, 142 N. W. 491, L.R.A.1915F, 744, Ann. Cas. 1915A, 911, affirmed in 238 U. S. 174, 59 L. ed. 1254, 35 S. Ct. 820.

[11] Salt Lake City v. Utah Light & Traction Co. 52 Utah, 210, 173 P. 556, 3 A.L.R. 715; Victoria v. Victoria Ice, Light & P. Co. 134 Va. 134, 114 S. E. 92, 28 A.L.R. 562.

[12] Victoria v. Victoria Ice, Light & P. Co.

[134] Va. 134, 114 S. E. 92, 28 A.L.R. 562. Annotation: 3 A.L.R. 735, s. 9 A.L.R. 1165, 28 A.L.R. 587, and 29 A.L.R. 356.

[13] Annotation: 9 A.L.R. 1425. See PUBLIC UTILITIES AND SERVICES. 44

ization has not generally been given and that contracts with such utilities are regarded as entered into subject to reserved authority in the state under the police power or express statute or constitutional provision to modify the contract rate in the interest of the public welfare.[14]

§ 413. Privileges and Their Recall.—

The general principle is that the legislature has the power to take away by statute that which has been given by statute except when to do so would obviously amount to the impairment of a vested right. The recall of such a privilege is not an impairment of the obligation of contracts.[15] So, until a general power granted to corporations has been exercised, the terms and conditions under which it may be exercised are subject to legislative control.[16] Provisions granting such a right or power to a corporation do not partake of the nature of a contract,[17] and the revocation of such a privilege at any time before it is acted upon does not amount to impairment in a constitutional sense.[18] Likewise, a statute limiting the time within which a certain privilege or license previously granted may be exercised is not unconstitutional as impairing the obligations of a contract.[19] The general principles stated have been applied to many different classes of laws—as, for example, to pensions,[20] to bounties offered by a state for the purpose of encouraging an industry,[1] to legislative grants of fines, forfeitures, and penalties accruing to a public corporation under its charter,[2] and to extraordinary remedies springing from no inherent right but resting wholly in positive statutory enactments.[3] Likewise, the privilege of occupying public lands with a view to pre-emption does not confer a contractual4 or vested right in the lands so occupied; and until the title has been obtained it is within the legal and constitutional competency of Congress to withdraw the land from entry or sale, though this may defeat the imperfect right of the settler.[5]

§ 414. Privilege of Using Streets and Highways.—

It is a general principle that the privilege granted by the state or municipality of the use of streets and highways for quasi-public purposes becomes, when accepted or at least when accepted and acted upon, a contract within the provision of the Federal Constitution forbidding the passage of any law impairing the obligation of contract.[6] It seems clear that to bring the grant of a right or privilege in a

[14] Annotation: 9 A.L.R. 1425. See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 678]; PUBLIC UTILITIES AND SERVICES.

[15] Oriental Bank v. Freeze, 18 Me. 109,

[36] Am. Dec. 701; Templeton v. Linn County, 22 Or. 313, 29 P. 795, 15 L.R.A. 730. And see Washington & B. Turnp. Co. v. Maryland, 3 Wall. (U. S.) 210, 18 L. ed. 180.

[16] East Tennessee, V. & G. R. Co. v. Frazier, 139 U. S. 288, 35 L. ed. 196, 11 S. Ct. 517.

[17] Bank of Commerce v. Tennessee, 163 U. S. 416, 41 L. ed. 211, 16 S. Ct. 1113.

[18] Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 401, 46 L. ed. 1219, 22 S. Ct. 866; Galveston, H. & S. A. R. Co. v. Texas, 170 U. S. 226, 42 L. ed. 1017, 18 S. Ct. 603; Pearsall v. Great Northern R. Co.

[161] U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; People's Pass. R. Co. v. Memphis R. Co. 10 Wall. (U. S.) 38, 19 L. ed. 844; Skillman v. Chicago, M. & St. P. R. Co. 78 Iowa, 404, 43 N. W. 275, 16 Am. St. Rep. 452; Wilkes County v. Call, 123 N. C. 308, 31 S. E. 481, 44 L.R.A. 252.

[19] Phalen v. Virginia, 8 How. (U. S.) 163,

[12] L. ed. 1030.

[20] United States v. Teller, 107 U. S. 64,

[27] L. ed. 352, 2 S. Ct. 39.

[1] Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 S. Ct. 428; East Saginaw Salt Mfg. Co. v. East Saginaw, 13 Wall. (U. S.) 373, 20 L. ed. 611.

[2] Watson Seminary v. County Court, 149 Mo. 57, 50 S. W. 889, 45 L.R.A. 675.

[3] Wilson v. Simon, 93 Md. 1, 45 A. 1022,

[80] Am. St. Rep. 427.

[4] Yosemite Valley Case (Hutchings v. Low) 15 Wall. (U. S.) 77, 21 L. ed. 82.

[5] Allen v. Forrest, 8 Wash. 700, 36 P. 971,

[24] L.R.A. 606. See PUBLIC LANDS [Also 22 R. C. L. p. 258, § 22].

[6] Northern Ohio Traction & L. Co. v. Ohio, 245 U. S. 574, 62 L. ed. 481, 38 S. Ct. 196, L.R.A.1918E, 865; New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 59 L. ed. 184, 35 S. Ct. 72, L.R.A. 1918E, 874, Ann. Cas. 1915A, 906; Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, 45

street within the protection of the contract laws, it must at least be accepted by the person or corporation to which it is granted.[7] The courts, however, in declaring the principle, quite commonly state or imply that the privilege not only must be accepted, but must be acted upon; and in most of the cases in which the contract clause has been invoked, it appears not only that the privilege had been accepted, but that large sums of money had been expended in reliance thereon.[8] In accord with the general principles of the law of franchises, a grant of this nature may be forfeited either through misuses or nonuses.[9] Of course, if the power to revoke or alter the original grant is reserved by the state or municipality, then the contract clause may not be invoked successfully.[10] Nor can the contract clause be successfully invoked where the original grant was invalid.[11] Furthermore, a franchise granting the

privilege of the use of streets is subject to the exercise of the police power by the state or municipality12 which may not, as a general rule, be bartered away.[13]

Contracts between individuals which relate to the use of the highways must be deemed to have been made in contemplation of the regulatory authority of the state.[14]

3. MISCELLANEOUS MATTERS

§ 415. Judgments.—

In an early Supreme Court case it was said to be doubtful whether a judgment not founded upon an agreement express or implied is a contract within the meaning of the constitutional prohibition.[15] It is now well settled that due to the fact that judgments lack the element of consent, they are not ordinarily deemed to be within the scope of the impairment clause of the Federal Constitution.[16] The purpose of the constitutional pro-

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[34] S. Ct. 517, L.R.A.1918E, 882, Ann. Cas. 1914C, 282. Annotation: 50 L.R.A. 142, s. L.R.A. 1918E, 893. The grant by a county board of a right to locate, construct, maintain, and oper- ate an interurban electric railway along a state highway, without specifying any lim- it of time, must be held—unless there are controlling provisions in the state Consti- tution or statutes or a prior adjudication by its courts to the contrary—to consti- tute, when accepted, a perpetual fran- chise, protected by the United States Const. Art. 1, § 10, against revocation by subsequent resolution of such board. Northern Ohio Traction & L. Co. v. Ohio,

[245] U. S. 574, 62 L. ed. 481, 38 S. Ct. 196, L.R.A.1918E, 865. For a detailed discussion, see FRANCHISES [Also 12 R. C. L. p. 187, § 13]; HIGHWAYS, STREETS, AND SIDEWALKS [Also

[13] R. C. L. p. 170, § 143].

[7] Annotation: 50 L.R.A. 142, s. L.R.A. 1918E, 895.

[8] Northern Ohio Traction & Light Co. v. Ohio, 245 U. S. 574, 62 L. ed. 481, 38 S. Ct. 196, L.R.A.1918E, 865. See New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 59 L. ed. 184, 35 S. Ct. 72, L.R.A.1918E, 874, Ann. Cas. 1915A, 906. Annotation: 50 L.R.A. 142, s. L.R.A. 1918E, 899.

[9] New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, v. Empire 184, 35 S. Ct. 72, L.R.A.1918E, 874, Ann. Cas. 1915A, 906. Annotation: 50 L.R.A. 142, s. L.R.A. 1918E, 901. See FRANCHISES [Also 12 R. C. L. p. 201, § 26].

[10] Northern Ohio Traction & L. Co. v. Ohio, 245 U. S. 574, 62 L. ed. 481, 38 S. Ct. 196, L.R.A.1918E, 865. Annotation: 50 L.R.A. 142, s. L.R.A. 1918E, 892.

[11] See, Pomona v. Sunset Teleph. & Teleg. Co. 224 U. S. 330, 56 L. ed. 788, 32 S. Ct. 477. Annotation: 50 L.R.A. 142, s. L.R.A. 1918E, 902.

[12] Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 S. Ct. 748; Colorado & S. R. Co. v. Ft. Collins, 52 Colo. 281, 121 P. 747, Ann. Cas. 1913D, 646.

[13] See infra, § 422.

[14] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581.

[15] Garrison v. New York, 21 Wall. (U. S.) 196, 22 L. ed. 612. Annotation: 17 L.R.A. 613.

[16] Morley v. Lake Shore & M. S. R. Co.

[146] U. S. 162, 36 L. ed. 925, 13 S. Ct. 54; Evans-Snider-Buel Co. v. McFadden (C. C. A. 8th) 105 F. 293, 58 L.R.A. 900, af- firmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758; Sprott v. Reid, 3 G. Greene (Iowa) 489, 56 Am. Dec. 549; Stanford v. Coram, 28 Mont. 288, 72 P. 655, 98 Am. St. Rep. 556; Livingston v. Livingston, 173 N. Y. 377, 69 N. E. 123, 61 L.R.A. 800, 93 Am. St. Rep. 600; Wyoming Nat. Bank v. Brown, 7 Wyo. 494, 53 P. 291, 75 Am. St. Rep. 935. Annotation: 17 L.R.A. 615. In a proceeding to condemn property for 46

hibition is the maintenance of good faith in the stipulations of parties against any state interference. If no assent is given to a transaction, no faith is pledged with respect to it, and thus there is no room for the operation of the prohibition.[17] A judgment for the repayment of money paid by mistake is not upon contract, and therefore is not protected by the Federal constitutional provision as such.[18] Likewise, a judgment founded on a tort is not a contract, and for that reason is not protected under the provision referred to.[19] The same principle is applicable to judgments for costs in proceedings in rem. In some instances, even where it is conceded that a judgment is not a contract, it may amount to a vested right and thereby be protected by the Federal Constitution from impairment by a subsequent statute.[20] If, however, a tort is one which benefits the tort-feasor's estate to the full extent of the actual damages sustained by the injured party, the latter may sue either in tort or on an implied contract; and if the damages awarded are commensurate to the benefits accruing to the defendant, then the judgment falls within the protection of the obligation of contract clause.[1] In case a judgment is founded upon a contract, the obligation which the state is prohibited from impairing partakes of the nature of the contract and comes within the protection of the Federal guaranty.[2]

§ 416. Marriage.—

Marriage is not a contract within the meaning of the provision in the Constitution of the United States prohibiting states from im-

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public use, there is nothing in the nature of a contract between the owner and a state, or the corporation which the state authorizes to take the property, that will entitle the owner of property condemned to public use to maintain an action for the recovery of the award made in the condemnation proceeding, after the vaca- tion of the order confirming the same. Gar- rison v. New York, 21 Wall. (U. S.) 196,

[22] L. ed. 612. A judgment is not the obligation of the contract, but the authorized power under which antecedent obligations are to be en- forced. Sprott v. Reid, 3 G. Greene (Iowa) 489, 56 Am. Dec. 549.

[17] Morley v. Lake Shore & M. S. R. Co.

[146] U. S. 162, 36 L. ed. 925, 13 S. Ct. 54; Chase v. Curtis, 113 U. S. 452, 28 L. ed. 1038, 5 S. Ct. 554; Garrison v. New York,

[21] Wall. (U. S.) 196, 22 L. ed. 612; McAfee v. Covington, 71 Ga. 272, 51 Am. Rep. 263.

[18] State v. New Orleans, 38 La. Ann. 119,

[58] Am. Rep. 163.

[19] Freeland v. Williams, 131 U. S. 405,

[33] L. ed. 193, 9 S. Ct. 763; Chase v. Curtis,

[113] U. S. 452, 28 L. ed. 1038, 5 S. Ct. 554; Louisiana ex rel. Nelson v. St. Martin's Parish, 111 U. S. 716, 28 L. ed. 574, 4 S. Ct. 648; Louisiana ex rel. Folsom v. New Or- leans, 109 U. S. 285, 27 L. ed. 936, 3 S. Ct. 211; McAfee v. Covington, 71 Ga. 272, 51 Am. Rep. 263; Douglass v. Loftus, 85 Kan. 720, 119 P. 74, L.R.A.1915B, 797, Ann. Cas. 1913A, 378; Cossard v. Tracy, 52 La. Ann. 835, 27 So. 368, 49 L.R.A. 272; Sherman v. Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L.R.A. 258; Bettman v. Cowley,

[19] Wash. 207, 53 P. 53, 40 L.R.A. 815. Annotation: 17 L.R.A. 613. The statutory obligation resting upon a municipality to make indemnity for dam- ages caused by a mob has no more element of contract in it because it was merged in a judgment than it had previously. Louisiana ex rel. Folsom v. New Orleans,

[109] U. S. 285, 27 L. ed. 936, 3 S. Ct. 211.

[20] Odell v. Green, 72 Ind. App. 65, 122 N. E. 791, citing R. C. L.; Livingston v. Livingston, 173 N. Y. 377, 69 N. E. 123, 61 L.R.A. 800, 93 Am. St. Rep. 600.

[1] A judgment for damages for a tres- pass to real estate, where the tort bene- fited the tort-feasor's estate to the full ex- tent of the actual damages recovered by the injured party, is not a judgment upon a tort, pure and simple, but upon a cause of action so far contractual as to bring the judgment within the protection of the provisions of the Federal Constitution against legislation impairing the obligation of a contract. Douglass v. Loftus, 85 Kan. 720, 119 P. 74, L.R.A.1915B, 797, Ann. Cas. 1913A, 378.

[2] W. B. Worthen Co. v. Thomas, 292 U. S. 426, 78 L. ed. 1344, 54 S. Ct. 816, 93 A.L.R. 173; Louisiana v. St. Martins Parish, 111 U. S. 716, 28 L. ed. 574, 4 S. Ct. 648; Rat- cliffe v. Anderson, 31 Gratt. (Va.) 105, 31 Am. Rep. 716. Annotation: 17 L.R.A. 613. A judgment upon a contract does not terminate its obligation because it does not pay the debt: the debt remains con- tractual in character, and its payment is as much within the obligation of the con- tract after the judgment as it was before. Lamb v. Powder River Live Stock Co. (C. C. A. 8th) 132 F. 434, 67 L.R.A. 558. The legislature cannot enlarge the dow- er rights of a widow as against the rights of one who has contracted with the hus- band for a judgment lien on the property of the husband in view of the constitu- tional provision against impairing the ob- ligation of contracts, although the judg- ment is not actually entered until after the statute is passed. Davidson v. Rich- ardson, 50 Or. 323, 91 P. 1080, 17 L.R.A. (N.S.) 319, 126 Am. St. Rep. 738. 47

pairing the obligation of a contract,[3] and legislation affecting or annulling the marriage relationship is not, therefore, within the protection of that provision.[4] In certain aspects laws regulating divorces resemble laws regulating remedies in other cases of breach of contracts, and for this reason are not treated as impairing the obligation of contracts.[5] Furthermore, since marriage is not within the protection of the clause forbidding impairment of contract, a statute amending the procedure required in divorce actions does not impair the obligation of contract.[6] The provision of the Constitution never has been understood to embrace contracts other than those which respect property or some object of value and confer rights which may be asserted in a court of justice.[7]

F. LAWS AFFECTING POLITICAL SUBDIVISIONS

§ 417. General Rule.—

In determining whether a statute affecting a municipal corporation operates as an impairment of the obligation of a contract, regard must be had to the distinction between the rights of such a corporation in its public or governmental capacity and its private rights. So far as a municipality is an agency of government, created by the legislature, it has no rights or powers which, as between it and the state, the legislature may not modify or abrogate at pleasure.[8] Neither the charter of a municipal cor-

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[3] Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 S. Ct. 723; Georgia v. Tutty (C. C.) 41 F. 753, 7 L.R.A. 50; Berthelemy v. Johnson, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179; Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A.1916A, 696, Ann. Cas. 1916E, 1097; Fearon v. Treanor, 272 N. Y. 268, 273 N. Y. 525, 5 N. E. (2d) 815, 7 N. E. (2d) 671, 109 A.L.R. 1229, appeal dismissed in 301 U. S. 667, 81 L. ed. 1332, 57 S. Ct. 933, which has a rehearing denied in — U. S. —, 82 L. ed. (Adv. 30), 58 S. Ct. 6; Rugh v. Ottenheimer, 6 Or. 231, 25 Am. Rep. 513; State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L.R.A. 515, 48 Am. St. Rep. 928. Annotation: 54 Am. St. Rep. 449.

[4] Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 S. Ct. 723; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A.1916A, 696, Ann. Cas. 1916E, 1097; State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L.R.A. 515, 48 Am. St. Rep. 928.

[5] The provision of the Constitution prohibiting states from passing laws impairing the obligation of contracts does not restrict the general right of a state legislature to legislate on the subject of divorce. Acts authorizing divorces do not impair the marriage contract, but liberate one of the parties because it has been broken by the other. Hunt v. Hunt, 131 U. S. clxv, Appx. and 24 L. ed. 1109. State laws in regard to divorce, being remedial in nature, do not come within the provision of the Constitution forbidding the passage of any law impairing the obligation of contracts. Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629. As to the nature of legislation respecting divorce generally, see DIVORCE AND SEPARATION [Also 9 R. C. L. p. 232].

[6] Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A.1916A, 696, Ann. Cas. 1916E, 1097.

[7] Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 S. Ct. 723; Hunt v. Hunt, 131 U. S. clxv, Appx. and 24 L. ed. 1109; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A.1916A, 696, Ann. Cas. 1916E, 1097.

[8] Trenton v. New Jersey, 262 U. S. 182, 67 L. ed. 937, 43 S. Ct. 534, 29 A.L.R. 1471; Pawhuska v. Pawhuska Oil & Gas Co. 250 U. S. 394, 63 L. ed. 1054, 39 S. Ct. 526; Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 49 L. ed. 591, 25 S. Ct. 327; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 S. Ct. 142; Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552; East Hartford v. Hartford Bridge Co. 10 How. (U. S.) 511, 13 L. ed. 518; Dubuque Electric Co. v. Dubuque (C. C. A. 8th) 260 F. 353, 10 A.L.R. 495; La Mesa, L. G. & S. Valley Irrig. Dist. v. Halley, 197 Cal. 50, 239 P. 719, citing R. C. L.; Hershey v. Cole, 130 Cal. App. 683, 20 P. (2d) 972, citing R. C. L.; State use of Washington County v. Baltimore & O. R. Co. 12 Gill & J. (Md.) 399, 38 Am. Dec. 317, affirmed in 3 How. (U. S.) 534, 11 L. ed. 714; Harsha v. Detroit, 261 Mich. 586, 246 N. W. 849, 90 A.L.R. 853; Saginaw County v. Hubinger, 137 Mich. 72, 100 N. W. 261, 4 Ann. Cas. 792; Com. v. Delaware Twp. 18 Pa. D. & C. 447, 36 Dauph. Co. Rep. 60; Oneida v. Pearson Hardwood Flooring Co. 169 Tenn. 449, 88 S. W. (2d) 998, citing R. C. L.; Montpelier v. East Montpelier, 29 Vt. 12, 67 Am. Dec. 748. Annotation: 4 Ann. Cas. 794. The state has power over the rights and property of cities, held and used for "governmental purposes," which is unrestricted by the contract or due process clauses of the Federal Constitution. Trenton v. New Jersey, 262 U. S. 182, 67 L. ed. 937, 43 S. Ct. 534, 29 A.L.R. 1471. A municipal corporation being a public corporation and a creature of the legisla- 48

poration nor any legislative act regulating the use of property held by it for governmental or public purposes is a contract within the meaning of the Federal Constitution.[9]

A municipality being a creature of the state may not question the power of the state to exercise its police power on the ground that by so doing the state would impair the obligation of contract.[10] Furthermore, the repeal or modification of the charter of a municipal corporation is not within the inhibition of the contract clause.[11] Municipalities, however, have and exercise powers that are not strictly governmental in character. They may lawfully make contracts under which rights are acquired or liabilities incurred, and the legislature cannot legally pass any statute impairing rights thus acquired either by a municipal corporation12 or by persons dealing with it,[13] provided, of

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ture, its charter is subject to amendment, change, or abrogation at the will of the latter without violating the constitutional provision against the impairment of contracts. New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 S. Ct. 142. See supra, Vol. 11, p. 615, § 17. As to home-rule municipalities, see MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 678].

[9] Trenton v. New Jersey, 262 U. S. 182, 67 L. ed. 937, 43 S. Ct. 534, 29 A.L.R. 1471; Pawhuska v. Pawhuska Oil & Gas Co. 250 U. S. 394, 63 L. ed. 1054, 39 S. Ct. 526; Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 49 L. ed. 591, 25 S. Ct. 327; Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 S. Ct. 383; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 S. Ct. 142; La Mesa, L. G. & S. Valley Irrig. Dist. v. Halley, 197 Cal. 50, 239 P. 719, citing R. C. L.; Hershey v. Cole, 130 Cal. App. 683, 20 P. (2d) 972, citing R. C. L.; Sandpoint Water & Light Co. v. Sandpoint, 31 Idaho, 498, 173 P. 972, L.R.A. 1918F, 1106; Com. v. Delaware Twp. 18 Pa. D. & C. 447, 36 Dauph. Co. Rep. 60; Oneida v. Pearson Hardwood Flooring Co. 169 Tenn. 449, 88 S. W. (2d) 998, citing R. C. L. Annotation: 4 Ann. Cas. 794. Neither the charters of municipal corporations nor any law conferring governmental powers, vesting in them property to be used for governmental purposes, authorizing them to hold or manage such property, or exempting them from taxation upon it constitute a contract with the state within the meaning of the Federal Constitution so that the state, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation, and may do this, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40. A state may withdraw from a municipality a grant of governmental authority previously given without violating the contract clause of the Constitution. Pawhuska v. Pawhuska Oil & Gas Co. 250 U. S. 394, 63 L. ed. 1054, 39 S. Ct. 526.

[10] Sandpoint Water & Light Co. v. Sandpoint, 31 Idaho, 498, 173 P. 972, L.R.A. 1918F, 1106; Com. v. Delaware Twp. 18 Pa. D. & C. 447, 36 Dauph. Co. Rep. 60.

[11] Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 S. Ct. 142; Broughton v. Pensacola, 93 U. S. 266, 23 L. ed. 896; Oneida v. Pearson Hardwood Flooring Co. 169 Tenn. 449, 88 S. W. (2d) 998, citing R. C. L. Annotation: 4 Ann. Cas. 795.

[12] Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 49 L. ed. 591, 25 S. Ct. 327 (dictum); Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 731. Annotation: 4 Ann. Cas. 796. The private or proprietary rights and interests of a municipal corporation may be entitled to constitutional protection against legislation impairing the obligation of contracts or depriving of property without due process of law. New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 S. Ct. 142. A contract concerning proprietary rights, harmless in itself, made by a municipality in the exercise of power clearly conferred is protected by the Constitution, and the police power cannot be invoked

to abrogate or impair it. Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, 3 A.L.R. 696. In Bowdoinham v. Richmond, 6 Me. 112, 19 Am. Dec. 197, it was held that where an act incorporating part of a town into a new town provided that the latter should support its proportion of all the paupers then supported in whole or in part by the original town, a subsequent act exonerating the new town from such liability in the future was unconstitutional and void as impairing the obligation of contracts.

[13] Graham v. Folsom, 200 U. S. 248, 50 L. ed. 464, 26 S. Ct. 245; Shapleigh v. San Angelo, 167 U. S. 646, 42 L. ed. 310, 17 S. Ct. 957; Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 S. Ct. 210; Mobile v. Watson, 116 U. S. 289, 29 L. ed. 620, 6 S. Ct. 398; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699; Broughton v. Pensacola, 93 U. S. 266, 23 L. ed. 896; Van Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403. 49

course, the contract is one which the municipality is authorized to make,[14] Under this general rule a contract entered into by a municipality, which is fully empowered to do so, and a private corporation for the municipality's water supply for a definite period is unconstitutionally impaired by a statute substituting an indeterminate time therefor.[15] The approval by the electors of a municipality or district of a proposed bond issue creates a status analogous to a contractual relationship which is entitled to protection under the Constitution.[16] The general principles stated above apply to counties and other political divisions of a state as well as to municipal corporations proper.[17] Hence, the state may change the location of a county seat as it sees fit18 or create a new school district granting to such a district property within its limits which had belonged to other districts from which it was created without impairing any contract obligations.[19]

§ 418. Taxing Power as Inherent Part of Contract.—

In accord with the general rule that existing laws become an integral part of the obligation of a contract,[20] the laws relating to the rights of enforcement existing at the time of the issuance of municipal bonds under the authority of which they are issued enter into and become a part of the contract in such a way that the obligation of the contract cannot thereafter be in any way impaired or its fulfilment hampered or obstructed by a change in the law.[1] As a result, when a contract is made with a municipal corporation on the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition as to the impairment of the obligation

of contracts.[2] Therefore, the remedies for the enforcement of such obligations

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[14] See supra, § 408.

[15] Baker v. Druesedow, 263 U. S. 137,

[68] L. ed. 212, 44 S. Ct. 40. Under the contract clause of the Federal Constitution a state cannot substitute an indeterminate permit to supply a munici- pality with water for a contract between the municipality and the supply company, giving an exclusive right to furnish such supply for a definite term, with an obliga- tion on the part of the municipality to pur- chase the supply system at the termina- tion of such term, at a specified price. Superior Water, Light & P. Co. v. Supe- rior, 263 U. S. 125, 68 L. ed. 204, 44 S. Ct. 82.

[16] Golden Gate Bridge & Highway Dist. v. Filmer, 217 Cal. 754, 21 P. (2d) 112, 91 A.L.R. 1; Peery v. Los Angeles, 187 Cal. 753, 203 P. 992, 19 A.L.R. 1044.

[17] Houck v. Little River Drainage Dist.

[239] U. S. 254, 60 L. ed. 266, 36 S. Ct. 58; Newton v. Mahoning County, 100 U. S. 548,

[25] L. ed. 710; McSurely v. McGrew, 140 Iowa, 163, 118 N. W. 415, 132 Am. St. Rep. 248; Miller v. Henry, 62 Or. 4, 124 P. 197,

[41] L.R.A.(N.S.) 97; Nelson v. Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L.R.A. 648. Annotation: 41 L.R.A.(N.S.) 97. The charter of a drainage district as a public corporation does not constitute a contract with its members that the laws it was created to administer will not be changed. Houck v. Little River Drainage Dist. 239 U. S. 254, 60 L. ed. 266, 36 S. Ct. 58. As respects grants of political or govern- mental authority to cities, towns, counties, and the like, the legislative power of the states is not restrained by the contract clause of the Constitution. Dubuque Elec- tric Co. v. Dubuque (C. C. A. 8th) 260 F. 353, 10 A.L.R. 495.

[18] Even assuming that the fulfilment of certain terms prescribed by statute as the conditions on which a county seat should be considered permanently established cre- ates a contract, its obligation is not im- paired by a statute changing its location, since such contract was satisfied on the part of the state establishing the county seat at a certain point with the intent that it should remain there, there being no stipulation that it should remain there in perpetuity. Newton v. Mahoning County,

[100] U. S. 548, 25 L. ed. 710.

[19] Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 S. Ct. 27.

[20] See supra, § 386.

[1] Nelson v. Pitts, 126 Okla. 191, 259 P. 533, 53 A.L.R. 1137.

[2] Farson v. Bird, 248 U. S. 268, 63 L. ed. 233, 39 S. Ct. 111; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Mobile v. Watson, 116 U. S. 289, 29 L. ed. 620, 6 S. Ct. 398; Lou- isiana ex rel. Nelson v. St. Martin's Parish,

[111] U. S. 716, 28 L. ed. 574, 4 S. Ct. 648; Louisiana ex rel. Folsom v. New Orleans,

[109] U. S. 285, 27 L. ed. 936, 3 S. Ct. 211; Ralls County Ct. v. United States, 105 U. S. 733, 26 L. ed. 1220; Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278,

[26] L. ed. 1090; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Meriwether v. Gar- rett, 102 U. S. 472, 26 L. ed. 197; Rees v. 50

assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature; or if they are changed, a substantial equivalent must be provided.[3] Likewise, where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States and is null and void.[4] This

rule is applicable regardless of whether the legislative action is taken by the municipality5 or by state legislation which repeals or limits the statute authorizing the municipality to levy taxes.[6] The creditor of the municipality

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Watertown, 19 Wall. (U. S.) 107, 22 L. ed. 72; Butz v. Muscatine, 8 Wall. (U. S.) 575, 19 L. ed. 490; Riggs v. Johnson Coun- ty, 6 Wall. (U. S.) 166, 18 L. ed. 768; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Board of Revenue v. Farson, Son & Co. 197 Ala. 375, 72 So. 613, L.R.A. 1918B, 881; Hershey v. Cole, 130 Cal. App. 683, 20 P. (2d) 972, citing R. C. L. Goodie v. Fennell, 27 Ohio St. 426, 22 Am. Rep. 321; Pitts v. Allen, 138 Okla. 295, 281 P. 126, citing R. C. L.; State ex rel. Clancy v. Columbia Irrig. Dist. 121 Wash. 79, 208 P. 27, citing R. C. L. Annotation: L.R.A.1918B, 886. Where a municipal corporation is author- ized to contract and to exercise the power of local taxation to meet its contractual engagements, this power must continue un- til the contracts are satisfied, and it is an impairment of an obligation of the con- tract to destroy or lessen the means by which it can be enforced. Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170,

[54] L. ed. 144, 30 S. Ct. 40. When a contract is made with a munic- ipal corporation on the faith that taxes will be levied, legislation repealing or mod- ifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition and is null and void. Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403.

[3] Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Mobile v. Watson, 116 U. S. 289,

[29] L. ed. 620, 6 S. Ct. 398; Ralls County Ct. v. United States, 105 U. S. 733, 26 L. ed. 1220; Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Board of Revenue v. Farson, Son & Co. 197 Ala. 375, 72 So. 613, L.R.A.1918B, 881; Broadfoot v. Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610. Annotation: L.R.A.1918B, 887. After services have been rendered to a municipality under a law, resolution, or ordinance which fixes the rate of compen- sation, there results an implied contract to pay for the services at that rate, which cannot be impaired by the adoption of a state Constitution so restricting the rate of municipal taxation as to destroy the right to enforce the contract. Fisk v. Jef- ferson, 116 U. S. 131, 29 L. ed. 587, 6 S. Ct. 329.

[4] Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Mobile v. Watson, 116 U. S. 289,

[29] L. ed. 620, 6 S. Ct. 398; Ralls County Ct. v. United States, 105 U. S. 733, 26 L. ed. 1220; Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Galena v. Amy (Galena v. United States) 5 Wall. (U. S.) 705, 18 L. ed. 560; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Board of Revenue v. Farson, Son & Co. 197 Ala. 375, 72 So. 613, L.R.A.1918B, 881; Broadfoot v. Fayetteville,

[124] N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610. Annotation: L.R.A.1918B, 887.

[5] Board of Revenue v. Farson, Son & Co.

[197] Ala. 375, 72 So. 613, L.R.A.1918B, 881. Annotation: L.R.A.1918B, 886. As the power to determine what persons and property shall be taxed belongs ex- clusively to the legislative branch of the government and is strictly a legislative power whether directly exercised by the legislature or delegated to a municipality, municipal ordinances assessing taxes upon municipal bonds and thereby lessening the amount of interest agreed to be paid un- der such obligations violate the constitu- tional provision against the passage of laws impairing the obligation of contracts. New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607,

[8] S. Ct. 741.

[6] Ralls County Ct. v. United States, 105 U. S. 733, 26 L. ed. 1220; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Galena v. Amy (Galena v. United States), 5 Wall. (U. S.) 705, 18 L. ed. 560; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403. Annotation: L.R.A.1918B, 887.

Legislation of a state impairing contracts made under its authority is void as im- pairing the obligation of contracts. Lou- isiana ex rel. Southern Bank v. Pilsbury,

[105] U. S. 278, 26 L. ed. 1090. Where a statute authorizing the issue of municipal bonds provides for their pay- ment by levy and collection of a special tax "in the same manner as county taxes are levied," the obligation of the contract is impaired by any change in the remedy making it less efficacious than that pro- vided at the same time for securing the revenues of the county. Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190. Legislation taking away the existing remedy for the enforcement of municipal bonds by repealing a statute authorizing the levy of a tax to pay the interest or principal due on such bonds impairs the obligation of a contract where no other remedy is substituted. Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278,

[26] L. ed. 1090. A state statute which so restricts mu- 51

§ [419] CONSTITUTIONAL LAW [12] Am. Jur.

does not always have a right to have the taxes collected in the same manner as they were always collected,[7] but he does have the right under his contract to have taxes collected in as prompt and efficacious a manner as provided at the time the contract was executed.[8] Thus, any act which attempts to put off or retard the enforcement of a municipality's obligations by postponing the power of the city to levy taxes impairs the obligation of contract.[9] A statute, however, exempting proceeds of the sale of municipal property which in its former guise was exempt does not impair any contract of a creditor of such municipality.[10]

No doubt a state might limit its control over the power of a municipal body to tax by authorizing such body to make contracts on the faith of its existing powers,[11] although, unless it did limit itself with a certain distinctness of implication, a subordinate body would contract subject, and not paramount, to the power of the state.[12] Under the foregoing conditions, a statute increas- ing the municipal debt limit beyond that fixed by statute at the time of the issuance of municipal bonds is not invalid as to a holder of such bonds as impairing their obligation.[13]

In accord with the general rule that judgments founded on tort do not fall within the protection of the impairment clause,[14] a statute which limits the taxing power of a municipality and thus prevents the collection of a judg- ment against the city founded on a tort action is not unconstitutional.[15]

§ 419. Reorganized Municipal Corporations.—

Where a municipal corpora-

tion with fixed boundaries is dissolved by law and a new corporation is created

nicipal taxation as to prevent a municipal- ity from meeting the interest on its bonds by levying a tax under a law in force when the bonds were issued is invalid as im- pairing contract obligations. Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403.

[7] Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190.

[8] Ibid. Laws passed since municipal securities were issued, taking away from the proper authority power to levy taxes necessary to meet the payment, are invalid, and manda- mus will issue to require the proper au- thorities to do all that the law required when the securities were issued to raise the means to pay the judgment. Ralls County Ct. v. United States, 105 U. S. 733,

[26] L. ed. 1220.

[9] A receiver as representative of the in- terested creditors is unconstitutionally de- prived of the right of taxation by a city for the payment of their claims, which right existed before the enactment of a statute by the provisions of which the payment of the judgment recovered by such receiver against the city upon out- standing indebtedness of the debtor, con- tracted on the faith of the exercise of the city's power to levy taxes for its payment, may be indefinitely postponed until such time as the city is ready and willing to make such payment. Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 54 L. ed. 144, 30 S. Ct. 40.

[10] New Orleans v. Morris, 105 U. S. 600,

[26] L. ed. 1184.

[11] Arkansas S. R. Co. v. Louisiana & A. R. Co. 218 U. S. 431, 54 L. ed. 1097, 31 S. Ct. 56; Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 54 L. ed. 144, 30 S. Ct. 40; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395. The power of taxation belongs exclusive- ly to the legislative department of the gov- ernment and the extent to which it shall be delegated to a municipal body is a matter of discretion and such delegation of power may be limited or revoked at the pleasure of the legislature, except that such revocation must not operate directly upon contracts of the municipality so as to impair their obligation by abrogating or lessening the means of their enforce- ment. Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 S. Ct. 211.

[12] Arkansas S. R. Co. v. Louisiana & A. R. Co. 218 U. S. 431, 54 L. ed. 1097, 31 S. Ct. 56; Knoxville Water Co. v. Knoxville,

[189] U. S. 434, 47 L. ed. 887, 23 S. Ct. 531; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 S. Ct. 127; Harsha v. Detroit,

[261] Mich. 586, 246 N. W. 849, 90 A.L.R. 853.

[13] Harsha v. Detroit, 261 Mich. 856, 246 N. W. 849, 90 A.L.R. 853. Annotation: 90 A.L.R. 859. For a detailed discussion of the impair- ment of the obligation of public securities and obligations, see PUBLIC SECURITIES AND OBLIGATIONS.

[14] See supra, § 415.

[15] A state law limiting the power of tax- ation of a city is not unconstitutional be- cause it prevents the collection of a judg- ment for damages caused by a mob. It does not violate the impairment of obliga- tion clause, because the judgment is not founded on contract. Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 S. Ct. 211. 52

by the legislature for the same general purposes, but with new boundaries, embracing less territory though containing substantially the same population, the great mass of the taxable property and the corporate property of the old corporation pass without consideration and for the same uses, the debts of the old corporation fall on the new as its legal successor, and the powers of taxation to pay them, which it had at the time of their creation and which entered into the contracts, also survive and pass into the new corporation.[16] Fur-

thermore, the exercise by a state of its right to destroy its political subdivisions without reorganizing the same is ineffectual to impair the obligation of their contracts.[17] The legislature cannot, in the exercise of the power to merge municipal corporations, pass any law impairing the obligations due from the old municipality to creditors.[18] Hence, a statute making a vote of the taxpaying voters necessary to the assumption by a new municipality of a debt of its predecessor, which has been abolished, is an unconstitutional attempt to impair the obligation of the contract if a liability existed without such vote before the statute.[19] An act providing, however, that residents of territory recently added to a city shall not be liable for municipal debts contracted previous to the annexation of such territory does not impair the obligation of a creditor's contract with the municipality.[20]

The consolidation of two municipalities by an act of Congress will not relieve the reorganized municipality from the obligations of its predecessors.[1] If the property remaining in a reorganized municipality is sufficient to produce revenue to meet municipal obligations and no contract rights of its creditors are impaired, the municipality has no right to continue taxation of the excluded territory on the ground that the loss of such right impairs the obligation of contract.[2]

§ 420. Matters Affecting Public Officers and Employees.—

It is well settled

that state legislatures have the power to enlarge, repeal, and limit the authorities of public officers in their official capacities, in all cases where the state Constitutions do not prohibit them, since there is no express or implied contract that such officers shall always exercise such authorities.[3] When, however, a state legislature makes a contract of employment, it is just as much a contract within the purview of the Constitution's prohibition as a like contract would be between private citizens.[4] A contract for commissions resulting from a stat-

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[16] Shapleigh v. San Angelo, 167 U. S. 646, 42 L. ed. 310, 17 S. Ct. 957; Mobile v. Watson, 116 U. S. 289, 29 L. ed. 620, 6 S. Ct. 398; Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699; Broughton v. Pensa- cola, 93 U. S. 266, 23 L. ed. 896; Broadfoot v. Fayetteville, 124 N. C. 478, 32 S. E. 804,

[70] Am. St. Rep. 610.

[17] Graham v. Folsom, 200 U. S. 248, 50 L. ed. 464, 26 S. Ct. 245. The laws establishing local municipal corporations cannot be altered or repealed so as to invade the constitutional rights of their creditors. Mobile v. Watson, 116 U. S. 289, 29 L. ed. 620, 6 S. Ct. 398.

[18] Mobile v. Watson, 116 U. S. 289, 29 L. ed. 620, 6 S. Ct. 398; Mt. Pleasant v. Beck- with, 100 U. S. 514, 25 L. ed. 699.

[19] Shapleigh v. San Angelo, 167 U. S. 646, 42 L. ed. 310, 17 S. Ct. 957.

[20] United States v. Memphis, 97 U. S. 284, 24 L. ed. 937.

[1] Missouri, K. & T. R. Co. v. Oklahoma,

[271] U. S. 303, 70 L. ed. 957, 46 S. Ct. 517.

[2] Oneida v. Pearson Hardwood Flooring Co. 169 Tenn. 449, 88 S. W. (2d) 998, cit- ing R. C. L.

[3] See PUBLIC OFFICERS [Also 22 R. C. L. p. 379, §§ 11 et seq.].

[4] Mississippi ex rel. Robertson v. Miller,

[276] U. S. 174, 72 L. ed. 517, 48 S. Ct. 266; Missouri ex rel. Walker v. Walker, 125 U. S. 339, 31 L. ed. 769, 8 S. Ct. 929; Hall v. Wisconsin, 103 U. S. 5, 26 L. ed. 302; Dart- mouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629. A positive contract made by a state un- der authority of law employing an agent in a particular service for a particular term cannot be rescinded by the state at will any more than a like contract by an individual employer can be. Missouri ex rel. Walker v. Walker, 125 U. S. 339, 31 L. ed. 769, 8 S. Ct. 929. If a person is employed to perform a service under a contract with a state with- out becoming an officer, and a contract is made accordingly, it will be within the protection of the Federal Constitution, and 53

ute authorizing an officer to bring suits to discover and recover delinquent taxes and entitling him to a percentage of the amount recovered is impaired by a stat- ute which reduces the commission on suits already commenced.[5]

The decisions of the various courts are not in harmony as to whether the leg- islature may release a public officer or his sureties from liability for loss of public funds.[6] The majority view and the one which seems to be supported by the better reasoning supports the rule that such a statute does not impair the obligation of contract contained in the bond.[7] The majority rule is founded upon the plenary and virtual unlimited power which the legislature has over agencies of the state, such as counties, townships, and school districts.[8] There is, however, some authority to the contrary, although states which adopt this view do so in part because of other provisions contained in their own Constitu- tions.[9]

G. POLICE POWER AS AFFECTING OBLIGATION OF CONTRACTS

1. IN GENERAL

§ 421. Generally.—

The constitutional protection of the obligation of con- tracts is necessarily subject to the police power of the state, and therefore a statute passed in the legitimate exercise of the police power will be upheld by

the courts, although it incidentally destroys existing contract rights.[10] This

cannot be impaired by state legislation. Hall v. Wisconsin, 103 U. S. 5, 26 L. ed. 302. An express contract between the state and an individual for the performance of services comes within the protection of the Federal Constitution, and, as to the obli- gation thereof, forms an exception to the rule that public officers are, at all times, subject to the control of the legislature. Per Story, J., Dartmouth College v. Wood- ward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

[5] Mississippi ex rel. Robertson v. Miller,

[276] U. S. 174, 72 L. ed. 517, 48 S. Ct. 266. In Atkins v. Kingsbury, 247 U. S. 484, 62 L. ed. 1226, 38 S. Ct. 558, it was held that the obligations of the contract of the State of California with a purchaser of public land, which gave to the state the right to foreclose for default in payment of the purchase price and to the purchaser the privilege of redemption within twenty days from the entry of the foreclosure decree upon payment of the amount due the state and the costs of suit, were not impaired by the enactment of subsequent legislation under which, in case the principal and interest were in arrears for five years and the state had issued to a subsequent pur- chaser another certificate for the same land, the first purchaser's right to the land and to complete the contract of purchase was cut off unless he should pay all un- paid interest within six months from the passage of the act.

[6] Miller v. Henry, 62 Or. 4, 124 P. 197, 41 L.R.A.(N.S.) 97. Annotation: 38 A.L.R. 1512, s. 96 A.L.R. 295; 41 L.R.A.(N.S.) 97.

[7] Schenebeck v. McCrary, 293 U. S. 36,

[80] L. ed. 1031, 56 S. Ct. 672; Pearson v. State, 56 Ark. 148, 19 S. W. 499, 35 Am. St. Rep. 91; McSurely v. McGrew, 140 Iowa, 163, 118 N. W. 415, 132 Am. St. Rep. 248; Board of Education v. McLandsborough, 36 Ohio St. 227, 38 Am. Rep. 582; Miller v. Henry, 62 Or. 4, 124 P. 197, 41 L.R.A.(N.S.) 97. Annotation: 38 A.L.R. 1512, s. 96 A.L.R. 295; 41 L.R.A.(N.S.) 97. State and Federal constitutional provi- sions against laws impairing the obliga- tion of contracts are not violated by a statute relieving uncompensated sureties on bonds of public depositories of liability on such bonds to the extent that deposits represent funds raised by general taxa- tion, and from liability upon judgments obtained thereon, and upon any evidence of indebtedness given in lieu of such li- ability, since depository bonds are in sub- stance contracts with the state itself through political subdivisions as its agents. Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271. A constitutional provision forbidding laws impairing the obligation of contracts does not prevent the legislature from re- leasing the liability of a county treasurer upon his bond for loss of public funds through the failure of a bank in which they were deposited, at least where the bond runs to the state, and not to the county. Miller v. Henry, 62 Or. 4, 124 P. 197, 41 L.R.A.(N.S.) 97.

[8] Bolivar Twp. Bd. of Finance v. Hawk- ins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; McSurely v. McGrew, 140 Iowa, 163,

[118] N. W. 415, 132 Am. St. Rep. 248. Annotation: 38 A.L.R. 1512, s. 96 A.L.R. 297.

[9] Annotation: 38 A.L.R. 1514, s. 96 A.L.R. 295; 41 L.R.A.(N.S.) 98.

[10] Semler v. Oregon State Dental Exam- iners, 294 U. S. 608, 79 L. ed. 1086, 55 S. Ct. 570; Home Bldg. & L. Asso. v. Blais- dell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Chi- cago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Hudson County Water Co. v. McCarter, 209 U. S. 54

principle applies to contracts made with the state, as well as to contracts between individuals.[11] Although the obligation of contracts must yield to a proper exercise of the police power and vested rights cannot inhibit proper exertion of the power, it must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end and

must not be arbitrary or oppressive.[12] All contracts made with reference to any matter that is subject to regulation under the police power must be understood as made in reference to the possible exercise of that power.[13] This is based on

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349, 52 L. ed. 828, 28 S. Ct. 529, 14 Ann. Cas. 560; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; Mani- gault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 S. Ct. 127; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453,

[49] L. ed. 831, 25 S. Ct. 471; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636,

[6] S. Ct. 334, 388, 1191; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 S. Ct. 265; Ft. Smith v. Hunt, 72 Ark. 556, 82 S. W. 163, 66 L.R.A. 238, 105 Am. St. Rep. 51; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Storen v. Sexton, Ind. —, 200 N. E. 251, 104 A.L.R. 1359; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Dey v. Knights & Ladies of Security, 113 Kan. 86, 213 P. 1066, citing R. C. L.; Treigle v. Acme Homestead Asso. 181 La. 941, 160 So. 637, 98 A.L.R. 69, reversed in 297 U. S. 189, 80 L. ed. 575, 56 S. Ct. 408, 101 A.L.R. 1284, which has rehearing denied in 297 U. S. 728, 80 L. ed. 1010, 56 S. Ct. 587, 588; Com. v. R. I. Sherman Mfg. Co. 189 Mass. 76, 75 N. E. 71, 4 Ann. Cas. 268; Chicago, R. I. & P. R. Co. v. State, 67 Okla. 10, 168 P. 239, L.R.A.1918C, 492; Woodburn v. Public Serv. Commission, 82 Or. 114, 161 P. 391, L.R.A.1917C, 98, Ann. Cas. 1917E, 996; Knoxville v. Bird, 12 Lea (Tenn.) 121,

[47] Am. Rep. 326; State v. Missouri, K. & T. R. Co. 99 Tex. 516, 91 S. W. 214, 5 L.R.A. (N.S.) 783, 13 Ann. Cas. 1072; Raymond Lumber Co. v. Raymond Light & Water Co. 92 Wash. 330, 159 P. 133, L.R.A.1917C, 574; State ex rel. Webster v. Superior Ct.

[67] Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78; Seattle v. Hurst, 50 Wash. 424, 97 P. 454, 18 L.R.A.(N.S.) 169; Filipkowski v. Springfield, F. & M. Ins. Co.

[206] Wis. 39, 238 N. W. 828, 78 A.L.R. 613. Annotation: 3 Ann. Cas. 92. It does not matter that legislation appro- priate to a legitimate end has the result of modifying or abrogating contracts already in effect, as contracts are to be re- garded as having been made subject to the future exercise of the constitutional power of the state, and the reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order. Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481. An exercise of public policy cannot be restricted because of conduct or contracts done or made upon the faith of former exercises of it, upon the ground that its later exercises deprive of property or in- validate those contracts. Thornton v. Duffy, 254 U. S. 361, 65 L. ed. 304, 41 S. Ct. 137. The sovereign right of the government is not less because the property in question happens to be a contract. Calhoun v. Massie, 253 U. S. 170, 64 L. ed. 843, 40 S. Ct. 474. One whose rights, such as they are, are subject to state restriction, cannot re- move them from the power of the state by making a contract involving them, for the contract will carry with it the infirmity of the subject matter. Hudson County Wa- ter Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 S. Ct. 529, 14 Ann. Cas. 560. Private contract rights must yield to the public welfare where the latter is appropri- ately declared and defined and the two conflict. Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 248 U. S. 372, 63 L. ed. 309, 39 S. Ct. 117, 9 A.L.R. 1420; Mill Creek Coal & Coke Co. v. Public Serv. Commis- sion, 84 W. Va. 662, 100 S. E. 557, 7 A.L.R. 1081. An unconstitutional impairment of a contract is not effected by the statutory prohibition of the further performance of a contract which is so injurious to the rights and interests of the citizens gen- erally as to justify an exercise of the po- lice power. State v. Missouri, K. & T. R. Co. 99 Tex. 516, 91 S. W. 214, 5 L.R.A.(N.S.) 783, 13 Ann. Cas. 1072.

[11] Matthews v. St. Louis & S. F. R. Co.

[165] U. S. 1, 41 L. ed. 611, 17 S. Ct. 243, affirm- ing 121 Mo. 298, 24 S. W. 591, 25 L.R.A. 161; New Orleans Gaslight Co. v. Louisi- ana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Pittsburgh, C. C. & St. L. R. Co. v. Chap- pell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627. Rights and privileges arising from con- tracts with a state are subject to regula- tions for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all

prop- erty, whether owned by natural persons or corporations. New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252.

[12] Treigle v. Acme Homestead Asso. 297 U. S. 189, 80 L. ed. 575, 56 S. Ct. 408, 101 A.L.R. 1284, rehearing denied in 297 U. S. 728, 80 L. ed. 1010, 56 S. Ct. 587, 588. See Vol. 11, p. 1075, § 303.

[13] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Dillingham v. McLaughlin, 264 U. S. 370, 68 L. ed. 742,

[44] S. Ct. 362; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 65 L. ed. 877, 41 S. Ct. 465; Erie R. Co. v. Public Utility Comrs. 254 U. S. 394, 65 L. ed. 322, 41 S. Ct. 169; Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 248 U. S. 372, 63 L. ed. 55

the principle that if the legislature has no power to alter its police laws when contracts will be affected, then the most important and valuable reforms may be precluded by the simple device of entering into contracts for the purpose of doing that which otherwise may be prohibited.[14] Furthermore, franchises, privileges, and contracts granted by municipalities affecting matters coming within the police power of the state must be considered as having been granted or passed with reference to the power of the state to legislate with respect to such matters unfettered by provisions of such franchises.[15]

The power to fix rates and tolls to be charged by public utilities is one of the attributes of sovereignty. Clearly, the legislature should not part with this power even for a limited time, except upon the most potent and convincing considerations.[16] Thus, it has been uniformly held that contracts between private parties and public utilities fixing the compensation to be paid for the services rendered, although executed under state or Federal authority, are made subject to the sovereign right of state to modify or annul them.[17] This rule is fur-

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309, 39 S. Ct. 117, 9 A.L.R. 1420; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 31 S. Ct. 265, 34 L.R.A.(N.S.) 671; Owensboro v. Owensboro Waterworks Co. 191 U. S. 358, 48 L. ed. 217, 24 S. Ct. 82; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Osborn v. Nicholson, 13 Wall. (U. S.) 654, 20 L. ed. 689; Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287; Sandpoint Water & Light Co. v. Sandpoint, 31 Idaho, 498, 173 P. 972, L.R.A.1918F, 1106; Idaho Power & Light Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; Woodburn v. Public Serv. Commission, 82 Or. 114, 161 P. 391, L.R.A.1917C, 98, Ann. Cas. 1917E, 996; Raymond Lumber Co. v. Raymond Light & Water Co. 92 Wash. 330, 159 P. 133, L.R.A.1917C, 574. "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481. The operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future. Dillingham v. McLaughlin, 264 U. S. 370, 68 L. ed. 742, 44 S. Ct. 362. All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation and is not within the provision of the Constitution forbidding a state to pass laws impairing the obligation of contracts. Osborn v. Nicholson, 13 Wall. (U. S.) 654, 20 L. ed. 689.

[14] Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 31 S. Ct. 265, 34 L.R.A.(N.S.) 671; Idaho Power & Light Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; Raymond Lumber Co. v. Raymond Light & Water Co. 92 Wash. 330, 159 P. 133, L.R.A.1917C, 574; State v. Superior Ct. 67 Wash. 37, 120 P. 861, Ann. Cas. 1913D, 78. Parties by entering into contracts may not estop the legislature from enacting laws intended for the public good. Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 S. Ct. 127. It is well settled by the decisions that the making of contracts between individuals or between individuals and corporations or municipalities

can never be held to abrogate or prevent the exercise by the state of its police power in any manner that it may consider just and proper. If it were conceded that such contracts could be entered into, every substantial power conferred by the commission by the legislature in the public utilities act could easily have been nullified and set at naught by the simple act of making contracts prior to the time the act became effective. Idaho Power & Light Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282.

[15] Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 33 S. Ct. 303, 44 L.R.A.(N.S.) 405; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 S. Ct. 880; Richmond, F. O. P. R. Co. v. Richmond, 96 U. S. 521, 24 L. ed. 734; Colorado & S. R. Co. v. Ft. Collins, 52 Colo. 281, 121 P. 747, Ann. Cas. 1913D, 646; Cape Girardeau v. St. Louis-San Francisco R. Co. 305 Mo. 590, 267 S. W. 601, 36 A.L.R. 1488; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A. 1915C, 287, Ann. Cas. 1913D, 78. Annotation: Ann. Cas. 1915A, 902. The constitutional provision against the impairment of contract obligations does not apply where the legislation which is alleged to impair a contract right under an ordinance granting a privilege is an exercise of the police power. Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 142 Ga. 841, 83 S. E. 946, L.R.A.1916E, 358.

[16] Minneapolis, St. P. & Ste. M. R. Co. v. Menasha Wooden Ware Co. 159 Wis. 130, 150 N. W. 411, L.R.A.1915F, 732, affirmed in 245 U. S. 633, 62 L. ed. 522, 38 S. Ct. 133; Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, 142 N. W. 491, L.R.A.1915F, 744, Ann. Cas. 1915A, 911, affirmed in 238 U. S. 174, 59 L. ed. 1254, 35 S. Ct. 820. For a full discussion of rate regulations, see PUBLIC UTILITIES AND SERVICES.

[17] Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 248 U. S. 372, 63 L. ed. 309, 39 S. Ct. 117, 9 A.L.R. 1420; Portland R. Light & P. Co. v. Railroad Commission, 229 U. S. 56

ther justified on the ground that public utilities are only agencies of the state in regulating rates and have no authority to enter into a contract not subject to modification or revocation by the state.[18]

§ 422. Contracts Restricting Police Power.—

It is a fundamental principle that the governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted or the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.19 In accordance with the principle that the power to legislate in the interest of the morals, health, and safety of the public is not restricted by the contract clause of the Constitution,20 the exercise of the police power cannot be limited by contract, and it is immaterial on what consideration the contracts rest, since in all cases it is beyond the authority of a state or its municipalities to abrogate this power so necessary to the public safety.1 Hence, it is well settled that a municipality cannot, by a contract in

397, 57 L. ed. 1248, 33 S. Ct. 820; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 31 S. Ct. 265, 34 L.R.A.(N.S.) 671; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 S. Ct. 428; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 S. Ct. 47; Minneapolis, St. P. & Ste. M. R. Co. v. Menasha Wooden Ware Co. 159 Wis. 130, 150 N. W. 411, L.R.A.1915F, 732, affirmed in 245 U. S. 633, 62 L. ed. 522, 38 S. Ct. 133.

[18] Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 142 Ga. 841, 83 S. E. 946, L.R.A. 1916E, 358, affirmed in 248 U. S. 372, 63 L. ed. 309, 39 S. Ct. 117, 9 A.L.R. 1420; Minnesota, St. P. & Ste. M. R. Co. v. Menasha Wooden Ware Co. 159 Wis. 130, 150 N. W. 411, L.R.A.1915F, 732, affirmed in 245 U. S. 633, 62 L. ed. 522, 38 S. Ct. 133; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056.

[19] See Vol. 11, p. 983, § 254.

[20] New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 S. Ct. 273; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Georgia R. & Power Co. v. Railroad Commission, 149 Ga. 1, 98 S. E. 696, 5 A.L.R. 1; Ætna Ins. Co. v. Chicago G. W. R. Co. 190 Iowa, 487, 130 N. W. 649, 16 A.L.R. 249; Jones Hollow Ware Co. v. Crane, 134 Md. 103, 106 A. 274, 3 A.L.R. 1658; Davison v. Chicago & N. W. R. Co. 100 Neb. 462, 160 N. W. 877, L.R.A.1917C, 135; Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, 3 A.L.R. 696. The state may not surrender, or bind itself not to exert, its police power. Phillips Petroleum Co. v. Jenkins, 297 U. S. 629, 80 L. ed. 943, 56 S. Ct. 611, rehearing denied in 298 U. S. 691, 80 L. ed. 1409, 56 S. Ct. 745. Contracts affecting the safety and welfare of the public are within the supervising power and control of the legislature, when exercised to protect the public safety, health, and morals. Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513. The inhibition of the Constitution of the United States upon the impairment of the obligation of contracts is not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437.

[1] Phillips Petroleum Co. v. Jenkins, 297 U. S. 629, 80 L. ed. 943, 56 S. Ct. 611, rehearing denied in 298 U. S. 691, 80 L. ed. 1409, 56 S. Ct. 745; Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 S. Ct. 471; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 S. Ct. 77; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Colorado & S. R. Co. v. Ft. Collins, 52 Colo. 281, 121 P. 747, Ann. Cas. 1913D, 646; Georgia R. & Power Co. v. Railroad Commission, 149 Ga. 1, 98 S. E. 696, 5 A.L.R. 1; Idaho Power & Light Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; Pittsburgh, C. C. & St. L. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627; Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512; Raymond Lumber Co. v. Raymond Light & Water Co. 92 Wash. 330, 159 P. 133, L.R.A.1917C, 574. The state cannot, by virtue of the contract clause of the Federal Constitution, divest itself by contract of the right to exert its governmental authority in matters which, from their very nature, so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties. Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 62 L. ed. 124, 38 S. Ct. 35. The right to exercise the police power is a continuing one which cannot be contracted away and a requirement that a company or an individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment

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§ [423] CONSTITUTIONAL LAW [12] Am. Jur.

the form of a franchise as to rates, foreclose the exercise of the police power of the state unless clearly authorized to do so by the supreme legislative power.[2] The proper exercise of the police power cannot be treated as an impairment of the obligation of contracts, although a contract purports to limit such police the obligation of contracts, although a contracts or warranties on the part of power.[3] The same is true as to implied contracts or warranties on the part of the state apparently limiting the right to exercise such power.[4] In many cases involving an inquiry as to whether a law is valid as an exercise of the police power or void as impairing the obligation of a contract, the determination ultimately depends on the nature of the contract and the right of government to make it. On the one hand there is general want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and on the other hand, the undoubted right of government to contract as to some matters without the power, when such contract is made, to destroy or impair its

obligation.[5] In some cases it has been decided that the right of the state to exercise its police power may be abrogated for a limited period by a binding contract either directly6 or by delegating its authority to a municipality.[7]

§ 423. Emergency Legislation.—

As previously shown, the legislature may, subject to limitations, enact statutes during emergencies to cope with the unusual exigencies which arise. This right is based upon the police power which is reserved to the legislature. It is, however, subject to certain constitutional restraints and a law depending upon the existence of an emergency to uphold it may cease to operate if the emergency ceases, even though the law was valid when passed.8 Under the broad rule that the economic interests of the state may justify the exercise of its protective power notwithstanding interference

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of the obligation of contracts. Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341. The police power, in so far as its exercise is essential to the health of a community, cannot be contracted away. New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 S. Ct. 471. One legislature may not, by any contract with an individual, restrain the power of a subsequent legislature to legislate for the public welfare. Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302. It is a fundamental rule of law that the right of the sovereign to direct that which is for the welfare of the general public cannot be contracted away or abridged by individuals. Jones v. Hadfield, 192 Ark. 224, 96 S. W. (2d) 959, 109 A.L.R. 488. The clause of the Constitution of the United States inhibiting the states from passing laws impairing the obligation of contracts is not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals, and this governmental power of protection of the people cannot be contracted away. Washington v. Atlantic Coast Line R. Co. 136 Ga. 638, 71 S. E. 1066, 38 L.R.A.(N.S.) 867. A city cannot contract away any police powers delegated to it by the legislature. Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916.

[2] Annotation: 3 A.L.R. 730, s. 9 A.L.R. 1165, 28 A.L.R. 587, and 29 A.L.R. 356. See PUBLIC UTILITIES AND SERVICES.

[3] Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 S. Ct. 529, 14 Ann. Cas. 560; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512; Cape Girardeau v. St. Louis-San Francisco R. Co. 305 Mo. 590, 267 S. W. 601, 36 A.L.R. 1488.

[4] State ex rel. Remley v. Meek, 112 Iowa, 338, 84 N. W. 3, 51 L.R.A. 414, 84 Am. St. Rep. 342.

[5] Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 33 S. Ct. 303, 44 L.R.A.(N.S.) 405; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

[6] Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 51 L. ed. 1155, 27 S. Ct. 762; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 S. Ct. 756; Sandpoint Water & Light Co. v. Sandpoint, 31 Idaho, 498, 173 P. 972, L.R.A.1918F, 1106; Virginia-Western Power Co. v. Clifton Forge (Virginia-Western Power Co. v. Com.) 125 Va. 469, 99 S. E. 723, 9 A.L.R. 1148, writ of certiorari denied in 251 U. S. 557, 64 L. ed. 413, 40 S. Ct. 179.

[7] Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 S. Ct. 736; Virginia-Western Power Co. v. Clifton Forge (Virginia-Western Power Co. v. Com.) 125 Va. 469, 99 S. E. 723, 9 A.L.R. 1148, writ of certiorari denied in 251 U. S. 557, 64 L. ed. 413, 40 S. Ct. 179.

[8] See Vol. 11, p. 979, § 252. 58

with existing contracts,[9] a statute which impairs the obligation of a contract may be justified in times of emergency as such an exercise of the police power.[10]

The principles applicable to the passage of emergency legislation have been extended in general to the so-called "moratorium" acts passed by the various state legislatures in order to afford relief to financially embarrassed mortgagors.[11] Many states have passed statutes which through some means postpone or delay foreclosures,[12] and the courts in determining whether such statutes are valid make the test one of reasonableness.[13] If the stay which is provided is reasonable as to the length of time and proper means are provided to care for the interests of the mortgagee, such an act is valid.[14] On the other hand, statutes which attempt to protect the owner on a foreclosure sale by fixing an upset or minimum price, by requiring credit of a specified amount on the mortgage debt, or by limiting the amount of deficiency judgments have been only fairly successful.[15]

Statutes which forbid the exacting of unreasonable rents and suspend the operation of the eviction laws are a valid exercise of the police power during an emergency, and if reasonable, do not impair the obligation of contracts.[16]

2. PARTICULAR CONTRACTS

§ 424. Generally.—

The charter of a corporation in no sense exempts it from police supervision and regulation. Such an exemption can never be implied from a mere grant of power and will not be valid if expressly conferred. It is frequently and rightly said that sovereign authority cannot divest itself of its ordinary police power over persons, whether natural or artificial, any more than it can of the power to make laws or to punish crime.17 A requirement that

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[9] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297. Annotation: 86 A.L.R. 1539, s. 88 A.L.R. 1519, 96 A.L.R. 312, 826. A state in the exercise of its police power may give temporary relief from the enforcement of contracts when the urgent public need demanding such relief is produced by economic causes, as well as in the presence of disasters caused by fire, flood, or earthquake. Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481.

[10] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, 66 L. ed. 595, 42 S. Ct. 289; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 65 L. ed. 877, 41 S. Ct. 465; Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A.L.R. 165; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47. Annotation: 86 A.L.R. 1539, s. 88 A.L.R. 1519, 96 A.L.R. 312, 826. Legislation intended to prevent the free liquidation, in times of economic stress, of great amounts of indebtedness secured by mortgages, with resultant widespread ruin to real estate owners and probable widespread damage to investors, is not invalid as impairing contract obligations if the means employed are legitimate and reasonable. Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297.

[11] Annotation: 85 A.L.R. 1480, s. 89 A.L.R. 1087, 90 A.L.R. 1330, s. 94 A.L.R. 1352, 96 A.L.R. 853, 97 A.L.R. 1123, and 104 A.L.R. 375. See generally MORTGAGES [Also 19 R. C. L. p. 225].

[12] Annotation: 90 A.L.R. 1330, s. 94 A.L.R. 1352, 96 A.L.R. 853, 97 A.L.R. 1123, and 104 A.L.R. 375.

[13] Annotation: 90 A.L.R. 1330, s. 94 A.L.R. 1352, 96 A.L.R. 853, 97 A.L.R. 1123, and 104 A.L.R. 375.

[14] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481. Annotation: 90 A.L.R. 1330, s. 94 A.L.R. 1352, 96 A.L.R. 853, 97 A.L.R. 1123, and 104 A.L.R. 375.

[15] Annotation: 86 A.L.R. 1539, s. 88 A.L.R. 1519, 96 A.L.R. 312, 826; 85 A.L.R. 1480, s. 89 A.L.R. 1087; 90 A.L.R. 1330, s. 94 A.L.R. 1352, 96 A.L.R. 853, 97 A.L.R. 1123, and 104 A.L.R. 375.

[16] Annotation: 11 A.L.R. 1238, s. 16 A.L.R. 178; 66 L. ed. 595. See LANDLORD AND TENANT [Also 16 R. C. L. Perm. Supp. p. 4170, § 480a].

[17] Cosmopolitan Club v. Virginia, 208 U. S. 378, 52 L. ed. 536, 28 S. Ct. 394; Westport v. Mulholland, 159 Mo. 86, 60 S. W. 77, 53 L.R.A. 442; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A.(N.S.) 977, Ann. Cas. 1915B, 157. See Vol. 11, p. 1068, § 298. 59

a corporation comply with reasonable police regulations without compensation

is not in violation of the constitutional inhibition against the impairment of the

obligation of contracts.17a The legislature may by general laws impose new burdens on corporations, in addition to those imposed by their charters, when such

dens are conducive to the public interest and safety,[18] notwithstanding the

power to do so may not have been reserved in the charter.[19] The state may

also in the exercise of its police power supervise and control public utilities in

a reasonable manner regardless of the impairment clause of the Federal Constitution.[20] Therefore, statutes which regulate the rates1 or the size, speed, and

loads permitted to motor carriers do not impair the obligation of contracts between the shipper and carrier which were entered into prior to the passage of

this type of law.[2] Furthermore, statutes which are passed to control the use of

natural gas so as to prevent waste thereof are a valid exercise of the police

power and do not impair the obligation of existing contracts of a company which

is using the gas in a forbidden manner.[3]

Under the police power a state may, without impairing the obligation of existing contracts or charters,[4] control the manufacture and sale of intoxicating

liquors,[5] forbid the further conduct of a lottery,[6] regulate the use of streets and

highways,[7] order the discontinuance or removal of a corporation which has become a nuisance,[8] and regulate corporations or individuals in order to prevent

injurious business practices.[9]

See also CORPORATIONS [Also 7 R. C. L. p. 616, § 611]. 17a See Vol. 11, p. 1068, § 293.

[18] Nelson v. Vermont & C. R. Co. 26 Vt. 717, 62 Am. Dec. 614.

[19] Westport v. Mulholland, 159 Mo. 86, 60 S. W. 77, 53 L.R.A. 442. For a detailed discussion as to the above principles, see CORPORATIONS [Also 7 R. C. L. p. 616, § 611].

[20] See PUBLIC UTILITIES AND SERVICES.

[1] The obligation of existing contracts for the transportation of goods by contract carriers on highways is not unconstitutionally impaired by the enactment of a statute empowering the state public service commission to fix the minimum rates of such carriers, as such contracts are to be regarded as

having been made subject to the future exercise of the constitutional power of the state to regulate the use of its highways for gain. Stephenson v. Binford,

[287] U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721.

[2] Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534. See MOTOR TRANSPORTATION.

[3] Walls v. Midland Carbon Co. 254 U. S. 300, 65 L. ed. 276, 41 S. Ct. 118. A statute regulating the use of natural gas is a proper exercise of the police power and does not unconstitutionally impair the obligation of contracts which it affects only incidentally. Henderson Co. v. Thompson, 300 U. S. 258, 81 L. ed. 632, 57 S. Ct. 447. See GAS AND OIL [Also 12 R. C. L. p. 867, § 4].

[4] See supra, § 421.

[5] Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989. See INTOXICATING LIQUORS [Also 15 R. C. L. p. 270, §§ 24 et seq.].

[6] The legislature of a state cannot, by the charter of a lottery company, defeat the will of the people, authoritatively expressed by the adoption of a new state Constitution, in relation to the further continuance of such business in their midst. Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079. See LOTTERIES [Also 17 R. C. L. p. 1208].

[7] Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 S. Ct. 748; Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534. See HIGHWAYS, STREETS, AND SIDEWALKS [Also 13 R. C. L. p. 163, §§ 143 et seq.].

[8] The states retain adequate power to protect the public health and safety against the maintenance of nuisances, despite insistence upon existing contracts. Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398,

[78] L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481. A contract on the part of a municipal corporation not to legislate against the storage of oil and gasoline in a given situation if the public welfare shall require it is not imported from the fact that the removal of such a business to its present site was made at the municipality's request, and such a contract, if made, would have no effect. Pierce Oil Corp. v. Hope,

[248] U. S. 498, 63 L. ed. 381, 39 S. Ct. 172. A charter authorizing the manufacture of animal matter into a fertilizer does not guarantee exemption from the exercise of the police power of the state, when the business becomes a nuisance by reason of the growth of population around the locality. Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036. A conveyance by a municipality of premises to be used by the grantee as a powder magazine, subject to such regulations relative to the storage, receipt, delivery, and transportation of powder as the council may prescribe, does not prevent the municipality from subsequently declaring the 60

The power of the state to compel a fishway to be made in a dam across a stream is not lost merely because the state itself made such dam without any fishway in it and conveyed it in that condition without expressly reserving the right thereafter to exercise police power over it.[10]

§ 425. Labor Legislation.—

From time to time efforts have been made to defeat labor legislation of various types as amounting to an impairment of the obligation of contracts. Such attempts have usually resulted in failure.[11] Thus, the obligation of contracts is not unconstitutionally impaired by a statute limiting the hours of labor in factories to ten hours per day, except in cases of emergency or public necessity.[12] This class of legislation is justified on the

basis that it is for the best welfare of the citizens concerned and that the interests of the public require such a law.[13] Furthermore, workmen's compensation

acts may validly interfere with existing contracts provided such interference is

done by a proper exercise of the police power,[14] and that such a workman's compensation act, as applied to existing contracts, gives the employees an option to

take advantage of it or to stand on their common-law right.[15]

A contract for insurance against industrial accidents is subject to the power

of the state to legislate on the question, and legislation forbidding employers to

compensate employees directly is not an unconstitutional impairment of such

contract.[16] Statutes which relate to the release of claims for personal injuries

or death or which invalidate contracts exonerating an employer from liability

in respect of an injury to an employee generally are held not to impair the obligation of contract.[17]

§ 426. Banks.—

The general relationships between savings banks and their

depositors, so far as contractual in nature, are entered into subject to future

proper exercise of the police power by the enactment of wholesome and reasonable laws for the common good.[18] A bill requiring all banks to become

members of a corporation and to pay a small assessment thereto for the purpose of affording relief to banks needing temporary financial assistance is a

proper exercise of the police power and does not unconstitutionally impair the

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magazine dangerous to life and property and directing that it be removed to some more remote locality. Davenport v. Richmond, 81 Va. 636, 59 Am. Rep. 694.

[9] Where the protective power of the state is exercised in a manner otherwise appropriate in the regulation of a business, it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices. Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398,

[78] L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481. The charter of an insurance company does not exempt it from obligation to comply with the subsequently established police regulations of the state, requiring insurance companies to make annual statements of their condition. Eagle Ins. Co. v. Ohio, 153 U. S. 446, 38 L. ed. 778, 14 S. Ct. 868.

[10] State v. Meek, 112 Iowa, 338, 84 N. W. 3, 1 L.R.A. 414, 84 Am. St. Rep. 342.

[11] For the constitutionality of labor legislation generally, see LABOR [Also 16 R. C. L. p. 410].

[12] State v. J. J. Newman Lumber Co.

[102] Miss. 802, 103 Miss. 263, 59 So. 923, 60 So. 215, 45 L.R.A.(N.S.) 851.

[13] Ibid.

[14] Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

[15] Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Borgnis v. Falk Co. 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.)

489. No contract right is impaired by making applicable to existing contracts which are to terminate in the future, an employees' indemnity act which gives the employees an option to take advantage of it or to stand on their common-law right, under the contract, to maintain an action to redress an injury received in the employment. Borgnis v. Falk Co. 147 Wis. 327,

[133] N. W. 209, 37 L.R.A.(N.S.) 489. See WORKMEN'S COMPENSATION ACTS [Also 28 R. C. L. pp. 742, 748].

[16] Thornton v. Duffy, 254 U. S. 361, 65 L. ed. 304, 41 S. Ct. 137.

[17] Annotation: 84 A.L.R. 1297. For a detailed discussion, see MASTER AND SERVANT [Also 18 R. C. L. p. 832, §§ 288 et seq.].

[18] See BANKS, Vol. 7, p. 30, § 9. 61

contract between the member banks and their depositors.[19] Furthermore, in accordance with the rule that the state in the exercise of its police power may regulate the rate of interest paid by banks,[20] a contract between a depositor and a bank for the payment of a certain rate of interest for a definite time is not impaired by a statute making it illegal for any bank to pay a rate of interest which is lower than the one specified in the contract.[1] In comparatively recent years, statutes have been enacted in various states relating to the rights of dissenting stockholders, depositors, or other creditors, upon reorganization, consolidation, or sale of the assets of insolvent or financially embarrassed banking institutions. While these statutes differ to a large extent in many respects, it may be said that, generally speaking, they have the effect of binding minority nonassenting stockholders, depositors, or other unsecured creditors by an agreement for reopening or reorganization entered into by a large majority and approved by the state liquidating officer. The minority are obliged either to accept the agreement and await the results under the new plan, or, as it is sometimes provided, they may be entitled to receive the liquidating value of their interests.[2] The question as to the constitutionality of such acts resolves itself apparently into one of substantial prejudice to nonconsenting depositors or creditors of the closed bank; the statute and reorganization plan thereunder being held not unconstitutional as an impairment of contract obligations, if, in view of the practical situation involved, no substantial injury results to such minority objecting parties.[3] While a number of courts adopt a liberal view and hold that such acts are valid and do not impair the obligation of contracts,[4] other courts take a more conservative view and rule such acts unconstitutional as impairing the obligation of contracts of the dissenting minority.[5] Under the liberal view the fact that there may be errors of judgment on the part of the liquidating agency of a

[19] Opinion of Justices, 278 Mass. 607, 181 N. E. 833, 82 A.L.R. 1021. Annotation: 82 A.L.R. 1025.

[20] See BANKS, Vol. 7, p. 36, § 18.

[1] Holland v. Nakdimen, 177 Ark. 920, 9 S. W. (2d) 307, 62 A.L.R. 484. Annotation: 62 A.L.R. 489.

[2] Annotation: 92 A.L.R. 1337, s. 96 A.L.R. 1445, and 104 A.L.R. 1203. See BANKS, Vol. 7, p. 537, § 814.

[3] Lansing Drop Forge Co. v. American State Sav. Bank, 273 Mich. 124, 262 N. W. 756, 104 A.L.R. 1199, appeal dismissed in

[297] U. S. 697, 80 L. ed. 987, 56 S. Ct. 593; Dunn v. Love, 172 Miss. 342, 155 So. 331, 92 A.L.R. 1323, affirmed in 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438. Annotation: 92 A.L.R. 1338, s. 96 A.L.R. 1445, and 104 A.L.R. 1203.

[4] Doty v. Love, 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438; Dunn v. Love, 172 Miss. 342, 155 So. 331, 92 A.L.R. 1323, affirmed in 295 U. S. 64, 79 L. ed. 1303,

[55] S. Ct. 558, 96 A.L.R. 1438. Annotation: 92 A.L.R. 1338, s. 96 A.L.R. 1445, and 104 A.L.R. 1203; 95 A.L.R. 1214. A statute conferring on creditors or stockholders of an embarrassed or insol- vent banking corporation dissenting from a proposed plan of reorganization, the right to receive the fair liquidating value of their claims as fixed by the court, is not unconstitutional as impairing contract ob- ligations by taking away existing legal remedies without providing a substantial equivalent. Nagel v. Ghingher, 166 Md. 315,

[171] A. 65, 92 A.L.R. 1315. Unconstitutional impairment of contract rights does not result as to a depositor in an insolvent state bank, by a statute en- acted after the making of the deposit, which, in providing for the reorganization of such banks, requires depositors who dissent from the proposed plan of reor- ganization to file written objections to ap- proval of the plan, in which case the court may set aside assets in such amount and character as it shall find to be just and equitable for the purpose of paying the claims of such dissenters, who are there- upon excluded from participation in the remaining assets. Lansing Drop Forge Co. v. American State Sav. Bank, 273 Mich. 124, 262 N. W. 756, 104 A.L.R. 1199, appeal dismissed in 297 U. S. 697, 80 L. ed. 987,

[56] S. Ct. 593. A statute providing that when a stabili- zation agreement approved by the state banking commissioner shall have been en- tered into between a bank and its deposi- tors and unsecured creditors representing 80 per cent of the amount of deposits and unsecured credits, the claims of all other depositors and unsecured creditors shall be treated as if they had joined in the agreement, does not unconstitutionally im- pair the obligation of the contract between the bank and one who made deposits after the law was passed, even though he may have prosecuted an action for the amount of his deposits to judgment before the stabilization agreement became effective. Wausau Malt Products Co. v. Citizens' State Bank, 214 Wis. 654, 254 N. W. 379, 95 A.L.R. 1206.

[5] Annotation: 92 A.L.R. 1339, s. 96 A.L.R. 1445, and 104 A.L.R. 1203. 62

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closed bank in the compromise of liabilities will not constitute an impairment of contracts in violation of the Federal Constitution.[6] The legislature has the right to provide the order and priority of claims against an insolvent bank based upon a reasonable classification.[7] Hence, a statute giving a preference to the owners of proceeds of collection items in the hands of the collecting bank where the bank has failed or has been closed before paying them over does not unconstitutionally impair the obligation of contracts as affecting stockholders of insolvent banks, or depositors therein, where reasonable time for the withdrawal of deposits has elapsed since the passage of the act.[8] A statute, however, which attempts to abrogate a contract of special deposit between a municipal

corporation and a bank, by establishing in lieu thereof a contract of general deposit whereby the title to such funds is passed to the bank and such moneys become a part of its general assets subject to distribution among its general depositors, thus imposing upon the municipality the status of a general creditor, impairs the obligation of contract and is invalid for that reason.[9] A statute which merely alters the remedies pertaining to actions by or against banks does not impair the obligation of contracts.[10]

H. INTEREST AND MONEY

1. INTEREST

§ 427. Generally.—

A distinction is to be drawn between the right of the legislature, without impairing the obligation of contracts, to reduce the rate of interest payable under contracts and the right to do so with respect to interest on judgments. The general rule is that the rate of interest allowed by law at the time a contract is made is deemed to be a part of such contract and protected from impairment by subsequent legislation.[11] This is true irrespective of whether the change in the statute authorizes an increase12 or a decrease in the legal rate13 or abolishes interest entirely.[14] The application of a state statute, how-

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[6] Doty v. Love, 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438.

[7] See BANKS, Vol. 7, p. 533, § 747.

[8] Witt v. People's State Bank, 166 S. C. 1, 164 S. E. 306, 83 A.L.R. 1068. Annotation: 31 A.L.R. 790, s. 79 A.L.R. 582, and 83 A.L.R. 1080.

[9] Re Fidelity State Bank, 35 Idaho, 797,

[209] P. 449, 31 A.L.R. 781. Annotation: 31 A.L.R. 790, s. 79 A.L.R. 582, and 83 A.L.R. 1080.

[10] A statute permitting the holder of a bank's obligations the right to set them off against debts due from him to the bank does not impair the obligation of contracts, provided a third person's rights are not impaired. Blount v. Windley, 95 U. S. 173,

[24] L. ed. 424. A statute denying to the creditors of an insolvent bank the right to enforce the constitutional liability of stockholders in individual actions, but requiring the re- ceiver to maintain such a suit for their benefit, does not infringe their vested rights or impair contract obligations, but is a change of remedy within the power of the legislature. Cowden v. Williams, 32 Ariz. 407, 259 P. 670, 55 A.L.R. 1059.

[11] Koshkonong v. Burton, 104 U. S. 668,

[26] L. ed. 886; Aguirre v. Packard, 14 Cal. 171, 73 Am. Dec. 645; Seymour v. Conti- nental L. Ins. Co. 44 Conn. 300, 26 Am. Rep. 469; Hubbard v. Callahan, 42 Conn. 524,

[19] Am. Rep. 564; Swint v. Carr, 76 Ga. 322,

[2] Am. St. Rep. 44; Pounds v. Rodgers, 52 Kan. 558, 35 P. 223, 39 Am. St. Rep. 360; Lee v. Davis, 1 A. K. Marsh. (Ky.) 397, 10 Am. Dec. 746; Richardson v. Campbell, 27 Neb. 644, 43 N. W. 405, 11 L.R.A. 189; North River Meadow Co. v. Christ Church,

[22] N. J. L. 424, 53 Am. Dec. 258; Seton v. Hoyt, 34 Or. 266, 55 P. 967, 43 L.R.A. 634,

[75] Am. St. Rep. 641; Goggans v. Turnip- seed, 1 S. C. 80, 98 Am. Dec. 397, 7 Am. Rep. 23; Cecil v. Hicks, 29 Gratt. (Va.) 1, 26 Am. Rep. 391; Union Sav. Bank & T. Co. v. Gelbach, 8 Wash. 497, 36 P. 467, 24 L.R.A. 359. Annotation: 87 A.L.R. 464; 17 L.R.A. 613. County warrants indorsed "Not paid for want of funds," upon which, by statute, interest is payable at the legal rate, are thereby made contracts on which the rate of interest cannot be decreased by subse- quent statute. Seton v. Hoyt, 34 Or. 266,

[55] P. 967, 43 L.R.A. 634, 75 Am. St. Rep. 641.

[12] Aguirre v. Packard, 14 Cal. 171, 73 Am. Dec. 645; Lee v. Davis, 1 A. K. Marsh. (Ky.) 397, 10 Am. Dec. 746. Annotation: 87 A.L.R. 469.

[13] Seymour v. Continental L. Ins. Co. 44 Conn. 300, 26 Am. Rep. 469. Annotation: 87 A.L.R. 465. See also infra, § 428.

[14] Annotation: 87 A.L.R. 470. 63

ever, permitting the recovery of interest in an action on contract for unliquidated damages, to contracts entered into prior to its effective date, does not unconstitutionally impair the obligation of such contracts.[15] Of course, in the case of an express agreement for nonliability for interest, a subsequent statute imposing such liability if construed to apply to such existing contract would impair its obligation.[16]

The rate of interest due payable on a judgment stands on a different basis from that due under a contract. It is generally recognized that interest allowed for nonpayment of judgments is in the nature of statutory damages, and the rule is established that a state without impairing the obligation of contracts may legislate to reduce the rate of interest on judgments previously obtained in its courts.[17] Moreover, the state may decree through legislative action that all interest on judgments shall cease to accrue without impairing any contract rights.[18] The theory upon which this view is based is that the interest on the judgment is not a matter of contract between the parties, but is an obligation implied or imposed by law and that accordingly the right to receive such interest depends entirely upon what the state chooses to prescribe.[19] The rule has been justified also on the principle that a change in interest rates on judgments is a change which merely affects the remedy and does not impair any obligation.[20] On the other hand, in some early cases the view has been taken that an enactment changing the rate of interest does not affect existing debts due prior to the passage of the law, whether evidenced by statute, judgment, or agreement of the parties.[21] On somewhat the same principle as that which governs judgments a statute reducing the rate of interest to be paid on redemption from a

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[15] Funkhouser v. J. B. Preston Co. 290 U. S. 163, 78 L. ed. 243, 54 S. Ct. 134. Annotation: 87 A.L.R. 464. The court, in J. B. Preston Co. v. Funkhouser, 261 N. Y. 140, 639, 184 N. E. 737, 185 N. E. 472, 87 A.L.R. 459, affirmed in 290 U. S. 163, 78 L. ed. 243, 54 S. Ct. 134, on the ground that parties who enter into a contract the breach of which results in a claim for unliquidated damages do not make an agreement that no interest will be charged on the principal sum found due in an action thereon and that, hence, there is no agreement to that effect which is impaired by a later statute which permits the recovery of interest on such a claim for unliquidated damages, upheld as constitutional a statute imposing interest in such an action.

[16] See cases cited to note 11, supra, this section.

[17] Missouri & A. Lumber & Min. Co. v. Greenwood Dist. 249 U. S. 170, 63 L. ed. 538, 39 S. Ct. 202; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 S. Ct. 54; Read v.

Mississippi County, 69 Ark. 365, 63 S. W. 807, 86 Am. St. Rep. 202, affirmed in 188 U. S. 739, 47 L. ed. 671, 23 S. Ct. 849; Stanford v. Coram, 28 Mont. 288, 72 P. 655, 98 Am. St. Rep. 566; O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64; Wyoming Nat. Bank v. Brown, 7 Wyo. 494, 53 P. 291, 75 Am. St. Rep. 935. Annotation: 87 A.L.R. 477; 17 L.R.A. 613. A state law that changed the rate of interest thereafter to accrue on a subsisting judgment did not infringe a contract within the meaning of the Constitution of the United States, although the judgment was founded on a contract. Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 S. Ct. 54. Where interest is given on the basis of damages, and not on contract, the rate of interest must at all times be the statutory rate, and it would seem to follow that if the rate of interest is changed during the default, the damages increase or diminish pari passu in the absence of any exception in the statute. The rule of damages does not change, but simply the computation. O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep.

[18] Missouri & A. Lumber & Min. Co. v. Greenwood Dist. 249 U. S. 170, 63 L. ed. 538, 39 S. Ct. 202; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 S. Ct. 54. The application to a subsisting judgment on noninterest-bearing county warrants which awards interest at a definite specified rate, of the provisions of a statute subsequently enacted that "no judgment rendered or to be rendered against any county in the state on county warrants or other evidence of county indebtedness shall bear any interest after the passage of this act," does not violate the contract or due process of law clauses of the Federal Constitution. Missouri & A. Lumber & Min. Co. v. Greenwood Dist. 249 U. S. 170, 63 L. ed. 538, 39 S. Ct. 202.

[19] Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 S. Ct. 54; Wyoming Nat. Bank v. Brown, 7 Wyo. 494, 53 P. 291, 75 Am. St. Rep. 935.

[20] Funkhouser v. J. B. Preston Co. 290 U. S. 163, 78 L. ed. 243, 54 S. Ct. 134.

[21] Butler v. Rockwell, 17 Colo. 290, 29 P. 458, 17 L.R.A. 611; Cox v. Marlatt, 36 N. J. L. 389, 13 Am. Rep. 454. Annotation: 17 L.R.A. 613; 6 Am. Dec. 197. 64

foreclosure sale does not impair the obligation of a contract,[1] at least where the rate to which it is reduced is not lower than the rate of interest agreed on in the mortgage.[2]

No impairment of contract obligations is involved in giving a retroactive operation to a statute decreasing the rate of interest chargeable on delinquent taxes, since it is merely a change in the method of collection.[3]

§ 428. Changes in Usury Laws.—

Although there is a conflict of authority, the majority rule exists that where a contract is entered into in violation of a statutory or constitutional provision, the subsequent repeal of such provision does not make the contract valid.4 Nevertheless, an exception has been established by the great weight of authority that the legislature may repeal a usury law and that no one has any vested right to take advantage of such laws.5 Furthermore, the repeal of usury laws does not operate as an impairment of the obligation of contract.6 Independent of the nature of the forfeiture as a penalty which is taken away by repeal of usury statutes, the repeal of such statutes is supported on the ground that the right of a defendant to avoid his contract is given to him by statute for purposes of its own, and not because the statute affects the merits of his obligation; and whatever the statute gives, under such circumstances, as long as it remains in fieri, and is not realized by having passed into a completed transaction, may by a subsequent statute be taken away. Such a statute is a privilege that belongs to the remedy and forms no element in the rights that inhere in the contract.7 Thus, a statute relieving from the imputation of usury all contracts made by a building and loan association under a charter of doubtful validity is not unconstitutional as to those contracts because it is retroactive.8 On the other hand, there is respectable authority for the proposition

that the repeal of the prohibitory provision will not infuse new life into a contract void for usury.9

It is well established that a statute which imposes a more stringent penalty on an usurious contract than the one imposed at the time the contract was executed

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[1] Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648, 2 S. Ct. 236. Annotation: 87 A.L.R. 476. In Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046, 24 S. Ct. 706, it was held that "no contract right of an independent purchaser at a foreclosure sale, who has no other connection with the mortgage contract than that arising from his purchase for a sum sufficient to pay the mortgage debt, is impaired by changes in the law subsequent to the execution of the mortgage, but prior to the sale, with reference to the time of redemption and the rate of interest payable in order to redeem."

[2] Robertson v. Vancleave, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L.R.A. 68. Annotation: 87 A.L.R. 476.

[3] Henry v. McKay, 164 Wash. 526, 3 P. (2d) 145, 77 A.L.R. 1025. See TAXATION [Also 26 R. C. L. p. 386, § 343].

[4] See CONTRACTS, infra, § 165.

[5] Ewell v. Daggs, 108 U. S. 143, 27 L. ed. 682, 2 S. Ct. 408; Woodruff v. Scruggs, 27 Ark. 26, 11 Am. Rep. 777; Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 236; Iowa Sav. & L. Asso. v. Heidt, 107 Iowa, 297, 77 N. W. 1050, 43 L.R.A. 689, 70 Am. St. Rep. 197; Smith v. Northern Neck Mut. F. Asso. 112 Va. 192, 70 S. E. 482, 33 L.R.A. (N.S.) 1016; Danville v. Pace, 25 Gratt. (Va.) 1, 18 Am. Rep. 663. Annotation: 87 A.L.R. 470; Ann. Cas. 1913C, 1401.

[6] Ewell v. Daggs, 108 U. S. 143, 27 L. ed. 682, 2 S. Ct. 408; Woodruff v. Scruggs, 27 Ark. 26, 11 Am. Rep. 777; Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 236; Baugher v. Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694; Smoot v. People's Perpetual Loan & Bldg. Asso. 95 Va. 686, 29 S. E. 746, 41 L.R.A. 589; Danville v. Pace, 25 Gratt. (Va.) 1, 18 Am. Rep. 663. Annotation: 87 A.L.R. 470; Ann. Cas. 1913C, 1401.

[7] Gross v. United States Mortg. Co. 108 U. S. 477, 27 L. ed. 795, 2 S. Ct. 940; Ewell v. Daggs, 108 U. S. 143, 27 L. ed. 682, 2 S. Ct. 408; Woodruff v. Scruggs, 27 Ark. 26, 11 Am. Rep. 777; Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 236; Iowa Sav. & L. Asso. v. Heidt, 107 Iowa, 297, 77 N. W. 1050, 43 L.R.A. 689, 70 Am. St. Rep. 197. Annotation: 87 A.L.R. 470; Ann. Cas. 1913C, 1401.

[8] Smoot v. People's Perpetual Loan & Bldg. Asso. 95 Va. 686, 29 S. E. 746, 41 L.R.A. 589.

[9] Annotation: 87 A.L.R. 473; Ann. Cas. 1913C, 1403. [12 Am. Jur.]—5 65

does not impair the obligation of contract.[10] A state law, however, which declares usurious and void contracts already existing and reserving interest at a rate which was legal at the time the contract was made impairs the obligation of such contracts and is clearly unconstitutional.[11]

2. MONEY

§ [429]. Generally.—As pointed out heretofore, the impairment clause is not a limitation upon Congress or the Federal Government.[12] Hence, the obligation of private contracts for the payment of money is subject to the exercise of the power vested in Congress over the monetary system,[13] with the result that Congress has the power to invalidate the provisions of private contracts for the payment of gold coin.[14]

Shortly after the Civil War the question arose as to the status of Confederate money and the effect as impairing the obligation of contracts of statutes determining its legality or illegality. The general principle in such cases was established that any act of

the legislature of a state during the period of secession, the tendency or purpose of which was to force the circulation of Confederate currency, was unconstitutional and wholly without force as a law as being in aid of the prosecution of the war against the United States Government.[15] But contracts made in the southern states, during the war between residents of those states, with reference to Confederate notes as a standard of value, and not designed to aid the insurrectionary government, could be enforced in the Federal courts;[16] and the value of the contracts was to be determined by the value of the Confederate notes in lawful money of the United States at the time when and place where such contracts were made.[17]

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[10] Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 S. Ct. 132. Annotation: 87 A.L.R. 473.

[11] Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Seymour v. Continental L. Ins. Co. 44 Conn. 300, 26 Am. Rep. 469; Hubbard v. Callahan, 42 Conn. 524, 19 Am. Rep. 564; Swint v. Carr, 76 Ga. 322, 2 Am. St. Rep. 44; Pounds v. Rodgers, 52 Kan. 558, 35 P. 223, 39 Am. St. Rep. 360; Richardson v. Campbell, 27 Neb. 644, 43 N. W. 405, 11 L.R.A. 189; North River Meadow Co. v. Christ Church, 22 N. J. L. 424, 53 Am. Dec. 258; Seton v. Hoyt, 34 Or. 266, 55 P. 967, 43 L.R.A. 634, 75 Am. St. Rep. 641; Cecil v. Hicks, 29 Gratt. (Va.) 1, 26 Am. Rep. 391; Union Sav. Bank & T. Co. v. Gelbach, 8 Wash. 497, 36 P. 467, 24 L.R.A. 359. Annotation: 87 A.L.R. 465. A statute invalidating a contract for the loan of money at interest greater than a certain rate cannot be made to apply to contracts existing at the time of its passage in view of the impairment clause. Annotation: 87 A.L.R. 465.

[12] See supra, § 384.

[13] Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 835, 55 S. Ct. 407, 95 A.L.R. 1352. Annotation: 95 A.L.R. 1383, s. 101 A.L.R. 1318. As to the principles governing money generally, see MONEY [Also 13 R. C. L. p. 1266].

[14] Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 835, 55 S. Ct. 407, 95 A.L.R. 1352. Annotation: 95 A.L.R. 1383, s. 101 A.L.R. 1318.

[15] Effinger v. Kenney, 115 U. S. 566, 29 L. ed. 495, 6 S. Ct. 179 (dictum); Ray v. Thompson, 43 Ala. 434, 94 Am. Dec. 696. Treasury notes issued under the Mississippi Act of December 19, 1861, as advances upon cotton, receivable in payment of all dues of the state except the military tax, were issued in aid of the Rebellion, and were therefore void, and did not constitute a contract which subsequent legislation could not impair. Taylor v. Thomas, 22 Wall. (U. S.) 479, 22 L. ed. 789.

[16] Effinger v. Kenney, 115 U. S. 566, 29 L. ed. 495, 6 S. Ct. 179; Keith v. Clark, 97 U. S. 454, 24 L. ed. 1071; Wilmington & W. R. Co. v. King, 91 U. S. 3, 23 L. ed. 186; Delmas v. Merchants Mut. Ins. Co. 14 Wall. (U. S.) 661, 20 L. ed. 757.

[17] Effinger v. Kenney, 115 U. S. 566, 29 L. ed. 495, 6 S. Ct. 179; Wilmington & W. R. Co. v. King, 91 U. S. 3, 23 L. ed. 186. When an act was passed unconstitutionally purporting to validate Confederate money and bonds and to authorize guardians and trustees to invest trust funds in Confederate bonds, the decision was reached that such statute was itself unconstitutional as impairing the obligation of contracts by changing the ward's solvent credits for what was not gold or silver or their equivalent. Houston v. Delooch, 43 Ala. 364, 94 Am. Dec. 689. 66

12 Am. Jur. CONSTITUTIONAL LAW § [430], [431]

I. OBLIGATION OF CONTRACTS AS AFFECTED BY TAXING POWER

§ [430]. Generally.—As a general rule in the absence of any express contract of exemption from taxation, there is no implied restriction, and the state, without in any way impairing the obligation of contracts, may tax contract rights as well as any other property within the jurisdiction of the taxing power. With reference to powers reserved by the state, the elementary rule is that if at the time the corporation is chartered and given either commutation or exemption from taxation, there exists a general statute

reserving the legislative power to repeal, alter, or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of the contract. The foundation of this rule is that a general statute reserving the power to repeal, alter, or amend is by implication read into a subsequent charter and prevents it from becoming irrevocable.

In the absence of special restrictions in its Constitution, a state may make a valid contract for exemption from taxation complete or partial, for a limited time or perpetually. When it does so explicitly and upon consideration, a provision for tax immunity may not be violated and is as binding as other parts of the grant. All such contracts are within the provision of the Federal Constitution inhibiting the passage of laws by the state impairing the obligation of contracts. Exemptions from taxation, in order to constitute a contract binding on the state, must be clearly and unequivocally expressed, because such exemptions are regarded as being in derogation of the state's sovereignty and of common right, and therefore not to be extended beyond the exact and express requirements of the language used construed strictissimi juris. In order that a grant of exemption may be irrevocable and beyond recall on the part of the state, it must be supported by an adequate consideration, for if there is no consideration for such an exemption, it is deemed to be a mere bounty or privilege and revocable as such at the pleasure of the state. An acceptance of a corporate charter and the attainment of a public benefit thereunder constitute a sufficient consideration and bring the granted right within the protection of the Federal Constitution.[18]

J. STATE CONTROL OVER REMEDIES

§ [431]. Remedies as Part of Contract.—It is a fundamental principle of constitutional law in reference to the obligation of contracts that the laws in force at the time of making a contract and the right to a remedy enter into and form a part of it as if they were expressly referred to, or incorporated in, its terms19 and that they likewise constitute a part of its obligation.[1]

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[18] See TAXATION generally [Also 26 R. C. L. p. 13].

[19] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; National Surety Co. v. Architectural Decorating Co. 226 U. S. 276, 57 L. ed. 221, 33 S. Ct. 17; Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 S. Ct. 234; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 S. Ct. 1042; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 S. Ct. 164; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 S. Ct. 91; Memphis v. United States, 97 U. S. 293, 24 L. ed. 920; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Rees v. Watertown, 19 Wall. (U. S.) 107, 22 L. ed. 72; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Gantly v. Ewing, 3 How. (U. S.) 707, 11 L. ed. 794; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Harrison v. Remington Paper Co. (C. C. A. 8th) 140 F. 385, 3 L.R.A.(N.S.) 954, 5 Ann. Cas. 314, writ of certiorari denied in 199 U. S. 607, 50 L. ed. 331, 26 S. Ct. 747; Myers v. Knickerbocker Trust Co. (C. C.) 139 F. 111, 1 L.R.A.(N.S.) 1171; Board of Revenue v. Farson, Son & Co. 197 Ala. 375, 72 So. 613, L.R.A.1918B, 881; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Welsh v. Cross, 146 Cal. 621, 81 P. 229, 106 Am. St. Rep. 63, 2 Ann. Cas. 796; Folks v. Marion County, 67

principle embraces alike those laws which affect its validity, construction, discharge, and enforcement.[2] The remedy which is protected by the contract clause of the Constitution is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of the contract. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are therefore inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment.[3]

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[2] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Shriver v. Woodbine Sav. Bank, 285 U. S. 467, 76 L. ed. 884, 52 S. Ct. 430; Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 S. Ct. 1042; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Harrison v. Remington Paper Co. (C. C. A. 8th) 140 F. 385, 3 L.R.A.(N.S.) 954, 5 Ann. Cas. 314, writ of certiorari denied in 199 U. S. 607, 50 L. ed. 331, 26 S. Ct. 747; Board of Revenue v. Farson, Son & Co. 197 Ala. 375, 72 So. 613, L.R.A. 1918B, 881; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; State ex rel. Buckwalter v. Lakeland, 112 Fla. 200, 150 So. 508, 90 A.L.R. 704; Stephenson v. Osborne, 41 Miss. 119, 90 Am. Dec. 358, overruled on another point in Johnson v. Fletcher, 54 Miss. 628, 28 Am. Rep. 388; Lander v. Deemy, 46 N. D. 273, 176 N. W. 922, citing R. C. L.; Macartney v. Shipherd, 60 Or. 133, 117 P. 814, Ann. Cas. 1913D, 1257; Chadwick v. Moore, 8 Watts & S. (Pa.) 49, 42 Am. Dec. 267; Womble v. Shirley (Tex. Civ. App.) 193 S. W. 719, citing R. C. L.; Kirkman v. Bird, 22 Utah, 100, 61 P. 338, 58 L.R.A. 669, 83 Am. St. Rep. 774; Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. 481, 44 L.R.A. 306, 81 Am. St. Rep. 715; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; Peninsular Lead & Color Works v. Union Oil & Paint Co. 100 Wis. 488, 76 N. W. 359, 42 L.R.A. 331, 69 Am. St. Rep. 934; Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L.R.A. 569. Annotation: 26 L. ed. 132; 1 L.R.A. 356. Validity and remedy are both parts of the obligation and are guaranteed by the Constitution against impairment. Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357.

[3] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Folks v. Marion County, 121 Fla. 17, 163 So. 298, 102 A.L.R. 659; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Sovereign Camp, W. W. v. Lenoir County, 208 N. C. 433, 181 S. E. 339, citing R. C. L. 68

12 Am. Jur. CONSTITUTIONAL LAW § [432]

§ [432]. Alteration of Remedies.—Under the inhibition in the Federal Constitution as to legislation impairing the obligation of contracts, it is immaterial whether the obligation of a contract is impaired by acting on the remedy or directly upon the contract. Impairment in either case is prohibited by the Constitution.[4] Hence, while it is now established beyond question that the remedy within certain limits may be altered or modified, according to the will of the state,[5] even though such statutes in certain cases may have a

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Schranck, 97 Wis. 250, 73 N. W. 31, 39 L.R.A. 569. Annotation: 26 L. ed. 132.

[4] Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 S. Ct. 972; Penniman's Case, 103 U. S. 714, 26 L. ed. 602; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; Butz v. Muscatine, 8 Wall. (U. S.) 575, 19 L. ed. 490; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547; Myers v. Knickerbocker Trust Co. (C. C. A. 3d) 139 F. 111, 1 L.R.A.(N.S.) 1171; Teralta Land & Water Co. v. Shaffer, 116 Cal. 518, 48 P. 613, 58 Am. St. Rep. 194; Sammon v. Wing, 105 Cal. App. 639, 288 P. 711, citing R. C. L.; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Scobey v. Gibson, 17 Ind. 572, 79 Am. Dec. 490; Johnson v. Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675; Barton v. Conley, 119 Me. 581, 112 A. 670 (affirmed in 260 U. S. 677, 67 L. ed. 456, 43 S. Ct. 238), citing R. C. L.; Briscoe v. Anketell, 28 Miss. 361, 61 Am. Dec. 553; People ex rel. Reynolds v. Buffalo, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563; First Nat. Bank v. Bovey, Shute & Jackson, 49 N. D. 450, 191 N. W. 765, citing R. C. L.; B. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 922, citing R. C. L.; Blakemore v. Cooper, 15 N. D. 5, 106 N. W. 566, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574; Slover v. Union Bank, 115 Tenn. 347, 89 S. W. 399, 1 L.R.A.(N.S.) 528; Luter v. Hunter, 30 Tex. 688, 98 Am. Dec. 494; Howard v. Ross, 38 Wash. 627, 30 P. 819, 3 Ann. Cas. 1146. Annotation: 61 Am. St. Rep. 940. A law does not impair the obligation of a contract, within the meaning of the Constitution, if neither party is relieved thereby from performing anything of that which he obligated himself to do; but if either party is absolved from performance, such obligation is impaired, whether affected directly or indirectly and only as a result of some modification of the legal proceedings for enforcement. State ex rel. National Bond & Secur. Co. v. Krahmer, 105 Minn. 422, 117 N. W. 780, 21 L.R.A. (N.S.) 157.

[5] United States.—W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 79 L. ed. 1298, 55 S. Ct. 555, 97 A.L.R. 905; Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Shriver v. Woodbine Sav. Bank, 285 U. S. 467, 76 L. ed. 884, 52 S. Ct. 430; Conley v. Barton, 260 U. S. 677, 67 L. ed. 456, 43 S. Ct. 238; Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 S. Ct. 428; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 S. Ct. 755; Waggoner v. Flack, 188 U. S. 595, 47 L. ed. 609, 23 S. Ct. 345; Wilson v. Standefer, 184 U. S. 399, 46 L. ed. 612, 22 S. Ct. 384; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 S. Ct. 703; Hill v. Merchants Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 S. Ct. 589; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Penniman's Case, 103 U. S. 714, 26 L. ed. 602; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Randall v. Kreiger, 23 Wall. 137, 23 L. ed. 124; Planters' Bank v. Sharp, 6 How. 301, 12 L. ed. 447; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; Re Inland Dredging Corp. (C. C. A. 2d) 61 F. (2d) 765, 88 A.L.R. 254, writ of certiorari denied in 288 U. S. 611, 77 L. ed. 985, 53 S. Ct. 403; Evans-Snider-Buel Co. v. McFadden (C. C. A. 8th) 105 F. 293, 58 L.R.A. 900, affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758. Arizona.—Cowden v. Williams, 32 Ariz. 407, 259 P. 670, 55 A.L.R. 1059. Delaware.—Cook v. Gray, 2 Houst. 455, 81 Am. Dec. 135. Georgia.—Morris v. Interstate Bond Co. 180 Ga. 639, 180 S. E. 819, 100 A.L.R. 415. Illinois.—Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447. Iowa.—Iowa Sav. & L. Asso. v. Heidt, 107 Iowa, 297, 77 N. W. 1050, 43 L.R.A. 689, 70 Am. St. Rep. 197; McCormick v. Rusch, 15 Iowa, 127, 83 Am. Dec. 401. Maine.—Phinney v. Phinney, 81 Me. 450, 17 A. 405, 4 L.R.A. 348, 10 Am. St. Rep. 266. Maryland.—Miners' & M. Bank v. Snyder, 100 Md. 57, 59 A. 707, 68 L.R.A. 312, 108 Am. St. Rep. 390; Williams v. Johnson, 30 Md. 500, 96 Am. Dec. 613. Nebraska.—Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825. New Hampshire.—Simpson v. City Sav. Bank, 56 N. H. 466, 22 Am. Rep. 491. New York.—People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47. North Carolina.—Bateman v. Sterrett, 201 N. C. 59, 159 S. E. 14, citing R. C. L.; Graves v. Howard, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565. North Dakota.—State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523. Pennsylvania.—Breitenbach v. Rush, 44 Pa. 313, 84 Am. Dec. 442. South Carolina.—Wardlaw v. Buzzard, 49 S. C. L. (15 Rich.) 158, 94 Am. Dec. 148; State v. Carew, 47 S. C. L. (13 Rich.) 498, 91 Am. Dec. 245. Tennessee.—Slover v. Union Bank, 115 Tenn. 347, 89 S. W. 399, 1 L.R.A.(N.S.) 69

retrospective effect6 and to some extent incidentally affect vested rights,[7] the alteration cannot, however, go to the extent of impairing the obligation of the contract.[8] In placing the obligation of contracts under the protection of the

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528; Townsend v. Townsend, Peck, 1, 14 Am. Dec. 722. Texas.—Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836. Utah.—Kirkham v. Bird, 22 Utah Rep. 774. P. 338, 58 L.R.A. 769, 63 Am. Neck. Mut. Virginia.—Smith v. Va. 192, 20 S. E. 482, 33 Gratt. F. Asso. 432, 112 Va. 192, 20 S. E. 482, 33 Gratt. (N.S.) 1015; Homestead Co. v. Buxton, 67 266, 12 Am. Rep. 507. West Virginia.—Boggess v. Buxton, 67 W. Va. 679, 3 L. ed. 162; 21 Ann. Cas. 289. Annotation: 3 Am. Rep. 940. The contract clause of the Federal Constitution is qualified by the control which the state retains over remedial processes. Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481. A state statute providing that notes given to the cashier of a bank may be sued on in the name of the bank affects the remedy only, and does not impair the obligation of the contract in respect of notes made before the act. The statute is constitutional. Crawford v. Branch Bank, 7 How. (U. S.) 279, 12 L. ed. 700. The constitutional inhibition of impairment of contract obligation permits minor changes which, though they may somewhat prejudice the creditor's recourse against the debtor, leave him with substantial sanctions. Re Inland Dredging Corp. (C. C. A. 2d) 61 F. (2d) 765, 88 A.L.R. 1009, writ of certiorari denied in 288 U. S. 611, 77 L. ed. 985, 53 S. Ct. 403. The legislature has power to formulate, prescribe, modify, and alter remedies, provided its action does not impair the obligation of contracts or vested property rights. Boggess v. Buxton, 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289. The constitutional prohibition against laws impairing the obligation of contracts does not apply to a change in the form of a remedy merely or a modification of it, provided no substantial right secured by the contract is thereby impaired. Owen v. Roberts, 81 Me. 439, 17 A. 403, 4 L.R.A. 229. A change in remedies open to parties to a contract does not necessarily constitute an impairment of its obligation. Preston Co. v. Funkhouser, 261 N. Y. 140, 184 N. E. 737, 87 A.L.R. 459.

[6] Teralta Land & W. Co. v. Shaffer, 116 Cal. 518, 48 P. 613, 58 Am. St. Rep. 194; Morris v. Interstate Bond Co. 180 Ga. 689, 180 S. E. 819, 100 A.L.R. 415.

[7] Morris v. Interstate Bond Co. 180 Ga. 689, 180 S. E. 819, 100 A.L.R. 415; Danville v. Pace, 25 Gratt. (Va.) 1, 18 Am. Rep. 663.

[8] Richmond Mortg. & Loan Corp. v. Wachovia Bank & T. Co. 300 U. S. 124, 81 L. ed. 552, 57 S. Ct. 338, 108 A.L.R. 886; W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 79 L. ed. 1298, 55 S. Ct. 555, 97 A.L.R. 905; Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 S. Ct. 428; Hill v. Merchants' Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 S. Ct. 589; Seibert v. Lewis (C. C. United States) 122 U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 S. Ct. 91; South Carolina v. Gaillard, 101 U. S. 433, 25 L. ed. 937; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Cairo & F. R. Co. v. Hecht, 95 U. S. 168, 24 L. ed. 423; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; Butz v. Muscatine, Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547; Myers v. Knickerbocker Trust Co. (C. C. A. 3d) 139 F. 111, 1 L.R.A.(N.S.) 1171; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Reapers' Bank v. Willard, 24 Ill. 433, 76 Am. Dec. 755; Flournoy v. Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; McCormick v. Rusch, 15 Iowa, 127, 83 Am. Dec. 401; Phinney v. Phinney, 81 Me. 450, 17 A. 405, 4 L.R.A. 348, 10 Am. St. Rep. 266; Miners' & M. Bank v. Snyder, 100 Md. 57, 59 A. 707, 68 L.R.A. 312, 108 Am. St. Rep. 390; Detroit Trust Co. v. Stormfeltz-Loveley Co. 257 Mich. 655, 242 N. W. 227, 88 A.L.R. 1263; Stephenson v. Osborne, 41 Miss. 119, 90 Am. Dec. 358, overruled on another point in Johnson v. Fletcher, 54 Miss. 628, 28 Am. Rep. 388; Coffman v. Bank of Kentucky, 40 Miss. 29, 90 Am. Dec. 311; State v. Weldon, 47 N. J. L. 59, 54 Am. Rep. 144; Boswell v. Security Mut. L. Ins. Co. 193 N. Y. 465, 86 N. E. 532, 19 L.R.A.(N.S.) 946; Graves v. Howard, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565; Bank of Gallipolis v. Domigan, 12 Ohio, 220, 40 Am. Dec. 475; State v. Carew, 47 S. C. L. (13 Rich.) 498, 91 Am. Dec. 245; International Bldg. & L. Asso. v. Hardy, 86 Tex. 610, 26 S. W. 497, 24 L.R.A. 284, 40 Am. St. Rep. 870; Bender v. Crawford, 33 Tex. 745, 7 Am. Rep. 270; Kirkman v. Bird, 22 Utah, 100, 61 P. 338, 53 L.R.A. 669, 83 Am. St. Rep. 774; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; Boggess v. Buxton, 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289; Peninsular Lead & Color Works v. Union Oil & Paint Co. 100 Wis. 488, 76 N. W. 359, 42 L.R.A. 331, 69

Am. St. Rep. 934; Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L.R.A. 569; Von Baumbach v. Bade, 9 Wis. 559, 76 Am. Dec. 283. Annotation: 76 Am. Dec. 287. The legislature may modify, limit, or alter the remedy for the enforcement of a contract without impairing its obligations; but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right. Richmond Mortg. & Loan Corp. v. Wachovia Bank & T. Co. 300 U. S. 124, 81 L. ed. 552, 57 S. Ct. 338, 108 A.L.R. 886. Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration and even repeal, provided the legislation does not operate to impair a contract or deprive one of a vested property right. If the changing or repealing statute leaves the parties a substantial remedy, the legislature does not exceed its authority. Et- 70

Constitution, the framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; after annulling all state legislation which impaired the obligation, they left to the states the right to prescribe and shape the remedy to enforce it.[9] While a statute which facilitates the intention of the parties to a contract by giving it validity never impairs its obligation10 or divests or impairs any vested rights,[11] any law which enlarges, abridges, or in any manner changes the intention of the parties as indicated from the stipulations in the contract necessarily impairs it. Whether the law professes to apply to the contract itself or to regulate the remedy, it is equally within the true meaning of the Constitution if it in effect impairs the obligation of existing contracts.[12] Likewise, any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is obnoxious to the Constitution and will not be upheld.[13]

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tor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 S. Ct. 428. The legislature may not so change the remedy for the enforcement of a contract as to leave a remedy which is incomplete or which does not secure all the substantial rights of the parties. Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858.

[9] McCracken v. Hayward, 2 How. (U. S.) 608, 11 L. ed. 397; Larrabee v. Talbott, 5 Gill (Md.) 426, 46 Am. Dec. 637, overruled on another point in Pinckney v. Lanahan, 62 Md. 447.

[10] National Surety Co. v. Architectural Decorating Co. 226 U. S. 276, 57 L. ed. 221, 33 S. Ct. 17; Gross v. United States Mortg. Co. 108 U. S. 477, 27 L. ed. 795, 2 S. Ct. 940; Ewell v. Daggs, 108 U. S. 143, 27 L. ed. 682, 2 S. Ct. 408; Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 236; Shields v. Clifton Hill Land Co. 94 Tenn. 123, 28 S. W. 668, 26 L.R.A. 509, 45 Am. St. Rep. 700. Annotation: 22 L.R.A. 379. Where parties have in good faith and for a valuable consideration entered into an engagement that is not contrary to good morals and is invalid only because of some legal impediment, such as the incapacity of a nominal party or the omission of some merely formal requirement, there is ground for maintaining that the legislature may by subsequent enactment provide a legal remedy and thereby give vitality to the obligation that the parties intended to create. National Surety Co. v. Architectural Decorating Co. 226 U. S. 276, 57 L. ed. 221, 33 S. Ct. 17. One who contracts to do a certain thing cannot claim that the obligation of his contract is impaired by legislation designed only to enforce it. New Orleans City & Lake R. Co. v. Louisiana, 157 U. S. 219, 39 L. ed. 679, 15 S. Ct. 581. Laws repealing laws which prevent the operation of contracts otherwise within the competency of the parties and permitting their enforcement according to their terms do not impair the obligation of contracts or impair vested rights. Rosenplanter v. Provident Sav. Life Assur. Soc. (C. C. A. 6th) 96 F. 721, 46 L.R.A. 473.

[11] Swartz v. Andrews, 137 Iowa, 261, 114 N. W. 888, 126 Am. St. Rep. 285; Hasbrouck v. Milwaukee, 13 Wis. 37, 80 Am. Dec. 718. Annotation: 10 Am. Dec. 133; 80 Am. Dec. 730. The legislature cannot, however, go to the extent of validating a void contract. Satterlee v. Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458.

[12] Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Sammon v. Wing, 105 Cal. App. 689, 288 P. 711, citing R. C. L.; Schuster v. Weiss, 114 Mo. 158, 21 S. W. 438, 19 L.R.A. 182; Boswell v. Security Mut. L. Ins. Co. 193 N. Y. 465, 86 N. E. 532, 19 L.R.A.(N.S.) 946; Goggans v. Turnipseed, 1 S. C. 80, 98 Am. Dec. 397, 7 Am. Rep. 33; State v. Carew, 47 S. C. L. (13 Rich.) 498, 91 Am. Dec. 245. A statute pertaining to the judicial enforcement of contract rights which abridges rights of a party resulting from stipulations of the agreement in such manner as to make the contract less valuable and which denies him lawful remedies existing when the contract was made, without substituting others equally valuable and effective, unconstitutionally impairs the obligation of contracts, even though it is regarded as operating merely upon the remedy. Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836. The legislature may enlarge, limit, or alter modes of proceedings and forms to enforce contracts, provided it does not deny a remedy or so embarrass it with conditions as seriously to impair the value of the right. Penniman's Case (Vial v. Penniman) 103 U. S. 714, 26 L. ed. 602. The obligation of a contract is impaired by any law which prevents its enforcement or which materially abridges the remedy for enforcing it which existed at the time the contract was made and does not supply an alternative remedy equally adequate and efficacious. Myers v. Knickerbocker Trust Co. (C. C. A. 3d) 139 F. 111, 1 L.R.A.(N.S.) 1171.

[13] Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 S. Ct. 1042; Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 S. Ct. 102; Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; Planters' Bank v. Sharp, 6 How. (U. S.) 301, 12 L. ed. 447; Gantly v. Ewing, 3 How. (U. S.) 707, 11 L. ed. 794; McCracken v. Hayward, 2 How. (U. S.) 608, 11 L. ed. 397; Myers v. Knickerbocker Trust Co (C. C. A. 3d) 139 F. 111, 1 L.R.A. (N.S.) 1171; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Pusey & J. Co. v. Love, 6 Penn. (Del.) 80, 71

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Since it is a rule that existing remedies should be preserved in substance and with integrity14 and that no changes in remedies that materially lessen the value of the agreement or abridge, obstruct, or unreasonably delay rights thereunder will be permitted,[15] the power of the legislature to legislate in respect of remedies is not unlimited. Thus, for example, the legislature cannot annul any legal ground on which a previous action is founded, create a new bar by which such action may be defeated,[16] make effectual unreasonable exemptions,[17] or take away a remedy by attachment after it has been established on a pre-existing debt.[18]

It has been said that to enact laws providing remedies for a violation of contracts and to alter or enlarge those remedies from time to time as to the legislature may seem appropriate constitute a proper exercise of sovereignty,[19] and it is to be assumed that the parties make their contracts with reference to this power of the state.[20]

A judicial tribunal which is vested with full power to regulate its own practice may change the mere form of a remedy, provided no change is made in the liabilities of the parties to the contract involved.[21]

While a state is free to regulate the procedure in its courts even with reference to contracts already made and moderate extensions of the time for

pleading or for trial will ordinarily fall within the power so reserved,[22] a different situation is presented when extensions are so piled up as to make the remedy a shadow and a statute attempting so to regulate extensions is void as impairing the obligation of contract.[1]

§ 433. Abrogation and Substitution of Remedies.—While the legislature may not withdraw all remedies and thus in effect destroy the contract,[2] modes

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[66] A. 1013, 11 L.R.A.(N.S.) 953, 130 Am. St. Rep. 144; People ex rel. Durham Real- ty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dis- missed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; Merchants Bank v. Ballou, 98 Va. 112, 32 S. E. 481, 44 L.R.A. 306, 81 Am. St. Rep. 715; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31,

[39] L.R.A. 569. The obligation of a contract which can- not be impaired consists in the binding force of its stipulations upon those who make them and depends upon the contin- ued existence of the means of enforcing them. A subsequent law which denies or diminishes the right of the obligee to re- quire performance or discharges the other party impairs the obligation, even though it professes to act only upon the remedy. Lamb v. Powder River Live Stock Co. (C. C. A. 8th) 132 F. 434, 67 L.R.A. 558.

[14] Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Myers v. Knickerbocker Trust Co. (C. C. A. 3d) 139 F. 111, 1 L.R.A. (N.S.) 1171; Detroit Trust Co. v. Storm- feltz-Loveley Co. 257 Mich. 655, 242 N. W. 227, 83 A.L.R. 1263; Hope Mut. Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 438; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103.

[15] See infra, § 434.

[16] Hope Mut. Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 438. As to changes affecting time of com- mencing actions, see infra, § 445.

[17] See infra, § 442.

[18] Peninsular Lead & Color Works v. Union Oil & Paint Co. 100 Wis. 488, 76 N. W. 359, 42 L.R.A. 331, 69 Am. St. Rep. 934.

[19] Waggoner v. Flack, 188 U. S. 595, 47 L. ed. 609, 23 S. Ct. 345.

[20] Henley v. Myers, 215 U. S. 373, 54 L. ed. 240, 30 S. Ct. 148.

[21] Fullerton v. Bank of United States, 1 Pet. (U. S.) 604, 7 L. ed. 280.

[22] W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 79 L. ed. 1298, 55 S. Ct. 555, 97 A.L.R. 905.

[1] Ibid.

[2] Richmond Mortg. & Loan Corp. v. Wachovia Bank & T. Co. 300 U. S. 124, 81 L. ed. 552, 57 S. Ct. 338, 108 A.L.R. 886; W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 79 L. ed. 1298, 55 S. Ct. 555, 97 A.L.R. 905; National Surety Co. v. Architectural Decorating Co. 226 U. S. 276, 57 L. ed. 221,

[33] S. Ct. 17; Waggoner v. Flack, 188 U. S. 595, 47 L. ed. 609, 23 S. Ct. 345; Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437,

[47] L. ed. 249, 23 S. Ct. 234; Butz v. Mus- catine, 8 Wall. (U. S.) 575, 19 L. ed. 490; Curran v. Arkansas, 15 How. (U. S.) 304,

[14] L. ed. 705; Per Trimble, J., Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Cragin v. Ocean & Lake Realty Co.

[101] Fla. 1324, 135 So. 795, citing R. C. L.; Re Davis, 103 Neb. 703, 173 N. W. 695, citing R. C. L.; E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 922, citing R. C. L. The legislature of a state may make laws affecting the remedy for the enforce- ment of a contract, altering its character or substituting one remedy for another. 72

that a particular remedy existing at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away.[3] This principle is applied even though the contract, so far as it pertains to its obligation, is of statutory origin.[4] The abrogation or substitution of remedies may be accomplished even though the new or the remaining remedy is less convenient than that which was abolished or less prompt and speedy.[5] On this phase of the rule, however, there is some conflict, for it has been held that the alteration must but it cannot deprive the parties of all
remedy. Strafford v. Sharon, [61] Vt. [126],
17 A. [793], [18] A. [308], [4] L.R.A. [499].
3 Richmond Mortg. & Loan Corp. v.
Wachovia Bank & T. Co. [300] U. S. [124], [81]
L. ed. [552], [57] S. Ct. [338], [108] A.L.R. [886];
Ingraham v. Hanson, [297] U. S. [378], [80] L.
ed. [728], [56] S. Ct. [511]; Conley v. Barton, [260]

U. S. 677, 67 L. ed. 456, 43 S. Ct. 238; Etor
v. Tacoma, [228] U. S. [148], [57] L. ed. [773], [33]

S. Ct. 428; Waggoner v. Flack, 188 U. S.
595, [47] L. ed. [609], [23] S. Ct. [345]; Oshkosh
Waterworks Co. v. Oshkosh, [187] U. S. [437],
47 L. ed. [249], [23] S. Ct. [234]; Wilson v.
Standefer, [184] U. S. [399], [46] L. ed. [612], [22] S.
Ct. [384]; McCullough v. Virginia, [172] U. S.
102, [43] L. ed. [382], [19] S. Ct. [134]; New Or-
leans City & Lake R. Co. v. Louisiana, [157]

U. S. 219, 39 L. ed. 679, 15 S. Ct. 581;
Antoni v. Greenhow, [107] U. S. [769], [27] L. ed.
468, [2] S. Ct. [91]; South Carolina v. Gail-
lard, [101] U. S. [433], [25] L. ed. [937]; Memphis

v. United States, 97 U. S. 293, 24 L. ed. 920; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Bank of Columbia v. Okely, 4 Wheat. (U. S.) 235, 4 L. ed. 559; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Re Jersey Island Packing Co. (C. C. A. 9th) 138 F. 625, 2 L.R.A.(N.S.) 560; Cragin v. Ocean & Lake Realty Co. 101 Fla. 1324, 135 So. 795, citing R. C. L.; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Board of Education v. Blodgett, 155 Ill. 441, 40 N. E. 1025, 31 L.R.A. 70, 46 Am. St. Rep. 348; Nagel v. Ghingher, 166 Md. 231, 171 A. 65, 92 A.L.R. 1315; Re Davis, 103 Neb. 703, 173 N. W. 695, citing R. C. L.; J. B. Preston Co. v. Funkhouser, 261 N. Y. 140, 184 N. E. 737, 87 A.L.R. 459; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 **N. E. 601, 16 A.L.R. 152, writ of error dis-**missed in 257 U. S. 665, 66 L. ed. 424, 42 **S. Ct. 47; Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L.R.A.(N.S.)** 1215, Ann. Cas. 1912B, 251; Klein v. Hutton, 49 N. D. 248, 191 N. W. 485, citing R.

C. L.; E. J. Lander & Co. v. Deemy, 46

N. D. 273, 176 N. W. 922, citing R. C. L.;

Langever v. Miller, [124] Tex. [80], [76] S. W. (2d) 1025, [96] A.L.R. [836].

The abrogation of the particular remedy existing at the date of a contract does not unconstitutionally impair its obligation if another equally effective remedy remains or is substituted for the one taken away. Richmond Mortg. & Loan Corp. v. Wachovia Bank & T. Co. [300] U. S. [124], [81] L. ed. 552, [57] S. Ct. [338], [108] A.L.R. [886].

In the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, even though the remedies existing at the time it was entered into are taken away. Waggoner v. Flack, [188] U. S. [595], [47] L. ed. [609], [23] S. Ct. 345.

While a change of remedy made after a contract has been entered into may be valid, it is only so when there is substituted an adequate and sufficient remedy by which the contract may be enforced or where such remedy existed and remained unaffected by the new law. Kring v. Missouri, [107] U. S. [221], [27] L. ed. [506], [2] S. Ct. 443.

A contract giving a consumer of water the right to draw and take from a canal all he may be entitled to on tender or pay-

ment of the amount due therefor is not, if the owner of the canal fails or refuses to comply with the contract, protected against legislative interference by a subsequent statute prohibiting such acts and regulating the distribution of water from such canals, but giving a remedy for the enforcement of the right to receive all the water to which the contract entitles him. White v. Farmers' Highline Canal & Reservoir Co. 22 Colo. 191, 43 P. 1028, 31 L.R.A. 828.

A statute pertaining to the judicial enforcement of contract rights which abridges rights of a party resulting from stipulations of the agreement in such manner as to make the contract less valuable and which denies him lawful remedies existing when the contract was made, without substituting others equally valuable and effective, unconstitutionally impairs the obligation of contracts even though it is regarded as operating merely upon the remedy. Langever v. Miller, 124 Tex. 80, 76 **S. W. (2d) 1025, 96 A.L.R. 836.**

4 National Surety Co. v. Architectural Decorating Co. 226 U. S. 276, 57 L. ed. 221, 33 S. Ct. 17.

5 W. B. Worthen Co. v. Kavanaugh, 295 **U. S. 56, 79 L. ed. 1298, 55 S. Ct. 555, 97** A.L.R. 905; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Nagel v. Ghingher,

166 Md. [231], [171] A. [65], [92] A.L.R. 1315; Wilson v. Simon, [91] Md. [1], [45] A. 1022, [80] Am. St. Rep. [427]; Re Davis, [103] Neb. [703], [173] N. W. 695, citing R. C. L.; Graves v. Howard, [159] N. C. [594], [75] S. E. [998], Ann. Cas. 1914C, [565]; Kirkman v. Bird, [22] Utah, [100], 61 P. [338], [53] L.R.A. [669], [83] Am. St. Rep. 774; Von Baumbach v. Bade, [9] Wis. [559], 76 Am. Dec. [283].

Annotation: [76] Am. Dec. [286].

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not, so far as prior contracts are concerned, appear on the face of the statute to be enacted to render the remedies less efficient or more dilatory than those in force when the contract was made.[6] It is enough if the contract is left with the same force and effect, including the substantial means of enforcement, which existed when it was made7 or with sufficient means to enforce the contract.[8] In accord with the general rule, remedies for the collection of a debt are essential parts of the contract of indebtedness, and those remedies in existence at the time the debt is incurred must be substantially preserved to creditors.[9]

§ 434. Tests and Operation of Rule.—

While it is conceded that a distinction exists between alterations of the remedy which are deemed to be legitimate and those which, under the form of modifying the remedy, impair substantial rights,[10] generally speaking, the difficulties of stating a rule render it imperative that every case be determined on its own particular circumstances11 and the question whether a change of remedy impairs a substantial right in the last analysis is ordinarily one as to reasonableness.[12] It has also been stated that whether changes affect the right is, in the end, a matter of degree as to which there can be no rules.[13]

A general test which is used frequently is that the obligation of a contract

is impaired where the remedy is taken away or abolished, the legal obliga-

[6] Townsend v. Townsend, Peck (Tenn.) 30 1, 14 Am. Dec. 723; Luter v. Hunter, 30 Tex. 688, 98 Am. Dec. 495.

[7] Hendrickson v. Apperson, 245 U. S. 105,

[62] L. ed. 178, 38 S. Ct. 44; McGahey v. Vir- ginia, 135 U. S. 662, 34 L. ed. 304, 10 S. Ct. 972; Antoni v. Greenhow, 107 U. S. 769, 2 S. Ct. 91, 27 L. ed. 468; Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278,

[26] L. ed. 1090; South Carolina v. Gaillard,

[101] U. S. 433, 25 L. ed. 937; Brine v. Hart- ford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; Gunn v. Barry,

[15] Wall. (U. S.) 610, 21 L. ed. 212; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Mason v. Haile, 12 Wheat. (U. S.) 370, 6 L. ed. 660; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Re Davis,

[103] Neb. 703, 173 N. W. 695, citing R. C. L.; People ex rel. Reynolds v. Buffalo, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563; Penrose v. Erie Canal Co. 56 Pa. 46,

[93] Am. Dec. 778; Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L.R.A. 569. Annotation: 61 Am. St. Rep. 940.

[8] Memphis & C. R. Co. v. Tennessee, 101 U. S. 337, 25 L. ed. 960; Re Davis, 103 Neb. 703, 173 N. W. 695, citing R. C. L.

[9] Rees v. Watertown, 19 Wall. (U. S.) 107, 22 L. ed. 72.

[10] Home Bldg. & L. Asso. v. Blaisdell,

[290] U. S. 398, 78 L. ed. 413, 54 S. Ct. 231,

[88] A.L.R. 1481. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a con- tract already made. Bernheimer v. Con- verse, 206 U. S. 516, 51 L. ed. 1163, 27 S. Ct. 755; Seibert v. United States, 122 U. S. 122, 32 L. ed. 645, 9 S. Ct. 271; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Bronson v. Kinzie, 1 How. (U. S.) 311,

[11] L. ed. 143; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Myers v. Knickerbocker Trust Co. (C. C. A. 3d) 139 F. 111, 1 L.R.A.(N.S.) 1171; Miners' & M. Bank v. Snyder, 100 Md. 57, 59 A. 707, 68 L.R.A. 312, 108 Am. St. Rep. 390; State v. Carew, 47 S. C. L. (13 Rich.) 498, 91 Am. Dec. 245; Lingo Lumber Co. v. Hayes (Tex. Civ. App.) 64 S. W. (2d) 835, citing R. C. L.; Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L.R.A. 569; Von Baumbach v. Bade, 9 Wis. 559, 76 Am. Dec. 283.

[11] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Sei- bert v. United States, 129 U. S. 192, 32 L. ed. 645, 9 S. Ct. 271; Von Hoffman v. Quin- cy, 4 Wall. (U. S.) 553, 18 L. ed. 403; Min- ers' & M. Bank v. Snyder, 100 Md. 57, 59 A. 707, 68 L.R.A. 312, 108 Am. St. Rep. 390; Re Davis, 103 Neb. 703, 173 N. W. 695, cit- ing R. C. L.; Lingo Lumber Co. v. Hayes (Tex. Civ. App.) 64 S. W. (2d) 835, citing R. C. L.

[12] Home Bldg. & L. Asso. v. Blaisdell,

[290] U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 S. Ct. 972; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468,

[2] S. Ct. 91; Koch v. Missouri-Lincoln Trust Co. (Mo.) 181 S. W. 44, citing R. C. L.; Re Davis, 103 Neb. 703, 173 N. W. 695, citing R. C. L.; People ex rel. Durham Realty Corn. v. La Fetra, 230 N. Y. 429,

[130] N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; Lingo Lumber Co. v. Hayes (Tex. Civ. App.) 64 S. W. (2d) 835, citing R. C. L.

[13] Re Inland Dredging Corp. (C. C. A. 2d) 61 F. (2d) 765, 88 A.L.R. 254, writ of certiorari denied in 288 U. S. 611, 77 L. ed. 985, 53 S. Ct. 403. 74

tion is diminished, suspended, or destroyed by relaxing or abolishing the legal remedy, or the proceedings for enforcement are burdened with new conditions or restrictions.[14] A more particular test frequently advanced is that only such repeals or changes of any of the remedies existing as to the enforcement of a contract as serve to lessen the value of the agreement15 or which substantially interfere with, abridge, obstruct, or unreasonably delay rights thereunder16 impair the obligation.[17]

§ 435. Stipulated Remedies.—

Frequently, parties, in executing contracts,
stipulate in the body of the contract what remedy is to be pursued in the event of a breach. In such cases the remedy agreed upon becomes a part of the obligation of contract and any subsequent statute which affects the remedy impairs the obligation and is unconstitutional.[18] For example, the parties may stipulate in the body of the contract that in case of failure of payment by a certain date of a debt secured by mortgage, there shall be no stay of execution or that the mortgagee may enter and sell the mortgaged estate or that all exemption rights shall be waived. These matters become a part of the contract and are protected in a like manner from impairment by subsequent statutes.[19] The effect of such specific reference to, and incorporation of, remedies is to deny to the legislature some of the power which it might otherwise have over the alteration and substitution of remedies; and when a contract is made stipulating for a specific remedy, it cannot be modified by subsequent

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[14] Louisiana v. New Orleans, 102 U. S. 203, 26 L. ed. 132; Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; East Hart- ford v. Hartford Bridge Co. 10 How. (U. S.) 511, 13 L. ed. 518; Woodruff v. Trapnall, 10 How. (U. S.) 190, 13 L. ed. 383; McCracken v. Hayward, 2 How. (U. S.) 608, 11 L. ed. 397; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143. Annotation: 26 L. ed. 132.

[15] Richmond Mortg. & Loan Corp. v. Wachovia Bank & T. Co. 300 U. S. 124, 81 L. ed. 552, 57 S. Ct. 338, 108 A.L.R. 886; Seibert v. Lewis (Seibert v. United States)

[122] U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Re Fidelity State Bank, 35 Idaho, 797, 209 P. 449, 31 A.L.R. 781; Koch v. Mis- souri-Lincoln Trust Co. (Mo.) 181 S. W. 44, citing R. C. L.; Harrison v. Remington Paper Co. (C. C. A. 8th) 140 F. 385, 3 L.R.A. (N.S.) 954, 5 Ann. Cas. 314; Myers v. Knickerbocker Trust Co. (C. C. A. 3d) 139 F. 111, 1 L.R.A.(N.S.) 1171; Blakemore v. Cooper, 15 N. D. 5, 106 N. W. 566, 4 L.R.A. (N.S.) 1074, 125 Am. St. Rep. 574; Lingo Lumber Co. v. Hayes (Tex. Civ. App.) 64 S. W. (2d) 835, citing R. C. L.; Merchants Bank v. Ballou, 98 Va. 112, 32 S. E. 481,

[44] L.R.A. 306, 81 Am. St. Rep. 715; Re Heilbron, 14 Wash. 536, 45 P. 153, 35 L.R.A. 602; Peninsular Lead & Color Works v. Union Oil & Paint Co. 100 Wis. 488, 76 N. W. 359, 42 L.R.A. 331, 69

Am. St. Rep. 934; Von Baumbach v. Bade, 9 Wis. 559, 76 Am. Dec. 283. Annotation: 6 Am. Dec. 540. The legislature may modify, limit, or al- ter the remedy for the enforcement of a contract without impairing its obligations; but in so doing, it may not deny all rem- edy or so circumscribe the existing remedy with conditions and restrictions as serious- ly to impair the value of the right. Rich- mond Mortg. & Loan Corp. v. Wachovia Bank & T. Co. 300 U. S. 124, 81 L. ed. 552,

[57] S. Ct. 338, 108 A.L.R. 886.

[16] W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 79 L. ed. 1298, 55 S. Ct. 555, 97 A.L.R. 905; Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Sei- bert v. Lewis (Seibert v. United States)

[122] U. S. 284, 30 L. ed. 1161, 7 S. Ct. 1190; Brine v. Hartford F. Ins. Co. 96 U. S. 627,

[24] L. ed. 858; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Harrison v. Remington Paper Co. (C. C. A. 8th) 140 F. 385, 3 L.R.A. (N.S.) 954, 5 Ann. Cas. 314, writ of certi- orari denied in 199 U. S. 607, 50 L. ed. 331,

[26] S. Ct. 747; Koch v. Missouri-Lincoln Trust Co. (Mo.) 181 S. W. 44, citing R. C. L.; Lingo Lumber Co. v. Hayes (Tex. Civ. App.) 64 S. W. (2d) 835, citing R. C. L.; Merchants Bank v. Ballou, 98 Va. 112, 32 S. E. 481, 44 L.R.A. 306, 81 Am. St. Rep. 715; Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L.R.A. 569.

[17] Koch v. Missouri-Lincoln Trust Co. (Mo.) 181 S. W. 44, citing R. C. L.; Lingo Lumber Co. v. Hayes (Tex. Civ. App.) 64 S. W. (2d) 835, citing R. C. L.

[18] Board of Revenue v. Farson, Son & Co.

[197] Ala. 375, 72 So. 613, L.R.A.1918B, 881; Atlantic Loan Co. v. Peterson, 181 Ga. 266,

[182] S. E. 15, citing R. C. L.; Breitenbach v. Rush, 44 Pa. 313, 84 Am. Dec. 442; Cha- pin v. Frank (Tex. Civ. Ann.) 236 S. W. 1006 (affirmed in (Tex.) 263 S. W. 255, which is modified in (Tex. Com. App.) 19 S. W. (2d) 704) citing R. C. L.; Womble v. Shirley (Tex. Civ. App.) 193 S. W. 719, citing R. C. L. A change of the expressed stipulations of a contract can no more be affected by the exercise of the taxing power than it can be by the exercise of any other power of the state. Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760.

[19] Breitenbach v. Rush, 44 Pa. 313, 84 Am. Dec. 442. 75

legislation requiring the parties to pursue a different remedy, even though in the stipulation as to the remedy the directions of the statute are disregarded.[20] Similarly, where a state enters into a contract with a private individual, it is competent for the parties to provide, as a substantive part of the contract, special remedies for the enforcement of their respective obligations, and in such a case neither party may, without the consent of the other, resort to any form of remedy other than those stipulated for.[1]

§ 436. Curative Legislation.—

It is a general rule that the legislature has power, in the absence of any inhibiting constitutional limitation, to pass a curative statute to correct errors or informalities in deeds, mortgages, and other instruments defectively executed or acknowledged where the rights of third parties which have been acquired in good faith are saved,[2] inasmuch as no impairment of the obligation of contracts is necessarily effected by such curative laws.[3] Legislation of this character is upheld as affecting merely the

remedy,[4] as, for example, in qualifying for record an instrument defectively acknowledged or giving it admissible character in evidence.[5] But the legislature has no power by a subsequent curative statute to remedy a jurisdictional defect or one which goes to the substance of a vested right.[6] If a legalizing act simply makes effectual as against the parties a conveyance otherwise ineffectual on account of some irregularity or omission not involving a substantial right, the parties affected are not in a situation to complain and those who claim under them by virtue of transactions taking place after the passage of the act cannot assert any rights which the parties themselves could not have asserted.[7] This principle applies where the defect is merely formal in character8 and does not render the conveyance absolutely void,[9] and it is given special force when the curative statute operates merely to bind the parties in accordance with the original intention.[10] Where, however, the rights of innocent third parties have intervened, the legislature does not have

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[20] International Bldg. & L. Asso. v. Hardy, 86 Tex. 610, 26 S. W. 497, 24 L.R.A. 284, 40 Am. St. Rep. 870; Chapin v. Frank (Tex. Civ. App.) 236 S. W. 1006 (affirmed in (Tex.) 263 S. W. 255, which is modified in (Tex. Com. App.) 10 S. W. (2d) 704) citing R. C. L.

[1] Wilson v. Standefer, 184 U. S. 399, 46 L. ed. 612, 22 S. Ct. 384. A specific remedy provided by the con- tract itself cannot be changed by legisla- tion because it constitutes a part of the contract itself. Ibid.

[2] McFaddin v. Evans-Snider-Buel Co.

[185] U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758; Randall v. Kreiger, 23 Wall. (U. S.) 137, 23 L. ed. 124; Planters' Bank v. Sharp, 6 How. (U. S.) 301, 12 L. ed. 447; Watson v. Mer- cer, 8 Pet. (U. S.) 88, 8 L. ed. 876; William- son v. Lazarus, 66 Ark. 226, 48 S. W. 974, 74 Am. St. Rep. 91; Summer v. Mitchell, 29 Fla. 179, 10 So. 562, 14 L.R.A. 815, 30 Am. St. Rep. 106; Steger v. Travelling Men's Bldg. & L. Asso. 208 Ill. 236, 70 N. E. 236,

[100] Am. St. Rep. 225; Eckles v. Wood, 143 Ky. 451, 136 S. W. 907, 34 L.R.A.(N.S.) 832; Wingert v. Zeigler, 91 Md. 318, 46 A. 1074,

[51] L.R.A. 316, 80 Am. St. Rep. 453; Wistar v. Foster, 46 Minn. 484, 49 N. W. 247, 24 Am. St. Rep. 241; Swartz v. Carlisle, 237 Pa. 473, 85 A. 847, Ann. Cas. 1914B, 458; Grim v. Weissenberg School Dist. 57 Pa. 433, 98 Am. Dec. 237; Lycoming County v. Union County, 15 Pa. 166, 53 Am. Dec. 575; Bleakney v. Farmers' & M. Bank, 17 Serg. & R. (Pa.) 64, 17 Am. Dec. 635. Annotation: 57 A.L.R. 1197.

[3] Randall v. Kreiger, 23 Wall. (U. S.) 137,

[23] L. ed. 124; Watson v. Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Chesnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387.

[4] McFadden v. Blocker, 2 Ind. Terr. 260,

[48] S. W. 1043, 53 L.R.A. 878; Iowa Sav. & L. Asso. v. Heidt, 107 Iowa, 297, 77 N. W. 1050, 43 L.R.A. 689, 70 Am. St. Rep. 197; Wingert v. Zeigler, 91 Md. 318, 46 A. 1074,

[51] L.R.A. 316, 80 Am. St. Rep. 453.

[5] Summer v. Mitchell, 29 Fla. 179, 10 So. 562, 14 L.R.A. 815, 30 Am. St. Rep. 106; Champion Fibre Co. v. Cozad, 183 N. C. 600, 112 S. E. 810, citing R. C. L.

[6] Preveslin v. Derby & A. Developing Co.

[112] Conn. 129, 151 A. 518, 70 A.L.R. 1426; Maguire v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182. Annotation: 22 L.R.A. 385. See Vol. 11, p. 1203, § 379.

[7] Swartz v. Andrews, 137 Iowa, 261, 114 N. W. 888, 126 Am. St. Rep. 285.

[8] Williamson v. Lazarus, 66 Ark. 226, 49 S. W. 974, 74 Am. St. Rep. 91.

[9] Annotation: 31 L.R.A.(N.S.) 1077.

[10] Meighen v. Strong, 6 Minn. 177, Gil. 76

the same freedom in enacting statutes curing defective acknowledgments,[11] and the rule then is that such persons are protected by the provisions of the Federal Constitution forbidding the legislatures from passing any statutes impairing contract obligations or vested rights.[12] The effect of legislation which facilitates the intention of the parties and the inhibition against that which changes the intention are matters elsewhere considered.[13] As far as the impairment clause is concerned, a state statute making valid a hitherto void contract does not impair the obligation of the contract since the creation of a contract is certainly not the same thing as the destruction or impairment of one.[14] Hence, a statute validating insurance contracts which, because of the phrase in which they were written, were ultra vires does not unconstitutionally impair the obligation of the contract.[15]

K. MODIFICATION OF PARTICULAR REMEDIES

§ 437. Generally.—

Subject to the rule as to remedies and within its reasonable limitations as indicated in the preceding sections,[16] the legislature may, without impairing contractual obligations, make changes or alterations in the laws relating to the rules of procedure,[17] to parties,[18] provisional remedies,[19] process,[20] and evidence generally.[1] It may act in many ways, as, for instance,

[11] Merchants' Bank v. Ballou, 98 Va. 112,

[32] S. E. 481, 44 L.R.A. 306, 81 Am. St. Rep. 715. Annotation: 57 A.L.R. 1197.

[12] Annotation: 57 A.L.R. 1197. See ACKNOWLEDGMENTS, Vol. 1, p. 371, § 133.

[13] See supra, § 432.

[14] Gross v. United States Mortg. Co. 108 U. S. 477, 27 L. ed. 795, 2 S. Ct. 940. A state statute which gives validity to a void contract is not repugnant to the con- tract clause of the Federal Constitution. Satterlee v. Matthewson, 2 Pet. (U. S.) 380,

[7] L. ed. 458.

[15] Zeigler v. Kansas L. Ins. Co. 120 Kan. 252, 243 P. 272, 44 A.L.R. 1367.

[16] See supra, §§ 431, 432, 436.

[17] Penniman's Case, 103 U. S. 714, 26 L. ed. 602; Tennessee v. Sneed, 96 U. S. 69,

[24] L. ed. 610; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; White v. Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Teralta Land & Water Co. v. Shaffer, 116 Cal. 518,

[48] P. 613, 58 Am. St. Rep. 194; Arnold & M. Co. v. Industrial Commission, 314 Ill. 251, 145 N. E. 342, 40 A.L.R. 1470; Henley v. Myers, 76 Kan. 723, 93 P. 168, 17 L.R.A. (N.S.) 779, affirmed in 215 U. S. 373, 54 L. ed. 240, 30 S. Ct. 148; Miners & M. Bank v. Snyder, 100 Md. 57, 59 A. 707, 68 L.R.A. 312, 108 Am. St. Rep. 390; Williams v. Johnson, 30 Md. 500, 96 Am. Dec. 613; Brown v. Circuit Judge, 75 Mich. 274, 42 N. W. 827, 5 L.R.A. 226, 13 Am. St. Rep. 438; Schuster v. Weiss, 114 Mo. 158, 21 S. W. 438, 19 L.R.A. 182; State, United R. & Canal Co., Prosecutor, v. Weldon, 47 N. J. L. 59, 54 Am. Rep. 114; Davis v. Johnson,

[41] N. D. 85, 170 N. W. 520, citing R. C. L.; Bender v. Crawford, 33 Tex. 745, 7 Am. Rep. 270; Luter v. Hunter, 30 Tex. 688, 98 Am. Dec. 494; Kirkman v. Bird, 22 Utah, 100, 61 P. 338, 58 L.R.A. 669, 83 Am. St. Rep. 774; Oshkosh Waterworks Co. v. Osh- kosh, 109 Wis. 208, 85 N. W. 376, 95 Am. St. Rep. 870, affirmed in 187 U. S. 437, 47 L. ed. 249, 23 S. Ct. 234; Von Baumbach v. Bade, 9 Wis. 559, 76 Am. Dec. 283. Annotation: 95 Am. St. Rep. 893. The legislature may repeal at will stat- utory provisions for the summary dispos- session of tenants, without impairing the obligation of a contract. People ex rel. Durham Realty Co. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47. This rule that the legislature may make changes in rules of procedure is applicable alike to past, as well as future, contracts. Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Cook v. Gray, 2 Houst. (Del.) 455, 81 Am. Dec. 185; Briscoe v. Anketell,

[28] Miss. 361, 61 Am. Dec. 553; Kirkman v. Bird, 22 Utah, 100, 61 P. 338, 58 L.R.A. 669,

[83] Am. St. Rep. 774; Boggess v. Buxton,

[67] W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289; Second Ward Sav. Bank v. Schranck,

[97] Wis. 250, 73 N. W. 31, 39 L.R.A. 569; Von Baumbach v. Bade, 9 Wis. 559, 76 Am. Dec. 283. Annotation: 61 Am. Dec. 557;

[76] Am. Dec. 286.

[18] People's Bkg. Co. v. Sterling, 300 U. S. 175, 81 L. ed. 536, 57 S. Ct. 386; Craw- ford v. Branch Bank, 7 How. (U. S.) 279,

[12] L. ed. 700; Stein v. Indianapolis Bldg. Loan Fund & Sav. Asso. 18 Ind. 237, 81 Am. Dec. 353. Annotation: 10 Am. Dec. 139. A statute authorizing a bank to sue on notes made payable to one of its officers in its own name, the bank having a bene- ficial interest therein, affects the remedy alone and does not impair the obligation of the contract. Crawford v. Branch Bank,

[7] How. (U. S.) 279, 12 L. ed. 700.

[19] Cook v. Gray, 2 Houst. (Del.) 455, 81 Am. Dec. 185.

[20] Cairo & F. R. Co. v. Hecht, 95 U. S. 168, 24 L. ed. 423.

[1] Reitler v. Harris, 223 U. S. 437, 56 L. ed. 491, 32 S. Ct. 248; Marx v. Hanthorn,

[148] U. S. 172, 37 L. ed. 410, 13 S. Ct. 508; 77

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by supplying a remedy in cases where there is no existing remedy or means of enforcing an obligation,[2] by providing an additional or more efficient remedy than the existing ones,[3] by enlarging the operation of writs,[4] by limiting the time of actions,[5] by removing, but not creating, exemptions,[6] by creating or removing statutory liens,[7] by prescribing rights as to setoff,[8] by preventing the recovery of costs when they had been given before,[9] by granting new trials,[10] by abolishing, absolutely or conditionally, the right of imprisonment for debt as to existing, as well as to future, contracts by means of insolvent laws11 or by general statute,[12] by establishing a system for the registration

of instruments,[13] and generally, within the limits defined in preceding sections,

by creating and modifying remedies, and even abolishing certain specific remedies where other reasonable and efficient remedies remain.[14] It is also generally conceded that the state, under its general power to change and alter remedies, may vary the times of holding courts, shift jurisdiction from one to another,[15] and create new courts and abolish old ones without in any wise impairing the obligation of contracts.[16]

§ 438. State Insolvency Laws.—

It is a well-established rule of law that so

long as Congress does not enact legislation with reference to bankruptcy mat-

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Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L.R.A. 141, 41 Am. St. Rep. 278; People's Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N. W. 170, 69 A.L.R. 1024; Meighen v. Strong, 6 Minn. 177, Gill. 111, 80 Am. Dec. 441; Hope Mut. Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 433; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523. Without impairing the obligation of contracts, the state may give the entry of a record the effect of prima facie evidence of the regularity of steps leading up to such entry. Rettler v. Harris, 223 U. S. 437, 56 L. ed. 497, 32 S. Ct. 248. Mere rules of evidence do not form a part of contracts entered into while they are in force, and it is competent for the legislature to change such rules from time to time and to make the changes apply to existing causes. Marx v. Hanthorn, 148 U. S. 172, 37 L. ed. 410, 13 S. Ct. 508.

[2] National Surety Co. v. Architectural Decorating Co. 226 U. S. 276, 57 L. ed. 221,

[33] S. Ct. 17; People v. Seymour, 16 Cal. 332,

[76] Am. Dec. 521.

[3] Funkhouser v. J. B. Preston Co. 290 U. S. 163, 78 L. ed. 243, 54 S. Ct. 134; Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 S. Ct. 755; Waggoner v. Flack, 188 U. S. 595, 47 L. ed. 609, 23 S. Ct. 345; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 S. Ct. 703; United States v. Union P. R. Co. 98 U. S. 569, 25 L. ed. 143. The state may give an additional and more efficacious remedy for the enforcement of contracts in the performance of which the public health and safety are involved, provided always that the new remedy is consistent with the nature of the obligation to be enforced and does not impair any substantial right given by the contract. New Orleans & L. R. Co. v. Louisiana, 157 U. S. 219, 39 L. ed. 679, 15 S. Ct. 581.

[4] Borgess v. Buxton, 67 W. Va. 679, 69 S. E. 367, 31 Ann. Cas. 289.

[5] See infra, § 445.

[6] See infra, § 442.

[7] See infra, § 443.

[8] Blount v. Windley, 95 U. S. 173, 24 L. ed. 424. The legal and equitable right of a debtor to procure the obligations of his creditor and use them as a setoff for his own debt will hardly be denied where the law of the state authorizes it, and such a law does not impair the obligation of a contract. Amy v. Taxing Dist. 114 U. S. 387, 29 L. ed. 172, 5 S. Ct. 893.

[9] Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 463, 2 S. Ct. 91.

[10] League v. De Young, 11 How. (U. S.) 185, 13 L. ed. 657.

[11] See infra, § 438.

[12] Penniman's Case, 103 U. S. 714, 26 L. ed. 602.

[13] American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 S. Ct. 200; Curtis v. Whitney, 13 Wall. (U. S.) 68, 20 L. ed. 513; Phalen v. Virginia, 8 How. (U. S.) 163, 12 L. ed. 1030; McCracken v. Hayward,

[2] How. (U. S.) 608, 11 L. ed. 397; Jackson v. Lamphire, 2 Pet. (U. S.) 280, 7 L. ed. 679; Pritchard v. Savannah Street & R. Resort R. Co. 87 Ga. 294, 13 S. E. 493, 14 L.R.A. 721; Tucker v. Harris, 13

Ga. 1, 58 Am. Dec. 488; Rockwell v. Hubbell, 2 Dougl. (Mich.) 197, 45 Am. Dec. 246; Smith v. Northern Neck Mut. F. Asso. 112 Va. 192,

[70] S. E. 482, 33 L.R.A.(N.S.) 1016. See RECORDS AND RECORDING LAWS [Also

[23] R. C. L. p. 150], as to their purpose and effect generally.

[14] See generally supra, §§ 432, 433.

[15] Scobey v. Gibson, 17 Ind. 572, 79 Am. Dec. 490; Baltimore & O. R. Co. v. Maughlin, 153 Md. 367, 138 A. 334; State, United R. & Canal Co., Prosecutor, v. Weldon, 47 N. J. L. 59, 54 Am. Rep. 114; Richardson v. Cook, 37 Vt. 599, 88 Am. Dec. 622. Annotation: 79 Am. Dec. 494.

[16] Baltimore & O. R. Co. v. Maughlin, 153 Md. 367, 138 A. 334, citing R. C. L.; Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825. 78

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ters, the state has full authority to pass insolvency laws binding persons and property within its jurisdiction,[17] provided such legislation does not impair the obligation of contracts.[18] State insolvency laws apply to all subsequent contracts of the citizens of the state19 and are to be construed as a part of such contracts,[20] but they can have no effect on contracts made before their enactment.[1] Insolvency laws do not impair the obligation of contracts in so far as they relate to debts contracted subsequent to their passage.[2] Due to the fact that a state insolvency law has a much narrower range of efficacy than a Federal bankruptcy law,[3] it is a rule that in consequence of the prohibition as to the impairment of the obligation of contracts, a nonassenting nonresident creditor cannot be bound by the debtor's discharge under state insolvency laws,[4] unless he voluntarily becomes a party to the proceedings.[5] So, if a creditor accepts a dividend in a proceeding under a state insolvency law, he thereby waives the benefit of the protection afforded by the constitutional inhibition as to the impairment of the obligation of contracts.[6] The right to imprison for debt constitutes no part of the contract, but is a remedy, and a discharge of the party from imprisonment does not impair the obligation of contract, but leaves it in full force against his property and effects.[7]

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[17] See BANKRUPTCY, Vol. 6, p. 518, § 3.

[18] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 22 S. Ct. 857; Brown v. Smart, 145 U. S. 454, 36 L. ed. 773, 12 S. Ct. 958; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 S. Ct. 269; Denny v. Bennett, 128 U. S. 489, 32 L. ed. 491, 9 S. Ct. 134; Gilman v. Lockwood, 4 Wall. (U. S.) 409, 18 L. ed. 432; Baldwin v. Hale, 1 Wall. (U. S.) 223, 17 L. ed. 531; Cook v. Moffat, 5 How. (U. S.) 295, 12 L. ed. 159; Ogden v. Saunders, 12 Wheat. (U. S.) 213,

[6] L. ed. 606; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Larrabee v. Talbott, 5 Gill (Md.) 426, 46 Am. Dec. 637; Barry v. Iseman, 48 S. C. L. (14 Rich.) 129, 91 Am. Dec. 262; Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L.R.A. 569. Annotation: 4 L. ed. 529.

[19] Stellwagen v. Clum, 245 U. S. 605, 62 L. ed. 507, 38 S. Ct. 215; Baldwin v. Hale, 1 Wall. (U. S.) 223, 17 L. ed. 531; Frey v. Kirk, 4 Gill & J. (Md.) 509, 23 Am. Dec. 581; Mather v. Bush, 16 Johns. (N. Y.) 233, 8 Am. Dec. 313; Smith v. Parsons,

[1] Ohio, 236, 13 Am. Dec. 608; Lace v. Smith, 34 R. I. 1, 82 A. 268, Ann. Cas. 1913E, 945. Annotation: 4 L. ed. 530. A bankrupt or insolvent law of any state, which discharges both the person of the debtor and his future acquisition of property, is not a law impairing the obligation of contracts so far as respects debts contracted subsequent to the passage of such law. Boyle v. Zacharie, 6 Pet. (U. S.) 348, 8 L. ed. 423.

[20] Denny v. Bennett, 128 U. S. 489, 32 L. ed. 491, 9 S. Ct. 134; Ogden v. Saunders,

[12] Wheat. (U. S.) 213, 6 L. ed. 606; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Barry v. Iseman, 48 S. C. L. (14 Rich.) 129, 91 Am. Dec. 262.

[1] Stellwagen v. Clum, 245 U. S. 605, 62 L. ed. 507, 38 S. Ct. 215; Brown v. Smart, 145 U. S. 454, 36 L. ed. 773, 12 S. Ct. 958; Denny v. Bennett, 128 U. S. 489, 32 L. ed. 491, 9 S. Ct. 134; Baldwin v. Hale, 1 Wall. (U. S.) 223, 17 L. ed. 531; Planters' Bank v. Sharp, 6 How. (U. S.) 301, 12 L. ed. 447; Cook v. Moffat, 5 How. (U. S.) 295, 12 L. ed. 159; Farmers' & M. Bank v. Smith, 6 Wheat. (U. S.) 131, 5 L. ed. 224; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Smith v. Mead, 3 Conn. 253, 8 Am. Dec. 183. Annotation: 4 L. ed. 530.

[2] Brown v. Smart, 145 U. S. 454, 36 L. ed. 773, 12 S. Ct. 958; Baldwin v. Hale, 1 Wall. (U. S.) 223, 17 L. ed. 531; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Mather v. Bush, 16 Johns. (N. Y.) 233, 8 Am. Dec. 313.

[3] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 22 S. Ct. 857; Denny v. Bennett, 128 U. S. 489, 32 L. ed. 491, 9 S. Ct. 134.

[4] Stellwagen v. Clum, 245 U. S. 605, 62 L. ed. 507, 38 S. Ct. 215; Brown v. Smart,

[145] U. S. 454, 36 L. ed. 773, 12 S. Ct. 958; Denny v. Bennett, 128 U. S. 489, 32 L. ed. 491, 9 S. Ct. 134; State Tax on Foreignheld Bonds, 15 Wall. (U. S.) 300, 21 L. ed.

[179] (dictum); Baldwin v. Hale, 1 Wall. (U. S.) 223, 17 L. ed. 531; Cook v. Moffat, 5 How. (U. S.) 295, 12 L. ed. 159; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Hawley v. Hunt,

[27] Iowa, 303, 1 Am. Rep. 273; Brigham v. Henderson, 1 Cush. (Mass.) 430, 48 Am. Dec. 610. Annotation: 4 L. ed. 530. A state insolvency law is unconstitutional so far as it authorizes a discharge to be pleaded in bar of a contract made in another state, although such law was passed before the contract was made. M'Millan v. M'Neill, 4 Wheat. (U. S.) 209,

[4] L. ed. 552.

[5] Brown v. Smart, 145 U. S. 454, 36 L. ed. 773, 12 S. Ct. 958.

[6] Van Hook v. Whitlock, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246.

[7] Penniman's Case (Vial v. Penniman)

[103] U. S. 714, 26 L. ed. 602; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Beers v. Haughton, 9 Pet. (U. S.) 329, 9 L. ed. 145; Mason v. Haile, 12 Wheat. (U. S.) 370, 6 79

§ 439. Preferences in Bankruptcy and Insolvency Distribution.—

In determining whether a statute creating preferences in the distribution of bankrupt or insolvent estates impairs the obligation of contracts, the cases depend largely on the question whether the statute affects merely the remedy or whether it alters the substantive rights of the parties.8 On the principle that it merely affects the remedy, the application to claims of creditors in existence at the time of its enactment of a statute giving certain claims priority in bankruptcy or insolvency proceedings involves no unconstitutional impairment of contract rights.9 This principle has been extended to statutes giving claims for premiums due an insurer, under a workmen's compensation act, priority in either insolvency or bankruptcy proceedings,10 to statutes regulating disbursements and preferences in an insolvent estate,11 and to statutes giving liens or

rights of preference to wage claims of laborers in case of the insolvency of employers.12 The legislature may constitutionally change the priority of payment as to existing contracts where the creditor has no lien.13 On the other hand, there is authority which supports the view that once the debt has been contracted, a statute which varies or alters the relationship in any way is unconstitutional as impairing the obligation of contracts.14 Some of these cases, however, may be distinguished on the basis of statutory construction.15

§ 440. Mortgages.—

The general rule is that the law in force at the time a mortgage is executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of the mortgage.16 Thus, any

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L. ed. 660; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; Rockwell v. Hubbell, 2 Dougl. (Mich.) 197, 45 Am. Dec. 246; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103; Kirkman v. Bird, 22 Utah, 100, 61 P. 338, 53 L.R.A. 669, 83 Am. St. Rep. 774. Annotation: 4 L. ed. 529.

[8] Annotation: 88 A.L.R. 257.

[9] Re Inland Dredging Corp. (C. C. A. 2d) 61 F. (2d) 765, 88 A.L.R. 254, writ of certiorari denied in 288 U. S. 611, 77 L. ed. 985, 53 S. Ct. 403. Annotation: 88 A.L.R. 257.

[10] Annotation: 88 A.L.R. 257. Where an insurer of a corporation under the Workmen's Compensation Act of New York obtained judgment against it for unpaid premiums and subsequently the statute was changed so as to give priority to debts for premiums in insolvency or bankruptcy proceedings, it was held that on the subsequent filing of a petition in bankruptcy against the insured, the judgment creditor was entitled to priority, and that such an interpretation of the statute would not give it an unconstitutional retroactive effect. The court regarded the case as coming within the doctrine that changes may be made in the remedy so long as they do not affect the rights. Re Inland Dredging Corp. (C. C. A. 2d) 61 F. (2d) 765, 88 A.L.R. 254, writ of certiorari denied in 288 U. S. 611, 77 L. ed. 985, 53 S. Ct. 403.

[11] Annotation: 88 A.L.R. 258. The rule is laid down in McLure v. Melton, 24 S. C. 569, 58 Am. Rep. 272, writ of error dismissed in 133 U. S. 380, 33 L. ed. 660, 10 S. Ct. 407, that the right of priority given to certain classes of creditors by a statute prescribing the order in which the assets of a decedent's estate shall be applied to the payment of his debts is a mere direction to the executor or administrator as to the manner in which he shall administer the assets, which is at all times subject to legislative control, and no vested right beyond such control is thereby conferred upon the creditor. Under a statute which in regulating the settlement of intestate estates abolishes the distinction between debts of the deceased and places all creditors on an equal footing, a judgment creditor is not entitled to priority, but is placed by such statute on a level with other creditors. Annotation: 88 A.L.R. 261.

[12] Annotation: 94 A.L.R. 1292.

[13] Annotation: 88 A.L.R. 258. The legislature may constitutionally make an existing contract debt a lien on real property of the debtor, since no alteration of the rights of the parties is involved, but only the giving of a specific remedy against the property, and retrospective laws are sustained where they touch not the rights but the remedies. Bolton v. Johns, 5 Pa. 145, 47 Am. Dec. 404.

[14] Annotation: 88 A.L.R. 259.

[15] Annotation: 88 A.L.R. 260.

[16] Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65, 24 S. Ct. 748; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 S. Ct. 1042; East Tennessee, V. & G. R. Co. v. Frazier, 139 U. S. 288, 35 L. ed. 196, 11 S. Ct. 517; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Hull v. State, 29 Fla. 79, 11 So. 97, 16 L.R.A. 308, 30 Am. St. Rep. 95; People v. Perlowski, 251 Ill. App. 506, citing R. C. L.; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; 80

changes in the law which impose conditions and restrictions on a mortgagee in the enforcement of his right and which affect its substance are invalid as impairing the obligation and cannot prevail.[17] Changes in the remedies available for the enforcement of a mortgage may not, even when the public welfare is invoked as an excuse, be pressed so far as to lessen the security of a mortgage without moderation or reason or in a spirit of oppression.[18] Following this rule, the law will not permit changes to be made by statute which, as to pre-existing mortgages, extend or otherwise alter the period of redemption,[19] even though a sale has not yet taken place,[20] or direct that decrees be made

Olson v. Gowan-Lenning Brown Co. 47 N. D. 544, 182 N. W. 929, citing R. C. L.; Chapin v. Frank (Tex. Civ. App.) 236 S. W. 1006 (affirmed in Frank v. State Bank & T. Co. (Tex.) 263 S. W. 255, which is modified on rehearing in (Tex. Com. App.) 10 S. W. (2d) 704) citing R. C. L.; Womble v. Shirley (Tex. Civ. App.) 193 S. W. 719, citing R. C. L.

Annotation: 79 L. ed. 303.

A power of sale contained in a mortgage is subject to existing statutes. Faxon v. All Persons, 166 Cal. 707, 137 P. 919, L.R.A. 1916B, 1209.

The statutory remedy for the foreclosure of mortgages existing at the time a mortgage is executed becomes a part of the contract to the extent that any subsequent change by legislative authority which affects it substantially to the injury of the mortgagee is invalid as impairing the obligation of contracts. Clark v. Reyburn, 8 Wall. (U. S.) 318, 19 L. ed. 354.

For a detailed discussion of general principles herein discussed, see MORTGAGES [Also 19 R. C. L. p. 302, § 77].

17 Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 S. Ct. 1042; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. ed. 143; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 8 L. ed. 403; People v. Perlowski, 251 Ill. App. 506, citing R. C. L.; Scobey v. Gibson, 17 Ind. 572, 79 Am. Dec. 490; McCormick v. Rusch, 15 Iowa, 127, 83 Am. Dec. 401; Chapin v. Frank (Tex. Civ. App.) 236 S. W. 1006 (affirmed in Frank v. State Bank & T. Co. (Tex.) 263 S. W. 255, which is modified on rehearing in (Tex. Com. App.) 10 S. W. (2d) 704) citing R. C. L.; Womble v. Shirley (Tex. Civ. App.) 193 S. W. 719, citing R. C. L.

Annotation: 79 L. ed. 303.

The obligation of the contract of a mortgagee in possession after a condition broken, who afterwards bids in the property for less than the mortgage debt on the sale in foreclosure proceedings initiated by her before a statute took effect, is impaired by the requirement of a section in the statute that the master's deed be taken out within a specified time after the expiration of the time for redemption, where failure to comply with this requirement is held by the highest state court to destroy the right of possession taken under the mortgage, to avoid the certificate of sale, and to entitle the mortgagor, without payment of the mortgage debt, to recover possession in ejectment, on the strength of a perfect title. Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65, 24 S. Ct. 748.

The contract of mortgage is a vested interest, and its main incident is a right to have the land applied in discharge of the

debt, either by an execution, as on a judgment at law, or by some form of remedy substantially equal. A new remedy which changes the contract and requires among other things that the mortgaged premises shall not be sold to satisfy the debt, unless they are first valued, and a certain proportion of that value is bid for them, impairs or defeats the obligation under the disguise of regulating the remedy. Gantly v. Ewing, [3] How. (U. S.) [707], [11] L. ed. [794].

The obligation of a mortgage contract is impaired by a subsequent state statute which prevents a sale on foreclosure unless two thirds of the amount at which the premises have been valued by three householders is bid. Bronson v. Kinzie, [1] How. (U. S.) [311], [11] L. ed. [143].

A provision for notice of sale under a deed of trust, which is included in the contract, cannot be changed by a subsequent statute providing for different notice in all such cases. International Bldg. & L. Asso. v. Hardy, [86] Tex. [610], [28] S. W. [497], [24] L.R.A. [284], [40] Am. St. Rep. [870].

18 W. B. Worthen Co. v. Kavanaugh, [295] U. S. [56], [79] L. ed. 1293, [55] S. Ct. [555], [97] A.L.R. [905].

In Federal Land Bank v. Wilmarth, [218] Iowa, [339], [252] N. W. [507], [94] A.L.R. 1338, it was held that equity could not refuse to foreclose a mortgage and allow a judgment for the full amount of the money loaned, because of the existence of a financial panic or economic depression, by reason of which the mortgaged property had depreciated about three fourths in market value.

In Kenly v. Huntingdon Bldg. Asso. [166] Md. [182], [170] A. [526], [90] A.L.R. 1321, it was held that unfavorable market conditions affecting the price obtainable at a mortgage foreclosure sale do not warrant a court of equity in making confirmation of a sale to the mortgagee conditional upon a waiver of the right to a deficiency judgment.

In Langever v. Miller, [124] Tex. [80], [76] S. W. (2d) 1025, [96] A.L.R. [836], it was held that a state statute enacted to meet the existing economic emergency, but not by its terms limited as to duration, in effect annulling valid deficiency judgments in proceedings to foreclose liens or after sale under deeds of trust, violates the constitutional provision against impairing the obligation of contracts.

As to moratory legislation generally, see supra, § [423].

As to the effect of moratory legislation on mortgages, see MORTGAGES [Also [19] R. C. L. p. 225].

19 See infra, § [441].

20 Scobey v. Gibson, [17] Ind. [572], [79] Am.

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§§ [440] CONSTITUTIONAL LAW [12] Am. Jur.

on a longer period of credit than was allowed at the date of the mortgage,[1]

or alter the right of a mortgagee to sale on foreclosure subject only to the

redemption provided for by the law in force when the mortgage was made.[2]

Furthermore, under the same principle a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, cannot constitutionally apply to a sale under a

mortgage executed before its passage.[3] On the other hand, a statute which

protects the redemptioner by requiring the purchaser to give a notice to the

former4 or to file an affidavit5 before the purchaser may take his deed does not

impair the obligation of contract, provided at the time of the passage of such

law ample time for performing the required acts remains before the expiration

of the redemption period.[6] On the same principle a statute requiring the redemptioner to record a notice of redemption does not impair the obligation

of contract, but merely affects the remedy.[7]

The existent laws, with reference to which the mortgagor and mortgagee

must be assumed to have contracted, are those only which in their direct or

necessary legal operation controlled or affected the obligation of the mortgage.[8] Thus, a statute enacted subsequent to the mortgage but prior to redemption, which reduces the rate of interest to be paid the purchaser at a

sale by one redeeming, does not impair the mortgage contract.[9] Furthermore,

a law changing the time of redemption and the amount of interest payable

in order to redeem the property, which is enacted prior to the sale but subsequent to the mortgage, does not impair any contract obligation of the purchaser.[10] The legislature may not, without the consent of all mortgage bond-

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Dec. 490; Greenwood v. Butler, 52 Kan. 424,

[34] P. 967, 22 L.R.A. 465; Chapin v. Frank (Tex. Civ. App.) 263 S. W. 1006 (affirmed in Frank v. State Bank & T. Co. (Tex.)

[263] S. W. 255, which is modified on rehearing in (Tex. Com. App.) 10 S. W. (2d) 704) citing R. C. L.; Womble v. Shirley (Tex. Civ. App.) 193 S. W. 719, citing R. C. L.

[1] January v. January, 7 T. B. Mon. (Ky.) 542, 18 Am. Dec. 211; Chapin v. Frank (Tex. Civ. App.) 236 S. W. 1006 (affirmed in Frank v. State Bank & T. Co. (Tex.) 263 S. W. 255, which is modified on rehearing in (Tex. Com. App.) 10 S. W. (2d) 704) citing R. C. L.; Womble v. Shirley (Tex. Civ. App.) 193 S. W. 719, citing R. C. L.

[2] Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648, 2 S. Ct. 236; Howard v. Bugbee, 24 How. (U. S.) 461, 16 L. ed. 753; State ex rel. German Sav. & L. Soc. v. Sears, 29 Or. 580, 46 P. 785, 54 Am. St. Rep. 808; Chapin v. Frank (Tex. Civ. App.) 236 S. W. 1006 (affirmed in Frank v. State Bank & T. Co. (Tex.)

[263] S. W. 255, which is modified on rehearing in (Tex. Com. App.) 10 S. W. (2d) 704) citing R. C. L.; Womble v. Shirley (Tex. App.) 193 S. W. 719, citing R. C. L.; Swinburne v. Mills, 17 Wash. 611, 50 P. 489, 61 Am. St. Rep. 932. Annotation: 54 Am. St. Rep. 811.

[3] Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65, 24 S. Ct. 748; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 S. Ct. 1042; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Welsh v. Cross, 146 Cal. 621, 81 P. 229, 106 Am. St. Rep. 63, 2 Ann. Cas. 796; Chapin v. Frank (Tex. Civ. App.)

[236] S. W. 1006 (affirmed in Frank v. State Bank & T. Co. (Tex.) 263 S. W. 255, which is modified on rehearing in (Tex. Com. App.) 10 S. W. (2d) 704) citing R. C. L.

[4] Curtis v. Whitney, 13 Wall. (U. S.) 68,

[20] L. ed. 513; Clark Implement Co. v. Wadden, 34 S. D. 550, 149 N. W. 424, L.R.A. 1915C, 414.

[5] A statute requiring a mortgagee, within three months after completion of foreclosure, to record an affidavit setting forth the facts, which is to be the condition on which the validity of the foreclosure depends, does not unconstitutionally impair a provision in an existing mortgage that the right to redeem shall be forever foreclosed in one year after the commencement of the foreclosure, since compliance with the condition does not involve any delay, is easy, and effects no substantial alteration of the remedy provided for in the contract. Conley v. Barton, 260 U. S. 677,

[67] L. ed. 456, 43 S. Ct. 238.

[6] Conley v. Barton, 260 U. S. 677, 67 L. ed. 456, 43 S. Ct. 238; Curtis v. Whitney,

[13] Wall. (U. S.) 68, 20 L. ed. 513; Clark Implement Co. v. Wadden, 34 S. D. 550, 149 N. W. 424, L.R.A.1915C, 414.

[7] A statute may provide that notices of redemption shall be recorded with the register of deeds, rather than filed; and the law may be applied to mortgages which were executed before its enactment. Heitsch v. Minneapolis Threshing Mach. Co. 29 N. D. 94, 150 N. W. 457, L.R.A.1915D, 349.

[8] Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648, 2 S. Ct. 236.

[9] Ibid.

[10] Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046, 24 S. Ct. 706. 82

holders, protect them as a class by subsequent statute against sacrifice of the property on foreclosure, since such a statute would impair the obligation of the original agreement between the bondholders.[11]

§ 441. Redemption.—

Notwithstanding some early decisions to the contrary, it is now settled that a law extending the time for redemption from a judicial or tax sale or giving such a right where none before existed cannot constitutionally be given a retroactive operation. Such a statute does not act merely on the remedy, but directly upon the contract itself.[12] Thus, statutes extending the period for redemption or giving a right of redemption where none before existed are not constitutional as applied to sales upon execution under judgments rendered on contracts made or debts incurred before their adoption.[13] Likewise, the obligation of a mortgage or deed of trust is impaired by applying to a sale thereunder a statute enacted since its execution, authorizing the redemption of property sold upon foreclosure, where no right of redemption previously existed, or extending the period of redemption beyond the time formerly allowed.[14] Although the legislature has the right to extend the period of redemption as to all mortgages executed subsequent to the passage of such an act,[15] the right of a purchaser, other than a state or some governmental agency acting as such, at a sale of land for taxes under a stat-

[11] Annotation: 88 A.L.R. 1270. **Contract obligations of nonassenting bondholders** are impaired by a statute enacted subsequent to the execution of the mortgage indenture, providing that if it shall appear that, on foreclosure sale under a trust mortgage, no bid is obtainable for a sum representing the fair and reasonable value of the mortgaged premises, the court may, on request of holders of a majority of the bonds, authorize the sale of the property at the fair and reasonable value of the interest of the bondholders to the mortgage trustee for the benefit of all the bondholders, and that the property shall be managed and administered by the trustee as an express trust, and sold by him as soon as can be done without sacrifice of its fair and reasonable value, either for cash, or for bonds, notes, debentures, stocks, or other securities. Detroit Trust Co. v. Stormfeltz-Loveley Co. 257 Mich. 655, 242 N. W. 227, 88 A.L.R. 1263.

[12] Rott v. Steffens, 229 Mich. 241, 201 N. W. 227, 38 A.L.R. 224. Annotation: 1 A.L.R. 143, s. 38 A.L.R. 229, and 89 A.L.R. 966. See cases cited infra, notes 13-19.

[13] Bronson v. Kinzie, 1 How. (U. S.) 311,

[11] L. ed. 143; Welsh v. Cross, 146 Cal. 621,

[81] P. 229, 106 Am. St. Rep. 63, 2 Ann. Cas.

[796] (overruling Moore v. Martin, 38 Cal. 428); Thresher v. Atchison, 117 Cal. 73, 48 P. 1020, 59 Am. St. Rep. 159 (obiter); Scobey v. Gibson, 17 Ind. 572, 79 Am. Dec. 490; Greenwood v. Butler, 52 Kan. 424, 34 P. 967, 22 L.R.A. 465. Annotation: 1 A.L.R. 143, s. 38 A.L.R. 229, and 89 A.L.R. 966.

[14] Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 S. Ct. 1042; Howard v. Bugbee, 24 How. (U. S.) 461, 16 L. ed. 753; Thresher v. Atchison, 117 Cal. 73, 48 P. 1020, 59 Am. St. Rep. 159; Allen v. Allen, 95 Cal. 184, 30 P. 213, 16 L.R.A. 646; Hull v. State, 29 Fla. 79, 11 So. 97, 16 L.R.A. 308, 30 Am. St. Rep. 95; Phinney v. Phinney, 81 Me. 450, 17 A. 405, 4 L.R.A. 348, 10 Am. St. Rep. 266; State ex rel. Thomas Cruse Sav. Bank v. Gilliam, 18 Mont. 94, 44 P. 394, 45 P. 661, 31 L.R.A. 721, 33 L.R.A. 556; Bateman v. Sterrett, 201 N. C. 59, 159 S. E. 14, citing R. C. L.; State ex rel. Cleveringa v. Klein,

[63] N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; State ex rel. German Sav. & L. Soc. v. Sears, 29 Or. 580, 46 P. 785, 54 Am. St. Rep. 808; Womble v. Shirley (Tex. Civ. App.)

[193] S. W. 719, citing R. C. L.; Chapin v. Frank (Tex. Civ. App.) 236 S. W. 1006, citing R. C. L.; Canadian & A. Mortg. Trust Co. v. Blake, 24 Wash. 102, 63 P. 1100, 85 Am. St. Rep. 946. Annotation: 1 A.L.R. 143, s. 38 A.L.R. 229, and 89 A.L.R. 966; 85 Am. St. Rep. 947. A statute abrogating a right which a mortgagee has at the time the mortgage is taken, of a fixed and definite period for the foreclosure of the mortgagor's equity, by providing that in case of an attachment of the mortgagor's interest by a creditor who files a bill in equity, the right of redemption shall not expire pending such proceedings by any attempted foreclosure of the mortgage is unconstitutional as impairing the obligation of contract. Phinney v. Phinney, 81 Me. 450, 17 A. 405, 4 L.R.A. 348, 10 Am. St. Rep. 266. The law fixing the period of redemption from a real-estate mortgage foreclosure sale, existing at the time of the entering into a contract of mortgage, wherein the parties agree that upon default in the payment of the debt secured by the mortgage the land may be sold "agreeable to the statute in such case made and provided," is a part of the contract of the mortgage, and any change in the law fixing the period of redemption—whether the law shortens the period of redemption or extends the period of redemption—is an impairment of the obligations of such contract. State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523.

[15] State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523. Annotation: 89 A.L.R. 966. 83

ute which fixes a certain period for redemption is a contract right which cannot be impaired by a statute passed subsequent to such sale which proposes to extend the period formerly allowed by law for redeeming the lands from such sale, even though such statute may have been enacted before the expiration of the original period for redemption.[16] This latter rule is subject

to an exception where the state or one of its governmental subdivisions is the purchaser. The legislature may bind the state and its assignee by an act extending the time of redemption from tax sales, because the grant of additional time to landowners to redeem is with the consent of the state, and, as respects subsequent assignees of the interest acquired by the state, they, of course, take subject to the conditions imposed by the existing statute.[17] This exception, however, does not extend to a case where the governmental agency has assigned the certificate originally issued to it to a private individual, prior to the time when the statute extending the time for redemption took effect.[18] A statute making less onerous the redemption of lands forfeited for nonpayment of taxes and held by the state does not impair the obligation of a lease between the state and its lessee when the lease is made subject to cancelation if the lands are redeemed.[19]

§ 442. Exemptions.—

Due to a broad dictum in a very early Federal Supreme Court decision,[20] some of the early state cases adopted the view that changes in exemption laws did not impair the obligation of contract, but related exclusively to the remedy.[1] In view of the rule subsequently adopted by the Federal Supreme Court, it would seem that these cases are valuable only from the historical viewpoint and are no longer to be considered as the law in this matter.[2] The Federal Supreme Court very early adopted the view that a state statute or constitutional provision which greatly increased the amount of an exemption not only impaired the obligation of a pre-existing judgment, but to all practical effects annihilated the remedy.[3] Now the generally accepted view that the remedy is inseparable from the contract itself is squarely taken, and statutes creating or enlarging exemptions substantially and materially are unconstitutional as impairing the obligation of pre-existing contracts.[4] Enlarged homestead exemptions have comprised by

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[16] Hull v. State, 29 Fla. 79, 11 So. 97, 16 L.R.A. 308, 30 Am. St. Rep. 95. Annotation: 1 A.L.R. 143, s. 38 A.L.R. 229, and 89 A.L.R. 966. An attempt by the legislature to extend the time for redemption from a sale under a decree foreclosing a tax lien, after the period in force when the sale was made for such redemption has expired, is void as impairing the obligation of contract, even though the sale had not been con- firmed when the extension was attempted. Smith v. Snillman, 135 Ark. 279, 205 S. W. 107, 1 A.L.R. 136. A provision of a municipal charter ex- tending the time before a

deed can be se- cured by a purchaser at a tax sale, until the expiration of a specified number of months after notice to be given at the expiration of the time as formerly fixed, cannot be applied to sales which occurred before its adoption, without unconstitu- tionally impairing the obligation of the contract. Rott v. Steffens, 229 Mich. 241,

[201] N. W. 227, 38 A.L.R. 224. For a detailed discussion, see TAXATION [Also 26 R. C. L. p. 434].

[17] State ex rel. Dowling v. Butts, 111 Fla. 630, 149 So. 746, 89 A.L.R. 946. Annotation: 1 A.L.R. 143, s. 39 A.L.R. 229, and 89 A.L.R. 966.

[18] Annotation: 1 A.L.R. 143, s. 38 A.L.R. 229, and 89 A.L.R. 966.

[19] Violet Trapping Co. v. Grace, 297 U. S. 119, 80 L. ed. 518, 56 S. Ct. 386.

[20] Bronson v. Kinzie, 1 How. (U. S.) 311,

[11] L. ed. 143. Annotation: 93 A.L.R. 179.

[1] Cusic v. Douglas, 3 Kan. 123, 87 Am. Dec. 458; Rockwell v. Hubbell, 2 Dougl. (Mich.) 197, 45 Am. Dec. 246; Stephenson v. Osborne, 41 Miss. 119, 90 Am. Dec. 358; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103. Annotation: 93 A.L.R. 179; 21 L. ed. 212.

[2] See Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507. Annotation: 93 A.L.R. 180.

[3] Gunn v. Barry, 15 Wall. (U. S.) 610,

[21] L. ed. 212. Annotation: 93 A.L.R. 178.

[4] New Orleans v. Morris, 105 U. S. 600, 26 L. ed. 1184; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Wilson v. Brown, 58 Ala. 62, 29 Am. Rep. 727; Johnson v. Fletcher, 84

far the most numerous type involved in the cases that have passed upon the question whether pre-existing contracts have been impaired,[5] and the later cases have very generally applied the test of whether the new or enlarged exemption is substantial or material.[6] Generally, where the amount of the exemption allowed is greatly increased, the courts hold such statutes invalid as destroying the remedy, and thus impairing the obligation of contract.[7] Furthermore, Congress cannot, through a bankruptcy act, validate state statutes providing for greatly increased homestead exemptions as far as prior debts are concerned.[8] The same principles have been applied to statutes exempting proceeds of insurance policies so far as they undertake to exempt the proceeds from antecedent debts of the insured.[9] Where, however, such a statute merely re-enacts the provision of a former statute existing at the time the indebtedness was contracted, it does not impair the obligation of insurance contracts.[10] On the other hand, a statute exempting the proceeds or avails of life insurance from liability for debts which were contracted after the passage of the act does not impair the obligation of a contract of insurance entered into prior to the passage of the act.[11]

The same general tests and rules have been applied to statutes increasing the exemption of farm stock,[12] wages,[13] pensions,[14] dower or like statutory provisions,[15] and to statutes which attempt to permit nonresidents to assert

exemptions allowed them by their own states, which, if permitted, would exempt property otherwise liable.[16]

Since the debtor has no vested right in the existing law pertaining to ex-

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[54] Miss. 628, 28 Am. Rep. 388; Penrose v. Erie Canal Co. 56 Pa. 46, 93 Am. Dec. 778. Annotation: 93 A.L.R. 178; 21 L. ed. 212;

[1] L.R.A. 359. Since there is no universal principle of law that every part of the property of a debtor is liable to be seized for the pay- ment of a judgment against him, the va- lidity of an exemption statute depends up- on the question whether the law which prevailed when the contract was made has been so far changed that there does not remain a substantial and reasonable mode of enforcing it. Per Hunt, J., in Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793. The exemption to married men or heads of families of their earnings for personal services rendered within sixty days next preceding the levy of execution by gar- nishment or otherwise, provided by stat- ute, being reasonable, and directed to the remedy, and not the right, does not impair the obligation of contracts entered into prior to its passage, in violation of the Federal Constitution. Kirkman v. Bird,

[22] Utah, 100, 61 P. 338, 58 L.R.A. 669, 83 Am. St. Rep. 774.

[5] Annotation: 93 A.L.R. 181.

[6] Annotation: 93 A.L.R. 181.

[7] Kener v. La Grange Mills, 231 U. S. 215, 58 L. ed. 189, 34 S. Ct. 83; Wilson v. Brown, 58 Ala. 62, 29 Am. Rep. 727 (in- crease to $1,200 in real estate and $1,000 in personalty); Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507 (exemption of $2,000 created). Annotation: 93 A.L.R. 181. The provision of a state Constitution making exemption from execution of home- steads not exceeding $1,000 in value is in- valid as to contracts previously existing. Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793.

[8] Kener v. La Grange Mills, 231 U. S. 215, 58 L. ed. 189, 34 S. Ct. 83; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212.

[9] W. B. Worthen Co. v. Thomas, 292 U. S. 426, 78 L. ed. 1344, 54 S. Ct. 816, 93 A.L.R. 173; Bank of Minden v. Clement,

[256] U. S. 126, 65 L. ed. 857, 41 S. Ct. 408; Addiss v. Selig, 264 N. Y. 274, 674, 190 N. E. 490, 191 N. E. 621, 92 A.L.R. 1384; Skin- ner v. Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878; Re Heitron, 14 Wash. 536, 45 P. 153, 35 L.R.A. 602. Annotation: 93 A.L.R. 182. A statute undertaking to exempt from the claims of creditors of the recipient the avails of life, sick, accident, or disability insurance cannot be sustained, as against the objection that it impairs contract obli- gations to existing creditors, as emergency legislation, where, although purporting to be such, it contains no limitation as to time, amount, circumstances, or need. W. B. Worthen Co. v. Thomas, 292 U. S. 426,

[78] L. ed. 1344, 54 S. Ct. 816, 93 A.L.R. 173.

[10] Irving Bank v. Alexander, 280 Pa. 466,

[124] A. 634, 34 A.L.R. 834.

[11] Le Blanc's Succession, 142 La. 27, 76 So. 223, L.R.A.1917F, 1137. Annotation: 93 A.L.R. 183.

[12] Annotation: 93 A.L.R. 183. An increase of a debtor's personal ex- emption by allowing him two horses in- stead of one impairs materially the obliga- tion of a pre-existing judgment. Johnson v. Fletcher, 54 Miss. 628, 28 Am. Rep. 388.

[13] Annotation: 93 A.L.R. 184.

[14] Annotation: 93 A.L.R. 184.

[15] Annotation: 93 A.L.R. 184.

[16] Annotation: 93 A.L.R. 185. 85

emptions,[17] the objection to the validity of statutes creating or extending exemptions, that they impair the obligation of contracts, has in a number of cases been held inapplicable to statutes which lessen or abrogate exemptions that have been previously granted, the interests of the debtors alone being affected in such cases and the remedies of creditors being not involved.[18]

§ 443. Liens.—

A lien created by statute for the payment of a debt is only a part of the remedy afforded by the law for its collection; a change of that remedy does not affect the obligation of the contract,19 even though the statute may operate retrospectively.20 Thus, a statute requiring a notice to be given of an intention to file a lien, the right to which already existed, does not impair the obligation of contract.21 Furthermore, a mechanic's lien given by statute is, as a general rule, liable always to modification or repeal by the same power that created it. Since such a lien is only a means for enforcing the payment of a debt arising from the performance of a contract, it is not a vested right, but may be taken away without impairing the obligation of the contract.1 Where, however, the lien is not purely statutory but is an integral part of the contract right, a different rule prevails in many jurisdictions. Hence, it is generally recognized that to postpone a legal existing lien upon real property to a subsequent lien by a statute enacted subsequent to the attaching of such prior lien is to impair the obligation of a contract;2 an act of the legislature which postpones an existing valid mortgage lien and makes a subsequently created lien superior to the mortgage lien is a law impairing vested property rights and likewise impairs the obligations of a contract.3 In other jurisdictions the rule is that a statutory lien may be given superiority over a prior mortgage and that statutes designed to effect this are not necessarily unconstitutional as impairing contractual obligations.4

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[17] See EXEMPTIONS [Also 11 R. C. L. p. 490, § 2].

[18] A statute providing a remedy which accelerates the enforcement of a contract or subjects a fund to the satisfaction of the obligation of a contract which was not previously subject to its satisfaction does not impair the obligation of contract. Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L.R.A.(N.S.) 1215, Ann. Cas. 1912B, 251; Laird v. Carton, 196 N. Y. 169, 89 N. E. 822, 25 L.R.A.(N.S.) 189.

[19] Livingston v. Moore, 7 Pet. (U. S.) 469, 8 L. ed. 751; Bangor v. Goding, 35 Me. 73, 56 Am. Dec. 688; John S. Hanes & Co. v. Wadey, 73 Mich. 178, 41 N. W. 222, 2 L.R.A. 498; Best v. Baumgardner, 122 Pa. 17, 15 A. 691, 1 L.R.A. 356. Annotation: 88 A.L.R. 261; 56 Am. Dec. 690.

[20] Bolton v. Johns, 5 Pa. 145, 47 Am. Dec. 404.

[21] Best v. Baumgardner, 122 Pa. 17, 15 A. 691, 1 L.R.A. 356.

[1] John S. Hanes & Co. v. Wadey, 73 Mich. 178, 41 N. W. 222, 2 L.R.A. 498. The power which gave a mechanic's lien may at any time take it away entirely and still not in any sense become answerable to the imputation of impairing the obligation of contract. Best v. Baumgardner, 122 Pa. 17, 15 A. 691, 1 L.R.A. 356.

[2] Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 S. Ct. 546; Yeatman v. King, 2 N. D. 421, 51 N. W. 721, 33 Am. St. Rep. 797.

[3] National Bank v. Jones, 18 Okla. 555, 91 P. 191, 12 L.R.A.(N.S.) 310, 11 Ann. Cas. 1041. The vested priority of a mortgagee is beyond the power of the mortgagor or the legislature thereafter to disturb. Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 S. Ct. 546. A statutory lien cannot be given priority over a mortgage existing and of record before the enactment of the statute creating the lien. Eccles v. Will, 23 N. M. 623, 170 P. 748, L.R.A.1918C, 1022.

[4] Wimberly v. Mayberry, 94 Ala. 240, 10 So. 157, 14 L.R.A. 305; Wabash E. R. Co. v. East Lake Fork Special Drainage Dist. 134 Ill. 384, 25 N. E. 781, 10 L.R.A. 285; Titusville Iron Works v. Keystone Oil Co. 122 Pa. 627, 15 A. 917, 1 L.R.A. 361. Giving a mechanic's lien superiority over a prior mortgage, as to the building or improvement added by the lienor, is not unconstitutional as impairing the obligation of a contract. Wimberly v. Mayberry, 94 Ala. 240, 10 So. 157, 14 L.R.A. 305. An alteration and enlargement of the remedy for enforcing a mechanic's lien after a sale under foreclosure of a mortgage on the premises, subject to the lien, by providing in addition to the right under the former statute to sell the building on the lien claim and remove it from the land, that the court, for the best interests of all the parties, might require the land and improvements to be sold together and the proceeds distributed so as to secure the prior mortgage or other lien priority upon the land and to the mechanic's lien 86

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A statute giving an improvement lien priority over a pre-existing mortgage on the property subsequently so assessed does not impair the obligation of contract contained in the mortgage.[5] The justification for this rule lies in the inherent power of a sovereignty to tax, and all contracts are made subject to this power.[6] Some courts justify the rule on the basis that if the legislature did not have this power, it would be within the power of the owner of the property to render his property immune from any assessment by merely giving a mortgage thereon.[7]

§ 444. Insurance.—

Attacks on the validity of statutes regulating the affairs of insurance companies are frequently made on the ground that the statutes called in question impair the obligation of the contract contained in the charter of the company, in the policies of insurance, or in some special contract relating to the company's affairs. Acting under the general principle that the legislature may regulate such corporations, the legislature, without impairing the obligation of contracts, may provide that no breach of condition in an insurance policy shall avoid it where such provisions amount to the mere establishment of limitations in relation to forfeiture of the contracts.8 Furthermore, the state, in pursuance of its police power and of its right to provide or change the remedies by which its objects are to be attained, may, without impairing the obligation of contracts, authorize proceedings through designated officers of the law for the dissolution of insurance companies which upon examination seem to be insolvent or in such condition as to render their further continuance in business hazardous to the insured or to the public.9 Other statutes have been upheld as not amounting to laws impairing the obligation of contracts, as, for example, where a statute provides that in all actions upon fire insurance policies issued after its enactment the defendant should be permitted to deny that the property insured was worth at the time of the issuing of the policy the full amount insured;10 where the legislature acts within its right to change the statutory liability of persons or corporations causing fires;11 or where, under a state statute made applicable to existing policies, the court is authorized to give judgment for an additional specified proportionate amount of the policy as a penalty in cases where there has been an unsuccessful defense interposed not in good faith.12

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priority building, does not impair the obligation of the contract with the mortgagee or the purchaser on foreclosure. Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 S. Ct. 703.

[5] Wabash E. R. Co. v. East Lake Fork Special Drainage Dist. 134 Ill. 334, 25 N. E. 781, 10 L.R.A. 285; Baldwin v. Moroney, 173 Ind. 574, 91 N. E. 3, 30 L.R.A.(N.S.) 761; State ex rel. White v. Kansas City, 134 Kan. 157, 4 P. (2d) 422, 78 A.L.R. 507. And see Provident Inst. for Sav. v. Jersey City, 113 U. S. 506, 28 L. ed. 1102, 5 S. Ct. 612. Annotation: 78 A.L.R. 513. See SPECIAL OR LOCAL ASSESSMENTS [Also 25 R. C. L. p. 188, § 101].

[6] See TAXATION [Also 26 R. C. L. p. 26, § 12].

[7] Annotation: 78 A.L.R. 516. A state statute which provides that when the holder of an obligation secured by real estate or personal property causes a sale of the property by a trustee becomes the purchaser for a sum less than the amount of the debt, and afterwards brings an action for the deficiency, the defendant may show by way of defense and setoff that the property sold was fairly worth the amount of the debt or that the sum bid was substantially less than the true value of the property, and thus defeat the claim in whole or in part, does not unconstitutionally impair contract obligations. Richmond Mortg. & Loan Corp. v. Wachovia Bank & T. Co. 300 U. S. 124, 81 L. ed. 552, 57 S. Ct. 338, 108 A.L.R. 886.

[8] McGannon v. Michigan Millers' Mut. F. Ins. Co. 127 Mich. 636, 87 N. W. 61, 54 L.R.A. 739, 89 Am. St. Rep. 501. See generally INSURANCE [Also 14 R. C. L. p. 823].

[9] Republic L. Ins. Co. v. Swigert, 135 Ill. 150, 25 N. E. 680, 12 L.R.A. 328.

[10] Daggs v. Orient Ins. Co. 136 Mo. 382, 38 S. W. 85, 35 L.R.A. 227, 58 Am. St. Rep. 638, affirmed in 172 U. S. 557, 43 L. ed. 552, 19 S. Ct. 281.

[11] Leavitt v. Canadian P. R. Co. 90 Me. 153, 37 A. 886, 38 L.R.A. 152.

[12] Snyder v. Supreme Ruler, F. M. C. 122 Tenn. 248, 122 S. W. 981, 45 L.R.A.(N.S.) 87

Furthermore, statutes allowing an attorney's fee for failure to pay an insurance loss promptly, which are made applicable to existing policies, are not unconstitutional as an impairment of the obligation of contract.[13] This principle has been applied to insurers under a workmen's compensation act who seek a review of an award. A statute enacted subsequent to an injury which permits the recovery of attorneys' fees by the employee does not impair the obligation of contract.[14] This view is supported on the basis that such legislation affects the remedy, as fees are merely cost items,[15] or is a valid exercise of the police power by the state in regulating insurance companies.[16] There is some authority to the contrary, however, which holds such statutes void as to existing contracts.[17]

The power, however, of the legislature over insurance companies and their policies of insurance is not unlimited. For example, under an existing policy of fire insurance the insured has a vested right from the date of the contract to be recompensed upon the happening of the contingency defined in the policy, and any statute destroying that right or the security upon which reliance was placed and which entered into the consideration for the policy would impair the obligation of the contract.[18] Likewise, a statute which provides that each insurer shall be liable for its proportionate share of the loss impairs the obligation of an existing fire insurance policy which provides that the insurer shall be exonerated from loss occurring while the insured has any other contract of insurance.[19]

Statutes which attempt to change beneficiaries of insurance policies already issued are void as impairing the obligation of contracts,[20] as are statutes which attempt to change provisions as to the availability of the defense of suicide.[1] Furthermore, a statute which attempts to change previous provisions relating

209, affirmed in 227 U. S. 497, 57 L. ed. 611, 33 S. Ct. 292. Annotation: 78 L. ed. 997. The obligation of an existing insurance contract was not unconstitutionally impaired by applying to it the provisions of a statute subsequently enacted, under which, in case the refusal of the insurance company to pay a loss is found not to have been in good faith, such additional recovery as shall be determined to be reasonable compensation for the resulting damage, if any, may be allowed, not exceeding 25 per cent of the liability under the policy. Supreme Ruling, F. M. C. v. Snyder, 227 U. S. 497, 57 L. ed. 611, 33 S. Ct. 292.

[13] Germania F. In. Co. v. Bally, 19 Ariz. 580, 173 P. 1052, 1 A.L.R. 488; L'Engle v. Scottish Union & Nat. F. Ins. Co. 48 Fla. 82, 37 So. 462, 67 L.R.A. 581, 111 Am. St. Rep. 77, 5 Ann. Cas. 748; Hartford F. Ins. Co. v. Redding, 47 Fla. 228, 37 So. 62, 67 L.R.A. 518, 110 Am. St. Rep. 118; Reed v. American Bonding Co. 102 Neb. 113, 166 N. W. 196, L.R.A.1918C, 63. Annotation: 90 A.L.R. 536; 78 L. ed. 998. A statute providing that upon the trial of an action the court shall award to the prevailing party a reasonable attorney's fee, to be taxed as costs and be included in the judgment rendered, does not impair contractual obligations, as applied to a surety on a contractor's bond who became such before the statute was enacted. Igoe Bros. v. National Surety Co. 112 N. J. L. 243, 169 A. 841, 96 A.L.R. 1422. No unconstitutional impairment of the obligation of contracts is involved in applying to actions on insurance policies written before it went into effect, a statute providing for the allowance of an attorney's fee to the successful respondent on an appeal by an insurer from a judgment against it in an action on a policy, such statute being in effect one relating to costs. Spicer v. Benefit Asso. R. E. 142 Or. 574, 21 P. (2d) 187, 90 A.L.R. 517.

[14] Norman's Case, 278 Mass. 464, 180 N. E. 238, 82 A.L.R. 885; Ahmed's Case, 278 Mass. 180, 179 N. E. 684, 79 A.L.R. 669. Annotation: 90 A.L.R. 538.

[15] Germania F. Ins. Co. v. Bally, 19 Ariz. 580, 173 P. 1052, 1 A.L.R. 488; Reed v. American Bonding Co. 102 Neb. 113, 166 N. W. 196, L.R.A.1918C, 63. Annotation: 90 A.L.R. 537.

[16] Annotation: 90 A.L.R. 537.

[17] Annotation: 90 A.L.R. 539; 78 L. ed. 998.

[18] British America Assur. Co. v. Colorado & S. R. Co. 52 Colo. 589, 125 P. 508, 1135, 41 L.R.A.(N.S.) 1202. Annotation: 41 L.R.A.(N.S.) 1202.

[19] Filipkowski v. Springfield F. & M. Ins. Co. 206 Wis. 39, 238 N. W. 828, 78 A.L.R. 613.

[20] Hess v. Segenfelter (Morgan v. Segenfelter) 127 Ky. 348, 105 S. W. 476, 14 L.R.A. (N.S.) 1172, 128 Am. St. Rep. 343. Annotation: 106 A.L.R. 52; 49 L.R.A. (N.S.) 487.

[1] Annotation: 106 A.L.R. 52. 88

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to incontestability and which determines the grounds therefor,[2] or a statute which substantially alters an earlier statute providing for the application of accumulated reserve to the purchase of extended insurance, where no other option expressed in the policy was availed of by the insured,[3] or which changes materially the results of misrepresentations contained in the application, impairs the obligation of the contract.[4]

The contract rights of one who has undertaken to be bound by all the rules of a mutual benefit society are not impaired by a statute permitting the society to distribute its funds according to its rules and regulations, even though a member is thereby deprived of the benefit of a statute providing for extended insurance in case of forfeiture of his policy for nonpayment of premiums.[5]

§ 445. Statutes of Limitation.—

An existing law of limitations is not considered as being a part of the contract. Hence, the legislature may enact a statute which limits the time within which actions may be brought to enforce demands where there was previously no period of limitation or which shortens the existing time of limitation, and such a law may operate upon existing contracts without necessarily being invalid as impairing their obligations.6 The

legislature by enactment may suspend the operation of a statute of limitations as to contracts in existence at the time of the passage of the act7 or may control the statute of limitations, if it does not thereby take away the remedy to enforce existing contracts.8 Such statutes relate only to the remedy and the enforcement of rights and, as a general rule, control future procedure in reference to previously existing causes of action, where they contain no language clearly limiting their application to causes of action arising in the future.9 It is within the power of the legislature to shorten the period of limitation, leaving always a reasonable time within which to invoke a remedy for a breach of contract, or to prolong the period of limitation, where the right to plead it has not accrued.10 If, however, the period fixed by a

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[2] Annotation: 106 A.L.R. 53.

[3] Annotation: 106 A.L.R. 49. An amendment which alters an earlier statute under which an insurer, upon default in the payment of life insurance premiums, was required to apply the accumulated reserve to the purchase of extended insurance where no other option expressed in the policy was availed of by the insured, by giving the insurer the right to elect between applying the reserve to the purchase of paid-up insurance or the continuance of the insurance in force at its full amount, cannot, in view of the constitutional prohibition of legislation impairing the obligation of contracts, be constitutionally applied where the policy, the premiums of which are in default, was in force at the time of such amendment. Furlong v. National L. & Acci. Ins. Co. 185 La. 352, 169 So. 431, 106 A.L.R. 40.

[4] Franklin L. Ins. Co. v. Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73. Annotation: 106 A.L.R. 53.

[5] Westerman v. Supreme Lodge, K. P. 196 Mo. 670, 94 S. W. 470, 5 L.R.A.(N.S.) 1114. See MUTUAL BENEFIT SOCIETIES [Also 19 R. C. L. p. 1175].

[6] Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659, 11 S. Ct. 76; Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886; Phalen v. Virginia, 8 How. (U. S.) 163, 12 L. ed. 1030; Aycock v. Martin, 37 Ga. 124, 92 Am. Dec. 56; Rockwell v. Hubbell, 2 Dougl. (Mich.) 197, 45 Am. Dec. 246; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103; State Land Bd. v. Lee, 84 Or. 431, 165 P. 372, citing R. C. L.; Frank v. State Bank & T. Co. (Tex. Com. App.) 10 S. W. (2d) 704, citing R. C. L.; Von Baumbach v. Bade, 9 Wis. 559, 76 Am. Dec. 283. Annotation: 26 L. ed. 886. A state law requiring bondholders dissenting to a refunding plan to file their dissent within a certain period of time or else they will be deemed to assent to the plan is valid on the same principle as providing a statute of limitations. Gilfillan v. Union Canal Co. 109 U. S. 401, 27 L. ed. 977, 3 S. Ct. 304. Statutes of limitation referring to the remedy, and not to the obligation of a contract, do not fall within the constitutional inhibition of statutes impairing the obligation of contracts. Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529. See LIMITATION OF ACTIONS [Also 17 R. C. L. pp. 680 et seq.].

[7] Wardlaw v. Buzzard, 49 S. C. L. (15 Rich.) 158, 94 Am. Dec. 148; Luter v. Hunter, 30 Tex. 688, 98 Am. Dec. 494; Caperton v. Martin, 4 W. Va. 138, 6 Am. Rep. 270.

[8] Richardson v. Cook, 37 Vt. 599, 88 Am. Dec. 622.

[9] Mulvey v. Boston, 197 Mass. 178, 83 N. E. 402, 14 Ann. Cas. 349.

[10] Atchafalaya Land Co. v. F. B. Williams Cypress Co. 258 U. S. 190, 66 L. ed. 89

statute of limitations is unreasonably short and is designed to defeat the remedy upon pre-existing contracts, which is part of their obligation, the statute is void.[11] A statute which declares that a period already elapsed should bar an action upon a contract is, however, an arbitrary destruction of contract-

ual rights and, therefore, unconstitutional,[12] as would also be a statute which practically, denied a party the right to sue on an existing cause of action by shortening the period of limitations, without leaving a reasonable time thereafter in which to bring the action.[13] The question as to what shall be considered a reasonable time within which an existing right must be asserted after a new statute of limitations is enacted before the statute will bar the right is for the determination of the legislature, and is in no sense a judicial question. Unless the time allowed is so manifestly insufficient that it becomes a denial of justice, the court will not interfere with the legislative discretion.[14]

XII. PRIVILEGES AND IMMUNITIES OF CITIZENSHIP

a. IN GENERAL

§ 446. Generally.—

The provisions of the United States Constitution which

559, 42 S. Ct. 284; Canadian N. R. Co. v. Eggen, 252 U. S. 553, 64 L. ed. 713, 40 S. Ct. 402; Ochoa v. Hernandez y Morales,

[230] U. S. 139, 57 L. ed. 1427, 33 S. Ct. 1033; Wilson v. Iseminger, 185 U. S. 55, 46 L. ed. 804, 22 S. Ct. 573; Turner v. New York,

[168] U. S. 90, 42 L. ed. 392, 18 S. Ct. 38; MacFarland v. Jackson, 137 U. S. 253, 34 L. ed. 664, 11 S. Ct. 79; Wheeler v. Jackson,

[137] U. S. 245, 34 L. ed. 659, 11 S. Ct. 76; McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 S. Ct. 972; Mitchell v. Clark,

[110] U. S. 633, 28 L. ed. 279, 4 S. Ct. 170, 312; Vance v. Vance, 108 U. S. 514, 27 L. ed. 808, 2 S. Ct. 854; Koshkonong v. Bur- ton, 104 U. S. 668, 26 L. ed. 886; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; Sohn v. Waterson, 17 Wall. (U. S.) 596, 21 L. ed. 737; McCracken v. Hayward, 2 How. (U. S.) 63) 608, 11 L. ed. 397; Hawkins v. Barney,

[5] Pet. (U. S.) 457, 8 L. ed. 190; Tipton v. Smythe, 78 Ark. 392, 94 S. W. 678, 7 L.R.A. (N.S.) 714, 115 Am. St. Rep. 44, 8 Ann. Cas. 521; Davis & McMillan v. Industrial Acci. Commission, 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095; Los Angeles Bond & Securi- ties Co. v. Heath, 120 Cal. App. 328, 7 P. (2d) 1039, citing R. C. L.; Briscoe v. An- ketell, 28 Miss. 361, 61 Am. Dec. 553; Graves v. Howard, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565; Macartney v. Shipherd, 60 Or. 133, 177 P. 814, Ann. Cas. 1919D, 1257; Smith v. Northern Neck Mut. F. Asso. 112 Va. 192, 70 S. E. 482, 38 L.R.A. (N.S.) 1016; Bettman v. Cowley, 19 Wash. 207, 53 P. 53, 40 L.R.A. 815; Parker v. Kane,

[4] Wis. 1, 65 Am. Dec. 283. Annotation: 26 L. ed. 886; 34 L. ed. 659;

[1] L.R.A.(N.S.) 528, s. 7 L.R.A.(N.S.) 715, and 21 L.R.A.(N.S.) 157; 8 Ann. Cas. 525. Shortening the time within which ac- tions on existing contracts must be brought impairs no obligation of the contract if a reasonable time is given to bring the suit before the bar attaches. Gilfillan v. Union Canal Co. 109 U. S. 401, 27 L. ed. 977, 3 S. Ct. 304. Statutes of limitation operating prospectively do not impair vested rights or the obligations of contracts, and their va- lidity cannot be questioned unless their provisions are so stringent and unreason- able as to amount to a denial of the right instead of merely affecting the remedy. Christmas v. Russell, 5 Wall. (U. S.) 290,

[18] L. ed. 475.

[11] Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793. Annotation: 26 L. ed. 887. A statute prohibiting proceedings to try the genuineness of the tax-receivable cou- pons issued under the law of 1871,

which became due before July 1, 1888, after one year from that date, and prohibiting such proceedings as to other coupons after one year from the time they are due, is an unreasonable law and impairs the obliga- tion of the contract. McGahey v. Virginia,

[135] U. S. 662, 34 L. ed. 304, 10 S. Ct. 972.

[12] Mulvey v. Boston, 197 Mass. 178, 83 N. E. 402, 14 Ann. Cas. 349. Annotation: 34 L. ed. 660.

[13] Soper v. Lawrence Bros. Co. 98 Me. 268, 56 A. 908, 99 Am. St. Rep. 397; Bris- coe v. Anketell, 28 Miss. 361, 61 Am. Dec. 553; Gilbert v. Ackerman, 159 N. Y. 118,

[53] N. E. 753, 45 L.R.A. 118; Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 46 L.R.A. 715, 81 Am. St. Rep. 516. Annotation: 34 L. ed. 660.

[14] Wilson v. Iseminger, 185 U. S. 55, 46 L. ed. 804, 22 S. Ct. 573; Antoni v. Green- how, 107 U. S. 769, 27 L. ed. 468, 2 S. Ct. 91; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365. Annotation: 8 Ann. Cas. 526. Statutes of limitation applicable to ac- tions to recover land do not impair con- tract obligations unless so unreasonable as to amount to a denial of a right. 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 discre- tion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Jackson ex dem. Hart v. Lamphire, 3 Pet. (U. S.) 280, 7 L. ed. 679. 90

relate to the protection of the privileges and immunities of citizens have the general effect of forbidding any discrimination by a state which would amount to a practical alienage against citizens of other states.[15] The recent tendency, moreover, disclosed by the decisions of the Supreme Court of the United States, is to forbid any state to abridge any privilege or immunity of any United States citizen in any state if the privilege or immunity sought to be abridged is one arising from United States citizenship.[16]

The Supreme Court pointed out in a very early case that the Constitution aims to make an American citizen as free in one state as another.[17] Furthermore, the enjoyment of the constitutional privileges and immunities by the citizens of each state in every other state is manifestly calculated the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.[18]

§ 447. Article 4, § 2, of Federal Constitution.—

Article 4, § 2, of the Federal

Constitution provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.[19] The intention of this article is to confer on the citizens of the several states a general citizenship and all the privileges and immunities which the citizens of any state would be entitled to under the like circumstances.[20] Hence, it is intended to prevent discrimination by the several states against citizens of other states

in respect of the fundamental privileges of citizenship.[1] One of the state courts, however, has taken the position that this provision of the Constitution is not only not restrictive, but furthermore is not penal or prohibitory.[2]

Under Article [4], § [2], of the Federal Constitution, no privileges are secured to citizens in the several states except those which belong to citizenship.[3] Moreover, it does not make the privileges and immunities enjoyed by the citizens of one state under the Constitution and laws of that state the measure of the privileges and immunities to be enjoyed as of right by citizens of another state under its Constitution and laws.[4] Its effect is to guarantee equality of privilege and to forbid the imposition of disabilities of alienage upon citizens of other states.[5] A law enforced by a state in rebellion which treats citizens of the United States as alien enemies because of their loyalty to the Union and decrees a sequestration of debts due to such United States citizens from its own citizens violates this clause of the Federal Constitution.[6]

Article [4], § [2], is only a limitation upon the powers of the states. It in no wise affects the powers of Congress over territories within the jurisdiction

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[15] See infra, §§ 449, 456 et seq.

[16] See infra, § 449.

[17] Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606 (opinion of Johnson, J.).

[18] Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165.

[19] U. S. Const. Art. 4, § 2.

[20] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Blake v. Mc- Clung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 S. Ct. 269. The purpose of the pertinent clause in the Fourth Article was to require each state to accord equality of treatment to the citizens of other states in respect of the privileges and immunities of state citizenship. Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54.

[1] Whitfield v. Ohio, 297 U. S. 431, 80 L. ed. 778, 56 S. Ct. 532; Maxwell v. Bugbee,

[250] U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601; Williams v. Bruffy,

[96] U. S. 176, 24 L. ed. 716.

[2] Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161.

[3] Connor v. Elliott, 18 How. (U. S.) 591,

[15] L. ed. 497.

[4] McKane v. Durston, 153 U. S. 684, 38 L. ed. 867, 14 S. Ct. 913.

[5] See infra, § 449.

[6] Williams v. Bruffy, 96 U. S. 176, 24 L. ed. 716. 91

of the Federal Government, such as unorganized territories and Indian reservations.[7]

§ [448]. Fourteenth Amendment to Federal Constitution.—The second clause of the Fourteenth Amendment declares that "no state shall make or impose any law which shall abridge the privileges or immunities of citizens of the United States."[8] The national scope of the government under the Federal Constitution was completely broadened by the Fourteenth Amendment, by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, the amendment operating upon all the powers conferred by the Constitution.[9]

The Fourteenth Amendment deals only with the rights of citizens of the United States as such, and the privileges and immunities protected thereby are those of citizens of the United States, as distinguished from the privileges and immunities of the citizens of a state as such.[10] It places the privileges and immunities of citizens of the United States under the protection of the Federal Constitution and leaves the privileges and immunities of citizens of a state under the protection of the state Constitution.[11]

This clause of the Fourteenth Amendment does not add to the privileges or immunities of citizenship in the United States;[12] it merely furnishes

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[7] Haavik v. Alaska Packers' Asso. 263 U. S. 510, 63 L. ed. 414, 44 S. Ct. 177; McFadden v. Blocker, 3 Ind. Terr. 224, 54 S. W. 873, 58 L.R.A. 894.

[8] Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

[9] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54; Kramer v. United States, 245 U. S. 478, 62 L. ed. 413, 38 S. Ct. 168; Jones v. Perkins, 245 U. S. 390, 62 L. ed. 358, 38 S. Ct. 166; Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 352, 38 S. Ct. 159, L.R.A.1918C, 361, Ann. Cas. 1918B, 856.

[10] Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27; Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 S. Ct. 27, Ann. Cas. 1914B, 71; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; In Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 354, 83 A.L.R. 1222; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Davidson v. Henry L. Doherty & Co. 214 Iowa, 739, 241 N. W. 700, 91 A.L.R. 1308; Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121, 10 L.R.A.(N.S.) 825, 9 Ann. Cas. 1039; State v. Hunter, 164 La. 405, 114 So. 76, 55 A.L.R. 309, affirmed in 275 U. S. 508, 72 L. ed. 406, 48 S. Ct. 158; Re Taylor, 48 Md. 28, 30 Am. Rep. 451; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385. Annotation: 25 Am. St. Rep. 871.

[11] Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Williams v. Bruffy, 96 U. S. 176, 24 L. ed. 716; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394, 738; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765, 11 L.R.A. 828, 23 Am. St. Rep. 895; People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A.1915D, 538. Annotation: 14 L.R.A. 579. By leaving out the words "citizen of the state" which are used in contradistinction to "citizen of the United States" in the preceding sentence, the second clause of the Fourteenth Amendment places the privileges and immunities of the citizens of the United States under the protection of the Federal Constitution and leaves the privileges and immunities of citizens of a state under the protection of the state Constitution. Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738.

[12] Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121, 10 L.R.A.(N.S.) 825, 9 Ann. Cas. 1039; Chilton v. St. Louis & I. M. R. Co. 114 Mo. 88, 21 S. W. 457, 19 L.R.A. 269; State v. Jackman, 69 N. H. 318, 41 A. 347, 42 L.R.A. 438. Such provision of the Fourteenth Amendment does not undertake to confer any new rights or regulate individual rights, but simply prohibits state legislation. Chilton v. St. Louis & I. M. R. Co. 114 Mo. 88, 21 S. W. 457, 19 L.R.A. 269. The privileges and immunities clause of the Fourteenth Amendment did not create any new or substantive legal right or add 92

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guaranties additional to those which already existed.[13] Hence, this clause does not have the effect of making all the provisions contained in the First Ten Amendments—or, more accurately, in the First Eight Amendments—operative in state courts, on the ground that the fundamental rights protected by those amendments are, by virtue of the Fourteenth Amendment, to be regarded as privileges or immunities of citizens of the United States.[14] Its function is negative, and not affirmative, and it carries no mandate for particular measures of reform.[15] Its object in respect of citizenship was to preserve equality of rights and to prevent discrimination between citizens, but not radically to change the whole theory of the relations of the state and Federal Governments to each other and of both governments to the people.[16] It was not the purpose of this clause of the Fourteenth Amendment to transfer from the states to the Federal Government the security and protection of those civil rights that inhere in state citizenship17 or to confer upon Congress power to legislate within the domain of state legislation.[18] Moreover, it does not operate to extend to the states the limitations on the powers of the Federal Government contained in the Tenth Amendment.[19] It does, however, make the fundamental rights, privileges, and immunities which belong to a citizen of the United States independent of his citizenship of any state,[20] prohibits discriminating legislation by one state against the citizens of another, and secures to all the equal protection of the laws.[1] A provision which thus extended and completed the shield of national protection between the citizen and hostile and discriminating state legislation cannot be lightly dismissed as a mere duplication, as subordinate or of no value, or as an almost-forgotten clause of the Constitution.[2]

§ [449]. Effect of Article [4], § [2], and Fourteenth Amendment.—The very status of national citizenship connotes equality of rights and privileges, so far as they flow from such citizenship, everywhere within the limits of the United States.[3] The constitutional guaranty of rights and immunities to the citizen insures to him the privilege of having those rights and immunities judicially declared and protected.[4] Article [4], § [2], of the Constitution, by

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to or enlarge the general classification of rights of persons or things existing in any state under the laws thereof. The provision, however, operated upon them as it found them already established and declared in substance that such as they were in each state they should be held and enjoyed alike by all persons within its jurisdiction. Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405.

[13] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627. Annotation: 25 Am. St. Rep. 872. The Fourteenth Amendment adds nothing to the rights of one citizen as against another, but simply furnishes an additional guaranty against any encroachment by the

states upon the fundamental rights of the citizens. United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

[14] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494. See infra, § 465.

[15] Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873.

[16] McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3.

[17] Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2.

[18] Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865.

[19] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930.

[20] Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

[1] State v. Travelers' Ins. Co. 73 Conn. 255, 47 A. 299, 57 L.R.A. 481, affirmed in 185 U. S. 364, 46 L. ed. 949, 22 S. Ct. 673.

[2] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54.

[3] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54. The privileges and immunities of an individual as a citizen of the United States protect him in any state and, under treaties and the law of nations, in foreign lands. State v. Bates, 14 Utah, 293, 47 P. 78, 43 L.R.A. 33.

[4] Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556, 87 A.L.R. 374. 93

giving the citizens of each state the privileges and immunities of the citizens of the several states, places the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned.[5] The view has been taken that this provision nowhere intimates that an immunity conferred upon citizens of a state, because not in terms conferred upon citizens of other states, shall therefore be void,[6] and that consequently it leaves to the state perfect freedom to grant such privileges to its own citizens as it may see fit, but secures to the citizens of all the other states, by virtue of the constitutional enactment itself, the same rights, privileges, and immunities.[7] The Supreme Court, however, in treating the provision as one having prohibitive aspects, has pointed out that it forbids such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when he asserts in another state the rights that commonly appertain to those persons who are part of the political community known as "the people of the United States," by and for whom the government of the Union was ordained and established.[8] Generally speaking, with regard to its effect, this provision of the Constitution relieves a citizen of one state from the disabilities of alienage in all other states; inhibits discriminating legislation against him by other

states; gives him the right of free ingress into, and egress from, other states; insures to him in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and secures to him in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.[9] The guaranty to the citizens of each state contained in this provision of the Constitution, however, implies no concession by or in one state to the laws of any other state and does not impart any extraterritorial vigor to the laws of any state.[10]

Even though the claimed constitutional protection as to privileges and immunities is denied in the decision of a state court on non-Federal grounds, it is the province of the Supreme Court of the United States to inquire whether the decision of the state court rests upon a fair or substan- tial basis. Lawrence v. State Tax Com- mission, 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556, 87 A.L.R. 374.

[5] United States v. Wheeler, 254 U. S. 281,

[65] L. ed. 270, 41 S. Ct. 133; Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522, 63 L. ed. 748, 39 S. Ct. 366; Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357 (as to extent to which the Dred Scott case is overruled, see Max- well v. Dow, 176 U. S. 581, 44 L. ed. 597,

[20] S. Ct. 448, 494; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 S. Ct. 269; Slaughter-House Cases,

[16] Wall. (U. S.) 36, 21 L. ed. 394; McRea- den v. Blocker, 3 Ind. Terr. 224, 54 S. W. 873, 53 L.R.A. 894); State ex rel. Hoadley v. Insurance Comrs. 37 Fla. 564, 20 So. 772,

[33] L.R.A. 288. To render a state law obnoxious to the U. S. Const. Art. 4, § 2, it is essential that the privilege denied be a civil right common to the citizens of the enacting state and that it be denied to a natural citizen of another state in his capacity as such citizen. State v. Travelers' Ins. Co. 73 Conn. 255, 47 A. 299,

[57] L.R.A. 481, affirmed in 185 U. S. 364, 46 L. ed. 949, 22 S. Ct. 673.

[6] Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161.

[7] Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, writ of error dismissed in 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373; Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161.

[8] Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165.

[9] United States v. Wheeler, 254 U. S. 281, 65 L. ed. 270, 41 S. Ct. 133; Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Paul v. Virginia, 8 Wall. (U. S.) 168,

[19] L. ed. 357; State ex rel. Hoadley v. Ins. Comrs. 37 Fla. 564, 20 So. 772,

[33] L.R.A. 288; State v. Montgomery,

[94] Me. 192, 47 A. 165, 80 Am. St. Rep. 386. As to what are privileges and immuni- ties of citizenship, see infra, §§ 456 et seq.

[10] Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 94

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The inhibition of Article [4], § [2], applies to discriminations against noncitizens

of a state; it does not apply to the forbidding of certain conduct by all persons affecting property of a citizen of a state enacting a statute. In other words, since it merely forbids discrimination between citizens and noncitizens, it does not operate to invalidate a statute which does not discriminate with regard to those who may or may not commit an act, but which forbids all alike.[11] Hence, a statute forbidding the going on premises in the night of citizens of the state and moving therefrom a tenant without the consent of the proprietor does not violate this constitutional provision.[12]

The question has been presented as to whether the effect of Article 4, § 2, may be obviated, even though a state statute discriminates against citizens of other states, by such other states creating like discriminations against citizens of the enacting state. Such action is not permissible, for discrimination by a state against citizens of adjoining states would not be cured if those states were to establish like discriminations against citizens of the former state.[13] A state may not barter away the right conferred upon its citizens by the Constitution of the United States to enjoy the privileges and immunities of citizens when they go into other states. Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution.[14]

A citizen coming from another state is entitled under the Federal Constitution to the privileges and immunities of citizens of the state into which he has come, but has no right to claim any greater privileges.[15] Article 4, § 2, is intended to give the citizens of each state the privileges of citizens in the several states, but not to give noncitizens of a state greater privileges than its own citizens; it does not exempt noncitizens of a state exercising privileges therein from any liability which the exercise of such privileges would impose upon citizens of the state who exercise them.[16]

The effect of Article 4, § 2, is limited in that in inhibiting discriminatory state legislation it protects only citizens of states other than the state enacting the statute. From the earliest cases down to the most recent, the Supreme Court has indicated that this article guarantees only equality of privileges and immunities between citizens of different states,[17] and that its protection of privileges and immunities does not extend to a citizen of the

state the laws of which are complained of.[18] The Constitution did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in Article [4], § [2], no security for the citizen of the state in which they were claimed or exercised.[19] It did not profess to control the

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650, 8 S. Ct. 737, 2 Inters. Com. Rep. 24; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Lexington v. Milton, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522.

[11] State v. Hunter, 164 La. 405, 114 So. 76, 55 A.L.R. 309, affirmed in 275 U. S. 508,

[72] L. ed. 398, 48 S. Ct. 158.

[12] State v. Hunter, 164 La. 405, 114 So. 76, 55 A.L.R. 309, affirmed in 275 U. S. 508,

[72] L. ed. 398, 48 S. Ct. 158.

[13] Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228.

[14] Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228.

[15] Detroit v. Osborne, 135 U. S. 492, 34 L. ed. 260, 10 S. Ct. 1012; People v. Gris- wold, 213 N. Y. 92, 106 N. E. 929, L.R.A. 1915D, 538. Annotation: 14 L.R.A. 580. Special privileges enjoyed by citizens in their own state are not secured to them in other states by the provision of the Federal Constitution relative to the privileges and immunities of the citizens of each state in the several states. Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

[16] Shaffer v. Carter, 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 695, 9 S. Ct. 277, 2 Inters. Com. Rep. 407; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274.

[17] Downham v. Alexandria, 10 Wall. 173,

[19] L. ed. 929.

[18] Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442; Slaughter-House Cases,

[16] Wall. (U. S.) 36, 21 L. ed. 394.

[19] Blake v. McClung, 172 U. S. 239, 43 L. 95

power of the state governments over the rights of its own citizens.[20] "Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens or as you limit, qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."[1] The effect of the privileges and immunities clause of the Fourteenth Amendment is more far-reaching than that of Article [4], § [2]. One object of the privileges and immunities clause of the Fourteenth Amendment, like Article [4], § [2], is to prevent an exercise of the independent power left to each state in favor of its own citizens in respect of their common personal rights as citizens and against a participation in the same rights by citizens of other states.[2] It goes much further, however, for it contains the additional purpose and effect to abridge the gap left by Article [4], § [2], so as also to

safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other states.[3] The principle under the clause of the Fourteenth Amendment is 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.[4] Hence, a state under the Fourteenth Amendment cannot abridge the privileges of a citizen of the United States, albeit he is at the same time a resident of the state which undertakes to do so.[5] Under the Fourteenth Amendment, therefore, the simple inquiry is whether the privilege claimed is one which arises in virtue of national citizenship. If the privilege is of that character, no state can abridge it.[6] In other words, the clause of the Fourteenth Amendment requires that all persons similarly situated be treated alike in regard to privileges conferred or liabilities imposed.[7]

Neither Article [4], § [2], of the Federal Constitution nor the privileges and immunities clause of the Fourteenth Amendment abridges the right of protection inherent in a state and reserved when the Federal Constitution was adopted.[8] The privileges and immunities of Federal citizenship have never

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ed. 432, 19 S. Ct. 165; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161.

[20] Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161.

[1] Whitfield v. Ohio, 297 U. S. 431, 80 L. ed. 778, 56 S. Ct. 532; Blake v. McClung,

[172] U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161.

[2] State v. Traveler's Ins. Co. 73 Conn. 255, 47 A. 299, 57 L.R.A. 481, affirmed in

[185] U. S. 364, 46 L. ed. 949, 22 S. Ct. 673.

[3] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54.

[4] Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580.

[5] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54. Contra.—Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114 (semble) (may now be regarded as overruled by Colgate v. Harvey, 296 U. S. 404,

[80] L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54). In Short v. State, 80 Md. 392, 31 A. 322,

[29] L.R.A. 404, the court indicated that the privileges and immunities clause of the Fourteenth Amendment has no application to a citizen of the state of which the laws are complained. This conclusion was reached through a misapplication of the principles stated in Bradwell v. Illinois,

[16] Wall. (U. S.) 130, 21 L. ed. 442, and may be disregarded in the light of the squarely opposite and controlling opinion of the United States Supreme Court in Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54.

[6] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54.

[7] Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Robison v. Fishback, 175 Ind. 132, 93 N. E. 666, L.R.A. 1917B, 1179, Ann. Cas. 1913B, 1271.

[8] State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A.1917C, 528; De Grazier v. Stephens,

[101] Tex. 194, 105 S. W. 992, 16 L.R.A.(N.S.) 1033, 16 Ann. Cas. 1059. 96

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been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as are necessary for the general good;[9] such provisions do not interfere with the power of the state to protect the lives, liberty, and property of its citizens and to promote their health, morals, education, and good order.[10] Thus, incompetent persons even though they are citizens may not have the full right to control their persons and property.[11] The Fourteenth Amendment does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the Constitution and laws of the state.[12] A state statute prohibiting the grazing of sheep on the Federal public domain upon a range previously occupied by cattle does not deny privileges and immunities of citizens of the United States.[13] In matters of public policy, however, discrimination based upon citizenship is invalid. Although different states may have different policies and the same state may have different policies at different times, any policy which the state may choose to adopt must operate in the same way on its own citizens and those of other states.[14] The mere fact that from a local standpoint considerations of public policy of a state do not affirmatively require the extension of benefits conferred by a statute of that state to citizens of other states as strongly as to its own citizens furnishes absolutely no ground for the exclusion of noncitizens from the benefits of the statute and is no basis upon which the discrimination can be allowed to stand.[15]

§ 450. State Citizenship and Its Privileges.—

Privileges and immunities which belong to a citizen solely by virtue of state rather than national citizenship are not broadly protected. The privileges and immunities guaranteed to a citizen by Article [4], § [2], in a state other than that of his citizenship are such privileges and immunities as are enjoyed by citizens of that state, not

those guaranteed by the Constitution and laws of his own state.[16] Hence, the privileges and immunities of an individual as a citizen of a state, outside of the state, depend upon comity.[17] Moreover, the privileges and immunities clause of the Fourteenth Amendment to the Federal Constitution does not limit the power of a state over those rights of its own citizens which exist by virtue of his state citizenship.[18] The 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.[19] There are certain privileges which states give only to their own residents. Such privileges are not secured to residents of other states by the Federal Constitution. Included are such matters as the elective franchise, the right

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[9] Marchie Tiger v. Western Invest. Co.

[221] U. S. 286, 55 L. ed. 738, 31 S. Ct. 578.

[10] De Grazier v. Stephens, 101 Tex. 194,

[105] S. W. 992, 16 L.R.A.(N.S.) 1033, 16 Ann. Cas. 1059. See also Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708,

[27] S. Ct. 412 (mining law).

[11] Marchie Tiger v. Western Invest. Co.

[221] U. S. 286, 55 L. ed. 738, 31 S. Ct. 578.

[12] Davis v. Massachusetts, 167 U. S. 43,

[42] L. ed. 71, 17 S. Ct. 731.

[13] Omaechevarria v. Idaho, 246 U. S. 343,

[62] L. ed. 763, 38 S. Ct. 323.

[14] Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 S. Ct. 34.

[15] Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, writ of error dismissed in 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373.

[16] See supra, § 449.

[17] State v. Bates, 14 Utah, 293, 47 P. 78,

[43] L.R.A. 33.

[18] Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Holden v. Hardy, 14 Utah, 71, 46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383. The power to create and define the privileges and immunities of citizens of the states is reserved to be exercised by the people. State v. Bates, 14 Utah, 293, 47 P. 78, 43 L.R.A. 33.

[19] Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357. [12 Am. Jur.]—7 97

to sit upon juries, and the right to hold public office. The reasons are patent. If a state were to intrust the elective franchise to residents of another state even only in part, its sovereignty would not rest upon the will of its own citizens; or if it permitted its offices to be filled and their functions to be exercised by persons from other states, its citizens to that extent would not enjoy the right of self-government.[20] There are also numerous privileges that may be accorded by a state to its own people in which citizens of other

states may not participate except in conformity to such reasonable regulations as may be established by the state. For instance, a state cannot forbid citizens of other states to sue in its courts, that right being enjoyed by its own people; but it may require a nonresident, although a citizen of another state, to give a bond for costs, although such bond is not required of a resident.[1] Hence, the Federal Constitution does not guarantee to the citizens in one state, while residents there, all the privileges that they would enjoy if they had their domicil and legal residence in another state.[2] It has been held, however, that if a state seeks to grant special privileges to its own citizens which are of such a nature as to fall within the purview of the privileges and immunities covered by Article [4], § [2], the constitutional provision will automatically secure to citizens of other states the special privileges so granted by the state to its own citizens.[3]

In some jurisdictions the state Constitution specifically provides that no citizen shall be deprived of any right, privilege, or immunity.[4] Provisions of a statute which in effect deny the right to carry on a business which involves the manufacture, sale, and delivery of a commodity, is ordinary in every respect, and does not affect adversely the public health, morals, and welfare, and which further authorize the purchase by one party engaged in such a business of the property of others so engaged violate such a guaranty in the state Constitution.[5]

B. WHO ARE CITIZENS ENTITLED TO PRIVILEGES AND IMMUNITIES

§ 451. Generally.—

To determine who were citizens of the United States before the adoption of the Fourteenth Amendment, it is necessary to ascertain which persons originally associated themselves together to form the nation, and which persons were afterwards admitted to membership.6 "Looking at the Constitution itself, we find that it was ordained and established by 'the people of the United States' (Preamble, 1 Stat. at L. 10), and then going further back, we find that these were the people of the several states that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth (Declaration of Independence, 1 Stat. at L. 1), and that had by Articles of Confederation and Perpetual Union, in which they took the name of 'the United States of America,' entered into a firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare, binding themselves to assist each other

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[20] Steed v. Harvey, 18 Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789.

[1] Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165.

[2] McCarter v. Hudson County Water Co. 70 N. J. Eq. 695, 65 A. 489, 14 L.R.A.(N.S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116, affirmed in 209 U. S. 349, 52 L. ed. 828, 28 S. Ct. 529, 14 Ann. Cas. 560.

[3] Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161 (exemptions in inheritance tax).

[4] Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018.

[5] Ibid.

[6] Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627. 98

against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever. Articles of Confederation, § 3, 1 Stat. at L. 4."[7] Whoever, therefore, was one of the people of any of the original states when the Constitution of the United States was adopted became ipso facto a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.[8]

Only a few years before the outbreak of the Civil War the Supreme Court of the United States decided that a man of African descent, whether a slave or not, was not and could not be a citizen of a state or of the United States.[9] This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, those who composed the negro race and who had recently been made freemen were incapable of becoming citizens except through an amendment to the Constitution. To remove this difficulty primarily and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States and also citizenship of a state, the first clause of the first section of the Fourteenth Amendment provided: "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."[10]

In the Constitution of the United States the word "citizen" is generally, if not always, used in a political sense to designate one who has the rights and privileges of a citizen of a state or of the United States. It is so used in the first section of the Fourteenth Amendment.[11] Under this amendment it is now clear that the inhabitants of a state have a dual citizenship, one a general12 or national citizenship13 which is independent of, and separate from, their citizenship of the particular state,[14] and the other a citizenship of the state in which they reside.[15] As a matter of fact, such dual character of citizenship had been forecasted by a decision which antedated the adoption of the Fourteenth Amendment.[16]

A man may be a citizen of the United States without being a citizen of a state.[17] There is no separate citizenship of a territory, and the only citizen-

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[7] Ibid.

[8] Ibid.

[9] Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691.

[10] Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

[11] Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 S. Ct. 656, 763.

[12] Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 S. Ct. 269.

[13] Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 S. Ct. 375; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; McFadden v. Blocker, 3

Ind. Terr. 224, 54 S. W. 873, 58 L.R.A. 894; State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696.

[14] Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738.

[15] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 S. Ct. 213; Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 S. Ct. 375; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930.

[16] Gassies v. Ballon, 6 Pet. (U. S.) 761, 8 L. ed. 573.

[17] Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394. A person residing within the District of Columbia or in one of the territories may be a citizen of the United States, but not of any one of the states. Pope v. Williams, 98 Md. 59, 56 A. 543, 66 L.R.A. 398, 103 Am. St. Rep. 379, affirmed in 193 U. S. 621, 48 L. ed. 817, 24 S. Ct. 573. 99

ship its inhabitants and residents have, or which Congress can confer on them, is national as citizens of the United States. Accordingly, it has been held that nonresidents of unorganized territories need not be given the rights of residents therein by reason of the constitutional provision that citizens of each state shall be entitled to all privileges and immunities of citizens in the different states.[18]

Women are citizens.[19]

§ 452. Negroes, Mongolians, Indians, and Aliens.—

While the main purpose of the Fourteenth Amendment was to establish the citizenship of the negro population of the United States, the operation of that constitutional provision is by no means confined to any race or races.20 A state must give to any citizen of the United States, whether white or colored, who becomes a bona fide resident therein, the same rights, privileges, and immunities secured by its Constitution and laws to its other citizens.1

A person of the Mongolian race who is born in the United States is a citizen of the United States even though his parents are not citizens either by birth or naturalization.[2]

Congress has the power to confer upon Indians the privileges of citizenship.[3] Indians are, however, peculiarly subject to the guardianship of the Federal Government.[4] Accordingly, it has been held that a citizen of Indian blood is not deprived of any constitutional privileges and immunities by a statute prohibiting the sale or giving of intoxicating liquors to any Indian.[5] Indians are not excepted from the protection guaranteed by the Constitution, and their private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. Moreover, this right of private property is not subject to impairment by legislative action, even while an Indian is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status.[6]

An alien is not a citizen of the United States and is not entitled to the privileges and immunities of citizenship. He is, however, a person whom the state cannot deprive of life, liberty, or property without due process of law and to whom the state cannot deny, while he is within its jurisdiction, the equal protection of the laws.[7]

§ 453. Corporations, Business Trusts, Municipal Corporations, and State Agencies.—

Article 4, § 2, of the Federal Constitution, in employing the term "citizens," refers only to natural persons, members of the body politic, owing

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[18] McFadden v. Blocker, 3 Ind. Terr. 224, 54 S. W. 873, 58 L.R.A. 894. See also Haavik v. Alaska Packers' Asso. 263 U. S. 510, 68 L. ed. 414, 44 S. Ct. 177.

[19] Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627; State v. Ehr, 57 N. D. 310, 221 N. W. 833, citing R. C. L. Annotation: 49 L.R.A. 114.

[20] See CIVIL RIGHTS, Vol. 10, p. 897, § 4. See also supra, §§ 448, 449.

[1] Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738. See also Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664.

[2] United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 S. Ct. 456.

[3] Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 S. Ct. 578; People v. Bray, 105 Cal. 344, 38 P. 731, 27 L.R.A. 158. See INDIANS [Also 14 R. C. L. p. 117, §§ 9 et seq.].

[4] Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 S. Ct. 578; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 S. Ct. 115; People v. Bray, 105 Cal. 344, 38 P. 731, 27 L.R.A. 158.

[5] People v. Bray, 105 Cal. 344, 38 P. 731, 27 L.R.A. 158.

[6] Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 S. Ct. 565.

[7] Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Templar v. State Examiners, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610. For a detailed discussion, see ALIENS, Vol. 2, p. 467, §§ 8, 9, 10.

allegiance to the state.[8] It is universally recognized that a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual and exempting them unless otherwise specially provided from individual liability, and that a corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. Accordingly, a corporation is not a citizen within the meaning of the constitutional provision as to privileges and immunities of citizens9 and cannot claim protection under that provision against abridgment or impairment of its privileges by the law of a state.[10] This is true although a corporation is designated as a "person" within the meaning of constitutional provisions that "no state shall deny to any person within its jurisdiction the equal protection of the laws;"[11] and although, for the purposes of jurisdiction and within the meaning of the clause of the Constitution extending the judicial powers of the United States to controversies between citizens of different states, a corporation is deemed to be a citizen of the state creating it.[12] Moreover, the natural persons who own a corporation cannot claim their own privileges and immunities as citizens for such purposes as are solely and entirely corporate.[13]

It has been held that a business trust cannot set up a contention of abridgment of privileges and immunities.[14] The same principle applies to individuals interested in such a trust and forbids such individuals operating a business trust to claim for it their personal privileges and immunities.[15] Hence, the trustees and members are not unconstitutionally deprived of the rights and immunities guaranteed by Article [4], § [2], by

denying to the trust the right to do business in another state without complying with the laws relating to foreign corporations.[16]

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[8] Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 8 S. Ct. 737; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

[9] See CORPORATIONS [Also 7 R. C. L. p. 35, § 11].

[10] Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Asso. 276 U. S. 71, 72 L. ed. 473, 48 S. Ct. 291; Selover, B. & Co. v. Walsh, 226 U. S. 112, 57 L. ed. 146, 33 S. Ct. 69; Western Turf Asso. v. Greenberg, 204 U. S. 359, 51 L. ed. 520, 27 S. Ct. 384; Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 S. Ct. 92; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 S. Ct. 518; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 S. Ct. 281; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 10 S. Ct. 958; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 8 S. Ct. 737; Fire Asso. of Phila. v. New York, 119 U. S. 110, 30 L. ed. 342, 7 S. Ct. 108; Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver) 10 Wall. (U. S.) 566, 19 L. ed. 1029; Re Speed, 216 Ill. 23, 74 N. E. 809, 108 Am. St. Rep. 189; Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 386; State v. Louisville & N. R. Co. 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150; Humphreys v. State, 70 Ohio St. 67, 70 N. E. 957, 65 L.R.A. 776, 101 Am. St. Rep. 888, 1 Ann. Cas. 233; Hawley v. Hurd, 72 Vt. 122, 47 A. 401, 52 L.R.A. 195, 82 Am. St. Rep. 922. See Board of Education v. Illinois, 203 U. S. 553, 51 L. ed. 314, 27 S. Ct. 171, 8 Ann. Cas. 157. Annotation: 14 L.R.A. 580; 82 Am. St. Rep. 926.

[11] See CORPORATIONS [Also 7 R. C. L. p. 31, § 8].

[12] See CORPORATIONS [Also 7 R. C. L. p. 36, § 11].

[13] Hemphill v. Orloff, 277 U. S. 537, 72 L. ed. 978, 48 S. Ct. 577; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 S. Ct. 518; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274. See also Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Herbring v. Lee, 126 Or. 588, 269 P. 236, 60 A.L.R. 1165 and Cook v. Howland, 74 Vt. 393, 52 A. 973, 59 L.R.A. 338, 93 Am. St. Rep. 912, stating that the same principle relates to such natural persons who act for corporations. A corporation is not a mere collection of individuals capable of claiming the benefits assured individuals by the constitutional provision entitling the citizens of each state to all privileges and immunities of citizens of the several states. Hemphill v. Orloff, 277 U. S. 537, 72 L. ed. 978, 48 S. Ct. 577.

[14] Hemphill v. Orloff, 238 Mich. 508, 213 N. W. 867, 58 A.L.R. 507, affirmed in 277 U. S. 537, 72 L. ed. 978, 48 S. Ct. 577; State ex rel. Colvin v. Paine, 137 Wash. 566, 243 P. 2, 247 P. 476, 46 A.L.R. 165.

[15] Hemphill v. Orloff, 277 U. S. 537, 72 L. ed. 978, 48 S. Ct. 577.

[16] Ibid.

A municipal corporation created by a state for the better ordering of government has no privileges or immunities under the Federal Constitution which it may invoke.[17] The same principle applies to a board or agency created by the state to enable it to perform certain governmental duties.[18]

§ 454. Residents and Nonresidents of a State.—

A citizen of a state may acquire and claim rights under the laws of another state without actually going into it. He may enter into contracts to be executed in another state and may acquire and own property, personal and real, situated therein, by purchase, bequest, or inheritance.19 After a citizen has moved into another state he undoubtedly has the right, as a privilege and immunity of citizenship, to become a

citizen of any state by a bona fide residence therein with the same rights as other citizens therein.20 As long as he remains a citizen of a particular state, however, he may within certain limits owe allegiance to its sovereignty.1

A citizenship and residence in a state are not necessarily synonymous,[2] for although the Fourteenth Amendment specifically says that United States citizens are citizens of the state in which they reside,[3] there may be a temporary residence in one state, with intent to return to another, which will not create citizenship in the former.[4] It has been held in some instances that a statute which makes discriminations and distinctions against nonresidents by permitting only residents to engage in certain occupations or by granting certain privileges only to residents does not violate the privileges and immunities of citizens of other states or United States citizens, provided the statute has been construed to include within the class of residents, not only citizens of the state, but also such citizens of other states who happen to be residents of the state.[5] In a recent case the Supreme Court has stated quite broadly that a statute conferring privileges may validly discriminate between residents and nonresidents where the distinction is based on rational considerations.[6] Residents of a state are generally, however, citizens of that state, and citizens of a state are usually residents of that state.[7] Unless the distinction is made clear by enactment or by judicial interpretation, as a usual rule residents include only citizens, and nonresidents are noncitizens. Hence, any law of a state which broadly discriminates against all nonresidents without being construed to include nonresident citizens of such state and which generally seeks to create an alienage which, although based upon residence in form, is based upon citizenship in meaning and effect discriminates against

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[17] Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431; George v. Asheville (C. C. A. 4th) 80 F. (2d) 50, 103 A.L.R. 563; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271 (recognizing and approving rule).

[18] Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 153, 96 A.L.R. 271.

[19] Steed v. Harvey, 18 Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789.

[20] See Infra, § 459.

[1] Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 S. Ct. 269; Wierse v. Thomas, 145 N. C. 261, 59 S. E. 58, 15 L.R.A.(N.S.) 1008, 122 Am. St. Rep. 446.

[2] Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160; State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A.1917C, 528.

[3] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54.

[4] State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A.1917C, 528.

[5] Haavik v. Alaska Packers' Asso. 263 U. S. 510, 68 L. ed. 414, 44 S. Ct. 177; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160; State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A.1917C, 528. See Rothermel v. Meyerle, 136 Pa. 250, 20 A. 583, 9 L.R.A. 366. See infra, §§ 461, 463.

[6] Douglas v. New York, N. H. & H. R. Co. 279 U. S. 377, 73 L. ed. 747, 49 S. Ct. 355.

[7] See Gassies v. Ballon, 6 Pet. (U. S.) 761, 8 L. ed. 573.

United States citizens who are not citizens of the state and unconstitutionally violates their privileges and immunities.[8] An unsecured nonresident creditor of a foreign corporation is entitled, under Article [4], § [2], of the Constitution, to share in the

distribution of its assets upon the same level as like creditors of the company who reside within the state.[9] Hence, a state statute giving to residents of that state a priority over nonresidents in the distribution of the assets of a foreign corporation which, by filing its charter or articles of association in the state, is deemed a corporation of that state is, so far as it discriminates against citizens of other states, a violation of Article [4], § [2].[10] A decree refusing to turn over local assets of a foreign insurance company having local creditors to the statutory liquidator of the company in its home state does not, however, violate Article [4], § [2], of the Constitution.[11]

C. WHO ARE INHIBITED FROM IMPAIRING PRIVILEGES AND IMMUNITIES

§ 455. Generally.—

The United States Supreme Court has stated the inclusive principle that all the powers possessed by a state must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States.12 The Fourteenth Amendment prohibits any act by a state which abridges the privileges and immunities of citizens of the United States, whether such act is by the legislative, executive, or judicial authorities of the state. The prohibitions of the amendment extend to every department of the state and every officer or agent by whom the powers of the state are exerted.13 Moreover, Congress has the power, where privileges and immunities are abridged, to counteract and render nugatory all state laws and proceedings which have the effect of abridging any of the privileges or immunities of citizens of the United States.14

The general rule is firmly settled by authoritative decisions that the constitutional guaranties against the impairment of privileges or immunities operate only to inhibit impairment of such privileges and immunities by action

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[8] Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 935; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165, also reported in 176 U. S. 59, 44 L. ed. 371, 20 S. Ct. 307; Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190. See People ex rel. Stafford v. Travis, 231 N. Y. 339, 132 N. E. 109, 15 A.L.R. 1319. A workmen's compensation act which extends its protection to residents injured in other states while working under contracts entered into in the state, without extending the same protection to nonresidents working under similar contracts, violates the provision of the Federal Constitution entitling the citizens of each state to all the privileges and immunities of citizens of the several states. Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190.

[9] Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 935. See Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873.

[10] Blake v. McClung, 176 U. S. 59, 44 L. ed. 371, 20 S. Ct. 307, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165. Annotation: 23 L.R.A. 37 et seq.; 65 L.R.A. 354, 368. A preference in favor of resident creditors of a foreign corporation over a nonresident mortgagee, whose mortgage is not registered when their debts are created, and when such preference is not given them over a resident mortgagee, constitutes an illegal discrimination against the nonresident. Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 935.

[11] Davis v. Amra Grotto M. O. V. P. E. R. 169 Tenn. 564, 170 Tenn. 19, 89 S. W. (2d) 754, 91 S. W. (2d) 294, 106 A.L.R. 1506.

[12] Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165.

[13] Saunders v. Shaw, 244 U. S. 317, 61 L. ed. 1163, 37 S. Ct. 638; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 S. Ct. 312; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667. Both judicial and legislative acts of a state in rebellion, which acts are hostile in their purpose or mode of enforcement to the authority of the National Government or which impair the rights of citizens under the Constitution of the United States, are invalid and void. Taylor v. Thomas, 22 Wall. (U. S.) 479, 22 L. ed. 789.

[14] State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

of the states themselves.[15] The prohibitions of the Fourteenth Amendment16 and of Article 4, § 2,[17] have reference to state action exclusively, and not to any action of private individuals. Hence, these clauses in no wise affect the conduct of individual persons.[18] In all cases where the Constitution seeks to protect the rights of the citizens against discriminative and unjust laws of the state by prohibiting such laws, it does not denounce individual offenses, but the abrogation and denial of rights, for which it clothes Congress with the power to provide a remedy.[19] The Fourteenth Amendment, therefore, does not authorize direct legislation by Congress to regulate the conduct of citizens among themselves, even though such individual conduct abridges the privileges and immunities of citizens of the United States.[20] The legislation authorized to be adopted by Congress for enforcing the Fourteenth Amendment is not direct legislation on the matters respecting which the states are prohibited from making or enforcing certain laws or doing certain acts, but is corrective legislation, such as may be necessary or proper for counteracting and redressing the effect of such laws or acts.[1] Although the civil rights guaranteed by the Fourteenth Amendment cannot with impunity be impaired by the wrongful acts of individuals unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings,[2] such impairment is simply a private wrong or a crime, and the rights thus violated remain in full force and may be vindicated by resort to the laws of the state for redress. The right itself is not destroyed by such state action as to permit Congress to intervene.[3]

D. WHAT ARE PRIVILEGES AND IMMUNITIES

1. IN GENERAL

§ 456. History and Definition.—

The first occurrence of the words "privileges and immunities" in American constitutional history is to be found in the fourth of the Articles of the old Confederation. That document declared that, "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from

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[15] Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; United States v. Har- ris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; McFadden v. Blocker, 3 Ind. Terr. 224, 54 S. W. 873, 58 L.R.A. 894. Annotation: 14 L.R.A. 579. See CIVIL RIGHTS, Vol. 10, p. 901, § 8.

[16] Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Hammer v. State,

[173] Ind. 199, 89 N. E. 850, 24 L.R.A.(N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034. See Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138.

[17] United States v. Wheeler, 254 U. S. 281, 65 L. ed. 270, 41 S. Ct. 133; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601; Younger v. Judah, 111 Mo. 303, 19 S. W. 1109, 16 L.R.A. 558, 33 Am. St. Rep. 527.

[18] United States v. Wheeler, 254 U. S. 281, 65 L. ed. 270, 41 S. Ct. 133; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; United States v. Harris, 106 U. S. 629,

[27] L. ed. 290, 1 S. Ct. 601; Robison v. Fish- back, 175 Ind. 132, 93 N. E. 666, Ann. Cas. 1913B, 1271; Chilton v. St. Louis & I. M. R. Co. 114 Mo. 88, 21 S. W. 457, 19 L.R.A. 269; Younger v. Judah, 111 Mo. 303, 19 S. W. 1109, 16 L.R.A. 558, 33 Am. St. Rep. 527. Annotation: 14 L.R.A. 579.

[19] Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18.

[20] Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; United States v. Har- ris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588. Annotation: 14 L.R.A. 579. The United States is without power to forbid and punish infractions by individuals of the right of citizens to reside peacefully in the several states, and to have free ingress into and egress from such states. Authority to deal with such wrongs is exclusively within the power reserved by the Federal Constitution to the states. United States v. Wheeler, 254 U. S. 281, 65 L. ed. 270, 41 S. Ct. 133.

[1] Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18.

[2] Ibid.

[3] Ibid.

justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."[4]

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in Article [2], § [4], in the following words: "The citizens of each state shall be entitled to all the

privileges and immunities of citizens of the several states."[5] There can be but little question that the purpose of both these provisions is the same and that the privileges and immunities intended are the same in each. In the article of the Articles of Confederation which covers the subject of privileges and immunities some of these are specifically mentioned and enough perhaps to give a general idea of the class of civil rights meant by the phrase.[6]

The Constitution of the United States itself, however, does not define the privileges and immunities of its citizens.[7] The Supreme Court of the United States has never undertaken to give any exact or comprehensive definition of these words as used in the Constitution, but has adopted the plan of leaving their meaning to be determined in each case upon a view of the particular rights asserted and denied therein.[8] It has been decided, however, that the words "immunity" and "privilege" are synonymous terms.[9]

The privileges and immunities secured to citizens of each state by Article 4, § [2], of the Constitution are those privileges and immunities which are common to the citizens in those states under their Constitutions and laws by virtue of their being citizens.[10] They are fundamental in nature.[11] A fundamental right inherent in state citizenship is, however, a privilege or immunity of state citizenship alone.[12] The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National Government and are granted or secured by the Constitution13 or by the laws and treaties made in pursuance there-

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[4] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

[5] Ibid.

[6] Ibid.

[7] Minor v. Happersett, 21 Wall. (U. S.) 170, 21 L. ed. 627.

[8] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Ward v. Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449; Conner v. Elliott, 18 How. (U. S.) 591, 15 L. ed. 497; Roby v. Smith, 131 Ind. 342, 30 N. E. 1093,

[15] L.R.A. 792, 31 Am. St. Rep. 439; State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A. 1917C, 528; Steed v. Harvey, 18 Utah, 367,

[54] P. 1011, 72 Am. St. Rep. 789; Bode v. Flynn, 213 Wis. 509, 252 N. W. 284, 94 A.L.R. 480. The court should not attempt a specific definition of such a broad provision of the Federal Constitution, not only involving matters of great delicacy and importance, but those which are furthermore of such a character that any merely abstract definition could scarcely be correct. Conner v. Elliott, 18 How. (U. S.) 591, 15 L. ed. 497.

[9] Conner v. Elliott, 18 How. (U. S.) 591,

[15] L. ed. 497; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L.R.A.(N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121, 10 L.R.A.(N.S.) 825, 9 Ann. Cas. 1039; Cofrode v. Circuit Judge, 79 Mich. 332, 44 N. W. 623, 7 L.R.A. 511.

[10] Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Pembina Consol. Silver Min. & Mil. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 8 S. Ct. 737; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

[11] See infra, §§ 457 et seq.

[12] Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14. See Tashiro v. Jordan, 201 Cal. 236, 256 P. 545, 53 A.L.R. 1279.

[13] Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 S. Ct. 213; Duncan v. Missouri,

[152] U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721; McPherson v. Blacker,

[146] U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Ex parte Kemmler, 136 U. S. 436, 34 L. ed. 519,

of.[14] These privileges and immunities, arising out of United States citizenship, are the ones which are protected by the Fourteenth Amendment.[15]

§ 457. General Illustrations.—

The Supreme Court, in determining what are the privileges and immunities of citizens of the several states, has repeatedly adopted the statement of Mr. Justice Washington, stating that it feels no hesitation in confining these expressions to those privileges and immunities which are fundamental,16 which belong of right to the citizens of all free governments,17 and which have at all times been enjoyed by citizens of the several states which compose this Union from the time of their becoming

10 S. Ct. [930]; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, [125] U. S. [181], [31] L. ed. [650], [8] S. Ct. [737]; Bunter City L. S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. [111] U. S. [746], [28] L. ed. [585], [4] S. Ct. [652]; Paul v. Virginia, [8] Wall. (U. S.) [168], [19] L. ed. [357]; State ex rel. Hoadley v. Insurance Comrs. [37] Fla. [564], [20] So. [772], [33] L.R.A. [288]; Robison v. Fishback, [175] Ind. [132], [93] N. E. [666], Ann. Cas. 1913B, [33]. But see State v. State, [173] Ind. Am. St. E [850], [24] L.R.A.(N.S.) [795], [140] Am. St. Rep. [248], [21] Ann. Cas. 1034; Com. v. Milton, [12] B. Mon. (Ky.) [212], [54] Am. Dec. [522].

The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National Government, the provisions of its Constitution or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the Fourteenth Amendment. Slaughter-House Cases, [16] Wall. (U. S.) [36], [21] L. ed. [394].

As to immunities guaranteed prior to the adoption of the civil rights amendments, first under the Articles of Confederation and later under the Federal Constitution, see CIVIL RIGHTS, Vol. [10], p. [895], § [2].

14 McPherson v. Blacker, [146] U. S. [1], [36] L. ed. [863], [13] S. Ct. [3]; Slaughter-House Cases, [16] Wall. (U. S.) [36], [21] L. ed. [394].

15 Hamilton v. University of California, 293 U. S. 245, 79 L. ed. 343, 55 S. Ct. 197, rehearing denied in 293 U. S. 633, 79 L. ed. 717, 55 S. Ct. 345; Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27; Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

The "privileges and immunities" protected by the Fourteenth Amendment to the Federal Constitution are only those that belong to citizens of the United States as distinguished from citizens of the state—those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources. Hamilton v. University of California, 293 U. S. 245, 79 L. ed. 343, 55 S. Ct. 197.

16 United States v. Wheeler, 254 U. S. 281, 65 L. ed. 270, 41 S. Ct. 133; Canadian N. R. Co. v. Eggen, 252 U. S. 553, 64 L. ed. 713, 40 S. Ct. 402; Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 S. Ct. 6; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Blake v. McClung,

172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Newnan v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507, appeal dismissed in 289 U. S. 707, 77 L. ed. 1269, 52 S. Ct. 495; State ex rel. Prall v. District Ct. 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915D, 198; Bode v. Flynn, 213 Wis. 509, 252 N. W. 284, 94 A.L.R. 480. See Rosa v. Portland, 86 Or. 438 P. 865, L.R.A.1918B, 851.

"This court has never attempted to formulate a comprehensive list of the rights included within the 'privileges and immunities' clause of the Constitution (Art. 4, § 2), but it has repeatedly approved as authoritative the statement by Mr. Justice Washington, in 1825, in Corfield v. Coryell, 4 Wash. C. C. 371, 389, Fed. Cas. No. 3,230 (the first Federal case in which this clause considered), saying: 'We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental.'" Canadian N. R. Co. v. Eggen, 252 U. S. 553, 64 L. ed. 713, 40 S. Ct. 402.

A right to accident insurance created within a state as an incident to certain contracts of employment is substantial in nature. Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, writ of error dismissed in 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373.

The provision of the Federal Constitution that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states applies to fundamental and universal rights, and not to special privileges. Baltimore & O. R. Co. v. Chambers, 73 Ohio St. 16, 76 N. E. 91, 11 L.R.A.(N.S.) 1012, affirmed in 207 U. S. 142, 52 L. ed. 143, 28 S. Ct. 34.

The privileges and immunities guaranteed by the Federal Constitution are only those fundamental rights which all individuals enjoy alike, except in so far as they are all restrained alike. State v. Hunter, 164 La. 405, 114 So. 76, 55 A.L.R. 309, affirmed in 275 U. S. 508, 72 L. ed. 398, 48 S. Ct. 158.

17 United States v. Wheeler, 254 U. S. 281, 65 L. ed. 270, 41 S. Ct. 133; Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 S. Ct. 6; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Slaughter-House Cases, 16

Wall. (U. S.) [36], [21] L. ed. [394]; Newnan v. Atlanta Laundries, [174] Ga. [99], [162] S. E. [497], [87] A.L.R. [507]; State ex rel. Prall v. District Ct. [126] Minn. [501], [148] N. W. [463], Ann. Cas. 1915D, [198].

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free, independent, and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: "Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."[18] They have always been held to be the class of rights which the state governments were created to establish and secure.[19] The court has pointed out, furthermore, that the words "privileges and immunities," as used in Article [4], § [2], of the Constitution are words of very comprehensive meaning.[20]

The Supreme Court of the United States has pointed out in numerous cases that Article [4], § [2], plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation,[1] to acquire personal property, to take and hold real estate, to protect and defend such property in law,[2] to maintain actions in the courts of a state together with the right to the usual remedies for the collection of debts and the enforcement of other personal rights,[3] and to be exempt from any higher taxes or excises than are imposed by a state upon its own citizens.[4]

Under the Fourteenth Amendment, it is essential to determine what constitutes the privileges and immunities of a citizen of the United States. It is settled that a citizen has the right to come to the seat of government to assert any claim which he may have upon that government, to transact any business which he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its seaports through which all the operations of foreign trade and commerce are conducted, to the subtreasury, to the land offices, and to the revenue offices.[5] Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government on the high seas or within the jurisdiction of a foreign government.[6] There can be no doubt of this or that the right depends upon his character as a citizen of the United States. The right to assemble peaceably and petition for redress of grievances and the privilege of the writ of habeas corpus are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, and all rights secured to our citizens by treaties with foreign nations are dependent upon citizenship of the United States, and not citizenship of a state.

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[18] United States v. Wheeler, 254 U. S. 281, 65 L. ed. 270, 41 S. Ct. 133; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 S. Ct. 578; Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 S. Ct. 6; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Newnan v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507. The privilege of a citizen is the right to pursue and obtain happiness and safety. La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160. As to right to acquire and possess property, see infra, § 460.

[19] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

[20] Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228.

[1] See infra, § 459.

[2] See infra, § 460.

[3] See infra, § 464.

[4] See infra, §§ 462, 463.

[5] Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 745.

[6] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; People v. Bray, 105 Cal. 344, 38 P. 731, 27 L.R.A. 158.

Another of these privileges is conferred by the first clause of the Fourteenth Amendment. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To all these may also be added the rights secured by the Thirteenth and Fifteenth Amendments and by the other clauses of the Fourteenth.[7] Other privileges and immunities secured by the Fourteenth Amendment include the right to serve on juries, both petit8 and grand,[9] to serve as witnesses,[10] to enter the public lands of the United States,[11] and to demand protection from the Federal Government while subject to a Federal agency, as, for example, while in the custody of a United States Marshal.[12] The right of a citizen of the United States resident in one state to contract in another may be a liberty safeguarded by the due process of law clause and at the same time a privilege protected by the privileges and immunities clause of the Fourteenth Amendment.[13]

§ 458. Distinction between Fundamental Rights of Persons and Privileges and Immunities of Citizenship.—

The inherent and inalienable rights which are common to all persons who are members of a civilized society from the complexity of human relationships include a great variety of social prerogatives. In so far as it is possible for the purpose of comparison to reduce such rights to a class, they may be said to include generically those rights which are essential to individual freedom, to the pursuit of happiness and the ability to gain a livelihood, and to acquire possessions.14 It has frequently been said that all men have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.15 These fundamental rights appear to be distinct from the privileges and immunities of citizens as such, possess characteristics peculiar to themselves, and have received separate consideration.16 In accordance with these distinctions the courts generally recognize that there are certain fundamental rights of every person, which, of course, includes every citizen, and that a statute which violates any of these rights is unconstitutional and void, even though the enactment thereof is not expressly forbidden.17 Artificial or remedial rights are contradistinguished from these and include such rights as that of citizenship

[7] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394. See Re Virginia, 100 U. S. 339, 25 L. ed. 676. As to the writ of habeas corpus as a distinct privilege and immunity of national citizenship, see Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; People v. Bray, 105 Cal. 344, 38 P. 731, 27 L.R.A. 158. As to the right to assemble and petition, see Vol. 11, p. 1118, § 325.

[8] Bush v. Kentucky, 107 U. S. 110, 27 L. ed. 354, 1 S. Ct. 625; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664. Annotation: 14 L.R.A. 581.

[9] Bush v. Kentucky, 107 U. S. 110, 27 L. ed. 354, 1 S. Ct. 625; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Re Virginia, 100 U. S. 339, 25 L. ed. 676. Annotation: 14 L.R.A. 581.

[10] Annotation: 14 L.R.A. 581.

[11] Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; United States v. Waddell, 112 U. S. 76, 28 L. ed. 673, 5 S. Ct. 35.

[12] Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 S. Ct. 617.

[13] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54. As to liberty of contract generally, see Vol. 11, p. 1153, § 339.

[14] See Vol. 11, p. 1100, §§ 312 et seq.; p. 1131, §§ 328 et seq.

[15] See Vol. 11, p. 1131, § 328.

[16] See Vol. 11, p. 1100, §§ 312 et seq.; p. 1131, §§ 328 et seq.

[17] Com. v. Perry, 155 Mass. 117, 28 N. E. 1126, 14 L.R.A. 325, 31 Am. St. Rep. 533; Jordon v. State, 51 Tex. Crim. Rep. 531, 103 S. W. 633, 11 L.R.A.(N.S.) 603, 14 Ann. Cas. 618. See Vol. 11, p. 897, § 194; p. 1131, §§ 328 et seq.

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itself, the right to vote, and the right to the particular methods of procedure pointed out in the Constitution which are peculiar to our jurisprudence.[18] It has been pointed out, in a case in which citizenship was being considered from the standpoint of excluding aliens from public works, that whatever is a privilege, rather than a right, may be made dependent upon citizenship.[19]

2. SPECIFIC PRIVILEGES AND IMMUNITIES

§ 459. Removal from One State to Another.—

In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the states to forbid and punish violations of this fundamental right.20 The authority which the several states possessed prior to the adoption of the Articles of Confederation to deal with infractions of the right of free residence, ingress, and egress was reserved to the states by Article 4 of such Articles of Confederation, with a limitation inhibiting the power from being used to discriminate.1 Such limitation as to discrimination, imposed upon the several states by Article 4 of the Articles of Confederation when dealing with infractions of the right of free residence, ingress, and egress, was preserved and enforced by Article 4, § 2, of the Federal Constitution, thus necessarily assuming the continued possession by the states of the reserved power to deal with this subject.2

The rule is firmly settled that not only by virtue of Article [4], § [2], but also because of the privileges and immunities clause of the Fourteenth Amendment, the right of a citizen of one state to pass into any other state of the Union or to reside therein for the purpose of engaging in lawful commerce, trade, or business without molestation is secured and protected.[3] Accordingly, a state law providing for the levying and collection of a capitation tax on every person leaving the state by any railroad or stagecoach, to be paid by the transportation company, is illegal.[4] A tax on emigrant agents who hire persons in a state to be employed in another state is not, however, an impairment of the right of a citizen to move from one state to another or an abridgment of his privileges or immunities as a citizen of the United States.[5] A state cannot make it a crime for anyone to come into such state after committing an offense in another, since the immunities and privileges of citizenship in-

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[18] Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 S. Ct. 770.

[19] People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A.1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85.

[20] United States v. Wheeler, 254 U. S. 281, 65 L. ed. 270, 41 S. Ct. 133.

[1] Ibid.

[2] Ibid.

[3] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54; Hess v. Pawloski, 274 U. S. 352, 71 L. ed. 1091, 47 S. Ct. 632; United States v. Wheeler, 254 U. S. 281, 65 L. ed. 270, 41 S. Ct. 133; Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; Shaffer v. Carter, 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 S. Ct. 128; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Ward v. Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449; Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 745; People v. Bray, 105 Cal. 344, 38 P. 731, 27 L.R.A. 158; Roby v. Smith, 131 Ind. 342, 30 N. E. 1093, 15 L.R.A. 792, 31 Am. St. Rep. 439; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Steed v. Harvey, 18 Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789; Sprague v. Fletcher, 69 Vt. 69, 37 A. 239, 37 L.R.A. 840; Bussell v. Gill, 58 Wash. 468, 108 P. 1080, 137 Am. St. Rep. 1070. Annotation: 14 L.R.A. 580.

[4] Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 745.

[5] Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 S. Ct. 128; State v. Hunt, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep.

clude the right to pass through another state without arrest and inquiry

into accountability for offenses against the sovereignty of another state.[6]

This rule is subject to the right to arrest for extradition purposes.6[a]

§ 460. Acquisition of Property.—

Under Article 4, § 2, of the Federal Constitution and under the privileges and immunities clause of the Fourteenth

Amendment, a citizen is entitled to acquire and hold both real estate and

personal property7 and to protect and defend the same in law.[8] It cannot be

doubted that a citizen of the United States residing and having property in one state exercises a privilege of national citizenship when he negotiates and takes out in another state a policy insuring that property or takes out in another state a policy insuring his life.[9] Legislation of one state denying the privilege or taxing such a transaction when it occurs in another state, while leaving the transaction wholly free from taxation when it takes place in the former state, would abridge that privilege of citizenship.[10] The privileges and immunities of citizenship relating to the acquisition and possession of property are subject, however, to such restraints as a state may justly prescribe for the general welfare.[11] Hence, no privileges or immunities of citizens are affected by a statute making owners of Texas cattle liable for allowing them to run at large and spread Texas fever.[12]

Special rights or expectancies in property are not necessarily within the property rights protected as privileges and immunities of citizenship.[13]

Dower is not a privilege or immunity of citizenship, either state or Federal, within the meaning of the provision of Article [4], § [2], or the Fourteenth Amendment.[14] Similarly, such marital rights as community of gains attached

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[6] State v. Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L.R.A. 130. 6[a] See EXTRADITION [Also 11 R. C. L. p. 720, § 10].

[7] United States v. Wheeler, 254 U. S. 281, 65 L. ed. 270, 41 S. Ct. 133; Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; Maxwell v. Bugbee,

[250] U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; Murchie-Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 S. Ct. 578; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Williams v. Bruffy, 96 U. S. 176, 24 L. ed. 716; Ward v. Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449; People v. Bray, 105 Cal. 344, 38 P. 731, 27 L.R.A. 158; Marallis v. Chicago,

[349] Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Gougar v. Timberlake, 148 Ind. 38, 46 N. E. 339, 37 L.R.A. 64, 62 Am. St. Rep. 487; Buffington v. Grosvenor, 46 Kan. 730, 27 P. 137, 13 L.R.A. 282; Steed v. Harvey, 18 Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789; Sprague v. Fletcher, 69 Vt. 69, 37 A. 239, 37 L.R.A. 840. Annotation: 14 L.R.A. 582.

[8] Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; Maxwell v. Dow,

[176] U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Russell v. Gill, 58 Wash. 468, 108 P. 1080, 137 Am. St. Rep. 1076. Discrimination between sheep brought into the state and those which are already therein, made by Idaho Sess. Laws 1895, p. 125, and Idaho Sess. Laws 1897, p. 115, requiring all sheep, whether healthy or not, to be dipped before they are brought into the state at any time of year, while sheep within the state are exempt from dipping between December 1 and the time when they are sheared in the following spring, and also exempting ewes with lambs between March 15 and May 15, constitutes a violation of the equal privileges and immunities of citizens in the several states. State v. Duckworth, 5 Idaho, 642,

[51] P. 456, 39 L.R.A. 365, 95 Am. St. Rep. 199.

[9] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54.

[10] Ibid.

[11] Ferry v. Spokane, P. & S. R. Co. 258 U. S. 314, 66 L. ed. 635, 42 S. Ct. 358, 20 A.L.R. 1326; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; People v. Bray, 105 Cal. 344, 38 P. 731, 27 L.R.A. 158.

[12] Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 695, 9 S. Ct. 277. The privileges and immunities of citizens in the several states are not denied by the provisions of Colo. Sess. Laws 1885, p. 335, for the protection of domestic cattle against the communication of disease by cattle from other states where the statute is equally applicable to citizens of all states. Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 S. Ct. 92.

[13] See infra, notes 14, 15, this section.

[14] Ferry v. Corbett, 258 U. S. 609, 66 L. ed. 783, 42 S. Ct. 381; Ferry v. Spokane, P. & S. R. Co. 258 U. S. 314, 66 L. ed. 635, 42 S. Ct. 358, 20 A.L.R. 1326. There is no unconstitutional discrimination against a nonresident widow under the Fourteenth Amendment, in the making of a conveyance by her husband of his property sufficient to cut off her interest if she was not then and never had been a resident of the state. Buffington v. Grosvenor, 46 Kan. 730, 27 P. 137, 13 L.R.A. 282.

by the law of a state to contracts of marriage occurring therein and property therein acquired are not privileges and immunities. Hence, a statute attaching such gains only to contracts of marriage within the state is not unconstitutional.[15] On the other hand, if the right of a husband, a citizen of a state, to his separate property is a vested one and may not be impaired or taken by the laws of the state, to disturb in such a manner which is forbidden as to the property of its own citizens the same property rights of a citizen of another state who chances to transfer his domicil to such state bringing his property with him is clearly to abridge his privileges and immunities as a citizen of the United States.[16] Hence, a statute enlarging the definition of community property to include property acquired by either spouse after marriage while domiciled elsewhere, which would not have been separate property if acquired while domiciled in the state, is unconstitutional.[17]

§ 461. Pursuit of Occupations.—

The right to follow any of the ordinary callings of life is one of the privileges of a citizen of the United States.[18] Hence, a state may not, consistent with the Federal Constitution, prohibit the citizens of other states from carrying on legitimate business within its borders like its own citizens.[19] Moreover, the right of a citizen of the United States to transact any lawful business or to make a lawful loan of money in any state other than that in which he resides is a privilege equally attributable to his national citizenship. A state law prohibiting the exercise of any of these rights in another state would, therefore, be invalid under the Fourteenth Amendment.[20] The privilege and immunity of engaging in ordinary callings

is not absolute. It includes only the right to pursue any lawful calling without let or hindrance, except under such reasonable regulations as may be applied to all persons of the same age, sex, and condition.[1] A state may impose rea-

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[15] Conner v. Elliott, 18 How. (U. S.) 591,

[15] L. ed. 497. The law of Louisiana, providing that persons married within the state or coming into the state after marriage to reside and acquiring property therein shall be nuptial partners as to the property so acquired and leaving their rights respecting such property, where the marriage takes place outside the state and the domicil of the parties continues outside the state, to be regulated by the law of the place of such domicil discriminates between contracts only, and not between citizens of the state and other states. Ibid.

[16] Re Thornton, 1 Cal. (2d) 1, 33 P. (2d) 1, 92 A.L.R. 1343.

[17] Ibid.

[18] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124,

[40] S. Ct. 2; La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Chicago v. Kautz, 313 Ill. 196, 144 N. E. 805, 35 A.L.R. 1050; Gougar v. Timberlake, 148 Ind. 38, 46 N. E. 339, 37 L.R.A. 644, 62 Am. St. Rep. 487; Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 74 N. E. 561,

[70] L.R.A. 722, 108 Am. St. Rep. 790; State v. Smith, 42 Wash. 237, 84 P. 851, 5 L.R.A. (N.S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577. See Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257. Annotation: 14 L.R.A. 582.

[19] Shaffer v. Carter, 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; Davidson v. Henry L. Doherty & Co. 214 Iowa, 739, 241 N. W. 700, 91 A.L.R. 1308. Under the Federal Constitution, a citizen of one state is guaranteed the right to enjoy in all the states equality of commercial privileges with their citizens; but he cannot have his chief office in every one of them. Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522, 63 L. ed. 748, 39 S. Ct. 366.

[20] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54.

[1] Crowley v. Christensen, 137 U. S. 86,

[34] L. ed. 620, 11 S. Ct. 13; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23,

[3] Ann. Cas. 319; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Schmaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 74 N. E. 561, 70 L.R.A. 722, 108 Am. St. Rep. 790; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; State v. Moore,

[113] N. C. 697, 18 S. E. 342, 22 L.R.A. 472. Privileges and immunities of citizens of the United States are not unconstitutionally abridged by the provisions of a state statute which, as construed by the highest court of the state, make it a criminal offense for a dealer or collector of junk, metals, or secondhand materials to buy or receive any stolen wire, cable, copper, lead, solder, iron, or brass used by, or belonging to, a railroad, telephone, telegraph, gas, or electric light company without making

sonable conditions upon the citizens of a foreign state who seek to do business within its borders, especially when like conditions are imposed upon its own citizens.[2] Moreover, the constitutional provisions as to equal privileges and immunities do not prevent the exclusion of certain classes of peddlers from the streets while permitting other classes to use them, since the right to use the streets for the prosecution of private business is not one of the privileges of citizenship.[3]

In some cases the extreme position has been taken that a calling or occupation which, although lawful, is subject to abuse and is likely to become injurious to the community may be limited to a state's own residents and the right denied to all others without violating Article [4], § [2], of the Federal Constitution.[4] Admission to professions may also be regulated without violation of the privileges and immunities clauses of the Federal Constitution.[5] For example, although it is true that the practice of law is a lawful occupation in itself, it is also well established that it is not a natural right or a right guaranteed by the Constitution, but a privilege granted by the state and one which may be surrounded with whatever restrictions the legislature may in reason prescribe.[6] Likewise, the privileges and immunities of national citizenship do not include the right to practice medicine.[7]

§ 462. Freedom from Discriminatory Taxation.—

The general rule is well settled that a citizen coming into a state has a right to be exempt from taxes or excises which are higher than those imposed by the state on its own citizens.8 A general taxing scheme which discriminates against all non-

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diligent inquiry for the purpose of ascertaining whether the person selling or delivering it has a legal right to do so. Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 S. Ct. 27, Ann. Cas. 1914B, 71. Privileges and immunities of the citizens of the several states are not abridged, contrary to U. S. Const. Art. 4, § 2, by the provisions of a state statute that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of the state must be given preference. Heim v. McCall, 239 U. S. 175, 60 L. ed. 206, 36 S. Ct. 78, Ann. Cas. 1917B, 287. See Vol. 11, p. 1147, § 336.

[2] Davidson v. Henry L. Doherty & Co. 214 Iowa, 739, 241 N. W. 700, 91 A.L.R. 1308.

[3] Rosa v. Portland, 86 Or. 438, 168 P. 936, L.R.A.1918B, 851.

[4] Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151. As to licensing statutes, see infra, § 463.

[5] See infra, notes 6, 7, this section.

[6] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Re Lockwood, 154 U. S. 116, 38 L. ed. 929, 14 S. Ct. 1082; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442; State v. Rossman, 53 Wash. 1, 101 P. 357, 21 L.R.A.(N.S.) 821, 17 Ann. Cas. 625. Annotation: 14 L.R.A. 581; 25 Am. St. Rep. 372. The right to practice law in the state courts is not a privilege or immunity of a citizen of the United States within the meaning of the Fourteenth Amendment to the Federal Constitution. The power of a state to prescribe qualifications for admission to the bar of its own courts is un- affected by that amendment. Re Lockwood, 154 U. S. 116, 38 L. ed. 929, 14 S. Ct. 1082; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442. See ATTORNEYS AT LAW, Vol. 5, p. 274, §§ 21, 22.

[7] Templar v. State Examiners, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610; State ex rel. Kellogg v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252. Annotation: 61 A.L.R. 346; 14 L.R.A. 581; 40 L.R.A.(N.S.) 284. A dentist who has practiced for years in one state does not thereby acquire a right to practice in another state, for the practice of dentistry is not a privilege of United States citizenship. People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A. 1915D, 538. A statute to secure the possession of requisite skill and learning by practitioners of medicine, surgery, and dentistry which excepts from its provisions persons who have practiced their professions in the place of their present residence for a certain time and also physicians residing outside the state and called into the state for consultation or to attend patients in the regular course of business is unconstitutional in discriminating between persons engaged in the same business or profession and also in discriminating against citizens of other states. State v. Pennoyer, 65 N. H.

113, 18 A. 878, 5 L.R.A. 709. See PHYSICIANS AND SURGEONS [Also 21 R. C. L. p. 353, §§ 3 et seq.].

[8] Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; Shaffer v. Carter, 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522,

residents has the necessary effect of including in the discrimination those who are citizens of other states; and if there is no reasonable ground for the diversity of treatment, such a scheme abridges the privileges and immunities to which such citizens are entitled.[9] The business of nonresidents, however, may be required to make a ratable contribution in taxes for the support of a state government. The very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another state is a very reasonable ground for subjecting such nonresident, though not personally, yet to the extent of his property held or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state.[10]

§ 463. Freedom from Discriminatory License Laws.[11]—

It is a general rule that license legislation which discriminates against nonresidents, including in that class only noncitizens, either by refusing to grant licenses to them or by granting such licenses on terms different from those upon which they are granted to residents, as by charging such nonresidents a higher fee or adding other burdens, where not actually required under the police power for the protection of local citizens, is unconstitutional and void because, generally speaking, it denies to citizens of other states the privileges and immunities of citizens of the state enacting the license legislation, contrary to Article 4, § 2, of the Constitution, and moreover in some instances abridges privileges and immunities of citizens of the United States contrary to the Fourteenth Amendment.12 This rule is subject to two well-recognized exceptions: (1) Licenses to sell intoxicating liquor, and (2) licenses to hunt, fish, or trap.13 The discrimination in the case of hunting and fishing licenses is sometimes justified under the police power, but oftener on the ground that game, fish, and furbearing animals when not reduced to possession belong to the state, as a part of its natural resources, which it can protect and save for its own citizens.14

Statutes requiring licenses to engage in various types of occupations graphically illustrate the principles involved in the general rule hereinabove

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[63] L. ed. 748, 39 S. Ct. 366; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Ward v. Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449; People ex rel. Stafford v. Travis, 231 N. Y. 339, 132 N. E. 109, 15 A.L.R. 1319; Sprague v. Fletcher, 69 Vt. 69, 37 A. 239, 37 L.R.A. 840.

[9] Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228.

[10] Shaffer v. Carter, 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; People ex rel. Stafford v. Travis, 231 N. Y. 339, 132 N. E. 109, 15 A.L.R. 1319. See State ex rel. Bolens v. Frear, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, L.R.A.1915B, 569, Ann. Cas. 1913A, 1147, writ of error dismissed in 231 U. S. 616, 58 L. ed. 400, 34 S. Ct. 272. Annotation: 15 A.L.R. 1331.

[11] As to persons subject to license laws, generally, see LICENSES [Also 17 R. C. L. p. 488, §§ 15 et seq.].

[12] Annotation: 61 A.L.R. 337; 40 L.R.A. (N.S.) 281. An unconstitutional discrimination in favor of citizens of Tennessee as against those of other states, forbidden by U. S. Const. Art. 4, § 2, results from the pro- vision of an act under which an annual license tax of $100 in each county is imposed upon a person engaged in railway construction work in Tennessee who has his chief office outside the state, while a person engaged in the same business, but having his chief office within the state, pays an annual tax of only $25 in each county. Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522, 63 L. ed. 748, 39 S. Ct. 366. A requirement that only agents who sell trees grown in other states must carry duplicates of the principal's permit illegally discriminates between resident and nonresident dealers. Ex parte Hawley (State ex rel. Hawley v. Nelson) 22 S. D. 23, 115 N. W. 93, 15 L.R.A.(N.S.) 138. Annotation: 61 A.L.R. 348; 40 L.R.A.(N.S.) 290.

[13] Annotation: 61 A.L.R. 338; 40 L.R.A. (N.S.) 284, 285. As to the sale of intoxicating liquor, see infra, § 467. As to hunting and fishing, see infra, § 465.

[14] Annotation: 61 A.L.R. 338; 40 L.R.A. (N.S.) 285. See infra, § 465. [12 Am. Jur.]—8 113

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stated.[15] In a very early case the Supreme Court stated the broad rule that a citizen of one state may lawfully sell, offer, or expose for sale, within any other state, any goods which the permanent residents of the latter state might sell, offer, or expose for sale, without being subjected to any higher license tax than that exacted by law of such permanent residents.[16] The test is whether there is any discrimination in favor of citizens of the state enacting the licensing law over citizens of other states; such discrimination between citizens is fatal.[17] Many license laws imposing upon such nonresident vendors as are noncitizens of the state conditions different from those imposed upon residents, where the term "residents" means only citizens of the enacting state, have been declared unconstitutional because they abridge the privileges and immunities clauses of the Federal Constitution.[18] Thus, a state statute requiring a license to engage in peddling and giving such license only to persons who have resided in the state for one year is unconstitutional as discriminating against nonresidents.[19] State statutes requiring licenses from peddlers or itinerant vendors have been held unconstitutional and void as violating Article [4], § [2], of the United States Constitution where they exempted from the payment of the license fee manufacturers who had paid taxes on capital employed,[20] farmers peddling their products,[1] citizens of a county selling products of their own growth or manufacture and merchants having a regular place of business in the county,[2] residents of a particular county and adjoining counties,[3] citizens of the state,[4] and persons having a permanent place of business.[5]

A borough ordinance which discriminates against nonresidents by prohibiting all persons from peddling or selling goods from house to house without a license, which is fixed at so high a figure that it amounts to prohibition, but which excepts residents of the borough from its provisions, is void. The borough can have no better right to adopt discriminating trade regulations than the state has. Sayre v. Phillips, [148] Pa. [482], [24] A. [76], [16] L.R.A. [49], [33] Am. St. Rep. [842]. Annotation: [16] L.R.A. [49].

A state statute imposing a heavy license tax upon the right to canvass from house to house for a certain limited number of articles not produced or manufactured within the state, which articles are not injurious to health or morals, for the apparent purpose of favoring resident merchants with established places of business violates the provisions of the Federal Constitution against abridging the privileges or immunities of citizens of the United States. State v. Bayer, [34] Utah, [257], [97] P. [129], [19] L.R.A.(N.S.) [297].

[15] Annotation: 61 A.L.R. 341 et seq.; 40 L.R.A.(N.S.) 285 et seq.

[16] Ward v. Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449. See also Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522, 63 L. ed. 748, 39 S. Ct. 366; Re Irish, 121 Kan. 72, 122 Kan. 33, 250 P. 1056, 1057, 61 A.L.R. 332. Annotation: 61 A.L.R. 350. A statute fixing the price of licenses for the sale of lightning rods at $100 to citizens of the state and $500 to citizens of other states is a discrimination prohibited by U. S. Const. Art. 4, § 2. State v. Wiggin, 64 N. H. 508, 15 A. 128, 1 L.R.A. 56.

[17] Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754.

[18] Ward v. Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449; Carrollton v. Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L.R.A. 522 (semble). Annotation: 61 A.L.R. 342, 343; 40 L.R.A.(N.S.) 286 et seq. A statute providing for the licensing of itinerant vendors and defining an itinerant vendor as any person who engages either as principal or agent in a temporary or transient business in the state either in one locality, or in traveling about the country or from place to place, selling manufactured goods, wares, or merchandise violates Art. 4, § 2, of the Federal Constitution, since a citizen of another state who has no permanent place of business therein is inhibited from selling his manufactured articles to consumers in the state, except by payment of a license fee, if he seeks and secures such customers in a manner which would make him an itinerant vendor as defined by the act, while the citizen and resident of the state with a permanent place of business therein is exempted from its operation. Annotation is 61 A.L.R. 342; 40 L.R.A.(N.S.) 287.

[19] Annotation: 61 A.L.R. 342.

[20] Com. v. Meyer, 92 Va. 809, 23 S. E. 915, 31 L.R.A. 379.

[1] Annotation: 61 A.L.R. 342.

[2] Annotation: 61 A.L.R. 342.

[3] Re Jarvis, 66 Kan. 329, 71 P. 576.

[4] Annotation: 61 A.L.R. 342. A municipal ordinance requiring a license to peddle violates Art. 4, § 2, of the United States Constitution where it exempts citizens of the city. Grafty v. Rushville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128. A municipal ordinance which imposes a higher license tax upon sellers whose principal place of business is not within the

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In some cases license laws, the effect of which upon a casual inspection indicates an imposition of burdens upon nonresidents different from those imposed upon resident citizens, have been sustained; such statutes, however, upon careful analysis disclose the distinguishing factor that they affect the business to be carried on in the state, the place where the business is done or the service is rendered, or the exemption of merchandise itself which is locally manufactured or sold, and do not actually discriminate between nonresidents, including in that class only noncitizens, and citizens of the state enacting the license law.[6] For example, it has been held that a statute which, for the purpose of revenue, imposes taxes on occupations and punishes a failure to take out a license as a misdemeanor is not rendered obnoxious to Article [4], § [2], of the Federal Constitution by the passage of another statute providing that it shall be lawful for all persons to peddle and sell without a license all things made or manufactured in the state, since it is within the power of the state to exempt from taxation manufacturers within its borders.[7] Similarly, a state statute imposing an annual license fee upon all sellers of merchandise in the state, the amount of which is determined by the sum of a merchant's purchases during the year, does not violate the privileges and immunities clause because it excludes such manufacturers as are taxed on capital by the state who offer for sale at the place of manufacture goods manufactured by themselves.[8] The cases dealing with the licensing of insurance agents well illustrate the principles involved in licensing

laws as affected by the constitutional provisions pertaining to privileges and immunities of citizens.[9] The regulation of the conduct of insurance agents is within the power of a state. Thus, persons desiring to act as such agents may be compelled to be licensed before being permitted to engage in such business.[10]

city violates U. S. Const. Art. 4, § 2, even though the discrimination includes not only nonresidents of the state, but also residents of the state who are nonresidents of the city. Annotation: 61 A.L.R. 345. This decision seems to go too far if based solely upon Art. 4, § 2, because under that article a state is not forbidden to abridge privileges and immunities of citizens generally. That article merely guarantees that privileges or immunities which a state grants to its own citizens are secured to citizens of other states. It does not prevent a state from denying privileges to its own citizens (see supra, §§ 447, 449) or from also denying such privileges to citizens of other states which it denies to its own citizens, since citizens of other states are guaranteed equal privileges and immunities, but not immunities and privileges greater than those of citizens of the state. See supra, §§ 447, 449. Such an ordinance, however, might be logically declared invalid under the Fourteenth Amendment. It affects the ordinary sale of ordinary articles. The carrying on of an ordinary business is a privilege or immunity arising out of United States citizenship (see supra, § 461); and under the Fourteenth Amendment, no state can abridge a privilege of United States citizens, including, under the present view of the law, as laid down in Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54 (see supra, § 449, notes 2-6) not only privileges of United States citizens belonging to citizens of other states, but such privileges of citizens of its own state. Hence, if the imposition of a license fee would interfere with the ordinary business of selling to the extent of abridging a privilege of United States citizenship,—an assumption which probably would not, however, be borne out by the courts in the usual case,—an ordinance imposing it might be held to violate the Fourteenth Amendment, even though it would apply not only to citizens or residents of other states, but also to citizens or residents of its own state not having a principal place of business within the city.

5 Leonard v. Reed, 46 Colo. 307, 104 P. 410, 133 Am. St. Rep. 77.

6 See Newnan v. Atlanta Laundries, 174 Ga. 99, 152 S. E. 497, 87 A.L.R. 507, appeal dismissed in 286 U. S. 526, 76 L. ed. 1269, 52 S. Ct. 495, as to different burden imposed upon that part of business carried on outside the city.

Annotation: 61 A.L.R. 342.

In Sears v. Warren County, 36 Ind. 267, 10 Am. Rep. 62, it was held that a statute requiring a license fee to be paid by traveling merchants and peddlers not residents of the state was not in conflict with the privileges and immunities clause, upon the ground that the tax was not on the person or property of nonresidents, but on a particular business carried on in the state.

7 Annotation: 61 A.L.R. 342.

8 Armour & Co. v. Virginia, 246 U. S. 1, 62 L. ed. 547, 38 S. Ct. 267.

9 See infra, notes 10-14 this section.

10 See INSURANCE [Also [14] R. C. L. p. [868], § 27].

Occasionally such licensing statutes have provided that only residents of the state may acquire a permit to act as insurance agents, and have been attacked as abridging the privileges and immunities of citizens of the United States or as denying equal privileges to citizens of other states because of this restriction. It is generally held that it is not an abridgment of a person's privileges as a citizen to require that he be a resident of a state in order to secure a license to act therein as an insurance agent.[11] This conclusion has been reached on various grounds. Thus, it has been stated that if the term "resident" in such a statute has been construed to include citizens of other states, no discrimination against citizens of other states, contrary to Article [4], § [2], of the Constitution, has been created.[12] Elsewhere it has been held that confining the right to act as agent for foreign insurance companies to residents of the state is not an unconstitutional impairment of the privileges and immunities of citizens of other states, since corporations are not within the protection of the provisions relating thereto and persons seeking to act for them can acquire no greater rights than the corporations have.[13] On substantially the same reasoning it has been held that there is no discrimination against citizens of other states created by a statute declaring it to be unlawful for any person to solicit insurance within the state on property therein located for any foreign insurance firm without procuring a certificate of insurance from the insurance commissioner.[14] Other similar laws pertaining to insurance have been held valid. Thus, a state statute requiring a $[500] fee from a foreign insurance company itself, not directly from a person seeking to act as agent for it in a state, for each additional agent beyond a prescribed number does not infringe the privileges or immunities of citizens.[15] On the other hand, the position has been taken elsewhere, on a different basis of unconstitutionality, that an ordinance requiring insurance agents who represent companies not located within a city, and those only, to pay a tax and procure a license before transacting business cannot be justified by the rule that conditions may be imposed upon a foreign corporation desiring to do business within the state, since it relates directly to, and deals with, the individual representative.[16]

Moreover, if the discrimination affects the engaging in the insurance business itself by such natural persons as are citizens of other states, it is invalid. Thus, the discrimination between resident and nonresident citizens in a statute providing that no foreign insurance company, association, firm, or individual shall transact any insurance business in the state unless possessed of at least $150,000 invested in a specified manner, without requiring any such property condition in the case of domestic, unincorporated associations, firms, or individuals, violates Article 4, § 2, of the Federal Constitution.[17] It has frequently been held that where an occupation is so related to the public health, safety,

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[11] La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160; Cook v. Howland, 74 Vt. 393, 52 A. 973, 59 L.R.A. 338, 93 Am. St. Rep. 912. Annotation: 36 A.L.R. 1514; 61 A.L.R. 349.

[12] La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160.

[13] Herbring v. Lee, 126 Or. 588, 269 P. 236, 60 A.L.R. 1165, affirmed in 280 U. S. 111, 74 L. ed. 217, 56 S. Ct. 49, 64 U. S. 1430; Cook v. Howland, 74 Vt. 393, 52 A. 973, 59 L.R.A. 338, 93 Am. St. Rep. 912.

[14] People v. Gay, 107 Mich. 422, 65 N. W. 292, 30 L.R.A. 464.

[15] Herbring v. Lee, 280 U. S. 111, 74 L. ed. 217, 50 S. Ct. 49, 64 A.L.R. 1430, affirming

[126] Or. 588, 269 P. 236, 60 A.L.R. 1165. Annotation: 60 A.L.R. 1172.

[16] Simrall v. Covington, 90 Ky. 444, 14 S. W. 369, 9 L.R.A. 556, 29 Am. St. Rep.

[398] (invalidated not on privileges and im- munities clause, but as an ordinance un- reasonable because of discrimination).

[17] State ex rel. Hoadley v. Insurance Comrs. 37 Fla. 564, 20 So. 772, 33 L.R.A. 288.

morals, and welfare of the citizens of a state that it comes within the police power of such state, the granting of licenses to pursue it may be restricted to residents.[18] Thus, it has been held that there is good ground for refusing a license to a resident of another state to serve as an auctioneer because of the difficulty that might be encountered in compelling him or his bondsmen to respond in case he rendered himself liable to either seller or purchaser. In such an occupation there is plainly an evil to be guarded against and reason to apprehend injury to the public by freely permitting nonresidents to engage in such a business within the state.[19] It has also been held that confining licenses to sell lightning rods to residents of the state does not abridge the privileges and immunities of United States citizenship in contravention of the Fourteenth Amendment. There is a plain object to protect from fraud and the dangers which might arise from an unrestricted sale of a material which might increase risk instead of preventing damage by lightning. Selling of

such articles is not the exercise of an ordinary trade or calling, and there is no natural right to sell them as agent.[20] The same reasoning has prevailed in the many cases in which it has been held that a state may restrict to residents of the state the granting of licenses for the sale of liquor.[1]

§ 464. Access to Courts.—

Among the privileges and immunities of citizen-

ship is included the right of access to courts,[2] for the purpose of bringing and maintaining actions.[3] This privilege includes the right to employ the usual remedies for the enforcement of personal rights4 in actions of every kind—a right which cannot be abrogated or even suspended.[5] It has been said that

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[18] Annotation: 40 L.R.A.(N.S.) 281. As to the effect of the privileges and immunities clause of the Fourteenth Amendment generally in relation to the exercise of police power by the states, see supra, § 449.

[19] Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151. Annotation: 61 A.L.R. 346.

[20] State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A.1917C, 528. Annotation: 61 A.L.R. 348.

[1] See infra, § 467.

[2] McKnett v. St. Louis & S. F. R. Co. 292 U. S. 230, 78 L. ed. 1227, 54 S. Ct. 690, re- hearing denied in 292 U. S. 613, 78 L. ed. 1472, 54 S. Ct. 855; Missouri P. R. Co. v. Clarendon Boat Oar Co. 257 U. S. 533, 66 L. ed. 354, 42 S. Ct. 210; Barbier v. Con- nolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Ward v. Maryland,

[12] Wall. (U. S.) 418, 20 L. ed. 449; Cran- dall v. Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 745; Marallis v. Chicago, 349 Ill. 422,

[182] N. E. 394, 83 A.L.R. 1222; Jones v. Chi- cago, E. I. & P. R. Co. 231 Ill. 302, 83 N. E. 215, 121 Am. St. Rep. 313; Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L.R.A. 190; Cofrode v. Gartner, 79 Mich. 332, 44 N. W. 623, 7 L.R.A. 511; State ex rel. Prall v. District Ct. 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915D, 198; State v. Penn- oyer, 65 N. H. 113, 18 A. 878, 5 L.R.A. 709; Bode v. Flynn, 213 Wis. 509, 252 N. W. 284,

[94] A.L.R. 480. See also State ex rel. Lopez v. Killigrew, 202 Ind. 397, 174 N. E. 808, 74 A.L.R. 631. Annotation: 14 L.R.A. 533. The privileges and immunities clause of the Federal Constitution requires a state to accord to citizens of other states sub- stantially the same right of access to its courts as it accords to its own citizens. McKnett v. St. Louis & S. F. R. Co. 292 U. S. 230, 78 L. ed. 1227, 54 S. Ct. 690, re- hearing denied in 292 U. S. 613, 78 L. ed. 1472, 54 S. Ct. 855.

[3] Canadian N. R. Co. v. Eggen, 252 U. S. 553, 64 L. ed. 713, 40 S. Ct. 402; Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538,

[10] S. Ct. 269; Ward v. Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449; People v. Bray,

[105] Cal. 344, 38 P. 731, 27 L.R.A. 158; Steed v. Harvey, 18 Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789.

[4] Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; Holbrook v. Ford,

[153] Ill. 633, 39 N. E. 1091, 27 L.R.A. 324, 46 Am. St. Rep. 917; Bussell v. Gill, 58 Wash. 468, 108 P. 1080, 137 Am. St. Rep. 1070; Brower v. Watson, 146 Tenn. 626, 244 S. W. 362, 26 A.L.R. 982 (recognizing rule as to an ordinary action brought in one state to enforce a right of action accruing else- where); Steed v. Harvey, 18 Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789.

[5] Davis v. Pierse, 7 Minn. 13, Gil. 1, 82 Am. Dec. 65. A statute making it a crime to send any chose in action out of the state for the purpose of suit thereon and of having garnishments or other process issued against the wages of a resident of the state and served upon any person indebted to him for

wages who is subject to the processes of the courts of the state is in violation of the provisions of the Federal Constitution guaranteeing the privileges and immunities of citizens of the United

the right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon the comity between the states,[6] but is guaranteed by the Federal Constitution.[7] If the state provides a court to which its own citizens may resort in a certain class of cases, citizens of other states of the Union also will have a right to resort to it in cases of the same class.[8]

A distinction not based on the citizenship of prospective litigants does not violate Article 4, § 2, of the Federal Constitution.[9] If a wrongful death action is given to the widow or personal representatives of a decedent, a statute—as construed by the state court of last resort—which permits wrongful death actions in the forum only if the decedent was a resident of such forum does not violate any privileges and immunities of citizens forbidden to bring such an action, in such an instance in which the decedent was not a citizen of the state; the discrimination is based solely on the citizenship of the deceased, and as far as the parties to the litigation are concerned, there is no discrimination based on citizenship, because the courts are open to plaintiffs who are residents of other states if the deceased was a resident of the forum and are closed to plaintiffs who actually are citizens of the forum if the decedent was a citizen of another state.[10]

The effect of the privileges and immunities clause in relation to access to the courts has been raised most often in those cases in which courts have sought to decline jurisdiction of transitory actions in which the plaintiff or both of the parties are nonresidents of the forum.[11] The position has generally been taken that under Article 4, § 2, a state court may not decline to entertain an action by a citizen of another state, even though the cause of action arose outside the state of suit and although the defendant is also a noncitizen, unless the circumstances of the case are such that the court would also decline the action if brought by a citizen of the state of suit.[12] A more difficult ques-

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States. Re Flukes, 157 Mo. 125, 57 S. W. 545, 51 L.R.A. 176, 80 Am. St. Rep. 619.

[6] Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 S. Ct. 34; State ex rel. Prall v. District Ct. 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915D, 198; Reynolds v. Day, 79 Wash. 499, 140 P. 681, L.R.A.1916A, 432; Bode v. Flynn, 213 Wis. 509, 252 N. W. 284, 94 A.L.R. 480. See also State use of Strepay v. Cohen, 166 Md. 682, 172 A. 274, 94 A.L.R. 427.

[7] Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 S. Ct. 34; Cofrode v. Gartner, 79 Mich. 332, 44 N. W. 623, 7 L.R.A. 511; State ex rel. Prall v. District Ct. 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915D, 198; Steed v. Harvey, 18 Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789; Bode v. Flynn, 213 Wis. 509, 252 N. W. 284, 94 A.L.R. 480. See also Life & C. Ins. Co. v. McCray, 291 U. S. 566, 78 L. ed. 987, 54 S. Ct. 482, rehearing denied in 292 U. S. 600, 78 L. ed. 1464, 54 S. Ct. 627; Life & C. Ins. Co. v. Barefield, 291 U. S. 515, 78 L. ed. 999, 54 S. Ct. 436, rehearing denied 292 U. S. 600, 78 L. ed. 1464, 54 S. Ct. 627.

[8] Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 S. Ct. 92.

[9] Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 S. Ct. 34.

[10] Ibid. Annotation: 74 A.L.R. 719 et seq., s. 100 A.L.R. 1152.

[11] For a general discussion of the power of the courts to decline jurisdiction of actions involving nonresidents, see COURTS [Also 7 R. C. L. p. 1035, § 65].

[12] Cofrode v. Gartner, 79 Mich. 332, 44 N. W. 623, 7 L.R.A. 511; State ex rel. Prall v. District Ct. 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915D, 198; Hale v. Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190; Eingartner v. Illinois Steel Co. 94 Wis. 70, 68 N. W. 664, 34 L.R.A. 503, 59 Am. St. Rep. 859. See also Reynolds v. Day, 79 Wash. 499, 140 P. 681, L.R.A.1916A, 432. Annotation: 32 A.L.R. 12. The refusal of a court to entertain jurisdiction of an action brought in Minnesota by a citizen of Iowa, upon a transitory cause of action for a tort committed there, against a railroad company incorporated in Illinois which has a line of railway in Iowa and Minnesota, does business in each, and is subject to the service of process and jurisdiction in each, is violative of the U. S. Const. Art. 4, § 2. State ex rel. Prall v. District Ct. 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915D, 198. There is considerable conflict of authority or at least uncertainty as to the extent to which the constitutional guaranty of the

tion arises as to whether the constitutional guaranty in effect prevents a discrimination, not only on the basis of difference of citizenship, but also on the basis of difference of residence; in other words, whether a court which may not, merely because the plaintiff is a citizen of another state, refuse to entertain an action on a foreign tort which it would entertain if the plaintiff were a citizen of the forum, may nevertheless refuse to entertain the action, not because the plaintiff is a citizen of another state, but because he is a resident of another state.[13] In a case in which the trial court refused to assume jurisdiction of an action where the facts actually were that both parties were nonresidents, the state supreme court held that such refusal violated the privileges and immunities clause. Any specific distinctions which might exist between nonresidents and noncitizens were not discussed, the court stating broadly that such refusal violated the privileges of citizens. The consideration that nonresidents may include both citizens and noncitizens was not raised or discussed.[14] It has been held elsewhere that the power of a court in its discretion to decline jurisdiction of a foreign transitory nonstatutory tort action the parties to which are nonresidents, although citizens of another state, is not denied to the state courts by Article [4], § [2], of the Federal Constitution.[15] One theory of the courts following this view is that the right of a nonresident to sue on a parity with residents in the courts of a state is not one of the privileges and immunities granted to citizens of the several states by the Federal Constitution, since nonresidents may include not only noncitizens but citizens.[16] Hence, the provisions of Article [4], § [2], are not violated by a state statute making it discretionary with the courts to entertain an action by a nonresident of the state against a foreign corporation doing business in the state, such statute being applicable alike to nonresident citizens and nonresident noncitizens.[17] The Supreme Court has also said: "From very early in our history, requirements have been imposed upon nonresidents in many, perhaps in all, of the states, as a condition of resorting to their courts, which have not been im-

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privileges and immunities of citizens in the several states operates as a limitation of the power of a court, in the exercise of its discretion, to refuse to entertain actions by citizens and residents of other states based on torts occurring beyond the forum; but it may be observed at this point that even in the view most unfavorable to the right to decline jurisdiction, it does not interfere with the right of the court, in the exercise of its discretion, to decline jurisdiction of such an action on grounds other than the noncitizenship or nonresidence at the forum, assuming, at least, that

jurisdiction of an action by a citizen and resident of the forum would be declined in circumstances otherwise the same. Annotation: 32 A.L.R. 13.

[13] Annotation: 32 A.L.R. 13.

[14] Eingartner v. Illinois Steel Co. 94 Wis. 70, 68 N. W. 664, 34 L.R.A. 503, 59 Am. St. Rep. 859. See also Cofrode v. Gartner, 79 Mich. 332, 44 N. W. 623, 7 L.R.A. 511; State ex rel. Prall v. District Ct. 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915D, 198. Annotation: 32 A.L.R. 16 et seq.

[15] Annotation: 32 A.L.R. 19. It is not strict right, but comity which enables one to bring a cause of action in one state for the enforcement of a cause of action which arises in another, and therefore there are well-known exceptions, not within the provisions of our Constitution, which prevent jurisdiction attaching where the cause of action arose in another state in favor of a citizen of that state against another citizen of that state. These exceptions grow naturally out of the principle that one state will not interfere with regulations relating to the government of another state. One of the exceptions to the general rule is that "no court will take cognizance of a matter which concerns the internal police regulations of another state." Hence, the courts of one state will not entertain an action for a tort committed in another state where both the parties reside, if the action is to recover on the official bond of the defendant, made payable to the state, and if a statute of the locus delicti requires actions on such bonds to be brought in the name of the state. Brower v. Watson, 146 Tenn. 626, 244 S. W. 362, 26 A.L.R. 991.

[16] Robinson v. Ocean Steam Nav. Co. 112 N. Y. 315, 19 N. E. 625, 2 L.R.A. 636. Annotation: 32 A.L.R. 22, 23; 74 A.L.R. 720 et seq. s. 100 A.L.R. 1152.

[17] Douglas v. New York, N. H. & H. R. Co. 279 U. S. 377, 73 L. ed. 747, 49 S. Ct. 355. Annotation: 74 A.L.R. 720, s. 100 A.L.R. 1152.

posed upon resident citizens. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. . . . Article 4, § 2, is satisfied if the nonresident is given access to the courts of the state upon terms which, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens."[18]

If the requirements of the due process clause as to notice and hearing are satisfied,[19] the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations may be enforced.[20] Hence, it is not a privilege or immunity of a citizen of the United States to have a controversy in a state court prosecuted or determined by one form of action instead of by another.[1] Statutes relating to service of process have been attacked on the ground of violation of the privileges or immunities clauses. Such assaults, however, have met with little success.[2] A state statute permitting the service of process on any agent or clerk employed in an office or agency maintained in the state by a nonresident, in all actions growing out of, or connected with, the business of that office or agency, does not, as applied in the case of a nonresident having

a local office in the state for the sale of securities, a business subjected in the state to special regulation, abridge the privileges and immunities to which he is entitled.[3] Similarly, a statute making a state officer the agent of a nonresident motorist to receive service of process in any civil suit or proceeding by a "resident of the state" arising out of or by reason of any accident or collision occurring within the state does not contravene Article [4], § [2], of the Federal Constitution.[4] Privileges and immunities of citizens of the United States are not unconstitutionally impaired by state foreign attachment statutes which debar a nonresident individual defendant from appearing and defending unless he first gives special security.[5] The Fourteenth Amendment does not require a state to dispense with the exaction of special security from a defendant appearing in such proceedings.[6]

Distinction between residents and nonresidents as to the creation of a defense by operation of a statute of limitations has been sustained by the courts.[7]

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[18] Canadian N. R. Co. v. Eggen, 252 U. S. 553, 64 L. ed. 713, 40 S. Ct. 402.

[19] See infra, §§ 616 et seq.

[20] Iowa C. R. Co. v. Iowa, 160 U. S. 389,

[40] L. ed. 467, 16 S. Ct. 344.

[1] Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 S. Ct. 344. See also Porter v. Wilson, 239 U. S. 170, 60 L. ed. 204, 36 S. Ct. 91. None of the privileges and immunities of a former convict as a citizen of the United States are abridged by bringing him, after conviction, before the court of another county in a separate proceeding by infor- mation charging him with prior convic- tions which were not alleged in the indict- ment on which he was last tried and con- victed, and, on the finding of the jury that he was the former convict, sentencing him to additional punishment prescribed by law. Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 S. Ct. 583. Privileges and immunities of citizenship are not impaired by a state law providing for a presumption of fraud against the president and directors of an insolvent bank. Griffin v. State, 142 Ga. 636, 83 S. E. 540, L.R.A.1915C, 716, Ann. Cas. 1916C, 80.

[2] See infra, notes, 3, 4 this section.

[3] Henry L. Doherty & Co. v. Goodman,

[294] U. S. 623, 79 L. ed. 1097, 55 S. Ct. 553; Davidson v. Henry L. Doherty & Co. 214 Iowa, 739, 241 N. W. 700, 91 A.L.R. 1308.

[4] State ex rel. Cochran v. Lewis, 118 Fla. 536, 159 So. 792, 99 A.L.R. 123.

[5] Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873. Annotation: 17 A.L.R. 884.

[6] Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873.

[7] Canadian N. R. Co. v. Eggen, 252 U. S. 553, 64 L. ed. 713, 40 S. Ct. 402; Bode v. Flynn, 213 Wis. 509, 252 N. W. 284, 94 A.L.R. 480. Constitutional privileges and immunities of a nonresident citizen are not denied by the exemption accorded to resident citizens by a state statute providing that "when a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be

A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.[8] A state statute which provides that when the defendant is out of the state, the statute of limitations shall not run against a resident plaintiff but shall run against a nonresident plaintiff is not repugnant to Article 4, § 2, of the Federal Constitution.[9]

Questions as to privileges and immunities are often raised by attempts to prevent access by noncitizens of a state to the Federal courts. The rule is that wherever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may also invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot limit a citizen of another state who has property rights within its territory invaded by unauthorized acts of its own officers to suits for redress in its own courts.[10] The converse is also generally true. A state may not under the Federal Constitution deny access to its courts of general jurisdiction to a resident of another state to recover under the Federal Employers' Liability Act, solely because the suit is brought under a Federal law.[11] Neither the Constitution of the United States nor any act of Congress, however, guarantees to a suitor that the same rule of law shall be applied to him by a state court which would be applied if his citizenship were such that his suit might be brought in a Federal court.[12]

Article 4, § 2, of the Federal Constitution insures noncitizens of a state access to its courts equal to that accorded to its own citizens, but not greater privileges in such courts than its own citizens are granted. Hence, where the citizens of a state are not given a process for reaching foreign corporations, noncitizens cannot claim it.[13]

E. WHAT ARE NOT PRIVILEGES AND IMMUNITIES

§ 465. Generally.—

The privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the First Eight

Amendments to the Federal Constitution against the powers of the Federal Government.[14] Hence, the privileges and immunities of a citizen of the Unit-

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maintained in this state unless the plain- tiff be a citizen of the state who has owned the cause of action ever since it accrued," where the foreign limitation, though short- er than that of Minnesota, is not unduly short. Canadian N. R. Co. v. Eggen, 252 U. S. 553, 64 L. ed. 713, 40 S. Ct. 402. A state statute which denies to a citizen of another state against whom suit might have been brought on a cause of action growing out of his use of an automobile on the highways of the state by service of process on the secretary of state, the right to the benefit of the statute of limitations until he shall come into or remove to the state, does not contravene the U. S. Const. Art. 4, § 2. Bode v. Flynn, 213 Wis. 509,

[252] N. W. 284, 94 A.L.R. 480.

[8] Canadian N. R. Co. v. Eggen, 252 U. S. 553, 64 L. ed. 713, 40 S. Ct. 402.

[9] Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. ed. 806.

[10] Prentiss v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 S. Ct. 67; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 S. Ct. 418; Reagan v. Farmers' Loan & T. Co.

[154] U. S. 362, 38 L. ed. 1014, 14 S. Ct. 1047.

[11] McKnett v. St. Louis & S. F. R. Co.

[292] U. S. 230, 78 L. ed. 1227, 54 S. Ct. 690, rehearing denied in 292 U. S. 613, 78 L. ed. 1472, 54 S. Ct. 855.

[12] Winona & St. P. R. Co. v. Plainview,

[143] U. S. 371, 36 L. ed. 191, 12 S. Ct. 530.

[13] Missouri P. R. Co. v. Clarendon Boat Oar Co. 257 U. S. 533, 66 L. ed. 354, 42 S. Ct. 210.

[14] Twining v. New Jersey, 211 U. S. 78,

[58] L. ed. 97, 29 S. Ct. 14; Maxwell v. Dow,

[176] U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494. See Consolidated Rendering Co. v. Ver- mont, 207 U. S. 541, 52 L. ed. 327, 28 S. Ct. 178, 12 Ann. Cas. 658; Spies v. Illi- nois, 123 U. S. 131, 31 L. ed. 80, 8 S. Ct. 21, 22. A conclusion opposite in result to the rule announced in the text—although it has never been adopted by the Supreme Court as the law—was announced by Jus- tice Field in his dissenting opinion in

ed States do not include the right to a trial by jury in suits at common law in the state courts, the right to a trial by jury in a state court for a criminal offense against the state, the right to be exempt from any trial in such case for an infamous crime unless upon presentment by a grand jury,[16] the right to exemption from self-incrimination in state criminal proceedings,[17] the right for exemption from self-incrimination in state criminal proceedings,[17] the right to exemption from self-incrimination in state laws to carry arms,[18] or the right to drill or parade with together as a military company or organization or to drill or parade with arms, without or independent of an act of Congress or law of a state authorizing the same.[19] The same principle has been applied to negative many assertions of privileges and immunities sought to be established to prevent various

O'Neil v. Vermont, [144] U. S. [323], [36] L. ed. [450], [12] S. Ct. [693]. He said: "The rights thus recognized and declared [in the Federal Bill of Rights] are rights of citizens of the United States under their Constitution which could not be violated by Federal authority. But when the late civil war closed, and slavery was abolished by the Thirteenth Amendment, there was legislation in the former slaveholding states

inconsistent with these rights, and a general apprehension arose in a portion of the country—whether justified or not is immaterial—that this legislation would still be enforced and the rights of the freedmen would not be respected. The Fourteenth Amendment followed, which declares that '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.' The freedmen thus became citizens of the United States and entitled in the future to all the privileges and immunities of such citizens. But owing to previous legislation many of those privileges and immunities, if that legislation was allowed to stand, would be abridged; therefore, in the same amendment by which they were made citizens, it was ordained that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' thus nullifying existing legislation of that character, and prohibiting its enactment in the future.

While, therefore, the ten amendments as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal Government and not to the states, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no state shall make or enforce any law which shall abridge them. . . . These rights, as those of citizens of the United States, find their recognition and guaranty against Federal action in the Constitution of the United States, and against state action in the Fourteenth Amendment. The inhibition by that amendment is not the less valuable and effective because of the prior and existing inhibition against such action in the Constitutions of the several states. The amendment only gives additional security to the rights of the citizen. It was natural that it should forbid the abridgment by any state of privileges and immunities

which the Constitution recognized and guaranteed as rights of citizens of the United States. A similar additional guaranty of private rights is found in other instances. An inhibition is contained in the several state Constitutions against their legislatures passing a bill of attainder of an ex post facto law, and yet a like inhibition against state action is embodied in the Constitution of the United States. See also the dissenting opinion of Justice Harlan in Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494, in which it is stated that without enumerating the privileges and immunities of a citizen of the United States, it ought to be deemed safe to say that such privileges and immunities embrace at least those expressly recognized by the Constitution of the United States and placed beyond the power of Congress to take away or impair, which include the rights enumerated in the Federal Bill of Rights.

15 French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 S. Ct. 625; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383, affirming 14 Utah, 71, 46 P. 756, 37 L.R.A. 103; Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 S. Ct. 105; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678.

Annotation: 25 Am. St. Rep. 872.

A state may provide for a jury trial by a jury of less than twelve jurors. State v. Bates, [14] Utah, [293], [47] P. [78], [43] L.R.A. [33], overruled so far as a retroactive effect was given thereto, in Thompson v. Utah, [170] U. S. [343], [42] L. ed. 1061, [18] S. Ct. [620].

16 Maxwell v. Dow, [176] U. S. [581], [44] L. ed. [597], [20] S. Ct. [448], [494].

17 Twining v. New Jersey, [211] U. S. [78], [53] L. ed. [97], [29] S. Ct. [14]. See Banks v. State, [207] Ala. [179], [93] So. [293], [24] A.L.R. 1359, writ of certiorari denied in [260] U. S. [736], [67] L. ed. [488], [43] S. Ct. [96].

18 Miller v. Texas, [153] U. S. [535], [38] L. ed. [812], [14] S. Ct. [874].

A state law prohibiting the carrying of dangerous weapons does not abridge the privileges or immunities of citizens of the United States within the meaning of the Fourteenth Amendment. Ibid.

19 Presser v. Illinois, [116] U. S. [252], [29] L. ed. [615], [6] S. Ct. [580].

Privileges and immunities of citizens of the United States are not abridged by state legislation prohibiting bodies of men, other than the organized militia of the state and the troops of the United States, from associating as a military company and drilling with arms in cities or towns. Ibid.

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criminal proceedings in the states.[20] A seizure in one state of a fugitive from justice of another state, who has committed a crime in the latter state, does not violate any privilege or immunity which the accused can claim under the Constitution of the United States.[1] The imposition of the death penalty by electrocution as a punishment for murder does not violate the privileges and immunities of a citizen;[2] and the keeping of such a prisoner in solitary confinement until the execution of such a sentence does not violate the Constitution.[3] Habitual criminal penalties do not violate the privileges and immunities of United States citizens.[4]

The privileges and immunities clauses do not confer rights, exemptions, or privileges to any individuals or class which are denied to others as common rights or which are subject to regulation by the state.[5] Membership in a secret, oath-bound association within a state is not a privilege arising out of citizenship of the United States so as to be protected by the privilege and immunity clause of the Federal Constitution.[6]

According to the express words and clear meaning of Article [4], § [2], of the Constitution, no privileges are secured except those which belong to citizenship. Rights attached by the law of contracts, by reason of the law of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to such contracts, cannot be deemed privileges within the meaning of the Constitution.[7] Privileges and immunities which are protected by constitutional inhibition concern the personal and private rights of citizens. They do not, however, include within their meaning the right to hold office,[8] the right to be appointed and act as an executor,[9] the right to intermarry, so as to invalidate a statute prohibiting the intermarriage of white and colored persons,[10] or the right to secure a divorce in a state without com-

[20] See infra, notes 1-4, this section. The constitutional privileges and immunities of a citizen are not abridged by an error of the court in a charge to the jury in a criminal case. Davis v. Texas, 139 U. S. 651, 35 L. ed. 300, 11 S. Ct. 675.

[1] Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 S. Ct. 1204.

[2] McElvaine v. Brush, 142 U. S. 155, 35 L. ed. 971, 12 S. Ct. 156; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930. See Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 S. Ct. 583.

[3] McElvaine v. Brush, 142 U. S. 155, 35 L. ed. 971, 12 S. Ct. 156.

[4] Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 S. Ct. 583.

[5] Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L.R.A.(N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034.

[6] People ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785. Annotation: 43 A.L.R. 914, s. 62 A.L.R. 798.

[7] Conner v. Elliot, 18 How. (U. S.) 591, 15 L. ed. 497.

[8] Re Mulford, 217 Ill. 242, 75 N. E. 345, 1 L.R.A.(N.S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986; State v. Goldthwait, 172 Ind. 210, 87 N. E. 133, 19 Ann. Cas. 737; Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121, 10 L.R.A.(N.S.) 825, 9 Ann. Cas. 1039; Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; State v. Frear, 146 Wis. 291, 131 N. W. 832, 34 L.R.A.(N.S.) 480. Annotation: 14 L.R.A. 580; 34 L.R.A. (N.S.) 480; 3 Ann. Cas. 1049. The privileges and immunities of citizens which a state Constitution protects against discrimination do not include the right to hold a minor municipal office. Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121, 10 L.R.A.(N.S.) 825, 9 Ann. Cas. 1039.

[9] Re Mulford, 217 Ill. 242, 75 N. E. 345, 1 L.R.A.(N.S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986. Annotation: 3 Ann. Cas. 990. In Roby v. Smith, 131 Ind. 342, 30 N. E. 1093, 15 L.R.A. 792, 31 Am. St. Rep. 439, on the theory that the right to hold the title to property in trust is part of the right to hold property and therefore is a privilege and immunity of citizenship, the court held that a statute prohibiting any person who is not a bona fide resident of the state to act or be appointed as a trustee in any deed, mortgage, or other instrument in writing, except wills, was in violation of the constitutional right of citizens of each state to all the privileges and immunities of citizens in the several states. Annotation: 3 Ann. Cas. 990.

[10] State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42. Annotation: 14 L.R.A. 580. See MARRIAGE [Also 18 R. C. L. p. 387, § 8].

plying with its residence requirements.[11] Moreover, marital rights attached to the contract of marriage are not included within the privileges.[12]

The privilege accorded to the youth of a state, of attending the public schools maintained at the expense of the state, is not a privilege or immunity appertaining to a citizen of the United States as such. It necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of the mere status of national citizenship.[13]

The rights, immunities, and privileges which are secured by the Constitution of the United States to the inhabitants of the several states do not include, in favor of inhabitants of any state, rights in the common property of the inhabitants of other states.[14] A statutory prohibition against the transportation outside the state, of its waters—of lakes, ponds, rivers, and streams—does not infringe Article [4], § [2], of the Federal Constitution.[15] A state may deny to citizens of another state the right to plant oysters or to fish in its

public waters.[16] It may, moreover, preserve wild game for its own citizens if it pleases.[17]

The prohibition of certain trades and business on Sunday does not infringe the constitutional provisions which forbid the making or enforcing of any laws which abridge the privileges or immunities of citizens of the United States.[18] A state may make it a misdemeanor for anyone to sell, expose, or offer for sale, any article of merchandise upon which shall have been printed

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[11] Worthington v. District Ct. 37 Nev. 475,

[142] P. 230, L.R.A.1916A, 696, Ann. Cas. 1916E, 1097.

[12] Conner v. Elliot, 18 How. (U. S.) 591,

[15] L. ed. 497. As to community property, see supra, § 460.

[13] Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765, 11 L.R.A. 828, 23 Am. St. Rep. 895; Flory v. Smith, 145 Va. 164, 134 S. E. 360, 48 A.L.R. 654. See Cumming v. Richmond County Bd. of Edu. 175 U. S. 528, 44 L. ed. 262, 20 S. Ct. 197. But see State ex rel. Stoutmeyer v. Duffy, 7 Nev. 342, 8 Am. Rep. 713, apparently holding to the contrary. Annotation: 44 L. ed. 262; 14 L.R.A. 581; 3 Ann. Cas. 693. A state statute requiring a member of a Greek letter fraternity at another college to renounce his affiliation to such fraternity before permitting his admission as a student to any educational institution supported by the state does not violate the privileges and immunities of United States citizens. Waugh v. University of Mississippi, 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720. The enforcement of an order of the board of regents of a state university prescribing instruction in military science and tactics as a required course does not unconstitutionally abridge the privileges or immunities of citizens of the United States. Hamilton v. University of California, 293 U. S. 245, 79 L. ed. 343, 55 S. Ct. 197, rehearing denied in 293 U. S. 633, 79 L. ed. 717, 55 S. Ct. 345. See SCHOOLS [Also 24 R. C. L. p. 624, § 82].

[14] Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Com. v. Hilton, 174 Mass. 29, 54 N. E. 362, 45 L.R.A. 475. See State v. Catholic, 75 Or. 367,

[147] P. 372, Ann. Cas. 1917B, 913. Annotation: 61 A.L.R. 339. The citizens of one state are not invested by the United States Constitution with any interest in the common property of the citizens of another state. McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248.

[15] McCarter ex rel. Kummel v. Hudson County Water Co. 70 N. J. Eq. 695, 65 A. 489, 14 L.R.A.(N.S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116, affirmed in Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 S. Ct. 529, 14 Ann. Cas. 560.

[16] McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Com. v. Hilton, 174 Mass. 29, 54 N. E. 362, 45 L.R.A. 475; State v. Kofines,

[33] R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120. Imposing a license tax upon nonresidents who come onto the waters of a territory to fish does not conflict with the provision of the Federal Constitution that the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states. Haavik v. Alaska Packers Asso. 263 U. S. 510, 68 L. ed. 414, 44 S. Ct. 177. The exclusion of citizens of other states from the right to dig clams for sale on certain flats, by a regulation restricting the right to residents of the town, does not violate the constitutional privileges or immunities of citizens. Com. v. Hilton, 174 Mass. 29, 54 N. E. 362, 45 L.R.A. 475. See FISH AND FISHERIES [Also 11 R. C. L. p. 1024, § 10].

[17] Patsone v. Pennsylvania, 232 U. S. 138,

[58] L. ed. 539, 34 S. Ct. 281. See GAME AND GAME LAWS [Also 12 R. C. L. p. 693, § 10].

[18] State v. Dolan, 13 Idaho, 693, 92 P. 995, 14 L.R.A.(N.S.) 1259. See SUNDAYS AND HOLIDAYS [Also 25 R. C. L. p. 1416, § 5].

or placed for the purpose of advertising a representation of the flag of the United States, and such a law has been held not to be unconstitutional as depriving citizens of any privilege of citizenship.[19] It has been held, however, to the contrary, that forbidding the use of the national flag for advertising purposes is an interference with constitutional immunities and privileges of citizens.[20]

In most of the cases which have reached the higher courts, in which a statute has been attacked on the ground that it violates the privileges and immunities clause of the Fourteenth Amendment, such attack has failed.[1]

§ 466. Right to Suffrage.—

The right of suffrage is not as a general rule considered as being a privilege or immunity of citizens of the United States.[2] Moreover, it is usually considered not to be an inherent or natural right existing in the absence of constitutional and legislative grant.[3] It is rather deemed to be a political and civil right under the control of the state.[4] It is clear, therefore, that the state has the general right to determine the qualifications of voters and to regulate the conduct of elections.[5] Accordingly, it has been decided that the citizen's right to vote at elections for officers of the state and even for officers of the United States exists by reason of the fact that he is a citizen of, and entitled to vote under the laws of, the state in which he resides.[6] Among the rights and privileges, however, which have been recognized by the Supreme Court to be secured to the citizens of the United States by the Constitution is the right to vote for presidential electors and members of Congress.[7]

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[19] Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525, affirming 74 Neb. 757, 105 N. W. 298, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754. Annotation: 7 L.R.A.(N.S.) 1079.

[20] Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30.

[1] In Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54, Justice Stone pointed out in his dissenting opinion that since the adoption of the Fourteenth Amendment at least forty-four cases have been brought to the Supreme Court of the United States in which state statutes have been assailed as infringements of the privileges and immunities clause. Until the decision in Colgate v. Harvey, no decision of the Supreme Court has concluded that state legislation infringed that clause.

[2] Pope v. Williams, 193 U. S. 621, 48 L. ed. 817, 24 S. Ct. 573; Maxwell v. Dow,

[176] U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; McPherson v. Blacker, 146 U. S. 1,

[36] L. ed. 869, 13 S. Ct. 3; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Minor v. Happersett, 21 Wall. (U. S.) 162,

[22] L. ed. 627; Davis v. Teague, 220 Ala. 309, 125 So. 51 (appeal dismissed in 281 U. S. 695, 74 L. ed. 1123, 50 S. Ct. 248) citing R. C. L. Annotation: 14 L.R.A. 580; 25 Am. St. Rep. 872. See ELECTIONS [Also 9 R. C. L. p. 1023, §§ 40 et seq.].

[3] Davis v. Teague, 220 Ala. 309, 125 So.

[51] (appeal dismissed in 281 U. S. 695, 74 L. ed. 1123, 50 S. Ct. 248) citing R. C. L.; Spencer v. Board of Registration, 1 MacArth. (D. C.) 169, 29 Am. Rep. 582; Gougar v. Timberlake, 148 Ind. 38, 46 N. E. 339, 37 L.R.A. 644, 62 Am. St. Rep. 487; Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121,

[10] L.R.A.(N.S.) 825, 9 Ann. Cas. 1039; Chamberlain v. Wood, 15 S. D. 216, 88 N. W. 109, 56 L.R.A. 187, 91 Am. St. Rep. 674.

[4] Davis v. Teague, 220 Ala. 309, 125 So.

[51] (appeal dismissed in 281 U. S. 695, 74 L. ed. 1123, 50 S. Ct. 248) citing R. C. L.; Washington v. State, 75 Ala. 582, 51 Am. Rep. 479; Election Comrs. v. Knight, 187 Ind. 108, 117 N. E. 565, 650, citing R. C. L.; Gougar v. Timberlake, 148 Ind. 38, 46 N. E. 339, 37 L.R.A. 644, 62 Am. St. Rep. 487; Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121, 10 L.R.A.(N.S.) 825, 9 Ann. Cas. 1039; Chamberlain v. Wood, 15 S. D. 216, 88 N. W. 109, 56 L.R.A. 187, 91 Am. St. Rep. 674.

[5] Pope v. Williams, 98 Md. 59, 56 A. 543, 66 L.R.A. 398, 103 Am. St. Rep. 379; Cook v. State, 90 Tenn. 407, 16 S. W. 471,

[13] L.R.A. 183. The privileges and immunities of citizens guaranteed by the Federal Constitution are not denied to a citizen removing from the District of Columbia to a state by requiring him, as a condition to the exercise of the elective franchise, to record in a public record his intention of becoming a citizen a certain time before he can qualify as a voter. Pope v. Williams, 98 Md. 59, 56 A. 543, 66 L.R.A. 398,

[103] Am. St. Rep. 379, affirmed in 193 U. S. 621, 48 L. ed. 817, 24 S. Ct. 573.

[6] State v. Weber, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630.

[7] Twining v. New Jersey, 211 U. S. 78,

[53] L. ed. 97, 29 S. Ct. 14; Wiley v. Sinkler,

[179] U. S. 58, 45 L. ed. 84, 21 S. Ct. 17; Re Quarles, 158 U. S. 532, 39 L. ed. 1080, 15 S. Ct. 959; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 S. Ct. 152.

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The Fourteenth Amendment to the Federal Constitution did not add the right of suffrage to the privileges and immunities of citizenship.[8] The Fifteenth Amendment has, however, invested the citizens of the United States with a new constitutional right —namely, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that although the right of suffrage is not a necessary attribute of national citizenship, exemption from discrimination in the exercise of that right on account of race is such an attribute. The right to vote in the states comes from the states; but the right of exemption from the prohibited discrimination comes from the United States.[9] The Nineteenth Amendment has invested citizens of the United States with an exemption from discrimination in the exercise of the right to vote on account of sex.[10]

§ 467. Rights Pertaining to Intoxicating Liquors.—

It is settled that the states have full control over all matters relating to intoxicating liquors within their local sovereignties11 and that the usual regulations pertaining to liquors in general do not violate any of the constitutional rights of the citizen.12 Thus, the entire business of manufacturing and selling intoxicating liquors is completely within the control of the states.13 There is nothing in the Constitution of the United

States to prevent them from regulating and restraining the traffic or from prohibiting it altogether.14

The right to sell intoxicating liquors is not one of the privileges or immunities of a citizen of the United States15 or an inherent right of citizenship.[16]

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[8] Pope v. Williams, 93 Md. 59, 56 A. 543, 66 L.R.A. 398, 103 Am. St. Rep. 379, affirmed in 193 U. S. 621, 48 L. ed. 817, 24 S. Ct. 573.

[9] Pope v. Williams, 193 U. S. 621, 48 L. ed. 817, 24 S. Ct. 573; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627.

[10] See U. S. Const. Amendment XIX.

[11] See INTOXICATING LIQUORS [Also 15 R. C. L. p. 255, § 10].

[12] See INTOXICATING LIQUORS [Also 15 R. C. L. p. 291, § 45].

[13] State v. Nicolls, 61 Wash. 142, 112 P. 269, Ann. Cas. 1912B, 1088. Annotation: 8 L.R.A.(N.S.) 362. Although the sale of alcohol for certain specified purposes, under certain restrictions, is not unlawful, the Georgia Prohibition Act, which prohibits entirely the manufacture of alcohol, is not violative of the Federal constitutional provision that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States or deny to any person within its jurisdiction the equal protection of the law. Cureton v. State, 135 Ga. 660, 70 S. E. 332, 49 L.R.A.(N.S.) 182, appeal dismissed in 229 U. S. 630, 57 L. ed. 1358, 33 S. Ct. 778. A statute making it a criminal offense for any person to circulate or distribute any price lists, circulars, or order blanks advertising liquors within the state does not, as applied to a liquor dealer residing and doing business in another state, who, by agency of the United States mails, sends into the state unsolicited, and thus circulates or distributes to prospective customers, price lists, circulars, and order blanks advertising his liquor for sale, violate the "privileges and immunities" clause of the Fourteenth Amendment to the Federal Constitution. State v. Davis, 77 W. Va. 271, 87 S. E. 262, L.R.A.1917C, 639.

[14] Rippey v. Texas, 193 U. S. 504, 48 L. ed. 767, 24 S. Ct. 516; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Thurlow v. Massachusetts, 5 How. (U. S.) 504, 12 L. ed. 256; State v. Baker, 50 Or. 381, 12 P. 1076, 13 L.R.A.(N.S.) 1040. There is no inherent right in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. It may be entirely prohibited by state legislation or be permitted under such conditions as will limit its evils. Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13.

[15] Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 S. Ct. 671; Cronin v. Denver, 192 U. S. 115, 48 L. ed. 368, 24 S. Ct. 220; Cronin v. Adams, 192 U. S. 108, 48 L. ed. 365, 24 S. Ct. 219; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 S. Ct. 132; Mette v. McGuckin (U. S.) 37 L. ed. 934; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Bartemeyer v. Iowa, 18 Wall. (U. S.) 129, 21 L. ed. 929; Barbour v. State, 146 Ga. 667, 92 S. E. 70, 2 A.L.R. 1095, affirmed in 249 U. S. 454, 63 L. ed. 704, 39 S. Ct. 316; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Jordan v. Evansville, 163 Ind. 512, N. E. 544, 67 L.R.A. 613, 2 Ann. Cas. 96; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; State v. Durein, Kan. 1, 78 P. 152, 15 L.R.A.(N.S.) 908,

The state may grant to one class the privilege to sell liquor and deny it to another class.[17] It may restrict the right to obtain licenses for the sale of intoxicating liquors to the male inhabitants of the state.[18]

The right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge.[19]

It cannot be said that a woman of full age is denied any constitutional privilege or immunity by a law that forbids her to remain in and about saloons.[20]

XIII. EQUAL PROTECTION OF THE LAWS; CLASS LEGISLATION

A. GENERAL CONSIDERATIONS AS TO CONSTITUTIONAL DEMAND OF EQUALITY

§ 468. Generally.—

American social and political philosophy has been based upon general principles of equality since the beginning of the American Government. The fundamental generalization as to the equality of all men is contained in the well-known and historic phrases of the Declaration of Independence. It is only natural, therefore, that such philosophical theories are carried out in the specific guaranties of equality and in the protection from arbitrary, capricious, and unjust disparity of treatment contained in the Fed-

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affirmed in 208 U. S. 613, 52 L. ed. 645, 28 S. Ct. 567; Trageser v. Gray, 73 Md. 250, 20 A. 905, 9 L.R.A. 780, 25 Am. St. Rep. 587; State v. Baker, 50 Or. 381, 92 P. 1076, 13 L.R.A.(N.S.) 1040; State ex rel. George v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345. Annotation: 9 L.R.A. 780; 14 L.R.A. 582; 8 L.R.A.(N.S.) 362. No citizen of the United States can complain because a state police regulation denies him the privilege of selling spirituous liquors, even if the privilege is granted to other citizens. Welsh v. State, 126 Ind. 71, 25 N. E. 883, 9 L.R.A. 664; Trageser v. Gray, 73 Md. 250, 20 A. 905, 9 L.R.A. 780, 25 Am. St. Rep. 587.

[16] Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; State v. Calloway, 11 Idaho, 719, 84 P. 27, 4 L.R.A.(N.S.) 109, 114 Am. St. Rep. 285; State ex rel. George v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345. An ordinance regulating the hours in which intoxicating liquors shall be sold is not objectionable as class legislation where it is equally applicable to all dealers in intoxicating liquors, whether at wholesale or retail; nor does it infringe any right, privilege, or immunity secured to the citizen by the Federal Constitution or that of the State of Idaho. State v. Calloway, 11 Idaho, 719, 84 P. 27, 4 L.R.A.(N.S.) 109, 114 Am. St. Rep. 285.

[17] Trageser v. Gray, 73 Md. 250, 20 A. 905, 9 L.R.A. 780, 25 Am. St. Rep. 587; State v. Nicolls, 61 Wash. 142, 112 P. 269, Ann. Cas. 1912B, 1088. Annotation: 61 A.L.R. 340. A special license tax imposed by a city for the privilege of selling beer is not, as to beer manufactured in other places within the state, obnoxious to the clause of the Federal Constitution declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. Downham v. Alexandria, 10 Wall. (U. S.) 173, 19 L. ed. 929. Liquor sellers are not denied the privileges or immunities of citizens of the United States, under the Fourteenth Amendment, because producers or manufacturers of domestic wines are exempted by a state statute, while such wines are in their hands, from the tax imposed and the bond required by preceding articles regulating the sale of intoxicating liquors. Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 S. Ct. 671.

[18] Welsh v. State, 126 Ind. 71, 25 N. E. 883, 9 L.R.A. 664. The requirement of a residence within the state for two years as a condition for the granting of a license to sell intoxicating liquor does not deprive the citizens of another state of the privileges and immunities and equal protection of the laws guaranteed them by the Federal Constitution. De Grazier v. Stephens, 101 Tex. 194, 105 S. W. 992, 16 L.R.A.(N.S.) 1033, 16 Ann. Cas. 1059.

[19] Crane v. Campbell, 245 U. S. 304, 62 L. ed. 304, 38 S. Ct. 98; State v. Certain Intoxicating Liquors, 51 Utah, 569, 172 P. 1050, L.R.A.1918E, 943. Annotation: 2 A.L.R. 1089. The mere possession of whisky for personal use may be rendered criminal by state legislation without abridging privileges or immunities of citizens of the United States. Crane v. Campbell, 245 U. S. 304, 62 L. ed. 304, 38 S. Ct. 98. The limitation by a state of the amount of intoxicating liquors which a citizen may

lawfully receive and possess in dry territory for personal use does not violate the provision of the Federal Constitution prohibiting any law which shall abridge the privileges or immunities of citizens of the United States. Southern Exp. Co. v. Whittle, 194 Ala. 406, 69 So. 652, L.R.A.1916C, 278.

[20] See infra, § 497.

[1] See infra, §§ 469 et seq.

eral and state Constitutions.[2] Specific protection from unequal operation of the laws entitling a person to like privileges and burdens accorded to other persons in like circumstances3 is essentially and peculiarly an American concept.[4]

Like all the great broad constitutional concepts which have their basis in the complexities of organized society, the constitutional guaranties of equality, whether Federal or state, or general or particular in scope, are construed to give full play to the powers of government so long as the exercise of such powers is not clearly an infringement of the rights of individuals and personalized entities. No hard and fast rules concerning their restrictions have been laid down due to the extensive nature of the subjects to which they relate, the variety of situations involved, and the sensible desire of the courts to feel more or less free to determine each individual situation on its merits in accordance with very broad general principles from which there is little or no divergence.[5]

The principal guaranty of equality to be found in American Constitutions is the clause in the Fourteenth Amendment to the Federal Constitution which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[6] Since the ratification of the Fourteenth Amendment the "equal protection clause," as this guaranty is popularly called by both courts and laymen, has probably been invoked upon more occasions both in the Federal and state courts and thus subjected to more judicial analysis than any other constitutional guaranty in the Federal Constitution or any of the state Constitutions, with the possible exception of the companion "due process" clause also contained in the Fourteenth Amendment.

§ 469. Definition and Nature.—

The phrase "equal protection of the laws" has not been precisely defined.[7] In fact, the phrase is not susceptible of ex-

act delimitation.[8] Nor can the boundaries of the protection afforded thereby be automatically or rigidly fixed.[9] In other words, no rule as to what may be regarded as a denial of the equal protection of the laws that will cover every case can be formulated,[10] and no test of the type of cases involving such a clause of the Constitution can be infallible or all-inclusive.[11] Moreover, it would be impracticable and unwise to attempt to lay down any generalization covering the subject;[12] each case must be decided as it arises.[13]

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[2] See infra, §§ 529, 541 et seq.

[3] See infra, § 469.

[4] See infra, § 470.

[5] See infra, §§ 469 et seq.

[6] United States Constitution, Fourteenth Amendment, § 1.

[7] Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, 48 S. Ct. 423; Ma- goun v. Illinois Trust & S. Bank, 170 U. S. 283, 43 L. ed. 1037, 18 S. Ct. 594; State v. Leavitt, 105 Me. 76, 72 A. 875, 26 L.R.A. (N.S.) 799; Ex parte Hollman, 79 S. C. 9,

[60] S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105.

[8] Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, 48 S. Ct. 423.

[9] See infra, notes 10-13, this section.

[10] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54; Louis- ville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, 48 S. Ct. 423; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)

[183] U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819,

[18] S. Ct. 418; Bell's Gap R. Co. v. Pennsyl- vania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Vandalia R. Co. v. Stillwell, 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D, 258, affirmed in 239 U. S. 637, 60 L. ed. 480,

[36] S. Ct. 445.

[11] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513.

[12] Puget Sound Power & L. Co. v. King County, 264 U. S. 22, 68 L. ed. 541, 44 S. Ct. 261; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Bell's Gap R. Co. v. Pennsylvania,

[134] U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Knisely v. Cotterel, 196 Pa. 614, 46 A. 861,

[50] L.R.A. 86.

[13] Puget Sound Power & L. Co. v. King County, 264 U. S. 22, 68 L. ed. 541, 44 S. Ct. 261; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496.

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Although the courts have recognized the unwisdom of attempting to de-limit precisely the equal protection clause,[14] various broad and sweeping gen-eralizations and statements as to the meaning of this important part of the Federal Constitution have from time to time been enunciated. It has been repeatedly said that the guaranty of the equal protection of the laws means that no person or class of persons shall be denied the same protection of the

laws which is enjoyed by other persons or other classes in like circumstances,[15] in their lives, liberty, and property, and in pursuit of happiness.[16] It has frequently been stated that "the equal protection of the laws is a pledge of the protection of equal laws."[17] One court has added the concept that it means equality of opportunity to all in like circumstances.[18] The guiding principle most often stated by the courts is that this constitutional guaranty requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.[19] In

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Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Knisely v. Cotterel, 196 Pa. 614, 46 A. 861, 50 L.R.A. 86.

[14] See supra, notes 7-13, this section.

[15] Kentucky Finance Corp. v. Paramount Auto Exch. Corp. 262 U. S. 544, 67 L. ed. 1112, 43 S. Ct. 636; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 S. Ct. 106; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730; French v. Barber Asphalt Pav- ing Co. 181 U. S. 324, 45 L. ed. 879, 21 S. Ct. 625; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Moore v. Mis- souri, 159 U. S. 673, 40 L. ed. 301, 16 S. Ct. 179; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105. Annotation: 14 L.R.A. 583, 584.

[16] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Eldridge v. Trezevant, 160 U. S. 452, 40 L. ed. 490, 16 S. Ct. 345; Hallinger v. Davis,

[146] U. S. 314, 36 L. ed. 986, 13 S. Ct. 105; Santa Clara County v. Southern P. R. Co.

[118] U. S. 394, 30 L. ed. 118, 6 S. Ct. 1132; Re Mallon, 16 Idaho, 737, 102 P. 374, 22 L.R.A.(N.S.) 1123; State v. Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L.R.A.(N.S.) 874,

[119] Am. St. Rep. 491, 10 Ann. Cas. 899; State v. Montgomery, 94 Me. 192, 47 A. 165,

[80] Am. St. Rep. 386; Templar v. State Ex- aminers, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610; Steed v. Harvey, 18 Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789. Annotation: 14 L.R.A. 583, 584; 38 L.R.A. (N.S.) 1144. Equality is an attribute of liberty. Mc- Kinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268.

[17] Power Mfg. Co. v. Saunders, 274 U. S. 490, 71 L. ed. 1165, 47 S. Ct. 678; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254,

[42] S. Ct. 124, 27 A.L.R. 375; Perley v. North Carolina, 249 U. S. 510, 63 L. ed. 735, 39 S. Ct. 357; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283; South Carolina ex rel. Phœnix Mut. L. Ins. Co. v. McMaster, 237 U. S. 63, 59 L. ed. 839, 35 S. Ct. 504; Ger- man Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 S. Ct. 246; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287, 17 Ann. Cas. 1247; Connolly v. Union Sewer Pipe Co. 184 U. S. 540,

[46] L. ed. 679, 22 S. Ct. 431; Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140,

[16] S. Ct. 977; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Morales v. Chicago, 349 Ill. 422, 182 N. E. 394, 33 A.L.R. 1222; Vandalia R. Co. v. Stillwell,

[181] Ind. 267, 104 N. E. 289, Ann. Cas. 1916D, 258, affirmed in 239 U. S. 637, 60 L. ed. 480,

[36] S. Ct. 445; Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L.R.A. (N.S.) 418; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268; Vigeant v. Postal Teleg.-Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867; Re Opinion of Justices, 207 Mass. 601,

[94] N. E. 558, 34 L.R.A.(N.S.) 604; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717; State v. Cadigan, 73 Vt. 245, 50 A. 1079, 57 L.R.A. 666, 87 Am. St. Rep. 714.

[18] Hauser v. North British & M. Ins. Co.

[206] N. Y. 455, 100 N. E. 52, 42 L.R.A.(N.S.) 1139, Ann. Cas. 1914B, 263.

[19] United States.—Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838; Old Dear- born Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; Colgate v. Harvey,

[296] U. S. 404, 80 L. ed. 299, 56 S. Ct. 252,

[102] A.L.R. 54; State Tax Comrs. v. Jack- son, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Corpo- ration Commission v. Lowe, 281 U. S. 431,

[74] L. ed. 945, 50 S. Ct. 397; Frost v. Corpo- ration Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770,

[48] S. Ct. 423; Ft. Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387, 71 L. ed. 1112, 47 S. Ct. 595; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254,

[42] S. Ct. 124, 27 A.L.R. 375; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; Mountain Timber Co. v. Washing- ton, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; South Carolina ex rel. Phœnix Mut. L. Ins. Co. v. McMas- ter, 237 U. S. 63, 59 L. ed. 839, 35 S. Ct. 504; McCabe v. Atchison, T. & S. F. R. Co.

[235] U. S. 151, 59 L. ed. 169, 35 S. Ct. 69; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. [12 Am. Jur.]—9 129

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some cases the principle is stated a little more fully so as to include also with-

1050, [33] S. Ct. [692]; Central Lumber Co. v.

South Dakota, [226] U. S. [157], [57] L. ed. [164],

33 S. Ct. [66]; Southern R. Co. v. Greene, [216]

U. S. 400, 54 L. ed. 536, 30 S. Ct. 287; Ann.

Cas. 1247; Jackson v. Hooper, [76] N. J. Eq.

setts, [137] U. S. [765]; Field v. Barber As-

phalt Paving Co. [194] U. S. [618], [48] L. ed.

1142, [24] S. Ct. [784]; Connolly v. Union Sewer

Pipe Co. [184] U. S. [540]; Illinois Trust & Sav.

Bank, [170] U. S. [283], [42] L. ed. Pennsylvania R.

Co. [594]; Marchant v. Pennsylvania R. Co.,

153 U. S. [380], [38] L. ed. [751], [14] S. Ct. [894];

Hallinger v. Davis, [146] U. S. [314], [36] L. ed.

986, [13] S. Ct. [105]; Minneapolis & St. L. R.

Co. v. Beckwith, [129] U. S. [26], [32] L. ed.

585, [9] S. Ct. [207]; Hayes v. Missouri, [120] U.

S. [68], [30] L. ed. [578], [7] S. Ct. A. 8th) [179], [928]

Abilene Nat. Bank (C. C. A. 8th) 179, 928
461, 32 L.R.A.(N.S.) 1065, 33 S. Ct. 409.

U. S. 57, 67 L. ed. 707; State v. State, Boyce,
4 Delaware.—Van Winkle v. State, 4 Boyce
(Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104.
Florida.—Davis v. Florida Power Co. 64
Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965.
Illinois.—Kocsis v. Chicago Park Dist.,
362 Ill. 24, 198 N. E. 847, 103 A.L.R. 141.
Indiana.—Miles v. Department of Treas-
ury, — Ind. —, 193 N. E. 855, 97 A.L.R.
1474, superseded, but not on this point, in
109 Ind. 172, 199 N. E. 372, 101 A.L.R. 1359;
Cincinnati, H. & D. R. Co. v. McCullom,
183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E,
1165, affirmed in 245 U. S. 632, 62 L. ed.
521, 38 S. Ct. 64; Chicago, T. H. & S. E. R.
Co. v. Anderson, 182 Ind. 140, 105 N. E.
49, Ann. Cas. 1917A, 132, affirmed in 242

U. S. 283, 61 L. ed. 302, 37 S. Ct. 124; Ham-
mer v. State, 173 Ind. 199, 89 N. E. 850,
24 L.R.A.(N.S.) 795, 140 Am. St. Rep. 248,
21 Ann. Cas. 1034; Taggart v. Claypool, 145
Ind. 590, 44 N. E. 18, 32 L.R.A. 586; Cleve-
land, C. C. & St. L. R. Co. v. Backus, 133
Ind. 513, 33 N. E. 421, 18 L.R.A. 729, af-
firmed in 154 U. S. 439, 38 L. ed. 1041, 14

S. Ct. 1122; Richmond v. Dudley (Ind.) 26

N. E. 184, 10 L.R.A. 137.
Iowa.—Iowa Motor Vehicle Asso. v. Rail-
road Comrs. 207 Iowa, 461, 221 N. W. 364,

75 A.L.R. [1], affirmed in [280] U. S. [529], [74] L. ed. [595], [50] S. Ct. [151]; Sisson v. Buena Vista County, [128] Iowa, [442], [104] N. W. [454], [70] L.R.A. [440].

Maine.—State v. Latham, [115] Me. [176], [98] A. [578], L.R.A.1917A, [480]; Dirken v. Great Northern Paper Co. [110] Me. [374], [86] A. [320], Ann. Cas. 1914D, [396]; State v. Leavitt, [105] Me. [76], [72] A. [875], [26] L.R.A.(N.S.) [799]; Leavitt v. Canadian P. R. Co. [90] Me. [153], [37] A. [886], [38] L.R.A. [152].

Massachusetts.—Universal Adjustment Corp. v. Midland Bank, [281] Mass. [303], [184]

N. E. 152, 87 A.L.R. 1407; Vigeant v. Postal

Teleg.-Cable Co. [260] Mass. [335], [157] N. E. 651, [53] A.L.R. [867].

Minnesota.—Mathison v. Minneapolis Street R. Co. [126] Minn. [286], [148] N. W. [71], L.R.A.1916D, [412].

Missouri.—Stone v. Jefferson, [317] Mo. [1], 293 S. W. [780], [52] A.L.R. [879]; State v. Baskowitz, [250] Mo. [82], [156] S. W. [945], Ann. Cas. 1915A, [477]; Wooley v. Mears, [226] Mo. [41], 125 S. W. 1112, [136] Am. St. Rep. [637]; State v. Walsh, [136] Mo. [400], [37] S. W. 1112, [35] L.R.A. [231].

Nebraska.—Norris v. Lincoln, [93] Neb. 658, [142] N. W. [114], Ann. Cas. 1914B, 1194.

New Hampshire.—Re Opinion of Justices, [81] N. H. [566], [129] A. [117], [39] A.L.R. 1023.

North Carolina.—State v. Fowler, [193] N.

C. [290], [136] S. E. [709], citing R. C. L.

Ohio.—H. & M. Co. v. Miller, [92]

Ohio St. [115], [110] N. E. [648], L.R.A.1916C,

926; State v. Hanlop,

Ohio St. Cas. 1917C, [926], [13] L.R.A.(N.S.)

1023, Ann. Cas. [82] N. E. [662], [13] L.R.A.(N.S.)

779, [122] Am. St. Rep. [472].

Oregon.—State v. Savage, [96] Or. [53], [184]

P. [567], [189] P. [427], [61] Or. [438], [123] P. [40], Ann.

Standard Oil Co. [61] Or. [438], [123] P. [40], Ann.

Cas. 1914B, [179].

Pennsylvania.—White's Appeal, [287] Pa.

259, [134] A. [409], [53] A.L.R. 1215.

Texas.—A. Ft. Worth & D. C. R. Co. v. Fra-

zier (Tex. Civ. App.) [191] S. W. [808], citing

R. C. L.

Utah.—State v. Haskell, [84] Vt. [429],

79 A. [852], [34] L.R.A.(N.S.) [286].

Vermont.—State v. Haskell, [84] Vt. [429],

Virginia.—Buck v. Bell, [143] Va. [310], [130]

S. E. 516, 47 A.L.R. 855, affirmed in 274 U.

S. [200], [71] L. ed. 1000, [47] S. Ct. [584].

The purpose of the clause in the Federal

Constitution with respect to equal protec-

tion of the laws is to rest the rights of all

persons upon the same rule under similar

circumstances. Frost v. Corporation Com-

mission, [278] U. S. [515], [73] L. ed. [483], [49] S.

Ct. [235].

Equal protection of the laws is not denied

to any person by a statute which is ap-

plicable to all persons under like circum-

stances and does not subject the individual to an arbitrary exercise of power. Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16

S. Ct. 1031.

The equal protection of the laws enjoined upon states for all persons within their jurisdictions by the Fourteenth Amendment to the United States Constitution is satisfied when, in the case of legislation enacted in the exercise of the police power, all persons brought under subjection to it are treated alike. St. Louis Poster Adv. Co. v. St. Louis, 249 U. S. 269, 63 L. ed. 599, 39 S. Ct. 274; Thomas Cusack Co. v. Chicago, 242 U. S. 526, 61 L. ed. 472, 37 S. Ct. 190, L.R.A.1918A, 136, Ann. Cas. 1917C, 594; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 S. Ct. 644; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 S. Ct. 144; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243; Minneapolis & St.

L. R. Co. v. Emmons, 149 U. S. 364, 37

L. ed. 769, 13 S. Ct. 870; Minneapolis & St.

L. R. Co. v. Beckwith, 129 U. S. 26, 32 L.

ed. 585, 9 S. Ct. 207; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Missouri P. R. Co. v. Humes, 115

U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; Bar-

bier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Chicago, T. H. & S. E. R. Co.

v. Anderson, [182] Ind. [140], [105] N. E. [49], Ann. Cas. 1917A, [182], affirmed in [242] U. S. [283], 61 L. ed. [302], [37] S. Ct. [124]; Vigeant v. Postal Teleg.-Cable Co. [260] Mass. [335], [157] N. E. [651], [53] A.L.R. [867]; Austin v. Thomas, 96 W. Va. [628], [123] S. E. [590], [38] A.L.R. 1490.

An act, though dealing with a subject within the police power, is unconstitutional as denying equal protection of the laws where it discriminates between persons under the same circumstances and conditions. Vicksburg v. Mullane, [106] Miss. [199], 63 So. [412], [50] L.R.A.(N.S.), [421].

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in its purview of equality exemptions from liabilities.[20] Furthermore, the equal protection guaranty is intended to secure equality of protection not only for all, but against all similarly situated. Protection is not protection unless it accomplishes this. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted to be worked against, a larger class.[1]

The Supreme Court has pointed out that the guaranty of equal protection of the laws is not one of equality of operation or application of state legislation upon all citizens of a state.[2] Hence, laws need not affect every man, woman, and child exactly alike in order to avoid the constitutional prohibition against inequality.[3] Equality of operation of statutes does not mean indiscriminate operation on persons merely as such, but on persons according to their circumstances.[4] Equal protection in its guaranty of like treatment to all similarly situated permits classification5 which is reasonable and not arbitrary6 and which is based upon substantial differences having a reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved.[7] The equal protection clause does not forbid discrimination with respect to things that are different.[8]

§ 470. Equality of Right.—

One of the principles on which this government was founded is that of equality of right, and this principle is emphasized in the equal protection clause of the Fourteenth Amendment.[9] The Constitution of the United States is no respecter of persons, and rich and poor are to be accorded equal rights under it.[10] Absolute equality before the law is also a

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[20] Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 S. Ct. 207; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Re Mallon, 16 Idaho, 737, 102 P. 374, 22 L.R.A.(N.S.) 1123. Annotation: 23 Am. St. Rep. 28. A law subjecting all citizens of the state to equal burdens and inflicting equal penalties on every person violating it is an equal law. State v. Dow, 70 N. H. 286, 47 A. 734, 53 L.R.A. 314.

[1] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375.

[2] Stebbins v. Riley, 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424, 44 A.L.R. 1454; Chicago v. Rhine, 363 Ill. 619, 2 N. E. (2d) 905,

[105] A.L.R. 1015.

[3] Sammarco v. Boysa, 193 Wis. 642, 215 N. W. 446, 55 A.L.R. 370.

[4] Stebbins v. Riley, 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424, 44 A.L.R. 1454; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Keningham v. Blake, 135 Md. 320, 109 A. 65, 8 A.L.R. 1066.

[5] See infra, § 476.

[6] See infra, § 480.

[7] See infra, § 481.

[8] Seattle Gas Co. v. Seattle, 291 U. S. 638, 78 L. ed. 1037, 54 S. Ct. 550; Puget Sound Power & L. Co. v. Seattle, 291 U. S. 619, 78 L. ed. 1025, 54 S. Ct. 542, rehearing denied in 292 U. S. 603, 78 L. ed. 1466, 54 S. Ct. 712.

[9] Concordia F. Ins. Co. v. Illinois, 292 U. S. 535, 78 L. ed. 1411, 54 S. Ct. 830; Seattle Gas Co. v. Seattle, 291 U. S. 638,

[78] L. ed. 1037, 54 S. Ct. 550; Puget Sound Power & L. Co. v. Seattle, 291 U. S. 619,

[78] L. ed. 1025, 54 S. Ct. 542, rehearing denied in 292 U. S. 603, 78 L. ed. 1466, 54 S. Ct. 712; Louis K. Liggett Co. v. Lee, 288 U. S. 517, 77 L. ed. 929, 53 S. Ct. 481, 85 A.L.R. 699; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; State v. Old Tavern Farm, 133 Me. 468, 180 A. 473,

[101] A.L.R. 810; Re Opinion of Justices, 220 Mass. 627, 108 N. E. 807, L.R.A.1917B, 1119; Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; State v. Pennoyer, 65 N. H. 113, 18 A. 878, 5 L.R.A. 709; Ex parte Leslie,

[87] Tex. Crim. Rep. 476, 223 S. W. 227, citing R. C. L.; Sammarco v. Boysa, 193 Wis. 642, 215 N. W. 446, 55 A.L.R. 370. Government is instituted for the benefit of all the people, and not for the benefit of any one class to the exclusion of others. Miller v. Des Moines, 143 Iowa, 409, 122 N. W. 226, 23 L.R.A.(N.S.) 815, 21 Ann. Cas. 207.

[10] McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L.R.A. 951, 90 Am. St. Rep. 440.

fundamental principle of state Constitutions.[11] The equality of rights protected by a provision of a state Constitution that government is instituted for the equal benefit,

security, and protection of the people is the same as that preserved by the Fourteenth Amendment to the Federal Constitution.[12] No legislative act is valid that is clearly obnoxious to the principle of equality of rights guaranteed by the Bill of Rights.[13]

The philosophy of equality of rights as bulwarked by constitutional guaranties is peculiar to the American system of constitutional law. It has been said that it would be in vain to look to the laws of England, written or unwritten, for a declaration or institution making all men equal before the law, for by the laws of that Kingdom from the earliest institutions down to the present time the whole framework of the government has been based on classes, titles, ranks, and precedence.[14]

It is important to note that the equality clause in the Fourteenth Amendment did not create any new or substantive legal rights or enlarge the general classification of rights of persons or things existing in any state under the laws thereof. It operated on them as it found them established, and it declared, in substance, that in whatever form they were in each state they should be held and enjoyed alike by all persons within its jurisdiction.[15] The clause as to the equal protection of the laws, moreover, does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority.[16]

When the government, under the Constitutions of the states and of the United States, secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it accomplished the end for which it is organized and performed all of the functions respecting social advantages with which it is endowed. It is generally recognized that legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences, and the attempt to do so can only result in accentuating the difficulties of the situation. If one race is inferior to another socially, the Constitution of the United States cannot put it upon the same plane with the other races living in this country.[17] The equal protection clause does not demand that laws operate with rigid sameness upon all persons within a state.[18] It guarantees equality, and not identity, of rights.[19] Some of the courts, in determining the nature of the equality required, have held that the equality demanded by the Constitution is equality of right, and not of enjoyment.[20]

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[11] Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831.

[12] Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189.

[13] State v. Conlon, 65 Conn. 478, 33 A. 519, 31 L.R.A. 55, 48 Am. St. Rep. 227; State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 101 A.L.R. 810; Beasley v. Cunningham, 171 Tenn. 334, 103 S. W. (2d) 18, 110 A.L.R. 306; Southern R. Co. v. Memphis, 126 Tenn. 267, 148 S. W. 662, 41 L.R.A.(N.S.) 828, Ann. Cas. 1913E, 153.

[14] State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

[15] State v. Leavitt, 105 Me. 76, 72 A. 875, 26 L.R.A.(N.S.) 799. See also infra, § 471.

[16] Louisville & N. R. Co. v. Malton, 218 U. S. 36, 54 L. ed. 921, 30 S. Ct. 676, 47 L.R.A.(N.S.) 84.

[17] Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; People ex rel. King v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232.

[18] See supra, § 469.

[19] Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765, 11 L.R.A. 828, 23 Am. St. Rep. 895.

[20] Chicago v. Rhine, 363 Ill. 619, 2 N. E. (2d) 905, 105 A.L.R. 1045; Re Opinion of Justices, 81 N. H. 566, 129 A. 117, 39 A.L.R. 1023; Thompson v. Kidder, 74 N. H. 89, 65 A. 392, 12 Ann. Cas. 948; State v. Aldrich, 70 N. H. 391, 47 A. 602, 85 Am. St. Rep. 631; State v. Dow, 70 N. H. 286, 47 A. 734, 53 L.R.A. 314; State v. Griffin, 69 N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139. The duty of protecting all citizens in the enjoyment of equality of rights was origi-

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§ 471. Effect of Fourteenth Amendment.—

By the Fourteenth Amendment all persons born or naturalized in the United States and subject to the jurisdiction thereof are made citizens of the United States and of the state wherein they reside; and the states are forbidden to deny to any person within their jurisdiction the equal protection of the laws.1 That amendment, in declaring that no state shall deprive any person of life, liberty, or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no 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; and all persons should be equally entitled to pursue their happiness and acquire and enjoy property.2

The primary object of the Fourteenth Amendment, in relation to the equal protection clause as to other clauses of § [1] of that amendment, was to secure to the colored race, then recently emancipated, the full enjoyment of its freedom.[3] It extends its protection, however, to all persons without regard to race, color, or class and prohibits any state legislation which has the effect of denying to any race, class, or individual the equal protection of the laws.[4]

In accordance with the very wording of the Fourteenth Amendment, Congress has the power by appropriate legislation to enforce the provision preventing any state from denying to any person within its jurisdiction the equal protection of the laws.[5] Such congressional legislation, however, must be

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nally assumed by the states and still remains with them. United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588. Since it is self-evident that unless all things are held in common some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960.

[1] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627; McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284; State v. Martin, 193 Ind. 120, 139 N. E. 282, 26 A.L.R. 1386; State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42.

[2] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; South Carolina ex rel. Phoenix Mut. L. Ins. Co. v. McMaster, 237 U. S. 63, 59 L. ed. 839, 35 S. Ct. 504; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Re Irish, 121 Kan. 72, 122 Kan. 33, 250 P. 1056, 61

A.L.R. 332; Aberdeen Sav. & L. Asso. v. Chase, 157 Wash. 351, 289 P. 536, 290 P. 697, 71 A.L.R. 232. See also supra, § 469.

[3] Nixon v. Herndon, 273 U. S. 536, 71 L. ed. 759, 47 S. Ct. 446; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 231, affirming 14 Utah, 71, 46 P. 756, 37 L.R.A. 103; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394. The object of the Fourteenth Amendment was undoubtedly to enforce the absolute equality of the two races before the law. Johnson v. Board of Education, 166 N. C. 468, 82 S. E. 832, L.R.A.1915A, 828. See CIVIL RIGHTS, Vol. 10, p. 898, § 4.

[4] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Kentucky v. Powers, 201 U. S. 1, 50 L. ed. 633, 26 S. Ct. 387, 5 Ann. Cas. 692; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 S. Ct. 977; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 S. Ct. 904; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Vigeant v. Postal Teleg.-Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867; State v. Dering, 84 Wis. 585, 54 N. W. 1104, 19 L.R.A. 858, 36 Am. St. Rep. 948.

[5] Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664.

corrective in nature—that is, such as may be necessary and proper for counteracting any laws which the states may adopt and enforce which are prohibited by the amendment. It is absurd to affirm that because the amendment forbids denial of the equal protection of the laws, therefore Congress may establish laws generally for the equal protection of persons.[6] At least, Congress has no power to legislate on subjects which are within the domain of state legislation.[7] The equal protection clause does not operate to change in any way the theory of the relations of the state and Federal Governments to each other and of both kinds of government to the people,[8] but leaves to the states the power to amend their laws so as to make them conform to the wishes of their citizens or to the exigencies of their social life.[9] It was not intended to bring within Federal control everything done by the state or by its instrumentalities that is simply illegal under the state laws, but only such acts by the states or their instrumentalities as are violative of rights secured by the Constitution of the United States.[10]

The Fourteenth Amendment does not protect property from every injurious or oppressive action by a state.[11] Furthermore, it affords no protection from the consequences of competition arising from state activity.[12]

§ 472. —

Relation between Due Process of Law and Equal Protection Clauses.—In a recent decision the Supreme Court has pointed out for the first time the probable line of demarcation between the extent of the due process clause and that of the equal protection clause. The court indicated that although the equal protection clause is associated in the Fourteenth Amendment with the due process clause and it is customary to consider them together and although they may overlap and a violation of one may at times involve the violation of the other, the spheres of protection they offer

are not coterminous.13 The requirement of due process tends to secure equality in that it demands a required minimum of protection of rights which is coupled with a spirit of equality in the administration of all governmental functions. The framers and adopters of the Fourteenth Amendment, however, were not content to depend upon a mere minimum secured by the due process clause or

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[6] Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601. The power to enforce by appropriate legislation the provision of the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws does not authorize Congress to pass a law making it a crime for two or more persons in a state to conspire to deprive any person of the equal protection of the laws, since the power of Congress is merely negative, affording protection against acts of the states, and does not extend to the passage of laws of a positive nature for the suppression of crime within the states. United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601.

[7] Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18.

[8] Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 S. Ct. 213; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930; 136 U. S. son v. Secretary of State, 92 Mich. 377, 52 N. W. 469, 16 L.R.A. 475, 31 Am. St. Rep. 587. Reasonable classification in state legislation implies action consistent with the legitimate interests of the state and these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283.

[9] Bolln v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 S. Ct. 287.

[10] Owensboro Waterworks Co. v. Owensboro, 200 U. S. 38, 50 L. ed. 361, 26 S. Ct. 249.

[11] Seattle Gas Co. v. Seattle, 291 U. S. 638, 78 L. ed. 1037, 54 S. Ct. 550; Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 78 L. ed. 1025, 54 S. Ct. 542, rehearing denied in 292 U. S. 603, 78 L. ed. 1466, 54 S. Ct. 712.

[12] Seattle Gas Co. v. Seattle, 291 U. S. 638, 78 L. ed. 1037, 54 S. Ct. 550; Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 78 L. ed. 1025, 54 S. Ct. 542, rehearing denied in 292 U. S. 603, 78 L. ed. 1466, 54 S. Ct. 712.

[13] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375.

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upon the spirit of equality which might not be insisted upon by local public opinion. They therefore embodied that spirit in a specific guaranty.[14]

Under the broad generalities of the principles laid down in the earlier cases, not much, if any distinction had been drawn between the scopes of the due process and equal protection clauses. The courts pointed out the extent to which equality of treatment was essential to due process, but did not indicate the further extent of protection afforded by the equal protection clause alone. Due process of law as guaranteed by the Fourteenth Amendment was defined in terms of the equal protection of the laws—that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.[15] Some decisions indicated that a test with respect to the requirement of due process of law seemed to be that if the law under consideration operated equally upon all who came within the class to be affected, embracing all persons who were or might be in like situation and circumstances, and the designation of the class was reasonable, not unjust, capricious, or arbitrary, but based upon a real distinction, and the law operated uniformly, and that if, added to this,

the law was enforced by usual and appropriate methods, the requirement as to "due process of law" was satisfied.[16] It was said by the Federal Supreme Court that legislation was not open to the charge of depriving one of his rights without due process of law if such legislation was general in its operation upon the subjects to which it related and was enforceable in the usual modes adapted to the nature of the case.[17] It was even stated that in order that a statute might comply with the necessary requirements as to due process of law, it could not violate the limitations as to classification imposed by the constitutional inhibition as to the denial of the equal protection of the laws.[18] The rules of these authorities are probably correct in declaring that due process demands equality. As recently pointed out by the Supreme Court, however, the equality demanded by the equal protection clause is not a mere generality or a minimum, but is specific and more extensive than that demanded by due process.[19]

Certain dicta of the Supreme Court in tax cases20 and the application to

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[14] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375.

[15] Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Minder v. Georgia, 183 U. S. 559, 46 L. ed. 328, 22 S. Ct. 224; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 S. Ct. 1031; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 S. Ct. 577; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 S. Ct. 224; Barrington v. Barrington, 206 Ala. 192, 89 So. 512, 17 A.L.R. 789; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; People v. Gordon, 274 Ill. 462, 113 N. E. 864, citing R. C. L.; State v. Haun, 61 Kan. 144, 59 P. 340, 47 L.R.A. 369; State ex rel. Civello v. New Orleans, 154 La. 271, 97 So. 440, 33 A.L.R. 260; Ivie v. Bailey, 319 Mo. 474, 5 S. W. (2d) 60, 57 A.L.R. 881; State v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L.R.A. 265, 77 Am. St. Rep. 765; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; Ex parte Sizemore, 110 Tex. Crim. Rep. 232, 8 S. W. (2d) 134, 59 A.L.R. 430. "Due process of law and the equal protection of the laws" are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government. Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L.R.A.(N.S.) 418. As to due process of law generally, see infra, §§ 567 et seq.

[16] Barrington v. Barrington, 206 Ala. 192, 89 So. 512, 17 A.L.R. 789; State v. Hogan, 63 Ohio St. 202, 58 N. E. 572, 52 L.R.A. 863, 81 Am. St. Rep. 626.

[17] Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Barrington v. Barrington, 206 Ala. 192, 89 So. 512, 17 A.L.R. 789; State v. Hogan, 63 Ohio St. 202, 58 N. E. 572, 52 L.R.A. 863, 81 Am. St. Rep. 626.

[18] Barrington v. Barrington, 206 Ala. 192, 89 So. 512, 17 A.L.R. 789.

[19] See supra, notes 13, 14, this section.

[20] See infra, § 518.

congressional legislation of the same rules as to classification which are applied to determine the validity of state legislation under the equal protection clause of the Fourteenth Amendment1 indicate that the Supreme Court often tests the validity of Federal legislation under the due process clause of the Fifth Amendment by the same rules of equality that are employed to test the validity of state legislation under the Fourteenth Amendment.

§ 473. Agencies Bound.—The equal protection clause of the Fourteenth Amendment is a restriction on the state governments and operates exclusively upon

them.[2] It does not extend to authority exercised by the government of the United States3 and does not purport to do so.[4]

The equal protection clause was designed as a safeguard against acts of the state, and not against the conduct of private individuals or persons.[5] It does not add anything to the rights which one citizen has against another under the Constitution.[6] Hence, the enforcement of a covenant in a deed against the occupation of property by persons of a particular race7 or the exclusion of persons of a particular race from the right to burial in cemeteries owned by private corporations8 does not violate the equal protection clause. A rule of a political party limiting membership to white voters, the effect of which is to exclude negroes from voting at primaries, is not in violation of this clause, even though nominees of the party are ordinarily elected at the general election, where the holding of primary elections is wholly optional, and the state appoints no officers to hold them, and does not pay the cost

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[1] See National Labor Relations Bd. v. Jones & L. Steel Corp. 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615, 108 A.L.R. 1352, and District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 S. Ct. 560.

[2] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Robinson v. Holman, 181 Ark. 428, 26 S. W. (2d) 66, 70 A.L.R. 1480, writ of certiorari denied in 282 U. S. 804, 75 L. ed. 722, 51 S. Ct. 88; Minneapolis, St. P. & S. Ste. M. R. Co. v. Washburn Lignite Coal Co. 40 N. D. 69, 168 N. W. 634, 12 A.L.R. 744, writ of error dismissed in 254 U. S. 370, 65 L. ed. 310, 41 S. Ct. 140.

[3] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375. Inasmuch as § 1 of the Fourteenth Amendment applies only to action by the states and imposes no inhibition against the action of the Federal Government, the question whether the Selective Draft Act of 1917, in exempting from military service certain persons mentioned therein, contained such arbitrary discriminations as to render it class legislation did not arise. Annotation: 7 B. R. C. 598. As to testing Federal legislation under the due process clause of the Fifth Amendment by rules of equality, see supra, § 472.

[4] Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 S. Ct. 616; People v. Daniels, 6 Utah, 288, 22 P. 159, 5 L.R.A. 444.

[5] Iowa-Des Moines Nat. Bank v. Bennett, 284 U. S. 239, 76 L. ed. 265, 52 S. Ct. 133; Corrigan v. Buckley, 271 U. S. 323, 70 L. ed. 969, 46 S. Ct. 521; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; Virginia v. Rives, 100 U. S. 313, 3 S. Ct. 18; 667; Los Angeles Invest. Co. 313, 25 L. ed. Cal. 680, 186 P. 596, 9 A.L.R. v. Gary, 181 115; People ex rel. Gaskill v. Forest Home Cemetery Co. 258 Ill. 36, 101 N. E. 219, L.R.A.1917B, 946, Ann. Cas. 1914B, 277, writ of error dismissed in 238 U. S. 606, 59 L. ed. 1486, 35 S. Ct. 602; Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 516, 63 N. E. 220, 57 L.R.A. 761; Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641, L.R.A. 1916B, 1201, Ann. Cas. 1916D, 1248; Porter v. Barrett, 233 Mich. 373, 206 N. W. 532, 42 A.L.R. 1267; Younger v. Judah, 111 Mo. 303, 19 S. W. 1109, 16 L.R.A. 558, 33 Am. St. Rep. 527; Bullock v. State, 65 N. J. L. 557, 47 A. 62, 86 Am. St. Rep. 668; Minneapolis, St. P. & S. Ste. M. R. Co. v. Washburn Lignite Coal Co. 40 N. D. 69, 168 N. W. 634, 12 A.L.R. 744, writ of error dismissed in 254 U. S. 370, 65 L. ed. 310, 41 S. Ct. 140. See also United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601, in which it is said as a dictum that the only way a private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder. Annotation: 9 A.L.R. 121, s. 38 A.L.R. 1185; and 66 A.L.R. 532.

[6] United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

[7] Los Angeles Invest. Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A.L.R. 115; Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641, L.R.A.1916B, 1201, Ann. Cas. 1916D, 1248. Annotation: 9 A.L.R. 121, s. 38 A.L.R. 1185; and 66 A.L.R. 532.

[8] People ex rel. Gaskill v. Forest Home Cemetery Co. 258 Ill. 36, 101 N. E. 219, L.R.A.1917B, 946, Ann. Cas. 1914B, 277, writ of error dismissed in 238 U. S. 606, 59 L. ed. 1486, 35 S. Ct. 602. Annotation: L.R.A.1917B, 948.

thereof.[9] It is well established that the equal protection clause like other similar clauses in the Thirteenth, Fourteenth, and Fifteenth Amendments in no way comprises a code of remedial law according to which reformation may or must be made for every temporary denial of a right secured by it. The clause spends its force in permitting state action to be set aside where such action involves a violation of the Fourteenth Amendment and where the right is sought to be vindicated in ordinary channels. The remedial law, as between individual suitors, is left entirely untouched and remains subject to such imperfections as are inherent in a judicial system that is compelled to respect practical considerations in measuring individual rights. Theoretically, there would be no occasion for fastening a liability upon an individual defendant because a state had violated the amendment; the amendment contemplates that such an action can and should be entirely prevented by a resort to appropriate legal remedies.[10] Thus, when a statute prescribing rates is held invalid under the Federal Constitution because of its confiscatory character, it does not follow that a shipper is obliged, as a matter of law, to make reparation to the carrier.[11]

The inhibitions of the Fourteenth Amendment include all the departments of state government, the judicial as well as the political.[12] A similar extent is accorded to like state constitutional provisions. A constitutional mandate to maintain equality before the law and equal laws rests upon the judicial department of government with as much force as upon the other departments.[13]

The general rule is well settled that the provisions of the equal protection clause are not confined to the action of the state through its legislature or through the executive or judicial authority. They relate to and cover all the instrumentalities by which the state acts, and whoever, by virtue of a public position under a state government, deprives another of any right protected by that amendment against deprivation by the state violates the constitutional inhibition; and since he acts in the name of the state and for the state and is clothed with the state's powers, his act is that of the state.[14] Hence, the prohibitions include every person, whether natural or juridical, who is the re-

[9] Robinson v. Holman, 181 Ark. 428, 26 S. W. (2d) 66, 70 A.L.R. 1480, writ of certiorari denied in 282 U. S. 804, 75 L. ed. 722, 51 S. Ct. 88.

[10] Minneapolis, St. P. & S. Ste. M. R. Co. v. Washburn Lignite Coal Co. 40 N. D. 69, 168 N. W. 634, 12 A.L.R. 744, writ of error dismissed in 254 U. S. 370, 65 L. ed. 310, 41 S. Ct. 140.

[11] Ibid.

[12] Ladner v. Siegel Co. 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172.

[13] Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407.

[14] Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 S. Ct. 312; Raymond v. Chicago Edison Co. 207 U. S. 42, 52 L. ed. 90, 28 S. Ct. 14, 13 Ann. Cas. 757; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 516, 63 N. E. 220, 57 L.R.A. 761; George v. Portland, 114

Or. 418, 235 P. 681, 39 A.L.R. 341; Ladner v. Siegel Co. 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172; Juarez v. State, 102 Tex. Crim. Rep. 297, 277 S. W. 1091, citing R. C. L. If an individual is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded. McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 59 L. ed. 169, 35 S. Ct. 69. In Standard Computing Scale Co. v. Farrell, 249 U. S. 571, 63 L. ed. 780, 39 S. Ct. 380, it was held that a suit to enjoin the enforcement of a so-called specification promulgated by a state official, on the ground that its enforcement unconstitutionally interfered with private business in disregard of the guaranty as to equal protection of the laws was properly dismissed, where it was found that such specification did not have the force of law, its function being educational, or at most advisory.

pository of state power.[15] All governmental agencies authorized by the state,[16] particularly municipal corporations,[17] are within the purview of the clause.

A case where one in possession of state power uses that power to accomplish the doing of wrongs which are forbidden by the Fourteenth Amendment is within the purview of that amendment, even though the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer.[18] Hence, the rights protected by the equal protection clause may be invaded by the acts of a state officer under color of state authority, even though he not only exceeded his authority, but also disregarded special commands of the state law.[19]

§ 474. Persons Protected.—

The constitutional inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class from being singled out as a special subject of hostile or discriminating legislation.[20] It relates to individuals,[1] but its protective scope goes much further, for it forbids the legislature to select any person, natural or artificial, and impose discriminations not cast upon others similarly situated.[2] The fact that corporations are "persons" within the meaning of this clause is so well settled as to be open to no question.[3] Declaring a business trust to be a corporation, however, denies to no one the equal protection of the laws.[4]

As a general rule, a municipal corporation, being a creature of the state, cannot invoke the equal protection clause against an act of the state legislature.[5] The legislature is not precluded from putting a burden upon a municipality because it may result in incidental benefit to another.[6] Moreover, a

state is not compelled by the Federal Constitution to grant to all its municipal corporations the same territorial extent or the same powers and duties.[7] It has been held, however, that the legislature cannot arbitrarily classify municipal corporations, but that there must be some reasonable relation to the situation of the municipalities classified and the objects to be attained.[8] The power of the state to impose liability for damage and injury to property from riots and mobs includes the power to make a classification of the subordinate municipalities upon which the responsibilities may be imposed; it is a matter

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[15] Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 S. Ct. 312.

[16] George v. Portland, 114 Or. 418, 235 P. 681, 39 A.L.R. 341.

[17] Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 S. Ct. 312; George v. Portland, 114 Or. 418, 235 P. 681, 39 A.L.R. 341. As to the principle of equality which is required in municipal legislation, see MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 812, § 117].

[18] Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 S. Ct. 312.

[19] Iowa-Des Moines Nat. Bank v. Bennett, 284 U. S. 239, 76 L. ed. 265, 52 S. Ct. 133.

[20] Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 8 S. Ct. 737; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965.

[1] McCabe v. Atchison, T. & S. F. R. Co.

[235] U. S. 151, 59 L. ed. 169, 35 S. Ct. 69.

[2] Atchison, T. & S. F. R. Co. v. Matthews,

[174] U. S. 96, 43 L. ed. 909, 19 S. Ct. 609.

[3] See CORPORATIONS [Also 7 R. C. L. p. 31, § 8].

[4] State ex rel. Colvin v. Paine, 137 Wash. 566, 243 P. 2, 247 P. 476, 46 A.L.R. 165.

[5] Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431. See also Trenton v. New Jersey, 262 U. S. 182, 67 L. ed. 937,

[43] S. Ct. 534, 29 A.L.R. 1471.

[6] Joslin Mfg. Co. v. Providence, 262 U. S. 668, 67 L. ed. 1167, 43 S. Ct. 684.

[7] Williams v. Eggleston, 170 U. S. 304,

[42] L. ed. 1047, 18 S. Ct. 617. Towns are not denied the equal protection of the laws because the legislature puts them in a class by themselves, organized into a single municipal corporation and separated from other towns in the state by being subjected to different control in respect to highways. Ibid.

[8] People ex rel. Hatfield v. Grover, 258 Ill. 124, 101 N. E. 216, Ann. Cas. 1914B, 212.

for the exercise of legislative discretion, and the equal protection of the law is not denied where the classification is not so unreasonable and extravagant as to be a mere arbitrary mandate.[9]

The rule is well settled that in order for a person to urge that a law is discriminatory, he must show that he himself belongs to the affected class,[10] and cannot complain merely because the law discriminates against other persons less favorably situated than himself.[11] Furthermore, a statute under which those included and those excepted are each at liberty to place themselves in

the same position as the other is, if a discrimination at all, a purely academic

one.[12]

§ 475. —

"Within Its Jurisdiction."—By the very wording of the equal protection clause the state is forbidden to deny to any person "within its jurisdiction" the equal protection of the laws.13 The Supreme Court has pointed

out that this phrase places a definite scope upon the inhibition against legislation by a state,[14] and that the prohibition of the equal protection clause

manifestly relates only to the denial by the state of equal protection to persons "within its jurisdiction."[15]

One court has taken the narrow view that the equality clause applies only

to persons physically present within the jurisdiction of the state the protection of the laws of which they invoke.[16] The words "within its jurisdiction"

are, however, comprehensive.[17] A person, natural or artificial, who has acquired a large amount of property in a state by its authority and in compliance with its laws, is subject to the jurisdiction of the courts of the state, has

paid taxes upon his property, and has been carrying on business in the state

is within its jurisdiction within the contemplation of the equal protection

clause of the Fourteenth Amendment.[18] A person who goes into a state for

the obviously lawful purpose of repossessing himself, by a permissible action

in the courts of the state, of specific personal property unlawfully taken out

of his possession elsewhere and fraudulently carried into the state is within

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[9] Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215, 32 S. Ct. 92, Ann. Cas. 1913B, 1349. A city is not denied the equal protection of the laws by a statute imposing upon it a liability for damage to property within its limits, caused by a mob or riot, because when property damaged under like circumstances is situated in a village or other incorporated town, the liability is imposed upon the county instead of upon such village or town. Ibid.

[10] See Vol. 11, p. 759, § 114.

[11] See Vol. 11, p. 757, § 113.

[12] Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

[13] United States Constitution, Fourteenth Amendment. 14 "Observe that the prohibition against the deprivation of property without due process of law is not qualified by the words 'within its jurisdiction' while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument." Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165.

[15] Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 935; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; Dolley v. Abilene Nat. Bank (C. C. A. 8th) 179 F. 461, 32 L.R.A.(N.S.) 1065, affirmed in 228 U. S. 1, 57 L. ed. 707,

[33] S. Ct. 408. See also State ex rel. Atlantic Horse Ins. Co. v. Blake, 241 Mo. 100,

[144] S. W. 1094, Ann. Cas. 1913C, 1283. In Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064, the Supreme Court stated that the equal protection clause is universal in its application "to all persons within the territorial jurisdiction." A nonresident mortgagee is not within the jurisdiction of the state merely because he has a mortgage on property therein, so as to be deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution, by denying him the right to participate on terms of equality in the distribution of the assets of an insolvent foreign corporation. Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 935.

[16] State v. Travelers Ins. Co. 70 Conn. 590, 40 A. 465, 66 Am. St. Rep. 138.

[17] Kentucky Finance Corp. v. Paramount Auto Exch. Corp. 262 U. S. 544, 67 L. ed. 1112, 43 S. Ct. 636.

[18] Southern R. Co. v. Greene, 216 U. S. 400,

[54] L. ed. 536, 30 S. Ct. 287, 17 Ann. Cas. 1247.

its jurisdiction for all purposes of such undertaking.[19] A corporation not created in a state or doing business there under conditions that subject it to process issuing from the courts thereof at the instance of suitors is not, under the equal protection clause, within the jurisdiction of that state.[20]

B. CLASSIFICATION

1. IN GENERAL

§ 476. Generally.—

The rule is well settled that a state may classify persons and objects for the purpose of legislation1 and pass laws applicable only to persons or objects within a designated class,2 for the purpose of obtaining revenue, applying the police power, strictly so-called, or increasing the industries of the state, developing its resources, or adding to its wealth and prosperity.3 As a matter of fact, as some of the courts have remarked, all legislation involves classification;4 from the earliest days classification has been made by legislatures whereby some people have rights or suffer burdens which others do not.5 Class legislation discriminating against some and favoring others is what is prohibited by the equal protection clause of the Fourteenth Amendment to the Constitution.6

The equal protection clause of the Fourteenth Amendment does not intend to take from the states the right and power to classify the subjects of legis-

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[19] Kentucky Finance Corp. v. Paramount Auto Exch. Corp. 262 U. S. 544, 67 L. ed. 1112, 43 S. Ct. 636.

[20] See FOREIGN CORPORATIONS [Also 12 R. C. L. p. 22, § 13].

[1] District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 S. Ct. 560; Thompson v. Kentucky, 209 U. S. 340, 52 L. ed. 822, 28 S. Ct. 533; St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 26 S. Ct. 554, 5 Ann. Cas. 909; State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 67; Bon Homme County v. Berndt, 13 S. D. 309, 83 N. W. 333, 50 L.R.A. 351.

[2] Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; People v. Schenck, 257 Ill. 384, 100 N. E. 994, 44 L.R.A. (N.S.) 46, Ann. Cas. 1914A, 643.

[3] Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210.

[4] Ex parte Lewinsky, 66 Fla. 324, 63 So. 577, 50 L.R.A.(N.S.) 1156; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210; Nitka v. Western U. Teleg. Co. 149 Wis. 105, 135 N. W. 492, 49 L.R.A.(N.S.) 337, Ann. Cas. 1913C, 863. The greater part of all legislation is discriminatory in the extent to which it operates, the manner in which it applies, or the objects sought to be attained by it. Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A. 1917A, 495, Ann. Cas. 1917E, 210.

[5] Bratberg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1338; State ex rel. Kellogg v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252.

[6] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 S. Ct. 894; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 S. Ct. 207; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 S. Ct. 350; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; Dolley v. Abilene Nat. Bank (C. C. A. 8th) 179 F. 461, 32 L.R.A.(N.S.) 1065, affirmed in 228 U. S. 1, 57 L. ed. 707, 33 S. Ct. 409; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; State Sav. & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675, affirmed in 238 U. S. 611, 59 L. ed. 1488, 35 S. Ct. 792; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; Casparis Stone Co. v. Industrial Bd. 278 Ill. 77, 115 N. E. 822, citing R. C. L.; People v. Gordon, 274 Ill. 462, 113 N. E. 864, citing R. C. L.; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; State v. Latham, 115 Me. 176, 98 A. 578, L.R.A. 1917A, 480; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Baltimore v. Hampton Court Co. 138 Md. 271, 113 A. 850, 15 A.L.R. 304; Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407; Vigeant v. Postal Teleg.-Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867; Davidow v. Wadsworth Mfg. Co. 211 Mich. 90, 178 N. W. 776, 12 A.L.R. 605; Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 384, 65 N. W. 652, 31 L.R.A. 553; State v. Baskowitz, 250 Mo. 82, 156 S. W. 945, Ann. Cas. 1915A, 477; Jones v. Union County, 63 Or. 566, 127 P. 781, 42 L.R.A.(N.S.) 1035; State v. Dering, 84 Wis. 585, 54 N. W. 1104, 19 L.R.A. 858, 36 Am. St. Rep. 948.

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lation.[7] It does not prohibit[8] or prevent classification,[9] provided such classification of persons and things is reasonable for the purpose of legislation,[1] is

[7] Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 S. Ct. 167; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 S. Ct. 784; Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A.L.R. 933; Norris v. Lincoln, 93 Neb. 658, 142 N. W. 114, Ann. Cas. 1914B, 1194.

[8] Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 538, rehearing denied in 295 U. S. 767, 79 L. ed. 1708, 55 S. Ct. 647.

[9] Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838; Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476, affirming 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435; Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54; Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 538, rehearing denied in 295 U. S. 767, 79 L. ed. 1708, 55 S. Ct. 647; Hart Refineries v. Harmon, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188; F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 64 L. ed. 989, 40 S. Ct. 560; Farmers Irrig. Dist. v. Nebraska, 244 U. S. 325, 61 L. ed. 1168, 37 S. Ct. 630; Lake Shore & M. S. R. Co. v. Clough, 242 U. S. 375, 61 L. ed. 374, 37 S. Ct. 144; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59 L. ed. 1199, 35 S. Ct. 675, L.R.A.1915E, 953; South Carolina ex rel. Phoenix Mut. L. Ins. Co. v. McMaster, 237 U. S. 63, 59 L. ed. 839, 35 S. Ct. 504; Miller v. Wilson, 236 U.

S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 S. Ct. 167; McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284; Vigeant v. Postal Teleg.-Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867; Riter-Conley Mfg. Co. v. Wryn, 70 Okla. 247, 174 P. 230, 11 A.L.R. 859; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584. Diversity in legislation to meet diversities in conditions is permitted under the Fourteenth Amendment. State v. Latham, 115 Me. 176, 98 A. 578, L.R.A.1917A, 480.

[1] United States.—Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Alward v. Johnson, 282 U. S. 509, 75 L. ed. 496, 51 S. Ct. 273, 75 A.L.R. 9; Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 50 S. Ct. 299, 68 A.L.R. 434; Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 72 L. ed. 927, 48 S. Ct. 553; Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, 48 S. Ct. 423; Stebbins v. Riley, 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424, 44 A.L.R. 1454; F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 64 L. ed. 989, 40 S. Ct. 560; Farmers Irrig. Dist. v. Nebraska, 244 U. S. 325, 61 L. ed. 1168, 37 S. Ct. 630; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59 L. ed. 1199, 35 S. Ct. 675, L.R.A.1915E, 953; Denver v. New York Trust Co. 229 U. S. 123, 57 L. ed. 1101, 33 S. Ct. 657; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 S. Ct. 692; Wil- liams v. Walsh, 222 U. S. 415, 56 L. ed. 253, 32 S. Ct. 137; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 S. Ct. 676, 47 L.R.A.(N.S.) 84; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 S. Ct. 560; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; Magoun v. Illinois Trust & S. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Kane v. Erie R. Co. (C. C. A. 6th) 133 F. 681, 68 L.R.A. 788. Florida.—Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A. (N.S.) 126, 16 Ann. Cas. 1234. Illinois.—Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Lueth v. Goodknecht, 345 Ill. 197, 177 N. E. 690, 79 A.L.R. 780; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; Casparis Stone Co. v. Industrial Bd. 278 Ill. 77, 115 N. E. 822, citing R. C. L.; People v. Gordon, 274 Ill. 462, 113 N. E. 864, citing R. C. L. Indiana.—McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Baldwin v. State, 194 Ind. 303, 141 N. E. 343, citing R. C. L. Iowa.—McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A. (N.S.) 706. Kentucky.—Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219. Louisiana.—State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574. Massachusetts.—Vigeant v. Postal Teleg.-Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867. Nebraska. — State ex rel. Sorensen v. First State Bank, 123 Neb. 502, 240 N. W. 747, 79 A.L.R. 576; Norris v. Lincoln, 93 Neb. 658, 142 N. W. 114, Ann. Cas. 1914B, 1194; Farmers' etc. Ins. Co. v. Dobney, 62 Neb. 213, 86 N. W. 1070, 97 Am. St. Rep. 624. New Hampshire.—Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067. New Jersey.—Wanser v. Hoos, 60 N. J. L. 482, 38 A. 449, 64 Am. St. Rep. 600. North Dakota.—Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; Bratberg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1338. Ohio.—Bloomfield v. State, 86 Ohio St. 253, 99 N. E. 309, 41 L.R.A.(N.S.) 726. Oregon.—Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136. Pennsylvania.—Com. use of Titusville v. Clark, 195 Pa. 634, 46 A. 286, 57 L.R.A. 348, 86 Am. St. Rep. 694, affirmed in 184 U. S. 329, 46 L. ed. 569, 22 S. Ct. 382; Juniata Limestone Co. v. Fagley, 187 Pa. 193, 40 A. 977, 42 L.R.A. 442, 67 Am. St. Rep. 579. South Carolina.—Witt v. People's State Bank, 166 S. C. 1, 164 S. E. 306, 83 A.L.R. 1063. Texas. — Ex parte Sepulveda, 108 Tex. Crim. Rep. 533, 2 S. W. (2d) 445, citing R. C. L.; Fletcher v. Bordelon (Tex. Civ. App.) 56 S. W. (2d) 313, citing R. C. L.;

based on proper and justifiable distinctions, considering the purpose of the law,[2] is not clearly arbitrary,[3] and is not a subterfuge to shield one class or unduly to burden another or to oppress unlawfully in its administration.[4] Proper classification is distinctly contemplated by other than those guarantees.

Provisions of the Federal or state Constitutions.[5] Where the Constitution ing equality may affect legislative classification.[6] Where the Constitution makes a classification, a different one cannot be made by the legislature.[7] Conversely, if the Constitution expressly sanctions a classification, it cannot be held invalid. Hence, a classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.[8] Finally, a classification designed to accord with superior constitutional requirements with a view to avoid- sonable. Thus, a classification adopted in a state statute with a view to avoiding conflict with the commerce clause of the Federal Constitution cannot be deemed arbitrary.[9]

§ [477]. Size.—The general rule is well settled that legislation which, in

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[2] Waid v. Ft. Worth (Tex. Civ. App.) 258 S. W. 114, citing Schnek (Tex. Civ. App.) 258 D. C. R. Co. v. Frazier (Tex. Civ. App.) 191 S. W. 803, citing R. v. Fisher, 137 Va. 75,

[119] S. E. 259, citing R. C. L. Virginia.—Roanoke v. R. C. L. Northern P. Washington.—Archibald v. Northern P. R. Co. 108 Wash. 97, 183 P. 95, citing R. C. L.; State v. Bowen, 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625. Wisconsin.—Julien v. Model Bldg. Loan & Invest. Asso. 116 Wis. 79, 92 N. W. 561, 61 L.R.A. 668. Wyoming.—State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819. A constitutional prohibition of class legis- lation does not preclude the making of a reasonable classification of persons or things for the purpose of legislation. Boli- var Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271. The equal protection clause of the Four- teenth Amendment does not take from the state the power to classify in the adoption of police laws but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis and, there- fore, is purely arbitrary. Whitney v. Cali- fornia, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; New Orleans v. Calamarl, 150 La. 737, 91 So. 172, 22 A.L.R. 106; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; Witt v. People's State Bank,

[166] S. C. 1, 164 S. E. 306, 83 A.L.R. 1063; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dis- missed in 239 U. S. 453, 60 L. ed. 437, 36 S. Ct. 161; Salt Lake City v. Industrial Commission, 58 Utah, 314, 199 P. 152, 18 A.L.R. 259; Bowman v. Virginia State En- tomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121. As to reasonableness of classification, see infra, § 480.

[2] Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 S. Ct. 676, 47 L.R.A.(N.S.) 84; Chicago, M. & St. P. R. Co. v. Westby (C. C. A. 8th) 178 F. 619, 47 L.R.A.(N.S.) 97; Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158; People v. Schenck, 257 Ill. 384, 100 N. E. 994, 44 L.R.A. (N.S.) 46, Ann. Cas. 1914A, 1129; Cincin- nati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 65; Selvage v. Talbott, 175 Ind. 648,

[95] N. E. 114, 33 L.R.A.(N.S.) 973, Ann. Cas. 1913C, 724; Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A.(N.S.) 1190; Dietch v. Jackson, 170 Md. 251, 183 A. 534, citing R. C. L.; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Bloomfield v. State, 86 Ohio St. 253, 99 N. E. 309, 41 L.R.A.(N.S.) 726, Ann. Cas. 1913D, 629; Upham v. Bramwell, Ann. Cas. 597, 209 P. 100, 25 A.L.R. 919; Flem-

[105] Or. 597, 209 P. 100, 25 A.L.R. 919; Flem- ing v. L.R.A.(N.S.) 493, Ann. Cas. 1913D, 1086; State v. Nashville, C. & St. L. R. Co.

[124] Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805; Archibald v. Northern P. R. Co. 108 Wash. 97, 183 P. 95, citing R. C. L. Annotation: Ann. Cas. 1914A, 1163. As to proper distinctions for classification, see infra, § 481.

[3] Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396.

[4] Frazier v. State Tax Commission, — Ala. — 175 So. 402, 110 A.L.R. 1479.

[5] Sanders v. Com. 117 Ky. 1, 77 S. W. 358,

[1] L.R.A.(N.S.) 932, 111 Am. St. Rep. 219; State v. Broadbelt, 89 Md. 565, 43 A. 771,

[45] L.R.A. 433, 73 Am. St. Rep. 201; Brat- berg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1333.

[6] See infra, notes 7-9, this section.

[7] Brewer v. McClelland, 144 Ind. 423, 32 N. E. 299, 17 L.R.A. 845 (constitutional pro- visions classifying qualifications of voters).

[8] State Bd. of Equalization v. Young's Market Co. 299 U. S. 59, 81 L. ed. 38, 57 S. Ct. 77, rehearing denied in 299 U. S. 623, 81 L. ed. 458, 57 S. Ct. 229 (imposing state li- cense tax for privilege of importing beer).

[9] Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643, 52 S. Ct. 273, 79 A.L.R. 546 (per- mitting tobacco advertising in newspapers and magazines). Annotation: 79 A.L.R. 551.

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carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the prohibition of the Fourteenth Amendment.[10] The mere fact that legislation is based on a classification and is made to apply only to a certain limited group of persons, and not to others, does not affect its validity, if it is so made that all persons subject to its terms are treated alike under similar circumstances and conditions.[11] Hence, a statute or ordinance depriving one of lib-

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[10] United States.—State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Mountain Timber Co. v. Washington, 243 U. S. 219,

[61] L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 S. Ct. 246; Wil- liams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 S. Ct. 493; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 S. Ct. 784; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 S. Ct. 894; McPherson v. Black- er, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Minneapolis & St. L. R. Co. v. Beckwith,

[129] U. S. 26, 32 L. ed. 585, 9 S. Ct. 207; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 S. Ct. 350; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Cin- cinnati, N. O. & T. P. R. Co. v. Kentucky,

[115] U. S. 321, 29 L. ed. 414, 6 S. Ct. 57; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Dolley v. Abilene Nat. Bank (C. C. A. 8th) 179 F. 461, 32 L.R.A. (N.S.) 1065, affirmed in 228 U. S. 1, 57 L. ed. 707, 33 S. Ct. 409; Fidelity & C. Co. v. Freeman (C. C. A. 6th) 109 P. 847, 54 L.R.A. 630. Alabama.—Miller v. Birmingham, 151 Ala. 469, 44 So. 388, 125 Am. St. Rep. 31. Arkansas.—Arkansas Stave Co. v. State,

[94] Ark. 27, 125 S. W. 1001, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103. California.—Pacific Coast Dairy v. Police Ct. 214 Cal. 668, 8 P. (2d) 140, 80 A.L.R. 1217; State Sav. & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A. 1915D, 675, affirmed in 238 U. S. 611, 59 L. ed. 1488, 35 S. Ct. 792. Delaware.—Van Winkle v. State, 4 Boyce, 578, 91 A. 385, Ann. Cas. 1916D,

104. Florida.—Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965. Georgia.—Cooper v. Rollins, 152 Ga. 588,

[110] S. E. 726, 20 A.L.R. 1105. Illinois.—Lueth v. Goodknecht, 345 Ill. 197, 177 N. E. 690, 79 A.L.R. 780. Indiana.—Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; State v. Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 10 Ann. Cas. 939; Cleve- land, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 33 N. E. 421, 18 L.R.A. 729. Iowa.—State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151. Maine.—State v. Leavitt, 105 Me. 76, 72 A. 875, 26 L.R.A.(N.S.) 799; State v. Mont- gomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386. Maryland.—Baltimore v. Hampton Court Co. 133 Md. 271, 113 A. 850, 15 A.L.R. 304; State v. Broadbelt, 89 Md. 565, 43 A. 771,

[45] L.R.A. 433, 73 Am. St. Rep. 201. Massachusetts.—Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407. Michigan.—People's Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N. W. 170, 69 A.L.R. 1024; Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515. Minnesota.—Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 384, 65 N. W. 652, 31 L.R.A. 553. Missouri.—State v. Baskowitz, 250 Mo. 82, 156 S. W. 945, Ann. Cas. 1915A, 477. North Carolina.—Broadfoot v. Fayette- ville, 121 N. C. 418, 28 S. E. 515, 39 L.R.A. 245, 61 Am. St. Rep. 668. North Dakota.—Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; Bratberg v. Advance-Rumely Thresher Co.

[61] N. D. 452, 238 N. W. 552, 78 A.L.R. 1333. Oregon.—Jones v. Union County, 63 Or. 566, 127 P. 781, 42 L.R.A.(N.S.) 1035. Pennsylvania.—Philadelphia v. Braben- der, 201 Pa. 574, 51 A. 374, 58 L.R.A. 220. South Carolina.—Johnson, L. & Co. v. Spartan Mills, 68 S. C. 339, 47 S. E. 695, 1 Ann. Cas. 409; Porter v. Charleston & S. R. Co. 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670. Texas.—Ex parte Sizemore, 110 Tex. Crim. Rep. 232, 8 S. W. (2d) 134, 59 A.L.R. 430. Utah.—Steed v. Harvey, 18 Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789; Brim v. Jones, 11 Utah, 200, 39 P. 825, 29 L.R.A. 97, affirmed in 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282. Wisconsin.—State v. Dering, 84 Wis. 585,

[54] N. W. 1104, 19 L.R.A. 858, 36 Am. St. Rep. 948. Wyoming.—State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819.

[11] New York ex rel. Bryant v. Zimmer- man, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282, affirming

[11] Utah, 200, 39 P. 825, 29 L.R.A. 97; Mc- Pherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 S. Ct. 192; Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 S. Ct. 1086; Richmond, F. & P. R. Co. v. Rich- mond, 96 U. S. 529, 24 L. ed. 734; Foster v. Police Comrs. 102 Cal. 483, 37 P. 763, 41 Am. St. Rep. 194; Atlantic Coast Line R. Co. v. Coachman, 59 Fla. 130, 52 So. 377,

[20] Ann. Cas. 1047; Lueth v. Goodknecht,

[345] Ill. 197, 177 N. E. 690, 79 A.L.R. 780; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; Gano v. Minneapolis & St. L. R. Co.

[114] Iowa, 713, 87 N. W. 714, 55 L.R.A. 263,

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erty or property does not amount to a denial of the equal protection of the laws because it does not apply to all persons within the jurisdiction of the legislative body enacting it, but is applicable only to certain of such persons. Under certain restrictions a legislative body has a right to discriminate among those persons and to limit the application of its laws to a portion of them only.[12] Similarly, the fact that only certain persons may be prone to do an act forbidden by statute does not make the statute unconstitutional.[13]

§ 478. Application of Law to All Members.—

A fundamental principle involved in classification is that it must meet the requirement that a law shall affect alike all persons in the same class and under similar conditions.[14] If a classification in legislation meets the prerequisites indispensable to the establishment of a class that it be reasonable and not arbitrary,[15] and be based upon substantial distinctions with a proper relation to the objects classified and the purposes sought to be achieved,[16] as long as the law operates alike on all members of the class which includes all persons and property similarly situated, it is not subject to any objections that it is special or class legislation,[17] and is not a violation of the Federal guaranty as to the equal protection

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[89] Am. St. Rep. 393, affirmed in 190 U. S. 557, 47 L. ed. 1183, 23 S. Ct. 854; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne)

[239] Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Haynes v. Lapeer Circuit Judge (Haynes v. Williams) 201 Mich. 138, 166 N. W. 938, L.R.A.1918D, 233; State ex rel. Scheffer v. Justus, 85 Minn. 279, 88 N. W. 759, 56 L.R.A. 757, 89 Am. St. Rep. 550; Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936, 3 L.R.A. 532, 12 Am. St. Rep. 707; O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 705; Tonn v. Helena, 42 Mont. 127, 111 P. 715, 36 L.R.A.(N.S.) 1136; Peterson v. Parvovitz, 62 N. D. 328, 243 N. W. 798, 94 A.L.R. 1290; Bratberg v. Ad- vance-Rumely Thresher Co. 61 N. D. 452,

[238] N. W. 552, 78 A.L.R. 1338; Re Hoffert,

[34] S. D. 271, 148 N. W. 20, 52 L.R.A.(N.S.) 949; Sammarco v. Boysa, 193 Wis. 642, 215 N. W. 446, 55 A.L.R. 370; Maercker v. Mil- waukee, 151 Wis. 324, 139 N. W. 199, L.R.A. 1915F, 1196, Ann. Cas. 1914B, 199. As to classification based upon numbers, see infra, § 491.

[12] Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997.

[13] Thomas v. Indianapolis, 195 Ind. 440,

[145] N. E. 550, 35 A.L.R. 1194; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne)

[239] Mich. 204, 214 N. W. 316, 53 A.L.R. 273.

[14] Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; Roth Drug v. Johnson, 13 Cal. App. (2d) 720, 57 P. (2d) 1022, citing R. C. L.; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Cooper v. Rollins, 152 Ga. 588,

[110] S. E. 726, 20 A.L.R. 1105; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171,

[191] N. E. 158, 96 A.L.R. 271; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; Dasch v. Jackson, 170 Md. 251,

[183] A. 534, citing R. C. L.; Re French, 315 Mo. 75, 285 S. W. 513, 47 A.L.R. 588; Re Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; Broadfoot v. Fayetteville,

[121] N. C. 418, 28 S. E. 515, 39 L.R.A. 246,

[61] Am. St. Rep. 668; State v. Norval, 245 Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637; State v. Hogan, 63 Ohio St. 202, 58 N. E. 572, 52 L.R.A. 863, 81 Am. St. Rep. 626; Com. use of Titusville v. Clark, 195 Pa. 634, 46 A. 286, 57 L.R.A. 348, 86 Am. St. Rep. 694, affirmed in 184 U. S. 329, 46 L. ed. 569, 22 S. Ct. 382; Bent v. Weaver, 108 W. Va. 299, 150 S. E. 738, citing R. C. L.; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434; Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 1196, Ann. Cas. 1914B, 199; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955; State v. Sherman,

[18] Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819. A law must apply equally to all of the classes affected by it. Re Ten Hour Law,

[24] R. I. 603, 54 A. 602, 61 L.R.A. 612.

[15] See infra, § 480.

[16] See infra, § 481.

[17] Frazier v. State Tax Commission.— Ala.— 175 So. 402, 110 A.L.R. 1479; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407,

[25] S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109; Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L.R.A. (N.S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475; Roth Drug v. John- son, 13 Cal. App. (2d) 720, 57 P. (2d) 1022, citing R. C. L.; Dell v. Marvin, 41 Fla. 221, 26 So. 188, 45 L.R.A. 201, 79 Am. St. Rep. 171; Lueth v. Goodknecht, 345 Ill. 197,

[177] N. E. 690, 79 A.L.R. 780; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; Chicago v. Schmidinger, 243 Ill. 167, 90 N. E. 369,

[44] L.R.A.(N.S.) 632, 17 Ann. Cas. 614, af- firmed in 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; State v. Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 10 Ann. Cas. 899; Richmond v. Dudley (Ind.)

[26] N. E. 184, 10 L.R.A. 187, rehearing de- nied in 129 Ind. 112, 28 N. E. 312, 13 L.R.A. 587, 28 Am. St. Rep. 180; Iowa Motor Ve- hicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in

[280] U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; Lee v. Hoffman, 182 Iowa, 1216, 166 N. W. 565, L.R.A.1918C, 933; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895,

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of the laws.[18] Hence, while classification is proper, there must always be uni-

42 L.R.A.(N.S.) [821]; Hubbell v. Higgins,

148 Iowa, [36], [126] N. W. [914], Ann. Cas.

1912B, [822]; Dirken v. Great Northern Pa-

per Co. [110] Me. [374], [86] A. [320], Ann. Cas.

1914D, [396]; State ex rel. Beck v. Wagener,

77 Minn. [483], [80] N. W. [633], [778], 1134, [46]

L.R.A. [442], [77] Am. St. Rep. [681], writ of er-

ror dismissed in Minnesota ex rel. Mohler

v. Mcgaarden (U. S.) [46] L. ed. 1163, [22] S.

Ct. [931]; Cheek v. Prudential Ins. Co. (Mo.)

192 S. W. [387], L.R.A.1918A, [166]; People v.

Beakes Dairy Co. [222] N. Y. [416], [119] N. E.

115, [3] A.L.R. 1260; Ives v. South Buffalo

R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.

(N.S.) [162], Ann. Cas. 1912B, [156]; Churchill

v. Albany, [65] Or. [442], [133] P. [632], Ann. Cas.

1915A, 1094; Jones v. Union County, [63] Or.

566, 127 P. 781, 42 L.R.A.(N.S.) 1035; State v. Baker, 50 Or. 381, 92 P. 1076, 13 L.R.A. (N.S.) 1040; State v. Randolph, 23 Or. 74, 31 P. 201, 17 L.R.A. 470, 37 Am. St. Rep. 655; Re Oberg, 21 Or. 406, 28 P. 130, 14 L.R.A. 577; State v. Foster, 22 R. I. 163, 46 A. 833, 50 L.R.A. 339; Bon Homme County v. Berndt, 13 S. D. 309, 83 N. W. 333, 50 L.R.A. 451; Waid v. Ft. Worth (Tex. Civ. App.) 258 S. W. 1114, citing R. C. L.; State v. McFarland, 60 Wash. 98, 110 P. 792, 140 Am. St. Rep. 909; Bent v. Weaver, 108 W. Va. 299, 150 S. E. 738, citing R. C. L.; Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102.

18 United States.—Great Atlantic & P. Tea Co. v. Grosjean, 301 U. S. 412, 81 L. ed. 1193, 57 S. Ct. 772, 112 A.L.R. 293; Phelps v. Board of Education, 300 U. S. 319, 81 L. ed. 674, 57 S. Ct. 483; Henderson Co. v. Thompson, 300 U. S. 258, 81 L. ed. 632, 57 S. Ct. 447; Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; Young v. Masci, 289 U. S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A.L.R. 170; Buck v. Bell, 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584; Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 70 L. ed. 818, 46 S. Ct. 384; R. E. Sheehan Co. v. Shuler, 265 U. S. 371, 68 L. ed. 1061, 44 S. Ct. 548, 35 A.L.R. 1056; National Union F. Ins. Co.

v. Wanberg, 260 U. S. 71, 67 L. ed. 136, 43

S. Ct. 32; Arkadelphia Mill. Co. v. St.

Louis S. W. R. Co. 249 U. S. 134, 63 L. ed. 517, 39 S. Ct. 237; Farmers Irrig. Dist. v. Nebraska, 244 U. S. 325, 61 L. ed. 1168, 37

S. Ct. 630; Mountain Timber Co. v. Wash-

ington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 S. Ct. 255, Ann. Cas. 1917D, 637; Northwestern Laundry v. Des Moines, 239 U. S. 486, 60 L. ed. 396, 36 S. Ct. 206; Chesapeake &

O. R. Co. v. Conley, 230 U. S. 513, 57 L. ed.

1597, 33 S. Ct. 985; Selover, B. & Co. v. Walsh, 226 U. S. 112, 57 L. ed. 146, 33 S. Ct. 69; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 S. Ct. 275; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 S. Ct. 246; Western Turf Asso. v. Greenberg, 204 U. S. 359, 51 L. ed. 520, 27 S. Ct. 384; Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, 51 L. ed. 168, 27 S. Ct. 126, 7 Ann. Cas. 1104; St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183, 51 L. ed. 144, 27 S. Ct. 132; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 S. Ct. 124; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282; Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 S. Ct. 1031; Palmer v. McMahon, 133 U. S. 660, 33 L.

ed. 772, 10 S. Ct. 324; Minneapolis & St. L.

R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed.

585, 9 S. Ct. 207; Walston v. Nevin, 128 U.

S. 578, 32 L. ed. 544, 9 S. Ct. 192; Dow v.

Beidelman, 125 U. S. 680, 31 L. ed. 841, 8

S. Ct. 1028; Barbier v. Connolly, 113 U. S.

27, 28 L. ed. 923, 5 S. Ct. 357.

Alabama.—Hale v. State, 217 Ala. 403,

116 So. 369, 58 A.L.R. 1333.

Arkansas.—Arkansas Stave Co. v. State,

94 Ark. 27, 125 S. W. 1001, 27 L.R.A.(N.S.)

255, 140 Am. St. Rep. 103.

California.—Rainey v. Michel, 6 Cal. (2d)

259, 57 P. (2d) 932, 105 A.L.R. 148; Roth

Drug v. Johnson, 13 Cal. App. (2d) 720, 57

P. (2d) 1022, citing R. C. L.

Colorado.—Consumers League v. Colorado

& S. R. Co. 53 Colo. 54, 125 P. 577,

Ann. Cas. 1914A, 1158.

Florida.—Pompano Horse Club v. State,

93 Fla. 415, 111 So. 801, 52 A.L.R. 51; Davis

v. Florida Power Co. 64 Fla. 246, 60 So. 759,

Ann. Cas. 1914B, 965.

Georgia.—Cooper v. Rollins, 152 Ga. 588,

110 S. E. 726, 29 A.L.R. 1105.

Illinois.—Casparis Stone Co. v. Industrial

Bd. 278 Ill. 77, 115 N. E. 822, citing R. C.

L.; People v. Gordon, 274 Ill. 462, 113 N. E.

864, citing R. C. L.

Indiana.—Baldwin v. State, 194 Ind. 303,

141 N. E. 343, citing R. C. L.; Vandalia R.

Co. v. Stillwell, 181 Ind. 267, 104 N. E. 289,

Ann. Cas. 1916D, [258], affirmed in [239] U. S. 637, [60] L. ed. [480], [36] S. Ct. [445]; State v. Richcreek, [167] Ind. [217], [77] N. E. 1085, [5] L.R.A.(N.S.) [874], [119] Am. St. Rep. [491], [10] Ann. Cas. [899].

Iowa.—Iowa Motor Vehicle Asso. v. Railroad Comrs. [207] Iowa, [461], [221] N. W. 364, [75] A.L.R. [1], affirmed in [280] U. S. [529], 74 L. ed. [595], [50] S. Ct. [151].

Maine.—State v. Old Tavern Farm, [133] Me. [468], [180] A. [473], [101] A.L.R. [810].

Maryland.—State v. Broadbelt, [89] Md. 565, [43] A. [771], [45] L.R.A. [433], [73] Am. St. Rep. [201].

Michigan.—Smith v. Wayne Probate Judge (Smith v. Command) [231] Mich. [409], 204 N. W. [140], [40] A.L.R. [515].

Minnesota. — Mathison v. Minneapolis Street R. Co. [126] Minn. [286], [148] N. W. [71], L.R.A.1916D, [412].

Missouri.—State v. Swagerty, [203] Mo. 517, [102] S. W. [483], [10] L.R.A.(N.S.) [601], [120] Am. St. Rep. [671], [11] Ann. Cas. [725].

Nebraska.—State ex rel. Sorensen v. First State Bank, [122] Neb. [502], [240] N. W. 747, [79] A.L.R. [576]; Fremont v. Postal Teleg.-Cable Co. [103] Neb. [476], [172] N. W. 525 (affirmed in [255] U. S. [124], [65] L. ed. 545, [41] S. Ct. 279) citing R. C. L.; Norris v. Lincoln, [93] Neb. [658], [142] N. W. [114], Ann. Cas. 1914B, 1194; Re Wickstrum, [82] Neb. 523, [138] N. W. [733], [42] L.R.A.(N.S.) 1068.

New York.—Ives v. South Buffalo R. Co.

201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.)

162, Ann. Cas. 1912B, 156.

Rhode Island.—Narragansett Electric

Lighting Co. v. Sabre, 50 R. I. 288, 146 A.

777, 147 A. 665, 66 A.L.R. 1553, later appeal

in 51 R. I. 37, 150 A. 756, 151 A. 363, 70

A.L.R. 46.

Texas.—St. Louis S. W. R. Co. v. State,

113 Tex. 570, 261 S. W. 996, 33 A.L.R. 367;

formity within the class. If persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination, and not classification.[19]

§ 479. Completeness of Inclusion of Members.—

In order for a classification to meet the requirements of constitutionality, such classification must not be persons who naturally belong to the class.20 Such classification must include or embrace all based on existing circumstances only or so constituted as to preclude additions to the number included within a class,1 but must be of such a nature as to embrace all those who may thereafter be in similar circumstances and conditions.2 Furthermore, all who are in situations and circumstances relative to the subjects of the discriminatory legislation indistinguishable from those of the members of the class must be brought under the influence of the law and

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[19] Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 S. Ct. 207; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 S. Ct. 730; Hale v. State, 217 Ala. 403, 116 So. 369, 58 A.L.R. 1333; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; State v. Garbroski, 111 Iowa, 496, 82 N. W. 959, 56 L.R.A. 570, 82 Am. St. Rep. 524; Barker v. Crum, 177 Ky. 637, 198 S. W. 211, L.R.A.1918F, 673; Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515; Haynes v. Lapeer Circuit Judge (Haynes v. Williams) 201 Mich. 138, 166 N. W. 938, L.R.A.1918D, 233; Re French, 315 Mo. 75, 285 S. W. 513, 47 A.L.R. 688; Lige v. Chicago, B. & Q. R. Co. 275 Mo. 249, 204 S. W. 508, L.R.A.1918F, 548; Stroll v. State, 95 Tex. Crim. Rep. 611, 255 S. W. 690, 30 A.L.R. 1424; Brimm v. Jones, 11 Utah, 200, 39 P. 825, 29 L.R.A. 97, affirmed in 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282; Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A.L.R. 1222; Black v. State, 113 Wis. 205, 89 N. W. 522, 90 Am. St. Rep. 853.

[20] Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282, affirming 11 Utah, 200, 39 P. 825, 29 L.R.A. 97; Chicago, M. & St. P. R. Co. v. Westby (C. C. A. 8th) 178 F. 619, 47 L.R.A.(N.S.) 97; McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Elwood v. State, 203 Ind. 626, 180 N. E. 471, 91 A.L.R. 1027; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Davis Constr. Co. v. Boone County, 192 Ind. 144, 132 N. E. 629, 21 A.L.R. 557; Cleveland, C. C. & St. L. R. Co. v. Schuler, 182 Ind. 51, 105 N. E. 560, L.R.A.1915A, 884; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; Selvage v. Talbott, 175 Ind. 648, 95 N. E. 114, 33 L.R.A.(N.S.) 973, Ann. Cas. 1913C, 724; Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L.R.A. (N.S.) 418; Davidow v. Wadsworth Mfg. Co. 211 Mich. 90, 178 N. W.

776, 12 A.L.R. 605; Murray v. Ramsey County, 81 Minn. 358, 84 N. W. 103, 51 L.R.A. 828, 83 Am. St. Rep. 379; Cheek v. Prudential Ins. Co. (Mo.) 192 S. W. 387, L.R.A.1918A, 166; Kreps v. Brady, 37 Okla. 754, 133 P. 216, 47 L.R.A. (N.S.) 106; Simmons v. Western U. Teleg. Co. 63 S. C. 425, 41 S. E. 521, 57 L.R.A. 607; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434; Borgnis v. Falk, 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489; Servonitz v. State, 133 Wis. 231, 113 N. W. 277, 126 Am. St. Rep. 955. "The classification must embrace all who possess the attributes or characteristics which are the basis of the classification, and their difference from those excluded must be substantial and related to the purpose of the legislation." McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284. An act of class legislation must include all who belong to the class—all who cannot be distinguished from those included in that particular characteristic which justifies the act—but none who do not belong to the class. Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 73 S. W. 686, 61 L.R.A. 475.

[1] Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; State v. Brown, 97 Minn. 402, 106 N. W. 477, 5 L.R.A.(N.S.) 327; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434; Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 196, Ann. Cas. 1914B, 199; Servonitz v. State, 133 Wis. 231, 113 N. W. 277, 126 Am. St. Rep. 955.

[2] Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L.R.A.(N.S.) 418; State v. Fairmount Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; State v. Garbroski, 111 Iowa, 496, 82 N. W. 959, 56 L.R.A. 570, 82 Am. St. Rep. 524; State v. Hogan, 63 Ohio St. 202, 58 N. E. 572, 52 L.R.A. 863, 81 Am. St. Rep. 626; Laurens v. Anderson, 75 S. C. 62, 55 S. E. 136, 117 Am. St. Rep. 885, 9 Ann. Cas. 1003; State v. Schlitz Brewing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126; Sutton v. State, 96 Tenn. 696, 36 S. W. 697, 33 L.R.A. 589.

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treated by it in the same way as are the members of the class.[3] It is also settled that no one who does not properly belong to a class may be included therein.[4]

There seems to be one class of cases which, at least under one view, forms an exception to some of the general principles stated in the foregoing paragraph. Where a statute is remedial or curative, the classification therein contained is legal, if it includes all the subjects which are affected by the conditions which it is sought to remedy or the evils it is sought to cure. This type of legislation, in the jurisdiction adopting this position, apparently forms an exception to the general rule that classification cannot be based on existing conditions alone, since the very object of the statute is to remedy a present condition and, if possible, avoid its repetition.[5]

2. ESSENTIAL AND NONESSENTIAL FEATURES

a. ESSENTIAL

§ 480. Reasonableness.—

The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment.6 One of the essential requirements as to classification, in order that it may not violate the constitutional guaranty as to equal protection of the laws, is that the classification must not be capricious or arbitrary,7 but

[3] Chicago, M. & St. P. R. Co. v. Westby (C. C. A. 8th) 178 F. 619, 47 L.R.A.(N.S.) 97; Kraus v. Lehman, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769, 15 Ann. Cas. 849; Davidow v. Wadsworth Mfg. Co. 211 Mich. 90, 178 N. W. 776, 12 A.L.R. 605; State ex rel. McCue v. Ramsey County, 48 Minn. 236, 51 N. W. 112, 31 Am. St. Rep. 650; Johnson v. St. Paul & D. R. Co. 43 Minn. 222, 45 N. W. 156, 8 L.R.A. 419; Lodi Twp. v. State, 51 N. J. L. 402, 18 A. 749, 6 L.R.A. 56; Sutton v.

State, 96 Tenn. 696, 36 S. W. 697, 33 L.R.A. 589; Stroll v. State, 95 Tex. Crim. Rep. 611, 255 S. W. 620, 30 A.L.R. 1424.

[4] Chicago, M. & St. P. R. Co. v. Westby (C. C. A. 8th) 178 F. 619, 47 L.R.A.(N.S.) 97; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A.(N.S.) 126, 16 Ann. Cas. 1234.

[5] Pollock v. Kansas City, 87 Kan. 205, 123 P. 985, 42 L.R.A.(N.S.) 465; Cole v. Dorr, 80 Kan. 251, 101 P. 1016, 22 L.R.A. (N.S.) 534; State v. Brown, 97 Minn. 402, 106 N. W. 477, 5 L.R.A.(N.S.) 327.

[6] Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Re Pell, 171 N. Y. 48, 63 N. E. 789, 57 L.R.A. 540, 89 Am. St. Rep. 791.

[7] United States.—Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838; Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54; Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 79 L. ed. 1054, 55 S. Ct. 525, rehearing denied in 295 U. S. 768, 79 L. ed. 1709, 55 S. Ct. 525; Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582; Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; New York ex rel. Bryant v. Zimmerman,

[278] U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Power Mfg. Co. v. Saunders, 274 U. S. 490, 71 L. ed. 1165, 47 S. Ct. 678; Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 64 L. ed. 989, 40 S. Ct. 560; McFarland v. American Sugar Ref. Co. 241 U. S. 79, 60 L. ed. 899, 36 S. Ct. 498; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A. 1917A, 421, Ann. Cas. 1917B, 455; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59 L. ed. 1199, 35 S. Ct. 675, L.R.A. 1915E, 953; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Denver v. New York Trust Co. 229 U. S. 123, 57 L. ed. 1101, 33 S. Ct. 657; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 S. Ct. 318; Toyota v. Hawaii, 226 U. S. 184, 57 L. ed. 180, 33 S. Ct. 47; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 S. Ct. 192; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A.(N.S.) 44; Williams v. Walsh, 222 U. S. 415, 56 L. ed. 253, 32 S. Ct. 137; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 S. Ct. 132; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 S. Ct. 644; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287, 17 Ann. Cas. 1247; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 S. Ct. 28; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 S. Ct. 522; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255. Alabama.—Frazier v. State Tax Commission, — Ala. —, 175 So. 402, 110 A.L.R. 1479.

California.—Bueneman v. Santa Barbara, [8] Cal. (2d) [405], [65] P. (2d) [884], [109] A.L.R. [895]; Moore v. Webb, [219] Cal. [304], [26] P. (2d) [22], [89] A.L.R. [925]; Re Stephan, [170] Cal. [48], [148] P. [196], Ann. Cas. 1916E, [617]; Deycoe v. Superior Ct. [140] Cal. [476], [74] P. [28], [98] Am. St. Rep. —; Van Winkle v. State, [4] **Delaware.**—Boyce, [578], [91] A. [385], [3] Boyce, [549], [83] A. Clendaniel v. Conrad, [3] Boyce, [549], [83] A. 1036, Ann. Cas. 1915B, [968], writ of error dismissed in [235] U. S. [712], [59] L. ed. [437], [35] S. Ct. [203].

Florida.—State ex rel. Clarkson v. Philips, [70] Fla. [340], [70] So. [367], Ann. Cas. 1918A, [138]; Davis v. Ann. Cas. 1914B, [965]; Seaboard Air Line [20] L.R.A.(N.S.) [40], [46], [46] So. [59], [59]; Co. v. Simon, [56] Fla. [545], [47] So. 1001, [20] L.R.A.(N.S.) [126], [16] Ann. Cas. 1234.

Georgia.—Cooper v. Rollins, [152] Ga. [588], [110] S. E. [726], [20] A.L.R. 1105.

Illinois.—Casparis Stone Co. v. Industrial Bd. [278] Ill. [77], [115] N. E. [822], citing R. C. L.; People v. Gordon, [274] Ill. [462], [113] N. E. [64], citing R. C. L. [994], [44] L.R.A.(N.S.) [557] Ill. [334], [100],

1914A, 1129; Christy v. El. [46], Ann. Cas. 1914A, 1129; Christy v. El. Hott, [216] Ill. [31], [74] N. E. 1035, [1] L.R.A. (N.S.) [215], [108] Am. St. Rep. [196], [3] Ann. Cas. [487].

Indiana.—Miles v. Department of Treasury, —, Ind. —, [193] N. E. [855], [97] A.L.R. 1474, superseded but opinion not altered on this point in [209] Ind. [172], [199] N. E. [372], [101] A.L.R. 1359; McErlain v. Taylor, [207] Ind. [240], [192] N. E. [260], [94] A.L.R. 1284; Bolivar Twp. Bd. of Finance v. Hawkins, [207] Ind. [171], [191] N. E. [158], [96] A.L.R. [271]; Elwood v. State, [203] Ind. [626], N. E. [471], [81] A.L.R. 1027; Fountain Park Co. v. Hensler, [199] Ind. [95], [155] N. E. [465], [50] A.L.R. 1518; Baldwin v. State, [194] Ind. [303], [141] N. E. [343], citing R. C. L.; Davis Constr. Co. v. Boone County, [192] Ind. [144], [132] N. E. [629], [21] A.L.R. [557]; Hirth-Krause Co. v. Cohen, [176] Ind. [1], [97] N. E. [1], Ann. Cas. 1914C, [708].

Iowa.—Hunter v. Colfax Consol. Coal Co. [175] Iowa, [245], [154] N. W. 1037, [157] N. W. [145], L.R.A.1917D, [15], Ann. Cas. 1917E, [803]; State v. Fairmont Creamery Co. [153] Iowa, [702], [133] N. W. [895], [42] L.R.A.(N.S.) [821]; Hubbell v. Higgins, [148] Iowa, [36], [126] N. W. [914], Ann. Cas. 1912B, [822].

Kansas.—Atkinson v. Woodmansee, [68] Kan. [71], [74] P. [640], [64] L.R.A. [325].

Kentucky.—Campbell v. Com. [229] Ky. [264], [17] S. W. (2d) [227], [63] A.L.R. [932]; Louisville v. Coulter, [177] Ky. [242], [197] S. W. [819], L.R.A.1918A, [811]; Stratman v. Com. [137] Ky. [500], [125] S. W. 1094, [27] L.R.A.(N.S.) [949], [136] Am. St. Rep. [299].

Louisiana.—State v. Thrift Oil & Gas Co. [162] La. [165], [110] So. [188], [51] A.L.R. [261].

Maine.—State v. Latham, [115] Me. [176], [98] A. [578], L.R.A.1917A, [480]; Dirken v. Great Northern Paper Co. [110] Me. [374], [86] A. [320], Ann. Cas. 1914D, [396]; State v. Mitchell, [97] Me. [66], [53] A. [887], [94] Am. St. Rep. [481]; State v. Montgomery, [94] Me. [192], [47] A. [165], [80] Am. St. Rep. [386].

Maryland.—Luman v. Hitchens Bros. Co. [90] Md. [14], [44] A. 1051, [46] L.R.A. [393]; State v. Broadbelt, [89] Md. [565], [43] A. [771], [45] State L.R.A. [433], [73] Am. St. Rep. [201].

Massachusetts.—Vigeant v. Postal Teleg.-Cable Co. [260] Mass. [335], [157] N. E. [651], [53] A.L.R. [867].

Michigan.—Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) [239] Mich. [204], [214] N. W. [316], [53] A.L.R. [273].

Minnesota.—State v. Bridgeman & R. Co. [117] Minn. [186], [134] N. W. [496], Ann. Cas. 1913D, [41]; State v. Brown, [97] Minn. [402], [108] N. W. [471], [5] L.R.A.(N.S.) [327]; State v. Justus, [103] Am. St. Rep. [521], [1] Ann. L.R.A. [510]; State ex rel. Douglas v. Westfall, Cas. [91]; State ex rel. [89] N. W. [175], [57] L.R.A. [297], [85] Minn. St. Rep. [571]; Murray v. Ramsey [89] Am. Minn. [359], [84] N. W. [103], [51] County, [83] Am. St. Rep. [379].

Missouri.—State ex rel. Wells v. Walker, L.R.A. [828], [34] S. W. (2d) [124], citing R. [326] Mo. 1233, [34] French, [315] Mo. [75], [285] S. W. C. la. Re L.R.A. [682]; State v. Missouri Tie & [513], [47] A.L.R. Co. [181] Mo. [536], [80] S. W. [933], [65] Timber Co. [103] Am. St. Rep. [614], [2] Ann. Cas. [119]; State v. Loomis, [115] Mo. [307], [22] S. W. [350], [21] L.R.A. [789].

Montana.—Hill v. Rae, [52] Mont. [378], [158] P. [826], L.R.A.1917A, [495], Ann. Cas. 1917E, [210]; John v. Northern P. R. Co. [42] Mont. [18], [111] P. [632], [32] L.R.A.(N.S.) [85].

Nebraska.—Rosenbloom v. State, [64] Neb. [342], [89] N. W. 1053, [57] L.R.A. [922].

New Hampshire.—Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067.

New York.—People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260; Hauser v. North British & M. Ins. Co. 206 N. Y. 455, 100 N. E. 52, 42 L.R.A.(N.S.) 1139, Ann. Cas. 1914B, 438; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 87 N. E. 504, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989; Re Pell, 171 N. Y. 48, 63 N. E. 789, 57 L.R.A. 540, 89 Am. St. Rep. 791.

North Dakota.—Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731.

Ohio.—State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637; Bronson v. Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90.

Oklahoma.—Trustees' Exrs' & Securities Ins. Corp. v. Hooton, 53 Okla. 530, 157 P. 293, L.R.A.1916E, 602.

Oregon.—Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136.

Pennsylvania.—Com. v. Girard L. Ins. Co. 305 Pa. 558, 158 A. 262, 83 A.L.R. 460, affirmed in 287 U. S. 570, 77 L. ed. 501, 53 S. Ct. 94.

South Carolina.—Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105; Laurens v. Anderson, 75 S. C. 62, 55 S. E. 136, 117 Am. St. Rep. 885, 9 Ann. Cas. 1003.

Tennessee.—Beasley v. Cunningham, 171 Tenn. 334, 103 S. W. (2d) 18, 110 A.L.R. 306; State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158; Memphis v. State, 133 Tenn. 83, 179 S. W. 631, L.R.A. 1916B, 1151, Ann. Cas. 1917C, 1056; Fleming v. Memphis, 126 Tenn. 331, 148 S. W. 1057, 42 L.R.A.(N.S.) 493, Ann. Cas. 1913D, 1306; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805; State v. Cook, 107 Tenn. 499, 64 S. W. 720, 62 L.R.A. 174, writ of error dismissed in 187 U. S. 639, 47 L. ed. 344, 23 S. Ct. 847; State ex rel. Astor v. Schlitz Brewing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; Sutton v. State, 96 Tenn. 696, 36 S. W. 697, 33 L.R.A. 589; Stratton Claimants v. Morris Claimants (Dibrell v. La-

must be reasonable8 and natural.[9] It is often stated that a classification must

nier) 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70.

Texas.—Randolph v. State, 117 Tex. Crim. Rep. 80, 36 S. W. (2d) 484, citing R. C. L.

Utah.—Salt Lake City v. Industrial Commission, 58 Utah, 314, 199 P. 152, 18 A.L.R. 259.

Virginia.—Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584.

Washington.—State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A. (N.S.) 466.

Wisconsin.—State ex rel. Kellogg v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252.

Annotation: Ann. Cas. 1914A, 1168.

The equal protection clause of the Federal Constitution is directed only against arbitrary discrimination, that is, such as is without any reasonable basis. Denver v. New York Trust Co. 229 U. S. 123, 57 L. ed. 1101, 33 S. Ct. 657.

8 **United States.**—Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838; Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54; Louis K. Liggett Co. v. Lee, 288 U. S. 517, 77 L. ed. 929, 53 S. Ct. 481, 85 A.L.R. 699; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. ed. 557, 46 S. Ct. 260, 43 A.L.R. 1224; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 64 L. ed. 989, 40 S. Ct. 560; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421, Ann. Cas. 1917B, 455; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59 L. ed. 1199, 35 S. Ct. 675, L.R.A.1915E, 953; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Kane v. Erie R. Co. (C. C. A. 6th) 133 F. 681, 68 L.R.A. 788.

California.—Bueneman v. Santa Barbara, 8 Cal. (2d) 405, 65 P. (2d) 884, 109 A.L.R. 895; Moore v. Webb, 219 Cal. 304, 26 P. (2d) 22, 89 A.L.R. 925; Re Stephan, 170 Cal. 48, 148 P. 196, Ann. Cas. 1916E, 617; Title & D. Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199; Roth Drug v. Johnson, 13 Cal. App. (2d) 720, 57 P. (2d) 1022, citing R. C. L.

Delaware.—Van Winkle v. State, 4 Boyce, 578, 91 A. 385, Ann. Cas. 1916D, 104; Clendaniel v. Conrad, 3 Boyce, 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203.

Florida.—State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138.

Illinois.—Casparis Stone Co. v. Industrial Bd. 278 Ill. 77, 115 N. E. 822, citing R. C. L.; People v. Gordon, 274 Ill. 462, 113 N. E. 864, citing R. C. L.

Indiana.—McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind.

171, 191 N. E. 158, 96 A.L.R. 271; Elwood v. State, 203 Ind. 626, 180 N. E. 471, 81 A.L.R. 1027; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Baldwin v. State, 194 Ind. 303, 141 N. E. 343, citing R. C. L.; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; Selvage v. Talbott, 175 Ind. 648, 95 N. E. 114, 33 L.R.A.(N.S.) 973, Ann. Cas. 1913C, 724; Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L.R.A.(N.S.) 418.

Iowa.—State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822.

Kentucky.—Hyman v. Boldrick, 153 Ky. 77, 154 S. W. 369, 44 L.R.A.(N.S.) 1039; Stratman v. Com. 137 Ky. 500, 125 S. W. 1094, 27 L.R.A.(N.S.) 949, 136 Am. St. Rep. 299; Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219.

Louisiana.—State v. Barba, 132 La. 768, 61 So. 784, 45 L.R.A.(N.S.) 546, Ann. Cas. 1914D, 1261.

Maine.—State v. Latham, 115 Me. 176, 98 A. 578, L.R.A.1917A, 480; State v. Leavitt, 105 Me. 76, 72 A. 875, 26 L.R.A.(N.S.) 799.

Maryland.—State v. Broadbelt, 89 Md. 565, 43 A. 771, 45 L.R.A. 433, 73 Am. St. Rep. 201.

Massachusetts.—Vigeant v. Postal Teleg.-Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867; Opinion of Justices, 220 Mass. 627, 108 N. E. 507, L.R.A.1917B, 1119.

Michigan.—Davidow v. Wadsworth Mfg. Co. 211 Mich. 90, 178 N. W. 776, 12 A.L.R. 605.

Minnesota.—State ex rel. Matteson v. Luecke, 194 Minn. 246, 260 N. W. 206, 99 A.L.R. 1053; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412.

Missouri.—State v. Missouri Tie & Timber Co. 181 Mo. 536, 80 S. W. 933, 65 L.R.A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789.

Montana.—Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210.

New Hampshire.—Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067.

New York.—People ex rel. Bryant v. Zimmerman, 241 N. Y. 405, 150 N. E. 497, 43 A.L.R. 909, affirmed in 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61; People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260; People v. Wilber, 198 N. Y. 1, 90 N. E. 1140, 27 L.R.A. (N.S.) 357, 19 Ann. Cas. 626; People v. Orange County Road Constr. Co. 175 N. Y. 84, 67 N. E. 129, 65 L.R.A. 33.

North Dakota.—Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1299.

Ohio.—Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926.

Oklahoma.—Trustees, Exrs' & Securities

be based on some natural principle of public policy.[10]

The rule is well settled that arbitrary selection can never be justified by calling it classification.[11] This is forbidden by the equal protection demanded

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Ins. Corp. v. Hooton, 53 Okla. 530, 157 P. 293, L.R.A.1916E, 602; Memphis & Securities Ins. Corp. v. Hooton, 53 Okla. 530, 157 P. 293, 83, 179 S. W. 631, L.R.A. 1916E, 1151, Ann. Cas. 1917C, 1056; State v. State, 133 Tenn. 499, 64 S. W. 720, 62 L.R.A. 174, writ of error dismissed in, 187 U. S. 639, 47 L. ed. 344, 23 S. Ct. 847; State ex rel. Astor v. Schlitz Brewing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; Sutton v. State, 96 Tenn. 696, 36 S. W. 697, 33 L.R.A. 589; Dugger v. Mechanics' & T. Ins. Co. 95 Tenn. 245, 32 S. W. 5, 28 L.R.A. 796; Stratton v. Morris,

89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70; Randolph v. State, 117 Tex. Crim. Rep. 80, 36 S. W. (2d) 484, citing R. C. L.; Maercker v. Milwaukee, 151 Wis. Ann. Cas. 1914B, 199.

[10] American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 S. Ct. 43; Casparis Stone Co. v. Industrial Bd. 278 Ill. 77, 115 N. E. 822, citing R. C. L.; People v. Gordon, 274 Ill. 462, 113 N. E. 864, citing R. C. L.; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412; Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 384, 65 N. W. 652, 31 L.R.A. 553; Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936, 3 L.R.A. 532, 12 Am. St. Rep. 707; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L.R.A. 922; Randolph v. State, 117 Tex. Crim. Rep. 80, 36 S. W. (2d) 484, citing R. C. L. See Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 85 N. E. 954, 23 L.R.A.(N.S.) 711. A valid classification must be grounded upon a reason of a public nature. Kane v. Erie R. Co. (C. C. A. 6th) 133 F. 681, 68 L.R.A. 788. The classification must be reasonably adapted to secure a legitimate public interest. Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067.

[11] Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287, 17 Ann. Cas. 1247; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 S. Ct. 272; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Elliott v. State, 29 Ariz. 389, 242 P. 340, 46 A.L.R. 284; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268; Com. v. Interstate Consol. Street R. Co. 187 Mass. 436, 73 N. E. 530, 11 L.R.A.(N.S.) 973, 2 Ann. Cas. 419, affirmed in 207 U. S. 79, 52 L. ed. 111, 28 S. Ct. 26, 12 Ann. Cas. 555; State ex rel. Wells v. Walker, 326 Mo. 1233, 34 S. W. (2d) 124, citing R. C. L.; State v. Missouri, K. & T. R. Co. 262 Mo. 507, 172 S. W. 35, L.R.A.1915C, 778, Ann. Cas. 1916E, 949; Chamberlin v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22, 106 A.L.R. 1519, affirmed in 299 U. S. 515, 81 L. ed. 380, 57 S. Ct. 122, and rehearing denied in 301 U. S. 714, 81 L. ed. 1365, 57 S. Ct. 926; Re Water Front, 190 N. Y. 350, 83 N. E. 299, 16 L.R.A.(N.S.) 335, 13 Ann. Cas. 598; People v. Orange County Road Constr. Co. 175 N. Y. 84, 67 N. E. 129, 65 L.R.A. 33; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805; Randolph v. State, 117 Tex. Crim. Rep. 80, 36 S. W. (2d) 484, citing R. C. L.

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by the Fourteenth Amendment.[12]

It is frequently difficult to determine whether a particular classification is reasonable or unreasonable,[13] and no definite rule has or can be laid down whereby this may be determined.[14] The legislature cannot arbitrarily create a class, however, and when thus created make it binding on the courts so that they would be bound to accept such classification as a proper one.[15]

Any discrimination is invalid if it is purely arbitrary, oppressive, or capricious, and made to depend on differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no proper connection with the object sought by the legislation.[16] If the classification is not wholly unreasonable and arbitrary, however, so that the statute is uniform in its operation on all the members of the class to which it is made applicable, no one is denied the equal protection of the laws guaranteed by the Federal Constitution.[17] It is a reasonable ground of classification that the state has the power to legislate with respect to persons in certain situations and not with respect to those in a different one.[18]

§ 481. Substantial Differences; Proper Relationship to Object.—

The general rule is well settled by unanimity of the authorities that a classification to be valid must rest upon material differences between the persons included in it and those excluded and, furthermore, must be based upon substantial dis-

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L. ed. 111, 28 S. Ct. 26, 12 Ann. Cas. 555; State ex rel. Wells v. Walker, 326 Mo. 1233, 34 S. W. (2d) 124, citing R. C. L.; State v. Missouri, K. & T. R. Co. 262 Mo. 507, 172 S. W. 35, L.R.A.1915C, 778, Ann. Cas. 1916E, 949; Chamberlin v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22, 106 A.L.R. 1519, affirmed in 299 U. S. 515, 81 L. ed. 380, 57 S. Ct. 122, and rehearing denied in 301 U. S. 714, 81 L. ed. 1365, 57 S. Ct. 926; Re Water Front, 190 N. Y. 350, 83 N. E. 299, 16 L.R.A.(N.S.) 335, 13 Ann. Cas. 598; People v. Orange County Road Constr. Co. 175 N. Y. 84, 67 N. E. 129, 65 L.R.A. 33; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805; Randolph v. State, 117 Tex. Crim. Rep. 80, 36 S. W. (2d) 484, citing R. C. L.

[12] Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287, 17 Ann. Cas. 1247; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 S. Ct. 272; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Elliott v. State, 29 Ariz. 389, 242 P. 340, 46 A.L.R. 284; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; Cleveland, C. C. & St. L. R. Co. v. Schuler, 182 Ind. 57, 105 N. E. 567, L.R.A.1915A, 834; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268; State v. Barba, 132 La. 768, 61 So. 784, 45 L.R.A. (N.S.) 546, Ann. Cas. 1914D, 1261; Com. v. Interstate Consol. Street R. Co. 187 Mass. 436, 73 N. E. 530, 11 L.R.A.(N.S.) 973, 2 Ann. Cas. 419, affirmed in 207 U. S. 79, 52 L. ed. 111, 28 S. Ct. 26, 12 Ann. Cas. 555; State ex rel. Wells v. Walker, 326 Mo. 1233, 34 S. W. (2d) 124, citing R. C. L.; State v. Missouri, K. & T. R. Co. 262 Mo. 507, 172 S. W. 35, L.R.A.1915C, 778, Ann. Cas. 1916E, 949; People v. Orange County Road Constr. Co. 175 N. Y. 84, 67 N. E. 129, 65 L.R.A. 33; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805; Randolph v. State, 117 Tex. Crim. Rep. 80, 36 S. W. (2d) 484, citing R. C. L.

[13] Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 S. Ct. 28; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 S. Ct. 272; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; State v. Broadbelt, 89 Md. 565, 43 A. 771, 45 L.R.A. 433, 73 Am. St. Rep. 201; State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819.

[14] Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 S. Ct. 676, 47 L.R.A.(N.S.) 84; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 S. Ct. 89; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; Trustees' Exrs' & Securities Ins. Corp. v. Hooton, 53 Okla. 530, 157 P. 293, L.R.A. 1916E, 602.

[15] Van Harlingen v. Doyle, 134 Cal. 53, 66 P. 44, 54 L.R.A. 771; Randolph v. State, 117 Tex. Crim. Rep. 80, 36 S. W. (2d) 484, citing R. C. L. As to court review of classification, see infra, §§ 519 et seq.

[16] American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 S. Ct. 43; Vandalia R. Co. v. Stillwell, 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D, 258, affirmed in 239 U. S. 637, 60 L. ed. 480, 36 S. Ct. 445; State v. Mitchell, 97 Me. 66, 53 A. 887, 94 Am. St. Rep. 481.

[17] See supra, § 478.

[18] Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643, 52 S. Ct. 273, 79 A.L.R. 546.

tinctions.[19] As the rule has sometimes been stated, the classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as

distinguished from irrelevant and artificial ones.[20] Therefore, any law that is made applicable to one class of citizens only must be based on some substantial difference between the situation of that class and

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[19] United States.—Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; Nebbia, 54 S. Ct. 505, 291 U. S. 502, 78 L. ed. 940, 89 A.L.R. 1469; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 72 L. ed. 927, 48 S. Ct. 553; Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, 48 S. Ct. 423; Ft. Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387, 71 L. ed. 1112, 47 S. Ct. 595, 593; Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. ed. 557, 46 S. Ct. 260, 43 A.L.R. 1224; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59 L. ed. 1199, 35 S. Ct. 675, L.R.A.1915E, 953. South Carolina ex rel. Phoenix Mut. L. Ins. Co. v. McMaster, 237 U. S. 63, 59 L. ed. 839, 35 S. Ct. 504; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 S. Ct. 644; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287, 17 Ann. Cas. 1247. California.—Bueneman v. Santa Barbara, 8 Cal. (2d) 405, 65 P. (2d) 884, 26 P. (2d) 22, 89 A.L.R. 925; Wallace v. Zinman, 200 Cal. 585, 254 P. 946, 62 A.L.R. 1341. Connecticut.—Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939. Delaware.—Clendaniel v. Conrad, 3 Boyce, 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203. Florida.—State ex rel. Clarkson v. Phillips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138. Illinois.—Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435, affirmed in 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; Marsalis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Lueth v. Goodknecht, 345 Ill. 197, 177 N. E. 690, 79 A.L.R. 780; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; Lasher v. People, 183 Ill. 226, 55 N. E. 663, 47 L.R.A. 802, 75 Am. St. Rep. 103. Indiana.—McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Elwood v. State, 203 Ind. 626, 180 N. E. 471, 81 A.L.R. 1027; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Davis Constr. Co. v. Boone County, 192 Ind. 144, 132 N. E. 629, 21 A.L.R. 557; Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L.R.A.(N.S.) 418. Iowa.—State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218. Kentucky.—Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 227, 63 A.L.R. 932, 24; Latham, 115 Me. 176, 98 A. 578, L.R.A.1917A, 480. Maine.—State v. Latham, 115 Me. 176, 98 A. 578, L.R.A.1917A, 480. Massachusetts.—Vigeant v. Postal Teleg. Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867. Michigan.—Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne), 239 Mich. 204, 214 N. W. 316, 52 A.L.R. 273; Peninsular Stove Co. v. Burton, 220 Mich. 284, 189 N. W. 880, citing R. C. L. Minnesota.—State ex rel. Matteson v. Kinnear, 194 Minn. 246, 260 N. W. 206, 99 A.L.R. 1053. Mississippi.—Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 34 So. 533, 62 L.R.A. 407, 95 Am. St. Rep. 476. New Hampshire.—Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; Opinion of Justices, 81 N. H. 566, 129 A. 117, 39 A.L.R. 1023. New York.—Chamberlin v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22, 106 A.L.R. 1519, affirmed in 299 U. S. 515, 81 L. ed. 380, 57 S. Ct. 122, and rehearing denied in 301 U. S. 714, 81 L. ed. 1365, 57 S. Ct. 926; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 1 A.L.R. 1260. North Dakota.—Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; Bratberg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1338. Ohio.—State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637. Oregon.—Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136. South Carolina.—Witt v. People's State Bank, 166 S. C. 1, 164 S. E. 306, 83 A.L.R. 1053. Tennessee.—State v. Columbia, G. & S. F. Turnp. Co. 133 Tenn. 446, 181 S. W. 682, citing R. C. L.; Memphis v. State, 133 Tenn. 83, 179 S. W. 631, L.R.A.1916B, 1151, Ann. Cas. 1917C, 1056. Vermont.—Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A.L.R. 1222. Virginia.—Fredericksburg v. Sanitary Grocery Co. — Va. —, 190 S. E. 318, 110 A.L.R. 1195. Washington.—Austin v. Seattle,

176 Wash. 654, 30 P. (2d) 646, 93 A.L.R. 2033; Aberdeen Sav. & L. Asso. v. Chase, 157 Wash. 351, 289 P. 536, 290 P. 697, 71 A.L.R. 232. Wisconsin.—State ex rel. Kempinger v. Whyte, 177 Wis. 541, 188 N. W. 607, 23 A.L.R. 67; Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 1196, Ann. Cas. 1914B, 199. Wyoming. — State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

[20] Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54. See Knisely v. Cotterel, 196 Pa. 614, 46 A. 861, 50 L.R.A. 86.

other individuals to which it does not apply1 and must rest on some reason on which it can be defended.[2] In other words, there must be such a difference between the situation and circumstances of all the members of the class and the situation and circumstances of all other members of the state in relation to the subjects of the discriminatory legislation as presents a just and natural reason for the difference made in their liabilities and burdens and in their rights and privileges.[3] A law is not general because it operates on all within a class unless there is a substantial reason why it is made to operate on that class only, and not generally on all.[4]

The standard by which the sufficiency of those differences which form a valid basis for classification may be measured has been repeatedly stated by the courts in many formulas which vary slightly in detail but contain substantially the same elements.[5] The precept most often employed states that a classification to be valid must always rest on a difference which bears a fair, substantial, natural, reasonable, and just relation to the object, act, or persons in respect to which it is proposed.[6] It has been stated many times that a

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[1] Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 S. Ct. 28; Deyoe v. Superior Ct. 140 Cal. 476, 74 P. 28, 98 Am. St. Rep. 73; State v. Crosson, 33 Idaho, 140, 190 P. 922, citing R. C. L.; Ritchie v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A.(N.S.) 994; Peninsular Stove Co. v. Burton, 220 Mich. 284, 189 N. W. 880, citing R. C. L.; Nitka v. Western U. Teleg. Co. 149 Wis. 106, 135 N. W. 492, 49 L.R.A.(N.S.) 337, Ann. Cas. 1913C, 863. Annotation: 113 Am. St. Rep. 243.

[2] State v. Haun, 61 Kan. 146, 59 P. 340, 47 L.R.A. 369.

[3] Chicago, M. & St. P. R. Co. v. Westby (C. C. A. 8th) 178 F. 619, 47 L.R.A.(N.S.) 97; McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Davis Constr. Co. v. Boone County, 192 Ind. 144, 132 N. E. 629, 21 A.L.R. 557; Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L.R.A.(N.S.) 418; Davidson v. Wadsworth Mfg. Co. 211 Mich. 90, 178 N. W. 776, 12 A.L.R. 605; State v. Bridgeman & R. Co. 117 Minn. 186, 134 N. W. 496, Ann. Cas. 1913D, 41; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 130 N. W. 545, 33 L.R.A.(N.S.) 494, Ann. Cas. 1912B, 1030; Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805; State v. Holtgreve, 58 Utah, 563, 200 P. 894, 26 A.L.R. 696; State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819.

[4] Ex parte Jentzsch, 112 Cal. 468, 44 P. 803, 32 L.R.A. 664; State v. Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430.

[5] See Infra, notes 6–11, this section.

[6] United States.—Carmichael v. Southern Coal & Coke Co. 301 U. S. 495, 81 L. ed. 1245, 57 S. Ct. 868, 109 A.L.R. 1327; Great Atlantic & P. Tea Co. v. Grosjean, 301 U. S. 412, 81 L. ed. 1193, 57 S. Ct. 772, 112 A.L.R. 293; Henderson Co. v. Thompson, 300 U. S. 258, 81 L. ed. 632, 57 S. Ct. 447; Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S.

Ct. 513; Colgate v. Harvey, 296 U. S. 404, 80 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54; Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 533, rehearing denied in 295 U. S. 767, 79 L. ed. 1708, 55 S. Ct. 647; United States Mortg. Co. v. Matthews, 293 U. S. 232, 79 L. ed. 299, 55 S. Ct. 168; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; Ohio Oil Co. v. Conway, 281 U. S. 146, 74 L. ed. 775, 50 S. Ct. 310; Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 72 L. ed. 927, 48 S. Ct. 553; Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, 48 S. Ct. 423; Ft. Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387, 71 L. ed. 1112, 47 S. Ct. 595; Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. ed. 557, 46 S. Ct. 260, 43 A.L.R. 1224; Air-way Electric Appliance Corp. v. Day, 266 U. S. 71, 69 L. ed. 169, 45 S. Ct. 12; Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129, 66 L. ed. 166, 42 S. Ct. 42; F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 64 L. ed. 989, 40 S. Ct. 560; Omaechevarria v. Idaho, 246 U. S. 343, 62 L. ed. 763, 38 S. Ct. 323; Wilson v. New, 243 U. S. 332, 61 L. ed. 755, 37 S. Ct. 298; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59 L. ed. 1199, 35 S. Ct. 675, L.R.A. 1915E, 953; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 S. Ct. 671; Waugh v. University of Mississippi, 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720; Bosley v. McLaughlin, 236 U. S. 385, 59 L. ed. 632, 35 S. Ct. 345; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 S. Ct. 246; Griffith v. Connecticut, 218 U. S. 572, 54 L. ed. 1155, 31 S. Ct. 134; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 S. Ct. 132; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 S. Ct. 644; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287; Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525, affirming 74 Neb. 757, 105 N. W. 298, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754; Bown v. Walling, 204 U.

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classification must be based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification.[7] It has

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S. Ct. 292; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 S. Ct. 289; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; W. W. Cargill Co. 51 S. Ct. 433, 180 U. S. 452, 45 L. ed. 612; Matthews v. Chicago, M. & St. P. R. Co. v. Magoun, 96 U. S. 93, 43 L. ed. Sav. Bank, 70 U. S. 283, v. Illinois Trust & S. Bank, 38 179 F. 461, 42 L. R.A.(N.S.) 1065, 32 S. Ct. 31, ed. 701, 33 S. Ct. (C. C. A. 8th) 133 F. cago, M. & St. F. 619, 47 L.R.A.(N.S.) 97; Kane v. Erie R. Co. (C. C. A. 6th) 133 F. 681, 68 L.R.A. Mobile v. Orr, 181 Ala. 308, 61 So. 920, 45 L.R.A.(N.S.) 575. Alabama.—Buenemann v. Santa Barbara, Cal. 109 A.L.R. 8 Calif. (2d) 405, 65 P. (2d) 834, 139 A.L.R. Cal. 159, 203; Veterans' Welfare Bd. 1531; Re Cardinal, 170 Cal. 519, 150 P. 678, 22 A.L.R. 343, L.R.A. 1915F, 850, 31 Cal. 619, 150 Gay, 155 Cal. 30, 109 P. 880, 28 L.R.A.(N.S.) Ann. Cas. 1912A, 690. Delaware.—Van Winkle v. State, 4 Boyce, 578, 91 A. 385, Ann. Cas. 1916D, 104; Clem-Connell v. Boyce, 549, 83 A. 1036, daniel v. Connell, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203. Florida.—Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Harper v. Galloway, 58 Fla. 255, 51 So. 226, Harper v. L.R.A.(N.S.) 794, 19 Ann. Cas. 235. 26 L.R.A.(N.S.) 783. Georgia.—Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105. Illinois—Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 106 A.L.R. 1435, affirmed in 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Lueth v. Goodknecht, 345 Ill. 197, 177 N. E. 690, 79 A.L.R. 780; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; People v. Schenck, 257 Ill. 384, 100 N. E. 994, 44 L.R.A.(N.S.) 46, Ann. Cas. 1914A, 1129; Starne v. People, 222 Ill. 139, 78 N. E. 61, 113 Am. St. Rep. 389; Re Day, 181 Ill. 73, 54 N. E. 646, 50 L.R.A. 519. Indiana.—Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268. Iowa.—State v. Bair, 112 Iowa, 466, 84 N. W. 532, 51 L.R.A. 776; State v. Garbroski, 111 Iowa, 496, 82 N. W. 959, 56 L.R.A. 570, 82 Am. St. Rep. 524. Louisiana.—State v. Barba, 132 La. 768, 61 So. 784, 45 L.R.A.(N.S.) 546, Ann. Cas. 1914D, 1261. Maine.—State v.

Leavitt, 105 Me. 76, 72 A. 875, 26 L.R.A.(N.S.) 799; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386. Maryland.—Luman v. Hitchens Bros. Co. 90 Md. 14, 44 A. 1051, 46 L.R.A. 393; State v. Broadbelt, 89 Md. 565, 43 A. 771, 45 L.R.A. 433, 73 Am. St. Rep. 201. Massachusetts.—Vigeant v. Postal Teleg.-Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867; Ashley v. Three Justices (Ash- ley v. Wait), 228 Mass. 63, 116 N. E. 961, 8 A.L.R. 1463, writ of error dismissed in 250 U. S. 652, 63 L. ed. 1190, 40 S. Ct. 56; Opinion of Justices, 220 Mass. 627, 108 N. E. 807, L.R.A.1917B, 1119. Minnesota.—State v. Brown, 97 Minn. W. 477, 5 L.R.A.(N.S.) 327; Murray v. 103, 51 L.R.A. 823, 83 Am. St. Rep. 379. Mississippi. — Lowry v. Clarksdale, 154 Miss. 155, 122 So. 195, citing R. C. L. Missouri.—Re French, 315 Mo. 75, 285 S. W. 513, 47 A.L.R. 688; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789. Nebraska.—Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L.R.A. 922. New Hampshire.—Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067. New York.—W. H. Chamberlin v. Andrews, 1915, affirmed in 299 U. S. 515, 81 L. ed. 380, 57 S. Ct. 122, and rehearing denied in 301 Hathorn v. Natural Carbonic Gas W. 552, 71 A.L.R. 1338. North Dakota. — Bratberg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1338. Pennsylvania.—Com. v. Girard L. Ins. Co. 305 Pa. 558, 158 A. 262, 83 A.L.R. 460, affirmed in 287 U. S. 570, 77 L. ed. 501, 53 S. Ct. 94; Juniata Limestone Co. v. Fagley, 187 Pa. 193, 40 A. 977, 42 L.R.A. 442, 67 Am. St. Rep. 579. South Carolina.—Laurens v. Anderson, 75 S. C. 62, 55 S. E. 136, 117 Am. St. Rep. 85, 9 Ann. Cas. 1003; Simmons v. Western U. Teleg. Co. 63 S. C. 425, 41 S. E. 521, 57 L.R.A. 607. Tennessee. — Fleming v. Memphis, 126 Tenn. 331, 148 S. W. 1057, 42 L.R.A.(N.S.) 493, Ann. Cas. 1913D, 1306; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805. Vermont.—State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22; State v. Shedroi, 75 Vt. 277, 54 A. 1081, 63 L.R.A. 179, 98 Am. St. Rep. 825. Washington.—Aberdeen Sav. & L. Asso. v. Chase, 157 Wash. 351, 289 P. 536, 260 P. 697, 71 A.L.R. 232. Wisconsin.—Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 1198, Ann. Cas. 1914B, 199. Wyoming.—State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819. Annotation: 113 Am. St. Rep. 243, 294; Ann. Cas. 1914B, 975.

[7] Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838; Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; Power Mfg. Co. v. Saunders, 274 U. S. 490, 71 L. ed. 1165, 47 S. Ct. 678; Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. 124, 27 A.L.R. 375; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 S. Ct. 114; Halter v. Ne-

also frequently been said that a classification must be based on substantial distinctions which make real differences and are germane to the purposes of the law.[8] Another oft-quoted group of canons is to the effect that the reason for a classification must inhere in the subject matter, must be natural and substantial,[9] and must be one suggested by necessity due to such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.[10] It is only when such distinctions exist that differentiate in important particulars persons or classes of persons from the body of the people that laws having operation only upon such particular persons or classes of persons are upheld as valid enactments.[11]

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braska, 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 S. Ct. 272; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 265; Davidow v. Wadsworth Mfg. Co. 211 Mich. 90, 178 N. W. 776, 12 A.L.R. 605; Re Pell, 171 N. Y. 48, 63 N. E. 789, 57 L.R.A. 540, 89 Am. St. Rep. 791; Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A.L.R. 1222.

[8] Deyoe v. Superior Ct. 140 Cal. 476, 74 P. 28, 98 Am. St. Rep. 73; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A. (N.S.) 126, 16 Ann. Cas. 1234; McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260,

94 A.L.R. 1284; Elwood v. State, 203 Ind. 626, 180 N. E. 471, 81 A.L.R. 1027; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; State v. Garbroski, 111 Iowa, 496, 82 N. W. 959, 56 L.R.A. 570, 82 Am. St. Rep. 524; State v. Mitchell, 97 Me. 66, 53 A. 887, 94 Am. St. Rep. 481; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515; Haynes v. Lapeer Circuit Judge (Haynes v. Williams) 201 Mich. 138, 166 N. W. 938, L.R.A.1918D, 233; Lowry v. Clarksdale, 154 Miss. 155, 122 So. 195, citing R. C. L.; Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805; Sammarco v. Boysa, 193 Wis. 642, 215 N. W. 446, 55 A.L.R. 370; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434; Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 1196, Ann. Cas. 1914B, 199; Borgnis v. Falk Co. 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489; Servonitz v. State, 133 Wis. 231, 113 N. W. 277, 126 Am. St. Rep. 955; Black v. State, 113 Wis. 205, 89 N. W. 522, 90 Am. St. Rep. 853; State ex rel. Kellogg v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252. Where the legislature makes a departure from the common-law classification, the legislative classification thus resorted to must be germane to the enactment. Riccio v. Hoboken, 69 N. J. L. 649, 55 A. 1109, 63 L.R.A. 485.

[9] Miles v. Dept. of Treasury, — Ind. — 193 N. E. 855, 97 A.L.R. 1474, superseded but not on this point in 209 Ind. 172, 199 N. E. 372, 101 A.L.R. 1359; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465,

[50] A.L.R. 1518; Davis Constr. Co. v. Boone County, 192 Ind. 144, 132 N. E. 629, 21 A.L.R. 557; Cleveland, C. C. & St. L. R. Co. v. Schuler, 182 Ind. 57, 105 N. E. 567, L.R.A. 1915A, 884; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; Selvage v. Talbott, 175 Ind. 648, 95 N. E. 114, 33 L.R.A.(N.S.) 973, Ann. Cas. 1913C, 724; Atkinson v. Woodmansee, 68 Kan. 71, 74 P. 640, 64 L.R.A. 325; State v. Holtgreve, 58 Utah, 563, 200 P. 894, 26 A.L.R. 696; Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955; State v. LeBarron, 24 Wyo. 519, 162 P. 265, Ann. Cas. 1918D, 993.

[10] McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Davis Constr. Co. v. Boone County, 192 Ind. 144, 132 N. E. 629, 21 A.L.R. 557; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L.R.A. (N.S.) 418; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A. (N.S.) 821; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; State v. Bridgeman & R. Co. 117 Minn. 186, 134 N. W. 496, Ann. Cas. 1913D, 41; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 130 N. W. 545, 33 L.R.A. (N.S.) 494, Ann. Cas. 1912B, 1030; State v. Ramsey County, 48 Minn. 236, 51 N. W. 112, 31 Am. St. Rep. 650; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L.R.A. 922; Moody v. Hagen, 36 N. D. 471, 162 N. W. 704, L.R.A.1918F, 947, Ann. Cas. 1918A, 933, affirmed in 245 U. S. 633, 62 L. ed. 522, 38 S. Ct. 133; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805; State v. McFarland, 60 Wash. 98, 110 P. 792, 140 Am. St. Rep. 909; Spokane v. Macho, 51 Wash. 322, 98 P. 755, 21 L.R.A.(N.S.) 263, 130 Am. St. Rep. 1100; Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 1196, Ann. Cas. 1914B, 199; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955. Annotation: 93 Am. St. Rep. 111. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. State v. Missouri Tie & Timber Co. 181 Mo. 536, 80 S. W. 933, 65 L.R.A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119.

[11] Harding v. People, 160 Ill. 459, 43 N. E. 624, 32 L.R.A. 445, 52 Am. St. Rep. 344.

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there is no real difference between localities, persons, occupations, or

property, the state cannot make one in favor of some persons.[12] A classification based merely on the circumstance of day and night work in some factories

and day or night work in others, not affecting hours of labor, rests on an arbitrary distinction.[13]

§ [482]. Nature of Differences.—The Supreme Court has held that, generally speaking, it is competent for a legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having resemblances although, of course, such power cannot be exercised arbitrarily and the distinction made must have some reasonable basis.[14] The Fourteenth Amendment in requiring equal protection of the laws is not to be construed as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment.[15] The classification must, however, regard real resemblances and real differences between persons and things, and such persons and things must be classed in accordance with their pertinence to the purpose in hand.[16] While the legislature has the power to enact laws which, by reason of peculiar circumstances, may affect some persons or classes of persons only, in such instances the class of persons on whom the law is to operate must possess some common disability, attribute, or qualification or must satisfy some condition marking them as proper objects for the operation of special or class legislation.[17] The legislature cannot take what might be termed "a natural class of persons," split that class in two, and then arbitrarily designate the dissevered

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[12] Elliott v. State, 29 Ariz. 389, 242 P. 340,

[46] A.L.R. 284; Davis Constr. Co. v. Boone County, 192 Ind. 144, 132 N. E. 629, 21 A.L.R. 557; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; State v. Latham, 115 Me. 176, 98 A. 578, L.R.A.1917A, 480; State v. Mitchell, 97 Me. 66, 53 A. 887, 94 Am. St. Rep. 481.

[13] State v. Barba, 132 La. 768, 61 So. 784,

[45] L.R.A.(N.S.) 546, Ann. Cas. 1914D, 1261.

[14] International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 34 S. Ct. 859, 52 L.R.A. (N.S.) 525; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 S. Ct. 678; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 S. Ct. 27, Ann. Cas. 1914B, 71; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 S. Ct. 697, 41 L.R.A.(N.S.) 153; Fifth Ave. Coach Co. v. New York, 221 U. S. 467, 55 L. ed. 815, 31 S. Ct. 709; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369,

[31] S. Ct. 337, Ann. Cas. 1912C, 160; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 S. Ct. 275; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151,

[31] S. Ct. 132; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 S. Ct. 128; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89,

[45] L. ed. 102, 21 S. Ct. 43; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 S. Ct. 633; Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 S. Ct. 666; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 S. Ct. 284; Magoun v. Illinois Trust & Sav. Bank,

[170] U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594. "It is the province of the legislature to determine what differences or peculiarities of condition or of business, furnish a sufficient basis for applying a

different rule to those engaged in such business or those affected by such condition, than is applied to the remainder of the community. It is also the province of the legislature to draw the line marking the boundary between one class and another, and between the several classes and the general public." Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412. Whether the differences in the use of commercial vehicles operated for hire and those transporting the property of their owners are such as to afford a sufficient basis for legislative classification is primarily a matter of legislative discretion. Interstate Trucking Co. v. Dammmann, 208 Wis. 116, 241 N. W. 625, 82 A.L.R. 1080. As to the discretion of the legislature in classification, see infra, § 520.

[15] Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 S. Ct. 583; Standard Oil Co. v. Tennessee, 217 U. S. 413, 54 L. ed. 817, 30 S. Ct. 543.

[16] Terrace v. Thompson, 263 U. S. 197,

[68] L. ed. 255, 44 S. Ct. 15; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375. See also infra, § 520.

[17] Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65; Off v. Morehead, 235 Ill. 40, 85 N. E. 264, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434; Jones v. Chicago, R. I. & P. R. Co. 231 Ill. 302, 83 N. E. 215, 121 Am. St. Rep. 313; Horwich v. Walker-Gordon Laboratory Co. 205 Ill. 497, 68 N. E. 938, 98 Am. St. Rep. 254; Fountain Park Co. v. Hensler, 199 Ind. 95,

[155] N. E. 465, 50 A.L.R. 1518.

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factions of the original unit as two classes and thereupon enact different rules for the government of each.[18]

Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things because they agree with one another in certain particulars and differ from other things in those same particulars.[19] Things may have very diverse qualities, and yet be united in a class. They may have very similar qualities, and yet be cast in different classes.[20] Differences which would serve for a classification for some purposes furnish no reason whatever for a classification for other purposes.[1]

Upon what differences or resemblances classification may be exercised depends necessarily upon the object in view, which differences or resemblances may be narrow or wide according to that object. "Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further; make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation."[2] The state may not say that all white men shall be subjected to the payment of attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age or all men possessed of a certain wealth shall be alone thus subjected.

These are distinctions which do not furnish any proper basis for the attempted classification.[3] In making classifications in law the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of a classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation.[4]

b. NONESSENTIAL

§ 483. Exactness.—In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things.[5] Classification in law, as in the other departments of knowledge or practice, is the grouping of things in speculation or practice because they agree with one another in

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[18] Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Haynes v. Lapeer Circuit Judge (Haynes v. Williams)

[201] Mich. 138, 166 N. W. 938, L.R.A.1918D, 233; State v. Miksicek, 225 Mo. 561, 125 S. W. 507, 135 Am. St. Rep. 597. State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L.R.A. 231; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443; Bent v. Weaver, 108 W. Va. 299, 150 S. E. 738, citing R. C. L.; State v. LeBarron, 24 Wyo. 519, 162 P. 265, Ann. Cas. 1918D, 998.

[19] See Infra, § 583.

[20] Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 S. Ct. 379; Billings v. Illinois,

[188] U. S. 97, 47 L. ed. 400, 23 S. Ct. 272.

[1] Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789; Heisler v. Thomas Colliery Co. 274 Pa. 448, 118 A. 394, 24 A.L.R. 1215, affirmed in 260 U. S. 246, 67 L. ed. 237, 43 S. Ct. 83; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1,

[135] S. W. 773, Ann. Cas. 1912D, 805; State ex rel. Kellogg v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252. See International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 34 S. Ct. 859,

[52] L.R.A.(N.S.) 525.

[2] Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 S. Ct. 379.

[3] Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386.

[4] McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Alexander v. Elizabeth, 56 N. J. L. 71, 28 A. 51, 23 L.R.A. 525; Edmonds v. Herbrandson, 2 N. D. 270, 50 N. W. 970,

[14] L.R.A. 725; State v. Columbia, G. & S. F. Turnp. Co. 133 Tenn. 446, 181 S. W. 682, citing R. C. L.; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

[5] Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 S. Ct. 89.

certain particulars, and differ from other things in those same particulars.[6]

It is almost impossible in some matters to foresee and provide for every

It is almost impossible in some matters to foresee and provide for every

imaginable and exceptional case, and a legislature ought not to be required to

do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws.[7] Hence, a large latitude is allowed to the states for classification upon any reasonable basis, and what is reasonable is a question of practical details into which fiction cannot enter.[8] It has been said that it is of the essence of a classification that on one class are cast duties and burdens different from those resting on the general public and that the very idea of classification is that of inequality, so that the mere fact of inequality in no manner determines the matter of constitutionality.[9] It is well settled that a classification having some reasonable basis does not offend against the Federal Constitution merely because it is not made with mathematical nicety or because in practice it results in some inequality.[10] The

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[6] Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 S. Ct. 379; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 S. Ct. 272.

[7] Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 S. Ct. 89. "It is generally the case that a classifi- cation cannot be made so as to make a definite line within which may be seen all the dangers to be guarded against and without which there are no such dangers. The best that can be done is to keep with- in the clearly reasonable and practicable. That is accomplished where there are such general characteristics of the members of the class as reasonably to call for special legislative treatment. That may be true, generally, and yet some of such charac- teristics sometimes be found to exist out- side of the boundaries of the class. Exactness in division is impossible and never looked for in applying the legal test, and that is required is that there must be, in general, some reasonable basis on general lines for the division." Mehlos v. Mil- waukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1916C, 1102.

[8] Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 S. Ct. 401. "Classification is not to be condemned because there may be occasional instances in which it does not fit the situation; it is proper if the great mass of situations to which the law applies justifies the formation of a class and the application of some special or different legislative provisions to that class." Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L.R.A.(N.S.) 778, Ann. Cas. 1916B, 1040.

[9] International Harvester Co. v. Missouri,

[234] U. S. 199, 58 L. ed. 1276, 34 S. Ct. 859,

[52] L.R.A.(N.S.) 525; Clark v. Kansas City,

[176] U. S. 114, 44 L. ed. 392, 20 S. Ct. 284; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; Peo- ple v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; State v. Broadbelt, 89 Md. 565, 43 A. 771,

[45] L.R.A. 433, 73 Am. St. Rep. 201; Brat- berg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1338.

[10] Great Atlantic & P. Tea Co. v. Gros- jean, 301 U. S. 412, 81 L. ed. 1193, 57 S. Ct. 772, 112 A.L.R. 293; Phelps v. Board of Ed- ucation, 300 U. S. 319, 81 L. ed. 674, 57 S. Ct. 483; Bayside Fish Flour Co. v. Gentry,

[297] U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Miller v. Wilson,

[236] U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 34 S. Ct. 859, 52 L.R.A.(N.S.) 525; Second Employers' Liability Cases (Mon- dou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A. (N.S.) 44; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921,

[30] S. Ct. 676, 47 L.R.A.(N.S.) 84; Ozan Lumber Co. v. Union County Nat. Bank,

[207] U. S. 251, 52 L. ed. 195, 28 S. Ct. 89; Minnesota Iron Co. v. Kline, 199 U. S. 593,

[50] L. ed. 322, 26 S. Ct. 159; Cotting v. Kan- sas City Stock Yards Co. (Cotting v. God- dard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 633,

[62] L. ed. 521, 38 S. Ct. 64; Vandalia R. Co. v. Stillwell, 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D, 258, affirmed in 239 U. S. 537,

[60] L. ed. 480, 36 S. Ct. 445; Baird v. Wich- ita, 128 Kan. 100, 276 P. 77, citing R. C. L.; Vigeant v. Postal Teleg.-Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; Kempner v. Ramsey County, 160 Minn. 69, 199 N. W. 442, citing R. C. L.; State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637; Steele, H. & M. Co. v. Miller, 92 Ohio St.

Fourteenth Amendment is not a pedagogical requirement of the impracticable.[11] Exact wisdom and nice adaptation of remedies are not required.[12] The crudities or even the injustice of state laws are not redressed by it.[13] The principle of equality, therefore, necessarily permits many practical inequalities,[14] and classification is not invalid because it does not depend on scientific or marked differences in things or persons or in their relations.[15]

It is not essential that there be a logical appropriateness of the inclusion or exclusion of objects or persons involved in a classification.[16] Hence, if a class is deemed to present a conspicuous example of what the legislature seeks to

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115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916P, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; Salt Lake City v. In- dustrial Commission, 58 Utah, 314, 199 P. 152, 18 A.L.R. 259; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584. "Classification can rarely be mathemat- ically exact." Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L.R.A.(N.S.) 778, Ann. Cas. 1916B, 1040.

[11] Perley v. North Carolina, 249 U. S. 510,

[63] L. ed. 735, 39 S. Ct. 357; Dominion Hotel Co. v. Arizona, 249 U. S. 265, 63 L. ed. 597,

[39] S. Ct. 273.

[12] Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 S. Ct. 114; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; State v. McKay, 137 Tenn. 280,

[193] S. W. 99, Ann. Cas. 1917E, 158.

[13] Chicago Dock & Canal Co. v. Fraley,

[228] U. S. 680, 57 L. ed. 1022, 33 S. Ct. 715; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 S. Ct. 114; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; State v. McKay, 137 Tenn. 230, 193 S. W. 99, Ann. Cas. 1917E, 158.

[14] Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; St. Louis, I. M. & S. R. Co. v. Arkansas, 240 U. S. 518, 60 L. ed. 776, 36 S. Ct. 443; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 S. Ct. 676, 47 L.R.A.(N.S.) 84; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552,

[19] S. Ct. 281; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Re Hunter, 97 Colo. 279, 49 P. (2d) 1009, 101 A.L.R. 1202; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Kocsis v. Chi- cago Park Dist. 362 Ill. 24, 198 N. E. 847,

[103] A.L.R. 141; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Baird v. Wichita, 128 Kan. 100, 276 P. 77, citing R. C. L.; Kein- ingham v. Blake, 135 Md. 320, 109 A. 65,

[8] A.L.R. 1066; State v. Fairmont Cream- ery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548; Strauss v. State, 36 N. D. 594,

[163] N. W. 908, L.R.A.1917E, 909; State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136; Cav- ender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; Salt Lake City v. Indus- trial Commission, 58 Utah, 314, 199 P. 152,

[18] A.L.R. 259.

[15] Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 538, rehearing denied in 295 U. S. 767, 79 L. ed. 1708, 55 S. Ct. 647; Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, 52 S. Ct. 595, 81 A.L.R. 1402; Salmon v. State Tax Commission, 278 U. S. 484, 73 L. ed. 443, 49 S. Ct. 192; Metropo- lis Theatre Co. v. Chicago, 228 U. S. 61, 57 L. ed. 730, 33 S. Ct. 441; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 S. Ct. 560; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 S. Ct. 281; Magoun v. Illinois Trust & Sav. Bank,

[170] U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Baird v. Wichita, 128 Kan. 100, 276 P. 77, citing R. C. L.; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210; State ex rel. Ev- ans v. Kozer, 116 Or. 581, 242 P. 621, citing R. C. L.; Heisler v. Thomas Colliery Co. 274 Pa. 448, 118 A. 394, 22 A.L.R. 1215, affirmed in 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83; Memphis v. State, 133 Tenn. 83,

[179] S. W. 631, L.R.A.1916B, 1151, Ann. Cas. 1917C, 1056; State v. Schlitz Brewing Co.

[104] Tenn. 715, 58 S. W. 1033, 78 Am. St. Rep. 941; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A. (N.S.) 466; State ex rel. Hickey v. Levitan,

[190] Wis. 646, 210 N. W. 111, 48 A.L.R. 434. A classification having a basis in prac- tical convenience is not unconstitutional because it is lacking in purely theoretical or scientific uniformity. Continental Bak- ing Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, 52 S. Ct. 595, 81 A.L.R. 1402.

[16] Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Heath & M. Mfg. Co. v. Worst,

[207] U. S. 338, 52 L. ed. 236, 28 S. Ct. 114; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Cin- cinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; Baird v. Wichita, 128 Kan. 100, 276 P. 77, citing R. C. L.; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A. 1918B, 374; State ex rel. Evans v. Kozer,

[116] Or. 581, 242 P. 621, citing R. C. L.; Heisler v. Thomas Colliery Co. 274 Pa. 448,

[118] A. 394, 22 A.L.R. 1215, affirmed in 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83; Mem- phis v. State, 133 Tenn. 83, 179 S. W. 631, L.R.A.1916B, 1151, Ann. Cas. 1917C, 1056.

prevent, the Fourteenth Amendment allows it to be dealt with, although it is otherwise and merely logically not distinguishable from others not embraced in the law.[17] It is also unquestioned that legislative classification may in many cases properly rest on narrow distinctions.[18]

Accidental inequality, however, is one thing, intentional and systematic discrimination, another.[19]

Apart from the question of the exactness or inexactness of a classification attempted by the legislature is the important fundamental problem as to whether the legislature had authority to deal with the subject at which the legislation was aimed. This qualification is of the utmost importance and must be kept in mind in any case. If the legislature has no authority to deal with the subject at which measures are aimed, a classification, however logical, appropriate, or scientific, will not be sustained. If such authority does exist, a classification may be deficient in all these attributes, may be harsh and oppressive, and yet be within the power of the legislature.[20]

§ 484. Completeness of Regulation of Evils.—

The Federal Constitution does

not require that all state laws shall be perfect1 or that state laws shall cover the entire field of proper legislation in a single enactment.[2] There is no constitutional requirement that regulation must reach every class to which it might be applied—that the legislature must regulate all or none.[3] It is not unconstitutional merely because it is not all-embracing,[4] and does not include all the evils within its reach.[5]

In the field of constitutional law relating to the extent to which corrective legislation may pick out the objects to which it is addressed, the rule is fundamental that the state may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.[6] This rule

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[17] Hall v. Geiger-Jones Co. 242 U. S. 539,

[61] L. ed. 480, 37 S. Ct. 217, L.R.A.1917F, 514, Ann. Cas. 1917C, 643; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; Longbrake v. State, 112 Ohio St. 13, 146 N. E. 417, 41 A.L.R. 925; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402.

[18] German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A. 1915C, 1189; Baird v. Wichita, 128 Kan. 100, 276 P. 77, citing R. C. L.; People v. Charles Schweinler Press, 214 N. Y. 395,

[108] N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214; In- surance Co. of N. A. v. Welch, 49 Okla. 620, 154 P. 48, Ann. Cas. 1918E, 471; Laugh- ney v. Maybury, 145 Wash. 146, 259 P. 17,

[54] A.L.R. 393.

[19] First Nat. Bank v. Albright, 208 U. S. 548, 52 L. ed. 614, 28 S. Ct. 349.

[20] Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 S. Ct. 379. An act aimed not against individuals or classes, but against certain acts, is not dis- criminating or partial in character. Halter v. State, 74 Neb. 757, 105 N. W. 298, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754, affirmed in 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525.

[1] Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 57 L. ed. 1022, 33 S. Ct. 715; Ros- enthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 S. Ct. 27, Ann. Cas. 1914B, 71.

[2] Middleton v. Texas Power & L. Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227; Chi- cago Dock & Canal Co. v. Fraley, 228 U. S. 680, 57 L. ed. 1022, 33 S. Ct. 715; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212,

[33] S. Ct. 27, Ann. Cas. 1914B, 71; State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548. Legislation cannot be all-comprehensive and there may be practical grouping of objects which will as a whole fairly pre- sent a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant. St. Louis, I. M. & S. R. Co. v. Arkansas, 240 U. S. 518, 60 L. ed. 776, 36 S. Ct. 443. There may be degrees of danger and a difference in degree may justify classifica- tion in safety legislation. Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 57 L. ed. 1022, 33 S. Ct. 715.

[3] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581.

[4] Zucht v. King, 260 U. S. 174, 67 L. ed. 194, 43 S. Ct. 24; Masonic Cemetery Asso. v. Gamage (C. C. A. 9th) 38 F. (2d) 950, 71 A.L.R. 1027, writ of certiorari denied in 282 U. S. 852, 75 L. ed. 755, 51 S. Ct. 30; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne)

[239] Mich. 204, 214 N. W. 316, 53 A.L.R. 273.

[5] National Labor Relations Bd. v. Jones & L. Steel Corp. 301 U. S. 1, 81 L. ed. 893,

[57] S. Ct. 615, 108 A.L.R. 1352 (act of Con- gress).

[6] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Whit-

is particularly applicable to police regulations.[7] The legislature is not bound, in order to support the constitutional validity of a regulation, to extend it to all cases which it might possibly reach. In dealing with practical exigencies, the legislature may be guided by experience.[8] If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.[9]

It is generally sufficient if a statute embraces such instances as lie at the root of the evil which it is sought to remedy, and when it does this, it does not deny to any person the equal protection of the law by reason of its failure to include other matters within the scope of its operation.[10] The state may legislate in such a manner even though the forbidden act does not differ

ney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; James-Dickinson Farm Mortg. Co. v. Harry, 273 U. S. 119, 71 L. ed. 569, 47 S. Ct. 308; Hall v. Geiger-Jones Co.

[242] U. S. 539, 61 L. ed. 480, 37 S. Ct. 217, L.R.A.1917F, 514, Ann. Cas. 1917C, 643; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 S. Ct. 281; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A. 1918B, 374; Campbell v. Com. 229 Ky. 264,

[17] S. W. (2d) 227, 63 A.L.R. 932; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne)

[239] Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Holsman v. Thomas, 112 Ohio St. 397, 147 N. E. 750, 39 A.L.R. 760; Longbrake v. State,

[112] Ohio St. 13, 146 N. E. 417, 41 A.L.R. 925; Yee Bow v. Cleveland, 99 Ohio St. 269, 124 N. E. 132, 12 A.L.R. 1424, writ of error dismissed in 255 U. S. 578, 65 L. ed. 794, 41 S. Ct. 320; Wessell v. Timberlake,

[95] Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402.

[7] James-Dickinson Farm Mortg. Co. v. Harry, 273 U. S. 119, 71 L. ed. 569, 47 S. Ct. 308; Farmers & M. Bank v. Federal Re- serve Bank, 262 U. S. 649, 67 L. ed. 1157,

[43] S. Ct. 651, 30 A.L.R. 635; Miller v. Wil- son, 236 U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; Missouri P. R. Co. v. Mackey, 127 U. S. 205,

[32] L. ed. 107, 8 S. Ct. 1161; State v. Olson,

[26] N. D. 304, 144 N. W. 661, L.R.A.1918B, 975, writ of error dismissed in 245 U. S. 676,

[62] L. ed. 542, 38 S. Ct. 13; Grown v. Cleve- land, 125 Ohio St. 455, 181 N. E. 897, 84 A.L.R. 708; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402.

[8] National Labor Relations Bd. v. Jones & L. Steel Corp. 301 U. S. 1, 81 L. ed. 893,

[57] S. Ct. 615, 108 A.L.R. 1352; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63,

[73] L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; James-Dickinson Farm Mortg. Co. v. Harry, 273 U. S. 119, 71 L. ed. 569, 47 S. Ct. 308; Zucht v. King, 260 U. S. 174, 67 L. ed. 194, 43 S. Ct. 24; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539,

[34] S. Ct. 281; Masonic Cemetery Asso. v. Gamage (C. C. A. 9th) 38 F. (2d) 950, 71 A.L.R. 1027, writ of certiorari denied in 282 U. S. 852, 75 L. ed. 755, 51 S. Ct. 30; Re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51.

[9] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; Silver v. Silver,

[280] U. S. 117, 74 L. ed. 221, 50 S. Ct. 57,

[65] A.L.R. 939; Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A. 1915F, 829; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 227, 58 L. ed. 1288, 1239, 34 S. Ct. 856; Re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714,

[42] A.L.R. 548. An ordinance is not void because it reg- ulates public dances alone, although the same objectionable conduct which it seeks to prevent might also occur at private dances. Mehlos v. Milwaukee, 156 Wis. 591,

[146] N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102.

[10] Silver v. Silver, 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212,

[33] S. Ct. 27, Ann. Cas. 1914B, 71; Ozan Lumber Co. v. Union County Nat. Bank,

[207] U. S. 251, 52 L. ed. 195, 28 S. Ct. 89; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 168; Re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; State v. Dolan, 13 Idaho, 693, 88 P. 235, 14 L.R.A.(N.S.) 1259; Booth v. People,

[186] Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; State v. Phillips, 109 Miss. 22, 67 So. 651, L.R.A. 1915D, 530; Thorne v.

Casale, 101 N. J. L. 418, 128 A. 174, citing R. C. L.; Thorne v. Kearny, 100 N. J. L. 223, 126 A. 613, cit- ing R. C. L.; People ex rel. Bryant v. Zim- merman, 241 N. Y. 405, 150 N. E. 497, 43 A.L.R. 909, affirmed in 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; People v. Charles Schweinler Press, 214 N. Y. 395,

[108] N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214; State v. Olson, 26 N. D. 304, 144 N. W. 661, L.R.A. 1918B, 975, writ of error dismissed in 245 U. S. 676, 62 L. ed. 542, 38 S. Ct. 13; Phila- delphia v. Brabender, 201 Pa. 574, 51 A. 374, 58 L.R.A. 220; Johnston, L. & Co. v. Spartan Mills, 68 S. C. 339, 47 S. E. 695, 1 Ann. Cas. 409; State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819. [12 Am. Jur.]—11 161

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in kind from those that are allowed,[11] because it is free to recognize degrees of harm and may confine its restrictions to those classes of cases where the need is deemed to be clearest.[12] Hence, it is not enough to invalidate a law that others may do a thing which is equally harmful and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named.[13]

Whenever experience shows that an evil arises from the activities of some specific group, a remedy may be prescribed by legislative action applicable only to those who form the evil-producing group, without violating a constitutional prohibition of class legislation,[14] moreover, the Federal Constitution embodies no prohibition of laws directed against evils experienced in particular branches of business.[15] If the class discriminated against is or reasonably might be considered to define those from whom the evil is to be feared, it may properly be picked out.[16]

The rule is also well settled that legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection

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[11] Hall v. Geiger-Jones Co. 242 U. S. 539,

[61] L. ed. 480, 37 S. Ct. 217, L.R.A.1917F, 514, Ann. Cas. 1917C, 643; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374. Where an evil exists in a variety of cases, it is a sufficient ground for classification in legislation so as to include some and exclude others, that in the former the evil can be remedied and in the latter it cannot be. State v. Smith, 58 Minn. 35, 59 N. W. 545, 25 L.R.A. 759.

[12] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Miller v. Wilson, 236 U. S. 373, L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; Masonic Cemetery Asso. v. Gamage (C. C. A. 9th) 38 F. (2d) 950, 71 A.L.R. 1027, writ of certiorari denied in 282 U. S. 852, 75 L. ed. 755, 51 S. Ct. 30; Re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51; State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548. A statute regulating a product which is injurious to the community will not be held unconstitutional because there are other products, equally as injurious, which are not regulated or forbidden. State v. Olson, 26 N. D. 304, 144 N. W. 661, L.R.A. 1918B, 978, writ of error dismissed in 245 U. S. 676, 62 L. ed. 542, 38 S. Ct. 13. A statute prohibiting

only those employed for a consideration to act as legislative counsel or agents, to go upon the floor of either house of the legislature while in session, except upon the invitation of such house, is not unconstitutional as making an arbitrary, unreasonable, and capricious classification. Campbell v. Com.

[229] Ky. 264, 17 S. W. (2d) 227, 63 A.L.R. 932. Annotation: 63 A.L.R. 941.

[13] New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Radice v. New York,

[264] U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 S. Ct. 281; Re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51; Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 227,

[63] A.L.R. 932. A state statute prohibiting, during the closed period for salmon fishing, the transportation through the protected waters of salmon caught outside the jurisdiction of the state does not, in precluding transportation to market, by water, of fish which may lawfully be transported to the same market by a land route, violate the equal protection clause of the Fourteenth Amendment. Johnson v. Gentry, 220 Cal. 17, 30 P. (2d) 400, 92 A.L.R. 1264.

[14] Spicer v. Benefit Asso. R. E. 142 Or. 588,

[21] P. (2d) 187, 90 A.L.R. 517.

[15] Lindsley v. Natural Carbonic Gas Co.

[220] U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 S. Ct. 246; Carroll v. Greenwich Ins. Co.

[199] U. S. 401, 50 L. ed. 246, 26 S. Ct. 66; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; Freadrich v. State, 89 Neb. 443, 131 N. W. 618, 34 L.R.A.(N.S.) 650; State v. Olson, 26 N. D. 304, 144 N. W. 661, L.R.A.1918B, 978, writ of error dismissed in 245 U. S. 676, 62 L. ed. 542, 38 S. Ct. 13; Spicer v. Benefit Asso. R. E.

[142] Or. 588, 21 P. (2d) 187, 90 A.L.R. 517. The equal protection of the laws is not denied by a municipal ordinance for the prevention of the emission of dense smoke in portions of the city, where it applies to all coming within its terms, although other businesses might have been, but were not, included. Northwestern Laundry v. Des Moines, 239 U. S. 486, 60 L. ed. 396, 36 S. Ct. 206.

[16] New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 S. Ct. 281. Members of the Ku Klux Klan are not deprived of the equal protection of the laws by being required to file their constitution, bylaws, rules, regulations, and oath of membership, and roster of membership, when members of labor unions, Masonic fraternities, Odd Fellows, Grand Army of the Republic, and Knights of Columbus are not required to do so. New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785.

clause of the Fourteenth Amendment.[17] This principle is sometimes stated in the concept that the power of a state to classify objects of legislation may be determined by degrees of evil or exercised in cases where detriment is specially experienced.[18] Legislation is addressed to evils as they appear.[19] In fact, the state must adapt its legislation in this manner and moreover is not helpless because of the forms of the evils.[20] It may "proceed cautiously, step by step," and "if an evil is specially experienced in a particular branch of business," it is not necessary that the prohibition "should be couched in all-embracing terms."[1] There is no doctrinaire requirement demanding such procedure.[2]

The existence of the power of classification to suppress an evil is not to be denied simply because some innocent articles or transactions may be found within the proscribed class.[3] Moreover, an exercise of police power will not be declared void for the reason that it is partial and does not exterminate the evil with which it undertakes to deal.[4]

3. FACTUAL BASES

§ 485. Generally.—

The contention that a state statute violates the constitutional guaranty of the equal protection of the laws is to be tested by considering whether there is a basis for the classification made by the statute.5

The question always is whether there is any reasonable ground for a classification or whether it is only and simply arbitrary, based upon no real distinction.[6]

The authorities are unanimous in their conclusion that the basis on which

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[17] Packer Corp. v. Utah, 285 U. S. 105,

[76] L. ed. 643, 52 S. Ct. 273, 79 A.L.R. 546; New York ex rel. Bryant v. Zimmerman,

[278] U. S. 63, 73 L. ed. 184, 49 S. Ct. 61,

[62] A.L.R. 785; Perley v. North Carolina,

[249] U. S. 510, 63 L. ed. 735, 39 S. Ct. 357; St. Louis, I. M. & S. R. Co. v. Arkansas,

[240] U. S. 518, 60 L. ed. 776, 36 S. Ct. 443; Armour & Co. v. North Dakota, 240 U. S. 510, 60 L. ed. 771, 36 S. Ct. 440, Ann. Cas. 1916D, 548; Truax v. Raich, 239 U. S. 33,

[60] L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283; Price v. Illinois, 238 U. S. 446, 59 L. ed. 1400, 35 S. Ct. 892; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 S. Ct. 856; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 34 S. Ct. 859, 52 L.R.A.(N.S.) 525; German Alliance Ins. Co. v. Lewis,

[233] U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 S. Ct. 190; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 S. Ct. 114; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; State v. Wilson, 101 Kan. 789,

[168] P. 679, L.R.A.1918B, 374; State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548; Insurance Co. of N. A. v. Welch, 49 Okla. 620, 154 P. 43, Ann. Cas. 1918E, 471; State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158; Laughney v. Maybury, 145 Wash. 146, 259 P. 17, 54 A.L.R. 393. The legislature may recognize degrees of evil and adapt its legislation accordingly, but underlying the classification must be the authority to deal with that at which the legislation is aimed. Truax v. Raich,

[239] U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283.

[18] Perley v. North Carolina, 249 U. S. 510, 63 L. ed. 735, 39 S. Ct. 357; Dominion Hotel Co. v. Arizona, 249 U. S. 265, 63 L. ed. 597, 39 S. Ct. 273; Armour & Co. v. North Dakota, 240 U. S. 510, 60 L. ed. 771,

[36] S. Ct. 440, Ann. Cas. 1916D, 548.

[19] German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Laughney v. Maybury,

[145] Wash. 146, 259 P. 17, 54 A.L.R. 393.

[20] Merrick v. N. W. Halsey & Co. 242 U. S. 568, 61 L. ed. 498, 37 S. Ct. 227.

[1] National Labor Relations Bd. v. Jones & L. Steel Corp. 301 U. S. 1, 81 L. ed. 893,

[57] S. Ct. 615, 108 A.L.R. 1352; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 S. Ct. 66; Masonic Cemetery Asso. v. Gamage (C. C. A. 9th) 38 F. (2d) 950, 71 A.L.R. 1027, writ of certiorari denied in 282 U. S. 852, 75 L. ed. 755, 51 S. Ct. 30; State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548.

[2] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 S. Ct. 66.

[3] Purity Extract & Tonic Co. v. Lynch,

[226] U. S. 192, 57 L. ed. 184, 33 S. Ct. 44.

[4] State v. Burgdoerfer, 107 Mo. 1, 17 S. W. 646, 14 L.R.A. 846.

[5] Finley v. California, 222 U. S. 28, 56 L. ed. 75, 32 S. Ct. 13.

[6] Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 S. Ct. 522.

a classification may validly rest must be reasonable7 and founded on material differences and substantial distinctions which bear a proper relation to the matters or persons dealt with by the legislation and to the purpose sought to be accomplished.[8]

Considering bases for classification concretely, it is apparent that such differences as time,[9] ability and experience,[10] place,[11] population,[12] size, amount13 or number14 including graduated scales15 and exemption of minima,[16] and choice or selection by certain officials17 have often been sought to be used as the foundation upon which a classification may stand, and that in a majority of cases the legislative selection of such factors as a basis for classification has been upheld.[18]

§ [486]. Time.—The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.[19] Frequently, changes in statutory regulations must be made so as to take effect after a given date without applying rigorously to previously established conditions.[20] For example, a law permitting the use of docked horses registered within a certain time after its passage and forbidding the use of all other docked horses has been held not to be void as objectionable class legislation.[1]

In some cases a statute cannot be given effect as to transactions and matters already existing without impairing the obligation of contracts.[2] Hence, a law which operates alike on all persons similarly situated is not necessarily invalid because it excepts from its operation all instances in which contract rights had been acquired prior to its adoption.[3] It is also generally held that considera-

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[7] See supra, § 480.

[8] See supra, § 481.

[9] See infra, § 486.

[10] See infra, § 487.

[11] See infra, § 488.

[12] See infra, § 489.

[13] See infra, § 490.

[14] See infra, § 491.

[15] See infra, § 492.

[16] See infra, § 493.

[17] See infra, § 494.

[18] See infra, §§ 486-494.

[19] Williams v. Walsh, 222 U. S. 415, 56 L. ed. 253, 32 S. Ct. 137; Sperry & H. Co. v. Rhodes, 220 U. S. 502, 55 L. ed. 561, 31 S. Ct. 490; People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A.1915D, 538. See also Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 S. Ct. 159. A statute relieving uncompensated sureties on bonds of public depositories designated as such after a stated date, and the heirs, devisees, and personal representatives of such sureties, of liability on such bonds, upon judgments obtained thereon, and upon any evidence of indebtedness given in lieu of such liability and authorizing the refunding of payments which may have been made on account of such liability, to the extent that deposits represent the funds raised by general taxation, is not class legislation in that it does not release sureties on bonds of depositories designated as such prior to a date fixed, where the purpose in fixing such date is to deal with a situation occasioned by a financial crisis, or in that it does not release compensated sureties, and furthermore does not violate a constitutional prohibition of the grant to a class of citizens of privileges and immunities which on the same terms do not equally belong to all citizens. Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271.

[20] Williams v. Walsh, 222 U. S. 415, 56 L. ed. 253, 32 S. Ct. 137; Sperry & H. Co. v. Rhodes, 220 U. S. 502, 55 L. ed. 561, 31 S. Ct. 490. An express company is not denied the equal protection of the laws by reason of the fact that it is subject to a penalty for beginning business over any road before paying the privilege tax, while persons and corporations already in business when the taxing day arrives are granted a number of days in which to pay the tax. Southeastern Exp. Co. v. Miller, 264 U. S. 535, 68 L. ed. 836, 44 S. Ct. 421.

[1] Bland v. People, 32 Colo. 319, 76 P. 359, 65 L.R.A. 424, 105 Am. St. Rep. 80.

[2] Williams v. Walsh, 222 U. S. 415, 56 L. ed. 253, 32 S. Ct. 137.

[3] Williams v. Walsh, 222 U. S. 415, 56 L. ed. 253, 32 S. Ct. 137 (holding that an exception in favor of existing contracts, contained in a statute making it criminal to sell or deliver black powder for use in any coal mines in the state except in original sealed packages did not vitiate the statute); J. Burton Co. v. Chicago, 236 Ill. 383, 86 N. E. 93, 15 Ann. Cas. 965; Re Ten Hour Law for Street R. Corporations, 24 R. I. 603, 54 A. 602, 61 L.R.A. 612, holding that the exemption of existing written contracts from the operation of a statute limiting the hours of labor of employees of a public service corporation did not render it unconstitutional.

tion for existing property rights furnishes a legitimate basis for classification in legislation of a regulatory nature.[4] An ordinance prohibiting the keeping of automobiles in wooden buildings is not invalid as denying the equal protection of the laws because it excepts the owners of existing garages.[5]

As a general rule, it may be stated that it is not an improper classification to make a law depend on a fact without which it would have been invalid, as, for instance, an inheritance tax which excepts from the operation all successions which had been fully administered at the time the law took effect.[6]

Unless a statute is curative or remedial and, therefore, temporary, a classification must not be based on existing conditions only, but provision must be made for future acquisitions to the class as other subjects acquire the characteristics which form the basis of the classification.[7] This principle is of considerable importance when attempts are made to draw distinctions based on time, putting in one class all the instances existing on a designated date, and placing all others in another class. Under certain circumstances, where such a procedure would discriminate unwarrantably in favor of establishments, things, or persons existing or engaged in particular occupations on a given date, the courts have held that the classification is in denial of the equal

protection of the laws.[8] Thus, a statute containing a classification which attempts to give an economic advantage to those engaged in a business at an arbitrary date as against all those who enter the industry after that date is not a regulation of a business in the interest of the public, and, unless otherwise shown to affect the public welfare in a manner which will create some reasonable basis for the distinction, is arbitrary and unreasonable.[9] If a statute requires undertakers to have embalmers' licenses, a provision in it that such licenses shall be issued to all undertakers in business on a specified date is invalid.[10] An ordinance making it unlawful to establish, extend, or enlarge any cemetery within the limits of a county, but impliedly permitting burials in cemeteries already established, has been held to be unequal in its operation, in assuming to limit the unrestricted privilege of burial to one class of citizens and to deny it to another class within the same district.[11] A classification of public utilities, for the purpose of regulation, into those in existence before and those created after a specified date is purely arbitrary, without reason, and invalid.[12] In order for a statute regulating a business or profession to make distinctions based on time as to the persons to whom it relates, there must be a reasonable basis for the distinctions relating to those engaged in the business at a certain time and those engaged at a later time.[13] The rule is that statutes which enact conditions and qualifications for those persons enter-

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[4] Sammarco v. Boysa, 193 Wis. 642, 215 N. W. 446, 55 A.L.R. 370.

[5] Ibid.

[6] Cahen v. Brewster, 203 U. S. 543, 51 L. ed. 310, 25 S. Ct. 174, 8 Ann. Cas. 215; Levy's Succession, 115 La. 377, 39 So. 37, 8 L.R.A.(N.S.) 1180, 5 Ann. Cas. 871, affirmed in 203 U. S. 543, 51 L. ed. 310, 27 S. Ct. 174.

[7] See supra, § 479.

[8] Mayflower Farms v. Ten Eyck, 297 U. S. 266, 80 L. ed. 675, 56 S. Ct. 457; Los Angeles County v. Hollywood Cemetery Asso. 124 Cal. 344, 57 P. 153, 71 Am. St. Rep. 75; Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086; Fulton v. Norteman, 60 W. Va. 562, 55 S. E. 658, 9 L.R.A.(N.S.) 1196; Pabst Corp. v. Milwaukee, 190 Wis. 349, 208 N. W. 493, 45 A.L.R. 1164; State ex rel. Kempinger v. Whyte, 177 Wis. 541, 188 N. W. 607, 23 A.L.R. 67.

[9] Mayflower Farms v. Ten Eyck, 297 U. S. 266, 80 L. ed. 675, 56 S. Ct. 457 (milk business).

[10] State ex rel. Kempinger v. Whyte, 177 Wis. 541, 188 N. W. 607, 23 A.L.R. 67.

[11] Los Angeles County v. Hollywood Cemetery Asso. 124 Cal. 344, 57 P. 153, 71 Am. St. Rep. 75; Fulton v. Norteman, 60 W. Va. 562, 55 S. E. 658, 9 L.R.A.(N.S.) 1196. See CEMETERIES, Vol. 10, p. 496, § 15.

[12] Pabst Corp. v. Milwaukee, 190 Wis. 349, 208 N. W. 493, 45 A.L.R. 1164.

[13] Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086.

ing into a business after a certain time but do not impose such conditions and qualifications on persons previously engaged therein are not on that account unconstitutional. Such exceptions proceed on the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination.[14] Exemptions if applied to persons already engaged in an occupation, however, must apply equally to all similarly situated and cannot be based upon a time limit which will operate arbitrarily.[15] A statute which discriminates against businesses, persons, or establishments already in existence is unreasonable and unconstitutional.[16]

§ 487. Capacity and Equipment.—

Classification of persons may be made according to their personal fitness to carry on particular businesses. This is characteristic of all license laws, and so far as they provide that all persons desiring to engage in a particular occupation shall be examined as to fitness or otherwise show that they possess proper qualifications, such laws have usually been held valid.[17] It is an unconstitutional exception, however, to permit members of a partnership or of a corporation to pursue a particular calling without a license, provided any member of the partnership or corporation shall have procured a license.[18] The courts have also held that the making of appointments to public office depend on fitness, to be ascertained by competitive examination as far as possible, does not create an unconstitutional discrimination between different classes of citizens in regard to the right to enter upon and continue in the public service.[19]

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[14] Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 S. Ct. 644 (physicians and surgeons); New Orleans v. Smythe, 116 La. 685, 41 So. 33, 6 L.R.A.(N.S.) 722, 114 Am. St. Rep. 566 (liquor dealers); State v. Randolph, 23 Or. 74, 31 P. 201, 17 L.R.A. 470, 37 Am. St. Rep. 655 (physicians and surgeons); State v. Sharpless, 31 Wash. 191, 71 P. 737, 96 Am. St. Rep. 893 (barbers); State v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252 (physicians and surgeons). Compare State v. Hinman, 65 N. H. 103, 18 A. 194, 23 Am. St. Rep. 22 (dentists); Harmon v. State, 66 Ohio St. 249, 64 N. E. 117, 58 L.R.A. 618 (steam engineers), holding particular statutes unconstitutional. See also State ex rel. Ebert v. Loden, 117 Md. 373, 83 A. 564, 40 L.R.A.(N.S.) 193, Ann. Cas. 1913E, 1300 (moving picture machine operators). A statute having for its general purpose the regulation of the undertaking business is not unfair and discriminatory, and so in violation of rights secured by the Fourteenth Amendment to the Federal Constitution because it limits membership on the state board of embalming authorized to enforce the provisions of the act, to citizens and residents of the state who have been actually engaged for at least five years in the undertaking business in the state as embalmers and funeral directors on their own account. Prata Undertaking Co. v. State Bd. of Embalming, — R. I. —, 182 A. 808, 104 A.L.R. 389. A provision in a statute for the licensing of dentists preserving the rights of those licensed and registered at the time of its passage does not affect the constitutional rights of one licensed at the time in another state, who, under the statute, must comply with its terms to secure a license to practice in the state after the passage of the act. People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A.1915D, 538.

[15] Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086 (statute regulating accountants).

[16] State v. Thrift Oil & Gas Co. 162 La. 165, 110 So. 188, 51 A.L.R. 261. A statute regulating gas wells, which discriminates against existing establishments, is unreasonable and unconstitutional. Ibid.

[17] Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 S. Ct. 286 (osteopaths); Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997 (laundrymen); Moler v. Whisman, 243 Mo. 571, 147 S. W. 985, 40 L.R.A.(N.S.) 629, Ann. Cas. 1913D, 392 (barbers); People v. Warden, 144 N. Y. 529, 39 N. E. 686, 27 L.R.A. 718 (plumbers); Servonitz v. State, 133 Wis. 231, 113 N. W. 277, 126 Am. St. Rep. 955 (peddlers). Requiring journeyman plumbers to secure a certificate of competency after examination before they can work at their trade while not requiring master plumbers to secure such certificate is not unlawful discrimination. Louisville v. Coulter, 177 Ky. 242, 197 S. W. 819, L.R.A.1918A, 811. As to police regulations protecting the public from incapacity, see Vol. 11, p. 1032, § 275.

[18] Henry v. Campbell, 133 Ga. 882, 57 S. E. 390, 27 L.R.A.(N.S.) 283, 18 Ann. Cas. 173; Vicksburg v. Mullane, 106 Miss. 199, 63 So. 412, 50 L.R.A.(N.S.) 421; State v. Gardner, 58 Ohio St. 599, 51 N. E. 136, 41 L.R.A. 689, 65 Am. St. Rep. 785.

[19] Buell v. Frear, 146 Wis. 291, 131 N. W. 832, 34 L.R.A.(N.S.) 480.

A statute granting liens to attorneys is not assailable as special legislation because it applies only to attorneys at law. Those who follow the legal profession constitute a class, and laws may be passed applicable only to members of such a class, where the classification rests upon some attribute or distinction marking them as proper objects for the operation of such special legislation, in any case wherein such local or special legislation is not expressly forbidden by the state Constitution.[20] This rule has frequently been applied to laws pertaining only to persons following a particular profession or occupation requiring skill and special training, including physicians, architects, pharmacists, and other persons engaged in similar occupations.[1]

§ 488. Location and Territory.—

The rule is well settled that the Constitution of the United States in securing the equal protection of the laws does not prohibit legislation which is limited as to the territory within which it is to operate.2 In the absence of restrictions contained in state Constitutions the legislature may determine within broad limits whether particular laws shall extend to the whole state or be limited in their operation to particular portions of the state. All that the Federal Constitution requires is that they shall be general in their application within the territory in which they operate.3 In some of the states, however, there are provisions in the state Constitutions which require that laws should have a uniform operation throughout the state. Such provisions have been interpreted to mean universal operation as to all persons and things in the same condition or category, so that whenever a law is available in every part of the state as to all persons and things in the

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[20] Standidge v. Chicago R. Co. 254 Ill. 524, 98 N. E. 963, 40 L.R.A.(N.S.) 529, Ann. Cas. 1913C, 65.

[1] Ibid.

[2] Ft. Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387, 71 L. ed. 1112, 47 S. Ct. 595; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Ocampo v. United States, 234 U. S. 91, 58 L. ed. 1231, 34 S. Ct. 712; Toyota v. Hawaii, 226 U. S. 184, 57 L. ed. 180, 33 S. Ct. 47; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 S. Ct. 171; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 S. Ct. 894; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 S. Ct. 350; Dolley v. Abilene Nat. Bank (C. C. A. 8th) 179 F. 461, 32 L.R.A.(N.S.) 1065, affirmed in 228 U. S. 1, 57 L. ed. 707, 33 S. Ct. 409; State v. Leavitt, 105 Me. 76, 72 A. 875, 26 L.R.A.(N.S.) 799; Woolley v. Mears, 226 Mo. 41, 112 S. W. 1112, 136 Am. St. Rep. 637; State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L.R.A. 231; Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L.R.A. 689, 52 Am. St. Rep. 707, writ of error dismissed in 170 U. S. 408, 42 L. ed. 1087, 18 S. Ct. 631; State v. Hanlon, 77 Ohio St. 19, 82 N. E. 662, 13 L.R.A.(N.S.) 539, 122 Am. St. Rep. 472; State v. Savage, 96 Or. 53, 184 P. 567, 189 P. 427, citing R. C. L.; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584; Bittenhaus v. Johnston, 92 Wis. 588, 66 N. W. 805, 32 L.R.A. 380. The constitutional guaranty of equal protection of the laws does not require territorial uniformity. Ocampo v. United States, 234 U. S. 91, 58 L. ed. 1231, 34 S. Ct. 712. A statute in relation to the grading and packing of potatoes which exempts those shipped during the months of July, August, and September from regulations otherwise applicable does not violate the Fourteenth Amendment upon the ground that it discriminates as between different sections of the state, there being no reference in the statute to

different sections, although it appears that certain portions of the state, by reason of soil, climate, or other conditions, are more suitable to the growing of varieties of potatoes that mature earlier than varieties best suited for production in other sections. Detweiler v. Welch (C. C. A. 9th) 46 F. (2d) 75, 73 A.L.R. 146. The discrimination between the district of Honolulu and other districts in the amount of the fee imposed by Hawaii Rev. Laws, § 1343, for a license to make sales at auction, which is $600 for the district of Honolulu, and $15 for each other taxation district, is not so arbitrary or unreasonable as to render the statute unconstitutional, as denying the equal protection of the laws. Toyota v. Hawaii, 226 U. S. 184, 57 L. ed. 180, 33 S. Ct. 47.

[3] People v. Gordon, 274 Ill. 462, 113 N. E. 864, citing R. C. L.; Atkinson v. Southern Exp. Co. 94 S. C. 444, 78 S. E. 516, 48 L.R.A. (N.S.) 349; Bon Homme County v. Berndt, 13 S. D. 309, 83 N. W. 333, 50 L.R.A. 351.

same condition or category, it is of uniform operation throughout the state.[4]

Many laws have been sustained which classify by forbidding certain acts in specified territories or which require licenses or other special conditions before persons are allowed to do certain things in particular territories. Such statutes do not deny the equal protection of the laws because they do not discriminate among persons, but apply equally to all persons within or without the territory to which the distinction is made applicable. There is a difference between making certain regulations applicable to events in a certain territory, which may be valid,[5] and imposing different conditions upon such persons as may not happen to be residents of a particular territory, which latter distinction is invalid.[6]

A law which confers equal rights on all citizens of a state or subjects them to equal burdens and inflicts equal penalties on any person who violates it is an equal law even though no one can enjoy the right, be subjected to the burden, or infringe its provisions without going to, or being in a particular part of, the state.[7]

A classification based upon the permanency of locality of those in a given calling is generally held to be based upon a reasonable distinction.[8] Such classification has, however, occasionally been held invalid.[9]

A classification is not illegal because certain cities are included while others are omitted from the operation of a statute.[10] Thus, the constitutional guaranty of equal rights is not infringed by making a police regulation applicable only in certain cities of a state.[11]

For legitimate purposes falling within the domain of the police power, restrictions may be imposed on the conduct of certain businesses in designated

localities or districts within a municipality.[12] Where such enactments have no tendency to facilitate police supervision by confining the business to a limited territory in a city and do not have other adequate reasonable basis, they cannot be upheld, however, as a valid exercise of the police power.[13] Classification may be made among producers of certain products based upon the distance from a town or industrial plant at which the source of

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[4] See infra, §§ 541, 542.

[5] See discussion of many types of cases in Barker v. State Fish Commission, 88 Wash. 73, 152 P. 537, Ann. Cas. 1917D, 810. A state may classify its territory as to hunting and fishing. Barker v. State Fish Commission, 88 Wash. 73, 152 P. 537, Ann. Cas. 1917D, 810.

[6] See infra, § 538.

[7] State v. Griffin, 69 N. H. 1, 39 A. 260,

[41] L.R.A. 177, 76 Am. St. Rep. 139.

[8] School City v. State, 203 Ind. 626, 180 N. E. 471, 81 A.L.R. 1027; State v. Bair, 112 Iowa, 466, 84 N. W. 532, 51 L.R.A. 776.

[9] State v. Pennoyer, 65 N. H. 113, 18 A. 878, 5 L.R.A. 709.

[10] Northwestern Laundry v. Des Moines,

[239] U. S. 486, 60 L. ed. 396, 36 S. Ct. 206. The Fourteenth Amendment contem- plates persons and classes of persons and does not relate to local or municipal regu- lations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which they are made. Missouri v. Lewis (Bowman v. Lewis), 101 U. S. 22, 25 L. ed. 989. The exemption from the operation of statute providing for the licensing and bonding of wholesale produce dealers, of persons subject to the jurisdiction of the grain and warehouse commission, who by the terms of the statute is located in only one city, does not create an unconstitu- tional discrimination where, on request, other dealers in grain may be brought within the jurisdiction of such commission. State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434. As to classification upon a basis of popu- lation, see infra, § 489.

[11] People ex rel. Armstrong v. Warden,

[183] N. Y. 223, 76 N. E. 11, 2 L.R.A.(N.S.) 859, 8 Ann. Cas. 325; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629,

[61] L. ed. 937, 37 S. Ct. 475.

[12] Hadacheck v. Sebastian, 239 U. S. 394,

[60] L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927, affirming 165 Cal. 416, 132 P. 584, L.R.A. 1916B, 1248; Reinman v. Little Rock, 237 U. S. 171, 59 L. ed. 900, 35 S. Ct. 511; Re Montgomery, 163 Cal. 457, 125 P. 1070, Ann. Cas. 1914A, 130. See Vol. 11, p. 1049, § 287.

[13] Weadock v. Judge of Recorder's Ct.

[156] Mich. 376, 120 N. W. 991, 132 Am. St. Rep. 527, 16 Ann. Cas. 720.

supply of material is located.[14] Ordinarily, however, the courts have not given sanction to laws which attempt to classify businesses solely upon the basis as to whether they are conducted within or without the limits of a municipality.[15] While the cases are not in accord,[16] a majority of those passing upon the point agree that license tax ordinances which classify persons or concerns engaged in the same line of business according to their maintenance

or nonmaintenance of plants or places of business within the municipality exacting the tax are unreasonably discriminatory and consequently violate the equal protection or uniformity provisions of the Federal and state Constitutions.[17] In some decisions the validity of such license laws has been sustained.[18] There are also cases which hold that while a valid discrimination cannot be based merely on maintenance or nonmaintenance of plants or places of business within the municipal limits, this may be one of the circumstances which may so affect the nature of the business which is being carried on as to afford a basis for classification because of the different methods of transacting business, or for other reasons. Accordingly, in various cases license tax ordinances classifying licensees in accordance with their maintenance or nonmaintenance of a plant or place of business within the city have been held not unreasonably to discriminate between the licensees.[19]

§ 489. Population.—

The rule is well settled that under usual circumstances and for most purposes, the legislature may, in the exercise of the various powers of state sovereignty which it possesses, employ population as a basis for classification, making distinctions applicable to people of different localities on such grounds, without violating any of the Federal or state constitutional guaranties of equality.[20] Legislation affecting only certain cities, its operation based upon population or, similarly, upon the fact that they are cities belonging to a particular class, has repeatedly been held to be valid as against the

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[14] Walls v. Midland Carbon Co. 254 U. S. 300, 65 L. ed. 276, 41 S. Ct. 118. See also Milliron v. Harrison, 175 Ga. 764, 166 S. E. 231, 84 A.L.R. 1142.

[15] Annotation: 109 A.L.R. 903. As to the equality required generally in municipal license laws, see MUNICIPAL COR- PORATIONS [Also 19 R. C. L. p. 955, §§ 255 et seq.].

[16] Annotation: 109 A.L.R. 903.

[17] Bueneman v. Santa Barbara, 8 Cal. (2d) 405, 65 P. (2d) 884, 109 A.L.R. 895 (laundry and dry cleaning); Newnan v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507, appeal dismissed in 286 U. S. 526, 76 L. ed. 1269, 52 S. Ct. 495 (laundry); Ideal Tea Co. v. Salem, 77 Or. 182, 150 P. 852, Ann. Cas. 1917D, 684. Annotation: 109 A.L.R. 903 et seq.

[18] Annotation: 109 A.L.R. 907. Some of the decisions following the mi- nority view may be distinguishable on the facts, but in others it seems that the theory on which the court sustained the tax in question might logically have been applied in cases reaching the opposite con- clusion. Annotation: 109 A.L.R. 907. In Standard Chemical & Oil Co. v. Troy,

[201] Ala. 89, 77 So. 383, L.R.A.1918C, 522, which involved an ordinance imposing a license tax on manufacturing establish- ments located outside a city but maintain- ing an office within the city, it was held that the ordinance could not be held dis- criminatory as not applying equally to es-

tablishments so located but not maintain- ing an office in the municipality, in the absence of proof of the existence of any such manufactories.

[19] Annotation: 109 A.L.R. 907.

[20] Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; State ex rel. Crenshaw v. Joseph, 175 Ala. 579, 57 So. 942, Ann. Cas. 1914D, 248; State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218; State ex rel. White v. Kansas City, 134 Kan. 157, 4 P. (2d) 422,

[78] A.L.R. 507; Louisville v. Coulter, 177 Ky. 242, 197 S. W. 519, L.R.A.1918A, 811; Ashley v. Three Justices (Ashley v. Wait),

[228] Mass. 63, 116 N. E. 961, 8 A.L.R. 1463, writ of error dismissed in 250 U. S. 652, 63 L. ed. 1190, 40 S. Ct. 53; Randolph v. Springfield, 302 Mo. 33, 257 S. W. 449, 31 A.L.R. 612; Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054; Bishop v. Tulsa, 21 Okla. Crim. Rep. 457, 209 P. 228, 27 A.L.R. 1008; State v. Kincaid, 133 Or. 95, 285 P. 1105,

[288] P. 1015, citing R. C. L.; State v. Foutch,

[155] Tenn. 476, 295 S. W. 469, 54 A.L.R. 725; McKnight v. Hodge, 55 Wash. 289, 104 P. 504, 40 L.R.A.(N.S.) 1207, writ of error dis- missed in 223 U. S. 748, 56 L. ed. 640, 32 S. Ct. 534; Pabst Corp. v. Milwaukee, 190 Wis. 349, 208 N. W. 493, 45 A.L.R. 1164. See also People ex rel. Hatfield v. Grover,

[258] Ill. 124, 101 N. E. 216, Ann. Cas. 1914B, 212. Annotation: 15 Ann. Cas. 856.

objections that it violates state constitutional provisions requiring uniformity in the operation of laws or forbidding special or local legislation, provided it is reasonable, and not arbitrary. Classification of municipalities on such bases for a great variety of purposes has been sustained.[1] Similarly, a law does not violate the requirement as to the equal protection of the laws merely because its operation is confined to cities having a designated population and upwards,[2] or to cities of a definite class, such as of the first3 or second class.[4] These principles have also been applied to the classification of counties5 and school districts.[6]

It is a mistaken idea that because classification on the basis of population is sustainable in respect of legislation on certain subjects, it may be appropriate for all purposes of classification in legislative enactments.[7] Such a basis for classification must have a reasonable relation to the purposes and objects of the legislation and must be based upon a rational difference in the necessities or conditions found in the groups subjected to different laws.[8] If no such relation and differences exist, the classification is invalid.[9] For example, since there is no relation between a person's fitness for jury service and the size of the county in which he resides, a discrimination in a statute controlling jury service based upon the population of the county involved is invalid.[10] Similarly, an act requiring stores to close at [6] o'clock P. M. in cities of ten thousand or more population has been held invalid.[11] A classifica-

tion based upon merely trivial differences in population is likewise invalid.[12] Although the authorities on the point are in conflict,[13] it appears to be the better view that a statute which classifies cities or other localities to be governed by its provisions by a given or fixed population "according to the last United States census" will be held to apply to all other cities or localities which under any Federal census may in the future pass into such class, and is valid.[14] A classification applicable, however, only to municipalities of the state having less than a specified number of inhabitants according to a particular Federal census has been held invalid.[15] It is void because it does not apply equally and alike to all municipalities then and thereafter having the

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[1] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 742, §§ 48-50].

[2] Mason v. Missouri, 179 U. S. 328, 45 L. ed. 214, 21 S. Ct. 125; Budd v. New York,

[143] U. S. 517, 36 L. ed. 247, 12 S. Ct. 468; Millron v. Harrison, 175 Ga. 764, 166 S. E. 231, 84 A.L.R. 1142; Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105; Doug- las v. People, 225 Ill. 536, 80 N. E. 341, 8 L.R.A.(N.S.) 1116, 116 Am. St. Rep. 162; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385. Annotation: 45 A.L.R. 1170 (water com- panies). A statute authorizing any city, village, or town having a population of forty thou- sand or over to require by ordinance the resident owners of motor vehicles to sub- mit them to inspection, not more often than semiannually, at public expense, to determine whether they conform to the statutory requirement as to equipment for safe operation and an ordinance adopted thereunder do not unreasonably discrim- inate against residents of the city. Evans- ton v. Wazau, 364 Ill. 198, 4 N. E. (2d) 78,

[106] A.L.R. 789.

[3] Packard v. Banton, 264 U. S. 140, 68 L. ed. 596, 44 S. Ct. 257; Louisville v. Coulter, 177 Ky. 242, 197 S. W. 819, L.R.A. 1918A, 811.

[4] Randolph v. Springfield, 302 Mo. 33, 257 S. W. 449, 31 A.L.R. 612.

[5] See COUNTIES [Also 7 R. C. L. p. 933, § 11].

[6] See SCHOOLS [Also 24 R. C. L. p. 562, § 41.

[7] State v. Columbia, G. & S. F. Turnp. Co.

[133] Tenn. 446, 181 S. W. 682, citing R. C. L.; Saville v. Corless, 46 Utah, 495, 151 P. 51, L.R.A.1916A, 651, Ann. Cas. 1918D, 198.

[8] Annotation: 15 Ann. Cas. 856.

[9] Annotation: 127 Am. St. Rep. 562.

[10] Randolph v. State, 117 Tex. Crim. Rep. 80, 36 S. W. (2d) 484, citing R. C. L.

[11] Saville v. Corless, 46 Utah, 495, 151 P. 51, L.R.A.1916A, 651, Ann. Cas. 1918D, 198 (statute also held invalid on other grounds).

[12] Annotation: 15 Ann. Cas. 857.

[13] Annotation: 15 Ann. Cas. 858.

[14] Annotation: 15 Ann. Cas. 858.

[15] Fleming v. Memphis, 126 Tenn. 331, 148 S. W. 1057, 42 L.R.A.(N.S.) 493, Ann. Cas. 1913D, 1306.

requisite population; nor does it extend to or embrace all such as may come

into the same situation and circumstances for the reason that the classification is based solely upon the Federal census of a particular year.[16] An act limited to cities having the required population at a given time has been sustained when it is clear that its purposes are merely temporary and remedial, that the existing conditions which are made a basis of classification are of such a character as fairly to suggest the propriety of different legislation as to the cities classified, and that during the time of its existence its provisions apply to every city of the prescribed class.[17]

In some jurisdictions provisions of the state Constitution specifically authorize classification on a basis of population for various matters relating to counties18 and municipalities.[19]

§ 490. Size and Amount.—

In some cases size may be an appropriate index for classification, creating such differences that it may be properly used as a basis for a legislative discrimination between the large and the small.[20] For example, a statute is valid which forbids assignments of wages to secure small loans unless accepted in writing by the employer or consented to in writing by the wife of the assignor, but which permits such assignments without any restriction to secure larger loans.[1] This is due to the fact that the practice of exacting oppressive rates of interest has been deemed to be very largely, if not entirely, confined to small loans. In such cases a dividing line is necessary to prevent uncertainty, and the courts have said that the exact location of the line can be left to the discretion of the legislature.[2] It has also been held that an ordinance is not unequal and unjust on the ground that it permits the owner of a small parcel of ground to cultivate a larger proportion of his ground than the owner of a larger tract where the same maximum limit is fixed for all persons.[3]

Amount may also be used as a basis of classification if the line drawn is reasonable. Imposing a license tax on persons who purchase at a tax sale to a specified amount, which is reasonable, without taxing those who purchase a less amount, has been held to be valid.[4] Criminal offenses may be classified into grades, and offenders receive different punishments according to distinctions of amount in value. For example, a statute may properly designate the

offense of stealing goods less in value than a designated amount as being a misdemeanor punishable by imprisonment in the jail or workhouse; and it may also provide that if the property is of value in excess of such amount, the offense shall be a felony punished by imprisonment in the penitentiary. This is true even though the two acts involve equal moral turpitude and the value of the goods stolen may differ by only a few cents.[5]

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[16] Ibid.

[17] Annotation: 15 Ann. Cas. 858.

[18] Annotation: 15 Ann. Cas. 862.

[19] Annotation: 15 Ann. Cas. 863.

[20] Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 S. Ct. 190; Big Wood Canal Co. v. Chapman, 45 Idaho, 380, 263 P. 45, citing R. C. L.; Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L.R.A.(N.S.) 746, 128 Am. St. Rep. 446, affirmed in 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Salt Lake City v. Christensen Co. 34 Utah, 38, 95 P. 523, 17 L.R.A.(N.S.) 898.

[1] Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L.R.A.(N.S.) 746, 128 Am. St. Rep. 446, affirmed in 222 U. S. 225,

[56] L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529.

[2] State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819.

[3] Summerville v. Pressley, 33 S. C. 56, 11 S. E. 545, 8 L.R.A. 854, 26 Am. St. Rep. 659.

[4] Com. v. Hazel, 155 Ky. 30, 159 S. W. 673, 47 L.R.A.(N.S.) 1078 (tax sales of $500 or over made taxable).

[5] Allen v. Smith, 84 Ohio St. 283, 95 N. E. 829, Ann. Cas. 1912C, 611. As to degrees of larceny, see LARCENY [Also 17 R. C. L. p. 6, § 3].

The law cannot discriminate between great and small where size is not an index to an admitted evil.[6] If a state may regulate one who does much business, while not regulating another engaged in the same enterprise, but doing less business, it denies the equal protection of the laws.[7] Hence, a gross sales tax which classifies vendors for the imposition of a varying rate of taxation solely by reference to the volume of their transactions8 or by the identical method of levying the tax on an accumulative graduated scale based on gross receipts9 violates the equal protection clause.

§ [491]. Number.—Classification based on numbers is not necessarily unreasonable. There are many instances in which it has been sustained.[10] A statute prohibiting, under penalty, membership in a secret, oath-bound organization which has not filed its constitution, bylaws, rules, regulations, and oath of membership, and roster of membership is not invalid as denying the equal protection of the laws because it is made applicable only to societies having a membership of twenty or more persons.[11] A statute requiring a $[500] fee for each additional agent of a foreign insurance company beyond a prescribed number does not deny the equal protection of the laws to one seeking appointment as such agent.[12] Statutes classifying hotels for the purposes of inspection, sanitary measures, and protection from fires according to the number of rooms contained therein13 and exempting hotels having one hundred rooms or more

from special restrictions against the sale of intoxicating liquors14 have been held not to be invalid as class legislation.

If the mere factor of numbers can form no reasonable basis for a classification, considering the matters dealt with and the purpose of the law, discriminations based solely upon numbers are invalid.[15] An occupation tax imposed on the business of operating one of a chain of five or more stores which is not imposed on the same kind of business where the number of chain stores is less than five is violative of the equal protection clauses of the state and Federal Constitutions.[16]

§ 492. Graduated Amounts.—Taxes and fees may under certain circumstances be graduated so that a different burden is placed on one class from that on another where the differences between the classes depend solely on quantity and amount. The courts of this country with substantial uniformity have upheld the progressive features of such laws as not violating the gen-

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[6] Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 S. Ct. 190.

[7] McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard), 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Com. v. Clark, 195 Pa. 634, 46 A. 286, 57 L.R.A. 348, 86 Am. St. Rep. 694.

[8] Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 79 L. ed. 1054, 55 S. Ct. 525, rehearing denied in 295 U. S. 768, 79 L. ed. 1709, 55 S. Ct. 652.

[9] Valentine v. Great Atlantic & P. Tea Co. 299 U. S. 32, 81 L. ed. 22, 57 S. Ct. 56.

[10] New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785.

[11] Ibid.

[12] Herbring v. Lee, 280 U. S. 111, 74 L. ed. 217, 50 S. Ct. 49, 64 A.L.R. 1430, affirming 126 Or. 588, 269 P. 236, 60 A.L.R. 1165. Annotation: 60 A.L.R. 1172, s. 64 A.L.R. 1434.

[13] Miller v. Strahl, 239 U. S. 426, 60 L. ed. 364, 36 S. Ct. 147; State v. McFarland, 60 Wash. 98, 110 P. 792, 140 Am. St. Rep. 909. Singling out hotels having more than fifty rooms as proper subjects for regulations respecting the duty of hotelkeepers towards guests and inmates in case of fire does not render a statute repugnant to the equal protection clause. Miller v. Strahl, 239 U. S. 426, 60 L. ed. 364, 36 S. Ct. 147. As to fire regulations relating to various types of structures, see BUILDINGS, Vol. 9, p. 213, §§ 17 et seq.

[14] Ex parte Lewinsky, 66 Fla. 324, 63 So. 577, 50 L.R.A.(N.S.) 1156.

[15] Douglas v. South Georgia Grocery Co. 180 Ga. 519, 179 S. E. 768, 99 A.L.R. 700.

[16] Ibid.

eral guaranties of equality and equal protection of the laws contained in the various state Constitutions and in the Fourteenth Amendment to the Constitution of the United States.[17] Thus, a graduated income tax which exempts incomes under a specified amount and increases the tax as the income reaches stated amounts above that sum is usually held to be valid as not denying taxpayers the equal protection of the laws.[18] The same conclusion has been reached with respect to a law imposing a legacy and inheritance tax where the rate progresses according to the amount of beneficial interest acquired.[19] Legislation imposing a license tax on merchants by which they are divided into classes according to the amount of their sales, each class including all whose sales range between a certain minimum and maximum amount, does not violate the equality clause of the Fourteenth Amendment even though the result is to make persons in

different classes pay different rates and to make those in the same class pay at a different ratio if the amounts of their sales differ.[20] Under the same principles as those involving license cases, graduated chain store taxes have been held not to invalidate the equal protection clause.[1] Grading a municipal license fee for theaters according to the price asked for the highest priced seats other than box seats, rather than according to revenue, has also been upheld as not being in violation of the guaranty as to the equal protection of the laws.[2]

§ [493]. Exemption of Minima.—A form of classification which is generally upheld, although it depends to a large extent on value and amount, is that which recognizes the validity of exemption statutes. These may be of various kinds, and the courts of the country abound in decisions which uphold statutes exempting property from execution and attachment, such as the homestead of the debtor, the books and library of the professional man, the surgical implements of the physician, or the household furniture, horses, cows, and other articles belonging to ordinary debtors.[3] Such acts when based on proper classification are generally sustained.[4] It has been held that an inheritance tax does not deny to anyone the equal protection of the laws because it ex-

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[17] Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627, 9 L.R.A.(N.S.) 121, 9 Ann. Cas. 711. As to the application of the principle of taxation by graduated scale to excise taxes, see TAXATION [Also 26 R. C. L. p. 261, § 230].

[18] Alderman v. Wells, 85 S. C. 507, 67 S. E. 781, 27 L.R.A.(N.S.) 864, 21 Ann. Cas. 193. Annotation: 27 L.R.A.(N.S.) 864. See INCOME TAXES [Also TAXATION, 26 R. C. L. p. 143, § 117].

[19] Keeney v. Comptroller, 222 U. S. 525, 56 L. ed. 299, 32 S. Ct. 105, 38 L.R.A.(N.S.) 1139; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 S. Ct. 213; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Black v. State, 113 Wis. 205, 89 N. W. 522, 90 Am. St. Rep. 853. Annotation: 46 L. ed. 569; 17 L.R.A. (N.S.) 898, s. 49 L.R.A.(N.S.) 955. See INHERITANCE, ESTATE, AND SUCCESSION TAXES [Also TAXATION, 26 R. C. L. p. 200, § 170].

[20] Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 S. Ct. 382; Louisville v. Schnell, 131 Ky. 104, 114 S. W. 742, 40 L.R.A.(N.S.) 637; Wayne Mercantile Co. v. Mt. Olive, 161 N. C. 121, 76 S. E. 690, 49 L.R.A.(N.S.) 954; Knisely v. Cotterel, 196 Pa. 614, 46 A. 861, 50 L.R.A. 86 (sales tax). See Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 S. Ct. 318. See LICENSES [Also 17 R. C. L. p. 511, § 32]. As to classifications in sales tax laws, see TAXATION [Also 26 R. C. L., 1937 Supp. § 213a].

[1] Great Atlantic & P. Tea Co. v. Grosjean, 301 U. S. 412, 81 L. ed. 1193, 57 S. Ct. 772, 112 A.L.R. 293; Fox v. Standard Oil Co. 294 U. S. 87, 79 L. ed. 780, 55 S. Ct. 333, rehearing denied in 294 U. S. 732, 79 L. ed. 1261, 55 S. Ct. 511; Louis K. Liggett Co. v. Lee, 288 U. S. 517, 77 L. ed. 929, 53 S. Ct. 481, 85 A.L.R. 699 (recognizing rule); State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Fredericksburg v. Sanitary Grocery Co. — Va. —, 190 S. E. 318, 110 A.L.R. 1195.

[2] Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 57 L. ed. 730, 33 S. Ct. 441.

[3] Denny v. Bennett, 128 U. S. 489, 32 L. ed. 491, 9 S. Ct. 134; Williams v. Donough, 65 Ohio St. 499, 63 N. E. 84, 56 L.R.A. 766. See EXEMPTIONS [Also 11 R. C. L. p. 490, § 2]; HOMESTEAD [Also 13 R. C. L. p. 543, § 4; p. 549, § 9].

[4] Williams v. Donough, 65 Ohio St. 499, 63 N. E. 84, 56 L.R.A. 766.

empts estates of less value than a designated amount each.[5] It may also be mentioned that the courts have held that a state may, if it chooses, exempt

certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions.[6]

As a general rule, a state Constitution does not authorize the legislature to discriminate between debtors or creditors so that a debtor may enjoy the benefits of an exemption as against one class of creditors that he may not enjoy as against another class; nor does it permit one class of creditors to have an advantage over another class of creditors in the means of collecting debts by the creation of discriminations in the exemption laws which tend to favor certain classes of creditors over other classes.[7] A statute reducing or abolishing the general exemption of personalty guaranteed to a debtor as against particular classes of claims is generally held to be invalid as class legislation in contravention to the Federal and state Constitutions.[8] A statute which attempts to abolish as against claims of a particular class the right to an exemption existing under a constitutional provision is invalid.[9]

§ 494. Discretion of Officials.—

One class of cases in which the basis of classification approaches perilously near the point of arbitrary decision and which nevertheless has been sustained by the courts as not denying the equal protection of the laws consists of those in which in certain instances the choice of a legislative body or of an administrative officer to whom a matter is committed is the sole basis of the classification. The common examples are cases where the power exists to limit the number of persons who may carry on a certain business or the place where it may be carried on. It is clear that in some cases the public welfare may require such a limitation and that therefore power to make it necessarily resides in the legislative body. When this is so, power to choose the persons or place must also exist.[10] A case of this

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[5] Booth v. Com. 130 Ky. 88, 113 S. W. 61,

[33] L.R.A.(N.S.) 592; Gelsthorpe v. Furnell,

[20] Mont. 299, 51 P. 267, 39 L.R.A. 170; Black v. State, 113 Wis. 205, 89 N. W. 1019, 90 Am. St. Rep. 853. Annotation: 33 L.R.A.(N.S.) 598. See INHERITANCE, ESTATE, AND SUCCESSION TAXES [Also TAXATION, 26 R. C. L. p. 199, § 170; p. 228, § 198].

[6] See infra, § 518. As to exemptions in taxation and rules of equality in general, see TAXATION [Also

[26] R. C. L. p. 252, §§ 223 et seq.]; as to ex- emption of charitable property, see TAXA- TION [Also 26 R. C. L. p. 316, §§ 27 et seq.]; as to exemption of churches, see TAXATION [Also 26 R. C. L. p.

32, § 283]; as to ex- emption of libraries and educational insti- tutions, see TAXATION [Also 26 R. C. L. p. 320, §§ 281, 282].

[7] O'Leary v. Croghan, 42 S. D. 210, 173 N. W. 844, 6 A.L.R. 1134.

[8] Annotation: 6 A.L.R. 1140 et seq. Classification of creditors so as to de- prive debtors of the benefit of the Exemp- tion Laws with respect to certain classes of debts is prohibited by a constitutional provision that no law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. O'Leary v. Croghan, 42 S. D. 210,

[173] N. W. 844, 6 A.L.R. 1134. In Tuttle v. Strout, 7 Minn. 465, Gil. 374,

[82] Am. Dec. 108, a question was raised as to the constitutionality of an act which provided for a homestead exemption, but excepted from the operation of the exemp- tion debts for wages due clerks, laborers, and mechanics. The court held that the part of the act which excluded the specific class of debts mentioned from its operation was unconstitutional and void, as it erect- ed a distinction as to particular classes of debts.

[9] Annotation: 6 A.L.R. 1143. In Volker-Scowcroft Lumber Co. v. Vance, 32 Utah, 74, 88 P. 896, 125 Am. St. Rep. 828, wherein it appeared that a home- stead exemption to the value of $1,500 was created by the Constitution, with no ex- ceptions (Const. Art. 22, § 1), the court held that the homestead statute (Rev. Stat. 1898, § 1156) which provided that a home- stead was subject to execution in satisfac- tion of judgments obtained on debts se- cured by mechanics' or laborers' liens was invalid, as the legislature did not have the power to make the homestead subject to sale for a particular debt, in contraven- tion to the constitutional exemption stated above.

[10] Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997 (carefully analyzing the various decisions). See also Pacific States Box & Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159, 101 A.L.R. 853; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Louis v. Fischer, 167 Mo. 654, 67 S. W. 872,

[64] L.R.A. 679, 99 Am. St. Rep. 614, affirmed

sort is to be found in the famous decision of the Supreme Court of the United States upholding a statute which granted an exclusive franchise to a slaughterhouse company.[11] The legislature was held clearly to have the power to select the person who should carry on the business. Another case of this sort is to be found in a decision upholding an ordinance which prohibited women of immoral character from dwelling outside certain limits of a city.[12] From a consideration of cases of this type the conclusion seems to be inevitable that a classification may properly be made on the basis of the choice or selection of the legislative body or of administrative officers to whom the matter is committed. It is not to be presumed in such cases that the choice or selection is made in the one instance or authorized to be made in the other without regard to such considerations as may be relevant thereto; in fact, it may be so made and yet this will have no effect upon the validity of classification. This power to select in such cases has been likened to the power to appoint to office. Since only one person can be appointed, the person having the appointing power has the power of selection. It has also been likened to the power to make grants

of exclusive franchises. Since only one grant can be made, the power to select the person to whom the grant shall be made necessarily exists. Such a classification in such cases has a real and substantial relation to the public welfare. The touchstone of the validity of legislation in all cases of this kind seems to be the public welfare. If the classification has a real and substantial relation thereto, it is valid; otherwise, it is not.[13]

There are many instances where legislation authorizing the issuance of permits in the discretion of officials has been upheld as against the contention that it violates the constitutional guaranties of equality.[14]

An ordinance requiring the written permission of the mayor or president of the city council, or, in his absence, of a councilor, before any person shall move a building on the streets is not unconstitutional as a denial of the equal protection of the laws.[15] The possibility that the comptroller may refuse a license to a private banker upon his arbitrary whim does not invalidate, under the Fourteenth Amendment, the requirement of a statute that a license from that official be obtained by individuals or partnerships desiring to engage in that business.[16] In any case, however, where it is sought to confer a discretion as to the granting of permits with respect to the carrying on of ordinary businesses, it is indispensable to validity that the power and discretion conferred

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in 194 U. S. 361, 48 L. ed. 1018, 24 S. Ct. 673. An order of a state department of agri- culture requiring the use of containers of a certain type, form, and dimensions in marketing strawberries and raspberries does not deny the equal protection of the law to manufacturers of other types of containers where the type prescribed is not protected by patent or trademark and its manufacture is not a trade secret so that all persons are free to manufacture it. Pacific States Box & Basket Co. v. White,

[296] U. S. 176, 80 L. ed. 138, 56 S. Ct. 159,

[101] A.L.R. 853. The delegation to the state secretary of agriculture of power to prescribe reason- able tolerances or variations in excess of, but not under, the weight specified by stat- ute for loaves of bread made for sale in the state and the time during which such weight shall be maintained does not vio- late the equal protection clause where the prescribed tolerances are not shown to be such as bakers may not readily comply with. P. F. Petersen Baking Co. v. Bryan,

[290] U. S. 570, 78 L. ed. 505, 54 S. Ct. 277,

[90] A.L.R. 1285.

[11] Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394, discussed in Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997.

[12] L'Hote v. New Orleans, 177 U. S. 587,

[44] L. ed. 899, 20 S. Ct. 788, discussed in Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997.

[13] Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997. See Hayman v. Galveston, 273 U. S. 414,

[71] L. ed. 714, 47 S. Ct. 363; Reinman v. Little Rock, 237 U. S. 171, 59 L. ed. 900, 35 S. Ct. 511.
[14] See infra, notes 15, 16, this section.
[15] Wilson v. Eureka City, 173 U. S. 32, 43 L. ed. 603, 19 S. Ct. 317.
[16] Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 S. Ct. 190.

be not arbitrary and, moreover, conform to a uniform rule of action so that the exercise of authority by officials will apply fairly to all of the class to which the law was intended to apply.[17] This rule accounts for the judicial position that police regulations with no other guide than the uncontrolled discretion of a board are discriminatory, and that when so applied that all persons may not engage in legitimate callings upon equal terms such regulations are void.[18]

Municipal regulations purporting to confer discretion upon administrative officers seem to be closely scrutinized by the courts. No sweeping rule may be safely laid down which will cover all the decisions. In the first place, the cases are not wholly consistent. In some of them, although a distinction seems to be made between a discretion recognized as valid in granting permits in an occupation which may be forbidden entirely and a discretion held to be invalid in cases in which an ordinary business is involved, this distinction is not always clear and is not in all cases the basis of decision. It is significant, however, that very many of the cases in which it has been held that the discretionary power to choose conferred upon administrative officers is arbitrary and denies the equal protection of the laws involve the validity of municipal ordinances.[19] The view usually taken is that a municipal ordinance must contain permanent legal provisions operating generally and impartially upon all within the territorial jurisdictions of the city, and that no part thereof may be left to the will or unregulated discretion of the common council or any officer.[20] Furthermore, such ordinances placing restrictions upon lawful conduct or the lawful use of property must, to be valid, specify the rules and conditions to be observed in such conduct or use and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions, and must not admit of the exercise, or of an opportunity for the exercise, of an arbitrary discrimination by the municipal authorities between citizens who will so comply.[1]

An owner of property abutting on a street in which an elevated viaduct has been constructed effecting a change of grade is not denied the equal protection of the laws merely because the official board having final jurisdiction over the amount of the damages sustained is composed of three city officials appointed by the mayor with power to pass on claims against it.[2]

Conferring power upon the head of one executive department to fix the salaries of his assistants, which power is not conferred upon the heads of other departments, is not an unconstitutional discrimination.[3]

4. PERSONAL BASES

§ 495. Generally.—

Classifications are often based upon the personal characteristics of the persons sought to be dealt with by particular legislation. Legislation has often sought to permit discriminations usually in favor of, but sometimes against, certain groups of society who are identified by special

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[17] See Vol. 11, p. 947, § 234.

[18] State ex rel. Woolridge v. Morehead,

[100] Neb. 864, 161 N. W. 569, L.R.A.1917D, 310. As to discrimination in the administra- tion of laws, see infra, § 566.

[19] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 813, § 118].

[20] Elkhart v. Murray, 165 Ind. 304, 75 N. E. 593, 1 L.R.A.(N.S.) 940, 112 Am. St. Rep. 228, 6 Ann. Cas. 748.

[1] Montgomery v. West, 149 Ala. 311, 42 So. 1000, 9 L.R.A.(N.S.) 659, 123 Am. St. Rep. 33, 13 Ann. Cas. 651; St. Louis v. Allen, 275 Mo. 501, 204 S. W. 1083, L.R.A. 1918F, 1110.

[2] Crane v. Hahlo, 258 U. S. 142, 66 L. ed. 514, 42 S. Ct. 214.

[3] Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418.

characteristics. Generally speaking, if the courts have been able to ascertain that particular qualities of a group form a reasonable basis for different treatment by the laws and have a proper relation to the purpose sought to be achieved, legislation containing classification founded on personal characteristics has been sustained.[4]

Personal qualifications on which classifications have been attempted are quite diversified, including sex,[5] minority,[6] alienage,6a race and color,[7] military service,[8] membership in labor unions,[9] and employing of labor.[10] Age limits may be fixed as a qualification for such public duties as military or jury service, and it is no objection that these are arbitrarily established.[11]

§ 496. Women.—

The Fourteenth Amendment does not interfere with a distinction based upon sex by creating a fictitious equality where there is a real difference.[12] It is clearly beyond the power of the legislature to prohibit women from engaging in the ordinary occupations, since they are unquestionably citizens13 and since all persons are entitled under constitutional guaranties of liberty, property, and the pursuit of happiness to earn a living.[14] The physical structure and maternal functions of women place them, however, at such a disadvantage in the struggle for existence as to form a substantial difference between the sexes. These factors form a basis for legislation regulating the condition of labor of women in limiting the hours of their employment and in prescribing minimum wages for them.[15] The courts adhere to the view that a woman's health is likely to be weakened or impaired where she is required or permitted to work long hours day after day under the pressure usually attending the labor of an employee who is subject to the con-

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[4] As to personal differences which relate to the purpose of legislation forming a proper basis for classification, see Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957. See infra, §§ 496-503.

[5] See infra, §§ 496, 497.

[6] See infra, § 498. 6a See infra, § 499.

[7] See infra, § 500.

[8] See infra, § 501.

[9] See infra, § 502.

[10] See infra, § 503.

[11] Thurston County v. Tenino Stone Quarries, 44 Wash. 351, 87 P. 634, 9 L.R.A. (N.S.) 306, 12 Ann. Cas. 314. See JURY [Also 16 R. C. L. p. 225, § 41]; MILITARY [Also 18 R. C. L. p. 1045, § 33]; PUBLIC OFFICERS [Also 22 R. C. L. p. 406, § 47].

[12] Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 S. Ct. 192. Exempting steam laundries and women engaged in the laundry business, where not more than two women are employed, from a license tax imposed by law upon the laundry business, does not deny the equal protection of the laws to a man operating a hand laundry. Ibid.

[13] See supra, § 451.

[14] See Vol. 11, p. 1147, § 336.

[15] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Bosley v. McLaughlin, 236 U. S. 385, 59 L. ed. 632, 35 S. Ct. 345; Miller v. Wilson, 236 U. S. 373,

[59] L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957, af- firming 48 Or. 252, 85 P. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88; State v. Crowe,

[130] Ark. 272, 197 S. W. 4, L.R.A.1918A, 567, Ann. Cas. 1918D, 460; People v. Elerding,

[254] Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893; Ritchie v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A.(N.S.) 994; Com. v. Riley, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388; Williams

v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A. 1918F, 542; Wenham v. State, 65 Neb. 394,

[91] N. W. 421, 58 L.R.A. 825; People v. Charles Schweinler Press, 214 N. Y. 395,

[108] N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214; State v. Ehr, 57 N. D. 310, 221 N. W. 883, citing R. C. L.; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937,

[37] S. Ct. 403. See First Wisconsin Nat. Bank v. Jahn, 179 Wis. 117, 190 N. W. 822,

[26] A.L.R. 349. Since healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public in- terest and care in order to preserve the strength and vigor of the race and so jus- tifies a difference in legislation between the sexes and upholds that which is de- signed to compensate for some of the bur- dens which rest upon her. Muller v. Ore- gon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 113 Ann. Cas. 957. As to maximum hour laws for women, see LABOR [Also 16 R. C. L. p. 485, § 60]; as to minimum wage laws for women, see LABOR [Also 16 R. C. L. p. 499, § 68]. [12 Am. Jur.]—12 177

trol, direction, and dismissal of the employer.[16] The general trend of authority is to hold that labor legislation affecting women only is not class legislation,[17] and does not contain an arbitrary discrimination because it does not extend to men.[18]

Labor legislation affecting women may ordinarily make classifications according to the type of work in which they are engaged, prescribing different hours and working conditions for different occupations, if there is a reasonable basis for the distinctions made.[19]

Classification in labor legislation on a basis of sex may not be completely unlimited. As one court has pointed out, sex alone will not in all cases serve as a proper basis for the exercise of the police power, for in the invasion of the right of liberty and property, there must be some reasonable connection between the limitation upon the hours females may work and the public health, safety, and welfare proposed to be secured by the limitation.[20]

§ 497. —

Discrimination against.—It is settled that the equal protection clause of the Fourteenth Amendment operates fully to include women within its protective scope. Discriminations against women as such are invalid.1

Discriminations against women in matters relating to intoxicating liquors have consistently been upheld by the courts.[2] Withholding from women permits to sell intoxicating liquors, while granting such permits to other persons, does not deprive women of any constitutional right of equal protection or uniform operation of laws or violate any provision against the granting of special privileges or immunities.[3] Such laws rest on the theory that as a rule retail dealing in intoxicants by women is opposed to sound public policy and that so long as the state chooses to exercise its right to regulate the traffic and minimize its admitted evils, it may constitutionally deny liquor licenses to women.[4] In recognition of this same principle, the courts have held that no unconstitutional discrimination against women is made by a statute forbidding their entering wine rooms for the purpose of being supplied with liquor5 or even prohibiting keepers of saloons where intoxicating liquors are sold from permitting women to be in or about their places of business.[6]

[16] People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893; People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214; State v. Ehr, 57 N. D. 310, 221 N. W. 883, citing R. C. L.; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930.

[17] Quong Wong v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 S. Ct. 192; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; State v. Ehr, 57 N. D. 310, 221 N. W. 883, citing R. C. L.

[18] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Ritchie v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A.(N.S.) 994.

[19] Bosley v. McLaughlin, 236 U. S. 385, 59 L. ed. 632, 35 S. Ct. 345; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893; W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A.(N.S.) 994; Withey v. Bloem, 163 Mich. 419, 128 N. W. 913, 35 L.R.A.(N.S.) 628.

[20] People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893.

[1] Carrithers v. Shelbyville, 126 Ky. 769, 104 S. W. 744, 17 L.R.A.(N.S.) 421; State ex rel. Wells v. Walker, 326 Mo. 1233, 34 S. W. (2d) 124, citing R. C. L.

[2] See INTOXICATING LIQUORS [Also 15 R. C. L. p. 278, § 33].

[3] Re Carragher, 149 Iowa, 225, 128 N. W. 352, 31 L.R.A.(N.S.) 321, Ann. Cas. 1912C, 972. Annotation: 49 L.R.A. 111.

[4] Re Carragher, 149 Iowa, 225, 128 N. W. 352, 31 L.R.A.(N.S.) 321, Ann. Cas. 1912C, 972; People v. Case, 153 Mich. 98, 116 N. W. 558, 18 L.R.A.(N.S.) 657. Annotation: 18 L.R.A.(N.S.) 657.

[5] Cronin v. Adams, 192 U. S. 108, 48 L. ed. 365, 24 S. Ct. 219, affirming 29 Colo. 488, 69 P. 590, 63 L.R.A. 61.

[6] Cronin v. Adams, 192 U. S. 108, 48 L. ed. 365, 24 S. Ct. 219, affirming 29 Colo. 488, 69 P. 590, 63 L.R.A. 61; People v. Case, 153 Mich. 98, 116 N. W. 558, 18 L.R.A.(N.S.) 657; State v. Baker, 50 Or. 381, 92 P. 1076, 13 L.R.A.(N.S.) 1040. Annotation: 48 L. ed. 365; 18 L.R.A. (N.S.) 657.

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A provision in a state Constitution that no person shall on account of sex be disqualified from entering on or pursuing any lawful business, vocation, or profession has been held not to be violated by an ordinance prohibiting the sale of intoxicating liquors in dance cellars or other places where musical and theatrical entertainments are given and where women attend as waitresses.[7] On the other hand, it is an undue interference with personal liberty to make it a misdemeanor for a woman to go into any building where liquor is sold or to stand within a given distance of such building.[8] It has likewise been held that a statute rendering the proprietor of a Chinese restaurant criminally liable for permitting a woman under the age of twenty-one years to enter it or be served with food or drink there was unconstitutional as denying him the equal protection of the laws.[9]

Work in some types of business or industry is injurious to women. In such instances it is proper to recognize distinctions that exist in the nature of things, and regulations recognizing the impropriety of permitting women to engage in certain occupations and forbidding them to do so are open to no reasonable objection.[10]

Before leaving the subject of the right of women to the equal protection of the laws, it may be mentioned that the courts have decided that a statute permitting the annexation to municipalities of property belonging to women, without giving them an opportunity, such as the statute gives to voters, to make defense to the proceedings, does not deprive them of the equal protection of the laws.[11]

§ 498. Minors.—

Minors are peculiarly entitled to legislative protection and form a class to which legislation may be exclusively directed without falling under the constitutional prohibition of special legislation and unfair discrimination.12 Statutes may regulate and forbid the employment and laboring of children under designated ages13 and in so doing may exempt agricultural and domestic labor, since these kinds are generally carried on at home and under the care and supervision of parents or those occupying the place of parents.14 Such statutes may contain special provisions relating to those who are unable to read and write English and may forbid their employment until

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[7] Ex parte Hayes, 98 Cal. 555, 33 P. 337, 20 L.R.A. 701.

[8] Gastineau v. Com. 108 Ky. 473, 56 S. W. 705, 49 L.R.A. 111, 94 Am. St. Rep. 386. Annotation: 49 L.R.A. 111.

[9] Opinion of Justices, 207 Mass. 601, 94 N. E. 558, 34 L.R.A.(N.S.) 604. Annotation: 34 L.R.A.(N.S.) 604.

[10] State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930.

[11] Carrithers v. Shelbyville, 126 Ky. 769, 104 S. W. 744, 17 L.R.A.(N.S.) 421.

[12] Re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269. See INFANTS [Also 14 R. C. L. p. 276, § 47].

[13] Sturges & B. Mfg. Co. v. Beauchamp, 231 U. S. 320, 58 L. ed. 245, 34 S. Ct. 60, L.R.A.1915A, 1196; Terry Dairy Co. v. Nalley, 146 Ark. 448, 225 S. W. 887, 12 A.L.R. 1208; Re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; State v. Erle, 210 Iowa, 974, 232 N. W. 279, 72 A.L.R. 137; Com. v. Fisher, 213 Pa. 48, 62 A. 198, 5 Ann. Cas. 92. The state may prohibit the employment of persons under fourteen years of age in defined occupations which are deemed dangerous either to the life or limb or injurious to the morals or the future welfare of children of tender years. State v. Erle, 210 Iowa, 974, 232 N. W. 279, 72 A.L.R. 137. The employment of children under the age of sixteen years in hazardous occupations may be prohibited without contravening the guaranty of the equal protection of the laws. Sturges & B. Mfg. Co. v. Beauchamp, 231 U. S. 320, 58 L. ed. 245, 34 S. Ct. 60, L.R.A.1915A, 1196. As to prohibition of child labor, see LABOR [Also 16 R. C. L. p. 477, § 54]; as to limitation of hours of labor for children, see LABOR [Also 16 R. C. L. p. 485, § 59]; as to minimum wages for children, see LABOR [Also 16 R. C. L. p. 499, § 68].

[14] Re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105. Exceptions to defined prohibition of child labor may be made when rested upon a reasonable and proper basis. State v. Erle, 210 Iowa, 974, 232 N. W. 279, 72 A.L.R. 137.

they reach an age greater than that at which others are allowed to work.[15]

The police power may be exercised by discriminating not only against minors, but also against places used exclusively by them, yet a discriminating statute will not be upheld merely because minors among others resort to the place in question.[16] It has been held that the constitutional guaranty of equal rights is not infringed by a police regulation forbidding the permitting of any person under twenty-one years of age to be or remain in a dance hall.[17] A law forbidding the permitting of females under age to remain in or about

saloons is not invalid class legislation because it does not apply to public restaurants and dining rooms.[18]

The discrimination may operate in favor of, instead of apparently against, minors as a class. For example, a compulsory vaccination law does not deny equal protection of the laws because it makes an exception in favor of children certified by a registered physician to be unfit for vaccination, but does not except adults in a like condition.[19]

§ 499. Aliens.—

The guaranties of the Fourteenth Amendment as to the equal protection of the laws are universal in their application to all persons within the territorial jurisdiction, including aliens without regard to any difference of race, color, or nationality.[20] The power of the state to make reasonable classification in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood.[1] It is a denial of the equal protection of the laws when the government, in its capacity as a lawmaker, regulating not its own property, but private business, bars the alien from the right to trade and labor.[2] Hence, a statute imposing a tax on employers of

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[15] Re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105.

[16] People v. Wilbur, 198 N. Y. 1, 90 N. E. 1140, 27 L.R.A.(N.S.) 357, 139 Am. St. Rep. 809, 19 Ann. Cas. 626.

[17] State v. Rosenfield, 111 Minn. 301, 126 N. W. 1068, 29 L.R.A.(N.S.) 331, 137 Am. St. Rep. 557. See THEATERS, SHOWS, EXHIBITIONS, AND PUBLIC RESORTS [Also 26 R. C. L. p. 701, § 6].

[18] State v. Baker, 50 Or. 381, 92 P. 1076,

[13] L.R.A.(N.S.) 1040.

[19] Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Com. v. Pear, 183 Mass. 242, 66 N. E. 719, 67 L.R.A. 935. See Zucht v. King, 260 U. S. 174, 67 L. ed. 194, 43 S. Ct. 24.

[20] Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A. 1916D, 545, Ann. Cas. 1917B, 283; Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 S. Ct. 977; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; State v. Sinchuk, 96 Conn. 605, 115 A. 33, 20 A.L.R. 1515; State v. Montgomery,

[94] Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407; Com. v. Hana, 195 Mass. 262,

[81] N. E. 149, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514; People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A. 1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85; Bloomfield v. State, 86 Ohio St. 253, 99 N. E. 309, 41 L.R.A.(N.S.) 726, Ann. Cas. 1913D, 629; Steed v. Harvey, 18 Utah, 367,

[54] P. 1011, 72 Am. St. Rep. 789. Annotation: 68 L. ed. 256; 14 L.R.A. 553. Chinese merchants in the Philippine Islands who are chiefly affected by the statute requiring account books to be kept in English, Spanish, or Philippine dialects are thereby denied the equal protection of the laws in violation of the Philippine Bill of Rights as enacted by Congress. Yu Cong Eng v. Trinidad, 271 U. S. 500, 70 L. ed. 1059, 46 S. Ct. 619. See ALIENS, Vol. 2, p. 468, § 10.

[1] Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064.

[2] Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283; Com. v. Hana, 195 Mass. 262, 81 N. E. 149, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514; Wright v. May,

[127] Minn. 150, 149 N. W. 9, L.R.A.1915B, 151; People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A.1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85. Annotation: 11 L.R.A.(N.S.) 799; Ann. Cas. 1917B, 287. A discrimination against aliens lawfully resident in the state, caused by a law providing that every employer of more than five workers at any one time, "regardless of kind or class of work or sex of workers shall employ not less than 80 per cent qualified electors or native-born citizens of the United States or some subdivision

foreign born, unnaturalized male persons for each day that each of such persons may be employed and authorizing the deduction of that sum from the

wages of such employees is unconstitutional.[3]

The equal protection clause does not forbid every distinction in the laws of

a state between citizens and aliens resident therein.[4] Although the Fourteenth

Amendment prohibits plainly irrational discrimination against aliens, alien

race and allegiance may bear such relation to a legitimate object of legislation

as to be made the basis of a permitted classification.[5]

The constitutional guaranty of equality invalidates laws denying to aliens

the right to obtain licenses to pursue ordinary callings.[6] If a calling is one,

however, that a state, in the exercise of its police power, may prohibit absolutely or conditionally by the exaction of a license,[7] as in cases where the calling or occupation is one which, though lawful, is subject to abuse and likely

to become injurious to the community,[8] the fact of alienage may justify a

denial of the privilege.[9] Because their occupation is one subject to abuse,

auctioneers' licenses may be refused to aliens.[10] They may be forbidden to

obtain licenses to sell intoxicating liquors,[11] to operate poolrooms,[12] or to

operate motorbuses.[13] Peddling has been considered as presenting so much

opportunity for fraud as to make it a proper subject for regulation and to

authorize the legislature to refuse peddlers' licenses to aliens.[14] As to peddlers,

however, the contrary view has also been taken, and a law permitting licenses

only to citizens has been held to be an unconstitutional discrimination against

aliens.[15]

A classification forbidding all aliens to own farm land who have not, in good faith, declared intention to become citizens of the United States is valid.[16] The rule established by Congress on the subject of naturalization of aliens in and of itself furnishes a reasonable basis for such a classification in

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thereof," renders the statute invalid as denying the equal protection of the laws. Truax v. Raich, 239 U. S. 33, 60 L. ed. 131,

[36] S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283.

[3] State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Juniata Limestone Co. v. Fagley, 187 Pa. 193, 40 A. 977,

[42] L.R.A. 442, 67 Am. St. Rep. 579.

[4] Cockrill v. California, 268 U. S. 258, 69 L. ed. 944, 45 S. Ct. 490; Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15.

[5] Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 71 L. ed. 1115, 47 S. Ct. 630.

[6] Templar v. State Examiners, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610; George v. Portland, 114 Or. 418, 235 P. 681,

[39] A.L.R. 341. Annotation: 39 A.L.R. 351. See ALIENS, Vol. 2, p. 470, § 13.

[7] People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A.1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218,

[36] S. Ct. 85. See LICENSES [Also 17 R. C. L. p. 522, § 41].

[8] Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151.

[9] Annotation: 39 A.L.R. 347 et seq.; 11 Ann. Cas. 516.

[10] Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151. Annotation: 39 A.L.R. 349.

[11] Trageser v. Gray, 73 Md. 250, 20 A. 905, 9 L.R.A. 730, 25 Am. St. Rep. 587; Bloomfield v. State, 86 Ohio St. 253, 99 N. E. 309, 41 L.R.A.(N.S.) 726, Ann. Cas. 1913D, 629. Annotation: 39 A.L.R. 348.

[12] Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 71 L. ed. 1115, 47 S. Ct. 630. Annotation: 39 A.L.R. 347.

[13] Annotation: 39 A.L.R. 347.

[14] Com. v. Hana, 195 Mass. 262, 81 N. E. 149, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514; Bloomfield v. State,

[86] Ohio St. 253, 99 N. E. 309, 41 L.R.A. (N.S.) 726, Ann. Cas. 1913D, 629. Annotation: 39 A.L.R. 347, 348.

[15] State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386. See Sayre v. Phillips, 148 Pa. 482, 24 A. 76, 16 L.R.A. 49, 33 Am. St. Rep. 842. Annotation: 39 A.L.R. 347, 348; 16 L.R.A. 49.

[16] Terrace v. Thompson, 263 U. S. 197,

[68] L. ed. 255, 44 S. Ct. 15. No violation of the constitutional provision guaranteeing equal protection of the laws is effected by a statute denying aliens who have not declared an intention to become citizens the right to hold land, while permitting citizens and aliens who have so declared in good faith to do so. Ibid. As to statutory regulation of the right of aliens to hold real property, see ALIENS, Vol. 2, p. 477, § 30.

a state law.[17] Similarly, the classification of aliens with respect to the right to hold land within the state into those eligible to citizenship and those not so eligible, giving the former the right to hold land and denying it to the latter, is not unreasonable,[18] and a statute limiting the privilege of ineligible aliens to acquire real property within the state to that prescribed by treaty is not in conflict with the Fourteenth Amendment.[19]

Forbidding aliens ineligible to citizenship to acquire stock in a corporation holding land for agricultural purposes does not deny the equal protection of the laws.[20]

The equal protection of the laws is not unconstitutionally denied to an alien parent seeking appointment as guardian of his American-born child, or to the child, by a statute denying the right of guardianship to an alien, where the estate consists in part of real property, although the child is born in this country.[1] Elsewhere, the opposite view has been taken, and such a statute has been held to deny to an alien the equal protection of the laws.[2]

The right to the equal protection of the laws does not give to aliens the right to participate in the administration of the laws, to hold public offices, or to discharge any duties of a public trust.[3] Just as the state may confine to citizens the right to hold public office, on the same ground, it may confine to citizens the right to serve the state in any way, whenever there is a relation between the exclusion of aliens and the promotion of efficiency.[4] It is not a denial of the equal protection of the laws when the government, in its capacity as proprietor, issuing a mandate to its own agents, bars the alien from the right to share in the property which it holds for its own citizens.[5] Forbidding the employment of aliens on public work does not unconstitutionally deny them the equal protection of the laws.[6]

Imposing a greater penalty on ownership or possession by a resident alien of a firearm capable of being concealed on the person than is imposed generally for carrying such weapons without a license does not unconstitutionally deny aliens the equal protection of the laws. The legislative assumption that unnaturalized foreign-born residents are peculiarly a source of danger to wild life cannot be said to be so unwarranted as to invalidate a statute prohibiting the killing of any wild bird or animal by any foreign-born person except in defense of person or property and to that end making it unlawful for any such person to own or be possessed of a shotgun or rifle.[7]

§ [500]. Race and Color.—While the purpose of the Fourteenth Amendment was primarily to secure to the negro race equality of civil rights, it was not intended to abolish distinctions based on color or to enforce social as distinguished from political equality or a commingling of the two races on terms

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[17] Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15.

[18] Porterfield v. Webb, 263 U. S. 225, 68 L. ed. 278, 44 S. Ct. 21. See Cockrill v. California, 268 U. S. 258, 69 L. ed. 944, 45 S. Ct. 490. A statute providing for escheat of land transferred to an alien ineligible to hold it, which raises a presumption of an intent to evade the statute where land is taken in the name of a person eligible to hold it, and the consideration is paid by a person ineligible to do so, does not violate the equal protection clause of the Federal Constitution. Cockrill v. California, 268 U. S. 258, 69 L. ed. 944, 45 S. Ct. 490.

[19] Webb v. O'Brien, 263 U. S. 313, 68 L. ed. 318, 44 S. Ct. 112.

[20] Frick v. Webb, 263 U. S. 326, 68 L. ed. 323, 44 S. Ct. 115.

[1] See ALIENS, Vol. 2, p. 471, § 15; GUARDIAN AND WARD [Also 12 R. C. L. p. 1115, § 16].

[2] Annotation: 39 A.L.R. 943.

[3] State v. Rives, 100 U. S. 313, 25 L. ed. 667. See ALIENS, Vol. 2, p. 473, §§ 20 et seq.

[4] People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A.1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85.

[5] Ibid.

[6] See ALIENS, Vol. 2, p. 471, § 17; PUBLIC WORKS [Also 22 R. C. L. p. 635, § 38].

[7] See ALIENS, Vol. 2, p. 470, § 14.

unsatisfactory to either.[8] Therefore, race and color have been recognized as a proper basis for classification for certain purposes, as in the case of laws requiring negroes to be provided with separate accommodations in the vehicles of common carriers9 and in the public schools,[10] and in the case of various other segregation laws.[11]

§ [501]. War Veterans.—In several states laws have been passed conferring special privileges and immunities on honorably discharged veterans either in exemption from burdens, such as the payment of license fees, or in giving them a preference in appointments to public office. Such statutes have been subjected to attack on the theory that military service as a basis for classification violates constitutional guaranties of equality.[12]

There is no complete unanimity of authority in the cases dealing with military service as a basis of a discrimination in legislation relating to taxation or licenses.[13] In a majority of instances in which the question has been presented, exemption from the payment of occupation or license taxes solely on a basis of war service has been held to violate equality guaranties of the Federal and state Constitutions.[14] In a few cases, however, such an exemption has been upheld as valid.[15] Statutes exempting veterans from the payment of poll taxes,[16] property taxes,[17] and various other types of taxes or licenses18 have occasionally been sustained.

As to the second class of statutes mentioned above—namely, those preferring veterans for appointments in the civil service of the state—their validity seems to depend on the character of the preference as follows: If an absolute right to appointment is given, regardless of the competency of the applicant to perform the duties of the position sought by him, the statute is viewed as giving an unlawful preference; but if it requires veterans to demonstrate their qualifications the same as other applicants and merely prefers them for appointment over all other qualified persons, the statute is usually sustained.[19]

Legislation creating miscellaneous privileges or preferences available to veterans has been repeatedly sustained.[20] Among the laws which have withstood attack are: Statutes providing for the purchase, subdivision, and sale

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[8] See supra, § 470.

[9] See CARRIERS, Vol. 9, p. 487, § 84; Vol. 10, p. 86, § 1079; CIVIL RIGHTS, Vol. 10, p. 907, § 13.

[10] See CIVIL RIGHTS, Vol. 10, p. 904, §§ 11, 12; SCHOOLS [Also 24 R. C. L. p. 652, § 110 et seq.].

[11] See CIVIL RIGHTS, Vol. 10, p. 902, § 9; p. 908, § 14.

[12] Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121, 10 L.R.A.(N.S.) 825, 9 Ann. Cas. 1039; State v. Garbroski, 111 Iowa, 496, 82 N. W. 959, 56 L.R.A. 570, 82 Am. St. Rep. 524; Goodrich v. Mitchell, 68 Kan. 765, 75 P. 1034, 64 L.R.A. 945, 104 Am. St. Rep. 429, 1 Ann. Cas. 288; Brown v. Russell, 166 Mass. 14, 43 N. E. 1005, 32 L.R.A. 253, 55 Am. St. Rep. 357; State ex rel. Hilton v. Independent School Dist. 164 Minn. 66, 204 N. W. 572, citing R. C. L.; State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N. W. 30, citing R. C. L.; Barthelmess v. Cukor, 231 N. Y. 435, 132 N. E. 140, 16 A.L.R. 1404;

Laurens v. Anderson, 75 S. C. 62, 55 S. E. 136, 117 Am. St. Rep. 885, 9 Ann. Cas. 1003; State v. Shedroi, 75 Vt. 277, 54 A. 1081, 63 L.R.A. 179, 98 Am. St. Rep. 825.

[13] Annotation: 83 A.L.R. 1231.

[14] Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222 (hawkers' and peddlers' licenses); State v. Garbroskie, 111 Iowa, 496, 82 N. W. 959, 56 L.R.A. 570, 82 Am. St. Rep. 524 (peddler's license); Com. v. Hana, 195 Mass. 262, 81 N. E. 149, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514 (peddler's license); Laurens v. Anderson, 75 S. C. 62, 55 S. E. 136, 117 Am. St. Rep. 885, 9 Ann. Cas. 1003 (license for carrying on of any business or profession); State v. Shedroi, 75 Vt. 277, 54 A. 1081, 63 L.R.A. 179, 98 Am. St. Rep. 825 (peddler's license). Annotation: 83 A.L.R. 1233 et seq.; 117 Am. St. Rep. 890 et seq. See LICENSES [Also 17 R. C. L. p. 522, § 43].

[15] Annotation: 83 A.L.R. 1231 et seq.

[16] Annotation: 83 A.L.R. 1235.

[17] Annotation: 83 A.L.R. 1235.

[18] Annotation: 83 A.L.R. 1236.

[19] See CIVIL SERVICE, Vol. 10, p. 927, § 9.

[20] See infra, notes 1-5, this section.

of land which give a preference to soldiers in the right to purchase;[1] statutes giving war veterans preference in state loans for land purchased, if other persons are given the same rights when no soldiers apply;[2] statutes for the sustenance of students, confined in operation to veterans of the World War;[3] and statutes limiting the use of a building erected as a memorial to soldiers to organizations of veterans.[4] Imposing a surtax upon incomes of a particular year to raise a bonus for soldiers has also been held not to be invalid as special legislation.[5]

§ 502. Labor Unions.—

In some states laws favoring labor unions have been enacted; and it has been held that the constitutional provisions as to special privileges and the equal protection of the laws are not violated by a statute authorizing a union or an association of workmen to adopt a trademark or label to be used only on goods prepared by its members,6 by a law which requires employers advertising for help during the existence of a strike to mention its existence,7 or by a law which excepts organizations of laboring men for the purpose of raising wages from the operation of a statute prohibiting combinations and conspiracies to prevent competition and regulate prices.8 On the other hand, it has been held that an unconstitutional discrimination in favor of union workmen is made in violation of such constitutional provisions by statutes making it a misdemeanor to discharge an employee because of his connection with any lawful labor organization.9 In this connection it may be mentioned that it has been held that a municipal corporation has no power to require its work to be performed only by union labor and that a municipality, in letting contracts for public printing, cannot discriminate in favor of union labor.10

§ 503. Employers.—

Employers, as distinguished from employees, do not constitute a class within the constitutional prohibition against class legislation.11 A statute applying to all employers similarly situated is not open to such objection.12 Hence, if a statute

subjects all employers engaged in hazardous or dangerous businesses to the same legal obligations, it is valid and does not deny the equal protection of the laws because it is directed against employers of labor.13 The validity of the National Labor Relations Act of 1935 is not affected by the fact that it subjects the employer to supervision

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[1] State ex rel. State Reclamation Bd. v. Clausen (State ex rel. Chase v. Clausen) 110 Wash. 525, 188 P. 538, 14 A.L.R. 1133.

[2] Whedon v. South Dakota Land Settlement Bd. 43 S. D. 551, 181 N. W. 359, 14 A.L.R. 1145.

[3] Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 P. 678, 22 A.L.R. 1531.

[4] Allied Architects' Asso. v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029.

[5] State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617.

[6] See LABOR [Also 16 R. C. L. p. 428, § 12].

[7] Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879, Ann. Cas. 1915B, 659. See LABOR [Also 16 R. C. L. p. 475, § 52].

[8] Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L.R.A.(N.S.) 136.

[9] Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176. As to right of discharge generally, see Vol. 11, p. 1172, § 346.

[10] Fiske v. People, 188 Ill. 206, 58 N. E. 985, 52 L.R.A. 291 (ordinance); Miller v. Des Moines, 143 Iowa, 409, 122 N. W. 226, 23 L.R.A.(N.S.) 815, 21 Ann. Cas. 207 (ordinance); Wright v. Hoctor, 95 Neb. 342, 145 N. W. 704, 146 N. W. 997, 52 L.R.A.(N.S.) 728, Ann. Cas. 1915D, 967 (statute). Annotation: 23 L.R.A.(N.S.) 815; 52 L.R.A.(N.S.) 728. An ordinance providing that all municipal printing be given to union printers is void as tending to encourage monopoly and defeat competition, although there may be no charter requirement for letting such contracts to the lowest bidders. Atlanta v. Stein, 111 Ga. 789, 36 S. E. 932, 51 L.R.A. 335. See LABOR [Also 16 R. C. L. p. 426, § 11].

[11] State ex rel. Scheffer v. Justus, 85 Minn. 279, 88 N. W. 759, 56 L.R.A. 757, 89 Am. St. Rep. 550.

[12] Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879, Ann. Cas. 1915B, 659.

[13] See infra, § 507.

and restraint and leaves untouched the abuses for which employees may be responsible.[14]

Legislation which singles out particular employers—such as owners and operators of mines and manufacturers of every kind—and provides that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibits them from making contracts which it is competent for such other owners of property or employers of labor to make, is unconstitutional and class legislation.[15] A statute establishing free employment agencies to be maintained at public expense, which forbids those in charge of such agencies to furnish help to persons whose employees are on strike or locked out or to permit such employers to have access to the names of applicants for service, while expressly entitling other employers to the services of such applicants, is void as discriminating between two classes of employers.[16]

A classification based on the relation of an employer not to an employee, but to one who has ceased to be such, in respect of torts thereafter committed by such employee on the business and property right of the employer, is not sufficient to relieve a statute from condemnation under the equal protection of the laws clause of the Fourteenth Amendment to the Federal Constitution.[17]

5. OCCUPATIONS, BUSINESSES, OR PURSUITS

a. IN GENERAL

§ 504. Generally.—

Since the establishment of regulations of a particular trade or business essential to the public health and safety is within the legislative capacity of the state in the exercise of its police power,18 the classification of the subjects of such legislation, so long as it has a reasonable basis and is not merely an arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to any person the equal protection of the laws.19 Legislation affecting alike all persons pur-

[14] National Labor Relations Bd. v. Jones & L. Steel Corp. 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615, 108 A.L.R. 1352.

[15] State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 10 S. E. 288, 6 L.R.A. 359, 25 Am. St. Rep. 891; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863. A statute prohibiting persons and corporations engaged in mining and manufacturing and interested in selling merchandise and supplies from selling any merchandise to their employees at a greater per cent profit than they sell to others not employed by them is unconstitutional and void because it is class legislation and an unjust interference with private contract and business. State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 10 S. E. 288, 6 L.R.A. 359, 25 Am. St. Rep. 891.

[16] Mathews v. People, 202 Ill. 389, 67 N. E. 28, 63 L.R.A. 73, 95 Am. St. Rep. 241 (also invalidating statute on other grounds).

[17] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375.

[18] See Vol. 11, p. 1044, § 284.

[19] Semler v. Oregon State Dental Examiners, 294 U. S. 608, 79 L. ed. 1086, 55 S. Ct. 570; Merchants Exch. v. Missouri, 248 U. S. 365, 63 L. ed. 300, 39 S. Ct. 114; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421, Ann. Cas. 1917B, 455; Northwestern Laundry v. Des Moines, 239 U. S. 486, 60 L. ed. 396, 36 S. Ct. 206; Booth v. Indiana, 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617, affirming 179 Ind. 405, 100 N. E. 563, L.R.A. 1915B, 420, Ann. Cas. 1915D, 987; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 34 S. Ct. 859, 52 L.R.A.(N.S.) 525; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A. 1915C, 1189; Baccus v. Louisiana, 232 U. S. 334, 58 L. ed. 627, 34 S. Ct. 439; Sturges & B. Mfg. Co. v. Beauchamp, 231 U. S. 320, 58 L. ed. 245, 34 S. Ct. 60, L.R.A.1915A, 1196; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 S. Ct. 692; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 S. Ct. 27, Ann. Cas. 1914B, 71, affirming 197 N. Y. 394, 90 N. E. 991, 46 L.R.A.(N.S.) 31; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 S. Ct. 697, 44 L.R.A.(N.S.) 153; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 S. Ct. 190; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30

suing the same business under the same conditions is not class legislation.[20] If some persons engaged in a calling or business, however, are subjected to special burdens or favored by special privileges while other persons engaged in the same calling or business are not so treated, the legislation is based upon unconstitutional discrimination.[1]

It is primarily for the state to select the kinds of business which shall be the subject of regulation.[2] There is no prohibition in the Federal Constitution against the making of different regulations for different kinds of businesses or occupations by the state.[3] If a business is subject to regulation by the state,[4] specific regulations for that one kind of business, which may be necessary for the protection of the public, can never constitute a just ground of complaint because similar restrictions are not imposed upon other business of a different kind.[5]

The equal protection of the laws does not mean that all occupations which are called by the same name must be treated in the same way.[6] Any substantial difference between particular businesses may serve as a reasonable basis

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S. Ct. 644; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 S. Ct. 493, 18 Ann. Cas. 865; Heath & Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 S. Ct. 114; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 S. Ct. 89; Cox v. Texas, 202 U. S. 446, 50 L. ed. 1099, 26 S. Ct. 671; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, L. ed. 305, 26 S. Ct. 144; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 S. Ct. 730; Sedalia ex rel. Bauman v. Standard Oil Co. (C. C. A. 8th) 66 F. (2d) 757, A.L.R., writ of certiorari denied in 290 U. S. 706, 78 L. ed. 607, 54 S. Ct. 374; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Berk v. State, 225 Ala. 324, 142 So. 832, 84 A.L.R. 740; Milliron v. Harrison, 175 Ga. 764, 166 S. E. 231, 84 A.L.R. 1142; Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A.L.R. 933; Pickett v. Kuchan, 323 Ill. 138, 153 N. E. 667, 49 A.L.R. 499; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; Ritchie v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A.(N.S.) 994; Hyman v. Boldrick, 153 Ky. 77, 154 S. W. 369, 44 L.R.A.(N.S.) 1039; State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574; Louisiana State Medical Examiners v. Fife, 162 La. 681, 111 So. 58, 54 A.L.R. 594, affirmed in 274 U. S. 720, 71 L. ed. 1324, 47 S. Ct. 590; State v. Weinstein, 141 La. 1085, 76 So. 208, L.R.A.1917F, 706; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; People v. Lewis, 233 Mich. 240, 206 N. W. 553, 42 A.L.R. 1337; State v. Murray, 104 Neb. 51, 175 N. W. 666, 8 A.L.R. 563; Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136; State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158; Barlin v. Knox County, 136 Tenn. 238, 188 S. W. 795, 2 A.L.R. 112; Kirk v. State, 126 Tenn. 7, 150 S. W. 83, Ann. Cas. 1913D, 1239; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625. See Crane v. Johnson, 242 U. S. 339, 61 L. ed. 348, 37 S. Ct. 176, Ann. Cas. 1917B, 796. Annotation: 21 L.R.A. 790 et seq. Forbidding persons to solicit employment in personal injury actions, while permitting it in actions for injury to property, is not unconstitutional class legislation. Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273.

[20] Schoolcraft v. Louisville & N. R. Co. (Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.) 92 Ky. 233, 17 S. W. 567, 14 L.R.A. 579; Crowley v. Ellsworth, 114 La. 308, 38 So. 199, 69 L.R.A. 276, 108 Am. St. Rep. 353; State v. Schlemmer, 42 La. Ann. 1166, 8 So. 307, 10 L.R.A. 135; Churchill v. Albany, 65 Or. 422, 133 P. 632, Ann. Cas. 1915A, 1094; Re Oberg, 21 Or. 406, 28 P. 130, 14 L.R.A. 577; State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756; Ex parte Luna, 98 Tex. Crim. Rep. 458, 266 S. W. 415, citing R. C. L. See also Spokane v. Macho, 51 Wash. 322, 98 P. 755, 21 L.R.A.(N.S.) 263, 130 Am. St. Rep. 1100.

[1] See infra, § 505.

[2] New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 S. Ct. 144.

[3] Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; State v. Leavitt, 105 Me. 76, 72 A. 875, 28 L.R.A.(N.S.) 799.

[4] See Vol. 11, p. 1045, § 284.

[5] New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 S. Ct. 144; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 S. Ct. 730; Simmons v. Western U. Teleg. Co. 63 S. C. 425, 41 S. E. 521, 57 L.R.A. 607. A law may be limited to the prevention of the dangers

peculiar to a particular industry without denying to any person the equal protection of the law. State v. Holden (Holden v. Hardy) 14 Utah, 71, 46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 333. A statute prohibiting unfair commercial discriminations between different sections, communities, or localities is not unconstitutional as class legislation. State v. Drayton, 82 Neb. 254, 117 N. W. 768, 23 L.R.A.(N.S.) 1287, 130 Am. St. Rep. 671.

[6] Dominion Hotel Co. v. Arizona, 249 U. S. 265, 63 L. ed. 597, 39 S. Ct. 273.

12 Am. Jur. CONSTITUTIONAL LAW §§ [505], [506]

for a classification and be sufficient.[7] Classification is proper when differences exist in the business classified which have a reasonable relation to the object of the statute in question.[8]

§ 505. Equality of Right.—

It is a general rule that legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by constitutional provisions.9 The discriminations which are open to objection are those in which persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions.10 Part of the liberty of a citizen consists in the enjoyment, upon terms of equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade and of acquiring, holding, and selling property.11 The constitutional guaranty as to the equal protection of the laws, moreover, requires that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under similar circumstances and that no greater burdens in engaging in a calling should be laid upon one than are laid upon others in the same calling and condition.12

A statute may amount to an arbitrary classification denying the equal protection of the laws if it violates a citizen's right to engage in business pursuits for a reason which does not have relationship to the public need. Hence, a statute which seeks to restrict the right to engage in an insurance brokerage business to such persons as make that their principal business contains an unreasonable discrimination.[13]

§ 506. Particular Classes.—

The practical application of the general principle of classification in accordance with the constitutional requirements as to equal protection of the laws is illustrated in the case of banks and bankers. The courts have recognized that the banking business may properly form a

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[7] Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 34 So. 533, 62 L.R.A. 407, 95 Am. St. Rep. 476.

[8] Nitka v. Western U. Teleg. Co. 149 Wis. 106, 135 N. W. 492, 49 L.R.A.(N.S.) 337, Ann. Cas. 1913C, 863.

[9] See supra, § 504.

[10] Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 S. Ct. 207; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 S. Ct. 730; Tucson v. Stewart, 45 Ariz. 36, 40 P. (2d) 72, 96 A.L.R. 1492; Elliott v. State, 29 Ariz. 389, 242 P. 340, 46 A.L.R. 284; People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A.L.R. 703; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A. (N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L.R.A. 558; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; Butte v. Paltrovich, 30 Mont. 18, 75 P. 521, 104 Am. St. Rep. 698; Philadelphia v.

Brabender, 201 Pa. 574, 51 A. 374, 58 L.R.A. 220; Simmons v. Western U. Teleg. Co. 63 S. C. 425, 41 S. E. 521, 57 L.R.A. 607; Ex parte Luna, 98 Tex. Crim. Rep. 458, 266 S. W. 415, citing R. C. L.; State v. Holden, 14 Utah, 71, 46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 333.

[11] See Vol. 11, p. 1145, §§ 335 et seq.

[12] Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A.L.R. 230; Re Opinion of Justices, 207 Mass. 601, 94 N. E. 558, 34 L.R.A.(N.S.) 604; Vicksburg v. Mullane, 106 Miss. 199, 63 So. 412, 50 L.R.A.(N.S.) 421; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717; State v. Pennoyer, 65 N. H. 113, 18 A. 878, 5 L.R.A. 709; State v. Shedroi, 75 Vt. 277, 54 A. 1081, 63 L.R.A. 179, 98 Am. St. Rep. 825; State v. Dering, 84 Wis. 585, 54 N. W. 1104, 19 L.R.A. 858, 36 Am. St. Rep. 948. The provisions of a statute which in effect deny the right to carry on the business of the manufacture, sale, and delivery of ice at any point where existing facilities are sufficient to meet the public needs, prescribe the procedure to that end, and authorize the purchase, by one party engaged in the business, of the property of others or the consolidation of their businesses violate the provisions of the state Constitution which prohibit the grant of special privileges, monopolies, and perpetuities. Cap F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018. As to equality of burdens, see infra, § 526.

[13] Hauser v. North British & M. Ins. Co. 206 N. Y. 455, 100 N. E. 52, 42 L.R.A.(N.S.) 1139, Ann. Cas. 1914B, 263.

class by itself for legislative regulation,[14] and that as between banks and bankers themselves, different classes may very properly exist.[15] While national banks are governmental agencies, not of the same or similar character as banks created under the laws of the state,[16] it has been held that a national bank in a state is not unconstitutionally denied the equal protection of the laws by a state statute permitting state banks to contribute to a guaranty fund for the security of depositors.[17] A state statute limiting the rights of stockholders of a state bank to inspect its books and records to other than those which show its transactions with any customer does not deny the equal protection of the laws to stockholders of such banks because it does not include stockholders of national banks within its operation.[18] A statute making exceptions, however, of the Federal Reserve Board, Federal reserve banks, the United States Comptroller of the Currency, and clearing houses to the inviolability of the information secured by the state bank examiners in the course of their examination of a bank is void as violating the equal protection clause of the Constitution.[19]

A statute fixing a limitation on commissions with respect to secured loans negotiated by a broker, with no limitation on commissions as to unsecured loans except the inhibition against any charge when the loan runs for a period

shorter than six months and is not secured by real estate, is discriminatory and void as violating constitutional provisions guaranteeing uniform operation of laws of a general nature, equal privileges and immunities, and equal protection of the laws.[20]

It is a recognized right of the legislature with respect to the matter of usury to deal with different classes of moneylenders and money borrowers in different ways, provided there is nothing apparently unreasonable in creating such distinctions and all members of each class are treated alike.[1] A constitutional

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[14] Youngblood v. Birmingham Trust & Sav. Co. 95 Ala. 521, 12 So. 579, 20 L.R.A. 58, 36 Am. St. Rep. 245; Rainey v. Michel,

[6] Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148; Griffin v. State, 142 Ga. 636, 83 S. E. 540, L.R.A.1915C, 716, Ann. Cas. 1916C, 80; State v. Sherman, 18 Wyo. 169, 105 P. 299,

[27] L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819. A statute making it a misdemeanor for any banker to discount commercial paper at more than a certain rate per cent is not unconstitutional legislation because it ap- plies to bankers only. Youngblood v. Bir- mingham Trust & Sav. Co. 95 Ala. 521, 12 So. 579, 20 L.R.A. 58, 36 Am. St. Rep. 245. As to power to regulate the business of banking, see BANKS, Vol. 7, p. 30, §§ 9 et seq. As to the constitutionality of statutes sanctioning preferences to certain classes of depositors in the distribution of the as- sets of insolvent banks, see BANKS, Vol. 7, p. 533, § 747.

[15] Provident Inst. for Sav. v. Malone, 221 U. S. 660, 55 L. ed. 899, 31 S. Ct. 661, 34 L.R.A.(N.S.) 1129; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 S. Ct. 190; As- saria State Bank v. Dolley, 219 U. S. 121,

[55] L. ed. 123, 31 S. Ct. 189; Bachtel v. Wil- son, 204 U. S. 36, 51 L. ed. 357, 27 S. Ct. 243. Savings banks are not unconstitutional- ly discriminated against where statutory provisions that deposits which have re- mained inactive and unclaimed for thirty years, where the claimant is unknown or the depositor cannot be found, shall be paid to the treasurer and receiver general, to be held by him as trustee for the true owner or his legal representatives are made ap- plicable to them alone. Provident Inst. for Sav. v. Malone, 221 U. S. 660, 55 L. ed. 899,

[31] S. Ct. 661, 34 L.R.A.(N.S.) 1129.

[16] State v. Thomas Cruse Sav. Bank, 21 Mont. 50, 52 P. 733, 45 L.R.A. 760. As to the nature of national banks gen- erally, see BANKS, Vol. 7, p. 601, §§ 834 et seq.

[17] Abilene Nat. Bank v. Dolley, 228 U. S. 1, 57 L. ed. 707, 33 S. Ct. 409, affirming (C. C. A. 8th) 179 F. 461, 32 L.R.A.(N.S.) 1065. See also Clement Nat. Bank v. Vermont,

[231] U. S. 120, 58 L. ed. 147, 34 S. Ct. 31; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 S. Ct. 189. The Federal reserve bank in a particular district is not deprived of the equal pro- tection of the laws by a statute of a state within such district permitting banks of the state to pay checks by draft, although competing banks may possibly demand cash in their collections. Farmers & M. Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. ed. 1157, 43 S. Ct. 651, 30 A.L.R. 635.

[18] State ex rel. Powell v. State Bank, Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494.

[19] Re French, 315 Mo. 75, 285 S. W. 513,

[47] A.L.R. 688.

[20] Wallace v. Zinman, 200 Cal. 585, 254 P. 946, 62 A.L.R. 1341.

[1] Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas.

provision, however, that interest rates prescribed by the legislature shall be uniform throughout the state and the constitutional requirement of equality

and uniformity preclude the legislature from empowering persons licensed under the Small Loan Act to make the maximum service charge permitted by the act without reference to the service rendered.[2] Moreover, a statute forbidding the loaning of small amounts at more than a specified rate of interest on certain kinds of chattels, while it permits any rate to be charged on such loans on other chattels, has been held to be unconstitutional where there is no reasonable distinction between the different classes of persons and things affected by the law.[3] Elsewhere the view has been taken that a statute making it a misdemeanor to take usury on loans secured by household or kitchen furniture is not invalid as tending to deprive persons lending on such security of the equal protection of the laws, since such articles furnish a proper basis for classification in dealing with usurious loans.[4] A statute relating to loans by insurance companies which operates to exempt such loans from the operation of statutes fixing a legal rate of interest and prescribing penalties for usury violates a state constitutional provision that no man or set of men is entitled to exclusive or separate emoluments or privileges from the community except in consideration of public services.[5]

While a special statute authorizing a corporation to take a rate of interest greater than that allowed by the general law is unconstitutional,[6] statutes exempting building and loan associations from the operation of usury laws have been frequently sustained as not amounting to prohibited class legislation, inasmuch as building and loan associations differ so widely from other corporations in their purposes and nature that they are generally recognized as a proper subject of independent legislation.[7] This distinction will not, however, justify the legislature in conferring special privileges on such associations.[8]

Various regulations pertaining to classifications in advertising have been assailed as discriminatory, but usually with little success.[9] A state statute prohibiting tobacco advertising on billboards, street car signs, and placards, while permitting it in newspapers and magazines, does not make an arbitrary classification in violation of the equal protection clause of the Fourteenth Amendment.[10] The exception in favor of newspapers, periodicals, books,

1913B, 529; Griffith v. Connecticut, 218 U. S. 572, 54 L. ed. 1155, 31 S. Ct. 134; Grif- fith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 S. Ct. 132; Re Stephan, 170 Cal. 48, 148 P. 196, Ann. Cas. 1916E, 617; Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A.(N.S.) 1190; State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574; Norris v. Lincoln, 93 Neb. 658, 142 N. W. 114, Ann. Cas. 1914B, 1194; Wessell v. Timberlake,

[95] Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402. See Carozza v. Federal Finance & Credit Co. 149 Md. 223, 131 A. 332, 43 A.L.R. 1. The exemption of banks or trust com- panies and bona fide mortgages from the operation of a statute prohibiting the ex- acting of more than 15 per cent interest on loans or the accepting of a note for an amount greater than that actually loaned with intent to evade this provision does not render such statute repugnant to the equal protection of the laws clause of the Federal Constitution; such classification has a reasonable basis. Griffith v. Con- necticut, 218 U. S. 572, 54 L. ed. 1155, 31 S. Ct. 134; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 S. Ct. 132. Annota- tion: 11 L.R.A.(N.S.) 635. As to chattel loans or small loans gen- erally, see SMALL LOAN ACTS.

[2] Family Loan Co. v. Hickerson, 168 Tenn. 36, 73 S. W. (2d) 694, 94 A.L.R. 664.

[3] Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L.R.A.(N.S.) 815, 113 Am. St. Rep. 236, 7 Ann. Cas. 475.

[4] State v. Davis, 157 N. C. 648, 73 S. E. 130, 39 L.R.A.(N.S.) 136.

[5] Cowan v. Security Life & T. Co. 211 N. C. 18, 188 S. E. 812, 110 A.L.R. 338. Annotation: 110 A.L.R. 343.

[6] Gordon v. Winchester Bldg. & Accumu- lating Fund Asso. 12 Bush (Ky.) 110, 23 Am. Rep. 713.

[7] See BUILDING AND LOAN ASSOCIATIONS, Vol. 9, p. 140, § 52.

[8] Henderson Bldg. & L. Asso. v. John- son, 88 Ky. 191, 10 S. W. 787, 3 L.R.A. 289.

[9] See infra, notes, 10, 11, this section.

[10] Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643, 52 S. Ct. 273, 79 A.L.R. 546. Annotation: 79 A.L.R. 551.

pamphlets, etc., on which shall be printed representations of the national flag, disconnected from any advertisement, which is made by a statute prohibiting the use of representations of the national flag for advertising articles of merchandise does not make such statute repugnant to the equal protection of the laws clause.[11]

§ 507. —

Industry.—Classifications in industrial activity with due regard to constitutional requirements as to the equal protection of the laws may be based on numerous and different factors. Consideration may be had of matters personal to the individuals engaging in certain occupations—such, for example, as sex, since it is recognized that some employments may be admissible for males and improper or injurious for females. Hence, regulations recognizing the impropriety of and forbidding women's engaging in certain occupations may be open to no reasonable objection,[12] while in other occupations, not forbidden, reasonable regulations may be prescribed. For example, a statute limiting the hours of women's labor is not unconstitutional as special legislation on the theory that it effects an arbitrary classification by applying

to women and not to men.[13] Minors also may be classified for their best interests and the public welfare, and statutes may very properly forbid their employment under a designated age.[14]

Classification of certain occupations may be made on the basis of their dangers or perils, as, for example, work in underground mines, in smelters,[15] in

foundries,[16] in hazardous occupations in which machinery is employed,[17] or in

the business of operating railroads.[18] This power to classify is in many cases

closely allied with that consideration for the public welfare which finds expression in the very general movement for so-called eight-hour laws, and accordingly statutes providing for an eight-hour working day have been upheld,

especially where they relate to employment in mines, mills,[19] factories, or

manufacturing establishments.[20] That class of legislation which has for its

object the regulation of the time and mode of payment of wages approaches

disputed boundaries, for while this right is upheld by some authorities, by

others it is denied on the ground that it is unreasonable and arbitrary.[1]

Classification in various regulations of occupations has often been made and

sustained on the basis of the number of persons employed, where such a basis

is not arbitrary or unreasonable.[2] Similar classification affecting the financial

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[11] Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525, affirming 74 Neb. 757, 105 N. W. 298, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754. Contra.—Ruhstrat v. People, 185 Ill. 133,

[57] N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30.

[12] See supra, § 497.

[13] See supra, § 496.

[14] See supra, § 498.

[15] Ex parte Boyce, 27 Nev. 299, 75 P. 1,

[65] L.R.A. 47, 1 Ann. Cas. 66. See LABOR [Also 16 R. C. L. p. 488, § 61]; MINES AND MINERALS [Also 18 R. C. L. p. 1233, §§ 131 et seq.].

[16] State v. Scullin-Gallagher Iron & Steel Co. 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918E, 620.

[17] State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A. (N.S.) 466. See also infra, note 6, this section.

[18] Jensen v. South Dakota C. R. Co. 25 S. D. 506, 127 N. W. 650, 35 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 700. As to classification of railroads, see infra, § 512.

[19] Bunting v. Oregon, 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043, affirming 71 Or. 259, 139 P. 731, L.R.A. 1917C, 1162, Ann. Cas. 1916C, 1003 (mills); Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Johnson, L. & Co. v. Spartan Mills, 68 S. C. 339, 47 S. E. 695, 1 Ann. Cas. 409. See LABOR [Also 16 R. C. L. p. 488, § 61]; MINES AND MINERALS [Also 18 R. C. L. p. 1233, § 131].

[20] Bunting v. Oregon, 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043, affirming 71 Or. 259, 139 P. 731, L.R.A. 1917C, 1162, Ann. Cas. 1916C, 1003, § 64; See LABOR [Also 16 R. C. L. p. 491, § 64.

[1] See LABOR [Also 16 R. C. L. p. 501, §§ 70- 72].

[2] Middleton v. Texas Power & L. Co.

[249] U. S. 152, 63 L. ed. 527, 39 S. Ct. 227;

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responsibility of employers in social legislation relating to unemployment has also been sustained.[3] In a very few cases relating to industrial activity a classification based upon the number of employees has been held invalid.[4]

Certain businesses or vocations are inherently of such a character, whether from considerations of their quasi-public nature or their relation to the police laws, that they are generally recognized as falling within distinct classes.[5]

The fact that legislative exercise of the police power applies alike to all persons and all corporations engaging in a dangerous or hazardous calling or business relieves such legislation from the charge that there is a denial of equal protection under the law by reason of such enactments.[6] Moreover, in such cases if the power to classify because of the nature of the employment exists, the classification is not rendered invalid because it happens to include some persons not subject to a uniform degree of danger.[7]

Classification based upon employment in public service is not unreasonable.[8]

The legislature may not, under the guise of classification, impose discriminatory or burdensome measures upon a particular industry or business, which have no vital or reasonable relation to the objects sought by a just and permissible classification.[9]

Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571,

[59] L. ed. 364, 35 S. Ct. 167; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 S. Ct. 616; Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158; Vandalia R. Co. v. Stillwell,

[181] Ind. 267, 104 N. E. 289, Ann. Cas. 1916D, 258, affirmed in 239 U. S. 637, 60 L. ed. 480,

[36] S. Ct. 445; State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 153; State v. McFarland, 60 Wash. 98, 110 P. 792, 140 Am. St. Rep. 909; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385; Borgnis v. Falk, Co.

[147] Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489. As to classification based upon numbers generally, see supra, § 491.

[3] Carmichael v. Southern Coal & Coke Co. 301 U. S. 495, 81 L. ed. 1245, 57 S. Ct. 868, 109 A.L.R. 1327; Gillum v. Johnson, 7 Cal. (2d) 744, 62 P. (2d) 1037, 63 P. (2d) 810, 108 A.L.R. 595; W. H. H. Chamberlin v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22,

[106] A.L.R. 1519, affirmed in 299 U. S. 515,

[81] L. ed. 380, 57 S. Ct. 122, which has rehearing denied in 301 U. S. 714, 81 L. ed. 1365, 57 S. Ct. 926. Annotation: 106 A.L.R. 1531; 108 A.L.R. 613, s. 109 A.L.R. 1346.

[4] State v. Haun, 61 Kan. 146, 59 P. 340,

[47] L.R.A. 369; State v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L.R.A. 265, 77 Am. St. Rep. 765.

[5] See generally, Vol. 11, p. 1050, §§ 289- 296.

[6] R. E. Sheehan Co. v. Shuler, 265 U. S. 371, 68 L. ed. 1061, 44 S. Ct. 548, 35 A.L.R. 1056; Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. Ann. Cas. 1917D, 642, affirming 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10; New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 37 S. Ct. 247, L.R.A. 1917D, 1, Ann. Cas. 1917D, 629; Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 S. Ct. 581; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A.(N.S.) 44; Missouri, K. & T. R. Co. v. Bailey, 220 U. S. 608, 55 L. ed. 607, 31 S. Ct. 725; New York C. & H. R. R. Co. v. Schrain, 220 U. S. 606, 55 L. ed. 606, 31 S. Ct. 722; Missouri, K. & T. R. Co. v. Richardson, 220 U. S. 601, 55 L. ed. 603,

[31] S. Ct. 715; Minnesota Iron Co. v. Kline,

[199] U. S. 593, 50 L. ed. 322, 26 S. Ct. 159; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 S. Ct. 136; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209,

[39] L. ed. 675, 15 S. Ct. 585; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 S. Ct. 1176; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 S. Ct. 1161; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; Jensen v. South Dakota C. R. Co. 25 S. D. 506, 127 N. W. 650, 35 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 700; Salt Lake City v. Industrial Commission, 58 Utah, 314, 199 P. 152, 18 A.L.R. 259; State ex rel. DavisSmith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466. See also Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284,

[51] L. ed. 184, 27 S. Ct. 100, 8 Ann. Cas. 87; Chicago & N. W. R. Co. v. McLaughlin, 119 U. S. 566, 30 L. ed. 477, 7 S. Ct. 1366. As to the validity of legislation classifying what employees may recover and what employers are liable for injuries received in employment, see MASTER AND SERVANT [Also 18 R. C. L. p. 833, § 288]; WORKMEN'S COMPENSATION ACTS [Also 28 R. C. L. p. 747, § 42].

[7] Mobile, J. & K. C. R. Co. v. Turnipseed,

[219] U. S. 35, 55 L. ed. 78, 31 S. Ct. 136, 32 L.R.A.(N.S.) 226, Ann. Cas. 1912A, 463.

[8] Lewis & Clark County v. Industrial Accid. Bd. 52 Mont. 6, 155 P. 268, L.R.A. 1916D, 628.

[9] Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Starne v. People, 222 Ill. 189, 78 N. E. 61, 113 Am. St. Rep. 389; Frorer v. People, 141 Ill. 171,

§ [508] CONSTITUTIONAL LAW [12] Am. Jur.

b. SELLING OR MERCHANDISING

§ 508. Methods of Selling.—

Regulations, licenses, and taxes imposed upon persons whose business consists of selling merchandise often provide for classifications based upon the factor that the businesses so sought to be regulated are a particular kind or technique of selling. It is generally held that legislation providing for classifications based upon the type of selling done by the persons sought to be regulated by it is constitutional, if the particular manner of selling so classified is substantially different from other selling and forms a rational basis for legislative distinction, and if all persons so engaged and regulated are treated alike.10 Many well-settled principles of regulation attest the validity of classification of businesses of selling in which the manner of sale involves material differences from other kinds of selling.11 Thus, one exception to the principle that size alone should not be recognized as a means of distinguishing classes of legislative regulation12 is to be found in the acquiescence by the courts in the inherent differences between wholesale and retail dealers.13 There is a clear distinction in principle between persons engaged in selling at retail and those engaged in selling by wholesale. For years it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like

distinction is observed between brewers and rectifiers, wholesale and retail dealers in liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco.[14] The difference between regular dealers or merchants and transients—such as peddlers, hawkers, and itinerant vendors—is likewise a reasonable basis for classification.[15] On the other hand, legislation which attempts to regulate or tax particular businesses, chiefly the selling of various kinds of merchandise, not on a basis that a different kind of selling is employed in one field of endeavor from that employed in another, but solely on the theory that in the same kind of selling different methods are used, is generally held to be unconstitutional and discriminatory. Such a classification in reality attempts to treat differently persons in the same position, being based upon a subclassification which is unreasonable.[16] For example, as far as an ordinary trade or business of selling is concerned, details connected with credit and delivery alone are not enough to afford a reasonable basis for license purposes, and different burdens cannot be directed at persons engaged in selling the same type of goods, because one operator sells for credit instead of for cash, or because he delivers or fails to deliver the goods which he sells.[17]

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[31] N. E. 395, 16 L.R.A. 492; State v. Haun, 61 Kan. 146, 59 P. 340, 47 L.R.A. 369; People ex rel. Atty. Gen. v. Sperry & H. Co. 197 Mich. 532, 164 N. W. 503, L.R.A.1918A, 797; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

[10] Annotation: 43 A.L.R. 594 et seq., s. 99 A.L.R. 703 et seq.

[11] See LICENSES [Also 17 R. C. L. p. 511, §§ 32 et seq.].

[12] See supra, § 490.

[13] State v. Foster, 22 R. I. 163, 46 A. 833, 50 L.R.A. 339; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434. The fact that the producers of, and small dealers in, produce are chiefly protected by a statute regulating the licensing and bonding of wholesalers does not render the statute void as class legislation. State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434.

[14] Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 S. Ct. 233. Annotation: 62 A.L.R. 109 (tobacco). See LICENSES [Also 17 R. C. L. p. 512, § 33].

[15] See LICENSES [Also 17 R. C. L. p. 513, § 33]; PEDDLERS [Also 21 R. C. L. p. 193, §§ 15 et seq.].

[16] Annotation: 43 A.L.R. 594 et seq., s. 99 A.L.R. 703 et seq. For detailed discussion of the principles discussed in the text rule, see LICENSES [Also 17 R. C. L. Perm. Supp. p. 4301, and 1937 Supp. § 38].

[17] Douglas v. South Georgia Grocery Co. 180 Ga. 519, 179 S. E. 768, 99 A.L.R. 700 (grocery); Danville v. Quaker Maid, 211 Ky. 677, 278 S. W. 98, 43 A.L.R. 590 (grocery).

§ 509. Articles Sold.—

Statutes which in the exercise of the police power impose restrictions or limitations on sales of a particular commodity or on all sales under certain circumstances which call for special regulation are generally upheld as valid and as not amounting to a denial of the equal protection of the laws. The sales so classified cover a wide variety of transactions.[18] Such laws place under the same restrictions and subject to like penalties and burdens all who manufacture or sell the articles embraced by their prohibitions, thus recognizing and preserving the principle of equality among those engaged in the same business.[19]

Equal protection of the laws is not denied by a municipal ordinance which, in prohibiting the sale, offering or exposing for sale, or soliciting to purchase any articles on any street, alley, or public place in certain defined districts, makes an exception of daily newspapers.[20]

c. FARMERS AND DEALERS IN DAIRY PRODUCTS

§ 510. Agriculturists.—

In the older cases the view was quite often expressed

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[18] Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 87 A.L.R. 285 (farm machinery); Merrick v. N. W. Halsey & Co. 242 U. S. 568, 61 L. ed. 498, 37 S. Ct. 227 ("blue sky laws"); Caldwell v. Sioux Falls Stock Yards Co. 242 U. S. 559, 61 L. ed. 493, 37 S. Ct. 224 ("blue sky laws"); Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, 37 S. Ct. 217 ("blue sky laws"); Sanders Ice Cream Co. v. Iowa, 242 U. S. 153, 61 L. ed. 222, 37 S. Ct. 30 (ice cream); Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28 (ice cream); Armour & Co. v. North Dakota, 240 U. S. 510, 60 L. ed. 771, 36 S. Ct. 440, Ann. Cas. 1916D, 548 (lard); Price v. Illinois, 238 U. S. 446, 59 L. ed. 1400, 35 S. Ct. 892 (food containing boric acid); Hammond Packing Co. v. Montana, 233 U. S. 331, 58 L. ed. 985, 34 S. Ct. 596 (oleomargarin); Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 S. Ct. 464 (liquor to be sold by druggists only); Baccus v. Louisiana, 232 U. S. 334, 58 L. ed. 627, 34 S. Ct. 439 (drugs); Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 S. Ct. 606 (Bulk Sales Act); Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 S. Ct. 174 (Bulk Sales Act); Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 S. Ct. 114 (mixed paints); Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 168 (stocks on margin); Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 S. Ct. 120 (oleomargarin); Boise Assoc. of Credit Men v. Ellis, 26 Idaho, 438, 144 P. 6, L.R.A.1915E, 917 (Bulk Sales Act); G. S. Johnson Co. v. Beloosky, 263 Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411 (Bulk Sales Act); People v. Freeman, 242 Ill. 373, 90 N. E. 366, 17 Ann. Cas. 1098 (oleomargarin); Cities Serv. Co. v. Koeneke, 137 Kan. 7, 20 P. (2d) 460, 87 A.L.R. 16 ("blue sky laws"); Bratberg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1338 (agricultural machinery); State v. Olson, 26 N. D. 304, 144 N. W. 661, L.R.A.1918B, 975, writ of error dismissed in 245 U. S. 676, 62 L. ed. 542, 38 S. Ct. 13 (snuff); Noble v. Ft. Smith Wholesale Grocery Co. 34 Okla. 662, 127 P. 14, 46 L.R.A.(N.S.) 455 (Bulk Sales Act); Williams v. Fourth Nat. Bank, 15 Okla. 477, 82 P. 496, 2 L.R.A.(N.S.) 334, 6 Ann. Cas. 970 (Bulk Sales Act); State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158 (agricultural seeds); Neas v. Borches, 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep. 851 (Bulk Sales Act); Motor Car Dealers' Asso. v. Fred S. Haines Co. 128 Wash. 267, 222 P. 611, 36 A.L.R. 493 (sale of personal property on Sunday forbidden, sale of real estate allowed); McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 71 P. 37, 60 L.R.A. 947, 94 Am. St. Rep. 889 (Bulk Sales Act). Excepting books and prints, art work, animals, farm products, and goods sold in original packages, from a statute forbidding auction sales at night, is not such discrimination as to render the act unconstitutional. Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A.L.R. 766. The complicated and costly character of tractors, gas or steam engines, and harvesting and threshing machinery, the need of tests to determine their fitness, the fact that their fitness for use is partly dependent upon local conditions, and the serious losses that result if, in actual use, they prove unfit, warrant their separate classification by a statute providing that any person purchasing such machinery for his own use shall have reasonable time to inspect and test it, and, if it does not prove to be reasonably fit for the purpose for which it was purchased, may rescind the sale by giving notice within a reasonable time after delivery, and that any contract provision to the contrary shall be void. Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 87 A.L.R. 285; Bratberg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1338. Forbidding the use of secondhand material in making for sale any mattress, quilt, or bed comforter, while permitting it in the making of pillows for sale, is unconstitutional class legislation. People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A. 1916C, 775, Ann. Cas. 1917C, 1065. As to restriction of sales under the police power, see Vol. 11, p. 1040, § 281.

[19] Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257. See also Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721 (sale of intoxicating liquors).

[20] Chicago v. Rhine, 363 Ill. 619, 2 N. E. (2d) 905, 105 A.L.R. 1045. [12 Am. Jur.]—13 193

that the courts were generally opposed to a recognition of farmers and of persons engaged in agricultural pursuits as forming a separate class within the limits allowed by the Federal Constitution securing to all the equal protection of the laws.[1] Hence, statutes purporting to prohibit the formation of trusts for the purpose of fixing the price or regulating the production of articles of commerce, but exempting from their provisions all persons engaged in agriculture and raising livestock, have been held unconstitutional as class legislation, denying the equal protection of the laws to those not included in the exempted class.[2] A contrary conclusion was reached by some of the state courts on the ground that farmers and stock raisers when acting within their limited sphere of immunity from the statutory penalties had but few opportunities and slight facilities for impairing competition and controlling prices, while those of many other pursuits had such opportunities and facilities almost without limit. This difference alone has been considered as being sufficient to justify the classification made by the statute.[3]

A provision in a statute levying a tax against persons engaged in selling tangible personal property at retail that, for the purposes of the act, tangible personal property does not mean or include farm products or farm produce sold by the producer thereof renders it unconstitutional as not uniform in its application to the class on which it operates, since it exempts a producer of farm products both when he sells to consumers only as an incident to his business of producing and also when he conducts a separate business of selling at retail in competition with other retail dealers in such commodities.[4]

Unsuccessful efforts have been made to exempt farmers from regulations as to the hours of labor.[5] Thus, a statute declaring that a day's work for all classes of mechanics, servants, and laborers, excepting those engaged in farm or domestic labor, should not exceed eight hours has been held to be unconstitutional as being special legislation, discriminating against farm and domestic laborers.[6] Workmen's Compensation Acts, however, which

exempt farmers and persons engaged in agricultural pursuits from participation in their benefits have been sustained.[7]

A statute penalizing the taking of fur-bearing animals by any trap or device likely to cause continued suffering to an animal caught therein is not invalid in classification, or discriminatory in nature, because it may affect farmers more acutely than other members of society.[8]

The policy of modern law is to favor agriculture whenever possible, and this policy is reflected in the multitude of farm aid laws of all sorts which have received judicial sanction.[9] Within certain limits farm land and farm products may be properly distinguished from other objects for the purpose of classification. For example, statutes providing for the extension of city boundaries over certain classes of adjoining lands and exempting agricul-

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[1] Kellyville Coal Co. v. Harrier, 207 Ill. 624, 69 N. E. 927, 99 Am. St. Rep. 240.

[2] Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 41 S. E. 553, 57 L.R.A. 547, 90 Am. St. Rep. 126; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804,

[8] Ann. Cas. 717.

[3] Brock v. Hardie, 114 Fla. 670, 154 So. 690, citing R. C. L.; State v. Schlitz Brew- ing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

[4] Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398.

[5] See LABOR [Also 16 R. C. L. p. 482, § 57].

[6] Low v. Rees Printing Co. 41 Neb. 127,

[59] N. W. 362, 24 L.R.A. 702, 43 Am. St. Rep. 670.

[7] See WORKMEN'S COMPENSATION ACTS [Al- so 28 R. C. L. p. 747, § 42].

[8] Com. v. Higgins, 277 Mass. 191, 178 N. E. 536, 79 A.L.R. 1304.

[9] See AGRICULTURE, Vol. 2, p. 405, §§ 12 et seq.

tural lands from their provisions have been sustained as not violative of the Fourteenth Amendment to the Constitution of the United States.[10] A statute creating a department to aid agriculturists in securing loans on their real estate is not unconstitutional as class legislation or a denial of the equal protection of the laws, although its benefits are limited to agriculturists and to the members of that class only who can furnish real-estate security.[11] A scheme to purchase lands, subdivide them, and sell them to settlers by the use of money raised by taxation which is limited to a sale for agricultural purposes is not void for discrimination against other industries.[12]

In some jurisdictions it is held that the peculiar characteristics of agri-

cultural products and farm produce and the liability to peculiar abuses resulting from sale thereof on commission justify the legislature, in its discretion, in putting those who sell them on commission in a class by themselves.[13] Elsewhere similar laws have been declared to be unconstitutional as class legislation.[14]

Motor vehicle legislation favoring agricultural producers or dispensers of their own products while engaged in agricultural pursuits has been sustained as far as permitting exemptions from annual taxes, licenses, or bond requirements is concerned; thus to free the farmer of fresh burdens is, under some circumstances, a means to foster agriculture and promote the common good.[15]

§ 511. Milk Dealers.—

The business of producing or dealing in milk products is acknowledged to be within the police power of the state, and license laws for persons so engaged have consistently been upheld.[16] Hence, a statute requiring a license of persons engaged in the business of buying milk and cream is not invalid as class legislation.[17] A statute requiring persons

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[10] Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 S. Ct. 284; Kansas City v. Un- ion P. R. Co. 59 Kan. 427, 53 P. 468, 52 L.R.A. 321.

[11] Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210. Annotation: 92 A.L.R. 776.

[12] State ex rel. State Reclamation Bd. v. Clausen (State ex rel. Chase v. Clausen)

[110] Wash. 525, 188 P. 538, 14 A.L.R. 1133. Annotation: 92 A.L.R. 776.

[13] Payne v. Kansas, 248 U. S. 112, 63 L. ed. 153, 39 S. Ct. 32; State ex rel. Beek v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L.R.A. 442, 77 Am. St. Rep. 681, writ of error dismissed in State ex rel. Mohler v. Megaarden (U. S.)

[46] L. ed. 1263, 22 S. Ct. 931; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434. The distinctions between wholesale and retail dealers in farm produce is sufficient to form the basis of a legislative classifica- tion so as to support a law requiring the licensing and bonding of the wholesaler to which the retailer is not made subject. State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434. An exception of dealers in grain, live- stock, and dressed meats from a statute requiring commission merchants in cities of more than 50,000 population to be li- censed is not unconstitutional as an ar- bitrary discrimination, since the classifica- tion in this case is a natural one, as the commission merchants subject to the act deal in the small products of the farm, while other laws provide for the inspec- tion of grain, livestock, and dressed meats. Lasher v. People, 183 Ill. 226, 55 N. E. 663,

[47] L.R.A. 802, 75 Am. St. Rep. 103. See AGRICULTURE, Vol. 2, p. 442, § 49.

[14] People ex rel. Valentine v. Berrien Cir- cuit Judge (People ex rel. Valentine v. Coolidge) 124 Mich. 664, 83 N. W. 594, 50 L.R.A. 493, 83 Am. St. Rep. 352.

[15] Aero Mayflower Transit Co. v. Georgia Pub. Serv. Commission, 295 U. S. 285,

[79] L. ed. 1439, 55 S. Ct. 709; Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, 52 S. Ct. 595, 81 A.L.R. 1402; Collins-Dietz-Morris Co. v. State Corp. Commission, 154 Okla. 121, 7 P. (2d) 123,

[80] A.L.R. 561; Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534. See also Hicklin v. Coney, 290 U. S. 169, 78 L. ed. 247, 54 S. Ct. 142. Annotation: 81 A.L.R. 1146; 109 A.L.R. 570 et seq. Compare Smith v. Cahoon, 283 U. S. 553,

[75] L. ed. 1264, 51 S. Ct. 582, in which a stat- ute which gave relief from its exactions of a bond or insurance policy to any trans- port company engaged exclusively in the carriage of agricultural products, whether for the producer or anyone else, was held invalid. In such a case the distinction favored the agricultural goods merely, and not the agricultural producer, and was in- valid.

[16] See FOOD [Also 11 R. C. L. p. 1102, § 8].

[17] People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260.

conducting milk gathering stations to give an approved bond to secure the prompt payment of all amounts due producers or in lieu thereof to satisfy the licensing authority of their ability to pay probable creditors is not violative of the equal protection clause of the Fourteenth Amendment.[18] A statute, however, requiring, under penalty, that dealers in milk pay for their purchases of that commodity twice a month has been held to be unconstitutional class legislation.[19]

Regulations made either by the state or by municipalities concerning the purity of milk, the care of milch cattle, and the cleanliness or wholesomeness of milk products have been sustained practically with unanimity.[20] Singling out the milk business in the city of New York as a proper subject for regulation does not deny the equal protection of the laws where all milk dealers in the city are equally affected by such regulation.[1] Similarly, equal protection of the laws is not denied to persons who supply milk to cities, towns, and villages for consumption by a statute compelling them to register their herds or cattle with the livestock sanitary board, where it applies to all persons of that class, although it does not apply to every person who may occasionally sell milk in the country.[2] Milk drawn from cows outside a city is not unconstitutionally discriminated against by a municipal ordinance prohibiting its shipment into the city unless the cows shall first have been subjected to the tuberculin test and an official certificate of their freedom from tuberculosis or other contagious diseases filed with the health officer, while the regulations relative to cows within the city forbid the sale of milk from sick or diseased cows and contemplate inspection by the health officer, and the application by him of any known test to determine whether the animal inspected is afflicted with tuberculosis, and the removal by him of any diseased animal to a place where it will not spread infection.[3] Likewise, nonproducing vendors of milk are not denied the equal protection of the laws because they are not given the privilege accorded to producing vendors of exempting themselves from actions or penalties for violations of a law to prevent the sale of adulterated milk, by showing that the milk sold or offered for sale by them is in the same condition as when it left the herd of the producer.[4]

Laws requiring standards of purity and richness in milk have always been regarded as valid police regulations.[5] Equal protection of the laws is not denied to milk dealers by requiring them to furnish samples for analysis.[6] An ordinance imposing a penalty on all who sell milk or cream in glass jars for having in possession, with intent to use them,

jars of less capacity than they are purported to contain is not special legislation, although it does not apply to all milk dealers or to all persons who vend substances in liquid form.[7] A provision in a statute the general purpose of which is to protect dairy products from contamination and adulteration, placing the duty upon every person who finds or receives any container marked with a brand regis-

[18] People v. Perretta, 253 N. Y. 305, 171 N. E. 72, 84 A.L.R. 636.

[19] State v. Latham, 115 Me. 176, 98 A. 578, L.R.A.1917A, 480.

[20] See Food [Also 11 R. C. L. p. 1109, § 17].

[1] New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 S. Ct. 144.

[2] State v. Broadbelt, 89 Md. 565, 43 A. 771, 45 L.R.A. 433, 73 Am. St. Rep. 201.

[3] Adams v. Milwaukee, 228 U. S. 572, 57 L. ed. 971, 33 S. Ct. 610, affirming 144 Wis. 371, 129 N. W. 518, 43 L.R.A.(N.S.) 1066.

[4] St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 26 S. Ct. 554, 5 Ann. Cas. 909.

[5] See Food [Also 11 R. C. L. p. 1111, §§ 17, 18].

[6] State v. Dupaquier, 46 La. Ann. 577, 15 So. 502, 26 L.R.A. 162, 49 Am. St. Rep. 334.

[7] Chicago v. Bowman Dairy Co. 234 Ill. 294, 84 N. E. 913, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 14 Ann. Cas. 700.

tered under the act, to make diligent effort to find the owner and return the same, does not violate a constitutional requirement that laws of a general nature shall have a uniform operation, or a constitutional prohibition of laws granting special privileges or immunities.[8]

The recent tendency has been to uphold milk price regulations as against the contention that constitutional equality guaranties are violated by them.[9] A difference in the price fixed for the sale of milk by a grocer and the price fixed for sales by distributors delivering milk to consumers is based on a valid distinction between the two sorts of merchants, and does not deny a grocer the equal protection of the laws.[10] While the constitutionality, under the equal protection clause of the Fourteenth Amendment, of a provision of a milk control act establishing a differential of [1] cent a quart in minimum prices in favor of milk dealers not having a "well-advertised trade name" was at first doubted,[11] it was later upheld where it was disclosed by evidence that such a differential was essential to allow dealers of unadvertised milk to dispose of their product through retail in competition with well-advertised milk.[12]

6. CORPORATIONS AND PARTNERSHIPS

§ 512. Classification among Corporations.—

Corporations as creatures of the law may, within reasonable limits, be divided into classes, and each class given such rights, capacities, and powers as the legislature may see fit. For this reason a corporation may not necessarily have the right to complain of a discrimination in favor of other classes of corporations or that all or any of the rights of natural persons have not been given to it.13 Generally

[8] Pacific Coast Dairy v. Police Ct. 214 Cal. 668, 8 P. (2d) 140, 80 A.L.R. 1217.

[9] See infra, notes 10–12, this section.

[10] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469. A grocer who may, if he desires, purchase milk from a producer is not deprived of the equal protection of the laws by an order of a state milk control board requiring retailers purchasing from dealers to pay certain prices and to resell at certain fixed prices, while dealers may purchase from producers at lower prices and sell milk, delivered to consumers, at the same fixed price per pint and one cent more a quart. Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

[11] Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187.

[12] Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251, 80 L. ed. 669, 56 S. Ct. 453.

[13] Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 538, rehearing denied in 295 U. S. 767, 79 L. ed. 1708, 55 S. Ct. 647; Washington ex rel. Bond & Goodwin & Tucker v. Superior Ct. 289 U. S. 361, 77 L. ed. 1256, 53 S. Ct. 624, 89 A.L.R. 653; Bain Peanut Co. v. Pinson, 282 U. S. 499, 75 L. ed. 482, 51 S. Ct. 228; Aluminum Co. v. Ramsey, 222 U. S. 251, 56 L. ed. 185, 32 S. Ct. 76; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 S. Ct. 676, 47 L.R.A.(N.S.) 84; Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 S. Ct. 33; St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183, 51 L. ed. 144, 27 S. Ct. 132; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 S. Ct. 159; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 S. Ct. 241; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 S. Ct. 95; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 S. Ct. 418; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 S. Ct. 418; Covington & L. Turnp. Road Co. v. Sanford, 164 U. S. 578, 41 L. ed. 560, 17 S. Ct. 198; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 S. Ct. 255; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 12 S. Ct. 250; St. Louis, I. M. & S. R. Co. v. Paul, 64 Ark. 83, 40 S. W. 705, 37 L.R.A. 504, 62 Am. St. Rep. 154; Bank of California v. San Francisco, 142 Cal. 276, 75 P. 832, 64 L.R.A. 918, 100 Am. St. Rep. 130; Davis v Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Crom v. Frahm, 33 Idaho, 314, 193 P. 1013, citing R. C. L. (recognizing rule); Meyer v. Building & Realty Serv. Co. 209 Ind. 125, 196 N. E. 250, 100 A.L.R. 1442; Pennington v. Sumner, —— Iowa, ——, 270 N. W. 629, 109 A.L.R. 355; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706, affirmed in 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259, and later appeal in 138 Iowa, 664, 116 N. W. 801; Wood v. Detroit, 188 Mich. 547, 155 N. W. 592, L.R.A.1916C, 388; State ex rel. Simpson v. Chicago, M. & St. P. R. Co. 118 Minn. 380, 137 N. W. 2, 41 L.R.A.(N.S.) 524, Ann. Cas. 1913E, 494; New York, C. & H. R. R. Co. v. Williams, 199 N. Y. 108, 92 N. E. 404, 35 L.R.A.(N.S.) 549, 139 Am. St. Rep. 850; Lawrence v. Rutland R. Co. 80 Vt. 370, 67 A. 1091, 15 L.R.A. (N.S.) 350, 13 Ann. Cas. 475; State v. St. Mary's Franco-American Petroleum Co. 58

speaking, the action of the state in so classifying corporations and in conferring different powers upon them is not in contravention of the Fourteenth Amendment of the Federal Constitution.[14]

Legislation which applies equally to all corporations in like circumstances and which makes a natural and reasonable classification is not vicious class legislation.[15] Hence, if a classification of corporations for the purpose of legislation is natural and reasonable and based on some distinctive difference in the business of the several classes, a difference peculiar to, and inhering in, its very nature, it is valid and will be sustained.[16] In order, however, to justify diversity of treatment of corporations, the classification must be founded on differences either defined by the Constitution or such as are natural or intrinsic17 and reasonable.[18] A statute imposing upon certain corporations a confiscatory and unreasonable penalty for failure to pay the wages due an employee leaving their employment, which is not made applicable to other corporations of similar character, is unconstitutional class legislation.[19]

Railroads may be placed in a class by themselves for some legislative purposes but only for such purposes as have to do with duties peculiar to them as carriers or with the dangers peculiar to their operation.[20] Many duties and dangers peculiar to railroads as such have been recognized by the legislature with subsequent approval by the courts of the legislative distinction. Hence, there are a great many instances involving liability for fires, killing livestock, hazardous employment and similar situations in which legislation applicable to railway companies only, although vigorously assailed as a de-

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W. Va. 108, 51 S. E. 865, 1 L.R.A.(N.S.) 558, 112 Am. St. Rep. 951, 6 Ann. Cas. 38, affirmed in 203 U. S. 183, 51 L. ed. 144, 27 S. Ct. 132. Annotation: 1 L.R.A.(N.S.) 558, 15 L.R.A. (N.S.) 350; 35 L.R.A.(N.S.) 549; 62 Am. St. Rep. 168 et seq.; Ann. Cas. 1914B, 985.

[14] Dolley v. Abilene Nat. Bank (C. C. A. 8th) 179 F. 461, 32 L.R.A.(N.S.) 1065, affirmed in 228 U. S. 1, 57 L. ed. 707, 33 S. Ct. 409; Crom v. Frahm, 33 Idaho, 314, 193 P. 1013, citing R. C. L. (recognizing rule).

[15] Knoxville & O. R. Co. v. Harris, 99 Tenn. 684, 43 S. W. 115, 53 L.R.A. 921.

[16] Tullis v. Lake Erie & W. Co. 175 U. S. 348, 44 L. ed. 192, 20 S. Ct. 136; Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805. A state may single out for separate regulation under "blue sky laws" all corporations organized for investment purposes. Ex parte Taylor, 68 Fla. 61, 66 So. 292, Ann. Cas. 1916A, 701. The legislature may raise a prima facie presumption of fraud against the president and directors upon proof of the insolvency of a bank without making the presumption apply to other corporations. Griffin v. State, 142 Ga. 636, 83 S. E. 540, L.R.A.1915C, 716, Ann. Cas. 1916C, 50. Exempting farmers' mutual insurance companies, organized and doing business under the laws of the state and insuring only farm property, from the regulation of fire insurance rates does not necessarily render such legislation invalid as to other insurance companies, as denying the equal protection of the laws. German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189. A statute empowering a commission to fix the rates charged by public service corporations is not necessarily invalid as denying to the corporations affected the equal protection of the laws. Annotation: Ann. Cas. 1917C, 60.

[17] Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 S. Ct. 178, 12 Ann. Cas. 658; Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103; Beveridge v. Lewis, 137 Cal. 619, 67 P. 1040, 70 P. 1083, 59 L.R.A. 581, 92 Am. St. Rep. 188; Johnson v. Goodyear Min. Co. 127 Cal. 4, 59 P. 304, 47 L.R.A. 338, 78 Am. St. Rep. 17; Crom v. Frahm, 33 Idaho, 314, 193 P. 1013, citing R. C. L.; Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L.R.A.(N.S.) 418; State v. Haun, 61 Kan. 146, 59 P. 340, 47 L.R.A. 369.

[18] Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 S. Ct. 565; Reagan v. Farmers Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 14 S. Ct. 1047; Crom v. Frahm, 33 Idaho, 314, 193 P. 1013, citing R. C. L.; Shelton v. Erie R. Co. 73 N. J. L. 558, 66 A. 403, 9 L.R.A.(N.S.) 727, 118 Am. St. Rep. 704, 9 Ann. Cas. 883; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 18 N. E. 693, 18 L.R.A.(N.S.) 713, 14 Ann. Cas. 606. See Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 S. Ct. 26, 12 Ann. Cas. 555.

[19] Davidow v. Wadsworth Mfg. Co. 211 Mich. 90, 170 N. W. 776, 12 A.L.R. 605.

[20] Cleveland, C. C. & St. L. R. Co. v. Schuler, 182 Ind. 57, 105 N. E. 567, L.R.A. 1915A, 884.

nial of the equal protection of the laws, has been upheld as a valid exercise of the police power of the states.[1] For a specific example, statutes making railroad corporations answerable for injuries to their employees resulting from the negligence of coemployees do not deny to such railroad companies the equal protection of the laws guaranteed by the state and Federal Constitutions and are therefore constitutional.[2]

Railroads cannot be classified separately, however, or subjected to different burdens, unless there is a rational basis for treatment of railroads different from that of other corporations arising from the nature of the railroad business. Hence, such companies are deprived of the equal protection of the laws and special privileges are conferred upon their employees by forbidding the discharge of a railroad employee upon information furnished by any person without giving him an opportunity to be heard in the presence of the informer.[3]

§ 513. Classification among Corporations and Individuals.—

For many purposes corporations may be put into one classification and individuals into another without violating constitutional guaranties of equality.4 This principle has been applied in a great variety of factual situations.5 Thus, the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions upon the right of nonresidents to do business in the state applicable to corporations alone.6 Corporations are

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[1] Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 77 L. ed. 457, 53 S. Ct. 249; Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 77 L. ed. 180, 53 S. Ct. 32, 36 A.L.R. 174; Chicago & A. R. Co. v. McWhirt, 243 U. S. 422, 61 L. ed. 826, 37 S. Ct. 392; Chicago, T. H. & S. E. R. Co. v. Anderson, 242 U. S. 283, 61 L. ed. 302, 37 S. Ct. 124; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Missouri P. R. Co. v. Castle, 224 U. S. 541, 56 L. ed. 875, 32 S. Ct. 606; Aluminum Co. v. Ramsey, 222 U. S. 251, 56 L. ed. 185, 32 S. Ct. 76; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259, affirming 131 Iowa, 340, 108 N. W. 902, 33 L.R.A. (N.S.) 706, and later appeal 138 Iowa, 664, 116 N. W. 801; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 S. Ct. 638; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 S. Ct. 419; Pittsburg, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 S. Ct. 1114; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 S. Ct. 1176; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 S. Ct. 1161; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A. (N.S.) 639; Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 85 N. E. 954, 23 L.R.A.(N.S.) 711; State v. Indiana & I. S. R. Co. 133 Ind. 69, 32 N. E. 817, 18 L.R.A. 502; Gano v. Minneapolis & St. L. R. Co. 114 Iowa, 713, 87 N. W. 714, 55 L.R.A. 263, 89 Am. St. Rep. 393; Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Venning v. Atlantic Coast Line R. Co. 78 S. C. 42, 58 S. E. 983, 12 L.R.A.(N.S.) 1217; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385. A statute requiring common carriers to furnish adequate telephone connections between their offices, buildings, and grounds and the local telephone exchange is not unconstitutional as denying carriers the equal protection of the laws. State ex rel. Nebraska State R. Commission v. Missouri P. R. Co. 100 Neb. 700, 161 N. W. 270, L.R.A.1918E, 346. An exception of all railroads chartered before a certain date from the provisions of a statute of limitations does not deny them the equal protection of the laws. Narron v. Wilmington & W. R. Co. 122 N. C. 856, 29 S. E. 356, 40 L.R.A. 415.

[2] Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 S. Ct. 581; Aluminum Co. v. Ramsey, 222 U. S. 251, 56 L. ed. 185, 32 S. Ct. 76; Missouri, K. & T. R. Co. v. Bailey, 220 U. S. 608, 55 L. ed. 607, 31 S. Ct. 725; New York C. & H. R. R. Co. v. Schradin, 220 U. S. 606, 55 L. ed. 606, 31 S. Ct. 722; Missouri, K. & T. R. Co. v. Richardson, 220 U. S. 601, 55 L. ed. 603, 31 S. Ct. 715; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 S. Ct. 136; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 69 L.R.A. 875, 71 Am. St. Rep. 301.

[3] Opinion of Justices, 220 Mass. 627, 108 N. E. 807, L.R.A.1917B, 1119. Annotation: L.R.A.1917B, 1122.

[4] Chicago, R. I. & P. R. Co. v. Perry, 259 U. S. 548, 66 L. ed. 1056, 42 S. Ct. 524; Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27; Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129, 66 L. ed. 166, 42 S. Ct. 42; Standard Oil Co. v. Tennessee, 217 U. S. 413, 54 L. ed. 817, 30 S. Ct. 543; Carozza v. Federal Finance & Credit Co. 149 Md. 223, 131 A. 332, 43 A.L.R. 1; State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617.

[5] See infra, notes 6-11, this section.

[6] Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129, 66 L. ed. 166, 42 S. Ct. 42.

not denied the equal protection of the laws by statutes under which corporations alone may be compelled to produce before a court or grand jury material, books, and papers in their custody or control;[7] by anti-trust statutes to secure the attendance of witnesses and the production of books and papers which may be construed to be confined to corporations and joint-stock associations;[8] by anti-trust statutes providing that corporate violators of the act may be proceeded against; by bills in equity on relation of the United States Attorney General, while natural persons offending against their provisions cannot be tried without a preliminary investigation by a grand jury, indictment, or presentment, and a trial by jury, with the right to an acquittal unless their guilt is established beyond a reasonable doubt and to the benefit of a statute of limitations of one year;[9] by statutes requiring from managing officers of corporations an affidavit setting forth the nonparticipation of the corporation in pools, trusts, agreements, combinations, etc., because individuals, partnerships, and associations of individuals, although equally within the law against monopolies, are not required to make similar exculpatory affidavits;[10] or by statutes requiring that an employing corporation, domestic or foreign, furnish through its superintendent or manager to an employee who, after serving it for at least ninety days, is discharged or voluntarily quits the service, a letter setting forth the nature, character, and duration of the service rendered and truly stating for what cause, if any, he left the service.[11] Another illustration of valid legislation which distinguishes between separate classes and subjects one class to burdens and restrictions not imposed on others is a statute which establishes one gas rate for a municipality and another for individual customers.[12]

Corporations may not arbitrarily be selected in order to be subjected to a burden to which individuals would as appropriately be subject.[13] Legislation which is directed solely to corporations or a particular class of corporations and which eliminates from its operation individuals where there is no basis for discrimination is unconstitutional as denying to corporations the equal protection of the laws.[14] Thus, a statute making all corporations

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[7] Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 S. Ct. 178, 12 Ann. Cas. 658.

[8] Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 S. Ct. 370, 15 Ann. Cas. 645.

[9] Standard Oil Co. v. Tennessee, 217 U. S. 413, 54 L. ed. 817, 30 S. Ct. 543.

[10] Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 S. Ct. 671.

[11] Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27. Making applicable to public service corporations and contractors working for them, to the exclusion of other corporations, individuals, and partnerships employing labor under similar circumstances, the requirement of the Oklahoma Service Letter Act that a public service corporation shall furnish, through its superintendent or manager, to any employee who is discharged or voluntarily quits its

service, a letter setting forth the nature and duration of the service rendered by him and truly stating for what cause he was discharged from or quit the service does not render the statute invalid as denying the equal protection of the laws. Chicago, R. I. & P. R. Co. v. Perry, 259 U. S. 548, 66 L. ed. 1056, 42 S. Ct. 524.

[12] Wilcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 S. Ct. 192, 15 Ann. Cas. 1034; State ex rel. Simpson v. Chicago, M. & St. P. R. Co. 118 Minn. 380, 137 N. W. 2, 41 L.R.A.(N.S.) 524, Ann. Cas. 1913E, 494.

[13] Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 S. Ct. 671.

[14] Louis K. Liggett Co. v. Lee, 288 U. S. 517, 77 L. ed. 929, 53 S. Ct. 481, 85 A.L.R. 699; Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 72 L. ed. 927, 48 S. Ct. 553; Slocum v. Bear Valley Irrig. Co. 122 Cal. 555, 55 P. 403, 68 Am. St. Rep. 68; Chamberlain v. Missouri P. R. Co. 107 Kan. 341, 191 P. 261, 12 A.L.R. 224; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 34 So. 433, 62 L.R.A. 407, 95 Am. St. Rep. 476; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805; Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 55 S. E. 572, 7 L.R.A.(N.S.) 1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124. Annotation: Ann. Cas. 1912D, 808. A statute forbidding any corporation or association to discharge any employee or threaten to do so for voting or not voting

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liable for injuries to employees through defective machinery, notwithstanding the employees had knowledge of the defect, when the same liability is not placed on private individuals and there is no distinctive difference in the business which will warrant the classification, denies to the corporations the equal protection of the laws.[15]

A classification which arbitrarily favors a corporation as against an individual is invalid under the Federal Constitution.[16] For example, an individual owner of a cotton gin who cannot do business without a franchise based on public necessity is unconstitutionally deprived of the equal protection of the laws by a statute permitting the securing of a franchise, without such necessity, by a corporation organized with capital stock which may be subscribed by anyone, and which can do business for anyone, make profits, and declare dividends, although it is required to divide the profits above a certain amount among its members and others who do business with it.[17] Usually, however, legislation granting corporations privileges not conferred upon natural persons or subjecting natural persons to different burdens from those to which corporations are subjected has been sustained because of a rational and material basis for the classification.[18] An individual is not denied the equal protection of the laws because he is forbidden to receive deposits in sums less than a certain amount for relending to depositors upon the chance of forfeiture for default in payments or for sharing in profits at maturity of the contract, although corporations are permitted to do so.[19] No denial of the equal protection of the laws results from the provisions of foreign attachment laws under which a nonresident individual defendant is debarred from appearing and defending without first giving special security, while a foreign corporate defendant may appear and answer without giving any security except for the lien of the process upon the property attached.[20]

§ 514. Classification among Individuals and Partnerships.—

The legislature cannot discriminate among individuals and partnerships without a proper and rational basis for classification. Thus, a statute which undertakes to impose a tax on the privilege of doing business in the state as a partnership while leaving individuals in the same line of business untaxed makes a classification which is

arbitrary and capricious, in violation of a state constitutional provision that no one shall be in any manner deprived of his liberty or property except by judgment of his peers or by the law of the land, and of the equal protection clause of the Fourteenth Amendment to the Federal

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at any election, etc., is in violation of Tenn. Const. Art. 11, § 8, forbidding any special grant of privileges, immunities, or exemptions; since the failure to include partnerships and individuals within the scope of the statute amounts to a discrimination against corporations, etc., and the statute is also invalid as denying corporations the equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution. State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805.

[15] Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 34 So. 533, 62 L.R.A. 407, 95 Am. St. Rep. 476.

[16] Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235.

[17] Ibid.

[18] See infra, notes 19, 20, this section.

[19] Dillingham v. McLaughlin, 264 U. S. 370, 68 L. ed. 742, 44 S. Ct. 362. Annotation: 68 L. ed. 742. A state may confine to corporations the business of collecting money in instalments from small investors and reletting it to them in order of priority, with a chance to forfeit the contract for nonpayment of instalments or to mature it by continued payments with a possibility of sharing in profits of the transaction. Dillingham v. McLaughlin, 264 U. S. 370, 68 L. ed. 742, 44 S. Ct. 362.

[20] Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873. Annotation: 17 A.L.R. 884.

Constitution.[1] Similar acts have, however, been held valid. Thus, a statute providing for payment of license fees by persons, copartnerships, or corporations engaged in the business of undertaking or embalming, and providing for one class embracing corporations, one class embracing partnerships, one class embracing individuals engaged in business for themselves, and one class embracing assistants and helpers, under which a corporation pays nothing for a license and one license suffices for a copartnership, provided it is issued in the firm name, while every individual in order to secure a license must pay the sum of $[20], has been held valid. The court took the position that there was no discrimination as between those embraced within a class and that the regulations of the statute operated alike upon all persons and property, under the same circumstances and conditions, every individual being on a footing of equality, and the opportunity to form a corporation or a copartnership being open to all.[2]

It is not an unconstitutional discrimination to require a license for the sale of partnership securities where none is required for the sale of securities issued by individuals. The public requires protection against the indiscriminate sale of partnership securities in somewhat the same measure in which it requires protection against a similar sale of corporate securities.[3]

7. MISCELLANEOUS

§ 515. Horse Racing and Pool Selling.—

The detailed particularity with which a statute may classify the subject matter of legislation enacted in the exercise of the police power without denying to anyone the equal protection of the laws is well illustrated by the decided cases dealing with

statutes regulating horse racing and pool selling.4 The equal protection clause and similar state provisions are not violated by statutes authorizing the licensing of race meets and legalizing pari-mutuel betting at licensed meets;5 prohibiting bookmaking or pool selling at all places except on grounds where the races are to be run and by all except licensed persons;6 prohibiting making books or selling pools on events to occur beyond the limits of a state, but not prohibiting it on events within the state;7 prohibiting the operation of tracks for running races without a license from a commission, while permitting trotting races and fairs at which races are held without such licenses.8 A statute allowing licenses for racecourses, however, in the counties, towns, and cities in which such racecourses already exist, in the discretion of the local authorities, but requiring a three-fourths vote for a decla-

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[1] Corn v. Fort, 170 Tenn. 377, 95 S. W. (2d) 620, 106 A.L.R. 647. Annotation: 106 A.L.R. 663.

[2] Annotation: 106 A.L.R. 663.

[3] Annotation: 106 A.L.R. 663.

[4] People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Com. v. Kentucky Jockey Club, 238 Ky. 739, 38 S. W. (2d) 987, citing R. C. L.; State v. Williams (State v. Thompson) 160 Mo. 333, 60 S. W. 1077, 54 L.R.A. 950, 83 Am. St. Rep. 468; State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L.R.A. 231. As to horse racing, bookmaking, and pool selling generally, see GAMING [Also 12 R. C. L. p. 713, §§ 17-19; p. 735, § 37].

[5] People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605. A statute providing for the licensing of horse-racing meets and legalizing pari-mutuel betting at such meets is not rendered unduly discriminatory by a provision that it shall not apply to agricultural fairs. People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605. No unconstitutional classification is involved in permitting wagering on horse races while forbidding it on dog races. People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605.

[6] State v. Williams (State v. Thompson) 160 Mo. 333, 60 S. W. 1077, 54 L.R.A. 950, 83 Am. St. Rep. 468; State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L.R.A. 231; State v. Loomis, 75 Mont. 88, 242 P. 344, citing R. C. L.

[7] State v. Burgdoerfer, 107 Mo. 1, 17 S. W. 646, 14 L.R.A. 846.

[8] State Racing Commission v. Latonia Agri. Asso. 136 Ky. 173, 123 S. W. 681, 25 L.R.A.(N.S.) 905.

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ration that it is a public necessity, in order to license any new racecourse, is unconstitutional as granting exclusive privileges, immunities, and franchises.[9]

A statute which empowers a commission to license and regulate horse racing and which provides that every unlicensed race meeting shall be a public nuisance has been upheld as not violative of the equal protection of the laws clause of the Fourteenth Amendment, although the statute discriminates between running and trotting meetings in that it does not subject the latter to regulation and between the owners of running tracks in that it enables the racing commission to grant or withhold licenses at its pleasure, and has resulted in material pecuniary loss to persons owning running race tracks before the passage of the act who were unable to procure licenses from the racing commission.[10]

The lessee in possession of a racecourse is not denied the equal protection of the laws by a state statute under which it is compelled to recognize its own tickets of admission in the hands of persons who are not, at the time, under the influence of liquor, boisterous in conduct, or of lewd or immoral character, where the statute is applicable

alike to all persons, corporations, or associations conducting places of public amusement or entertainment.[11]

§ 516. Vehicles.—

For the purpose of classification and regulation without destroying the equal protection of the laws, the legislature may put in separate classes almost all of the major types of vehicles seen today on the public highways of this country.12

Many classifications in the regulation of motor vehicles generally have been sustained.[13] In the first place valid exceptions or exemptions to regulations may be based upon the type of business in which the owner of the motor vehicle is engaged, such as agriculture;[14] upon the ownership of their own trucks by shippers;[15] upon the fact that persons are transporting their own commodities under substantially similar conditions to common or contract carriers in whose favor the exception is not made, where it is not shown that as administered all provisions relating to contract carriers which are germane to persons transporting their own goods are not applied to such persons;[16] upon the fact that persons engaged in the business of transporting certain named commodities are so engaged upon such terms, conditions, and restrictions as the railroad commission may deem proper, where it is not clear that persons operating under such exception permits either as con-

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[9] State, Alexander, Prosecutor, v. Elizabeth, 56 N. J. L. 71, 28 A. 51, 23 L.R.A. 525.

[10] Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997.

[11] Western Turf Asso. v. Greenberg, 204 U. S. 359, 51 L. ed. 520, 27 S. Ct. 384.

[12] Aero Mayflower Transit Co. v. Georgia Pub. Serv. Commission, 295 U. S. 285, 79 L. ed. 1439, 55 S. Ct. 709; Stanley v. Public Utilities Commission, 295 U. S. 76, 79 L. ed. 1311, 55 S. Ct. 628; Hicklin v. Coney, 290 U. S. 169, 78 L. ed. 247, 54 S. Ct. 142; Bradley v. Public Utilities Commission, 289 U. S. 92, 77 L. ed. 1053, 53 S. Ct. 577, 85 A.L.R. 1131; Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, 52 S. Ct. 595, 81 A.L.R. 1402; Pacific Gas & E. Co. v. Police Ct. 251 U. S. 22, 64 L. ed. 112, 40 S. Ct. 79; Re Cardinal, 170 Cal. 519, 150 P. 348, L.R.A.1915F, 850; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; Allen v. Smith, 84 Ohio St. 283, 95 N. E. 829, Ann. Cas. 1912C, 611. See also Jones v. Union County, 63 Or. 566, 127 P. 781, 42 L.R.A.(N.S.) 1035.

[13] Annotation: 109 A.L.R. 551 et seq. See infra, notes 12-14, this section. For detailed discussion of the matters treated herein, see AUTOMOBILES, Vol. 5, p. 525, §§ 15 et seq.; MOTOR TRANSPORTATION.

[14] See supra, § 510.

[15] Bradley v. Public Utilities Commission, 289 U. S. 92, 77 L. ed. 1053, 53 S. Ct. 577, 85 A.L.R. 1131.

[16] Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721. See also Collins-Dietz-Morris Co. v. State Corp. Commission, 154 Okla. 121, 7 P. (2d) 123, 80 A.L.R. 561.

tract or common carriers are not subject to the provisions of the act applicable to such carriers, and it does not appear that the provision has been applied as exempting them from the requirements imposed upon other carriers;[17] upon the fact that the operators engaged in motor transportation make no direct charge for the services which they render;[18] upon the fact of the hauling of implements of husbandry, including drilling machinery and highway building and maintenance equipment;[19] upon the determination

of whether operation of the business is within a city or town or within a specified distance thereof;[20] upon the fact that a state from which exempted foreign motor vehicles come in turn exempts similar vehicles of the state enacting the regulations and creating the instant exemption;[1] and upon many miscellaneous characteristics.[2] Classification of motor vehicles may also be based upon the size,[3] width,[4] height,[5] or weight of a vehicle,[6] weight of load carried,[7] length of vehicle or trailer,[8] or the length of a combination of vehicles.[9] Classification may likewise rest upon the nature of the business in which motor vehicles are used. Thus, a municipal corporation having full legislative power to limit and regulate the use of vehicles kept for hire may classify them for purposes of regulation; and an ordinance dealing fully with one class of such vehicles, as determined by the nature of their business and the prices they charge, is not discriminative because of its lack of provision for the regulation of other distinct classes of vehicles kept for hire.[10] Jitneys may be subject to different regulations from privately owned automobiles and street railways.[11] Passenger traffic may be classified distinctly from freight.[12] No unconstitutional discrimination is made against persons engaging in the motor vehicle junk business by subjecting it to regulations and restrictions other than those to which dealers in general junk are subjected.[13] Requiring one desiring to do business as a common carrier by autobus to obtain indemnity insurance from a corporation authorized to do business in the state does not unconstitutionally deny the operator the equal protection of the laws14 or grant an unconstitutional privilege and immunity to local insurance companies.[15] Permitting property owners to operate motor vehicles on the highway without securing indemnity insurance, however, and denying others the right to furnish indemnity bonds with individual

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[17] Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721.

[18] Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136. Annotation: 81 A.L.R. 1145.

[19] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274.

[20] Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136.

[1] Interstate Trucking Co. v. Dammann, 208 Wis. 116, 241 N. W. 625, 82 A.L.R. 1080.

[2] Annotation: 109 A.L.R. 575-582.

[3] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581.

[4] Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534.

[5] Ibid.

[6] Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194.

[7] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997.

[8] Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534.

[9] State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274.

[10] Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L.R.A.1915F, 840.

[11] Memphis v. State, 133 Tenn. 83, 179 S. W. 631, L.R.A.1916B, 1151, Ann. Cas. 1917C, 1056.

[12] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581.

[13] State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962.

[14] Sprout v. South Bend, 198 Ind. 563, 153 N. E. 504, 154 N. E. 369, 49 A.L.R. 1198, reversed on grounds of violation of commerce clause in 277 U. S. 163, 72 L. ed. 833, 48 S. Ct. 502, 62 A.L.R. 45.

[15] Ibid.

surety is a discrimination which renders the sustaining of the statute doubtful.[16]

The automobile may be placed in a class by itself, so that a statute limiting speed on the highways applying only to motor vehicles is not unconstitutional as making an unjust discrimination against the manufacturers and owners of such vehicles.[17] A statute releasing owners of motor vehicles from responsibility for injuries to guests in cases of accident occasioned by ordinary negligence18 and a practically identical statute exonerating the owner or operator of an automobile from liability to such guests unless caused by gross negligence or wilful and wanton misconduct19 do not deny the equal protection of the laws in discriminating between gratuitous and paying passengers in automobiles or between passengers in the vehicles enumerated and those in other classes of vehicles.[20] The legislature may, without impairing the constitutional right to equal protection of the laws, authorize a municipal corporation to close to automobiles dangerous streets the use of which by such machines may endanger the lives of their occupants or of those driving horses on the streets,[1] and the limitation of the use of a street to the purposes of a pleasure driveway has been said to be in no sense class legislation.[2]

An ordinance requiring bicycle riders to carry lamps is not unconstitutional because not applying to other silently running vehicles.[3] An ordinance prohibiting any person operating a motorcycle from carrying another person on it in front of the operator has been upheld as based on a reasonable classification.[4] The courts have also generally recognized that there is a difference between ordinary vehicles and cars propelled by electricity, which may be recognized by the state in the exercise of its police power and accordingly they may be placed in separate classes.[5] Wagons and vehicles may be classified so as to distinguish those used for business purposes and those used for advertising purposes.[6] On the other hand, in regulating and licensing vehicles the legislature cannot arbitrarily fix a tax of a considerable amount on vehicles used for transportation of one commodity and a tax of a markedly smaller amount on vehicles of the same kind, size, and capacity used for other purposes.[7]

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[16] Opinion of Justices, 81 N. H. 566, 129 A. 117, 39 A.L.R. 1023.

[17] See AUTOMOBILES, Vol. 5, p. 538, §§ 38 et seq.

[18] Silver v. Silver, 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939.

[19] Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189.

[20] A statute providing that no person transported by the owner or operator of a motor vehicle as his guest, without payment for such transportation, shall have a cause of action against such owner or operator for accidental injury, death, or loss, unless the accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others, makes a proper distinction between the degree of care to be exercised by the owner or operator of a motor vehicle toward a guest and that to be exercised toward one who pays for his transportation, and such guest is not thereby deprived of the equal protection of the laws, in violation of constitutional guaranties. Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943,

affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939. A guest in an automobile is not deprived of the equal protection of the law, in violation of constitutional guaranties, by a statute varying the duty owed to him by the owner or operator from the duty owed to a guest in any other conveyance or in any other place. Ibid.

[1] See AUTOMOBILES, Vol. 5, p. 545, §§ 48 et seq.

[2] Cicero Lumber Co. v. Cicero, 176 Ill. 9, 51 N. E. 758, 42 L.R.A. 696, 68 Am. St. Rep. 155.

[3] See BICYCLES, Vol. 7, p. 738, § 10.

[4] Re Wickstrum, 92 Neb. 523, 138 N. W. 733, 42 L.R.A.(N.S.) 1068.

[5] Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540.

[6] Fifth Ave. Coach Co. v. New York, 221 U. S. 467, 55 L. ed. 815, 31 S. Ct. 709; Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 S. W. 293, 16 L.R.A.(N.S.) 1035.

[7] Waters-Pierce Oil Co. v. Hot Springs, 85 Ark. 509, 109 S. W. 293, 16 L.R.A.(N.S.)

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The exception of attorneys at law "acting in the usual course of their profession" from a statute requiring persons furnishing "motor club service," so-called, and defined as including, among other things, bail bond service and financial service, to make a deposit of cash or securities with the insurance commissioner or to furnish an approved surety company bond as security for the faithful performance of such service, as a condition of obtaining a license to do business, does not render the statute unreasonably discriminatory, since it does not permit attorneys, without complying with its requirements, to conduct a motor club service embracing services other than those rendered in the usual course of their profession.[8] Moreover, the exception of insurance, bonding, or surety companies duly and regularly licensed from such a statute does not include agents and brokers operating under insurance regulations and, therefore, does not render the statute unreasonably discriminatory.[9]

§ 517. Buildings.—

A municipality in enacting ordinances relating to the safety of the public may make reasonable classifications among structures with reference to their location and the necessity or importance thereof without violating the Federal Constitution, but the classification as well as the ordinance itself must be based upon some necessity justifying the exercise of the police powers.[10] Permitting public service corporations to erect buildings in sections of a city where private individuals are forbidden to erect similar buildings is not invalid as class legislation.[11]

Regulations requiring safeguards in buildings are usually upheld.[12] Re-

quiring the inclosure by a substantial barrier of shafts or openings in the floors of a building in the course of construction through which is operated an elevator or hoist for the purpose of lifting materials to be used in such construction does not deny the equal protection of the laws because the act does not require other uninclosed openings in the buildings or outside hoists to be guarded or because it distinguishes between buildings in cities and buildings in villages and makes a distinction between houses used exclusively for private residences and other structures as to the strength of the supports for joists.[13] On the other hand, a municipal ordinance supervising the installation of heating apparatus in private dwellings, but not in other buildings, as a measure of fire protection, has been held to be invalid class legis-

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1035. See also Re Hoffert, 34 S. D. 271, 148 N. W. 20, 52 L.R.A.(N.S.) 949. A license fee of from $5 to $15 for a two- horse dray or express wagon, while only $1 is charged for a two-horse hack carry- ing passengers, is invalid because of the unreasonable and arbitrary discrimination. State v. Finch, 78 Minn. 118, 80 N. W. 856,

[46] L.R.A. 437. A license tax on a four-horse wagon used for hauling freight for hire, which is near- ly three times as much as that imposed on three-horse wagons, is void for discrim- ination. Fiscal Ct. v. P. & A. Cox Co. 132 Ky. 738, 117 S. W. 296, 21 L.R.A.(N.S.) 83. The invalidity of a provision in an ordi- nance levying a tax for the privilege of using vehicles on its streets, which discriminated in favor of one using more than five buggies, does not defeat the whole ordinance so as to relieve one using only two vehicles from payment of the tax. Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 58 L.R.A. 921, 91 Am. St. Rep. 100.

[8] Moore v. Webb, 219 Cal. 304, 26 P. (2d) 22, 89 A.L.R. 925. Annotation: 89 A.L.R. 930.

[9] Annotation: 89 A.L.R. 930.

[10] People ex rel. M. Wineburgh Adv. Co. v. Murphy, 195 N. Y. 126, 88 N. E. 17, 21 L.R.A.(N.S.) 735. The equal protection of the laws is not denied by a statute requiring the substi- tution of water closets for school sinks in tenement houses only, and then only when they are located in cities of the first class. Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L.R.A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439, affirmed in

[203] U. S. 583, 51 L. ed. 328, 27 S. Ct. 781.

[11] State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269.

[12] See BUILDINGS, Vol. 9, p. 212, § 16.

[13] Chicago Dock & Canal Co. v. Fraley,

[228] U. S. 680, 57 L. ed. 1022, 33 S. Ct. 715.

lation.[14] A statute providing that in every hotel, boarding, lodging, tenement, or apartment house there shall be fireproof stairways, chutes, or toboggans, steel platforms, and automatic, metallic fire escapes is not unconstitutional.[15] A statute providing, however, that not more than a prescribed number of persons shall sleep in the same room in any lodginghouse at the same time is unconstitutional, as a discrimination against such houses and

in favor of hotels, inns, and boardinghouses, and cannot be upheld as a legal exercise of the police power, designed as a sanitary measure.[16]

Various classifications in regulations affecting the height of buildings have been frequently sustained.[17] Statutes regulating the height of buildings are not necessarily invalid on the ground that they exempt churches from their operation, since the courts adhere to the opinion that there is not the same reason for regulating the height of churches as of some other buildings.[18]

The tendency of modern law is to sanction building line regulations.[19] The reservation, in an ordinance establishing a building line on public streets, of authority to make exceptions and permit the erection of buildings closer to the street than there specified does not render the ordinance invalid as denying the equal protection of the laws.[20]

While the exemption of chimneys of buildings used exclusively for private residences from a statute prohibiting the emission of dense or thick black or gray smoke has been sustained,[1] the courts have refused to uphold statutes prohibiting the emission of dense smoke but providing that their provisions should not be applicable to manufacturing establishments using the entire product of combustion, and the heat, power, and light produced thereby, within the building wherein the same are generated or within a radius of 300 feet therefrom.[2]

§ 518. Taxation.—

One of the most important applications of the general principles as to the equal protection of the laws is found in the domain of taxation legislation. It is unquestionably settled that the provision in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property, such as churches, libraries, and the property of charitable institutions, from any taxation at all. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow

deductions for indebtedness, or not allow them. All such regulations, and those of similar character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their Constitution.[3] So far as the classes into

[14] Harrigan & R. Co. v. Burton, 224 Mich. 564, 195 N. W. 60, 33 A.L.R. 142.

[15] Hoopes v. Creighton, 100 Neb. 510, 160 N. W. 742, L.R.A.1917C, 1146, Ann. Cas. 1917E, 847.

[16] People v. Schenck, 257 Ill. 384, 100 N. E. 994, 44 L.R.A.(N.S.) 46, Ann. Cas. 1914A, 1129; Bailey v. People, 190 Ill. 28, 60 N. E. 98, 54 L.R.A. 838, 83 Am. St. Rep. 116.

[17] See Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 S. Ct. 567. See BUILDINGS, Vol. 9, p. 208, § 12.

[18] Cochran v. Preston, 108 Md. 220, 70 A. 113, 23 L.R.A.(N.S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048.

[19] See BUILDINGS, Vol. 9, p. 206, § 10.

[20] Gorieb v. Fox, 274 U. S. 603, 71 L. ed. 1228, 47 S. Ct. 675, 53 A.L.R. 1210.

[1] Moses v. United States, 16 App. (D. C.) 428, 50 L.R.A. 532.

[2] State ex rel. McCue v. Ramsey County,

[48] Minn. 236, 51 N. W. 112, 31 Am. St. Rep. 650.

[3] United States.—Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838; Colgate v.

which articles can be arranged for purposes of taxation are concerned, the matter is one for the legislature, and not for the courts.[4] It has frequently

Harvey, 296 U. S. 404, 56 L. ed. 299, 56 S. Ct. 252, 102 A.L.R. 54, 4 Magnano Co. v. Hamilton, 292 U. S. 40, 78 L. ed. 1109, 54 S. Ct. 599; Louis K. Liggett Co. v. Lee, 288 U. S. 517, 77 L. ed. 929, 53 S. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464; Miller, 283 U. S. 96, 75 L. ed. 78 A.L.R. 1464; Miller, 283 U. S. 96, 75 L. ed. & G. R. Co. v. Miller; Storaasli v. Minnesota, 283 U. S. 57, 75 L. ed. 861, 51 S. Ct. 75 L. ed. 839, 75 L. ed. 839, 75 L. ed. 496, 51 S. Ct. 273, 23 A.L.R. 99; Ohio Oil Co. v. Conway, 281 U. S. 146, 74 L. ed. 775, 50 S. Ct. 281 U. S. 66, 74 L. ed. Snook, 68 A.L.R. 194; Hart Refineries v. Harmon, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188; Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 72 L. ed. 48 S. Ct. 553; Louisville Gas & E. Co. v. Coleman, 277 L. ed. 32 S. Consol. Iron Mines v. Ct. 627; Roberts & S. Co. v. Emmerston, 71 U. S. 50, 827, 45 Ct. 375, 45 A.L.R. 1495; Stebbins 827, 45 Ct. 63 L. ed. 884, 45 S. Ct. Riley, 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424, 44 A.L.R. 1464; New York, P. & N. Teleg. Co. v. Dolan, Puget Sound Power & L. Co. v. King County, 264 U. S. 22, 68 L. ed. 541, 44 S. Ct. 261; Oliver Iron Min. Co. v. Lord, 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526; Watson v. State Comptroller, 254 U. S. 122, 65 L. ed. 170, 41 S. Ct. 43; Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132, 62 L. ed. 1025, 38 S. Ct. 444; Rogers v. Hennepin County, 240 U. S. 184, 60 L. v. 594, 36 S. Ct. 265; Hammond Packing Co. v. Montana, 233 U. S. 331, 58 L. ed. 985, 34 S. Ct. 596; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 S. Ct. 493; Clement Nat. Bank v. Vermont, 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 S. Ct. 192; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Thompson v. Kentucky, 209 U. S. 340, 52 L. ed. 822, 28 S. Ct. 533; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 S. Ct. 188, 9 Ann. Cas. 736; Board of Education v. Illinois, 203 U. S. 553, 51 L. ed. 314, 27 S. Ct. 171, 8 Ann. Cas. 157; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 S. Ct. 232; Campbell v. California, 200 U.

S. 87, 50 L. ed. 382, 26 S. Ct. 182; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 S. Ct. 705, 4 Ann. Cas. 381; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 S. Ct. 403; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 S. Ct. 233; Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 S. Ct. 401; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 233, 22 S. Ct. 176; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 S. Ct. 43; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 S. Ct. 829; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Sedalia ex rel. Bauman v. Standard Oil Co. C. A. 8th) 66 F. (2d) 757, 95 A.L.R. 1514, writ of certiorari denied in 290 U. S. 706, 78 L. ed. 607, 54 S. Ct. 374. Alabama. — Frazier v. State Tax Com. — Ala. —, 175 So. 402, 110 A.L.R. 1479. Georgia. — Featherstone v. Norman, 170 Ga. 370, 153 S. E. 58, 70 A.L.R. 449. Illinois. — Koesis v. Chicago Park Dist. 362 Ill. 24, 198 N. E. 847, 103 A.L.R. 141. Indiana. — Miles v. Department of Treasury. — Ind. —, 193 N. E. 855, 97 A.L.R. 1474, superseded, but not on this point, in 209 Ind. 172, 199 N. E. 372, 101 A.L.R. 1359; State v. Smith, 158 Ind. 543, 63 N. E. 25, 63 L.R.A. 116. Iowa. — Iowa Motor Vehicle Asso. v. Iowa Comrs. 207 Iowa, 461, 221 N.W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151. Mississippi. — Magnolia Bank v. Pike County, 111 Miss. 857, 72 So. 697, 3 A.L.R. 1365, writ of error dismissed in 248 U. S. 546, 63 L. ed. 414, 39 S. Ct. 135. North Carolina. — Dalton v. George C. Brown & Co. 159 N. C. 175, 75 S. E. 40, 42 L.R.A.(N.S.) 506. Oklahoma. — Exrs' & Securities Ins. Corp. v. Hooton, 53 Okla. 530, 157 P. 293, L.R.A.1916E, 602. Oregon. — Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136; State v. Standard Oil Co. 61 Or. 438, 123 P. 40, Ann. Cas. 1914B, 179. Pennsylvania. — Heisler v. Thomas Colliery Co. 274 Pa. 448, 118 A. 394, 24 A.L.R. 1215, affirmed in 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83; Knisely v. Cotterel, 196 Pa. 614, 46 A. 861, 50 L.R.A. 86. Tennessee. — Barlin v. Knox County, 136 Tenn. 238, 188 S. W. 795, 2 A.L.R. 112. Vermont. — Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A.L.R. 1222; State v. Shedroi, 75 Vt. 277, 54 A. 1081, 63 L.R.A. 179, 98 Am. St. Rep. 825. Virginia. — Fredericksburg v. Sanitary Grocery Co. — Va. —, 190 S. E. 318, 110 A.L.R. 1195. Washington. — Casco Co. v. Thurston County, 163 Wash. 666, 2 P. (2d) 677, 77 A.L.R. 622. Wisconsin. — State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617; Ebeling's Estate, 169 Wis. 432, 172 N. W. 734, 4 A.L.R. 1519; State ex rel. Bolens v. Frear, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, L.R.A.1915B, 569, Ann. Cas. 1913A, 1147, writ of error dismissed in 231 U. S. 616, 58 L. ed. 400, 34 S. Ct. 212. The taxation of membership in an incorporated chamber of commerce does not deny the members the equal protection of the laws because of the exemption from taxation of such organizations as the associated press, lodges, fraternal orders, churches, etc. Rogers v. Hennepin County, 240 U. S. 184, 60 L. ed. 594, 36 S. Ct. 265.

[4] Heisler v. Thomas Colliery Co. 274 Pa.

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been held that a very wide discretion must be conceded to the legislature in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax.[5] A classification adopted by a state legislature in imposing occupation taxes will be held constitutional if there are substantial differences between the occupations separately classified, and such differences need not be great.[6]

A detailed treatment of the principles of constitutional equality involved in taxation matters is made elsewhere,[7] and the present discussion will state only the general principle that with respect to taxation, the Fourteenth

Amendment was not intended to compel the state to adopt any iron rule of equality or to prevent the classification of property for taxation at different rates or to prohibit legislation in that regard which is special either in the extent to which it operates or the objects sought to be obtained by it. Here, as in other cases, it is enough that there is no discrimination in favor of one as against another of the same class.[8] Clear and hostile discriminations against

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448, 118 A. 394, 24 A.L.R. 1215, affirmed in 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83.

[5] Aero Mayflower Transit Co. v. Georgia Pub. Serv. Commission, 295 U. S. 285, 79 L. ed. 1439, 55 S. Ct. 709; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 S. Ct. 493; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 S. Ct. 318; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 S. Ct. 403; Million v. Harrison, 175 Ga. 764, 166 S. E. 231, 84 A.L.R. 1142; Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136; Com. v. Girard L. Ins. Co. 305 Pa. 558, 158 A. 262, 83 A.L.R. 460, affirmed in 287 U. S. 570, 77 L. ed. 501, 53 S. Ct. 94; Casco Co. v. Thurston County, 163 Wash. 666, 2 P. (2d) 677, 77 A.L.R. 622; Interstate Trucking Co. v. Dammann, 208 Wis. 116, 241 N. W. 625, 82 A.L.R. 1080.

[6] Louis K. Liggett Co. v. Lee, 288 U. S. 517, 77 L. ed. 929, 53 S. Ct. 481, 85 A.L.R. 699; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536.

[7] See TAXATION [Also 26 R. C. L. p. 241, §§ 214 et seq.].

[8] United States. — Carmichael v. Southern Coal & Coke Co. 301 U. S. 495, 81 L. ed. 1245, 57 S. Ct. 868, 109 A.L.R. 1327; Great Atlantic & P. Tea Co. v. Grosjean, 301 U. S. 412, 81 L. ed. 1193, 57 S. Ct. 772, 112 A.L.R. 293; Monamotor Oil Co. v. Johnson, 292 U. S. 86, 78 L. ed. 1141, 54 S. Ct. 575; Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556, 87 A.L.R. 374; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Ohio Oil Co. v. Conway, 281 U. S. 146, 74 L. ed. 775, 50 S. Ct. 310; International Shoe Co. v. Shartel, 279 U. S. 429, 73 L. ed. 781, 49 S. Ct. 380; New York v. Latrobe, 279 U. S. 421, 73 L. ed. 776, 49 S. Ct. 377, 65 A.L.R. 1341; Leonard v. Earle, 279 U. S. 392, 73 L. ed. 754, 49 S. Ct. 372; Hart Refineries v. Harmon, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188; Salomon v. State Tax Commis- sion, 278 U. S. 484, 73 L. ed. 464, 49 S. Ct. 192; Swiss Oil Corp. v. Shanks, 273 U. S. 407, 71 L. ed. 709, 47 S. Ct. 393; Lake Superior Consol. Iron Mines v. Lord, 271 U. S. 577, 70 L. ed. 1093, 46 S. Ct. 627; Stebbins v. Riley, 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424, 44 A.L.R. 1454; J. E. Raley & Bros. v. Richardson, 264 U. S. 157, 68 L. ed. 615, 44 S. Ct. 256; Puget Sound Power & L. Co. v. King County, 264 U. S. 22, 68 L. ed. 541, 44 S. Ct. 261; Lacoste v. Department of Conservation, 263 U. S. 545, 68 L. ed. 437, 44 S. Ct. 186; Baker v. Druesedow, 263 U. S. 137, 68 L. ed. 212, 44 S. Ct. 40; Oliver Iron Min. Co. v. Lord, 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526; Citizens Nat. Bank v. Durr, 257 U. S. 99, 66 L. ed. 149, 42 S. Ct. 15; Alaska Fish Salting & By-Products Co. v. Smith, 255 U. S. 44, 65 L. ed. 489, 41 S. Ct. 219; Watson v. State Comptroller, 254 U. S. 122, 65 L. ed. 170, 41 S. Ct. 43; Branson v. Bush, 251 U. S. 182, 64 L. ed. 215, 40 S. Ct. 113; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 S. Ct. 2; Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132, 62 L. ed. 1025, 38 S. Ct. 444; Armour & Co. v. Virginia, 246 U. S. 1, 62 L. ed. 547, 38 S. Ct. 267; St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 59 L. ed. 265, 35 S. Ct. 99; Ohio River & W. R. Co. v. Dittey, 232 U. S. 576, 58 L. ed. 737, 34 S. Ct. 372; Keeney v. Comptroller, 222 U. S. 525, 56 L. ed. 299, 32 S. Ct. 105, 32 L.R.A. (N.S.) 1139; Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 S. Ct. 238; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 S. Ct. 171; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 S. Ct. 459; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 S. Ct. 705, 4 Ann. Cas. 381; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471,

46 L. ed. 233, 22 S. Ct. 176; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 S. Ct. 213; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 S. Ct. 829; American Exp. Co. v. Indiana, 165 U. S. 255, 41 L. ed. 707, 17 S. Ct. 991; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. [12 Am. Jur.]—14 209

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particular persons and classes, however, especially such as are of an unusual character and unreasonable, are in every case held to be obnoxious to the constitutional prohibition as to the equal protection of the laws.[8] If the dis-

194, 41 L. ed. 683, 17 S. Ct. 305, rehearing denied in 166 U. S. 185, 41 L. ed. 965, 17

S. Ct. 604; Giozza v. Tiernan, 148 U. S.

657, 37 L. ed. 599, 13 S. Ct. 721; Jennings v. Coal Ridge Improv. & Coal Co., 147 U. S. 147, 37 L. ed. 116, 13 S. Ct. 282, 332, 33 L. ed. 892, 10 U. S. 321, 29 L. ed. A. 1st) 29 Cases, 115 U. S. 321, 29 L. ed. (C. A. 1st) 29 F. 809, 7 A.L.R. 608.

Alabama. — Frazier v. State Tax Commission, — Ala. —, 175 So. 402, 110 A.L.R. 1479.

Georgia. — Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77.

Indiana. — Miles v. Department of Treasury, — Ind. —, 193 N. E. 855, 97 A.L.R. 1474, superseded, but not on this point, in 209 Ind. 172, 199 N. E. 372, 102 A.L.R. 1359.

Iowa. — Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N.W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151.

Louisiana. — State ex rel. Porterie v.

H. Hunt, 132 La. 1073, 162 So. 777, 103

A.L.R. [8].

Mississippi. — Magnolia Bank v. Pike County, [111] Miss. [857], [72] So. [697], [3] A.L.R. 1365, writ of error dismissed in [248] U. S. 546, [63] L. ed. [414], [39] S. Ct. [135].

Missouri. — Ex parte Asotsky, [319] Mo. 810, [5] S. W. (2d) [22], [62] A.L.R. [95].

Montana. — Stanley v. Jeffries, [86] Mont. 114, [284] P. [134], [70] A.L.R. [166].

Nebraska. — Norris v. Lincoln, [93] Neb. 658, [142] N. W. [114], Ann. Cas. 1914B, 1194.

New York. — New York Steam Corp. v. New York, [268] N. Y. [137], [197] N. E. [172], [99] A.L.R. 1157.

North Dakota. — Strauss v. State, [36] N. D. [594], [162] N. W. [908], L.R.A.1917E, [909].

Oregon. — Portland Van & Storage Co. v. Hoss, [139] Or. [434], [9] P. (2d) [122], [81] A.L.R. 1136; State v. Standard Oil Co., [61] Or. [438], [123] P. [40], Ann. Cas. 1914B, [179].

Pennsylvania. — Knisely v. Cotterel, [196] Pa. [614], [46] A. [861], [50] L.R.A. [86].

Vermont. — Hardwick v. Wolcott, [98] Vt. 343, [129] A. [159], [39] A.L.R. 1222.

Virginia. — Fredericksburg v. Sanitary Grocery Co. — Va. —, [190] S. E. [318], [110] A.L.R. 1195.

Washington. — Casco Co. v. Thurston County, [163] Wash. [666], [2] P. (2d) [677], [77] A.L.R. [622].

Wisconsin. — Welch v. Henry, [223] Wis. 319, [271] N. W. [68], [109] A.L.R. [508]; State ex

rel. Froedtert Grain & Malting Co. v. Tax Commission, 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478.

The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discrimination not shown to be arbitrary or capricious do not fall within constitutional prohibitions. Lawrence v. Mississippi State Tax Commission, 286 U. S. 276, 76 L. ed. 1102, 52

S. Ct. 556, 87 A.L.R. 374.

9 Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838, 299, 56 S. Ct. 252, 102 A.L.R. 404, 80 L. ed. Goods Co. v. Lewis, 294

U. S. 550, 79 L. ed. 1054, 55 S. Ct. 525, re-

hearing denied in 295 U. S. 768, 79 L. ed. 1709, 55 S. Ct. 652; Concordia F. Ins. Co. v. Illinois, 292 U. S. 535, 78 L. ed. 1411, 54

S. Ct. 830, 77 L. ed. 929, 53 S. Ct. 481, 85

U. S. 517, 77; Hoeper v. Tax Commission,

A.L.R. 898, 206, 76 L. ed. 248, 52 S. Ct. 120, 284 U. S. 346; Memphis & C. R. Co. v. Pace, 78 U. S. 241, 75 L. ed. 315, 51 S. Ct. 108, 282 U. S. 1096; Quaker City Cab Co. v. 72 A.L.R. 553; Louisville Gas & E. Co. v. Pennsylvania, 277 U. S. 389, 72 L. ed. 927,

48 S. Ct. [553]; Louisville Gas & E. Co. v. Coleman, [277] U. S. [32], [72] L. ed. [770], [48]

S. Ct. 423; Hanover F. Ins. Co. v. Harding

(Hanover F. Ins. Co. v. Carr) [272] U. S. 713; Schlesinger v. Wisconsin, [270] U. S. 230, [70] L. ed. [557], [46] S. Ct. [260], [43] A.L.R. 1224; Bethlehem Motors Corp. v. Flynt, [256]

U. S. 421, 65 L. ed. 1029, 41 S. Ct. 571; F. S.

Royster Guano Co. v. Virginia, [253] U. S. 412, [64] L. ed. [989], [40] S. Ct. [560]; Flint v. Stone Tracy Co. [220] U. S. [107], [55] L. ed. 389, [31] S. Ct. [342], Ann. Cas. 1912B, 1312; Southwestern Oil Co. v. Texas, [217] U. S. 114, [54] L. ed. [688], [30] S. Ct. [496]; Southern

R. Co. v. Greene, 216 U. S. 400, 54 L. ed.

536, [30] S. Ct. [287], [17] Ann. Cas. 1247; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) [183] U. S. [79], [46] L. ed. [92], [22] S. Ct. [30]; American Sugar Ref. Co. v. Louisiana, [179] U. S. [89], [45] L. ed. [102], [21] S. Ct. 43; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. [283], [42] L. ed. 1037, [18] S. Ct. [594]; Chester v. Pennsylvania, [134] U. S. [240], [33] L. ed. [896], [10] S. Ct. [536]; Bell's Gap R. Co. v. Pennsylvania, [134] U. S. [232], [33] L. ed. 892, [10] S. Ct. [533]; State v. Firemen's Fund Ins. Co. [223] Ala. [134], [134] So. [858], [77] A.L.R. 1486; Elliasberg Bros. Mercantile Co. v. Grimes, [204] Ala. [492], [86] So. [56], [11] A.L.R. 300; Bueneman v. Santa Barbara, [8] Cal. (2d) [405], [65] P. (2d) [884], [109] A.L.R. [895];

Chicago v. Ames, [365] Ill. [529], [7] N. E. (2d) 294, [109] A.L.R. 1509; State v. Sunburst Ref. Co. [76] Mont. [472], [248] P. [186], [47] A.L.R. 969, writ of certiorari denied in [273] U. S. 722, [71] L. ed. [859], [47] S. Ct. [112]; State v. Standard Oil Co. [61] Or. [438], [123] P. [40], Ann. Cas. 1914B, [179]; State v. McCrillis, [28] R. I. 165, [66] A. [301], [9] L.R.A.(N.S.) [635], [13] Ann. Cas. [701]; Alderman v. Wells, [85] S. C. [507], 67 S. E. [781], [27] L.R.A.(N.S.) [864], [21] Ann. Cas. [193]; Corn v. Fort, [170] Tenn. [377], [95]

S. W. (2d) 620, 106 A.L.R. 647; Hardwick v.

Wolcott, [98] Vt. [343], [129] A. [159], [39] Chase, 1222; Aberdeen Sav. & L. Asso. v. Chase, 157 Wash. [351], [289] P. [536], [290] P. [697], [71] A.L.R. [232]; State ex rel. Sale v. Stahlman, 81 W. Va. [335], [94] S. E. [497], L.R.A.1918C, 77.

Legislative classification of property for tax purposes must have regard to differences in character or use of the property, character of the business affected, or of governmental relationship, and cannot be purely arbitrary. A classification based wholly on grounds of ownership—that is, as to whether a given species of property is owned by a corporation, joint-stock

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crimination is arbitrary, it becomes none the less so because it is probable that the unequal operation of the taxing system is due to inadvertence rather than design.[10]

Cases in which state tax laws have been declared to create invalid dis-

criminations within the equal protection clause of the Fourteenth Amendment are not particularly applicable in testing the discriminations of a congressional tax under the Fifth Amendment. The Fifth Amendment has no equal protection clause; the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is the territorial uniformity required by Article [1], § [8], of the Constitution.[11] Even if it is conceded that a congressional tax act can be so arbitrarily discriminatory as to violate the due process clause of the Fifth Amendment, it must be taken into consideration that not only is the difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing proverbial, and that furthermore such nicety is not even required of the states under the equal protection clause, but that such precision is much less required of Congress under the more general prerequisite of due process of law in taxation under the Fifth Amendment.[12]

8. COURT REVIEW

a. RELATIONSHIP OF LEGISLATURE AND JUDICIARY

§ 519. Generally.—

It is unquestionable that because the courts, in the last analysis, possess the power to determine the constitutionality of the acts of the various departments of government,[13] whether a classification of persons or objects for the purpose of legislative regulation or control is based upon substantial differences or is arbitrary and consequently illegal is a judicial question [14] reviewable by the courts.[15] If a classification is clearly fanciful, capricious, arbitrary, or unnatural, it becomes the duty of the courts, in the event questions concerning constitutional equality are properly raised, to uphold constitutional rights and declare the statute invalid.[16]

The relationship between the legislative and judicial departments of government in the determination of the validity of classification is well settled and governed by the same general principles as those which control all phases of constitutional law.[17] The authorities state with unanimity that the question of classification is primarily for the legislature and that it can never become a judicial question except for the purpose of determining, in any given situation, whether the legislative action is clearly unreasonable.[18] It

company, or association, or owned by an individual—is arbitrary. Gamble-Robin- son Fruit Co. v. Thoresen, 53 N. D. 28, 204 N. W. 861, 42 A.L.R. 1039.

[10] F. S. Royster Guano Co. v. Virginia,

[253] U. S. 412, 64 L. ed. 989, 40 S. Ct. 560.

[11] La Belle Iron Works v. United States,

[256] U. S. 377, 65 L. ed. 998, 41 S. Ct. 528.

[12] La Belle Iron Works v. United States,

[256] U. S. 377, 65 L. ed. 998, 41 S. Ct. 528. See also Pacific American Fisheries v. Alaska, 269 U. S. 269, 70 L. ed. 270, 46 S. Ct. 110; Barclay & Co. v. Edwards, 267 U. S. 442, 69 L. ed. 703, 45 S. Ct. 135, 348. The Fifth Amendment to the Federal Constitution does not apply to prevent collection of taxes in case of a classifica- tion of taxpayers which is reasonable, and not merely arbitrary and capricious. Bar- clay & Co. v. Edwards, 267 U. S. 442, 69 L. ed. 703, 45 S. Ct. 135, 348.

[13] See Vol. 11, p. 709, §§ 86 et seq.

[14] People v. Schenck, 257 Ill. 384, 100 N. E. 994, 44 L.R.A.(N.S.) 46, Ann. Cas. 1914A, 1129.

[15] People v. Schenck, 257 Ill. 384, 100 N. E. 994, 44 L.R.A.(N.S.) 46, Ann. Cas. 1914A, 1129; Kraus v. Lehman, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769, 15 Ann. Cas. 849.

[16] State v. Holtgreve, 58 Utah, 563, 200 P. 894, 26 A.L.R. 696.

[17] See infra, §§ 521 et seq.

[18] Williams v. State, 85 Ark. 464, 108 S. W. 838, 26 L.R.A.(N.S.) 482, 122 Am. St. Rep. 47; Gillum v. Johnson, 7 Cal. (2d) 744, 62 P. (2d) 1037, 63 P. (2d) 810, 108 A.L.R. 595; Rainey v. Michel, 6 Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148; Re Cardinal, 170 Cal. 519, 150 P. 348, L.R.A. 1915F, 850; Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356,

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is subject to judicial revision only to the extent of seeing that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition.[19] Therefore, unless a classification is arbitrary and not founded on any substantial distinction or apparent natural reason which suggests the necessity or propriety of different legislation, a court has no right to interfere with the exercise of legislative discretion.[20] Furthermore, the courts cannot require the legislature to specify its reasons for a classification.[1]

Great liberality has always been indulged in the matter of classification.[2] The Fourteenth Amendment was not designed to prevent all exercise of judgment by a state legislature of what the interests of the state require and to compel it to run all its laws in the channels of general legislation.[3] In the determination of whether or not a basis of classification is reason-

[8] L.R.A.(N.S.) 632, 119 Am. St. Rep. 199; Driverless Car Co. v. Armstrong, 91 Colo. 334, 14 P. (2d) 1098, citing R. C. L.; Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 57 S. Ct. 65 A.L.R. 939; Big ed. 221, 50 S. Ct. 57; Chapman, 45 Idaho, 380, Wood Canal Co. v. Chapman, 45 Idaho, 380, 263 P. 45, citing R. C. L.; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 199 Ind. 95, 155 N. E. 465, Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Baldwin v. C. L.; Baird 303, 141 N. E. 343, citing R. C. 77, citing v. Wichita, 128 Kan. 100, 276 P. 77, citing R. C. L.; Festervand v. Laster, C. L.; App. 159, 130 So. 634, citing R. C. L.; State v. Chicago, M. & St. P. R. Co., 114 Minn. 122, 130 N. W. 545, 33 L.R.A.(N.S.) 494, Ann. Cas. 1912B, 1030; State ex rel. Douglas v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L.R.A. 297, 89 Am. St. Rep. 571; Ex parte Kolasky, 319 Mo. 810, 5 S. W. (2d) 22, 62 A.L.R. 95; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S.

Ct. 584; Interstate Trucking Co. v. Dammann, 208 Wis. 116, 241 N. W. 625, 82 A.L.R. 1080; Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 1196, Ann. Cas. 1914B, 199. As to the function of the courts, see infra, § 521.

[19] Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A.1915B, 420, Ann. Cas. 1915D, 987, affirmed in 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617; State v. Brown, 97 Minn. 402, 106 N. W. 477, 5 L.R.A.(N.S.) 327; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L.R.A. 922.

[20] Hauge v. Chicago, 299 U. S. 387, 81 L. ed. 297, 57 S. Ct. 241, — A.L.R. —; Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; Phillips Petroleum Co. v. Jenkins, 297 U. S. 629, 80 L. ed. 43, 56 S. Ct. 611, rehearing denied in 298 U. S. 691, 80 L. ed. 1409, 56 S. Ct. 745; Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251, 80 L. ed. 669, 56 S. Ct. 453; Violet Trapping Co. v. Grace, 297 U. S. 119, 80 L. ed. 513, 56 S. Ct. 386; United States Mortg. Co. v. Matthews, 293 U. S. 232, 79 L. ed. 299, 55 S. Ct. 168; Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; State Tax Comrs. v. Jackson, 283 U. S. 527,

[75] L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194; Silver v. Silver, 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939; Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; Zahn v. Board of Public Works, 274 U. S. 325, 71 L. ed. 1074, 47 S. Ct. 594; Graves v. Minnesota, 272 U. S. 425, 71 L. ed. 331, 47 S. Ct. 122; Southeastern Exp. Co. v. Miller, 264 U. S. 535, 68 L. ed. 836, 44 S. Ct. 421; Georgia R. & Power Co. v. Decatur, 262 U. S. 432, 67 L. ed. 1065, 43 S. Ct. 613; Springfield Gas & E. Co. v. Springfield, 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; Lower Vein Coal Co. v. Industrial Bd. 255 U. S. 144, 65 L. ed. 555, 41 S. Ct. 252; Sedalia ex rel. Baumman v. Standard Oil Co. (C. C. A. 8th) 66 F. (2d) 757, 95 A.L.R. 1514, writ of certiorari denied in 290 U. S. 706, 78 L. ed. 607, 54 S. Ct. 374; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Vandalia R. Co. v. Stillwell, 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D, 258, affirmed in 239 U. S. 637, 60 L. ed. 480, 36 S. Ct. 445; Keiningham v. Blake, 135 Md. 320, 109 A. 65, 8 A.L.R. 1066; Ashley v. Three Justices (Ashley v. Wait) 228 Mass. 63, 116 N. E. 961, 8 A.L.R. 1472, writ of error dismissed in 250 U. S. 652, 63 L. ed. 1199, 40 S. Ct. 53; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412; State ex rel. Hoffman v. Justus, 91 Minn. 447, 98 N. W. 325, 64 L.R.A. 510, 103 Am. St. Rep. 521, 1 Ann. Cas. 91; Ivens v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A. (N.S.) 162, Ann. Cas. 1912B, 156; Wessel v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402; Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136; American Baseball Club v. Philadelphia, 312 Pa. 311, 167 A. 891, 92 A.L.R. 356, appeal dismissed in 290 U. S. 595, 78 L. ed. 524, 54 S. Ct. 128.

[1] Baird v. Wichita, 128 Kan. 100, 276 P. 77, citing R. C. L.; Festervand v. Laster, 15 La. App. 159, 130 So. 634, citing R. C. L.; Nitka v. Western U. Teleg. Co. 149 Wis. 106, 135 N. W. 492, 49 L.R.A. (N.S.) 337, Ann. Cas. 1913C, 863.

[2] State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821.

[3] Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 S. Ct. 243.

able, it must be looked at from the standpoint of the legislature enacting it.[4] The deference due to the judgment of a state legislature on the matter of statutory classifications alleged to deny equal protection of the laws is especially to be observed when local conditions that the court cannot know may affect the answer to the crucial question whether the court can say, on its judicial knowledge, that the legislature could not have had any reasonable ground for believing that there were such public considerations as to justify the distinction made.[5]

§ 520. Discretion of Legislature.—

One of the basic principles involved in considering the validity of legislation assailed under equality provisions of the Federal and state Constitutions is that in the exercise

of its power to make classifications for the purpose of enacting laws over matters within its jurisdiction, the state is recognized as enjoying a wide range of discretion.6 Therefore, whenever the power to regulate exists, the details of the

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[4] Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271.

[5] Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 71 L. ed. 1115, 47 S. Ct. 630; Cudahy Packing Co. v. Parramore, 263 U. S. 418, 68 L. ed. 366, 44 S. Ct. 153, 30 A.L.R. 532; Dominion Hotel Co. v. Arizona, 249 U. S. 265, 63 L. ed. 597, 39 S. Ct. 273; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 S. Ct. 281; Adams v. Milwaukee, 228 U. S. 572, 57 L. ed. 971, 33 S. Ct. 610; Re Ramirez, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51.

[6] United States. — Borden's Farm Products Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, 52 S. Ct. 595, 81 A.L.R. 1402; Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Bain Peanut Co. v. Pinson, 282 U. S. 499, 75 L. ed. 482, 51 S. Ct. 228; Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, 48 S. Ct. 423; Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; Cockrill v. California, 268 U. S. 258, 69 L. ed. 944, 45 S. Ct. 490; Stebbins v. Riley, 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424, 44 A.L.R. 1454; Porterfield v. Webb, 263 U. S. 225, 68 L. ed. 278, 44 S. Ct. 21; Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Arkansas Natural Gas Co. v. Arkansas R. Commission, 261 U. S. 379, 67 L. ed. 705, 43 S. Ct. 387; Ward & Gow v. Krinsky, 259 U. S. 503, 66 L. ed. 1033, 42 S. Ct. 529, 28 A.L.R. 1207; Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537; Chicago, T. H. & S. E. R. Co. v. Anderson, 242 U. S. 283, 61 L. ed. 302, 37 S. Ct. 124; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 S. Ct. 671; Booth v. Indiana, 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 S. Ct. 856; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 34 S. Ct. 859, 52 L.R.A.(N.S.) 525; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 S. Ct. 678; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Metropolis Theater Co. v. Chicago, 228 U. S. 61, 57 L. ed. 730, 33 S. Ct. 441; Toyota v. Hawall, 226 U. S. 184, 57 L. ed. 180, 33 S. Ct. 47; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A.(N.S.) 44; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 S. Ct. 676, 47 L.R.A.(N.S.) 84; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 S. Ct. 560; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. ed. 236, 28 S. Ct. 114; Kidd v. Alabama, 188 U. S. 730, 47 L. ed. 669, 23 S. Ct. 401; Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 S. Ct. 272; Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 S. Ct. 666; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 S. Ct. 284; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 S. Ct. 136; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 S. Ct. 281; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 8 S. Ct. 1028. **Alabama.** — Hale v. State, 217 Ala. 403, 116 So. 369, 58 A.L.R. 1333. **California.** — Rainey v. Michel, 6 Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148. **Colorado.** — Driverless Car Co. v. Armstrong, 91 Colo. 334, 14 P. (2d) 1098, citing R. C. L. **Florida.** — State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138. **Georgia.** — Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A.L.R. 933. **Idaho.** — Big Wood Canal Co. v. Chapman, 45 Idaho, 380, 263 P. 45, citing R. C. L.; State v. Calloway, 11 Idaho, 719, 84 P. 27, 4 L.R.A.(N.S.) 109, 114 Am. St. Rep. 285. **Illinois.** — People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997. **Indiana.** — Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521,

legislation and the exceptions proper to be made rest primarily within the

discretion of the state legislature.[7] For example, a classification in police measures should be sustained if there is a reasonable and practical ground of classification for legislative regulations under the police power, even though some other classification or the absence of specific classifications would appear to some minds to be more in accord with the general welfare, since the discretion of selecting the subjects of police regulations and the nature and extent of such regulations is left to the general lawmaking power where there is no undoubted and irreconcilable conflict between the regulations and the provisions and principles of organic law.[8] Moreover, facts justifying classification for regulation may also justify classification for revenue purposes.[9]

b. JUDICIAL INVESTIGATION

§ 521. Presumptions and Burden of Proof.—

In accordance with the basic

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[7] See Vol. 11, p. 776, §§ 128 et seq.

[8] Baird v. State, 159 Ind. 211,

[38] S. Ct. 64; Parks v. State, 100 Kan.

[64] N. E. 862, 59 L.R.A. 190. Iowa. — State ex rel. Welsh v. Darling,

[216] Iowa, 553, 246 N. W. 390, 38 A.L.R. 218; Lee v. Hoffman, 182 Iowa, 1216, 166 N. W. 565, L.R.A.1918C, 933; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803. Kansas. — Baird v. Wichita, 128 Kan. 100, 276 P. 77, citing R. C. L.; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A. 1918B, 374; Atkinson v. Woodmansee, 68 Kan. 71, 74 P. 640, 64 L.R.A. 325, 15 Kan. 71, 74 P. 640, 64 L.R.A. 325. Louisiana. — Festervand v. Laster, 15 La. App. 159, 130 So. 634, citing R. C. L. Maryland. — Keinigsham v. Blake, 135 Md. 320, 109 A. 65, 8 A.L.R. 1066. Massachusetts. — Ashley v. Three Jus- tices (Ashley v. Wait) 228 Mass. 63, 116 N. E. 961, 5 A.L.R. 1472, writ of error dis- missed in 250 U. S. 652, 63 L. ed. 1190, 40 S. Ct. 53. Michigan. — Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189. Minnesota. — State v. Fairmont Cream- ery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548; State v. Bridgeman & R. Co.

[117] Minn. 186, 134 N. W. 496, Ann. Cas. 1913D, 41. Missouri. — State v. Scullin-Gallagher Iron & Steel Co. 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918E, 620. North Carolina. — State v. Davis, 157 N. C. 648, 73 S. E. 130, 39 L.R.A.(N.S.) 136. Ohio. — State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637. Oklahoma. — Trustees', Exrs. & Securi- ties Ins. Corp. v. Hooton, 53 Okla. 530, 157 P. 293, L.R.A.1916E, 602. Oregon. — Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136; State ex rel. Evans v. Kozer, 116 Or. 581, 242 P. 621, citing R. C. L. Pennsylvania.—Heissler v. Thomas Col- liery Co. 274 Pa. 448, 118 A. 394, 24 A.L.R. 1215, affirmed in 260 U. S. 245, 67 L. ed. 237,

[43] S. Ct. 83. South Carolina. — Witt v. People's State Bank, 166 S. C. 1, 164 S. E. 306, 83 A.L.R. 1068. Tennessee. — Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158; Motlow v. State,

[125] Kan. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; State ex rel. Astor v. Schlitz Brewing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941. Washington. — Laughney v. Maybury,

[145] Wash. 146, 259 P. 17, 54 A.L.R. 393; State ex rel. Davis-Smith Co. v. Clausen,

[65] Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466. Wisconsin. — Maercker v. Milwaukee,

[151] Wis. 324, 139 N. W. 199, L.R.A.1915F, 1196, Ann. Cas. 1914B, 199.

[7] Lower Vein Coal Co. v. Industrial Bd.

[255] U. S. 144, 65 L. ed. 555, 41 S. Ct. 252; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 S. Ct. 692; Griffith v. Connecticut,

[218] U. S. 572, 54 L. ed. 1155, 31 S. Ct. 134; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 S. Ct. 132; Watson v. Mary- land, 218 U. S. 173, 54 ed. 987, 30 S. Ct. 644; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 S. Ct. 819; Baird v. Wichita, 128 Kan. 100, 276 P. 77, citing R. C. L.; Festervand v. Laster, 15 La. App. 159, 130 So. 634, citing R. C. L.; Mathison v. Minne- apolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L.R.A. 922; Heisler v. Thomas Colliery Co. 274 Pa. 448, 118 A. 394, 24 A.L.R. 1215, affirmed in 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83; Re Snyder, 93 Wash. 59, 160 P. 12, 3 A.L.R. 1230. The selection of the exempted classes is within the legislative power, subject only to the restriction that it be not arbitrary or oppressive and that it apply equally to all persons similarly situated. Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105. As to the discretion of the legislature with reference to the nature of differences underlying classification, see supra, § 482.

[8] Davis v. Florida Power Co. 64 Fla. 246,

[60] So. 759, Ann. Cas. 1914B, 965; Fester- vand v. Laster, 15 La. App. 159, 130 So. 634, citing R. C. L. See also Crescent Cot- ton Oil Co. v. Mississippi, 257 U. S. 129, 66 L. ed. 166, 42 S. Ct. 42. The legislature has a broad discretion in making classifications for police regula- tion. People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Laughney v. May- bury, 145 Wash. 146, 259 P. 17, 54 A.L.R. 393.

[9] Ex parte Asotsky, 319 Mo. 810, 5 S. W. (2d) 22, 62 A.L.R. 95.

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rules of constitutional law underlying court review of legislation assailed as unconstitutional,[10] in those cases in which laws are attacked as violating the equality requirements of the Federal and state Constitutions there is a presumption in favor of a legislative classification,[11] of the reasonableness and fairness of legislative action,[12] and of legitimate grounds of distinction, if any such grounds exist, on which the legislature acted.[13] Hence, when the classification in a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.[14] Although the presumption in favor of a classification is not conclusive and is rebuttable,[15] courts may not declare it invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience

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[10] See Vol. 11, p. 776, §§ 128 et seq.

[11] Borden's Farm Products Co. v. Bald- win, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187; Corporation Commission v. Lowe, 281 U. S. 431, 74 L. ed. 945, 50 S. Ct. 397; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 S. Ct. 318; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 S. Ct. 50; Erb v. Morasch,

[177] U. S. 584, 44 L. ed. 897, 20 S. Ct. 819; Re Cardinal, 170 Cal. 519, 150 P. 348, L.R.A. 1915F, 850; Martin v. Com. 126 Va. 603,

[102] S. E. 77, 724, citing R. C. L.

[12] People v. Monterey Fish Products Co.

[195] Cal. 548, 234 P. 398, 38 A.L.R. 1186; Re Cardinal, 170 Cal. 519, 150 P. 348, L.R.A.1915F, 850; Bolivar Twp. Bd. of Fi- nance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Iowa Motor Vehicle Asso. v. Railroad Commissioners, 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in

[280] U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 534.

[13] Wampler v. Lecompte, 282 U. S. 172,

[75] L. ed. 276, 51 S. Ct. 92; Arkansas Natur- al Gas Co. v. Arkansas R. Commission,

[261] U. S. 379, 67 L. ed. 705, 43 S. Ct. 387; Middleton v. Texas Power & L. Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171,

[191] N. E. 158, 96 A.L.R. 271; Carr v. State,

[175] Ind. 241, 93 N. E. 1071, 32 L.R.A.(N.S.) 1190; Baird v. Wichita, 128 Kan. 100, 276 P. 77, citing R. C. L.; Festervand v. Laster,

[15] La. App. 159, 130 So. 634, citing R. C. L.; Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136; Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102; Mercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 1196, Ann. Cas. 1914B, 199; Nitka v. Western U. Teleg. Co. 149 Wis. 106, 135 N. W. 492,

[49] L.R.A.(N.S.) 337, Ann. Cas. 1913C, 863. "There is a strong presumption that a legislature understands and correctly ap- preciates the needs of its own people; that its laws are directed to problems made manifest by experience; and that its discriminations are based upon ade- quate grounds." Ward v. Krinsky, 259 U. S. 503, 66 L. ed. 1033, 42 S. Ct. 529, 28 A.L.R. 1207, quoting Middleton v. Texas Power & L. Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227; Festervand v. Laster, 15 La. App. 159, 130 So. 634, citing R. C. L.; State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548.

[14] Carmichael v. Southern Coal & Coke Co. 301 U. S. 495, 81 L. ed. 1245, 57 S. Ct. 868, 109 A.L.R. 1327; Metropolitan Casual- ty Ins. Co. v. Brownell, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 538, rehearing denied in 295 U. S. 767, 79 L. ed. 1708, 55 S. Ct. 647; Borden's Farm Products Co. v. Bald- win, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187; Lawrence v. State Tax Commission,

[286] U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556,

[87] A.L.R. 374; State Tax Comrs. v. Jackson, son, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Cres- cent Cotton Oil Co. v. Mississippi, 257 U. S. 129, 66 L. ed. 166, 42 S. Ct. 42; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421, Ann. Cas. 1917B, 455; Lindsley v. Natural Car- bonic Gas Co. 220 U. S. 61, 55 L. ed. 369,

[31] S. Ct. 337, Ann. Cas. 1912C, 160; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171,

[191] N. E. 158, 96 A.L.R. 271; Baldwin v. State, 194 Ind. 303, 141 N. E. 343, citing R. C. L.; Baird v. Wichita, 128 Kan. 100,

[276] P. 77, citing R. C. L.; State v. Wilson,

[101] Kan. 789, 168 P. 679, L.R.A.1918B, 374; Festervand v. Laster, 15 La. App. 159, 130 So. 634, citing R. C. L.; Vigant v. Postal Teleg. Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402; Memphis v. State, 133 Tenn. 83, 179 S. W. 631, L.R.A.1916B, 1151, Ann. Cas. 1917C, 1056; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; Salt Lake City v. Industrial Commission, 58 Utah, 314, 199 P. 152, 18 A.L.R. 259; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584; State v. Walter Bowen & Co. 86 Wash. 23,

[149] P. 330, Ann. Cas. 1917B, 625.

[15] Borden's Farm Products Co. v. Bald- win, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187.

of the legislators.[16] All reasonable doubts must be resolved in favor of a classification made by the legislature,[17] and it is the duty of the court to sustain it if any reasonable distinction can be found.[18]

One who assails the classification in a law must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary.[19] Invalid discrimination must be proved or admitted; it is not presumed.[20] The courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism.[21]

The authorities cumulatively establish the rule that the assailant of a classification must clearly establish invalidity, not permitting logically disputable contentions in behalf of the legislative judgment to persist, in order to prevail.[1] To strike down an act as class legislation requires the strongest of showings.[2] It has been variously stated that a discrimination must be shown to be invalid with convincing clarity,[3] not merely possibly, but clearly and

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[16] Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 538, rehearing denied in 295 U. S. 767, 79 L. ed. 1708, 55 S. Ct. 647.

[17] Corporation Commission v. Lowe, 281 U. S. 431, 74 L. ed. 945, 50 S. Ct. 397; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 S. Ct. 671; Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1153; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218; State v. Bridgeman & R. Co. 117 Minn. 186, State v. Ann. Cas. 1913D, 41; Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1103; Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 1196, Ann. Cas. 1914B, 199; Servonitz v. State, 133 Wis. 231, 113 N. W. 277, 126 Am. St. Rep. 955; State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819.

[18] Louis K. Liggett Co. v. Lee, 288 U. S. 517, 77 L. ed. 929, 53 S. Ct. 481, 85 A.L.R. 699; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271.

[19] Pacific States Box & Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159, 101 A.L.R. 853; Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 538, rehearing denied in 295 U. S. 767, 79 L. ed. 1708, 55 S. Ct. 647; Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187; Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556, 87 A.L.R. 374; Bain Peanut Co. v. Pinson, 282 U. S. 499, 75 L. ed. 482, 51 S. Ct. 228; Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; Kansas City S. R. Co. v. Road Improv. Dist. 266 U. S. 379, 69 L. ed. 335, 45 S. Ct. 136; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 S. Ct. 318; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 S. Ct. 243; Standard Chemical & Oil Co. v. Troy, 201 Ala. 89, 77 So. 383, L.R.A.1918C, 522; Denson v. Alabama Fuel & I. Co. 198 Ala. 383, 73 So. 525, citing R. C. L.; Ruth Drug v. Johnson, 13 Cal. App. (2d) 720, 57 P. (2d) 1022, citing R. C. L.; Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1153; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Big Wood Canal Co. v. Chapman, 45 Idaho, 380, 263 P. 45, citing R. C. L.; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; New Orleans v. Calamari, 150 La. 737, 91 So. 172, 22 A.L.R. 106; Vigeant v. Postal Telege. Cable Co. 260 Mass.

335, 157 N. E. 651, 53 A.L.R. 867; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; Witt v. People's State Bank, 166 S. C. 1, 164 S. E. 306, 83 A.L.R. 1608; State v. Reininger, 59 S. D. 336, 239 N. W. 849, citing R. C. L.; Memphis v. State, 133 Tenn. 83, 179 S. W. 631, L.R.A.1916B, 1151, Ann. Cas. 1917C, 1056; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; Salt Lake City v. Industrial Commission, 58 Utah, 314, 199 P. 152, 18 A.L.R. 259; Fredericksburg v. Sanitary Grocery Co. — Va. —, 190 S. E. 318, 110 A.L.R. 1195; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584. See also McNaughton v. Johnson, 242 U. S. 344, 61 L. ed. 352, 37 S. Ct. 178, Ann. Cas. 1917B, 801. A classification not shown to be unreasonable or arbitrary cannot be said to be obnoxious to the equal protection clause of the Federal Constitution. Georgia R. & Power Co. v. Decatur, 262 U. S. 432, 67 L. ed. 1065, 43 S. Ct. 613. A corporation claiming that legislation applicable to corporations but not to individuals in a similar situation denies the equal protection of the laws has the burden of establishing the fact. Bain Peanut Co. v. Pinson, 282 U. S. 499, 75 L. ed. 482, 51 S. Ct. 228.

[20] Tarrance v. Florida, 188 U. S. 519, 47 L. ed. 572, 23 S. Ct. 402.

[21] Middleton v. Texas Power & L. Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227.

[1] See infra, notes 2-14, this section.

[2] Ex parte Lewinsky, 66 Fla. 324, 63 So. 577, 50 L.R.A.(N.S.) 1156.

[3] Corporation Commission v. Lowe, 281 U. S. 431, 74 L. ed. 945, 50 S. Ct. 397;

actually unreasonable;[4] that it must be clear that there is no fair reason or basis for the classification;[5] that a classification is not reviewable unless palpably6 or manifestly arbitrary, unreasonable, inequitable, and unjust,[7] purely fanciful,[8] plainly without warrant in the facts,[9] and not justifiable on any reasonable grounds.[10] A claim of repugnancy to the equality clause of the Fourteenth Amendment cannot be supported by mere speculation or conjecture.[11] Furthermore, it is not enough to show that the question is fairly debatable12 or that the facts may be disputed or their effect opposed by argument and opinion of serious strength.[13] Before a court can interfere with the legislative judgment, it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.[14] When properly attacked, however, a classification must dis-

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People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997.

[4] Georgia R. & Power Co. v. Decatur, 262 U. S. 432, 67 L. ed. 1065, 43 S. Ct. 613; Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 S. Ct. 243; State v. Reininger, 59 S. D. 336, 239 N. W. 849, citing R. C. L.

[5] Ex parte Lewinsky, 66 Fla. 324, 63 So. 577, 50 L.R.A.(N.S.) 1156; Pickett v. Kuchan, 323 Ill. 138, 153 N. E. 667, 49 A.L.R. 499; Vandalia R. Co. v. Stillwell, 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D, 258, affirmed in 239 U. S. 637, 60 L. ed. 480, 36 S. Ct. 445. The legislative judgment as to what is a sufficient distinction cannot be overthrown by the courts unless it is, beyond rational doubt, erroneous. Re Stephan, 170 Cal. 48, 148 P. 196, Ann. Cas. 1916E, 617.

[6] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Joslin Mfg. Co. v. Providence, 262 U. S. 668, 67 L. ed. 1167, 43 S. Ct. 684; Arkansas Natural Gas Co. v. Arkansas R. Commission, 261 U. S. 379, 67 L. ed. 705, 43 S. Ct. 387; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 34 S. Ct. 859, 52 L.R.A.(N.S.) 525; Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 57 L. ed. 730, 33 S. Ct. 441; Toyota v. Hawaii, 226 U. S. 184, 57 L. ed. 180, 33 S. Ct. 47; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 S. Ct. 666; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 S. Ct. 136; Orient Ins.

Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 S. Ct. 281; Rainey v. Michel, 6 Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148; People v. Monterey Fish Products Co. 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186; Ex parte Lewinsky, 66 Fla. 324, 63 So. 577, 50 L.R.A.(N.S.) 1156; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Big Wood Canal Co. v. Chapman, 45 Idaho, 380, 263 P. 45, citing R. C. L.; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; Lee v. Hoffman, 182 Iowa, 1216, 166 N. W. 565, L.R.A.1918C, 933; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A. 1917A, 495, Ann. Cas. 1917E, 210; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; Memphis v. State, 133 Tenn. 83, 179 S. W. 631, L.R.A.1916B, 1151, Ann. Cas. 1917C, 1056.

[7] Baldwin v. State, 194 Ind. 303, 141 N. E. 343, citing R. C. L.; Festervand v. Laster, 15 La. App. 159, 130 So. 634, citing R. C. L.; State v. Bridgeman & R. Co. 117 Minn. 136, 134 N. W. 496, Ann. Cas. 1913D, 41; State v. McFarland, 60 Wash. 98, 110 P. 792, 140 Am. St. Rep. 909.

[8] Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412.

[9] Re Cardinal, 170 Cal. 519, 150 P. 348, L.R.A.1915F, 850.

[10] Ex parte Asotsky (Asotsky v. Beach) 319 Mo. 810, 5 S. W. (2d) 22, 62 A.L.R. 95.

[11] Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U. S. 335, 76 L. ed. 323, 52 S. Ct. 144.

[12] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Zahn v. Board of Public Works, 274 U. S. 325, 71 L. ed. 1074, 47 S. Ct. 594; Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016.

[13] Lower Vein Coal Co. v. Industrial Bd. 255 U. S. 144, 65 L. ed. 555, 41 S. Ct. 252; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421, Ann. Cas. 1917B, 455; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402.

[14] International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 34 S. Ct. 859, 52 L.R.A. (N.S.) 525; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 S. Ct. 692; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 S. Ct. 644; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 S. Ct. 493, 18 Ann. Cas. 865; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 S. Ct. 638; Driverless Car Co. v. Armstrong, 91 Colo. 334, 14 P. (2d) 1098, citing R. C. L.; Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105; Big Wood Canal Co. v. Chapman, 45 Idaho, 380, 263 P. 45, citing R. C. L.; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Baird v. Wichita, 128 Kan. 100, 276 P. 77, citing R. C. L.; Festervand v. Laster, 15

close its rational basis. A discrimination is not to be supported by mere fanciful conjecture [15] and cannot stand as reasonable if it offends the plain standards of common sense.[16] Thus, a classification may appear from the face of an act to be unreasonable unless, by proof adduced in its behalf, it is shown to bear some substantial relation to a valid purpose or object. For example, a challenged classification which, on its face, is not a regulation in the interest of the public, but is an attempt to create an economic advantage to persons who may be already engaged in a business at a date arbitrarily determined, must be shown to have some relation to the public welfare; and in the absence of such showing, the courts have no right to conjure up possible situations which might justify the discrimination.[17]

§ 522. Matters Considered by Courts.—

In the determination of the legality

of classification for legislative regulation, the subject to be regulated, the

character, extent, and purpose of the regulation, the classes of persons legally and naturally affected by the regulation, and the particular classification and regulation adopted by the statute should be considered.[18] Difficulty

is often experienced in determining whether all those belonging to the classes

legally and naturally affected by the regulation are included in the classification made or whether any are illegally excluded from the particular classification adopted by the statute.[19] The inquiry should be whether the distinctive characteristics upon which it is proposed to found different treatment are such as in the nature of things will denote in some reasonable degree

a practical and real basis for discrimination.[20]

In the determination of what classification is within the range of discretion and what is arbitrary, regard must be had to the particular subject of

action,[1] the characteristics of the class as a whole must be looked to,[2] and the

classification is entitled to be tested by the conditions which usually and

ordinarily exist.[3] That similar statutes have been adopted and sustained

in other states is an indication that the classification is reasonable.[4] Moreover, the constitutional validity of the statute assailed is not dependent solely

on the provisions of the act itself, but the existence of other statutes may be

taken into consideration.[5]

La. App. 159, 130 So. 634, citing R. C. L.; Keiningham v. Blake, 135 Md. 320, 109 A. 65, 8 A.L.R. 1066; Vigeant v. Postal Teleg. Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867; Com. v. Libbey, 216 Mass. 356,

[103] N. E. 923, 49 L.R.A.(N.S.) 879; People v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L.R.A.(N.S.) 201; State v. Pioneer Oil & Ref. Co. (Tex. Com. App.) 292 S. W. 869, citing R. C. L.

[15] Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838; Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187.

[16] Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838.

[17] Mayflower Farms v. Ten Eyck, 297 U. S. 266, 80 L. ed. 675, 56 S. Ct. 457.

[18] Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A.(N.S.) 126,

[16] Ann. Cas. 1234; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70.

[19] Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A.(N.S.) 126, 16 Ann. Cas. 1234; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70.

[20] Portland v. Welch, 154 Or. 286, 59 P. (2d) 228, 106 A.L.R. 1188.

[1] Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582.

[2] McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284.
[3] Pasadena City High School Dist. v. Upjohn, 206 Cal. 775, 276 P. 341, 63 A.L.R. 408.
[4] Bain Peanut Co. v. Pinson, 282 U. S. 499, 75 L. ed. 482, 51 S. Ct. 228.
[5] Gregg Dyeing Co. v. Query, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631, 84 A.L.R. 831.

necessity, and policy of legislation [6] applies with particular emphasis to statutes assailed as unequal. The courts cannot set aside a statute merely because in their view it may have been unwise or unnecessary to apply certain

rules to one class of cases [7] or because they deem it to be impolitic.[8] In determining whether a classification is such as to deny the equal protection

of the laws, the courts must consider only whether the difference does injustice to the class generally, even though it bears hard in the particular case.[9]

Moreover, a mere error in judgment on the part of the legislature is not

sufficient to condemn a law as arbitrary.[10] A rule adopted by one of the

state courts allows the judiciary more leeway in considering such legislation. It is held that while in determining the reasonableness of a classification set up by the legislature, the court will not concern itself with the

question of public policy involved and expediency of the measure, it may

consider the practical effect the classification is bound to have on business

and organized society generally.[11]

§ 523. Technique of Judicial Investigation.—

The authorities which have

passed upon the question have determined with unanimity that in considering the validity of a classification, the courts will take judicial notice of all

facts relevant to the question.[12] Matters of common knowledge and of common report are, therefore, taken into consideration in passing upon the reasonableness of a classification.[13] Such procedure is in accord with the method

employed by the courts in ascertaining the validity of legislation generally.[14]

There is no complete agreement among the courts as to whether evidence

may be adduced to show the invalidity of a classification and, if it may be

used, to what extent. Moreover, each conclusion reached seems to depend

largely upon the circumstances of the particular case and the extent to which

the statute involved discloses equality or inequality from its face.[15] The

Supreme Court of the United States has indicated that in some instances

evidence or factual proof is not only proper but necessary.[16] The Supreme

Court points out that in some cases legislation may contain a classification

which on the very face of the act is unreasonable and arbitrary.[17] In

[6] See Vol. 11, p. 804, §§ 138, 139.

[7] Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356, 8 L.R.A. (N.S.) 682, 119 Am. St. Rep. 199; St. Louis S. W. R. Co. v. State, 113 Tex. 570, 261 S. W. 996, 33 A.L.R. 367; Fredericksburg v. Sanitary Grocery Co. — Va. —, 190 S. E. 318, 110 A.L.R. 1195. Since the wisdom of legislation is not a matter for judicial consideration, the courts are bound to assume that the legislature in imposing an occupation tax has paid due heed to all economic considerations affecting classification and to yield full effect to the statute unless it is impossible to discern any substantial differences between the occupations separately classified. Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136.

[8] Magoun v. Illinois Trust & Sav. Bank,

[170] U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594. When the validity of class legislation is in question, the courts will look into the nature of the class to see if it possesses peculiar features which might reasonably call for legislative action, but beyond that they will not interfere with the policy of the legislature. Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 73 S. W. 686, 61 L.R.A. 475.

[9] Bain Peanut Co. v. Pinson, 282 U. S. 499,

[75] L. ed. 482, 51 S. Ct. 228.

[10] State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274.

[11] State ex rel. Matteson v. Luecke, 194 Minn. 246, 260 N. W. 206, 99 A.L.R. 1053.

[12] State v. Bridgeman & R. Co. 117 Minn. 186, 134 N. W. 496, Ann. Cas. 1913D, 41. See Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187.

[13] Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187; Chicago, B. & Q. R. Co. v. McGuire,

[219] U. S. 549, 55 L. ed. 328, 31 S. Ct. 259, affirming 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706, 117 Am. St. Rep. 425, and later appeal in 138 Iowa, 664, 116 N. W. 801; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821.

[14] See Vol. 11, p. 825, § 145.

[15] See infra, notes 17-1, this section.

[16] See infra, note 19, this section.

[17] See discussion in Borden's Farm Prod-

such instances, which are rare, the court infers that obviously no proof of invalidity would be required.[18] In a case, however, in which classification is suitably challenged and the rational basis claimed for it is predicated upon the particular economic facts of a given trade or industry, which facts are outside the sphere of judicial notice, they are properly the subject of evidence and of finding. With the notable expansion of the scope of governmental regulations and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Supreme Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determination upon evidence, so that conclusions shall not be reached without adequate factual support.[19] One of the state courts has held quite generally, on the other hand, without qualifying its language as to the economic situation which may be involved, that if a statute on its face is general in terms and applicable alike to all members of a class, evidence will not

be taken to show that such a classification is not a legal one.[1]

§ 524. Construction of State Statutes.—

Before the Supreme Court of the

United States can judicially declare that a state statute as construed by the

state courts denies the equal protection of the laws, it must appear that the

statute as thus construed and applied by the state court of last resort bases

discrimination upon arbitrary distinctions.[2] A mere characterization, however, of a state statute, such as a taxing statute, by the court of last resort

of the state is not binding upon the Federal Supreme Court, which will determine for itself the effect of the statute under the equal protection clause.[3]

C. SPECIAL BURDENS AND PRIVILEGES

1. IN GENERAL

§ 525. Generally.—

The theory underlying constitutional requirements of

equality is that all persons in like circumstances and like conditions must

be treated alike, both as to privileges conferred and as to liabilities or burdens imposed.[4] Any statute which imposes special restrictions or burdens

on, or grants special privileges to, certain persons engaged in a business,

which burdens or privileges are not imposed on, or granted to, other persons

engaged in the same business under the same circumstances, is invalid.[5] In

the application of the Fourteenth Amendment to the Constitution of the

United States, no distinction is to be observed between the effect of privileges conferred and the effect of burdens imposed. A privilege conferred

upon one class is a discrimination in favor of that class and against all others

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ucts Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187.

[18] Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187. See also Mayflower Farms v. Ten Eyck, 297 U. S. 266, 80 L. ed. 675, 56 S. Ct. 467.

[19] Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187.

[1] Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158.

[2] Lake Shore & M. S. R. Co. v. Clough,

[242] U. S. 375, 61 L. ed. 374, 37 S. Ct. 144; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 S. Ct. 678; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 S. Ct. 493; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531,

[58] L. ed. 713, 34 S. Ct. 359; Adams v. Russell, 229 U. S. 353, 57 L. ed. 1224, 33 S. Ct. 846; Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 S. Ct. 243.

[3] Quaker City Cab Co. v. Pennsylvania,

[277] U. S. 389, 72 L. ed. 927, 48 S. Ct. 553; Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, 48 S. Ct. 423.

[4] See supra, § 469.

[5] Elliott v. State, 29 Ariz. 389, 242 P. 340,

[46] A.L.R. 284; State v. Gardner, 58 Ohio St. 599, 51 N. E. 136, 41 L.R.A. 689, 65 Am. St. Rep. 785; State v. Wright, 53 Or. 344,

[100] P. 296, 21 L.R.A.(N.S.) 349.

not similarly endowed just as a burden upon one class is a discrimination against it and in favor of all others not similarly afflicted.[6]

A privilege or a burden is or is not a denial of the equal protection of the laws according to whether the discrimination relates to a matter upon which classification is legally permissible and, if so, whether the classification is a reasonable one.[7]

2. EQUALITY OF BURDENS

§ 526. Generally.—

In the exercise of the undoubted right of classification, it may often happen that some classes are subjected to regulations and some individuals are burdened with obligations which do not rest on other classes or other individuals not similarly situated, but this fact does not necessarily vitiate a statute, because it would practically defeat legislation if it were laid down as an invariable rule that a statute is void if it does not bring all within its scope or subject all to the same burdens.[8]

The general rule as to classification in the imposition of burdens is that no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition [9] or in like circumstances.[10]

No burden can be imposed on one class of persons, natural or artificial, and arbitrarily selected, which is not in like conditions imposed on all other classes.[11] Thus, a statute imposing absolute liability upon telegraph companies for injuries caused by their poles, wires, and apparatus, while not applying to others utilizing similar apparatus, unconstitutionally deprives such companies of the equal protection of the laws.[12] The Supreme Court has stated in a general way that the guaranty of the equal protection of the laws forbids that one class should by law be compelled to suffer losses that others may make gain.[13] To hedge a privilege about with conditions and exactions for one class which do not exist for others likewise violates the

equality provision of the Constitution.[14]

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[6] Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210.

[7] Ibid.

[8] Cotting v. Kansas City Stock Yards Co. (Cotting v. Godair) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30. In enacting provisions necessary for the protection of the public health, conditions may exist that make it necessary to impose upon some persons greater burdens than upon others not similarly situated. Scholle v. State, 90 Md. 729, 46 A. 326, 50 L.R.A. 411.

[9] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Connolly v. Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godair)

[183] U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A.(N.S.) 126, 16 Ann. Cas. 1234; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in

[245] U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; State v. Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L.R.A. (N.S.) 874, 119 Am. St. Rep. 49, 10 Ann. Cas. 899; Opinion of Justices,

[207] Mass. 601, 94 N. E. 558, 34 L.R.A.(N.S.) 604; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804,

[8] Ann. Cas. 717; State v. Savage, 96 Or. 53, 184 P. 567, 189 P. 427, citing R. C. L.; Jones v. Union County, 63 Or. 566, 127 P. 781, 42 L.R.A.(N.S.) 1035; Steed v. Harvey,

[18] Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789; State v. Shedroi, 75 Vt. 277, 54 A. 1081, 63 L.R.A. 179, 98 Am. St. Rep. 825; State v. Dering, 84 Wis. 585, 54 N. W. 1104,

[19] L.R.A. 858, 36 Am. St. Rep. 948.

[10] Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 S. Ct. 1132; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Templar v. State Examiners, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610; State v. Standard Oil Co. 61 Or. 438, 123 P. 40, Ann. Cas. 1914B, 179.

[11] Boone v. State, 170 Ala. 57, 54 So. 109, Ann. Cas. 1912C, 1065; State v. Northwestern Electric Co. 183 Wash. 184, 49 P. (2d) 8, 101 A.L.R. 189.

[12] Vigeant v. Postal Teleg. Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867.

[13] Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 S. Ct. 198; Reagan v. Farmer's Loan & T. Co. 154 U. S. 362, 420, 38 L. ed. 1014, 1031,

[14] S. Ct. 1047, 1062.

[14] State v. Cadigan, 73 Vt. 245, 50 A. 1079,

[57] L.R.A. 666, 87 Am. St. Rep. 714.

§ [526] CONSTITUTIONAL LAW [12] Am. Jur.

A statute infringes the constitutional guaranty of equal protection if it singles out for discriminatory legislation particular individuals not forming an appropriate class15 and imposes on them burdens or obligations or subjects them to rules from which others are exempt.[16] Under the guise of the exercise of the police power, it is not competent either for the legislature or for a municipality to impose unequal burdens upon individual citizens,[17] A statute, in fact applicable only to a single individual, which purports to render ineligible to election to the office of county superintendent of roads

or the office of member of the board of highway commission at a particular future election anyone who has served as county road commissioner of the county for as long as four years in the eight-year period preceding the date of such election, is arbitrary, unreasonable, and within the condemnation of the principle that a statute which is partial in its operation, intended to affect particular individuals alone, is unwarranted by the Constitution and void.[18]

If a statute applies only to one class of persons and imposes upon them duties and burdens not common to others, there must exist in the relations of such persons to the state, to the public, or to individuals some reasonable ground of distinction sufficient to show that the classification is not merely personal and arbitrary, or there will be a denial of the equal protection of the laws;[19] if, however, under such a classification all persons affected by a statute are treated alike in the burdens imposed upon them, the legislation is not open to the objection that it denies to any the equal protection of the laws.[20] In other words, an act will not be declared invalid because it sub-

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[15] See supra, §§ 480-482.

[16] Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 79 L. ed. 1054, 55 S. Ct. 525, rehearing denied in 295 U. S. 768, 79 L. ed. 1709, 55 S. Ct. 525; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 8 S. Ct. 737; Beveridge v. Lewis,

[137] Cal. 619, 67 P. 1040, 70 P. 1083, 59 L.R.A. 581, 92 Am. St. Rep. 188; Davis v. Florida Powder Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Re Mallon, 16 Idaho, 737, 102 P. 374, 22 L.R.A. (N.S.) 1123; Off v. Morehead, 235 Ill. 40, 85 N. E. 264, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434; Jones v. Chicago, R. I. & P. R. Co. 231 Ill. 302, 83 N. E. 215, 121 Am. St. Rep. 313; Braceville Coal Co. v. People,

[147] Ill. 66, 35 N. E. 62, 22 L.R.A. 340, 37 Am. St. Rep. 206; Armstrong v. State, 170 Ind. 188, 84 N. E. 3, 15 L.R.A.(N.S.) 646; Chamberlain v. Missouri P. R. Co. 107 Kan. 341, 191 P. 261, 12 A.L.R. 224; Re Gardner,

[84] Kan. 264, 113 P. 1054, 33 L.R.A.(N.S.) 956; State v. Leavitt, 105 Me. 76, 72 A. 875,

[26] L.R.A.(N.S.) 799; State v. Montgomery,

[94] Me. 194, 47 A. 165, 80 Am. St. Rep. 386; State v. Walsh, 136 Mo. 400, 37 S. W. 1112,

[35] L.R.A. 231; State v. Pennoyer, 56 N. H. 113, 18 A. 878, 5 L.R.A. 709.

[17] McGuire v. District of Columbia, 24 App. D. C. 22, 65 L.R.A. 430. A statute enacted in a state in which cotton gins are required to be licensed and are subject to regulation as public utilities, which exempts from such requirement and regulation gins ginning cotton of their owners or stockholders, is unconstitutional as denying to licensed gin owners the equal protection of the laws. Chickasha Cotton Oil Co. v. Cotton County Gin Co. (C. C. A. 10th) 40 F. (2d) 846, 74 A.L.R. 1070.

[18] Beasley v. Cunningham, — Tenn. —,

[103] S. W. (2d) 18, 110 A.L.R. 306. Annotation: 110 A.L.R. 312.

[19] Stratton Claimants v. Morris Claimants (Dibell v. Lanier) 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70; Nitka v. Western U. Teleg. Co. 149 Wis. 160, 135 N. W. 492,

[49] L.R.A.(N.S.) 337, Ann. Cas. 1913C, 863.

[20] Staten Island Rapid Transit R. Co. v. Phoenix Indem. Co. 281 U. S. 98, 74 L. ed. 726, 50 S. Ct. 242; Turner, D. & L. Lumber Co. v. Chicago, M. & St. P. R. Co. 271 U. S. 259, 70 L. ed. 934, 46 S. Ct. 530; Durham Pub. Serv. Co. v. Durham, 261 U. S. 149, 67 L. ed. 580, 43 S. Ct. 290; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406,

[54] L. ed. 1088, 31 S. Ct. 59, 36 L.R.A.(N.S.) 220, 21 Ann. Cas. 815; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 S. Ct. 28; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 S. Ct. 412; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 S. Ct. 95; American Sugar Ref. Co. v. Louisiana,

[179] U. S. 89, 45 L. ed. 102, 21 S. Ct. 43; New York, N. H. & H. R. Co. v. New York,

[165] U. S. 628, 41 L. ed. 853, 17 S. Ct. 418; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364,

[37] L. ed. 769, 13 S. Ct. 870; Charlotte, C. & A. P. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 S. Ct. 255; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L.

jects persons coming within its classifications to burdens or duties not imposed upon individuals outside such classes, provided such classifications operate alike upon all persons and property under the same circumstances and

conditions and bear a reasonable and just relation to the act with respect

to which they are made.[1]

§ 527. Special Burdens or Liabilities.—

Special burdens are often necessary

for general benefits, such as for supplying water, preventing fire, lighting

districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than

upon another, but they are designed not to impose unequal or unnecessary

restrictions upon anyone, but to promote with as little individual inconvenience as possible the general good.[2]

A classification for the imposition of special duties or special liabilities

arising out of the peculiar business in which persons in a class are engaged

is a just classification and one which has been sustained as complying with

the constitutional requirements. Under this principle the courts have sustained statutes which impose on telegraph companies a liability for mental

anguish or suffering in case of their negligent failure in the transmission

or delivery of messages3 and also statutes which forbid such companies to

limit their liability for negligent failure to deliver telegrams addressed to

persons in other states, although express companies and other common carriers may, by contract, limit their liability in this respect.[4] Making an ordinance prohibiting the maintenance of leaky water pipes in a street apply

only to water companies and their managers, to the exclusion of consumers

maintaining pipes in the streets, has likewise been upheld as not creating

an unlawful discrimination.[5]

It has been stated as a general rule that an act which puts in one class

all engaged in business of a special and public character, requires of them

the performance of a duty which they can do better and more quickly than

others, and imposes a not exorbitant penalty for a failure to perform that

duty within a reasonable time cannot be adjudged unconstitutional as a

purely arbitrary classification.[6] Carriers are not unconstitutionally deprived

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ed. 109, 8 S. Ct. 1176; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 S. Ct. 1161; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 S. Ct. 1086; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 S. Ct. 730; Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103; Kocsis v. Chicago Park Dist. 362 Ill. 24, 198 N. E. 847, 103 A.L.R. 141; Buckler v. Hilt, 209 Ind. 541, 200 N. E. 219, 103 A.L.R. 901; Com. v. Watson, 223 Ky. 427, 3 S. W. (2d) 1077, 58 A.L.R. 212; New Orleans v. Calamari, 150 La. 737, 91 So. 172,

[22] A.L.R. 106; Wood v. Detroit, 188 Mich. 547, 155 N. W. 592, L.R.A.1916C, 388; Templar v. State Examiners, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610; State v. Murray, 104 Neb. 51, 175 N. W. 666, 8 A.L.R. 563; Union Cent. L. Ins. Co. v. Chowning, 86 Tex. 654, 26 S. W. 982, 24 L.R.A. 504; Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 1196, Ann. Cas. 1914B, 199. The obligation imposed by statute upon the owners or occupants of lands bordering on the public highway to remove therefrom weeds, brush, or other obstructions operates alike upon all persons similarly situated, and is not discriminatory. Com. v. Watson, 223 Ky. 427, 3 S. W. (2d) 1077,

[58] A.L.R. 212.

[1] Etchison v. Frederick, 123 Md. 283, 91 A. 161, L.R.A.1916C, 561.

[2] Mountain Timber Co. v. Washington,

[243] U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357.

[3] Nitka v. Western U. Teleg. Co. 149 Wis. 106, 135 N. W. 492, 49 L.R.A.(N.S.) 337, Ann. Cas. 1913C, 863. See Simmons v. Western U. Teleg. Co. 63 S. C. 425, 41 S. E. 521, 57 L.R.A. 607.

[4] Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 31 S. Ct. 59, 36 L.R.A.(N.S.) 220, 21 Ann. Cas. 815.

[5] Crumpler v. Vicksburg, 89 Miss. 214, 42 So. 673, 11 L.R.A.(N.S.) 476, 10 Ann. Cas. 1098.

[6] Seaboard Air Line R. Co. v. Seegers,

[207] U. S. 73, 52 L. ed. 108, 28 S. Ct. 28

of the equal protection of the laws by the imposition of a penalty for failure promptly to settle a claim for loss of property in transit.[7] An act requiring them to adjust and pay intrastate freight loss claims or adjustments within a specified time after filing of a

claim, under a reasonable penalty for each failure or refusal, where there can be no award of a penalty unless there is a recovery of the full amount claimed, is valid.[8] The same result has been reached under a very similar statute, although the amount finally recovered is less than the claim presented.[9]

3. SPECIAL PRIVILEGES OR IMMUNITIES

§ 528. Generally.—

Under the Federal Constitution, if statutes arbitrarily confer on one class benefits from which others in a like situation are excluded, the courts usually hold that the equal protection of the laws has been denied to those not included.10 Thus, a statute which directly or by implication grants a special privilege to persons engaged in substantially the same business, under the same conditions, is class legislation and an infringement of the equal rights guaranteed to all.11 Every citizen should share the common benefits of a government the common burden of which he is required to bear.12 The constitutional mandate is satisfied, however, if there is no manifest intent to discriminate and if the provisions of the restrictive act are in fact open alike to all citizens who may bring themselves within its terms.13 A statute does not conflict with the guaranty of equal protection of the laws merely because it is special in character and certain persons or interests derive special benefit from its operation if all persons subject to it are treated alike under the same conditions.14

§ 529. Prohibitive State Constitutional Provisions.—

In the Constitutions of some of the states there are inserted provisions which, although varying slightly in terminology, have the general effect of prohibiting the granting of special privileges or immunities.15 Such guaranties in the state Consti-

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[7] Beckler Produce Co. v. American R. Exp. Co. 156 Ark. 296, 246 S. W. 1, 26 A.L.R. 1197. For a general discussion of penalties assessed against carriers for nonpayment of claims for loss or damage to freight, see CARRIERS, Vol. 9, p. 912, § 794.

[8] Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 S. Ct. 28. Annotation: 26 A.L.R. 1205.

[9] Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 S. Ct. 40; Mobile & O. R. Co. v. Brandon, 98 Miss. 461, 53 So. 957, 42 L.R.A.(N.S.) 106.

[10] State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805.

[11] Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315; Jones v. Union County, 63 Or. 566, 127 P. 781, 42 L.R.A.(N.S.) 1035; State v. Wright, 53 Or. 344, 100 P. 296, 21 L.R.A.(N.S.) 349.

[12] Hickman v. Kansas City, 120 Mo. 110, 25 S. W. 225, 23 L.R.A. 658, 41 Am. St. Rep. 684.

[13] State v. Bichcreek, 167 Ind. 217, 77 N. E. 1085, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 10 Ann. Cas. 899.

[14] Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

[15] State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1530 (Indiana Constitution); Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. ed. 704, 50 S. Ct. 204, 68 A.L.R. 194 (California Constitution); Opelika v. Opelika Sewer Co. 265 U. S. 215, 68 L. ed. 985, 44 S. Ct. 517 (Alabama Constitution); Tipton County v. Rogers Locomotive & Mach. Works, 103 U. S. 523, 26 L. ed. 340 (Tennessee Constitution); Frazier v. State Tax

Commission, — Ala. —, 175 So. 402, 110 A.L.R. 1479; Elliott v. State, 29 Ariz. 389, 242 P. 340, 46 A.L.R. 284; Wallace v. Zinman, 200 Cal. 585, 254 P. 946, 62 A.L.R. 1341; Allied Architects' Asso. v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; People ex rel. Mather v. Marshall Field & Co. 266 Ill. 609, 107 N. E. 864, L.R.A.1915F, 937, Ann. Cas. 1916B, 743; Storen v. Sexton, 209 Ind. 589, 200 N. E. 251, 104 A.L.R. 1359; Miles v. Department of Treasury, — Ind. —, 193 N. E. 855, 97 A.L.R. 1474, superseded but not on this point in 209 Ind. 172, 199 N. E. 372, 101 A.L.R. 1359; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Elwood v. State, 203 Ind. 626, 180 N. E. 471, 81 A.L.R. 1027; Fountain

tutions are in nature simply a protection of those fundamental or inherent rights which are common to all citizens.[16] These provisions have been described as being the antithesis of the Fourteenth Amendment to the Federal Constitution, since the latter operates to prevent abridgment by the states of constitutional rights of citizens of the United States and the former prevents the state from granting privileges or immunities and exemptions from otherwise common burdens which do not equally belong to all citizens. One prevents the curtailment of the constitutional rights of citizens, and the other prohibits the enlargement of the right of some in discrimination against others.[17]

The general principle involved in constitutional equality guaranties forbidding special privileges or immunities seems to be that if legislation, without good reason and just basis, imposes a burden on one class which is not imposed on others in like circumstances or engaged in the same business, it is a denial of the equal protection of the laws to those subject to the burden and a grant of an immunity to those not subject to it.[18] So long as all are treated alike under like circumstances, however, neither the Federal nor the state provisions are violated.[19] Such provisions of the state Constitutions permit classification, if it is not arbitrary, is reasonable, and has a substantial basis and a proper relation to the objects sought to be accomplished.[20]

Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Davis Constr. Co. v. Boone County, 192 Ind. 144, 132 N. E. 629, 21 A.L.R. 557; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; Selvage v. Talbott, 175 Ind. 648, 95 N. E. 114, 33 L.R.A.(N.S.) 973, Ann. Cas. 1913C, 724; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L.R.A.(N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; Hays v. Poplar Bluff, 263 Mo. 516, 173 S. W. 676, L.R.A. 1915D, 595; People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A.1915D, 538; State ex rel. Atkins v. Lawler, 53 N. D. 278, 205 N. W. 880, citing R. C. L.; State v. Savage, 96 Or. 53, 184 P. 567, 189 P. 427, citing R. C. L.; O'Leary v. Croghan, 42 S. D. 210, 173 N. W. 844, 6 A.L.R. 1134; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; McClintock v. Richlands Brick Corp. 152 Va. 1, 145 S. E. 425, 61 A.L.R. 1033; State ex rel. Lathrop v. Hauptly, 86 Wash. 199, 149 P. 705, L.R.A.1915F, 920.

[16] Rosa v. Portland, 86 Or. 438, 168 P. 936, L.R.A.1918B, 851.

[17] Miles v. Department of Treasury, — Ind. —, 193 N. E. 855, 97 A.L.R. 1474, superseded but not on this point in 209 Ind. 172, 199 N. E. 372, 101 A.L.R. 1359; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 35 S. Ct. 64; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L.R.A.(N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; State ex rel. Atkins v. Lawler, 53 N. D. 278, 205 N. W. 880, citing R. C. L.; State v. Savage, 96 Or. 53, 184 P. 567, 189 P. 427, citing R. C. L.

[18] Tipton County v. Rogers Locomotive & Mach. Works, 103 U. S. 523, 26 L. ed. 340; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; State v. Savage, 96 Or. 53, 184 P. 567, 189 P. 427, citing R. C. L.; Fleming v. Memphis, 126 Tenn. 331, 148 S. W. 1057, 42 L.R.A. (N.S.) 493, Ann. Cas. 1913D, 1306; State v. Nashville, C. & St. L. R. Co. 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912D, 805.

[19] Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94 (Iowa Constitution); Frazier v. State Tax Commission, — Ala. —, 175 So. 402, 110 A.L.R. 1479; Mammina v. Alexander Auto Serv. Co. 333 Ill. 158, 164 N. E. 173, 61 A.L.R. 649; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; Selvage v. Talbott, 175 Ind. 648, 95 N. E. 114, 33 L.R.A. (N.S.) 973, Ann. Cas. 1913C, 724; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L.R.A. (N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; State ex rel. Atkins v. Lawler, 53 N. D. 278, 205 N. W. 880, citing R. C. L.; State v. Savage, 96 Or. 53, 184 P. 567, 189 P. 427, citing R. C. L.; Churchill v. Albany, 65 Or. 442, 133 P. 632, Ann. Cas. 1915A, 1094; Ft. Worth & D. C. R. Co. v. Frazier (Tex. Civ. App.) 191 S. W. 808, citing R. C. L.

[20] Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Kelso v. Cook, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918E, 68; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 51; State v. Savage, 96 Or. 53, 184 P. 567, 189 P. 427, citing R. C. L.; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; Fleming v. Memphis, 126 Tenn. 331, 148 S. W. 1057, 42 L.R.A. (N.S.) 493, Ann. Cas. 1913D, 1306. [12 Am. Jur.]—15

A similar constitutional provision which declares that no grant of exclusive privileges shall be made to any man or set of men, except in consideration of public services, likewise does not deny to the legislature the power to classify persons and enact laws for their government and protection as a class, if based on reasonable distinctions.[1]

Since the tests as to the granting of special privileges and immunities by a state are substantially similar to those used in determining whether the equal protection of the laws has been denied by a state,[2] it seems appropriate to consider the general subject of the constitutional clauses inhibiting the granting of privileges and immunities with the equal protection clause. Even apart from any such prohibition as to the granting of special privileges and immunities, however, some of the courts have held that it is beyond the bounds of legitimate legislation to enact a special law or pass a resolve dispensing with the general law in a particular case and to grant a privilege and indulgence to one man by way of exemption from the general law, leaving all other persons under its operation.[3] It would thus appear that particular laws granting special privileges and immunities must run the gauntlet of the provisions of the Federal Constitution which secure the equal protection

of the laws and those of state Constitutions which prohibit either special legislation or special laws granting privileges and immunities, and also that the inherent limitations on legislative power may themselves be sufficient to nullify such laws.[4]

To enlarge upon a provision of the Constitution beyond the express limitation it permits in the way of privilege and immunities is just as repugnant to the instrument as it would be for the general assembly to attempt to enact into law some measure especially prohibited by the Constitution.[5] If there is a state constitutional provision forbidding the granting of any special privilege or immunity, it would be absurd to say that the legislature might, by special law, permit such individuals as it should select from time to time to violate a penal law and grant them immunity therefor. It would be still more absurd to say that the general assembly could give itself the power to grant such special privileges and immunities by the clumsy subterfuge of inserting in all prohibitive and penal laws a condition that the forbidden act might only be done with its permission expressed by statute. But it would be the most absurd of all to contend that although the Constitution had withheld from the general assembly the power to pass such laws, that body might give its own agent, the legislative body of a municipal corporation, the power to make them.[6] Under such a constitutional provision, however, a state cannot complain that an act of its own legislature is invalid in that rights are granted to other parties in litigation but denied to the state. Since the acts of the legislature are the acts of the state, the state cannot assert that its own activities deny it equal privileges.[7]

If the state constitutional provision provides that no special privileges or

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[1] Louisville R. Co. v. Louisville Fire & Life Protection Asso. 151 Ky. 644, 152 S. W. 799, 43 L.R.A. (N.S.) 600, Ann. Cas. 1915A, 89.

[2] State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1530.

[3] Milton v. Bangor R. & Electric Co. 103 Me. 218, 68 A. 826, 15 L.R.A.(N.S.) 203, 125 Am. St. Rep. 293.

[4] Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Savage v. Savage, 96 Or. 53, 184 P. 567, 189 P. 427, citing R. C. L.

[5] Benjamin Rose Inst. v. Myers, 92 Ohio St. 252, 110 N. E. 924, L.R.A.1916D, 1170.

[6] Hays v. Poplar Bluff, 263 Mo. 516, 173 S. W. 676, L.R.A.1915D, 595. See Opelika v. Opelika Sewer Co. 265 U. S. 215, 68 L. ed. 985, 44 S. Ct. 517.

[7] State ex rel. Lathrop v. Hauptly, 86 Wash. 199, 149 P. 705, L.R.A.1915F, 920.

immunities shall ever be granted to any citizen or class of citizens which shall not be granted upon the same terms to all citizens, it is not available to aliens who are not citizens.[8]

§ 530. Classification Creating Special Privileges.—

In order to avoid the limitations inherent in the constitutional requirements as to the equal protection of the laws, appropriate classifications may be made. When made on natural and reasonable grounds, the grant of rights to one class will not necessarily amount to a denial of the equal protection of the laws to members of other classes. In all cases, however, where a classification is made for the purpose of conferring a special privilege on a class, there must be some good and valid reason why that particular class should alone be the recipient of the benefit.[9] Under the Federal Constitution distinctions in rights and privileges must be based on some reason not applicable to all.[10] An ordinance enacted by municipal authorities providing for the issuance of municipal bonds to raise funds for the payment of back salaries of firemen and policemen does not amount to class legislation, as preferring one class of creditors of the municipality.[11] Statutes exempting military organizations from a general prohibition against parading with firearms are not unconstitutional as class legislation, since they grant a right which in no wise conflicts with the constitutional rights of others.[12] It has been held, however, that the excepting of funerals, fire companies, state militia, and political parties from general prohibitory enactments as to street parades constitutes an unreasonable and unjust discrimination.[13]

An otherwise valid statute or ordinance conferring a privilege is not rendered invalid merely because it chances that particular persons find it hard or even impossible to comply with precedent conditions upon which enjoyment of the privilege is made to depend.[14]

§ 531. Illustrations of Valid Special Privileges and Immunities.—

One important class of special privileges consists of franchises of various types and

kinds. As a rule there are no constitutional objections to the granting of exclusive privileges in the form of franchises, if obtained under general laws enacted in accordance with the terms of the state Constitution.[15] For the purposes of government such exclusive rights and privileges are occasionally granted to particular individuals. When the public purpose of such grants is apparent, the courts as a rule sustain them as in no wise denying to any the equal protection of the laws or violating prohibitions as to the granting to anyone of special and exclusive rights or immunities. This principle has been applied to sustain the validity of exclusive privileges to remove garbage from

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[8] Moody v. Hagen, 36 N. D. 471, 162 N. W. 704, L.R.A.1918F, 947, Ann. Cas. 1918A, 933, affirmed in 245 U. S. 633, 62 L. ed. 522,

[38] S. Ct. 153.

[9] Stratton Claimants v. Morris Claim- ants (Dibrell v. Lanier) 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70. See People ex rel. Mather v. Marshall Field & Co. 266 Ill. 609,

[107] N. E. 864, L.R.A.1915F, 937, Ann. Cas. 1916B, 743.

[10] Harding v. People, 160 Ill. 459, 43 N. E. 624, 32 L.R.A. 445, 52 Am. St. Rep. 344.

[11] Weisfield v. Seattle, 180 Wash. 288, 40 P. (2d) 149, 96 A.L.R. 1190.

[12] Com. v. Murphy, 166 Mass. 171, 44 N. E. 138, 32 L.R.A. 606.

[13] State v. Dering, 84 Wis. 585, 54 N. W. 1104, 19 L.R.A. 858, 36 Am. St. Rep. 948. A salvage corps maintained by private insurance companies does not render such a public service that it may be accorded a preference in the use of the streets. Louis- ville R. Co. v. Louisville Fire & Life Protection Asso. 151 Ky. 644, 152 S. W. 799, 43 L.R.A.(N.S.) 600, Ann. Cas. 1915A, 89. Annotation: Ann. Cas. 1915A, 93.

[14] Gant v. Oklahoma City, 289 U. S. 98,

[77] L. ed. 1058, 53 S. Ct. 530.

[15] Perkins v. Heert, 158 N. Y. 306, 53 N. E. 18, 43 L.R.A. 858, 70 Am. St. Rep. 483. See FRANCHISES [Also 12 R. C. L. p. 196, § 22].

cities,[16] to erect slaughterhouses,[17] to dispense intoxicating liquors,[18] to supply schoolbooks,[19] to operate ferries,[20] and to exercise the power of eminent domain.[1]

Statutes allowing the sale of carriers' tickets only by agents appointed in a particular manner and providing for the redemption of unused tickets have been upheld as not amounting to unconstitutional class legislation or the prohibited granting of special privileges.[2]

In conclusion it may be mentioned that it has been held that a municipal ordinance is not invalid as unconstitutionally granting special privileges which allows the granting of special permission to licensed hack drivers who procure

the consent of the abutting property owners to stand their vehicles in the street in front of such property, although the same privilege is not granted to those who do not obtain such consent.[3]

§ 532. Illustrations of Invalid Special Privileges and Immunities.— If there are other general classes situated in all respects like the class benefited by a statute, with the same inherent needs and qualities which indicate the necessity or expediency of protection for the favored class, and legislation discriminates against, casts a burden upon, or withholds the same protection from the other class or classes in like situations, it cannot stand.[4] Thus, a statute

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[16] State v. Orr, 68 Conn. 101, 35 A. 770,

[34] L.R.A. 279; Jansen Farms v. Indian- apolis, 202 Ind. 138, 171 N. E. 199, 72 A.L.R. 514; Walker v. Jameson, 140 Ind. 591, 97 N. E. 402, 39 N. E. 869, 28 L.R.A. 679, 48 Am. St. Rep. 222; O'Neal v. Harrison, 96 Kan. 339, 150 P. 551, L.R.A.1915F, 1069, overruling Re Lowe, 54 Kan. 757, 39 P. 710,

[27] L.R.A. 545; State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275; Wheeler v. Bos- ton, 233 Mass. 275, 123 N. E. 684, 15 A.L.R. 275; Tiger River Ranch Co. v. Plage- mann, 282 Mo. 1, 220 S. W. 1, 15 A.L.R. 266; Iler v. Ross, 64 Neb. 710, 90 N. W. 869,

[57] L.R.A. 895, 97 Am. St. Rep. 676; Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684; Rochester v. Gutberlett, 211 N. Y. 309, 105 N. E. 483, L.R.A.1915D, 209, Ann. Cas. 1915C, 53; Riggins v. District Ct. 89 Utah, 183, 51 P. (2d) 645, citing R. C. L.; Utah Mfrs.' Asso. v. Stewart, 82 Utah, 198, 23 P. (2d) 229, citing R. C. L. See also Schoen v. Atlanta, 97 Ga. 697, 25 S. E. 380, 33 L.R.A. 804; Landberg v. Chicago, 237 Ill. 112, 86 N. E. 638, 21 L.R.A. (N.S.) 830, 127 Am. St. Rep. 319; State v. Hill, 126 N. C. 1139, 36 S. E. 326, 50 L.R.A. 473. Annotation: 15 A.L.R. 293, s. 72 A.L.R. 523; 97 Am. St. Rep. 688; 4 Ann. Cas. 281;

[19] Ann. Cas. 1222; Ann. Cas. 1915C, 487. For a detailed discussion see MONOPOLIES, COMBINATIONS, AND RESTRAINTS OF TRADE [Al- so 19 R. C. L. p. 23, § 16]; MUNICIPAL COR- PORATIONS [Also 19 R. C. L. p. 824, § 128].

[17] Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

[18] Plumb v. Christie, 103 Ga. 686, 30 S. E. 759, 42 L.R.A. 181; Riggins v. District Ct. 89 Utah, 183, 51 P. (2d) 645, citing R. C. L.; Utah Mfrs.' Asso. v. Stewart, 82 Utah, 198, 23 P. (2d) 229, citing R. C. L. See INTOXICATING LIQUORS [Also 15 R. C. L. p. 267, §§ 21 et seq.; p. 291 § 45].

[19] Curryer v. Merrill, 25 Minn. 1, 33 Am. Rep. 450; Leeper v. State, 103 Tenn. 500,

[53] S. W. 962, 48 L.R.A. 167; Riggins v. District Ct. 89 Utah, 183, 51 P. (2d) 645, citing R. C. L.; Utah Mfrs.' Asso. v. Stew- art, 82 Utah, 198, 23 P. (2d) 229, citing R. C. L. See Schools [Also 24 R. C. L. p. 635, § 93].

[20] Patterson v. Wollmann, 5 N. D. 608,

[67] N. W. 1040, 33 L.R.A. 536; Nixon v. Reid, 8 S. D. 507, 67 N. W. 57, 32 L.R.A. 315; Riggins v. District Ct. 89 Utah, 183,

[51] P. (2d) 645, citing R. C. L.; Utah Mfrs.' Asso. v. Stewart, 82 Utah, 198, 23 P. (2d) 229, citing R. C. L. See FERRIES [Also 11 R. C. L. p. 923, § 14].

[1] Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. 240 U. S. 30, 60 L. ed. 507, 36 S. Ct. 234; Con- sumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L.R.A. 505; Riggins v. District Ct. 89 Utah, 183, 51 P. (2d) 645, citing R. C. L.; Utah Mfrs.' Asso. v. Stew- art, 82 Utah, 198, 23 P. (2d) 229, citing R. C. L. "Railroad companies and telephone companies and other public service corpora- tions, although they are private corpora- tions, as

distinguished from public corpora- tions are granted special privileges, such as the right of eminent domain, because they are in a measure public corporations and subject to public control. They are chargeable with certain duties to the pub- lic and are answerable to public author- ity for a failure to perform them." Louis- ville R. Co. v. Louisville Fire & Life Pro- tection Asso. 151 Ky. 644, 152 S. W. 799,

[43] L.R.A.(N.S.) 600, Ann. Cas. 1915A, 89. See EMINENT DOMAIN [Also 10 R. C. L. p. 195, § 167].

[2] See CARRIERS, Vol. 9, p. 466, § 59.

[3] Mader v. Topeka, 106 Kan. 867, 189 P. 969, 15 A.L.R. 340; McFall v. St. Louis, 232 Mo. 716, 135 S. W. 51, 33 L.R.A.(N.S.) 471.

[4] McErlain v. Taylor, 207 Ind. 240, 192 N. E. 260, 94 A.L.R. 1284.

creating a preference in the distribution of the assets of an insolvent employer in favor of "manual and mechanical laborers," as against all other types of wage-earning employees, is unconstitutional as making a classification for which there is no reasonable basis.[5] A statute which confers on registered pharmacists the exclusive right to sell patent and proprietary medicines;[6] a special municipal ordinance granting to only a particular individual a special license to conduct a restaurant in which intoxicants may be sold;[7] a statute providing for the use of gas manufactured from petroleum, which requires a person to use a designated lamp when others equally safe are available in the market;[8] a statute permitting county commissioners to relieve from their contracts persons who have entered into contracts for highway construction, of a limited class only, in case of a threatened shortage of labor and materials because of war conditions;[9] and a statute making failure of a convict discharged from a penitentiary to travel beyond the confines of two counties specified, within a specified time,[10] have all been held invalid as granting special privileges in violation of the Constitution.

It has been held that a residence of five years cannot be required by statute as a qualification for office under a constitutional provision against granting privileges or immunities to any citizen or class of citizens which shall not belong to all citizens on the same terms.[11] A statute exempting from liability for debt the proceeds of certificates of fraternal beneficiary associations organized under such statute has been held to be invalid as conferring on such societies and their members a special privilege not given to other insurance companies and benefit societies, in violation of constitutional inhibitions.[12]

A special act authorizing a town to grant to anyone engaged in mining, manufacturing, or merchandising a right of way for the construction, opera-

tion, and maintenance of a tramway or railway upon the streets of the town is unconstitutional as granting a special or exclusive right, privilege, or immunity to a private corporation, association, or individual.[13] Similarly, the intention of the author of a statute and the legislature granting the right to exercise the power of eminent domain that it shall apply to one corporation only invalidates it under the equal protection and special privileges and immunities clauses of the Constitution.[14] An act, however, granting to Purdue University the right of eminent domain does not violate the constitutional provision against granting privileges or immunities which, upon the same

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[5] Ibid.

[6] Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L.R.A. 287, 79 Am. St. Rep. 238.

[7] State ex rel. Davies v. White, 36 Nev. 334, 136 P. 110, 50 L.R.A.(N.S.) 195.

[8] State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489. Annotation: 53 L.R.A. 763.

[9] Davis Constr. Co. v. Boone County, 192 Ind. 144, 132 N. E. 629, 21 A.L.R. 557. Annotation: 21 A.L.R. 568.

[10] Ex parte Schatz, 307 Mo. 67, 269 S. W. 383, 38 A.L.R. 1032.

[11] State ex rel. Holt v. Denny, 118 Ind. 449,

[21] N. E. 274, 4 L.R.A. 65; Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L.R.A. 93.

[12] Williams v. Donough, 65 Ohio St. 499,

[63] N. E. 84, 56 L.R.A. 766. Annotation: 1 A.L.R. 758 et seq. Contra: Brown v. Steckler, 40 N. D. 113,

[168] N. W. 670, 1 A.L.R. 753, in which it was held that a statute providing that "the money or other benefit . . . provided or rendered by any" fraternal beneficiary so- ciety "shall not be liable to attachment" or garnishment, either against the association or beneficiary was constitutional.

[13] McClintock v. Richlands Brick Corp.

[152] Va. 1, 145 S. E. 425, 61 A.L.R. 1033.

[14] Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518. Conferring the power of eminent domain upon voluntary incorporated associations maintaining a religious Chautauqua, which have been in existence and operation for fifteen years with an annual program of not less than sixteen days each year, which have held a lease of timberland for such period, and acquired the land so held, not exceeding 40 acres, creates an arbitrary and unconstitutional classification. Ibid.

terms, do not equally belong to all citizens, since the university, for such considerations, occupies a unique position which permits separate classification.[15]

4. SELECTION OF OFFICERS

§ [533]. Discriminatory Political Qualifications.—Wherever qualifications for public office are fixed, there is necessarily a division into classes, since there is a class which may serve, and another which may not.[16] While the validity of such classifications is subject to attack on constitutional grounds as denying the equal protection of the laws or granting special privileges, the right of the legislature to make such classifications as may be needed to provide for the qualifications of public officers for statutory offices

is generally recognized and unquestioned.[17] One class of statutes which is, however, peculiarly subject to attack on such grounds consists of those making eligibility for appointment dependent upon political qualifications. The decisions are not harmonious on the question as to whether statutes providing for diverse political qualifications of persons to be appointed to public office are or are not unconstitutional as denying the equal protection of the laws or as granting illegal special privileges. The weight of authority seems to uphold the validity of legislation of this character. Some courts take the broad position that there is no such thing as a right to hold office, that in the absence of special constitutional limitations this is a mere privilege at all times within the control of the legislature,[18] and that there can be no valid objection to the right of the legislature to fix the qualifications of public officers or to provide that they shall be appointed from the two principal political parties, although the effect would be that an elector who does not ally himself with their parties could not be appointed to office.[19] Other courts, without manifesting any willingness to concede the correctness of the foregoing reasoning, have upheld statutes which provide that where a particular board of public officers is to consist of several members, not more than a designated number of them shall be members of the same political party. The position is taken that instead of prescribing political qualifications as a requisite for membership in these boards, the statutes permit them to be filled by persons who belong to no political party and who have no political affiliations;[20] that the equal right of every man to be eligible to hold office is fully recognized when he stands on an equal footing with others of his class, all of whom are eligible; that where there are two offices which members of the same party may fill, if one, being a member of such party, is equally eligible with any other member of that party to fill either, his constitutional privilege to hold office is fully recognized and vindicated; and that where a person has been a member of the eligible class from which the two persons were selected, he has had his constitutional chance of appointment equally with all others of that class, so that it cannot be said that eligibility

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[15] Russell v. Purdue University, 201 Ind. 367, 168 N. E. 529, 65 A.L.R. 1384.

[16] State ex rel. Jones v. Sargent, 145 Iowa, 298, 124 N. W. 339, 27 L.R.A.(N.S.) 719, 139 Am. St. Rep. 439.

[17] See PUBLIC OFFICERS [Also 22 R. C. L. p. 401, § 42].

[18] State ex rel. Jones v. Sargent, 145 Iowa, 298, 124 N. W. 339, 27 L.R.A.(N.S.) 719, 139 Am. St. Rep. 439.

[19] Render v. Louisville, 142 Ky. 403, 134 S. W. 458, 32 L.R.A.(N.S.) 530. Annotation: 138 Am. St. Rep. 588. A statute requiring the members of a commission to be appointed from the two dominant political parties is not void as granting special privileges or immunities. State ex rel. Jones v. Sargent, 145 Iowa, 298, 124 N. W. 339, 27 L.R.A.(N.S.) 719, 139 Am. St. Rep. 439.

[20] People v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L.R.A. 775; Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102; McCarter v. McKelvey, 78 N. J. L. 3, 74 A. 316, 138 Am. St. Rep. 583; Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L.R.A. 579.

to hold office depends upon party affiliation.[1] In other jurisdictions it has been held that a provision that certain officers shall be selected equally from the two leading political parties is unconstitutional as granting special privileges and immunities.[2]

A statute conferring on the central committee of one political party only the power to name certain persons from whom the governor must appoint an election commissioner has been held to be in violation of a constitutional prohibition against passing any local or special law granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity, on the ground that such statute confers a special privilege on the committee of one political party and withholds it from the committees of all other parties.[3]

A constitutional provision against the granting of special privileges and immunities is not violated by a statute providing a commission or city manager plan of city government, in making the commission judge of the election and qualification of its members, subject to review by the courts in case of conflict, or in providing for ballots without political party mark or designation, or in making the filing of an acceptance of nomination within five days a condition of printing a candidate's name on the ballots, or in providing that the city manager need not, when appointed, be an inhabitant of the city or state, or in prohibiting active participation by city employees in party politics, or in providing that the commission may fix the salary of the city manager.[4]

§ [534]. Officers of Private Organizations.—Constitutional attacks have been occasionally made on statutes providing for the establishment of official boards and commissions appointed by private associations and organizations. The argument has been made that such laws amount to the granting of special privileges and to a denial of the equal protection of the laws. The trend of judicial authority is to sustain such legislation. For example, the courts have sustained statutes establishing boards of medical examiners to be composed of members appointed by the several medical associations within the state and even permitting one society to name more members than others were permitted to name,[5] and also a statute providing for a municipal plans commission, the members of which were to be appointed by various enumerated organizations.[6] Similarly, the members of a charitable corporation are not deprived of the equal protection of the laws by a statute making the board of trustees of such corporation a self-perpetuating body, by transferring the right to vote for the trustees from such members to the board itself.[7] On the other hand, in some jurisdictions statutes of this general type have been held to be invalid as violating constitutional clauses inhibiting the granting to any corporation,

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[1] Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L.R.A. 579.

[2] State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65 (fire department); Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L.R.A. 93 (fire department). See also Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L.R.A. 408 (police commissioners). Annotation: 138 Am. St. Rep. 588.

[3] State v. Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430.

[4] Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718. A statute forbidding active participation by city employees in party politics, under penalty of fine and imprisonment, does not violate a state constitutional provision that the legislature shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens, or the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Ibid.

[5] Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249.

[6] Bussell v. Gill, 58 Wash. 468, 108 P. 1080, 137 Am. St. Rep. 1070.

[7] Re Mt. Sinai Hospital (Goldman v. Emsheimer) 250 N. Y. 103, 164 N. E. 871, 62 A.L.R. 564.

association, or individual of any special or exclusive privilege, immunity, or franchise.[8]

5. PAYMENT OF FEES AND TAXES INTO SPECIAL FUNDS

§ 535. Generally.—

One form of special privilege, with regard to the constitutional validity of which a difference of opinion exists, is found in statutes which provide for the payment of fees and taxes under special circumstances into the coffers of semipublic corporations or into funds devoted towards designated appropriate objects. For example, it has been held that a statute requiring the agents of insurers doing business in a particular city, but not incorporated under the laws of the state in question, to pay a percentage on the gross premiums received by them for insurance on property in that city, to an exempt firemen's benevolent fund, is not unconstitutional as granting an exclusive privilege or as giving money of the state to a private undertaking.9 In other jurisdictions the courts adhere to a different rule and hold that the state cannot require insurance companies doing business in cities to pay a portion of their earnings to firemen's relief associations for the benefit of disabled firemen and their families.10 It has been held that where a statute providing for the incorporation of societies for the prevention of cruelty to animals permits the incorporation of only one society in a county, the state cannot constitutionally empower such society to appropriate and keep dogs without paying license fees while every other citizen is obliged to pay such a license fee.11 A statute imposing a tax on dogs to indemnify the owners of sheep killed by them has been upheld as not violating a constitutional prohibition of the granting of exclusive separate public emoluments or privileges.12

D. DISCRIMINATIONS BASED ON RESIDENCE

§ 536. Against Nonresidents.—

In considering the application of the equal protection clause of the Fourteenth Amendment to legislation discriminating between residents and nonresidents of a state, it must be kept in mind that the clause cannot be invoked unless the action of a state denies the equal protection of the laws to persons "within its jurisdiction."13 If persons are, however, in the purview of this clause within the jurisdiction of a state, the clause guarantees to all so situated, whether citizens or residents of the state or not, the protection of its laws equally with its own citizens.14 The limitations on

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[8] Lasher v. People, 183 Ill. 226, 55 N. E. 663, 47 L.R.A. 802, 75 Am. St. Rep. 103.

[9] Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217. 10 Ætna F. Ins. Co. v. Jones, 78 S. C. 445, 59 S. E. 148, 13 L.R.A.(N.S.) 1147, 125 Am. St. Rep. 818. Annotation: 13 L.R.A.(N.S.) 1147.

[11] Fox v. Mohawk & H. R. Humane Soc. 165 N. Y. 517, 59 N. E. 353, 51 L.R.A. 681, 80 Am. St. Rep. 767.

[12] McGlone v. Womack, 129 Ky. 274, 111 S. W. 688, 17 L.R.A.(N.S.) 855; State v. Anderson, 144 Tenn. 564, 234 S. W. 768, 19 A.L.R. 180.

[13] See supra, § 475.

[14] Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 919; Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165; State v. Mallory, 73 Ark. 236, 83 S. W. 955, 67 L.R.A. 773, 3 Ann. Cas. 852; McGuire v. District of Columbia, 24 App. D. C. 22, 65 L.R.A. 430; Harper v. Galloway, 58 Fla. 255, 51 So. 226, 26 L.R.A.(N.S.) 794, 19 Ann. Cas. 235; Re Irish, 121 Kan. 72, 122 Kan. 33, 250 P. 1056, 1057, 61 A.L.R. 332; State v. Standard Oil Co. 61 Or. 438, 123 P. 40, Ann. Cas. 1914B, 179; State v. Higgins, 51 S. C. 51, 28 S. E. 15, 38 L.R.A. 561; Steed v. Harvey, 18 Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789. A citizen of another state receives the equal protection of the laws of a state when the state law is impartially administered, with its benefits and obligations, in a matter which is within the state control. Eldridge v. Trezevant, 160 U. S. 452, 40 L. ed. 490, 16 S. Ct. 345. Nonresident landowners may be called upon to share the public burden, and property rights in some instances must yield to the public demands; but the burden must rest equally upon all and no discrimination in this respect can be made

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the right of one state to establish preferences in favor of its own citizens do not depend solely on the guaranty of the clause of the Fourteenth Amendment as to the equal protection of the laws which does not protect persons not within the jurisdiction of such a state. Such limitations are broader, and nonresidents of a state who are noncitizens are also—even though they are not within the jurisdiction of a state, as that phrase is employed in the equal protection clause—protected from discriminations by Article 4, § 2, of the Federal Constitution which secures equal privileges and immunities in the several states to citizens of each state. Moreover, any citizen of the United States, regardless of residence or whether he is within the jurisdiction of a state, is protected in the privileges and immunities which arise from his United States citizenship by the privileges and immunities clause of the Fourteenth Amendment.[15] Laws creating preferences in favor of the citizens of a state may also be violative of provisions in the state Constitution forbidding special legislation.[16]

There is much authority which recognizes the right of the state under certain circumstances to classify residents and nonresidents.[17] Without denying the equal protection of the laws regulations may be based upon the fact that persons or property dealt with are not within the territorial jurisdiction of the regulating authority.[18] Limiting the dower right of a nonresident to the lands of which the husband died seised, while residents are entitled to dower in any lands of which the husband was seised during coverture, does not deny the equal protection of the laws.[19]

When a nonresident observes laws that are enacted with a view to regulate the conduct and action of the citizens of a state, it is his right and privilege to have his property, situated in such state, protected under the law as effectually as the property of a resident; and if his property is subject to taxation, burdens, and diminutions that a resident's property, under the same circumstances, is exempt from, his property is not thus protected and he is denied the equal protection of the laws.[20] Thus, denying tax exemptions to nonresidents which are allowed to residents denies such nonresidents the equal protection of the laws as guaranteed by the Federal Constitution.[1] Many license and tax laws which discriminate against nonresidents have been held to violate the equal protection clause.[2] An exception to the general rule that such

against nonresidents as such. State v. Mallory, 73 Ark. 236, 83 S. W. 955, 67 L.R.A. 773, 3 Ann. Cas. 852. The mere organization of a partnership under the laws of another state is not sufficient to justify the imposition of conditions upon its doing business within the state not required of local partnerships. State v. Cadigan, 73 Vt. 245, 50 A. 1079, 57 L.R.A. 666, 87 Am. St. Rep. 714.

[15] See supra, §§ 449, 454.

[16] Greene v. State, 83 Neb. 84, 119 N. W. 6, 131 Am. St. Rep. 626.

[17] District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 S. Ct. 560; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 S. Ct. 370, 15 Ann. Cas. 645; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261; Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346; Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065, 69 L.R.A. 805; De Grazier v. Stephens, 101 Tex. 194, 105 S. W. 992, 16 L.R.A.(N.S.) 1033, 16 Ann. Cas. 1059. In State v. De Verges, 153 La. 349, 95 So. 805, 27 A.L.R. 1526, it was held that a statute fixing the fee for certificates of a certified public accountant was not void for discrimination in charging $10 to all who apply within ninety days after passage of the act, while it charged nonresidents $25 for a certificate, without examination, on presentation of their credentials in the state of their residence.

[18] Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 S. Ct. 370, 15 Ann. Cas. 645.

[19] Ferry v. Spokane P. & S. R. Co. 258 U. S. 314, 66 L. ed. 635, 42 S. Ct. 358, 20 A.L.R. 1326. Annotation: 66 L. ed. 635.

[20] Sprague v. Fletcher, 69 Vt. 69, 37 A. 239, 37 L.R.A. 840.

[1] Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300.

[2] Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, 65 L. ed. 1029, 41 S. Ct. 571; Re Irish, 121 Kan. 72, 122 Kan. 33, 250 P. 1056, 1057, 61 A.L.R. 332 (recognizing rule); State v. Williams, 158 N. C. 610, 73 S. E. 1000, 40 L.R.A.(N.S.) 279. See also Brown-

enactments discriminating against nonresidents are invalid exists where the license statute or ordinance in question is a police regulation and in addition the classification dividing residents from nonresidents bears a reasonable relation to the purpose to be subserved. Examples are found in decisions upholding the constitutionality of statutes restricting to residents liquor licenses and licenses to practice medicine.[3] Similarly, imposing a license tax upon nonresidents who come onto the waters of a territory to fish, which is not exacted of residents of the territory, is not unconstitutional.[4] The equal protection of the laws is, moreover, not denied a managing agent of a nonresident meat-packing house by the imposition of a license tax on the domestic business conducted by him, since such act applies to managing agents of both domestic and foreign houses.[5]

It is well settled that a state may enact police regulations of a reasonable nature respecting the use of its highways by nonresident operators of motor vehicles, and such regulations may include prohibition of such use in the absence of a license from the state.[6] Furthermore, licenses may be required of nonresidents.[7] Such legislation does not deny to nonresidents the equal pro-

tection required by the Federal and state Constitutions.[8] Nonresident motorists may further be required to appoint the secretary of state as their agent upon whom process may be served in any legal proceedings caused by the operation of their vehicles within the state,[9] and such legislation does not violate the equal protection clause.[10]

The equal protection clause is a general guaranty of equality to all in like circumstances in court proceedings.[11] Deprivation of a nonresident of the right to sue and defend in the courts of a state upon terms of equality with residents of the state in respect of the measure of damages enforced in similar

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back v. North Wales, 194 Pa. 609, 45 A. 660,

[49] L.R.A. 446. Annotation: 61 A.L.R. 337 et seq.; 40 L.R.A.(N.S.) 279 et seq. A state act imposing a license tax upon all manufacturers or persons or corpora- tions engaged in selling automobiles in the state unconstitutionally discriminates against nonresident manufacturers doing business in the state through local sales agents, where it reduces the tax to one fifth of its normal amount if the manu- facturer of the automobiles has three fourths of his assets invested in the bonds of the state or of some of its municipalities, or in other property situated therein and returned for taxation. Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, 65 L. ed. 1029,

[41] S. Ct. 571. For detailed discussion, see LICENSES [Al- so 17 R. C. L. p. 513, § 34].

[3] See LICENSES [Also 17 R. C. L. p. 514, § 34]. No constitutional right of a dentist who has practiced many years in one state is infringed by requiring him, upon seeking a license in another state, to comply with educational qualifications much higher than were required when he first began to practice. People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A.1915D, 538.

[4] Haavik v. Alaska Packers Asso. 263 U. S. 510, 68 L. ed. 414, 44 S. Ct. 177.

[5] Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 S. Ct. 232; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 S. Ct. 403.

[6] See AUTOMOBILES, Vol. 5, p. 590, § 148.

[7] See AUTOMOBILES, Vol. 5, p. 592, § 153.

[8] Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30; Wallace v. Pfost, — Idaho, — 65 P. (2d) 725, 110 A.L.R. 613; State v. Chandler, 131 Me. 262, 161 A. 148, 82 A.L.R. 1339. The fact that the fees collected under the New Jersey Automobile Law exceed the amount required to defray the expense of maintaining the regulation and inspec- tion department, which excess, under the law, is to be applied to the maintenance of improved highways, does not render in- valid as to nonresidents, under the Four- teenth Amendment, the requirements of that law for the registration of automo- biles and the licensing of drivers. Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222,

[37] S. Ct. 30. The absence from the New Jersey Auto- mobile Law of any reciprocal provision by which nonresidents whose cars are duly registered in their home state are given for a limited period free use of the high- ways in return for similar privileges grant- ed to residents of New Jersey does not in- volve an unconstitutional discrimination against nonresidents, where the annual fees prescribed are not so large as to be unreasonable and where any resident own- er would be subjected to the full annual charge for the use of the highways for any period, however brief. Ibid.

[9] See AUTOMOBILES, Vol. 5, p. 830, § 590.

[10] Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30.

[11] See Infra, § 543.

causes of action and like circumstances is a denial of the equal protection of

the laws.[12] The limitation of the time period for which nonresident defendants may be granted a continuance to ninety days, while the time allowed resident defendants rests solely in the discretion of the court, is unconstitutional.[13]
The imposition of certain terms upon nonresidents, regarding service of process upon them, does not violate the equal protection clause.[14] A statute providing that when a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency in all actions growing out of, or connected with, the business of that office or agency, is not, as applied to a nonresident individual, unconstitutional as denying to nonresidents the equal protection of the laws.[15] A statute which requires personal service of summons upon resident owners or occupants of lands for a specified time before the rendition of a decree of sale for taxes and provides for constructive service by publication upon nonresident owners for a different specified length of time before the rendition of such a decree does not create an invalid discrimination.[16]
For the purposes of the remedy by attachment, the legislative authority of a state may classify residents in one class and nonresidents in another.[17] Accordingly, it has been held that a statute permitting an attachment against a nonresident debtor without a bond, while requiring a bond for an attachment against a resident debtor, does not constitute a denial to the nonresident of the equal protection of the law, since it was within the power of the legislature to divide debtors into two classes—nonresident and resident—and, when so classified, to prescribe different modes of proceeding against each class.[18]

§ 537. Against Residents.—

A statute which discriminates unjustly against residents in favor of nonresidents violates the equal protection clause.[19] There must, however, be an actual discrimination against residents in order to invalidate a statute. A license law which requires both resident and nonresident dealers to pay a tax in order to perform certain acts within a state, but, upon payment of which, allows nonresidents to use the facilities of the state without any additional charge therefor, although resident dealers have had to pay a general additional charge for such use, is not invalid because such nonresi-

dents are not also required to pay the regular registration fee which residents are charged. Residents obtain regular and general use of such facilities and use them frequently, while nonresidents are using them only upon special

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[12] State use of Strepay v. Cohen, 166 Md. 682, 172 A. 274, 94 A.L.R. 427.

[13] State ex rel. Cronkhite v. Belden, 193 Wis. 145, 211 N. W. 916, 214 N. W. 460, 57 A.L.R. 1218.

[14] Davidson v. Doherty, 214 Iowa, 739,

[241] N. W. 700, 91 A.L.R. 1308.

[15] Doherty v. Goodman, 294 U. S. 623, 79 L. ed. 1097, 55 S. Ct. 553.

[16] Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261.

[17] Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623,

[19] S. Ct. 346. See also Ownbey v. Mor- gan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433,

[17] A.L.R. 873. The attachment conformably to local law, at the instance of a foreign creditor, of bonds of a foreign corporation for a debt of their nonresident owner, does not deny such owner the equal protection of the laws, where such bonds had been de- posited with a custodian in the state un- der the direction of the state court in the exercise of admittedly lawful powers and could not be removed therefrom without obtaining the authority of the state court,—an authority which was unaffected by the fact that the bonds were registered in the name of the attachment debtor's minor children, since they were so regis- tered solely because of the previous ac- tion of the state court. De Bearn v. Safe Deposit & T. Co. 233 U. S. 24, 58 L. ed. 833,

[34] S. Ct. 584. See ATTACHMENT, Vol. 5, p. 136, § 896.

[18] Central Loan & T. Co. v. Campbell Com. Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346; State v. Broadbelt, 89 Md. 565, 43 A. 771, 45 L.R.A. 433, 73 Am. St. Rep. 201.

[19] Little v. Smith, 124 Kan. 237, 257 P. 959, 57 A.L.R. 100.

occasions.[20] A statute which imposes a license fee on each automobile transported from without the state on its own wheels or in tow of another motor vehicle for the purpose of selling or offering the same for sale does not unconstitutionally discriminate in favor of nonresidents because resident automobile dealers are required to pay in addition a dealer's registration fee for which they receive an allotted number of dealers' plates for use on automobiles traversing the highways of the state.[1] Similarly, the imposition of a license tax upon resident owners of vehicles used upon the streets of a city, the proceeds of which are used for repairs of such streets, is not void in discriminating in favor of nonresidents as against residents. The fact that nonresidents do not use the streets as much as residents furnishes a reasonable basis for the distinction made in the act between the two classes and, moreover, as a class all residents are treated alike, use the streets more, and are more benefited by having them kept in good repair than are nonresidents.[2]

§ [538]. Against Nonresidents of Particular Portions of State.—The constitu-

tional guaranty as to the equal protection of the laws may render invalid statutes and ordinances which effect an unlawful discrimination in favor of a municipality or its inhabitants. Such enactments invalidly attempt to give a preference to a class consisting of residents of a political subdivision of a state.[3] License laws discriminating between residents and nonresidents of a part of the state,[4] such as a particular municipality,[5] violate equality provisions of the Federal and state Constitutions. Accordingly, statutes imposing a license on a business, but exempting therefrom citizens of the town in which the business is conducted and also persons residing or paying taxes therein, have been held to be invalid by reason of the making of a discrimination not permitted under the Fourteenth Amendment to the Federal Constitution.[6]

The exception from a statute requiring the licensing and bonding of wholesale dealers in produce, of local groups composed of individuals residing in the same county, which buy principally from such individuals, is unconstitutional as constituting an arbitrary and unwarranted classification.[7] While there may be apparent discriminations, however, if a statute treats all persons alike under like circumstances and conditions, it cannot be said to deprive anyone of the equal protection of the laws.[8]

Fish and game belong to the states. They are assets of the entire people of a state. Hence, residents of a particular part of the state may not be excluded from fishing9 or hunting10 in other parts of the state and may not be

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[20] Wallace v. Pfost, — Idaho, — 65 P. (2d) 725, 110 A.L.R. 613.

[1] Ibid.

[2] Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 58 L.R.A. 921, 91 Am. St. Rep. 100.

[3] Carrollton v. Bazette, 159 Ill. 284, 42 N. E. 837, 31 L.R.A. 522; Graffty v. Rush- ville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128; Re Irish, 121 Kan. 72, 122 Kan. 33, 250 P. 1056, 1057, 61 A.L.R. 332; McGraw v. Marin, 98 Ky. 673, 34 S. W. 18, 47 L.R.A. 593; Simrall v. Covington, 90 Ky. 444, 14 S. W. 369, 9 L.R.A. 556, 29 Am. St. Rep. 398; State v. Mitchell, 97 Me. 66, 53 A. 887, 94 Am. St. Rep. 481; Pearson v. Portland, 69 Me. 278, 31 Am. Rep. 276; Brooks v. Man- gan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137; State v. Williams, 158 N. C. 610, 73 S. E. 1000, 40 L.R.A.(N.S.) 279; Ideal Tea. Co. v. Salem, 77 Or. 182, 150 P. 852, Ann. Cas. 1917D, 684; Sayre v. Phil- lips, 148 Pa. 482, 24 A. 76, 16 L.R.A. 49, 33 Am. St. Rep. 842. Annotation: 61 A.L.R. 343 et seq.; 16 L.R.A. 49; 40 L.R.A.(N.S.) 280 et seq.

[4] See LICENSES [Also 17 R. C. L. p. 514, § 34].

[5] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 956, § 255].

[6] Com. v. Hana, 195 Mass. 262, 81 N. E. 149, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514.

[7] State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434.

[8] Taggart v. Claypool, 145 Ind. 590, 44 N. E. 18, 32 L.R.A. 586; Crosswell & Co. v. Bishopville, 172 S. C. 26, 172 S. E. 698, cit- ing R. C. L.

[9] See FISH AND FISHERIES [Also 11 R. C. L. p. 1047, § 35].

[10] See GAME AND GAME LAWS [Also 12 R. C. L. p. 693, § 10].

charged more for a license or subjected to greater burdens than residents of such parts of the state in the event they seek to enjoy such privileges. A statute requiring citizens of the state to obtain a license to hunt or fish in certain named counties, exempting residents of those counties from the tax,[11] a statute imposing a higher license fee for the privilege of hunting in a certain county on citizens of the state who are nonresidents of that county,[12] and a statute requiring residents of the state who are not residents of a particular county to give notice of intention to hunt and to pay a special license tax to hunt in that county, while no notice or license tax is required of residents of that county,[13] have variously been held to violate constitutional guaranties of equality. A similar statute, however, has been upheld on the theory that no discrimination is created against residents of any part of the state because nonresidents of any county are charged more to hunt in counties other than those in which they live than residents of such county are charged. Such a law treats all counties alike, gives no privileges to residents of certain counties, and imposes no corresponding burdens on nonresidents of particular counties.[14]

E. CONSTITUTIONAL LIMITATIONS AS TO SPECIAL AND LOCAL LEGISLATION

§ [539]. Generally.—It is a well-recognized principle that under the Federal Constitution all men have the right to be governed by general rules,[15] since equality of rights, privileges, and capacities, and not the granting of special privileges, is the aim of the law.[16] Efforts are not infrequently made by interested parties to procure legislation in their own behalf against other classes of the community, but such legislation is not favored by the courts and will be upheld only when it is strictly within the legitimate power of Congress or the state or municipal legislatures.[17] In general every partial or private law which directly proposes to destroy or affect individual rights or does the same thing by restricting the privileges of certain classes of citizens and not of

others, when there is no public necessity for such discrimination, is unconstitutional and void.[18]

Most of the state Constitutions contain provisions varying greatly in detail but all agreeing in substance or purpose in forbidding local or special legislation.[19] Where, however, there is no express constitutional restriction against the passage of local laws by a state legislature, the courts cannot hold such

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[11] Annotation: 61 A.L.R. 339.

[12] Annotation: 61 A.L.R. 339.

[13] Harper v. Galloway, 58 Fla. 255, 51 So. 226, 26 L.R.A.(N.S.) 794, 19 Ann. Cas. 235. Annotation: 61 A.L.R. 339.

[14] State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138.

[15] Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 S. Ct. 1161; Otf v. Morehead, 235 Ill. 40, 85 N. E. 264, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434; Mathews v. People,

[202] Ill. 389, 67 N. E. 28, 63 L.R.A. 73, 95 Am. St. Rep. 241; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; Harding v. People, 160 Ill. 459,

[43] N. E. 624, 32 L.R.A. 445, 52 Am. St. Rep. 344; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 69 L.R.A. 875, 71 Am. St. Rep. 301; State v. Haun, 61 Kan. 146, 59 P. 340, 47 L.R.A. 369; State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L.R.A. 231; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443.

[16] Gustafson v. State, 40 Tex. Crim. Rep. 67, 45 S. W. 717, 48 S. W. 518, 43 L.R.A. 615.

[17] Chaddock v. Day, 75 Mich. 537, 42 N. W. 977, 4 L.R.A. 809, 13 Am. St. Rep. 468.

[18] Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Jones v. Chicago, R. I. & P. R. Co. 231 Ill. 302, 83 N. E. 215, 121 Am. St. Rep. 313; Millett v. People, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869; State v. Womble, 112 N. C. 862, 17 S. E. 491, 19 L.R.A. 827; Laurens v. Anderson, 75 S. C. 62, 55 S. E. 136, 117 Am. St. Rep. 885, 9 Ann. Cas. 1003; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

[19] See infra, §§ 541, 542.

laws void for want of constitutional authority to enact them,[20] unless they are clearly discriminatory or merely arbitrary.[1]

§ [540]. Fourteenth Amendment.—The equality clause of the Fourteenth Amendment is not necessarily infringed by special legislation. It does not prohibit legislation which is limited either in the objects to which it is directed2 or by the territory within which it is to operate.[3] It merely requires that all persons subjected to such special legislation shall be treated alike under like circumstances and conditions.[4]

§ [541]. State Constitutional Provisions as to Local or Special Legislation.—The Constitutions of practically all of the states contain provisions which prohibit the passage of local or special laws. Many of these constitutional

provisions are quite general in the matters which they cover, while others are very detailed and enumerate many types of fact situations which the legislature is forbidden to treat specially. Since the construction of statutes is the fundamental problem involved in interpreting these constitutional provisions, they are more appropriately treated elsewhere in this work, and merely the general principles relating to them are here set forth.

In determining whether a law is general or special, the courts look ordinarily to its substance rather than to its form. In testing legislation they have stated broadly that general laws are those which relate to, or bind all within, the jurisdiction of the lawmaking power, while special laws are limited

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[20] Harper v. Galloway, 58 Fla. 255, 51 So. 226, 26 L.R.A.(N.S.) 794, 19 Ann. Cas. 235. Annotation: 4 Ann. Cas. 659.

[1] See infra, § 540.

[2] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Cen- tral Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Marchant v. Pennsylvania R. Co.

[153] U. S. 380, 38 L. ed. 751, 14 S. Ct. 894; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 S. Ct. 350; Dolley v. Abilene Nat. Bank (C. C. A. 5th) 179 F. 461, 32 L.R.A.(N.S.) 1065, affirmed in 228 U. S. 1, 57 L. ed. 707, 33 S. Ct. 409; State v. Leavitt, 105 Me. 76, 72 A. 875, 26 L.R.A. (N.S.) 799; Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407; Woolley v. Mears, 226 Mo. 41, 125 S. W. 1112, 136 Am. St. Rep. 687; State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L.R.A. 231; State v. Hanlon, 77 Ohio St. 19, 82 N. E. 662, 13 L.R.A.(N.S.) 539, 122 Am. St. Rep. 472; State v. Savage,

[96] Or. 53, 184 P. 567, 189 P. 427, citing R. C. L.; State v. Haskell, 84 Vt. 429, 79 A. 852, 34 L.R.A. (N.S.) 286; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, af- firmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584; Bittenhaus v. Johnston, 92 Wis. 588, 66 N. W. 805, 32 L.R.A. 380. Annotation: 25 Am. St. Rep. 883.

[3] See supra, § 488.

[4] Ft. Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387, 71 L. ed. 1112, 47 S. Ct. 595; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Connolly v. Union Sewer Pipe Co.

[184] U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; American Sugar Ref. Co. v. Louisiana,

[179] U. S. 89, 45 L. ed. 102, 21 S. Ct. 43; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 S. Ct. 284; Brown v. New Jer- sey, 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77; Orient Ins. Co. v. Daggs, 172 U. S. 557,

[43] L. ed. 552, 19 S. Ct. 281; Magoun v. Illi- nois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 S. Ct. 585; Marchant v. Pennsyl- vania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 S. Ct. 894; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; McPher- son v. Blacker, 146 U. S. 1, 36 L. ed. 869,

[13] S. Ct. 3; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 S. Ct. 1176; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 S. Ct. 1161; Hays v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 S. Ct. 350; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Dolley v. Abi- lene Nat. Bank (C. C. A. 8th) 179 F. 461, 32 L.R.A.(N.S.) 1065, affirmed in

228 U. S. 1, 57 L. ed. 707, 33 S. Ct. 409; State v. Leav- itt, 105 Me. 76, 72 A. 875, 26 L.R.A. (N.S.) 799; Leavitt v. Canadian P. R. Co. 90 Me. 153, 37 A. 886, 38 L.R.A. 152; Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407; Stone v. Jefferson, 317 Mo. 1, 293 S. W. 780, 52 A.L.R. 879; Woolley v. Mears, 226 Mo. 41, 125 S. W. 1112, 136 Am. St. Rep. 637; State v. Walsh,

[136] Mo. 400, 37 S. W. 1112, 35 L.R.A. 231; State v. Hanlon, 77 Ohio St. 19, 82 N. E. 662, 13 L.R.A. (N.S.) 539, 122 Am. St. Rep. 472; State v. Savage, 96 Or. 53, 184 P. 567,

[189] P. 427, citing R. C. L.; State v. Haskell,

[84] Vt. 429, 79 A. 852, 34 L.R.A.(N.S.) 286; Lawrence v. Rutland R. Co. 80 Vt. 370, 67 A. 1091, 15 L.R.A.(N.S.) 350, 13 Ann. Cas. 475; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200,

[71] L. ed. 1000, 47 S. Ct. 584.

in the objects to which they apply, relating to particular persons, things, or places or to persons, things, or places which, though not particularized, are separated by some method of selection from the whole class to which the law might, except for such legislation, be applied. Local laws are those the operation of which is confined within territorial limits other than those of the whole state or any properly constituted class or locality therein.

The mere fact that a law only applies, however, to a limited number does not make it special instead of general. It may be general within the constitutional sense and yet, in its application, only affect one person or one place. Because its right and protection cannot be enjoyed by every citizen does not make it unconstitutional. If the law is general and uniform in its operation upon all persons in like circumstances, it is general in a constitutional sense. Laws are general and uniform not because they operate on every person in the state, but because they operate on every person who is brought within the relations and circumstances provided for—not because they embrace all of the governed, but because they may embrace all—if the persons governed occupy the position of those who are embraced. Classification is permissible under constitutional provisions forbidding local or special laws, provided not only the law applies uniformly to all persons in its operation who are in the same circumstances, but provided there is a rational basis for putting the persons to whom it applies in a different group from other persons. Therefore, the rule is settled that a statute relating to persons or things as a class is a general law, but a statute relating to particular persons or things of a class is special. Under this rule it is apparent that in every case the vice of a law, as a special law, is that it rests upon a false and deficient classification and

does not embrace all of the class to which it is naturally related.[5]

§ [542]. Miscellaneous State Constitutional Provisions; Uniformity of Operation.—In several of the state Constitutions there are clauses requiring that all laws of a general nature shall have a uniform operation6 or that no special or local law shall be passed where a general law can be made applicable.[7] In

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[5] See STATUTES [Also 25 R. C. L. p. 813, §§ 65-81].

[6] Chicago, B. & Q. R. Co. v. Iowa (Chi- cago, B. & Q. R. Co. v. Cutts) 94 U. S. 155,

[24] L. ed. 94 (Iowa Constitution); Peirce v. Van Dusen (C. C. A. 6th) 78 F. 693, 69 L.R.A. 705; State v. Pitts, 160 Ala. 133, 49 So. 441, 686, 135 Am. St. Rep. 79; Rainey v. Michel, 6 Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148; Pacific Coast Dairy v. Police Ct. 214 Cal. 668, 8 P. (2d) 140, 80 A.L.R. 1217; Wallace v. Zinman, 200 Cal. 585, 254 P. 946, 62 A.L.R. 1341; Dougherty v. Aus- tin, 94 Cal. 601, 28 P. 834, 29 P. 1092, 16 L.R.A. 161; Bainbridge v. Jester, 157 Ga. 505, 121 N. E. 798, 33 A.L.R. 1406; Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105; State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218; State v. Garbroski, 111 Iowa, 496, 82 N. W. 959, 56 L.R.A. 570, 82 Am. St. Rep. 524; Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; Davis v. Wiemeyer,

[124] Ohio St. 103, 177 N. E. 37, 77 A.L.R. 1280; State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637; State ex rel. Schwartz v. Ferris, 53 Ohio St. 314,

[41] N. E. 579, 30 L.R.A. 218; State v. Nelson,

[52] Ohio St. 88, 39 N. E. 22, 26 L.R.A. 317; Bishop v. Tulsa, 21 Okla. Crim. Rep. 457,

[209] P. 228, 27 A.L.R. 1008. See STATUTES [Also 25 R. C. L. p. 815, § 66].

[7] Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431 (Maryland Consti- tution); Missouri & N. A. R. Co. v. State,

[92] Ark. 1, 121 S. W. 930, 31 L.R.A.(N.S.) 861, 135 Am. St. Rep. 164; Pacific Coast Dairy v. Police Ct. 214 Cal. 668, 8 P. (2d) 140, 80 A.L.R. 1217; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Bainbridge v. Jester, 157 Ga. 505, 121 N. E. 798, 33 A.L.R. 1406; Union Dry Goods Co. v. Georgia Pub. Serv. Corp.

[142] Ga. 841, 83 S. E. 946, L.R.A.1916E, 358, affirmed in 248 U. S. 372, 63 L. ed. 309, 39 S. Ct. 117, 9 A.L.R. 1420; Sanitary Dist. v. Ray, 199 Ill. 63, N. 64 N. E. 1048, 93 Am. St. Rep. 102; Knopf v. People, 185 Ill. 20, 57 N. E. 22, 76 Am. St. Rep. 17; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Szroka v. Northwest- ern Bell Teleph. Co. 171 Minn. 57, 213 N. W. 557, 59 A.L.R. 404; State v. Baskowitz,

[250] Mo. 82, 156 S. W. 945, Ann. Cas. 1915A, 477; Sapulpa v. Land, 101 Okla. 22, 223 P. 640, 35 A.L.R. 872; Bishop v. Tulsa, 21 Okla. Crim. Rep. 457, 209 P. 228, 27 A.L.R. 1008; Kucker v. Sunlight Oil & Gasoline Co. 230 Pa. 528, 79 A. 747, Ann. Cas. 1912A, 503. See STATUTES [Also 25 R. C. L. p. 820, § 68; p. 824, § 73].

many instances the granting of special privileges to any citizen or classes of citizens on terms not equally applicable to all citizens8 or the enacting of special legislation relating to any one of a list of enumerated subjects is expressly forbidden.[9] The general effect of all of such provisions is to prohibit class legislation of the character inhibited by the clause of the Fourteenth Amendment to the Federal Constitution securing the equal protection of the law.[10]

A provision requiring uniformity of legislation does not mean that all laws must embrace all persons, since a law is said to be general and uniform, not because it operates alike upon every person in the state, but because it operates alike upon every person in the state who is brought within the conditions and circumstances prescribed

by the law.[11] As the rule is sometimes stated, it is sufficient if a law operates the same in all parts of the state under the

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[8] Pacific Coast Dairy v. Police Ct. 214 Cal. 668, 8 P. (2d) 140, 80 A.L.R. 1217; Sarlis v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218; State v. Garbroski, 111 Iowa, 496, 82 N. W. 959, 56 L.R.A. 570, 82 Am. St. Rep. 524; State v. Hill, 98 Miss. 142, 53 So. 411, 31 L.R.A.(N.S.) 490; State v. Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L.R.A. 317; Gustafson v. State, 97 Tex. Crim. Rep. 67, 45 S. W. 717, 43 S. W. 518, 43 L.R.A. 615. As to similar state constitutional provisions forbidding generally the granting of special privileges or immunities, see supra, § 529.

[9] Knopf v. People, 185 Ill. 20, 57 N. E. 22, 76 Am. St. Rep. 17. Annotation: 7 L.R.A. 194. For a detailed discussion of the specific matters in which special or local legislation is forbidden, see STATUTES [Also 25 R. C. L. p. 826, §§ 74-81].

[10] Peirce v. Van Dusen (C. C. A. 6th) 78 F. 693, 69 L.R.A. 705; People v. Gordon, 274 Ill. 462, 113 N. E. 864, citing R. C. L.; State v. Garbroski, 111 Iowa, 496, 82 N. W. 56 L.R.A. 570, 82 Am. St. Rep. 524; State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637; Spicer v. Benefit Asso. R. E. 142 Or. 574, 17 P. (2d) 1107, 21 P. (2d) 187, 90 A.L.R. 517. State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

[11] Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94 (Iowa Constitution); Rainey v. Michel, 6 Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148; Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L.R.A.(N.S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475; Van Harlinger v. Doyle, 134 Ca.. 33, 66 P. 44, 54 L.R.A. 771; Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105; Waugh v. Glos, 246 Ill. 604, 92 N. E. 974, 138 Am. St. Rep. 259; Ritchie v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A.(N.S.) 994; Chicago v. Schmidinger, 243 Ill. 167, 90 N. E. 369, 44 L.R.A.(N.S.) 632, 17 Ann. Cas. 614, affirmed in 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; Chicago v. Hulbert, 234 Ill. 321, 84 N. E. 922, 17 L.R.A. (N.S.) 684, 123 Am. St. Rep. 100; Jones v. Chicago, R. I. & P. R. Co. 231 Ill. 302, 83 N. E. 215, 121 Am. St. Rep. 313; Douglas v. People, 225 Ill. 536, 80 N. E. 341, 8 L.R.A. (N.S.) 1116, 116 Am. St. Rep. 162; Arms v. Ayer, 192 Ill. 601, 61 N. E. 851, 58 L.R.A. 277, 85 Am. St. Rep. 357; Louisville, N. A. & C. R. Co. v. Wallace, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787; Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610; Armstrong v. State, 170 Ind. 188, 84 N. E. 3, 15 L.R.A. (N.S.) 646; Davis Coal Co. v. Polland, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; Morris v. Stout, 110 Iowa, 659, 73 N. W. 843, 50 L.R.A. 97; State ex rel. West v. Des Moines, 96 Iowa, 521, 65 N. W. 818, 31 L.R.A. 186, 59 Am. St. Rep. 381; McCormick v. Rusch, 15 Iowa, 127, 83 Am. Dec. 401; Festerand v. Laster, 15 La. App. 159, 130 So. 634, citing R. C. L.; State v. Bridgeman & R. Co. 117 Minn. 186, 134 N. W. 496, Ann. Cas. 1913D, 41; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 130 N. W. 545, 33 L.R.A.(N.S.) 494, Ann. Cas. 1912B, 1030; Murray v. Ramsey County, 81 Minn. 359, 84 N. W. 103, 51 L.R.A. 828, 83 Am. St. Rep. 379; State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725; Alexander v. Elizabeth, 56 N. J. L. 71, 28 A. 51, 23 L.R.A. 525; State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; Cramer v. C. athern Ohio Loan & T. Co. 72 Ohio St. 25, 74 N. E. 200, 69 L.R.A. 415, 2 Ann. Cas. 990; State v. Hogan, 63 Ohio St. 202, 58 N. E. 572, 52 L.R.A. 863, 81 Am. St. Rep. 626; State ex rel. Richards v. Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L.R.A. 737; Bishop v. Tulsa, 21 Okla. Crim. Rep. 457, 209 P. 228, 27 A.L.R. 1008; Re Oberg, 21 Or. 406, 28 P. 130, 14 L.R.A. 577; Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498; De Walt v. Bartley, 146 Pa. 529, 24 A. 185, 15 L.R.A. 771, 28 Am. St. Rep. 814; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70; Carnegie Natural Gas Co. v. Swiger, 72 W. Va. 557, 79 S. E. 3, 46 L.R.A.(N.S.) 1073. The constitutional requirement of uniformity in the operation of Federal laws is not intrinsic, but geographic. Poe v. Seaborn, 282 U. S. 101, 75 L. ed. 239, 51 S. Ct. 58. The provision of the Ohio Const. Art. 2, § 26, that all laws of a general nature shall have a uniform operation throughout the state, does not guarantee the general protection of all the inhabitants of the state, but only that such laws shall be in force in all parts of the state. State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 41 N. E. 579, 30 L.R.A. 218. See STATUTES [Also 25 R. C. L. p. 816, § 66].

same circumstances.[12] The word "uniform" in such constitutional provisions does not mean "universal,"[13] and, therefore, the uniform operation required by them does not mean universal operation.[14] A law may be constitutional within the purview of such constitutional provisions, and yet operate in fact only upon a very limited number of persons or things or within a limited territory.[15] Classification made by statute meets a constitutional requirement that all laws of a general nature shall have a uniform operation, however, if based upon something which distinguishes one class from another in such a way as to suggest the reasonable necessity for legislation based upon such classification.[16]

F. EQUALITY IN LEGAL PROCEEDINGS

1. CIVIL

§ 543. Generally.—

Generally speaking, equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected if such a course also would be applied to any other person in the state under similar circumstances and conditions.17

Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the Fourteenth Amendment to the Federal Constitution, when its courts are open to them on the same condition as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts.[18] The Supreme Court

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[12] Sarlis v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718.

[13] Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L.R.A.(N.S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475.

[14] Cooper v. Rollins, 152 Ga. 538, 110 S. E. 726, 20 A.L.R. 1105; Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1296; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

[15] Re Martin, 157 Cal. 51, 106 P. 235, 26 L.R.A.(N.S.) 242; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

[16] State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218.

[17] Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 S. Ct. 805; Ashley v. Three Justices (Ashley v. Wait) 228 Mass. 63, 116 N. E. 961, 8 A.L.R. 1463, writ of error dismissed in 250 U. S. 652, 63 L. ed. 1190, 40 S. Ct. 53.

[18] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287, 17 Ann. Cas. 1247; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Jones

v. Chicago, R. I. & P. R. Co. 231 Ill. 302, 83 N. E. 215, 121 Am. St. Rep. 313; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407; Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831; Opinion of Justices, 207 Mass. 601, 94 N. E. 558, 34 L.R.A. (N.S.) 604; Templar v. State Examiners, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610; State ex rel. Wells v. Walker, 336 Mo. 1233, 84 S. W. (2d) 124, citing R. C. L.; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717; State v. Shedrol, 75 Vt. 277, 54 A. 1081, 63 L.R.A. 179, 98 Am. St. Rep. 825; State v. Dering, 84 Wis. 585, 54 N. W. 1104, 19 L.R.A. 858, 36 Am. St. Rep. 948. See also State ex rel. Woods-Young Co. v. Tedder, 103 Fla. 1033, 138 So. 643, writ of certiorari denied in 285 U. S. 557, 76 L. ed. 946, 52 S. Ct. 458, citing R. C. L. Annotation: 14 L.R.A. 585; 23 Am. St. Rep. 25; 25 Am. St. Rep. 877. It is an essential element of equal protection of the laws that each person shall possess the unhampered right to assert in the courts his rights, without discrimination, by the same process against those who wrong him as is open to every other person. The courts must be open to all upon the same terms. No obstacles can be thrown in the way of some which are not interposed in the path of others. Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A. 1916F, 831. As to the validity of legislation granting attorneys' fees as costs to particular litigants in certain types of proceedings, or against certain classes of litigants, such as railroads and insurance companies, see COSTS.

at an early date recognized the rule that an act of the legislature which in terms would give to one individual certain rights and the benefit of certain modes of procedure and would deny to another similarly situated the same rights could be challenged successfully on the ground of unjust discrimination and denial of the equal protection of the laws.[19] Thus, a statute which denies to the laboring man equal access to the courts denies the equal protection of the laws. Whatever may be his social and economic condition outside, when he enters the court, the law can permit no rule to fetter him in the prosecution of his claims or the preservation of his rights which does not apply equally to all others respecting the same kinds of claims and rights.[20]

The Fourteenth Amendment was not intended to deprive the states of their power to establish and regulate judicial proceedings, and its provisions therefore only restrain acts which so transcend the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation.[1] The equal protection of the laws guaranteed by this amendment in respect of legal proceedings does not require that every person in the land shall possess the same rights and privileges as every other person, and hence does not forbid proper and reasonable classifications in the field of court proceedings.[2] This amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies,[3] whether as between states4 or as between different sections of the same state.[5] A provision in a state Constitution, however, to the effect that the legislature shall not pass any local or special law regulating the practice or jurisdiction of the courts is a specific limitation, and because of it the practice or jurisdiction as prescribed by statute cannot be different in the courts of such a state in any class of localities from what it is elsewhere in the state.[6] The reason for the

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[19] Backus v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 S. Ct. 445. A legislature may not prescribe one rule for one suitor or class of suitors and another for all others under like circumstances. Davidson v. Jennings, 27 Colo. 187, 60 P. 354, 48 L.R.A. 340, 83 Am. St. Rep. 49. The legislature has no power to discriminate between persons or classes respecting the right to

invoke the arbitration of the courts in the adjustment of their respective rights. Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 41 N. E. 263, 29 L.R.A. 386, 53 Am. St. Rep. 622.

[20] Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831.

[1] Missouri P. R. Co. v. Larabee, 234 U. S. 459, 58 L. ed. 1398, 34 S. Ct. 979; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 S. Ct. 1114; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989.

[2] Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; State v. Broadbelt, 89 Md. 565, 43 A. 771, 45 L.R.A. 433, 73 Am. St. Rep. 201.

[3] Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 S. Ct. 390; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 S. Ct. 625; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383, affirming 14 Utah, 71, 46 P. 756, 37 L.R.A. 103; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 S. Ct. 1114; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 S. Ct. 350; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Sawyer v. State, 94 Fla. 60, 113 So. 736, citing R. C. L.; People ex rel. Thrasher v. Smith, 275 Ill. 256, 114 N. E. 31, L.R.A. 1917B, 1075; Saylor v. Duel, 236 Ill. 429, 86 N. E. 119, 19 L.R.A. (N.S.) 377; Taggart v. Claypole, 145 Ind. 590, 44 N. E. 18, 32 L.R.A. 586; Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 33 N. E. 421, 18 L.R.A. 729; State v. Jack, 69 Kan. 387, 76 P. 911, 1 L.R.A.(N.S.) 167, 2 Ann. Cas. 171; People ex rel. Armstrong v. Warden, 183 N. Y. 223, 76 N. E. 11, 2 L.R.A.(N.S.) 859, 5 Ann. Cas. 325.

[4] Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Sawyer v. State, 94 Fla. 60, 113 So. 736, citing R. C. L.; State v. Jack, 69 Kan. 387, 76 P. 911, 1 L.R.A.(N.S.) 167, 2 Ann. Cas. 171.

[5] Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 S. Ct. 583; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383, affirming 14 Utah, 71, 46 P. 756, 37 L.R.A. 103; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Sawyer v. State, 94 Fla. 60, 113 So. 736, citing R. C. L.

[6] Sapulpa v. Land, 101 Okla. 22, 223 P. 640, 35 A.L.R. 872.

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rule is that the right to redress of any wrong in the courts is a personal one unaffected by the place of residence.[7]

§ 544. Jurisdiction.—

The equal protection clause of the Fourteenth Amendment is not violated by any diversity in the jurisdiction of the several courts of a state as to subject matter, amount, or finality of decision, if all persons within the territorial limits of the respective jurisdictions of such courts have an equal right, in like cases and under like circumstances, to resort to them for redress.8

§ 545. Venue.—

As a general proposition the venue of civil actions is a matter within legislative discretion.9 In relation to the guaranty of equal right of access to the courts, it is fundamental rights which the Fourteenth Amendment safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not, under any view, the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal

protection of the laws has been afforded, but whether in the tribunals which the state has provided equal laws prevail.10 The mere direction of the state law that a cause, under given circumstances, shall be tried in one forum instead of another or may be transferred and brought from one forum to another can have no tendency to violate the guaranty of the equal protection of the laws where, in both the forums, equality of law governs and equality of administration prevails.11 A provision that election contests shall be brought and may be heard in one particular county while prosecutions for criminal violations of the election laws must be conducted in the county where the crime is alleged to have been committed does not violate the inhibition against inequality.12 A discrimination without any reasonable and adequate basis against particular persons in venue statutes, however, which is arbitrary and burdensome, violates the Fourteenth Amendment.13

§ 546. —

Corporate Nature of Litigants.—The cases in general recognize that the nature of a litigant as corporate or otherwise may serve as a ground of reasonable discrimination as to the place of trial,14 although doubtless every statute presents its own problem as to whether, in view of its terms and opera-

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[7] Sapulpa v. Land, 101 Okla. 22, 223 P. 640, 35 A.L.R. 872; Re Ruan Street, 132 Pa. 257, 19 A. 219, 7 L.R.A. 193.

[8] Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. 281 U. S. 74, 74 L. ed. 710, 50 S. Ct. 228, 66 A.L.R. 1460; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Ocampo v. United States, 234 U. S. 91, 58 L. ed. 1231, 34 S. Ct. 712; Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 S. Ct. 106; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 S. Ct. 350; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 S. Ct. 57; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989.

[9] See VENUE [Also 27 R. C. L. p. 779, § 31.

[10] Bain Peanut Co. v. Pinson, 282 U. S. 499, 75 L. ed. 482, 51 S. Ct. 228; Cincinnati Street R. Co. v. Snell, 193 U. S. 30, 48 L. ed. 604, 24 S. Ct. 319; Phillips Petroleum Co. v. Smith, 177 Okla. 539, 61 P. (2d) 184, 107 A.L.R. 858. Annotation: 107 A.L.R. 863.

[11] Cincinnati Street R. Co. v. Snell, 193 U. S. 30, 48 L. ed. 604, 24 S. Ct. 319.

[12] Ashley v. Three Justices (Ashley v. Wait) 228 Mass. 63, 116 N. E. 961, 8 A.L.R. 1463, writ of error dismissed in 250 U. S. 652, 63 L. ed. 1190, 40 S. Ct. 53.

[13] See Power Mfg. Co. v. Saunders, 274 U. S. 490, 71 L. ed. 1165, 47 S. Ct. 678. Annotation: 107 A.L.R. 863, 866 et seq.

[14] Bain Peanut Co. v. Pinson, 282 U. S. 499, 75 L. ed. 482, 51 S. Ct. 228. Annotation: 107 A.L.R. 863 et seq.; 75 L. ed. 482.

tion as a whole and the sort of actions to which it relates, a conceivable reasonable basis of classification exists.[15]

A statute which allows suits against private corporations to be brought in any county in which the cause of action arose does not deny the equal protection of the laws, although unincorporated individuals are not subject to suit outside their domiciliary counties in a similar situation.[16] On the other hand, it has been decided, overruling earlier authorities,[17] that a statute entitling a natural person to be sued in the county where he or the plaintiff resides, but authorizing suit against a corporation in the county

in which the cause of action accrues, denies to such a corporate defendant the equal protection of the laws.[18] A statute which provides that suit against a corporation may be brought in any county where the cause of action accrued or where the corporation has or usually keeps an office or agent for the transaction of its usual and customary business does not deny to corporations the equal protection of the laws in that other sections of the venue statutes provide that suits generally are required to be brought "either in the county within which the defendant resides or in the county in which the plaintiff resides and the defendant may be found."[19]

It has been held that in actions concerning the title to real estate, a corporation cannot be denied the right to have an action tried in the county where the land is situated if natural persons are granted such right.[20]

In some cases statutes pertaining to venue which discriminate among foreign and domestic corporations have been held to be invalid.[1] Thus, a statute permitting a domestic corporation to be sued in any county in the state in which any part of the alleged cause of action arose, without making like provision as to foreign corporations and individuals, violates the equal protection clause.[2] A statute which permits a foreign corporation doing business in the state and having an office in one county to be sued in any county of the state, without regard to its place of business or the location of its property or officers, but which requires a domestic corporation to be sued at its place of business or where its chief officer resides, and entitles a natural person to be sued at his residence, unconstitutionally discriminates against foreign corporations.[3] A statute which provides that "any foreign corporation doing business in the state . . . and any person . . . having any cause of action against such corporation, arising on contract, tort, or otherwise, may file suit in any county . . . where the plaintiff resides or where said corporation has its principal place of business, or has property, or . . . has an agent appointed upon whom service of . . . process may be had" is unconstitutional.[4] Elsewhere, statutes very similar in import have been sustained.[5] Thus, a statute authorizing a suit against a foreign corporation in any county where it may be "found," while a domestic corporation is entitled to be sued "in the county in which such corporation is domiciled, or in the county in

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[15] Annotation: 107 A.L.R. 863; 75 L. ed. 482.

[16] Bain Peanut Co. v. Pinson, 282 U. S. 499, 75 L. ed. 482, 51 S. Ct. 228.

[17] Annotation: 107 A.L.R. 865 (rule of earlier cases now overruled).

[18] Annotation: 107 A.L.R. 865, 866.

[19] Annotation: 107 A.L.R. 865.

[20] Annotation: 107 A.L.R. 864; 75 L. ed. 484.

[1] Power Mfg. Co. v. Saunders, 274 U. S. 490, 71 L. ed. 1165, 47 S. Ct. 678. Annotation: 107 A.L.R. 866 et seq.; 75 L. ed. 487, 488.

[2] Annotation: 107 A.L.R. 866.

[3] Power Mfg. Co. v. Saunders, 274 U. S. 490, 71 L. ed. 1165, 47 S. Ct. 678. Annotation: 107 A.L.R. 867, 868.

[4] Phillips Petroleum Co. v. Smith, 177 Okla. 539, 61 P. (2d) 184, 107 A.L.R. 858.

[5] Annotation: 107 A.L.R. 868 et seq.; 75 L. ed. 488.

which the cause of action may occur or accrue," which is construed to mean that a foreign corporation is "found" in a county in which it had its business localized, has been held valid.[6]

Statutes classifying corporations or associations for purposes of venue according to the particular purpose or specific business in which they are engaged have generally been held not to violate the equal protection of the laws.[7] A statute, however, which permits actions for injuries to persons or property to be brought against trucking or bus companies, railroads, or mail stage operators in any county through or into which the line or road passes, is unconstitutional in singling out such particular firms engaged in vehicular traffic.[8]

§ 547. —

Miscellaneous Bases.—Classifications as to venue have often been made not on the basis of the nature of litigants as corporate or natural, but on the basis of the nonresidence of a party. Such statutes have been held in some instances to violate the equal protection clause. In other cases similar legislation has been declared valid.9

Classifications as to venue based upon the type of action involved have been variously adjudged. A statute expressly authorizing libel suits against corporations to be brought in the county in which the defendant is located or in the county in which the plaintiff resides, while suits against individuals under the general venue statutes must be brought in the county where the defendant resides or where the plaintiff resides and the defendant may be found, is invalid in discriminating for no good reason between corporate libelers and individual libelers.[10] On the other hand, a statute providing that actions for injuries caused by the negligence of the owner of any automobile may be brought by the party injured against such owner in the county in which the injured party resides and that a summons may be issued to the sheriff of any county in the state wherein the defendant resides has been held not to deny the equal protection of the laws.[11]

Classification making venue dependent upon the place of the transaction out of which the cause of action arises has been held valid.[12] Similarly, a venue classification based upon the fact that a cause of action arose outside the state has been sustained.[13]

§ 548. Removal of Causes.—

The plenary power of Congress over the privilege of granting jurisdiction affecting the removal of causes to the Federal courts manifestly includes discretion to classify remedies as well as the rights thereby intended to be enforced. Hence, a Federal statute which prohibits removal on the ground of diversity of citizenship in such cases as arise under the Federal Employers' Liability Act does not deny the equal protection of the laws because other statutes do not prohibit removal of causes in other types of cases.14

A state constitutional provision which requires a foreign public service corporation to become incorporated under the laws of the state as a condition of obtaining authority to carry on intrastate business therein does not violate the Fourteenth Amendment because an effect of local incorporation will be

[6] Annotation: 107 A.L.R. 868.
[7] Annotation: 107 A.L.R. 870, 871.
[8] Schwarting v. Ogram, 123 Neb. 76, 242 N. W. 273, 81 A.L.R. 769.
[9] Annotation: 107 A.L.R. 871.
[10] Annotation: 107 A.L.R. 872.
[11] Allen v. Smith, 84 Ohio St. 283, 95 N. E. 829, Ann. Cas. 1912C, 611.
[12] Annotation: 107 A.L.R. 872.
[13] Annotation: 107 A.L.R. 873.
[14] Teel v. Chesapeake & O. R. Co. (C. C. A. 6th) 204 F. 918, 47 L.R.A.(N.S.) 21.

to deprive such corporation of the right to sue in the Federal courts and to remove suits to them on the ground of diversity of citizenship.[15]

§ 549. Conditions Precedent to Suit.—

The Fourteenth Amendment to the Federal Constitution does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object.[16] Actions for damages for loss of crops through deficient fertilizers are sufficiently distinguishable from other damage suits to uphold legislation requiring chemical analysis of the fertilizer sold before suit may be brought.[17] Reasonable classifications as to the residence prerequisite to the maintenance of certain types of litigation, such as divorce, do not violate the Constitution.[18]

§ 550. Procedure.—

The equal protection clause does not exact uniformity of procedure; and the legislature may classify litigation and adopt one type of procedure for one class and a different type for another.[19] Moreover, this constitutional guaranty does not prevent a legislature which has established a certain rule of procedure and continued it in force for some time from subsequently repealing the act and establishing an entirely different mode of procedure.[20]

Classifications in the procedure employed in litigation which are ascertained to be reasonable and to rest upon a sufficient basis have been consistently sustained in a variety of types of proceedings.[1] Thus, the fact that condemnation

proceedings under a highway act are conducted on behalf of the state is in itself sufficient basis for the exercise of the legislative judgment in providing for the state exercise of the power, a different procedure from that prescribed for the exercise of eminent domain by a public corporation.[2] Moratorium laws affecting the procedure in mortgage foreclosure cases have been sustained against attack under the equal protection clause.[3] Denial of the right to certain litigants to assert defenses in particular instances has been sustained. Included in such instances are cutting off to insurance companies the defense of fraudulent statements in insurance applications unless the death of the injured resulted from matter misrepresented4 and the abolition of the defenses of assumption of risk, contributory negligence, and fellow servant doctrine to employers who come within the Employers' Liability Acts or Workmen's

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[15] Railway Exp. Agency v. Virginia, 282 U. S. 440, 75 L. ed. 450, 51 S. Ct. 201, 72 A.L.R. 102.

[16] Jones v. Union Guano Co. 264 U. S. 171, 68 L. ed. 623, 44 S. Ct. 280. Annotation: 68 L. ed. 623.

[17] Jones v. Union Guano Co. 264 U. S. 171, 68 L. ed. 623, 44 S. Ct. 280. Annotation: 68 L. ed. 623.

[18] Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A.1916A, 696, Ann. Cas. 1916E, 1097. Annotation: L.R.A.1916A, 710.

[19] Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 50 S. Ct. 299, 68 A.L.R. 434.

[20] A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 S. Ct. 445. See also Northern P. R. Co. v. Meese, 239 U. S. 614, 60 L. ed. 467, 36 S. Ct. 223.

[1] See infra, notes 2-6, this section.

[2] Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 50 S. Ct. 299, 68 A.L.R. 434.

[3] United States Mortg. Co. v. Matthews,

[293] U. S. 232, 79 L. ed. 299, 55 S. Ct. 168; Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507. The equal protection of the laws is not denied by a statute providing that during the period of emergency therein declared the remedy afforded by a statute author- izing a summary and ex parte decree of mortgage foreclosure and sale shall not be available to the holder or holders of less than 25 per cent of the entire unpaid mortgage debt. United States Mortg. Co. v. Matthews, 293 U. S. 232, 79 L. ed. 299, 55 S. Ct. 168.

[4] Northwestern Nat. L. Ins. Co. v. Riggs,

[203] U. S. 243, 51 L. ed. 168, 27 S. Ct. 126,

[7] Ann. Cas. 1104.

Compensation Acts.[5] Similarly, an employer is not denied the equal protection of the laws by requiring him, in order to avoid or mitigate liability under a workmen's compensation act, to plead that the injury was not caused by his negligence or that the plaintiff's negligence or intoxication caused or contributed to the injury.[6]

The equal protection of the laws is not denied to the owners of property

assessed in a supplemental curative proceeding for benefits from the widening of a street, without any opportunity to be heard upon the amounts of the awards to the owners of the property condemned, because in the original proceeding there was such opportunity, together with a right to appeal, where the asserted inequality springs solely from the fact that certain assessed owners, despite the defect in the publication of notice in the original proceeding, appeared and acquiesced therein.[7] It is likewise not denied by confining to Spanish and Mexican grants a statute under which ten years' possession of land under a deed purporting to convey a fee simple gives title in fee to the quantity of land specified in the deed if, during the ten years, no claim by suit in law or equity, effectually prosecuted, shall have been set up.[8]

§ 551. —

Remedies.—The fact that litigants are required to follow the remedies provided by law does not amount to a denial of equal protection of the laws.[9] Denying a tenant the right to a setoff, counterclaim, or cross complaint in an action for unlawful detainer, when the landlord is entitled to such right in actions for breach of covenant and tenants are so entitled in actions for rent, does not work an unconstitutional deprivation of equal protection.[10] Such a classification provides a uniform, although special and summary, proceeding for a quick determination of the questions relating to real property and is based upon a natural and reasonable distinction between cases of such a character which require prompt hearing and a particular form of judgment and ordinary cases at law or in equity.[11]

The Fourteenth Amendment to the Federal Constitution does not constrain the state to accept particular modern doctrines of equity, to adopt a combined system of law and equity procedure, to dispense with all necessity for form and method in pleading, or to give untrammeled liberty to make amendments.[12] The legislative discretion to grant or withhold equitable relief in any class of cases must, however, under the equal protection of the laws clause, be so exercised as not to grant equitable relief to one and to deny it to others under like circumstances and in the same territorial jurisdiction.[13] The prohibition of a statute against interference by injunction between employers and employees in cases growing out of a dispute concerning terms or conditions

of employment denies the equal protection of the laws when applied to defeat injunctive relief (which, under the local statutes, would have been proper had the controversy been any other kind than a dispute between employers and former employees) against concerted action by striking employees and others to injure the employer's business by picketing, displaying banners, advertising

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[5] Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 S. Ct. 255, Ann. Cas. 1917D, 637.

[6] Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

[7] St. Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419, 60 L. ed. 1072, 36 S. Ct. 647.

[8] Montoya v. Gonzales, 232 U. S. 375, 58 L. ed. 645, 34 S. Ct. 413.

[9] State v. Aloe, 152 Mo. 466, 54 S. W. 494,

[47] L.R.A. 393.

[10] Telegraph Ave Corp. v. Raentsch, 205 Cal. 93, 269 P. 1109, 61 A.L.R. 366.

[11] Ibid.

[12] Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873.

[13] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375.

the strike, denouncing the employer as unfair to union labor, appealing to customers to withdraw their patronage, and circulating handbills containing abusive and libelous charges against employers, employees, and patrons, and intimations of injury to future patrons.[14] If the conduct against which a statute forbids injunctions, however, is in and of itself lawful and authorized by statute, there is no denial of the equal protection of the laws in such statute forbidding injunctions, because no one has in the first instance a constitutional right to a "remedy" against conduct of another person which is lawful.[15] Similarly, it has been held that constitutional inhibitions of grants of special privileges and immunities and of arbitrary and unlawful discrimination between different classes of persons and litigants are not violated by a statute forbidding the granting of injunctions against acts of peaceful picketing and peaceable persuasion in connection with labor disputes.[16]

§ 552. Evidence; Witnesses.—

It is the province of the legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts, and the creation by law of such presumptions comes within the power to classify.17 Statutory prima facie rules of evidence in general do not deny the equal protection of the laws.18 In order that a legislative presumption of one fact from evidence of another may not constitute a denial of the equal protection of the laws, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.19 If a presumption created by legislation has no relation in experience to general facts and no foundation except with tacit reference to one particular person against whom it has the effect to declare a presumption of guilt of a

criminal offense because of the carrying on of a particular business, the statute upon which such presumption is based denies the equal protection of the laws.20

Equal protection of the laws is not denied by legislation under which in actions against railway companies for damage done to persons or property proof of injury inflicted by the running of the locomotives or cars is made prima facie evidence of negligence,[1] by a statutory presumption that failure of a railroad company to give the prescribed crossing signals is the proximate cause of a crossing accident,[2] by a statute declaring that a railroad company shall be liable for any damage done by its operations or employees unless the railroad shall make it appear that its agents have exercised reasonable care and diligence and that the presumption in all cases shall be against the

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[14] Ibid. Annotation: 27 A.L.R. 412, s. 35 A.L.R. 460, 97 A.L.R. 1336, and 106 A.L.R. 363.

[15] Senn v. Tile Layers Protective Union, 301 U. S. 468, 81 L. ed. 1229, 57 S. Ct. 857. Annotation: 106 A.L.R. 364.

[16] Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1632, 55 S. Ct. 645. Annotation: 97 A.L.R. 1336, s. 106 A.L.R. 364.

[17] Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 S. Ct. 573; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282. See also Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305, 27 S. Ct. 167. For a detailed discussion of the validity of statutes creating presumptions, see EVIDENCE.

[18] Annotation: 51 A.L.R. 1141, s. 86 A.L.R. 180; L.R.A.1915C, 723.

[19] Yee Hem v. United States, 268 U. S. 178, 69 L. ed. 904, 45 S. Ct. 470; McFarland v. American Sugar Ref. Co. 241 U. S. 79, 60 L. ed. 899, 36 S. Ct. 498; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 31 S. Ct. 136, 32 L.R.A.(N.S.) 226, Ann. Cas. 1912A, 463.

[20] McFarland v. American Sugar Ref. Co. 241 U. S. 79, 60 L. ed. 899, 36 S. Ct. 498.

[1] Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 31 S. Ct. 136, 32 L.R.A.(N.S.) 226, Ann. Cas. 1912A, 463.

[2] Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 77 L. ed. 457, 53 S. Ct. 249.

company,[3] or by a statutory presumption of fraud from nonperformance of a promise which applies only to transactions involving the purchase of real estate and of stock in a corporation or joint-stock company.[4]

Although, in so far as is necessary to equal access to the courts, litigants are entitled to equality in the legislative or judicially declared competency of witnesses or the use or production of them, it has been held that the exclusion of Chinese as witnesses in favor of or against a white man does not deny to any person the equal protection of the laws.[5]

§ 553. Trial.—

Miscellaneous matters relating to the trial of lawsuits arising from conduct of the legislative or judicial departments of the state or both have been held not to violate constitutional rights to equality guaranteed to litigants.6 For example, a statute providing for a short-cause calendar on which the plaintiff may have a cause placed under certain circumstances, but denying the same right to the defendant, is not unconstitutional as being unequal, partial, or special legislation.7 In the trial of a cause

a person is not entitled, under the equal protection clause, to a jury of his own race, in the absence of any discrimination against qualified persons of that race.8 Furthermore, a jury of mixed races is not necessary to fulfil the constitutional requirements.9 The equal protection of the laws is likewise not denied by a state statute abridging the right of trial by jury in the courts of a city without making a similar provision for the counties of the state.10 Refusal of a trial court to give a defendant's requested instructions concerning contributory negligence in a negligence action against a railroad company, though erroneous, does not deprive the defendant of the equal protection of the laws.11

The power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined and to parties belonging to a different class only a single hearing.[12] A statute forbidding the granting of more than two new trials in the same cause on the facts, but allowing more for errors of law, is not in conflict with the Fourteenth Amendment.[13]

A taxpayer, since he cannot sue the state without its consent to recover back a tax voluntarily paid, is not in a position to complain that while he is given a right to appeal only, the state is given a right to a rehearing as well as to an appeal.[14] Hence, a statute giving to the state tax commissioner, and not to the taxpayer, the right to apply for rehearing in the trial court, in addition to the right of appeal accorded the taxpayer, in an action for refund of taxes, is not invalid as discriminating against the taxpayer or as violating the Fourteenth Amendment to the Federal Constitution, since the separate classification of the state and the taxpayer is not arbitrary or unreasonable.[15]

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[3] Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 77 L. ed. 180, 53 S. Ct. 32, 86 A.L.R. 174.

[4] James-Dickinson Farm Mortg. Co. v. Harry, 273 U. S. 119, 71 L. ed. 569, 47 S. Ct. 308.

[5] Annotation: 14 L.R.A. 584.

[6] See infra, notes, 7–11, this section.

[7] Louisville, N. A. & C. R. Co. v. Wallace, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787.

[8] Annotation: 14 L.R.A. 584. As to racial discriminations in the selection of jurors, see JURY.

[9] Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567.

[10] Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 474, 43 L. ed. 520, 19 S. Ct. 268.

[11] Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 77 L. ed. 180, 53 S. Ct. 32, 86 A.L.R. 174.

[12] Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 S. Ct. 1114.

[13] Louisville & N. R. Co. v. Woodson, 134 U. S. 614, 33 L. ed. 1032, 10 S. Ct. 628.

[14] Putnam v. Ford, 155 Va. 625, 155 S. E. 823, 71 A.L.R. 1217.

[15] Ibid.

§ 554. Appeal.—

It is part of the general rule relating to the application of the equal protection clause of the Fourteenth Amendment to legislation which classifies in fixing the jurisdiction of courts that among the matters in which diversity may validly be effected is diversity respecting the finality of decision.16 Thus, the equal protection of the laws is not

denied by a state statute which establishes a separate appellate court for certain counties, with exclusive final appellate jurisdiction in certain cases which, if arising in the courts of other counties, would be appealable to the highest state court.17 Moreover, the equal protection clause does not require an appeal in a particular type of proceeding or in some particular situation, if all persons within a class are treated alike, although an appeal may be allowed to persons differently situated.18

§ 555. Decisions.—

The rule is well settled that the equal protection clause of the Fourteenth Amendment does not assure uniformity of judicial decisions.19 Thus, the fact that a court departs from the precedent established by its earlier decisions does not deprive the complaining party of the equal protection of the laws.20 For example, if the courts of a state have construed a statute as prescribing one form of procedure and parties have acted under that construction, and subsequently the same court holds that the statute was theretofore misconstrued and really provides a different mode of procedure, the last adjudication cannot be set aside in the Federal courts on the ground of unjust discrimination or denial of the equal protection of the laws.1 Furthermore, one against whom a judicial decision has been rendered can base no rights under the equal protection clause upon a later decision between strangers which is asserted to be irreconcilable on a matter of law with such earlier decision.2

The Federal Constitution does not require a state to adopt a unifying method of appeals which will insure to all litigants within the state the same decisions on particular questions which may arise.[3] A state constitutional provision that no law shall be held unconstitutional by the supreme court of the state without a concurrence of at least all but one of the judges, except in the affirmance of a judgment declaring a law unconstitutional, does not deny the equal protection of the laws, even though it may so operate that a statute will be held constitutional in one case and unconstitutional in another.[4]

§ 556. Penalties.—

A denial of the right to the equal protection of the laws may be occasioned by statutes which directly or indirectly limit the right of litigants to have access to the courts. Illustrations of a denial of right by indirection may be found in some of those statutes which impose a penalty as a condition or as a deterrent where one seeks to exercise a constitutional

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[16] See supra, § 544.

[17] Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989.

[18] Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 S. Ct. 57; Saylor v. Duel, 236 Ill. 429, 86 N. E. 119, 19 L.R.A.(N.S.) 377. Annotation: 19 L.R.A.(N.S.) 378, s. 44 L.R.A.(N.S.) 1210. For a discussion of the right to a review, see APPEAL AND ERROR, Vol. 2, p. 933, §§ 146 et seq.

[19] Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U. S. 100, 64 L. ed. 476, 40 S. Ct. 306, 10 A.L.R. 892.

[20] Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 62 L. ed. 145, 38 S. Ct. 40, L.R.A.1918C, 124; Lombard v. West Chicago Park, 181 U. S. 33, 45 L. ed. 731, 21 S. Ct. 507.

[1] A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 S. Ct. 445.

[2] Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U. S. 100, 64 L. ed. 476, 40 S. Ct. 306, 10 A.L.R. 892.

[3] Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. 281 U. S. 74, 74 L. ed. 710, 50 S. Ct. 228, 66 A.L.R. 1460.

[4] Ibid.

right.[5] A statute which operates upon all alike situated is not taken out of the constitutional inhibition against denial of equal protection of the laws if it subjects an individual to an arbitrary and unreasonable exercise of the powers of government by assessing penalties greatly out of proportion to the actual damages sustained, whereby he may be unduly oppressed.[6] For example, while the freedom of the courts may be ostensibly granted to a suitor or litigant, if the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so encumbers any challenge thereof in the courts by such excessive penalties that the party affected is necessarily intimidated and constrained to submit to the law rather than risk the penalties in testing it, it is often held that the party is deprived of the equal protection of the laws.[7] In some instances the courts have held that the penalties provided by the statutes are not so severe as to preclude access to the courts and that consequently the equal protection clause is not violated.[8]

2. CRIMINAL

§ 557. Generally.—

The powers of states in dealing with crime within their borders are not limited by the Fourteenth Amendment to the Federal Constitution, except for the important qualification that no state can deprive particular persons or classes of persons of equal and impartial justice under the law.9 The Fourteenth Amendment operates to forbid discrimination by the states against persons or classes in criminal cases.10 The state, therefore, cannot enact valid criminal laws if such laws make an act done by one penal and impose no penalty upon another for the same act done under like circumstances,11 or confer the right upon one class of citizens to do an act which is a

[5] Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194.

[6] State v. Martin, 193 Ind. 120, 139 N. E. 282, 26 A.L.R. 1386.

[7] Oklahoma Gin Co. v. Oklahoma, 252 U. S. 339, 64 L. ed. 600, 40 S. Ct. 341; Oklahoma Operating Co. v. Love, 252 U. S. 331, 64 L. ed. 596, 40 S. Ct. 338; Wadley S. R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, 35 S. Ct. 214; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L.R.A. (N.S.) 932, 16 Ann. Cas. 764; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Superior Laundry Co. v. Rose, 193 Ind. 138, 137 N. E. 761, 139 N. E. 142, 26 A.L.R. 1392; State ex rel. Dushek v. Watland, 51 N. D. 710, 201 N. W. 680, 39 A.L.R. 1169. Annotation: 39 A.L.R. 1181 et seq.; 59 L. ed. 608. A statute providing for the establishment of rates for railroad transportation without giving the corporation an opportunity to be heard, which fixes penalties for disobedience of its provisions by fines so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to the courts to test the validity of the rates, is unconstitutional, as depriving the corporations of the equal protection of the laws. Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L.R.A. (N.S.) 932, 14 Ann. Cas. 764. As to such statutes as violating the guaranty of due process, see infra, §§ 617, 666.

[8] Gulf, C. & S. F. R. Co. v. Texas, 246 U. S. 58, 62 L. ed. 574, 38 S. Ct. 236; St. Louis, I. M. & S. R. Co. v. Arkansas, 240 U. S. 518, 60 L. ed. 776, 36 S. Ct. 443; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421, Ann. Cas. 1917B, 455; Rail & River Coal Co. v. Yaple, 236 U. S. 338, 59 L. ed. 607, 35 S. Ct. 359. Annotation: 39 A.L.R. 1182; 59 L. ed. 609. The penalties of $1,000 fine, or six months' imprisonment, for violations of a statute against the sale without payment of a specified license fee, of merchandise accompanied by coupons, profit-sharing certificates, or other evidences of indebtedness, or other liability redeemable in premiums, are not so severe as to intimidate against a contest of the validity of such statute, and thus deny the equal protection of the laws. Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421, Ann. Cas. 1917B, 455.

[9] Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 S. Ct. 577.

[10] Ughbanks v. Armstrong, 208 U. S. 481, 52 L. ed. 582, 28 S. Ct. 372; Caldwell v. Texas, 137 U. S. 691, 34 L. ed. 816, 11 S. Ct. 224.

[11] Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L.R.A. 492; Spokane v. Macho, 51 Wash. 322, 98 P. 755, 21 L.R.A.(N.S.) 263, 130 Am. St. Rep. 1100. A statute which makes it a misdemeanor for persons in one branch of industry to do what is lawful for those in another branch of industry, in like relation and under like conditions, is unconstitutional. Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L.R.A. 492.

criminal offense if done by any other class.[12] It is not an objection to a penal statute, however, that it does not apply to all persons who might by any possibility commit the act interdicted.[13] Certain acts may be singled out for punishment.[14] A statute which makes it a criminal offense for any person by personal solicitation to seek employment to prosecute or collect claims, including unliquidated claims for personal injuries, although the state may have made causes of action in tort as well as in contract assignable, has been held valid.[15]

The equal protection of the laws is not denied by a state local option law under which the traffic in intoxicating liquors may be made a crime in certain territory and permitted elsewhere.[16] It has also been held that if the state Constitution contains no provision that all laws shall be equal and uniform throughout the state, the legislature is not prohibited from legislating for particular localities; and it has power to declare that certain acts committed in a particular locality may be punished as a crime, while if committed in other localities they are not punishable.[17] The view has been taken, on the other hand, that under a state Constitution prohibiting the grant of special or exclusive rights, privileges, or immunities, it is beyond the legislative power to enact a general law for the punishment of a crime within the state, and then make the same criminal act nonpunishable if perpetrated in certain favored localities.[18]

The Federal constitutional guaranty of equal protection of the laws does not prevent the placing of an accused who has been indicted for murder and convicted of voluntary manslaughter again on trial for murder on a new trial obtained by him on his own motion, under a state constitutional provision that no person shall be put in jeopardy of life or liberty more than once for the same offense, save on his own motion for a new trial after conviction or in case of mistrial.[19]

§ 558. Preliminary Examination.—

Under certain circumstances classification may be made in procedure concerning preliminary examination in criminal cases without violating fundamental guaranties of equality.[20] Denying to an inhabitant of Manila the right to a preliminary examination which is accorded to all other persons in the Philippine Islands, as is done by an act providing that in cases triable only in the court of first instance in the city of Manila the accused shall not be entitled as of right to a preliminary examination in any case where the prosecuting attorney, after a due investigation of the facts, shall have presented an information against him in proper form, does not contravene the prohibition of the Philippine Bill of Rights against the denial of the equal protection of the laws.[1]

§ 559. Venue.—

The majority view relating to legislation permitting a

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[12] Horwich v. Walker-Gordon Labora- tory Co. 205 Ill. 497, 68 N. E. 938, 98 Am. St. Rep. 254; Com. v. International Har- vester Co. 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256; State v. Schmuck, 77 Ohio St. 438, 83 N. E. 797, 14 L.R.A.(N.S.) 1128, 122 Am. St. Rep. 527; Ex parte Holl- man, 79 S. C. 9, 60 S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105.

[13] State v. Hogan, 63 Ohio St. 202, 58 N. E. 572, 52 L.R.A. 863, 81 Am. St. Rep.

[626] ("tramp" act).

[14] See supra, § 484.

[15] McCloskey v. Tobin, 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306.

[16] Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 48 L. ed. 1062, 24 S. Ct. 703.

[17] People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L.R.A. 751.

[18] State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L.R.A. 231.

[19] Brantley v. State, 132 Ga. 573, 64 S. E. 676, 22 L.R.A.(N.S.) 959, 131 Am. St. Rep. 218, 16 Ann. Cas. 1203, affirmed in 217 U. S. 284, 54 L. ed. 768, 30 S. Ct. 514.

[20] Ocampo v. United States, 234 U. S. 91,

[58] L. ed. 1231, 34 S. Ct. 712.

[1] Ibid.

change of venue in criminal cases on the application of the state or by a court on its own motion is that such laws are unconstitutional.[2] On the other hand, the constitutional provision against the granting of special privileges is not infringed by giving an accused a right to change of venue without conferring the same right upon the state.[3]

§ 560. Trial.—

The Supreme Court has definitely stated concerning the validity of disparities in laws governing the trial of criminal causes that a state may make different arrangements for trials under different circumstances of even the same class of offenses.[4]

The refusal of a state court to continue a criminal case on account of the absence of material witnesses residing in another state is not a denial of the equal protection of the laws, because it is not within the power of the state courts to compel the attendance of witnesses beyond the limits of the state or because the taking or using of depositions of witnesses so situated in criminal cases on behalf of the defendant is not provided for and may not be recognized in that state.[5]

Various matters relating to jury selection in criminal trials have withstood attack on the ground that they violated the equal protection clause.[6] A state law conferring judicial powers on jury commissioners in selecting jurors does not for that reason conflict with the Fourteenth Amendment to the Federal Constitution, where the accused is not subjected to any different treatment from that which prevails in other cases.[7] A statute allowing an accused person only five peremptory challenges in a case where a struck jury has been ordered, while twenty peremptory challenges are allowed in a trial before an ordinary jury, does not constitute a denial of the equal protection of the laws, where the same number of challenges are permitted in all cases in which a struck jury is ordered.[8] Moreover, the denial of the equal protection of the laws by a state court is not shown by the facts that one of the jurors by whom the accused was convicted was an alien and that the state law did not permit any exception on that ground after a juror was sworn, where it does not appear when the accused learned the fact of alienage or objected to the juror.[9]

A substantial error in the charge to the jury in a criminal case in a state court does not deprive the prisoner of the equal protection of the laws.[10] The law of a state that amendments of the record of a court in derogation of its final judgment are not permitted after the term at which the judgment was rendered, which is applicable to all persons within the jurisdiction of the state, is not a denial to a person adjudged guilty of crime, by the state, of the equal protection of the laws.[11]

§ 561. Appeal.—

Various classifications in legislation treating appeals in criminal cases have been sustained as against contentions that they violate constitutional guaranties of equality.[12] The allowance of an appeal to the state from the court of one district, but not from another district of the state

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[2] See VENUE [Also 27 R. C. L. p. 781, § 5].

[3] State ex rel. Lathrop v. Hauptly, 86 Wash. 199, 149 P. 705, L.R.A.1915F, 920. Annotation: L.R.A.1915F, 920.

[4] Graham v. West Virginia, 224 U. S. 616,

[56] L. ed. 917, 32 S. Ct. 583.

[5] Minder v. Georgia, 183 U. S. 559, 46 L. ed. 328, 22 S. Ct. 224.

[6] See infra, notes 7-9, this section.

[7] Murray v. Louisiana, 163 U. S. 101, 41 L. ed. 87, 16 S. Ct. 990.

[8] Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77.

[9] Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 S. Ct. 304.

[10] Davis v. Texas, 139 U. S. 651, 35 L. ed. 300, 11 S. Ct. 675.

[11] Fielden v. Illinois, 143 U. S. 452, 36 L. ed. 224, 12 S. Ct. 528.

[12] See infra, notes 13, 14, this section.

in case of the grant of a new trial to an accused person, is not a denial of the equal protection of the laws.[13] In some instances, allowing direct appeals by the government to the highest appellate court, as upon the sustaining of a demurrer to an indictment, without granting the same right to an accused in event such a demurrer should be overruled, has been held to violate no constitutional rights of the accused.[14]

The denial of the equal protection of the laws by a state court is not shown by the fact that a writ of error in a murder case was denied by a state court.[15] The decision of a state court of last resort that the reversal of a conviction for an error, if any, committed by the trial court in discharging a juror, is

precluded by a statute of the state does not deny the accused the equal protection of the laws, if such was the construction given that section by prior

cases and no discriminating application against him was made.[16]

§ 562. Punishment.—Equality of protection of the laws implies that in the

administration of criminal justice no one shall be subjected, for the same

offense, to any greater or different punishment from that to which others are

subjected.[17] Hence, statutes are unconstitutional which provide different degrees of punishment for different persons for the same act.[18] Equality of

protection as thus guaranteed by the equal protection clause demands that in

the administration of criminal justice no person, by reason of race or color,

shall be subjected for the same offense to any greater or different punishment

from that to which other persons of the same race or color are subjected.[19]

While the legislature, in prescribing and fixing punishment for a crime, has

very great latitude in classifying the same, still, such classification should be

natural, and not arbitrary, and should be made with reference to the heinousness or gravity of the act or acts made the crime, and not with reference to

matters disconnected with the crime.[20] Therefore, as a rule the line of demarcation between permitted and forbidden legislation relating to punishment in

criminal cases follows that which limits the legislature's authority to make

reasonable classifications. Accordingly, such legislation is constitutional1 or

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[13] Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730.

[14] United States v. Heinze, 218 U. S. 532,

[54] L. ed. 1139, 31 S. Ct. 98, 21 Ann. Cas. 834. See also United States v. Bitty, 208 U. S. 393, 52 L. ed. 543, 28 S. Ct. 396.

[15] Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 S. Ct. 304.

[16] Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421, 26 S. Ct. 189.

[17] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Hodgson v. Vermont, 168 U. S. 262, 42 L. ed. 461, 18 S. Ct. 80; Moore v. Missouri,

[159] U. S. 673, 40 L. ed. 301, 16 S. Ct. 179; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 S. Ct. 191; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Yick Wo v. Hopkins,

[118] U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Pace v. Alabama, 106 U. S. 583, 27 L. ed. 207, 1 S. Ct. 637; Re Mallon, 16 Idaho, 737, 102 P. 374, 22 L.R.A. (N.S.) 1123; Marallis v. Chicago, 349 Ill. 422, 182 N. E. 394, 83 A.L.R. 1222; Armstrong v. State, 170 Ind. 188, 84 N. E. 3, 15 L.R.A.(N.S.) 646; Opinion of Justices, 207 Mass. 601, 94 N. E. 558, 34 L.R.A.(N.S.) 604; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717; State v. Shedroi, 75 Vt. 277, 54 A. 1081, 63 L.R.A. 179, 98 Am. St. Rep. 825; State v. Dering, 84 Wis. 585, 54 N. W. 1104,

[19] L.R.A. 858, 36 Am. St. Rep. 948. Annotation: 14 L.R.A. 584.

[18] Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L.R.A.(N.S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475; Budd v. State, 3 Humph. (Tenn.) 483, 39 Am. Dec. 189.

[19] See CRIMINAL LAW.

[20] Re Mallon, 16 Idaho, 737, 102 P. 374,

[22] L.R.A.(N.S.) 1123.

[1] Finley v. California, 222 U. S. 28, 56 L. ed. 75, 32 S. Ct. 13; Ughbanks v. Armstrong, 208 U. S. 481, 52 L. ed. 582, 28 S. Ct. 372; Theisen v. McDavid, 34 Fla. 440,

[16] So. 321, 26 L.R.A. 234; Carr v. State,

[175] Ind. 241, 93 N. E. 1071, 32 L.R.A.(N.S.) 1190; People v. Bellet, 99 Mich. 151, 57 N. W. 1094, 22 L.R.A. 696, 41 Am. St. Rep. 589; Osborn v. Leach, 135 N. C. 628, 47 S. E. 811, 66 L.R.A. 648; State v. Hogan, 63 Ohio St. 202, 58 N. E. 572, 52 L.R.A. 863, 81 Am. St. Rep. 626. A statute providing for punishment of criminal syndicalism does not violate the

unconstitutional2 in so far as it is based upon valid or invalid classifications,

the solution of the one question indicating the conclusion as to the other.

Where several different acts are prohibited by law, a difference in the penalties for violations of such several acts cannot be said to constitute a breach

of the constitutional provisions intended to secure equal rights to all citizens.[3]

The equal protection of the laws is not denied to a person sentenced to fourteen years' imprisonment for the crime of perjury under a statute which

makes perjury punishable by imprisonment in the state prison for not less

than one nor more than fourteen years, although five years' imprisonment may

be the average maximum penalty for other felonies, some of which may be of

greater gravity and of more injurious consequences than perjury.[4] Furthermore, the equal protection clause does not require the courts to impose sentences for exactly the same length of time under statutes permitting discretion

in the length of sentence imposed.[5] Equal protection of the laws is not denied

to two or three persons convicted of conspiracy to defraud because their sentence was for ten years' imprisonment, while that of their codefendant was for

only seven years.[6]

The constitutionality of statutes providing for the detention of juveniles

who have been convicted of offenses punishable by imprisonment for a period

of time and at a place different from that of more mature offenders has often

been upheld, as against the contention that unequal penalties are thus imposed.[7] The legislature may also determine that women convicted of crime

shall be less severely punished than men convicted of the same crime.[8] There

is, however, some authority to the contrary, holding that a classification allowing male offenders to be punished in a different manner from females is

invalid.[9]

Legislation which varies the punishment for an identical offense according to the county or district within a state in which the offense is committed or the person committing it is put upon his trial is unconstitutional as an unjust discrimination and a deprivation of the equal protection of the laws.[10] A statute which limits the punishment for an offense to a fine if the offense is committed in five particular counties, but allows imprisonment for the same offense if

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equal protection clause of the Federal Constitution because its penalties are confined to those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions, without including those who advocate a resort to such methods as a means of maintaining such conditions. Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641.

[2] Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L.R.A.(N.S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475; Bailey v. People, 190 Ill. 28,

[60] N. E. 98, 54 L.R.A. 838, 83 Am. St. Rep. 116; Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L.R.A. 492; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550; Spokane v. Macho, 51 Wash. 322, 98 P. 755, 21 L.R.A. (N.S.) 263, 130 Am. St. Rep. 1100.

[3] State v. Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L.R.A. 504; People v. Bellet, 99 Mich. 151, 57 N. W. 1094, 22 L.R.A. 696, 41 Am. St. Rep. 589; State v. Murray, 104 Neb. 51, 175 N. W. 666, 8 A.L.R. 563; Stanford v. State, 78 Ohio St. 24, 84 N. E. 419,

[14] Ann. Cas. 138. Annotation: 8 A.L.R. 566 (different penalties for different violations of Sunday laws); 15 L.R.A.(N.S.) 646 (different penalties for different violations of Sunday laws).

[4] Collins v. Johnston, 237 U. S. 502, 59 L. ed. 1071, 35 S. Ct. 649.

[5] Howard v. Fleming, 191 U. S. 126, 48 L. ed. 121, 24 S. Ct. 49.

[6] Ibid.

[7] People ex rel. Bradley v. Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L.R.A. 139; Com. v. Pear, 183 Mass. 242, 66 N. E. 719, 67 L.R.A. 935, affirmed in 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 58, 3 Ann. Cas. 765. Annotation: 3 A.L.R. 1614, s. 8 A.L.R. 854.

[8] Re Dunkerton, 104 Kan. 481, 179 P. 347,

[3] A.L.R. 1611. See also State v. Heitman,

[105] Kan. 139, 181 P. 630, 8 A.L.R. 848. Annotation: 3 A.L.R. 1618, s. 8 A.L.R. 854.

[9] Annotation: 3 A.L.R. 1618.

[10] Ex parte Sizemore, 110 Tex. Crim. Rep. 232, 8 S. W. (2d) 134, 59 A.L.R. 430. Annotation: 59 A.L.R. 433.

committed in other counties, violates the constitutional guaranty of equality.[11]

A special road law applicable to a particular county, which allows prisoners a credit of [50] cents a day for road work, is invalid as denying the equal protection of the laws, where a general law applicable in other portions of the state allows a credit of $[3] per day.[12]

§ 563. —

Corporations and Individuals.—In accordance with the general rule that corporations and individuals may be classified differently if there is

a proper basis for different treatment,[13] the legislature may impose a different punishment on a corporation for a criminal offense than is imposed on an individual for the same offense if the distinction in punishment is based upon reasonable grounds having relation to the crime and nature and condition of the parties.[14] A statute providing different degrees of punishment for the same act, however, when performed by officers of a particular class of corporations than when performed by other offenders violates a constitutional requirement of uniformity of operation.[15]

§ 564. —

Second and Subsequent Offenders.—Statutes which impose a heavier penalty for second or subsequent offenses are almost uniformly upheld as not violating the constitutional provision securing the equal protection of the laws,[16] since the fact of a prior conviction in such cases is considered as affording a reasonable basis for classification.[17]

§ 565. —

Convicts.—The classification of convicts differently from other persons in the matter of punishment has been upheld in several instances.[18] They may be subjected to more severe penalties if found guilty of capital offenses against custody officers.[19] Similarly, singling out convicts serving life sentences in a state prison as proper subjects for the imposition of the death penalty in case they shall, with malice aforethought, commit an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury does not deny such life prisoners the equal protection of the laws.[20]

Legislation classifying punishment for an escape with reference to the

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[11] State v. Fowler, 193 N. C. 290, 136 S. E. 709, citing R. C. L.

[12] Ex parte Sizemore, 110 Tex. Crim. Rep. 232, 8 S. W. (2d) 134, 59 A.L.R. 430.

[13] See supra, § 513.

[14] State v. Central Lumber Co. 24 S. D. 136, 123 N. W. 504, 42 L.R.A.(N.S.) 804, affirmed in 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66.

[15] Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L.R.A.(N.S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475.

[16] Carlesi v. New York, 233 U. S. 51, 58 L. ed. 843, 34 S. Ct. 576; McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 St. 389; Moore v. Missouri,

[159] U. S. 673, 40 L. ed. 301, 16 S. Ct. 179; People v. McBride, 234 Ill. 146, 84 N. E. 865,

[123] Am. St. Rep. 82, 14 Ann. Cas. 994. Annotation: 45 L. ed. 542. Equal protection of the laws is not denied by a statute requiring the punishment on conviction of a second offense to be greater than it would be on a first offense. Moore v. Missouri, 159 U. S. 673,

[40] L. ed. 301, 16 S. Ct. 179. The equal protection of the laws is not denied by a statute imposing a heavier penalty upon a person convicted of a felony if he has twice before been sentenced for crime to three years' imprisonment or more. McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 S. Ct. 389. Bringing a convict after judgment before the court of another county in a separate proceeding instituted conformably to a statute by information charging him with prior convictions which were not alleged in the indictment on which he was last tried and convicted, and, on the finding of the jury that he was the former convict, sentencing him to the additional punishment in such cases prescribed, does not deny him the equal protection of the laws. Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 S. Ct. 583. For detailed discussion of statutes relating to second or habitual offenders, see SECOND AND SUBSEQUENT OFFENDERS.

[17] Graham v. West Virginia, 224 U. S. 616, 56 L. ed. 917, 32 S. Ct. 583.

[18] Annotation: 56 L. ed. 75.

[19] See Hart v. Virginia, 298 U. S. 34, 80 L. ed. 1030, 56 S. Ct. 672.

[20] Finley v. California, 222 U. S. 28, 56 L. ed. 75, 32 S. Ct. 13.

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original term for which a convict was sentenced has been held unconstitutional.[1]

A statute making failure of a convict discharged from the penitentiary to

leave the county within which the penitentiary is located within a specified

time a misdemeanor unconstitutionally deprives him of the equal protection

of the laws, notwithstanding his conviction deprives him of the right to vote.[2]

G. DISCRIMINATORY ADMINISTRATION OF LAWS

§ 566. Generally.—

The purpose of the equal protection clause of the Fourteenth Amendment to the Federal Constitution is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination,

whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents.[3] An actual discrimination arising from

the method of administering a law is as potential in creating a denial of equality of rights as a discrimination made by law.[4] The validity of a state statute

under the equal protection clause, therefore, often depends on how it is construed and applied.[5]

Although, as a general rule, a law cannot be held unconstitutional because,

while its just interpretation is consistent with the Constitution, it is unfaithfully administered by those who are charged with its execution,[6] it is, nevertheless, an equally well-established principle that a provision not objectionable on its face may be adjudged unconstitutional because of its effect in operation.[7] A law, though fair on its face and impartial in appearance, which

applies and administers with an evil eye and unequal hand so as to make unjust and illegal discrimination is within the prohibition of the Federal Constitution.[8] Hence, in a

consideration of the classification embodied in a statute, regard should be given not only to its final purpose, but, likewise, to the

means provided for its administration9—whether, for example, it confers upon

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[1] Re Mallon, 16 Idaho, 737, 102 P. 374, 22 L.R.A.(N.S.) 1123. Annotation: 56 L. ed. 76. A statute making it a crime for a state prisoner to escape from a state prison and fixing the punishment at a term equal in length to that which he is serving at the time of his escape by exempting from its operation Federal prisoners confined in such prison, who are, by Federal statute, rendered subject to the same discipline as state prisoners, is rendered special and discriminatory legislation. Re Mallon, 16 Idaho, 737, 102 P. 374, 22 L.R.A.(N.S.) 1123.

[2] Ex parte Schatz, 307 Mo. 67, 269 S. W. 383, 38 A.L.R. 1032. Annotation: 38 A.L.R. 1036.

[3] Sunday Lake Iron Co. v. Wakefield Twp.

[247] U. S. 350, 62 L. ed. 1154, 38 S. Ct. 495.

[4] Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 S. Ct. 257; Tarrance v. Florida,

[188] U. S. 519, 47 L. ed. 572, 23 S. Ct. 402.

[5] Concordia F. Ins. Co. v. Illinois, 292 U. S. 535, 78 L. ed. 1411, 54 S. Ct. 830.

[6] Reagan v. Farmers Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 14 S. Ct. 1047; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; People ex rel. Mechameus v. Warden, 144 N. Y. 529, 39 N. E. 686, 27 L.R.A. 718.

[7] General Oil Co. v. Crain, 209 U. S. 211,

[52] L. ed. 754, 28 S. Ct. 475; State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31.

[8] Norris v. Alabama, 294 U. S. 587, 79 L. ed. 1074, 55 S. Ct. 579; Bailey v. Alabama,

[219] U. S. 219, 55 L. ed. 191, 31 S. Ct. 145; Williams v. Mississippi, 170 U. S. 213, 42 L. ed. 1012, 18 S. Ct. 583; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Cutsinger v. Atlanta, 142 Ga. 555, 83 S. E. 263, L.R.A.1915B, 1097, Ann. Cas. 1916C, 280. See also Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550. The ordinances of the supervisors of the city and county of San Francisco providing that it shall be unlawful to engage in the laundry business within the corporate or county limits "without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone" does not prescribe a rule and conditions for the regulation of the use of laundry property, to which all similarly situated may conform, but it confers a naked, arbitrary power upon the board to give or withhold consent, makes all engaged in the business the tenants at will under the board of supervisors as to their means of living, and is therefore invalid. Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064.

[9] Adams v. Milwaukee, 228 U. S. 572, 57 L. ed. 971, 33 S. Ct. 610, affirming 144 Wis. 371, 129 N. W. 518, 43 L.R.A.(N.S.) 1066. See also St. John v. New York, 201 U. S. [12 Am. Jur.]—17 257

the administrative authorities arbitrary power and, without regard to discretion in the legal sense of that term, permits unjust discriminations, founded on differences of race or other unjustifiable basis, between persons otherwise in similar circumstances.[10]

Mere errors of judgment by officials will not support a claim of discrimination.[11] Moreover, it is not enough to show that a law or ordinance has not been enforced against other persons as it is sought to be forced against the person claiming discrimination.[12] To establish arbitrary discrimination inimical to constitutional equality there must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.[13] Some of the state courts have taken the position that in the absence of facts properly pleaded showing a fixed

and continuous policy of unjust discrimination on the part of a municipality, they will not enter on a consideration of the question whether its administration is in violation of the guaranties as to the equal protection of the laws.[14]

XIV. DUE PROCESS OF LAW

A. IN GENERAL

§ 567. Generally.—

The guaranty of due process found in the Fifth Amendment of the Federal Constitution declares that no person shall "be deprived of life, liberty, or property without due process of law." The Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property without due process of law." The Fifth Amendment is a limitation upon the powers of Congress, while the Fourteenth Amendment is a limitation upon the powers of the states.15

633, 50 L. ed. 896, 26 S. Ct. 554, 5 Ann. Cas. 909.

[10] Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 S. Ct. 633; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 51 N. E. 758, 42 L.R.A. 696, 68 Am. St. Rep. 155; Elkhart v. Murray, 165 Ind. 304, 75 N. E. 593, 1 L.R.A.(N.S.) 940, 112 Am. St. Rep. 228, 6 Ann. Cas. 748; State ex rel. Makris v. Superior Ct. 113 Wash. 296, 193 P. 845, 12 A.L.R. 1428; Fulton v. Norteman, 60 W. Va. 562, 55 S. E. 658, 9 L.R.A.(N.S.) 1196. An ordinance requiring drivers of vehicles at all times to comply with any directions of the police force as to stopping, starting, approaching, or departing from any place, and as to the manner of taking up or setting down passengers, is unconstitutional as depriving persons of the equal protection of the laws. St. Louis v. Allen, 276 Mo. 501, 204 S. W. 1083, L.R.A. 1918F, 1110. As to discretion as a basis for classification, see supra, § 494. As to arbitrary administration as a denial of due process, see infra, § 576.

[11] Sunday Lake Iron Co. v. Wakefield Twp. 247 U. S. 350, 62 L. ed. 1154, 38 S. Ct. 495.

[12] Mackay Teleg. & Cable Co. v. Little Rock, 250 U. S. 94, 63 L. ed. 863, 39 S. Ct. 428.

[13] Mackay Teleg. & Cable Co. v. Little Rock, 250 U. S. 94, 63 L. ed. 863, 39 S. Ct. 428; Sunday Lake Iron Co. v. Wakefield Twp. 247 U. S. 350, 62 L. ed. 1154, 38 S. Ct. 495.

[14] Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 386.

[15] Georgia Power Co. v. Decatur, 281 U. S. 464, 74 L. ed. 999, 50 S. Ct. 369; Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; Jones v. Buffalo Creek Coal & Coke Co. 245 U. S. 328, 62 L. ed. 325, 38 S. Ct. 121; Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, 36 S. Ct. 236, L.R.A. 1917D, 414, Ann. Cas. 1917B, 713; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 S. Ct. 88; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 S. Ct. 120; Lombard v. West Chicago Park, 181 U. S. 33, 45 L. ed. 731, 21 S. Ct. 507; Bolin v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 S. Ct. 287; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383, affirming 14 Utah, 71, 46 P. 756, 37 L.R.A. 103; Thorington v. Montgomery, 147 U. S. 490, 37 L. ed. 252, 13 S. Ct. 394; Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 S. Ct. 105; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Alabama Pub. Serv. Commission v. Mobile Gas Co. 213 Ala. 50, 104 So. 538, 41 A.L.R. 872; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532; Griffin v. State, 142 Ga. 636, 83 S. E. 540, L.R.A.1915C, 716, Ann. Cas. 1916C, 80; Windfall City v. Somerville, 181 Ind. 463, 104 N. E. 859, Ann. Cas. 1916D, 661; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; Wichita Council, S. B. A. v. Security Ben. Asso. 138 Kan. 841, 28 P. (2d) 976, 94 A.L.R.

The same meaning is usually given to the guaranty in both amendments.[16] In fact, it is said that the restraint imposed upon legislation by the due process clause of the Fifth and Fourteenth Amendments is the same.[17] It has been suggested, however, that different constructions and applications of the provisions may be proper in appropriate cases.[18] The phrase as used in the Fifth Amendment refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law; and as used in the Fourteenth Amendment, by parity of reason, the phrase refers to the law of the land in each state, which derives its authority from the inherent and reserved powers of the state exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[19]

The Fourteenth Amendment did not invest, and did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation.[20] Neither does it enable the Supreme Court of the United States to revise decisions of the state courts on questions of state law.[1] Nor does it raise a Federal question in every case to test the justice of a decision.[2]

Many of the state Constitutions contain guaranties securing due process.[3] A state adopting the language of the Fourteenth Amendment to the Federal Constitution in its own Bill of Rights adopts with it the interpretation it has received.[4] However, the Federal question and the state question are not necessarily the same.[5] The due process clause as embodied in the Bill of Rights of a state Constitution has no purpose other than to check the legislature, as representing the majority for the time being, from encroaching upon this reserved right of the minority or of the individual.[6]

The guaranty of due process adds nothing to the rights of one citizen as against another.[7] The Fourteenth Amendment, while furnishing additional guaranties, did not introduce any new principle into the administration of our constitutional system; it was merely declaratory of a rule which previously existed.[8] It is a prohibition applicable to the acts of the state, and does not,

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629; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; State v. Buente, 256 Mo. 227, 165 S. W. 340, Ann. Cas. 1915D, 879; State v. Gardner, 77 Mont. 8, 249 P. 574, 52 A.L.R. 454; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; Heavner v. Elkins, 69 W. Va. 255, 71 S. E. 184, 52 L.R.A.(N.S.) 1035, Ann. Cas. 1913A, 653, affirmed in 231 U. S. 743, 58 L. ed. 463, 34 S. Ct. 318.

[16] Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 S. Ct. 88; Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 S. Ct. 105; Ex parte Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111; Great Northern Utilities Co. v. Public Serv. Commission, 88 Mont. 180, 293 P. 294, citing R. C. L.

[17] Heiner v. Donnan, 285 U. S. 312, 76 L. ed. 772, 52 S. Ct. 358; Cass Farm Co. v. Detroit, 181 U. S. 396, 45 L. ed. 914, 21 S. Ct. 644; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 S. Ct. 625.

[18] French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 S. Ct. 625.

[19] Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 S. Ct. 105.

[20] Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865.

[1] Hebert v. Louisiana, 272 U. S. 312, 71 L. ed. 270, 47 S. Ct. 103, 48 A.L.R. 1102.

[2] New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

[3] State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523.

[4] State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805.

[5] Ibid.

[6] Ibid.

[7] Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 S. Ct. 968; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588. See also supra, § 470, as to the equal protection clause.

[8] United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Bank of Columbia v. Okely, 4 Wheat. (U. S.) 235, 4 L. ed. 559; McKinster v. Sager, 163 Ind. 671, 72 N. E.

of itself, secure to individuals whose rights may be transgressed by the state a remedy by way of reparation.[9] Whatever was due process of law before the adoption of the Federal Constitution10 and before the adoption of this amendment continues to be such. However, it should be noted that before the action of this amendment the final determination of the question whether a state statute was according to the law of the land rested with the courts of the state, whereas since the amendment it rests with the Supreme Court of the United States.[11] Nevertheless, Congress has no power by affirmative action to provide due process of law as a means of preventing the states from denying it.[12]

The fundamental guaranty of due process is absolute, and not merely relative.[13] It does not have regard merely to enforcement of the law, but searches also the authority for making the law.[14] It is not merely a political right, but is a legal right assertable in the courts.[15]

The guaranty of due process is one that has been asserted in a large number of situations. Many of these involve matters which are the subject of separate articles in this work. The detailed discussion and application of the due process guaranty as it relates to these particular subjects will be left for those subjects. Here the fundamental rules governing the guaranty will be discussed.[16]

A great deal of the litigation over the due process guaranty involves that contained in the Fourteenth Amendment. The discrepancy in the number of cases involving these two amendments has been noted by the Supreme Court.[17]

In ascertaining what is due process, the courts have generally resorted to

two sources: (1) The Constitution itself must be examined to determine whether there is a conflict with any of its provisions;[18] and (2) if the act com-

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854, 68 L.R.A. 273, 106 Am. St. Rep. 268; Cleveland, C. C. & St. L. R. Co. v. Backus,

[133] Ind. 513, 33 N. E. 421, 18 L.R.A. 729; State v. Pennoyer, 65 N. H. 113, 18 A. 878,

[5] L.R.A. 709; Valentine v. Englewood, 76 N. J. L. 509, 71 A. 344, 19 L.R.A.(N.S.) 262,

[16] Ann. Cas. 731; Minneapolis, St. P. & S. Ste. M. R. Co. v. Washburn Lignite Coal Co. 40 N. D. 69, 168 N. W. 684, 12 A.L.R. 744, writ of error dismissed in 254 U. S. 370, 65 L. ed. 310, 41 S. Ct. 140; Paulsen v. Portland, 16 Or. 450, 19 P. 450, 1 L.R.A. 673; McCandless v. Richmond & D. R. Co.

[38] S. C. 103, 16 S. E. 429, 18 L.R.A. 440.

[9] Minneapolis, St. P. & S. Ste. M. R. Co. v. Washburn Lignite Coal Co. 40 N. D. 69,

[168] N. W. 684, 12 A.L.R. 744, writ of error dismissed in 254 U. S. 370, 65 L. ed. 310, 41 S. Ct. 140.

[10] State v. Sponaugle, 45 W. Va. 415, 32 S. E. 283, 43 L.R.A. 727.

[11] Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Eames v. Savage, 77 Me. 212, 52 Am. Rep. 751.

[12] Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865; Robin- son v. Memphis & C. R. Co. 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18.

[13] Hammond Packing Co. v. Arkansas,

[212] U. S. 322, 53 L. ed. 530, 29 S. Ct. 370,

[15] Ann. Cas. 645.

[14] State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805.

[15] Ibid.

[16] As to the validity of particular stat- utes, see ARBITRATION AND AWARD, Vol. 3, p. 836, § 6; BANKRUPTCY, Vol. 6, p. 517, §§ 2 et seq.; p. 850, § 561; BANKS, Vol. 7, p. 30, § 9 et seq.; DIVORCE AND SEPARATION [Also

[9] R. C. L. p. 232]; EMINENT DOMAIN [Also

[10] R. C. L. p. 1]; FRAUDULENT CONVEYANCES [Also 12 R. C. L. p. 459]; INCOME TAXES; INHERITANCE, ESTATE, SUCCESSION, AND GIFT TAXES; INSOLVENCY [Also 14 R. C. L. p. 823]; 626]; INSURANCE [Also 14 R. C. L. p. 821]; INTOXICATING LIQUORS [Also 15 R. C. L. p. 239]; LABOR [Also 16 R. C. L. p. 410]; LI- CENSES [Also 17 R. C. L. p. 470]; MECHAN- ICS' LIENS [Also 18 R. C. L. p. 868]; MINES AND MINERALS [Also 18 R. C. L. p. 1087]; MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 678]; MUTUAL BENEFIT SOCIETIES [Also 19 R. C. L. p. 1175]; PHYSICIANS AND SURGEONS [Also 21 R. C. L. p. 350]; PUBLIC OFFICERS [Also 22 R. C. L. p. 362]; RAILROADS [Also

[22] R. C. L. p. 730]; SCHOOLS [Also 24 R. C. L. p. 553]; SECURITIES ACTS; SOCIAL SECU- RITY, UNEMPLOYMENT INSURANCE, AND RE- TIREMENT FUNDS; SPECIAL OR LOCAL ASSESS- MENTS [Also 25 R. C. L. p. 76]; TAXATION [Also 26 R. C. L. p. 1]; TRADEMARKS, TRADE- NAMES, AND UNFAIR COMPETITION [Also 26 R. C. L. p. 826]; WITNESSES [Also 28 R. C. L. p. 411]; WORKMEN'S COMPENSATION ACTS [Also 28 R. C. L. p. 709]; ZONING.

[17] French v. Barber Asphalt Paving Co.

[181] U. S. 324, 45 L. ed. 879, 21 S. Ct. 625; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

[18] New Orleans Waterworks Co. v. Lou- isiana, 185 U. S. 336, 46 L. ed. 936, 22 S. Ct. 691; French v. Barber Asphalt Paving Co.

[181] U. S. 324, 45 L. ed. 879, 21 S. Ct. 625.

plained of does not violate the constitutional provisions, the court must look to those settled usages and modes of proceeding existing in the common and

statutory law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political conditions by having been acted on by them after the settlement of this country.[19] The fundamental principles referred to are those principles of judicial procedure which existed and were recognized in the courts of England and the American Colonies prior to the adoption of the Federal and state Constitutions.[20] The common law is the foundation of that which is designated as due process of law.[1]

A distinction is drawn between the fundamental rights of citizenship and the rights which are inherent in due process and therefore an essential part of it.[2]

§ 568. Origin of Guaranty.—

The principle that no person should be deprived of life, liberty, or property except by due process of law did not originate in the American system of constitutional law,[3] but was contained in Magna Charta as a part of ancient English liberties.[4] Chapter [39] of Magna Charta (sometimes referred to as "chapter 29"), confirmed on the 19th day of June, 1215, declared: "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."[5] It has even been said that the principle was known before Magna Charta6 and that it was originally designed to secure the subject against the arbitrary action of the Crown and to place him under the protection of the law.[7] It is settled beyond question that this principle came from England to America8 as part of the common law9 and has been a fundamental rule in the judicial system of every state in the Union which adopted the common law.[10] When first adopted in Magna Charta, the phrase "law of the land" had reference to the common and statute law then existing in England; and when embodied in Constitutions in this country, it referred to the same

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[19] Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97,

[29] S. Ct. 14; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936,

[22] S. Ct. 691; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 S. Ct. 625; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372; Re Clark, 65 Conn. 17, 31 A. 522, 28 L.R.A. 242.

[20] Twining v. New Jersey, 211 U. S. 78,

[53] L. ed. 97, 29 S. Ct. 14; Tracy v. Ginz- berg, 205 U. S. 170, 51 L. ed. 755, 27 S. Ct. 461; Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 S. Ct. 1031; State v. Height, 117 Iowa, 650, 91 N. W. 935, 59 L.R.A. 437, 94 Am. St. Rep. 323.

[1] Ekern v. McGovern, 154 Wis. 157, 142 N. W. 595, 46 L.R.A.(N.S.) 796.

[2] Twining v. New Jersey, 211 U. S. 78,

[53] L. ed. 97, 29 S. Ct. 14.

[3] Davidson v. New Orleans, 96 U. S. 97, 113, 24 L. ed. 616; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Moses v. United States,

[16] App. D. C. 428, 50 L.R.A. 532; Poulsen v. Portland, 16 Or. 450, 19 P. 450, 1 L.R.A. 673.

[4] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532.

[5] Poulsen v. Portland, 16 Or. 450, 19 P. 450, 1 L.R.A. 673.

[6] Ochoa v. Hernandez y Morales, 230 U. S. 139, 57 L. ed. 1427, 33 S. Ct. 1033.

[7] Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; State v. Rose, 33 Del. 168, 132 A. 864, 45 A.L.R. 85; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789.

[8] Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; First Nat. Bank v. Bovey, 49 N. D. 450, 191 N. W. 765, citing R. C. L.

[9] Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

[10] Davidson v. New Orleans, 96 U. S. 97,

[24] L. ed. 618; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532; State v. Cut- shall, 110 N. C. 538, 15 S. E. 261, 16 L.R.A. 130; Poulsen v. Portland, 16 Or. 450, 19 P. 450, 1 L.R.A. 673.

common law as previously modified, and as far as suited to the wants and conditions of the people.[11]

§ 569. General Nature of Guaranty.—

The guaranty of due process of law is one of the most important to be found in the Federal Constitution or any of the amendments;[12] indeed, it has been said that without it the right of private property could not be said to exist, in the sense in which it is known to our laws.[13] By reason of this guaranty it has been stated as a general principle that everyone is entitled to the protection of those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions14 and have long been recognized under the common-law system.[15] The right is of such importance that the people have never delegated to either the state or Federal Government the power to deprive a person of property except by observing its requirements.[16] The provisions embodying this guaranty have received a very broad and liberal interpretation,[17] and it has been

said that the guaranty is always and everywhere present to protect the citizen against arbitrary interference with his rights.[18] Nevertheless, the courts have become cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme.[19]

While the fact that a right is specifically dealt with in another part of the Federal Constitution may be indicative that it is not embraced within the due process clause of the Fourteenth Amendment, such rule is merely an aid to construction and must yield to more compelling considerations whenever such considerations exist, as where the right is of such a character that it cannot be denied without violating fundamental principles of liberty and justice.[20] That which is done in violation of the due process clause is not entitled to be enforced under the full faith and credit clause.[1]

The effect of the guaranty is to inhibit the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, without notice and opportunity for a hearing.[2] An attempt by statute to work such a change of ownership would be a glaring violation of this guaranty and could not be defended as an exercise of the police power.[3]

The protection extends to rights, in the broadest sense of the term.[4] In the determination of whether the requirement has been observed, regard must be

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[11] Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1, affirming 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682; State v. Stimpson, 78 Vt. 124, 62 A. 14, 1 L.R.A. (N.S.) 1153, 6 Ann. Cas. 639.

[12] Ulman v. Baltimore, 72 Md. 587, 20 A. 141, 21 A. 709, 11 L.R.A. 224.

[13] Ochoa v. Hernandez y Morales, 230 U. S. 139, 57 L. ed. 1427, 33 S. Ct. 1033.

[14] Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406, re- hearing denied in 294 U. S. 732, 79 L. ed. 1261, 55 S. Ct. 511; Hebert v. Louisiana,

[272] U. S. 312, 71 L. ed. 270, 47 S. Ct. 103, 48 A.L.R. 1102; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241 (Ethridge, J.).

[15] Butler v. Perry, 240 U. S. 328, 60 L. ed. 672, 36 S. Ct. 258; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; Sinque- feld v. Valentine, 159 Miss. 144, 132 So. 81,

[76] A.L.R. 238.

[16] Poulsen v. Portland, 16 Or. 450, 19 P. 450, 1 L.R.A. 673.

[17] State v. Height, 117 Iowa, 650, 91 N. W. 935, 59 L.R.A. 437, 94 Am. St. Rep. 323; People v. King, 110 N. Y. 418, 18 N. E. 245,

[1] L.R.A. 293, 6 Am. St. Rep. 389.

[18] Ulman v. Baltimore, 72 Md. 587, 20 A. 141, 21 A. 709, 11 L.R.A. 224.

[19] People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260.

[20] Powell v. Alabama, 287 U. S. 45, 77 L. ed. 153, 53 S. Ct. 55, 84 A.L.R. 527.

[1] Hall v. Wilder Mfg. Co. 316 Mo. 812, 293 S. W. 760, 52 A.L.R. 723.

[2] Ochoa v. Hernandez y Morales, 230 U. S. 139, 57 L. ed. 1427, 33 S. Ct. 1033. And see infra, § 573.

[3] Burdick v. People, 149 Ill. 600, 36 N. E. 948, 24 L.R.A. 152, 41 Am. St. Rep. 329; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699; Palairet's Appeal, 67 Pa. 479, 5 Am. Rep. 450.

[4] Ekern v. McGovern, 154 Wis. 157, 142 N. W. 595, 46 L.R.A.(N.S.) 796.

had to substance rather than to form,[5] for the mere form of the proceeding cannot convert the process used into due process of law, if the necessary result is illegally to deprive a person of his property without compensation.[6]

§ 570. Difficulty of Definition.—

The difficulty of defining the phrase "due process of law" has been repeatedly recognized.[7] It has been said that it would be very difficult, if not impossible, to frame a definition of the term which would be accurate, complete, and appropriate under all circumstances,[8] and would embrace every permissible exertion of power affecting private rights and exclude such as are forbidden.[9] What is due process depends on circumstances varying with the subject matter and the necessities of the situation.[10] It also depends, to some extent, on the power of government which is being exercised and the purpose to be accomplished.[11] Respect must be had to the object of the proceeding and as to whether the right is exercised under the power of taxation, of eminent domain, or of making assessments for local improvements. If the proceeding is found to be suitable or admissible in the special case, it will be adjudged to be due process of law;[12] but if, on the other hand, it is found to be arbitrary, oppressive, and unjust, it may be de-

[5] Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. Ct. 582; Western L. Indem. Co. v. Rupp, 235 U. S. 261, 59 L. ed. 220,

[35] S. Ct. 37; Jacob v. Roberts, 223 U. S. 261, 56 L. ed. 429, 32 S. Ct. 303; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 S. Ct. 390; Cincinnati Street R. Co. v. Snell, 193 U. S. 30, 48 L. ed. 604, 24 S. Ct. 319; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 S. Ct. 836; Chicago, B. & Q. R. Co. v. Chi- cago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; Maxwell v. Page, 23 N. M. 356, 168 P. 492, 5 A.L.R. 155; Bowers v. Smith, 14 Pa. D. & C. 220, citing R. C. L. Merely giving a name to an action, as concerning the thing rather than personal rights in it, cannot justify the procedure if in fact the property owner is deprived of his estate without due process of law. Leigh v. Green, 193 U. S. 79, 48 L. ed. 623,

[24] S. Ct. 390.

[6] Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; Barber Asphalt Paving Co. v. French, 158 Mo. 534, 58 S. W. 934, 54 L.R.A. 492.

[7] Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, 48 S. Ct. 423; Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S.

Ct. 14; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 S. Ct. 281; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Freeland v. Williams, 131 U. S. 405,

[33] L. ed. 193, 9 S. Ct. 763; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L.R.A. 190; Bardwell v. Collins (Bardwell v. An- derson) 44 Minn. 97, 46 N. W. 315, 9 L.R.A. 152, 20 Am. St. Rep. 547; Alderman v. Wells, 85 S. C. 507, 67 S. E. 781, 27 L.R.A. (N.S.) 864, 21 Ann. Cas. 193; State v. Spon- augle, 45 W. Va. 415, 32 S. E. 283, 43 L.R.A. 727. Annotation: 20 Am. St. Rep. 554.

[8] Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; Hagar v. Reclamation Dist. 111 U. S. 701, 33 L. ed. 569, 4 S. Ct. 663; State v. Jack, 69 Kan. 387, 76 P. 911, 1 L.R.A.(N.S.) 167, 2 Ann. Cas. 171; Chauvin v. Valiton,

[3] Mont. 451, 20 P. 658, 3 L.R.A. 194; Salt Creek Valley Turnp. Co. v. Parks, 50 Ohio St. 568, 35 N. E. 304, 28 L.R.A. 769; Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; Anderson v. State, 8 Okla. Crim. Rep. 90, 126 P. 840, Ann. Cas. 1914C, 314; State v. Strasburg, 60 Wash. 106, 110 P. 1020, 32 L.R.A.(N.S.) 1216, Ann. Cas. 1912B, 917. To make scientific precision a criterion of constitutional power would be to sub- ject the state to an intolerable supervision hostile to the basic principles of our gov- ernment and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure. Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581.

[9] Dent v. West Virginia, 129 U. S. 114,

[32] L. ed. 623, 9 S. Ct. 231; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624,

[41] L.R.A. 481, 53 Am. St. Rep. 557; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289.

[10] Moyer v. Peabody, 212 U. S. 78, 53 L. ed. 410, 29 S. Ct. 235; State v. Sponaugle,

[45] W. Va. 415, 32 S. E. 283, 43 L.R.A. 727.

[11] Harmon v. Bolley, 187 Ind. 511, 120 N. E. 33, 2 A.L.R. 609.

[12] Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 S. Ct. 57; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Ft. Smith v. Dodson,

[46] Ark. 296, 55 Am. Rep. 589; Wulzen v. San Francisco, 101 Cal. 15, 35 P. 353, 40 Am. St. Rep. 17; Chauvin v. Valiton, 3 Mont. 451, 20 P. 658, 3 L.R.A. 194; Alderman v. Wells, 85 S. C. 507, 67 S. E. 781, 27 L.R.A. (N.S.) 864, 21 Ann. Cas. 193; State v. Spon- augle, 45 W. Va. 415, 32 S. E. 283, 43 L.R.A. 727. Annotation: 5 L.R.A. 359. See EMINENT DOMAIN [Also 10 R. C. L. p. 1]; SPECIAL OR LOCAL ASSESSMENTS [Also

[25] R. C. L. p. 76]; TAXATION [Also 26 R. C. L. p. 1].

clared to be not due process of law.[13] In fact, the phrase probably never can be defined so as to draw a clear and distinct line, applicable to all cases, between proceedings which constitute due process of law and those which do not,[14] because the definition in each case depends not so much upon the quality of the act as upon the relation of the particular law authorizing it to the fundamental law which limits the power of the legislature.[15]

As in the case of the police power,[16] the courts usually have contented themselves, in ascertaining the intent and application of this important phrase, with the process of judicial inclusion and exclusion as the cases presented for decision have arisen.[17]

The Constitution does not declare what principles are to be applied to ascer-

tain whether there has been due process of law.[18] Nor does it contain any definition of the word "deprive" as used in the Fourteenth Amendment.[19]

§ 571. Attempted Definitions.—

While it is true that no precise definition of the phrase "due process of law" can be given, yet the courts have frequently defined the phrase in general terms. It has been said that due process of law must be understood to mean law in the regular course of administration through courts of justice20 according to those rules and forms which have been established for the protection of private rights.[1] Substantially the same

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[13] Wulzen v. San Francisco, 101 Cal. 15,

[35] P. 353, 40 Am. St. Rep. 17.

[14] Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 S. Ct. 763; Lacey v. Lemmens,

[22] N. M. 54, 159 P. 949, L.R.A.1917A, 185.

[15] Re Clark, 65 Conn. 17, 31 A. 522, 28 L.R.A. 242.

[16] See Vol. 11, p. 970, §§ 246, 247.

[17] Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 S. Ct. 281; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 S. Ct. 663; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Scott v. Toledo (C. C.) 36 F. 385, 1 L.R.A. 688; Farmers Independent Ditch Co. v. Agricultural Ditch Co. 22 Colo. 513, 45 P. 444, 55 Am. St. Rep. 149; Ferry v. Camp- bell, 110 Iowa, 290, 81 N. W. 604, 50 L.R.A. 92; Great Northern Utilities Co. v. Public Serv. Commission, 88 Mont. 180, 293 P. 294, citing R. C. L.; Chauvin v. Valiton, 8 Mont. 451, 20 P. 658, 3 L.R.A. 194; Stuart v. Palm- er, 74 N. Y. 183, 30 Am. Rep. 289; Alder- man v. Wells, 85 S. C. 507, 67 S. E. 781, 27 L.R.A.(N.S.) 864, 21 Ann. Cas. 193; Har- bison v. Knoxville Iron Co. 103 Tenn. 421,

[53] S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682.

[18] French v. Barber Asphalt Paving Co.

[181] U. S. 324, 45 L. ed. 879, 21 S. Ct. 625.

[19] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

[20] Brown v. New Jersey, 175 U. S. 172,

[44] L. ed. 119, 20 S. Ct. 77; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 S. Ct. 344; Hallinger v. Davis, 146 U. S. 314,

[36] L. ed. 986, 13 S. Ct. 105; Leeper v. Texas,

[139] U. S. 462, 35 L. ed. 225, 11 S. Ct. 577; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 S. Ct. 224; Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; State v. Jack, 69 Kan. 387, 76 P. 911, 1 L.R.A.(N.S.) 167, 2 Ann. Cas. 171; Re Thompson, 116 Me. 473, 102 A. 303, citing R. C. L.; Rosenbush v. Bern- heimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317; Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A. (N.S.) 162, Ann. Cas. 1912B, 156; People v. Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L.R.A. 247; Church v. South Kingstown,

[22] R. I. 381, 48 A. 3, 53 L.R.A. 739. Annotation: 24 L. ed. 436; 42 ed. 865;

[2] L.R.A. 655; 11 L.R.A. 224; 13 L.R.A. 304.

[1] Endicott-Johnson Corp. v. Smith, 266 U. S. 291, 69 L. ed. 293, 45 S. Ct. 63; Tur- pin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 S. Ct. 20; Scott v. McNeal, 154 U. S. 34,

[38] L. ed. 896, 14 S. Ct. 1108; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 S. Ct. 894; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Kennard v. Louis- iana, 92 U. S. 480, 23 L. ed.

478; State Sav. & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675, affirmed in

[238] U. S. 611, 59 L. ed. 1488, 35 S. Ct. 792; Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398; Union Drainage Dist. v. Smith, 233 Ill. 417, 84 N. E. 376, 16 L.R.A. (N.S.) 292; Burdick v. People, 149 Ill. 600,

[36] N. E. 948, 24 L.R.A. 152, 41 Am. St. Rep. 329; Re Thompson, 116 Me. 473, 102 A. 303, citing R. C. L.; People v. Dickerson,

[164] Mich. 148, 129 N. W. 199, 33 L.R.A. (N.S.) 917, Ann. Cas. 1912B, 688; Ivie v. Bailey, 319 Mo. 474, 5 S. W. (2d) 50, 57 A.L.R. 881; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Re Davies,

[168] N. Y. 89, 61 N. E. 118, 56 L.R.A. 855; Ward v. Boyce, 152 N. Y. 191, 46 N. E. 180,

[36] L.R.A. 549; Anderson v. State, 8 Okla. Crim. Rep. 90, 126 P. 840, Ann. Cas. 1914C, 314; Church v. South Kingstown, 22 R. I. 381, 48 A. 3, 53 L.R.A. 739; Carnegie Natural Gas Co. v. Swiger, 72 W. Va. 557, 79 S. E. 3, 46 L.R.A.(N.S.) 1073; Prescott v. State,

[56] Okla. Crim. Rep. 259, 37 P. (2d) 830, citing Com. v. Gryctko, 22 Pa. D. & C. 462, citing R. C. L. Annotation: 2 L.R.A. 655; 11 L.R.A. 224;

[13] L.R.A. 304; 41 Am. St. Rep. 338. Due process of law, in each particular case, means such an exercise of the pow-

idea is embodied in the statement that it means law according to the settled course of judicial proceedings2 or in accordance with natural, inherent, and fundamental principles of justice,[3] enforceable in the usual modes established in the administration of government with respect to kindred matters.[4] A general law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike, is due process of law.[5]

The term "due process of law" includes all the steps essential to deprive a person of life, liberty, or property; it includes all the forms and acts essential to its application and to give effect to it. The means that may be employed to accomplish the purpose of the law is the process; in other words, "process" is the mode by which the purpose of the law may be effected.[6]

The term "law" as used in this guaranty embraces all legal and equitable rules defining human rights and duties and providing for their enforcement, not only as between man and man, but also between the state and its citizens.[7]

§ 572. Definition of "Law of the Land."—

The term "due process of law"

as used in the Federal Constitution has been repeatedly declared to be the

exact equivalent of the phrase "law of the land"[8] as used in Magna Charta.[9]

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ers of government as the settled maxims of law permit and sanction and under such safeguards for the protection of in- dividual rights as those maxims prescribe for the classes of cases to which the one in question belongs. State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602,

[39] L.R.A.(N.S.) 694.

[2] Minder v. Georgia, 183 U. S. 559, 46 L. ed. 328, 22 S. Ct. 224; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 S. Ct. 625; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 S. Ct. 577; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Re Thomp- son, 116 Me. 473, 102 A. 303, citing R. C. L.; St. Louis v. Galt, 179 Mo. 8, 77 S. W. 876,

[63] L.R.A. 778; Ives v. South B. R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Harbison v. Knox- ville Iron Co. 103 Tenn. 421, 53 S. W. 955,

[56] L.R.A. 316, 76 Am. St. Rep. 682; State v. Stimpson, 78 Vt. 124, 62 A. 14, 1 L.R.A. (N.S.) 1153, 6 Ann. Cas. 639; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559. Legislation is not open to the charge of depriving one of his rights without due process of law, if it is general in its opera- tion upon the subjects to which it relates and is enforceable by usual methods adapt- ed to the nature of the case. Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231.

[3] Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Wilmot v. Chicago,

[328] Ill. 552, 160 N. E. 206, 62 A.L.R. 394; State v. Height, 117 Iowa, 650, 91 N. W. 935,

[59] L.R.A. 437, 94 Am. St. Rep. 323; Re Thompson, 116 Me. 473, 102 A. 303, citing R. C. L.; Ives v. South B. R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Carr v. Brown, 20 R. I. 555, 38 A. 9, 38 L.R.A. 294, 78 Am. St. Rep.

[4] Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Harding v. People,

[160] Ill. 459, 43 N. E. 624, 32 L.R.A. 445, 52 Am. St. Rep. 344; Re Thompson, 116 Me. 473, 102 A. 303, citing R. C. L.; State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696. Annotation: 24 L. ed. 436.

[5] Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398.

[6] Com. v. Gryctko, 22 Pa. D. & C. 462, citing R. C. L.; Jenkins v. Ballantyne, 8 Utah, 245, 30 P. 760, 16 L.R.A. 689. See infra, § 573.

[7] Jenkins v. Ballantyne, 8 Utah, 245, 30 P. 760, 16 L.R.A. 689.

[8] Klafter v. State Examiners, 259 Ill. 15,

[102] N. E. 193, 46 L.R.A.(N.S.) 532, Ann. Cas. 1914B, 1221; Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 84 N. E. 1049, 17 L.R.A.(N.S.) 1071; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268; Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65; State v. Loomis,

[115] Mo. 307, 22 S. W. 350, 21 L.R.A. 789; Gunn v. Union R. Co. 27 R. I. 320, 62 A. 118, 2 L.R.A. (N.S.) 362; Harbison v. Knox- ville Iron Co. 103 Tenn. 421, 53 S. W. 955,

[56] L.R.A. 316, 76 Am. St. Rep. 632, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1; Knoxville & O. R. Co. v. Harris, 99 Tenn. 684, 43 S. W. 115, 53 L.R.A. 921; Ex parte Sizemore, 110 Tex. Crim. Rep. 232, 8 S. W. (2d) 134, 59 A.L.R. 430; State v. Bates, 14 Utah, 293, 47 P. 78, 43 L.R.A. 33.

[9] French v. Barber Asphalt Paving Co.

[181] U. S. 324, 45 L. ed. 879, 21 S. Ct. 625; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; Davidson v. New Orleans, 96 U. S. 97,

[24] L. ed. 616; Waller v. Sauvinet, 92 U. S. 90, 23 L. ed. 679; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372; Jacobsen v. Superior Ct. 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep.

It is a general public law of the land.[10] It may be broadly stated that the words "per legem terre," as expressed in Magna Charta, are the equivalent of such expressions as

"according to the law of the land," "by due process of law," or "by due course of law," which are contained in the several Constitutions of the American states.[11] Due process of law means something more, however, than the actual existing law of the land. If it were otherwise, it is obvious that a guaranty as to due process of law would be no restraint upon legislative power.[12] Therefore, not everything which may pass under the form of statutory enactment can be considered the law of the land.[13] Nor does the phrase "law of the land" mean the general body of the law, common and statute, which was in existence at the time the Constitution took effect, for that would deny to the legislature the power to change or amend the law in any particular.[14] The law of the land means the law of the state in which the proceeding is brought; the prohibition of the Federal Constitution does not mean that a state must observe the due process of law of some other jurisdiction over which it has no control. For example, it has been decided that the

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656; Water Comrs. v. Johnson, 86 Conn. 151, 84 A. 727, 41 L.R.A.(N.S.) 1024; Re Clark, 65 Conn. 17, 31 A. 522, 28 L.R.A. 242; Klafter v. State Examiners, 259 Ill. 15, 102 N. E. 193, 46 L.R.A. (N.S.) 532, Ann. Cas. 1914B, 1221; Off v. Morehead, 235 Ill. 40, 85 N. E. 264, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434; Union Drainage Dist. v. Smith, 233 Ill. 417, 84 N. E. 376, 16 L.R.A.(N.S.) 292; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 78; Am. St. Rep. 229, affirmed in 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; Eder v. People, 161 Ill. 296, 43 N. E. 1108, 32 L.R.A. 659, 52 Am. St. Rep. 365; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315; Millett v. People, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268; Wichita Council, S. B. A. v. Security Ben. Asso. 138 Kan. 841, 28 P. (2d) 976, 94 A.L.R. 629; Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65; Wright v. Wright, 2 Md. 429, 56 Am. Dec. 723; University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789; Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420; Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248; Wenham v. State, 65 Neb. 421, 91 N. W. 421, 58 L.R.A. 825; People v. Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L.R.A. 247; State v. Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L.R.A. 130; Ex parte Sullivan, 10 Okla. Crim. Rep. 465, 138 P. 815, Ann. Cas. 1916A, 719; Anderson v. State, 8 Okla. Crim. Rep. 90, 126 P. 840, Ann. Cas. 1914C, 314; Paulson v. Portland, 16 Or. 450, 19 P. 450, 1 L.R.A. 673; Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636; Church v. South Kingstown, 22 R. I. 381, 48 A. 3, 53 L.R.A. 739; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1; Ex parte Sizemore, 110 Tex. Crim. Rep. 232, 8 S. W. (2d) 134, 59 A.L.R. 430; State v. Bates, 14 Utah, 293, 47 P. 78, 43 L.R.A. 33, overruled on another point in Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620; Jensen v. Union P. R. Co. 5 Utah, 253, 21 P. 994, 4 L.R.A. 724; State v. Strasburg, 60 Wash. 106, 110 P. 1020, 32 L.R.A. (N.S.) 1216, Ann. Cas. 1912B, 917; Ekern v. McGovern, 154 Wis. 157, 142 N. W. 595, 46 L.R.A.(N.S.) 796; Bowen v. State, 30 Wis. 129, 11 Am. Rep. 559. Annotation: 24 L. ed. 437; 5 L.R.A. 359; 122 Am. St. Rep. 905. The words "law of the land" as used in Magna Charta implied a conformity with the ancient and customary laws of the English people or laws enacted by Parliament. Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

[10] Off v. Morehead, 235 Ill. 40, 85 N. E. 264, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184; Booth v. People, 186 Ill. 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229, affirmed in 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425.

[11] Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 S. Ct. 841; State v. Rose, 33 Del. 163, 132 A. 864, 45 A.L.R. 85; State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L.R.A. 519, 60 Am. St. Rep. 756. The phrase "conformably to the laws," in a constitutional provision that every person is entitled to a certain remedy for wrongs conformably to the laws, relates to a recognized long-established system of laws existing in states adopting Constitutions as well as in the prior

organizations from which the states were organized. McCoy v. Kenosha County, 195 Wis. 273, 218 N. W. 348, 57 A.L.R. 412.

[12] Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372; Re Clark, 65 Conn. 17, 31 A. 522, 28 L.R.A. 242; Union Drainage Dist. v. Smith, 233 Ill. 417, 84 N. E. 376, 16 L.R.A.(N.S.) 292; Salt Creek Valley Turnp. Co. v. Parks, 50 Ohio St. 568, 35 N. E. 304, 28 L.R.A. 769; Pinney v. Providence Loan & Invest. Co. 106 Wis. 396, 82 N. W. 308, 50 L.R.A. 577, 80 Am. St. Rep. 41.

[13] Martin v. Dix, 52 Miss. 53, 24 Am. Rep. 661; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789.

[14] Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315, 9 L.R.A. 152, 20 Am. St. Rep. 547.

guaranty of due process of law does not, of itself, require a trial by jury in states where the usage and statutes are otherwise.[15]

§ 573. Essential Elements.—

The essential elements of due process of law are notice16 and an opportunity to be heard17 and to defend18 in an orderly

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[15] See infra, § 619.

[16] United States.—Snyder v. Massachusetts, 291 U. S. 97, 78 L. ed. 674, 54 S. Ct. 330, 90 A.L.R. 575; American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. ed. 231, 53 S. Ct. 98, 86 A.L.R. 298; Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527; Blackmer v. United States, 284 U. S. 421, 76 L. ed. 375, 52 S. Ct. 252; Louisville & N. R. Co. v. Western U. Teleg. Co. 234 U. S. 369, 58 L. ed. 1356, 34 S. Ct. 810; Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 S. Ct. 406, Ann. Cas. 1913D, 936; Jacob v. Roberts, 223 U. S. 261, 56 L. ed. 429, 32 S. Ct. 303; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 S. Ct. 836; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 S. Ct. 281; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 S. Ct. 841; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 S. Ct. 344; Orchard v. Alexander, 157 U. S. 372, 39 L. ed. 737, 15 S. Ct. 635; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 S. Ct. 1108; Baldwin v. Hale, 1 Wall. 223, 17 L. ed. 531. **Alabama.** — Fowler v. Fowler, 219 Ala. 453, 122 So. 440, citing R. C. L. **California.**—Pierce v. Superior Ct. 1 Cal. (2d) 759, 37 P. (2d) 453, 460, 96 A.L.R. 1020; Gray v. Hall, 203 Cal. 306, 265 P. 246, citing R. C. L. Re Lambert, 134 Cal. 626, 66 P. 851, 55 L.R.A. 856, 86 Am. St. Rep. 296 (insanity inquisition). **Colorado.**—Great West Min. Co. v. Woodmas of Alston Min. Co. 12 Colo. 46, 20 P. 771, 13 Am. St. Rep. 204. **Delaware.**—State v. Rose, 33 Del. 168, 132 A. 864, 45 A.L.R. 85 (forfeiture of property used unlawfully). **Florida.**—Coral Gables v. Certain Lands, 110 Fla. 189, 149 So. 36, citing R. C. L.; State ex rel. Woods-Young Co. v. Tedder, 103 Fla. 1083, 138 So. 643 (writ of certiorari denied in 285 U. S. 557, 76 L. ed. 946, 52 S. Ct. 458) citing R. C. L.; Fiehe v. R. E. Householder Co. 98 Fla. 627, 125 So. 2, citing R. C. L.; Tibbetts v. Olson, 91 Fla. 824, 108 So. 679, citing R. C. L.; McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731. **Georgia.**—Frank v. State, 142 Ga. 741, 83 S. E. 645, L.R.A.1915D, 817, writ of error denied in 235 U. S. 694, 59 L. ed. 429, 35 S. Ct. 208. **Idaho.**—Anderson v. Great Northern R. Co. 25 Idaho, 433, 138 P. 127, Ann. Cas. 1916C, 191. **Illinois.**—Chicago v. Cohn, 326 Ill. 372, 158 N. E. 118, 55 A.L.R. 196; Rabbitt v. Weber, 297 Ill. 491, 130 N. E. 737, citing R. C. L.; Rothschild & Co. v. Steger & Sons Piano Mfg. Co. 256 Ill. 196, 99 N. E. 920, 42 L.R.A. (N.S.) 793, Ann. Cas. 1913E, 276. **Indiana.**—Harmon v. Bolley, 187 Ind. 511, 120 N. E. 33, 2 A.L.R. 609; Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L.R.A. 190. **Iowa.**—Davidson v. Henry L. Doherty & Co. 214 Iowa, 739, 241 N. W. 700, 91 A.L.R. **Kansas.**—Wichita Council, S. B. A. v. Security Ben. Asso. 138 Kan. 841, 28 P. (2d) 976, 94 A.L.R. 629. **Kentucky.** — Levee Comrs. v. Johnson, 178 Ky. 287, 199 S. W. 8, L.R.A.1918E, 202. **Maine.**—Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65. **Michigan.**—Grand

Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 14 L.R.A. 498, 28 Am. St. Rep. 276. **Minnesota.**—Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315, 9 L.R.A. 152, 20 Am. St. Rep. 547. **Mississippi.**—Dunn v. Love, 172 Miss. 342, 155 So. 331, 92 A.L.R. 1323, affirmed in Doty v. Love, 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438; Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238. **Missouri.**—Re Moynihan, 332 Mo. 1022, 62 S. W. (2d) 410, 91 A.L.R. 74; State ex rel. Love v. Becker, 226 Mo. 1193, 34 S. W. (2d) 27, citing R. C. L.; Stone v. Jefferson, 317 Mo. 1, 293 S. W. 730, 52 A.L.R. 879. **New Jersey.** —State v. Zied, 116 N. J. L. 234, 183 A. 210, citing R. C. L. **New Mexico.**—Gutierrez v. Middle Rio Grande Conservancy Dist. 34 N. M. 346, 282 P. 1, 70 A.L.R. 1261, writ of certiorari denied in 280 U. S. 610, 74 L. ed. 653, 50 S. Ct. 158; Lacey v. Lemmons, 22 N. M. 54, 159 P. 949, L.R.A.1917A, 1185. **North Carolina.**—Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; Parish v. East Coast Cedar Co. 133 N. C. 478, 45 S. E. 768, 98 Am. St. Rep. 718; Bernhardt v. Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L.R.A. 402. **Oklahoma.** — Muskogee Iron Works v. Bason, 176 Okla. 298, 55 P. 68, citing R. C. L. **Oregon.**—Cordrey v. The Bee, 102 Or. 636, 201 P. 202, 20 A.L.R. 1079. **Pennsylvania.**—Com. v. O'Keefe, 298 Pa. 169, 148 A. 73, citing R. C. L.; Com. v. Gryctko, 22 Pa. D. & C. 462, citing R. C. L.; Bowers v. Smith, 14 Pa. D. & C. 220, citing R. C. L. **South Carolina.**—Koester v. Citizens' Pub. Co. 154 S. C. 154, 151 S. E. 452, citing R. C. L. **Texas.**—Ex parte Renfro, 115 Tex. 82, 273 S. W. 813, 40 A.L.R. 900. **Utah.**—Denver & R. G. W. R. Co. v. Industrial Commission, 74 Utah, 316, 279 P. 612, citing R. C. L. **Virginia.**—Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584; Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 55 S. E. 572, 7 L.R.A.(N.S.) 1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124. **Wisconsin.**—Lacher v. Venus, 177 Wis. 558, 188 N. W. 613, 24 A.L.R. 403. **Wyoming.**—Sterritt v. Young, 14 Wyo. 146, 82 P. 946, 4 L.R.A.(N.S.) 169, 116 Am. St. Rep. 994. Annotation: 42 L. ed. 865; 2 L.R.A. 657; 11 L.R.A. 225; 20 Am. St. Rep. 554.

[17] Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527; Blackmer v. United States, 284 U. S. 421, 76 L. ed. 375, 52 S. Ct. 252; Baker v. Baker, E. & Co. 242 U. S. 394, 61 L. ed. 386, 37 S. Ct.

§ [573] CONSTITUTIONAL LAW [12] Am. Jur.

proceeding adapted to the nature of the case19 before a tribunal having jurisdiction of the cause.[20] One of the most famous and perhaps the most often quoted definition of due process of law is that of Daniel Webster in his argument in the Dartmouth College Case,[1] in which he declared that by due process of law is meant "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."[2] Somewhat similar is the

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152; Riverside & D. River Cotton Mills v. Menefee, 237 U. S. 189, 59 L. ed. 910, 35 S. Ct. 579; Jacob v. Roberts, 223 U. S. 261, 56 L. ed. 429, 32 S. Ct. 303; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Iowa C. R. Co. v. Ct. 344; Orchard v. Alexander, 157 U. S. 372, 39 L. ed. 737, 15 S. Ct. 635; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 S. Ct. 663; Fowler v. Nash, 225 Ala. 613, 144 So. 831, citing R. L.; Fowler v. Fowler, 219 Ala. 453, 122 So. 440, citing R. C. L.; Gray v. Hall, 203 Cal. 306, 265 P. 246, citing R. C. L.; San Christina Invest. Co. v. San Francisco, 167 Cal. 762, 141 P. 384, 52 L.R.A.(N.S.) 676; Re Lambert, 134 Cal. 626, 66 P. 851, 55 L.R.A. 856, 86 Am. St. Rep. 296 (insanity inquisition); State v. Rose, 33 Del. 168, 132 A. 864, 45 A.L.R. 85 (forfeiture of property used unlawfully); Coral Gables v. Certain Lands, 110 Fla. 189, 149 So. 36, citing R. C. L.; State ex rel. Woods-Young Co. v. Tedder, 103 Fla. 1083, 138 So. 643 (writ of certiorari denied in 285 U. S. 557, 76 L. ed. 946, 52 S. Ct. 458) citing R. C. L.; Flehe v. R. E. Householder Co. 98 Fla. 627, 125 So. 2, citing R. C. L.; Tibbetts v. Olson, 91 Fla. 824, 108 So. 679, citing R. C. L.; McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731; Frank v. State, 142 Ga. 741, 83 S. E. 645, L.R.A.1915D, 817, writ of error denied in 235 U. S. 694, 59 L. ed. 429, 35 S. Ct. 208; Chicago v. Cohn, 326 Ill. 372, 158 N. E. 118, 55 A.L.R. 196; Rabbitt v. Weber, 297 Ill. 491, 130 N. E. 787, citing R. C. L.; Rothschild & Co. v. Steger & Sons Piano Mfg. Co. 256 Ill. 196, 99 N. E. 920, 42 L.R.A.(N.S.) 793, Ann. Cas. 1913E, 276; Harmon v. Bolley, 187 Ind. 511, 120 N. E. 33, 2 A.L.R. 609; Davidson v. Henry L. Doherty & Co. 214 Iowa,

739, 241 N. W. 700, 91 A.L.R. 1308; Wichita Council, S. B. A. v. Security Ben. Asso. 138 Kan. 841, 28 P. (2d) 976, 94 A.L.R. 629; Levee Comrs. v. Johnson, 178 Ky. 287, 199 S. W. 8, L.R.A.1918E, 202; Jones v. Caldwell, 176 Ky. 15, 195 S. W. 122, L.R.A.1918B, 50; Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65; Dunn v. Love, 172 Miss. 342, 155 So. 331, 92 A.L.R. 1323, affirmed in Doty v. Love, 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438; Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238; State ex rel. Love v. Becker, 326 Mo. 1193, 34 S. W. (2d) 27, citing R. C. L.; State v. Zied, 116 N. J. L. 234, 183 A. 210, citing R. C. L.; Gutierrez v. Middle Rio Grande Conservancy Dist. 34 N. M. 346, 282 P. 1, 70 A.L.R. 1261, writ of certiorari denied in 280 U. S. 610, 74 L. ed. 653, 50 S. Ct. 158; Lacey v. Lemmons, 22 N. M. 54, 159 P. 949, L.R.A.1917A, 1185; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State v. Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L.R.A. 130; State ex rel. Lofthus v. Langer, 46 N. D. 462, 177 N. W. 408, citing R. C. L.; Hutchinson v. Hutchinson, 126 Or. 519, 270 P. 484, 62 A.L.R. 660; Com. v. O'Keefe, 298 Pa. 169, 148 A. 73, citing R. C. L.; Bowers v. Smith, 14 Pa. D. & C. 220, citing R. C. L.; Ex parte Hardcastle, 84 Tex. Crim. Rep. 463, 208 S. W. 531, 2 A.L.R. 1539; Denver & R. G. W. R. Co. v. Industrial Commission, 74 Utah, 316, 279 P. 612, citing R. C. L.; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584; Lacher v. Venus, 177 Wis. 558, 188 N. W. 613, 24 A.L.R. 403. Annotation: 42 L. ed. 865; 2 L.R.A. 657; 11 L.R.A. 225.

[18] George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. ed. 1265, 53 S. Ct. 620; American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. ed. 231, 53 S. Ct. 98, 86 A.L.R. 298; Jacob v. Roberts, 223 U. S. 261, 56 L. ed. 429, 32 S. Ct. 303; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Turner v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 S. Ct. 20; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 S. Ct. 836.

[19] Chicago v. Cohn, 326 Ill. 372, 158 N. E. 118, 55 A.L.R. 196; Parish v. East Coast Cedar Co. 133 N. C. 478, 45 S. E. 768, 98 Am. St. Rep. 718. Annotation: 98 Am. St. Rep. 724.

[20] See infra, § 633.

[1] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

[2] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; McClatchy v. Superior Ct. 119 Cal. 413, 51 P. 696, 39 L.R.A. 691; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656; Jenks v. Stump, 41 Colo. 281, 93 P. 17, 15 L.R.A.(N.S.) 554, 124 Am. St. Rep. 137, 14 Ann. Cas. 914; Chicago v. Cohn, 326 Ill. 372, 158 N. E. 118, 55 A.L.R. 196; People v. Dickerson, 164 Mich. 148, 129 N. W. 199, 33 L.R.A.(N.S.) 917, Ann. Cas. 1912B, 688; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315, 9 L.R.A. 152, 20 Am. St. Rep. 547; Holmes v. Murray, 207 Mo. 413, 105 S. W. 1085, 17 L.R.A. (N.S.) 431, 123 Am. St. Rep. 386, 13 Ann. Cas. 845; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A. (N.S.) 162, Ann. Cas. 1912B, 156; Clapp v. Hong, 12 N. D. 600, 98 N. W. 710, 65 L.R.A. 757, 102 Am. St. Rep. 589; Anderson v. State, 8 Okla. Crim. Rep. 90, 126 P. 840; Ann. Cas. 1914C, 314; Bowers v. Smith, 14 Pa. D. & C. 220, citing R. C. L.; Koester v. Citizens' Pub. Co. 154 S. C. 154, 151 S. E. 452, citing R. C. L.; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1; Gulf, C. & S. F. R. Co. v. Ellis (Tex.) 18 S. W. 723, 17 L.R.A. 286, affirmed in 87 Tex. 19, 26 S. W. 985, which was reversed on other points in 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; State v. Stimpson, 78 Vt. Cas. 62 A. 14, 1 L.R.A.(N.S.) 1153, 6 Ann. Cas. 639; State v. Strasburg, 60 Wash. 106, 110 P. 1020, 32 L.R.A.(N.S.) 1216, Ann. Cas. 1912B, 917; Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559.

statement that it is a rule as old as the law that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity lacks all the attributes of a judicial determination; it is judicial usurpation and oppression and can never be upheld where justice is fairly administered.[3]

Due process of law generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings.[4] Expressed in other language, the words "law of the land" or "due process of law," when used in considering the property rights of individuals, mean

summons or notice, such as is ordinarily given upon the institution of a suit, due appearance of the parties in interest, pleading of the facts in issue, and a determination thereof by a jury or by a court in accordance with settled practice.[5] In any proceedings where notice is essential, the view has been taken that the law authorizing such proceedings must require notice; otherwise, it will be unconstitutional. It is not enough that a person may by chance have notice or that he may, as a matter of favor or courtesy, have a hearing.[6] A contrary view has been taken on this question to the effect that a statute is not invalid merely by reason of the fact that it does not expressly provide for notice and hearing; it may be implied by the courts, unless the language of the statute excludes the theory that notice and hearing are necessary.[7] Where a statute does not expressly provide for notice

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[3] Snyder v. Massachusetts, 291 U. S. 97, 78 L. ed. 674, 54 S. Ct. 330, 90 A.L.R. 575; Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527; Blackmer v. United States, 284 U. S. 421, 76 L. ed. 375, 52 S. Ct. 252; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107, 50 S. Ct. 451; Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. Ct. 582; Grannis v. Ordean, 234 U. S. 385, 58 L. ed. 1363, 34 S. Ct. 779; Louisville & N. R. Co. v. Western U. Teleg. Co. 234 U. S. 369, 58 L. ed. 1356, 34 S. Ct. 810; Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 S. Ct. 406, Ann. Cas. 1913D, 936; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 S. Ct. 836; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 S. Ct. 841; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 S. Ct. 894; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 S. Ct. 825; Galpin v. Page, 18 Wall. (U. S.) 350, 21 L. ed. 959; Pierce v. Superior Ct. 1 Cal. (2d) 759, 37 P. (2d) 453, 460, 96 A.L.R. 1020; Bicknell v. Herbert, 20 Haw. 132, Ann. Cas. 1913A, 1186; Chicago v. Cohn, 326 Ill. 372, 158 N. E. 118, 55 A.L.R. 196; Ferry v. Campbell, 110 Iowa, 290, 81 N. W. 604, 50 L.R.A. 92; Wichita Council, S. B. A. v. Security Ben. Asso. 138 Kan. 841, 28 P. (2d) 976, 94 A.L.R. 629; Randall v. Patch, 118 Me. 303, 72 A. 97, 8 A.L.R. 65; Ulman v. Baltimore, 224 Md. 587, 20 A. 141, 21 A. 709, 11 L.R.A. 224; People's Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N. W. 170, 64 A.L.R. 1024; Dunn v. Love, 172 Miss. 342, 155 So. 331, 92 A.L.R. 1323, affirmed in 55 S. Ct. 558, 96 A.L.R. 1438; Lacey v. Lemmons, 22 N. M. 54, 159 P. 949, L.R.A.1917A, 1185; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; Gallagher v. National Nonpartisan League, 53 N. D. 238, 205 N. W. 674, citing R. C. L.; Branson v. Gee, 25 Or. 462, 36 P. 527, 24 L.R.A. 355; State v. Sullivan, 127 S. C. 136, 121 S. E. 47, citing R. C. L.; Ex parte Renfro, 115 Tex. 82, 273 S. W. 813, 40 A.L.R. 900; Dillon v. Whitley (Tex. Civ. App.) 210 S. W. 229, citing R. C. L.; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584; Lacher v. Venus, 177 Wis. 558, 188 N. W. 613, 24 A.L.R. 403.

[4] King v. Panther Lumber Co. 171 U. S. 437, 43 L. ed. 227, 18 S. Ct. 573; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 S. Ct. 925; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372. Annotation: 13 L.R.A. 305. The words "law of the land" or "due process of law," when used in considering the property rights of individuals, mean summons or notice, such as is ordinarily given upon the institution of a suit, due appearance of the parties in interest, pleading of the facts in issue, and a determination thereof by a jury. State v. Rose, 33 Del. 168, 132 A. 864, 45 A.L.R. 85. "Remedy by due course of law," as used in the Kansas Bill of Rights, § 18, means the reparation for injury ordered by a tribunal having jurisdiction in due course of procedure after a fair hearing. Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 64 L.R.A. 790, 104 Am. St. Rep. 422.

[5] State v. Rose, 33 Del. 168, 132 A. 864, 45 A.L.R. 85.

[6] Beveridge v. Baer, 59 S. D. 563, 241 N. W. 727, 84 A.L.R. 189.

[7] Tatlow v. Bacon, 101 Kan. 26, 165 P. 835, 14 A.L.R. 269, writ of error dismissed in 251 U. S. 537, 64 L. ed. 402, 40 S. Ct. 68.

and a hearing, other statutes must be looked to and the process authorized under them should be had before a decree or judgment can be entered. The legislature cannot dispense with such notice. The court, in all cases, must proceed upon notice and inquiry. It must hear before it can adjudge, and it must give an opportunity to persons affected by the judgment to be heard before it is rendered; otherwise, the judgment does not affect them.[8]

§ 574. Requirement of Equality of Operation.—

Due process of law and the equivalent phrase "law of the land" have frequently been defined to mean a general9 and public law operating equally on all persons in like circumstances,[10] and not a partial or private law affecting the rights of a particular individual or class of individuals11 in a way in which the same rights of other persons are not affected.[12] Under this guaranty not only must a statute embrace all persons in like situation, but the classification must be natural and reasonable, not arbitrary and capricious.[13] Due process of law is denied when any particular person of a class or of the community is singled out for the imposition of restraint or burdens not imposed upon, and to be borne by, all of the class or of the community at large, unless the imposition or restraint is based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community.[14] An act which affects only, and exhausts itself upon, a particular person, or his rights and privileges, and has no relation to the community in general is rather a sentence than a law and one which condemns without a hearing.[15] It would seem that it may safely be stated as a general rule that whatever, in the matter of classification, complies with the requirements as to the equal protection of the laws will, so far as such an objection is concerned, be likewise upheld as amount-

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[8] Sinquefield v. Valentine, 159 Miss. 144,

[132] So. 81, 76 A.L.R. 238.

[9] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Hirth- Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; University of Mary- land v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Atty. Gen. v. Jochim, 99 Mich. 358, 58 N. W. 611, 23 L.R.A. 699, 41 Am. St. Rep. 606; J. O. Plott Co. v. H. K. Ferguson Co. 202 N. C. 446, 163 S. E. 688, citing R. C. L.; State v. Strasburg, 60 Wash. 106, 110 P. 1020, 32 L.R.A.(N.S.) 1216, Ann. Cas. 1912B, 917; Moore v. Strickling, 46 W. Va. 515, 33 S. E. 274, 50 L.R.A. 279.

[10] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282, affirming

[11] Utah, 200, 39 P. 825, 29 L.R.A. 97; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721; Frank v. State, 142 Ga. 741, 83 S. E. 645, L.R.A.1915D, 817, writ of error denied in 235 U. S. 694, 59 L. ed. 429, 35 S. Ct. 208; Off v. Morehead, 235 Ill. 40, 85 N. E. 264, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434; Eden v. People, 161 Ill. 296, 43 N. E. 1108, 32 L.R.A. 659, 52 Am. St. Rep. 365; Harding v. People, 160 Ill. 459,

[43] N. E. 624, 32 L.R.A. 445, 52 Am. St. Rep. 344; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L.R.A. 340, 37 Am. St. Rep. 206; Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 33 N. E. 421, 18 L.R.A. 729; Eames v. Savage, 77 Me. 212, 52 Am. Rep. 751; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789; State v. Creamer,

[85] Ohio St. 349, 97 N. E. 602, 39 L.R.A. (N.S.) 394; Harbison v. Knoxville Iron Co.

[103] Tenn. 421, 53 S. W. 955, 56 L.R.A. 316,

[76] Am. St. Rep. 682; Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126; Stratton v. Morris, 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70; Jones v. Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; State Bank v. Cooper, 2 Yerg. (Tenn.) 599, 24 Am. Dec. 517; Wally v. Kennedy, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511; Ex parte Sizemore,

[110] Tex. Crim. Rep. 232, 8 S. W. (2d) 134,

[59] A.L.R. 430.

[11] Off v. Morehead, 235 Ill. 40, 85 N. E. 264, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434; Bailey v. People, 190 Ill. 28, 60 N. E. 98, 54 L.R.A. 838, 83 Am. St. Rep. 116; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L.R.A. 340, 37 Am. St. Rep. 206.

[12] Atty. Gen. v. Jochim, 99 Mich. 358, 58 N. W. 611, 23 L.R.A. 699, 41 Am. St. Rep. 606.

[13] Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682. As to the relationship between due proc- ess of law and equal protection of the laws, see supra, § 472.

[14] State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L.R.A. 265, 77 Am. St. Rep. 765; Anderson v. State, 8 Okla. Crim. Rep. 90, 126 P. 840, Ann. Cas. 1914C, 314.

[15] University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

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ing to due process of law. In fact, the courts frequently refer to both clauses at once in discussing the constitutionality of statutes.[16]

§ 575. Protection from Arbitrary Action.—

The principle of due process of law had its origin in England as a protection to individuals from arbitrary action on the part of the Crown.[17] It has been said that in this country the requirement is intended to have a similar effect against legislative power—that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property.[18] It is a limitation upon arbitrary power and a guaranty against arbitrary legislation.[19] The primary purpose of the guaranty is the security of the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.[20] Substantially the same idea is embraced in the statement that the great purpose of the require-

ment is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen.[1] Accordingly, in general terms it has been

[16] See, for example, Barbier v. Connolly,

[113] U. S. 27, 28 L. ed. 923, 5 S. Ct. 357.

[17] See supra, § 568.

[18] Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 S. Ct. 1108; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Missouri P. R. Co. v. Humes,

[115] U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Bank of Columbia v. Okely,

[4] Wheat. (U. S.) 235, 4 L. ed. 559; Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317; People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; Ashland Trans- fer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; Leav- itt v. Canadian P. R. Co. 90 Me. 153, 37 A. 886, 38 L.R.A. 152; Templar v. State Examiners, 131 Mich. 254, 90 N. W. 1058,

[100] Am. St. Rep. 610; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717; State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696; First Nat. Bank v. Bovey, Shute & Jackson, 49 N. D. 450, 191 N. W. 765, citing R. C. L.; Ex parte Sizemore (Tex. Crim. Rep.) 8 S. W. (2d) 134, 59 A.L.R. 430; State v. Shedroi, 75 Vt. 277, 54 A. 1081,

[63] L.R.A. 179, 98 Am. St. Rep. 825; State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274; Uram v. Roach, 47 Wyo. 335,

[37] P. (2d) 793, 95 A.L.R. 1448. See also infra, §§ 580 et seq.

[19] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Heiner v. Donnan, 285 U. S. 312, 76 L. ed. 772, 52 S. Ct. 358; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Seaboard Air Line R. Co. v. Simon,

[56] Fla. 545, 47 So. 1001, 20 L.R.A.(N.S.) 126,

[16] Ann. Cas. 1234; Mt. Carmel Public Util- ity & Serv. Co. v. Public Utilities Commis- sion, 297 Ill. 303, 130 N. E. 693, 21 A.L.R. 571; Ulman v. Baltimore, 72 Md. 587, 20 A. 141, 21 A. 709, 11 L.R.A. 224; Thurman v. Chicago, M. & St. P. R. Co. 254 Mass. 569,

[151] N. E. 63, 46 A.L.R. 563; Bryant v. Brown,

[151] Miss. 398, 118 So. 184, 60 A.L.R. 1325; First Nat. Bank v. Bovey, Shute & Jackson,

[49] N. D. 450, 191 N. W. 765, citing R. C. L.; Sandel v. State, 115 S. C. 168, 104 S. E. 567,

[13] A.L.R. 1268.

[20] Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Minder v. Georgia,

[183] U. S. 559, 46 L. ed. 328, 22 S. Ct. 224; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597,

[20] S. Ct. 448, 494; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282, affirming 11 Utah, 200, 39 P. 825, 29 L.R.A. 97; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721; Leeper v. Texas, 139 U. S. 462,

[35] L. ed. 225, 11 S. Ct. 577; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111; Bank of Columbia v. Okely, 4 Wheat. (U. S.) 235, 4 L. ed. 559; McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A.(N.S.) 126, 16 Ann. Cas. 1234; Blackman Health Resort v. Atlanta,

[151] Ga. 507, 107 S. E. 525, 17 A.L.R. 516 (police power); People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; Klafter v. State Examiners, 259 Ill. 15, 102 N. E. 193,

[46] L.R.A.(N.S.) 532, Ann. Cas. 1914B, 1221; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268; Cleveland, C. C. & St. L. R. Co. v. Backus,

[133] Ind. 513, 33 N. E. 421, 18 L.R.A. 729; State v. Height, 117 Iowa, 650, 91 N. W. 935, 59 L.R.A. 437, 94 Am. St. Rep. 323; Eames v. Savage, 77 Me. 212, 52 Am. Rep. 751; Com. v. Gallo, 275 Mass. 320, 175 N. E. 718, 79 A.L.R. 1380; Rosenbush v. Bern- heimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789; First Nat. Bank v. Bovey, Shute

& Jackson, 49 N. D. 450, 191 N. W. 765, citing R. C. L.; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682; Gulf, C. & S. F. R. Co. v. Ellis (Tex.) 18 S. W. 723, 17 L.R.A. 236; Pinney v. Providence Loan & Invest. Co. 106 Wis. 396, 82 N. W. 308, 50 L.R.A. 577, 80 Am. St. Rep. 41. Annotation: 122 Am. St. Rep. 905.

[1] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Beveridge v. Lewis, 137 Cal. 619, 67 P. 1040, 70 P. 1083, 59 L.R.A. 581, 92 Am. St. Rep. 188; Parks v. State,

[159] Ind. 211, 64 N. E. 862, 59 L.R.A. 190; Scholle v. State, 90 Md. 729, 46 A. 326, 50 L.R.A. 411.

stated that the requirements of due process of law may be satisfied if there is no unauthorized and merely arbitrary exercise of the powers of government to the detriment of the people or of some of them.[2] The line of division between the rational and the arbitrary in legislation is not to be drawn with an eye to remote possibilities. What the law looks for in establishing its standards is a probability or tendency of general validity. If this is attained, the formula will serve, although there are imperfections here and there.[3] The due process of law clause does not impose an unobtainable standard of accuracy.[4] A mere error in judgment on the part of the legislature as to measures best calculated to promote public safety is not enough to condemn a law as arbitrary.[5] The fact that a rule of law may, in certain instances, work a hardship does not violate the due process clause of the Constitution, provided it operates without any discrimination and in like manner against all persons of a class.[6] Similarly, the fact that rules of evidence and procedure may work a hardship under certain circumstances does not render them unconstitutional if they further justice in the general course of their operation.[7]

§ 576. Vesting Discretion as Arbitrary Denial.—

There are many instances

where statutes have been held unconstitutional on the ground that they vested an arbitrary power and discretion over matters protected by the Constitution.[8] Administrative officers cannot be delegated the power to determine what the law is.[9] The legislature cannot invest a court with power to divest an owner of his property, without compensation, whenever in the exercise of its discretion it sees fit to do so, and this has been held to be the effect of a statute authorizing a court, in its discretion, to empower a married woman to transfer realty without the joinder of her husband who has vested interest therein.[10] On like principle, a statute seeking to clothe the agents of a society for the

prevention of cruelty to animals with absolute authority to determine whether an animal is neglected, abandoned, or ill-treated, so as to justify its seizure, has been considered to fall outside the pale of legitimate legislative action.[11] It is not in every case, however, in which a discretion has been conferred that due process of law is absent.[12] Where a reasonable discretion has been vested,

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[2] Davis v. Florida Power Co. 64 Fla. 246,

[60] So. 759, Ann. Cas. 1914B, 965. Orders of the President under authority of Congress fixing the price of coal as a war measure, the effect of which is merely to prevent the owner from obtaining more than the coal is worth, are not so clearly unreasonable and arbitrary as to render them repugnant to the due process clause of the Federal Constitution. Highland v. Russell Car & Snow Plow Co. 279 U. S. 253,

[73] L. ed. 688, 49 S. Ct. 314.

[3] Burnet v. Wells, 289 U. S. 670, 77 L. ed. 1439, 53 S. Ct. 761. The cost of complying with state laws enacted to promote safety is an element properly to be taken into account in de- termining whether such laws are arbitrary and repugnant to the due process clause of the Fourteenth Amendment. Missouri P. R. Co. v. Norwood, 283 U. S. 249, 75 L. ed. 1010, 51 S. Ct. 458.

[4] Grannis v. Ordean, 234 U. S. 385, 58 L. ed. 1363, 34 S. Ct. 779.

[5] State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274.

[6] People's Wayne County Bank v. Wolver- ine Box Co. 250 Mich. 273, 230 N. W. 170, 69 A.L.R. 1024.

[7] Ibid.

[8] Bradley v. Richmond, 227 U. S. 477,

[57] L. ed. 603, 33 S. Ct. 318; State v. Sherow,

[87] Kan. 235, 123 P. 866, Ann. Cas. 1913D, 1050. Annotation: 2 Ann. Cas. 317.

[9] People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223.

[10] Hubbard v. Hubbard, 77 Vt. 73, 58 A. 969, 107 Am. St. Rep. 749, 67 L.R.A. 969, 2 Ann. Cas. 315. Annotation: 2 Ann. Cas. 317.

[11] Jenks v. Stump, 41 Colo. 281, 93 P. 17, 15 L.R.A.(N.S.) 554, 124 Am. St. Rep. 137, 14 Ann. Cas. 914. Annotation: 15 L.R.A.(N.S.) 554.

[12] Jones v. Union Guano Co. 264 U. S. 171,

[68] L. ed. 623, 44 S. Ct. 280; Winter v. Bar- rett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398; Turner v. Children's Home Soc. 158 Va. 406, 163 S. E. 399, 80 A.L.R. 1125. Merely prohibiting actions for damages for the sale of deficient fertilizer except aft- er chemical analysis, showing the deficiency, does not substitute the determination of the official for a trial in court, so as to constitute a deprivation of due process of law. Jones v. Union Guano Co. 264 U. S. 171, 68 L. ed. 623, 44 S. Ct. 280.

it cannot be presumed that official action will be arbitrary in its nature, and such statutes have frequently been upheld.[13] For example, there is not necessarily a denial of due process of law where some discretion is allowed to an inspector of mines in determining the number of times mines shall be inspected, the fees of the officer depending on the number of inspections.[14] The commission to a board of examiners of authority to determine the subjects of which one must have knowledge in order to be fit to practice a profession, the

extent of knowledge in each subject necessary, and the degree of skill requisite does not confer upon the board arbitrary power to exclude applicants from the practice, so as to violate the due process clause of the Federal Constitution.[15]

The mere fact that the amount of damages in a death action is left to the discretion of the jury does not make the statute violative of the constitutional guaranty of due process of law, where the finding is regulated by applicable principles of law and the verdict is rendered subject to approval and to such appellate review as may be provided.[16] It has been authoritatively stated that the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.[17]

§ 577. Effect of Party Being Unsuccessful before Tribunal; Errors of Tri-bunal.—The mere fact that a person is unsuccessful in a court in a matter involving life, liberty, or property does not show that there has been a violation of the due process of law guaranty.[18] The reversal of a former decision to the prejudice of one of the parties19 or a departure by the courts of the state from a rule of property established by prior decisions20 does not violate the guaranty. If there has been a full hearing or opportunity for hearing, there is no necessary violation of the guaranty.[1] The highest court of a state, in overruling an earlier decision, may make a choice for itself whether the new rule declared by it shall operate prospectively only or apply also to past transactions, and the alternative is the same whether the subject of the new decision is common law or the construction of a statute.[2] A court may give its overruling of

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[13] Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 S. Ct. 633; State v. Sherow,

[87] Kan. 235, 123 P. 866, Ann. Cas. 1913D, 1050; Louisville & N. R. Co. v. Com. 106 Ky. 633, 51 S. W. 164, 1012, 90 Am. St. Rep. 236, affirmed in 183 U. S. 503, 46 L. ed. 298,

[22] S. Ct. 95. Annotation: 2 Ann. Cas. 318.

[14] St. Louis Consol. Coal Co. v. Illinois,

[185] U. S. 203, 46 L. ed. 872, 22 S. Ct. 616.

[15] Douglas v. Noble, 261 U. S. 165, 67 L. ed. 590, 43 S. Ct. 303.

[16] Davis v. Florida Power Co. 64 Fla. 246,

[60] So. 759, Ann. Cas. 1914B, 965.

[17] Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 S. Ct. 410; Com. v. O'Keefe, 298 Pa. 169, 148 A. 73, citing R. C. L.

[18] Goltra v. Weeks, 271 U. S. 536, 70 L. ed. 1074, 46 S. Ct. 613; Palmer v. Ohio, 248 U. S. 32, 63 L. ed. 108, 39 S. Ct. 16; Tracy v. Ginzberg, 205 U. S. 170, 51 L. ed. 755, 27 S. Ct. 461 (denying

claim to ownership of property); Re Hull, 163 Minn. 439, 204 N. W. 534, 205 N. W. 613, 49 A.L.R. 320, error dismissed in Breen v. Hull, 275 U. S. 491,

[72] L. ed. 390, 48 S. Ct. 33. Persons suing a state for damages are not deprived of their property without com- pensation, in violation of the Fifth Amend- ment of the Federal Constitution, by a de- cision of the court that the state had not consented to be sued. Palmer v. Ohio, 248 U. S. 32, 63 L. ed. 108, 39 S. Ct. 16. Legitimate judicial discretion is due proc- ess of law. Hubbard v. Hubbard, 77 Vt. 73, 58 A. 969, 67 L.R.A. 969, 107 Am. St. Rep. 749, 2 Ann. Cas. 315. No denial of the due process of law guar- anteed by the Fourteenth Amendment is involved in refusing to permit one sued on a judgment to set up, as a defense thereto, want of jurisdiction of his person, on which ground he had unsuccessfully sought dis- missal of the action in which judgment was rendered, as the doctrine of due process does not involve the right to litigate the same question twice. Baldwin v. Iowa State Traveling Men's Asso. 283 U. S. 522,

[75] L. ed. 1244, 51 S. Ct. 517.

[19] Tidal Oil Co. v. Flanagan, 263 U. S. 444,

[68] L. ed. 382, 44 S. Ct. 197.

[20] O'Neil v. Northern Colorado Irrig. Co.

[242] U. S. 20, 61 L. ed. 123, 37 S. Ct. 7.

[1] Goltra v. Weeks, 271 U. S. 536, 70 L. ed. 1074, 46 S. Ct. 613; Holmes v. Conway, 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681.

[2] Great Northern R. Co. v. Sunburst Oil & Ref. Co. 287 U. S. 358, 77 L. ed. 360, 53 S. Ct. 145, 85 A.L.R. 254. Annotation: 85 A.L.R. 262. [12 Am. Jur.]—18 273

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an earlier decision a retroactive bearing, thereby making invalid that which was valid in the doing.[3]

Even an erroneous decision of a court on matters within its jurisdiction does not deprive the unsuccessful party of his rights under this guaranty where the parties have been fully heard in the regular course of judicial proceedings.[4] The same rule applies to the errors of other tribunals or officers.[5] So far as this guaranty is concerned, the extent to which a decision is erroneous or the fact that it is contrary to previous decisions has been said to be immaterial.[6] It has been intimated, however, that if the error is gross and obvious, coming close to the boundary of arbitrary action, there may be a violation of the guaranty.[7] It has been stated that whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights.[8] It seems clear that a violation of the due process clause may be committed by the state judiciary, at least in construing a state statute. But the Federal Supreme Court cannot interfere, unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental principles which have been

established in our systems of jurisprudence for the protection and enforcement of private rights.[9]

The rule that an erroneous decision does not necessarily violate the due

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[3] Great Northern R. Co. v. Sunburst Oil & Ref. Co. 287 U. S. 358, 77 L. ed. 360, 53 S. Ct. 145, 85 A.L.R. 254.

[4] American R. Exp. Co. v. Kentucky, 273 U. S. 269, 71 L. ed. 639, 47 S. Ct. 353; Corri- gan v. Buckley, 271 U. S. 323, 70 L. ed. 969,

[46] S. Ct. 521; Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U. S. 100, 64 L. ed. 476, 40 S. Ct. 306, 10 A.L.R. 892; Mc- Donald v. Oregon R. & Nav. Co. 233 U. S. 665, 58 L. ed. 1145, 34 S. Ct. 772; Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 S. Ct. 406, Ann. Cas. 1913D, 936; Bonner v. Gorman, 213 U. S. 86, 53 L. ed. 709, 29 S. Ct. 483; Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421, 26 S. Ct. 189; West v. Louisiana, 194 U. S. 258, 48 L. ed. 965,

[24] S. Ct. 650; Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 S. Ct. 890, 1009; Cen- tral Land Co. v. Laidley, 159 U. S. 103,

[40] L. ed. 91, 16 S. Ct. 80; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 S. Ct. 191; Ar- rowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 S. Ct. 1023; Rothschild & Co. v. Steger & Sons Piano Mfg. Co. 256 Ill. 196,

[99] N. E. 920, 42 L.R.A.(N.S.) 793, Ann. Cas. 1913E, 276; Cramer v. Farmers State Bank,

[98] Kan. 641, 158 P. 1111, citing R. C. L.; Griggs v. Hanson, 86 Kan. 632, 121 P. 1094,

[52] L.R.A.(N.S.) 1161, Ann. Cas. 1913C, 242; Hall v. Wilder Mfg. Co. 316 Mo. 812, 293 S. W. 760, 52 A.L.R. 723; State v. Orfanakis, 22 N. M. 107, 159 P. 674, citing R. C. L.; Apex Transp. Co. v. Garbade, 32 Or. 582, 52 P. 573, 54 P. 367, 882, 62 L.R.A. 513; Ladner v. Siegel, 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172; Roller v. Murray, 71 W. Va. 161, 76 S. E. 172, L.R.A.1915F, 984, Ann. Cas. 1914B, 1139, writ of error dismissed in 234 U. S. 738, 58 L. ed. 1570, 34 S. Ct. 902. A state cannot be deemed guilty of vio- lating the constitutional provision against depriving a person of liberty "without due process of law" because of a decision, even if erroneous, of its highest court while act- ing within its jurisdiction, as, for example, in a conviction and judgment for embezzlement. Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 S. Ct. 191. The rendition of a judgment in favor of the plaintiff in an action upon a judgment of a court of another state over the defend- ants' objection that the judgment sued up- on was void for lack of valid service of process does not take the property of the defendants without due process of law where the second judgment rests upon the view, right or wrong, that as the issue of jurisdiction over the parties was raised and adjudicated after full hearing in the former case, it could not be reopened in the pres- ent suit. Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492.

[5] Doty v. Love, 295 U. S. 64, 79 L. ed. 1303,

[55] S. Ct. 558, 96 A.L.R. 1438 (liquidating agency of a bank).

[6] Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689.

[7] Roberts v. New York, 295 U. S. 264, 79 L. ed. 1429, 55 S. Ct. 689. In condemnation proceedings, as in law- suits generally, the Fourteenth Amendment is not a guaranty that a trial shall be free from error. To constitute a taking of prop- erty without due process of law by force of a judgment in such proceedings, such error must be gross and obvious, coming close to the boundary of arbitrary action. Ibid.

[8] Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107, 50 S. Ct. 451; Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492.

[9] American R. Exp. Co. v. Kentucky, 273 U. S. 269, 71 L. ed. 639, 47 S. Ct. 353; Corrigan v. Buckley, 271 U. S. 323, 70 L. ed. 969, 46 S. Ct. 521; West v. Louisiana,

[194] U. S. 258, 48 L. ed. 965, 24 S. Ct. 650; Ladner v. Siegel, 298 Pa. 487, 148 A. 699,

[68] A.L.R. 1172.

process guaranty has been applied to errors in a charge to the jury in a crim-

inal case,[10] to an erroneous judgment as to what costs the law allows in a suit to enforce the payment of levee taxes,[11] to an erroneous interpretation by a state court of the decision of the Supreme Court of the United States as to punishment for contempt,[12] to an erroneous decision that the issue of jurisdiction had been judicially heard and determined in prior proceedings,[13] to an error of a trial judge in admitting evidence or entering judgment after full hearing,[14] to a mistake as to the law of another state,[15] to errors of a state court in interpreting and applying the laws of that state,[16] to errors in the mere administration of a statute not involving jurisdiction of the subject matter or of the parties,[17] to an error of judgment on the part of the liquidated agency of a closed bank in the compromise of liabilities,[18] and to an error in ordering a guardian's sale without first requiring a bond to be filed and approved as a statute of the state requires.[19]

§ 578. Military Law as Due Process.—

What is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process.[20] The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts by habeas corpus or otherwise.[1] Due process of law does not require that an army officer discharged from the service under the Army Reorganization Act providing for classification and reduction in numbers of the officers of the Army be given an opportunity to be heard before the so-called "Honest and Faithful Board" before that board makes the finding which requires his discharge where he was given full opportunity to be heard and was heard by the court of inquiry, which is the only one of the four military tribunals dealing with his case that the statute requires shall give him a hearing.[2]

The action of the governor of a state in limiting, by executive order enforced by the military arm of the state, the permissible production of petroleum at a time when and place where the courts were open and functioning is not due process of law.[3]

§ 579. Police Regulation.—

It is generally held that the provisions of the

Federal Constitution, including the amendments, do not interfere with the

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[10] Davis v. Texas, 139 U. S. 651, 35 L. ed. 300, 11 S. Ct. 675.

[11] Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261.

[12] Rothschild v. Steger, 256 Ill. 196, 99 N. E. 920, 42 L.R.A.(N.S.) 793, Ann. Cas. 1913E, 276.

[13] Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492.

[14] Jones v. Buffalo Creek Coal & Coke Co. 245 U. S. 328, 62 L. ed. 325, 38 S. Ct. 121.

[15] Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492; Pennsyl- vania F. Ins. Co. v. Gold Issue Min. & Mill. Co. 243 U. S. 93, 61 L. ed. 610, 37 S. Ct. 344; Porter v. Wilson, 239 U. S. 170, 60 L. ed. 204, 36 S. Ct. 91; Hall v. Wilder Mfg. Co. 316 Mo. 812, 293 S. W. 760, 52 A.L.R. 723. Since a mere mistake as to the law of an- other state is a question of fact, it is not a denial of due process of law. Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 61 L. ed. 966, 37 S. Ct. 492.

[16] Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421, 26 S. Ct. 189.

[17] Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 S. Ct. 825; Griggs v. Hanson, 86 Kan. 632,

[121] P. 1094, 52 L.R.A.(N.S.) 1161, Ann. Cas. 1913C, 242.

[18] Doty v. Love, 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438.

[19] Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 S. Ct. 1023.

[20] United States ex rel. French v. Weeks,

[259] U. S. 326, 66 L. ed. 965, 42 S. Ct. 505; Kahn v. Anderson, 255 U. S. 1, 65 L. ed. 469,

[41] S. Ct. 224; Reaves v. Ainsworth, 219 U. S. 296, 55 L. ed. 225, 31 S. Ct. 230.

[1] Johnson v. Sayre, 158 U. S. 109, 39 L. ed. 914, 15 S. Ct. 773. See MILITARY [Also 18 R. C. L. p. 1010].

[2] United States ex rel. Creary v. Weeks,

[259] U. S. 336, 66 L. ed. 973, 42 S. Ct. 509.

[3] Sterling v. Constantin, 287 U. S. 378, 77 L. ed. 375, 53 S. Ct. 190.

police power of the various states.[4] This is true of the Fourteenth Amendment,[5] including the guaranty of due process.[6] The state is not deprived of the power to enact regulations.[7] The Fifth and Fourteenth Amendments do not prohibit governmental regulation for the public welfare, but merely require that the end shall be accomplished by methods consistent with due process.[8] Even the fact that police regulations may prevent the enjoyment of rights in property without providing compensation does not necessarily render them violative of the due process clause.[9] Regulation under a proper exercise of the police power is due process, even though a property in whole or in part is taken or destroyed.[10]

There are, however, some limitations upon the exercise of the police power. An arbitrary or unreasonable exercise of police power is not justified.[11] The

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[4] See Vol. 11, p. 986, § 255.

[5] See Vol. 11, p. 995, § 261.

[6] Van Oster v. Kansas, 272 U. S. 465, 71 L. ed. 354, 47 S. Ct. 133, 47 A.L.R. 1044; Hutchinson v. Valdosta, 227 U. S. 303, 57 L. ed. 520, 33 S. Ct. 290; Lemieux v. Young, 211 U. S. 489, 53 L. ed.

295, 29 S. Ct. 174; Western Turf Asso. v. Greenberg, 204 U. S. 359, 51 L. ed. 520, 27 S. Ct. 384 (imposition of liability upon place of amusement for wrongfully excluding patron); Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 S. Ct. 811 (health regulation); New Orleans Debenture Redemption Co. v. Louisiana, 180 U. S. 320, 45 L. ed. 550, 21 S. Ct. 378; Hodgson v. Vermont, 168 U. S. 262, 42 L. ed. 461, 18 S. Ct. 80; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721; Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865; Re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516 (building regulation); Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215. See Vol. 11, p. 998, § 262. An ordinance adopted under legislative authority by an inland town containing less than 6,000 inhabitants by which the owners of property abutting upon any street along which sewer mains had been laid were required to install waterclosets in their houses and connect the same with the main sewer pipe within thirty days from the passage of the ordinance, under penalty of fine and imprisonment for noncompliance, is a valid exercise of the police power and does not, though affording no notice or opportunity to be heard, deny either due process of law or the equal protection of the laws. Hutchinson v. Valdosta, 227 U. S. 303, 57 L. ed. 520, 33 S. Ct. 290. A decree adjudging the charter of an alleged corporation to be null and void and enjoining the officers and stockholders from acting as a corporation on the ground that the purpose for which it was formed is illegal does not take away the property of the individual corporators without due process of law, or deny to them the equal protection of the laws. New Orleans Debenture Redemption Co. v. Louisiana, 180 U. S. 320, 45 L. ed. 550, 21 S. Ct. 378. As to regulations generally, see infra, §§ 684 et seq.

[7] Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 S. Ct. 811 (quarantine). See infra, §§ 684 et seq.

[8] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

[9] See Vol. 11, p. 1003, § 266. The enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation or without due process of law in the sense of the Fourteenth Amendment. Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678.

[10] White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215.

[11] Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 S. Ct. 76, 42 L.R.A.(N.S.) 1123, Ann. Cas. 1914B, 192; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 S. Ct. 174; Hodgson v. Vermont, 168 U. S. 262, 42 L. ed. 461, 18 S. Ct. 80; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274; Piper v. Ekern, 180 Wis. 586, 194 N. W. 159, 34 A.L.R. 32. A city ordinance prohibiting colored persons from occupying as residences any house in any block in which the majority of residences are occupied by white people, thereby preventing white persons in such blocks from selling property to colored people for residence purposes, violates the constitutional prohibition against interference with property rights except by due process of law and cannot be sustained on the ground that it will promote the public peace by preventing race conflicts or that the acquisition of property in such blocks by colored persons for residence purposes will cause the depreciation in value of property in the neighborhood owned by white persons. Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201. An unconstitutional infringement of the guaranties of the Fourteenth Amendment which cannot be upheld as an exercise of the police power resulted from a municipal ordinance passed under the authority of Virginia Laws 1908, p. 623, which required the committee on streets, upon request of the owners of two thirds of the abutting property, to establish a building line on the side of the square on which such property abutted not less than 5 feet or more than 30 feet from the street line. Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 S. Ct.

state is bound to recognize, even in the exercise of its police power, the right of all persons to the security afforded by due process of law.[12] A law which assumes to be a police regulation, but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort, or welfare when it is manifest that such

is not the real object and purpose of the regulation will be set aside as a clear and direct invasion of the right of property without any compensating advantages.[13] The right of the state to make an unreasonable regulation restricting the right to use business property for business purposes14 has been denied. The courts will, however, be slow to strike down as unconstitutional legislation of the states enacted under the police power.[15]

B. MODIFICATION OF COMMON-LAW RIGHTS AND REMEDIES

§ 580. Generally.—

The fact that one of the tests of due process is the common law as it existed at the time of the establishment of our civil and political institutions16 does not prevent a change in the law as it then existed.17 There is no constitutional right to have all general propositions of law once adopted remain unchanged.18 It is not to be inferred that all modes of procedure which do not have the sanction of this early law are to be condemned.19 Nor can it be said that every form of procedure settled in English law at the time of the emigration to America and brought to this country and practiced by the early colonists is an essential element of due process of law. It has been pertinently remarked that if this were so, the procedure of the first half of the seventeenth century would be fastened upon American jurisprudence like a strait jacket, only to be unloosened by constitutional amendment, and that it would be to deny every quality of the law but its age and to render it incapable of progress or improvement.20 The guaranty of due process demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.1

While change is thus permissible, neither Congress2 nor the states3 have power to make any process "due process of law" by their mere will. It has been said not to be within the power of Congress to withdraw from judicial cognizance any matter which from its nature is the subject of a suit at the common law, in equity, or in admiralty.[4] Nor can Congress bring under the

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76, 42 L.R.A.(N.S.) 1123, Ann. Cas. 1914B, 192. See particularly Vol. 11, p. 994, § 260.

[12] State v. Martin, 193 Ind. 120, 139 N. E. 282, 26 A.L.R. 1386.

[13] Fitzhugh v. Jackson, 132 Miss. 585, 97 So. 190, 33 A.L.R. 279.

[14] Piper v. Ekern, 180 Wis. 586, 194 N. W. 159, 34 A.L.R. 32.

[15] Salt Lake City v. Industrial Commission, 58 Utah, 314, 199 P. 152, 18 A.L.R. 259.

[16] See supra, § 567.

[17] Railroad Commission v. Louisville, etc. R. Co. 140 Ga. 817, 80 S. E. 327, Ann. Cas. 1915A, 1018, L.R.A.1915E, 902; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834. The phrase "law of the land" as used in a state Constitution merely refers to the common and statutory law then existing, but does not prohibit a change of the common law. Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834.

[18] Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689.

[19] Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372.

[20] Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14.

[1] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805.

[2] Pinney v. Providence Loan & Invest. Co. 106 Wis. 396, 82 N. W. 308, 50 L.R.A. 577, 80 Am. St. Rep. 41.

[3] See infra, § 581.

[4] Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 S. Ct. 1016; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372.

judicial power a matter which from its nature is not a subject for judicial determination.[5]

§ 581. By States.—

The Fourteenth Amendment was not intended to curtail the powers of the states to amend their laws so as to make them conform to the wishes of their citizens to changed views of administration or to the exigencies of their social life.[6] It was not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens or with the exercise of that power in the adjudications of the courts of the state in administering the process provided by the law of the state.[7] The states are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment to the Federal Constitution, and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.[8] A state is free to adopt and enforce whatever economic policy may reasonably be deemed to promote public welfare, whether by promoting free competition by laws aimed at monopolies, or by curbing harmful competition by fixing minimum prices.[9]

It has been said that what is due process of law in a state is regulated by the law of the state.[10] Nevertheless, the state must conform to the fundamental requirements of due process, giving reasonable notice, and must afford fair opportunity to be heard before the issues are decided.[11] The due process of law clause in the Fourteenth Amendment of the Federal Constitution does not make the statutes of the several states the test of what it requires.[12] A state cannot make due process of law anything which by its own legislation it chooses to declare such.[13] In other words, legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property.[14] Purely arbitrary or capricious exercise of power whereby a wrongful

and highly injurious invasion of property rights is practically sanctioned and the owner stripped of all real remedy is at variance with fundamental principles.[15] Conversely stated, the Fourteenth Amendment requires that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions and which are frequently designated as "law of the land."

The criterion of due process in a state statute is not the possibility of conceivable injury, but the just and reasonable character of the requirements

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[5] Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 S. Ct. 1016; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372.

[6] O'Neill v. Leamer, 239 U. S. 244, 60 L. ed. 249, 36 S. Ct. 54 (irrigation); Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215, 32 S. Ct. 92, Ann. Cas. 1913B, 1349; Bolin v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 S. Ct. 287; Banks v. State, 207 Ala. 179,

[93] So. 293, 24 A.L.R. 1359, writ of cer- tiorari denied in 260 U. S. 736, 67 L. ed. 488, 43 S. Ct. 96; Cordrey v. The Bee, 102 Or. 636, 201 P. 202, 20 A.L.R. 1079; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834.

[7] Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421, 26 S. Ct. 189.

[8] Arizona Employers' Liability Cases (Ar- izona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537.

[9] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

[10] Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 S. Ct. 1023; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678. Annotation: 2 L.R.A. 655.

[11] People's Wayne County Bank v. Wol- verine Box Co. 250 Mich. 273, 230 N. W. 170,

[69] A.L.R. 1024.

[12] Hebert v. Louisiana, 272 U. S. 312, 71 L. ed. 270, 47 S. Ct. 103, 48 A.L.R. 1102.

[13] Davidson v. New Orleans, 96 U. S. 97,

[24] L. ed. 616; Burdick v. People, 149 Ill. 600,

[36] N. E. 948, 24 L.R.A. 152, 41 Am. St. Rep. 329. Annotation: 41 Am. St. Rep. 338.

[14] Manley v. Georgia, 279 U. S. 1, 73 L. ed. 575, 49 S. Ct. 215.

[15] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375.

having reference to the subject with which the statute deals.[16] Harshness, injustice, and oppressiveness will not of themselves invalidate state laws as contrary to due process of law.[17]

Although the due process clause of the Fourteenth Amendment places a limitation upon the power of the states to prescribe penalties for violations of their laws, it is always placed with the express or tacit qualification that the states still possess a wide latitude of discretion in the matter and that their enactments transcend the limitation only where the penalty prescribed is so

severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.[18]

§ 582. Remedies and Procedure.—

A change of remedy does not contravene the Fourteenth Amendment if the substitute remedy is substantial and efficient.[19] No one has a vested right in any given mode of procedure, and so long as a substantial and efficient remedy remains or is provided, due process of law is not denied by the legislative change.[20] A procedure is not shown to be unconstitutional because it was never heard of before.[1] Inspections such as are authorized in equity proceedings may be authorized by statute.[2] No change in procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which relate to process of law, protect the citizen in his private right, and guard him against the arbitrary action of government.[3]

A statute affecting the remedy of parties to a contract may not, consistent with due process, take away substantial rights.[4] Especially as between individuals between whom a contract exists, the remedy on the contract cannot be taken away altogether or materially lessened.[5] A different rule is said to prevail in respect of the contracts of sovereigns.[6]

While the bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment,[7] the due process clause of the Fifth Amendment, while forbidding destruction of a contract, does not prohibit bankruptcy legislation affecting the creditor's remedy for its enforcement against the debtor's assets or the measure of the creditor's participation

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[16] American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 S. Ct. 200.

[17] Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110.

[18] St. Louis, I. M. & S. R. Co. v. Williams,

[251] U. S. 63, 64 L. ed. 139, 40 S. Ct. 71.

[19] Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Crane v. Hahlo, 258 U. S. 142, 66 L. ed. 514, 42 S. Ct. 214; Evans-Snyder-Buel Co. v. McFadden (C. C. A. 5th) 105 F. 293,

[53] L.R.A. 900, affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758; Billmyer Lumber Co. v. Merchants' Coal Co. 66 W. Va. 696,

[66] S. E. 1073, 26 L.R.A.(N.S.) 1101.

[20] Gibbes v. Zimmerman, 290 U. S. 326, 78 L. ed. 342, 54 S. Ct. 140; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Crane v. Hahlo, 258 U. S. 142, 66

L. ed. 514, 42 S. Ct. 214. The cutting down of the remedy of an abutting owner, dissatisfied with an award for the damages caused by the construction of an elevated viaduct changing the street grade, from a general review in a state court of general jurisdiction of the proceed- ings of the board confirming the award, to a review limited to questions of jurisdic- tion, fraud, and wilful misconduct on the part of the officials composing the board, does not take the property of such owner without due process of law. Crane v. Hah- lo, 258 U. S. 142, 66 L. ed. 514, 42 S. Ct. 214.

[1] Tyler v. Judges of Ct. of Registration,

[175] Mass. 71, 55 N. E. 812, 51 L.R.A. 433, writ of error dismissed in 179 U. S. 405,

[45] L. ed. 252, 21 S. Ct. 206.

[2] Montane Co. v. St. Louis Min. & Mill. Co. 152 U. S. 160, 38 L. ed. 398, 14 S. Ct. 506.

[3] Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14.

[4] Detroit Trust Co. v. Stormfeltz-Loveley Co. 257 Mich. 655, 242 N. W. 227, 38 A.L.R. 1263.

[5] Lynch v. United States, 292 U. S. 571,

[78] L. ed. 1434, 54 S. Ct. 840.

[6] Ibid.

[7] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A.L.R. 1106, rehearing denied in 296 U. S. 661, 80 L. ed. 471, 56 S. Ct. 82.

therein, if the statutory provisions are consonant with a fair, reasonable, and equitable distribution of those assets.[8]

§ 583. —

Powers of States.—The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.9 The due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein;10 nor is it designed to reach errors in the administration of the laws not involving jurisdiction of the subject or of the parties.11 The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. A state may regulate the procedure of its courts in accordance with its own conception of policy and fairness unless it offends some principle of justice ranked as fundamental,12 such as the requirements of hearing and notice,13 or unless it is unreasonable or arbitrary.14 There is nothing in the Federal Constitution or its amendments that requires a state to maintain the familiar line between the functions of the jury and those of the court.15

When a regular course of justice by an efficacious remedy is secured by the law of the state, the constitutional requirement contained in the Fourteenth Amendment is satisfied.[16] It has sometimes been broadly stated that the adjudication of a person's claims by the courts of his own state is due process of law,[17] that what is due process of law in a state is regulated by the law of the state,[18] that the requirements of the Fourteenth Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular state and the laws operate on all persons alike and do not sub-

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[8] Kuehner v. Irving Trust Co. 299 U. S. 455, 81 L. ed. 340, 57 S. Ct. 298.

[9] Brown v. Mississippi, 297 U. S. 278, 80 L. ed. 682, 56 S. Ct. 461; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 50 S. Ct. 299, 68 A.L.R. 434; Bank v. State, 207 Ala. 179, 93 So. 293, 24 A.L.R. 1359,

writ of certiorari denied in 260 U. S. 736, 67 L. ed. 488, 43 S. Ct. 96; Jardine v. Superior Ct. 213 Cal. 301, 2 P. (2d) 756, 79 A.L.R. 291, appeal dismissed in 284 U. S. 592, 76 L. ed. 510, 52 S. Ct. 197; Ohio & M. R. Co. v. Taber, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L.R.A. 685; Cordrey v. The Bee, 102 Or. 636, 201 P. 202, 20 A.L.R. 1079.

[10] Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 50 S. Ct. 299, 68 A.L.R. 434; Holmes v. Conway, 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681; McDonald v. Oregon R. & Nav. Co. 233 U. S. 665, 58 L. ed. 1145, 34 S. Ct. 772; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 31 S. Ct. 625; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 S. Ct. 620; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 S. Ct. 344; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678. See supra, §§ 569 et seq.

[11] See supra, § 577.

[12] Snyder v. Massachusetts, 291 U. S. 97, 78 L. ed. 674, 54 S. Ct. 330, 90 A.L.R. 575 (criminal procedure); Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 50 S. Ct. 299, 68 A.L.R. 434; Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. Ct. 582; Tyson v. Washington County, 78 Neb. 211, 110 N. W. 634, 12 L.R.A.(N.S.) 350; State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805; Cordrey v. The Bee, 102 Or. 636, 201 P. 202, 20 A.L.R. 1079; Apex Transp. Co. v. Garbade, 32 Or. 582, 52 P. 573, 54 P. 367, 882, 62 L.R.A. 513; Bettman v. Cowley, 19 Wash. 207, 53 P. 53, 40 L.R.A. 815. Annotation: 2 L.R.A. 655; 11 L.R.A. 224.

[13] Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 23 S. Ct. 395, 63 L.R.A. 471.

[14] Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 S. Ct. 200; Banks v. State, 207 Ala. 179, 93 So. 293, 24 A.L.R. 1359, writ of certiorari denied in 260 U. S. 736, 67 L. ed. 488, 43 S. Ct. 96; Cordrey v. The Bee, 102 Or. 636, 201 P. 202, 20 A.L.R. 1079.

[15] Chicago, R. I. & P. R. Co. v. Cole, 251 U. S. 54, 64 L. ed. 133, 40 S. Ct. 68.

[16] New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 S. Ct. 418; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 S. Ct. 577; Schuster v. Weiss, 114 Mo. 158, 21 S. W. 438, 19 L.R.A. 182.

[17] Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 S. Ct. 105; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 S. Ct. 54.

[18] Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; White v. White, 108 Tex. 570, 196 S. W. 508, L.R.A.1918A, 339.

ject the individual to the arbitrary exercise of the powers of government,[19] or that the law of the state is the law of the land.[20] If the state courts have acted in consonance with the constitutional laws of the state and its own procedure, it is only in very exceptional cases that a Federal court will interfere on the ground that there has been a failure of due process.[1] The proceedings in a state court need not be by any particular mode if they constitute a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it.[2]

The procedure of a state does not violate the Fourteenth Amendment because another method may seem fairer or wiser or give a surer promise of protection to a prisoner.[3]

There is nothing in the Federal Constitution to prevent a state from providing such a system of courts as it chooses.[4] A state has the right to determine for itself the courts in which crime may be prosecuted and the appellate tribunal, if any, to which such causes may be carried for review.[5]

The Fourteenth Amendment did not impair the authority of the states by their judicial tribunals and according to their settled usages and established modes of procedure to determine finally for the parties before them controverted questions as to the ownership

or property, which did not involve any rights secured by the Federal Constitution, by any valid act of Congress, or by any treaty.[6]

A state may, consistent with due process of law, abolish the defense of contributory negligence7 or require that the defense of contributory negligence or of assumption of risk shall in all cases be left to the jury.[8] The legislature has power to provide what portion of the property of a quasi-public corporation necessary for corporate purposes shall be subject to sale and when and how it shall be sold for the payment of its debts.[9]

It is nevertheless necessary for the state laws to adhere to certain fundamental rules.[10] While a state has full power over remedies and procedure in

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[19] Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; Minder v. Georgia, 183 U. S. 559, 46 L. ed. 328, 22 S. Ct. 224; Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 S. Ct. 805; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282; Murray v. Louisiana, 163 U. S. 101, 41 L. ed. 87, 16 S. Ct. 990; Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 S. Ct. 1031; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437 (cost of grade crossing elimination); Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721; Fielden v. Illinois, 143 U. S. 452, 36 L. ed. 224, 12 S. Ct. 528 (refusal to amend record in derogation of judgment); Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 S. Ct. 577; Caldwell v. Texas, 137 U. S. 692, 34 L. ed. 816, 11 S. Ct. 224; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 S. Ct. 191; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 127; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 S. Ct. 1176; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 S. Ct. 1161; Re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51.

[20] Bittenhaus v. Johnston, 92 Wis. 588, 66 N. W. 805, 32 L.R.A. 380.

[1] Jordan v. Massachusetts, 225 U. S. 167, 56 L. ed. 1038, 32 S. Ct. 651; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 S. Ct. 435; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 S. Ct. 841; Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 S. Ct. 525.

[2] Rogers v. Peck, 199 U. S. 425, 50 L. ed. 256, 26 S. Ct. 87 (criminal prosecution); Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 23 S. Ct. 395, 63 L.R.A. 471; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 S. Ct. 836.

[3] Snyder v. Massachusetts, 291 U. S. 97, 78 L. ed. 674, 54 S. Ct. 330, 90 A.L.R. 575.

[4] Tumey v. Ohio, 273 U. S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243; State ex rel. McCaffery v. Aloe, 152 Mo. 466, 54 S. W. 494, 47 L.R.A. 393.

[5] Rogers v. Peck, 199 U. S. 425, 50 L. ed. 256, 26 S. Ct. 87.

[6] Tracy v. Ginzberg, 205 U. S. 170, 51 L. ed. 755, 27 S. Ct. 461.

[7] Chicago, R. I. & P. R. Co. v. Cole, 251 U. S. 54, 64 L. ed. 133, 40 S. Ct. 68.

[8] Herron v. Southern P. Co. 283 U. S. 91, 75 L. ed. 857, 51 S. Ct. 383; Chicago, R. I. & P. R. Co. v. Cole, 251 U. S. 54, 64 L. ed. 133, 40 S. Ct. 68 (provision was in state Constitution).

[9] Bass v. Roanoke Nav. & Water Power Co. 111 N. C. 439, 16 S. E. 402, 19 L.R.A. 247.

[10] West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 S. Ct. 650; Rothschild & Co. v. Steger & Sons Piano Mfg. Co. 256 Ill. 196,

its own courts and can make any order it pleases in respect of these, the substance of right must be secured and preserved to parties and litigants without unreasonable burdens.[11]

It is not within the power of the state to take away all remedy for the enforcement of a right.[12]

§ 584. —

Conditions upon Exercise.—While conditions may be imposed on the exercise of a remedy, especially one created by the state and not one of common or natural right,13 a different remedy which is unreasonable and imposes conditions so onerous and impracticable as to give substantially no remedy is unconstitutional.14

§ 585. Definiteness of Statutes and Orders.—

It is a general principle of statutory law that a statute must be definite to be valid.15 A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.16 On the other hand, where the words assailed, taken in connection with the context, are commonly understood, their use does not render a statute invalid.17 The same is true as to an order of court.18

A great many statutes have been sustained against the contention that they were so uncertain or indefinite that the enforcement thereof did not constitute due process of law. Thus, statutes defining rent as "unjust and unreasonable,"[19] a statute prohibiting the "unreasonable waste" of natural gas,[20] and a provision in a statute penalizing misstatement, in the required marking on a package containing an article of food, of the quantity of its contents that "reasonable variation shall be permitted and tolerances and also exemptions as to small packages shall be established by rules and regulations by

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[99] N. E. 920, 42 L.R.A.(N.S.) 793, Ann. Cas. 1913E, 276; Byers v. Meridian Printing Co. 84 Ohio St. 408, 95 N. E. 917, 38 L.R.A. (N.S.) 913. As to these fundamental rules, see supra, §§ 569 et seq.

[11] York v. Texas, 137 U. S. 15, 34 L. ed. 604, 11 S. Ct. 9.

[12] Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962; Board of Education v. Blodgett, 155 Ill. 441, 40 N. E. 1025, 31 L.R.A. 70, 46 Am. St. Rep. 348. **The right to a remedy by due course of law** is not satisfied by the requirement contained in a statute to make specific reparation for the injury done, which reparation is the same in all cases, bears no relation to the injury suffered, and has not been decreed by a tribunal after ascertainment of the extent of such injury. Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 64 L.R.A. 790, 104 Am. St. Rep. 422; Gilman v. Tucker, 128 N. Y. 190, 28 N. E. 1040, 13 L.R.A. 304, 26 Am. St. Rep. 464.

[13] Gano v. Minneapolis & St. L. R. Co. 114 Iowa, 713, 87 N. W. 714, 55 L.R.A. 263, 89 Am. St. Rep. 393, affirmed in 190 U. S. 557, 47 L. ed. 1183, 23 S. Ct. 854.

[14] Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L.R.A.(N.S.) 932, 14 Ann. Cas. 764; White v. Ward, 157 Ala. 345, 47 So. 166, 18 L.R.A.(N.S.) 568; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061. **The court cannot enter judgment in favor** of the plaintiff in an action for the recovery of real estate of which the defendant is in possession, because of the defendant's noncompliance with a rule of court requiring him to deposit one half the reporter's per diem before proceeding to trial, since it deprives him of his property without due process of law. Meacham v. Bear Valley Irrig. Co. 145 Cal. 606, 79 P. 281, 68 L.R.A. 600.

[15] As to the definiteness of statutes generally, see STATUTES [Also 25 R. C. L. p. 750]. As to the definiteness of statutes relating to workmen's compensation laws, see WORKMEN'S COMPENSATION ACTS [Also 28 R. C. L. p. 709].

[16] Yu Cong Eng v. Trinidad, 271 U. S. 500, 70 L. ed. 1059, 46 S. Ct. 619; Connally v. General Constr. Co. 269 U. S. 385, 70 L. ed. 322, 46 S. Ct. 126; Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435; Vallat v. Radium Dial Co. 360 Ill. 407, 196 N. E. 485, 99 A.L.R. 607.

[17] Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435.

[18] McCreery v. Libby-Owens-Ford Glass Co. 363 Ill. 321, 2 N. E. (2d) 290, 105 A.L.R. 75.

[19] Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, 66 L. ed. 595, 42 S. Ct. 289.

[20] Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826.

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administrative officers"[1] have been held not so indefinite as to violate the due process guaranty clause. On the other hand, statutes using the terms "reasonable," "approved," etc., in defining the measure of duty, have been disapproved.[2] A statute which permits the state board of dental examiners to revoke the license of any dentist for gross violation of professional duties or for incompetency is not so indefinite as to violate the due process clause.[3]

The absence of any definite rules as to what is a "long and short haul" in the clause in a Federal statute relating to the Interstate Commerce Commission,[4] the failure to describe an "isolated sale" of a security in a securities act,[5] a provision in a statute for the fixing of a barrier pillar between adjoining coal properties that it shall be determined "by the engineers of the adjoining property owners, together with the inspector of the district in which the mine is situated,"[6] and a provision in a statute relating to innkeepers that in case of fire they shall "do all in their power" to save guests and inmates have been held not to be so indefinite as to violate the guaranty clause.[7] A provision for a license or excise tax upon the gross income of the business in a stated city of a telephone company which does both an interstate and an intrastate business and carries on its operations within and outside the city cannot be held invalid on the ground of indefiniteness before administrative action by the officer whose duty it is to interpret the ordinance, since before such action the ordinance cannot be said to fall short of the requirements of due process.[8]

An executive order must, in order to satisfy the constitutional requirement of due process, show the existence of the particular circumstances and conditions under which the making of such an order has been authorized by Congress.[9]

C. PERSONS AFFECTED BY GUARANTY

1. PERSONS BOUND

§ 586. Generally.—

The requirements of due process of law extend to every case of the exercise of governmental power.10 The limitations inherent in the requirements as to due process of law are binding equally on the United States11 and on the several states.12

A state may not by any of its agencies, legislative, judicial, or executive,

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[1] United States v. Shreveport Grain & Elevator Co. 287 U. S. 77, 77 L. ed. 175, 53 S. Ct. 42.

[2] Vallat v. Radium Dial Co. 360 Ill. 407, 196 N. E. 485, 99 A.L.R. 607. Annotation: 99 A.L.R. 613.

[3] State Dental Examiners v. Savelle, 90 Colo. 177, 8 P. (2d) 693, 82 A.L.R. 1176, appeal dismissed in 287 U. S. 562, 77 L. ed. 496, 53 S. Ct. 5.

[4] Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.) 234 U. S. 476, 58 L. ed. 1408, 34 S. Ct. 986; United States v. Union P. R. Co. 234 U. S. 495, 58 L. ed. 1426, 34 S. Ct. 995.

[5] Kneeland v. Emerton, 280 Mass. 371, 183 N. E. 155, 87 A.L.R. 1.

[6] Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 S. Ct. 359.

[7] Miller v. Strahl, 239 U. S. 426, 60 L. ed. 364, 36 S. Ct. 147.

[8] Seattle Gas Co. v. Seattle, 291 U. S. 638, 78 L. ed. 1037, 54 S. Ct. 550; Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 78 L. ed. 1025, 54 S. Ct. 542, rehearing denied in 292 U. S. 603, 78 L. ed. 1466, 54 S. Ct. 712.

[9] Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241.

[10] Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 S. Ct. 367; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A.(N.S.) 126, 16 Ann. Cas. 1234.

[11] Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Hines v. Dahn (C. C. A. 8th) 267 F. 105, affirmed in 258 U. S. 421, 66 L. ed. 696, 42 S. Ct. 320; Vaughn v. State, 17 Ala. App. 35, 81 So. 417 (writ of certiorari denied in 203 Ala. 700, 82 So. 894) citing R. C. L.

[12] Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77.

disregard the constitutional prohibition.[13] The inhibition includes all functionaries of state government, judicial as well as political.[14]

It is recognized that the United States cannot interfere with private rights, except for legitimate governmental purposes. Nor can the Federal Government15 or any agencies set up by Congress for the government of its territory16 violate the guaranty of due process. The great substantive powers of Congress are all subject in their operation to the guaranties of due process contained in the Fifth Amendment.[17] The amendment has been applied to restrict the powers of Congress within the limitations of due process in the exercise of the war power,[18] the taxing power,[19] the bankruptcy power,[20] the power to regulate commerce,[1] and the power to exclude aliens.[2] The Supreme Court has held, however, that although rights in contracts are property within the purview of the due process clause of the Fifth Amendment, of which parties cannot be despoiled by congressional action, contracts involving payment in gold include a congenital infirmity when they are made in that they affect a matter over which congressional control may be exercised at any time in the future, and, therefore, an act of Congress which has the effect of nullifying contractual provisions as to payment in gold, passed by Congress under its constitutional power to regulate money, does not violate the Fifth Amendment.[3]

Where rights are acquired by a citizen under the existing law, there is no power in any branch of the government to take them away except by due process of law.[4] The purpose of this clause is to exclude arbitrary power from every branch of the government.[5] So far, at least, as the Fourteenth Amendment is concerned, it is a restraint on the legislative,[6] executive,[7] and judicial

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[13] Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107, 50 S. Ct. 451; Georgia Power Co. v. Decatur, 281 U. S. 505, 74 L. ed. 999, 50 S. Ct. 369; Phillip Wagner v. Leser, 239 U. S. 207, 60 L. ed. 230, 36 S. Ct. 66; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 S. Ct. 312; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 S. Ct. 625; Abbott v. National Bank, 175 U. S. 409, 44 L. ed. 217, 20 S. Ct. 153; Civil Rights Cases, 109 U. S. 3, 37 L. ed. 835, 3 S. Ct. 18; Cincinnati v. Vester (C. C. A. 6th) 33 F. (2d) 242, 68 A.L.R. 831, affirmed in 281 U. S. 439, 74 L. ed. 950, 50 S. Ct. 360; Ulman v. Baltimore, 72 Md. 587, 20 A. 141, 21 A. 709, 11 L.R.A. 224; Branson v. Gee, 25 Or. 462, 36 P. 527, 24 L.R.A. 355;

Pinney v. Providence Loan & Invest. Co. 106 Wis. 396, 82 N. W. 308, 50 L.R.A. 577, 80 Am. St. Rep. 41. Annotation: 98 A.L.R. 411.

[14] Ladner v. Siegel Co. 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172.

[15] Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496.

[16] Farrington v. Tokushige, 273 U. S. 284, 71 L. ed. 646, 47 S. Ct. 406.

[17] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A.L.R. 1106, rehearing denied in 296 U. S. 661, 80 L. ed. 471, 56 S. Ct. 82.

[18] Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106; Ochoa v. Hernandez y Morales, 230 U. S. 139, 57 L. ed. 1427, 33 S. Ct. 1033; Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281.

[19] Heiner v. Donnan, 285 U. S. 312, 76 L. ed. 772, 52 S. Ct. 358; Blodgett v. Holden, 275 U. S. 142, 72 L. ed. 206, 48 S. Ct. 105; Nichols v. Coolidge, 274 U. S. 531, 71 L. ed. 1184, 47 S. Ct. 710, 52 A.L.R. 1081; Barclay & Co. v. Edwards, 267 U. S. 442, 69 L. ed. 703, 45 S. Ct. 135, 348; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 524; United States v. Baltimore & O. R. Co. 17 Wall. (U. S.) 322, 21 L. ed. 597.

[20] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A.L.R. 1106, rehearing denied in 296 U. S. 661, 80 L. ed. 471, 56 S. Ct. 82.

[1] United States v. Cress, 243 U. S. 316, 61 L. ed. 746, 37 S. Ct. 380; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 S. Ct. 349; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 S. Ct. 66; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 S. Ct. 25; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622.

[2] Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 S. Ct. 977.

[3] Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352.

[4] Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559.

[5] State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L.R.A. 519, 60 Am. St. Rep. 756; Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636; Norman v. Heist, 5 Watts & S. (Pa.) 171, 40 Am. Dec. 493. The denial of rights given by the Fourteenth Amendment need not be by legislation. Saunders v. Shaw, 244 U. S. 317, 61 L. ed. 1163, 37 S. Ct. 638.

[6] Ex parte Rhodes, 202 Ala. 68, 79 So. 462, 1 A.L.R. 568; State v. Rose, 33 Del. 168, 132 A. 864, 45 A.L.R. 85; State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L.R.A.

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departments8 of the state. It seems undoubted that the people of a sovereign state in drafting and adopting a state Constitution are bound to respect these limitations equally with the legislative and other departments of government acting under such Constitution.[9]

The object of the constitutional guaranty of due process of law is to preserve personal and property rights against the arbitrary action of public officials.[10] Hence, it is recognized that administrative officers when executing the provisions of a statute involving the liberty of persons have no right to disregard the fundamental principles that inhere in due process of law.[11] The action of prosecuting officers on behalf of the state may constitute state action within the purview of the due process clause of the Fourteenth Amendment.[12] The guaranty may be violated by unfairness or corruption of officers.[13] The guaranty is violated whenever any person, by virtue of public position under the Federal or state government, deprives another of any right protected by that amendment.[14] It has been asserted that the guaranty should be enforced even against persons assuming to act under the authority of the government.[15] The act of the public official of a state is the act of the state in depriving an individual of property, life, or liberty without due process of law.[16]

The acts of a municipal corporation cannot be said to be wanting in the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution, if such acts, when done or ratified by the state, would not be inconsistent with that amendment.[17]

§ 587. Private Persons.—

The provisions of the due process clause in a state Constitution and in the Federal Constitution are inhibitions upon the power of government and its agencies, not upon freedom of action of private persons in respect of disposition of their own property; and hence do not preclude a testator from providing that any contestant of his will shall be deprived of any share in his estate.18

2. PERSONS PROTECTED

§ 588. Generally.—

It is obvious that the guaranty of due process of law inures to the benefit of persons who are citizens of the United States or of the state in which the question arises. It is not, however, limited to such citizens.

519, 60 Am. St. Rep. 756; Ladner v. Siegel Co. 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172; Simmons v. Western U. Teleg. Co. 63 S. C. 425, 41 S. E. 521, 57 L.R.A. 607.

[7] Ulman v. Baltimore, 72 Md. 587, 20 A. 141, 21 A. 709, 11 L.R.A. 224.

[8] Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107, 50 S. Ct. 451; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 S. Ct. 841; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; Ulman v. Baltimore, 72 Md. 587, 20 A. 141, 21 A. 709, 11 L.R.A. 224; State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L.R.A. 519, 60 Am. St. Rep. 756; Ladner v. Siegel Co. 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172.

[9] State ex rel. Wausau Street R. Co. v. Bancroft, 148 Wis. 124, 134 N. W. 330, 38 L.R.A.(N.S.) 526. Annotation: 6 L.R.A.(N.S.) 258.

[10] See supra, § 575.

[11] Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 S. Ct. 611; People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223.

[12] Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406, rehearing denied in 294 U. S. 732, 79 L. ed. 1261, 55 S. Ct. 511. Annotation: 98 A.L.R. 411.

[13] Annotation: 98 A.L.R. 411.

[14] Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 516, 63 N. E. 220, 57 L.R.A. 761.

[15] United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 S. Ct. 240.

[16] Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567.

[17] Owensboro Waterworks Co. v. Owensboro, 200 U. S. 38, 50 L. ed. 361, 26 S. Ct. 249.

[18] Re Chambers, 322 Mo. 1086, 18 S. W. (2d) 30, 67 A.L.R. 41. Annotation: 67 A.L.R. 52.

The guaranty is universal in its application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or nationality.[19] Persons yet unascertained and unborn are not deprived of their rights without due process of law by making them defendants in a bill to remove a cloud upon title and having them represented by a guardian ad litem.[20]

The guaranty does not extend to persons in governmental capacity who are claiming injury only in such capacity.[1]

The guaranty applies in the Philippines and in Puerto Rico.[2]

§ 589. Aliens.—

It has been broadly stated that aliens within the United States are within the protection of the due process guaranty.3 At least, an alien lawfully within the United States is entitled to the benefits of the guaranties of life, liberty, and property secured by the Constitution to all persons. His personal rights when he is in this country and such of his property as is here during his absence are protected as fully as those of a citizen.4 The alien has been held entitled to the protection of the guaranty although he is alleged to be here illegally.5

When an alien is beyond the jurisdiction of the Federal Government, he can enter only on compliance with the statutory requirements, and Congress may lawfully provide that the question of his right to admission shall be finally determined by administrative officers.[6]

§ 590. Corporations.—

In so far as property of corporations is concerned, corporations are protected by the constitutional guaranty of due process of law.7 Whether a foreign corporation is doing business within a state, so as to give the courts jurisdiction over it, has been stated to raise a question of due process of law under the Federal Constitution.8 The liberty guaranteed is the liberty of natural, not artificial, persons.9

§ 591. Insane Persons.10—

It is generally recognized that it is within the duties and powers of the state to provide for the care and treatment of its insane, with such confinement and restraint of their liberty as may be necessary for that purpose. The courts, however, have not undertaken precisely to define the limitations of the power which the state possesses in this respect, except by the announcement of general principles essential to their welfare and

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[19] Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283.

[20] Loring v. Hildreth, 170 Mass. 328, 49 N. E. 652, 40 L.R.A. 127, 64 Am. St. Rep. 301.

[1] See infra, § 593.

[2] Balzac v. Porto Rico, 258 U. S. 298, 66 L. ed. 627, 42 S. Ct. 343.

[3] Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701; Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 S. Ct. 977 (criminal proceeding); Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407. Annotation: 68 L. ed. 255. Alien inhabitants of a state may invoke the protection of the due process clause of the Federal Constitution. Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15. See ALIENS, Vol. 2, p. 467, § 9.

[4] Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 S. Ct. 770; Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 S. Ct. 967; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064. Annotation: 68 L. ed. 255. See ALIENS, Vol. 2, p. 467, § 9.

[5] Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 S. Ct. 611.

[6] United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 S. Ct. 644; United States v. Sing Tuck, 194 U. S. 161, 48 L. ed. 917, 24 S. Ct. 621. See also ALIENS, Vol. 2, p. 465, §§ 7 et seq., where the power of Congress and the nature of its enactments are considered at length.

[7] See CORPORATIONS, Vol. 13, p. —, § —.

[8] Hall v. Wilder Mfg. Co. 316 Mo. 812, 293 S. W. 760, 52 A.L.R. 723.

[9] See CORPORATIONS, Vol. 13, p. —, § —.

[10] As to insane person accused of crime, see CRIMINAL LAW; INSANE AND OTHER INCOMPETENT PERSONS.

the protection of the public.[11] Some of the requirements imposed by the Fourteenth Amendment are of sufficient importance to warrant mention in the present connection. A person even if insane cannot be deprived of his liberty without due process of law, which includes notice and an opportunity of being heard. While a state may provide for the temporary confinement of a person alleged to be insane, on a sufficient showing, pending proceedings for the determination of his sanity,[12] a person cannot be permanently deprived of his liberty on the ground of insanity without such notice and hearing,[13] as by indefinite confinement upon a mere certificate of practicing physicians,[14] although the certificate of physicians may be made prima facie evidence, subject to be overcome by countervailing evidence.[15] It is no answer to say that the person is insane and consequently notice to him will be useless, for that is assuming as a fact the very thing in question, which is presumed to be otherwise until proved.[16] Where the person alleged to be insane has been given notice but is not produced at the trial because, on examination by a physician, his presence is deemed to be inconsistent with his health or safety, the requirements as to due process of law are met,[17] especially where any relative or any citizen of the county may appear and resist the application.[18] On somewhat the same principles as are applicable in the case of insane persons, due process of law has been held not to be denied by a statute providing for the commitment of inebriates, without their consent, to a public hospital conducted by the state for the treatment of inebriates.[19]

§ 592. Children.[20]—

It is well recognized that the state, as parens patriæ, may take into its custody a wayward child without being required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts.21 Many statutes provide for notice and hearing. Such notice and hearing are held to constitute due process.1 Due process of law has been considered not to be denied by a statute authorizing the grand jury, where an infant under the age of sixteen years is charged with crime and the charge appears to be supported by evidence sufficient to put the accused upon trial, instead of finding an indictment, to return to the court that the accused is a suitable person to be committed to a house of refuge and directing the court

[11] Re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L.R.A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729; Re Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A.(N.S.) 232. Annotation: 26 L.R.A.(N.S.) 232. See generally, INSANE AND OTHER INCOMPETENT PERSONS [Also 14 R. C. L. p. 546].

[12] Porter v. Ritch, 70 Conn. 235, 39 A. 169, 39 L.R.A. 353. The right to restrain an insane person is not governed by the general law which provides that no one shall be deprived of life, liberty, or

property without due process of law. Maxwell v. Maxwell, 189 Iowa, 7, 177 N. W. 541, 10 A.L.R. 482.

[13] State ex rel. Blaisdell v. Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525; Re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L.R.A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729.

[14] Re Lambert, 134 Cal. 626, 66 P. 851, 55 L.R.A. 856, 86 Am. St. Rep. 296; Re Gannon, 16 R. I. 537, 18 A. 159, 5 L.R.A. 359, 27 Am. St. Rep. 759; Re Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A.(N.S.) 232. Annotation: 5 L.R.A. 359.

[15] Re Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A.(N.S.) 232.

[16] State ex rel. Blaisdell v. Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525; Re Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A.(N.S.) 232. Annotation: 26 L.R.A.(N.S.) 232; 43 Am. St. Rep. 531.

[17] Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 S. Ct. 836.

[18] Chavannes v. Priestley, 80 Iowa, 316, 45 N. W. 766, 9 L.R.A. 193.

[19] Leavitt v. Morris, 105 Minn. 170, 117 N. W. 393, 17 L.R.A.(N.S.) 984, 15 Ann. Cas. 961. Annotation: 17 L.R.A.(N.S.) 984.

[20] As to right of parent to notice and hearing before being deprived of custody of child, see annotation: 76 A.L.R. 242. See PARENT AND CHILD [Also 20 R. C. L. p. 597, §§ 13 et seq.]. As to juvenile proceedings, see JUVENILE COURTS AND OFFENDERS.

[21] Re Sharp, 15 Idaho, 120, 96 P. 563, 18 L.R.A.(N.S.) 886; Com. v. Fisher, 213 Pa. 48, 62 A. 198, 5 Ann. Cas. 92. See INFANTS [Also 14 R. C. L. p. 213].

[1] Bryant v. Brown, 151 Miss. 398, 118 So. 184, 60 A.L.R. 1325.

thereupon to order its commitment without trial by jury.[2] In general, it may be stated that a state may provide for the commitment of minors to industrial schools and houses of refuge under appropriate circumstances without providing for a jury trial.[3]

§ [593]. Public Bodies.—So far as the state and its instrumentalities are concerned, there is no scope for invoking the due process guaranty as against the action of the state itself. The state may authorize a suit against itself.[4] A governmental agency which is not authorized to hold property in a private sense is not deprived of property without due process of law by a statute providing for the extinguishment of its title to land.[5]

In the application of this rule to municipalities the question depends upon the view taken in the particular jurisdiction as to the rights of a municipal government. In a majority of states the right of the people of a municipality to control its affairs is not considered as an inherent right residing in the people, but as dependent for its existence on the legislative will.[6] In such jurisdictions the state has a power over the rights and properties of cities which is unrestricted by the due process guaranty.[7] The state may, without violating the guaranty, interfere with the right of a municipality to take water from a public stream although such municipality acquired the right from a private grantee of the state.[8] The state may impose a license fee or charge for the diversion of water from the stream.[9] It may abrogate a right of setoff previously given to a municipal corporation,[10] charge a municipal corporation with public obligations,[11] or make a municipality liable for damages by a mob or riot.[12] Similarly, the state is held to have power over a school district, so that its action in creating a new district to which is given property within its limits which had belonged to the district from which it was created cannot be attacked on the ground of violation of due process of law.[13] A school corporation may be charged with special assessments.[14] The same rule applies to townships15 and to counties,[16] although there has been some variance in this

[2] Prescott v. State, 19 Ohio St. 184, 2 Am. Rep. 388.

[3] Re Ferrier, 103 Ill. 367, 42 Am. Rep. 10; Re Clark, 86 Kan. 539, 121 P. 492, 39 L.R.A. (N.S.) 680, Ann. Cas. 1913C, 317; Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702.

[4] Sandel v. State, 115 S. C. 168, 104 S. E. 567, 13 A.L.R. 1268, holding that a statute authorizing suit against the state for death of a child killed by impure vaccine furnished by the state does not violate the constitutional provision against depriving one of life, liberty, or property without due process of law.

[5] Essex Public Road Bd. v. Skinkle, 140 U. S. 334, 35 L. ed. 446, 11 S. Ct. 790. New Jersey Law March 31, 1882, providing a mode by which an assessment may be compromised and discharged where the real estate has been sold to the public road board, which is an involuntary quasi corporation created to construct a public work, does not impair a contract or deprive the board of property without due process of law. Such a public agency cannot own property in a proprietary or private sense. Ibid.

[6] See Vol. 11, p. 613, § 16.

[7] Trenton v. New Jersey, 262 U. S. 182, 67 L. ed. 937, 43 S. Ct. 534, 29 A.L.R. 1471.

[8] Ibid.

[9] Ibid.

[10] New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 S. Ct. 142.

[11] State ex rel. Bulkeley v. Williams, 68 Conn. 131, 35 A. 24, 421, 48 L.R.A. 465, affirmed in 120 U. S. 304, 42 L. ed. 1047, 18 S. Ct. 617.

[12] Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215, 32 S. Ct. 92, Ann. Cas. 1918B, 1349.

[13] Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 S. Ct. 27; Pass School Dist. v. Hollywood City School Dist. 156 Cal. 416, 105 P. 122, 26 L.R.A.(N.S.) 485, 20 Ann. Cas. 87.

[14] Windfall City v. Somerville, 181 Ind. 463, 104 N. E. 859, Ann. Cas. 1916D, 661.

[15] Soliah v. Heskin, 222 U. S. 522, 56 L. ed. 294, 32 S. Ct. 103. A state law directing that five towns shall maintain a bridge and highway, each bearing a share in the expense thereof, and creating them a body corporate under a particular name for the care and maintenance of the bridge and highway does not deprive of property without due process of law. Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 S. Ct. 617.

[16] State v. Pierce County, 132 Wash. 155, 231 P. 801, 46 A.L.R. 594.

respect.[17] It has been held that the state cannot, in view of the constitutional provisions that no one shall be deprived of his property except by the law of the land, require a county to give bond for payment of interest on money loaned a township for improving a highway of an exclusively local nature.[18]

The state may compel a township, as one of its political subdivisions, to levy and collect taxes for the purpose of paying the amount assessed against such township for the public benefits accruing from the construction of a drain19 or determine what duties may be performed by local officers and whether they shall be appointed or elected by the people.[20] It may impose upon a county the cost of maintaining its harmless insane when the insane persons themselves or their relatives are not able to do so, even though the county is not made party to the proceedings in which the necessary facts are determined.

In other jurisdictions the right to local self-government is treated as inherent in cities and towns and, if not surrendered on the adoption of the state Constitution, cannot be

taken away by the legislature.[1] In these jurisdictions the due process guaranty applies to municipal corporations,[2] at least as to its proprietary functions.[3]

The right of home rule by cities has been established in a number of states by constitutional provision.[4] A home-rule city is protected by the due process guaranty.[5] The constitutional protection of the Fourteenth Amendment against state action does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws.[6]

D. NOTICE

§ [594]. Generally.—As stated in an earlier section, one of the essentials of due process is notice.[7] This is especially true in proceedings of a judicial nature affecting the property rights of citizens.[8] The notice essential to due process of law in such proceedings is original notice whereby the court acquires original jurisdiction, and not notice of the time when jurisdiction already completely vested will be exercised.[9]

A person is not precluded from complaining that the taking of his prop-

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[17] Johnston County v. Lacy, 174 N. C. 141, 93 S. E. 482, 2 A.L.R. 726.

[18] Ibid. See HIGHWAYS, STREETS, AND SIDEWALKS [Also 13 R. C. L. p. 1].

[19] Soliah v. Heskin, 222 U. S. 522, 56 L. ed. 294, 32 S. Ct. 103.

[20] Ibid.

[1] See Vol. 11, p. 614, § 16.

[2] People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L.R.A. 814, 82 Am. St. Rep. 605.

[3] State ex rel. Kern v. Arnold, 100 Mont. 346, 49 P. (2d) 976, 100 A.L.R. 1071, holding that an act of the legislature requiring a city which is empowered, but not compelled, to maintain a paid fire department to set up a 3-platoon system and to pay a stated minimum salary to firemen is unconstitutional as depriving the city of its property without due process of law.

[4] See Vol. 11, p. 615, § 17.

[5] State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581, holding that a statute making it compulsory upon cities and towns to insure their public buildings and property in a state insurance fund violates the due process and home-rule provisions of the state Constitution. Annotation: 100 A.L.R. 600.

[6] Columbus & G. R. Co. v. Miller, 283 U. S. 96, 75 L. ed. 861, 51 S. Ct. 392.

[7] See supra, § 573.

[8] Loesch v. Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L.R.A. 682; Levee Comrs. v. Johnson, 178 Ky. 287, 199 S. W. 8, L.R.A.1918E, 202; Baker v. Baker, E. & Co. 162 Ky. 683, 173 S. W. 109, L.R.A.1917C, 171, affirmed in 242 U. S. 394, 61 L. ed. 386, 31 S. Ct. 152; Riley v. Pearson, 120 Minn. 210, 139 N. W. 361, L.R.A.1916D, 7; Davis v. St. Louis County, 65 Minn. 310, 67 N. W. 997, 33 L.R.A. 432, 60 Am. St. Rep. 475; State ex rel. Ferrocarriles Nacionales v. Rutledge, 331 Mo. 1015, 56 S. W. (2d) 28, 85 A.L.R. 1378; Jones v. Williams, 155 N. C. 179, 71 S. E. 222, 36 L.R.A.(N.S.) 426; Davies v. Thompson, 61 Okla. 21, 160 P. 75, L.R.A.1917B, 395; Pinney v. Providence Loan & Invest. Co. 106 Wis. 396, 82 N. W. 308, 50 L.R.A. 577, 80 Am. St. Rep. 41.

[9] As to process generally, see PROCESS [Also 21 R. C. L. p. 1279, §§ 23 et seq.]. [12 Am. Jur.]—19 289

erty conformably to state legislation to satisfy an alleged debt or obligation was without the notice essential under the due process clause, because in his particular case

due process of law would lead to the same result because he had no adequate defense on the merits.[10]

A guaranty that notice shall be actually received is not, it seems, involved in due process if provision is made for notice.[11]

In the determination of what is due process of law as to notice within the meaning of the Fourteenth Amendment, a distinction is to be observed between actions in personam and actions in rem or quasi in rem.[12]

§ 595. Actions in Personam.—

When the action is purely in personam and a personal judgment is sought, there must, subject to limitations subsequently mentioned, be personal service within the jurisdiction. A judgment in personam against a nonresident cannot be rendered unless he enters his appearance or consents to a substituted service; such a judgment is devoid of validity within as well as outside the state in which it is rendered.13 Judgment cannot be rendered against a nonresident joint debtor.14 A statute permitting the substitution of a nonresident executor or administrator upon the death of a nonresident defendant in an action in personam is unconstitutional as depriving him of due process of law where there are no assets in the state.15 Personal service on the defendant outside the jurisdiction of the court will not suffice for this purpose.16

The states have more control over the form of service upon their residents

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[10] Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 35 S. Ct. 625.

[11] Miedreich v. Lauenstein, 232 U. S. 236, 58 L. ed. 584, 34 S. Ct. 309. Upholding a sale under a decree for the foreclosure of a mortgage against an attack based on the ground that the owner was not served with process in the foreclosure proceedings does not deprive him of his property without due process of law where the state had made provision for the service of process and the original party in the foreclosure proceeding did all that the law required in the issuance of, and attempt to serve, process and the sheriff made a return to the court, contrary to fact, that the service had been duly made, although, under the circumstances, the recovery upon the sheriff's bond authorized by the state law may not have been an adequate remedy. Miedreich v. Lauenstein, 232 U. S. 236, 58 L. ed. 584, 34 S. Ct. 309.

[12] Grannis v. Ordean, 234 U. S. 385, 58 L. ed. 1363, 34 S. Ct. 779.

[13] Minnesota Commercial Men's Asso. v. Benn, 261 U. S. 140, 67 L. ed. 573, 43 S. Ct. 293; Pennington v. Fourth Nat. Bank, 243 U. S. 269, 61 L. ed. 713, 37 S. Ct. 282, L.R.A. 1917F, 1159; McDonald v. Mabee, 243 U. S. 90, 61 L. ed. 608, 37 S. Ct. 343, L.R.A. 1917F, 458; Baker v. Baker, E. & Co. 242 U. S. 394, 61 L. ed. 386, 37 S. Ct. 152; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 S. Ct. 379; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Cella Commission Co. v. Bohlinger (C. C. A. 8th) 147 F. 419, 8 L.R.A.(N.S.) 537; Ex parte Cullinan, 224 Ala. 263, 139 So. 255, 81 A.L.R. 160; Bicknell v. Herbert, 20 Haw. 132, Ann. Cas. 1913A, 1186, affirmed in 233 U. S. 70, 58 L. ed. 854, 34 S. Ct. 562; Cabanne v. Graf, 87 Minn. 510, 92 N. W. 461, 59 L.R.A. 735, 94 Am. St. Rep. 722; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315, 9 L.R.A. 152, 20 Am. St. Rep. 547; Blessing v. McLinden, 81 N. J. L. 379, 79 A. 347, 35 L.R.A.(N.S.) 312; Foster v. Allison Corp. 191 N. C. 166, 131 S. E. 648, 44 A.L.R. 610. Annotation: 8 L.R.A.(N.S.) 537; 35 L.R.A. (N.S.) 312. It has been held, however, that there is no infirmity in a personal judgment for a devastavit, rendered by the probate court conformably to the local practice, in favor of an administrator de bonis non against the executor, who, having removed to another jurisdiction and having been adjudged incompetent there, can only be served constructively, where the steps taken were concurred in by both the court that controlled the cause and the court that controlled his person. Michigan Trust Co. v. Ferry, 228 U. S. 346, 57 L. ed. 867, 33 S. Ct. 550.

[14] Blessing v. McLinden, 81 N. J. L. 379, 79 A. 347, 35 L.R.A.(N.S.) 312.

[15] McMaster v. Gould, 239 N. Y. 606, 147 N. E. 214, 40 A.L.R. 792. Annotation: 40 A.L.R. 796.

[16] Riverside & D. River Cotton Mills v. Menefee, 237 U. S. 189, 59 L. ed. 910, 35 S. Ct. 579; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 S. Ct. 236; Raher v. Raher, 150 Iowa, 511, 129 N. W. 494, 35 L.R.A.(N.S.) 292, Ann. Cas. 1912D, 680. Annotation: 35 L.R.A.(N.S.) 292; Ann. Cas. 1912D, 633. Due process of law is denied by the action of a state court in according full faith and credit to a judgment in personam rendered by a court of a sister state against a nonresident who was not personally served with process within the state and who made no appearance in the action. Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 S. Ct. 236.

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than upon nonresidents.[17] It is generally held to be due process of law sufficient to sustain a personal judgment against a resident of a state if the service is made by leaving a copy of the process at his residence.[18] Personal service within the jurisdiction of the court in which the action is brought is the ordinary form of service and must be made in all actions where practicable, even in actions to quiet title or settle private adverse rights to property, where the jurisdiction rests upon the process, and not upon a seizure of property.[19] Where actual service is impracticable in such cases, nothing more is essential to the due process of law than that the service provided for be such as in the exercise of legislative discretion shall have been found most suitable to accomplish the purpose of actual service.[20]

In some cases a personal judgment may be rendered against a resident upon constructive service.[1] The validity of such a judgment against a resident of the state of the forum who is absent therefrom at the time of the service raises some questions that are not uniformly answered.[2] An individual transacting business within a state through agents has been held amenable to process by service upon an agent; such notice does not deprive the individual of property without due process of law.[3] On the other hand, a personal judgment against nonresidents doing business within the state as partners cannot, it has been held, be based upon service of process upon a resident agent.[4]

A state may authorize proceedings to determine the status of one of its citizens towards a nonresident which would be binding within the state, even though made without service of process or personal notice to the nonresident.[5]

§ 596. —

Automobile Accident Litigation.—There are in many states statutes providing for constructive or substituted service of process on a nonresident motorist in an action growing out of an automobile accident in which such motorist was involved while operating his automobile within the state. These statutes usually designate a state official as the proper person to receive service of process. Such statutes are constitutional, provided they contain provisions which make it reasonably probable that notice will be communicated to the person to be served as by requiring the mailing of a copy of the summons and complaint to his last-known address.6 Service of process on the state official and the mailing of a copy to the nonresident at his place of resi-

[17] As to process, see PROCESS [Also 21 R. C. L. p. 1279, §§ 23 et seq.]. See also infra, § 604.

[18] Biesenthall v. Williams, 1 Duv. (Ky.) 329, 85 Am. Dec. 629. Annotation: 58 L. ed. 854.

[19] State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L.R.A. 519, 60 Am. St. Rep. 756; Bear Lake County v. Budge, 9 Idaho, 703, 75 P. 614, 108 Am. St. Rep. 179.

[20] State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L.R.A. 519, 60 Am. St. Rep. 756; Ashton-Jenkins Co. v. Bramel, 56 Utah, 587, 192 P. 375, 11 A.L.R. 752 (quiet title proceeding). Mailing to a resident of the state, as well as publishing, a notice of a proceeding in scire facias to revive a judgment, as provided in 2 Starr & C. Stat. (Ill.) p. 1789, where his residence is stated in the affidavit, which shows that he has gone out of the state or is concealed within it so that process cannot be served on him, is sufficient to satisfy the constitutional requirement of due process of law. Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740, 29 L.R.A. 782.

[1] See PROCESS [Also 21 R. C. L. p. 1292, § 35]. A personal judgment for money against a person who has left the state not intending to return may not, however, consistent with due process of law, be rendered upon service by publication in a local newspaper, and such judgment is not merely voidable, but absolutely void. McDonald v. Mabee, 243 U. S. 90, 61 L. ed. 608, 37 S. Ct. 343, L.R.A.1917F, 458.

[2] See PROCESS [Also 21 R. C. L. p. 1292, § 35].

[3] Davidson v. Henry L. Doherty & Co. 214 Iowa, 739, 241 N. W. 700, 91 A.L.R. 1308. Annotation: 91 A.L.R. 1327.

[4] Flexner v. Farson, 248 U. S. 289, 63 L. ed. 250, 39 S. Ct. 97. Annotation: 91 A.L.R. 1327.

[5] Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

[6] See AUTOMOBILES, Vol. 5, p. 829, § 590.

dence constitute due process of law and support a personal judgment in favor of the person injured.[7] A reasonable method must be provided for, however, giving notice to the defendant.[8] The fact that the nonresident had actual notice of the suit does not render valid the statute under which the suit was brought, which permitted service of process on a state official without providing notice to defendant, or validate the judgment rendered in accordance with the provisions of such statute.[9]

§ 597. Actions in Rem.—

It is generally recognized that when the proceedings are in rem or quasi in rem, substituted service may be sufficient even as against nonresidents who cannot be found within the state.[10] At least this is true of proceedings strictly in rem.[11] Notice necessary for due process of law in determining the right to the succession of real estate, whether by ordinary administration proceedings or by proceedings in escheat, is afforded by actual notice by service of summons to all known claimants and constructive notice by publication to all possible claimants who are unknown.[12] The inherent authority of the states over the titles to lands within their respective borders carries with it of necessity the jurisdiction to determine rights and interests claimed therein by persons resident beyond the territorial limits of the state and upon whom the ordinary judicial process cannot be served, so that a state,

consistent with due process, may through its courts proceed to judgment respecting the ownership of lands within its limits upon constructive notice to the parties concerned who reside beyond the reach of process.[13] This rule extends alike to tangible and intangible property.[14]

In proceedings in rem or quasi in rem, however, the judgment can affect only the property brought within the jurisdiction of the court.[15]

Any reasonable method of giving notice to the owners of the property is sufficient.[16] The efficacy, as due process, of constructive service rests upon

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[7] Hess v. Pawloski, 274 U. S. 352, 71 L. ed. 1091, 47 S. Ct. 632; Pawloski v. Hess,

[250] Mass. 22, 144 N. E. 760, 35 A.L.R. 945; State ex rel. Cronkhite v. Belden, 193 Wis. 145, 211 N. W. 916, 214 N. W. 460, 57 A.L.R. 1218. Annotation: 35 A.L.R. 951; 57 A.L.R. 1239; 99 A.L.R. 131.

[8] State ex rel. Bond & Goodwin & Tucker v. Superior Ct. 289 U. S. 361, 77 L. ed. 1256,

[53] S. Ct. 624, 89 A.L.R. 653 (obiter); Wuch- ter v. Pizzutti, 276 U. S. 13, 72 L. ed. 446,

[48] S. Ct. 259, 57 A.L.R. 1230.

[9] Wuchter v. Pizzutti, 276 U. S. 13, 72 L. ed. 446, 48 S. Ct. 259, 57 A.L.R. 1230.

[10] Herbert v. Bicknell, 233 U. S. 70, 58 L. ed. 854, 34 S. Ct. 562, affirming 20 Haw. 132, Ann. Cas. 1913A, 1186; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199; Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182, 18 L.R.A.(N.S.) 647, 127 Am. St. Rep. 220; Tyler v. Judges of Ct. of Registration, 175 Mass. 71, 55 N. E. 812,

[51] L.R.A. 433, writ of error dismissed in

[179] U. S. 405, 45 L. ed. 252, 21 S. Ct. 206; Foster v. Allison Corp. 191 N. C. 166, 131 S. E. 648, 44 A.L.R. 610; Straub v. Lyman Land & Invest. Co. 30 S. D. 310, 31 S. D. 571,

[138] N. W. 957, 141 N. W. 979, 46 L.R.A.(N.S.) 941. The principal defendant in a garnishment suit in a territorial court having jurisdic- tion over small debts only is not deprived of his property without due process of law because judgment was taken by default, appropriating property within the jurisdic- tion to the payment of the defendant's debt, with no other service of process upon him than that provided for in Hawaii Rev. Laws, § 2114, by leaving a copy of the sum- mons at his last and usual place of abode, where he had actual knowledge of the suit before the time for suing out a writ of error had expired and when it might still have been possible to set aside the judg- ment and retry the case. Herbert v. Bick- nell, 233 U. S. 70, 58 L. ed. 854, 34 S. Ct. 562. As to the sufficiency of substituted serv- ice against residents, see supra, § 595.

[11] Combs v. Combs, 249 Ky. 155, 60 S. W. (2d) 368, 89 A.L.R. 1095; Re Apostolopoulos,

[68] Utah, 344, 250 P. 469, 253 P. 1117, 48 A.L.R. 1322.

[12] Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 S. Ct. 585. Annotation: 40 L. ed. 691.

[13] Grannis v. Ordean, 234 U. S. 385, 58 L. ed. 1363, 34 S. Ct. 779.

[14] Pennington v. Fourth Nat. Bank, 243 U. S. 269, 61 L. ed. 713, 37 S. Ct. 282, L.R.A. 1917F, 1159.

[15] Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 S. Ct. 379; Pennoyer v. Neff,

[95] U. S. 714, 24 L. ed. 565.

[16] Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 S. Ct. 557. It is competent for the legislature, by reasonable regulations, to authorize the issuance of substituted process upon alle-

the presumption that the notice will be given in a manner calculated to reach the person to be notified.[17] At least, a statute providing for substituted serv-

ice of process on an individual whose entrance into a state may render him amenable to action therein is consistent with due process only if it incorporates reasonable provisions for giving the defendant notice of the initiation of litigation.[18]

The foregoing rules apply to actions to enforce liens upon land within the state of the forum,[19] to quiet title proceedings,[20] to partition proceedings,[1] to escheat proceedings,[2] to administration proceedings on absentees' estates,[3] and to proceedings for the determination of rights in waters.[4]

§ 598. Character.5—

The notice must be reasonable and adequate for the purpose, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.[6] It must give sufficient notice of the pendency of the action or proceeding and a reasonable opportunity to a defendant to appear and assert his rights before a tribunal legally constituted to adjudicate such rights.[7] Special proceedings which are applicable to the specified subject matter and conformable to the rules requiring notice and the acquisition of jurisdiction and which affect all persons alike whose property or rights come within the lawful scope of the proceedings are prosecuted with "due process of law."[8] To validate a judgment in rem, there must be adequate public notice of the proceeding, and such notice must emanate from a court which has jurisdiction of the res.[9] The legislature may prescribe what notice

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gations which follow the wording of the statute, unsupported by other allegations which show that personal service is im- possible or impracticable. Such a proce- dure is constitutionally valid. McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731.

[17] Blackmer v. United States, 284 U. S. 421, 76 L. ed. 375, 52 S. Ct. 252.

[18] See supra, § 596.

[19] Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 S. Ct. 410. Service by publication and mailing of a summons in a partition suit conformably to the local law with respect to construc- tive service of nonresidents, naming as party defendant and addressee, "Albert Guilfuss, assignee," and "Albert B. Guil- fuss," has been held to satisfy the require- ment of the due process of law clause of the Fourteenth Amendment to the United States Constitution conferring jurisdiction, notwithstanding the misnomer, to render a judgment binding upon "Albert B. Geil- fuss, assignee," with respect to his lien upon, or interest in, the land, he not having appeared. Grannis v. Ordean, 234 U. S. 385,

[58] L. ed. 1363, 34 S. Ct. 779.

[20] Jacob v. Roberts, 223 U. S. 261, 56 L. ed. 429, 32 S. Ct. 303; American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 S. Ct. 200; McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731; State ex rel. Mon- nett v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L.R.A. 519, 60 Am. St. Rep. 756.

[1] Grannis v. Ordean, 234 U. S. 385, 58 L. ed. 1363, 34 S. Ct. 779.

[2] Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 S. Ct. 585; Com. v. Dollar Sav. Bank, 259 Pa. 138, 102 A. 569, 1 A.L.R. 1048; Re Apostolopoulos, 68 Utah, 344, 250 P. 469, 253 P. 1117, 48 A.L.R. 1322. Annotation: 48 A.L.R. 1342; 40 L. ed. 691. As to escheat of deposit, see BANKS, Vol. 7, p. 290, § 415.

[3] Cunnius v. Reading School Dist. 198 U. S. 458, 49 L. ed. 1125, 25 S. Ct. 721. As to the conclusiveness of the determi- nation in such cases, see EXECUTORS AND ADMINISTRATORS [Also 11 R. C. L. p. 1].

[4] Farm Invest. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258, 50 L.R.A. 747, 87 Am. St. Rep. 918 (notice by registered mail in addi- tion to publication).

[5] As to notice in guardianship proceed- ings, see GUARDIAN AND WARD [Also 12 R. C. L. p. 1114, § 15]. As to notice of demurrage charges, see CARRIERS, Vol. 9, p. 789, § 617.

[6] Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 50 S. Ct. 299, 68 A.L.R. 434; Mis- souri ex rel. Hurwitz v. North, 271 U. S. 40, 70 L. ed. 818, 46 S. Ct. 384; Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 S. Ct. 406, Ann. Cas. 1913D, 936; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520,

[20] S. Ct. 410; McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731; Gutierrez v. Middle Rio Grande Conservancy Dist. 34 N. M. 346, 282 P. 1, 70 A.L.R. 1261, writ of certiorari denied in 280 U. S. 610, 74 L. ed. 653, 50 S. Ct. 158.

[7] Straub v. Lyman Land & Invest. Co. 30 S. D. 310, 31 S. D. 571, 138 N. W. 957, 141 N. W. 979, 46 L.R.A.(N.S.) 941.

[8] Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 48 N. W. 98, 12 L.R.A. 436, 31 Am. St. Rep. 477.

[9] Re Clark, 148 Cal. 108, 82 P. 760, 1 L.R.A. (N.S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306.

shall be given to parties whose rights are to be affected by judicial proceedings, subject to the condition that the notice prescribed shall afford an opportunity to be heard.[10] The criterion is not whether any injury to an individual is possible, but whether the requirement as to notice and opportunity to protect property rights affected is just and reasonable.[11] Extraofficial or casual notice is not sufficient.[12]

If the form sanctioned by the state law gives notice and affords an opportunity to be heard, the mere question whether it is by a motion or ordinary action is not material.[13] Accordingly, a rule upon the incumbent of a public office to show cause why he refuses to surrender his office, providing for service of the rule upon him, issued in pursuance of a state statute, may be a full compliance with the requirements as to due process of law.[14]

The due process of law clause does not impose an unattainable standard of accuracy. If a defendant within the jurisdiction is served personally with process in which his name is misspelled, he cannot safely ignore it on account of the misnomer.[15]

Actual personal notice is not necessary in all proceedings. There may be, and must be, some form of constructive service,[16] especially when actual service is impracticable.[17] In cases where the statute authorizes the court to determine the question of title and decree it to the rightful owner, and where personal service cannot be effected after due diligence, the decree is valid and binding without personal service or appearance, if the statute has provided a reasonable method of imparting notice to the defendant and that method has been strictly followed.[18] A statute authorizing a ministerial officer to issue orders of publication against defendants who cannot, after due diligence, be personally served with process is usually held valid.[19] It is competent for the legislature to

authorize the issuance of substituted process upon allegations which follow the wording of the statute, unsupported by other allegations which show that personal service is impossible or impractical. Such a procedure is constitutionally valid.[20]

In admiralty a seizure of the thing itself is notice.[1]

An order adjudging a person incompetent and appointing a committee of his person and estate is not wanting in due process of law where, at each stage in the proceedings leading up to such order, the alleged incompetent, then under commitment to a private hospital, was personally served with notice and was given an opportunity to be heard.[2]

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[10] Gutierrez v. Middle Rio Grande Conservancy Dist. 34 N. M. 346, 282 P. 1, 70 A.L.R. 1261, writ of certiorari denied in 280 U. S. 610, 74 L. ed. 653, 50 S. Ct. 158.

[11] McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731.

[12] Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 35 S. Ct. 625. See also supra, § 573.

[13] Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 S. Ct. 344.

[14] Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478.

[15] Grannis v. Ordean, 234 U. S. 385, 58 L. ed. 1363, 34 S. Ct. 779. A person is not deprived of his property without due process of law where a judgment in a previous suit against the person to whose interest he succeeded, based upon constructive service, in which such person, whose true name is "Albert B. Geilfuss, assignee," was named as "Albert Guilfuss, assignee," is sustained as valid against a collateral attack. Ordean v. Grannis, 118 Minn. 117, 136 N. W. 575, 1026, L.R.A.1915B, 1149, affirmed in 234 U. S. 385, 58 L. ed. 1363, 34 S. Ct. 779.

[16] Jacob v. Roberts, 223 U. S. 261, 56 L. ed. 429, 32 S. Ct. 303; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261.

[17] State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L.R.A. 519, 60 Am. St. Rep. 756. See also supra, §§ 595, 596, 597.

[18] McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731.

[19] Ibid.

[20] Ibid.

[1] Cordrey v. The Bee, 102 Or. 636, 201 P. 202, 20 A.L.R. 1079. See ADMIRALTY, Vol. 1, p. 592, §§ 81 et seq.

[2] Chaloner v. Sherman, 242 U. S. 455, 61 L. ed. 427, 37 S. Ct. 136.

That notice to the claimants of a dormant bank deposit, which the state is seeking to compel the bank to turn over to it, is required to be made in the county containing the state capitol rather than in that wherein the bank is located is not so unreasonable that it will fail to constitute due process of law, where the bank has been required to publish in the local paper a statement of the facts relating to the account each year for nine years prior to the time fixed for state proceedings.[3]

Notice by publication where the only statutory provision is for summons or other personal service does not give jurisdiction.[4]

§ 599. To Foreign Corporations.5—

The state may impose any reasonable requirements upon a foreign corporation coming into the state to transact business. Requiring it to appoint a resident agent upon whom process may be served and, in the event of its failure so to appoint an agent, making a state official such agent constitute due process, although there is no requirement that

the agent give the corporation notice.6 The rule here is not the same as in cases involving substituted service upon individuals.7 The state may provide for service of process upon the agent of a foreign corporation doing business within the state.8

It is not necessary for a state, in making provision for service of process upon foreign corporations in the state, to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the state; causes of action not arising in the business done by the foreign corporation in the state may be excluded from the operation of the statute.[9] The due process clause, however, is not violated by a state statute permitting service of summons on a local agent of a foreign corporation having property and transacting business within the state through local agents, in an action by a nonresident on a transitory cause of action arising outside the state and not connected with any corporate action in the state.[10]

Where the corporation is not doing business in the state, then to authorize or sustain process upon it does not constitute due process.[11] The enforcement by the courts of the state of the residence of an insurance company of

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See INSANE AND OTHER INCOMPETENT PERSONS [Also 14 R. C. L. p. 546].

[3] Security Sav. Bank v. California, 263 U. S. 282, 68 L. ed. 301, 44 S. Ct. 108, 31 A.L.R. 391.

[4] Pierce v. Superior Ct. 1 Cal. (2d) 759, 37 P. (2d) 460, 96 A.L.R. 1020 (cancelation of fraudulent election registrations). Annotation: 96 A.L.R. 1041. For a general question of purging voters' registration lists, see ELECTIONS [Also 9 R. C. L. p. 972].

[5] As to service of process upon corporations, domestic and foreign, see PROCESS [Also 21 R. C. L. p. 1279, §§ 23 et seq.].

[6] Washington ex rel. Bond & Goodwin & Tucker v. Superior Ct. 289 U. S. 361, 77 L. ed. 1256, 53 S. Ct. 624, 89 A.L.R. 653. A foreign corporation owning land within the state is not deprived of its property without due process of law by a statute permitting its property to be sold under a judgment obtained upon service of process of which it had no actual notice, although it is guilty of no laches or negligence in failing to file an answer. Foster v. Allison Corp. 191 N. C. 166, 131 S. E. 648, 44 A.L.R. 610.

[7] See supra, § 596.

[8] Connecticut Mut. L. Ins. Co. v. Spratley, 99 Tenn. 322, 42 S. W. 145, 44 L.R.A. 442, affirmed in 172 U. S. 602, 43 L. ed. 569, 19 S. Ct. 308.

[9] Missouri P. R. Co. v. Clarendon Boat Oar Co. 257 U. S. 533, 66 L. ed. 354, 42 S. Ct. 210.

[10] Pennsylvania F. Ins. Co. v. Gold Issue Min. & Mill. Co. 243 U. S. 93, 61 L. ed. 610, 37 S. Ct. 344; Steele v. Western U. Teleg. Co. 206 N. C. 220, 173 S. E. 583, 96 A.L.R. 361.

[11] Minnesota Commercial Men's Asso. v. Benn, 261 U. S. 140, 67 L. ed. 573, 43 S. Ct. 293; Riverside & D. River Cotton Mills v. Menefee, 237 U. S. 189, 59 L. ed. 910, 35 S. Ct. 579; Cella Commission Co. v. Bohlinger (C. C. A. 8th) 147 F. 419, 8 L.R.A.(N.S.) 537; Gloeser v. Dollar S. S. Lines, 192 Minn. 376, 256 N. W. 666, 95 A.L.R. 1470; State ex rel. Ferrocarriles Nacionales v. Rutledge, 331 Mo. 1015, 56 S. W. (2d) 28, 85 A.L.R. 1378, writ of certiorari denied in 289 U. S. 746, 77 L. ed. 1492, 53 S. Ct. 689. Annotation: 8 L.R.A.(N.S.) 538. See PROCESS [Also 21 R. C. L. p. 1339, §§ 96 et seq.].

§ 600. Time.—

Ordinarily, the notice must be given a sufficient length of time before the hearing to afford opportunity to be present.13 A notice which fails to give such a length of time is invalid, notwithstanding, by the local practice, there will be several days' additional time before the case can be called for trial or default taken or the court in its discretion will probably set aside a default judgment and permit a defense.14 While the authority of the legislature to prescribe the length of notice is not absolute and beyond review, it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time.15

The time required in order to validate a notice varies with the circumstances. Service of process made upon a defendant residing in Virginia, requiring him to appear and answer a suit in Texas within five days, was not a reasonable notice, and therefore not due process of law.[16] Notice to the attorney for those whose names were duly entered as freedmen by blood on the rolls made and approved by the Secretary of the Interior, given a few hours before the hearing of a motion to strike their names from the roll on the ground that their enrolment had been secured by perjury, was not such notice as afforded due process of law.[17] Due process is not denied by a state statute providing for the giving of notice by publication to nonresident owners of the institution of condemnation proceedings, where, as construed by the state courts, service was complete upon its first publication, eighteen days before return day.[18] Twenty days' written notice of a proceeding to revoke the license of a physician is reasonable within the due process clause of the Federal Constitution.[19]

In certain proceedings notice need not be given at the very initiation of the proceeding. The failure of the Bankruptcy Act to provide for notice to creditors of the filing of a petition in voluntary proceedings does not deprive such creditors of their property without due process of law, in view of the provisions of the act for ten days' notice of the first meeting of creditors, and of each of the subsequent steps in administration, and of the various provisions relative to the granting of a discharge and for revocation of the same when procured by fraud or not warranted by the facts.[20] A preliminary order of a bankruptcy court assuming jurisdiction to enjoin the enforcement of a valid judgment against the property of a debtor pend-

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[12] Minnesota Commercial Men's Asso. v. Benn, 261 U. S. 140, 67 L. ed. 573, 43 S. Ct. 293.

[13] Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 S. Ct. 410; McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731; Straub v. Lyman Land & Invest. Co. 30 S. D. 310, 31 S. D. 571, 138 N. W. 957, 141 N. W. 979, 46 L.R.A.(N.S.) 941. Five days' notice to a nonresident in another state of a suit to foreclose a lien on land, where it would require four days of constant traveling to reach the court, giving but one day, and that a Sunday, to make preparations for the trip, without any allowance for accidental delays, is insufficient to constitute reasonable notice or due process of law. Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 S. Ct. 410.

[14] Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 S. Ct. 410.

[15] McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731.

[16] Ibid.

[17] United States ex rel. Turner v. Fisher, 222 U. S. 204, 56 L. ed. 165, 32 S. Ct. 37.

[18] Wick v. Chelan Electric Co. 280 U. S. 108, 74 L. ed. 212, 50 S. Ct. 41.

[19] Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 70 L. ed. 818, 46 S. Ct. 384.

[20] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 22 S. Ct. 857.

ing disposition of the debtor's petition for an order of the bankruptcy court effecting a composition or extending time for payment does not effect a taking against which the due process clause may be invoked.[1] A decree of a bankruptcy court enjoining, pending disposition of a petition seeking composition with creditors or an extension of time, a sale under execution of the property of the petitioner is not invalid as wanting in due process because made without actual notice to the execution creditor, he being entitled to move to set the order aside.[2] A statutory provision that any vehicle used in violation of the Motor Vehicle Law, and thereby causing damage to any public highway, shall be subject to a lien for the full amount of all damages is not lacking in due process in that it does not provide notice and an opportunity to be heard to the owner of such vehicle, since the foreclosure of such lien, not being provided for therein, must be by a bill in equity, of which the owner will have notice.[3]

§ 601. Persons Entitled.4—

Persons entitled to notice are, speaking generally, those who are to be affected by a judgment or order. Due process of law in proceedings for the adoption of a child requires, as to the parent, some notice and opportunity to be heard.5 Notice is required to a mental defective before he can be sterilized under a statute providing for such sterilization upon the petition of the next of kin or legal guardian if approved by certain state officers.6 Notice to a person of proceedings to have him declared insane is essential to due process of law.7 It has, however, been held that adjudging a person insane without notice to him, when the commissioners think it would be injurious to him to hold the examination in his presence, does not deprive him of his liberty without due process of law, where a regular practicing physician visits and personally examines him, and any relative or any citizen of the county may appear and resist the application, and the parties may appear by counsel if they like.8

Before the right of suffrage may be denied to an individual, he must have notice and an opportunity to be heard in the manner provided by law.[9]

The notice need not be given to every party for every new step or in every supplementary proceeding in litigation.[10] Accordingly, the giving of proper notice for the appointment of an administrator has been deemed to bring into court all persons having an interest in the estate, for all purposes necessary for the settlement of the estate, including its distribution among

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[1] Collins v. Welsh (C. C. A. 9th) 75 F. (2d) 894, 99 A.L.R. 1319, writ of certiorari denied in 295 U. S. 762, 79 L. ed. 1704, 55 S. Ct. 921.

[2] Ibid. Annotation: 99 A.L.R. 1331. See BANKRUPTCY, Vol. 6, p. 780, § 428.

[3] Mammina v. Alexander Auto Serv. Co. 333 Ill. 158, 164 N. E. 173, 61 A.L.R. 649. Annotation: 61 A.L.R. 655.

[4] As to notice upon appointment of guardian for infant, see GUARDIAN AND WARD [Also 12 R. C. L. p. 1101]. As to notice upon appointment of guardian ad litem for infants, see INFANTS [Also 14 R. C. L. p. 213].

[5] Schiltz v. Roenitz, 86 Wis. 31, 56 N. W. 194, 21 L.R.A. 483, 39 Am. St. Rep. 873. See ADOPTION OF CHILDREN, Vol. 1, p. 644, § 44.

[6] Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237. Annotation: 40 A.L.R. 535, s. 51 A.L.R. 862 and 87 A.L.R. 242. As to constitutionality generally of these laws, see CRIMINAL LAW [Also 8 R. C. L. p. 38]; INSANE AND OTHER INCOMPETENT PERSONS [Also 14 R. C. L. p. 546].

[7] Re Lambert, 134 Cal. 626, 66 P. 851, 55 L.R.A. 856, 86 Am. St. Rep. 296; Re Moynihan, 332 Mo. 1022, 62 S. W. (2d) 410, 91 A.L.R. 74; Re Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A.(N.S.) 232. Annotation: 26 L.R.A.(N.S.) 232. See INSANE AND OTHER INCOMPETENT PERSONS [Also 14 R. C. L. p. 546].

[8] Chavannes v. Priestley, 80 Iowa, 316, 45 N. W. 766, 9 L.R.A. 193.

[9] Pierce v. Superior Ct. 1 Cal. (2d) 759, 37 P. (2d) 460, 96 A.L.R. 1020. See ELECTIONS [Also 9 R. C. L. p. 972].

[10] See infra, § 602.

the heirs of the decedent.[11] Construing a statute to mean that the heirs are not necessary parties to a suit against the administratrix to foreclose a mortgage executed by the decedent does not deprive such heirs, without due process of law, of the title which is cast upon them upon the death of their ancestor.[12]

§ 602. Of Subsequent Steps.—

After a person has been brought into a proceeding by notice, due process does not require notice of all subsequent steps in the proceeding.13 After a hearing before judgment, with full opportunity to present all evidence and arguments, no further notice and hearing need be given after a decision in order to constitute due process of law.14 A statute providing for constructive notice only of the institution and pendency of a writ of error proceeding, by making a record in the minute book of the court a substitute for personal service, does not violate the constitutional provision against deprivation of property without due process of law.15 It has been suggested, however, that entry of judgment without notice may be a denial of due process, even where there is jurisdiction over the person and subject matter.16

A judgment debtor is not entitled, under the constitutional guaranty of due process of law, to notice before the issuance of execution.[17] Creditors of a bankrupt are not deprived of their property without due process of law because the Bankruptcy Act does not require personal service of notice of the application for the discharge in voluntary proceedings.[18] After a judgment of dismissal of the action has been rendered, however, the action cannot, without motion or proceedings to vacate the judgment and without notice, be reinstated after the term or the rule day which under the local practice is equivalent to the end of the term, and a personal judgment rendered.[19]

If, in the course of a proceeding, amendments are made which materially enlarge or change the action, an additional notice is necessary, although the defendant can, of course, waive the notice by appearance.[20]

§ 603. As Dependent on Pleading.—

In civil suits the pleading should contain a prayer for judgment so as to show that the judicial power of the court is invoked, but the prayer does not constitute a part of the

notice guaranteed by the due process clause of the Fourteenth Amendment to the Federal Constitution; and while the judgment must not go beyond that to which the

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[11] Ro Bards v. Lamb, 127 U. S. 58, 32 L. ed. 60, 8 S. Ct. 1031; Barrette v. Whitney, 36 Utah, 574, 106 P. 522, 37 L.R.A.(N.S.) 368. See also infra, § 602.

[12] McCaughey v. Lyall, 224 U. S. 558, 56 L. ed. 883, 32 S. Ct. 602. See EXECUTORS AND ADMINISTRATORS [Also 11 R. C. L. p. 1].

[13] Elk River Coal & Lumber Co. v. Funk, — Iowa, —, 271 N. W. 204, 110 A.L.R. 1415 (administrative board); Griggs v. Hanson, 86 Kan. 632, 121 P. 1094, 52 L.R.A.(N.S.) 1161, Ann. Cas. 1913C, 242. Annotation: 52 L.R.A.(N.S.) 1161.

[14] Pittsburg, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 S. Ct. 1114.

[15] State ex rel. Andreu v. Canfield, 40 Fla. 36, 23 So. 591, 42 L.R.A. 72.

[16] American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. ed. 231, 53 S. Ct. 98, 86 A.L.R. 298.

[17] Endicott-Johnson Corp. v. Encyclopedia Press, 266 U. S. 285, 69 L. ed. 288, 45 S. Ct. 61; Endicott-Johnson Corp. v. Smith, 266 U. S. 291, 69 L. ed. 293, 45 S. Ct. 63.

[18] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 22 S. Ct. 857.

[19] Wetmore v. Karrick, 205 U. S. 141, 51 L. ed. 745, 27 S. Ct. 434.

[20] Laing v. Rigney, 160 U. S. 531, 40 L. ed. 525, 16 S. Ct. 366. An opportunity to be heard, sufficient to prevent the claim of a denial of due process of law in a decree rendered upon a supplemental bill personally served outside the state, appears where the defendant had been served under the original bill within the jurisdiction and after a default as to the supplemental bill appeared by counsel and procured a modification of the decree. Ibid.

plaintiff is entitled on proof of the allegations made, the court may grant other and different relief than that for which he prays.[21] Entry of a judgment of ouster and the imposition of a substantial fine in quo warranto proceedings, conformably to the local practice, afford sufficient notice and opportunity to be heard to satisfy the due process of law clause of the Fourteenth Amendment, although the information contains only general allegations of misuser, with only a prayer for ouster.[1] There is no want of due process of law in a judgment of the highest court of a state, imposing a substantial fine in quo warranto proceedings, conformably to the local practice, upon a foreign corporation found to have misused its license to do business in the state, although there is no statute fixing a maximum penalty, no rule for measuring damages, and no hearing on that subject.[2]

§ 604. When Not Required.—

In certain cases, notice is not necessary. Some cases have sustained a seizure of property without notice of any kind where the procedure in question is an ancient one.3 A resident is charged with knowledge that under the supervision of the law, his property will be applied, without notice, according to statute, to the discharge of his duty to support his wife and child if he absconds leaving them destitute behind him.4 Due process of law does not require that notice and an opportunity to be heard be given before a court may accept the resignation of a committee of an adjudged incompetent and appoint another person as his successor.5 In certain instances of seizure of property, used in violation of law, notice is not necessary. Notice to the owner is not necessary to render valid a seizure and sale of stock found running at large in violation of law.6

In certain cases of attachment of property in which a redelivery bond is given, the statutes provide for judgment against the principal and sureties on the bond in the event judgment goes in favor of the plaintiff. Such a proceeding without notice to the surety has been sustained.[7] On the other hand, statutes of this kind have been construed as not authorizing summary judgment on the theory that to do so would violate due process.[8] Again, a judgment against sureties in a summary proceeding for the amount of a judgment recovered against the principal in an action to which they were not made parties is without due process of law, when there has been no suit brought against them on the undertaking or any opportunity given them to plead or defend according to the usual course of legal proceedings.

There may be cases where persons to be affected by proceedings will not be entitled to notice and a hearing under the due process of law clause, be-

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[21] Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 S. Ct. 406, Ann. Cas. 1913D, 936. See JUDGMENTS [Also 15 R. C. L. p. 554].

[1] Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 S. Ct. 406, Ann. Cas. 1913D, 936.

[2] Ibid.

[3] Corn Exch. Bank v. Coler, 280 U. S. 218, 74 L. ed. 378, 50 S. Ct. 94, affirming 250 N. Y. 136, 164 N. E. 882, 65 A.L.R. 879, holding that a statute authorizing the impounding of property of an absconding husband or father, a resident of the state, and its application to the maintenance of a wife or children likely to become charges on the public, without providing for notice, either actual or constructive, to the absconder, of a proceeding to seize property, cannot be said to deny due process of law, where the challenged procedure is an ancient one. Annotation: 65 A.L.R. 886.

[4] Coler v. Corn Exch. Bank, 250 N. Y. 136, 164 N. E. 882, 65 A.L.R. 879, affirmed in 280 U. S. 218, 74 L. ed. 378, 50 S. Ct. 94.

[5] Chaloner v. Sherman, 242 U. S. 455, 61 L. ed. 427, 37 S. Ct. 136.

[6] Howell v. Daughet, 148 Ark. 450, 230 S. W. 559, 18 A.L.R. 63. See also infra, §§ 677 et seq. See ANIMALS, Vol. 2, p. 797, § 143.

[7] Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 S. Ct. 254. Annotation: 24 L. ed. 436. On appeal or supersedeas bonds, see APPEAL AND ERROR, Vol. 3, p. 776, § 1303.

[8] Sandusky Second Nat. Bank v. Becker, 62 Ohio St. 289, 56 N. E. 1025, 51 L.R.A. 860. For a full discussion, see SURETYSHIP [Also PRINCIPAL AND SURETY, 21 R. C. L. p. 940].

cause of a waiver thereof by accepting a statutory privilege or making an application which the proceedings may follow as a consequence. For example, there is authority to the effect that a license for the sale of liquors may be revoked before the expiration of the time for which it was granted, by the granting power, without notice to the licensee, if statutory authority and conditions are pursued, without violating any of the constitutional rights of the licensee.[9] On the ground that the proceedings are administrative, have their origin in necessity, and have the sanction of usage, the removal of a person in destitute circumstances, who applies for public support in a county where he is temporarily remaining, to a county in which he has a legal settlement, by the county commissioners or their chairman, without judicial proceedings or notice to him of the contemplated removal and without opportunity to be heard in respect thereto, does not violate the constitutional provision as to due process of law.[10] The cases in which such notice may be dispensed with are, however, few, and as a general rule proceedings not founded on notice to the person affected are

void. Thus, a statute authorizing a commission finally and conclusively to fix the rates of charges for the transportation of property, without an opportunity for judicial inquiry as to the reasonableness of such rates, cannot be sustained.[11] Permitting an administrative board which acts only by consent of the parties interested to take testimony without notice to either party and to give notices by mail does not deprive the parties of due process of law.[12]

§ 605. Representative Actions.—

In certain cases, notice to one party may by reason of representation be notice to another, at least so far as the representative relation is concerned.13 Due process of law is not denied a stockholder in a domestic corporation by a state statute enacted to make more effectual the constitutional liability of stockholders for the debts of the corporation, because stockholders need not be served with process in the action in which the assessment is made,14 or because under such statute they may be assessed for the corporate debts antedating the transfer, in proceedings in which they are represented by the corporation and of which they are notified only by publication and mailing of notice.15

A statute which provides that jurisdiction to render judgment against an association which will bind the joint property of the associates may be acquired by service on one or more of its members is consistent with due process.[16] It has been asserted that so far as constitutionality is concerned, there is no distinction between such a statute applied to partnerships and one applied to other unincorporated associations.[17] When, however, it comes to actually reaching individual property of a person, such as a stockholder in a corporation or a person in an association, notice is required.[18] Due

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[9] Wallace v. Reno, 27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am. St. Rep. 747. See INTOXICATING LIQUORS [Also 15 R. C. L. p. 239].

[10] Lovell v. Seeback, 45 Minn. 465, 48 N. W. 23, 11 L.R.A. 667.

[11] See PUBLIC UTILITIES AND SERVICES.

[12] Borgnis v. Falk Co. 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489.

[13] As to notice to agents of foreign corporations, see supra, § 599.

[14] Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 S. Ct. 755.

[15] Selig v. Hamilton, 234 U. S. 652, 58 L. ed. 1518, 34 S. Ct. 926, Ann. Cas. 1917A, 104.

[16] Jardine v. Superior Ct. 213 Cal. 301, 2 P. (2d) 756, 79 A.L.R. 291, appeal dismissed in 284 U. S. 592, 76 L. ed. 510, 52 S. Ct. 197. Annotation: 79 A.L.R. 305. See PROCESS [Also 21 R. C. L. p. 1279, §§ 23 et seq.].

[17] Jardine v. Superior Ct. 213 Cal. 301, 2 P. (2d) 756, 79 A.L.R. 291, appeal dismissed in 284 U. S. 592, 76 L. ed. 510, 52 S. Ct. 197.

[18] Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 35 S. Ct. 625, holding that the failure to afford notice, hearing, or opportunity to be heard renders invalid a statute under which, upon the return nulla bona of an execution against a corporation, an execution may issue against

process requires notice to nonassenting bondholders of an application to the court, in pursuance of statute, by a bondholders' committee, for leave to the mortgage trustee to bid in the mortgaged property for the benefit of all bondholders, administer it as an express trust, and dispose of it as soon as may be done without sacrifice of its fair and

reasonable value, either for cash or for bonds, notes, debentures, stocks, or other securities.[19]

§ 606. Appearance as Dispensing with Notice.—

Notice is for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and declare, if he has anything to say, why the judgment sought should not be rendered.20 If he actually appears in the proceeding, the notice becomes unimportant.1 One who actually appears and makes a defense in an action to which he was not technically a party cannot contend that when he was brought in by rule to show cause after the judgment was rendered and was condemned to pay it, he was denied due process of law because all right to defend had been cut off by the previous judgment, if he offered no defense which the court did not entertain.2

A state, without violence to the due process clause of the Fourteenth Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant.[3]

E. HEARING

1. IN GENERAL

§ 607. Generally.—

An opportunity for hearing is one of the essential elements of due process,4 at least whenever it is necessary for the protection of the parties.5 It was a maxim of the common law that "no man should be punished without an opportunity of being heard."6 Hence, no one may be legally divested of his property unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and facts7 and show if he can that it is unfound-

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a stockholder for the amount of the unpaid subscription to the stock he holds, without notice to him or other preliminary steps, he having the right, in case he is not in fact the holder of stock upon which there is an unpaid subscription, or in case the amount of the execution is in excess of the unpaid subscription, to appropriate relief, by testing the legality of the execution after issuance, and the execution, in the absence of such objections, being enforceable, although there may have been only a formal levy, without even such notice as might be implied from a forcible seizure or interference with the possession.

[19] Detroit Trust Co. v. Stormfeltz-Loveley Co. 257 Mich. 655, 242 N. W. 227, 88 A.L.R. 1263.

[20] Ex parte Sullivan, 10 Okla. Crim. Rep. 465, 138 P. 815, Ann. Cas. 1916A, 719.

[1] Doty v. Love, 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438 (opening of closed bank); Kryger v. Wilson, 242 U. S. 171, 61 L. ed. 229, 37 S. Ct. 34; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 S. Ct. 617; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513.

[2] Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 S. Ct. 620.

[3] Western Life Indem. Co. v. Rupp, 235 U. S. 261, 59 L. ed. 220, 35 S. Ct. 37.

[4] See supra, § 573.

[5] Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 S. Ct. 20.

[6] Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 S. Ct. 841; Terrell v. Allison, 21 Wall. (U. S.) 289, 22 L. ed. 634; Re Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A.(N.S.) 232.

[7] Iron Cliffs Co. v. Negaunee Iron Co. 197 U. S. 463, 49 L. ed. 836, 25 S. Ct. 474; Ames v. Port Huron Log Driving & Boom Co. 11 Mich. 139, 83 Am. Dec. 731; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289.

ed.[8] A person is not precluded from complaining that the taking of his property conformably to state legislation, to satisfy an alleged debt or obligation, was without the hearing essential under the due process guaranty, because, in his particular case, due process of law would lead to the same result, because he had no adequate defense on the merits.[9]

The required hearing is a matter of right; a hearing granted as a matter of favor or discretion in proceedings for the taking of one's property to satisfy his alleged debt or obligation is not a substantial substitute for due process of law.[10]

The general rule that due process of law implies a hearing before condemnation or the reaching of a judgment through what is ordinarily understood to be judicial process is subject to an exception only in extreme cases or emergencies, as where the preservation and repose of society or the protection of the property rights of a large class of the community absolutely require a departure from the usual course of procedure.[11]

If opportunity for hearing is afforded a person sought to be affected by a proceeding, then he has had due process.[12] The fact that external circumstances may prevent a defendant from availing himself of the opportunity to defend does not render a summary judgment law unconstitutional as denying due process.[13] Nor does the fact that opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error furnish the basis for a claim that due process of law has been denied.[14]

Where only property rights are involved, mere postponement of judicial inquiry into liability is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate.[15]

When the right to a hearing is denied, the mere giving of a notice is ineffectual for any purpose within the meaning of the constitutional guaranty. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him.[16] For example, ordering one to pay alimony without having had his day in court and without a hearing on the question of the marriage, when that is denied, amounts to a taking of his property without due process of law.[17] Again, a forfeiture without notice to the owner of property and without opportunity of being heard on the question of his culpability has also been held to amount to the denial of due process of law.[18] There are, however, some instances where a hearing is not required, as will presently be seen.[19]

[8] Ray v. Norseworthy, 23 Wall. (U. S.) 128, 23 L. ed. 116; Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420.

[9] Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 35 S. Ct. 625.

[10] Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 35 S. Ct. 625. See also supra, § 573.

[11] The Apollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 208; Shafer v. Mumma, 17 Md. 331, 79 Am. Dec. 656; Lovell v. Seeback, 45 Minn. 465, 48 N. W. 23, 11 L.R.A. 667; Neer v. State Live Stock Sanitary Bd. 40 N. D. 340, 168 N. W. 601, citing R. C. L.; Jenkins v. Ballantyne, 8 Utah, 245, 30 P. 760, 16 L.R.A. 689.

[12] Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 S. Ct. 555; People's Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N. W. 170, 69 A.L.R. 1024.

[13] People's Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N. W. 170, 69 A.L.R. 1024.

[14] American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. ed. 231, 53 S. Ct. 98, 86 A.L.R. 298.

[15] Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 75 L. ed. 1289, 51 S. Ct. 608.

[16] Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.

[17] Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793, 71 Am. St. Rep. 82.

[18] Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636.

[19] See infra, § 618.

§ 608. Sufficiency.—The proceeding or hearing requisite to due process must be appropriate [20] and such as is practicable and reasonable in the particular case.[1] It must be an orderly proceeding, in which one sought to be affected has an opportunity to be heard and to defend, enforce, and protect his rights.[2]

A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken.[3]

There is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute.[4]

No fixed procedure is demanded.[5] The requirement of due process is met if the trial is had according to the settled course of judicial proceedings6

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[20] Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 S. Ct. 611; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 S. Ct. 894; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 S. Ct. 663; Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Ray v. Norseworthy, 23 Wall. (U. S.) 128, 23 L. ed. 116; Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793, 71 Am. St. Rep. 82; Branson v. Gee, 25 Or. 462, 36 P. 527, 24 L.R.A. 355; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385; Pinney v. Providence Loan & Invest. Co. 106 Wis. 396, 82 N. W. 308, 50 L.R.A. 577, 80 Am. St. Rep. 41. Annotation: 20 Am. St. Rep. 554. See TRIAL [Also 26 R. C. L. p. 1008].

[1] Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 50 S. Ct. 299, 68 A.L.R. 434; Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793, 71 Am. St. Rep. 82; Redman v. Kyle, 76 Fla. 79, 80 So. 300, citing R. C. L.

[2] George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. ed. 1265, 53 S. Ct. 620; American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. ed. 231, 53 S. Ct. 98, 86 A.L.R. 298; Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 50 S. Ct. 299, 68 A.L.R. 434; Postal Teleg.-Cable Co. v. Newport, 247 U. S. 464, 62 L. ed. 1215, 38 S. Ct. 566; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 S. Ct. 185; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 S. Ct. 841; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 S. Ct. 894; Hagar v.

Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 S. Ct. 663; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; McVeigh v. United States, 11 Wall. (U. S.) 259, 20 L. ed. 80; Gray v. Hall, 203 Cal. 306, 265 P. 246, citing R. C. L.; State ex rel. Woods-Young Co. v. Tedder, 103 Fla. 1083, 138 So. 643 (writ of certiorari denied in 285 U. S. 557, 76 L. ed. 946, 52 S. Ct. 458) citing R. C. L.; Tibbetts v. Olson, 91 Fla. 824, 108 So. 679, citing R. C. L.; Chicago v. Cohn, 326 Ill. 372, 158 N. E. 118, 55 A.L.R. 196; Taylorville v. Central Illinois Pub. Serv. Co. 301 Ill. 157, 133 N. E. 720, citing R. C. L.; Board of Education v. Blodgett, 155 Ill. 441, 40 N. E. 1025, 31 L.R.A. 70, 46 Am. St. Rep. 348; Kwiatkowski v. Putzhaven, 189 Ind. 119, 126 N. E. 3, citing R. C. L.; Saco v. Wentworth, 37 Me. 165, 58 Am. Dec. 786; People's Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N. W. 170, 69 A.L.R. 1024; State ex rel. Blaisdell v. Billings, 55 Minn. 467, 57 N. W. 286, 794, 43 Am. St. Rep. 524; citing v. Zied, 116 N. J. L. 234, 183 A. 210, noting R. C. L.; Doyle's Petition (Re Gannon) 16 R. I. 537, 18 A. 159, 5 L.R.A. 359, 27 Am. St. Rep. 759; Koester v. Citizens' Pub. Co. 154 S. C. 154, 151 S. E. 452, citing R. C. L.; Violett v. Alexandria, 92 Va. 561, 23 S. E. 909, 31 L.R.A. 382, 53 Am. St. Rep. 825. **Opportunity to be heard**, if it is necessary for a town before a burden is cast upon it by the legislature, is furnished when the town has a representative who takes part in the proceedings. Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 S. Ct. 617.

[3] New England Division Case (Akron, C. & Y. R. Co. v. United States) 261 U. S. 184, 67 L. ed. 605, 43 S. Ct. 270; Smith v. McCann, 24 How. (U. S.) 398, 16 L. ed. 714.

[4] Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 S. Ct. 185.

[5] Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261.

[6] Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 S. Ct. 611; Rothschild v. Knight, 184 U. S. 334, 46 L. ed. 573, 22 S. Ct. 391; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 S. Ct. 625; Backus v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 S. Ct. 445; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 S. Ct. 894; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 S. Ct. 54; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 S. Ct. 825; Hagar v. Reclamation Dist. 111 U. S. 708, 28 L. ed. 569, 4 S. Ct. 663; Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372; Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; Com. v. Farmers & M. Bank, 21 Pick. (Mass.) 542, 32 Am. Dec. 290; Parsons v. Russell, 11 Mich. 113, 83 Am. Dec. 728; Adams v. Yazoo & M. V. R. Co. 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L.R.A. 33; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Brown v. Hummel, 6 Pa. 86, 47 Am. Dec. 431; Ex parte Renfro, 115 Tex. 82, 273 S. W. 813, 40 A.L.R. 900; Pinney v. Providence Loan &

by a court of justice having jurisdiction.[7] Any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves the principles of liberty and justice, is regarded as due process of law.[8] The cases proceed upon the theory that given a court of justice which has jurisdiction and acts not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with.[9]

A court may exercise jurisdiction to inquire into the conduct of members of the bar without compliance with the requirements of formal procedure which must be observed in ordinary litigation; and it is enough if in some proper way the attorney is reasonably and definitely informed of the matters alleged against him and given an opportunity of

being heard in answer.[10] A summary proceeding to disbar an attorney, in cases within the jurisdiction of the court, is due process of law.[11]

Exclusion of claims of ultimate right from possessory actions does not violate the constitutional guaranty of due process of law.[12] Quo warranto proceedings may constitute due process.[13] A forfeiture of the charter of a corporation for maintaining illegal rates made after full hearing by all parties in a proceeding by quo warranto does not deprive the corporation of its property without due process of law because mandamus is prescribed as the remedy for illegal rates.[14]

The denial of a right to be heard before judgment on the single question as to the sufficiency of the service does not amount to a denial of due process of law. Hence, it is clear that laws simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, do not con-

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Invest. Co. 106 Wis. 396, 82 N. W. 308, 50 L.R.A. 577, 80 Am. St. Rep. 41. The demands of justice are satisfied if a party has an opportunity for the trial of all parts of his case. Wiscart v. Dauchy, 3 Dall. (U. S.) 321, 1 L. ed. 619. See also supra, §§ 569 et seq.

[7] See infra, §§ 633 et seq.

[8] Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 S. Ct. 390; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77; Backus v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 S. Ct. 445; Hagar v. Reclamation Dist. 111 U. S. 708, 28 L. ed. 569, 4 S. Ct. 663; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292; Rothschild & Co. v. Steger & Sons Piano Mfg. Co. 256 Ill. 196, 99 N. E. 920, 42 L.R.A. (N.S.) 793, Ann. Cas. 1913E, 276; State v. Jack, 69 Kan. 387, 76 P. 911, 1 L.R.A.(N.S.) 167, 2 Ann. Cas. 171; Conover v. West Jersey Mortg. Co. 37 N. J. Eq. 16, 99 A. 604, citing R. C. L.; Anderson v. State, 8 Okla. Crim. Rep. 90, 126 P. 840, Ann. Cas. 1914C, 314; Dillon v. Whitley (Tex. Civ. App.) 210 S. W. 329, citing R. C. L.

[9] Jordan v. Massachusetts, 225 U. S. 167, 56 L. ed. 1038, 32 S. Ct. 651; Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 S. Ct. 406, Ann. Cas. 1913D, 936; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 S. Ct. 625; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 S. Ct. 841; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 S. Ct. 577; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315, 9 L.R.A. 152, 20 Am. St. Rep. 547; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L.R.A. 689, 52 Am. St. Rep. 707; Carr v. Brown, 20 R. I. 215, 38 A. 9, 38 L.R.A. 294, 78 Am. St. Rep. 855. A decree pro confesso entered after striking the defendant's answer from the files because of his contempt in refusing to obey an order of the court is void for want of due process of law. Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 S. Ct. 841.

[10] Re Mayberry, — Mass. —, 3 N. E. (2d) 248, 105 A.L.R. 976.

[11] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 S. Ct. 569.

[12] Bianchi v. Morales, 262 U. S. 170, 67 L. ed. 928, 43 S. Ct. 526.

[13] Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478. A national bank is not denied due process of law by the issuance against it of a writ of quo warranto at the suit of state officials, to oust it from the maintenance of a branch. First Nat. Bank v. Missouri, 263 U. S. 640, 68 L. ed. 486, 44 S. Ct. 213.

[14] New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 S. Ct. 691.

flict with the constitutional requirement.[15] One who actually appears and makes a defense in an action to which he is not technically a party cannot when he is brought in by rule to show cause after judgment rendered, and condemned to pay it, contend that

he is denied due process of law because all right to defend had been cut off by the previous judgment, if he offered no defense which the court did not entertain.[16]

Various rulings in the trial of actions have been sustained.[17]

§ 609. Raising Issues.—

Due process requires that a party sought to be affected by a proceeding shall have the right to raise such issues or set up any defense18 which he may have in the cause. He is not entitled to set up a defense which has been previously adjudicated against him, since the right to due process does not involve the right to litigate the same question twice.19 Refusal to allow the filing of amended answers which are based upon facts concluded by a former decision does not violate due process.20 Even if he has no defense to the action, the fundamental law of the land secures to him the right to be heard in his defense.1

§ 610. Time.—

Due process of law does not necessarily imply delay. Certain causes may be brought to a hearing by being given priority over others without violating the right of parties thus required to come to trial earlier than would otherwise be required.2

§ 611. Time in Relation to Judgment or Order.—

Although it is the general rule that everyone is entitled to a hearing as an essential part of due process of law, a statute is not unconstitutional merely because it authorizes a ministerial act by which possession of property is taken before the right to it has been judicially determined. This is done in cases of attachment and

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[15] Kauffman v. Wooters, 138 U. S. 285, 34 L. ed. 962, 11 S. Ct. 298; York v. Texas, 137 U. S. 15, 34 L. ed. 604, 11 S. Ct. 9.

[16] Louisville N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 S. Ct. 620.

[17] No Federal constitutional right is violated because of the refusal to transfer a cause from the decision of the highest court of the state which heard it to the court in banc. Goldsmith v. George G. Prendergast Constr. Co. 252 U. S. 12, 64 L. ed. 427, 40 S. Ct. 273. Due process is not denied by the issuance of a writ of mandamus to restore conditions existing at the time of the bringing of a suit to determine the rights of the parties, where the grant of the mandamus is conditioned on the giving of a bond of indemnity. Detroit & M. R. Co. v. Michigan R. Commission, 240 U. S. 564, 60 L. ed. 802, 36 S. Ct. 424. There is no denial of due process of law in permitting an amendment of pleadings and requiring the parties to proceed with the trial, where the party adversely affected declines to plead surprise. Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352, 60 L. ed. 324, 36 S. Ct. 126. The mere fact that a proceeding to hold a party, who appeared and defended, liable to a judgment was by rule to show cause does not conflict with due process under the Fourteenth Amendment, since forms of procedure in the state courts are not controlled by that amendment, provided the fundamental rights secured by the amendment are not denied. Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 S. Ct. 620.

[18] Rouse, H. & Co. v. Donovan, 104 Mich. 234, 62 N. W. 359, 27 L.R.A. 577, 53 Am. St. Rep. 457; State ex rel. Blaisdell v. Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 524; Larson v. Dickey, 39 Neb. 463, 58 N. W. 167, 42 Am. St. Rep. 595; State v. Strasburg, 60 Wash. 106, 110 P. 1020, 32 L.R.A.(N.S.) 1216, Ann. Cas. 1912B, 917; Schiltz v. Roenitz, 86 Wis. 31, 56 N. W. 194, 21 L.R.A. 483, 39 Am. St. Rep. 873. The striking of so much of the defense in an action for divorce and alimony as states a defense to the application for divorce, for failure to obey an order for the payment of temporary alimony, and the refusal to permit the defendant to defend except as

to the amount of alimony violate his constitutional right to due process of law, especially where he shows by affidavit that he was unable to comply with the order for temporary alimony. McNamara v. McNamara, 86 Neb. 631, 126 N. W. 94, 27 L.R.A.(N.S.) 1062, 21 Ann. Cas. 451.

[19] Baldwin v. Iowa State Traveling Men's Asso. 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517.

[20] Louisville & N. R. Co. v. Higdon, 234 U. S. 592, 58 L. ed. 1484, 34 S. Ct. 948; International Harvester Co. v. Kentucky, 234 U. S. 589, 58 L. ed. 1484, 34 S. Ct. 947.

[1] Western Pattern & Mfg. Co. v. American Metal Shoe Co. 175 Wis. 493, 185 N. W. 535, 20 A.L.R. 264.

[2] Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478. [12 Am. Jur.]—20 305

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replevin, without objection, and is a matter in the discretion of the legislative power in creating remedies. But it is error for the court, on application of the plaintiff and before trial on the merits, to order the seizure and sale of property by provisional orders, where such seizure and sale would render ineffectual a judgment thereafter obtained after trial.[3]

A party must not be deprived of his property without a judicial hearing, but the stage of proceedings at which that hearing shall take place and the manner in which the cause of a party shall be brought before the judicial tribunal, provided it is not an unreasonably inconvenient and embarrassing one, are with the legislative power.[4]

Due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered.[5] It has been announced that the hearing or opportunity to be heard must be prior to judgment.[6] On the other hand, the view is taken that due process does not require an opportunity to present defenses before the entry of judgment; that it is sufficient if an appeal is provided or another method of review available.[7] This view has been taken in special proceedings, such as entry of judgment on a supersedeas bond,[8] and in tax matters.[9]

Within these principles due process of law is not denied by an ordinance which provides that the failure to remove weeds after notice to do so shall render the owner of premises guilty of a misdemeanor, where he can be punished only after a trial has been had, at which he is given an opportunity to defend.[10] On like principles a statute requiring corporations to produce books and papers before a court or grand jury upon notice does not deny due process of law where a hearing is given before any proceeding to enforce the production of papers is concluded, and in case a production before the grand jury is required, any objection made before that body must be reported to the court for its action.[11] The ex parte appointment of a receiver to take possession of the property of an insolvent corporation upon the petition of a creditor is due process.[12] The fact that the commissioner conducting an investigation preliminary to the institution of a disbarment proceeding made findings of fact without affording the person investigated an opportunity to be heard does not amount to a denial of due process, where the charges against him were thereafter fully and fairly tried upon issues of which he was well informed, and full opportunity was given him to present his defense.[13]

Any right to a hearing may be lost by delay. There is no denial of due process in a provision that if the person affected takes no steps to assert

[3] Columbus Packing Co. v. State, 106 Ohio St. 469, 140 N. E. 376, 37 A.L.R. 1525.

[4] Fleming v. McFerson, 94 Colo. 1, 28 P. (2d) 1013, citing R. C. L.; Flournoy v. Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; McInnes v. McKay, 127 Me. 110, 141 A. 699 (affirmed in 279 U. S. 820, 73 L. ed. 975, 49 S. Ct. 344) citing R. C. L.; Shealy v. Seaboard Air Line R. Co. 131 S. C. 144, 126 S. E. 622, citing R. C. L.

[5] Wilson v. Standefer, 184 U. S. 399, 46 L. ed. 612, 22 S. Ct. 384; Shipp v. Lexington, 212 Ky. 702, 279 S. W. 1094, citing R. C. L.; Shealy v. Seaboard Air Line R. Co. 131 S. C. 144, 126 S. E. 622, citing R. C. L.

[6] Fleming v. McFerson, 94 Colo. 1, 28 P. (2d) 1013, citing R. C. L.; State ex rel. Blaisdell v. Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 524. Annotation: 43 Am. St. Rep. 531.

[7] George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. ed. 1265, 53 S. Ct. 620; American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. ed. 231, 53 S. Ct. 98, 86 A.L.R. 298.

[8] American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. ed. 231, 53 S. Ct. 98, 86 A.L.R. 298; Beall v. New Mexico, 16 Wall. (U. S.) 535, 21 L. ed. 292. Annotation: 86 A.L.R. 319.

[9] George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. ed. 1265, 53 S. Ct. 620.

[10] St. Louis v. Galt, 179 Mo. 8, 77 S. W. 876, 63 L.R.A. 778.

[11] Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 S. Ct. 178, 12 Ann. Cas. 658.

[12] Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. ed. 762, 19 S. Ct. 456.

[13] Re Mayberry, — Mass. —, 3 N. E. (2d) 248, 105 A.L.R. 976.

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his rights within four years after the judicial assertion of an adverse title, he shall lose those rights.[14]

The opportunity of landowners within a proposed road district to be heard upon the question whether their lands will be benefited by its creation may be sufficient to satisfy the requirements of due process of law although the particular road to be improved has not been selected at the time of such hearing.[15]

§ 612. —

Before Commissions, Boards, etc.—The rule that a hearing before judgment or order is not necessary to due process is especially applicable to proceedings before commissioners and boards, such as public utility commissioners, banking superintendents, etc. There is no violation of due process if provision is made for a trial de novo before a court of the issues passed upon by such a commission,16 for a judicial review of the order,17 even a review by mandamus,18 provision for suspending or setting aside the order,19 for a hearing before the order is put into effect,20 or for a rehearing upon application.1 A bank may be declared insolvent and assessments laid upon stockholders without a hearing; the stockholders' remedy by injunction to enjoin further proceedings 2 or their right to raise the question upon an affidavit of illegality where every possible defense may be made 3 meets the due process requirements.

It has been made a condition in such cases that there be a stay until final decision; due process is not afforded where a supersedeas or stay cannot be had until final action of the reviewing court.[4]

An appeal in such cases may be conditioned upon certain action being taken by the person affected, as, for example, an appeal to the commissioner of internal revenue after payment of taxes and his refusal to refund prerequisites to a suit to recover taxes.[5]

Confining the scope of the judicial review to the testimony which has been submitted to the commission does not take the property of carriers without due process of law, where the statute provides for a "full hearing" before the commission, at which such carriers may show that the order asked for, if granted, will be unreasonable.[6]

§ 613. Presence of Person.—

A person has the right to be present at the hearing in person and represented by counsel.7 The right to a hearing in-

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[14] O'Neil v. Northern Colorado Irrig. Co. 242 U. S. 20, 61 L. ed. 123, 37 S. Ct. 7.

[15] Embree v. Kansas City & L. Boulevard Road Dist. 240 U. S. 242, 60 L. ed. 624, 36 S. Ct. 317. For sufficiency of hearings in assessment proceedings, see SPECIAL OR LOCAL ASSESSMENTS [Also 25 R. C. L. p. 76].

[16] Alabama, Pub. Serv. Commission v. Mobile Gas Co. 213 Ala. 50, 104 So. 538, 41 A.L.R. 872.

[17] Bourjois v. Chapman, 301 U. S. 183, 81 L. ed. 1027, 57 S. Ct. 691; Lehigh Valley R. Co. v. Public Utility Commissioners, 278 U. S. 24, 73 L. ed. 161, 49 S. Ct. 69, 62 A.L.R. 805; Wadley S. R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, 35 S. Ct. 214; Alabama Pub. Serv. Commission v. Mobile Gas Co. 213 Ala. 50, 104 So. 538, 41 A.L.R. 872.

[18] Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706.

[19] Vandalia R. Co. v. Public Serv. Commission, 242 U. S. 255, 61 L. ed. 276, 37 S. Ct. 93; Rail & River Coal Co. v. Yaple, 236 U. S. 338, 59 L. ed. 607, 35 S. Ct. 359.

[20] United States v. Illinois C. R. Co. 291 U. S. 457, 78 L. ed. 909, 54 S. Ct. 471.

[1] Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916.

[2] American State Bank v. Jones, 184 Minn. 498, 239 N. W. 144, 78 A.L.R. 770.

[3] Coffin Bros. & Co. v. Bennett, 277 U. S. 29, 72 L. ed. 768, 48 S. Ct. 422.

[4] Porter v. Investors Syndicate, 286 U. S. 461, 76 L. ed. 1226, 52 S. Ct. 617, affirmed on rehearing in 287 U. S. 346, 77 L. ed. 354, 53 S. Ct. 132.

[5] Dodge v. Osborn, 240 U. S. 118, 60 L. ed. 557, 36 S. Ct. 275.

[6] Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535.

[7] State ex rel. Blaisdell v. Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 524; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Schiltz v. Roenitz, 86 Wis. 31, 56 N. W. 194, 21 L.R.A. 483, 39 Am. St. Rep. 873.

cludes the right to aid of counsel,[8] although such aid need not be given at early stages of the proceeding.[9]

In civil matters the right to a hearing, as is commonly stated, is more accurately a right to an opportunity for a hearing. Obviously, the presence of the person affected by the judgment is not required if he has been given notice.[10] In such proceedings as insanity inquisitions11 or proceedings to punish for contempt12 the presence of the person sought to be affected is not required.

§ 614. Conditions and Restrictions.—

Reasonable conditions may be imposed as a condition of a hearing.[13] That a rule of procedure may work particular hardship on a particular defendant does not make the rule wanting in due process.[14]

The requirements of due process are not met where the right of hearing is granted only on conditions so harsh and oppressive as to be tantamount to a denial of the right.[15] Where the findings of an administrative bureau, as to matters concerning which a party affected is constitutionally entitled to an opportunity of judicial review, are made subject to such review only on the condition that if the party is unsuccessful in the courts he shall pay a large penalty, there is not afforded that opportunity of judicial review guaranteed by the Constitution.[16]

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[8] Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527.

[9] Low Wah Suey v. Backus, 225 U. S. 460,

[56] L. ed. 1165, 32 S. Ct. 734. Proceedings resulting in the deportation of an alien found as an inmate of a house of prostitution within three years subse- quent to her entry into the United States are not wanting in due process of law be- cause she had no counsel when first under examination, where such an examination is within statutory authority and at subse- quent stages in the proceeding, and be- fore the hearing was closed or the orders for deportation made, she had the assist- ance and advice of counsel. Ibid.

[10] As to criminal proceedings, see CRIMI- NAL LAW [Also 8 R. C. L. p. 38].

[11] Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 S. Ct. 836; Re Moynihan, 332 Mo. 1022, 62 S. W. (2d) 410, 91 A.L.R. 74. A person was not deprived of liberty without due process of law by being ad- judged a lunatic in his absence, under Ala- bama Civ. Code 1886, § 2398, providing that the sheriff may take possession of the per- son "and, if consistent with his health or safety, have him present at the place of trial," where such person was duly served with process, but was not produced by the sheriff at the trial because, on examination by a physician, it was deemed to be incon- sistent with his health or safety, and was not in fact prevented from attending the hearing, or refused opportunity to be rep- resented there by counsel. Simon v. Craft,

[182] U. S. 427, 45 L. ed. 1165, 21 S. Ct. 836.

[12] Blackmer v. United States, 284 U. S. 421, 76 L. ed. 375, 52 S. Ct. 252.

[13] Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873 (holding that a statute which affords a nonresident individual defendant in a suit begun by foreign attachment an opportunity to ap- pear and defend only in case he gives bail or security for the discharge of the prop- erty seized to the value of such property and costs does not deny due process of law, even though the defendant may have no resources or credit aside from the prop- erty attached); Gulf, C. & S. F. R. Co. v. Texas, 246 U. S. 58, 62 L. ed. 574, 38 S. Ct. 236; St. Louis, I. M. & S. R. Co. v. Arkan- sas, 240 U. S. 518, 60 L. ed. 776, 36 S. Ct. 443; Kauffman v. Wooters, 138 U. S. 285, 34 L. ed. 962, 11 S. Ct. 298; York v. Texas,

[137] U. S. 15, 34 L. ed. 604, 11 S. Ct. 9 (sus- taining state legislation which simply for- bids the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his prop- erty, and his rights against any attempt to enforce a judgment rendered without due service of process).

[14] Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873.

[15] St. Louis, I. M. & S. R. Co. v. Williams,

[251] U. S. 63, 64 L. ed. 139, 40 S. Ct. 71; Wad- ley Southern R. Co. v. Georgia, 235 U. S. 651,

[59] L. ed. 405, 35 S. Ct. 214; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507,

[33] S. Ct. 961; White v. Ward, 157 Ala. 345,

[47] So. 166, 18 L.R.A.(N.S.) 568 (holding that an attorney cannot constitutionally be compelled to pay into court money alleged to have been collected for his client, and not paid over, as a condition to the right to defend on the merits a summary pro- ceeding to compel its payment, since he would thereby be deprived of due process of law); State ex rel. Dushek v. Watland,

[51] N. D. 710, 201 N. W. 680, 39 A.L.R. 1169; State v. Crawford, 74 Wash. 248, 133 P. 590,

[46] L.R.A.(N.S.) 1039; Bonnett v. Vallier,

[136] Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061. Annotation: 39 A.L.R. 1181.

[16] State ex rel. Dushek v. Watland, 51 N. D. 710, 201 N. W. 680, 39 A.L.R. 1169. Annotation: 39 A.L.R. 1181.

12 Am. Jur. CONSTITUTIONAL LAW §§ 615-[617]

§ 615. Requiring Certain Pleadings.—

Due process of law is not denied by a statute providing for summary judgment in certain classes of cases unless a proper affidavit of merits is filed, though it applies only to actions based upon contracts, judgments, and statutes, and not to other kinds of actions, since in such others there are questions of fact for the jury as to the existence of liability or the amount of damages.[17]

§ 616. Rulings of Trial Court.—

Due process of law protects against arbitrary action.[18] Arbitrary action by the tribunal in the hearing of a cause or in its order violates due process.[19] What is such arbitrary action depends upon the facts of the case. Failure to give reasonable time and opportunity to secure counsel prior to trial, to ignorant and illiterate youths, away from their families and friends, charged with a crime punishable with death, against whom popular hostility was so aroused that it was necessary to keep them closely confined and under military guard, infringes the due process clause of the Fourteenth Amendment.[20]

Reasonable action will be sustained.[1] If a plea to the jurisdiction in a garnishment proceeding is found to be insufficient upon demurrer, refusal of the court to try a question of fact as to whether a res exists within the jurisdiction of the court is not an unconstitutional denial of due process of law.[2] The rejection of an amendment to a bill in equity on account of im-

materiality and delay in tendering it, ample opportunity for an earlier tender thereof having been allowed and the materiality thereof being doubtful, does not amount to denial of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.[3] A collector of customs by disregarding the certificates which by an act of Congress are made evidence to establish a right of entry into the United States on the part of the person presenting them does not lose his jurisdiction finally to determine the right of such persons to enter.[4]

§ 617. Imposition of Severe Penalties.—

The imposition of severe or excessive penalties may violate the due process guaranty,[5] especially if access to the courts to test the constitutional validity of a commission's orders is denied, if the right of review actually given is one of which a carrier may avail itself only at the risk of having to pay such penalties if the order is found to be valid,[6] or if the penalized acts had the supposed sanction of the law.[7]

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[17] People's Wayne County Bank v. Wol- verine Box Co. 250 Mich. 273, 230 N. W. 170,

[69] A.L.R. 1024. Annotation: 69 A.L.R. 1031.

[18] See supra, § 575.

[19] Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863,

[32] S. Ct. 535.

[20] Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527. Annotation: 84 A.L.R. 544.

[1] Porter v. Wilson, 239 U. S. 170, 60 L. ed. 204, 36 S. Ct. 91.

[2] Parker, Peebles & Knox v. El Saieh, 107 Conn. 545, 141 A. 884, 59 A.L.R. 1424.

[3] Roller v. Murray, 71 W. Va. 161, 76 S. E. 172, L.R.A.1915F, 984, Ann. Cas. 1914B, 1139, writ of error dismissed in 234 U. S. 738, 58 L. ed. 1570, 34 S. Ct. 902.

[4] Lee Lung v. Patterson, 186 U. S. 168, 46 L. ed. 1108, 22 S. Ct. 795.

[5] Life & C. Ins. Co. v. Barefield, 291 U. S. 576, 78 L. ed. 999, 54 S. Ct. 486; Life & C. Ins. Co. v. McCray, 291 U. S. 566, 78 L. ed. 987, 54 S. Ct. 482, rehearing denied in 292 U. S. 600, 78 L. ed. 1464, 54 S. Ct. 627; Okla- homa Operating Co. v. Love, 252 U. S. 331,

[64] L. ed. 596, 40 S. Ct. 338; St. Louis, I. M. & S. R. Co. v. Williams, 251 U. S. 63, 64 L. ed. 139, 40 S. Ct. 71; Southwestern Teleg. & Teleph. Co. v. Danaher, 238 U. S. 482, 59 L. ed. 1419, 35 S. Ct. 886; Ex parte Young,

[209] U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L.R.A.(N.S.) 932, 14 Ann. Cas. 764; Beckler Produce Co. v. American R. Exp. Co. 156 Ark. 296, 245 S. W. 1, 26 A.L.R. 1197; Supe- rior Laundry Co. v. Rose, 193 Ind. 138, 137 N. E. 761, 139 N. E. 142, 26 A.L.R. 1392; State v. Crawford, 74 Wash. 248, 133 P. 590,

[46] L.R.A.(N.S.) 1039; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486,

[128] Am. St. Rep. 1061. Annotation. 26 A.L.R. 1200; 46 L.R.A. (N.S.) 1039.

[6] Wadley S. R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, 35 S. Ct. 214.

[7] Southwestern Teleg. & Teleph. Co. v.

A reasonable penalty will be sustained.[8] A state, however, has power to impose a punishment heavy enough to secure obedience to administrative orders of a state commission after they have been found to be lawful and to impose a penalty for acts of disobedience committed after ample opportunity to test the validity of such orders and failure to do so.[9]

§ 618. Proceedings in Which Hearing Not Required.—

The constitutional right to a hearing as part of due process of law does not exist in all possible cases where rights of liberty or property are affected or interfered with by official action and procedure. It is well settled that as related to the exercise of the power of eminent domain, all questions which are political in their nature and lie within the legislative province may be determined without notice to the owner of the property affected, and the question whether a particular work or improvement shall be made or particular property taken, being one of that character, the owner is not entitled to a hearing upon it as a matter of right.10 Making the ruling of county authorities conclusive evidence of the necessity of taking land for a public highway does not violate the provision of the Federal Constitution against taking property without due process of law.11 The taxing power12 and many acts of government13 are validly exercised without hearing, especially if the matter is subject to revision in the courts.14

The doctrine is established, although after some diversity of opinion, that previous notice and an opportunity to be heard by persons thereby affected are not indispensable to a valid exercise of the police power. It is enough that such persons are enabled, in maintaining their rights, to invoke the equal protection of the law, by any appropriate proceeding.[15] On this ground, a railroad company is not entitled to a hearing upon the question of the pas-

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Danaher, 238 U. S. 482, 59 L. ed. 1419, 35 S. Ct. 886, L.R.A.1916A, 1208. Annotation: L.R.A.1916A, 1211.

[8] United States Fidelity & G. Co. v. Wickline, 103 Neb. 21, 170 N. W. 193, 6 A.L.R. 1267.

[9] Wadley S. R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, 35 S. Ct. 214.

[10] Georgia v. Chattanooga, 264 U. S. 472, 68 L. ed. 796, 44 S. Ct. 369; Bragg v. Weaver, 251 U. S. 57, 64 L. ed. 135, 40 S. Ct. 62; Water Comrs. v. Johnson, 86 Conn. 151, 84 A. 727, 41 L.R.A.(N.S.) 1024. See EMINENT DOMAIN [Also 10 R. C. L. p. 11]. A railway company cannot complain of not having a hearing on the right of a telegraph company to condemn an easement along the railway right of way for a pole line merely because it is referred for that hearing to a separate suit in equity, the eminent domain proceedings being limited in their effect to determining the amount of the damages. Louisville & N. R. Co. v. Western U. Teleg. Co. 250 U. S. 363, 63 L. ed. 1032, 39 S. Ct. 513. Conferring authority upon the Public Service Commission to hear upon notice an application for the exercise of the right of eminent domain, determine the facts of necessity and due compensation, and render judgment, which, subject to appeal, shall be final, does not deprive the owner of his property without due process of law. George v. Consolidated Lighting Co. 87 Vt. 411, 89 A. 635, 52 L.R.A.(N.S.) 850, Ann. Cas. 1916C, 416.

[11] Rindge Co. v. Los Angeles County, 262 U. S. 700, 67 L. ed. 1186, 43 S. Ct. 689.

[12] See infra, §§ 640 et seq.

[13] Monamotor Oil Co. v. Johnson, 292 U. S. 86, 78 L. ed. 1141, 54 S. Ct. 575 (revocation of motor vehicle fuel distributors license); Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 S. Ct. 789 (seizure of mail in certain case); Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23

S. Ct. 390; McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508 (act to eradicate cattle fever tick, see ANIMALS, Vol. 2, p. 806, §§ 156 et seq.). Due process of law requires no special provision for granting a hearing to applicants for registration by the board of registration in medicine created by Michigan Pub. Acts 1899, Act No. 237, where such act provides for semiannual meetings of the board at specified times at the state capitol. Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 S. Ct. 390. That the act of public authorities in forbidding the casting of sawdust from a particular mill into a particular stream is not a general regulation does not make it a judicial act, which will entitle the mill owner to a hearing. Com. v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L.R.A.(N.S.) 752, 109 Am. St. Rep. 630.

[14] Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 S. Ct. 789.

[15] Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557; Lacey v. Lemons, 22 N. M. 54, L.R.A.1917A, 1185, 159 P. 949.

sage of an ordinance requiring it to light its street crossings [16] or requiring it to repair a viaduct; notice afterward, with an opportunity on the part of the railroad company to contest the validity of the ordinance, is sufficient.[17] Again, an importer of teas is not entitled to a hearing with reference to the establishing of government standards of purity, quality, and fitness for consumption or on the question whether his tea should be rejected as not entitled to admission into the United States because inferior to the standards.[18] An express company undertaking to do business on railroads the classification of which has already been fixed by the legislature cannot question the validity of a privilege tax graded with respect to the classification of the various railroads, on the ground that it was not accorded a hearing as to such classification.[19]

Contraband property may be seized and destroyed without a hearing.[20] The right to a hearing also has been denied in the case of the rearrest and confinement of a convict who has violated the conditions of a parole or pardon granted him,[1] although there is authority to the effect that the convict cannot be denied a hearing in such a case.[2]

The suspension by the governor of a railroad commissioner under a statute which operates only until the general assembly determines the question is not wanting in due process of law because the governor refuses to produce to the officer the evidence against him or give him an opportunity to confront his accusers and cross-examine the witnesses.[3] A citizen cannot be deprived of his right to be heard in the court established by law for the purpose of hearing his cause, except under very exceptional circumstances.[4] It is doubted whether the hearing can be dispensed with even in proceedings for the seizure of the property of alien enemies.[5]

§ 619. Necessity of Jury Trial.6—

The Seventh Amendment to the Constitution, which provides that in suits at common law where the value in controversy shall exceed $20 the right of trial by jury shall be preserved, relates only to trials in the courts of the United States. The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. The due process clause does not imply that all trials in the state courts affecting the personal or property rights must be by jury.7 Under

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[16] Pittsburgh, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L.R.A.(N.S.) 461.

[17] Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513.

[18] Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 S. Ct. 349.

[19] Southeastern Exp. Co. v. Miller, 264 U. S. 535, 68 L. ed. 836, 44 S. Ct. 421.

[20] Samuels v. McCurdy, 267 U. S. 188, 69 L. ed. 568, 45 S. Ct. 264, 37 A.L.R. 1378. For limitations upon this rule, see infra, § 677.

[1] Re Patterson, 94 Kan. 439, 146 P. 1009, L.R.A.1915F, 541; Re Ridley, 3 Okla. Crim. Rep. 350, 106 P. 549, 26 L.R.A.(N.S.) 110, holding, however, that after recommitment he might have the facts considered on habeas corpus. Annotation: L.R.A.1915F, 541.

[2] State v. Wolfer, 53 Minn. 135, 54 N. W. 1068, 19 L.R.A. 783, 39 Am. St. Rep. 582. See PARDON, REPRIEVE, AND AMNESTY [Also 20 R. C. L. p. 513].

[3] Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 S. Ct. 435. Annotation: 42 L. ed. 865.

[4] Illinois C. R. Co. v. Baker, 155 Ky. 512, 159 S. W. 1169, 49 L.R.A.(N.S.) 496.

[5] The constitutionality of a Federal statute authorizing the seizure by a named officer of the property of enemy aliens, providing no adequate remedy to secure to a nonenemy owner either the return of his property seized or compensation for it and affording such owner no remedy where the officer no longer has possession of the property or its proceeds, has been doubted. Becker Steel Co. v. Cummings, 296 U. S. 74, 80 L. ed. 54, 56 S. Ct. 15.

[6] See JURY [Also 16 R. C. L. §§ 13 et seq.].

[7] Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 67 L. ed. 961, 43 S. Ct. 589; Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 S. Ct. 255, Ann. Cas. 1917D, 637; New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 37 S. Ct. 247, Ann. Cas. 1917D, 629; Frank v. Mangum, 237 U. S. 309,

constitutional provisions the right of trial by jury is preserved inviolate only as to the classes of cases in which that right was enjoyed before the adoption of the Constitution. In all other cases the legislature may provide for a hearing or trial without a jury.[8] Accordingly, aside from the well-known practice of purely equity courts, in which no right to jury trial exists, except as it may be granted by statute,[9] such trials may be properly denied in certain proceedings of a summary nature [10] or in purely statutory actions or proceedings,[11] as, for example, proceedings designed to effect the disbarment of an attorney at law,[12] contempt proceedings,[13] proceedings for the removal of an officer,[14] election contests,[15] juvenile commitment proceedings,[16] deportation proceedings,[17] and insanity proceedings.[18] The right may be given to one party and denied to the other.[19]

When the right to trial by jury is essential to due process of law, the courts will not countenance a denial of the right under statutes imposing burdensome conditions or prescribing penalties designed to prevent and discourage trial by jury.[1] The legislature may not deprive a person of the right of trial by jury, in cases in which such right is secured to him by the Constitution, either directly or by conferring jurisdiction on a court of equity to try cases,

the trial of which by jury is a matter of right in a common-law court.[2]

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[59] L. ed. 969, 35 S. Ct. 582; Marvin v. Trout,

[199] U. S. 212, 50 L. ed. 157, 26 S. Ct. 31; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 S. Ct. 625; Max- well v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Montana Co. v. St. Louis Min. & Mill. Co. 152 U. S. 160, 38 L. ed. 398,

[14] S. Ct. 506; Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 S. Ct. 105; Re Delgado,

[140] U. S. 586, 35 L. ed. 578, 11 S. Ct. 874 (mandamus); Ex parte Wall, 107 U. S. 265,

[27] L. ed. 552, 2 S. Ct. 569; Walker v. Sauvi- net, 92 U. S. 90, 23 L. ed. 678; State ex rel. Cartmel v. Ætna Casualty & S. Co. 84 Fla. 123, 92 So. 871, 24 A.L.R. 1262; Atty. Gen. v. Jochim, 99 Mich. 358, 58 N. W. 611, 23 L.R.A. 699, 41 Am. St. Rep. 606; Lommen v. Min- neapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 450; Re Moynihan, 332 Mo. 1022, 62 S. W. (2d) 410, 91 A.L.R. 74; State ex rel. Rhodes v. Saunders, 66 N. H. 39, 25 A. 588, 18 L.R.A. 646; Salt Creek Valley Turnp. Co. v. Parks,

[50] Ohio St. 568, 35 N. E. 304, 28 L.R.A. 769; Moore v. Strickling, 46 W. Va. 515, 33 S. E. 274, 50 L.R.A. 279; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121. Annotation: 24 L. ed. 436; 11 L.R.A. 224;

[13] L.R.A. 304.

[8] Kirkland v. State, 72 Ark. 171, 78 S. W. 770, 65 L.R.A. 76, 105 Am. St. Rep. 25, 2 Ann. Cas. 242; Frost v. People, 193 Ill. 635,

[61] N. E. 1054, 86 Am. St. Rep. 352; State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449; State ex rel. Payne v. District Ct. 53 Mont. 350, 165 P. 294, cit- ing R. C. L.; Woods v. State, 130 Tenn. 100,

[169] S. W. 558, L.R.A.1915F, 531; Bowman v. Virginia State Entomologist, 128 Va. 351,

[105] S. E. 141, 12 A.L.R. 1121; Reliance Auto Repair Co. v. Nugent, 159 Wis. 488, 149 N. W. 377, Ann. Cas. 1917B, 307.

[9] See EQUITY [Also 10 R. C. L. p. 245].

[10] Kirkland v. State, 72 Ark. 171, 78 S. W. 770, 65 L.R.A. 76, 105 Am. St. Rep. 25, 2 Ann. Cas. 242; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121. See NUISANCES [Also 20 R. C. L. p. 376].

[11] Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801, 52 A.L.R. 51 (abatement of nuisance); Loeb v. Jennings, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376; State v. Loden,

[117] Md. 373, 83 A. 564, 40 L.R.A.(N.S.) 193, Ann. Cas. 1913E, 1300.

[12] Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 S. Ct. 573; Ex parte Robin- son, 19 Wall. (U. S.) 505, 22 L. ed. 205. See ATTORNEYS AT LAW, Vol. 5, p. 441, § 297.

[13] Wheeler v. United States, 226 U. S. 478,

[57] L. ed. 309, 33 S. Ct. 158; Tinsley v. An- derson, 171 U. S. 101, 43 L. ed. 91, 18 S. Ct. 805; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 S. Ct. 1125; Eilenbecker v. District Ct. 134 U. S. 31, 33 L. ed. 801, 10 S. Ct. 424.

[14] Wilson v. North Carolina, 169 U. S. 586,

[42] L. ed. 865, 18 S. Ct. 435. Annotation: 42 L. ed. 865.

[15] Ashley v. Three Justices (Ashley v. Wait) 228 Mass. 63, 116 N. E. 961, 8 A.L.R. 1472, writ of error dismissed in 250 U. S. 652, 63 L. ed. 1190, 40 S. Ct. 53.

[16] Wissenberg v. Bradley, 209 Iowa, 813,

[229] N. W. 205, 67 A.L.R. 1075. Annotation: 67 A.L.R. 1082.

[17] United States ex rel. Turner v. Wil- liams, 194 U. S. 279, 48 L. ed. 979, 24 S. Ct. 719.

[18] Re Dowdell, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290; Re Moynihan,

[332] Mo. 1022, 62 S. W. (2d) 410, 91 A.L.R. 74; White v. White, 108 Tex. 570, 196 S. W. 508, L.R.A.1918A, 339. Annotation: 91 A.L.R. 88. See INSANE AND OTHER INCOMPETENT PER- SONS.

[19] Panama R. Co. v. Johnson, 264 U. S. 375, 63 L. ed. 748, 44 S. Ct. 391.

[1] Saco v. Wentworth, 37 Me. 165, 58 Am. Dec. 786. Annotation: 58 Am. Dec. 791.
[2] State Bank v. Cooper, 2 Yerg. (Tenn.) 599, 24 Am. Dec. 517.

Under the general principle that wide discretion is conceded to the legislature in reference to the regulation of litigation and the procedure in courts, it may within broad limits regulate the right of trial by jury;[3] and it may surround the right with reasonable conditions and restrictions, provided, of course, these do not amount to a denial of that right, either directly or indirectly. Thus, statutes may require the defendants in certain classes of cases to pay what they admit to be due and to give security therefor, before obtaining a jury trial;[4] or, as a general rule, under statutes so providing, the courts may, as a condition to a jury trial, require the payment of jury fees in advance [5] or other reasonable fees.[6]

2. EVIDENCE, PROOF, AND WITNESSES

§ 620. Generally.—

The case against the party asserting the protection of the due process guaranty must be made out by proof, in the absence of a default. For example, a statute providing for the seizure and sale of vessels on the mere assertion of a debt or demand, without any proof to substantiate the claim being made before a judicial tribunal and without any judgment or decree of any such tribunal allowing the sale, is unconstitutional.[7] When the party defaults, proof is not necessary.[8] If the allegations of the bill are taken as confessed and a decree pro confesso is rendered, a final decree may thereupon be rendered without the taking of further proof or reference thereof to a master.[9] The constitutional requirement of due process is not satisfied where a conviction is obtained by the presentation of testimony known to the prosecuting authorities to be perjured.[10–13]

§ 621. Right to Introduce Evidence.—

The right under the due process clause to a full hearing includes the right on the part of the party whose rights are sought to be affected to introduce evidence [14] and have judicial

[3] Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77; Parker v. People,

[13] Colo. 155, 21 P. 1120, 4 L.R.A. 803; State v. Bates, 14 Utah, 293, 47 P. 78, 43 L.R.A.

[33] (overruled as to the particular regula- tion in Thompson v. Utah, 170 U. S. 343,

[42] L. ed. 1061, 18 S. Ct. 620). Annotation: 42 L. ed. 1061.

[4] Flint River S. B. Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248.

[5] Knee v. Baltimore City Pass. R. Co. 87 Md. 623, 40 A. 890, 42 L.R.A. 363.

[6] Malin v. La Moure County, 27 N. D. 140,

[145] N. W. 582, 50 L.R.A.(N.S.) 997.

[7] Parsons v. Russell, 11 Mich. 113, 83 Am. Dec. 728.

[8] Stephenson v. Kirtley, 269 U. S. 163, 70 L. ed. 213, 46 S. Ct. 50. Where a court has acquired jurisdiction of a suit to set aside a deed as in fraud of creditors by the levying of an attachment and a decree nisi has been entered upon the order of publication, a failure to hear proof before adjudging the deed void will not deprive the court of jurisdiction or con- stitute a denial of due process of law. Ste- phenson v. Kirtley, 269 U. S. 163, 70 L. ed. 213, 46 S. Ct. 50 (admission through de- fault sufficient proof).

[9] McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731. 10–13 Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406, re- hearing denied in 294 U. S. 732, 79 L. ed. 1261, 55 S. Ct. 511. Annotation: 98 A.L.R. 411.

[14] Baltimore & O. R. Co. v. United States,

[298] U. S. 349, 80 L. ed. 1209, 56 S. Ct. 797; Louisville & N. R. Co. v. Finn, 235 U. S. 601, 59 L. ed. 379, 35 S. Ct. 146; Washing- ton ex rel. Oregon R. & Nav. Co. v. Fair- child, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535; Re Lambert, 134 Cal. 626, 66 P. 851,

[55] L.R.A. 856, 85 Am. St. Rep. 296 (insanity inquisition); Ives v. South Buffalo R. Co.

[201] N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Taylor v. Ander- son, 40 Okla. 316, 137 P. 1183, 51 L.R.A. (N.S.) 731; Ex parte Hardcastle, 84 Tex. Crim. Rep. 463, 208 S. W. 531, 2 A.L.R. 1539 (habeas corpus); Jensen v. Union P. R. Co.

[6] Utah, 253, 21 P. 994, 4 L.R.A. 724; Schlitz v. Roenitz, 86 Wis. 31, 56 N. W. 194, 21 L.R.A. 483, 39 Am. St. Rep. 873. Refusal of a state court to receive or con- sider evidence of lack of benefits to a street railway company which is required by a municipal ordinance to pay the cost of street paving, on the ground that such evidence is immaterial, amounts to a de- nial of a hearing on that issue, in viola- tion of the due process clause of the Federal Constitution, where the statute authorizing and the ordinance directing the assessment for the cost of such improvements, as con- strued by the state courts, require, as the basis of their operation, the existence of benefits. Georgia R. & Electric Co. v. Deca-

findings based upon it.[15] A party has the right to the opportunity, when in court, to establish any fact, which, according to the usages of common law or provisions of the Constitution, would be a protection to his property or his liberty.[16]

The right to be heard and to produce evidence has been held not to include any inherent right on the part of a litigant to offer oral evidence in support of his cause of action or defense; written evidence may be required in some cases.[17] If all facts and suggestions deemed necessary are presented by af- fidavits and in writing, the exclusion of oral evidence is not a violation of the guaranty of due process.[18] Requiring a physician to produce his testi- mony by deposition to the exclusion of witnesses in person, in a proceeding to revoke his license, does not unconstitutionally deprive him of due process

of law.[19]

In the case of a review of the orders of commissions, boards, etc., provision is frequently made for the hearing of the case in the court of review upon the testimony adduced before the commission or board. If the party affected has the right on the hearing before the board or commission to introduce evidence as to all material points, such a limitation of the evidence on review does not violate the due process guaranty.[20] Due process of law does not forbid the hearing of a cause upon a transcript of evidence formerly heard in court, especially where the course pursued has the assent of the parties.[1]

A party who has not shown that he has any evidence not already either interposed or waived in a proceeding before a commission cannot complain of the rule that in an action based upon the commission's award, there is no right to adduce evidence other than such as was presented to the commission, unless the court shall first be satisfied that the evidence is such as cannot be produced before the commission with the exercise of reasonable diligence.[2]

§ 622. Right to Prove and Recover Damages.—

It has been said that due process of law guarantees an orderly procedure in court for the ascertainment of damages for an injury, to the end that the person injured shall have a proper and adequate remedy. It is accordingly recognized that the right to damages for an injury is included within this constitutional guaranty. Perhaps the best illustrations may be taken from the law of libel and slander where the courts have sustained the inherent right of one who has been

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tur, 295 U. S. 165, 79 L. ed. 1365, 55 S. Ct. 701. In view of the rule that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts up- on that score, a provision of a statute look- ing to the licensing of real-estate brokers that the commission is authorized to "re- quire and procure" satisfactory proof as to the qualifications of applicants will not be held to be unconstitutional, as giving the applicant no opportunity to meet evidence procured by the commission as to his qual- ifications, through notice and opportunity to be heard. Bratton v. Chandler, 260 U. S. 110, 67 L. ed. 157, 43 S. Ct. 43.

[15] Baltimore & O. R. Co. v. United States,

[298] U. S. 349, 80 L. ed. 1209, 56 S. Ct. 797.

[16] Rouse, H. & Co. v. Donovan, 104 Mich. 234, 62 N. W. 359, 27 L.R.A. 577, 53 Am. St. Rep. 457; Larson v. Dickey, 39 Neb. 463, 58 N. W. 167, 42 Am. St. Rep. 595; Ives v. South Buffalo R. Co.

201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; State v. Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L.R.A. 130.

[17] State v. Heldenbrand, 62 Neb. 136, 87 N. W. 25, 89 Am. St. Rep. 743.

[18] State ex rel. School Dist. v. Cary, 166 Wis. 103, 163 N. W. 645, 1 A.L.R. 1554.

[19] Missouri ex rel. Hurwitz v. North, 271 U. S. 40, 70 L. ed. 818, 46 S. Ct. 384.

[20] Seward v. Denver & R. G. R. Co. 17 N. M. 557, 131 P. 980, 46 L.R.A.(N.S.) 242.

[1] De La Rama v. De La Rama, 241 U. S. 154, 60 L. ed. 932, 36 S. Ct. 518, Ann. Cas. 1917C, 411.

[2] Louisville & N. R. Co. v. Finn, 235 U. S. 601, 59 L. ed. 379, 35 S. Ct. 146.

defamed to recover damages for the injury sustained, and a statute limiting a recovery to damages suffered in respect of property, business, or occupation, where a publication was made in good faith and a retraction was made after the giving of a notice provided for by the statute, has been considered a denial of due process of law.[3] By the common law, one who is injured by such a publication has a natural right to demand an apology or retraction, but unless it is accepted as a satisfaction, it will not be a complete defense and will only be considered in mitigation of damages. Accordingly, the courts have treated the right to damages as a substantial one of which a person cannot be deprived except by due process of law.[4]

§ 623. Changes in Rules of Evidence.—

The legislature has general power to prescribe rules of evidence and methods of proof not in conflict with the Constitution or the rights guaranteed by it.[5] If a legislative provision, not unreasonable in itself, prescribing a rule of evidence in either criminal or civil cases does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.[6] In other words, as to what shall be evidence and who shall assume the burden of proof, the power of the legislature is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights, since this would substantially deprive him of due process of law.[7]

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[3] Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 64 L.R.A. 790, 104 Am. St. Rep. 422; Park v. Detroit Free Press Co. 72 Mich. 560,

[40] N. W. 731, 1 L.R.A. 599, 16 Am. St. Rep. 544; Osborn v. Leach, 135 N. C. 628, 47 S. E. 811, 66 L.R.A. 648. But see to the con- trary Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936, 3 L.R.A. 532, 12 Am. St. Rep. 707.

[4] Byers v. Meridian Printing Co. 84 Ohio St. 408, 95 N. E. 917, 38 L.R.A.(N.S.) 913. See generally LIBEL AND SLANDER [Also 17 R. C. L. p. 254].

[5] Bandini Petroleum Co. v. Superior Ct.

[284] U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826; Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 S. Ct. 372; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 S. Ct. 1016; Morris v. Pacific Electric R. Co. 2 Cal. (2d) 764, 43 P. (2d) 276, citing R. C. L.; Re Patterson, 155 Cal. 626, 102 P. 941, 26 L.R.A.(N.S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625; Banks v. State, 124 Ga. 15, 52 S. E. 74, 2 L.R.A.(N.S.) 1007; Meadowcroft v. People, 163 Ill. 56,

[45] N. E. 991, 35 L.R.A. 176, 54 Am. St. Rep. 447; Powers v. State, 204 Ind. 472, 184 N. E. 549, 86 A.L.R. 166; Green v. State, 204 Ind. 349, 184 N. E. 183, 87 A.L.R. 1251; Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381; Daggs v. Orient Ins. Co. 136 Mo. 382,

[38] S. W. 85, 35 L.R.A. 227, 58 Am. St. Rep. 638, affirmed in 172 U. S. 557, 43 L. ed. 552,

[19] S. Ct. 281; People ex rel. Woronoff v. Mallon, 222 N. Y. 456, 119 N. E. 102, 4 A.L.R. 463; State v. Barrett, 138 N. C. 630, 50 S. E. 506, 1 L.R.A.(N.S.) 626; Blakemore v. Cooper, 15 N. D. 5, 106 N. W. 566, 4 L.R.A. (N.S.) 1074, 125 Am. St. Rep. 574; Penn- sylvania Co. v. McCann, 54 Ohio St. 10, 42 N. E. 768, 31 L.R.A. 651, 56 Am. St. Rep. 695; Taylor v. Anderson, 40 Okla. 316, 137 P. 1193, 51 L.R.A.(N.S.) 731; State v. Ran- dolph, 85 Or. 172, 166 P. 555, citing R. C. L.: State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L.R.A. 656; Re Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A. (N.S.) 232. Annotation: 2 L.R.A.(N.S.) 1007. The legislature may, in the absence of constitutional provision to the contrary, authorize a state through its judges and attorney general to take testimony in order to enforce its own laws, and the exercise of such power is not a violation of the pro- vision that no person shall be deprived of life, liberty, or property without due process of law. Re Davies, 168 N. Y. 89,

[61] N. E. 118, 56 L.R.A. 855. The provision of Ohio Rev. Stat. § 4427-6, that the character of an alleged trust or combination may be established by proof of its general reputation as such is uncon- stitutional and void in that it prescribes a rule of evidence which is violative of the guaranty contained in U. S. Const. Art. 15, § 1, that no person shall be deprived of "life, liberty, or property" without due process of law. Hammond v. State, 78 Ohio St. 15, 84 N. E. 416, 15 L.R.A. (N.S.) 906, 125 Am. St. Rep. 634, 14 Ann. Cas. 732. For a detailed discussion of this question, see EVIDENCE [Also 10 R. C. L. p. 847].

[6] Mobile, J. & K. C. R. Co. v. Turnipseed,

[219] U. S. 35, 55 L. ed. 78, 31 S. Ct. 136, 32 L.R.A.(N.S.) 226, Ann. Cas. 1912A, 463; State v. Thomas, 144 Ala. 77, 40 So. 271, 2 L.R.A.(N.S.) 1011, 113 Am. St. Rep. 17, 6 Ann. Cas. 744; Pilcher v. Tanner Motor Livery, 138 Cal. App. 558, 33 P. (2d) 58, cit- ing R. C. L.; Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25, 62 N. E. 488, 56 L.R.A. 468, 92 Am. St. Rep. 293; State v. Beach,

[147] Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L.R.A. 179.

[7] Lindsley v. Natural Carbonic Gas Co.

[220] U. S. 61, 55 L. ed. 369, 31 St. Ct. 337, Ann. Cas. 1912C, 160; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 31

§ 624. Creation of Presumptions.—

A certain fact or facts may be made prima facie evidence of other facts if there is a rational connection between what is proof and what is to be inferred and if the rule is not arbitrary.8

S. Ct. 136, 32 L.R.A.(N.S.) 226, Ann. Cas. 1912A, 463; State v. Thomas, 144 Ala. 77, 40 So. 271, 2 L.R.A.(N.S.) 1011, 113 Am. St. Rep. 17, 6 Ann. Cas. 744; Banks v. State, 124 Ga. 15, 52 S. E. 74, 2 L.R.A.(N.S.) 1007; State v. Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L.R.A. 179; Odell v. Green, 72 Ind. App. 65, 122 N. E. 791, citing R. C. L.; Missouri, K. & T. R. Co. v.

Simonson, 64 Kan. 802, 68 P. 653, 57 L.R.A. 765, 91 Am. St. Rep. 248; Larson v. Dickey, 39 Neb. 463, 58 N. W. 167, 42 Am. St. Rep. 595; Board of Excise v. Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705; Taylor v. Anderson, 40 Okla. 316, 137 P. 1183, 51 L.R.A.(N.S.) 731; Re Allen, 82 Vt. 365, 72 A. 1078, 26 L.R.A.(N.S.) 232.

[8] Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 77 L. ed. 457, 53 S. Ct. 249; Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826 (holding that a statute prohibiting the unreasonable waste of natural gas is not inconsistent with due process by reason of a provision therein that the release or escape of natural gas into the air shall be prima facie evidence of unreasonable waste); Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 77 L. ed. 457, 53 S. Ct. 249 (failure to give signals at railroad crossing); Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826 (release or escape of natural gas as prima facie evidence of unreasonable waste); Western & A. R. Co. v. Henderson, 279 U. S. 639, 73 L. ed. 884, 49 S. Ct. 445; Manley v. Georgia, 279 U. S. 1, 73 L. ed. 575, 49 S. Ct. 215; United States v. Los Angeles & Salt L. R. Co. 273 U. S. 299, 71 L. ed. 651, 47 S. Ct. 413 (valuation of railroads by Interstate Commerce Commission evidence of property in certain judicial proceedings); Yee Hem v. United States, 268 U. S. 178, 69 L. ed. 904, 45 S. Ct. 470; United States ex rel. St. Louis S. W. R. Co. v. Interstate Commerce Commission, 264 U. S. 64, 68 L. ed. 565, 44 S. Ct. 294; Hawes v. Georgia, 258 U. S. 1, 66 L. ed. 431, 42 S. Ct. 204; Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 S. Ct. 255, Ann. Cas. 1917D, 637; McFarland v. American Sugar Ref. Co. 241 U. S. 79, 60 L. ed. 899, 36 S. Ct. 498; Meeker v. Lehigh Valley R. Co. 236 U. S. 412, 59 L. ed. 644, 35 S. Ct. 328, Ann. Cas. 1916B, 691 (presumption that in actions to recover from a carrier the damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the carrier's violation of the provisions of those statutes, "the findings and order of the Commission shall be prima facie evidence of the facts therein stated"); Luria v. United States, 231 U. S. 9, 58 L. ed. 101, 34 S. Ct. 10 (making the taking up of a permanent residence in a foreign country within five years after the issuance of a certificate of citizenship prima facie evidence of the lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, which, in the absence of countervailing evidence, shall be sufficient to warrant the cancellation of the certificate as fraudulent); Reitler v. Harris, 223 U. S. 437, 56 L. ed. 497, 32 S. Ct. 248 (making the entry upon the official record of the forfeiture of school land for default in payment of the purchase price prima facie, but not conclusive, evidence that all the preliminary steps essential to a valid forfeiture were properly taken); Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160 (making the engaging in pumping mineral waters from wells bored or drilled into the rock for the purpose of collecting and vending as a separate commodity the carbonic acid gas contained therein prima facie evidence of the common underground source of supply and of injury to other proprietors); Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 S. Ct. 145; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 31 S. Ct. 136, 2 L.R.A.(N.S.) 226, Ann. Cas. 1912A, 463; Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 S. Ct. 372; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 S. Ct. 20; State v. Thomas, 144 Ala. 77, 40 So. 271, 2 L.R.A.(N.S.) 1011, 113 Am. St. Rep. 17, 6 Ann. Cas. 744; Griffin v. State, 142 Ga. 636, 83 S. E. 540, L.R.A. 1915C, 716, Ann. Cas. 1916C, 80; Banks v. State, 124 Ga. 15, 52 S. E. 74, 2 L.R.A.(N.S.) 1007; Shellabarger Elevator Co. v. Illinois C. R. Co. 278 Ill. 333, 116 N. E. 170, L.R.A. 1917E, 1011; Waugh v. Glos, 246 Ill. 604, 92 N. E. 974, 138 Am. St. Rep. 259; People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; Green v. State, 204 Ind. 349, 184 N. E. 183, 87 A.L.R. 1251; State v. Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L.R.A. 179; Ramsey-Petroleum Co. v. Adams, 119 Kan. 844, 241 P. 433, citing R. C. L.; Duggan v. Bay Street R. Co. 230 Mass. 370, 119 N. E. 757, L.R.A.1918E, 680; People ex rel. Woronoff v. Mallon, 222 N. Y. 456, 119 N. E. 102, 4 A.L.R. 463; Pennsylvania Co. v. McCann, 54 Ohio St. 10, 42 N. E. 768, 31 L.R.A. 651, 56 Am. St. Rep. 695; Taylor v. Anderson, 40 Okla. 316, 137 P. 1183, 51 L.R.A.(N.S.) 731; Hall v. Johnson, 87 Or. 21, 169 P. 515, Ann. Cas. 1918E, 49. Annotation: 51 A.L.R. 1141, s. 86 A.L.R. 180; 32 L.R.A.(N.S.) 226; L.R.A.1915C, 717; Ann. Cas. 1916B, 699. The "first-in, first-out," regulation of the United States Treasury Department relative to computing capital gains and losses for income tax purposes, and declaring that when shares of corporate stock are sold from lots purchased at different dates and at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock, is not invalid under the Fifth Amendment on the ground that it creates a conclusive presumption as applied to marginal transactions where stock is purchased at different times by a broker for a

customer and is not earmarked or allocated in any way to the customer, but is carried in the name of the broker or in "street names" and the certificates are commingled with like certificates held by the broker for other customers, the regulation at most affecting only the burden of proof of identifying stock sold. Helvering

Various cases sustain the constitutionality of statutes making failure of a bank under certain conditions prima facie evidence of knowledge on the part of the banker that the institution was insolvent at the time of the receipt of deposits or evidence of an intent to defraud.[9]

If the statute is arbitrary, it violates the due process guaranty.[10] A constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment.[11] An order of a court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or of verity.[12]

§ 625. —

Conclusive Presumptions.—A conclusive presumption,13 or a pre-

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v. Rankin, 295 U. S. 123, 79 L. ed. 1343, 55 S. Ct. 732. Statutory provisions for a commitment of an alleged insane person on the certificate of physicians and an inquisition as to whether or not he is a public charge make the certificate merely prima facie evidence of insanity, subject to be overthrown by countervailing evidence, and the statute does not, therefore, deprive the alleged insane person of his liberty without due process of law. Re Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A.(N.S.) 232. A statute prescribing the circumstances that shall constitute prima facie evidence of a fact in issue on trial in the courts of the state is within the authority of the legislature and may be made applicable to a cause of action which arose outside the state. Pennsylvania Co. v. McCann, 54 Ohio St. 10, 42 N. E. 768, 31 L.R.A. 651, 56 Am. St. Rep. 695. The provision of a statute making the commissioners' schedule prima facie evidence that the rates fixed thereby are reasonable is not an infringement of the constitutional guaranties of the right to trial by jury and against deprivation of property without due process of law. Chicago & N. W. R. Co. v. Dey (C. C.) 35 F. 866, 1 L.R.A. 744. A statute providing that neglect to give the required signals at a crossing, contributing to injury to person or property by collision, shall render the railroad company liable for all resulting damages cannot be regarded as contravening the due process clause on the ground that the presumption it raises that failure to give the prescribed signals is the proximate cause of the collision does not vanish upon the introduction of opposing evidence, but remains to be considered by the jury as evidence, where the court, by overruling the railroad company's motion for a directed verdict upon the ground that the statute violates the due process clause and by instructing the jury that while the failure to give the required signals raises a presumption that it was the proximate cause of the injury, such presumption may be rebutted by the defendant's evidence and that all the evidence must be considered in determining the question of proximate cause, treated the statute as creating a temporary inference that vanished upon the introduction of opposing evidence. Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 77 L. ed. 457, 53 S. Ct. 249. See EVIDENCE [Also 10 R. C. L. p. 847]. 183Annotation: 51 A.L.R. 1154, s. 86 A.L.R. See BANKS, Vol. 7, p. 271, § 380; p. 275, § 335.

[10] Hall v. Johnson, 87 Or. 21, 169 P. 515, Ann. Cas. 1918E, 49, holding that a municipal ordinance declaring that the loitering or parading in the vicinity or in front of any store, factory, or place of business shall be prima facie evidence of a conspiracy to injure the trade, business, or commerce of the proprietor of the store thus patrolled is invalid, since the acts have no tendency to prove a conspiracy to injure the commerce or trade of such person. In McFarland v. American Sugar Ref. Co. 241 U. S. 79, 60 L. ed. 899, 36 S. Ct. 498, it was held that a state cannot create a presumption of participation in a forbidden monopoly or combination from the systematic payment in one state by a person engaged in sugar refining within that state of a less price for sugar than he pays in any

other state or a presumption that the closing or keeping idle of a sugar refinery for more than one year was for the purpose of violating that statute or the laws against monopolies.

[11] Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 S. Ct. 145.

[12] Ex parte Peterson, 253 U. S. 300, 64 L. ed. 919, 40 S. Ct. 543.

[13] Manley v. Georgia, 279 U. S. 1, 73 L. ed. 575, 49 S. Ct. 215; Shellabarger Elevator Co. v. Illinois C. R. Co. 278 Ill. 333, 116 N. E. 170, L.R.A.1917E, 1011; Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25, 62 N. E. 488, 56 L.R.A. 468, 92 Am. St. Rep. 293; State v. Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L.R.A. 179; Ramsey Petroleum Co. v. Adams, 119 Kan. 844, 241 P. 433; Missouri, K. & T. R. Co. v. Simonson, 64 Kan. 802, 68 P. 653, 57 L.R.A. 765, 91 Am. St. Rep. 248; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513, 1 L.R.A. 777, 12 Am. St. Rep. 663; Eastland v. Sneed, 134 Tenn. 599, 185 S. W. 717. Annotation: 51 A.L.R. 1149, s. 86 A.L.R. 182. A statute making a judicial determination of title to land forever binding and conclusive upon all persons after the lapse of two years may be given effect against parties to the proceeding and persons who must bring legal proceedings to establish their rights, although it would be void in favor of persons in possession of all they claim, yet who were not parties to the proceeding. People ex rel. Deneen v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L.R.A. 801, 68 Am. St. Rep. 175.

sumption that operates to deny a fair opportunity to repel it, violates the due process clause. Even a statute that hurts the evidence that may be offered in rebuttal of the presumption is invalid.[14] Conclusive presumptions may be created by statute where the legislature has the power to impose the penalty without reference to the fact which is conclusively presumed.[15] Such a statute does not involve taking of property without due process of law.[16] Making failure to produce his books on demand by one who has obtained credit by written representations of his ability to pay and a statement of the conducting of a business and the keeping of books presumptive evidence that the statement was knowingly false does not deprive the one making the representation of his life, liberty, or property without due process of law.[1] Whatever is ordinarily connected with bad character or indicative of it may be prescribed by the legislature as conclusive evidence thereof.[2]

§ 626. —

As to Negligence.—In various cases the courts have sustained, as against the argument that they violate the guaranty of due process, the constitutionality of statutes providing that certain facts shall constitute prima facie evidence of negligence rendering railroad companies responsible for injuries to persons or property by the operation of trains.[3] Other statutes have been upheld, the courts declaring that in all actions against railway corporations for injuries to stock by collision with moving trains, a showing by the defendant that the track was not fenced so as to turn stock there-

from should be prima facie evidence, even though such corporations are not required to fence their tracks.[4]

The presumption may be made conclusive within limits.[5] For example, an act which makes any person who drives a herd of animals over a public highway constructed on a hillside liable for all damage done by such animals in destroying the banks or rolling rocks into or on the highway has been sustained.[6] On the other hand, in some states the courts have declined to give effect to statutes purporting to impose on railroad companies liability for the killing by its trains of all animals straying on its tracks without reference to the omission of duty or the violation of law on the part of such com-

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[14] Clem v. Evans (Tex. Com. App.) 291 S. W. 871, 51 A.L.R. 1135. Annotation: 51 A.L.R. 1157, s. 86 A.L.R. 184. A statutory provision that when a prom- ise to do a future act induces one to enter into a contract which he otherwise would not have entered into, and said promise has not been complied with in a reasonable time, a presumption arises that it was falsely and fraudulently made, and the bur- den of proof that it was made in good faith, but that performance by the prom- isor was prevented by an act of God, the public enemy, or by some equitable reason, rests upon said promisor, unconstituion- ally deprives him of due process of law. Clem v. Evans (Tex. Com. App.) 291 S. W. 871, 51 A.L.R. 1135.

[15] Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317 (presumption of neg- ligence from driving an automobile when intoxicated). Annotation: 56 A.L.R. 327.

[16] Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317.

[1] Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 S. Ct. 1016; People ex rel. Woronoff v. Mallon, 222 N. Y. 456, 119 N. E. 102, 4 A.L.R. 463. Annotation: 4 A.L.R. 471.

[2] Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 S. Ct. 573.

[3] Mobile, J. & K. C. R. Co. v. Turnipseed,

[219] U. S. 35, 55 L. ed. 78, 31 S. Ct. 136, 32 L.R.A.(N.S.) 226, Ann. Cas. 1912A, 463, af- firming 91 Miss. 273, 46 So. 360, 124 Am. St. Rep. 679. Annotation: 51 A.L.R. 1172, s. 86 A.L.R. 187; 32 L.R.A.(N.S.) 226. See NEGLIGENCE [Also 20 R. C. L. p. 184, §§ 155 et seq.].

[4] See FENCES [Also 11 R. C. L. p. 890, §§ 24 et seq.]; RAILROADS [Also 22 R. C. L. p. 730].

[5] Western & A. R. Co. v. Henderson, 279 U. S. 639, 73 L. ed. 884, 49 S. Ct. 445, hold- ing that permitting the presumption of negligence created by statute to be given the effect of evidence, to be weighed against opposing testimony, and to prevail unless such testimony is found by the jury to preponderate is violative of the due proc- ess clause. As to carriers, see CARRIERS, Vol. 9, p. 813, § 661.

[6] Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282, affirming 11 Utah, 200, 39 P. 825, 29 L.R.A. 97.

panies.[7] Where there are statutes which make it the duty of railroad companies to fence their tracks at reasonable places, all the authorities hold that a conclusive presumption of negligence may be established resulting from the killing of animals at a place where there ought to have been a fence, but where none had been erected.[8] It seems that the legislature may constitu-

tionally pass a statute providing that the occurrence of a fire caused by the operation of a railroad shall be prima facie evidence of negligence on the part of the railroad company.[9]

§ 627. —

As to Fraud.—A presumption of fraud or intent to defraud may be created.[10] In some jurisdictions the courts have upheld as constitutional statutes providing that the failure or refusal of any person who has entered into a contract for service and obtained any money or property thereby to perform such service or refund such money or property without just cause shall be prima facie evidence of an intent to defraud.[11]

The rule that it is competent for a legislature to make one fact prima facie evidence of another to which it bears a reasonable evidentiary relationship finds application or recognition in various cases sustaining the constitutionality of statutes declaring in effect that sales of a stock of goods in bulk or of a portion of a stock of goods other than in the usual course of the seller's business shall be prima facie evidence of fraud as to creditors of the latter unless the provisions of the statute have been complied with.[12] A rebuttable presumption of fraud from the insolvency of a bank has been sustained.[13] The same decision has been reached with respect to a statute making it prima facie evidence of a banker's intent to defraud in receiving a deposit when insolvent or when the bank's failure, suspension, or involuntary liquidation occurs within thirty days thereafter.[14] In such a case it has been said that the inference of fraudulent intent in receiving a deposit within thirty days of failure is not so purely arbitrary, unreasonable, unnatural, or extraordinary as to justify the court in saying that such failure had no fair

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[7] Bielenberg v. Montana U. R. Co. 8 Mont. 271, 20 P. 314, 2 L.R.A. 813. See RAILROADS [Also 22 R. C. L. p. 730].

[8] Oregon R. & Nav. Co. v. Smalley, 1 Wash. 206, 23 P. 1008, 22 Am. St. Rep. 143.

[9] Annotation: 32 L.R.A.(N.S.) 227.

[10] Hammond Packing Co. v. Arkansas,

[212] U. S. 322, 53 L. ed. 530, 29 S. Ct. 370, 15 Ann. Cas. 645 (bad faith or untruth of answer presumed from suppression or fail- ure of proof); People ex rel. Woronoff v. Mallon, 222 N. Y. 456, 119 N. E. 102, 4 A.L.R. 463; Re Milecke, 52 Wash. 312, 100 P. 743,

[21] L.R.A.(N.S.) 259, 132 Am. St. Rep. 968 (departing from an hotel or boarding house or removing, or surreptitiously attempting to remove, baggage therefrom).

[11] James-Dickinson Farm Mortg. Co. v. Harry, 273 U. S. 119, 71 L. ed. 569, 47 S. Ct. 308 (presumption of fraud and falsity from failure to comply with a promise); State v. Thomas, 144 Ala. 77, 40 So. 271, 2 L.R.A.(N.S.) 1011, 113 Am. St. Rep. 17, 6 Ann. Cas. 744; Banks v. State, 124 Ga. 15,

[52] S. E. 74, 2 L.R.A.(N.S.) 1007; Clem v. Evans (Tex. Com. App.) 291 S. W. 871, 51 A.L.R. 1135 (holding that a prima facie presumption of falsity from failure to per- form promise is valid). Annotation: 4 A.L.R. 471; 51 A.L.R. 1157, s. 86 A.L.R. 184. See FRAUD AND DECEIT [Also 12 R. C. L. p. 222].

[12] Annotation: 51 A.L.R. 1176, s. 86 A.L.R. 189. See FRAUDULENT CONVEYANCES [Also 12 R. C. L. p. 459].

[13] Griffin v. State, 142 Ga. 636, 83 S. E. 540, L.R.A.1915C, 716, Ann. Cas. 1916C, 80. Annotation: L.R.A.1915C, 717.

[14] Manley v. Georgia, 279 U. S. 1, 73 L. ed. 575, 49 S. Ct. 215 (holding that a statute declaring that every insolvency of a bank shall be deemed fraudulent and subject the directors to imprisonment unless they repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe, and declaring that a bank shall be deemed to be insolvent when it cannot meet its liabilities as they become due in the regular course of business, when the actual market value of its assets is insuffi- cient to pay its liabilities, and when its reserve shall fall below the amount re- quired and is not made good within thirty days, is unreasonable and arbitrary and violates the constitutional requirement of due process of law); State v. Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L.R.A. 179. See BANKS, Vol. 7, p. 271, § 380; p. 275, § 385.

relationship to, or connection with, the existence of fraudulent intent at the time of the deposit.[15] Statutes providing that if a person performing labor or furnishing material is not enjoined therefrom by the person in whom is vested the title to the property benefited by such labor or material it shall be conclusive evidence that the labor was performed or the material furnished with his consent have been held to be unconstitutional as depriving a man of his property without due process of law.[16]

§ 628. —

In Tax Matters.—Apt illustrations as to the right of the legislature, consistent with due process of law, to establish presumptions as to evidence may be taken from the law as to tax deeds.[17] While the legislature has power to make tax deeds prima facie evidence that every requirement of the law necessary to their validity has been complied with, it has no power to make a tax deed conclusive evidence of any jurisdictional fact or fact vital to the exercise of the power of taxation or sale, divesting the title of the citizen's property for the nonpayment of taxes.[18] A statute which undertakes to make a tax deed conclusive evidence of a complete title and to preclude the owner of the original title from showing the invalidity of such deed is

not a law merely regulating evidence, but is unconstitutional as providing for a confiscation of property.[19] A legislative provision that a tax sale shall not be invalid because of irregularities with respect to the time of the sale does not, however, violate the due process guaranty or make the deed conclusive evidence of regularity in this respect.[1] A statute making a tax title valid and conclusive upon all grounds except the fact that the taxes were paid before sale or that the property was not subject to taxation was sustained as not violating the due process guaranty.[2] The legislature may enact a provision that the deed of a collector of taxes shall be prima facie evidence that the land has been sold for nonpayment of taxes at a time and in a manner authorized by law,[3] and it may provide that after two years, duly recorded conveyances on judicial sales shall be conclusive evidence that the sale and all proceedings prior thereto were regular.[4] A rebuttable presumption that gifts made a period of two years prior to death are made in contemplation thereof for the purpose of evasion of the succession or inheritance tax is valid.[5] But a conclusive presumption to this effect is a violation of the guaranty.[6]

§ 629. —

In Criminal Cases.—The legislature has power to enact provisions, even in criminal actions, that where certain facts have been proved, they shall be prima facie evidence of the main fact in question if the fact proved has

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[15] Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L.R.A. 176, 54 Am. St. Rep. 447.

[16] Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513, 1 L.R.A. 777, 12 Am. St. Rep. 663. See MECHANICS' LIENS [Also 18 R. C. L. p. 868].

[17] See TAXATION [Also 26 R. C. L. p. 1].

[18] Larson v. Dickey, 39 Neb. 463, 58 N. W. 167, 42 Am. St. Rep. 595. Annotation: 76 Am. Dec. 532.

[19] McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214; Maguiar v. Henry, 84 Ky. 1,

[4] Am. St. Rep. 182. Annotation: 4 Am. St. Rep. 185.

[1] McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214; Larson v. Dickey, 39 Neb. 463,

[58] N. W. 167, 42 Am. St. Rep. 595. Annotation: 5 A.L.R. 164.

[2] Maxwell v. Page, 23 N. M. 356, 168 P. 492, 5 A.L.R. 155. Annotation: 5 A.L.R. 164.

[3] Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381.

[4] People v. Turner, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498.

[5] Heiner v. Donnan, 285 U. S. 312, 76 L. ed. 772, 52 S. Ct. 358.

[6] Handy v. Delaware Trust Co. 285 U. S. 352, 76 L. ed. 793, 52 S. Ct. 371; Heiner v. Donnan, 285 U. S. 312, 76 L. ed. 772, 52 S. Ct. 358 (conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death).

some fair relation to, or natural connection with, the main fact. There is no vested right to the rule of evidence that everyone shall be presumed innocent until proved guilty, which prevents the legislature from making the doing of certain acts prima facie proof of guilt or of some element of guilt.[7] Likewise, it has been held that the legislature may impose on one in whose possession papers used in playing policy are found the burden of showing that such possession was not with knowledge and in violation of a statute making it a penal offense.[8] Since payment of the special tax required by the Federal Government of one as a liquor dealer or possession of a government license to carry on business as such a dealer reasonably tends to show that the person making such payment or in possession of such a license or permit is engaged in the sale of liquor, the legislature may constitutionally provide that such payment or possession shall constitute prima facie evidence of violation of prohibitory liquor laws.[9]

It has well been said that presumptions of law are especially dangerous in the administration of criminal justice when used to control or impair the natural fundamental presumption of innocence, inasmuch as their effect is to give to evidence a technical probative force beyond that which it would naturally and ordinarily possess in producing conviction in the minds of the jury.[10] Hence, it is generally recognized that a law cannot constitutionally provide that certain facts shall be conclusive proof of guilt,[11] especially where this would amount to the giving of an artificial and evidentiary force to certain facts which otherwise would be wholly irrelevant and inconclusive.[12] Nor

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[7] Casey v. United States, 276 U. S. 413,

[72] L. ed. 632, 48 S. Ct. 373 (making the possession of a narcotic drug which does not bear the required stamps prima facie evidence of its purchase from other than the original stamped packages, contrary to the provisions of the statute); Yee Hem v. United States, 268 U. S. 178, 69 L. ed. 904, 45 S. Ct. 470 (presumption of unlawful im- portation of opium); Hawes v. Georgia, 258 U. S. 1, 66 L. ed. 431, 42 S. Ct. 204 (pre- sumption of guilty knowledge by the actual occupant of a farm from a finding upon the premises of apparatus for distilling pro- hibited intoxicating liquors, although, un- der the local law, a defendant in a crimi- nal case may not testify as a witness and husband and wife are not competent or compellable to give evidence in any criminal proceeding for or against each other); State v. Thomas, 144 Ala. 77, 40 So. 271, 2 L.R.A. (N.S.) 1011, 113 Am. St. Rep. 17, 6 Ann. Cas. 744; Wooten v. State, 24 Fla. 335, 5 So. 39,

[1] L.R.A. 819; Griffin v. State, 142 Ga. 636, 83 S. E. 540, L.R.A.1915C, 716, Ann. Cas. 1916C, 89; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L.R.A. 176, 54 Am. St. Rep. 447; State v.

Nossaman, 107 Kan. 715, 193 P. 347, 20 A.L.R. 921, writ of error dismissed in 258 U. S. 633, 66 L. ed. 802, 42 S. Ct. 314 (holding that a statutory provision making the possession of cigarettes and cigarette papers prima facie evidence of the selling and keeping for sale of the prohibited articles is not a denial of due process of law); State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Rob- ertson v. Lane) 126 Minn. 78, 147 N. W. 951, 52 L.R.A.(N.S.) 932, Ann. Cas. 1915D,

[549] (holding that the legislature may pro- vide that the reputation of a building as a house of ill fame shall be prima facie evi- dence as to its character and may create a presumption of knowledge on the part of all persons having property interest in the property in or about such house); People ex rel. Woronoff v. Mallon, 222 N. Y. 456, 119 N. E. 102, 4 A.L.R. 463. Annotation: 1 L.R.A.(N.S.) 626; L.R.A. 1915C, 719. The possession of more than one quart of liquor may be made prima facie evi- dence of intent to violate the statute against illegal sales. State v. Barrett, 138 N. C. 630, 50 S. E. 506, 1 L.R.A.(N.S.) 626.

[8] Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 S. Ct. 372, affirming 176 N. Y. 351, 68 N. E. 636, 63 L.R.A. 406, 98 Am. St. Rep. 675. See GAMING [Also 12 R. C. L. p. 704].

[9] Annotation: 51 A.L.R. 1165.

[10] Hammond v. State, 78 Ohio St. 15, 84 N. E. 416, 15 L.R.A.(N.S.) 906, 125 Am. St. Rep. 684, 14 Ann. Cas. 732.

[11] State v. Thomas, 144 Ala. 77, 40 So. 271,

[2] L.R.A.(N.S.) 1011, 113 Am. St. Rep. 17, 6 Ann. Cas. 744; Banks v. State, 124 Ga. 15,

[52] S. E. 74, 2 L.R.A.(N.S.) 1007; State v. Grimmett, 33 Idaho, 203, 193 P. 380, citing R. C. L.; Powers v. State, 204 Ind. 472, 184 N. E. 549, 86 A.L.R. 166; Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25, 62 N. E. 488,

[56] L.R.A. 468, 92 Am. St. Rep. 293; State v. Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L.R.A. 179; Hollins v. State, 128 Miss. 119, 90 So. 630, citing R. C. L.; Taylor v. Anderson, 40 Okla. 316, 137 P. 1183, 51 L.R.A.(N.S.) 731. Annotation: 51 A.L.R. 1156. See CRIMINAL LAW [Also 8 R. C. L. p. 38].

[12] Hammond v. State, 78 Ohio St. 15, 84 N. E. 416, 15 L.R.A.(N.S.) 906, 125 Am. St. Rep. 684, 14 Ann. Cas. 732. [12 Am. Jur.]—21 321

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would it be possible to uphold a law which would make 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 criminal cases, leaves a party a fair opportunity to make his defense and to submit all the facts to a jury, to be weighed by them, on evidence legitimately bearing on them, the constitutionality of the laws will be upheld.[13] The courts have held invalid statutes providing that on criminal prosecution for the illegal keeping of intoxicating liquors for sale, it shall not be necessary to prove actual sale; but a notorious character of the premises or notoriously bad or intemperate character of those frequenting them or the keeping of implements or appurtenances usually appertaining to liquor saloons shall be prima facie evidence of such illegal keeping.[14] A statute declaring that every insolvency of a bank shall be deemed fraudulent and

subject the directors to imprisonment unless they repel the presumption of

fraud by showing a fair and legal administration of the bank's affairs is unreasonable and arbitrary and violates the constitutional requirement of due

process.[15]

§ 630. —

Relation to Estoppel.—Statutes which make the specification of

weights in bills of lading issued by railroad companies for goods shipped

over their lines conclusive evidence of the correctness of such weights have

been held to be unconstitutional.[16] It is said that such laws amount to an arbitrary exercise of power and an attempt to deprive a person of his day in

court, thereby denying to him due process of law.[17] Where, however, the fixing of the amount of the weight or value of articles depends on elements of

estoppel, it seems that statutes may constitutionally create conclusive rules of

law limiting the right of parties to prove that such amounts were incorrect.[18]

For example, the courts have upheld statutes compelling fire insurance companies, in case of total loss, to pay the amount for which the property was insured, less depreciation between the time of issuing the policy and the time of

loss, holding that such a statute does not deprive the insurer of property without due process of law, because it leaves the parties to fix the valuation of the

property as they choose, merely making their action conclusive after they

voluntarily enter into it. The theory of this is that the insurers are left to fix

the valuation of the property on such prudence and inquiry as they choose and

that the statute merely ascribes an estoppel after this has been done.[19] On

similar grounds the courts have sustained the constitutional validity of statutes making the acknowledgment of the receipt of property for transportation

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[13] State v. Thomas, 144 Ala. 77, 40 So. 271,

[2] L.R.A.(N.S.) 1011, 113 Am. St. Rep. 17,

[6] Ann. Cas. 744; Banks v. State, 124 Ga. 15,

[52] S. E. 74, 2 L.R.A.(N.S.) 1007; State v. Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L.R.A. 179; Re Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A.(N.S.) 232.

[14] State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26. Annotation: 43 Am. Rep. 29. See INTOXICATING LIQUORS [Also 15 R. C. L. p. 239].

[15] Manley v. Georgia, 279 U. S. 1, 73 L. ed. 575, 49 S. Ct. 215; People v. Mancuso, 255 N. Y. 463, 175 N. E. 177, 76 A.L.R. 514. Annotation: 76 A.L.R. 530.

[16] Shellabarger Elevator Co. v. Illinois C. R. Co. 278 Ill. 333, 116 N. E. 170, L.R.A.1917E, 1011; Missouri, K. & T. R. Co. v. Simonson,

[64] Kan. 802, 68 P. 653, 57 L.R.A. 765, 91 Am. St. Rep. 248; Taylor v. Anderson, 40 Okla. 316, 137 P. 1183, 51 L.R.A.(N.S.) 731. Annotation: 51 L.R.A.(N.S.) 731; L.R.A. 1917E, 1022.

[17] Vega S. S. Co. v. Consolidated Elevator Co. 75 Minn. 308, 77 N. W. 973, 43 L.R.A. 843, 74 Am. St. Rep. 484. Annotation: 74 Am. St. Rep. 488.

[18] See CARRIERS, Vol. 9, p. 675, §§ 417 et seq.

[19] Orient Ins. Co. v. Daggs, 172 U. S. 557,

[43] L. ed. 552, 19 S. Ct. 281; Yazoo & M. Valley R. Co. v. Bent, 94 Miss. 681, 47 So. 805, 22 L.R.A. (N.S.) 821.

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contained in a bill of lading conclusive evidence of the fact so stated in favor of bona fide holders for value.[20]

§ 631. Compulsory Process upon Witnesses.—

Although hearings have been attacked on the ground of lack of compulsory process against witnesses, they have been sustained as due process even though the tribunal hearing the cause had no power to compel the attendance of witnesses.[21] At least, if there is nothing to show that the parties suffered from the failure to have compulsory process, a statute which fails to provide for such process may be sustained.[22]

§ 632. Fixing Burden of Proof.—

The burden of proof may be shifted, provided the statute is reasonable.1 The burden may be cast upon those seeking a reversal of the order of a commission of showing the order to be unreasonable or unlawful.[2] The burden of proving citizenship may be cast upon one claiming it.[3] For example, one claiming citizenship in justification or excuse of an act otherwise illegal may be called upon to prove his claim good.[4] The burden of proof in criminal prosecutions may be cast on a defendant after the state has proved enough to make it just for the defendant to have the burden of excuse or explanation,[5] at least where, on a balancing of convenience or of the opportunities for knowledge, the shifting of the burden will aid the accuser without subjecting the accused to hardship or oppression.[6] The burden of showing, in a proceeding to compel a railroad company to provide a station at a village on its line, that the establishment of a station there is unreasonable and unnecessary may be cast upon the railroad company by a statute without violating the due process of law guaranty.[7] The burden of proving facts peculiarly within the knowledge of an accused and hidden from discovery by the government violates no constitutional rights.[8] No constitutional right of the defendant is infringed by requiring him to prove contribu-

[20] Yazoo & M. Valley R. Co. v. Bent, 94 Miss. 681, 47 So. 805, 22 L.R.A.(N.S.) 821. Annotation: 22 L.R.A.(N.S.) 821.

[21] Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165, 32 S. Ct. 734. The immigration officer's lack of power to issue process to compel the attendance of witnesses does not render invalid, as denying due process of law, the proceedings had conformably to the Act of February 20, 1907 (34 Stat. at L. 898, Chap. 1134), as amended by the Act of March 26, 1910 (36 Stat. at L. 263, Chap. 128), resulting in the deportation of an alien found as an inmate of a house of prostitution within three years subsequent to her entry into the United States. Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165, 32 S. Ct. 734.

[22] Louisville & N. R. Co. v. Finn, 235 U. S. 601, 59 L. ed. 379, 35 S. Ct. 146. As to criminal proceedings, see CRIMINAL LAW.

[1] Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 S. Ct. 255, Ann. Cas. 1917D, 637; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 S. Ct. 20; Shellabarger Elevator Co. v. Illinois C. R. Co. 278 Ill. 333, 116 N. E. 170, L.R.A.1917E, 1011; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, Ann. Cas. 1917E, 803; Duggan v. Bay Street R. Co. 230 Mass. 370,

[119] N. E. 757, L.R.A.1918E, 680. Annotation: Ann. Cas. 1917E, 839. The attempt by the legislature to require a person libeled to prove malice in order to secure substantial damages, if he demands and secures a retraction, unconstitutionally abridges his privileges and immunities and takes away his constitutional remedy for injury to reputation. Byers v. Meridian Printing Co. 84 Ohio St. 408, 95 N. E. 917, 38 L.R.A.(N.S.) 913.

[2] United States v. Illinois C. R. Co. 291 U. S. 457, 78 L. ed. 909, 54 S. Ct. 471 (reconsideration of Interstate Commerce Commission ruling); Chicago, R. I. & P. R. Co. v. Nebraska State R. Commission, 85 Neb. 818,

[124] N. W. 477, 26 L.R.A.(N.S.) 444.

[3] Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 S. Ct. 1016.

[4] Morrison v. California, 291 U. S. 82, 78 L. ed. 664, 54 S. Ct. 281.

[5] People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L.R.A. 406, 98 Am. St. Rep. 675, affirmed in 192 U. S. 585, 48 L. ed. 575, 24 S. Ct. 372.

[6] Morrison v. California, 291 U. S. 82, 78 L. ed. 664, 54 S. Ct. 281 (California alien land law).

[7] Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 S. Ct. 396.

[8] Casey v. United States, 276 U. S. 413, 72 L. ed. 632, 48 S. Ct. 373. Making possession of a narcotic drug which does not bear the required stamps prima facie evidence of its purchase from other than the original stamped packages, contrary to the provisions of the statute, violates no constitutional right of one accused of violating the statute. Ibid.

tory negligence in actions for personal injuries or for causing death, since such requirement is a mere rule of procedure.[9]

3. THE TRIBUNAL

§ 633. Generally.—

Due process of law requires a hearing before a court or other tribunal having jurisdiction of the cause[10] either in equity or at common law.[11] The tribunal must be appointed by law and be governed by rules of law previously established.[12] The courts of one state cannot, without a violation of the due process clause, extend their authority beyond their jurisdiction so as to condemn the resident of another state when neither his person nor his property is within the jurisdiction of the court rendering the judgment.[13]

§ 634. Necessity of Judicial Tribunal.—

Under ordinary circumstances the constitutional guaranty as to due process of law implies a formal judicial proceeding. In fact, most of the definitions refer to judicial proceedings as an element of due process of law. Nevertheless, it is settled that such proceedings are not an indispensable requisite in all cases.[14] It is accordingly said

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[9] Duggan v. Bay State Street R. Co. 230 Mass. 370, 119 N. E. 757, L.R.A.1918E, 680.

[10] Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527; Wash- ington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535; Scott v. McNeal, 154 U. S. 34,

[38] L. ed. 896, 14 S. Ct. 1108; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; McDaniel v. McElvy, 91 Fla. 770, 108 So. 820, 51 A.L.R. 731; Frank v. State, 142 Ga. 741, 83 S. E. 645, L.R.A.1915D, 817, writ of error denied in 235 U. S. 694, 59 L. ed. 429, 35 S. Ct. 208; Chicago v. Cohn, 326 Ill. 372, 158 N. E. 118,

[55] A.L.R. 196; Thurman v. Chicago, M. & St. P. R. Co. 254 Mass. 569, 151 N. E. 63, 46 A.L.R. 563; McMaster v. Gould, 239 N. Y. 606, 147 N. E. 214, 40 A.L.R. 792; Muskogee Iron Works v. Bason, 176 Okla. 298, 55 P. (2d) 68, citing R. C. L.; J. B. Barnes Drill- ing Co. v. Phillips, 166 Okla. 154, 26 P. (2d) 766, citing R. C. L.; Hauschildt v. Collins,

[152] Okla. 193, 4 P. (2d) 99, citing R. C. L.; Oklahoma Gas & E. Co. v. Wilson & Co. 146 Okla. 272, 288 P. 316, citing R. C. L.; Satcher v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A. 1917C, 944, Ann. Cas. 1916A, 217, affirmed in

[243] U. S. 629, 61 L. ed. 937, 37 S. Ct. 475; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584.

[11] Montana Co. v. St. Louis Min. & Mill. Co. 152 U. S. 160, 38 L. ed. 398, 14 S. Ct. 506; Eikenbery v. Edwards, 67 Iowa, 619,

[25] N. W. 832, 56 Am. Rep. 360; Salt Creek Valley Turnp. Co. v. Parks, 50 Ohio St. 568,

[35] N. E. 304, 28 L.R.A. 769; Smith v. Speed,

[11] Okla. 95, 66 P. 511, 55 L.R.A. 402.

[12] The fact that the deputy commissioner is not bound by technical rules of proce- dure does not invalidate a proceeding to obtain an award of compensation under the Longshoremen's and Harbor Workers' Act, provided substantial rights of the parties are not infringed. Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285; Kil- bourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

[13] Riverside & D. River Cotton Mills v. Menefee, 237 U. S. 189, 59 L. ed. 910, 35 S. Ct. 579.

[14] Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 S. Ct. 789; Reetz v. Michigan, 188 U. S. 505,

[47] L. ed. 563, 23 S. Ct. 390; Palmer v. McMa- hon, 133 U. S. 660, 33 L. ed. 772, 10 S. Ct. 324; Davidson v. New Orleans, 96 U. S. 97,

[24] L. ed. 616; Den ex dem. Murray v. Ho- boken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372; State Sav. & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675, affirmed in 238 U. S. 611,

[59] L. ed. 1488, 35 S. Ct. 792; Water Comrs. v. Johnson, 86 Conn. 151, 84 A. 727, 41 L.R.A.(N.S.) 1024; Klafter v. State Ex- aminers, 259 Ill. 15, 102 N. E. 193, 46 L.R.A.(N.S.) 532, Ann. Cas. 1914B, 1221; Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65; Atty. Gen. v. Jochim, 99 Mich. 358, 58 N. W. 611, 23 L.R.A. 699, 41 Am. St. Rep. 606; Lovell v. Seeback, 45 Minn. 465,

[48] N. W. 23, 11 L.R.A. 667; Horton v. Clark,

[316] Mo. 770, 293 S. W. 362, citing R. C. L.; State ex rel. Hurwitz v. North, 304 Mo. 607,

[264] S. W. 678 (affirmed in 271 U. S. 40, 70 L. ed. 818, 46 S. Ct. 384); Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894; Chauvin v. Valiton, 8 Mont. 451, 20 P. 658,

[3] L.R.A. 194; Vineyard Land & Stock Co. v. District Ct. 42 Nev. 1, 171 P. 166, citing R. C. L.; Lacey v. Lemmons, 22 N. M. 54, 159 P. 949, L.R.A.1917A, 1185; Neer v. State Live Stock Sanitary Bd. 40 N. D. 340, 168 N. W. 601, citing R. C. L.; Bowman v. Vir- ginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; Carnegie Natural Gas Co. v. Swiger, 72 W. Va. 557, 79 S. E. 3, 46 L.R.A.(N.S.) 1073; State v. Sponaugle,

[45] W. Va. 415, 32 S. E. 283, 43 L.R.A. 727; Burdett v. Allen, 35 W. Va. 347, 13 S. E. 1012, 14 L.R.A. 337; Ekern v. McGovern,

[154] Wis. 157, 142 N. W. 595, 46 L.R.A.(N.S.) 796. Annotation: 2 L.R.A. 655; 11 L.R.A. 224. Although the phrase "due process of law" does not necessarily mean a judicial pro- ceeding, neither does it necessarily mean a special tribunal for the express purpose of hearing the merits of a particular contro- versy, and where ample notice is provided, giving an owner opportunity to have a hearing in a court of competent jurisdic- tion before his property is affected, he is afforded due process of law. Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A. (N.S.) 1080, Ann. Cas. 1913A, 406.

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that the term "proceeding" means such an exercise of the powers of government as the settled maxims of the law permit and sanction under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.[15] Questions may arise which may be best determined otherwise than by ordinary process of judicial investigation without violating the constitutional provision as to due process of law. An illustration is afforded in that class of cases which relates to the determination by scientific methods of the purity of foods offered for public sale.[16] A hearing of a judicial nature is not essential where the state is engaged in the exercise of the police power,[17] such as the power of taxation18 or eminent domain.[19] Judicial proceedings are not necessary to the revocation of a license to practice medicine1 or the license of an architect.[2]

On certain other matters the tribunal may be a board or commission, such as a drainage board,[3] a board of park commissioners,[4] a board of tax appeals,[5] a board of dental examiners,[6] or a bank commissioner.[7] It may be an executive8 or an administrative officer,[9] such as the United States Secretary of Labor,[10] the Federal Secretary of Agriculture,[11] a notary public,[12] or an administrative tribunal.[13] Administrative process, also, especially when sanctioned by long usage, is as much due process of law as judicial process.[14]

A hearing before such boards is sufficient to constitute due process.[15] The

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[15] State Sav. & Commercial Bank v. An- derson, 165 Cal. 437, 132 P. 755, L.R.A. 1915E, 675, affirmed in 238 U. S. 611,

[59] L. ed. 1488, 35 S. Ct. 792; Wulzen v. San Francisco, 101 Cal. 15, 35 P. 353, 40 Am. St. Rep. 17; Water Comrs. v. Johnson, 86 Conn. 151, 84 A. 727, 41 L.R.A. (N.S.) 1024; Chicago, B. & Q. R.

Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557; State v. Cream- er, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A. (N.S.) 694; Byers v. Meridian Printing Co.

[84] Ohio St. 408, 95 N. E. 917, 38 L.R.A.(N.S.) 913; Anderson v. State, 8 Okla. Crim. Rep. 90, 126 P. 840, Ann. Cas. 1914C, 314; Gulf, C. & S. F. R. Co. v. Ellis (Tex.) 18 S. W. 723, 17 L.R.A. 286; State v. Stimpson, 78 Vt. 124, 62 A. 14, 1 L.R.A.(N.S.) 1153, 6 Ann. Cas. 639.

[16] Windsor v. State, 103 Md. 611, 64 A. 288,

[12] L.R.A.(N.S.) 869; Deems v. Baltimore, 80 Md. 164, 30 A. 648, 26 L.R.A. 541, 45 Am. St. Rep. 339; People v. Vandecarr, 175 N. Y. 440, 67 N. E. 913, 108 Am. St. Rep. 781, affirmed in 199 U. S. 552, 50 L. ed. 305, 26 S. Ct. 144. See HEALTH [Also 12 R. C. L. p. 1263].

[17] Harmon v. Bolley, 187 Ind. 511, 120 N. E. 33, 2 A.L.R. 609.

[18] Lacey v. Lemmons, 22 N. M. 54, 159 P. 949, L.R.A.1917A, 1185. See infra, §§ 640 et seq. See generally TAXATION [Also 26 R. C. L. p. 1].

[19] See EMINENT DOMAIN [Also 10 R. C. L. p. 1].

[1] State Medical Bd. v. McCrary, 95 Ark. 511, 130 S. W. 544, 30 L.R.A.(N.S.) 783, Ann. Cas. 1912A, 631.

[2] Klafter v. State Examiners, 259 Ill. 15,

[102] N. E. 193, 46 L.R.A.(N.S.) 532, Ann. Cas. 1914B, 1221.

[3] Soliah v. Heskin, 222 U. S. 522, 56 L. ed. 294, 32 S. Ct. 103.

[4] Ohio ex rel. Bryant v. Akron Metropoli- tan Park Dist. 281 U. S. 74, 74 L. ed. 710, 50 S. Ct. 228, 66 A.L.R. 1460.

[5] Goldsmith v. United States Bd. of Tax Appeals, 270 U. S. 117, 70 L. ed. 494, 46 S. Ct. 215.

[6] State ex rel. Williams v. Whitman, 116 Fla. 196, 156 So. 705, 95 A.L.R. 1416.

[7] Title Guaranty & S. Co. v. Idaho, 240 U. S. 136, 60 L. ed. 566, 36 S. Ct. 345.

[8] Mahler v. Eby, 264 U. S. 32, 65 L. ed. 549, 44 S. Ct. 283; United States ex rel. Turner v. Williams, 194 U. S. 279, 48 L. ed. 979, 24 S. Ct. 719; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 S. Ct. 611; Lee Lung v. Patterson, 186 U. S. 168, 46 L. ed. 1108, 22 S. Ct. 795; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905.

[9] Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285.

[10] Lloyd Sabaudo Societa Anonima v. Elting, 287 U. S. 329, 77 L. ed. 341, 53 S. Ct. 167.

[11] P. F. Petersen Baking Co. v. Bryan, 290 U. S. 570, 78 L. ed. 505, 54 S. Ct. 277, 90 A.L.R. 1285.

[12] Bevan v. Krieger, 289 U. S. 459, 77 L. ed. 1316, 53 S. Ct. 661.

[13] National Labor Relations Bd. v. Jones & Laughlin Steel Corp. 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615, 108 A.L.R. 1352 (National Labor Relations Board); Flory v. Smith,

[145] Va. 164, 134 S. E. 360, 48 A.L.R. 654.

[14] Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 S. Ct. 789; Wulzen v. San Francisco, 101 Cal. 15, 35 P. 353, 40 Am. St. Rep. 17; Atty. Gen. v. Jochim, 99 Mich. 358, 58 N. W. 611, 23 L.R.A. 699, 41 Am. St. Rep. 606; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682.

[15] Elk River Coal & Lumber Co. v. Funk, — Iowa, —, 271 N. W. 204, 110 A.L.R. 1415,

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limitations of authority in such proceedings, however, are soon reached and cannot be allowed to outrun the immediate emergency or the necessity that calls for the exercise of such extraordinary powers. Accordingly, it has been held that a deprivation of property upon an ex parte proceeding of a board of commissioners is without authority of law where the actual conditions have no real existence which warrant such a proceeding under the statute, and that the fact that the board acts in good faith is no justification where the condi-

tions do not actually exist.[16] It is clear that administrative officers, when executing the provisions of a statute involving the liberty of persons, may not disregard the fundamental principles that inhere in due process of law in its constitutional sense.[17]

Legislative action within the limits of legislative authority and conformably to constitutional safeguards and established principles may amount to due process of law and the law of the land.[18] For a reason analogous to that which applies to encroachments of the administrative or executive branch of government upon matters properly within the scope of judicial inquiry, any invasion by the legislative branch of government upon the judicial province is a denial of due process of law.[19]

Due process of law may be afforded by the action of social and benevolent organizations under an agreement between the members by which they voluntarily submit themselves to the jurisdiction of such bodies.[20] The enforcement of an order of the board of regents of a state university prescribing instruction in military science and tactics as a required course does not deprive any person of liberty without due process of law in violation of the Fourteenth Amendment.[21]

§ 635. Requirement of Impartiality.—

The tribunal must be an impartial one.[22] A statute which compels a litigant to submit his controversy to a tribunal of which his adversary is a member does not afford due process of law.[23]

An accused is unconstitutionally deprived of due process of law if his liberty and property are subjected to the judgment of a court the judge of which has a direct and substantial pecuniary interest in reaching a conclusion against him.[24] This has been held with reference to a trial before a mayor the sole source of whose costs will be the fine imposed upon the accused, unless the costs are so small that they may properly be ignored as within the maxim "de minimus non curat lex."[25] The possibility of a mayor receiving $[12] as costs for conviction of one accused of violating the liquor law, where his emoluments from such source amount to about $[100] per month in addition to his salary, is not an interest so minute, remote, trifling, or insignificant that his

[16] Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854,

[32] Am. St. Rep. 113.

[17] Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 S. Ct. 611; People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223.

[18] Water Comrs. v. Johnson, 86 Conn. 151,

[84] A. 727, 41 L.R.A.(N.S.) 1024.

[19] Missouri, K. & T. R. Co. v. Simonson,

[64] Kan. 802, 68 P. 653, 57 L.R.A. 765, 91 Am. St. Rep. 248. Annotation: 91 Am. St. Rep. 254.

[20] Landis v. Campbell, 79 Mo. 433, 49 Am. Rep. 239. See ASSOCIATIONS AND CLUBS, Vol. 4, p. 455; MUTUAL BENEFIT SOCIETIES [Also 19 R. C. L. p. 1175].

[21] Hamilton v. University of California,

[293] U. S. 245, 79 L. ed. 343, 55 S. Ct. 197, re- hearing denied in 293 U. S. 633, 79 L. ed. 717,

[55] S. Ct. 345.

[22] Federal Constr. Co. v. Curd, 179 Cal. 489, 177 P. 469, 2 A.L.R. 1202; Stahl v. Ring- gold County, 187 Iowa, 1342, 175 N. W. 772,

[11] A.L.R. 185; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584.

[23] Union Drainage Dist. v. Smith, 233 Ill. 417, 84 N. E. 376, 16 L.R.A.(N.S.) 292.

[24] Tumey v. Ohio, 273 U. S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243. Annotation: 50 A.L.R. 1256.

[25] Tumey v. Ohio, 273 U. S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243.

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sitting as judge in the case will not deprive the accused of due process of law.[1]

But a notary entitled to a fee of [25] cents per hundred words for taking and certifying a deposition and who, if he takes the testimony stenographically, by custom receives compensation at a somewhat less rate for additional copies has no such pecuniary interest in compelling testimony as will disqualify him and deprive his ruling upon a witness's claim of privilege of the impartiality required for due process, particularly where provision is made for court review of his action in committing a witness for failure to answer.[2]

There is a difference of opinion as to the qualifications of a property owner in a special assessment district to sit as a member of the body charged with the making or correction of assessments. The majority hold that the property owner is not disqualified so as to render his action void as not constituting due process of law.[3] A contrary view, however, has been taken.[4] But the disqualification of tribunals may be waived by failure to object.[5]

The lack of a disinterested tribunal has not always prevented a hearing.

A judge of a court cannot be deprived of an allowance made to him by statute simply because there is no court which would be regarded as disinterested;

to allow him thus to be deprived of the allowance would violate the due process of law guaranty.[6]

4. APPEAL AND REHEARING

§ 636. Generally.—

Generally speaking, due process is satisfied by one hearing which furnishes a full and fair opportunity within the rules hereinbefore discussed.[7] No rehearing8 or review is necessary.[9]

§ 637. Rehearings.—

A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital under the guaranty of due process of law. Rehearings or new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment satisfies the demand of the Federal Constitution in this respect.[10]

§ 638. Appeal or Review.—

The right of appeal or review is not essential to due process, provided due process has already been accorded in the tribunal

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[1] Ibid.

[2] Bevan v. Krieger, 289 U. S. 459, 77 L. ed. 1316, 53 S. Ct. 661.

[3] Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 S. Ct. 88; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 S. Ct. 825; Federal Constr. Co. v. Curd, 179 Cal. 489, 177 P. 469,

[2] A.L.R. 1202. Annotation: 2 A.L.R. 1207.

[4] Union Drainage Dist. v. Smith, 233 Ill. 417, 84 N. E. 376, 16 L.R.A.(N.S.) 292. Annotation: 2 A.L.R. 1208.

[5] Union Drainage Dist. v. Smith, 233 Ill. 417, 84 N. E. 376, 16 L.R.A.(N.S.) 292. Annotation: 2 A.L.R. 1208.

[6] McCoy v. Handlin, 35 S. D. 487, 153 N. W. 361, L.R.A.1915E, 858, Ann. Cas. 1917A, 1046.

[7] Western Life Indem. Co. v. Rupp,

[235] U. S. 261, 59 L. ed. 220, 35 S. Ct. 37. No infringement of the due process of law clause of the Fourteenth Amendment to the Federal Constitution results from the ruling of a state court that the de- fendant, by permitting a judgment in his favor to be reviewed on the merits at the instance of the plaintiff in the action with- out interposing a cross appeal to call in question the decision of the trial court overruling a motion to quash the return upon the summons, waived its objection to the jurisdiction of the court over it and could not have any benefit of that objection upon a second appeal by it from a judg- ment for the plaintiff. Ibid. See supra, §§ 607 et seq.

[8] See infra, § 637.

[9] See infra, § 638.

[10] Louisville & N. R. Co. v. Higdon, 234 U. S. 592, 58 L. ed. 1484, 34 S. Ct. 948; United States v. Heinze, 218 U. S. 532, 54 L. ed. 1139, 31 S. Ct. 98, 21 Ann. Cas. 884; James v. Appel, 192 U. S. 129, 48 L. ed. 377,

[24] S. Ct. 222; Fallbrook Irrig. Dist. v. Brad- ley, 164 U. S. 112, 41 L. ed. 369, 17 S. Ct. 56; Pittsburg C. C. & St. L. R. Co. v. Backus,

[154] U. S. 421, 38 L. ed. 1031, 14 S. Ct. 1114; The Francis Wright (Duncan v. The Fran- cis Wright) 105 U. S. 381, 26 L. ed. 1100; Saylor v. Duel, 236 Ill. 429, 86 N. E. 119, 19 L.R.A.(N.S.) 377; Dillon v. Whitley (Tex. Civ. App.) 210 S. W. 329, citing R. C. L.; Putnam v. Ford, 155 Va. 625, 155 S. E. 823,

[71] A.L.R. 1217.

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of first instance.[11] Nor is appeal necessary for the purpose of securing a second trial upon the merits.[12] An appeal is not necessary in a juvenile commitment proceeding,[13] or even in a criminal case,[14] however grave may be the nature of the case.[15] The judgment of an appellate court below the court of last resort may be made final.[16]

Limitations of the matters that may be considered in review proceedings17 or upon the right to reverse18 do not violate the guaranty even in a criminal case.[19] Limitations as to appeals may be imposed with respect to the time within which they may be perfected20 and with respect to the amount involved.[1] Various other limitations upon the appellate procedure have been held not to violate the guaranty of due process. For example, a state constitutional provision that no law shall be held unconstitutional by the state supreme court without a concurrence of at least all except one of the judges does not violate the due process guaranty.[2] The state may prescribe rules as to appellate procedure.[3]

The rules governing appeals must operate uniformly. A party otherwise entitled to appeal who, by the construction of a statute, is prevented from doing so when such right is given to all others in similar cases is thus deprived of the right of due process of law.[4]

There is no denial of due process of law under the Federal Constitution

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[11] District of Columbia v. Clawans, 300 U. S. 617, 81 L. ed. 843, 57 S. Ct. 660; Baldwin v. Iowa State Traveling Men's Asso. 283 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517; Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. 281 U. S. 74, 74 L. ed. 710, 50 S. Ct. 228, 66 A.L.R. 1460; Luckenbach S. S. Co. v. United States, 272 U. S. 533, 71 L. ed. 394, 47 S. Ct. 186; Lott v. Pittman, 243 U. S. 588, 61 L. ed. 915, 37 S. Ct. 473; Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 S. Ct. 406, Ann. Cas. 1913D, 936; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 S. Ct. 390; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 S. Ct. 57; Beck v. Missouri Valley Drainage Dist. (C. C. A. 8th) 46 F. (2d) 632, 84 A.L.R. 1039, writ of certiorari denied in 284 U. S. 618, 76 L. ed. 527, 52 S. Ct. 7; Re Sharp, 15 Idaho, 120, 96 P. 563, 18 L.R.A. (N.S.) 886; Chicago v. Cohn, 326 Ill. 372, 158 N. E. 118, 55 A.L.R. 196; Wissenburg v. Bradley, 209 Iowa, 813, 229 N. W. 205, 67 A.L.R. 1075; Ross v. Wright County, 128 Iowa, 427, 104 N. W. 506, 1 L.R.A.(N.S.) 431; Insurance Co. of N. A. v. Schall, 96 Md. 225, 53 A. 925, 61 L.R.A. 300; Re Third Street, 177 Minn. 146, 225 N. W. 86, 74 A.L.R. 561; Wilson v. Kryger, 26 N. D. 77, 143 N. W. 764, 51 L.R.A.(N.S.) 760; Macartney v. Shipherd, 60 Or. 133, 117 P. 814, Ann. Cas. 1913D, 1257; Putnam v. Ford, 155 Va. 625, 155 S. E. 823, 71 A.L.R. 1217. Annotation: 19 L.R.A. (N.S.) 377. A statute denying an appeal in proceedings to contest a local option election does not unconstitutionally deprive contestants of property without due process of law. Saylor v. Duel, 236 Ill. 429, 86 N. E. 119, 19 L.R.A.(N.S.) 377.

[12] Sullivan v. Haug, 82 Mich. 548, 46 N. W. 795, 10 L.R.A. 263.

[13] Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 52, 87 A.L.R. 1407.

[14] Andrews v. Swartz, 156 U. S. 272, 39 L. ed. 422, 15 S. Ct. 389; McKane v. Durston, 153 U. S. 684, 38 L. ed. 867, 14 S. Ct. 913. Whether an appeal in a criminal case should be allowed and, if so,

under what circumstances or on what conditions are matters for each state to determine for itself. McKane v. Durston, 153 U. S. 684, 38 L. ed. 867, 14 S. Ct. 913.

[15] Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 S. Ct. 390; Murphy v. Massachusetts, 177 U. S. 155, 44 L. ed. 711, 20 S. Ct. 639; McKane v. Durston, 153 U. S. 684, 38 L. ed. 867, 14 S. Ct. 913.

[16] Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L.R.A. 33.

[17] Re Francis Wright (Duncan v. The Francis Wright) 105 U. S. 381, 26 L. ed. 1100; Beck v. Missouri Valley Drainage Dist. (C. C. A. 8th) 46 F. (2d) 632, 84 A.L.R. 1039, writ of certiorari denied in 284 U. S. 618, 76 L. ed. 527, 52 S. Ct. 7; Re Third Street, 177 Minn. 146, 225 N. W. 86, 74 A.L.R. 561; State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L.R.A. 394.

[18] Johnson v. State, 42 Tex. Crim. Rep. 87, 58 S. W. 51, 51 L.R.A. 272.

[19] Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 S. Ct. 304; Ryan v. State, 81 Tex. Crim. Rep. 632, 198 S. W. 582, citing R. C. L.

[20] Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 S. Ct. 234.

[1] Duncan v. Baltimore & O. R. Co. 68 W. Va. 293, 69 S. E. 1004, Ann. Cas. 1912B, 272. Annotation: Ann. Cas. 1912B, 275.

[2] Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. 281 U. S. 74, 74 L. ed. 710, 50 S. Ct. 228, 66 A.L.R. 1460; Lott v. Pittman, 243 U. S. 588, 61 L. ed. 915, 37 S. Ct. 473.

[3] State ex rel. Cartmel v. Ætna Casualty & Surety Co. 84 Fla. 123, 92 So. 871, 24 A.L.R. 1262.

[4] State ex rel. J. Hahn Bakery Co. v. Anderson, 269 Mo. 381, 190 S. W. 857, L.R.A. 1917C, 130.

where a state court dismisses a writ of error taken in a criminal case because of the escape of the accused and the fact that he is at large.[5]

Appeals may be granted without violating the due process guaranty. No constitutional provision is infringed by a statute giving a further appeal from a judgment in a given tribunal which would otherwise be final.[6] An appeal may, of course, be waived.[7]

§ 639. Judgments and Orders of Administrative Boards or Commissions.— The legislature may, consistently with due process, provide that a hearing before an administrative tribunal shall be final and conclusive.[8]

Judicial review of the issues before the Federal Secretary of Labor in determining whether a fine should be imposed for violating the immigration laws is not essential to due process.[9] There must, however, be a fair and impartial tribunal.[10] When review is granted, the scope may be limited,[11] although there is some dispute as to this.[12]

It should be borne in mind that due process of law involves in many instances the right to have a matter in dispute passed upon by a judicial tribunal. Hence, an appeal to a court from the action of a nonjudicial body may be implied in the requirements as to due process of law. A statute providing for the calling in and payment of state bonds and authorizing the state treasurer to pay valid bonds only, thereby imposing upon him the duty of ascertaining the validity of all bonds presented for payment, is not unconstitutional as depriving a bondholder of his property without due process of law where provision is made for an appeal to the courts from the adverse decision of the state treasurer.[13] Furthermore, where a right to a jury trial exists, the guaranty may include the right to an appeal to a court of record conducting such trials from the judgment of a magistrate's court entered without any jury trial.[14] Where the right to appeal in such case exists, an act imposing a double penalty upon one who appeals to a court in order to enjoy his right to a jury trial in case of a conviction on appeal cannot be given effect.[15] The fact that the provision for court review of an administrative order

is by certiorari within the discretion of the court does not infringe the constitutional rights to have a judicial review of the order.[16]

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[5] Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 S. Ct. 525.

[6] Essex Public Road Bd. v. Skinkle, 140 U. S. 334, 35 L. ed. 446, 11 S. Ct. 790.

[7] Western Life Indem. Co. v. Rupp, 235 U. S. 261, 59 L. ed. 220, 35 S. Ct. 37.

[8] Beck v. Missouri Valley Drainage Dist. (C. C. A. 8th) 46 F. (2d) 632, 84 A.L.R. 1039, writ of certiorari denied in 284 U. S. 618, 76 L. ed. 527, 52 S. Ct. 7; Ross v. Wright County, 128 Iowa, 427, 104 N. W. 506, 1 L.R.A.(N.S.) 431; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475.

[9] Lloyd Sabaudo Societa Anonima v. Elting, 287 U. S. 329, 77 L. ed. 341, 53 S. Ct. 167.

[10] Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 S. Ct. 48. The failure of the Kentucky Act of March 10, 1900, to provide for an appeal to any court from the final order of the state railroad commission fixing maximum freight rates under the authority of that statute or for a judicial review of the reasonableness of the prescribed rates before they become effective does not invalidate such statute as operating to deprive the carrier of its property without due process of law or to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Federal Constitution where the statute does not, except by its separable penal provisions, deny the carrier the right of access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry. Ibid.

[11] Nega v. Chicago R. Co. 317 Ill. 482, 148 N. E. 250, 39 A.L.R. 1057. Annotation: 39 A.L.R. 1064.

[12] Annotation: 39 A.L.R. 1064.

[13] Tipton v. Smyth, 78 Ark. 392, 94 S. W. 678, 7 L.R.A.(N.S.) 714, 115 Am. St. Rep. 44, 8 Ann. Cas. 521.

[14] Brown v. Epps, 91 Va. 726, 21 S. E. 119, 27 L.R.A. 676. See generally JURY [Also 16 R. C. L. p. 209, § 26].

[15] State v. Gurney, 37 Me. 156, 58 Am. Dec. 782.

[16] Lehigh Valley R. Co. v. Public Utility Comrs. 278 U. S. 24, 73 L. ed. 161, 49 S. Ct. 59, 62 A.L.R. 805.

§ [640] CONSTITUTIONAL LAW [12] Am. Jur.

5. TAX MATTERS

§ 640. Generally.—

A discussion of the notice and hearing required by due process in order to give a proper perspective of the demands included in the constitutional provisions entails some treatment of the procedure involved in tax cases necessary to fulfil the requirements of the Constitution. The questions involved are primarily questions of taxation and therefore are appropriately discussed in detail elsewhere in this work.17 In the present discussion it is proposed to sketch out only the broad essentials and distinctive features of notice and hearing as they relate to tax matters, so that the reader may contemplate a more or less complete picture of this question.

In an early case the United States Supreme Court pointed out the distinction between ordinary hearings involving life, liberty, or property and matters relating to the enforcement of the taxing measures of a state. The court stated that where life and liberty, or even the title or possession of property, are involved, due process requires that there be a regular course of judicial proceeding, which implies that the party to be affected shall have notice and an opportunity to be heard. Where the taking of the property is in the enforcement of a tax, however, the proceeding is necessarily less

formal, and whether notice to the property-owner taxpayer is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable.[18] Due process of law in tax proceedings is afforded litigants if they have an opportunity to question the validity or the amount of an assessment or charge before the amount is determined or to enforce its collection at any subsequent proceedings or at any time before final judgment is entered.[19] It has been stated generally that the general system of procedure for the levy and collection of taxes which is established in this country is, within the meaning of the Constitution, due process of law.[20]

The constitutional guaranty against the taking of property without due process of law has to do, in taxation proceedings, with the essentials of taxation only.[1] The legislature may provide by law what shall be essential and what not essential in taxation proceedings, subject only to the fundamental principles that the taxpayer must have an opportunity to be heard as to the amount of the charge laid upon his property,[2] as to whether the purpose of the tax is a permissible one, and as to the lawfulness and proper apportionment of the tax against his property.[3] Generally speaking, all other matters may be regulated according to the legislative will.[4]

It has been stated by the United States Supreme Court that the right to notice and hearing does not extend to taxes of every description, but only to such as involve the exercise of quasi-judicial power in the determination of amount.[5] This amounts to the same thing as saying that notice and an oppor-

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[17] See TAXATION [Also 26 R. C. L. p. 345, §§ 302 et seq.].

[18] Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 S. Ct. 663.

[19] Gallup v. Schmidt, 183 U. S. 300, 46 L. ed. 207, 22 S. Ct. 162. **Under the Georgia Tax Laws**, due process of law requires that after such notice as may be appropriate, the taxpayer have an opportunity to be heard as to the validity of the tax and the amount thereof by giving him the right to appear for that purpose at some stage of the proceedings. Turner v. Wade, 254 U. S. 64, 65 L. ed. 134, 41 S. Ct. 27.

[20] Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658.

[1] Maxwell v. Page, 23 N. M. 356, 168 P. 492, 5 A.L.R. 155.

[2] Ibid.

[3] Garden of Eden Drainage Dist. v. Bartlett Trust Co. 330 Mo. 554, 50 S. W. (2d) 627, 84 A.L.R. 1078.

[4] Maxwell v. Page, 23 N. M. 356, 168 P. 492, 5 A.L.R. 155.

[5] Carson v. Brockland Sewerage Comrs. 182 U. S. 398, 45 L. ed. 1151, 21 S. Ct. 860.

tunity to be heard are necessary to due process of law under statutes imposing a tax in cases other than those in which the tax may be computed by a simple mechanical calculation.[6] Therefore, in the case of an excise not dependent upon the valuation of property and in which there is no discretion as to the amount, no notice of the assessment or levy of the tax is necessary.[7] The same is true of poll taxes and other specific taxes on persons and things.[8] Where, however, a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle is involved and a hearing at some stage of the proceedings is essential.[9]

With regard to the notice to be employed in tax proceedings, it is settled that the process of taxation does not require the same kind of notice as is required in a suit at law. Such notice involves no violation of due process of law when it is executed according to customary forms and established usages.[10] In cases of this type due process of law does not imply or require the right to such notice as is considered essential to the validity of the proceedings and judgments of judicial tribunals11 or to the exercise of the right of eminent domain, it generally being regarded as sufficient if the taxpayer has an opportunity to contest the validity of the assessment or amount of the tax in proceedings for its collection.[12] Not only is notice of each step in the tax proceedings not necessary,[13] but opportunity to question the validity or amount of a tax either before the amount is determined or in subsequent proceedings for its collection is deemed sufficient to meet the requirements of due process of law.[14] Putting the rule in other words, the owner, if he has notice and opportunity to be heard either before or after the tax lien is fixed upon his property, has due process of law.[15]

A state statute which authorizes the assessment and collection of a tax and provides for due notice to all persons interested and a proper mode of contesting the tax in a court does not deprive persons of property without due process of law.[16] Whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether for the whole state or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary course of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, due process of law is afforded.[17] The rules have been carried to a point whereby it is held that if a taxpayer is given an opportunity to test the validity of a tax at any time before it is made final, whether

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[6] Turner v. Wade, 254 U. S. 64, 65 L. ed. 134, 41 S. Ct. 27.

[7] Hodge v. Muscatine County, 196 U. S. 276, 49 L. ed. 477, 25 S. Ct. 237, affirming 121 Iowa, 482, 96 N. W. 968, 67 L.R.A. 624, 104 Am. St. Rep. 304; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 S. Ct. 825; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 S. Ct. 663.

[8] Lent v. Tillson, 140 U. S. 316, 35 L. ed. 418, 11 S. Ct. 825; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 S. Ct. 663.

[9] See infra, § 641.

[10] Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658.

[11] Kentucky R. Tax Cases (Cincinnati, N. O. & T. P. R. Co. v. Kentucky) 115 U. S. 321, 29 L. ed. 414, 6 S. Ct. 57.

[12] State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31.

[13] Maxwell v. Page, 23 N. M. 356, 168 P. 492, 5 A.L.R. 155.

[14] Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 S. Ct. 83.

[15] Maxwell v. Page, 23 N. M. 356, 168 P. 492, 5 A.L.R. 155.

[16] Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 S. Ct. 825.

[17] Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 S. Ct. 56; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

the proceedings for a review take place before a board having a quasi-judicial character or before a tribunal provided by the state for the purpose of determining such questions, due process of law is not denied.[18]

§ 641. Levy according to Value.—In cases in which a tax is levied on property, not specifically, but according to its value, to be ascertained by assessors upon such evidence as they may obtain, in estimating the value, such officers act judicially. In most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard gives all the notice required, and the proceeding on which the valuation is determined, though it may be followed, if the tax is not paid by a sale of the delinquent's property, is due process of law.[19] In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and there be corrected if erroneous or set aside if invalid; or objections to the validity of amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law.[20]

It is not essential to due process of law that the taxpayer be given notice and hearing before his property is originally assessed.[1] Notice of the assessment and opportunity to contest it therefore need not be given in advance of the assessment.[2] It is sufficient if the taxpayer is granted the right to be heard on the assessment before the valuation is finally determined.[3]

Notice to all property holders of the time and place at which an assessment is to be made is all that "due process" requires.[4] The notice is sufficient where the statute names the time and place for the meeting of the assessing board.[5]

Thus, a statute for taxation of shares of stock is not wanting in due process of law because it does not contemplate any personal notice to the shareholder, if it defines the time when the assessment shall be made by an officer and specifically directs him to hear any stockholder who may desire to be heard.[6]

Notice by publication is likewise sufficient to constitute due process of law in tax assessments, if the statute prescribes the court in which and the time at which the various steps for collection shall be taken, in which there is opportunity to appear and defend.[7]

Although the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard

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[18] Hodge v. Muscatine County, 196 U. S. 276, 49 L. ed. 477, 25 S. Ct. 237.

[19] Clement Nat. Bank v. Vermont, 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 S. Ct. 663. The lack of any assessment other than that made by the statute itself or of any other notice to the depositor than that thus given by law does not invalidate, as denying due process of law, a semiannual tax laid at a specified rate upon interest-bearing deposits in national banks, where the tax is recoverable by suit in which the depositor will have full opportunity to resist any illegal demand.

[20] Davidson v. New Orleans, 96 U. S. 97,

[24] L. ed. 616.

[1] McGregor v. Hogan, 263 U. S. 234, 68 L. ed. 282, 44 S. Ct. 50.

[2] Nickey v. Mississippi, 292 U. S. 393, 78 L. ed. 1323, 54 S. Ct. 743.

[3] McGregor v. Hogan, 263 U. S. 234, 68 L. ed. 282, 44 S. Ct. 50.

[4] Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 S. Ct. 829.

[5] Pittsburgh, J. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 S. Ct. 1114.

[6] Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 S. Ct. 829.

[7] Winona & St. P. Land Co. v. Minnesota,

[159] U. S. 526, 40 L. ed. 247, 16 S. Ct. 83.

as the circumstances of the case require,[8] such proceedings should be construed with the utmost liberality. While a notice may be required at some stage of the proceedings, it is only necessary that such notice shall be given as is suitable in a given case, and it is only where the proceedings are arbitrary, oppressive, or unjust that they are declared to be not due process of law.[9] The requirement of due process is that after notice as may be appropriate the taxpayer have opportunity to be heard as to the amount of the tax by giving him the right to appear for that purpose at some stage of the proceedings before the tax becomes irrevocably fixed.[10] It is sufficient if the party assessed has an opportunity to be heard either before a judicial tribunal or before a board of assessment at some stage of the proceedings.[11] If available defenses may be presented to a competent tribunal before the exaction of the tax and before the command to pay it become final and irrevocable, constitutional requirements are satisfied.[12]

A statute which provides for an assessment, which assessment can be enforced only by suits in which notice is given to the taxpayer and an opportunity afforded him to be heard respecting the assessment, in which he may set forth by way of defense all his grievances, satisfies the Fourteenth Amendment.[13] There is no want of due process of law in a tax assessment where the mode of enforcing the tax is by a judicial proceeding wherein process issues,

and an opportunity is afforded for a full hearing, and only after there is a judgment sustaining the tax is payment enforced.[14] A statute which gives a person against whom taxes are assessed a right to enjoin their collection and have their validity judicially determined is due process of law, notwithstanding security is required, as in other injunction cases.[15]

A taxpayer who after assessment of his property for taxation is given a right to appear and be heard upon the question of valuation before arbitrators, whose decision shall be final, is not deprived of his property without due process of law through enforcement of a tax.[16] Similarly, when the law provides for a mode of confirming or contesting assessment of taxes by a board of revision whose action can be reviewed on certiorari with due notice to the person assessed, and for a review, the assessment does not deprive the owner of his property without due process of law.[17] Due process of law, however, is not afforded a taxpayer where a county board of assessors, conformably to the state tax law, increased the valuation of his property as returned for taxation without notice or hearing other than notice given after the assessment was made and a hearing in the arbitration provided for in case of the taxpayer's dissatisfaction, and such arbitration failed because the arbitrators could not agree within the ten-day period fixed by law, and hence no majority award could be made, though all believed the assessment was too high.[18]

Failure of a statute to require notice to be given of a special assessment for back taxes on omitted property, made by the regular assessor under a

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[8] Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 S. Ct. 47, 12 Ann. Cas. 463.
[9] Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 S. Ct. 574.
[10] McGregor v. Hogan, 263 U. S. 234, 68 L. ed. 282, 44 S. Ct. 50.
[11] Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32, 43 L. ed. 354, 19 S. Ct. 90.
[12] Nickey v. Mississippi, 292 U. S. 393, 78 L. ed. 1323, 54 S. Ct. 743.
[13] Hagar v. Reclamation Dist. 111 U. S. 701, 38 L. ed. 569, 4 S. Ct. 663.
[14] Wells, F. & Co. v. Nevada, 248 U. S. 165, 63 L. ed. 190, 39 S. Ct. 62.
[15] McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335.
[16] McGregor v. Hogan, 263 U. S. 234, 68 L. ed. 282, 44 S. Ct. 50.
[17] Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 S. Ct. 324.
[18] Turner v. Wade, 254 U. S. 64, 65 L. ed. 134, 41 S. Ct. 27.

statute after the time provided by law for the making of a general assessment, does not deprive the taxpayer of his property without due process of law, provided the state court had afforded him full opportunity to be heard on the question of the validity and the amount of the tax.[19] In assessing taxes upon omitted property, however, somewhere

during the course of the process of assessment the taxpayer must have an opportunity to be heard.[20] Hence, due process of law is not afforded by the scheme of a taxation statute which provides that if property is withheld from return, the state comptroller without notice or opportunity for hearing must proceed to value the property and, furthermore, states such valuation is final and conclusive, against which no relief in the courts can be secured either upon proceedings brought to collect the taxes or by bill to enjoin their collection, unless the taxpayer can show that the taxing officer has acted in bad faith in making the assessment.[1]

The revenue laws of a state may be in harmony with the Fourteenth Amendment to the United States Constitution, although they do not provide for the presence of a person when a tax is assessed against him.[2] Lack of provision for notice to a nonresident stockholder in a domestic corporation of the assessment of taxes on his stock or for opportunity for contest by him as to the correctness of the valuation does not render invalid, as denying due process of law, so much of a statute as imposes upon him, as a condition of such ownership, a personal liability for the taxes upon his stock, to be enforced by a personal action brought against him by the corporation to recover the amount of the tax which it is compelled to pay on his behalf, since that statute is construed by the state courts as constituting the corporation in legal effect the agent of the stockholders, to receive notice and to represent them in proceedings for the correction of the assessment.[3]

A state in the exercise of its taxing power may direct that the property subject to that power shall be assessed without any reference whatever to the name of the owner by any such description or method which is legally adequate to convey either actual or constructive notice to the owner.[4] The use of an initial instead of the first name of a person in an assessment roll does not make the assessment void for want of due process of law, where the law provides for describing the property as well as naming the owner on the roll and also fixes a time for examination and correction, of which notice is given by a general publication calling upon all persons having property subject to taxation to come forward and ask for such corrections as they desire to have made.[5]

Where ample opportunity is given railroads to be heard before the final assessment of their properties, they cannot complain because an additional hearing is given ordinary taxpayers.[6]

§ 642. Changes in Valuation; Reassessment.—

It is a general rule that "due process" requires that after an assessment has been made by an assessor, it cannot be increased by a reviewing board without notice to the taxpayer or oppor-

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[19] Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 S. Ct. 87.

[20] Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 S. Ct. 47, 12 Ann. Cas. 463; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 S. Ct. 87.

[1] Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 S. Ct. 47, 12 Ann. Cas. 463.

[2] McMillen v. Anderson, 95 U. S. 37, 24 S. Ct. 335.

[3] Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 S. Ct. 297.

[4] Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 S. Ct. 229.
[5] Ibid.
[6] Putnam v. Ford, 155 Va. 240, 155 S. E. 823, 71 A.L.R. 1217.

tunity to be heard.[7] Hence, a statute giving a reviewing board power to increase individual assessments without notice to the taxpayer or provision for review is unconstitutional as denying due process.[8] The law authorizing such proceedings must require notice or it will be unconstitutional. It is not enough that a person may by chance have notice or that he may as a matter of favor or courtesy have a hearing.[9] A statute giving to a tax commission power to increase individual assessments, without providing for notice to the taxpayer other than is given by the fact that the time of the meeting of the commission is fixed by law, does not afford the notice necessary to due process; though the rule may be otherwise in the case of a horizontal increase of all property, or of all property of a certain class, in the taxing district.[10] Some cases, however, because of the necessities of government in matters of taxation, extend the general rule so that wherever actual notice is impracticable, the requirement of due process is satisfied by substituted or constructive notice, to a point where the only constructive notice is that contained in the statutes fixing the time of meeting of the board.[11] Thus, an order of a tax commission and state board of equalization requiring the local taxing officer to make a [40] per cent increase in the assessed valuation of all taxable property in a particular city and county is not wanting in due process of law because no opportunity to be heard is given to the individual taxpayers or to any city or county official other than such as they may have had by reason of the fact that the time of meeting of the boards is fixed by law.[12] Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption.[13]

A reassessment of grossly undervalued property, so as to make the property bear the same burden it would have borne if the true assessment had been made in the first instance, does not violate the constitutional provision for due process of law on the ground that the former assessments constituted judicial judgments which could be set aside only after notice and opportunity to be heard.[14] The failure to provide a hearing before the governor in proceedings for the revaluation of undervalued property, pursuant to statute, does not make the proceeding void for want of due process of law, since the governor only starts the inquiry upon which reassessment may be based, and opportunity to be heard is offered in the course of the subsequent proceedings.[15]

§ 643. Collection.—

The power to collect and disburse revenue and to make all laws that shall be necessary and proper for carrying that power into effect includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some part of the Constitution.16 Taxes have not, as a general rule, in this country since its independence or in England before that time, been collected by regular judicial proceedings. The necessity of government, the nature of the duty to be performed, and the customary usages of the people have established a different procedure which, in regard to that matter, is and always has been

[7] Beveridge v. Baer, 59 S. D. 563, 241 N. W. 727, 84 A.L.R. 189. Annotation: 24 A.L.R. 331, s. 84 A.L.R. 197.
[8] Beveridge v. Baer, 59 S. D. 563, 241 N. W. 727, 84 A.L.R. 189.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Bi-Metallic Invest. Co. v. State Bd. of Equalization, 239 U. S. 441, 60 L. ed. 372, 36 S. Ct. 141.
[13] Ibid.
[14] Weyerhaeuser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 S. Ct. 485.
[15] Ibid.
[16] Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372.

due process of law.[17] The collection of a tax is an administrative matter, and, provided some reasonable mode is given the taxpayer by which he may be heard upon the question of the legality of the tax, it is due process of law, and he cannot complain.[18] Hence, due process of law in taxation does not require a judicial proceeding for collection.[19]

Due process of law does not require that the nonresident owners of lands within a levee district have personal notice of the pendency of a suit to collect the levee taxes assessed upon their lands.[20] Four weeks' notice given by publication to nonresident owners of lands within a levee district created by statute, of the pendency of the suit authorized by a part of the act to enforce the collection of levee taxes, is adequate to afford due process of law.[1]

A state statute making a tax a personal liability of the property owner, collectible by suit against him, does not violate the due process clause of the Fourteenth Amendment, even as applied to a nonresident, although the tax is assessed without notice, service of process or opportunity to be heard, where the statute makes the assessment rolls only prima facie correct, and the state supreme court ruled that it is open to the defendant in any suit to collect the tax, to assail the correctness and validity thereof, and that the court proceeding, and not the assessment, fixes the liability to pay the tax.[2]

§ 644. Forfeiture or Sale.—

Due process of law in forfeiting lands for non-payment of taxes and failure to place them on the landbooks is furnished under a Constitution which provides that such failure for five years in succes-

sion shall, by operation of the Constitution itself, forfeit the title to the state, where the statutes provide the taxpayer a reasonable opportunity to protect his lands in a judicial proceeding of which he is entitled to notice and in which the court has authority to relieve him, upon reasonable terms, from the forfeiture.[3] There is no want of due process of law in a proceeding by which land is forfeited for nonpayment of taxes, because the state, having become vested with the title to land worth $500 by the lapse of five years, with no offer to redeem following a sale to the state for the unpaid tax, sells the land for $166, all of which goes to the state to satisfy a tax which, with penalties and costs, amounts to only $16.19, the owner having been afforded an opportunity to be heard as to the fairness of the original assessment and given notice of the time and place at which the property would be sold to the state, subject to his right to redeem within five years, and having also been given notice of the second sale by mail and publication, his right to redeem continuing up to the time when the state actually enters or sells.[4]

Where the state seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and the notice which permits all interested who are so minded to ascertain that it is to be subjected to sale to answer for taxes and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within

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[17] Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658.

[18] Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372.

[19] McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335.

[20] Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261.

[1] Ibid.

[2] Nickey v. Mississippi, 292 U. S. 393, 78 L. ed. 1323, 54 S. Ct. 743.

[3] See Chapman v. Zobelein, 237 U. S. 135,

[59] L. ed. 874, 35 S. Ct. 518; King v. Panther Lumber Co. 171 U. S. 437, 43 L. ed. 227, 18 S. Ct. 573; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 S. Ct. 925.

[4] Chapman v. Zobelein, 237 U. S. 135, 59 L. ed. 874, 35 S. Ct. 518.

in rem to enforce the lien acquired by a purchaser of the property at a tax sale, which proceedings are authorized by statute, where notice is given by publication to all persons interested in the property to appear and set up their claims.[6] A decree for the sale of lands for unpaid levee taxes, based on constructive service, cannot be deemed to deny due process of law because there was no sufficient proof of publication of a warning order or notice filed or produced in court when the decree was made, where, under the local procedure, the entry of a warning order, even if required, is not jurisdictional.[7] Tax proceedings resulting in a tax sale and deed under which property marked "reserved" on an official plat was described as certain numbered blocks, not designated on the plat, but which would have borne such numbers if the tract reserved had been divided into blocks and lots and numbered in harmony with the numbering of the rest of the tract, do not deprive the owner of his property without due process of law, where he has not only notice from the record, but notice in fact, that such property was listed and assessed for taxes under such description.[8]

Thirty days' publication of a notice of sale of land for taxes is sufficient notice to constitute due process of law.[9] Adding to the name of a male person in the advertisement of a tax sale the words "or her estate and heirs" does not destroy the efficacy of the advertisement so that it is insufficient for the purpose of due process of law.[10]

§ 645. Imposition of Lien.—

Sufficient provision for notice and hearing to constitute due process of law is afforded the owner of real property who is made personally liable, and whose property is impressed with a lien, for the tax imposed by statute on cigarette selling on the premises, by proceedings which permit him to make application to the board of supervisors to remit the tax and, in case of a denial of the petition, to appeal to the District Court for a judicial determination of his liability.[11] An allowance of a claim for personal property taxes against the estate of a decedent under a statute preferring claims for taxes to ordinary debts, making them a lien on personal property, and under other provisions for enforcing delinquent taxes by distraint of goods and chattels by proceedings by attachment and publication

giving appropriate notice and opportunity to contest is not without due process of law, although the decedent was a nonresident of the state.[12] Legislation, however, which provides for the publication of a petition and order in a chancery suit for the foreclosure of a tax lien which merely show that court proceedings are pending, without any description of the land or designation of the owners, and stating that one may determine whether his land is involved by examining the delinquent tax list in the office of the county clerk or county treasurer, does not meet the constitutional requirement of due process.[13]

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[5] Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 S. Ct. 390.
[6] Ibid.
[7] Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261.
[8] Ontario Land Co. v. Yordy, 212 U. S. 152, 53 L. ed. 449, 29 S. Ct. 278.
[9] Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 S. Ct. 229.
[10] Ibid.
[11] Hodge v. Muscatine County, 196 U. S. 276, 49 L. ed. 477, 25 S. Ct. 237.
[12] Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 S. Ct. 585.
[13] Re Auditor Gen. 275 Mich. 462, 266 N. W. 464, 107 A.L.R. 279.

§ 646. Proceedings against Collectors.—

A distress warrant issued by the Solicitor of the Treasury under the Act of May 15, 1820, against a delinquent collector, is not in conflict with the Constitution and is "due process of law."14 It is not invalid, within the Constitution, because issued without oath or affirmation. The adjustment of balances due from accounting offices is not necessarily a judicial controversy.15

6. SPECIAL ASSESSMENT PROCEEDINGS

§ 647. Generally.—

The proceedings by which special assessments are levied vary greatly in form. The necessity of notice and hearing sufficient to constitute due process depends to a certain extent upon the form the proceeding takes. This matter is discussed in detail in another title.16

F. PROTECTION OF LIBERTY

§ 648. Generally.17—

The guaranty of due process protects the liberty of the individual. The cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest is that a government should be one of law.18

The due process provisions of the Fifth and Fourteenth Amendments are not a guaranty of untrammeled freedom of action and of contract.[19] The guaranty is only of freedom from arbitrary restraint, not of immunity from reasonable regulations and prohibitions imposed in the interests of the community.[20] The Constitution does not recognize an absolute and uncontrollable liberty, the liberty safeguarded being liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people.[1]

The liberty which is within the protection of the guaranty cannot be defined in any general way. It has been said to be the liberty of natural, not artificial, persons.[2] So far as persons are concerned, it has been said to be not natural, but civil, liberty of which a person may not be deprived without due process of law.[3] It embraces the right of a person to be free not only from physical restraint, but also in the enjoyment of all his faculties.[4] The liberty of the press and of speech is within the liberty safeguarded.[5] The protection extends to the right to entertain the belief and to teach the doctrine that war, training for war, and military training are immoral, wrong, and contrary to the precepts of Christianity.[6] The view has been taken that personal liberty is invaded without due process by a statute making it a criminal offense against the United States for an agent or officer of an inter-

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[14] Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372.

[15] Ibid.

[16] See SPECIAL OR LOCAL ASSESSMENTS [Also 25 R. C. L. p. 76].

[17] As to the right to enter into contracts, see infra, § 657.

[18] Jones v. Securities & Exch. Commission, 298 U. S. 1, 80 L. ed. 1015, 56 S. Ct. 654.

[19] Virginian R. Co. v. System Federation, R. E. D. 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592.

[20] Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Bryant v. Brown, 151 Miss. 398, 118 So. 184, 60 A.L.R. 1325. See supra, § 575.

[1] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330.

[2] See CORPORATIONS, Vol. 13, p. —, § —.

[3] Bryant v. Brown, 151 Miss. 398, 118 So. 184, 60 A.L.R. 1325.

[4] Grosjean v. American Press Co. 297 U. S. 233, 80 L. ed. 660, 56 S. Ct. 444.

[5] Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; Stromberg v. California, 283 U. S. 359, 75 L. ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484.

[6] Hamilton v. University of California, 293 U. S. 245, 79 L. ed. 343, 55 S. Ct. 197, rehearing denied in 293 U. S. 633, 79 L. ed. 717, 55 S. Ct. 345.

state carrier having full authority in the premises from his principal to discharge an employee from service to such carrier because of his membership in a labor organization.[7]

The liberty to conduct a business so as to injure the public at large or any substantial group is not protected.[8] The guaranty is not infringed by the provisions of a statute making it a misdemeanor to use representations of the national flag upon articles of merchandise for advertising purposes.[9] One is not unconstitutionally deprived of liberty by being prohibited, under penalty, from becoming a member of a secret, oath-bound

association which has not filed a copy of its constitution, bylaws, rules, regulations, oath of membership, and the roster of its membership.[10]

State legislation applying alike and equally to all aliens, withholding from them the right to own land, does not amount to an arbitrary deprivation of liberty or transgress the due process of law clause of the Federal Constitution.[11] The enforcement of an order of the board of regents of a state university prescribing instruction in military science and tactics as a required course does not unconstitutionally deprive any person of liberty without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.[12] Commitment for contempt in refusing to make a disclosure as required by law is not a deprivation of liberty without due process of law.[13]

An ordinance authorizing officers of the city police department to direct all traffic in accordance with the provisions of the traffic ordinance, except in times of an emergency, at which times such officers shall direct the traffic as public safety or public convenience may require, is valid and constitutional, and is not open to the objection that it deprives motorists and drivers of other vehicles of their liberty without due process of law.[14] An arrest cannot be authorized upon a mere verbal charge by a citizen, of trespass to a police officer.[15]

G. PROTECTION OF PROPERTY

1. IN GENERAL

§ 649. Generally.—

The guaranty of due process protects property rights. As it is commonly stated, an owner of property cannot be deprived thereof without due process.16 Property cannot be taken for a debt unless the debt

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[7] Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764. But see National Labor Relations Bd. v. Jones & L. Steel Corp. 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615, 108 A.L.R. 1352. See infra, § 670.

[8] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

[9] Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525.

[10] New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785.

[11] Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15.

[12] Hamilton v. University of California, 293 U. S. 245, 79 L. ed. 343, 55 S. Ct. 197, rehearing denied in 293 U. S. 633, 79 L. ed. 717, 55 S. Ct. 345.

[13] Re Clayton, 59 Conn. 510, 21 A. 1005, 13 L.R.A. 66, 21 Am. St. Rep. 128.

[14] Chicago v. Marriotto, 332 Ill. 44, 163 N. E. 369, 60 A.L.R. 501. Annotation: 60 A.L.R. 504.

[15] Ex parte Rhodes, 202 Ala. 68, 79 So. 462, 1 A.L.R. 568. Annotation: 1 A.L.R. 585.

[16] Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Ochoa v. Hernandez y Morales, 230 U. S. 139, 57 L. ed. 1427, 33 S. Ct. 1033; Western U. Teleg. Co. v. Davenport, 97 U. S. 369, 24 L. ed. 1047; Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. ed. 822; Rees v. Watertown, 19 Wall. (U. S.) 107, 22 L. ed. 72; Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L.R.A. 116, 23 Am. St. Rep. 850; Ives v. Edison, 124 Mich. 402, 83 N. W. 120, 50 L.R.A. 134, 83 Am. St. Rep. 329; Hill v. Woodward, 100 Miss. 879, 57 So. 294, 39 L.R.A.(N.S.) 538, Ann. Cas. 1914A, 390; Wicks v. Monihan, 130 N. Y. 232, 29 N. E. 139, 14 L.R.A. 243; Hutchinson v. Hutchinson, 126 Or. 519, 270 P. 484, 62 A.L.R. 660 (divorce suit); McClain v. Williams, 11 S. D. 227, 76 N. W. 930, 49 L.R.A. 610.

has been created with the knowledge and consent of the debtor.[17] Whether property is taken without due process of law depends upon the nature of each particular case; if it is such an exercise of power as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the classes to which the one in question belongs, it is due process.[18] The guaranty of due process as it relates to property rights raises two questions: First, what is property, and second, what is a taking. Abstractly, these questions are distinct. In the cases, however, it is very difficult to determine whether the decision turned upon the "property" question or upon the "taking" question. The questions arise in a variety of situations, many of which are treated in specific titles in this work. The reader should supplement the study of this article by the study of the specific article within which his question falls.[19] In some jurisdictions, the courts have held that the clause in the Declaration of Rights which prohibits the taking of private property without just compensation applies only to a taking in the exercise of eminent domain. The general rule, however, gives the guaranty a much broader scope.[20]

Congress is free to authorize the seizure, use, or appropriation of enemy properties without compensation to the owners; there is no constitutional prohibition against such confiscation.[1]

§ 650. What Is Property.—

The property rights which are protected by the guaranty of due process are varied. No question arises over the more common forms of real and personal property. It is when the question arises over the less tangible forms of property that an inquiry into what is property must be made. It is a vested right which cannot be taken away except by due process of law.[2] A statute suspending the execution of a law for the relief of certain individuals before any vested right accrues under the law, the whole matter still remaining executory, does not deprive such persons of their property without due process.[3]

To constitute a violation of the provision against depriving any person of his property without due process of law, it should appear that such person

has a property in the particular thing of which he is alleged to have been deprived.[4] The mere incorporation of a company for the development of a water power described in its certificate of incorporation does not, where no property has been acquired or work or construction commenced, create a property right of which it cannot be deprived without compensation by the

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[17] Anderson v. Great Northern R. Co. 25 Idaho, 433, 138 P. 127, Ann. Cas. 1916C, 191.

[18] Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 S. Ct. 390. As to fundamental principles of due process, see supra, §§ 567 et seq.

[19] See HEALTH [Also 12 R. C. L. p. 1263]; LANDLORD AND TENANT [Also 16 R. C. L. p. 509]; PUBLIC UTILITIES AND SERVICES; SPE- CIAL OR LOCAL ASSESSMENTS [Also 25 R. C. L. p. 76]; TAXATION [Also 26 R. C. L. p. 1]. ZONING.

[20] State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307.

[1] United States v. Chemical Foundation,

[272] U. S. 1, 71 L. ed. 131, 47 S. Ct. 1.

[2] Crump v. Guyer, 60 Okla. 222, 157 P. 321,

[2] A.L.R. 331. A reservation of "wharves and wharfing privileges" in a dedication of land for an addition to a city does not include the right to appropriate for wharfage purposes a street or an extension thereof which can- not be taken away or destroyed without compensation without denying the due process of law secured by the Fourteenth Amendment to the Federal Constitution. Mead v. Portland, 200 U. S. 148, 50 L. ed. 413, 26 S. Ct. 171. Since no rights, property or otherwise, are fixed or established by a verdict of a coroner's jury, under the Illinois Coroner's Act, § 14, that section is not void as depriv- ing persons of property without due proc- ess of law. Devine v. Brunswick-Balke- Collender Co. 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917B, 887.

[3] United States ex rel. Levey v. Stock- slager, 129 U. S. 470, 32 L. ed. 785, 9 S. Ct. 382.

[4] New Orleans v. New Orleans Water Works Co. 142 U. S. 79, 35 L. ed. 943, 12 S. Ct. 142.

appropriation, under authority from the state, of the waters of a river for the purpose of a municipal water supply5 or of land which it intends to use.[6] A charter provision for the election of the trustees of a charitable corporation does not confer a property right which the corporation cannot be deprived of without its consent, under the due process clause of the Federal Constitution.[7] Mere members of a charitable corporation have no beneficial interest of their own to protect in exercising their voting power for the benefit of the corporation and are deprived of no vested interest by a statutory amendment of the charter depriving them of such right to vote,[8] by transferring the right to vote for the trustees from the members to the board itself.[9] Property is not taken without due process of law by a statute relieving uncompensated sureties on bonds of public depositories of liability on such bonds, upon judgments obtained thereon, and upon any evidence of indebt-

edness given in lieu of such liability, to the extent that the deposits represent funds raised by general taxation.[10]

The Constitution does not guarantee to any man the right of acquiring property in anything that is not the subject of private property by law or the right of disposing of property that has not been duly acquired under the law of the land.[11] Pursuant to this principle the legislature may authorize the destruction of illegal articles. Furthermore, a person is not deprived of his liberty or property without due process of law by a statute making it an offense to have possession of prohibited articles, such, for example, as a record of lottery drawings.[12]

Certain privileges as to which a qualified right of property may be recognized are inherently subject to legislative regulation and no such vested right in them exists as will prevent the legislature from withdrawing such privileges from those who previously enjoyed them.[13] Accordingly the revocation of such qualified rights does not amount to a deprivation of property without due process of law.[14] This is true as to rights acquired under a preliminary proceeding for allotment of public lands.[15] Until such right has become vested, it may be changed,[16] as, for example, by substituting state laws of descent and distribution for Indian laws.[17] A contestant of a pre-emption entry who has neither made an entry on the land nor perfected a right to do so has no vested right or interest therein of which he is deprived without due process by an act of Congress confirming the title of the original entryman.[18] A right of property may become vested by a decision of the land

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[5] Sears v. Akron, 246 U. S. 242, 62 L. ed. 688, 38 S. Ct. 245.

[6] Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co. 252 U. S. 388, 64 L. ed. 626, 40 S. Ct. 404.

[7] Re Mt. Sinai Hospital, 250 N. Y. 103,

[164] N. E. 871, 62 A.L.R. 564.

[8] Ibid.

[9] Ibid.

[10] Bolivar Twp. Bd. of Finance v. Haw- kins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271. Annotation: 38 A.L.R. 1512, s. 96 A.L.R. 295. See generally PUBLIC FUNDS [Also 22 R. C. L. p. 222.]

[11] McCarter v. Hudson County Water Co.

[70] N. J. Eq. 695, 65 A. 489, 14 L.R.A.(N.S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116.

[12] Ford v. State, 85 Md. 465, 37 A. 172, 41 L.R.A. 551, 60 Am. St. Rep. 337. As to the destruction of property incapa- ble of legal use, see infra, §§ 676 et seq.

[13] District of Columbia v. R. P. Andrews Paper Co. 256 U. S. 582, 65 L. ed. 1103, 41 S. Ct. 545 (permits for construction of vaults under sidewalks); Tracy v. Ginz- berg, 205 U. S. 170, 51 L. ed. 755, 27 S. Ct. 461.

[14] State v. Durein, 70 Kan. 1, 78 P. 152, 15 L.R.A.(N.S.) 908, affirmed in 208 U. S. 613,

[52] L. ed. 645, 28 S. Ct. 567. Annotation: 15 L.R.A.(N.S.) 908.

[15] United States v. Rowell, 243 U. S. 464,

[61] L. ed. 848, 37 S. Ct. 425 (Indian reserve).

[16] United States v. Jackson, 280 U. S. 183, 74 L. ed. 361, 50 S. Ct. 143.

[17] Sizemore v. Brady, 235 U. S. 441, 59 L. ed. 308, 35 S. Ct. 135.

[18] Emblem v. Lincoln Land Co. 184 U. S. 660, 46 L. ed. 736, 22 S. Ct. 523.

department of which the applicant cannot be deprived, except upon proceedings directly therefor, and of which he has notice.[19] Enrolment for the purposes of Indian allotments of land concerns property rights and cannot be taken away without notice and an opportunity to be heard.[20] A fund arising from royalties under an oil and gas lease of lands of an Indian allottee is his individual property and as such within the protective guaranties of the Constitution.[1] The same general principle applies with reference to certain specific and statutory rights. Accordingly, the right to transmit property at death, free from a succession tax, has been held not to be within the constitutional guaranty as to property;[2] and, further illustrating the rule, it has been held that the holder of a patent has no exclusive right of property in his invention, except under and by virtue of the statutes securing it to him, and that a modification of the regulations and restrictions of such statutes is therefore not necessarily an impairment of his rights.[3]

§ [651]. What Is a Taking.—What amounts to deprivation of property without due process of law is often difficult to determine, especially where the question relates to the property of a quasi-public corporation and the extent to which it may be subjected to public control.[4] All property is held subject to reasonable regulation by the state.[5] In consequence, the question as to whether property is taken without due process of law largely depends upon the nature of the particular case.[6] Declaring a common-law trust or business trust to be a corporation does not deprive anyone of property without due process.[7]

As a general rule, there is a taking of property within the meaning of the constitutional provision, "nor shall private property be taken for public use, without just compensation," where the act involves an actual interference with, or disturbance of, property rights, as distinguished from injuries which are merely consequential or incidental8 and as distinguished further from trivial or insignificant takings or interferences.[9] It is not necessary, in order

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[19] Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 S. Ct. 271; Love v. Flahive, 205 U. S. 195, 51 L. ed. 768, 27 S. Ct. 486.

[20] Duncan Townsite Co. v. Lane, 245 U. S. 308, 62 L. ed. 309, 38 S. Ct. 99; United States ex rel. Turner v. Fisher, 222 U. S. 204, 56 L. ed. 165, 32 S. Ct. 37.

[1] Mott v. United States, 283 U. S. 747, 75 L. ed. 1385, 51 S. Ct. 642.

[2] State v. Hamlin, 86 Me. 495, 30 A. 76, 25 L.R.A. 632, 41 Am. St. Rep. 569. Annotation: 41 Am. St. Rep. 580.

[3] Dable Grain Shovel Co. v. Flint, 137 U. S. 41, 34 L. ed. 618, 11 S. Ct. 3.

[4] Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 S. Ct. 418.

[5] See Vol. 11, p. 1009, § 263; supra, §§ 648 et seq.

[6] Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 S. Ct. 390. The removal by the South Carolina Dispensary Commission, under the authority of South Carolina Act of February 23, 1910, of funds in the hands of county dispensaries, due to a corporation which the commission has found to be indebted to the state, does not deprive the corporation of its property without due process of law or impair any contract obligations, the state not having consented to be sued. Carolina Glass Co. v. South Carolina, 240 U. S. 305, 60 L. ed. 658, 36 S. Ct. 293.

[7] State ex rel. Colvin v. Paine, 137 Wash. 566, 243 P. 2, 247 P. 476, 46 A.L.R. 165.

[8] Andrews v. Heiney, 178 Ind. 1, 98 N. E. 628, 43 L.R.A.(N.S.) 1023, Ann. Cas. 1915B, 1136. Annotation: Ann. Cas. 1915B, 1139. A decision, after a full and fair trial, that an abutting owner cannot recover for mere consequential injuries caused by the lawful operation of a railroad under a constitutional provision for compensation to those whose property is taken, injured, or destroyed by the "construction or enlargement of" works for public use, does not deprive him of property without due process of law. Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 S. Ct. 894.

[9] Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 31 S. Ct. 186, 32 L.R.A. (N.S.) 1062, Ann. Cas. 1912A, 487; Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 S. Ct. 106; Montana Co. v. St. Louis Min. & Mill. Co. 152 U. S. 160, 38 L. ed. 398, 14 S. Ct. 506; State v. Dupaquier, 46 La. Ann. 577, 15 So. 502, 26 L.R.A. 162, 49 Am. St. Rep. 334; Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112; Seneca v. Cochran, 84 S. C. 279, 66 S. E. 238, 26 L.R.A. (N.S.) 124; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061. Annotation: 1 L.R.A.(N.S.) 918; 4 Ann. Cas. 115.

to render a statute vulnerable from a constitutional viewpoint, that it in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment or the power of disposition at the will of the owner.[10]

An owner cannot be deprived of any of the essential attributes which belong to the right of property,[11] such as use, enjoyment, purchase, mortgage, and sale; in fact, any contracts in relation thereto.[12] He cannot be deprived of the increment of property or the increment of proceeds into which property has been converted.[13] The right protected is an attribute of property existing through the application of common-law principles.[14] Wherever the operation and effect of any general regulation is to extinguish or destroy that which by the law of the land is the property of any person, so far as it has that effect, it is unconstitutional and void.[15] Burdens and expenses may within reasonable and constitutional limits be imposed on property.[16] Denial by a state of permission to a riparian owner owning the bed of a navigable stream to erect a dam therein for development of power does not deprive him of his property without due process of law in violation of the provisions of the Federal Constitution.[17] Temporary and emergency invasions or limitations of the use of property have been sustained.[18]

An act in order to violate the guaranty of due process must have some actual operation. A provision of a state Constitution which is only declaratory of what is in fact the law cannot unlawfully deprive a person of his property.[19] The mere entry of a judgment for money, which is void for want of proper service, does not deprive the defendant of liberty or property.[20] The garnishment of assets of a defendant in the hands of a third party does not of itself operate to deprive the defendant of his property. There must be an adjudication of the rights of the parties before the property can be subjected to the plaintiff's claim.[1] A nonresident enemy legatee under a will is not deprived of his

property without due process of law because the court orders its distribution on service of notice to him by publication, since

[10] Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L.R.A. 543; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L.R.A. 255, 7 Am. St. Rep. 684. Annotation: 1 L.R.A.(N.S.) 115. As to tax matters, see TAXATION [Also 26 R. C. L. p. 1].

[11] Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621.

[12] Chicago, R. I. & P. R. Co. v. United States, 284 U. S. 80, 76 L. ed. 177, 52 S. Ct. 87; Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 73 L. ed. 210, 49 S. Ct. 50, 86 A.L.R. 654; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Pacific Palisades Asso. v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; Re Kelso, 147 Cal. 609, 82 P. 241, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263; Taylor v. Lexington Water Power Co. 165 S. C. 120, 163 S. E. 137, citing R. C. L.; State v. Del Rio Turnp. Co. 131 Tenn. 600, 172 S. W. 1143, citing R. C. L.; Third Nat. Bank v. Divine Grocery Co. 97 Tenn. 603, 37 S. W. 390, 34 L.R.A. 445; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550; Piper v. Ekern, 180 Wis. 586, 194 N. W. 159, 34 A.L.R. 32. A municipal ordinance arbitrarily declaring a nuisance that which is not a nuisance per se takes and destroys property without due process of law and is unconstitutional. Denver v. Rogers, 46 Colo. 479, 104 P. 1042, 25 L.R.A. (N.S.) 247.

[13] Henkels v. Sutherland, 271 U. S. 298, 70 L. ed. 953, 46 S. Ct. 524, 51 A.L.R. 229.

[14] Ladner v. Siegel, 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172.

[15] Palairet's Appeal, 67 Pa. 479, 5 Am. Rep. 450.

[16] See infra, §§ 684 et seq.

[17] Fox River Paper Co. v. Railroad Commission, 274 U. S. 651, 71 L. ed. 1279, 47 S. Ct. 669.

[18] Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A.L.R. 165; Montana Co. v. St. Louis Min. & Mill. Co. 152 U. S. 160, 38 L. ed. 398, 14 S. Ct. 506.

[19] Brown v. Grant, 116 U. S. 207, 29 L. ed. 598, 6 S. Ct. 357.

[20] York v. Texas, 137 U. S. 15, 34 L. ed. 604, 11 S. Ct. 9.

[1] Byrd v. Rector, 112 W. Va. 192, 163 S. E. 845, 81 A.L.R. 1213.

his right is merely changed from one against the trustee to one against the distributee.[2]

§ 652. Relation to Police Power.—

It must be remembered that the enjoyment of property is subject to the exercise by the state of the police power.3 There is, therefore, in addition to the question of whether what has been done amounts to a taking of property the question whether such taking is a valid exercise of the police power. Constitutional limitations as to due process of law may be violated by enactments, in the exercise of the police power, which impose unreasonable restraints and burdens on property and the enjoyment of property rights 4 or which work a practical confiscation of property or of its beneficial use.5 An unreasonable police regulation restricting the right to use business property for business purposes amounts to a taking of private property for a public use without compensation, contrary to the provisions of the Constitution.6 If the nature and conditions of a restriction on the use or disposition of property are such that a state can, under the police power, impose it consistently with the Fourteenth Amendment to the Federal Constitution without making compensation, then the United States may, for a

permitted purpose, impose a like restriction consistently with the Fifth Amendment without making compensation.[7] The regulations which may be made under the police power are discussed in a subsequent subdivision.

2. ILLUSTRATIONS

§ 653. Generally.—

In the following sections an illustrative group of decisions dealing with various topics has been given. These are only illustrative. The reader investigating any particular subject should supplement the study here with a study of the title dealing with such particular subject.

§ 654. Attachment and Garnishment.—

There is a great diversity of holdings as to the attachment or garnishment of a debt due a nonresident.[8] The general rule is that a debt owing a nonresident may be reached in an action against such nonresident by garnishment process served personally upon his debtor within the state of the forum.[9] Such attachment does not deprive the nonresident creditor of property without due process of law.[10]

§ 655. Business.—

A business is a property right entitled to protection against state legislation in contravention of the Federal Constitution.[11] The right to engage in a business is protected.[12] The right to operate a cotton

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[2] Chapman v. Northern Trust Co. 296 Ill. 353, 129 N. E. 836, 13 A.L.R. 568. See Process [Also 21 R. C. L. p. 1258].

[3] See Vol. 11, p. 966, §§ 245 et seq.

[4] Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L.R.A. 175; State v. Chicago, M. & St. P. R. Co. 68 Minn. 381, 71 N. W. 400, 38 L.R.A. 672, 64 Am. St. Rep. 482; Eiermann v. Milwaukee, 142 Wis. 606, 126 N. W. 53, 27 L.R.A.(N.S.) 1085.

[5] Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557. Annotation: 53 Am. St. Rep. 572.

[6] Piper v. Ekern, 180 Wis. 586, 194 N. W. 159, 34 A.L.R. 32.

[7] Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106.

[8] See ATTACHMENT AND GARNISHMENT, Vol. 4, p. 588, §§ 63 et seq.

[9] See ATTACHMENT AND GARNISHMENT, Vol. 4, p. 589, § 66.

[10] Rothschild v. Knight, 184 U. S. 334, 46 L. ed. 573, 22 S. Ct. 391; King v. Cross, 175 U. S. 396, 44 L. ed. 211, 20 S. Ct. 131. See also ATTACHMENT AND GARNISHMENT, Vol. 4, p. 589, § 66. For other phases of due process as related to attachment and garnishment, see ATTACHMENT AND GARNISHMENT, Vol. 5, p. 13, § 656; p. 141, § 903; p. 175, § 959.

[11] Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. ed. 204, 49 S. Ct. 57.

[12] New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371. Unreasonable or arbitrary interference

gin and collect tolls therefor under a statute declaring such business to be a public utility, to be permitted only in case of public necessity, is not a mere license, but is a

franchise granted in consideration of the performance of public service and constitutes property within the protection of the Fourteenth Amendment to the Federal Constitution.[13]

The Constitution, however, affords no protection from the consequences of competition.[14] A state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a tax to support it, and compete with private interests engaged in a like activity,[15] at least where there is no contract to the contrary.[16] Subjecting a water company, the franchise of which has expired, to the alternative of accepting an inadequate price for its plant or of having its value ruinously impaired by the construction and operation of a municipal plant does not take property without due process of law, contrary to the Fourteenth Amendment, where the municipality not only is under no legal obligation either to renew the franchise or to purchase the plant, but is free to construct and operate its own plant.[17] So far as the due process requirement is concerned, a state is free to adopt and enforce whatever economic policy may reasonably be deemed to promote public welfare, whether by promoting free competition by laws aimed at monopolies or by curbing harmful competition by fixing minimum prices.[18]

§ 656. Rights in Children.—

Persons in whose home a children's welfare society has placed a child committed to its care have no property or natural right entitling them to attack the validity of a statute giving the society discretionary power to require the return of the child, as depriving them of property without due process.19

§ 657. Contracts.20—

The right to enter into a contract, with some exceptions, is a liberty which falls within the protection of the due process clause of the Fourteenth Amendment.1 Valid contracts are property and as such are protected from being taken without just compensation, whether the obligor is a private individual, a municipality, a state, or the United States.2 The denial of a vested right under a contract, by a state Constitution subsequently adopted, is a deprivation of property without due process of law.3 The

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with, or restrictions on, the common right to engage in a lawful private business, such as the manufacture and sale of ice, cannot be saved from the condemnation of the Fourteenth Amendment by calling them experimental. Ibid.

[13] Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235.

[14] Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 79 L. ed. 259, 55 S. Ct. 7; Seattle Gas Co. v. Seattle, 291 U. S. 638, 78 L. ed. 1037, 54 S. Ct. 550; Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 78 L. ed. 1025, 54 S. Ct. 542, rehearing denied in 292 U. S. 603, 78 L. ed. 1466, 54 S. Ct. 712.

[15] Seattle Gas Co. v. Seattle, 291 U. S. 638, 78 L. ed. 1037, 54 S. Ct. 550; Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 78 L. ed. 1025, 54 S. Ct. 542, rehearing denied in 292 U. S. 603, 78 L. ed. 1466, 54 S. Ct. 712; Boston v. Jackson, 260 U. S. 309, 67 L. ed. 274, 43 S. Ct. 129.

[16] Madera Waterworks v. Madera, 228 U. S. 454, 57 L. ed. 915, 33 S. Ct. 571.

[17] Denver v. New York Trust Co. 229 U. S. 123, 57 L. ed. 1101, 33 S. Ct. 657.

[18] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469. Annotation: 96 A.L.R. 313.

[19] Turner v. Children's Home Soc. 158 Va. 406, 163 S. E. 399, 80 A.L.R. 1125. Annotation. 80 A.L.R. 1129.

[20] As to the regulation of contracts, see infra, §§ 684 et seq.

[1] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 53 S. Ct. 133, 87 A.L.R. 285; Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27; Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238.

[2] Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840.

[3] Houston & T. C. R. Co. v. Texas, 170 U. S. 243, 42 L. ed. 1023, 18 S. Ct. 610.

breach of a contract is neither a confiscation of property nor a taking of property without due process of law.[4]

In certain governmental matters the incidents of the ordinary contract do not attach. By virtue of the power of Congress over the monetary system of the United States, there attach to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange.[5] "Gold clauses" of private obligations for the payment of money, whether construable as requiring the payment of gold coin or as intended to set up a standard of value if gold coin is not available, may properly be declared by Congress to be against public policy, and the obligation to which they relate to be dischargeable in any coin or currency which at the time of payment is legal tender for public debts, as being an interference with a monetary policy which contemplates a devaluation of the dollar in terms of gold.[6] The calling of state bonds for payment prior to the maturity date is not, irrespective of whether it is a breach of contract, a deprivation of property without due process of law.[7]

A state may not, consistent with the due process clause, penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state.[8]

§ 658. Taking under Eminent Domain.[9]—

The Fifth Amendment, which is applicable to Congress, in addition to the guaranty against deprivation of life, liberty, or property without due process of law, contains an express prohibition against taking private property for public use without just compensation. Although this provision is omitted from the Fourteenth Amendment, which operates upon the states, still property cannot be taken by the states without compensation under that amendment, since to do so would be

a violation of the due process clause contained therein.[10] The provision that

private property shall not be taken for public use without just compensation has been regarded in certain instances as an additional guaranty to the

provision that a citizen shall not be deprived of his liberty or property without due process of law. It prevents the property of the citizen from being

taken under the power of eminent domain, for any purpose except a public

use, and then only upon making just compensation.[11] It is now settled that

private property cannot be taken in any way for public use without com-

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[4] Shawnee Sewerage & Drainage Co. v. Stearns, 220 U. S. 462, 55 L. ed. 544, 31 S. Ct. 452.

[5] Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352. Annotation: 92 A.L.R. 1525, s. 95 A.L.R. 1383, and 101 A.L.R. 1318.

[6] Holyoke Water Power Co. v. American Writing Paper Co. 300 U. S. 324, 81 L. ed. 678, 57 S. Ct. 485; Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352, affirming 265 N. Y. 37, 191 N. E. 726, 92 A.L.R. 1523. Annotation: 92 A.L.R. 1525, s. 95 A.L.R. 1383, and 101 A.L.R. 1318.

[7] Catholic Order of Foresters v. State, — N. D. —, 271 N. W. 670, 109 A.L.R. 379. Annotation: 109 A.L.R. 996.

[8] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518.

[9] For a full discussion of this subject, see EMINENT DOMAIN.

[10] Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613,

[79] L. ed. 1090, 55 S. Ct. 563, rehearing denied in 295 U. S. 768, 79 L. ed. 1709, 55 S. Ct. 652; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 57 L. ed. 857,

[33] S. Ct. 510; Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 S. Ct. 699; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 S. Ct. 56; Goldman v. Crowther,

[147] Md. 282, 128 A. 50, 38 A.L.R. 1455; State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269.

[11] Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462,

[25] S. Ct. 251; Hopper v. Britt, 203 N. Y. 144, 96 N. E. 371, 37 L.R.A.(N.S.) 825, Ann. Cas. 1913B, 172; Ex parte Smythe, 56 Tex. Crim. Rep. 375, 120 S. W. 200; Violett (N.S.) 854, 133 Am. St. Rep. 976; Violett v. Alexandria, 92 Va. 561, 23 S. E. 909, 31 L.R.A. 382, 53 Am. St. Rep. 825.

pensation made [12] or secured.[13] The taking may precede the ascertainment

of what compensation is just.[14] But there must be provision for payment

without unreasonable delay.[15] Such compensation has been said to be the

market value of the property.[16] The constitutional requirement of just compensation may not be evaded or impaired by any form of legislation.[17] The

condemnation of private property for public use beyond the powers conferred

by the statute under which the condemnation is sought amounts to a deprivation of property without due process of law.[18]

Judicial authorization of the entry by a water company upon land in private ownership to test by borings and wells its availability for the purposes

of the corporation, without making compensation to the owner, unconstitutionally deprives the owner of his property without due process of law.[19]

The question as to what is a public use authorizing the taking of property upon compensation is discussed in another title.[20]

It is settled that private property cannot be taken for other than public use under any circumstances.[1] Condemnation for a nonpublic use is a denial of due process,[2] even though accompanied by full compensation to the owner.[3]

§ 659. Franchises.—

A franchise conveys rights coming into existence by compact and is entitled, as such, against being taken without the payment

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[12] West v. Chesapeake & P. Teleph. Co.

[295] U. S. 662, 79 L. ed. 1640, 55 S. Ct. 894, rehearing denied in 296 U. S. 661, 80 L. ed. 471, 56 S. Ct. 82; McCoy v. Union Elev. R. Co. 247 U. S. 354, 62 L. ed. 1156, 38 S. Ct. 504; Weems v. St. Co. v. People's S. B. Co.

[214] U. S. 345, 53 L. ed. 1024, 29 S. Ct. 661,

[16] Ann. Cas. 1222; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523,

[27] S. Ct. 367; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 S. Ct. 301, 4 Ann. Cas. 1174; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 S. Ct. 36, 4 Ann. Cas. 493; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239,

[49] L. ed. 462, 25 S. Ct. 251; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862,

[21] S. Ct. 648; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 S. Ct. 187; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 S. Ct. 56; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622; Thorington v. Montgomery, 147 U. S. 490, 37 L. ed. 252, 13 S. Ct. 394; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 S. Ct. 21, 22; Kentucky R. Tax Cases (Cincinnati, N. O. & T. P. R. Co. v. Kentucky) 115 U. S. 321, 29 L. ed. 414, 6 S. Ct. 57; Scott v. Toledo (C. C.) 36 F. 385, 1 L.R.A. 688; Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 492,

[29] S. W. 104, 27 L.R.A. 236.

[13] Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 50 S. Ct. 299, 68 A.L.R. 434; Bragg v. Weaver, 251 U. S. 57, 64 L. ed. 135, 40 S. Ct. 62; Norwood v. Baker, 172 U. S. 269,

[43] L. ed. 443, 19 S. Ct. 187; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581.

[14] Bragg v. Weaver, 251 U. S. 57, 64 L. ed. 135, 40 S. Ct. 62.

[15] Hays v. Seattle, 251 U. S. 233, 64 L. ed. 243, 40 S. Ct. 125.

[16] McCoy v. Union Elev. R. Co. 247 U. S. 354, 62 L. ed. 1156, 38 S. Ct. 504.

[17] Baltimore & O. R. Co. v. United States,

[298] U. S. 349, 80 L. ed. 1209, 56 S. Ct. 797.

[18] State ex rel. Cranfill v. Smith, 330 Mo. 252, 48 S. W. (2d) 891, 81 A.L.R. 1066. Annotation: 81 A.L.R. 1071.

[19] Jacobsen v. Superior Ct. 192 Cal. 319,

[219] P. 986, 29 A.L.R. 1399.

[20] See EMINENT DOMAIN [Also 10 R. C. L. p. 1].

[1] Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 S. Ct. 130; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455; Fall River Valley Irrig. Dist. v. Mt. Shasta Power Corp. 202 Cal. 56, 259 P. 444, 56 A.L.R. 264; Reed v. Seattle, 124 Wash. 185, 213 P. 923, 29 A.L.R. 446; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400; Priewe v. Wisconsin State Land & Improv. Co. 93 Wis. 534, 67 N. W. 918, 33 L.R.A. 645.

[2] Cincinnati v. Vester (C. C. A. 6th) 33 F. (2d) 242, 68 A.L.R. 831, affirmed in 281 U. S. 439, 74 L. ed. 950, 50 S. Ct. 360; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; Wright v. Walcott, 238 Mass. 432, 131 N. E. 291, 18 A.L.R. 1242; State ex rel. Tacoma Industrial Co. v. White River Power Co. 39 Wash. 648, 82 P. 150, 2 L.R.A.(N.S.) 842, 4 Ann. Cas. 987. The provisions of the Ohio Constitution forbid the laying of an imposition upon the private property of one for the sole benefit of another. Alma Coal Co. v. Cozad, 79 Ohio St. 348, 87 N. E. 172, 20 L.R.A.(N.S.) 1092.

[3] Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462,

[25] S. Ct. 251; Wright v. Walcott, 238 Mass. 432, 131 N. E. 291, 18 A.L.R. 1242; Salisbury Land & Improv. Co. v. Com. 215 Mass. 371,

[102] N. E. 619, 46 L.R.A.(N.S.) 1196; Wisconsin Water Co. v. Winans, 85 Wis. 26, 54 N. W. 1003, 20 L.R.A. 662, 39 Am. St. Rep. 813.

of compensation.[4] After the expiration of a franchise in city streets, the holder has no property rights of which its ouster from the use of the streets of the city will deprive it without due process of law.[5] The right to take possession of the property of a street railway company remaining in the streets at the expiration of its franchise cannot, consistent with due process of law, be conferred by municipal ordinance upon another street railway company.[6]

§ 660. Rights under Judgment.—

Rights acquired by a judgment are property rights which cannot be taken without due process of law.7 Where a judgment creditor has actually received on account of his judgment all that he is entitled to receive, he cannot be said to have been deprived of his property.8 A state limiting the power of a city to raise money by taxation is not unconstitutional because it prevents the collection of a judgment against the city for damages caused by a mob. A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect.9

§ 661. Jural Rights.—

Property rights may exist in causes of action which cannot be taken without violation of the guaranty against due process. An existing cause of action to recover an amount due,10 to recover tolls unlawfully collected,11 or to recover damages 12 cannot be taken away without violation of the guaranty of due process. A statute depriving a creditor of his vested right of bringing an action in another state is a deprivation of property without due process of law.13 Existing causes of action under a state constitutional provision making directors of a corporation liable to its creditors for money embezzled or misappropriated during their terms by its officers are protected by the contract impairment clause in Article 1, § 10 of the Federal Constitution, from extinguishment upon repeal of such constitutional provision, even though such repeal is regarded as an exercise of the power reserved by the state Constitution over laws concerning corporations.14

Rights acquired by an administrative or judicial proceeding cannot be taken away without notice and opportunity to be heard.[15]

Since an injunction decree does not create a right, its modification cannot be considered as an unconstitutional deprivation of property without due process of law.[16]

Although a vested cause of action is property, protected from arbitrary interference, all that is guaranteed by the due process clause of the Four-

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[4] Los Angeles v. Los Angeles Gas & E. Corp. 251 U. S. 32, 64 L. ed. 121, 40 S. Ct. 76.

[5] State ex rel. McKittrick v. Missouri Utilities Co. 339 Mo. 385, 96 S. E. (2d) 607, 106 A.L.R. 1169.

[6] Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 51 L. ed. 399, 27 S. Ct. 202.

[7] Collins v. Welsh (C. C. A. 9th) 75 F. (2d) 894, 99 A.L.R. 1319, writ of certiorari denied in 295 U. S. 762, 79 L. ed. 1704, 55 S. Ct. 921; Gilman v. Tucker, 128 N. Y. 190, 28 N. E. 1040, 13 L.R.A. 304, 26 Am. St. Rep. 464.

[8] Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 S. Ct. 54.

[9] Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 S. Ct. 211; Sherman v. Laughman, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L.R.A. 258.

[10] Graham v. Goodcell, 282 U. S. 409, 75 L. ed. 415, 51 S. Ct. 186.

[11] Forbes Pioneer Boat Line v. Everglades Drainage Dist. 258 U. S. 338, 66 L. ed. 647, 42 S. Ct. 325.

[12] Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 S. Ct. 240.

[13] Re Flukes, 157 Mo. 125, 57 S. W. 545, 51 L.R.A. 176, 80 Am. St. Rep. 619.

[14] Coombes v. Getz, 285 U. S. 434, 76 L. ed. 866, 52 S. Ct. 435.

[15] Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 S. Ct. 62.

[16] Ladner v. Siegel Co. 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172.

teenth Amendment is the preservation of a substantial right to redress by some effective procedure, and there is no property right, in the constitutional sense, in any particular form of remedy.[17] A statute authorizing the receiver of an insolvent bank to enforce the constitutional liability of stockholders does not, by denying to creditors the right to maintain individual actions, deprive them of a property right without due process of law.[18] A statute which substitutes, for a taxpayer's existing right of action against a collector of internal revenue for the amounts exacted under an invalid tax law, a remedy against the government is not an invasion of the taxpayer's constitutional rights under the Fifth Amendment.[19] Changing the form of remedy or giving an additional remedy for the collection of the personal liability of a stockholder, which does not impose upon him any greater liability than existed at common law, does not violate the guaranty of due process.[20] There is no deprivation of the right to due process of law in declining to entertain an action on the ground that the issues thereunder can be more conveniently litigated in another forum.[1] Awarding a new trial upon the question of damages only, upon reversing a judgment, does not deprive the defendant of his property without due process of law.[2] Allowing an injunction without a bond to prevent the use of property in violation of a statute does not deprive the owner of his property without due process of law.[3]

Curative statutes taking away causes of action have been sustained.[4]

§ 662. —

Imposing Liability.—The rules governing the imposition of liability raise fundamental questions of taking of property rights. The state has the power to impose absolute liability upon one causing loss of property to another by the use of agencies necessarily destructive and in the use of which absolute control is impossible, whether the one using the agency is a private person or a corporation.5 It may make a railroad company absolutely liable for fires set by its locomotives.6 But an absolute liability for injury to stock cannot be imposed 7 except as a penalty for failure to fence.8 A statute imposing double liability upon a railroad company for damages to livestock resulting from its failure to fence does not deprive the company of its property without due process where the company is afforded every facility for presenting its defense.9 A carrier may be made liable for injury to a passenger unless the injury is occasioned by the passenger's criminal negligence or by his violation of some express rule or regulation of the carrier actually brought to his notice.10 A carrier may be made liable for the difference between charges exacted by the carrier in conformity with the tariff schedule approved by the state railroad commission and a less amount thereafter

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[17] Gibbes v. Zimmerman, 290 U. S. 326, 78 L. ed. 342, 54 S. Ct. 140.

[18] Cowden v. Williams, 32 Ariz. 407, 259 P. 670, 55 A.L.R. 1059.

[19] Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. ed. 1143, 57 S. Ct. 816.

[20] Shriver v. Woodbine Sav. Bank, 285 U. S. 467, 76 L. ed. 884, 52 S. Ct. 430.

[1] Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407.

[2] Yazoo & M. Valley R. Co. v. Scott, 108 Miss. 871, 67 So. 491, L.R.A.1915E, 239, Ann. Cas. 1917E, 880.

[3] State ex rel. Duensing v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174.

[4] United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 S. Ct. 742, 11 Ann. Cas. 688 (cause of action for illegal collection of duties). Campbell v. Missouri P. R. Co. 121 Mo. 340, 25 S. W. 936, 25 L.R.A. 175, 42 Am. St. Rep. 530.

[6] See FIRES [Also 11 R. C. L. p. 978, § 33].

[7] See RAILROADS [Also 22 R. C. L. p. 730].

[8] See RAILROADS [Also 22 R. C. L. p. 730].

[9] Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110.

[10] Chicago, R. I. & P. R. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26, 55 L.R.A. 610, affirmed in 183 U. S. 582, 46 L. ed. 339, 22 S. Ct. 229. As to liability of carriers, see CARRIERS, Vol. 10, p. 160, § 1240.

found by the commission upon complaint by a shipper to be reasonable.[11] A statute permitting the owner of sheep killed by dogs to recover their value from the owner of the dogs and requiring the dogs to be killed does not deprive the owner of the dogs of his property without due process of law.[12] The constitutional right to acquire, possess, and protect property prevents making a man liable for the acts and engagements of strangers over whom he has no control.[13] Liability may arise, however, where the owner has expressly or impliedly put it within the power of the third person to cause

injuries. Statutes which make the owner of an automobile liable for the negligent operation of his car when driven by others with his express or implied consent, have been sustained as a valid exercise of the police power, and as not depriving the owner of his liberty or property without due process.[14] He cannot, however, be made liable where the car is taken without his consent or knowledge.[15] Adjudging a prosecutor to be liable for the costs and subject to imprisonment in default of their payment, when the jury finds that he instituted the prosecution without probable cause and from malicious motives, does not deprive him of liberty or property without due process of law, if he is not denied the right to be heard at the trial before the jury upon every question which is to be determined by their verdict.[16]

An employer is not deprived of its property without due process of law by a recovery against it alone, in a suit in which it and its servants are charged with joint and concurring negligence, on the theory that it was thereby deprived of the right of reimbursement from the servants.[17] Punitive damages may be allowed without violating due process.[18] Punitive damages may even be assessed against an employer for the mere negligence of his employee, resulting in death, without unconstitutionally depriving the employer of property without due process of law.[19] The mere fact that a railroad was constructed under legislative authority at a time when the Constitution made the company liable to pay only for property taken in its exercise of the right of eminent domain does not render a requirement that its owner pay for injuries to property through the operation of the road in such manner as to constitute a private nuisance a taking of its property without due process of law.[20]

An owner of sheep is not deprived of his property without due process of law by a statute under which damages may be recovered from him for permitting his sheep to graze on the public domain within [2] miles of a dwelling house.[1]

To subject the individual property of the citizens of a municipality, by a summary proceeding in equity, to the payment of a judgment against the municipality because the remedy by mandamus has proved unavailing, would be a denial of due process of law.[2]

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[11] Great Northern R. Co. v. Sunburst Oil & Ref. Co. 287 U. S. 358, 77 L. ed. 360, 53 S. Ct. 145, 85 A.L.R. 254.

[12] Holmes v. Murray, 207 Mo. 413, 105 S. W. 1085, 17 L.R.A.(N.S.) 431, 123 Am. St. Rep. 336, 13 Ann. Cas. 845.

[13] Durkin v. Kingston Coal Co. 171 Pa. 193, 33 A. 237, 29 L.R.A. 808, 50 Am. St. Rep. 801.
[14] See AUTOMOBILES, Vol. 5, p. 732, § 398.
[15] Ibid.
[16] Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 S. Ct. 1031.
[17] Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 S. Ct. 609.
[18] Louis Pizitz Dry Goods Co. v. Yeldell,
[274] U. S. 112, 71 L. ed. 952, 47 S. Ct. 509,
[51] A.L.R. 1376. Annotation: 51 A.L.R. 1379.
[19] Louis Pizitz Dry Goods Co. v. Yeldell,
[274] U. S. 112, 71 L. ed. 952, 47 S. Ct. 509, 51 A.L.R. 1376.
[20] Alabama & V. R. Co. v. King, 93 Miss. 379, 47 So. 857, 22 L.R.A.(N.S.) 603.
[1] Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 S. Ct. 289.
[2] Rees v. Watertown, 19 Wall. (U. S.) 107,
[22] L. ed. 72.

A statute providing that actionable fraud shall consist in making a false promise to do some act in the future, made as a material inducement to another to enter into a contract, and without which the contract would not have been made, does not unconstitutionally deprive one guilty of such act of property without due process of law.[3]

§ 663. —

Imposing Liability for Mob Violence.—It is generally recognized that statutes subjecting counties and cities to liability for damages to property by mobs and riots within such counties and cities are within the general scope of legislative authority and are not obnoxious to the due process of law clause of the Constitution,[4] even though it is no defense to an action brought under such statutes that the city or county was unable to prevent the injury.[5] The policy of such statutes finds support in many early English statutes.[6] In accordance with the same principles, the property of taxpayers is not taken without due process of law by statutes imposing a penalty upon a county for a lynching and authorizing its collection in the tax levy.[7]

§ 664. —

Denying Liability.8—The state may, at least within limits, abolish a cause of action or limit recovery therein. An injured employee, his personal representative, or next of kin has no vested right to recover damages for the employee's personal injuries that the legislature cannot do away with at any time by public enactment, without depriving him of due process of law.[9] Due process of law is not denied a person injured in the course of his

employment in or about a railroad by a statute restricting his rights as against the railroad company to those which an employee of such company would have under like circumstances.[10]

A cause of action for breach of promise to marry,[11] for seduction,[12] or for alienation of affections [13] may be abolished. A person is not deprived of his reputation, even if it constitutes property, without due process of law by the denial of a right of action for defamatory words in a pleading.[14] The owner of land is not deprived of the inherent right to the means of acquiring and possessing property or of the constitutional guaranty against taking his property for public uses without just compensation by a statute denying him any recovery for trespass on his lands by animals, unless he has inclosed

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[3] James-Dickinson Farm Mortg. Co. v. Harry, 273 U. S. 119, 71 L. ed. 569, 47 S. Ct. 308.

[4] Chicago v. Sturges, 222 U. S. 313, 50 L. ed. 215, 32 S. Ct. 313, Ann. Cas. 1913B, 1349; Dawson Soap Co. v. Chicago, 234 Ill. 314, 84 N. E. 920, 14 Ann. Cas. 1131; Chicago v. Manhattan Cement Co. 178 Ill. 372, 53 N. E. 68, 45 L.R.A. 848, 69 Am. St. Rep. 321; Darlington v. New York, 31 N. Y. 164, 88 Am. Dec. 248; Champaign County v. Church,

[62] Ohio St. 318, 57 N. E. 50, 48 L.R.A. 738, 78 Am. St. Rep. 718; Allegheny County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670. Annotation: 24 L.R.A. 600; 44 L.R.A. (N.S.) 361; 69 Am. St. Rep. 331; 14 Ann. Cas. 1134; Ann. Cas. 1913B, 1351. See RIOTS AND UNLAWFUL ASSEMBLY.

[5] Iola v. Birnbaum, 71 Kan. 600, 81 P. 198, 6 Ann. Cas. 267. Annotation: 6 Ann. Cas. 274.

[6] Chicago v. Sturges, 222 U. S. 313, 50 L. ed. 215, 32 S. Ct. 313, Ann. Cas. 1913B, 1349.

[7] Champaign County v. Church, 62 Ohio St. 318, 57 N. E. 50, 48 L.R.A. 738, 78 Am. Am. St. Rep. 318.

[8] As to modification of liability of automobile owners to guests, see AUTOMOBILES, Vol. 5, p. 633, § 238.

[9] Gones v. Fisher, 286 Ill. 606, 122 N. E. 95, 19 A.L.R. 760.

[10] Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 51 L. ed. 184, 27 S. Ct. 100, 8 Ann. Cas. 87.

[11] Fearon v. Treanor, 272 N. Y. 268, 273 N. Y. 528, 5 N. E. (2d) 815, 7 N. E. (2d) 677,

[109] A.L.R. 1229, appeal dismissed in 301 U. S. 667, 81 L. ed. 1332, 57 S. Ct. 939, and rehearing denied in — U. S. —, 82 L. ed. (Adv. 30), 58 S. Ct. 6. Annotation: 109 A.L.R. 1234.

[12] Fearon v. Treanor, 272 N. Y. 268, 273 N. Y. 528, 5 N. E. (2d) 815, 7 N. E. (2d) 677,

[109] A.L.R. 1229, appeal dismissed in 301 U. S. 667, 81 L. ed. 1332, 57 S. Ct. 933, and rehearing denied in — U. S. —, 82 L. ed. (Adv. 30), 58 S. Ct. 6.

[13] Annotation: 109 A.L.R. 1234.

[14] Abbott v. National Bank, 175 U. S. 409, 44 L. ed. 217, 20 S. Ct. 153.

the premises by a lawful fence.[15] The right to abolish a cause of action has been in some cases based upon the fact that the particular cause of action does not exist at common law.[16] Where the legislation relates to rights which had become well established prior to the adoption of the Constitution, the right to abolish the cause of action altogether has been denied. This rule has been applied to a cause of action for negligence.[17] Limitation of liability for negligence has been sustained.[18] It has been

stated that not all causes of action which existed at common law are beyond legislative control.[19]

§ 665. —

Denying Remedy.—Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.20 A law which operates in effect to make remediless injury to an employer's business by striking employees and others, through concerted action in picketing, displaying banners, advertising the strike, denouncing the employer as unfair to union labor, appealing to customers to withdraw their patronage, and circulating handbills containing abusive and libelous charges against employers, employees, and patrons, and intimations of injury to future patrons, deprives the owner of the business and the premises of his property without due process of law, contrary to the Fourteenth Amendment to the United States Constitution.1 If Congress cannot validate a tax by subsequent legislation, it cannot accomplish the same result by denying to the taxpayers all remedy both as against the United States and as against the tax collector personally.2

A state may prohibit the enjoyment by persons within its borders of rights acquired elsewhere, which violate its laws or public policy, and under some

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[15] Poindexter v. May, 98 Va. 143, 34 S. E. 971, 47 L.R.A. 588.

[16] Fearon v. Treanor, 272 N. Y. 268, 273 N. Y. 528, 5 N. E. (2d) 815, 7 N. E. (2d) 677, 109 A.L.R. 1229, appeal dismissed in 301 U. S. 667, 81 L. ed. 1332, 57 S. Ct. 933, and rehearing denied in — U. S. —, 82 L. ed. (Adv. 30), 58 S. Ct. 6.

[17] Stewart v. Houk, 127 Or. 589, 271 P. 998, 272 P. 893, 61 A.L.R. 1236, holding that the right of a guest to recover for a breach, resulting in injury, of the duty to exercise care, owed by one transporting such guest without charge, is protected against legislative abolishment by a constitutional provision giving every man a remedy by due course of law for injury done him in his person or property. Annotation: 61 A.L.R. 1255; 111 A.L.R. 1013.

[18] Shea v. Olson, 185 Wash. 143, 186 Wash. 700, 53 P. (2d) 615, 59 P. (2d) 1183, 111 A.L.R. 998. Annotation: 111 A.L.R. 1012.

[19] Fearon v. Treanor, 272 N. Y. 268, 273 N. Y. 528, 5 N. E. (2d) 815, 7 N. E. (2d) 677, 109 A.L.R. 1229, appeal dismissed in 301 U. S. 667, 81 L. ed. 1332, 57 S. Ct. 933, and rehearing denied in — U. S. —, 82 L. ed. (Adv. 30), 58 S. Ct. 6

[20] Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107, 50 S. Ct. 451. The constitutionality of a Federal statute authorizing the seizure by a named officer of the property of enemy aliens, providing no adequate remedy to secure to a nonenemy owner either the return of his property seized or compensation for it, and affording such owner no remedy where the officer no longer has possession of the property or its proceeds has been doubted. Becker Steel Co. v. Cummings, 296 U. S. 74, 80 L. ed. 54, 56 S. Ct. 15. Due process of law is denied by a decision of a state court denying an injunction against the collection of a tax based on an alleged discriminatory assessment, on the ground that the plaintiff had a remedy by complaining to the state tax commission before the tax books were delivered to the collector and was guilty of laches in not so doing, where prior to the decision in the instant case an application to the state tax commission would have been unavailing because the highest court of the state had held in a former case that the tax commission was without power to afford relief and at the time of the instant decision that it had such power, the time for filing such complaint had expired. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107, 50 S. Ct. 451. See generally, supra, §§ 580 et seq.

[1] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375.

[2] Graham v. Goodcell, 282 U. S. 409, 75 L. ed. 415, 51 S. Ct. 186.

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circumstances may refuse to aid in the enforcement of such rights.[3] Trustees of a Massachusetts trust are not unconstitutionally deprived of property without due process of law by being denied the right to maintain an action in a state other than that where the trust was organized, with the laws of which it has not complied, upon notes executed to it in such state.[4]

§ 666. —

Imposing Conditions on Suit.—The Fourteenth Amendment to the Federal Constitution does not prevent a state from prescribing a reasonable and appropriate condition to the bringing or defending of a suit of a specified kind or class, so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object.5

§ 667. —

Withdrawal by State of Consent to Be Sued.—The consent of the United States to be sued is a privilege accorded, not the grant of a property right protected by the Fifth Amendment, and may be withdrawn at any time, although given after much deliberation and for a pecuniary consideration.6 Refusal to permit the assertion in a suit brought by the United States to foreclose a mortgage securing a loan made through the Federal Farm Board, of a counterclaim in respect of which the United States has not waived immunity from suit, does not amount to a taking of the defendant's property without due process of law.7

§ 668. —

Limitations on Right of Removal from State to Federal Court.— The privilege of removal from a state to a Federal court is not in any sense a vested right, no matter whether it is based on diversity of citizenship or on a right of action created by Federal law. The power in Congress to grant or withhold the right of removal is involved in the power to prescribe the jurisdiction of courts, and since such power is continuing in its nature, it of necessity includes authority to take away, as well as to bestow, the right to remove causes.8

§ 669. Right to Labor.—

The right to pursue any lawful occupation or calling is generally, if not universally, recognized as property within the due process clause of the Federal Constitution.9 Every man has a natural right to the fruits of his own labor.10 The right to earn wages is just as much property and within the protection of the due process clause of the Fourteenth Amendment to the Federal Constitution as earned wages.11

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[3] Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701.

[4] Hemphill v. Orloff, 277 U. S. 537, 72 L. ed. 978, 48 S. Ct. 577.

[5] Jones v. Union Guano Co. 264 U. S. 171, 68 L. ed. 623, 44 S. Ct. 280; Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873 (requiring security of nonresident defendant in attachment). Annotation: 17 A.L.R. 884; 68 L. ed. 623. Merely prohibiting actions for damages for sale of deficient fertilizer except after chemical analysis, showing the deficiency, does not substitute the determination of the official for a trial in court, so as to constitute a deprivation of due process of law. Jones v. Union Guano Co. 264 U. S. 171, 68 L. ed. 623, 44 S. Ct. 280.

[6] Cummings v. Deutsche Bank, 300 U. S. 115, 81 L. ed. 545, 57 S. Ct. 359; Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840.

[7] North Dakota-Montana Wheat Growers' Asso. v. United States (C. C. A. 8th) 66 F. (2d) 573, 92 A.L.R. 1484, writ of certiorari denied in 291 U. S. 672, 78 L. ed. 1061, 54 S. Ct. 457.

[8] Teel v. Chesapeake & O. R. Co. (C. C. A. 6th) 204 F. 918, 47 L.R.A.(N.S.) 21. See REMOVAL OF CAUSES.

[9] New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371; State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336, followed in appellate court in 26 Ala. App. 446, 162 So. 538; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; Singuefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238.

[10] The Antelope, 10 Wheat. (U. S.) 66, 6 L. ed. 268.

[11] Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864. [12 Am. Jur.]—23 353

§ 670. Labor Relations.—

Labor relations between employer and employee raise questions of due process.12 An employer is protected by the guaranty of due process in his right to discharge an employee.13 This view has been somewhat modified in that it is now held that due process is not denied by a statute forbidding discrimination against employees because of union activities.14 The legislature cannot prevent the granting of an injunction against the intimidation of a merchant's employees and customers by a labor union for the purpose of compelling him to pay the union's scale of prices to his employees, since it interferes with his constitutional right to acquire, possess, enjoy, and protect property.15

Publicity to labor disputes may be authorized and peaceful picketing and patrolling validated.[16]

§ 671. Liens.—

The general rule with reference to priority of liens is that the lien which is first in point of time is first in right.17 As between private parties this priority of liens cannot, as to vested liens, be modified without depriving the prior lien holder of his property without due process.18 When public liens are involved, such as taxes, assessments,19 and even municipal water rents,20 priority may be given to the public charge. In contests between resident and nonresident creditors in insolvency proceedings some shifting of priorities has been sustained.1 Privity of contract between the persons to whom a lien is given and the owner of property is not necessary to constitute due process.2 Liens may be imposed upon property by the implied consent of the owner.3

§ 672. Limitation of Actions.—

Where property rights have been acquired under a statute of limitations, a vested right exists which cannot be taken away without due process.4 There is a difference of

opinion as to the right to extend the bar of the statute of limitations after it has once fallen in actions not involving title to real or personal property.5

§ 673. Rights in Property.—

Requiring the use of property for the public may constitute a taking. A corporation cannot be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it.6 A public hack stand cannot be established upon

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[12] See LABOR [Also 16 R. C. L. p. 410].

[13] Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764.

[14] National Labor Relations Bd. v. Jones & L. Steel Corp. 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615, 108 A.L.R. 1352.

[15] Goldberg, B. & Co. v. Stablemen's Union, 149 Cal. 429, 86 P. 806, 8 L.R.A.(N.S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219.

[16] Senn v. Tile Layers Protective Union, 301 U. S. 468, 81 L. ed. 1229, 57 S. Ct. 857; Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 A. 551, 92 A.L.R. 1450.

[17] See LIENS [Also 17 R. C. L. p. 609, § 13].

[18] Fisher v. Wineman, 125 Mich. 642, 84 N. W. 1111, 52 L.R.A. 192; Pacific Spruce Corp. v. Oregon Portland Cement Co. 133 Or. 223, 286 P. 520, 289 P. 489, 72 A.L.R. 1507.

[19] Baldwin v. Moroney, 173 Ind. 574, 91 N. E. 3, 30 L.R.A.(N.S.) 761. Annotation: 30 L.R.A.(N.S.) 761. See SPECIAL OR LOCAL ASSESSMENTS [Also 25 R. C. L. p. 76]; TAXATION [Also 26 R. C. L. p. 1].

[20] Dunbar v. New York, 251 U. S. 516, 64 L. ed. 384, 40 S. Ct. 250; Provident Inst. for Sav. v. Jersey City, 113 U. S. 506, 28 L. ed. 1102, 5 S. Ct. 612.

[1] Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 935. See INSOLVENCY [Also 14 R. C. L. p. 626].

[2] Hartford Acci. & Indem. Co. v. N. O. Nelson Mfg. Co. 291 U. S. 352, 78 L. ed. 840, 54 S. Ct. 392. See MECHANICS' LIENS [Also 18 R. C. L. p. 868].

[3] Lindsay & P. Co. v. Mullen, 176 U. S. 126, 44 L. ed. 400, 20 S. Ct. 325.

[4] See LIMITATION OF ACTIONS [Also 17 R. C. L. p. 674, § 16].

[5] See LIMITATION OF ACTIONS [Also 17 R. C. L. p. 675, § 17].

[6] Delaware, L. & W. R. Co. v. Morristown, 276 U. S. 182, 72 L. ed. 523, 48 S. Ct. 276, 56 A.L.R. 756; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 S. Ct. 418; Associated Pipe Line Co. v. Railroad Commission, 176 Cal. 518, 169 P. 62, L.R.A.1918C, 849 (pipe line). Annotation: L.R.A.1918C, 855.

a driveway maintained by a railroad company upon its own property to afford means of ingress and egress to the public to its station, which has not been dedicated as a public highway.[7] A statute will not be construed as attempting to convert private carriers into public carriers unless such construction is unavoidable.[8] The substitution of one public use to the exclusion of other public uses is not an invasion of a right of property within the meaning of the Constitution.[9]

Property can be destroyed by legislation limiting or prohibiting its use.[10] It is not, however, every interference with the use of property which amounts to a taking.[11]

§ 674. —

Real Property.—One of the most common illustrations of the taking of property is an interference with rights in real property.12 The right to devote real estate to any legitimate use is property within the protection of the Constitution,13 such as the right to use it for advertising purposes.14

A statute forbidding the mining of coal under private dwellings or streets or cities in places where the right to mine such coal is reserved in the grant is unconstitutional as taking property without due process of law.[15]

A wharf built by riparian owners under the permission and license of the state is property [16] which cannot be destroyed or its value impaired and the exclusive use of which the owner can only be deprived in accordance with established law.[17]

Judicial authorization of the entry by a water company upon land in private ownership to test by borings and wells its availability for the purposes of the corporation, without making compensation to the owner, unconstitutionally deprives the owner of his property without due process of law.[18] A statute declaring waters flowing in a natural channel public and subject to appropriation, so far as they are not being applied to a useful or beneficial purpose, or reasonably needed for such purpose, unconstitutionally deprives riparian owners of their property without due process of law.[19] Although the right of a mortgagee, who has foreclosed his mortgage and purchased at the foreclosure sale, to an unlimited time for obtaining a sheriff's deed cannot be taken away by fixing a limitation,[20] such right may be subjected to certain rules and regulations imposed by the public authorities.[1] The state has power to regulate water rights. It may regulate adverse claims

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[7] Delaware, L. & W. R. Co. v. Morristown, 276 U. S. 182, 72 L. ed. 523, 48 S. Ct. 276, 56 A.L.R. 756.

[8] Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721.

[9] Park Comrs. v. Diamond Ice Co. 130 Iowa, 603, 105 N. W. 203, 3 L.R.A.(N.S.) 1103, 8 Ann. Cas. 28.

[10] State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75.

[11] Cited in Riggins v. District Ct. 89 Utah, 183, 51 P. (2d) 645.

[12] Jacobsen v. Superior Ct. 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399.

[13] Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 73 L. ed. 210, 49 S. Ct. 50, 86 A.L.R. 654.

[14] Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N. E. 920, 34 L.R.A.(N.S.) 998. Annotation: 34 L.R.A.(N.S.) 998.

[15] Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 67 L. ed. 322, 43 S. Ct. 158, 28 A.L.R. 1321.

[16] Lewis v. Portland, 25 Or. 133, 35 P. 256, 22 L.R.A. 736, 42 Am. St. Rep. 772.

[17] Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 53 L. ed. 1024, 29 S. Ct. 661, 16 Ann. Cas. 1222.

[18] Jacobsen v. Superior Ct. 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399. Annotation: 56 A.L.R. 287.

[19] Fall River Valley Irrig. Dist. v. Mt. Shasta Power Corp. 202 Cal. 56, 259 P. 444, 56 A.L.R. 264. Annotation: 56 A.L.R. 287.

[20] Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65, 24 S. Ct. 748.

[1] See infra, §§ 684 et seq.

and prescribe limitations.[2] Curative statutes affecting rights in real property have been sustained.[3]

§ 675. Statutory Rights.—

Rights acquired under a statute while it is duly adjudged to be constitutional are valid legal rights that are protected by the Constitution, not by judicial decision. But rights acquired under a statute that has not been adjudged valid are subject to be lost if the statute is adjudged invalid, although the statute was considered valid by eminent attorneys, public officers, and others.4 The repeal of a statute5 or change therein is sometimes prevented by the due process clause. Generally, statutes may be repealed or changed at the will of the legislature.6

H. DESTRUCTION OF PROPERTY

§ 676. Generally.—

The state, in a bona fide exercise of its police power, may interfere with private property and even order its destruction in the public interests.7 All property is held under the implied obligation that the use of it shall not be injurious to the community.8

When necessary to insure the public safety, the legislature may under its police power authorize municipal authorities summarily to destroy property without legal process or previous notice to the owner.[9] For instance, a dwelling house may be pulled down or blown up by the public authorities if this is necessary in order to avert or stay a general conflagration, and this may be done without recourse against such authorities for the injuries occasioned thereby.[10] Private property may be destroyed even by private individuals

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[2] O'Neil v. Northern Colorado Irrig. Co. 242 U. S. 20, 61 L. ed. 123, 37 S. Ct. 7. Annotation: 56 A.L.R. 287. See generally, IRRIGATION [Also 15 R. C. L. p. 442]; WATERS [Also 27 R. C. L. p. 1052].

[3] Downs v. Blount (C. C. A. 5th) 170 F. 15, 31 L.R.A.(N.S.) 1076; writ of certiorari denied in 226 U. S. 609, 57 L. ed. 380, 33 S. Ct. 216; Eckles v. Wood, 143 Ky. 451, 136 S. W. 907, 34 L.R.A. (N.S.) 832.

[4] State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298. Bonds sold to bona fide holders, while the statute authorizing the bonds is duly adjudged to be constitutional, are valid, and the purchaser is protected from a subsequent decision of invalidity by the property rights clause of the organic law, because the bonds, being valid when issued, are lawful obligations to pay money, —therefore, property,—and the Constitution secures to the purchaser the "inalienable right of acquiring, possessing, and protecting property," and requires the courts to afford a remedy by due course of law for any injury done to property rights. State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298.

[5] Treigle v. Acme Homestead Asso. 297 U. S. 189, 80 L. ed. 575, 56 S. Ct. 408, 101 A.L.R. 1284, rehearing denied in 297 U. S. 728, 80 L. ed. 1010, 56 S. Ct. 587 (Building and Loan Association Act); Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840 (War Risk Insurance Act).

[6] Vance v. Vance, 108 U. S. 514, 27 L. ed. 808, 2 S. Ct. 854 (holding that the abolition of existing tacit mortgages as against third persons, unless they shall be recorded within a stated reasonable time, does not deprive a minor owner of such a mortgage of her property without due process of law); Gross v. United States Mortg. Co. 108 U. S. 477, 27 L. ed. 795, 2 S. Ct. 940 (holding that the

withdrawing of the inhibition of the local law against the taking of mortgages within the state by a foreign corporation does not, as applied to an existing mortgage, deprive a purchaser of his property without due process of law, where he assumed and agreed to pay the mortgage); Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961; Fox v. Cincinnati, 104 U. S. 783, 26 L. ed. 928 (change in canal law). The repeal of a statute which created a right of action against a county for an injury resulting from a defective bridge or highway does not violate a constitutional provision that every man shall have a remedy by due course of law for injury done him in person, property, or reputation, although the statute was in force at the adoption of the Constitution. Templeton v. Linn County, 22 Or. 313, 29 P. 795, 15 L.R.A. 730.

[7] Miller v. Schoene, 276 U. S. 272, 72 L. ed. 568, 48 S. Ct. 246; Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 S. Ct. 693; Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512.

[8] Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273.

[9] Blair v. Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94.

[10] Jenks v. Stump, 41 Colo. 281, 93 P. 17, 15 L.R.A.(N.S.) 554, 124 Am. St. Rep. 137, 14 Ann. Cas. 914; Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84; Ferry v. Campbell, 110 Iowa, 290, 81 N. W. 604, 50 L.R.A. 92; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

in the exercise of the common-law right of necessity to prevent the spreading of a conflagration.[11] Similarly, the municipal authorities may order the destruction of a house falling into decay or otherwise endangering the lives of passers-by.[12]

When a business is extinguished as noxious under the Constitution, the owners cannot demand compensation from the government.[13] The police power of the state includes the right to destroy or abate a public nuisance. Property so destroyed is not taken for public use, and therefore there is no obligation to make compensation for such taking.[14] In cases of great emergency engendering overwhelming necessity, property may thus be taken or destroyed without compensation and without what is commonly called "due process of law."[15] As an additional example it may be mentioned that boards of health exercising the police power may be empowered to employ all necessary means to protect the public health and, when the emergency demands, to destroy private property without preliminary formal legal proceedings. Thus, it has been held that the appearance of a malignant and contagious disease in cattle may be in its nature such a menace to the public health as to bring it clearly within the general rule and so as to permit the destruction of the animals afflicted.[16] It is settled that by due process of law specific forfeitures may be imposed for specific acts, including even total destruction of property per se innocent, when such fairly tends and is reasonably necessary to accomplish a legitimate purpose under the police power.[17] It is not an objection to the validity of a police regulation that it does not provide for a hearing or for notice to the owner before his property is subjected to restraint or destruction. The very purpose to be subserved by such a regulation would be defeated if the officer charged with its administration was required to give notice or conduct a hearing before he could proceed. His action is intended to be prompt and summary.[18] The right, however, of either an individual or the community to destroy private property can as a rule be exercised only in case of extreme, imperative, or overruling necessity; and it has been said that the justification of destruction of private property under plea of necessity is always a question of fact to be tried by a jury and settled by their verdict, unless the sovereign authority has constitutionally provided some other mode.[19] The legislature may fix any time it pleases within which articles seized for a violation of law shall be

brought before a court for condemnation, subject to the limitation that the delay is not in itself a deprivation of property without due process of law.[20]

See BUILDINGS, Vol. 9, p. 197; MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 678].

[11] Blair v. Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; American Print Works v. Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420. Annotation: 57 Am. Dec. 433. See FIRES [Also 11 R. C. L. p. 938]; TORTS [Also 26 R. C. L. p. 755].

[12] State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

[13] New Orleans Pub. Serv. v. New Orleans, 281 U. S. 682, 74 L. ed. 1115, 50 S. Ct. 449; Clarke v. Haberle Crystal Springs Brewing Co. 280 U. S. 384, 74 L. ed. 498, 50 S. Ct. 155; Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512.

[14] State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894.

[15] Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 S. Ct. 693; Ross v. Desha Levee Bd. 83 Ark. 176, 103 S. W. 380, 21 L.R.A.(N.S.) 699, 119 Am. St. Rep. 131; McClone v. Womack, 129 Ky. 274, 111 S. W. 688, 17 L.R.A.(N.S.) 855; State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

[16] See ANIMALS, Vol. 2, p. 685; HEALTH [Also 12 R. C. L. p. 1263].

[17] State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449.

[18] Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894.

[19] Hale v. Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190. Annotation: 47 Am. Dec. 207.

[20] Ely v. Bugbee, 90 Conn. 584, 98 A. 121, L.R.A.1916F, 910.

§ [677]. Notice and Hearing.—In certain cases property may be destroyed summarily without any notice or hearing to the owner. This is true in cases of emergency, such as the destruction of buildings to stay a conflagration, or in cases of property seized which has no lawful use, as, for example, burglars' tools.[1] So far as property is dangerous to the safety or health of the community, due process of law may authorize its summary destruction.[2] But in any case in which the property may have a lawful use or in which a fair question arises as to whether the property is such as should be destroyed, notice and hearing are necessary.[3] As otherwise stated, property which is inoffensive and harmless can be condemned or destroyed only by legal proceedings with due notice to the owner.[4] Notice and an opportunity to be heard are essential to the validity of a statute providing for forfeiture of an automobile used in the transportation of intoxicating liquor.[5] As to intoxicating liquors, notice and hearing are not necessary to due process in ordering their destruction,[6] at least, not if the owner can secure a hearing by instituting injunction proceedings to prevent the destruction.[7] Due process is not denied by a statute providing that a slot machine seized as illegal may be taken before a magistrate who, if he comes to the conclusion that the machine is a gambling device, may order it to be summarily destroyed, even though there is no provision for a hearing or to test the wisdom of the magistrate. Its justification lies in the evil it is aimed at.[8]

The rights of an owner of property who is not made a party to, but whose property is bound by the decree in, a suit for the abatement of a nuisance maintained on the premises by his tenant are preserved by a statutory provision for the giving of a bond by him that he will immediately abate the nuisance that may exist, whereupon the abatement order will be canceled so far as it relates to the property itself.[9]

Courts in determining what is due process of law in the deprivation of a person of his property are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has previously been regarded as within the police power.[10]

§ 678. Summary Destruction or Forfeiture of Property Used Illegally.— With respect to the necessity of affording a notice or hearing before destroying property used for an unlawful purpose, a distinction has been drawn between property which may be innocently used and that which is incapable of any except an illegal use. While in the exercise of the police power the legislature has authority to declare property which may be used only for an unlawful purpose to be a public nuisance and authorize it to be abated summarily, it has been said that if property which is innocent in its ordinary and

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[1] See supra, §§ 676 et seq.

[2] Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 S. Ct. 693; State ex rel. Daniel v. Kizer, 164 S. C. 383, 162 S. E. 444, 81 A.L.R. 722.

[3] Loesch v. Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L.R.A. 682; State v. Robbins, 124 Ind. 308, 24 N. E. 978, 8 L.R.A. 438; Ferry v. Campbell, 110 Iowa, 290, 81 N. W. 604, 50 L.R.A. 92.

[4] Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 S. Ct. 693; State ex rel. Daniel v. Kizer, 164 S. C. 383, 162 S. E. 444, 81 A.L.R. 722.

[5] State v. Rose, 33 Del. 168, 132 A. 864, 45 A.L.R. 85; People v. Marquis, 291 Ill. 121, 125 N. E. 757, 8 A.L.R. 874. Annotation: 8 A.L.R. 888, s. 45 A.L.R. 93. See generally INTOXICATING LIQUORS [Also 15 R. C. L. p. 239].

[6] Samuels v. McCurdy, 267 U. S. 188, 69 L. ed. 568, 45 S. Ct. 264, 37 A.L.R. 1378; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A.1917D, 926, Ann. Cas. 1917E, 685. Annotation: 8 A.L.R. 888, s. 45 A.L.R. 93.

[7] Samuels v. McCurdy, 267 U. S. 188, 69 L. ed. 568, 45 S. Ct. 264, 37 A.L.R. 1378.

[8] State ex rel. Daniel v. Kizer, 164 S. C. 383, 162 S. E. 444, 81 A.L.R. 722.

[9] Gaskins v. People, 84 Colo. 582, 272 P. 662, 63 A.L.R. 693.

[10] Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 S. Ct. 693.

proper use has been used for an unlawful purpose, it is beyond the power of the legislature to order its summary forfeiture to the state as a penalty or punishment for such unlawful use without giving its owner an opportunity for a hearing.[11] In accordance with this distinction it has been held that a statute authorizing a game warden to seize and forfeit to the state, without a hearing, all guns, dogs, decoys and fishing tackle used by any person hunting or fishing without a license, when such license is required by law, is unconstitutional and void.[12] The state has an undoubted right, in the exercise of its police power, to seize implements used in taking or catching fish in violation of law, with a view to subjecting them to judicial condemnation and to sale or destruction by process of law.[13] The proposition has been laid down that the legislature may declare that any net for catching fish in violation of law shall be deemed to be a public nuisance and that the summary destruction thereof may be authorized.[14] The value of the articles has sometimes been considered to have a bearing on the right to destroy them when illegally used, provided they are capable of an innocent use. If of little value, as compared with the expense of proceedings to determine their real character and the lawfulness of their use, and if the owner may,

without inconvenience or hardship, avoid drastic proceedings by compliance with the law, it seems that the courts do not hesitate in sustaining the summary power of destruction.[15] In such a case the legislature may declare the property to be a nuisance and subject to summary abatement. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal is left to its discretion in this regard.[16] Some authority may be found for the proposition that the confiscation and public sale of valuable nets used in fishing contrary to the provision of a statute may be authorized by the legislature without according the owner a notice or a hearing, since he has a sufficient remedy in an action to recover the property or damages for its wrongful destruction or, by way of injunction, to restrain its sale.[17]

Articles such as cards and dice used for gambling purposes, although perfectly harmless in themselves, may become nuisances by being put to an illegal use and in such cases may fall within the ban of the law and be sum-

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[11] State v. Robbins, 124 Ind. 308, 24 N. E. 978, 8 L.R.A. 438; State v. Nejin, 140 La. 793, 74 So. 103, citing R. C. L.; McConnell v. McKillip, 71 Neb. 712, 99 N. W. 505, 65 L.R.A. 610, 115 Am. St. Rep. 614, 8 Ann. Cas. 898; Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275, 65 L.R.A. 616, 104 Am. St. Rep. 1004, 2 Ann. Cas. 933.

[12] McConnell v. McKillip, 71 Neb. 712, 99 N. W. 505, 65 L.R.A. 610, 115 Am. St. Rep. 614, 8 Ann. Cas. 898. State legislation making unlawful the possession of nets, traps, and seines, the use of which in taking fish from the waters of the state is prohibited, is not violative of the Fourteenth Amendment, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor. Miller v. McLaughlin, 281 U. S. 261, 74 L. ed. 840, 50 S. Ct. 296.

[13] Ely v. Bugbee, 90 Conn. 584, 98 A. 121, L.R.A.1916F, 910.

[14] State v. French, 71 Ohio St. 186, 73 N. E. 216, 104 Am. St. Rep. 770, 1 Ann. Cas. 948; Bittenhaus v. Johnston, 92 Wis. 588, 66 N. W. 805, 32 L.R.A. 380. Annotation: 17 A.L.R. 574, s. 50 A.L.R. 97. The confiscation and sale at auction of nets used in fishery, contrary to the provision of a statute, may be authorized by the legislature without according the owner notice or a hearing; he has a sufficient remedy in an action to recover the property, or damages for its wrongful destruction, or by way of injunction to restrain its sale. Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, 3 L.R.A. (N.S.) 997. See FISH AND FISHERIES [Also 11 R. C. L. p. 1014]; GAME AND GAME LAWS [Also 12 R. C. L. p. 683].

[15] Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Ross v. Desha Levee Bd. 83 Ark. 176, 103 S. W. 380, 21 L.R.A. (N.S.) 699; Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445, 29 L.R.A. (N.S.) 260; McConnell v. McKillip, 71 Neb. 712, 99 N. W. 505, 65 L.R.A. 610, 115 Am. St. Rep. 614, 8 Ann. Cas. 898; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

[16] Ross v. Desha Levee Bd. 83 Ark. 176, 103 S. W. 380, 21 L.R.A.(N.S.) 699, 119 Am. St. Rep. 131. Annotation: 21 L.R.A.(N.S.) 699.

[17] Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, 3 L.R.A.(N.S.) 997. Annotation: 3 L.R.A.(N.S.) 997.

marily destroyed.[18] There is no constitutional objection to enforcing a penalty by forfeiture of the offending article.[19] Statutory forfeitures of property intrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States do not constitute a violation of the due process clause of the Fifth Amendment.[20] But the forfeiture of property of an innocent third person, used without his knowledge or permission in the illegal transportation of liquor by one in possession of the car, without notice to the owner, unconstitutionally deprives him of his property without due process of law.[1] Some articles may be incapable of any lawful use and the

legislature may make the mere possession of them illegal. In this class fall burglars' tools, counterfeiting outfits, obscene pictures or prints, gaming tables and slot machines.[2] Statutes may authorize their seizure and forfeiture without in any way violating constitutional provisions prohibiting the deprivation of property without due process of law.[3] Similarly, it has been held that a statute making it an offense knowingly to have in possession any papers used in playing policy does not deprive anyone of his property without due process of law.[4] Possession of opium without having a license therefor or without having obtained it on the prescription of a physician or pharmacist for medicinal purposes may likewise be made a criminal offense in the discretion of the legislature, without violating any constitutional right.[5]

The courts are not in agreement as to whether a jury trial is necessary in such cases.[6]

§ 679. Property Constituting Nuisance.[7]—

It is universally conceded that the police power of the state includes the right to destroy or abate by a summary proceeding whatever may be regarded as a public nuisance.[8] This right is

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[18] Mullen v. Moseley, 13 Idaho, 457, 90 P. 986, 12 L.R.A.(N.S.) 394, 121 Am. St. Rep. 277, 13 Ann. Cas. 450; Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, 3 L.R.A.(N.S.) 997; State ex rel. Daniel v. Kizer, 164 S. C. 383, 162 S. E. 444, 81 A.L.R. 722. See GAMING [Also 12 R. C. L. p. 704].

[19] United States v. One Ford Coupe Auto. 272 U. S. 321, 71 L. ed. 279, 47 S. Ct. 154, 47 A.L.R. 1025.

[20] Van Oster v. Kansas, 272 U. S. 465, 71 L. ed. 354, 47 S. Ct. 133, 47 A.L.R. 1044; J. W. Goldsmith, Jr.-Grant Co. v. United States, 254 U. S. 505, 65 L. ed. 376, 41 S. Ct. 189; Com. v. Certain Motor Vehicle, 261 Mass. 504, 159 N. E. 613, 61 A.L.R. 548. Annotation: 47 A.L.R. 1055, s, 61 A.L.R. 553, 73 A.L.R. 1087, and 82 A.L.R. 607; 71 L. ed. 357. See generally INTOXICATING LIQUORS [Also 15 R. C. L. p. 239].

[1] State v. Rose, 33 Del. 168, 132 A. 864, 45 A.L.R. 85. See supra, § 677.

[2] Mullen v. Moseley, 13 Idaho, 457, 90 P. 986, 12 L.R.A.(N.S.) 394, 121 Am. St. Rep. 277, 13 Ann. Cas. 450; State v. Robbins, 124 Ind. 308, 24 N. E. 978, 8 L.R.A. 438; Police Comrs. v. Wagner, 93 Md. 182, 48 A. 455, 52 L.R.A. 775, 86 Am. St. Rep. 423; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562. Annotation: 12 L.R.A.(N.S.) 394; 13 Ann. Cas. 454.

[3] Mullen v. Moseley, 13 Idaho, 457, 90 P. 986, 12 L.R.A.(N.S.) 394, 121 Am. St. Rep. 277, 13 Ann. Cas. 450; Frost v. People, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352; Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275, 65 L.R.A. 616, 104 Am. St. Rep. 1004, 2 Ann. Cas. 933. Annotation: 12 L.R.A.(N.S.) 394; 2 Ann. Cas. 936.

[4] People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L.R.A. 406, 98 Am. St. Rep. 675, affirmed 192 U. S. 585, 48 L. ed. 575, 24 S. Ct. 372.

[5] Ex parte Mon Luck, 29 Or. 421, 44 P. 693, 32 L.R.A. 738, 54 Am. St. Rep. 804.

[6] See FISH AND FISHERIES [Also 11 R. C. L. p. 1014]; GAME AND GAME LAWS [Also 12 R. C. L. p. 683]; GAMING [Also 12 R. C. L. p. 704]; INTOXICATING LIQUORS [Also 15 R. C. L. p. 239]; PROSTITUTION. As to the right to a jury trial in case of seizure of property alleged to be illegally used, see annotation: 17 A.L.R. 568, s, 50 A.L.R. 97.

[7] See also supra, § 677.

[8] Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Kirkland v. State, 72 Ark. 171, 78 S. W. 770, 65 L.R.A. 76, 105 Am. St. Rep. 25, 2 Ann. Cas. 242; People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A. (N.S.) 792, Ann. Cas. 1914A, 1177; Pompano Horse Club Co. v. State, 93 Fla. 415, 111 So. 801, 52 A.L.R. 51 (gambling house); Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 576; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294,

62 Am. St. Rep. 477; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406; State v. Nejin,

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akin to the right of destroying property for the public safety in case of the prevalence of a devastating fire or other controlling exigency,[9] which has already been considered.[10] Property taken or destroyed for the purpose of abating a nuisance is not taken for public use, and accordingly there is no obligation to make compensation for such taking.[11] The state may authorize the removal, destruction, or abatement of nuisances before any judicial decision and leave the party to his right of appeal to the courts, by an action for damages, for a determination of the question whether the thing abated was a nuisance.[12] Where buildings are so used as to be common nuisances, the normal power to abate them exists and such action is not a taking of property without due process of law.[13] Equity may be invested with jurisdiction to abate a nuisance without violating the due process guaranty,[14] and in proper cases an injunction may be issued for the same purpose without infringing the constitutional guaranty.[15]

Summary proceedings may be taken against the maintenance of a bawdyhouse without violating the due process of law. A temporary injunction which does not prevent the owners from using the property in a lawful manner, but only prevents the maintenance of a nuisance thereon, may be authorized without notice to the person guilty of the nuisance.[16] The extent to which such nuisances may be abated without notice and hearing is not answered uniformly. It has been stated generally that a statute conferring power upon a chancery court to abate nuisances must provide for a hearing and an opportunity to defend.[17] Other cases without mentioning any provision as to notice and opportunity have sustained statutes conferring jurisdiction upon the chancery courts.[18] A seizure and a retention of property alleged to be used as a bawdyhouse without notice and without a hearing to determine whether such place is a nuisance in fact constitute a violation of the due process guaranty.[19] The owner of property used as a bawdyhouse is not deprived of his property without due process of law if he is accorded notice and hearing, by selling the personal property at an auction and paying him

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[140] La. 793, 74 So. 103, citing R. C. L.; State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L.R.A. 134, 16 Am. St. Rep. 813, affirmed 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; State v. French, 71 Ohio St. 186, 73 N. E. 216, 104 Am. St. Rep. 770, 1 Ann. Cas. 948; Harrington v. Providence, 20 R. I. 233, 38 A. 1, 38 L.R.A. 305; Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275, 65 L.R.A. 616, 104 Am. St. Rep. 1004, 2 Ann. Cas. 933. Annotation: 2 Ann. Cas. 245.

[9] Jenks v. Stump, 41 Colo. 281, 93 P. 17, 15 L.R.A.(N.S.) 554, 124 Am. St. Rep. 137, 14 Ann. Cas. 914.

[10] See supra, § 676.

[11] Sweet v. Reckel, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406; State v. Nejin, 140 La. 793, 74 So. 103, citing R. C. L.; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607. Annotation: Ann. Cas. 1913A, 412.

[12] Wheeling & E. G. R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L.R.A. (N.S.) 321.

[13] Carleton v. Rugg, 149 Mass. 550, 22 N. E. 55, 5 L.R.A. 193, 14 Am. St. Rep. 446.

[14] State ex rel. Wilcox v. Ryder, 126 Minn. 95, 146 N. W. 953, 5 A.L.R. 1449; State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) 126 Minn. 78, 147 N. W. 951, 52 L.R.A. (N.S.) 932, Ann. Cas. 1915D, 549. Annotation: 5 A.L.R. 1483, s, 22 A.L.R. 545, and 75 A.L.R. 1298. As to abatement of nuisances generally, see NUISANCES [Also 20 R. C. L. p. 376]. As to abatement of particular nuisances, see particular titles.

[15] Eilenbecker v. Plymouth County Dist. Court, 134 U. S. 31, 33 L. ed. 801, 10 S. Ct. 424; Carleton v. Rugg, 149 Mass. 550, 22 N. E. 55, 5 L.R.A. 193, 14 Am. St. Rep. 446; State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449.

[16] State ex rel. Herigstad v. McCray, 48 N. D. 625, 186 N. W. 280, 22 A.L.R. 530. Annotation: 5 A.L.R. 1483, s, 22 A.L.R. 545, and 75 A.L.R. 1298.

[17] Annotation: 5 A.L.R. 1483, s, 22 A.L.R. 545, and 75 A.L.R. 1298.

[18] Annotation: 5 A.L.R. 1483, s, 22 A.L.R. 545, and 75 A.L.R. 1298.

[19] State ex rel. Herigstad v. McCray, 48 N. D. 625, 186 N. W. 280, 22 A.L.R. 530. Annotation: 5 A.L.R. 1483, s, 22 A.L.R. 545, and 75 A.L.R. 1298.

the proceeds after deduction of costs, and closing the building for a year unless security is given for the immediate abatement of the nuisance.[20]

Due process of law is not denied by a municipal ordinance adopted under legislative authority forbidding the establishment or maintenance of a dairy or cow stable within the city limits without having received permission so to do from the municipal assembly by a proper ordinance.[1]

§ 680. Foodstuffs.—

The keeping for sale of food which is not fit to be eaten may constitute a nuisance, and it is generally recognized that impure food may be seized and destroyed and that due process of law does not require any hearing before seizure and condemnation.[2] It is immaterial that foodstuffs, such as meats, fruits, and vegetables, have merely decayed and have not ceased to be private property by their decay.[3] Accordingly, it is within the police power to provide for the destruction of milk which is found by proper means and instruments not to come up to prescribed standards4 or which has been drawn from cows which have not been subjected to requisite tuberculin tests.[5] In some cases on the facts summary action has been held invalid.[6]

Due process of law is not denied an importer of teas by the provisions of a tea inspection act commanding the destruction of teas not exported within six months after their final rejection as not entitled to admission into the United States because inferior to the government standards.[7]

§ 681. Intoxicating Liquors.—

An excellent illustration of the extent of the power of the state consistent with due process of law to provide for the summary destruction of property declared by statute to be illegal is found in the case of intoxicating liquors. The courts have generally recognized the right of a state to declare all places where intoxicating liquors are manufactured or sold to be common nuisances8 and to provide regulations for their abatement as such,[9] and liquors brought for sale into a district in which such sale is prohibited may be summarily seized and destroyed without compensation.[10]

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[20] People ex rel. Thrasher v. Smith, 275 Ill. 256, 114 N. E. 31, L.R.A.1917B, 1075.

[1] Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 S. Ct. 673.

[2] Adams v. Milwaukee, 228 U. S. 572, 57 L. ed. 971, 33 S. Ct. 610, affirming 144 Wis. 371, 129 N. W. 518, 43 L.R.A.(N.S.) 1066; North American Cold Storage Co. v. Chi- cago, 211 U. S. 306, 53 L. ed. 195, 29 S. Ct. 101, 15 Ann. Cas. 276. As to fruit, see infra, § 682. See Food [Also 11 R. C. L. p. 1093].

[3] Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 S. Ct. 693; Ross v. Desha Levee Bd. 83 Ark. 176, 103 S. W. 380, 21 L.R.A.(N.S.) 699, 119 Am. St. Rep. 131; State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

[4] Windsor v. State, 103 Md. 611, 64 A. 288, 12 L.R.A.(N.S.) 869; Deems v. Balti- more, 80 Md. 164, 30 A. 648, 26 L.R.A. 541,

[45] Am. St. Rep. 339; Nelson v. Minneapolis,

[112] Minn. 16, 127 N. W. 445, 29 L.R.A.(N.S.) 260; State v. Morse, 84 Vt. 387, 80 A. 189,

[34] L.R.A.(N.S.) 190, Ann. Cas. 1913B, 218. Annotation: 18 A.L.R. 249, s. 42 A.L.R. 556, 58 A.L.R. 672, 80 A.L.R. 1225, 101 A.L.R. 64, and 110 A.L.R. 644; 1 L.R.A.(N.S.) 918.

[5] Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445, 29 L.R.A.(N.S.) 260; Adams v. Milwaukee, 144 Wis. 371, 129 N. W. 518, 43 L.R.A.(N.S.) 1066, affirmed in 228 U. S. 572,

[57] L. ed. 971, 33 S. Ct. 610. Annotation: 29 L.R.A.(N.S.) 260; 43 L.R.A.(N.S.) 1066.

[6] In Columbus Packing Co. v. State, 106 Ohio St. 469, 140 N. E. 376, 37 A.L.R. 1525, it was held that under the facts presented, where the action and controversy involved the res, or right of property, it was error for the court, on application of the plaintiff and before trial on the merits, to order the seizure and sale of food, the property of a cold storage company, by provisional or- ders, where such seizure and sale would render ineffectual a judgment thereafter obtained after trial.

[7] Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 S. Ct. 349.

[8] Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; State v. Nejin, 140 La. 793, 74 So. 103, citing R. C. L. See INTOXICATING LIQUORS [Also 15 R. C. L. p. 239].

[9] Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 9 S. Ct. 6; State v. Nejin, 140 La. 793,

[74] So. 103, citing R. C. L.

[10] Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 S. Ct. 693; Ross v. Desha Levee Bd. 83 Ark. 176, 103 S. W. 380, 21 L.R.A.(N.S.) 699, 119 Am. St. Rep. 131; State v. Nejin, 140 La. 793, 74 So. 103,

There is authority tending to support the proposition that notice and an opportunity to be heard are essential in such a case11 and that a statute authorizing a summary destruction of liquors cannot be given effect as to liquors

lawfully within a district at the time of the adoption of prohibition.[12] But the fact that structures for the manufacture of liquor were erected at a time when their use for such purpose was permitted does not prevent the legislature from forbidding their further use for that purpose,[13] for the owner cannot complain of a loss resulting from having invested his property in an occupation which he was bound to know could lawfully be regulated out of existence.[14]

§ 682. Trees.—

Reasonable regulations enacted to prevent the spread of weeds or noxious vegetation and the infection of trees, orchards, and crops are within the police power of the state.[15] Trees infected with noxious plant diseases may be treated and the expense thereof assessed against the owner or may be destroyed without compensation without violating the guaranty of due process.[16] The destruction of noxious weeds may be required.[17] Some of the statutes do have provision for damages.[18]

A statute requiring the destruction of infected trees is not rendered unconstitutional by the fact that the proceeding is put into motion by request of a certain number of reputable freeholders.[19]

It is generally held that notice and hearing are necessary to due process in such cases.[20] Due process of law is provided by a statute prescribing the destruction of trees as a public nuisance, if there is provision for investigation by the state entomologist, notice to the owner, and an appeal to the court from the decision1 or if the owner has recourse to the courts to contest it.[2]

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citing R. C. L.; State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

[11] Fisher v. McGirr, 1 Gray (Mass.) 1,

[61] Am. Dec. 381. See supra, § 677.

[12] Ex parte Campbell, 74 Cal. 20, 15 P. 318, 5 Am. St. Rep. 418; People v. Van de Carr, 178 N. Y. 425, 70 N. E. 965, 66 L.R.A. 189, 102 Am. St. Rep. 516; People v. Orange County Road Constr. Co. 175 N. Y. 84, 67 N. E. 129, 65 L.R.A. 33.

[13] Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Re Young, 154 Cal. 317, 97 P. 822, 22 L.R.A.(N.S.) 330; Cureton v. State, 135 Ga. 660, 70 S. E. 332, 49 L.R.A. (N.S.) 182.

[14] Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 S. Ct. 697, 41 L.R.A.(N.S.) 153.

[15] See Vol. 11, p. 1020, § 271.

[16] Miller v. Schoene, 276 U. S. 272, 72 L. ed. 568, 48 S. Ct. 246; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406; Louisiana State Bd. of Agri. & Immigration v. Tanzmann, 140 La. 756, 73 So. 854, L.R.A.1917C, 894, Ann. Cas. 1917E, 217; Colvill v. Fox, 51

Mont. 72, 149 P. 496, L.R.A.1915F, 894. Annotation: 12 A.L.R. 1136; 67 A.L.R. 214; L.R.A.1915F, 894; 43 L.R.A.(N.S.) 1080. See also AGRICULTURE, Vol. 2, p. 433, § 39.

[17] Chicago, T. H. & S. E. R. Co. v. Ander- son, 182 Ind. 140, 105 N. E. 49, Ann. Cas. 1917A, 182, affirmed in 242 U. S. 283, 61 L. ed. 302, 37 S. Ct. 124; St. Louis v. Galt, 179 Mo. 8, 77 S. W. 876, 63 L.R.A. 778; Northern P. R. Co. v. Adams County, 78 Wash. 53,

[138] P. 307, 51 L.R.A.(N.S.) 274; Wedemeyer v. Crouch, 68 Wash. 14, 122 P. 366, 43 L.R.A. (N.S.) 1090. Annotation: 12 A.L.R. 1143.

[18] Miller v. State Entomologist (Miller v. Schoene) 146 Va. 175, 135 S. E. 813, 67 A.L.R. 197, affirmed in 276 U. S. 272, 72 L. ed. 568, 48 S. Ct. 246. Annotation: 67 A.L.R. 215.

[19] Miller v. Schoene, 276 U. S. 272, 72 L. ed. 568, 48 S. Ct. 246, affirming 146 Va. 175,

[135] S. E. 813, 67 A.L.R. 197.

[20] St. Louis v. Galt, 179 Mo. 8, 77 S. W. 876, 63 L.R.A. 778; Stockwell v. State, 110 Tex. 550, 221 S. W. 932, 12 A.L.R. 1116.

[1] Miller v. State Entomologist (Miller v. Schoene) 146 Va. 175, 135 S. E. 813, 67 A.L.R. 197, affirmed in 276 U. S. 272, 72 L. ed. 568, 48 S. Ct. 246; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121. See also AGRICULTURE, Vol. 2, p. 433, § 39. Due process in a statute authorizing the destruction of noxious weeds upon land of a nonresident at his expense is provided for by requiring that notice of the expense be mailed to him and that if the claim has not been paid within thirty days, it be pre- sented to the county commissioner before whom he might contest its validity before the cost is assessed against him. Wede- meyer v. Crouch, 68 Wash. 14, 122 P. 366,

[43] L.R.A.(N.S.) 1090. A statute which imposes the cost in- curred by an entomological commission in inspecting and treating trees, shrubs, and plants for insects and plant diseases upon the owner of the property whose premises

Some statutes have been sustained although no method is provided by which the owner may contest the necessity for the destruction of his property.[3]

A jury trial is not necessary.[4]

The commissioner of agriculture cannot be clothed with arbitrary power to determine that insects found upon trees are injurious insect pests or that conditions found there constitute contagious disease and to order destruction of the trees.[5]

§ 683. Animals.—

Provisions for the impounding and destruction of animals suffering from contagious or infectious diseases are quite general. Many of the statutes provide for compensation to the owner for the loss of the stock.[6]

Statutes have been sustained which permit destruction without compensation on the ground that it is a valid exercise of the police power to require the destruction of that which is a public nuisance.[7] The necessity of notice and hearing depends upon the purpose for which animals are destroyed. Where the destruction is based upon the presence of a contagious or infectious disease and is for the purposes of preventing the spread of the disease and for protecting health, the destruction without a prior hearing has been sustained as

not violating the due process guaranty.[8] In fact, destruction without any hearing on the existence of the disease has been held permissible.[9] Doubt, however, has been expressed on this point,[10] at least where the destruction is without compensation and without notice to the owner.[11] It has been held that to make the determination of the members of the board intrusted with such determination of the question conclusive would be a violation of the guaranty of due process.[12] Even some of the cases which seem to sustain the destruction without hearing base the holding upon the fact that the owner may have a judicial hearing in an action against the officer or other person who destroys the animal.[13] Where animals are destroyed under humanitarian statutes providing for the destruction of abandoned or disabled animals, notice and hearing are necessary.[14] The same rule applies to a lien created on the animals.[15]

Statutes and ordinances may provide for the summary destruction of dogs running at large in violation of such statutes or ordinances.[16] A statute providing for the destruction of any dog not registered and not wearing a collar

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are inspected and gives him twenty days within which to pay such cost and, in the event of his failure, makes it a lien upon the property is not invalid on the ground that it authorizes the cost of the proceeding to be taxed against his property without notice to him or opportunity to question the amount thereof. Balch v. Glenn,

[85] Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406.

[2] Balch v. Glenn, 85 Kan. 735, 119 P. 67,

[43] L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406.

[3] Ibid.

[4] Bowman v. Virginia State Entomologist,

[128] Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

[5] Stockwell v. State, 110 Tex. 550, 221 S. W. 932, 12 A.L.R. 1116.

[6] See ANIMALS, Vol. 2, p. 810, § 160.

[7] See ANIMALS, Vol. 2, p. 811, § 160.

[8] New Orleans v. Charouleau, 121 La. 890, 46 So. 911, 18 L.R.A.(N.S.) 368, 126 Am. St. Rep. 332, 15 Ann. Cas. 46. Annotation: 8 A.L.R. 71.

[9] Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84.

[10] Annotation: 8 A.L.R. 72.

[11] Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L.R.A. 116, 23 Am. St. Rep. 850.

[12] Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113. Annotation: 8 A.L.R. 73.

[13] Annotation: 8 A.L.R. 72.

[14] Loesch v. Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L.R.A. 682; Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65. Annotation: 8 A.L.R. 67. The constitutional provision against the taking of property without due process of law is violated by a statute which authorizes the seizure and sale of calves under seven months of age if consigned or held under herd

unaccompanied by their mothers, without notice, actual or constructive, to the reputed owner. Lacey v. Lemmons,

[22] N. M. 54, 159 P. 949, L.R.A.1917A, 1185.

[15] Jenks v. Stump, 41 Colo. 281, 93 P. 17,

[15] L.R.A.(N.S.) 554, 124 Am. St. Rep. 137,

[14] Ann. Cas. 914.

[16] See ANIMALS, Vol. 2, p. 799, § 146.

12 Am. Jur. CONSTITUTIONAL LAW § [684]

as required, by any person, does not violate the guaranty.[17] A license statute which authorizes the destruction of any dog which, having been seized for nonpayment of the license, is not redeemed within forty-eight hours after the seizure does not take property without due process of law in that it provides for the destruction without notice to the owner.[18] In several cases ordinances providing for the summary killing of dogs have been held to deprive the owner of property without due process of law.[19] Permitting the summary killing of hogs found running at large on or near public levees does not unconstitutionally deprive the owner of his property where prevention of the weakening of the levees by the rooting of hogs is necessary to the public safety.[20]

I. REGULATIONS

§ 684. Generally.—

The power of government to regulate extends to almost limitless fields. A great many of the functions of legislation are included in this power. It is obviously true that regulation is not per se a violation of the due process of law guaranty. Laws enacted to further the general welfare, which do not appropriate private property, even though they in fact destroy private rights, are not inhibited by the Constitution of the United States.[1] Burdens and expenses of various types may be imposed under the exercise of the police power without compensation2 and without in any way violating the constitutional guaranties as to due process of law.[3] The guaranty of due process demands only that the law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained.[4]

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[17] Jenkins v. Ballantyne, 8 Utah, 245, 30 P. 760, 16 L.R.A. 689. Annotation: 8 A.L.R. 75. An ordinance providing that a dog seized while running at large shall be killed if not ransomed by payment of $1 before 10 o'clock of the morning after it has been detained twenty-four hours and providing for a

notice of the seizure to be given to the owner of any dog having a collar with the owner's name thereon is not unconstitutional or so unreasonable that the court can hold it void. Hagerstown v. Witmer,

[86] Md. 293, 37 A. 965, 39 L.R.A. 649.

[18] Fox v. Mohawk & H. R. Humane Soc.

[165] N. Y. 517, 59 N. E. 353, 51 L.R.A. 681, 80 Am. St. Rep. 767. Annotation: 8 A.L.R. 75.

[19] Annotation: 8 A.L.R. 76.

[20] Ross v. Desha Levee Bd. 83 Ark. 176,

[103] S. W. 380, 21 L.R.A.(N.S.) 699, 119 Am. St. Rep. 131. Annotation: 21 L.R.A.(N.S.) 699.

[1] Masonic Cemetery Asso. v. Gamage (C. C. A. 9th) 38 F. (2d) 950, 71 A.L.R. 1027, writ of certiorari denied in 282 U. S. 852,

[75] L. ed. 755, 51 S. Ct. 30; State v. Kierman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962.

[2] See Vol. 11, p. 1003, § 266.

[3] Stephens v. Central of Georgia R. Co.

[138] Ga. 625, 75 S. E. 1041, 42 L.R.A.(N.S.) 541, Ann. Cas. 1913E, 609; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406. Annotation: 43 L.R.A.(N.S.) 1080; Ann. Cas. 1913A, 412.

[4] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Burnet v. Wells, 289 U. S. 670, 77 L. ed. 1439, 53 S. Ct. 761; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct.

[581] (weight of loads on highways); Northern P. R. Co. v. Puget Sound & W. H. R. Co. 250 U. S. 332, 63 L. ed. 1013, 39 S. Ct.

[474] (charges on property); Puget Sound Traction, Light & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1325, 37 S. Ct. 705, 5 A.L.R. 1; Mississippi R. Commission v. Mobile & O. R. Co. 244 U. S. 388, 61 L. ed. 1216, 37 S. Ct. 602. A court may not, under the guise of protecting private property, extend its authority to a subject of regulation not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate has been exercised to so unwarranted a degree as, in substance and effect, to exceed regulation and to be equivalent to a taking of property without due process of law or a denial of the equal protection of the laws. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 S. Ct. 585, 11 Ann. Cas. 398; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468 (fees chargeable by grain elevators); Durgin v. Minot, 203 Mass. 26, 89 N. E. 144, 24 L.R.A.(N.S.) 241, 133 Am. St. Rep. 276; People v. Luhrs, 195 N. Y. 377,

[89] N. E. 171, 25 L.R.A.(N.S.) 473. Compelling expense to improve property by the exercise of police power does not deprive the owner of his property without due process of law, if the exaction is not unreasonable either with reference to the nature or cost. Health Dept. v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L.R.A. 710, 45 Am. St. Rep. 579; Etheredge v. Norfolk, 148 Va. 795, 139 S. E. 508, 55 A.L.R.

A statute fair upon its face may be shown to be void and unenforceable on account of its actual operation.[5] If a statute in its practical operation becomes arbitrary or confiscatory, its validity, even though affirmed by former adjudication, is open to inquiry and investigation in the light of changed conditions.[6]

Regulations in regard to specific matters are treated under appropriate titles. In the following sections some general illustrations of regulations are given. It is not intended to be exhaustive in these illustrations. The reader must consult the article dealing with the particular subject in which he is

interested.

§ 685. Animals.—

State legislation regulating diseased animals, such as subjecting them to tests for tuberculosis, etc., has generally been sustained.[7] The subjecting of healthy animals to a tuberculin test does not deprive their owner of property without due process of law.[8]

§ 636. Attorneys' Fees.—

Statutes limiting the amount of attorneys' fees in certain proceedings have generally been sustained as against the objection that it is a violation of the guaranty of due process.[9] Such fees may be made determinable by a court, board, or commission.[10] There is a dispute as to whether such a statute may be made applicable to existing contracts. One view is that the statute may be made applicable to such contracts;[11] the other, that it may not.[12]

Imposition of liability for attorneys' fees in certain cases usually as a penalty for an excess charge or vexatious refusal to pay a claim has generally been held not to violate the guaranty of due process.[13]

§ 687. Automobiles.—

Automobile traffic constitutes a well-established field for public regulation and control. A variety of regulations in regard thereto has been sustained.[14] A municipal ordinance classifying automobiles leased to be driven by the lessees as public vehicles, imposing license fees for their use upon the streets, and requiring persons engaged in the business of leasing such automobiles to deposit with the city treasurer insurance policies or bonds in specified sums for the protection of persons injured or whose property may be damaged as a result of the lessees' negligent operation, maintenance, or use of such vehicles will not be regarded as repugnant to due process in the absence of a showing that the conditions imposed are arbitrarily burdensome or that discrimination against the business of the lessors will result from its enforcement.[15]

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[781] (making landlord liable for water rents).

[5] Great Northern R. Co. v. Washington,

[300] U. S. 154, 81 L. ed. 573, 57 S. Ct. 397, re- hearing denied in 300 U. S. 686, 81 L. ed. 888, 57 S. Ct. 504.

[6] Re Opinion of Justices, 278 Mass. 607,

[181] N. E. 833, 82 A.L.R. 1021.

[7] See ANIMALS, Vol. 2, p. 807, § 157.

[8] Hacker v. Barnes, 166 Wash. 553, 7 P. (2d) 607, 80 A.L.R. 1212.

[9] Margolin v. United States, 269 U. S. 93,

[70] L. ed. 176, 46 S. Ct. 64 (limited to a fee of $3 for preparing the papers to secure a claim, under the War Risk Insurance Act); Yeiser v. Dysart, 267 U. S. 540, 69 L. ed. 775, 45 S. Ct. 399; Capital Trust Co. v. Cal- houn, 250 U. S. 208, 63 L. ed. 942, 39 S. Ct. 486. Annotation: 69 L. ed. 775. See generally ATTORNEYS AT LAW, Vol. 5, p. 331, § 200.

[10] Buckler v. Hilt, 209 Ind. 541, 200 N. E. 219, 103 A.L.R. 901. Annotation: 103 A.L.R. 907.

[11] Calhoun v. Massie, 253 U. S. 170, 64 L. ed. 843, 40 S. Ct. 474; Newman v. Moyers,

[253] U. S. 182, 64 L. ed. 849, 40 S. Ct. 478. Annotation: 69 L. ed. 779.

[12] Annotation: 69 L. ed. 778.

[13] Hartford L. Ins. Co. v. Blincoe, 255 U. S. 129, 65 L. ed. 549, 41 S. Ct. 276 (refusal to pay insurance claim); Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507,

[33] S. Ct. 961 (excess charge by carrier).

[14] See AUTOMOBILES, Vol. 5, p. 531, §§ 22 et seq.

[15] Hodge Drive-It-Yourself Co. v. Cincin- nati, 284 U. S. 335, 76 L. ed. 323, 52 S. Ct. 144.

§ 688. Banks.—

Banks and banking have been the subjects of frequent regulations by the state.[16] A guaranty fund may be created.[17] Banks may be compelled to contribute to such fund even at a time when the fund is hopelessly insolvent without violating due process of law.[18] In liquidating a depositor's guaranty scheme assessments may be levied upon the banks.[19] Savings banks of the state may be required to become members of a corporation the purpose of which is to assist member banks temporarily in need of cash by making loans to them.[20]

Various statutes have been enacted in recent years regarding the reopening or reorganization of insolvent banks.[1] The validity of a reorganization plan which does not prejudice creditors has been sustained.[2] Preferences may be given in the assets of an insolvent bank, within certain limits, without violating the guaranty of due process.[3] Preferences may be accorded to the claims of correspondent banks already protected by collateral security which would have required their payment in full.[4] Preferences may also be granted to holders of small claims where payment thereof in full is more economical than to incur bookkeeping expenses incident to a calculation of percentages when dividends are paid.[5] A statute conferring upon savings depositors in a bank

having savings and commercial departments a preference in the distribution of the assets of the savings department and entitling them to share ratably with commercial depositors in the distribution of all other assets and resources of the bank does not violate the guaranty of due process.[6]

Regulations as to deposits have been sustained as against the contention of violation of due process. The bank may be required to turn over unclaimed deposits to the state if a right of action against the state for the amount is preserved to the depositor and his legal representative.[7]

Permitting drawee banks to pay checks by draft, for the purpose of pro-

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[16] See BANKS, Vol. 7, p. 30, §§ 9 et seq.

[17] See BANKS, Vol. 7, p. 37, § 20.

[18] Corn Exch. Sav. Bank v. Smith, 59 Or. 182, 239 N. W. 186, 78 A.L.R. 800.

[19] Abie State Bank v. Bryan, 282 U. S. 765, 75 L. ed. 690, 51 S. Ct. 252.

[20] Opinion of Justices, 278 Mass. 607, 181 N. E. 833, 82 A.L.R. 1021. Annotation: 82 A.L.R. 1025.

[1] See BANKS, Vol. 7, p. 585, §§ 813 et seq.

[2] Doty v. Love, 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438. A plan adopted pursuant to state stat- ute for the reopening of a closed bank, pro- posed by at least three fourths of the cred- itors, recommended by the superintendent of banks, and approved after hearing by the court of chancery, whereby part of the stockholders contributed new capital in consideration of their release from further statutory liability on their old shares, the noncontributing stockholders remaining lia- ble on their shares, and 25 per cent of the claims against the old bank was assumed by the reopened bank, and 75 per cent was to be a charge on assets to be placed in a pool to be administered by the bank as a trust for the benefit of creditors, and as- sets having an estimated value exceeding the liabilities assumed were turned over to the reopened bank as the primary source of payment, and whereby no dividends were to be declared upon shares of the re- opened bank until all the assumed liabil- ities had been satisfied, does not annul rights of property in violation of the Fourteenth Amendment to the Federal Con- stitution. Ibid. Error of judgment on the part of the liq- uidating agency of a closed bank in the compromise of liabilities is not a taking of property in violation of the Federal Con- stitution. Ibid.

[3] Annotation: 31 A.L.R. 790, s. 79 A.L.R. 582, 83 A.L.R. 1080. In Abilene Nat. Bank v. Dolley, 228 U. S. 1, 57 L. ed. 707, 33 S. Ct. 409, it was held that national banks cannot claim that as to dealings after the Kansas State Depos- itors' Guaranty Law of March 6, 1909, went into effect, the obligation of their contract was impaired and their property taken without due process of law, because as creditors they did not share equally with depositors under that statute in the assets of an insolvent state bank. As to preferences and priorities, see BANKS, Vol. 7, p. 538, §§ 747 et seq.

[4] Doty v. Love, 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438.

[5] Ibid.

[6] Upham v. Bramwell, 105 Or. 597, 209 P. 100, 210 P. 706, 25 A.L.R. 919. Annotation: 31 A.L.R. 790, s. 79 A.L.R. 582, 83 A.L.R. 1080.

[7] Com. v. Dollar Sav. Bank, 259 Pa. 138,

[102] A. 569, 1 A.L.R. 1048. For a full discussion, see BANKS, Vol. 7, p. 290, § 415.

moting their solvency, is merely an exercise of the police power by which the banking business is regulated for the purpose of protecting the public and

promoting the general welfare, and does not deprive the collecting bank of its liberty or property without due process of law, although it may interfere with its right to revenue for making the collection.[8]

Questions between a receiver of an insurance company and a bank having on deposit money of the company as to the character of the deposit are judicial, and the bank is entitled to have them tried before a proper tribunal upon notice.[9]

§ 689. Business and Trade Practices.—

The regulation of a business, the unregulated operation of which may injuriously affect the welfare of others, does not deprive its owner of property without due process of law.[10] When any business, lawful in nature, is such that it may be conducted in such a way as to become harmful to the public or when supervision is necessary to confine it to legitimate channels, the state has a right to throw around it such safeguards as will fully protect the public.[11] An owner is not deprived of his property or denied the equal protection of the laws by being required to disclose the real nature or ingredients of the commodity which he exposes for sale.[12] Grading and packing may be regulated.[13] A trunk line railroad has no right protected by the due process of law clause of the Federal Constitution to build up its business by paying tap line railroads bonuses or rebates which have been forbidden by Congress from considerations affecting the public welfare.[14]

It has been held that a statute requiring Chinese merchants doing business in the Philippine Islands to keep their account books in the English or Spanish language, or local dialects, deprives them of their liberty and property without due process of law, in violation of the Philippine Bill of Rights as enacted by Congress July [1], 1902, Chap. 1369.[15]

§ 690. Contracts.—

Liberty of contract is not an absolute concept, but is relative to many conditions of time, place, and circumstance.[16] The liberty of contract guaranteed by the Federal Constitution is freedom from arbitrary restraint, not immunity from reasonable regulation to safeguard the public

interest.[17] The exercise of legislative authority to abridge freedom of contract can be justified only by the existence of exceptional circumstances.[18] A

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[8] Farmers & M. Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. ed. 1157, 43 S. Ct. 651, 30 A.L.R. 635.

[9] Ex parte Renfro, 115 Tex. 32, 273 S. W. 813, 40 A.L.R. 900.

[10] Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864.

[11] State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336.

[12] National Fertilizer Asso. v. Bradley,

[301] U. S. 178, 81 L. ed. 990, 57 S. Ct. 748 (contents of fertilizer); State v. W. S. Buck Mercantile Co. 33 Wyo. 47, 264 P. 1023, 57 A.L.R. 675 (label showing content of virgin wool required on woolen goods). Annotation: 81 L. ed. 1002.

[13] Detweiler v. Welch (C. C. A. 9th) 46 F. (2d) 75, 73 A.L.R. 1440 (potatoes). See MARKETS AND MARKETING STATUTES [Also 18 R. C. L. p. 366].

[14] O'Keefe v. United States, 240 U. S. 294,

[60] L. ed. 651, 36 S. Ct. 313.

[15] Yu Cong Eng v. Trinidad, 271 U. S. 500, 70 L. ed. 1059, 46 S. Ct. 619.

[16] Hartford Acci. & Indem. Co. v. N. O. Nelson Mfg. Co. 291 U. S. 352, 78 L. ed. 840, 54 S. Ct. 392. See also Vol. 11, p. 1153, §§ 339 et seq.

[17] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Stephenson v. Binford,

[287] U. S. 251, 77 L. ed. 288, 53 S. Ct. 181,

[87] A.L.R. 721; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151,

[76] L. ed. 214, 52 S. Ct. 69; Highland v. Russell Car & Snow Plow Co. 279 U. S. 253, 73 L. ed. 688, 49 S. Ct. 314; Growers Warehouse Co. v. Burley Tobacco Co-op Marketing Asso. 276 U. S. 71, 72 L. ed. 473, 48 S. Ct. 291; Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27; Crowley v. Chris- tensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13.

[18] Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 53 S. Ct. 133, 87 A.L.R. 285.

state may prohibit and declare invalid the making of certain contracts within its borders, and may prohibit performance within its borders of contracts validly made elsewhere, if they are required to be performed within the state and their performance would violate its laws.[19] The fact that a contract entered into within the state is to be performed elsewhere does not put its terms, its obligations, and its sanctions beyond the reach of the power which a state may constitutionally exercise.[20] But a state cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction and lawful where made.[1] A state may not, in an action based upon a contract lawful where made and operative, enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties

is its own citizen.[2] A state statute prohibiting billboard advertising of tobacco products, being a valid exercise of the police power, does not, by making it illegal to carry out a contract for such advertising, take the property of a billboard owner without due process of law.[3] A statute forbidding interference with contracts between marketing associations and their members is not invalidated by the provision of a penalty for violation, to be received by the aggrieved party, as a punishment therefor.[4] A statute does not violate the due process clause because it creates a condition of affairs which renders the making of a related contract, lawful in itself, ineffective.[5] A person who is liable in damages for personal injuries sustained by another is not deprived of his property without due process guaranteed to him by § [13] of the Constitution of the State of North Dakota and the Fourteenth Amendment to the Constitution of the United States by Chapter [179], Laws 1917 (§§ 5941a1, 5941a2, Comp. Laws Supp. 1925), which provides that "every settlement or adjustment of any cause of action and every contract of retainer or employment to prosecute an action for damages on account of any personal injuries received . . . shall be voidable if made while the person so injured is under disability from the effect of the injuries so received, or if made within thirty days after the date of such injury."[6]

Congress has power to forbid some contracts in interstate commerce without violating the due process clause.[7]

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[19] Home Ins. Co. v. Dick, 281 U. S. 397,

[74] L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701.

[20] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518. A state statute imposing restrictions upon the processing of fish does not de- prive a processor of property without due process of law because it operates indi- rectly as a deterrent on the making of con- tracts for the purchase of fish taken from the high seas and brought into the state. Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513.

[1] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Hartford Acci. & Indem. Co. v. Delta & Pine Land Co. 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928.

[2] Hartford Acci. & Indem. Co. v. Delta & Pine Land Co. 292 U. S. 143, 78 L. ed. 1178,

[54] S. Ct. 634, 92 A.L.R. 928. A state statute whereby the bond of a contractor guaranteeing to an owner the faithful performance of a contract for the construction of a building is declared to inure to the protection of materialmen and laborers as if a guaranty that the con- tractor shall pay them had been ex- pressed therein, but which does not re- quire that a bond be given, does not, as applied to a bond which expresses an in- tention to exclude materialmen and labor- ers, constitute an arbitrary interference with liberty of contract, with resulting vio- lation of the Fourteenth

Amendment. Hartford Acci. & Indem. Co. v. N. O. Nel- son Mfg. Co. 291 U. S. 352, 78 L. ed. 840,

[54] S. Ct. 392.

[3] Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643, 52 S. Ct. 273, 79 A.L.R. 546.

[4] Liberty Warehouse Co. v. Burley To- bacco Growers' Co-op. Marketing Asso. 276 U. S. 71, 72 L. ed. 473, 48 S. Ct. 291.

[5] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513.

[6] Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290. Annotation: 84 A.L.R. 1297.

[7] Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 S. Ct. 96; United States v. Joint Traffic Asso.

[171] U. S. 505, 43 L. ed. 259, 19 S. Ct. 25

§ 691. Flag.—

Legislation designed to prevent the use of the national flag for advertising purposes does not violate the guaranty of due process.[8] A statute providing for punishment of persons placing words, figures, or designs on the national or state flag for advertising or other purposes or using or displaying a flag so decorated, which intends to prevent the use of flags already decorated as well as those to be decorated in the future, is void as depriving persons owning flags so decorated of their property without due process of law.[9] There has been held to be some limits on legislation of this character.[10] No constitutional right of liberty is infringed by forbidding the carrying of a red flag in a parade.[11] But a state statute penalizing the public display of a flag, banner, or device "as a sign, symbol, or emblem of opposition to organized government," being capable of construction as embracing conduct which the state may not constitutionally prohibit, is invalid as infringing upon the constitutional right of free speech and accordingly repugnant to the guaranty of liberty contained in the Fourteenth Amendment.[12]

§ 692. Garbage.—

Regulations governing the gathering and disposal of garbage have generally been sustained. Ordinances providing for the exclusive collection of garbage by a licensed collector13 and forbidding its transportation through the streets of a municipality by other than such collector14 have been sustained, even though such regulation may prevent one from selling his garbage15 which may be valuable for various purposes.[16] It has been suggested, however, that this rule may be subject to some modification in view of the

increased price of foodstuffs and feed in recent years and the development of scientific methods of reduction of fats.[17] It is recognized that the regulations in this regard must be reasonable and not arbitrary.[18]

§ 693. Moratorium.—

Moratory legislation has been sustained in times of severe financial and economic depression.[19] Thus, the right of a mortgagee to maintain an action for a deficiency judgment and to obtain possession of the mortgaged property may, without violating the due process guaranty, be suspended under proper safeguards, such as requiring the mortgagor to pay all or a reasonable part20 of the income or rental value of the property toward

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[8] Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525, affirming 74 Neb. 757, 105 N. W. 298, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754. Annotation: 7 L.R.A.(N.S.) 1079.

[9] People ex rel. McPike v. Van De Carr,

[178] N. Y. 425, 70 N. E. 965, 66 L.R.A. 189,

[102] Am. St. Rep. 516.

[10] Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30. Annotation: 7 L.R.A.(N.S.) 1079.

[11] Com. v. Karvonen, 219 Mass. 30, 106 N. E. 556, L.R.A.1915B, 706, Ann. Cas. 1916D, 846. Annotation: L.R.A.1915B, 706.

[12] Stromberg v. California, 283 U. S. 359,

[75] L. ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484.

[13] Rochester v. Gutberlett, 211 N. Y. 309,

[105] N. E. 548, L.R.A.1915D, 209, Ann. Cas. 1915C, 483.

[14] Wheeler v. Boston, 233 Mass. 275, 123 N. E. 684, 15 A.L.R. 275; Pantlind v. Grand Rapids, 210 Mich. 18, 177 N. W. 302, 15 A.L.R. 280. Annotation: 15 A.L.R. 287, s. 72 A.L.R. 520.

[15] Urbach v. Omaha, 101 Neb. 314, 163 N. W. 307, L.R.A.1917E, 1163.

[16] Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 S. Ct. 106.

[17] Jansen Farms v. Indianapolis, 202 Ind. 138, 171 N. E. 199, 72 A.L.R. 514.

[18] Jansen Farms v. Indianapolis, 202 Ind. 138, 171 N. E. 199, 72 A.L.R. 514; Pantlind v. Grand Rapids, 210 Mich. 18, 177 N. W. 302, 15 A.L.R. 280.

[19] Home Bldg. & L. Asso. v. Blaisdell,

[290] U. S. 398, 78 L. ed. 413, 54 S. Ct. 231,

[88] A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297.

[20] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A.L.R. 1106, rehearing denied in 296 U. S. 661, 80 L. ed. 471, 56 S. Ct. 82; Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481.

the payment of the mortgage debt, interest, taxes, or insurance under regulations by the court.[1]

§ 694. Occupations.2—

The state may regulate occupations3 by requiring a license and prohibiting engaging in the occupation without such license,[4] or by imposing a tax on the occupation,[5] without violating due process. Due process of law is not denied in requiring an examination and license before one can engage in the occupation of an architect.[6] Statutes prescribing the qualifications of persons engaged in professions which require them to take out a license in no manner impair any vested right as respects those who were practicing in the state prior to the passing and going into effect of such statutes.[7] No person can acquire a vested right to continue, when once licensed, in a business, trade, or occupation which is subject to legislative control and regulation under the police power.[8] Similarly, it is clear that the state, by permitting the keeping of poolrooms, cannot be said to give an assurance that they may continue, and hence it is not estopped from subsequently prohibiting their operation. The mere fact that an enactment under the police power strikes down a business of profit or renders property of little value and of no use does not give any basis to a contention that it has been taken without due process of law.[9]

§ 695. Privacy.—

The state may protect the right of privacy by prohibiting the use of the name, portrait, or picture of any living person for advertising purposes without the written consent of such person.[10] Such a statute will be given a prospective operation and therefore does not deprive the owner of such portrait without due process of law.[11]

§ 696. Property.—

All property is held subject to reasonable regulation by the state.[12] A prohibition simply upon the use of property in a manner injurious to the health, morals, or safety of the community cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes or restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden pur-

poses, is prejudicial to the interests of the community.[13] A reasonable regula-

[1] Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297.

[2] As to licensing occupations generally, see LICENSES [Also 17 R. C. L. p. 470]. See ATTORNEYS AT LAW, Vol. 5, p. 270, §§ 14 et seq.; AUCTIONS, Vol. 5, p. 447, §§ 3 et seq.; PHYSICIANS AND SURGEONS [Also 21 R. C. L. p. 352, §§ 3 et seq.].

[3] Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A.L.R. 933 (auction sales of jewel- ry).

[4] Semler v. Oregon State Dental Ex- aminers, 294 U. S. 608, 79 L. ed. 1086, 55 S. Ct. 570 (dentists); Berk v. State, 225 Ala. 324, 142 So. 832, 84 A.L.R.

[740] (attorney at law); State v. Kievman,

[116] Conn. 458, 165 A. 601, 88 A.L.R. 962 (junk yard); Tuttle v. Wood (Tex. Civ. App.) 35 S. W. (2d) 1061, citing R. C. L.

[5] Pacific American Fisheries v. Alaska,

[269] U. S. 269, 70 L. ed. 270, 46 S. Ct. 110, sustaining the imposition of a graduated tax upon the product of fish canners for the purpose of discouraging the canning of the larger amounts.

[6] Klafter v. State Examiners, 259 Ill. 15,

[102] N. E. 193, 46 L.R.A.(N.S.) 532, Ann. Cas. 1914B, 1221. See ARCHITECTS, Vol. 3, p. 997.

[7] Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 S. Ct. 286; Reetz v. Michigan,

[188] U. S. 505, 47 L. ed. 563, 23 S. Ct. 390; State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 55 L.R.A. 791, 87 Am. St. Rep. 605; State v. Carlisle, 28 S. D. 169, 132 N. W. 686, Ann. Cas. 1914B, 395. Annotation: Ann. Cas. 1914B, 399. See PHYSICIANS AND SURGEONS [Also 21 R. C. L. p. 350].

[8] Gregory v. Hecke, 73 Cal. App. 268, 238 P. 787, citing R. C. L.; State v. Havorka,

[100] Minn. 249, 110 N. W. 870, 8 L.R.A. (N.S.) 1272, 10 Ann. Cas. 398.

[9] Burlingame v. Thompson, 74 Kan. 393,

[86] P. 449, 11 Ann. Cas. 64.

[10] Sperry & H. Co. v. Rhodes, 220 U. S. 502, 55 L. ed. 561, 31 S. Ct. 490.

[11] Ibid.

[12] See Vol. 11, p. 1009, § 268.

[13] Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Richmond, F. O. P.

tion under the police power is not a violation of the due process guaranty,[14] even though property in whole or in part is taken or destroyed15 without compensation.[16] The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, morals, or safety of the public is not burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.[17] Although such regulations may sometimes occasion inconvenience to an individual, he is deemed to have compensation in participating in the general advantage.[18] Likewise, acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may, in a measure, impair its use, do not

constitute a "taking" in a constitutional sense.[19] All such prohibitions as to the use of property must, however, be reasonable under all the circumstances of the case. Thus, it has been held that an ordinance which absolutely prohibited the opening or working of stone quarries within certain prescribed limits, whether it could be done without injury to other property or the public or not, was void as depriving the owner of his property without due process of law.[20] The state may require an owner of property who cuts or removes timber within a certain distance of any watershed held or owned by any city or town for the purpose of furnishing the city or town with water to remove or cause to be burned all treetops and other portions not desired to be taken for commercial or other purposes within the stipulated distance of the boundary line of the watershed.[1] There are some limits to the power of the state in this regard. The state cannot require the clearing of a strip of land adjacent to a railroad track of all trees and underbrush.[2]

R. Co. v. Richmond, 96 U. S. 521, 24 L. ed.

[734] (prohibition of use of engines of rail- road company on a certain street of a mu- nicipality); State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555,

[28] N. E. 76, 12 L.R.A. 652; Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A.(N.S.) 321; Bountiful City v. De Lu- ca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657.

[14] Crowley v. Christensen, 137 U. S. 86,

[34] L. ed. 620, 11 S. Ct. 13; Barbier v. Con- nolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036 (nui- sance); Boston Beer Co. v. Massachusetts,

[97] U. S. 25, 24 L. ed. 989 (prohibition of manufacture and sale of intoxicating liq- uors).

[15] Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15 (prohibiting lease of lands to aliens); Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669 (city building plan); Wilmot v. Chicago, 328 Ill. 552, 160 N. E. 206, 62 A.L.R. 394 (prohibi- tion against change of grade in sidewalk); White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215. Annotation: 12 A.L.R. 679. A statute providing that a railroad com- pany shall not collect fare from a passen- ger when it fails, neglects, or refuses to deliver the passenger a check for his bag- gage is valid and binding on such company as a part of the penalty for its failure and neglect to comply with the statute, and is in no sense a taking of property without due process of law within the inhibition of the Fourteenth Amendment to the Consti- tution of the United States. Tarr v. Ore- gon Short Line R. Co. 14 Idaho, 192, 93 P. 957, 125 Am. St. Rep. 151.

[16] Eldridge v. Trezevant, 160 U. S. 452,

[40] L. ed. 490, 16 S. Ct. 345 (state laws sub- jecting lands on a river bank to ease- ment or servitude for the construction of a levee); Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A. (N.S.) 977, Ann. Cas. 1915B, 157.

[17] Balch v. Glenn, 85 Kan. 735, 119 P. 67,

[43] L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406.

[18] Opinion of Justices, 103 Me. 506, 69 A. 627, 19 L.R.A.(N.S.) 422, 13 Ann. Cas. 745.

[19] Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175; Taggart v. Claypole, 145 Ind. 590, 44 N. E. 18, 32 L.R.A. 586; Swift v. Calnan, 102 Iowa, 206, 71 N. W. 233, 37 L.R.A. 462, 63 Am. St. Rep. 443; Callen v. Junction City, 43 Kan. 627, 23 P. 652, 7 L.R.A. 736; Fellows v. Charleston, 62 W. Va. 665, 59 S. E. 623, 13 L.R.A.(N.S.) 737,

[125] Am. St. Rep. 990, 13 Ann. Cas. 1154. Annotation: 13 L.R.A.(N.S.) 737; 4 Ann. Cas. 1185.

[20] Re Kelso, 147 Cal. 609, 82 P. 241, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178.

[1] Perley v. North Carolina, 249 U. S. 510,

[63] L. ed. 735, 39 S. Ct. 357.

[2] Vreeland v. Forest Park Reservation Commission, 82 N. J. Eq. 349, 87 A. 435, 46 L.R.A.(N.S.) 1062, Ann. Cas. 1915B, 1153.

12 Am. Jur. CONSTITUTIONAL LAW §§ [697], [698]

§ 697. Public Printing.—

A statute prohibiting the letting of public printing jobs to one who is a nonresident of the state and who has not a printing plant in the state does not deprive any person of life, liberty, or property without due process of law.[3]

§ 698. Public Utilities.—

The owner of private property voluntarily devoted to public use subjects himself to reasonable municipal regulation and surrenders the right to fix the price of his service or commodity, although he is protected against confiscation by a constitutional guaranty that the price fixed by the municipality shall not be unreasonable.[4] The requirements of the due process clauses in reference to regulatory acts of the state or Federal government upon the business and operations of public utilities or public service companies are twofold in nature, being both procedural and substantive.[5] In accordance with the general principles of reasonableness and fair play required of all governmental activity or regulation by the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution and similar clauses in the various state Constitutions,[6] although it is settled that the states may regulate the business of public utilities, including not only regulation of public service property, but the compensation to be paid for its use, because such businesses are of a nature in which the public have an interest or use, or, to use a phrase which has become historical in connection with the regulation of utilities and allied enterprises, namely, because they are businesses affected with a public interest,[7] it is equally well settled that the property of public utilities is private property of which a person cannot

be deprived without due process, which entails reasonable compensation in every case for its taking. Therefore, in every case in which it is sought to regulate the use of the property of public utilities, the regulations must be reasonable and not arbitrary. In every instance in which it is sought to regulate the rates which may be charged by public utilities, due process requires that such rates be reasonable, not arbitrary or confiscatory, and be founded upon a rate base which is proper and yields a fair return upon the investment made under the circumstances. The questions involved are obviously questions relating to public utilities as such and, therefore, are discussed in another title of this work.[8] This article purports to treat broadly the general rules required by the due process clauses as to notice and hearing in various types of proceedings. Hence, the procedural phase of due process affecting public utility regulation, involving the notice and hearing required in the various aspects of utility regulation, is sketched herein.

A public utility must be afforded some opportunity to be heard as to the reasonableness of the rates fixed for its charges by a rate-fixing commission.[9] The right to a fair and open hearing is one of the rudiments of fair play as-

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[3] State ex rel. Collins v. Senatobia Blank Book & Stationery Co. 115 Miss. 254, 76 So. 258, Ann. Cas. 1918B, 953.

[4] Mapleton v. Iowa Pub. Serv. Co. 209 Iowa, 400, 223 N. W. 476, 68 A.L.R. 993.

[5] See PUBLIC UTILITIES AND SERVICES.

[6] See supra, §§ 575 et seq.

[7] See Vol. 11, p. 1058, §§ 293-296.

[8] See PUBLIC UTILITIES AND SERVICES.

[9] Ohio Bell Teleph. Co. v. Public Util- ities Commission, 301 U. S. 292, 81 L. ed. 1093, 57 S. Ct. 724; Morgan v. United States, 298 U. S. 468, 80 L. ed. 1288, 56 S. Ct. 906; St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 80 L. ed. 1033,

[56] S. Ct. 720; Northwestern Bell Teleph. Co. v. Nebraska State R. Co. 297 U. S. 471, 80 L. ed. 810, 56 S. Ct. 536; West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63, 79 L. ed. 761, 55 S. Ct. 316; South- ern R. Co. v. Virginia, 290 U. S. 190, 78 L. ed. 260, 54 S. Ct. 148; Los Angeles Gas & E. Corp. v. Railroad Commission, 289 U. S. 287, 77 L. ed. 1180, 53 S. Ct. 637 (recognizing rule); Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 S. Ct. 185; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 S. Ct. 462, 702.

sured to every litigant by the Federal Constitution as a minimal requirement.[10] There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the commission must act

upon evidence and not arbitrarily.[11] Such procedure is an inexorable safeguard.[12] Moreover, there can be no compromise on the footing of convenience or expediency or because of a natural desire to be rid of harassing delay when such minimum requirements are ignored.[13] Hence, if no hearing is provided for, and no notice or summons to the company required before the commission has found what it is to find, and no opportunity is provided for the company to introduce witnesses before the commission, not even the semblance of due process of law is provided.[14] As an example of improper conduct of a hearing by a commission itself, the action of a state public utilities commission, fixing the rates of a gas company within a town, taken without notice to the company and without hearing further evidence, in spreading distribution and other expenses, admittedly incurred by the company in that town, over the total outlying area served by the company, including another town as to which such a spread would be favorable but in fixing the rates of which such spread was not adopted, is an exercise of arbitrary power at variance with the rudiments of fair play required by the Fourteenth Amendment.[15]

A public utility is, under the due process clause of the Federal Constitution, entitled to the independent judgment of the court as to both law and facts upon review of rates fixed by a public service commission.[16] In all cases where a state public service commission has prescribed a complete schedule of maximum future rates to be charged by a public utility, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order, which is legislative in character, is void because in conflict with the due process of law clause.[17] Such a right to a judicial determination of the question of unconstitutional deprivation of property exists whether the deprivation is by a rate statute passed without a hearing or by administrative orders of a commission made after a hearing, for rates made by a general assembly and administrative orders made by a commission are both legislative in their nature, and any party affected by such legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution.[18] Hence, if a statute provides that

[10] Ohio Bell Teleph. Co. v. Public Util- ities Commission, 301 U. S. 292, 81 L. ed. 1093, 57 S. Ct. 724; West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63,

[79] L. ed. 761, 55 S. Ct. 316.

[11] Ohio Bell Teleph. Co. v. Public Util- ities Commission, 301 U. S. 292, 81 L. ed. 1093, 57 S. Ct. 724; Morgan v. United States, 298 U. S. 468, 80 L. ed. 1288, 56 S. Ct. 906; St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 80 L. ed. 1033,

[56] S. Ct. 720; West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63, 79 L. ed. 761, 55 S. Ct. 316; Southern R. Co. v. Virginia, 290 U. S. 190, 78 L. ed. 260, 54 S. Ct. 148; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 S. Ct. 185.

[12] Ohio Bell Teleph. Co. v. Public Util- ities Commission, 301 U. S. 292, 81 L. ed. 1093, 57 S. Ct. 724; St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 80 L. ed. 1033, 56 S. Ct. 720.

[13] Ohio Bell Teleph. Co. v. Public Util- ities Commission, 301 U. S. 292, 81 L. ed. 1093, 57 S. Ct. 724.

[14] Southern R. Co. v. Virginia, 290 U. S. 190, 78 L. ed. 260, 54 S. Ct. 148; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 S. Ct. 462, 702.

[15] West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63, 79 L. ed. 761, 55 S. Ct. 316.

[16] Bluefield Waterworks & Improv. Co. v. Public Serv. Commission, 262 U. S. 679,

[67] L. ed. 1176, 43 S. Ct. 675; Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287, 64 L. ed. 908, 40 S. Ct. 527.

[17] Ohio Valley Water Co. v. Ben Avon,

[253] U. S. 287, 64 L. ed. 908, 40 S. Ct. 527.

[18] Wadley S. R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, 35 S. Ct. 214.

rates are to be fixed by a commission, a utility company cannot, consistent with the demands of due process, be deprived of its right to a judicial investigation under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy.[19] Withholding from the courts power to determine the question of confiscation according to their own independent judgment, when the act of a state public service commission in fixing the value of a water company's property for rate-making purposes comes to be considered on appeal, must be deemed to deny due process of law, in the absence of a ruling by the state court that the remedy by injunction provided for by a section of the act providing for rate establishment affords adequate opportunity for testing judicially an order of the commission, alleged to be confiscatory.[20] A statute which makes the rates recommended and published by a commission final and conclusive as to what are equal and reasonable charges, and neither allows nor contemplates any issue to be made or inquiry to be had as to the equality or reasonableness in fact of such rates, and affords no recourse in the courts to stay the hands of the commission if it chooses to establish rates that are unequal and unreasonable violates the due process clause.[1]

Procedure in rate-fixing statutes which provides for some method of court review of findings of the rate-making commission has generally been sustained.[2] Thus, the procedure permitted by a railroad commission act under which the railroad commission may determine, upon hearing, that freight rates are unreasonable, excessive, and discriminatory and make orders for other rates which in its judgment are not open to such objection does not deny due process of law, where the statute provides that suit may be brought in the state court to set aside orders of the commission upon the ground that the rates fixed are unlawful.[3] A statute permitting a state railroad commission to fix the rates for transportation of logs wholly within the state is not in violation of the Fourteenth Amendment of the Federal Constitution, as precluding an inquiry into the confiscatory character of such rates, where the carrier has, and makes use of, a chance to have the validity of the rates judicially determined in an action against the commission.[4] Similarly, an act creating a board of railroad commissioners and defining and regulating its powers and duties is not invalid on the theory that by failing to provide an adequate judicial review of the orders of the commission, it authorizes the taking of property without due process of law, if under it a railroad by an orderly and not burdensome course may present to the state supreme court the commission's rulings in receiving or excluding evidence, the sufficiency of the evidence to sustain its findings, and the sufficiency of its findings to warrant its order. Moreover, under a constitutional provision that the courts shall be open for the trial of all causes proper for their cognizance, the courts, regardless of the statute, may determine whether the board has exceeded its powers.[5]

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[19] Southern R. Co. v. Virginia, 290 U. S. 190, 78 L. ed. 260, 54 S. Ct. 148; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 S. Ct. 462, 702.

[20] Ohio Valley Water Co. v. Ben Avon,

[253] U. S. 287, 64 L. ed. 908, 40 S. Ct. 527.

[1] Southern R. Co. v. Virginia, 290 U. S. 190, 78 L. ed. 260, 54 S. Ct. 148; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 S. Ct. 462, 702.

[2] Southern P. Co. v. Campbell, 230 U. S. 537, 57 L. ed. 1610, 33 S. Ct. 1027.

[3] Southern P. Co. v. Campbell, 230 U. S. 537, 57 L. ed. 1610, 33 S. Ct. 1027; Portland R. Light & P. Co. v. Railroad Commission,

[229] U. S. 414, 57 L. ed. 1259, 33 S. Ct. 827; Portland R. Light & P. Co. v. Railroad Commission, 229 U. S. 397, 57 L. ed. 1248,

[33] S. Ct. 820.

[4] Detroit & M. R. Co. v. Fletcher Paper Co. 248 U. S. 30, 63 L. ed. 107, 39 S. Ct. 13.

[5] Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

The time when a judicial inquiry is made into the action of a rate-fixing commission is not of much significance in ascertaining under the due process clause the validity of the procedure afforded, provided at some stage of the proceedings hearing by judicial inquiry is afforded.[6] Thus, a state may provide that after a judicial inquiry into the character of an order of the state railroad commission fixing rates, such order shall be binding on the parties until changed.[7] Failure to provide a hearing in advance as to whether the return allowed a railroad company on its investment is fair does not invalidate the statute providing for recapture by the government of the excess profits of a railroad, where there may be resort to the courts to test the question under the general provisions of law.[8] One not made a party to a proceeding before a public service commission which results in an order affecting his interests is not deprived of his property without due process of law if the statute provides for a rehearing upon his application.[9]

The main essential in rate-fixing cases is that notice and hearing actually be afforded to interested parties. Thus, municipal ordinances fixing telephone rates do not deny due process of law because the section of the municipal charter under the authority of which they are enacted does not expressly provide for notice and hearing, where both notice and an opportunity to be heard are in fact accorded by ordinances providing that the rates be fixed at a meeting of the city council held in a certain month in each year and requiring the telephone company to furnish the city council annually in that month a statement of its receipts, expenditures, and property employed in the business.[10] Similarly, formal notice as to the precise day upon which water rates will be fixed by ordinance need not be given to a company the rates of which are thus fixed, under a state Constitution which gives notice of the fact that ordinances will be passed annually in a certain month to take effect on a particular date, and under statutes requiring the company to make an annual statement of its ratepayers, revenue, and expenditures at least thirty days prior to a date previous to the effective date of such ordinances.[11]

§ 699. Secret Societies.—

The legislature may regulate secret societies reasonably without depriving the members of their liberty without due process of law.12 A statute requiring oath-bound secret societies having a membership of twenty or more, except labor unions and benevolent orders, to file sworn copies of their constitutions, laws, regulations, and oaths, together with a list of members and officers, may be upheld as not actually and palpably unreasonable and arbitrary.13

§ 700. Time.—

The owner of a clock is not deprived of his property without due process of law by a statute forbidding the display of it in a public place

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[6] See infra, notes 7-9, this section.

[7] Detroit & M. R. Co. v. Fletcher Paper Co. 248 U. S. 30, 63 L. ed. 107, 39 S. Ct. 13.

[8] Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456, 68 L. ed. 388, 44 S. Ct. 169, 33 A.L.R. 472.

[9] Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916.

[10] Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 S. Ct. 50.

[11] San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 S. Ct. 804.

[12] People ex rel. Bryant v. Zimmerman, 241 N. Y. 405, 150 N. E. 497, 43 A.L.R. 909, affirmed in 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785. Annotation: 43 A.L.R. 914, s. 62 A.L.R. 798.

[13] People ex rel. Bryant v. Zimmerman, 241 N. Y. 405, 150 N. E. 497, 43 A.L.R. 909, affirmed in 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785.

to furnish time for the general public when it is set to indicate other than standard time.[14]

§ 701. Waste.—

The state may impose reasonable regulations to prevent unnecessary loss, destruction, and waste of natural resources, such as petroleum, natural gas,15 or natural mineral waters,16 without violating the guaranty of due process. A statute in regard thereto must be definite.17 An action of the governor of a state in limiting, by executive order enforced by the military arm of the state, the permissible production of petroleum at a time when and place where the courts are open and functioning is not due process of law.18

XV. FULL FAITH AND CREDIT

§ 702. Generally.—

Modern interpretation of constitutional provisions has seen the gradual growth of an important development affecting the power of states over foreign rights sought to be enforced within their borders. Due to recent decisions of the Supreme Court of the United States, the freedom exercised under the ancient doctrine of comity, in the sense in which it prevails in conflict of laws among different nations, has been greatly curtailed as between the various states and territories of the United States. Many of the decisions limiting the ancient theories of comity have arisen under Article 4, § 1, of the Federal Constitution, usually designated as the "full faith and credit clause." Hence, this clause has become of increasing importance in recent developments of the law, and its effect is of extreme significance in ascertaining the extent to which the courts or statutes of a forum may interpose local laws or policies upon foreign rights there asserted.19

Article 4, § 1, of the Constitution of the United States, provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress, in the execution of the power conferred upon it by the Constitution, prescribed in the Act of May 20, 1790, the mode of attestation of the records of the courts of one state to entitle them to be proved in the courts of another state and enacted that records so authenticated should have such faith and credit in every court

within the United States as they have by law or usage in the state from which they are taken. By this act Congress has not only provided for the admission of such records as evidence, but has declared the effect of such evidence when admitted—namely, that if a record is duly authenticated, it shall have such faith and credit as it has in the state court whence it is taken. On March [27], 1804, Congress passed an act extending the provisions of the former statute to the public acts, records, judicial proceedings, etc., of the territories of the United States and countries subject to the jurisdiction thereof. These stat-

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[14] State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131. Annotation: 37 A.L.R. 134.

[15] Sterling v. Constantin, 287 U. S. 378, 77 L. ed. 375, 53 S. Ct. 190; Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 S. Ct. 576.

[16] Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160.

[17] Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826.

[18] Sterling v. Constantin, 287 U. S. 378, 77 L. ed. 375, 53 S. Ct. 190.

[19] See CONFLICT OF LAWS, Vol. 11, p. 304, § 7; p. 311, § 11.

utory enactments subsequently became §§ [905] and [906] of the Revised Statutes, [28] U. S. C. A. §§ [687], [688].[1]

The effect of the full faith and credit clause upon the force which must be given to judgments of another state has been judicially scrutinized almost since the ratification of the Constitution. It may be added that even at the present time almost all of the cases which involve the effect of this clause of the Constitution relate to such judicial acts of another state. Such matters involving as they do the status and conclusiveness of judgments are properly considered in another title and will not be dealt with herein.[2] Some of the recent decisions, however, have given the constitutional provision a broader scope. It is no longer limited in its application to judicial proceedings or judgments of another state. Its application to public acts of states is one of the important recent developments in the field of constitutional construction.[3]

It is now well settled that a statute is a "public act" within the meaning of Article [4], § [1], of the Federal Constitution.[4] Hence, if a court of one state refuses to enforce the statute of another state in a case in which it ought to do so and in which the statute gives a right, it thereby denies the full faith and credit demanded by the Federal Constitution, because the statute is a public act of another state.[5] Furthermore, the duty imposed upon the courts to give full faith and credit to the Constitution of a state as a public act of the state is as obligatory as the similar duty with respect to the judicial proceedings of such a state.[6] The clause has nothing to do, however, with the conduct of individuals or corporations.[7]

§ 703. History.—

After the American Revolution, when independence was declared and the confederation of the former colonies was being formed, it was seen by the wise men of that day that the powers necessary to be given to the Confederation and the rights to be given to the citizens of such states, in all the states, would produce such intimate relations between the states and persons that the former would no longer be foreign to each other in the sense that they had been, as dependent provinces, and that for the prosecution of rights in courts, it was proper to put an end to the uncertainty upon the effect of judgments obtained in the different states. Accordingly, in the Articles of Confederation, there was inserted this clause: "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of

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[1] See JUDGMENTS [Also 15 R. C. L. p. 923, § 403].

[2] See JUDGMENTS [Also 15 R. C. L. p. 922, §§ 403-417].

[3] Annotation: 74 A.L.R. 711 et seq., s. 100 A.L.R. 1143 et seq.

[4] John Hancock Mut. L. Ins. Co. v. Yates, 299 U. S. 178, 81 L. ed. 106, 57 S. Ct. 129; Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 55 S. Ct. 589, 100 A.L.R. 1133; Ohio v. Chattanooga Boiler & Tank Co. 289 U. S. 439, 77 L. ed. 1307, 53 S. Ct. 663; Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 76 L. ed. 1026, 52 S. Ct. 571, 82 A.L.R. 696; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 30 L. ed. 519, 7 S. Ct. 398. See Modern Woodmen v. Mixer, 267 U. S. 544, 69 L. ed. 783, 45 S. Ct. 389, 41 A.L.R. 1384 (statute and bylaw of mutual benefit society); Ætna L. Ins. Co. v. Dunken, 266 U. S. 389, 69 L. ed. 342, 45 S. Ct. 129 (statute relating to insurance); Royal Arcanum v. Green, 237 U. S. 531, 59 L. ed. 1089, 35 S. Ct. 724, L.R.A.1916A, 771 (statute and charter of mutual benefit society); New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. ed. 1259, 34 S. Ct. 879 (statutes relating to insurance). Annotation: 74 A.L.R. 711, s. 100 A.L.R. 1144.

[5] Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 55 S. Ct. 589, 100 A.L.R. 1133; Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 76 L. ed. 1026, 52 S. Ct. 571, 82 A.L.R. 696; Roller v. Murray, 71 W. Va. 161, 76 S. E. 172, L.R.A.1915F, 984, Ann. Cas. 1914B, 1139, writ of error dismissed in 234 U. S. 738, 58 L. ed. 1570, 34 S. Ct. 902.

[6] Smithsonian Inst. v. St. John, 214 U. S. 19, 53 L. ed. 892, 29 S. Ct. 601.

[7] Minnesota v. Northern Securities Co. U. S. 48, 48 L. ed. 870, 24 S. Ct. 598.

the courts and magistrates of every other state."[8] What was meant by this clause inserted in the Articles of Confederation may be considered as conclusively determined, almost by contemporaneous exposition.[9] When the present Constitution was formed, the same clause was introduced into it, but with a variation, making it more comprehensive, including within the purview of full faith and credit which shall be given in each state to proceedings of other states, public acts, records, and judicial proceedings.[10] The constitutional provision, moreover, added that Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof. This contingency had not been taken care of in the provisions of the Articles of Confederation and the purpose of the additional clause in the Constitution was to take care of the deficiency and permit Congress to enforce the declaration of the provision.[11]

§ 704. Interpretation.—

The constitutional requirement as to full faith and credit must be interpreted in connection with other provisions of the Constitution.12 For example, no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if such proceedings are themselves wanting in the due process of law demanded by the fundamental law.13

§ 705. Operation and Effect.—

The full faith and credit clause of the Federal Constitution prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting.14 Federal courts are bound equally with state courts to observe the command of the full faith and credit clause where it is applicable.15

The constitutional provision as to full faith and credit by its terms excludes from operation among the states a considerable portion of private international law. It gives full faith and credit, not only to the judicial proceedings of every state, but also to its public acts and records. Hence, a law of one state, affecting the rights of persons and property and local in the sense that it differs from the laws of other states, and may be to some extent contrary to their policy—such as would not be recognized and enforced, nor a judgment carrying it into effect recognized, if it were the law of a foreign country —must nevertheless have full faith and credit in all of the states of the Union.[16] The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.[17] The clause does not, however, require a greater effect to be given to a state

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[8] M'Elmoyle v. Cohen, 13 Pet. (U. S.) 312, 10 L. ed. 177.

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 S. Ct. 236.

[13] Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 S. Ct. 236; Magdanz v. District Ct. — Iowa —, 269 N. W. 498, 108 A.L.R. 377. See also Wetmore v. Karrick, 205 U. S. 141, 51 L. ed. 745, 27 S. Ct. 434.

[14] Minnesota v. Northern Securities Co. 194 U. S. 48, 48 L. ed. 870, 24 S. Ct. 598.

[15] Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 76 L. ed. 1026, 52 S. Ct. 571, 82 A.L.R. 696.

[16] Roller v. Murray, 71 W. Va. 161, 76 S. E. 172, L.R.A.1915F, 984, Ann. Cas. 1914B, 1139, writ of error dismissed in 234 U. S. 738, 58 L. ed. 1570, 34 S. Ct. 902.

[17] Milwaukee County v. M. E. White Co. 296 U. S. 268, 80 L. ed. 220, 56 S. Ct. 229.

statute in other states than is given to it by the courts of the enacting state.[18]

Full faith and credit is enjoined by the Constitution only with respect to

those public acts which are within the legislative jurisdiction of the enacting state.[19] For example, since one state cannot legislate to affect the transmission of title to lands located in another state, the courts of a state in which land is located need not, because of the full faith and credit clause, give effect to a statute of another state which would control the devolution of title to lands of the forum.[20] Likewise, an act of a state exempting its registered public debt from taxation is not a public act of the state within the meaning of the full faith and credit clause in such a manner as to prevent another state from taxing one of its own residents on property comprising such public debt in such other state.[1] The contention that full faith and credit has not been given to the statutes or public acts of another state cannot be raised, moreover, if the question involved concerns the application of statutes to a contract and the contract cannot as a matter of law be regarded as controlled by the laws or statutes of such other state.[2]

The full faith and credit clause, like other appropriate provisions of the Federal Constitution, limits the power of a state to determine the confines of the jurisdiction of its courts and the character of the controversies which shall be heard therein.[3] A state cannot escape its constitutional obligations under the full faith and credit clause by the simple device of denying jurisdiction to courts otherwise competent.[4] Although it is true that a state can legislate only with reference to its own jurisdiction5 and that the full faith and credit clause does not require the enforcement of every right which has been conferred by the statutes of another state,[6] the room left for the play of conflicting policies is a narrow one.[7] A state may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter of the parties.[8] Hence, a statute which has the effect of

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[18] Ohio v. Chattanooga Boiler & Tank Co.

[289] U. S. 439, 77 L. ed. 1307, 53 S. Ct. 663.

[19] Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 55 S. Ct. 589, 100 A.L.R. 1133 (recognizing rule); Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 76 L. ed. 1026,

[52] S. Ct. 571, 82 A.L.R. 696.

[20] Olmsted v. Olmsted, 216 U. S. 386, 54 L. ed. 530, 30 S. Ct. 292, 25 L.R.A.(N.S.) 1292. Annotation: 74 A.L.R. 715, s. 100 A.L.R. 1147.

[1] Bonaparte v. Appeal Tax Ct. 104 U. S. 592, 26 L. ed. 845.

[2] National Mut. Bldg. & L. Asso. v. Bra- han, 193 U. S. 635, 48 L. ed. 823, 24 S. Ct. 532.

[3] Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 55 S. Ct. 589, 100 A.L.R. 1133.

[4] Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 55 S. Ct. 589, 100 A.L.R. 1133. See Kenney v. Supreme Lodge, L. O. M.

[252] U. S. 411, 64 L. ed. 638, 40 S. Ct. 371,

[10] A.L.R. 716.

[5] See supra, notes 19-2, this section.

[6] See infra, § 708.

[7] Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 55 S. Ct. 589, 100 A.L.R. 1133. In Cole v. Industrial Commission, 353 Ill. 415, 187 N. E. 520, 90 A.L.R. 116, it was held that Illinois must give full faith and credit to the Compensation Statute of In- diana, which provides an exclusive rem- edy for injuries occurring either within or without the state, where the contract of employment is made within the state, in respect of compensation for injuries occur- ring in Illinois, to a workman employed un- der a contract made in Indiana, where both the employer and employee were resi- dents of Indiana and subject to the laws thereof.

[8] Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 55 S. Ct. 589, 100 A.L.R. 1133. In Clark v. Willard, 294 U. S. 211, 79 L. ed. 865, 55 S. Ct. 356, 98 A.L.R. 347, the court held that under the full faith and credit provision of the Federal Constitu- tion a state in which was located prop- erty of a foreign corporation for which a statutory liquidator had, in the domiciliary state, been appointed for the purpose of liquidating its assets upon dissolution, must recognize such liquidator as the suc- cessor in title to the property of the cor- poration, but that this rule did not pre- vent such state, in effectuating its pol- icy tolerating preferences and a race of diligence among the creditors, from subor- dinating such title to the liens of attach- ment and execution levied upon such prop- erty by the creditors of the corporation subsequent to the appointment of the liq- uidator. In so holding the court expressed the opinion that while full faith and credit must be given to the decree of the Iowa

refusing to permit actions against residents of the state by a nonresident super- intendent of banks to enforce a foreign statutory liability assessed by him under the statutes of another state violates the full faith and credit clause.[9]

§ 706. —

Territorial Acts.—By virtue of the act of Congress which gives force and effect to the full faith and credit clause, which act is in accordance with the very mandates of Article [4], § [1], of the Constitution, the command of the clause is made applicable to public acts, records, and judicial proceedings of territories.[10] Therefore, the full faith and credit clause is made applicable to territorial statutes with the same force and effect with which it applies to statutes of the various states.[11]

§ 707. Exceptions to Operation.—

Some important exceptions contravene the letter of the constitutional provision as to full faith and credit and are permitted to do so, but only because they are deemed not to be within its spirit.

Subject to the restraint and limitations of the Federal Constitution, the states have all the sovereign powers of independent nations. These limitations were imposed for the accomplishment of certain purposes; and in order to preserve harmony in the constitutional system, the limitations upon the powers of the states are themselves limited to a certain extent—or rather, certain things are deemed not to be within them.[12] The general exceptions from the operation of Article [4], § [1], include only such things as it was the plain purpose of the Con-

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court and the statute of Iowa, to the ef- fect that the receiver there appointed was entitled to the property not as an ordinary receiver, but as a quasi assignee of the dissolved corporation, and that as such it might defend and sue in Montana, the question whether such a liquidator would prevail in Montana as against creditors of the corporation attaching or levying exe- cution on local property must be determined by principles of interstate comity and not by the constitutional mandate as to full faith and credit, and that, therefore, the foreign liquidator could not prevail over later attaching or execution creditors. A decree refusing to turn over local as- sets of a foreign insurance company hav- ing local creditors to the statutory liqui- dator of the company in its home state does not violate the provisions of the Fed- eral Constitution that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. Davis v. Amra Grotto, M. O. V. P. E. R. 169 Tenn. 564, 170 Tenn. 19, 89 S. W. (2d) 754, 91 S. W. (2d) 294, 106 A.L.R. 1506. For a detailed discussion of the differ- ences and probable grounds of reconcilia- tion of the decisions of the United States Supreme Court, see Broderick v. Rosner,

[294] U. S. 629, 79 L. ed. 1100, 55 S. Ct. 589,

[100] A.L.R. 1133, and Clark v. Willard, 294 U. S. 211, 79 L. ed. 865, 55 S. Ct. 356, 98 A.L.R. 347. See annotation: 100 A.L.R. 1145.

[9] Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 55 S. Ct. 589, 100 A.L.R. 1133. In Broderick v. McGuire, 119 Conn. 83,

[174] A. 314, 94 L.R.A. 890, it was held that the superintendent of banks of the state of New York, who, under the statute of New York, was authorized to make assess- ments on stockholders of insolvent banks and enforce their statutory liability, and had at least an equitable title to the prop- erty of such banks, was, under the full faith and credit provision of the Federal Constitution, entitled to sue in Connecticut to enforce assessments made by him under the New York statute on Connecticut stock- holders of an insolvent New York bank. The court was of the opinion that by vir- tue of the statute of New York the plain- tiff became a statutory assignee of the right to enforce the obligation of the stock- holders, as a receiver appointed by a court would be under a like statute; and that since such a receiver would, under the de- cisions of the United States Supreme Court, be entitled to sue in a foreign jurisdiction as a matter of right, under the full faith and credit provision of the Federal Consti- tution, so might the superintendent of banks of New York sue in Connecticut, be- cause in this respect there exists no dis- tinction between an officer with title who derives his authority through court action and one who derives his power directly from a statute, without intermediary court action. For a detailed discussion of the rule stat- ed in the text, see CONFLICT OF LAWS, Vol. 11, p. 304, § 7.

[10] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695,

[29] S. Ct. 397; Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346, 2 S. Ct. 25.

[11] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695,

[29] S. Ct. 397.

[12] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Roller v. Murray, 71 W. Va. 161, 76 S. E. 172, L.R.A.1915F, 984, Ann. Cas. 1914B, 1139, writ of error dismissed in

[234] U. S. 738, 58 L. ed. 1570, 34 S. Ct. 902. As to questions of policy and conflicting interests of states, see infra, § 708.

stitution to leave within the sole power and jurisdiction of the individual state.[13] Local sovereignty over local questions and the requirement that each state give full faith and credit to the public acts, records, and judicial proceedings of every other state seem to have had for their purpose not the attainment of uniformity in laws, but rather the right of each state to have local and peculiar laws which all others should respect and enforce within certain limitations. To enable it to make and enforce such laws as it desires, each state is permitted to retain such limited sovereign power.[14] It was not contemplated, for example, that any state should surrender to another the power to determine what should constitute crimes and public offenses within its borders or the manner or extent of their punishment, or that any state should say for another what should be sufficient to pass title to land or prescribe the mode of its alienation, descent, or distribution, by what means it should be subjected to the satisfaction of debts, or how questions of title should be litigated.[15] No state is allowed to interfere with the domestic or internal policy of another state. To allow the courts of another state to administer in any degree its criminal laws or determine questions of title would subject the policy of a state to outside interference. On the other hand, the full faith and credit clause and others compel each state to recognize and respect certain rights acquired by private individuals under the laws of other states, even though such laws may differ from its own and vary from its policy.[16]

Another settled doctrine in constitutional construction is that although a particular provision of the Federal Constitution, such as the full faith and credit clause, may seemingly be applicable, its controlling effect is limited by the essential nature of the powers reserved to the states when the Constitution was adopted.[17] For example, the full faith and credit clause cannot be invoked to destroy the power of the states over local matters of morals as to which they must always possess the power to legislate, and it cannot be invoked to prevent continued exercise of such authority to save society from destruction.[18]

§ 708. Policy of Forum; Conflicting Interests.—

The purpose of the full

faith and credit clause ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state the judgment of which is challenged.[19] Yet even though the field in which local policies may be considered as against the operation of the constitutional provision is a narrow one,[20] there is room for some play of conflicting policies in the effect and operation of the full faith and credit clause.[1]

It has often been recognized by the United States Supreme Court that there

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[13] Roller v. Murray, 71 W. Va. 161, 76 S. E. 172, L.R.A.1915F, 984, Ann. Cas. 1914B, 1139, writ of error dismissed in 234 U. S. 738, 58 L. ed. 1570, 34 S. Ct. 902.

[14] Ibid.

[15] Roller v. Murray, 71 W. Va. 161, 76 S. E. 172, L.R.A.1915F, 984, Ann. Cas. 1914B, 1139, writ of error dismissed in 234 U. S. 738, 58 L. ed. 1570, 34 S. Ct. 902. See also Olmsted v. Olmsted, 216 U. S. 386, 54 L. ed. 530, 30 S. Ct. 292, 25 L.R.A.(N.S.) 1292, as to the fact that effect need not be given to a statute of another state affecting an interest in real estate in the forum.

[16] Roller v. Murray, 71 W. Va. 161, 76 S. E. 172, L.R.A.1915F, 984, Ann. Cas. 1914B, 1139, writ of error dismissed in 234 U. S. 738, 58 L. ed. 1570, 34 S. Ct. 902.

[17] Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 S. Ct. 237.

[18] Ibid.

[19] Milwaukee County v. M. E. White Co.

[296] U. S. 268, 80 L. ed. 220, 56 S. Ct. 229.

[20] See supra, § 705.

[1] Milwaukee County v. M. E. White Co.

[296] U. S. 268, 80 L. ed. 220, 56 S. Ct. 229; Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 55 S. Ct. 589, 100 A.L.R. 1133 (rec- ognizing rule); Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532,

[79] L. ed. 1044, 55 S. Ct. 518; Bradford Elec- tric Light Co. v. Clapper, 286 U. S. 145, 76 L. ed. 1026, 52 S. Ct. 571, 82 A.L.R. 696.

are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy.[2]

In the case of statutes, the extrastate effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is even more apparent than in a case of the enforcement of foreign

judgments.[3] A rigid and literal enforcement of the clause, without regard to the statutes of the forum, would lead to the absurd result that wherever a conflict arises, the statute of each state must be enforced in the courts of another, but cannot be enforced in its own courts. Unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that the Federal Supreme Court must determine for itself the extent to which a statute of one state may qualify or deny rights asserted under the statute of another.[4] Hence, the full faith and credit clause does not require the enforcement of every right conferred by a statute of another state.[5] One who challenges the prima facie right of a state to enforce in its own courts its own lawfully enacted statutes because of the force which it has asserted should be given to a conflicting statute of another state by virtue of the full faith and credit clause assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.[6] It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and again, that the two conflicting statutes may each prevail over the other at home, though given no extraterritorial effect in the state of the other.[7]

In the determination of whether the statute of a state under which foreign rights arose or the law of the forum should control in matters involving policy and conflicting interests, the rule is fairly well settled that different considerations usually apply where the statute creating a foreign right, which it is claimed should be given effect, is set up by way of defense to an asserted liability, from those where merely affirmative rights are claimed under a foreign statute. Upon several occasions the Supreme Court has held that under the full faith and credit clause, one state cannot refuse to give effect to a substantive defense arising under applicable statutes of another state if failure to sanction

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[2] Milwaukee County v. M. E. White Co.

[296] U. S. 268, 80 L. ed. 220, 56 S. Ct.

[229] (recognizing rule, but holding that a judgment for taxes is entitled to full faith and credit); Alaska Packers Asso. v. In- dustrial Acci. Commission, 294 U. S. 532,

[79] L. ed. 1044, 55 S. Ct. 518.

[3] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518. See also discussion of the cases in Mil- waukee County v. M. E. White Co. 296 U. S. 268, 80 L. ed. 220, 56 S. Ct. 229.

[4] Milwaukee County v. M. E. White Co.

[296] U. S. 268, 80 L. ed. 220, 56 S. Ct. 229; Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044,

[55] S. Ct. 518. See also Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 76 L. ed. 1026, 52 S. Ct. 571, 82 A.L.R. 696. The Supreme Court of the United States is the final arbiter of the question wheth- er a state may have a local policy merit- ing recognition as a permissible limita- tion upon the full faith and credit clause. Milwaukee County v. M. E. White Co.

[296] U. S. 268, 80 L. ed. 220, 56 S. Ct. 229.

[5] Milwaukee County v. M. E. White Co.

[296] U. S. 268, 80 L. ed. 220, 56 S. Ct. 229; Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 76 L. ed. 1026, 52 S. Ct. 571, 82 A.L.R. 696.

[6] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518.

[7] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518. See also Bradford Elec- tric Light Co. v. Clapper, 286 U. S. 145,

[76] L. ed. 1026, 52 S. Ct. 571, 82 A.L.R. 696.

the defense thus created by the statute of such other state subjects the defendant to irremediable liability.[8] The Supreme Court has pointed out, however, that the necessity of balancing the interests of the forum and of the foreign state the statute of which is asserted to control is not any the less whether the statute and policy of the forum are set up as a defense to a suit brought under a foreign statute or a foreign statute is set up as a defense to a suit or proceeding under the local statute. In either case the conflict is the same. In each rights claimed under one statute prevail only by denying effect to the other. In both the conflict is to be resolved not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its statutes to those of the other, but by appraising the governmental interests of each jurisdiction and turning the scale of decision according to their weight.[9] As an example of a fact situation which sets up a defense the denial of which would subject the defendant to an irremediable liability and the nature of which swings any conflicting interest of the forum and of the foreign state the statute of which creates the defensive right in favor of such foreign state so that the full faith and credit clause compels the application of its statute, there may be mentioned a statute of a state in which a contract is entered into, which statute, by enacting a rule of substantive law and in effect becoming a term of such contract, determines the substantive rights of the parties thereto just as if a provision to the same effect as the statute had been embodied in writing in the contract.[10]

§ 709. Necessity that Validity of Foreign Laws Be Involved.—

In order to create a reviewable Federal question under the constitutional provision as to full faith and credit, the fact that the validity of laws of another state is drawn into question by the courts of a state determining rights arising under such laws of such other state, and not merely the construction of such laws, must be shown.11 If, every time the courts of a state put a construction upon the statutes of another state, the

United States Supreme Court should be required to determine whether the construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow

[8] John Hancock Mut. L. Ins. Co. v. Yates, 299 U. S. 178, 81 L. ed. 106, 57 S. Ct. 129; Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 76 L. ed. 1026, 52 S. Ct. 571, 82 A.L.R. 696. Annotation: 100 A.L.R. 1148 et seq.

[9] Alaska Packers Asso. v. Industrial Accl. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518.

[10] John Hancock Mut. L. Ins. Co. v. Yates, 299 U. S. 178, 81 L. ed. 106, 57 S. Ct. 129 (statute relating to false answers in application for insurance).

[11] Pennsylvania F. Ins. Co. v. Gold Issue Min. & Mill. Co. 243 U. S. 93, 61 L. ed. 610, 37 S. Ct. 344; Western Life Indem. Co. v. Rupp, 235 U. S. 261, 59 L. ed. 220, 35 S. Ct. 37; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 S. Ct. 676, 47 L.R.A.(N.S.) 84; Allen v. Alleghany Co. 196 U. S. 458, 49 L. ed. 551, 25 S. Ct. 311; Johnson v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 S. Ct. 194; Banholzer v. New York L. Ins. Co. 178 U. S. 402, 44 L. ed. 1124, 20 S. Ct. 972; Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 S. Ct. 70. See also Finney v. Guy, 189 U. S. 335, 47 L. ed. 839, 23 S. Ct. 558. Annotation: 74 A.L.R. 716. In Glenn v. Garth, 147 U. S. 360, 37 L. ed. 203, 13 S. Ct. 350, the United States Supreme Court, in denying a writ of error to the supreme court of New York in an action under the Virginia statute to enforce the liability of a party who had never subscribed for stock or been a transferee thereof in fact because of the presence of his name upon the books of the company without his consent, held that the New York court did not deny full faith and credit to the Virginia statute, because it merely construed such statute without questioning its validity. In Allen v. Alleghany Co. 196 U. S. 458, 49 L. ed. 551, 25 S. Ct. 311, an action in New Jersey upon a contract of a corporation doing business in New York and Pennsylvania contrary to statutes of those states, the holding of the New Jersey court, that such contract is not void and is enforceable in New Jersey was held not to deny full faith and credit to the laws of Pennsylvania and New York, the theory being that the validity of the statutes was not questioned by the holding and that the case turned only upon the construction and effect to be given to them in another state.

12 Am. Jur. CONSTITUTIONAL LAW § [709]

that the state courts had refused to give full faith and credit to the statutes involved, the jurisdiction of the Supreme Court would be enlarged in a manner not contemplated.[12] Moreover, the full faith and credit clause does not require the courts of one state to follow the construction given by the courts of another state to its statutes.[13]

[12] Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 S. Ct. 70; Glenn v. Garth, 147 U. S. 360, 37 L. ed. 203, 13 S. Ct. 350. In Banholzer v. New York L. Ins. Co. 178 U. S. 402, 44 L. ed. 1124, 20 S. Ct. 972, where it was contended that the Supreme Court of Minnesota did not give full faith and credit to the New York statute as to insurance, the United States Supreme Court held that the court merely construed the New York statute, and, granting that its construction was erroneous, full faith and credit were not thereby denied to the New York statute.

[13] Nesbitt v. Clark, 272 Pa. 161, 116 A. 404, 25 A.L.R. 1406, writ of certiorari denied in 253 U. S. 621, 66 L. ed. 795, 42 S. Ct. 272.